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Senate Committee on Governmental Organization

Assembly Committee on Governmental Organization

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CALIFORNIA LEGISLATURE

JOINT HEARING

SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION

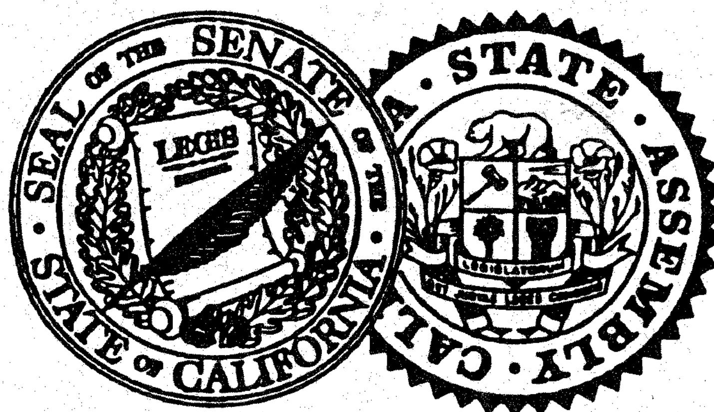
AND

ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION

INFORMATIONAL HEARING ON

PART I – INDIAN GAMING IN CALIFORNIA

PART II – REVIEW OF THE ATTORNEY GENERAL'S PROPOSAL TO CREATE A STATE GAMING COMMISSION



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NOVEMBER 29 AND 30, 1993
STATE CAPITOL, ROOM 4202
SACRAMENTO, CALIFORNIA

SENATE MEMBERS PRESENT

Ralph C. Dills, Chairman
Robert G. Beverly
Leroy Greene
Teresa Hughes
Ken Maddy
Art Torres

ASSEMBLY MEMBERS PRESENT

Curtis Tucker, Chairman
Joe Baca
Tom Connolly
Bill Hoge
Paul Horcher
Pat Nolan
Bernie Richter

SENATE STAFF

Stephen M. Hardy
CONSULTANT

ASSEMBLY STAFF

Jerry McFetridge
CONSULTANT
Brenda Heiser
COMMITTEE SECRETARY

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CALIFORNIA LEGISLATURE

JOINT HEARING

SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION
AND
ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION

INFORMATIONAL HEARING ON

PART I - INDIAN GAMING IN CALIFORNIA

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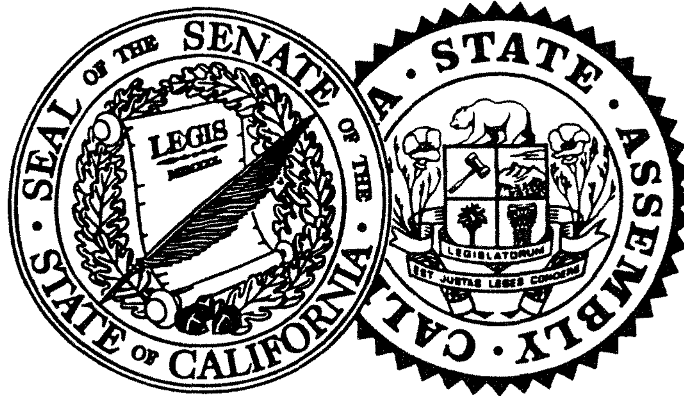

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STATE CAPITOL - ROOM 4202
SACRAMENTO, CALIFORNIA

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COMMITTEE SECRETARY

MEMBERS
RALPH C. DILLS
CHAIRMAN
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HERSCHEL ROSENTHAL
ART TORRES

California Legislature

STEPHEN M. HAR[illegible]
PRINCIPAL CONSULTANT
ARTHUR TERZAKIS
SENIOR CONSULTANT
BILLIE J. WILLIAMS
COMMITTEE SECRETARY

SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION

ROOM 5048, STATE CAPITOL
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: 445-1193

RALPH C. DILLS
CHAIRMAN

January 10, 1994

Honorable David Roberti
Senate President pro Tempore
State Capitol, Room 205
Sacramento, CA 95814

Honorable Willie L.Brown, Jr.
Speaker of the Assembly
State Capitol, Room 219
Sacramento, CA 95814

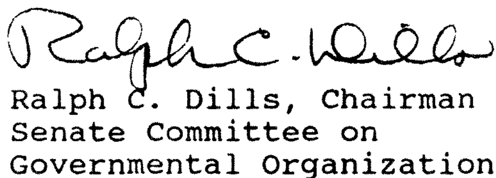
Dear Senator Roberti and Speaker Brown:

The Senate and Assembly Committees on Governmental Organization held joint informational hearings in Sacramento on Monday, November 29, 1993, and Tuesday, November 30, 1993, on the subjects of Indian Gaming in California, and the Attorney General's proposal for a California State Gaming Commission respectively.

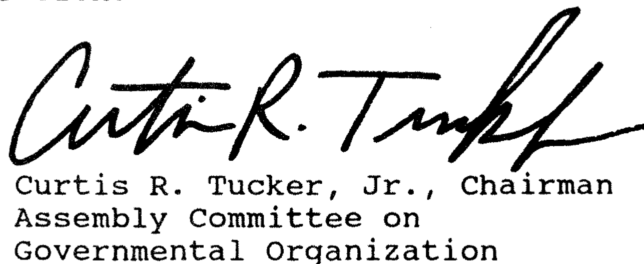
The expansion of gaming on Indian lands across the United States, and particularly in California, is a very topical subject that will be further clarified by the courts and future legislation, on both the state and federal level. In addition, the second day's hearing pertaining to the creation of a California State Gaming Commission was a closely related topic.

The witnesses at both hearings were informative as the transcripts reflect. The information received from these hearings and contained in these transcripts, will be invaluable during the coming legislative session.

Sincerely,



Ralph C. Dills, Chairman
Senate Committee on
Governmental Organization



Curtis R. Tucker, Jr., Chairman
Assembly Committee on
Governmental Organization

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APPEARANCES

MEMBERS PRESENT

SENATOR RALPH DILLS, Chair
Senate Committee on Governmental Organization

ASSEMBLYMAN CURTIS TUCKER, Chair
Assembly Committee on Governmental Organization

SENATOR ROBERT BEVERLY

SENATOR LEROY GREENE

SENATOR TERESA HUGHES

SENATOR KEN MADDY

SENATOR ART TORRES

ASSEMBLYMAN JOE BACA

ASSEMBLYMAN TOM CONNOLLY

ASSEMBLYMAN BILL HOGE

ASSEMBLYMAN PAUL HORCHER

ASSEMBLYMAN PAT NOLAN

ASSEMBLYMAN BERNIE RICHTER

ALSO PRESENT

MARSHALL McKAY, Chairman
California-Nevada Indian Gaming Association

DANIEL TUCKER, Chairman
Sycuan Indian Bingo

ANTHONY PICO, Chairman
Viejas Indian Gaming

HOWARD L. DICKSTEIN, Attorney
Dickstein &Merin

GLENN M. FELDMAN, Attorney
O'Connor, Cavanagh, Anderson, Westover, Killingworth & Beshears

THOMAS F. GEDE, Special Assistant
Attorney General

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Institute for the Study of Gambling and Commercial Gaming
University of Nevada

DENNIS MILLER, Chairman
Morongo Tribe

GEORGE FORMAN, Attorney
Alexander & Karshamer

DALLAS BARNES, Chief of Security
Casino Morongo

MICHAEL LOMBARDI, General Manager
Santa Ynez Casino

JEROME LEVINE, Attorney
Levine & Associates
San Manuel Band of Mission Indians

NORMA MANZANO, Chairwoman
San Manuel Tribe

BARBARA MURPHY, Tribal Councilmember
Redding Rancheria

NORM TOWNE, Executive Director
Federation of California Racing Associations

RODNEY BLONIEN, Legislative Advocate
Commerce Club

LOUIS P. SHELDON, Chairman
Traditional Values Coalition

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PART I
Informational Hearing on Indian Gaming in California
November 29, 1993

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Appendix W - Letter submitted by Sonoma Joe's Casino-Restaurant-Sports Bar.

# # # # # #

1 P-R-O-C-E-E-D-I-N-G-S

2 --oo0oo--

3 CHAIRMAN TUCKER: Thank you for joining us this
4 morning. I am Curtis Tucker, Chairman of the Assembly Committee
5 on Governmental Organization. We're joined today, this is a
6 joint hearing, and we're joined by Senator Dills and the Senate
7 Governmental Organization Committee.

8 Today we're here to discuss, learn about, and ponder
9 the notion of Indian gaming in California. As I'm sure everyone
10 knows from reading the newspapers, listening to the news, Indian
11 gaming is here in California. From the small rancherias to the
12 big reservations, we have the explosion from high stakes bingo
13 to casino gambling on tribal lands here in California.

14 The reason for this hearing is two-fold. One, to
15 find out everything we can about this issue, to hear about the
16 impact of the Indian Gaming Regulatory Act, to hear from the
17 tribes themselves what their plans are, what their goals are,
18 and to look at the impact it may possibly have on gambling here
19 in California.

20 This is an informational hearing; informational, I'm
21 sure, not only to the Members of both committees, but to the
22 public as well. We've heard a lot; we've read a lot, and now
23 it's time for us to get a first-hand working knowledge of this
24 subject.

25 Joining me, as I said, this is a joint hearing.
26 Joining me today is Senator Ralph Dills, the Chairman of the
27 Senate Governmental Organization Committee.

28 Senator Dills.

1 CHAIRMAN DILLS: Thank you, Assemblyman Tucker.

2 I am Chair of the Governmental Organization Committee
3 of the Senate. I'd like to take this opportunity to welcome you
4 to our hearing regarding Indian gaming in California.

5 During this hearing, we will thoroughly examine all
6 aspects of Indian gaming with the hope of gaining a better
7 understanding of the impacts, both present and future, this most
8 important subject will have in California.

9 Both the Governor and the Attorney General of
10 California have expressed publicly concerns that they have
11 regarding the expansion of Indian gaming in this state.

12 At the same time, in their frustration at not being
13 able to negotiate a compact among the Indians to provide Class
14 III gaming as provided for under the Indian Gaming Regulatory
15 Act, a number of tribes in California have gone to federal court
16 to obtain the right to provide expanded gaming on Indian lands.

17 Judging from the list of proposed witnesses, it
18 should be a most informative and interesting hearing today.

19 The hearing is being recorded, and a transcript of
20 the proceedings will be available at a future date.

21 In advance of their testimony, I would like to join
22 with Chairman Tucker to thank the witnesses for their
23 participation today.

24 Mr. Chairman, let the meeting begin.

25 CHAIRMAN TUCKER: Thank you very much, Senator Dills.

26 Does any other Member have any opening comments
27 they'd like to make? If not, we will start today by calling
28 Honorable Daniel Tucker, Honorable Marshall McKay, and Honorable

1 Anthony Pico forward to give us their feelings and their views
2 on Indian gaming.
3 Before you begin your testimony, could you please
4 state your name for the record.
5 MR. McKAY: For the record, my name is Marshall
6 McKay. I'm Chairman of the California-Nevada Indian Gaming
7 Association; a member and an elected official of my reservation.
8 I'm working, serving, as a tribal secretary in the executive
9 capacity. I'm also a board member for Cash Creek Indian Bingo
10 and Casino.
11 This morning I've brought another tool. Just as we
12 open our meetings, and you open your meetings, with prayers,
13 traditionally this is a talking stick. In our councils, in our
14 lodges, in our roundhouses and longhouses, when we have
15 important meetings such as this, this stick is passed between
16 the different delegates in order to present truth and honesty
17 and integrity. We want to do the same in this room as we do in
18 our own culture. So, I'm going to leave this tool on the
19 podium, so as our other esteemed speakers and witnesses come
20 up, they'll be influenced by the power.
21 I want to thank you for this opportunity, too,
22 Chairman Tucker and Chairman Dills, and the rest of the
23 committees that are present today, for your concern about Indian
24 gaming, and the respect we can meet on a government-to-
25 government basis. I think throughout the testimony today, we'll
26 hear a great deal about the mutual respect, and the mutual
27 camaraderie that we need to develop in the next coming period of
28 time so we can understand one another and get our issues out and

1 continue the much-needed gaming on reservations and rancherias
2 to support our people, and to support our culture.
3 This morning, I would like to take a moment and
4 present a little history as my testimony, if you will, because I
5 think to understand our people, you need to understand our
6 history. I'm going to speak to Rumsey Rancheria in specific,
7 because that's where I'm from and that's what I know the most
8 about. But you see similarities in this history throughout the
9 state of some of the activities that went on in California.
10 The Rumsey Band of Wintun Indians today are fairly
11 self-sufficient. We have a new spirit and pride in our
12 achievements and hope for the future.
13 But it's not always been so. For thousands of years,
14 bands of Wintun people have lived along Cache Creek in the
15 Caypay Valley, which is 45 minutes northwest of here, just east
16 of the Napa ridge, and they lived off the bounty of Mother
17 Earth. But without immunities to diseases introduced by
18 settlers, the southern Wintun were nearly wiped out by smallpox
19 and malaria epidemics in the early 1800s.
20 Gold brought fortune to many here in California, but
21 it also brought hardships for our people. The Forty-niners --
22 who flooded California from around the world to find gold --
23 confiscated our lands, enslaved our people, and massacred the
24 Indians who lived here. Over a 36-year period, over 100,000
25 Indians were killed during the gold rush.
26 The few Wintun who survived the raging epidemics and
27 the horrifying massacres and grueling servitude were placed on
28 rancherias. The rancherias were federally created postage-stamp

reservations for homeless and landless Indians. Forced off their ancestral lands, our proud forefathers became wards of the federal government.

Life on the rancheria was hard. They were small, and the land was arid. Our ancestors could no longer live off the bounty of Mother Earth. Those who chose to remain and live with tribal members on the rancheria had no economic base on which to support their families. There were few options for work, and gradually the tribes became more and more dependent on federal government for survival.

This is a time when many traditions and customs faded from practice. Our leaders virtually -- valiantly sought to hand down the customs that make our people distinctive. However, with few choices, the Wintun slowly embraced the settlers' culture. In fact, in an attempt to assimilate Indians, the federal government declared in 1953 that government funding and services be -- to Indians be immediately withdrawn and our special status as tribes be terminated. The government's goal was to relocate Indians from tribal lands to the cities.

We're proud that the Rumsey Band of Wintun Indians have survived while many other have been dissolved. After being forcibly removed from ancestral lands and relegated to poverty in the past century, the tide has begun to change for members of my tribe. Today, our sovereignty is officially recognized by the federal government, and our people have a democratic style of government in which all tribal members are active participants in our government.

1 Today, with new opportunities for economic self-
2 sufficiency and self-determination and independence, no member
3 of the Rumsey Band of Wintun Indians receives state or federal
4 government financial assistance.
5 Remembering the past, we are carefully building our
6 future. We look back to the traditions of our ancestors, and we
7 can never be certain of what the future holds. However, an
8 overriding ambition of ours is the financial well being and
9 self-sufficiency of our people. This is why we are saving
10 money, diversifying our business interests. At this point,
11 Rumsey owns and operates agriculture enterprises, a grocery
12 store, a gas station, and a gaming enterprise.
13 Today we make our business decisions the same way our
14 ancestors did: we contemplate the impacts of our actions on the
15 next seven generations. Finally, this generation of the Rumsey
16 Band of Wintun Indians has hope, and for the first time in a
17 century, the prospect of living better than our parents and
18 grandparents. But still, we hope to attain the self-sufficiency
19 that our great-grandparents held.
20 With that, I'd like to introduce Mr. Tucker.
21 MR. TUCKER: Good morning. My name is Daniel James
22 Tucker from the Sycuan Band of Mission Indians in San Diego
23 County.
24 I'd like to thank you for hearing us this morning,
25 Mr. Chairman and Mr. Dills, and Members of the Assembly and the
26 Senate.
27 What I'm going to talk about here is basically what
28 Mr. Marshall McKay had to say about those struggles that Indians

1 have throughout the years. But since Indian gaming has come
2 into the limelight of this, I'm here today to protect the future
3 of our children, to protect the future of our tribe as well.
4 We look for the American dream like anybody else: a
5 home, economic stability, education, employment, economic
6 freedom. These things are now made possible through Indian
7 governmental gaming through our tribe. What it has done for us
8 has been phenomenal. What we look for now is that future to
9 diversify, to do things that we couldn't do in the past, not
10 just economic-wise, but to inherit our heritage, where we came
11 from, how we got there, and where we're going from here.
12 We just -- before we did have -- our employment rate
13 was just phenomenal on our reservation. Right now, we have over
14 700 people coming to our reservation with jobs, full-time jobs
15 that we do supply. Ten percent of the 100 percent of our
16 employment is only 10 percent of our Indians. And that's all
17 there is; the rest are non-Indian individuals.
18 But now, the changes that we have now are just, like
19 I said, phenomenal for Indian tribes. What we have done with
20 our moneys, according to IGRA -- you all know what IGRA is, we
21 have to put our moneys back into our government, which means
22 through health care, through economic growth, through supporting
23 our people, those kind of things have to be done with tribal
24 moneys that come from gaming, and we have been doing that.
25 What I want to show you real quick here is a video, a
26 document that shows the past decade for Sycuan that I'd like to
27 share with you. This video was compiled to celebrate our tenth
28 anniversary, which was this past -- this year, and our

1 continuous operation of the Sycuan Gaming Center.
2 Will you please roll the tape.
--oo0oo--
3
4 MR. TUCKER: As you can see, a lot of the support for
5 Indian gaming and a lot that has happened at Sycuan. What we're
6 looking at now, if you look over to the right, is the economic
7 benefits to the Gaming Center to Sycuan Band.
8 There are five points here: no reliance on
9 government assistance; full employment for tribal members; the
10 improvement of infrastructure on the reservation; ability to
11 invest in nongaming business adventures; long-term economic
12 self-sufficiency. Those are the goals that we have on our
13 reservation, like any other reservation in California. We look
14 for those things for our stability and economic growth.
15 If you want to go to the next one, I'll be real brief
16 here. This is the proceeds that we use -- that was done by
17 Sycuan tribal government in 1992: 651,000; estimated in '93 is
18 1,089,000. Education and human services: 3 million; for '93,
19 3,153,000. Per capita direct services: 804,000 to 930,000;
20 Capital expenses and investments: in 1992 it was 929,000; '93
21 is 4,428,000. We estimate 9,000,600 is what went to the tribe
22 as payment from the Gaming Center which we used back in our
23 government, as you can see.
24 Finally, the 1992 field research poll -- you'll have
25 it in your book, I think, in Part A -- it tells you what
26 California believes what the percentages are, how they support
27 Indian gaming and the assets of what we have at this time.
28 So what we're looking for here is your support in
looking at Indian gaming in a different perspective of helping

1 the State of California, and not sending it elsewhere, like
2 Nevada. Let's keep the money here in California, because that's
3 what it is.
4 The myth about Indians not giving back things to the
5 State of California is, it is a myth. The three reservations in
6 San Diego County alone give back nearly $20 million last year in
7 state taxes and vendor opportunities for other businesses out
8 there.
9 So, I'm just going to read this real quick. My point
10 is that Indian gaming is not about making rich Indians. It is
11 about enriching the community as a whole.
12 Thank you very much.
13 CHAIRMAN TUCKER: Thank you very much.
14 MR. PICO: I'm Anthony Pico. I'm the Chairman of the
15 Viejas Band of Cumyua Indians, which is located about 35 miles
16 due east of San Diego. I've been the tribal Chairman for over
17 ten years.
18 Honorable Members of the California Assembly and
19 Senate, I must tell you how excited I am to have the opportunity
20 to be here this morning on this most historical occasion.
21 You've heard and will continue to hear more about the
22 hopes and the plans for an economic revival of our people. We
23 welcome the opportunity to sit down with you as elected leaders
24 of our respective people to discuss our common challenges. Like
25 you, we have been elected by our people in the hopes that we can
26 improve their plight and secure a better future for our
27 children. We have been chosen to take on these responsibilities
28 for the same reasons that you have, and that's for the welfare

1 of our people.

2 But unlike you, tribal leaders face a critical
3 burden. Our tribes face the serious possibility of cultural
4 extinction as a result of poverty and the lack of economic
5 resources. Until gaming, as governments and as people, we had
6 no economic means to reverse this trend or foster hope. Yearly
7 an elder dies, and with that person a tribal language, a dance,
8 a custom, and a tradition die. Annually across the nation,
9 tribes are expunged by the United States government for their
10 inability to maintain that government. Underdeveloped nations,
11 Third World countries within your borders, our people suffer the
12 highest unemployment rates of any minority. The suicides,
13 substance abuse, and related social problems arising from
14 poverty, both material and spiritual, are triple those of any
15 segment of people in California.

16 You as elected leaders can appreciate the joy that we
17 find in seeing our people begin to prosper, believe in our own
18 future, and find our will and incentive to achieve. As a
19 consequence of gaming, tribes are beginning to dance new dances,
20 and we're beginning to sing new songs.

21 After the the riots in Los Angeles, precipitated by
22 the Rodney King trial, state and federal governments rushed to
23 acknowledge the poverty and frustrations of Black Americans.
24 Only when Native Americans find a way to help themselves does
25 the State of California take an interest in our 200 years of
26 grinding and pitiful poverty.

27 America has ratified NAFTA, a treaty to encourage
28 free trade, economic partnerships, and strengthening the

1 economic development of neighboring countries. We hope you will
2 seize this opportunity to work with the tribal leaders of the
3 nations that exist within your borders, and recognize and
4 support the Indian Gaming Regulatory Act, a similar economic
5 treaty.
6 Historically, relations between the State of
7 California and its original inhabitants has not been good. The
8 state obstructed our original treaties with the federal
9 government: first, pressuring the United States not to ratify
10 original treaties for compensation for removal of our lands;
11 then attempting to close down the first embryo bingo operation
12 by the Cabazon tribe in Indio. It took that very case to the
13 Supreme Court to remind the State of California that Native
14 Americans had the right to regulate and undertake any form of
15 economic development on their lands that was not illegal.
16 That decision led to the Indian Gaming Regulatory Act
17 and today's meeting on whether the state will honor that treaty.
18 The state uses gaming to fund education programs. It is only
19 once source of funding for your government. Gaming is currently
20 our only source of financing for programs, including future
21 economic alternatives.
22 Could you exist as a government or achieve your
23 aspirations for your people without revenues?
24 Today, by sitting down with tribal leaders, you have
25 shown us your concern for our needs and respect for our
26 governments. We thank you for that. It's so encouraging to be
27 here, and to be able to dialogue with you, and hopefully educate
28 you about the issues of gaming and our plight.

1 Our governments need to discuss and recognize each
2 other and our hopes and challenges. We can and should
3 communicate regularly. That is the best way to avoid
4 misunderstanding and conflict.
5 Our survival hangs on the decisions required between
6 tribal leaders and the State of California. Today is a positive
7 beginning. It's a wonderful beginning for us. It's a hopeful
8 beginning for us. And hopefully, it will require a process for
9 continued dialogue and mutual understanding.
10 We ask only that you support us as you would any
11 underdeveloped or foreign nation struggling to find a means of
12 economic and social stability. Americans speak passionately
13 about human rights and protecting native and aboriginal
14 cultures around the world. Today, in your own backyard, Native
15 Americans have the potential for revival of culture and a
16 revival of our pride.
17 Please, give us your blessing, give us your
18 assistance. This would reverse the history that has gone
19 before. Together -- together we can start a positive, new
20 chapter in nurturing California's cultural diversity, economic
21 straits, and treatment of Native Americans.
22 May you listen with your hearts as well as your
23 minds.
24 CHAIRMAN TUCKER: Thank you very much.
25 Do we have any questions? Senator Dills, do you have
26 any questions? Assemblyman Baca.
27 ASSEMBLYMAN BACA: I have a couple of questions in
28 reference to the -- I can understand the need for the economic

building in that area. I can understand the social stability. I can understand needing moneys for health, housing, and other areas. I can see the areas of improvement.

But I'm very much concerned, I guess, in other areas as well, as we look at gaming, and the possibility of expanding, the possibility of the state, the possibility of having gambling here, is how it would affect the infrastructure surrounding that area. As we look at the infrastructure around the reservations, what about the infrastructures leading to and from that area?

And then what about education? As we look at education affecting the state, we look at the Lotto right now, that 34 cents of every dollar goes into education. I'm very much concerned, as we look at this area, that we continue to support education. And as we look at the growth, and the state's population continues to increase in California, there is added need for funds, especially in education and other areas.

How is this going to help us in these areas?

MR. PICO: This is Anthony Pico.

Certainly, these are governmental issues on the tribal side and the state side that we all have concerns for. And the tribes have always been flexible in regards to those issues.

But at this point, for us, it's a little bit too premature to start talking any kind of numbers, or any specific direction. But we do, certainly, we share your concerns on those issues.

ASSEMBLYMAN BACA: One other comment that I'd like to make, Mr. Chairman.

1 The other is, I believe in fairness and equality, and
2 I realize that what we've just approved last year as well when
3 we allowed the gambling to go on from one port to another port.
4 I also believe in equity and in fairness, and I think here is
5 what we have to deal with as well. I remember many of the
6 merchants and commerce coming to us saying that it's very
7 important that we support such a bill because that would
8 increase the revenue in the communities of San Diego, of
9 Catalina Island, and some of the other areas.
10 I think here, we have to look at this, as well as
11 other areas, look at how it would improve in that area. I just
12 remind us of what we did last year in reference to legislation,
13 and what we may have to do when we look at how the communities
14 can grow as well.
15 CHAIRMAN TUCKER: Thank you very much, Mr. Baca.
16 Just for your information, that bill is stuck over in
17 the Senate.
18 Mr. Richter.
19 ASSEMBLYMAN RICHTER: You made reference to NAFTA,
20 which I found very interesting, because NAFTA, the whole
21 concept of NAFTA, which I supported enthusiastically, is to
22 break down trade barriers and to allow everyone to participate
23 in the exchange of goods and services in the countries of
24 Canada, the U.S., and Mexico.
25 And you talked about it as if it would apply within
26 California to you, and I found that rather amazing, because,
27 would you be willing to see gambling legalized throughout the
28 State of California so that all of those people who are outside

1 the area of your reservations would be able to compete with you
2 on a level playing field?
3 And I have kind of another question that I wanted to
4 ask you, because there are many people who feel that gambling is
5 extremely destructive. Granted, that it goes on in different
6 states to different degrees, and in this state.
7 But I'm just curious, if your very significant
8 profits flow out of your providing services to -- so that people
9 can engage in -- pardon the expression -- this vice, if, in
10 effect, your people aren't really getting revenge, pardon the
11 expression, on the White man by being in a position to do a
12 little bit to them what you feel they've been doing to you for a
13 long time, which is destroy their values and make your -- gather
14 your income out of promoting an industry that a lot of people
15 view as extremely destructive to any society.
16 MR. PICO: In regards to gaming for the entire State
17 of California, I really can't speak on that because I don't --
18 we're just interested in what's legal in California. That's our
19 primary interest.
20 In regards to gaming and problems that certainly we
21 all know exist in those areas, I can let Sycuan speak on that
22 because I know they've done extensive work on that area.
23 As far as revenge is concerned, sir, we are a
24 spiritual people. We are people who use love as a basis for our
25 existence, and revenge and negativism is only destructive, and
26 we shall not participate in that. That is our heritage.
27 MR. TUCKER: On behalf of Sycuan, what you mentioned
28 about the fair trade, and this and that, and with this NAFTA

situation, we have an opportunity here to really help the state in other measures than just, let's say, financially coming right out of our pocket.

People say that we don't pay taxes. Any non-Indian who works on the Indian reservation pays taxes. We pay their federal and we pay their state taxes. We can't get away from that. That's the law. So, we respect that very much, and we do pay into that.

In our negotiations, we offered a percentage of our payments from the tribes in California to help the State of California in certain ways that they want to be helped in, and the negotiations turned that down.

It's not like we're not trying to establish a good relationship. I think you need to remember that we are a sovereign nation. We have our own laws. We have our own ability to govern ourselves.

We want to work with the State of California, and with the state and federal government, as a government-to-government relationship that we can have. Even though we are in the State of California, under Public Law 280, we still are a sovereign nation. And when California recognizes that, we'll probably get a lot farther in our negotiations.

CHAIRMAN TUCKER: Senator Greene.

SENATOR GREENE: Thank you.

Gentlemen, the treaties between the various Indian tribes are treaties with the United States federal government?

MR. PICO: Those treaties do not exist because of pressure that was put on from the State of California to not

1 ratify those treaties originally in Congress.

2 SENATOR GREENE: All right. Are there any treaties

3 between Indian tribes and the State of California?

4 MR. PICO: In the areas of gaming, I think I would

5 let some of our attorneys --

6 SENATOR GREENE: I'm not talking about the areas of

7 gaming. I'm simply making a universal statement.

8 Are there any tribal treaties between various Indian

9 tribes and the State of California?

10 MR. TUCKER: No, there's not.

11 SENATOR GREENE: There is not?

12 MR. TUCKER: No.

13 SENATOR GREENE: That's your answer, right?

14 Do the tribes concede that their tribal grounds are

15 within and part of the State of California? Or, do you take the

16 position that you are a sovereign nation, and your tribal

17 grounds are not in the State of California by independent of it?

18 MR. TUCKER: Our tribal grounds are what's given us

19 by the federal government as trust land, ordered by the federal

20 government. For the Sycuan Indians, it was a Presidential

21 Decree in, I believe, 1875.

22 SENATOR GREENE: Is that typical? You're talking

23 about you're a singular tribe rather than generally. Is that

24 generally the case?

25 MR. TUCKER: Yes, I would think generally that's the

26 case.

27 SENATOR GREENE: But once again, it's by some compact

28 between yourself and the United States government in Washington,

1 D.C.?

2 MR. TUCKER: Correct.

3 SENATOR GREENE: If you are an independent nation,

4 why are you then paying state and federal taxes?

5 MR. TUCKER: For non-Indians who work on our

6 reservations, that is the law. They have to pay their taxes.

7 SENATOR GREENE: I'm sorry, I don't follow that. Do

8 the Indians within the reservation that have income pay income

9 taxes?

10 MR. TUCKER: They do pay income taxes.

11 SENATOR GREENE: Both the state and federal

12 government?

13 MR. TUCKER: Indians who work for the Gaming Center

14 do not pay state taxes, but they do pay federal taxes.

15 SENATOR GREENE: All right. Then the Indians that

16 work within the gaming centers, does that mean, then, that any

17 Indian who works on the reservation, on some project within the

18 reservation boundaries, does not pay state taxes?

19 MR. TUCKER: That's correct.

20 SENATOR GREENE: But they do pay federal taxes?

21 MR. TUCKER: That's correct.

22 SENATOR GREENE: So then, in your treaty, you're

23 recognizing some relationship with the federal government, but

24 none with the state government? Is that reasonably stated?

25 MR. TUCKER: Correct. I believe so. If you can,

26 leave those questions for the next panel, it'd be probably

27 better answered.

28 SENATOR GREENE: All right. Will the panel then keep

1 it in mind.

2 The other gentleman that spoke said that you're only

3 interested in what is legal in California. But slot machines

4 are not legal in California; blackjack is not legal in

5 California; crap tables are not legal in California. But you

6 want those things. Is that not so? Are you not asking for the

7 right to do things that are not otherwise legal in the State of

8 California?

9 MR. PICO: We are at the present time, as we speak,

10 we are not conducting any games in California that are illegal.

11 And the attorney panels, when they come up here, will be able to

12 answer that more specifically.

13 SENATOR GREENE: We're looking here at this

14 television. They were showing us, they carted out some of the

15 slot machines. We saw blackjack tables, all right?

16 And I'm not talking about your tribe. I'm talking

17 about the Indian nations, however you see this. Does one or

18 more Indian tribe, or rancheria, or whatever, do this wide open

19 gambling?

20 MR. TUCKER: What you're referring to on this video

21 were not considered Class III gaming devices. They're Class II

22 gaming devices, that we consider a Class II, which is a video

23 pull tab machine, which is allowable in the State of

24 California.

25 SENATOR GREENE: Again, the other gentleman speaking

26 said that he's only interested in what is legal in the State of

27 California.

28 Now, is that factually stated, or is it that you seek

1 more than was currently legal on non-Indian lands in the State
2 of California?
3 MR. PICO: We seek only what's provided by law.
4 SENATOR GREENE: I don't know what that means. Are
5 we talking about federal law now, or are we talking about tribal
6 agreement? Are we talking about California law?
7 Are you seeking other than what would be permitted
8 outside your Indian tribal confines?
9 MR. PICO: What we seek is what is permitted within
10 the State of California.
11 SENATOR GREENE: All right, then you do not seek to
12 play blackjack for profit, for gambling. You do not seek to
13 shoot and play craps. Am I right?
14 MR. PICO: Whatever is prohibited, criminally
15 prohibited by California law, we do not seek.
16 SENATOR GREENE: Is that a yes or no answer?
17 MR. PICO: That's the same answer I'm going to give
18 you, because that is the answer.
19 SENATOR GREENE: I see. In other words, you will not
20 specifically answer the question. That's fair enough.
21 MR. TUCKER: I think we'll let our attorneys answer
22 that.
23 SENATOR GREENE: Sure.
24 MR. PICO: That's correct. It's a very complex legal
25 question that we aren't trained to answer those kind of
26 questions.
27 SENATOR GREENE: Well, maybe your next panel, they
28 can volunteer the answer there.

1 MR. PICO: Yes.

2 MR. TUCKER: Yes.

3 SENATOR GREENE: All right.

4 I thank you for your patience with me. I'm simply
5 trying to get a better understanding.

6 I authored the original bingo laws. At that time,
7 there was nothing in my mind, no thought, you know, that there
8 would be a problem, or a possibility, of anything specially with
9 Indian tribes. I thought I was simply covering the State of
10 California, you know, and gave no thought to this particular
11 issue.

12 I think it's a fair issue. I think it's a reasonable
13 one.

14 On the other hand, I'm sensitive to what one of the
15 Assemblymen was saying here, that there's an uneasy feeling
16 about saying that the wealth of the community depends on
17 gambling. There's so many among us that are uneasy, to
18 downright opposed to gambling in any form. I'm not. I'm not
19 one of those people, but I don't generally know how the people
20 of the State of California feel. It gives us a problem.

21 But whether it gives us a problem or not, you're
22 entitled to whatever your tribal and other agreements offer you.

23 Thank you, Mr. Chairman.

24 CHAIRMAN TUCKER: Thank you, Senator.

25 Assemblyman Connolly.

26 ASSEMBLYMAN CONNOLLY: This question is to Anthony
27 Pico.

28 Mr. Pico, there was a reference to Class I, Class II

1 and Class III gambling. Where does keno fall within those
2 classifications?
3 MR. PICO: Under Class III.
4 ASSEMBLYMAN CONNOLLY: What other games would fall
5 within Class III?
6 MR. PICO: I'd like to have one of the attorneys
7 answer that question. But I think we're talking about lottery.
8 ASSEMBLYMAN CONNOLLY: It would include craps, and
9 roulette, and various other electronic games of chance; is that
10 correct?
11 MR. PICO: Certainly would include games that are
12 prohibited by California, criminally prohibited.
13 ASSEMBLYMAN CONNOLLY: But if keno is Class III, then
14 it would be your argument that you're permitted to do what the
15 state already allows us to do. Is that a fair statement?
16 In other words, you don't want to do any more than
17 the law already allows you to do.
18 MR. PICO: That's correct.
19 ASSEMBLYMAN CONNOLLY: Now, we opened up the Lottery
20 to keno; didn't we?
21 MR. PICO: That's my understanding.
22 ASSEMBLYMAN CONNOLLY: So it seems to me that as a
23 state, we've opened the door to Class III gambling. In fact, an
24 appellate court decision agrees with that; doesn't it?
25 MR. PICO: They do.
26 ASSEMBLYMAN CONNOLLY: So, when you refer to Class
27 III, you're saying that we ought to be treated the way everybody
28 else is treated since keno's already open. Is that a fair

1 statement?

2 MR. PICO: According to the 1988 Indian Gaming

3 Regulatory Act, Class III gaming is games that are permitted

4 within an individual state.

5 ASSEMBLYMAN CONNOLLY: Now, let me ask you. There's

6 a difference between betting with all the other players and

7 betting against the house; is that correct?

8 MR. PICO: That's correct.

9 ASSEMBLYMAN CONNOLLY: And the original Lottery that

10 we have here and sanctioned here in the state would have us

11 betting against all other players; is that correct?

12 MR. PICO: I would like to again ask that the experts

13 involved in that area be allowed to answer those questions.

14 MR. TUCKER: Mr. Chairman, I want to ask Mr. Howard

15 Dickstein up here to help answer some of these questions. Is

16 that all right with you?

17 CHAIRMAN TUCKER: Why don't we just bring the second

18 panel up.

19 ASSEMBLYMAN CONNOLLY: Let me just ask one more

20 question of Mr. Pico.

21 CHAIRMAN TUCKER: Sure, while they're coming up: Mr.

22 Dickstein, Mr. Feldman and Mr. Gede. Come forward now and seat

23 yourselves at the table. Any questions that the membership is

24 throwing out that can't be answered by the chairmen of the

25 respective tribes, then they can be fielded by the attorneys.

26 Mr. Connolly, you can proceed.

27 ASSEMBLYMAN CONNOLLY: My second area that I wanted

28 to go into with Mr. Pico, I know that the appellate court

1 decision refers to an arrangement that existed between the
2 Indian reservations and the State of Connecticut, particularly
3 with regard to the millions of dollars going to the State of
4 Connecticut because of whatever the arrangement was.
5 Can you describe the arrangement that now exists
6 between the Indian reservations in the State of Connecticut,
7 particularly as it pertains to revenues for the state?
8 MR. PICO: I would like to defer that, because I
9 really don't know the exact particulars. I'm just generally
10 knowledgeable of that. And because it's in Connecticut, I don't
11 really --
12 ASSEMBLYMAN CONNOLLY: Perhaps whoever best could
13 answer. The first question pertains to the Appellate Court
14 decisions that says essentially: you've opened the door when
15 you allowed keno, so now you can't close the door.
16 Would you describe that decision for us?
17 MR. DICKSTEIN: I think that you're --
18 CHAIRMAN TUCKER: Could you identify yourself for the
19 record.
20 MR. DICKSTEIN: My name is Howard Dickstein. I'm one
21 of the attorneys for the tribes that are testifying today. I
22 represent three or four of them, including the Rumsey Rancheria,
23 near Sacramento.
24 I think that the question goes to a certain federal
25 district court decision in the Eastern District here called
26 Rumsey vs. Wilson. And while I'd be prepared to answer it if
27 the panel would indicate that that's their desire, the way we've
28 set this up, we do have a couple of attorneys who'll explain the

1 basis of the law, the jurisdictional dichotomies between tribes,
2 the federal government, and the state, and local jurisdictions.
3 ASSEMBLYMAN CONNOLLY: Okay, then I'll hold off and
4 wait until I hear --
5 MR. DICKSTEIN: I think that, for the benefit of the
6 committee as a whole, if you saw the answers to these questions
7 in context, it might save a lot of time.
8 ASSEMBLYMAN CONNOLLY: Would you also address the
9 relationship that Connecticut has?
10 MR. DICKSTEIN: Yes.
11 ASSEMBLYMAN CONNOLLY: Thank you.
12 CHAIRMAN TUCKER: Any other questions of the first
13 panel?
14 Thank you very much, gentlemen.
15 All right, now, Mr. Dickstein, why don't you lead
16 off?
17 MR. DICKSTEIN: If I may, Mr. Chairman, I'm going to
18 defer to Mr. Feldman to speak to the first part of our
19 presentation, which is the explanation of the background of
20 Indian gaming, and the current federal law that authorizes it on
21 reservations in California.
22 CHAIRMAN TUCKER: Sure.
23 MR. DICKSTEIN: Thank you.
24 MR. FELDMAN: Thank you, Mr. Chairman.
25 My name is Glenn Feldman. I'm a lawyer from Phoenix,
26 Arizona.
27 I have been involved in representing California
28 Indian tribes since 1979. I represent the Cabazon band of

1 Mission Indians in Riverside County, and the Santa Ynez band of
2 Mission Indians in Santa Barbara County.
3 I've submitted to the committee a prepared statement
4 which is not included in the bound book that you have, and I
5 hope that those have been distributed.
6 CHAIRMAN DILLS: They have been distributed.
7 MR. FELDMAN: Thank you.
8 I'm going to begin in talking in what I hope will set
9 the stage for some of the questions that have been asked here
10 this morning and give you a general legal overview of the
11 federal law and federal statutes that apply to gaming on
12 reservations.
13 When I'm through, Mr. Dickstein is going to talk
14 about some of the very current cases that have interpreted some
15 of those laws, and then either in the midst of that or the end
16 of that, we'd be happy to answer any questions you have and come
17 back to some of the questions that were asked of some of the
18 tribal leaders that really are fairly technical legal issues. I
19 think we can, perhaps, be of some assistance in those.
20 Let me begin with outlining what are really the two
21 basic principles of federal Indian law that apply to everything
22 that we're talking about here today. And those principles are
23 as follows:
24 Number one, in the absence of expressed Congressional
25 authorization, state laws generally do not apply to tribal
26 activities within the boundaries of an Indian reservation. So,
27 unless Congress says that the state can do something, or affect
28 something, or assert jurisdiction over certain activities within

1 applied to non-Indian activities on the reservation.
2 And you must keep in mind that the weighing and
3 balancing is conducted against what the Supreme Court has called
4 a backdrop of tribal sovereignty. That is, that's the basic
5 principle that the courts apply: that tribes are sovereign
6 governments; that they have the right to govern their own
7 affairs. And so, that's the backdrop against which the courts
8 weigh and balance these various interests.
9 Now, those are the two basic principles that apply as
10 matters of federal law.
11 Now with those in mind, I'd like to take a couple of
12 minutes to talk about the two subjects that the committee has
13 asked for us to discuss, and that is Public Law 280, or what's
14 commonly known as PL 280, and the much more recent Indian Gaming
15 Regulatory Act of 1988.
16 Let me begin with PL 280. This is a statute that was
17 enacted in 1953 by Congress, and it was an -- it is an example
18 of Congress giving the states some degree of authority over
19 activities on Indian reservations. Remember, I told you,
20 Congress has to give that authority in order for it to be
21 effective. Well, this is -- in '53, Congress did give the
22 states, gave six states including the State of California, some
23 measure of authority over activities on the reservations.
24 That statute is divided into two parts: a civil
25 component and a criminal component. The criminal component
26 basically made state criminal laws applicable within reservation
27 boundaries. Made them effective just as they are effective
28 elsewhere within the state.

1 the reservation boundaries, in general state laws do not apply.
2 In general, federal laws do apply, and that's the basis of the
3 so-called government-to-government relationship that exists
4 between Indian tribes and the federal government.
5 Keep in mind that Indian reservations are federally
6 owned land. That land is owned by the federal government and
7 held in trust for the tribes. So, there's a very unique
8 relationship there, and unless Congress specifically says so,
9 state laws generally cannot intrude into tribal activities on
10 the reservation.
11 Now, when non-Indians engage in certain activities on
12 the reservation, as is increasingly the case with increased
13 commercial activities and related activities on the
14 reservations, then a slightly different standard applies.
15 And when the state seeks to assert jurisdiction or
16 authority over those non-Indian activities, and the tribe
17 likewise seeks to assert jurisdiction over those activities, the
18 court has developed -- the courts, including the Supreme Court
19 -- has developed what is commonly referred to as the balancing
20 test. The court looks at, in a very particularized way, looking
21 at exactly what activities we're talking about, under what
22 circumstances, and in what context, the courts then weigh and
23 balance the various federal interests involved, the tribal
24 interests involved, and the state interests involved, and
25 determine which of those predominate. And only if the state
26 interests predominate over what are generally tribal and federal
27 interests that ordinarily are pretty well unified in these
28 activities, only in those circumstances can state laws then be

1 The civil component of the act, however, is where
2 much of the debate has focused and has really caused a great
3 deal of litigation that we'll talk about. At the same time that
4 it was giving fairly broad criminal jurisdiction to activities
5 within the reservation, it also gave a much limited measure of
6 civil jurisdiction. And it gave state courts the authority to
7 adjudicate private civil litigation amongst parties, including
8 Indians or tribal members arising within the reservation, and
9 provided that state laws would provide the rule of decision in
10 that private litigation, private civil litigation.
11 Now, having said that, let me tell you what the civil
12 provision of PL 280 didn't do, because that's really more
13 applicable to what we're talking about here.
14 PL 280 did not give the state the authority to
15 impose its general civil regulatory laws on the reservation. It
16 did not do that. It was not a grant of jurisdiction over the
17 tribes themselves. It applied to individuals within the
18 reservation. It did not terminate or extinguish existing tribal
19 governments. They pre-existed PL 280 and existed after the
20 enactment of PL 280. And it did not -- PL 280 did not waive
21 tribal sovereign immunity from unconsented suit.
22 So, we have in PL 280 a civil component which says --
23 excuse me, a criminal component that says state criminal laws
24 apply on the reservation, and a civil component which says that
25 under certain circumstances, state -- some state civil laws will
26 apply to private civil litigation.
27 In order, then, to determine which state laws apply
28 and how they apply, the courts have developed what is commonly

1 called the civil regulatory versus criminal prohibitory test.
2 And that is -- and this is the way this PL 280 has been
3 interpreted by the courts, is that you look at a particular
4 state law. And if it is a criminal law that absolutely
5 prohibits conduct everywhere within the state, under any
6 circumstances, to everybody across the board, then that is
7 probably going to be a criminal law that is applicable to
8 individuals within the boundaries of an Indian reservation. The
9 criminal provision of PL 280.
10 But at the same time, PL 280 does not grant the state
11 general civil regulatory authority. So, if an act is anything
12 other than a criminal prohibitory act, if it is a civil
13 regulatory enactment in the terms of the statute, in terms of
14 the court cases, then that is not applicable within the
15 reservation boundaries.
16 Now, with that background, in the mid and late '70s
17 and early '80s, Indian tribes who were desperately seeking
18 sources of funding for their tribal governmental activities, and
19 for whom the federal spigot was very slowly but very clearly
20 being turned off in Washington, the tribes began to look around
21 and noticed that many states were beginning to generate
22 substantial amounts of revenue for state governmental purposes
23 through gaming: the expansion of state lotteries; the expansion
24 of off-track betting facilities; the expansion of race tracks;
25 casinos; riverboat gaming; Atlantic City casinos. The tribes
26 saw that the trend was towards extensive and expanded gaming.
27 And they began to view that as an option for themselves in order
28 to generate revenues for their own purposes.

1 As a result, a number of tribes began operating what
2 began with bingo games in which they offered prizes that were
3 not limited in the same way that state prize limits would apply
4 outside the reservation.
5 The gentleman indicated that he had authored the
6 state bingo law. You know that California has a $250 limit on
7 prizes for bingo games.
8 The tribes, because they are self-governing, believed
9 that they could offer bingo and offer prizes that exceeded $250,
10 or in other ways exceed state restrictions and state
11 regulations.
12 Federal courts, through the '70s and early '80s,
13 uniformly agreed with the tribes' position. There was
14 extensive litigation. We don't have time to go into it, but
15 there were a dozen or more court cases from all over the
16 country raising pretty much the same issues, and in every single
17 case, including a fairly well-known case here in the Ninth
18 Circuit Court of Appeals that includes California involving the
19 Morongo Group of Mission Indians, every federal court ruled that
20 the tribes did have that authority to engage in gaming, that
21 state laws did not regulate those games, and that in those
22 states that were PL 280 states, that after analyzing the state
23 laws that were involved, the courts uniformly concluded that
24 those state laws were civil regulatory laws, and therefore did
25 not apply on the reservations. They were not criminal laws.
26 CHAIRMAN TUCKER: Mr. Connolly.
27 ASSEMBLYMAN CONNOLLY: And the idea is that it's not
28 a crime to play bingo and have a prize greater than $250. That

1 would apply to everybody across the state, and therefore it
2 would not be a criminal prohibitory act? Is that the argument?
3 MR. FELDMAN: Well, the analysis is that if the state
4 permits but regulates an activity -- the $250 limit is a
5 regulation. There's nothing -- I mean, it's, with all
6 deference, it's arbitrary. It could have been $200, it could
7 have been $400. It's a regulatory enactment.
8 The court says if you allow bingo to be played, then
9 you are permitting it, and you're regulating it. That is, by
10 definition, a civil regulatory enactment which doesn't apply.
11 And the tribes can offer bingo and offer a $500 prize. That's
12 the analysis.
13 SENATOR GREENE: If I may, Mr. Chairman.
14 What you are indicating to us, then, is that none of
15 the limitations -- $250 is one of the limitations; the time of
16 day; the number of days; local control is in there -- all that's
17 out the window as far as the Indian gaming is concerned?
18 MR. FELDMAN: All regulatory enactments that are part
19 of state law.
20 SENATOR GREENE: There's no limitation on time of
21 day, number of games, amount of money, or anything else.
22 MR. FELDMAN: That's correct.
23 SENATOR GREENE: Thank you.
24 MR. FELDMAN: That's correct.
25 Now, these federal court cases, and I apologize if
26 I'm going over. I'm going to try to speed this up as best I
27 can. These federal court cases finally resulted in 1987 with
28 the U.S. Supreme Court decision involving one of my clients, the

1 Cabazon Band of Mission Indians against the State of California.
2 And in 1987, the U.S. Supreme Court basically affirmed this line
3 of federal court cases that had been developing since the late
4 '70s.

5 And although it's a complicated case, and we could
6 spend all day talking about it, the two basic principles that
7 came out of the Cabazon case were as follows:

8 Number one, that PL 280 did not give the State of
9 California the authority to impose its bingo or other regulatory
10 enactments with regard or on tribal gaming activities on the
11 reservation.

12 And secondly, even putting PL 280 aside, and the
13 court then went through this weighing and balancing test that I
14 spoke about earlier that applies if there is no federal statute
15 in place, and applicable to non-Indians, the court concluded,
16 after carefully weighing all the interests involved, concluded
17 that the federal and tribal interests in generating revenue, in
18 providing strong tribal governments, outweighed the interest of
19 the state. And the interest that had been presented by the
20 state in that litigation was keeping these tribal operations
21 free from the infiltration of organized crime.

22 The Supreme Court said that's an absolutely
23 legitimate concern. Everybody is equally concerned about that,
24 the tribes as much as anybody, but that there was, a, no
25 evidence that there was any infiltration of organized crime; and
26 b, the federal government and the tribes had ample opportunity
27 to regulate these activities and be sure that that didn't
28 happen. And we're going to talk about the regulatory structure

1 in a different panel. And c, that under any circumstances, that
2 interest did not outweigh the predominant federal and tribal
3 interest in generating revenues and trying to improve the
4 welfare of tribal members on the reservation.
5 SENATOR GREENE: Can we go back to the question where
6 there was a little uncertainty on my trying to interpret the
7 answer. When I asked for a yes or no answer, and I couldn't
8 quite get it in that frame of reference. Can you help us out
9 there, where the question related to when the witness was saying
10 that we didn't want to do anything that was otherwise illegal.
11 MR. FELDMAN: Sure.
12 SENATOR GREENE: And I got confused in my mind
13 whether he was talking about federal law or state law as to what
14 was or was not illegal. And the attendant question comes up
15 with this, according to what you're just saying now, a secondary
16 issue, state taxes, income tax, and so on.
17 MR. FELDMAN: I'll address both those.
18 Let me address it in this context. Immediately after
19 the Cabazon decision came down in 1987, Congress began looking
20 much more carefully at what had been sitting around in Congress
21 for four or five years, and these were federal laws that would
22 affect the regulation of these gaming activities on the
23 reservation. Bills had been introduced as early as '83 and '84.
24 They'd gotten nowhere.
25 One the Supreme Court ruled in the tribes' favor,
26 Congress got a lot more interest in enacting legislation to deal
27 with this issue, and so in '88, Congress enacted the Indian
28 Gaming Regulatory Act, IGRA. That's the act that basically has

1 brought us here today, because it's the implementation of that
2 act, and the questions that you raise all relate to provisions
3 of that act that I'm going to finish with in the next couple of
4 minutes.

5 The act basically codified the Cabazon decision. It
6 basically adopted and recognized the Cabazon decision and its
7 various aspects. It stated very specifically in statutory
8 language that the purposes of the act -- the act has multiple
9 purposes, but the two primary purposes are to statutorily
10 authorize gaming on Indian reservations as a legitimate means
11 by which tribes can generate tribal revenues and become
12 economically self-sufficient. And secondly, to ensure that the
13 gaming is conducted fairly and honestly, so that everybody can
14 be assured that they're getting a fair shake.

15 Now, the act creates three classes of gaming. I'm
16 going to get to your question. I'm just sort of giving you a
17 little bit of background here, and this answers some of the
18 other questions.

19 The act creates three classes of gaming. Class I
20 gaming is basically traditional Indian games conducted at
21 ceremonials and celebrations, for essentially prizes of minimal
22 value, and that activity is regulated entirely by the tribe.
23 That is strictly within tribal regulation, and it's not involved
24 in any of the discussion that we're having here today.

25 Class II was designated as: bingo; games similar to
26 bingo, including pull tabs; and all these games could be aided
27 through computerized or technological aides and still be
28 considered to be part of Class II. In addition, Class II also

1 includes non-banking card games, essentially poker is what was
2 at issue there.
3 Keep in mind, in the Cabazon case, the Cabazons had
4 been operating not only bingo, but they had been operating a
5 card room. I may have failed to mention that. The Cabazons had
6 been operating a card room on the reservation which was playing
7 and offering for play exactly the same card games that were
8 being played all over this state in as many as 400 card rooms.
9 Those games were not different in any way, yet the state and the
10 county tried to shut them down, arguing that the tribe had no
11 authority to operate a card room, even though there were 400 of
12 them operating. The Supreme Court threw that argument out
13 pretty quickly. But because poker was one of the games that was
14 included within the Cabazon decision, it was made a Class II
15 gaming activity.
16 So, you've got bingo, bingo-like games, pull tabs,
17 including electronic versions, or electronically aided versions
18 of those games, and poker as Class II.
19 Class III is everything else. It's defined by
20 exclusion. Everything that isn't Class I or Class II is Class
21 III. That includes: parimutual wagering, on-track off-track
22 betting, lotteries, keno, the broad scope of casino-style games,
23 craps and other games like roulette.
24 SENATOR HUGHES: Mr. Chairman.
25 Is that where slot machines are in fact --
26 MR. FELDMAN: Slot machines are in Class III.
27 SENATOR HUGHES: Thank you.
28 MR. FELDMAN: Now, what are tribes authorized to

1 conduct? What activities are they authorized to conduct on the
2 reservation?
3 The act basically took the Cabazon standard that the
4 Supreme Court had enunciated in Cabazon and said that if a state
5 -- if a gaming activity is permitted within the state for any
6 purpose by any person, organization, or entity, then the tribes
7 have the authority to request to negotiate an agreement for
8 those games.
9 Class III gaming -- let me back up one minute because
10 it won't make sense without this.
11 Class II gaming is regulated by the tribes with
12 oversight from a new federal Congressional -- a new commission
13 had been established: the Indian Gaming Commission, which was
14 established under this 1988 act. It has extensive authority
15 over the -- oversight regulatory authority over Class II gaming.
16 Class III gaming, though, was to be regulated in a
17 completely different way. Congress, in its infinite wisdom,
18 said: the tribes and the states shall get together and shall
19 negotiate what are called Class III tribal-state gaming
20 compacts. A compact is nothing other than a contract between
21 two governments. And Congress said: the state and the tribe
22 will sit down as co-equal sovereigns, each with their own
23 legitimate interests to protect, and in the spirit of
24 camaraderie and mutual benefit, will sit down and negotiate
25 agreements which will lay out the regulatory framework for Class
26 III gaming. They will allocate jurisdiction; they'll determine
27 to what extent the state has any authority over these
28 activities, to what extent the tribe has authority. It laid out

1 a variety of subjects that could be part of that.
2 Now, in terms of taxation the act is very clear. The
3 state may not tax Indian gaming activities. They are exempt
4 from state taxation. However, recognizing that the states might
5 have some regulatory role to play in these activities under the
6 negotiated compact, the act is equally clear that the states can
7 negotiate for and may be entitled to receive reimbursement for
8 their actual costs of regulatory services provided. So that the
9 state -- the concept, I think, is that the state should not lose
10 anything on the deal, it shouldn't gain anything, and it should
11 not have the right to tax these activities, but if it's
12 providing additional services as a result of these activities,
13 then it should be entitled to reimbursement.
14 ASSEMBLYMAN CONNOLLY: Would you then address the
15 Connecticut relationship that I referred to earlier at this
16 time? Is that what they have entered into? Are they getting
17 reimbursement for the cost to the state for the activity? How
18 would you describe that?
19 MR. FELDMAN: I believe that is probably the way the
20 parties to that agreement would describe that. That rather than
21 attempting to work out some complicated process by which actual
22 bills for precise services were rendered, they agreed on a
23 percentage reimbursement to the state based on gaming revenues.
24 I believe that's correct.
25 ASSEMBLYMAN CONNOLLY: This is how it becomes
26 significant.
27 I happen to represent El Cajon, which is adjacent to
28 one of the reservations you referred to earlier. The argument

1 is that the road, the roadway, to accommodate egress and ingress
2 into the reservation, isn't sufficient to meet the needs of the
3 numbers of people. And who, then, is going to pay for the road
4 to accommodate the traffic that will follow? And that's sort of
5 a legitimate question to be asked.

6 MR. FELDMAN: It's an absolutely legitimate question,
7 and the answer is: if and when the state sits down and
8 negotiates with the tribes in good faith over these gaming
9 activities, that will be an issue that will be addressed. It is
10 a legitimate subject for negotiation, but we can't get there
11 until we get negotiations under way.

12 ASSEMBLYMAN CONNOLLY: That would be with a
13 reimbursement part pertaining --

14 MR. FELDMAN: That's correct.

15 SENATOR GREENE: Mr. Chairman, if I may once again.

16 Suppose that the tribe hires someone to run the games
17 for them, and they bring in their own personnel, et cetera.
18 There's a contract between them either for cash, or a
19 percentage, or whatever.

20 Now tell me about taxation.

21 MR. FELDMAN: You're talking about taxation of the
22 non-Indians?

23 SENATOR GREENE: Yes, the non-Indian firm hired by
24 the Indian firm to conduct business on Indian land. Is there
25 taxation there?

26 MR. FELDMAN: I'm going to defer to some other
27 lawyers here.

28 I have to tell you, I don't think this question has

1 arisen. My sense is, and I want to say this fairly carefully,
2 my sense is that a non-Indian management company gaining
3 revenues would probably be subject -- certainly they're subject
4 to federal taxes; no question about that. Everybody's subject
5 to federal tax.
6 But probably, more likely than not, that revenue
7 would be -- I can hear some of the management people in the
8 background shaking their heads -- but I think more likely than
9 not, that revenue would probably be subject to state --
10 SENATOR GREENE: I'm assuming that there may be some
11 kind of concessionaires on the Indian land, whether it is or is
12 not related to the gambling.
13 MR. FELDMAN: I'm sorry?
14 SENATOR GREENE: I would assume that there may be
15 some kind of concessionaires. You know, where the Indians hired
16 somebody to render some kind of service for them. You set up a
17 gas station, or whatever the heck it is, and you hire somebody
18 to do this or that.
19 So, I'm interested in then what happens in terms of
20 taxation for the state?
21 CHAIRMAN DILLS: Mr. Chairman, Senator Greene is the
22 Chairman of the Revenue and Taxation Committee of the Senate. I
23 think maybe we ought to leave this subject matter to that
24 committee at a later time, Senator.
25 SENATOR GREENE: I never argue with a senior citizen.
26 CHAIRMAN DILLS: When did that start?
27 SENATOR GREENE: When I became one.
28 SENATOR HUGHES: Mr. Chairman.

1 CHAIRMAN TUCKER: Senator Hughes, if it's for a
2 question, let me ask you to hold off because the stenographer
3 has to take a break, and we are at the break point.
4 We're going to take a break for ten minutes and then
5 come right back. So, we will continue in ten minutes.
6 [Thereupon a brief recess was taken.]
7 CHAIRMAN DILLS: Ten minutes have expired. Let the
8 meeting please come to order. Please take your places on the
9 podium and proceed.
10 You may proceed.
11 MR. FELDMAN: Thank you, Mr. Chairman.
12 I'd like to conclude with just two very brief points,
13 and then I'd be happy to answer any further questions, and then
14 Mr. Dickstein's going to talk about some of the litigation.
15 Let my just conclude on two final issues involving
16 the Indian Gaming Regulatory Act, because I suspect these may be
17 related to issues that will come up at some point today.
18 First, the act imposes very strict limits on the
19 ability of tribes to use non-reservation lands for gaming
20 purposes. In general, the act is intended to promote gaming on
21 existing reservations. There is a very limited ability under
22 the statute for tribes to use lands that are not included within
23 or contiguous to existing reservations for gaming purposes, but
24 under those circumstances, it requires the concurrence of the
25 governor of the state for those lands to be used for gaming
26 purposes by the tribes.
27 CHAIRMAN DILLS: Would parking space be considered
28 gambling purposes?

1 MR. FELDMAN: No, I don't think so. I think it would
2 apply to the gaming activities themselves, not to a parking lot
3 or related facilities.
4 But I just want to make the point that it does
5 require the concurrence of the governor in order to have lands
6 put into trust and used for that purpose.
7 Finally, let me just bring the two statutes back
8 together, PL 280 and the Indian Gaming Regulatory Act, because
9 one of the things -- and Howard is going to talk about this in a
10 little more detail, and one of the other witnesses, George
11 Forman, will talk about it in some detail as well since it's his
12 case -- but one of the things that the Indian Gaming Regulatory
13 Act did was to essentially federalize state gaming laws on the
14 reservation. And by that, I mean that in effect, IGRA
15 pre-empted whatever criminal authority states might otherwise
16 have had under PL 280 or other statutes with regard to gaming
17 activities.
18 IGRA was intended to be a comprehensive federal
19 enactment dealing with all aspects of gaming on the
20 reservations. And as a result of that, it basically took all
21 state laws that applied to gaming, made them federal laws, has
22 assimilated those laws into federal law, and essentially said
23 that the federal government shall have exclusive jurisdiction to
24 enforce gaming laws on the reservation.
25 With that, I'm through and I'd be happy to answer any
26 further questions.
27 CHAIRMAN DILLS: Senator Hughes has a question, and
28 Assemblyman Baca.

1 SENATOR HUGHES: For the purposes of taxation for
2 people who are employed at these gaming facilities, what
3 definition, or how do you define an Indian firm?
4 I've heard references here to Indian firms. Is it
5 like the definition of women-owned firms, or minority firms,
6 that X number of partners in a business? Or does the tribe
7 identify you as an Indian firm for taxation purposes?
8 There might be several partners. I don't know that
9 this has ever come up before or not, and maybe it has.
10 MR. FELDMAN: I'm not sure how to respond to that. I
11 can only tell you that there is not much difficulty in
12 determining who is -- you're saying a tribal firm. I'm not
13 familiar with that term. It's not one that we use in this --
14 SENATOR HUGHES: No, no. I didn't mean a tribal
15 firm. I said, how do you determine if a firm is truly an Indian
16 firm? Does the tribe have to acknowledge you as an Indian and
17 say you are a member of their tribe, so any firm that you head
18 is an Indian firm? Or, if you had several people other than
19 Indians who were members of the firm, and owned stock, is the
20 largest percentage of the stock considered a firm?
21 I'm talking about for taxation purposes, how do you
22 define on the federal level what an Indian firm is? Does it
23 have to be all Native Americans?
24 MR. DICKSTEIN: This is Howard Dickstein. Let me try
25 to answer the question briefly.
26 The relevant group that is exempt from state law is
27 not Indian firms. It's tribal members who are employed, tribal
28 members of the reservation who are employed on the reservation.

1 Indian firms have certain preferences and certain
2 rights if they are majority-owned by members of federally
3 recognized tribes across the country.
4 But for tax purposes, that's not really the relevant
5 group, I think, your question intends to target.
6 The exemption from state income taxation is limited
7 to enrolled members who enrolled pursuant to ordinances in the
8 constitution of that particular tribe, meet certain defined
9 criteria. Enrolled members who are employed on the reservation.
10 So that, say, in the Sycuan example, only tribal members of
11 Sycuan who were working on the reservation would be exempt from
12 state income tax.
13 Now, state sales tax is paid by all nonmembers who
14 purchase goods at Sycuan or any of the other tribal gaming
15 enterprises.
16 SENATOR HUGHES: What happens if a person comes to be
17 employed, and they'll say, "I'm part Indian."
18 MR. DICKSTEIN: They don't qualify.
19 MR. FELDMAN: It makes no difference.
20 MR. DICKSTEIN: No. The definition of Indian under
21 the federal law is a member of a federally recognized tribe, an
22 enrolled member of a federally recognized tribe.
23 There are a lot of people who say that they're half
24 Indian, but they don't qualify for tax exemption or, for that
25 matter, many other things.
26 CHAIRMAN DILLS: Thank you very much.
27 We have to move along. We get too much into federal
28 taxation, and we're not going to make -- I heard a gentleman in

1 the hallway say, "I don't know if I'm ever going to be able to
2 get to the state. I'm the only one that represents the state.
3 I don't know whether or not they're ever going to let me speak."
4 So anyway, let's see.
5 ASSEMBLYMAN BACA: Thank you, Mr. Chair.
6 I have a concern. I don't know if the question
7 should be addressed to the individual speaking or back to the
8 Chair in reference to what part does the Legislature play in the
9 gaming treaty? We talk about the negotiation that goes on right
10 now between the tribes and the Governor. The Governor basically
11 has a say, so what part would the Legislature play in this, if
12 any?
13 CHAIRMAN TUCKER: Well, the Governor will ultimately
14 negotiate the gaming compact between the Indian nations and the
15 State of California. The Legislature and the Governor will have
16 to obviously debate the question as to gambling on State of
17 California land, how we see it, how it existed in the past. And
18 if there's a change in the future, how we see that change
19 occurring.
20 ASSEMBLYMAN BACA: We have a voice or impact over the
21 information that is disseminated to us. Will we actually be
22 involved in part of that negotiation?
23 CHAIRMAN TUCKER: Any expansion of gambling in the
24 State of California has to be done by the Legislature on State
25 of California lands. Therefore, any expansion of gambling would
26 have to go through the legislative process. Everyone will have
27 a vote on it. There'll be public hearings. And you most
28 certainly will have a voice in the direction of gambling in

1 California.

2 MR. DICKSTEIN: Mr. Chairman, if I may answer that a

3 little further.

4 There was actually a bill that passed through the

5 Legislature last session. I think it was AB 2138, and I think

6 Assemblyman Hoge authored it. And while it had other provisions

7 which resulted in its veto by the Governor, in the veto message

8 the Governor said he would sign legislation into law if it was

9 introduced in a way that didn't involve those other issues. And

10 that legislation particularly authorized the Governor to enter

11 compacts and set up a joint standing committee of the

12 Legislature to review compacts after the Governor executed or --

13 after they were negotiated, but prior to execution, so that the

14 Legislature would have a role in each and every compact.

15 And that did confirm the Governor's authority. And I

16 think most states, if not all states in which governors have

17 entered into compacts, they've had some authority from the

18 Legislature to do so because the federal law speaks in terms of

19 the state's obligations, not the governor's personal obligation.

20 CHAIRMAN TUCKER: Just for my own personal point of

21 view, while I welcome the opportunity for the Governor to

22 negotiate the compacts, I would personally like the purview of

23 gambling in California to stay under the Assembly GO Committee

24 and the Senate GO Committee, and I would fight any attempt to

25 form another committee because we should be downsizing

26 government.

27 CHAIRMAN DILLS: Assemblyman Hoge, did you --

28 ASSEMBLYMAN HOGE: You've got the makings of a joint

1 committee right here.

2 SENATOR GREENE: I move to abolish both G.O.

3 Committees.

4 CHAIRMAN DILLS: I move to abolish you.

5 [Laughter.]

6 SENATOR GREENE: I'll second that motion myself.

7 ASSEMBLYMAN HOGE: Mr. Dickstein, could you tell me,

8 I understand there's some fairly interesting games being played

9 at Cache Creek. I'd like to know what those games are.

10 I understand that blackjack's being played there; I

11 guess it's called Jack Pot 21, and a few other things.

12 Could you tell me a little bit about that?

13 MR. DICKSTEIN: I thought you'd never ask.

14 Well, I think that's part of what I want to say, and

15 let me get to that part directly in response to your question.

16 Mr. Feldman talked about Class II games and Class III

17 games. There is an area, a gray area, between those two that

18 has yet to be clarified by the courts: where Class II ends and

19 where Class III begins.

20 I think that the genesis of the ambiguity is in the

21 act itself, because while the act expressly makes the game of

22 pull tabs a Class II game, and it also says that in playing pull

23 tabs, tribes are entitled to use electronic or technological

24 aides in the play of that game, and it doesn't limit that phrase

25 at all, at the same time IGRA also indicates that all electronic

26 or electro-mechanical facsimiles of any game of chance are Class

27 III.

28 So, there is a set-up there for some ambiguity,

1 particularly with regard to certain video games that are
2 essentially pull tab games, in that they retain all the
3 fundamental characteristics of a pull tab game. They are just
4 like the paper game, which is essentially the same as a
5 Scratcher game. There's a large box, if you will, of cards or
6 pull tabs that have a finite number of winners. There may be
7 2600, or 26,000 of them. And the players are essentially trying
8 to compete with each other to pull out the winning cards.
9 They're not doing it at the same time. They're doing it
10 seriatim, but in fact there's only a limited number, a finite
11 number of cards.
12 Now, the video game does the same thing. It's an
13 electronic box. It has a finite number of electronic cards in
14 them. And through manipulating the device in various ways, the
15 computer will randomly generate for the player the cards and may
16 or may not result in a winner, depending on whether it picks one
17 of those combinations that's pre-selected to be a winner.
18 So, the two games are essentially the same in terms
19 of their essential characteristics.
20 Those games at Cache Creek of which you speak, for
21 example, don't have hoppers that dispense coins and currency.
22 They don't have reels. They don't have arms, and they're not
23 just simply random number generated games in which the player is
24 playing against a machine, but the player is trying to pick out
25 a predetermined number of winners.
26 Now, that ambiguity as to where one ends and one
27 begins has led, as you would expect, to some litigation. First,
28 the Indian Gaming Regulatory Commission had a hand at drafting

1 some regulations. After a long comment period, ultimately in, I
2 think, April of '92, decided that the game I just described to
3 you really was a Class III game, not a Class II game.
4 Seven tribes across the country immediately filed a
5 lawsuit called Cabazon versus the National Indian Gaming
6 Commission, and three of these tribes are tribes that are
7 represented by the attorneys right here. Mr. Feldman is one of
8 the lead attorneys, and I think he's probably better qualified
9 than I am to describe the status of that case.
10 Maybe, Glenn, you might say where that case is,
11 because I think where that case is, is in part, creating a
12 window of opportunity that you saw the results of at Cash Creek.
13 CHAIRMAN DILLS: May I comment.
14 We are not too far along on the agenda. If we start
15 getting into a lot of particulars, we may lose the general
16 theme.
17 I'm trying to suggest that maybe we ought to let all
18 of these details work themselves out as the lawyers take them
19 upstairs and get some rulings on them. Speaking to generalities
20 would be a little better.
21 MR. DICKSTEIN: Suffice it to say that the United
22 States Court of Appeals, District of Columbia, has enjoined the
23 regulations at this point pending the outcome of an appeal.
24 There's a hearing on that appeal before long, but at this time,
25 those regulations which classify the games as Class III have
26 been enjoined by a federal appellate court.
27 To do that, the court had to, for example, make a
28 determination that there was some likelihood of success on the

merits.

Now, let me go back, because this did cover a portion of what I was going to say.

CHAIRMAN DILLS: May I accommodate Assemblyman Richter. You've been very patient in asking for permission.

ASSEMBLYMAN RICHTER: I wanted to ask a question.

There are a number of people who believe that the addition of keno to the Lottery opened up doors that you are now knocking at. I'm curious if you could comment on that, number one.

And number two, do you think if the Legislature eliminated keno from the repertoire of games available for the Lottery, that this would make it more difficult to advance your cause, which is obviously the expansion of gambling for the tribal areas?

And the other question is, because I won't have a chance to ask it, obviously, the potential for corruption always surrounds gambling. I mean, all over the United States, this is an empirical fact. And the more monopolistic the authority or the people are who are in a position to sell the gambling services, the higher the potential for corruption. I think that's also an empirical fact.

What kinds of things do you envision doing that would mitigate against that happening with an expansion of gambling in the tribal areas?

MR. DICKSTEIN: With regard to your last question, that is the entire subject matter of a panel, which I think is the one after this one. So, I would rather leave it to that

1 group, because that's a very important question. I have
2 responses, but I think that it should be answered
3 comprehensively, and it would probably take 15 or 20 minutes to
4 tell you how the tribes are dealing with that present danger.

5 With regard to your first question, it pretty much
6 takes care of the rest of my presentation, so that's fine.

7 There is a case --

8 CHAIRMAN DILLS: Excuse me.

9 Mr. Connolly, did you have an additional question?

10 ASSEMBLYMAN CONNOLLY: Maybe I'll just let it work
11 itself out, like you suggested.

12 CHAIRMAN DILLS: Thank you.

13 MR. DICKSTEIN: With regard to the scope of gaming in
14 California, Class III gaming we're talking about now, not bingo
15 and pull tabs, but other forms of gaming, there was a recent
16 decision in July 1993 that did reference the keno game. And
17 that decision is called Rumsey versus Wilson. It was brought by
18 17 or 18 tribes in the State of California against the Governor.

19 It was entered into pursuant to a stipulation between
20 the Attorney General and the tribes to seek guidance on exactly
21 what the scope of gaming in California could be.

22 I think that the answer of the court in Rumsey versus
23 Wilson was that the electronic games that the tribes asked for
24 in that suit were the proper subject of negotiation. And it's
25 important to note what the tribes asked for and what they didn't
26 ask for. They did not ask for one-armed bandits. They didn't
27 ask for mechanical slot machines. They didn't ask for machines
28 that dispensed coins or currency.

1 They asked for electronic versions of video bingo,
2 video keno, video poker, video lotto, and other electronic games
3 of chance. Essentially games where you either push a button, or
4 touch a screen, that would generate credit slips. And they
5 consist of a monitor, of a random number, computer-generated
6 bill acceptor, and paraphernalia of that type.
7 And the court indicated in its decision that, under
8 Public Law 280, that those kinds of devices don't fit the
9 criminal prohibitory category in California. They fit into the
10 civil regulatory category in California, and therefore, are the
11 proper subject of negotiations under IGRA.
12 And the reason they said that was in part because the
13 State Lottery does utilize electronics in the play of games.
14 Keno is only the latest and perhaps most obvious version of the
15 game that utilizes electronics. And I don't think that the
16 court's decision rests solely, or even primarily, on the play of
17 the keno game.
18 What the court said is that the game of lotto, or
19 fantasy five, for example, the winners are picked three times a
20 week in Sacramento by random number generators, but computer
21 equipment. In fact, the Lottery Act specifically authorizes the
22 use of current technology of any type to select winners.
23 The player can select symbols or numbers on a
24 machine. Some of them are clerk-activated machines; some of
25 them are self-serve machines; some of them actually pick the
26 numbers for the player. And keno simply expanded that. It made
27 it a quicker game so that the winners are picked five minutes
28 after the player selects the numbers. It put it in more

1 convenient locations for the player, but it really didn't change
2 the fundamental nature of the devices that are used for playing
3 the game.
4 So, the court relied in large part, when it talked
5 about electronics, on what the State Lottery does. And not only
6 what it does, but more importantly, what it's authorized to do.
7 Under Public Law 280, it doesn't matter what the state actually
8 does; it's what the Lottery Act and the California Constitution
9 say it can do.
10 So, in Rumsey versus Wilson, the court looked at the
11 act. The act, among other things, exempts -- it starts out, it
12 exempts the State Lottery from the prohibitions, other
13 prohibitions, in all the state's gaming laws. There's a section
14 that starts with the words: except for the state-operated
15 lottery, and then it goes on to say that none of the gaming laws
16 in the state are changed.
17 But that's a large exception when you think back
18 about Public Law 280, and the civil regulatory versus criminal
19 prohibitory distinction, because once the state said that there
20 was an entity, the state itself, that could engage in the
21 activity, it went from criminal prohibitory to civil regulatory.
22 So, that happened back in 1984. The regulations and the
23 particular games are following suit.
24 In addition, not only Rumsey vs. Wilson took that
25 position, but in an interesting lawsuit brought in state court
26 -- I mention this to show you it's not just federal courts and
27 federal judges interpreting federal law that have come to this
28 conclusion -- an interesting case was only decided in July --

1 rather, October this year, brought by the California Horsemen's
2 Benevolent and Protective Association and Pachinko Palace
3 against the California State Lottery alleging that the game of
4 keno was unlawful because the machinery on which it's used
5 constitute a slot machine, and also because keno was a banked
6 game which is unlawful in California. The Superior Court in Los
7 Angeles held -- the tribes intervened in that case on the side
8 of the State Lottery, but made a slightly different argument
9 than the State Lottery did -- and the court held that the State
10 Lottery is exempt from the state's gaming laws. Therefore, even
11 if they are slot machines, so what? State Lottery is allowed to
12 use those devices.
13 And it said in a footnote in this decision that,
14 although it doesn't have to face the question directly of
15 whether it's a slot machine because it didn't matter, in fact it
16 looks to the court like it is a slot machine.
17 As far as banked games are concerned, the state court
18 and the federal court in Rumsey vs. Wilson also said the same
19 thing, and that is, again, the State Lottery is exempted, first.
20 And they do play banked games. Even before keno came in, the
21 Fantasy Five game, the lower tier winners win fixed prizes.
22 It's not like the Scratcher game, or a parimutuel type game, in
23 which only the players that -- the money that's bet in a
24 particular game can be won by the players. The State Lottery is
25 guaranteeing that if you get three out of five, you're going to
26 get five bucks, or ten bucks, or whatever. It doesn't matter
27 whether you're the only player who plays. And the same thing
28 with keno, the State Lottery is banking the game.

1 And these are not my words, but the words of both
2 courts that have looked at this question.
3 There was one limit in Rumsey vs. Wilson on the types
4 of games that the tribes would be allowed to play, and the court
5 said that banked card games with traditional casino themes are
6 prohibited by California public policy. There are no banked
7 card games in California by statute. There is language in the
8 Constitution that prohibits casinos of the type operating in
9 Nevada and New Jersey. And if you look at the prohibition
10 against banked card games, and that language, and certain
11 thematic prohibitions in the Lottery Act itself, that category
12 does violate public policy. And it said that while the format
13 of banked card games is something that the state is obligated to
14 negotiate with the tribe, to the extent that it uses traditional
15 casino themes, it's something that is not subject to negotiation
16 between the parties. So, there was some limitation on it.
17 Now with regard to -- there was some talk about
18 craps and roulette, and other forms of gaming. The tribes
19 didn't ask for that. And even in the negotiations now, and I
20 think this needs to be made crystal clear because there's
21 apparently a great deal of misunderstanding about that, the
22 tribes are not asking for table games other than banked card
23 games. They're asking for these forms of electronic gaming that
24 were described in the lawsuit and banking card games. They're
25 not asking for the full panoply of casino table games.
26 Whether they have a right to those games or not, I
27 think, is open to some question, but that is not the subject of
28 the present negotiations, it's not the subject of the

1 litigation.

2 The final judicial part that I would just talk to
3 briefly, the cases that have been decided in the state that you
4 ought to know about came as a result of the state's disagreement
5 with what Mr. Feldman described as the federalization of state
6 criminal laws. In October of 1991, the Attorney General wrote a
7 memorandum to all local law enforcement agencies, quote,
8 "urging" them to take action against those video pull tab
9 devices that I just spoke about because the state retained
10 Public Law 280 jurisdiction, in his view, and because they're
11 Class III devices.

12 At his urging, the Sheriff's Office in San Diego
13 County and Fresno County took such action. They seized all the
14 machines at Sycuan, at Morongo, and Viejas in San Diego County.
15 They seized all the -- the professional authority seized all the
16 machines in Fresno County on the Table Mountain Rancheria. And
17 as a result of those seizures, litigation ensued. There're
18 really three pieces of litigation. All of them resulted in
19 decisions that the state acted in excess of its jurisdiction,
20 without authority, and not only were the prosecutions that were
21 threatened in that seizure enjoined, but in all cases the
22 machines were actually returned.

23 First, the first case in Fresno County was in
24 federal court, the Federal District Court. The court issued a
25 preliminary injunction ordering no further seizures, no
26 prosecutions, and the case was then settled at that level. The
27 tribes -- the tribe in that case, which was my client, moved in
28 state court for the return of the machines, and that was

1 successful, on the theory that they simply had no jurisdiction
2 under IGRA to enforce state gambling laws. First, there was
3 serious question in the court's mind whether it was Class II or
4 Class III, but that irrespective, it was the federal authorities
5 that had jurisdiction, not the state authorities, and it cited
6 an expressed provision to that effect in IGRA. And it followed
7 all the decisions across the country on that same question.
8 There is no court in this country that's held that state courts
9 have jurisdiction to enforce criminal laws in the Class II area
10 in light of IGRA.
11 Then the final case was a federal case in San Diego
12 County in which all the tribes sought similar relief and
13 achieved it in a federal court there in a written opinion that
14 again held the state doesn't have jurisdiction to enforce those
15 laws.
16 So, those raids went nowhere ultimately. All the
17 courts that looked at them held that they were unlawful. But
18 they caused a great deal of economic disruption at the tribal
19 level. They accomplished without any notice to the tribes that
20 it was going to happen, without any discussion with the tribes
21 that it was going to happen. And it also created an atmosphere
22 in tribal-state relations that has yet really to be completely
23 overcome.
24 Thank you.
25 CHAIRMAN DILLS: I think we'd better proceed with our
26 calendar. At this time, Mr. Gede, Special Assistant Attorney
27 General, State of California, would like to address the subject.
28 MR. GEDE: Thank you. Tom Gede, Special Assistant

1 Attorney General.

2 Chairman Tucker, Chairman Dills, Members of the
3 committee, let me just say at the beginning, I don't think we're
4 in the perfect position here to re-argue the merits of all of
5 the cases that we had before state and federal court. If the
6 Members would like that, I would be pleased to indulge them,
7 because we vigorously disagree with many of the positions that
8 have been stated by the attorneys for the tribes here today on
9 the merits, on the legal points. And we made those arguments
10 below; we lost in many of these cases, and we have the matters
11 on appeal. Every case that Mr. Dickstein referred to is on
12 appeal, and we are taking positions in higher courts, both on
13 the state level and the federal level, pursuing our views of
14 these issues.

15 With respect to Rumsey, I think the Members should
16 understand that the federal district court there was reviewing a
17 narrow question; the narrow question of what games should be
18 subject to negotiation. And it was a request for declaratory
19 relief, and we sent it to the federal court by means of a
20 stipulation as a friendly lawsuit for the federal judge to
21 resolve that question, and both sides preserved their rights to
22 appeal that question. It is now on appeal in the Ninth Circuit
23 Court of Appeals and will be handled there.

24 In the meantime, the state and the tribes are
25 continuing to negotiate, and are continuing to negotiate in good
26 faith, all those particulars of the compacts for Class III
27 gaming that we can come up with, with the exception of the this
28 thorny area of what games are appropriate subject for the

1 negotiation, what games are the appropriate games to go into the
2 compact.
3 So, the Attorney General and the state have
4 negotiated in the past. We have had countless meetings, meeting
5 after meeting, going into detail after detail, of what must be
6 in a Class III compact.
7 But I would just like to go back kind of to the
8 beginning of what this discussion was on the overview of the
9 Indian Gaming Regulatory Act. And I would submit that the
10 fundamental problem here is that Congress attempted to marry
11 state law and federal Indian law. And in this regard, the
12 tribes and the state don't have much disagreement. Congress has
13 plenary power over Indian affairs, and the states really have no
14 role at all. The Constitution of the United States gives
15 Congress that power over Indian affairs.
16 But for Class III gaming, Congress didn't arrange for
17 federal regulation of the Class III gaming for any sort of
18 federal regulation, or federal oversight with tribal regulation,
19 like it does for Class II gaming. And instead, it tried to
20 marry state law with federal Indian law by saying: states, sit
21 down and negotiate with the Indian tribes, and we will
22 incorporate for the purposes of federal law all state gambling
23 law; that will be the basis that you work from.
24 And then Congress moved and added statutory language
25 which should be followed with respect to what law or what gaming
26 should be the subject of a Class III negotiation. And it
27 stipulated and it required that the states negotiate with the
28 Indian tribes for, as Mr. Feldman said, the gaming that the

1 states permit for any purpose by any person, organization, or
2 entity.
3 So, obviously, the question comes here in California,
4 what about these stand-alone electronic video gambling devices?
5 And what about blackjack? Does the state permit those?
6 It has been the state's view, and the Attorney
7 General's view, that the state doesn't permit them. It doesn't
8 permit them for any purpose by any person, entity or
9 organization, so how does it fit in the requirement to negotiate
10 with the tribes?
11 That became a very difficult and thorny issue as we
12 sat down with the tribes to negotiate a compact for Class III
13 gaming.
14 The Class III gaming that California does permit is
15 parimutuel wagering on horseracing and Lottery. So, there's
16 never been any question but that the State of California is
17 required to sit down and negotiate a compact, and has
18 negotiated, successfully, five compacts for parimutuel wagers on
19 horseracing, and for lottery-type games.
20 There's the rub: what are lottery-type games? What
21 lottery-type games do the tribes get in a tribal-state compact?
22 We have always maintained that there is a distinction
23 to be made between lottery games and non-lottery games. There's
24 a separate chapter in the Penal Code for it. One chapter deals
25 with lottery-type games; another chapter deals with non-lottery
26 type gaming. All the banked and percentage games, slot
27 machines, gaming devices, things of that sort, fall into a
28 different chapter than lottery games.

1 Lotteries are prohibited in California with the
2 exception of the State Lottery Commission which may run a State
3 Lottery. That's what's permitted from the perspective of the
4 state when we sit down and negotiate with the Indian tribes. We
5 must negotiate a compact for lottery-type games, and the tribes
6 are entitled to it under federal law.
7 The question is: what kind of lottery-type games?
8 And we keep coming up to this question of what is that
9 stand-alone electronic video pull tab device, and you've heard
10 argument here about what's going on in the courts with that. It
11 is clearly in the D.C. Circuit, and the D.C. Circuit will
12 resolve it at some point in time.
13 But in the meantime, the act, the statute itself,
14 says right there that electronic games of chance are Class III
15 gaming. In fact, what's Class II gaming is specified. What's
16 Class III gaming is generally unspecified; it's a residual
17 category. Everything that's not in II is in III. Except it
18 happens to mention that electronic games of chance are not Class
19 II; they are Class III. So even if the regulations that were
20 prescribed by the National Indian Gaming Commission are held in
21 abeyance, or their effect is stayed by the D.C. Circuit by a
22 motions panel of that court, that doesn't mean the statute
23 changed. The federal still prescribes that electronic games of
24 chance are Class III gaming.
25 So, it is our view that if there's any electronic
26 game of chance that's going to be part of a compact, we have to
27 sit down and negotiate for it, and then we have to decide: is
28 it permitted; is it permitted in the state; does it follow the

1 statute; does it follow the words of the statute. And that's a
2 very difficult and thorny issue, particularly when it comes to
3 the question of what lotteries may the tribes have under the
4 federal law and for which the state must sit down and negotiate.
5 And that's something that we're working on right now.
6 That's something that is in the Rumsey decision. The Rumsey
7 decision kind of glossed over this whole question, and we think
8 that the Rumsey decision is flat wrong in failing to distinguish
9 between lotteries and non-lotteries.
10 We also think that the state court decision in Los
11 Angles was -- the reasoning was flat wrong. It failed to
12 distinguish between lotteries and non-lotteries. And yet, our
13 Penal Code does just that.
14 Now, if the federal courts are going to resolve this
15 issue, and that's flatly where it is; it's in the federal
16 courts, and I don't want to stand here and re-litigate in front
17 of the Members of these two committees everything that we've
18 argued in federal court, or it could take quite a long time.
19 But it's clear that some federal courts have moved in the
20 direction of suggesting that the Cabazon decision, which Mr.
21 Feldman ably argued in U.S. Supreme Court, stands for an
22 analysis that you look at the state's public policy and see what
23 does it permit in general public policy terms.
24 And in fact, the judge in San Diego, Federal Judge
25 Marilyn Huff, ruled and said that California permits a lot of
26 gaming, a lot of other gaming, and it has a Lottery, and it
27 promotes its Lottery. And therefore, I don't think she said
28 that the criminal prohibition on slot machines, gaming devices,

1 isn't criminal prohibitory. It's civil regulatory. And if it's
2 civil regulatory, then it should be the subject of negotiations.
3 However, she also ruled that the video pull tab
4 devices that were seized in 1991 were Class III devices. She
5 had no question in her mind about that.
6 So, there are conflicting decisions out there as to
7 what is a Class II and a Class III device. But right here in
8 California, a federal judge has ruled that those are Class III
9 devices, and if they are on the reservation, they are
10 uncompacted for and in violation, then, of the Indian Gaming
11 Act, which prescribes that they must be compacted for. They are
12 not legal on Indian lands if they're not compacted for.
13 Similarly, there's a federal law, the Johnson Act, in
14 a different title than the criminal code, in Title 15, which
15 prescribes -- which, excuse me, prohibits in Indian country
16 gambling devices of the sort that these video pull tab devices
17 are. So, they are by federal law not clearly legal in Indian
18 lands.
19 That's not our jurisdiction or our area to resolve.
20 CHAIRMAN TUCKER: Mr. Gede, I have a question.
21 MR. GEDE: Sure.
22 CHAIRMAN TUCKER: You stated that the State of
23 California has entered into compacts with the Indian nations on
24 various occasions. You mentioned as it relates to parimutuel,
25 earlier.
26 Do you feel the Governor has the current authority to
27 enter into a compact with the various Indian nations as it
28 relates to casino gambling today?

1 MR. GEDE: Well, I would say casino gambling, no. I
2 don't know what casino gambling means in that context.
3 CHAIRMAN TUCKER: Class III gambling.
4 MR. GEDE: Class II gambling, and in our view,
5 lottery-type games that we permit in California, yes, I believe
6 the Governor has that authority.
7 It is an untested area, but as long as the Secretary
8 of Interior approves a compact which has been signed by the
9 Governor and the chairpeople of the respective tribal
10 governments, then the Secretary's action or inaction in that
11 case would probably constitute a clear statement that the
12 Governor's approval is legally adequate.
13 It could be challenged in court, and we could see a
14 federal court handle that, but at this point, I think the
15 Governor has that authority.
16 CHAIRMAN TUCKER: Well, then, how do you respond to
17 the Governor's assertion that he clearly lacks the authority to
18 enter into Class III gaming compacts with the various Indian
19 nations?
20 MR. GEDE: He's referring there to the kind of Class
21 III gaming that is requested.
22 The tribes are requesting stand-alone electronic
23 video devices that, in our view, fall clearly within the
24 criminal prohibition in Penal Code Section 330 et seq.
25 CHAIRMAN TUCKER: So is the question not whether the
26 Governor has the authority, but the legality of the different
27 types of gambling that is currently being sought?
28 MR. GEDE: I believe that's correct.

1 CHAIRMAN DILLS: Senator Torres.

2 SENATOR TORRES: Mr. Gede, the issues are very
3 similar to issues that we traversed a few years ago in the toxic
4 field area, where distinctions were made regarding civil
5 liability, environmental laws, et cetera.

6 In your proposed argument to the federal court, which
7 I presume has already taken place, or is about to take place?

8 MR. GEDE: In the Rumsey case?

9 SENATOR TORRES: No, beyond the Rumsey case.

10 MR. GEDE: Well, we have several cases on appeal.
11 The Rumsey case and --

12 SENATOR TORRES: Which is --

13 MR. GEDE: -- and Sycuan vs. Roach.

14 SENATOR TORRES: Which is the most proximate
15 appellate argument to be made?

16 MR. GEDE: The first is Rumsey, I think; next
17 February, I think.

18 SENATOR TORRES: And you intend to be the lead
19 presenter in that case?

20 MR. GEDE: Not I personally, but the Attorney General
21 of the State of California.

22 SENATOR TORRES: But you will be advising him on --

23 MR. GEDE: Certainly.

24 SENATOR TORRES: In that presentation, if you could
25 provide us a preview, if that is permissible, without
26 jeopardizing the position of the state, it's very unclear to us,
27 as it was unclear to me at the time that we held those hearings
28 in the toxics field, just what is the power of the state.

1 If, in fact, the Secretary of the Interior is silent,
2 therefore by omission provides the authority for the Governor,
3 unless there's an affirmative act to the contrary, allows the
4 Governor to negotiate on those issues which are, in our minds,
5 the state's, permissible to negotiate on, what are the
6 parameters of those negotiations, very quickly?
7 MR. GEDE: Well, we have today one of the panels to
8 discuss what it is that we're negotiating between the state and
9 the tribes. I'd like to leave a little bit to that, the
10 discussion of some of the general areas that we're covering in
11 the negotiations.
12 But as to what would be our view in the federal
13 courts as to the authority of the Governor, we believe that the
14 federal act lays out in very general terms that the state must
15 enter into the compact, and the Secretary has interpreted our
16 Governor's approval to be adequate for the purposes of meeting
17 the legal requirement that the state enter into the compact.
18 Unless there's somebody out there that thinks that
19 the Governor doesn't have that authority and would then
20 challenge it, but we wouldn't be in that position. We can't
21 argue against ourselves.
22 SENATOR TORRES: No, of course not.
23 But what I'm concerned about is, getting back to the
24 specifics of what are the parameters of those negotiations
25 within that compact. You argued earlier that certain electronic
26 games would not be within the purview or the parameters of those
27 negotiations.
28 If that is the case, at what point, and at what

1 level, is that to be adjudicated?

2 MR. GEDE: Okay, that's a good question.

3 This action that was in Rumsey was strictly

4 declaratory relief. All we asked the court to do was examine a

5 question and declare what the law is.

6 We disagreed with what the judge said what the law

7 is, because the judge said that our State Lottery uses

8 electronic equipment; therefore, the tribes get to use stand-

9 alone electronic gambling devices.

10 We would argue that, clearly, in the court, that we

11 disagree with the district judge's decision that the use of mere

12 -- mere use of electronic equipment, such as a television screen

13 or a telephone line, or fiber optics that are transmitting a

14 signal to Sacramento for the State Lottery, or the use of a

15 computer to serve as the random number generator, that any use

16 of that electronic equipment somehow translates to a stand-alone

17 electronic video gambling device that you come up to and play.

18 And, in fact, that's why in the federal act, when it says

19 electronic games of chance are not Class II, it's referring to

20 single electronic games of chance.

21 When you play the Lottery, you're playing with

22 multiple persons.

23 SENATOR TORRES: Although the judge in that case

24 argued to the contrary.

25 MR. GEDE: The judge in Sacramento?

26 SENATOR TORRES: Correct, argued to the contrary.

27 MR. GEDE: He found to the contrary, right. He found

28 that the mere use of electronic equipment opened the door for

1 the state to negotiate --

2 SENATOR TORRES: And the state's argument is, that is

3 not the case, and we're going to pursue that to the federal

4 appellate level --

5 MR. GEDE: That's right.

6 SENATOR TORRES: -- to make that argument.

7 MR. GEDE: That's right.

8 SENATOR TORRES: Now, within the parameters of what

9 can be negotiated, it's my understanding that those negotiations

10 are about to take place, are still taking place, or being waited

11 upon to review whatever appellate decisions may be forthcoming?

12 Where are we on that?

13 MR. GEDE: That generally is the subject of the next

14 panel, but in general terms, I can tell you that the state and

15 the tribes decided to continue negotiating all the details of a

16 proposed Class III gaming compact concurrent with the court

17 examining the narrow question of what should be negotiated for

18 specific games, such as what regulation should apply.

19 SENATOR TORRES: Does that concurrence include the

20 independent standing electronic machines?

21 MR. GEDE: No, that's the one question --

22 SENATOR TORRES: You've left that out of --

23 MR. GEDE: Precisely.

24 SENATOR TORRES: -- current negotiations until the

25 courts decide whether you're right or the lower court was

26 correct.

27 MR. GEDE: Precisely.

28 SENATOR TORRES: Thank you, Mr. Chairman.

1 CHAIRMAN DILLS: Thank you.

2 It occurs to me that the State of California is
3 engaged in gambling which is the result of an initiative act,
4 the Lottery, which everybody around here knows that I've been
5 opposed from the very beginning. I wish it would go away, which
6 it will never.

7 In the Lottery Act itself, the Legislature has
8 something to say. We can change the Lottery Act by a two-thirds
9 vote of both Houses, and if it's furthering the purposes of the
10 Lottery, and the Governor can sign that measure.

11 Up to now, I haven't heard anything about the
12 Legislature's authority of participation. Is there any thought
13 on the part of the Administration that the Legislature has no
14 point, since we are in the Lottery business, and we in the
15 Legislature have something to say about the Lottery, might it
16 not be valuable for the Governor to say: well, the federal
17 government or Congress believes that the Governor can take care
18 of the situation, and there really is no place for the
19 Legislature.

20 MR. GEDE: Well, Chairman, it is a federal act. The
21 state is required to sit down and negotiate with the Indian
22 tribes as a result of a federal act.

23 And the federal law incorporated state gaming law,
24 and so we are required to sit down by federal law and negotiate
25 our own gaming law, the issues of our own gaming law, with the
26 Indian tribes.

27 The state legislative action doesn't have a direct
28 role to play. In fact, all the federal act says is, the state

1 shall negotiate with the Indian tribes.

2 Now, if the Legislature decides that the Governor
3 shouldn't be the person to negotiate, or that the state should
4 be some other entity for the purposes of negotiating, that's up
5 to the Legislature. But the Legislature --

6 CHAIRMAN DILLS: It's also subject to a veto.

7 MR. GEDE: Certainly. But it's a federal law, and
8 we're grappling with a federal law.

9 CHAIRMAN DILLS: Several hands went up awhile ago,
10 and I think it's Assemblyman Connolly first.

11 ASSEMBLYMAN CONNOLLY: Mr. Gede, when the Governor
12 says that he doesn't have the authority to include stand-alone
13 video electronic devices in a tribal-state gaming compact, he
14 says that over the federal judge's directive; is that correct?

15 MR. GEDE: The federal judge's order, Mr. Connolly,
16 is a declaration of the law. All we asked the judge to do is
17 examine the law and declare what the judge believes the law to
18 be.

19 ASSEMBLYMAN CONNOLLY: And the reason you asked for
20 the judge to make that declaration was so that the state would
21 know what their responsibilities are with regard to the gaming
22 compact; is that correct?

23 MR. GEDE: That's fair to say.

24 We did preserve the right to appeal, and the tribes
25 preserved the right to appeal in case they lost. And so, that's
26 why the matter is on appeal.

27 ASSEMBLYMAN CONNOLLY: It seems sensible that we
28 ought to be entering into the compact now, and then maybe have

1 the compact challenged, but we ought to be doing something
2 consistent with the judge's declaration of the law as opposed to
3 doing things relying on that declaration of law being
4 overturned.

5 MR. GEDE: The tribes and the state agreed ahead of
6 time, however, that the declaration of the judge would not be
7 final until the matter is final on appeal.

8 We are negotiating all the other terms of the
9 compact, everything that we can agree upon, including -- and
10 there's a remarkable degree of unanimity between the tribes and
11 the state -- on issues such as the need for regulation, the need
12 for some mechanism in the state government to regulate Class III
13 that we don't otherwise have.

14 ASSEMBLYMAN CONNOLLY: So the reason the stand-up
15 video games is outside the present negotiations is on the hope
16 that it will be -- the declaration of law will be overturned on
17 appeal?

18 MR. GEDE: I think that would be the state's view. I
19 don't think that would be the tribes' view. They're seeking to
20 affirm the case.

21 MR. DICKSTEIN: If I may answer your question
22 further, what Mr. Gede has failed to indicate to you is that in
23 the agreement to submit this issue to the federal court, the
24 state expressly agreed to negotiate into a compact all those
25 games that the district court ruled it had an obligation to
26 negotiate about, but to withhold execution of that compact
27 pending appeal.

28 ASSEMBLYMAN CONNOLLY: You're shaking your head in

1 agreement with that?

2 MR. GEDE: That is correct.

3 MR. DICKSTEIN: And I think the thrust of your
4 question really was one that the tribes have thought of before,
5 because we were confident we would win since the courts have
6 been holding this all over the country. And the state has an
7 obligation to negotiate right now over all these stand-alone
8 games that the court said were substantially similar to lottery
9 games.

10 ASSEMBLYMAN CONNOLLY: It just seemed to me that we
11 ought to be abiding by the agreements and by the declaration of
12 law that we apparently spent a lot of money to finally get in
13 place, as opposed to pretending that maybe someday that won't be
14 the law.

15 MR. GEDE: Well, Mr. Dickstein is absolutely correct.
16 We agreed ahead of time that we would continue the negotiations
17 and put into a proposed compact every conceivable detail,
18 including those games which the judge declares to be the
19 appropriate subject of the negotiations, but that execution
20 would not ever occur until the issue is final on appeal.

21 It's not final on appeal. It hasn't even been argued
22 yet. We agreed to that ahead of time.

23 ASSEMBLYMAN CONNOLLY: That we could go forward with
24 the negotiations, then, I think that's what seems to make sense,
25 and then, once it's in place, before we would execute that
26 agreement --

27 MR. GEDE: That's right.

28 ASSEMBLYMAN CONNOLLY: But we're not going forward on

1 the agreement now, because from what I understand you to say.

2 MR. GEDE: We have no executed agreement. We are
3 continuing to negotiate. We have been negotiating, and we are
4 continuing to negotiate as we speak.

5 ASSEMBLYMAN CONNOLLY: And all those things that the
6 federal judge said should be on the table are on the table?

7 MR. GEDE: We are developing them. We are working
8 them out. We are examining. We're trying to get consensus on
9 how they would be negotiated into a compact. It's a very
10 difficult and complex issue, but -- and that's the subject of
11 the next panel, but we are continuing to negotiate.

12 ASSEMBLYMAN RICHTER: Suppose that your position is
13 wrong, and the courts uphold the Indians' position. Does not
14 that mean that the decision in regards to this whole structure
15 could, in fact, could and would be made by the courts, and this
16 body and others would have virtually nothing to say about it?

17 In other words, you're taking a certain risk here,
18 are you not, in pursuing certain appeals. And from what I heard
19 about odds makers around here as who's likely to win, it's a
20 poor gamble on your part, no pun intended.

21 What I'm wondering is, here we are holding a hearing,
22 and is it likely that events will take place over which we have
23 no control that will set the policies, the frameworks, and the
24 rules, and they will not be to your liking at all?

25 MR. GEDE: Yes, there is a risk of that, but it was a
26 risk that the tribes and the state understood when they first
27 sat down and hammered out a stipulation to take the issue to the
28 federal court in the first place. And there was no guarantee of

1 the outcome from Judge Burrell before he issued his ruling. We
2 didn't know which way the ruling was going to go.
3 So, the decision to preserve within the stipulation a
4 right to appeal the decision, whatever the declaratory relief
5 was going to be, was a risk that both sides took.
6 It is true that the State Legislature may appear to
7 be out of the picture, but I'm not entirely convinced that's
8 true. I think that you have to look at the federal law and see
9 just what state law is. The federal court is looking at what
10 state law is today and not in the future.
11 There are all kinds of questions that have never been
12 tested and resolved: about the future applicability of changes
13 in state law, about the retroactivity of the changes in state
14 law, about -- and depends in part on what goes into the compact,
15 whether the compact negotiators agree to allow changes in state
16 or federal law to take place, what the retroactivity provisions
17 will be. Those are all matters that have to be worked out over
18 time.
19 But that means, I think, that the State Legislature
20 does have a role to play. State policy can be made by this
21 body, and it can affect, conceivably, the compact negotiations.
22 CHAIRMAN DILLS: I'd like to suggest that we have one
23 more witness on this panel before the noon break. So, to the
24 extent that we can proceed and solve the problem here, and not
25 leaving the Legislature out in the cold, why, let's proceed.
26 Assemblyman Baca, you desired an opportunity.
27 ASSEMBLYMAN BACA: I'll yield to Senator Torres.
28 CHAIRMAN DILLS: All right, Senator Torres.

1 SENATOR TORRES: Senator Dills raised a very
2 important question, and that is the role of the Legislature.
3 The role of the Legislature has to approve the budget
4 for the Attorney General's Office. And I don't think that the
5 Indians voluntarily agreed to go to federal court, because they
6 feel they're right.
7 Given Mr. Richter's questioning about whether this is
8 a good gamble or not, is it a good gamble for the taxpayers,
9 unless you're doing this pro bono, which I think you are not, is
10 it a good gamble for the taxpayers, and the Legislature, as
11 Senator Dills appropriately stated, for us to approve the
12 expenditures for this type of approach when lower court
13 decisions argue that we are wrong in proceeding in this
14 direction?
15 And number two, the question I have is, how much is
16 this costing the taxpayers for you to fight the Indians on this
17 issue? We need to know that because we have to approve the
18 budget.
19 MR. GEDE: Yes, sir.
20 Let me start with the first basic premise here. The
21 Attorney General and the Governor are obliged to enforce the
22 state's criminal code. The state's criminal code includes an
23 expressed prohibition on slot machines, and it is our reading,
24 and I think it is a legitimate reading of our criminal code,
25 that the devices that are described by the act include the
26 electronic stand-alone video gaming devices that are being
27 proposed by the tribes.
28 So, we are faced with, and I think it is an honest

1 and sincere effort on the part of the Attorney General and the
2 Governor, with how do they enforce a state criminal statute, and
3 we had not yet had the decision in the Rumsey case when we first
4 -- when we put this --
5 SENATOR TORRES: But you have it now and you're still
6 proceeding --
7 MR. GEDE: And we think that it's wrong.
8 SENATOR TORRES: I understand you think that it's
9 wrong, but you're still proceeding even though lower court cases
10 have argued that a standing alone video poker machine is against
11 our criminal statute; correct? They've held that; right?
12 ASSEMBLYMAN CONNOLLY: They've held that.
13 SENATOR TORRES: And my question to you is, and the
14 taxpayers that are watching this television channel, how much
15 money are they willing to spend to fight the establishment of a
16 standing alone video poker machine that thousands of them
17 utilize in traveling to Vegas and Tahoe from California? How
18 appropriate is it for us to expend the money?
19 And do you have an answer to my second question,
20 without a premise, but a specific answer as to how much it's
21 costing the taxpayers who are vehemently opposed, according to
22 your argument, against standing alone, for example, a video
23 poker machine?
24 MR. GEDE: I don't have an answer to your question.
25 SENATOR TORRES: I think we need to have an answer.
26 As Legislators, having just gone through a very difficult
27 initiative campaign, to argue on your behalf to support law
28 enforcement, as I did, that the sales tax ought to be extended

1 because I believe in enforcing the law, especially the criminal
2 law, but I'm beginning to wonder whether this is an appropriate
3 expenditure that we, as a Legislature, should approve of you
4 continuing to do if lower courts -- lower federal courts -- have
5 already held that you're on the wrong track, so to speak.
6 MR. GEDE: Yes, sir, except that the tribes and the
7 state agreed to take this up on appeal once it was decided.
8 That was an agreement that we had before we went to the federal
9 district court in the first place.
10 SENATOR TORRES: Yes, but you didn't come to the
11 Legislature, which must appropriate the funds to pay you and all
12 the other people that you utilize to expend taxpayers' moneys to
13 fight stand-alone video poker machines.
14 MR. GEDE: That's true, Senator, but we are required
15 under federal law to sit down and negotiate a compact with the
16 Indian tribes.
17 SENATOR TORRES: Sitting down to negotiate a compact
18 is quite different from taking this to a higher appellate court.
19 Those are two different acts.
20 I'm not deploring or opposing your ability or your
21 requirement under federal or state law to negotiate a compact.
22 What I'm putting forward is, is it appropriate,
23 following the questions of Senator Dills and Mr. Richter, is it
24 appropriate that we should be expending taxpayer dollars on this
25 approach, or rather get back to the negotiating table and
26 negotiate a compact that's favorable to the State of California,
27 rather than spending the money for appellate court briefs,
28 appellate time, attorneys' time, that could be spent in getting

1 criminals off the streets?

2 MR. GEDE: The answer is that on appeal, we are

3 presenting a legal argument which comports precisely with the

4 criminal code, with the Penal Code that this body, the

5 Legislature and the Governor, the state government, has

6 established as the code.

7 It is the obligation of the Attorney General to take

8 that position and defend it to its maximum extent.

9 SENATOR TORRES: And it is our obligation to justify

10 to the taxpayers of this state that that's an appropriate

11 expenditure, and we need to know what are those expenditures?

12 CHAIRMAN DILLS: I think it's my obligation at this

13 time to do what the man does who calls time.

14 We have one more witness in this panel: I. Nelson

15 Rose, professor of law and visiting scholar from the Institute

16 for the Study of Gambling and Commercial Gaming.

17 MR. ROSE: Thank you, Mr. Chairman.

18 My name is I. Nelson Rose. I was listed later on the

19 schedule under the economics, but after discussing this with the

20 aides, we thought it was more appropriate, since I've been

21 writing on gambling law for 17 years, to join this panel to

22 clarify, to the extent I can.

23 To give you something of my background, I've worked

24 with national and state governments, Indian tribes, casinos,

25 card rooms, race tracks. In fact, just this summer, I advised

26 the federal government of Canada on Indian gaming.

27 Although I am a licensed attorney, I'm not here as an

28 advocate, and I hope that I will be -- remain as objective as

1 I've tried to be over the last 17 years. Sometimes it's a
2 little difficult.
3 I'm Vice President of the California Council on
4 Compulsive Gambling. Last year, I helped draft a bill which
5 would have given one-quarter of one percent of the State Lottery
6 revenue to help set up a hotline for problem gamblers, including
7 potential suicides. And these committees endorsed that bill,
8 and I thank you. It failed to get the two-thirds vote on the
9 Floor of the Senate.
10 In fact, it's kind of unusual, I ended up sending a
11 copy of the bill to the State of Texas, which did in fact pass
12 it. Texas now gives over $2 million a year to help compulsive
13 gamblers. The State of California gives nothing.
14 And I urge you, if in fact California's going to
15 continue to promote gambling, that it should take some social
16 responsibility and pay some share of the revenues to the
17 California Council on Compulsive Gambling.
18 I've also been consulting with with California card
19 rooms for about ten years, working with and developing casinos
20 on Indian land in Southern California, so you'll know my
21 background. I've been involved in virtually every case on every
22 level now.
23 There's a couple -- I'm going to take a couple
24 different positions from the other speakers. First of all, I'm
25 absolutely opposed to self-government, any form of
26 self-government. And this has nothing to do with the tribes'
27 ability to govern themselves. It has to do with gambling.
28 Gambling is a cash business with no paper records, a history of

1 corruption, and there just seems to be no way to regulate it
2 internally. For example, would we allow a Las Vegas casino to
3 regulate itself?
4 To give you another example, the State of California,
5 which is one of the largest governments in the world, is not
6 doing such a hot job right now in regulating its own State
7 Lottery.
8 The Indian tribes, by the way, do have some outside
9 regulations under the Indian Gaming Act. Under Class II, there
10 is oversight from the federal Indian Gaming Commission. And
11 under Class III, the state does have a role, if it wishes to
12 take, which I would urge you do to.
13 With all due respect to the Attorney General, these
14 arguments have been fought for the last, well, more than four
15 years since the law was passed, and every court in the United
16 States has ruled against them. I just testified as an expert
17 witness on behalf of a tribe in Texas, and last month the
18 federal judge ordered the State of Texas to negotiate for full
19 standing casinos near El Paso: slot machines, blackjack,
20 roulette, craps.
21 The State of Texas took the same position as the
22 State of California, there's no gambling. Well, the State of
23 Texas, like California, has one of the largest lotteries in the
24 world and has gaming devices, including, by the way, rub-off
25 lottery tickets. And if you check Penal Code, I believe it's
26 Section 330(a), defines rub-off lottery tickets as slot
27 machines. So the state -- forgetting about all the video games
28 that are out there.

The law in this area is absolutely clear: Indian tribes are dependent sovereigns of the federal government. To understand the law, you have to understand that they are nations that came into the Union, like the other nations -- for example, like the Republic of California -- which gave up some but not all of their powers.

Now, California may not like having to treat a tribe the size of the Cabazons as a sovereign, any more than it may like having to treat a state the size of Rhode Island as a state, but it is a federal issue. It's been resolved, settled, for well over 150 years.

I want to recap real quick those three recent decisions. There's no doubt that Indian casinos are legal in the State of California. I brought, in case nobody has seen one, I actually brought a paper pull tab with me. Under both state and federal law, this is bingo. It's defined statutorily as bingo. You walk up, buy one -- this happens to be a 50 cent ticket -- and you open up the back. And if you have the winning symbols, which can look exactly like slot machine symbols, then you win. In this case, three bars across gives you $100.

Imagine now you have a video screen with this image on it. You put in a dollar. The image seems to turn around. You press a button, and the image seems to pull open the pull tabs. And if you win, you get credits. That's a video pull tab machine.

The federal appellate court in the District of Columbia, by a two-to-one decision, preliminarily ruled that these are Class II. Video pull tab machines are Class II.

1 There's a injunction in place right now, which is the reason
2 those machines are operating on Indian land in California,
3 legally, because the regulations have been tentatively
4 overturned.
5 Since it's Class II, as long as you have bingo in
6 California, you will be able to have video pull tabs, unless, of
7 course, that decision is overturned.
8 The Rumsey case went a little further. What the
9 Rumsey case said was that the state allows video lottery
10 terminals. Now, no one knows exactly what a video lottery
11 terminal is, except it doesn't have three reels, and it doesn't
12 have a coin drop.
13 However, the State of South Dakota State Lottery has
14 video lottery terminals all throughout the state. You walk up
15 to them; you put in a dollar. It's got a video poker game on
16 it. You press -- you can draw cards if you want, and if you
17 have a winning hand, you get credit. It's exactly like a Nevada
18 slot machine. It's got a random number generator inside. You
19 play one against the machine. The only difference is, it
20 doesn't pay coins. If you want to cash out, you have to press a
21 little button, and it dispenses a pay slip, which you then can
22 go to the cashier.
23 By the way, the casinos would love to have that,
24 because then you don't have to worry about change people. If
25 you have like three credits left, you'd press the button rather
26 than -- you play them rather than go and embarrass yourself and
27 cash out for 75 cents.
28 The third case, a state court went even further. On

1 October 14th, Los Angeles Superior Court Judge Younger ruled in
2 the keno case that the State Lottery, and therefore the state
3 Indian tribes, are exempt from all of the restrictions on
4 gambling. He specifically held that Penal Code Sections 330 and
5 330(a), the prohibitions on banking games, on slot machines, on
6 blackjack, do not apply to the State Lottery. Therefore, the
7 Indians can have it.
8 A banking game, by the way, in case -- we've been
9 using that term, California allows nonbanking games in the card
10 rooms. That's where players play against each other. Which
11 means, by the way, the Indians can probably have revolving deal
12 blackjack as long as the house doesn't participate under Class
13 II. For Class III, the house plays against you.
14 The difference can be seen easily in the difference
15 between poker and blackjack. When you walk up to a blackjack
16 table in Nevada, there is a house dealer ready to cover your
17 bet.
18 The courts have ruled exclusively that, in fact,
19 California allows banking games, which means if the tribes had
20 wanted to -- they've so far only asked for banking card games,
21 but they could, in fact, ask for banking dice games like craps,
22 or banking roulette.
23 One other point that seems to have been missed here
24 is, not all of the tribes have, in fact, signed that agreement.
25 I am working with the management group for the 29 Palms Band of
26 Mission Indians near Indio, California. In fact, they did not
27 agree; they didn't stipulate to anything. They are suing not
28 for declaratory judgment, but for an order that the state, in 60

1 days, allow them to have video lottery terminals.

2 And what I would urge, my conclusion is that I urge

3 the state to reach a compromise now with the tribes if they want

4 to -- if the state wants to be able to have some power to

5 regulate and some power to share revenues, because the state --

6 the tribes can voluntarily make payments in lieu of taxes.

7 If the state continues to close its eyes, the tribes

8 can and will go to federal court, and what you'll end up with is

9 the state getting absolutely nothing.

10 Questions?

11 ASSEMBLYMAN CONNOLLY: This is sort of a take-off on

12 Senator Torres's question. Perhaps you could also have an

13 opinion.

14 MR. ROSE: Sure.

15 ASSEMBLYMAN CONNOLLY: Over the years, when I would

16 have a client come to me and talk about whether or not to appeal

17 a case, they were always darned mad at the judge's ruling, but

18 they'd always ask: what's it going to cost, and what's the

19 probability of victory? And depending on the answer, they would

20 decide whether or not to go forward.

21 What do you think it would cost, and what's the

22 probability of victory, for the state taxpayers to continue to

23 pursue this issue?

24 MR. ROSE: In terms of the cost, I don't know how the

25 Attorney General calculates its budget. If they were private

26 attorneys, we're talking on the order of a couple hundred

27 thousand dollars, which probably is not significant for the

28 state budget.

1 In terms of the probability of succeeding, it's
2 possible the state could win on a technicality. The Rumsey case
3 included a stipulation that there was no bad faith. This is a
4 federal statute that requires that there be bad faith. If not,
5 it's possible -- it's possible the Ninth Circuit may say there's
6 no subject matter jurisdiction; we can't hear this case; there
7 was no bad faith. You've alleged it away. All that does is
8 postpone things.
9 If they get around that technicality, well, this is a
10 gambling case, so I can tell you, I'd guess the odds are about,
11 oh, 20-1 against them.
12 CHAIRMAN DILLS: Senator Maddy.
13 SENATOR MADDY: Sir, you've addressed some of the
14 legal questions, but also some of the broader based questions of
15 gambling throughout the United States.
16 If you're right, if it's a slam-dunk that full casino
17 Indian tribes in California, why shouldn't the Legislature in
18 California just approve full casino gambling for the state so
19 that we recognize some of the revenues that might be forthcoming
20 from that?
21 MR. ROSE: As a legislative matter, there's all sorts
22 of problems with the question of the state getting into the
23 gambling business, but my estimation --
24 SENATOR MADDY: But we're in it.
25 MR. ROSE: Right.
26 SENATOR MADDY: You started, your premise was, we're
27 in it.
28 MR. ROSE: Yes, you're in it already.

1 SENATOR MADDY: That's how you got to the fact that
2 the Indians could have full-scale gambling because we're in it.
3 MR. ROSE: Right.
4 I think there actually is one legal problem, which is
5 the State Constitution has an expressed prohibition of casinos
6 of the type that exist in Nevada or Atlantic City.
7 SENATOR MADDY: We could change the Constitution.
8 MR. ROSE: You would need a two-thirds -- you would
9 need a vote of the people.
10 In the history of the United States, no state has
11 ever voted for high-stakes casino gambling with one exception,
12 which was the voters of New Jersey, on the third attempt, with
13 no opposition, approving it in Atlantic City. All of the
14 gambling that's come in, like high-stakes casinos in Nevada,
15 Illinois, Mississippi, Louisiana, was done by the Legislature
16 because they didn't need to amend the Constitution.
17 When they did amend the Constitution like in Iowa,
18 they put in $5 limits, they put it on river boats.
19 So, it's possible you could get the voters of
20 California to approve it if it was restricted, perhaps.
21 SENATOR MADDY: Doesn't this go to Mr. Gede's
22 statements earlier on, that by and large, people are not, in
23 California, desirous of having casino gaming?
24 MR. ROSE: I think that's absolutely right. I think
25 that there's a general assumption among both politicians across
26 the country and the industry that people are in favor of
27 gambling.
28 I always tell proponents, if you have to get a vote

1 of the people, you're going to go -- you're going to start with
2 a 2-1 vote against you. However, the law in California is very
3 clear; California -- we may not have known it in 1984, when we
4 voted for the State Lottery, but we voted for casinos.
5 And there were casinos -- by the way, the pull tabs,
6 which come under the Bingo Act as well, are also defined as slot
7 machines.
8 SENATOR MADDY: What would you say that we could do
9 legislatively that would expand gambling for hotels, motels, and
10 other people who contact us about the fact that the Indians are
11 going into casino gambling, and they would like to have some of
12 that revenue, as well as pay the taxes on that revenue?
13 MR. ROSE: My personal opinion is that you cannot
14 have banking and percentage games and slot machines --
15 SENATOR MADDY: The Rumsey case.
16 MR. ROSE: But that's for federal.
17 SENATOR MADDY: We have banking, we have percentage,
18 and we have cards, so we have banking percentage card games.
19 That's what he said; wasn't it?
20 MR. ROSE: That's right.
21 But the statute -- but your Constitution says you
22 can't have casinos.
23 What in effect the court ruled was, you can't have a
24 place where all these games are played together. It doesn't
25 prohibit any specific games.
26 You might be able to amend Penal Code 330 to allow
27 card clubs and horseracing to have some of these. You'd have to
28 be very careful, though, that it didn't violate the

1 Constitutional prohibition on casinos.

2 CHAIRMAN DILLS: Assemblyman Richter.

3 ASSEMBLYMAN RICHTER: Real quick question.

4 CHAIRMAN DILLS: Just a moment, please.

5 Mr. Feldman here's been suffering from ingrown words
6 when the dialogue was going on between these two gentlemen, and
7 then I'll come back to you.

8 MR. FELDMAN: I just to indicate very briefly.

9 One of the things that perhaps ought to be factored
10 in here is public support for some of these things. One of the
11 things you will find in that bound book there, a study that I
12 did in the spring, analyzing public opinion surveys, not only
13 here in California but nationally. And I think it's worth
14 noting that in every -- both nationally, the Harris Poll did a
15 nationwide survey -- and in every state where this issue has
16 come up, the people, the voters of those states, support
17 significantly expanded gaming on Indian reservations, at the
18 same time they are very ambivalent or opposed to expanded gaming
19 off the reservations. And that was true with a statewide study
20 that was done here in California, as well as four or five other
21 states.

22 So, your constituents understand the difference
23 between gaming on the reservations, where those revenues are
24 going for the purposes you heard from the tribal chairmen early
25 on --

26 CHAIRMAN DILLS: Maybe our consciences are bothering
27 us a bit.

28 MR. FELDMAN: Well, I just want to indicate that

1 there is some public concern about some of these things as well.

2 MR. ROSE: I think -- and by the way, I think that's
3 right. I think the consciences are bothering people, and the
4 fact that the Indians are on welfare and they're our Third World
5 economy in this country. And in fact, Indian gaming has got
6 them out of that ditch.

7 But by the way, I also would say that the voters of
8 America are not stupid. When the gambling comes in, such as in
9 Illinois and starts on river boats, and making all this money,
10 they don't vote it out. In fact, the tax revenues are fairly
11 substantial.

12 CHAIRMAN DILLS: Senator Maddy, your mike is still
13 on.

14 SENATOR MADDY: I was only going to comment on the
15 fact that, just what you said: gaming's coming in as fast as it
16 can come in all over, not just on Indian reservations. It is
17 the panacea for governments to try to find the easy money that
18 comes from revenues.

19 And I think, not withstanding the polling that has
20 been ongoing, when the public begins to discern that this is a
21 easy way to generate revenues -- easy in the sense that it's
22 somebody else's money that's being lost -- that I think this
23 result where they say gaming on Indian reservations is fine, but
24 not off the reservations, when they start to understand how much
25 "revenue", quote-unquote, is not being captured by the state, I
26 think you'll quickly find that their opinion will change. This
27 is what's happening all over the country.

28 CHAIRMAN DILLS: Assemblyman Richter.

1 ASSEMBLYMAN RICHTER: Mr. Rose, Senator Torres has
2 made some comments in line with what I'm saying. Let me see if
3 I'm correct.
4 We could now negotiate, as I understand -- not go
5 forward with the judicial process -- negotiate with the Indians,
6 and get, perhaps, in those negotiations a share of the revenue
7 that flows out of this to the State Treasury.
8 If in fact this goes through the judicial process and
9 we lose, do we the forego the ability to be able to get some of
10 the proceeds into the State Treasury that we would be in a
11 position to get if we were to pre-negotiate this?
12 MR. ROSE: My understanding is actually that the
13 state is under an obligation to negotiate, now having lost the
14 <u>Rumsey</u> case.
15 In terms of getting a share of the revenue, the
16 statute is extremely clear: you cannot demand it. If, like in
17 the State of Connecticut, the tribe wants to give you $100
18 million a year, you don't have to turn it down.
19 So, if the state and the tribes could now sit down
20 and negotiate, including a revenue sharing which would be
21 voluntary, it would be a binding agreement. After they win at
22 the highest federal court level, I guess they have no reason to
23 give anything.
24 ASSEMBLYMAN RICHTER: That's what I thought. Thank
25 you.
26 MR. DICKSTEIN: Mr. Chairman, if I may follow up on
27 that response.
28

1 I think the tribes have, are on record in letters of
2 January of 1993, and September of 1993, expressly in letters to
3 the Governor, saying that they are willing to discuss those
4 issues of revenue share, of shared regulation, of concurrent
5 jurisdiction. So, there's no formality that we need to stand
6 behind and say: who has to propose it? It's been on the table.
7 The tribes are not going to negotiate against
8 themselves, however. There's nothing coming from the other side
9 whatsoever.
10 CHAIRMAN DILLS: Also, the tribe has 60 percent of
11 the take. How do you negotiate the 40 percent on the other
12 side? They may not want to negotiate; right?
13 MR. ROSE: I think what you're talking about, under
14 the Indian Gaming Act, the tribe must get at least 60 percent of
15 the net gaming revenue.
16 CHAIRMAN DILLS: Yes.
17 MR. ROSE: I actually worked with one of the
18 management groups and got the management group to voluntarily
19 give some of its share to the California Council on Compulsive
20 Gambling.
21 I suppose the answer is that the state -- that the
22 management group doesn't have to, but probably you would do it
23 as a share of gross revenue right off the top, and that would be
24 part of the compact.
25 CHAIRMAN DILLS: Maybe it's not within the confines
26 of certain of the executives to want to engage in collective
27 bargaining.
28 Have you concluded, Mr. Rose?

MR. ROSE: Yes, thank you.

CHAIRMAN DILLS: Questions of Mr. Rose's comments?

All right. That about does it for the morning session, unless there's something that must be said now. Forever hold it.

Thank you very much. We will come back in ten minutes.

[Thereupon the luncheon recess was taken.]

--oo0oo--

1 AFTERNOON PROCEEDINGS

2 --oo0oo--

3 CHAIRMAN TUCKER: All right, thank you very much.
4 We're going to move on to Section C, the status of tribal-state
5 compact negotiations in California. This discussion will be on
6 probable gaming which will be allowed pursuant to a compact.
7 Even though pretty much everything has been discussed along
8 these lines, we're going to just touch bases in case we've
9 omitted any subject areas that you would like to touch on in
10 terms of this discussion period.

11 So gentlemen, begin.

12 MR. MILLER: Yes, sir. I'm going slightly out of
13 line.

14 My name's Dennis Miller. I'm halfway through my
15 third term as tribal Chairman of the Morongo Band of Mission
16 Indians. I've also been a life-long resident of the
17 reservation.

18 I'm actually down in Section E, I believe.

19 CHAIRMAN TUCKER: Right. We've moved you up to
20 Section D, and we are currently on Section C.

21 MR. MILLER: That's where I want to be.

22 CHAIRMAN TUCKER: You want to be in Section C?

23 MR. MILLER: I'm exactly where I want to be at this
24 time.

25 CHAIRMAN TUCKER: All right, well, make yourself
26 comfortable.

27 MR. MILLER: Thank you.

28 Today I'd like to give you a summary of the economic

development and opportunities that have taken place in the Morongo reservation, and I can assure you, I'll be very brief.

Some of the instances that I'll point out may be peculiar to the Morongo, but also they may be a mirror image of other reservations throughout the state.

Our reservation was formed by Executive Order in 1865, and immediately we were elevated on the scale of Man, from Neanderthal to Cro-Magnon. We were now to be food growers. We were to sustain ourselves with livestock and agriculture.

Unfortunately, the best source of water was sliced out of the reservation like a piece of pie, and that piece of land was given to the railroad. Our source of water was six miles back up into the canyons from the closest road.

Our next chance for economic development and opportunity came at the turn of the century when, according to Indian Agent Steadman, the Indians needed more access to the job markets. Therefore, a 300-foot wide strip of land, 8 miles long, was carved out of the reservation, and now we call it part of Highway 10. We were given $860 in compensation, 200 of which we had to return as overpayment.

Next came the 1920s and an opportunity to lease our lands out to utility companies that crossed the reservation. There was promise of jobs during construction and yearly rentals. Factually, not one single Indian was employed during the construction of those power lines. Additionally, it was over 20 years before the reservation had electricity, although the power lines ran right smack-dab through them. They were given a 50-year lease, and we received approximately $150 per

1 year. They had -- there was no such thing as cost of living
2 increases in those days.
3 Next, in the 1930s, came the Depression. And for the
4 obvious reasons, the Depression had no effect on the
5 reservation. We didn't even know it existed.
6 Now we're in the '40s and '50s. Talk of termination
7 of reservations left everybody in the doldrums for several
8 years.
9 Now we've moved up into the '60s. There was hope
10 that we would all become jojoba bean plantation owners. And we
11 were going to lock up the market on the jojoba bean. Today,
12 there are no jojoba bean plantations. Someone forgot to remind
13 us that the rabbits also had the jojoba bean market locked up.
14 Now we're in the late 1970s and early '80s, where my
15 discussion's going to end. But first, I want to take you back
16 to a time well over a hundred years ago, and it was a day much
17 like today: rainy, cloudy, windy.
18 And there he was, Benjamin Franklin. He looked up in
19 the sky, and he had that kite, the string, the jar, and the key.
20 There was a whiz, a bang, and a flash, and we all remember what
21 Ben said: Bingo! So, that's where we are today.
22 In closing, let me seriously say to you folks and
23 extend a serious, a warm, and a personal invitation to come out
24 to our reservation and visit us so that we can open up a
25 dialogue and have a better understanding of what the issues are,
26 face to face.
27 Thank you for your time.
28 CHAIRMAN TUCKER: Thank you very much.

1 ASSEMBLYMAN BACA: Mr. Chair, I'd like to take him up
2 on that invitation since he is from the Inland Empire, and I do
3 represent the Inland Empire.
4 I'll be glad to go down there, Dennis.
5 CHAIRMAN TUCKER: Would you sponsor the
6 transportation for all the other Members on the committee for
7 that field trip?
8 ASSEMBLYMAN BACA: I will not sponsor it, but I'll
9 ask him to give their in-kind and participate as they are to
10 find out what's going on.
11 CHAIRMAN TUCKER: Never mind, Mr. Baca.
12 All right, gentlemen. Where are we now?
13 MR. DICKSTEIN: Mr. Chairman, I think you were
14 correct in saying that most of what's in Section C has been
15 covered.
16 The only thing that hasn't, and I'll give it to put
17 what's already taken place in some context, is to give you the
18 history of these negotiations: what they're about, and where
19 they are now.
20 The negotiations for Class III gaming started in
21 California in December, 1991. Unlike any other state in the
22 country, the tribes in this state determined that it was in
23 their interest, and the state agreed, that instead of conducting
24 simultaneous negotiations with different Indian tribes, the
25 tribes came together and conducted joint negotiations, and still
26 are. Those negotiations include about 20 Indian tribes right
27 now, including all the tribes that have gaming operations on
28 their lands.

1 I think we recognized early on that we couldn't come
2 to any agreement on what kinds of gaming this compact was
3 supposed to regulate. And that's when we entered into a
4 stipulation to file the Rumsey vs. Wilson case. That was in
5 about February of '93. The lawsuit was filed in May of '93.
6 And the terms of the stipulation were, first, that
7 the tribes would not raise a bad faith claim against the state
8 for failure to negotiate.
9 The state would waive its 11th Amendment sovereign
10 immunity, and that 11th Amendment sovereign immunity has been a
11 sticky issue in other cases.
12 And third, that we would seek a declaration from the
13 court. Once we got that declaration, we would proceed
14 forthwith, I think the words in the stipulation are, to
15 negotiate those games that the judge decided the state was
16 obligated to negotiate. And to reserve each party's right, not
17 an obligation -- some of Mr. Gede's comments made it almost
18 appear like the state obligated itself to appeal. That's not
19 the case. The state reserved the right. And this, of course,
20 was before most of the cases that we've been talking about today
21 had been decided, including a large group of states -- courts
22 outside the state.
23 That decision came down in July, '93, and in theory,
24 negotiations should be going on now about those disputed games.
25 I think that the -- a tribal-state compact is a
26 document that the act provides should include certain items, and
27 certain items only. They basically fit the description of how
28 you regulate Indian gaming on the reservation. There are

1 time. I think we do have an agreement with the Attorney General
2 that the tribes respect, and that is not to negotiate the
3 specific terms in any kind of public forum, so I haven't gone
4 into any detail about: we suggested this; they suggested this;
5 they want a waiver of sovereign immunity; we came back with
6 this.

7 So, there's a lot of that that's gone on, but we
8 really are at a crossroads right now because of that decision,
9 and the seeming inability or unwillingness of the Governor to
10 recognize that change is going to come in this state on the
11 Indian gaming issue. And if he -- if he recognizes it, and
12 deals with it in a manner that -- the tribes and the state could
13 both benefit, because the tribes have been flexible. There are
14 written letters to the Governor saying, "We are flexible. We
15 would like to come to an agreement. Here's our proposals; how
16 about yours."

17 CHAIRMAN TUCKER: Senator Torres.

18 SENATOR TORRES: Given your role in the negotiations,
19 do you think that the Attorney General and the Governor will
20 appeal the federal appellate decision if, in fact, in February
21 or shortly thereafter that court also rules against us?

22 MR. DICKSTEIN: Well, there is no further appeal.
23 They petition the Supreme Court to review it, and I have little
24 doubt that, if they hold true to form, that's what they'll seek
25 to do.

26 SENATOR TORRES: Is that your intent, Mr. Gede?

27 MR. GEDE: We can't make that determination at this
28 point. I mean, we're not going to commit ourselves to filing a

1 petition for cert. if we lose.
2 I know that we've already been told that it's 20-1
3 odds against us, apparently, but in fact, it's very possible
4 that the Ninth Circuit will come down with a mixed decision, in
5 which case, both the tribes and the state might have reason to
6 consider a petition for cert.
7 SENATOR TORRES: What we're concerned about is that
8 if in fact those court rulings prevail against us, there's no
9 incentive for the tribes to give the state any money, is there?
10 MR. GEDE: Well, the tribes are free to make offers
11 and withdraw offers at any point, including today.
12 SENATOR TORRES: I understand that, but there's no
13 incentive to make offers if, in fact, the state wishes to
14 proceed along a course that everyone suggests is legal suicide.
15 MR. GEDE: Well, I tend to think that -- I've said
16 earlier, and I'll say it again, I don't think it is legal
17 suicide. I think we're proceeding on a course that we think is
18 legally sound and proper.
19 SENATOR TORRES: But the courts are not agreeing with
20 that so far.
21 MR. GEDE: Only one court has not agreed with us in
22 that regard, and in fact, if I may take the opportunity, there
23 were a few things thrown out earlier. And since I'm outgunned
24 here a little bit, and I do have these 20-1 odds --
25 SENATOR TORRES: I never had the illusion that you
26 were outgunned. All I'm saying is --
27 MR. GEDE: Okay, but the statement was made earlier
28 that every court in the U.S. has ruled against us, and this is

1 nonsense.

2 In fact, district courts throughout this country have
3 come to a different conclusion than Judge Burrell did in
4 Sacramento. And let me outline the most recent one.

5 The most recent one was Seminole vs. State of
6 Florida. In that case, very similar facts and circumstances to
7 California, and very similar lottery to California's Lottery,
8 very similar equipment being used by the Florida State Lottery,
9 and we could get into details --

10 SENATOR TORRES: No, I don't want to get into those.

11 MR. GEDE: -- the judge came to the exact opposite
12 conclusion, Senator, than this judge did.

13 SENATOR TORRES: I don't want the case argued before
14 these committees, and I don't want to take the time of the
15 committee.

16 I just want to make sure what the parameters are for
17 all of us, and that is that if, in fact, this lower court rules
18 against us at the federal level, or this appellate court --

19 MR. GEDE: The appellate court.

20 SENATOR TORRES: Right, the appellate court rules
21 against us, there's no incentive for the tribes to help out
22 California taxpayers by giving us any of their money; correct?

23 MR. GEDE: That's true. We are looking at it as
24 lawyers that have an obligation --

25 SENATOR TORRES: Right, I understand, but every day
26 that we proceed along this path, we create more solidification
27 on the other side never to help us.

28 MR. GEDE: Well --

1 SENATOR TORRES: Meanwhile, other cases are receiving
2 less priority: drug busting cases; child molestation cases;
3 drive-by shooting cases. Other cases that our law enforcement
4 resources could be utilized if, in fact, and we have to leave
5 that to your judgment, if in fact proceeding along this other
6 pathway and fighting mechanical video machines is more of a
7 priority than fighting crime.

8 As I define crime in my district, it's drive-by
9 shootings; it's gang murders; it's a lot of other things that
10 we're not -- and I'm not saying the Attorney General hasn't been
11 doing that. All I'm saying is that the priorities seem to be
12 misplaced.

13 MR. GEDE: Senator, it's in the Penal Code. This
14 Legislature drafted the Penal Code, and it's the law. The
15 Attorney General has --

16 SENATOR TORRES: But you have the discretion whether
17 to proceed or not.

18 MR. GEDE: That's true.

19 SENATOR TORRES: Thank you, Mr. Chairman.

20 CHAIRMAN TUCKER: Thank you very much, Senator.

21 The only question I have at this point is, how many
22 federally recognized Indian tribes do we have in the State of
23 California?

24 MR. DICKSTEIN: Approximately 100, Mr. Chairman.

25 CHAIRMAN TUCKER: And of those 100, how many actually
26 engage in gaming today?

27 MR. DICKSTEIN: Somewhere in the vicinity of 15-20.

28 CHAIRMAN TUCKER: All right, and would a compact

1 between the tribes and the State of California, or any court
2 decision that comes down and makes that whole compact moot,
3 would that open up the possibility for gaming on all 100
4 reservations or rancherias?

5 MR. DICKSTEIN: The compact that's being negotiated
6 is a model that each tribe would then have to enter into if it
7 wished with the state, and the state would have the opportunity
8 to negotiate directly any local issues with those tribes.

9 I think, so that -- the terms of a compact, the
10 substantive terms, would probably be determined by this model.
11 The state then would have met its good faith obligation by
12 entering into those terms.

13 The reality, though, is that there's as reason why
14 there are 15 or 20 gaming tribes in the this state, and it has
15 to do with their location and their proximity to urban
16 populations. It's simply not a reality for the majority of
17 tribes in the state. So that, while theoretically that's
18 possible, as a practical matter, history has shown that it
19 really is not a practical solution.

20 CHAIRMAN TUCKER: As a practical matter, all 100
21 probably will not be engaged, but what do you think that odds
22 are of the number growing beyond 15?

23 MR. DICKSTEIN: Well, I think that looking at --

24 CHAIRMAN TUCKER: The reason why I'm asking is, I'm
25 trying to get into the record what the scope of this is now, and
26 what it can be. And if there's 100 tribes currently recognized
27 in California, and only 15 are participating in gambling, I just
28 want to get a feel, and I want the rest of the Membership to get

1 a feel as to the number that could possibly engage in gambling
2 after a compact has been formed or after the federal courts have
3 spoken.
4 MR. DICKSTEIN: I think realistically, and this is
5 speculation, it could well double. I think it's possible for
6 all 100, as a matter of law.
7 CHAIRMAN TUCKER: Right.
8 MR. DICKSTEIN: But realistically, I think it could
9 well double because of the types of gaming that could be offered
10 would be attractive enough to bring people in from further
11 distances.
12 MR. FORMAN: Mr. Chairman, if I might further
13 respond.
14 My name is George Forman. I'm on the next panel, but
15 I have --
16 CHAIRMAN TUCKER: Why don't we start the next panel
17 now since you're here.
18 MR. FORMAN: To follow up on what Mr. Dickstein was
19 saying, I think that the discussion has presumed sort of an all
20 or nothing level of gaming. And I think it's important to
21 recognize, if there are 100 tribes in California, that the
22 market is going to determine whether a tribe in Modoc County,
23 for example, has several pull tab machines versus a 50,000
24 square foot facility.
25 CHAIRMAN TUCKER: Oh, sure.
26 MR. FORMAN: And so, if you talk about gaming
27 spreading, I think it's very important to bear in mind that
28 there are going to be all levels, different levels, of gaming,

1 and there are tribes in California today that are offering bingo
2 with $250 jackpots.
3 CHAIRMAN TUCKER: Sure, sure.
4 I just wanted the record to show that what we're
5 talking about here today is pretty much in its infancy right
6 now. And however the courts decide, it's bound to grow.
7 I just wanted the Membership to be sensitive to that,
8 and I wanted that in the back of our minds when we deliberate
9 over the rest of today's hearing and tomorrow's hearing as well.
10 All right, we're moving to Section D, the regulation
11 of gaming on tribal lands, tribal, state and local role. We
12 have Honorable Richard Milanovich, Tribal Chairman, Agua
13 Caliente Tribe. We have Mr. Forman, Mr. Gede, Mr. Dallas
14 Barnes, Chief of Security, Casino Morongo, and Michael Lombardi,
15 General Manager, Santa Ynez Casino.
16 MR. MILANOVICH: Thank you, Mr. Chairman. Members of
17 the joint committee, I'm rather nervous.
18 CHAIRMAN TUCKER: Don't be.
19 MR. MILANOVICH: Yesterday evening, we were talking
20 about how we were going to make our presentations, and they
21 said, "They're just like you and I. Don't worry about it. Just
22 go up there and just try and relax."
23 But sitting here this morning, all morning, trying to
24 relax after hearing such eloquent speakers, the question that
25 came across from you as individuals naturally brought up a
26 little bit more of the anxiety within me.
27 CHAIRMAN TUCKER: Well, you're making me blush. I
28 don't know about the rest of the committee.

[Laughter.]

CHAIRMAN TUCKER: Just relax. This is an informational hearing. We're just trying to get as much of this issue out before the Membership and the people of California.

I'm sure, through next year, we're going to be debating these issues, at which point it'll be hotly lobbied one way or the other. We're just trying to get the information out. We want everyone to understand what's going on.

So, feel very comfortable. And the fact that, you know, upwards of 10 million people are watching you as we speak should have absolutely no impact on your delivery.

[Laughter.]

CHAIRMAN TUCKER: But before we go any further, could you state your name for the record, sir.

MR. MILANOVICH: Thank you, Mr. Chairman.

Richard M. Milanovich. I am the Chairman, Agua Caliente Band of Indians, located in and around Palm Springs, California. Our reservation also extends into Cathedral City, Rancho Mirage, and portions of Riverside County.

My topic was to talk about the federal -- pardon me -- the state tribal-private gaming, the distinctions, when in actuality, there is no distinction between state and tribal, but rather there is a great distinction between tribal-state versus private gaming. Both the state and the tribes do operate gaming to raise revenue.

We have a membership in Palm Springs Agua Caliente of approximately 278 members. Of that, 179 are of majority age.

Now, there has been a common misconception in Indian

country amongst our own brothers and sisters, as well as the non-Indian population, that the Palm Springs Indians are so well off because of where we're located. When in actuality, after 1960, the land that composed our reservation was allotted to the individual members at that time. Since 1960, no more lands have been available for allotment.

The tribe has, in its own, as its own, approximately 2300 acres out of 26,000, which means that any income derived from economic development on our reservation mainly goes to about 70 members. And even that income that is derived is based on figures that were negotiated in the '60s and in the '70s, at which time tribal members could not have the business acumen to know that they were getting a proper deal.

We had the Bureau of Indian Affairs as our trust [sic], Great White Father, so to speak. And for the most part, they sent us down the river in our own little canoe. It didn't happen. That income that should have come, that rightfully belonged to us, was not there. So, there are some members who are quite well off; majority of the members are not so well off. As a matter of fact, we had our own study done, a needs survey study done, which showed -- shows us, showed the tribal council, that over 50 percent of our members live at or below the poverty level.

CHAIRMAN TUCKER: Quick question.

MR. MILANOVICH: Yes.

CHAIRMAN TUCKER: You said you have roughly 250 members in your tribe?

MR. MILANOVICH: Two hundred seventy-eight.

1 CHAIRMAN TUCKER: Two hundred seventy-eight members,
2 yet only seventy members of the tribe make the money?
3 MR. MILANOVICH: That's basically it, yes.
4 CHAIRMAN TUCKER: Your tribe holds elections for
5 leadership positions?
6 MR. MILANOVICH: Yes.
7 CHAIRMAN TUCKER: Are the 70 in leadership positions?
8 MR. MILANOVICH: At the present time, we have a
9 5-member council, and yes, we -- they are allotted members.
10 CHAIRMAN TUCKER: They're the ones that basically
11 sold everyone down the river?
12 MR. MILANOVICH: No, no, no. The Bureau of Indian
13 Affairs, by not negotiating a proper lease, by approving leases
14 which were not in the best interests of the tribal members.
15 CHAIRMAN TUCKER: In the best interests of all the
16 tribal members.
17 MR. MILANOVICH: Yes.
18 CHAIRMAN TUCKER: But in the best interests of some.
19 It seems to me that someone knew what they were
20 doing.
21 MR. MILANOVICH: Yeah, the developer.
22 CHAIRMAN TUCKER: Yes, but you said --
23 MR. MILANOVICH: A tribal member back in the '60s and
24 the '70s, when somebody came to the Bureau of Indian Affairs and
25 said, "I wish to lease a particular piece of property," the
26 developer brought in their proposal.
27 The Bureau of Indian Affairs personnel were not very
28 well trained in real estate development. They saw numbers which

1 -- they didn't know any better. They told the allottee, the
2 tribal member, "This is a good deal." The tribal member didn't
3 know any better, so he signed it; the Bureau signed it. Ten
4 years later, fifteen years later, you learn what the true value
5 of that property is worth, but you have a least for 65 years.
6 CHAIRMAN TUCKER: So then --
7 MR. MILANOVICH: You're not reaching your maximum
8 potential.
9 CHAIRMAN TUCKER: And the difference between your
10 tribe and others is that your tribe segmented the land?
11 MR. MILANOVICH: Yes, we disbursed it to the tribal
12 members.
13 CHAIRMAN TUCKER: And they all went and cut their
14 individual deals?
15 MR. MILANOVICH: Exactly.
16 CHAIRMAN TUCKER: Okay.
17 MR. MILANOVICH: Exactly, so what we have today is,
18 we have a very small percentage for tribal -- for a tribal land
19 base, although other reservations have approximately 26-28,000
20 acres tribally.
21 CHAIRMAN TUCKER: These are long held leases? You
22 won't get that land for another --
23 MR. MILANOVICH: Sure. But even so, in 1983, the
24 Tribal Council passed our own ordinance prohibiting any type of
25 gaming on our reservation, just like we passed an ordinance
26 prohibiting any type of dumping on our reservation, waste
27 disposal on our reservation.
28 It wasn't until 1991 that the membership, our

1 membership, by referendum, voted and told us: change the
2 ordinance; begin the process to locate a gaming facility within
3 our reservation or on our reservation.
4 So, just as the state reacts to their constituents,
5 tribal government reacts to our members. We are trying to offer
6 our members the health, the housing, the education, just like
7 the state government tries to do for their constituents.
8 The state has other options to raise revenue. We
9 don't have those options. We are very -- for the most part, we
10 have a very small limited resource area base. In our instance
11 again, I have to refer back, because of Palm Springs being Palm
12 Spring, Agua Caliente is supposed to be so well off. That's
13 just not true. We have to raise the revenue.
14 So, just as the state did when they enacted or had
15 the referendum passed by the voters of California, that's what
16 our membership did. They asked us to rescind our ordinance and
17 to allow gaming.
18 So, just two weeks ago, we had a press conference in
19 Palm Springs with the company that we were joint venturing with,
20 which some of you are aware of, Caesar's World out of Las Vegas,
21 to construct a $20 million project in downtown Palm Springs.
22 The income from this casino, this development, is to go, as
23 directed by IGRA, to tribal governmental functions to assist our
24 tribal members.
25 I don't know how many of you folks are aware that
26 Indian people in general are loathe to go to outside sources for
27 assistance. I have -- I know personally tribal members who have
28 been living in a car on another reservation because they don't

1 want to go to the county assistance, the state assistance. They
2 still have their pride, and they look to the tribal government
3 for assistance, for help. They want us to help them.
4 And we say, "What can we do? We're trying." That's
5 all we're trying to do. Just like the state address the
6 concerns of their constituents, that's what we're trying to do.
7 That's the only difference between state and tribal
8 government gaming.
9 Now, you take private gaming, all they're after is
10 lining their own pockets. They have no membership to answer to.
11 They have no constituents to answer to. They just want to
12 operate a facility for their own well being.
13 That's the American way, though. That's fine. But
14 by the same token, it should also be the American way to allow
15 us, as sovereign governments, to be treated as such; to be
16 allowed to open an economic venture which we want to afford our
17 members a decent standard of living. That's all we're asking
18 for.
19 Thank you.
20 CHAIRMAN TUCKER: Thank you very much.
21 Any questions?
22 See, you had nothing to be worried about.
23 MR. FORMAN: Good morning, Mr. Chairman. My name is
24 George Forman.
25 CHAIRMAN TUCKER: I thought you were bigger.
26 [Laughter.]
27 MR. FORMAN: Well, it's a mistake people make more on
28 the phone than in person, but I've got a few others I'll save

1 for another day.

2 Mr. Feldman this morning talked about some general

3 principles of jurisdiction in Indian country, and I wanted to

4 add a couple of basic principles that need extra emphasis

5 because they cannot ever be emphasized enough.

6 First is that tribes, in the words of the Supreme

7 Court, are, quote, "unique aggregations," end quote. They have

8 sovereignty over their territory. They have sovereignty over

9 their members; they have sovereignty over persons who enter

10 their territory.

11 And tribes are not states. They're not subdivisions

12 of states. They're not the United States; they're not

13 instrumentalities of the United States.

14 But what they are, more than anything else -- what

15 they are not is mere aggregations of individuals. They are not

16 private associations. They are not clubs. They are not

17 membership organizations in the conventional sense of the word.

18 They're governments. And they're governments with

19 responsibilities. They're governments with powers.

20 And this is a very difficult concept, it seems, for a

21 fair number of people to understand, and an even more difficult

22 concept for some people, particularly some elements of the

23 government of the State of California, to accept.

24 It's been a very difficult process. The State of

25 California's posture in dealing with tribes traditionally has

26 been to attempt to dictate to them, rather than negotiate with

27 them. And I think no better example in the gaming area can be

28 provided than what occurred in San Diego County in October of

1 '91, when the Attorney General issued his famous October 8th
2 memorandum, encouraging all local law enforcement to go out and
3 seize -- raid reservations, and seize offending equipment, and
4 arrest those responsible.

5 But the day after that memorandum was after, I wrote
6 a letter to Mr. Lungren on behalf of a number of the clients
7 that our firm represents, asking for an opportunity to sit down
8 and talk on a government-to-government basis, to see if there
9 was a way to identify areas of disagreement and attempt to
10 negotiate resolutions of those areas of disagreement. To this
11 day, I've never received an answer to that letter.

12 I made the same approach to the Sheriff in San Diego
13 County. I was told, "Oh, yes. We certainly are interested in
14 talking about this." And the next response that the Sycuan
15 Tribe received, which was my client, was a raid on the 30th of
16 October, of an 84-member task force; the largest thing this side
17 of the invasion of Granada. And no opportunity to discuss the
18 matter, no interest in discussing resolutions of differences.

19 The status of tribes as governments is something that
20 has to inform one's consideration of the whole issue of tribal
21 gaming. One hears the question: well, if it's okay for the
22 tribes, why not for everybody else?

23 Nobody tells the Bicycle Club how it has to spend its
24 money. Congress, in the Indian Gaming Regulatory Act, has set
25 forth very specific things for which tribes are allowed to spend
26 their gaming revenues.

27 The second issue, the second principle that needs to
28 be emphasized, and I was delighted to hear Mr. Gede say it,

1 although it's not always consistent with what the Attorney
2 General says in various briefs in our litigation, is that the
3 United States has plenary power to legislation in the area of
4 Indian affairs. And Congress can pre-empt state jurisdiction,
5 even over a state's own citizens if the subject of the
6 legislation involves Indian affairs and fulfillment of federal
7 obligations toward Indians.

8 That's what IGRA was all about: a comprehensive
9 federal scheme to pre-empt whatever jurisdiction state's
10 otherwise may have had, whether under PL 280, or under a claim
11 of residual jurisdiction over their own citizens, or whatever,
12 in the area of Indian gaming to assimilate not only state
13 criminal prohibitory laws, but also state civil regulatory laws
14 into the law of the United States, to vest exclusive
15 jurisdiction to prosecute for violations of such laws in the
16 United States. And then to define out of the term "gaming" for
17 purposes of federal criminal jurisdiction, Class II gaming and
18 Class III gaming authorized under a state-tribal compact.

19 The notion, too, another notion that needs to be
20 dispelled, you'll often hear references to unregulated Indian
21 gaming. There has never been unregulated Indian gaming. If we
22 go back to traditional tribal ways in California, you find that
23 gaming was an integral part of a lot of tribes' cultures.

24 While Nevada's gaming industry, or at least Las
25 Vegas's, may have been started by the mob, the tribal gaming
26 industry was not. The tribal gaming industry was started by
27 tribal governments, and was started in the late '70s, early
28 '80s, in order to put tribal members to work, to raise revenues

1 to fund tribal governmental programs, to raise money to support
2 tribal governments. These were services that local governments
3 weren't providing, the Bureau of Indian Affairs wasn't
4 providing.

5 These reservations are located in very remote areas.
6 They were established in areas that the United States never
7 thought anybody else would ever want. So, these communities
8 were historically underserved by all levels of government, and
9 they decided they should do it for themselves. And they did it
10 through a resource which they were able to develop, not with
11 federal capital or not with state capital. They had to rely in
12 many instances on private capital, but develop it they did.

13 And we now have a gaming industry that, considering
14 the lack of external regulation -- remember, some tribes have
15 been regulating themselves and operating their own gaming since
16 -- for more than ten years -- has been remarkably free of the
17 kinds of problems, the kinds of horrors, that one hears the
18 opponents of tribal gaming shouting about at every opportunity.

19 The notion that Indian gaming is a ripe plum for the
20 picking by organized crime was an argument that the state made
21 in the Cabazon decision, from the district court up through the
22 Supreme Court. It was an argument that the states made in
23 opposition to IGRA when Congress was considering IGRA. It is an
24 argument that the Governor's surrogates have put out, and I've
25 read pieces in newspapers all over this state. But the fact of
26 the matter is, there is no reliable evidence to show any
27 significant degree of irregularity or problems with gaming,
28 particularly California gaming, Indian gaming, which I know the

1 best.

2 And this shouldn't be a surprise. The governments of
3 these tribes have gone into this activity for governmental
4 purposes in their own communities. These aren't absentee
5 stockholders building a casino in somebody else's backyard.
6 This facility is going up in the tribal members' own front
7 yards. They're the ones that have to look at it. They're the
8 ones that are going to have to live within the environmental
9 consequences, and these are not self-destructive people. These
10 are people who are making rational, reasoned decisions about the
11 conduct of economic affairs in their own reservation
12 communities.

13 Now, the tribes have the most to lose if there are
14 problems, be they regulatory or environmental. And I submit
15 that on the record of tribal gaming in California, tribes have
16 done a remarkably good job of preventing these kinds of
17 problems.

18 Reference was made to the California State Lottery.
19 I dare say that perhaps nobody knows that the California State
20 Lottery is running a game, the keno game, in which it reserves
21 the right not to pay the winners if too many people win.

22 Do people know about that? I'm sorry. The former
23 Director of the Lottery swore under oath that this was the case,
24 and that is why the state argued that its keno game was not a
25 banking game. If too many people win, well, we just won't pay
26 the winners.

27 If a tribe tried to do that, I submit that Attorney
28 General Lungren would have the entire law enforcement

1 establishment of the State of California on that reservation
2 dragging everybody off in chains.
3 So, tribes have exercised their self-regulatory
4 authority.
5 CHAIRMAN TUCKER: First of all, let me just interject
6 that probably in the last, oh, probably day, we've spent maybe
7 $3 million on advertisement for the Lottery. And you just shot
8 it down --
9 [Laughter.]
10 CHAIRMAN TUCKER: -- just in one sentence. I want to
11 thank you for that.
12 MR. FORMAN: It's in the public record, otherwise I
13 wouldn't have brought it up. It was filed in the Rumsey
14 litigation. That was part of the state's defense in the Rumsey
15 litigation.
16 You know, I guess what it comes down to at root is
17 not what the state can do, but what, as a matter of good public
18 policy, it should do in dealing with tribes that are attempting
19 to use their own inherent abilities and resources to develop
20 economics that benefit not only the tribes, but the surrounding
21 communities at no cost to those who receive the greatest
22 benefits.
23 But tribes exercise their self-regulatory authority
24 in a variety of ways. Tribes have the inherent right to exclude
25 from the reservation anybody they don't want there. Tribes have
26 the ability to get to federal court if they need to to expel
27 people from the reservation.
28 Tribes have had problems with management companies

1 from time to time; it's no secret. The early management
2 contracts were pretty unfavorable to tribes, but that was, like
3 any venture capital opportunity, when you go into a new endeavor
4 of uncertainty, the person who's putting up the money is going
5 to want more in return than when you come into an established
6 industry. Tribes have litigated themselves out of bad
7 management contracts. Tribes have litigated against management
8 contractors and have solved problems associated with management
9 contracts.
10 Tribes have cooperated extensively with local and
11 federal law enforcement authorities to identify, investigate,
12 and prosecute people, people that are either trying to
13 infiltrate or cheat. San Diego County right now, in federal
14 court there is a large-scale racketeering trial going on -- it
15 may be over by now -- where a tribe turned this effort over to
16 federal regulatory authorities, and cooperated in the
17 investigation.
18 Other tribes of which I'm aware have provided all
19 kinds of information to law enforcement on both the state and
20 federal level, and maintain a very good working relationship
21 because it's in everybody's interest to do that.
22 Tribes have invested heavily in state-of-the-art
23 surveillance equipment, and training, and security systems. And
24 they've staffed their facilities with qualified and capable
25 public safety and security personnel.
26 I think it's fair to say that tribes have more
27 experience managing large scale gaming facilities in this state
28 than does the State of California itself.

1 The tribes also have the resources available to them
2 of the National Indian Gaming Commission. The tribes, of
3 course, have to file extensive financial information with the
4 NIGC, but the tribes also have available to them through the
5 NIGC access to FBI criminal history records, and the kinds of
6 things they need to do background investigations.
7 So, based on the experience of California tribes to
8 date, tribal self-regulation, with the statutory oversight by
9 the NIGC, provides ample protection of the public safety, gaming
10 integrity, and it doesn't need extensive or any real other
11 outside intervention.
12 Regulatory jurisdiction over Class III gaming, as
13 you've heard described to you, is a matter for negotiation and
14 agreement between the tribes and the state in compacts approved
15 by the Secretary of the Interior. One of the objectives of the
16 compact is to identify and adequately protect legitimate state
17 interests, such as: are the games honestly run; are there
18 adequate fire safety provisions and the like.
19 The tribes have not seen an ability on the part of
20 the state to carry out the extensive regulatory role the state
21 says that it needs to have in order to have these legitimate
22 interests protected. And so, the tribes are in the process of
23 taking the initiative to develop a tribal self-regulatory and
24 intratribal gaming regulatory authority that would have the
25 ability of financing the staffing to do the kinds of things that
26 the state says it needs to do but can't.
27 And so, in closing, I think that anybody that
28 suggests that tribes are not capable of regulating their own

1 affairs in the area of gaming is either unfamiliar with the
2 facts, or has an inability to accept tribes as successful
3 entrepreneurs, and the need, perhaps, to see them as something
4 other than what they are.
5 Thank you.
6 CHAIRMAN TUCKER: Thank you very much. I have a
7 question for you.
8 If we had our state gaming commission, whether it was
9 in the image and likeness of what the Attorney General is
10 proposing, or some other gaming commission, what role do you see
11 it playing in terms of regulating gaming on tribal lands?
12 MR. FORMAN: Well, the understanding that I think the
13 tribes have, and I think the Attorney General would concur, is
14 that the only appropriate role would be as negotiated in a
15 tribal-state compact. To the extent that the tribes accede to a
16 state demand for a role in regulation, it really matters not to
17 the tribes which agency the state chooses to fulfill the state's
18 agreed upon regulatory functions.
19 It probably would be preferable to have a state
20 gaming commission do it than to have the tribes have to release
21 all their proprietary information to the State Lottery, which
22 could then turn around and use it against them.
23 But that's a matter that needs to be negotiated, and
24 at this point, of course, it's very difficult to negotiate the
25 role of something that doesn't exist.
26 CHAIRMAN TUCKER: All right.
27 MR. GEDE: Tom Gede again for the Attorney General's
28 Office.

1 In this particular case, with the exception of the
2 few references that Mr. Forman made to court decisions, I
3 couldn't agree with him more.
4 I think that the -- a need for a regulatory mechanism
5 in the State of California to deal with gaming that goes beyond,
6 or that is different from that which is already constitutionally
7 under the Horseracing Board, or the State Lottery Commission, is
8 essential in order to make any progress in this particular area.
9 The federal law permits the states and tribes in
10 Class III gaming to establish in their compact provisions that
11 include standards for the operation of the gaming activity and
12 the maintenance of the gaming facility, including licensing.
13 It is generally our view with respect to the
14 regulation of gaming that, at least in two very broad
15 categories, those who have extensive experience in regulating
16 gaming -- the State of Nevada, for example -- they have always
17 looked at the two following areas: at front end, a licensing
18 system; a system that can provide for detailed, thorough
19 background investigations of the personal and financial
20 backgrounds of the owners and operators of the facility.
21 The tribes have the same interest that the state has,
22 the same interest that the feds have in ensuring that when the
23 tribe grants a license to a tribal gaming facility, that every
24 management company, or every person or individual that is
25 involved with it is up to the quality and standards that the
26 tribe needs. And in a gaming compact between the state and the
27 tribe, we have that very same interest. The state does; the
28 tribe does. And that's the purpose of the compact, is to work

1 out those details and how those kinds of background
2 investigations and front-end controls on licensing would occur.
3 CHAIRMAN TUCKER: Now, would you see that as a
4 function of the gaming commission?
5 MR. GEDE: Certainly, certainly. The gaming
6 commission proposal that the Attorney General has provided
7 provides for a commission that provides licenses to, in this
8 particular case, as outlined in the proposal, the card rooms,
9 and any other gambling facilities that are in California that
10 aren't already constitutionally covered.
11 As for the tribes, we would work out with the tribes,
12 in the tribal-state negotiation, where and to what extent the
13 commission could be of value to providing background
14 investigation; the enforcement and investigatory arm that is --
15 that works with that commission. A division of gaming control,
16 for example, could provide those kinds of facilities.
17 There would be reimbursements for costs. The direct
18 cost of regulation is something that is directly accounted for
19 in the federal act, and those kinds of things could be built
20 right into a compact.
21 The second area of regulation that is of concern is
22 the monitoring of the cash flow. As Nelson Rose put it, the
23 business of gaming is the business of cash. It's cash
24 transactions; cash in, cash out, and that kind of thing.
25 Nevada controls it through its own regulations, but
26 the federal government has looked very strongly at how they can
27 enforce the Bank Secrecy Act, which requires reporting of
28 certain amounts of cash transactions, in or out, to casinos.

1 And they have provided a detailed set of casino regulations that
2 go with the Bank Secrecy Act. Those regulations have not yet
3 gone into effect because everytime they've been proposed,
4 they've been pulled by the Secretary of the Treasury.
5 The Secretary of Treasury, at some point, most
6 certainly will adopt those casino regulations. They are the
7 most severe, strict -- they are comprehensive in the
8 requirements for recordation and reporting for large amounts of
9 cash. They put burdens of proof right into the regulations that
10 require the casino employees are deemed to know when a single
11 individual is separating certain amounts of money and that can
12 be aggregated into an amount that should be reported or
13 recorded, whether these are suspicious transactions or not.
14 All that kind of regulatory regime has been proposed
15 by the Secretary of the Treasury, and it's that kind of cash
16 flow monitoring, that kind of regulation of what is going on
17 with the cash in the casino, that is of interest to both the
18 tribes and the state in hammering out a tribal-state agreement.
19 Those kinds of regulatory mechanisms, the front-end
20 and the ongoing monitoring, are essential to any successful
21 regulatory program.
22 CHAIRMAN TUCKER: But now, isn't it true that the
23 individual tribes could, say, "With all due respect to the State
24 of California, we, having gone to the highest level of federal
25 court, that we choose to litigate. We've won, and we don't
26 subscribe to any state regulations at all."
27 MR. GEDE: No.
28 Mr. Chairman, the purpose of the ongoing negotiations

1 is to arrive at a compact for Class III gaming.

2 CHAIRMAN TUCKER: Right, but --

3 MR. GEDE: The court decision was strictly what we

4 agreed ahead of time to set aside and have a judge declare what

5 is the scope of gaming. When that's final, that gets plugged

6 right into the compact, and the compact is submitted to the

7 Governor for approval.

8 CHAIRMAN TUCKER: But is it not true that if the

9 court decision does not come down on the side that you're

10 arguing, let's say the court finds on the side of the tribes

11 that we can have Class III, and we've already stated that by

12 then, the horse is already out of the barn, and any negotiations

13 from then on would be subject to the good will of the tribes;

14 correct?

15 MR. GEDE: Well, with all due respect, Mr. Chairman,

16 I think it's more complex than that.

17 CHAIRMAN TUCKER: Well sure, but I'm paraphrasing

18 because I'm not an attorney.

19 MR. GEDE: Mr. Chairman, I don't think that the

20 tribes are going to --

21 CHAIRMAN TUCKER: No, no. Let's not say what they're

22 going to do.

23 I'm asking you: is this a possibility? No one can

24 predict what they're going to do, but I'm saying, you know,

25 isn't it true that after the courts -- let's say,

26 hypothetically, the courts decide in favor of the Indians, then

27 the Indians are then allowed to operate Class III gaming,

28 whether or not they have a compact with the State of California;

correct?

MR. GEDE: No, they have to have a compact.

CHAIRMAN TUCKER: All right, but they could say, "This is what we're going to do. Take it or leave it."

MR. GEDE: Well, that's the subject of negotiation. We're going to sit down and in confidence work out those details.

CHAIRMAN TUCKER: Right, but what I'm saying is, if the State of California loses in federal court --

MR. GEDE: Just on that one narrow issue.

CHAIRMAN TUCKER: Well, let's say we lose in that narrow issue, or we lose on every issue, let's just say if we lose in federal court, and the courts say that the Indians have a right to Class III gaming on their tribal lands, then, as was stated by the question that Mr. Richter asked and Mr. Torres asked, then we're behind in terms of being able to negotiate.

MR. GEDE: We have to have a compact, Mr. Chairman. We can't -- the gaming is not lawful on Indian lands without a compact.

CHAIRMAN TUCKER: Sure, but --

MR. GEDE: -- except for a situation where we -- where we the state are sued by the tribes for proceeding in bad faith. And we've not ever reached that point.

CHAIRMAN TUCKER: No, but if the courts say we in the State of California are wrong, and that the Indians can now go forward with Class III gaming, and then we sit down and we say, "Well, we'll give you Class III, but we don't want to give you, you know, what you want in Class III," then, not being an

1 attorney, one could look at it and say, well, that's bad faith
2 negotiation because they had already won the right to do that in
3 court.
4 The only thing that I'm asking you is if we go ahead,
5 and if the courts rule that the Indians can have Class III --
6 are you with me so far?
7 MR. GEDE: Well, they're entitled to Class III
8 anyway. We know that. We're ready to give Class III; there's
9 no question about that.
10 CHAIRMAN TUCKER: If they can have what they're
11 asking for --
12 MR. GEDE: The video games.
13 CHAIRMAN TUCKER: -- the specifics in Class III, and
14 if the courts say: yes, yes, they can --
15 MR. GEDE: We're obliged to sit down and negotiate
16 it.
17 CHAIRMAN TUCKER: Right. But it seems to me at that
18 point, you've already discussed it. At that point, there really
19 isn't too much negotiating that we can do.
20 MR. GEDE: That was the purpose, Mr. Chairman.
21 Mr. Chairman, that was the purpose of the
22 stipulation, was that we would sit down and negotiate everything
23 that we could negotiate except that one narrow question: what
24 is the scope of the gaming with respect to those electronic
25 games. We submit that to the judge.
26 All the rest of it's going to be in place. If we
27 lose all the way down the line on that narrow question of the
28 electronic games -- and I think that's what's at issue here, is

1 the electronic games -- not the -- you could argue about the
2 banked games, and the hybridization between lotteries and
3 non-lotteries -- but if it goes to the video electronic games,
4 and the state loses on it all the way up the line on the
5 appeals, then it just fits right in like part of a puzzle.

6 It's all ready -- we've been sitting down. We
7 continue to sit down and negotiate the terms of a compact right
8 now. We are missing some of the regulatory mechanism, which is
9 one reason why this panel is here right now. And we would very
10 much like to have a regulatory mechanism in place so that the
11 compact could be fully fleshed out.

12 But I don't see that the tribes or the state have any
13 difference of opinion with respect to the need for that.

14 CHAIRMAN TUCKER: Will one of the representatives
15 from the tribes come back up so I can -- just hang tight, Mr.
16 Gede -- come back up and try to answer that question for me?

17 Because in my mind, it seems to me if we go to court,
18 and as a state we lose, then what is there to negotiate?

19 MR. FORMAN: Mr. Chairman, I think that there is a --
20 perhaps a confusion --

21 CHAIRMAN TUCKER: Obviously.

22 MR. FORMAN: -- as to what the litigation thus far
23 has been about.

24 IGRA sets up a process. The tribe requests of the
25 state the negotiation of a compact. If the state either fails
26 to respond within a certain period of time, or within that
27 period of time fails in good faith to negotiate and agree to a
28 compact, the tribe has a remedy: to file a lawsuit in U.S.

1 District Court.

2 If the tribe establishes that the state failed to act
3 or negotiate in good faith, and there are some burden of proof
4 shifts that go on, depending on what the tribe is able to show,
5 the court appoints a mediator. The parties submit their last
6 best offers -- the court first direct the parties to negotiate.
7 If they can't do that, the court appoints a mediator. The
8 parties submit their last best offers to the mediator. The
9 mediator picks one which bets comports with the spirit of IGRA
10 and sends that to the state.

11 If the state says, "Fine," then there is a compact.
12 If the state says, "We don't like that one either," then the
13 matter is submitted to the Secretary of the Interior, who
14 determines the conditions under which Class III gaming may occur
15 on the reservation.

16 We have not reached that point; although, as a number
17 of earlier presenters indicated, that point may well be fast
18 approaching.

19 The lawsuit that was brought, the Rumsey case, was
20 not a bad faith lawsuit. It was a declaratory relief action
21 which we would submit was adequately supported jurisdictionally
22 by a federal question: what was federal law obligate California
23 to negotiation about, if anything? And Judge Burrell made a
24 determine of what California, as a matter of public policy,
25 permits or prohibits within a narrow range of games.

26 That issue now has been resolved and presumably will
27 be further clarified on appeal. When the tribes prevail on
28 appeal, and when the tribes defeat the state's cert. petition,

1 if that's filed, there will remain the execution of a compact
2 which includes not only the scope of games, but also the
3 regulatory regime under which those games will be permitted.
4 The question of the state's posture with respect to
5 the regulatory regime is an entirely separate question than what
6 has gone before in the litigation. If the state takes a
7 position with respect to the regulatory regime which the tribes
8 deem to be so unreasonable as to be in bad faith, the tribes
9 then will have to go to federal court and persuade a federal
10 judge that that is, in deed, the case.
11 Whether the state will be able to meet its burden is
12 debatable. Based on track records, I would think probably not,
13 because the tribes have been eminently reasonable in their
14 posture in these negotiations, and in the absence of a state
15 regulatory mechanism, I think the tribes will put forth an
16 alternative which more than adequately addresses any legitimate
17 concerns the state might have about regulation.
18 But I think your question was based on a faulty
19 premise, that somehow, once the scope of gaming is decided, that
20 there's nothing more to talk about.
21 CHAIRMAN TUCKER: That, and also, we had heard the
22 notion that the Governor refuses to negotiate with the Indians,
23 or doesn't feel that he has the authority to negotiate a compact
24 with the various tribes in California. And yet we hear that the
25 negotiations are all but complete, except as it regards the
26 video lottery terminals.
27 Is the Governor negotiating, or is he not
28 negotiating? Is there going to be a compact, or is there not

1 going to be a compact? Will there be state regulation; will
2 there not be state regulation?
3 I mean, it's like we've been hearing both sides
4 today.
5 MR. GEDE: Mr. Chairman, the Governor stated that he
6 did not think he had the authority to negotiate games which are
7 prohibited by California criminal code. And that led, in the
8 course of negotiations, to disagreement between the tribes and
9 the state as to just exactly which games would be negotiable,
10 most notably, stand-alone electronic video gambling devices.
11 So, that's when the state and the tribes entered into
12 their stipulation to submit that very question to the federal
13 court. That didn't mean that we had to stop negotiating out all
14 the details of the compact otherwise, going to allocation of
15 civil and criminal authority, location, hours, other mechanisms
16 that are necessary for the compact to make any sense. And
17 that's what we've continued to do.
18 CHAIRMAN TUCKER: Sure, but the Hoge bill that the
19 Governor vetoed, but in his veto message, he said that there was
20 language in the Hoge bill that he would sign if it stood alone,
21 and that language was for negotiating compacts with California
22 tribes, or Indian tribes in California.
23 Now, to my knowledge, that language was not to give
24 the Governor the ability to negotiate games that are currently
25 illegal in California.
26 MR. GEDE: I would suspect not.
27 The purpose of that was to provide the Governor with
28 authority to enter into the compacts with the legislative

1 imprimatur that basically would remove a cloud or prevent a
2 cloud from being put on the Governor's action down the line,
3 because there are the possibilities of constitutional claims and
4 other complications that could arise in court if we didn't have,
5 from the Legislature, that kind of clear authority placed in the
6 Governor.

7 The Governor still believes that's an important
8 authority to have stated in the law.

9 CHAIRMAN TUCKER: As it relates to Class III?

10 MR. GEDE: As it relates to tribal-state compacts,
11 which is only Class III to begin with.

12 CHAIRMAN TUCKER: Because we've had tribal-state
13 compacts already negotiated by the Governor, and the Governor
14 hasn't had this specific language in law, and there's been no
15 cloud.

16 MR. GEDE: There's been no challenge, either. And by
17 now, I don't think anybody would challenge the compacts that
18 have been signed.

19 CHAIRMAN TUCKER: So, in your view, the Governor
20 currently has the authority to do whatever he wants to do?

21 MR. GEDE: It's really -- actually, it's really up to
22 the Secretary of the Interior. If the Secretary of Interior --

23 CHAIRMAN TUCKER: No, no --

24 MR. GEDE: -- wants to approve a compact --

25 CHAIRMAN TUCKER: No, excuse me.

26 Secretary of Interior doesn't come to us and say: we
27 need a bill; we need this language.

28 MR. GEDE: Sure.

1 CHAIRMAN TUCKER: I'll talk the Governor into signing
2 that.
3 MR. GEDE: That's right.
4 CHAIRMAN TUCKER: Do you feel the Governor has the
5 authority to enter into a compact now with the Indians as it
6 relates to gambling?
7 MR. GEDE: I think so, but it could be a clouded
8 authority.
9 CHAIRMAN TUCKER: Who clouded it? I'm saying, if
10 you already have precedent in terms of parimutuel, and you've
11 had it for years, and no one has challenged it, and it's pretty
12 uncloudy in terms of the horseracing betting that's going on,
13 who is and what is suddenly clouding the issue in terms of --
14 MR. GEDE: Class III.
15 CHAIRMAN TUCKER: -- of the Class III? Who's doing
16 that?
17 MR. GEDE: Well, nobody's doing it. The federal act
18 doesn't ever refer to a governor, a legislature, or a
19 commission. It just says the state must negotiate a compact.
20 So, there's no state law in California that tells you
21 what is the state for the purposes of the federal act, and the
22 federal act doesn't tell you what is the agency in any state
23 that serves as the state for the purposes of the federal act.
24 And so, the state legislation that would designate
25 the Governor as having the authority to enter into the compact
26 provides the Governor with a clean line of authority to do so.
27 I think that states it the best I can.
28 CHAIRMAN TUCKER: So you feel the Governor currently

1 has a clean line of authority, and you also feel that, not
2 withstanding whatever the court case will be, that there will be
3 a compact worked out with the various tribes, and regulation of
4 the Indian gaming as it relates to the tribes is still up for
5 negotiation.

6 MR. GEDE: We would like very much, and we are
7 sincerely endeavoring to provide anything and everything we can
8 with the tribes to help arrive at a compact on regulatory
9 issues.

10 We don't think that the state has adequate regulatory
11 mechanisms in place, and we'd very much like to have those.

12 One of the purposes of the Attorney General's
13 proposal for a gaming commission and a gaming control division
14 is to provide that regulatory mechanism.

15 CHAIRMAN TUCKER: Right, right. Let's hypothesize
16 that there is a commission, whether it's in the Attorney
17 General's vision or someone else's. But let's say there is a
18 commission. Let's say there is regulatory authority in that
19 commission.

20 Is there any binding law, or is there anything to
21 compel the tribal gaming to then fall under that commission?

22 MR. GEDE: Well, right now there is no such law. The
23 Attorney General's proposal provides an express section of the
24 proposal, of the Gaming Control Act, which would provide the
25 authority of the Governor to enter into compacts, the
26 legislative imprimatur given to it, and outline that various
27 provisions of the act would play a role in the application of
28 the regulatory mechanism in the act to the tribal-state

1 compacts.

2 CHAIRMAN TUCKER: But the regulation is all

3 negotiated.

4 MR. GEDE: Yes, but you see, there's a mechanism

5 there.

6 CHAIRMAN TUCKER: Sure.

7 MR. GEDE: The enforcement arm, the investigatory

8 arm, and --

9 CHAIRMAN TUCKER: All I'm saying is, bottom line, we

10 go through the hoops, and bells, and whistles, and we do a state

11 gaming commission, and if the commission has regulations that

12 the tribes feel are onerous, the tribes can say, "Take a walk."

13 MR. GEDE: That's the subject of tribal-state

14 negotiations, and I can't speak for the tribes, but I think that

15 those -- the details of what joint regulation --

16 CHAIRMAN TUCKER: So it's all up for negotiation.

17 MR. GEDE: -- is subject to negotiation, that's

18 right.

19 CHAIRMAN TUCKER: Okay, all right.

20 So, just to finish this question before I move on to

21 Mr. Baca, any discussion, or any formulation of regulation in

22 terms of Indian gaming should probably include sitting down with

23 the various tribes to negotiate what regulations they may feel

24 that they could live with or not beforehand; correct?

25 MR. GEDE: It's a give and take. We don't put any

26 ultimatums to the tribe on that, and they don't do it to us.

27 The whole point of it is that we get together and figure out

28 what is the best.

1 CHAIRMAN TUCKER: All right.

2 Mr. Baca.

3 ASSEMBLYMAN BACA: Thank you, Mr. Chair.

4 My question is, is there a regulatory mechanism in
5 place for gaming III license now?

6 MR. GEDE: For gaming licenses?

7 ASSEMBLYMAN BACA: Yes.

8 MR. GEDE: For horseracing there is. For card rooms,
9 it's at the local level. There is a registration act that each
10 card club must get a registration from the state before the
11 local government can provide a license.

12 Tribal governments license tribal casinos, whether
13 it's Class II or III. And then, where it's Class II, obviously
14 the tribal governments have a federal oversight role; if it's
15 Class III, the gaming isn't legal until it's that product of a
16 tribal-state negotiation and a tribal-state compact. And once
17 that compact is reached, that's where the regulation is
18 something that is jointly worked out.

19 ASSEMBLYMAN BACA: Who can offer them the license
20 now?

21 MR. GEDE: Tribal governments provide their own
22 license. They are their own government. They provide a license
23 for their own casino.

24 ASSEMBLYMAN BACA: And what are the requirements for
25 obtaining a license within their own tribe?

26 MR. GEDE: Maybe a tribal attorney could best --

27 MR. FORMAN: Mr. Baca, I think it's important to
28 understand that on reservations in California, the tribes

1 themselves own the facilities. That it's not as if they are
2 franchising out gambling operations in the state.
3 The tribes that have -- and not all tribes have
4 outside management companies, either. Some do; some don't. Any
5 tribe that has an outside management contractor has an agreement
6 which has been approved by either the Secretary of the Interior
7 before the NIGC's -- the National Indian Gaming Commission's --
8 regulations kicked in, or by the chair of the National Indian
9 Gaming Commission.
10 Over and above that, each tribe has its own licensing
11 standards and criteria which it enforces, not only against the
12 management company and key management officials, but the tribes
13 that we represent require that each employee in the gaming
14 facility have a tribal work permit, which is usually issued only
15 after background investigations and other investigations to
16 ensure that people are not unworthy of trust.
17 ASSEMBLYMAN BACA: So, the procedures and guidelines
18 could vary or differ from each tribe, then, as part of the
19 requirements; is that correct?
20 MR. FORMAN: Yes, except that -- except for the
21 simulcast facilities, there are no Class III tribal gaming
22 operations in California.
23 The reference earlier to the so-called slot machines
24 that were taken out of the Sycuan reservation in '91, those were
25 not slot machines. And indeed, when those devices were
26 installed at Sycuan, they were licensed for installation in the
27 County of Los Angeles.
28 ASSEMBLYMAN BACA: If the state under the compact

1 agreement does not agree, then what is the process or procedure
2 for them to continue with that process, to apply for a license
3 or apply for gaming?
4 MR. FORMAN: The tribal -- understand that the tribal
5 gaming under IGRA, tribal gaming occurs -- gaming cannot occur
6 on Indian lands unless the tribe has an ordinance that spells
7 out the terms and conditions under which gaming can be
8 conducted. That ordinance must be approved by the chair of the
9 National Indian Gaming Commission.
10 So, each tribe has an ordinance. The Gaming
11 Commission is in the process of calling in those ordinances for
12 review, because the Gaming Commission has only recently got up
13 and running. And the Gaming Commission goes through those
14 ordinances with a fine-toothed comb, requests that changes be
15 made to bring them into conformity with what the Commission sees
16 IGRA to require, and also requires the submission not only of
17 the ordinance, but also the procedures that the tribe follows in
18 licensing, in background investigations, and the like.
19 So, the tribe is the licenser, not the state, not the
20 state gaming commission. What has been discussed thus far has
21 been registration of gaming management officials and key gaming
22 employees, but not state licensing of those employees.
23 ASSEMBLYMAN BACA: Thank you.
24 CHAIRMAN TUCKER: All right, thank you.
25 MR. BARNES: Good afternoon, Mr. Chairman, Members of
26 the committee.
27 I'm not an attorney. My name is Dallas Barnes. I'm
28 the Director of Security for Casino Morongo, a tribal gaming

1 facility operated by the Morongo Band of Mission Indians near
2 Palm Springs, California.
3 I've been in law enforcement and corporate security
4 for nearly 30 years. I've been a police officer on both coasts:
5 first in Pennsylvania, then in California, where I spent a
6 decade with the LAPD.
7 I'm an experienced veteran officer, and I've been in
8 Indian gaming for nearly two years now.
9 As the Director of Security at Casino Morongo, I
10 supervise a 40-member tribal police department. And if I've
11 learned anything during my tenure at Casino Morongo in Indian
12 gaming, it is that somehow Native American gaming is perceived
13 as unregulated money-makers run by uneducated Indians eager to
14 make deals with organized crime, and in general, somehow a
15 threat to the local community.
16 Now, I thank you for the opportunity to come here
17 today and perhaps set the record straight. The fact is, all
18 Native American gaming is governed by the 1988 Indian Gaming
19 Regulatory Act, which has been discussed at some length here
20 today. And as a result of this, Indian gaming is more
21 thoroughly regulated than traditional gaming facilities.
22 When a tribe elects to utilize gaming as a means of
23 economic development, they must first undergo a complex and
24 timely approval process. This process is governed by the Bureau
25 of Indian Affairs under the Department of Interior. And all of
26 this was -- is reinforced with extensive background searches and
27 checks by the Federal Bureau of Investigation.
28 In addition to these federal requirements in

1 oversight is demonstrated concern by tribal leadership.
2 Collectively and independently, tribal leaders are dedicated to
3 the integrity of Indian gaming. Thus, the litany of federal
4 regulations -- safeguards, and requirements -- are underscored
5 with even more stringent tribal ordinances and operational
6 procedures regarding the gaming operation.
7 The tribes are very cognizant of the fact that
8 failure is expected, anticipated, and in some cases, even hoped
9 for. Let me assure you, as someone with inside knowledge, this
10 just isn't going to happen.
11 I think it's also important to note that the
12 screening and hiring standards for Indian gaming is far more
13 demanding than the current California State requirements for the
14 State Lottery and the racing industry.
15 There are about 150 tribes in the United States using
16 gaming as a form of economic development. Any of these tribes
17 would welcome a comparison of crime statistics with Las Vegas,
18 Laughlin, or Atlantic City. Indian reservations are not only
19 where people work, it's where Indians live. It's home for
20 thousands of Native Americans. And like you and I, they don't
21 want crime in their neighborhood, either.
22 Let me use Casino Morongo as an example of security,
23 surveillance and safety in Indian gaming, particularly here in
24 California. The 40-member tribal police force at Casino Morongo
25 represents nearly 200 years of professional law enforcement
26 experience in California. Divided into three divisions --
27 parking lot security; uniform security; and surveillance -- the
28 tribal police ensure Casino Morongo remains a safe and

1 crime-free environment.

2 In the 18 months of our 24-hour continuous operation,
3 Casino Morongo has hosted over one million customers without the
4 occurrence of one major crime. An estimated 750,000 cars,
5 trucks and buses have come to the casino with only three
6 minor/major noninjury traffic accidents. Can any other
7 non-Indian gaming operation say this? I don't think so.

8 Casino Morongo's gaming operations are monitored by
9 an extensive network of 102 cameras manned by a diligent and
10 highly trained 24-hour surveillance team.

11 In addition to that, we have an internal and external
12 network of both human and electronic resources monitoring the
13 Casino's cash flow operation to ensure accountability, honesty,
14 and compliance with federal and Indian gaming regulations.

15 All of our money counts are conducted by a
16 combination of a tribal member, management team, and armed
17 tribal police officers. And all of it takes place under camera
18 surveillance.

19 Reinforcing this highly visible and effective tribal
20 police is tribal policy that also acts as a preventive policy.
21 Let me explain.

22 All of our Casino gaming employees are screened
23 carefully for credit and criminal background. No one, not one
24 -- no one with felony conviction of any type is permitted
25 employment. Even those with repeat petty offenses are turned
26 away. And once hired, the policy is zero tolerance of any type
27 of crime.

28 Reinforcing this practice is a policy of a drug-free

1 workplace. Again, all Casino employees are drug tested prior to
2 employment. Once they are employed, we have random drug testing
3 which is continuous.

4 As a direct result of these policies, never in the 18
5 months of our operation has an outside law enforcement agency
6 been summoned for help or assistance, not by a customer, not by
7 an employee, and not by the tribal police.

8 But outside law enforcement agencies do come. The
9 County Sheriff, the California Highway Patrol, County Probation,
10 State Police, Customs, the Department of Justice, they all come
11 to exchange valuable information and for support. These other
12 law enforcement professionals don't view us as some rogue,
13 crime- ridden, unregulated operation. They've seen behind the
14 scenes because we take them there. They've looked in every
15 corner. They know that we don't have any secrets, and they know
16 that we run a tight ship. And they treat us with respect, a
17 respect that we've earned by professional conduct.

18 On behalf of the Morongo Band of Mission Indians, I'd
19 like to invite each and every one of you to our Casino, and
20 we'll give you the opportunity to look in all the corners. But
21 knowing that it's difficult, if not impossible, for some of you,
22 my staff has prepared a short, behind-the-scenes video. It
23 pales in what we saw produced by our brothers at Sycuan earlier
24 today, but a picture is worth a thousand words, and it was shot
25 with our surveillance resources in the Casino. So, we'll give
26 you some idea of what we're capable of in policing the gaming
27 operations. The tribe has invested about $350,000 in state-of-
28 the-art surveillance equipment at Morongo.

1 CHAIRMAN TUCKER: How long is this tape?

2 MR. BARNES: It runs, perhaps, three minutes, sir.

3 CHAIRMAN TUCKER: Okay. Can we roll the tape?

4 --oo0oo--

5 MR. BARNES: Thank you for your attention to us, Mr.
6 Chairman and Members of the committee.

7 CHAIRMAN TUCKER: We will stop the tape now.

8 MR. BARNES: In conclusion, please allow me to assure
9 you, as an experienced and knowledgeable police officer, many
10 years for the State of California, and having some inside
11 knowledge of how Indian gaming works, especially again in
12 California, I see no evidence, no indication, that it's anything
13 other than crime-free and safe.

14 In addition to that, Indian gaming employs thousands
15 of local residents; provides safe entertainment for millions,
16 and is, pun intended, a great bet. And either the bet gets made
17 here in California, or more of California's gold goes to Nevada.

18 Thank you.

19 CHAIRMAN TUCKER: Thank you.

20 MR. LOMBARDI: Good afternoon. My name is Michael
21 Lombardi. I was born in California in 1949.

22 In 1975, I opened a community center in South Los
23 Angeles County which offered job training, gang diversion, and
24 child care programs. Our primary source of funding at that
25 center was a charity bingo game, which I managed for 9 years.

26 In 1989, I became the General Manager of the casino
27 you've just seen at Morongo, which is located 15 miles west of
28 Palm Springs, California. It's an Indian community composed of

1 approximately 800 members, of which my wife and my daughter are
2 enrolled members.
3 In the past two years, I've had the opportunity to
4 visit 15 of the Indian gaming facilities currently in operation
5 in the state. I've been permitted to examine the respective
6 gaming operations, study their internal control procedures, and
7 talk with elected tribal officials.
8 Regulation of gaming in general seeks to achieve two
9 objectives. One is to guarantee to all customers the integrity
10 and honesty of each and every game. And two is to protect the
11 assets of the business.
12 It is clear to me that California tribal leaders are
13 well aware of the importance of effective regulation in the
14 operation of their casinos. Tribal governments are cognizant of
15 the fact that regulation is in their own self-interest, as
16 you've seen today.
17 I have found that tribal presidents, their council
18 members, and their general tribal membership are obsessed with
19 the subject of the proper handling and the counting of their
20 gaming facilities' cash receipts.
21 The track record of California gaming tribes in
22 regulating the gambling and the counting activities of Indian
23 casinos demonstrates not only their commitment to building a
24 clean industry, but their ability to manage the gaming
25 businesses as professionally as state, county, and municipal
26 personnel charged with the responsibility of managing the
27 Lottery, horseracing, card rooms, and charity bingos. In fact,
28 Indian gaming is the most heavily regulated gaming business in

1 the United States today. Class III Indian gaming is subject to
2 four levels of governmental regulation: tribal governments,
3 state governments, the National Indian Gaming Commission, and
4 two departments of the executive branch of the federal
5 government, the Department of Justice and the Department of
6 Interior.

7 Class II Indian gaming is subject to regulation by
8 the National Indian Gaming Commission, as again you've heard
9 about today. And that's done in accordance with provisions
10 contained in the Indian Gaming Regulatory Act. Commission
11 regulations require all federally recognized tribes, indeed,
12 intent on offering Class II gaming to first enact a
13 comprehensive tribal gaming ordinance which must be approved by
14 the Commission. These regulations which you've heard about
15 clarify such important subject matter as: background
16 investigations on investors and key management personnel;
17 accounting procedures; permissible uses of gaming revenues;
18 payment of regulatory fees to the Commission; as well as the
19 conditions necessary for a tribe to obtain a certificate of
20 self-regulation.

21 It is the long-term goal of all California Indian
22 tribes to ultimately become self-regulating.

23 Over the past four years, I have observed that tribes
24 have made significant investments to improve their regulatory
25 capabilities. The tape today demonstrates the number of
26 different views that Casino Morongo's able to generate in terms
27 of monitoring the ongoing activity within their property.
28 They've also, as Dallas has pointed out to you, adopted strict

1 drug testing programs. They've established procedures to
2 require competitive bids on all equipment and service vendors in
3 the state -- something I think the State of California is
4 debating right now regarding their Lottery -- establishment or
5 significant upgrading of in-house security force personnel, and
6 the acquisition, installation of modern surveillance equipment.
7 As a result of the ongoing professionalization and
8 modernization of Indian gaming operations, many tribes are now
9 restructuring their traditional tribal governments to
10 incorporate independent gaming commissions or committees. This
11 growing trend enables tribal governments to separate the day-to-
12 day operation of their business ventures from political
13 concerns.
14 This trend is not peculiar to California Indian
15 gaming, but is a national trend which has contributed to the
16 growing professionalization of Indian gaming.
17 In the ongoing tribal-state compact negotiations,
18 tribes have been open and sensitive to the state's concern for
19 effective regulation of Indian gaming. Indeed, the issue of
20 regulation has been one of the least controversial of the
21 difficult issues addressed in the current negotiations. Keeping
22 undesirable elements out of California gaming, including Indian
23 gaming, is in the interest of both the state and the tribes.
24 Remember, the Indian citizens of our state have a
25 long history of dealing with unscrupulous characters that
26 cheated them out of their land, their rights, and their
27 money.
28 State and tribal representatives in the compact

1 negotiations have had dialogue on a number of subjects, which
2 Mr. Forman has covered, and I'll skip over that.
3 I'd like to conclude by pointing out that clearly,
4 the tribes that I have dealt with, and as I told you, I visited
5 15 of the current -- I believe there were 18 tribes currently
6 operating game facilities in the state -- have demonstrated not
7 only their willingness to submit to effective gaming regulation,
8 but have implemented their own regulatory efforts independently,
9 without prodding from the state.
10 The record indicates that while tribes will not
11 negotiate away their constitutionally guaranteed rights of
12 political sovereignty, they have conducted themselves in a
13 highly responsible manner. Vigilant, fair, and rigorous
14 regulation of California Indian gaming, in partnership with the
15 state and the tribes, would be a plus in the development of what
16 is an emerging industry in our state. And like it or not, it's
17 here to stay.
18 Thank you very much for the opportunity to address
19 the committee.
20 CHAIRMAN TUCKER: Thank you very much.
21 Any questions from Senator Dills or the rest of the
22 committee before we take a ten-minute break to allow our
23 stenographer to catch her breath.
24 [Thereupon a brief recess was taken.]
25 CHAIRMAN TUCKER: Let's take our seats. We're almost
26 halfway through with this hearing today. If all goes well,
27 we'll be out by Christmas.
28 All right, we are now at Section E, the status of

1 negotiations between the tribes and the states' Attorneys
2 General and Governors concerning amendments to IGRA.
3 MR. LEVINE: My remarks started out "good morning,"
4 so I'll have to amend --
5 CHAIRMAN TUCKER: Optimistic, weren't you.
6 MR. LEVINE: I'll have to amend that. Good
7 afternoon. My name is Jerome Levine. I'm an attorney from Los
8 Angeles engaged primarily in the practice of Indian and gaming
9 law, and I've been asked to testify today on the status of
10 negotiations at the federal level on the Indian Gaming
11 Regulatory Act.
12 Those negotiations are taking place with the
13 encouragement and support of Senators Inouye and McCain, the
14 Chairman and Vice Chairman of the Senate Committee on Indian
15 Affairs, and were convened in response to a number of
16 legislative proposals that have been discussed in legislation
17 that is pending before Congress now to provide some kind of a
18 dialogue between states and tribes in an effort to see if a
19 consensus could be reached on what amendments, if any, should be
20 made to the Indian Gaming Regulatory Act.
21 The states are represented in these negotiations by
22 the National Governors Association and the National Association
23 of Attorneys General. The tribes are represented by a coalition
24 of tribal leaders who have been organized by the National
25 Congress of American Indians and the National Indian Gaming
26 Association, the two largest tribally representational
27 organizations in the country.
28 I'm a member of the technical team which is advising

1 the tribes in these negotiations. The remarks I will make,
2 however, will be my own, and certainly not a position of any
3 negotiating team, either on an official or an unofficial basis.
4 Nor are they intended to give any indication as to what the
5 tendency might be, except to the extent that they reflect my
6 personal views.

7 I have to be somewhat circumspect about doing that,
8 because as with any negotiations, they are delicate. They
9 involved in this case particularly not only the legal issues,
10 the practical issues having to do with gaming, but also
11 political issues, and those that concern the public. And
12 therefore, we've tried to keep the negotiations discreet and
13 respect the interests of all the parties in these negotiations
14 in allowing us as much freedom as possible to be candid in
15 discussing these issues.

16 The negotiations emerged from a number of events
17 which have to be placed in a legal and legislative framework to
18 be fully understood. Much of that framework has been described
19 for you this morning. They are in my prepared remarks, and I
20 won't go through them in the detail that I have in my paper.

21 Suffice it to say, however, that I think the fact
22 that we've spent this much time on these hearings today
23 illustrates the fact that these issues are not simple issues.
24 They're not simple matters that can be resolved with sound
25 bytes, and there's been a tendency, I think, to attempt to try
26 and reach solutions on that basis.

27 Rather, these are issues that involve both complex
28 legal issues as well as social, political, and governmental

1 issues that concern both the states and the tribes. And they
2 emerged out of a history that has been described this morning
3 but needs to be, I think, reiterated in somewhat simplistic
4 terms, because they go to the very heart of the federal
5 negotiations that are taking place.

6 There has been a trend, obviously, in this country
7 towards gaming, both at the governmental and commercial levels.
8 Nearly every state permits some form of gaming now, and the
9 industry itself is dominated in large part by publicly held
10 corporations. Thus, gaming is, like it or not, an accepted form
11 of the entertainment business and an accepted mode of recreation
12 in our society.

13 The tribes recognized that trend in the 1970s, when,
14 with the government responsibilities that they had for hundreds
15 of thousands of lives -- and that point should not be lost;
16 these are governmental organizations, as George Forman pointed
17 out, and they do have responsibilities; for the most part, the
18 only government that many people ever relate to in this country.
19 Those governments were looking for ways to provide finances for
20 government programs, and gaming, as an emerging way of doing
21 that, seemed like an appropriate means, and appropriate it was.

22 Gaming, as you have heard and will hear more of, I'm
23 sure, has brought to the tribes not simply revenues, but the
24 other benefits that gaming in an enterprise setting provides;
25 namely, jobs, job training, and opportunities for tribal members
26 to find hope in receiving responsibility and advancement in
27 areas that they might not otherwise have had the opportunity to
28 engage in.

1 But as that gaming emerged on reservations, a battle
2 ensued. And the battle was between the states and the tribes
3 and was certainly not a new battle. It is a battle essentially
4 that is as old as the relationship between tribes and states in
5 this country. States have a natural interest in seeking control
6 over all activity within their borders, while tribes regard
7 control over their reservations as an intrusion into their
8 legitimate governmental sovereignty, a legitimate which is all
9 too often ignored.
10 Those developments ultimately led to the federal
11 Indian Gaming Regulatory Act, which was a delicate compromise
12 to, quote Congressman Udall, over these very principles of
13 tribal versus states' rights. And it is that compromise which
14 at the core of these negotiations.
15 As George Forman highlighted when he described the
16 fact that we are dealing with governmental organizations, it's a
17 governmental presence that is painfully absent from the civics
18 class concept that our political system is based only on local,
19 state and federal governments. The issue in our negotiations
20 encompass the position of that government in its relationship to
21 the state and vice-versa.
22 The Indian Gaming Act's delicate compromise provided
23 a recognition of the government's -- of the tribal governments'
24 right to regulate their own affairs in those areas in which the
25 public policy of the state was not violated. That was the basic
26 and essence of the holding in the Cabazon case, and that
27 principle, that public policy of the state principle, was what
28 was carried over into the Indian Gaming Regulatory Act. So,

1 where that act talks about permitting tribes to engage in that
2 form of gaming that is permitted within the state, the
3 permissive language that is used in the act has consistently
4 been interpreted by the tribes -- by the courts to mean what is
5 permitted under the public policy of the state.
6 And what that means exactly is that, as the Supreme
7 Court recognized, not simply what the states say they are
8 permitting or prohibiting, but what they actually do. In every
9 case, contrary to my colleague, Mr. Gede's comment, the same
10 principle has been upheld. Even though the facts of each of
11 these cases has differed -- and in some cases, the tribes have
12 won and in others they have lost -- the courts have consistently
13 held in case, after case, after case, that the principles of
14 public policy that are enunciated in the Cabazon case have been
15 carried forward into the Indian Gaming Regulatory Act and are
16 essential principles that must be preserved.
17 It is that principle that creates somewhat of a roll
18 of the dice that states have apparently decided to engage in by
19 allowing these issues that we've been discussing all day to be
20 resolved by the courts rather than dealing with them through the
21 negotiation process. Indeed, there are a number of successful
22 negotiations across the country. Some -- I believe over 80
23 tribes now have entered into tribal-state compacts, and those
24 compacts are functioning. They represent regulation at both the
25 tribal, state and federal levels. And for all intents and
26 purposes, they are a successful illustration of what the act was
27 intended to do.
28 On the other hand, there are a number of states that,

1 for one reason or another, have refused to go forward with the
2 compacting process. Even though the Indian Gaming Act provides
3 for a federal court remedy if that refusal occurs, states have
4 raised constitutional bars to letting the federal courts
5 participate in that process. And as a result, stalemates have
6 occurred across the country.

7 Thus, there's a frustration by the tribes that,
8 despite the fact that states negotiated themselves into the act,
9 negotiated a role for themselves in regulating Class III gaming,
10 when actually confronted with the opportunity to sit down and
11 negotiate their role, and resisting true, good faith
12 negotiation, with challenge in federal court, rather than
13 dealing with the issue squarely, they chose to hide behind
14 constitutional defenses that were never anticipated when they
15 placed themselves in the process itself.

16 As a result, you have not only this frustration by
17 the tribes, but you do have some frustration by the states
18 because the states are claiming that there's uncertainty still
19 in the act. Despite the fact that the courts have been
20 consistent in their recognition of the public policy test of
21 Cabazon that is included in the act, the states claim that
22 there's not enough certainty to tell them what it is they have
23 to negotiate.

24 We have contested that. Our contention is that the
25 cases that we've lost demonstrate more than amply that the
26 courts are more than able to separate out what is and what is
27 not within the public policy of the states, and what games must
28 be negotiated, and those games that cannot be. Moreover, the 80

1 compacts that have been entered into demonstrate that, left to
2 their own devices, states and tribes can -- are more than
3 adequately able to negotiate those issues themselves.
4 Nevertheless, the sense that there is some
5 uncertainty about what games are supposed to be negotiated, what
6 the scope of gaming is, coupled with the tribes' sense that this
7 compacting process is not functioning the way it should because
8 states are not operating under the act as it was intended, and
9 the pressure from commercial interests who would like to see all
10 Indian gaming destroyed because of the obvious threat that they
11 feel it has -- and I'll comment on that in a moment -- has
12 created this environment in which interests ranging from Donald
13 Trump, to more good faith efforts to try and deal with these
14 problems have been introduced into Congress.
15 My footnote was the fact that there -- that Indian
16 gaming represents about 3 percent of all the gaming in the
17 United States, probably will never grow to anything greater than
18 that, and the statistics of New Jersey and Nevada certainly show
19 that they have grown in the years that Indian gaming has come on
20 board, not diminished. The threat is one that, I think, used
21 for other purposes but not based in fact.
22 Our negotiations began last July. There was a
23 convening of tribal leaders, and governors, and attorneys
24 general in Washington, D.C. There was a general discussion
25 about the issues that had to be placed on the table, and those
26 included scope of gaming and some of these other issues that
27 I've mentioned. Some of them went to more specific matters,
28 such as control, accounting, things of that sort. But the basic

1 thrust of the negotiations and the discussion had to do with
2 scope of gaming and the role the states would play in relation
3 to what role the tribes would play in the Gaming Act.

4 The tribes' basic position is, there is no need for a
5 change in the Gaming Act. The courts have not had any
6 difficulty in interpreting the act; they've been consistent in
7 applying it. The cases have turned on factual distinctions that
8 vary from state to state, but not on legal principles.

9 SENATOR MADDY: Mr. Chairman.

10 CHAIRMAN DILLS: Senator Maddy.

11 SENATOR MADDY: I'm somewhat confused, because you
12 indicate that all these cases are so clear.

13 But again, what prompted the negotiations? I
14 understand that you're part of a negotiating team; you've been
15 given some authority of power by the committee of Congress to
16 negotiate --

17 MR. LEVINE: No, on the contrary.

18 Senators Inouye and McCain, on the Senate Committee
19 on Indian Affairs, have suggested that a dialogue be opened
20 between the states and the tribes on the issue of possible
21 amendments to the Indian Gaming Regulatory Act. And under those
22 auspices, we commenced --

23 SENATOR MADDY: And what prompted that?

24 MR. LEVINE: What prompted that was these various
25 perceptions that I've described, the various court decisions
26 that the states --

27 SENATOR MADDY: Well, you've indicated to me, you
28 just indicated in your testimony, that the court decisions are

1 clear.

2 So, is it the fact that the Conference of Governors

3 has indicated throughout the nation that they would like to have

4 some amendments, or is it legislators that are demanding

5 amendments, or who's demanding amendments, or what prompted

6 Senators Inouye and McCain to suggest, quote, "negotiations",

7 unquote?

8 MR. LEVINE: The amendments are coming from various

9 sources; sources, as I indicated --

10 SENATOR MADDY: Legislators. They're the ones who

11 can suggest amendments.

12 MR. LEVINE: Certainly from the Legislators. Those

13 that are interested in those Legislators introducing those

14 amendments are -- come from various sources. Some are clearly

15 private competitive interests.

16 SENATOR MADDY: Legislators indicate to you that's

17 where they come from?

18 MR. LEVINE: That appears to be the case, based on

19 those who are testifying in favor.

20 SENATOR MADDY: Have governors expressed some concern

21 about the --

22 MR. LEVINE: Absolutely.

23 SENATOR MADDY: -- Indian Gaming Regulatory Act?

24 MR. LEVINE: Absolutely.

25 SENATOR MADDY: Many governors? One governor, two

26 governors? I know our Governor has expressed some interest in

27 it.

28 MR. LEVINE: Well, I think I would differ to Mr. Gede

1 in that regard.

2 The governors have certainly taken positions. To the
3 extent to which every position is reflective of every governor's
4 position, I think that's a matter that Mr. Gede might be better
5 able to address than myself.

6 There's no question that governors have raised
7 issues, certainly one of those being the definition of the scope
8 of gaming. And it goes back to that very conflict that I
9 described earlier, and that is this tension between states and
10 tribes. States wanting to control everything within their
11 borders, including all that goes on on Indian reservations.

12 And as Mr. Feldman and others described this morning,
13 that's --

14 SENATOR MADDY: That's the scope of gaming issue. Our
15 Penal Code Section 330 and others, which define what's
16 permissible in California, and our Governor, I think, has
17 already expressed himself as having reservations or having
18 concerns about the fact that the Indian gaming, as interpreted
19 by the courts, Indian Gaming Act has allowed the Indians to go
20 beyond our Section 330.

21 MR. LEVINE: Well, it hasn't in the sense that we're
22 talking about federal law versus state law.

23 As a matter of federal law, nothing has gone beyond
24 that which Congress has deemed to be that part of state law
25 which is applicable to tribes.

26 The struggle here is by states who, having argued
27 this once and gotten part of a compromise that they wanted in
28 IGRA, apparently now want more and are dissatisfied with the

1 results that they're receiving from these court decisions.

2 SENATOR MADDY: And in the negotiations, is the

3 thought expressed to you that the Chairman and the Vice Chairman

4 would like to have, what, a consensus build between you

5 negotiators?

6 MR. LEVINE: I wouldn't -- I wouldn't go so far as to

7 say that they would like to have a consensus, only that they

8 have assisted in providing a forum for what is really an

9 historic event in American history, and that is a coming

10 together of all the tribes, or a representative number of tribes

11 in this country, and representative number of states and state

12 governors to try and negotiate an issue which is of mutual

13 concern. And we don't know of any precedence that proceed that.

14 One would hope that that forum is followed forever

15 for solving other areas where issues have arisen between tribes

16 and states.

17 SENATOR MADDY: And the issues again that are being

18 negotiated, if you could state those? Scope of gaming is one.

19 MR. LEVINE: Scope of gaming is certainly one.

20 SENATOR MADDY: When you speak of scope of gaming,

21 you're referring to what I mentioned before, what our state

22 prohibits our citizens from doing, versus what extent that the

23 Indian tribes may go beyond that in terms of gaming on the

24 reservations?

25 MR. LEVINE: No, because again, it isn't a question

26 of tribes going beyond anything. It's a question of --

27 SENATOR MADDY: Let me ask you a question.

28 We heard testimony. The Indian tribes here would

1 like to have games played on the reservations that others in
2 California -- card clubs, other forms of gaming that are
3 permissible -- cannot engage in. Is that correct? They've
4 already said that.

5 MR. LEVINE: What they want to do is follow the
6 federal law, and what the federal law says is, that they're
7 entitled -- that they may engage in those games which are
8 consistent with the public policy of the state. In other words,
9 that --

10 SENATOR MADDY: But the practical effect of that is
11 that on the Indian reservations, you'd be engaging in certain
12 activities, gaming activities, card games and others, that other
13 citizens could not engage in off the reservations here in
14 California because of the Penal Code sections.

15 MR. LEVINE: That might be the case if one were only
16 to look at state law as applied to state citizens, ignoring the
17 federal law.

18 SENATOR MADDY: It's state law applied to our
19 citizens versus federal, which is interpreting our state law,
20 which allows something to go beyond that on the Indian
21 reservations.

22 MR. LEVINE: That's what's been --

23 SENATOR MADDY: That's the nub of the problem.
24 You're not talking to a bunch of novices here on this committee.

25 MR. LEVINE: But that's not a new issue, though.

26 SENATOR MADDY: It's not a new issue, I know that.

27 MR. LEVINE: Bingo was played on reservations for
28 much larger jackpots than the state's limit of $250, which

1 creates, in effect, a crime if that limit is exceeded.

2 SENATOR MADDY: But that has been one of the problems
3 in terms of the State of California's view towards Indian
4 gaming.

5 MR. LEVINE: The perception that that is a problem is
6 what's creating this dialogue.

7 And I don't mean to be facetious by saying that.

8 SENATOR MADDY: You're being somewhat facetious,
9 because the Governor, who is being accused of not negotiating
10 the compact, has made the statement that is a concern of his.
11 Whether it's a perception of his, or a concern of his, or a real
12 life problem probably doesn't make any difference. But I think
13 it is a concern in terms of what you're asking us to do here
14 in the Legislature in view of the Governor's position versus
15 where the Indian tribes are.

16 MR. LEVINE: What that translates to is that the
17 state would not be satisfied, or the Governor would not be
18 satisfied, unless the letter of state law were followed by
19 tribes.

20 That, then, reverses 200 years of a balancing that's
21 taken place between states and tribes. And what I'm trying to
22 express is that this is not a unique situation. It's all
23 focused on gaming --

24 SENATOR MADDY: The point I'm trying to make is that
25 when you're "negotiating," quote-unquote, at the behest of the
26 Chairman, Mr. Inouye and Senator McCain, you are negotiating
27 over in part that issue; are you not? Isn't that what governors
28 have asked, that the Congress look at that issue?

1 MR. LEVINE: No, the negotiation really has to do
2 with whether or not the place at which state laws now
3 incorporated into federal law shifts from the point in which it
4 is now placed to some other point, and where on that spectrum
5 it's going to be placed.
6 SENATOR MADDY: I'll come back to Mr. Gede and see if
7 that's their same interpretation. I'm sure that the
8 interpretation you're putting on it is from your perspective in
9 the negotiations.
10 But what else besides the scope of gaming is being
11 negotiated?
12 MR. LEVINE: Well, there are various matters relating
13 to regulation of gaming. I think the Bank Secrecy Act was
14 mentioned earlier; that's probably an academic question. The
15 tribes are fully supportive of regulation and certainly --
16 SENATOR MADDY: In other words, having the Attorney
17 General's Office have some regulatory power over our card clubs,
18 over our race tracks, and then in some sense, over the Indian
19 tribes that are engaged in gaming?
20 MR. LEVINE: Well, the extent to which there would be
21 any jurisdiction over any Indian tribes would be a matter of
22 negotiation under the present federal scheme. In other words,
23 through your gaming commission, or through the Attorney
24 General's Office, or through some other body of the state, that
25 would be the state's call as to how it would want to implement
26 whatever regulation, regulatory role, it negotiates for itself
27 in its dealing with the tribes.
28 SENATOR MADDY: And my understanding is, the tribes

1 here in California are not opposed to negotiating over that
2 issue as far as the compact is concerned.

3 But what I'm trying to get from you is, what are you
4 negotiating at the federal level in terms of the Indian Gaming
5 Regulatory Act? Are you attempting to change the act in that
6 respect?

7 MR. LEVINE: At the federal level, we are discussing
8 whether or not the scope of gaming issue needs some further
9 clarification. Right now, the language has been interpreted by
10 a number of courts consistently. It says "permitted", and that
11 permission, as I said, is public policy.

12 SENATOR MADDY: Permits some state regulation.

13 MR. LEVINE: States have said that isn't defined
14 enough for them, and would like further clarification.

15 The question is, in clarifying that further, whether
16 or not that shifts the point -- that shifts the amount of state
17 law that's incorporated in the federal law. That's part of the
18 substance of the negotiations.

19 SENATOR MADDY: Is it anticipated by the Chairman and
20 the Vice Chairman that when negotiations reach some point, or at
21 some concluding point, they're going to open hearings and have
22 hearings on this issue in the next session of Congress?

23 MR. LEVINE: Well, there is no -- there's no bill
24 pending that has come out of these discussions that we're having
25 with the states.

26 I would assume that should a bill emerge, and in a
27 perfect world, a bill would emerge from these discussions, that
28 they would be the subject of hearings, certainly.

1 SENATOR MADDY: Thank you.

2 CHAIRMAN DILLS: Any other questions, comments?

3 MR. LEVINE: I'd just like to conclude and say that
4 the hearings have taken place for several months. We've met all
5 over the country. The various negotiating teams have caucused
6 at various times with their state or tribal representatives and
7 come back to the negotiating table. Negotiations sometimes have
8 taken three and four days at a time.

9 I think both sides have worked very hard to deal with
10 what are really very complex issues, and issues that do go to
11 the very core of this relationship between tribes and states.
12 It isn't simply a matter of deciding what kind of gaming the
13 state would like to see or not see on a particular reservation.
14 In my view, at least, it goes to the very essence of that
15 government-to-government relationship between tribes and states.

16 If nothing else emerges from these negotiations that
17 are now taking place, at least from a government-to-government
18 standpoint, I think there's been a great deal of understanding,
19 a clarification of the issues, and some definitions that will
20 help in any further legislation that might come down the pike.

21 Thank you.

22 CHAIRMAN DILLS: Are your services voluntarily? Who
23 picks up the tab for your tribe?

24 MR. LEVINE: I'm a representative in these
25 negotiations for the San Manuel Band of Mission Indians.

26 CHAIRMAN DILLS: One of the --

27 MR. LEVINE: One of the tribes.

28 CHAIRMAN DILLS: Thank you.

1 Next we have, again, the Special Assistant Attorney
2 General, Mr. Gede.
3 MR. GEDE: Thank you, Mr. Chairman.
4 I also need to mention that I serve as a member of
5 that task force and working group at the federal level. I was
6 asked to do so by the Conference of Western Attorneys General;
7 they serve as part of the national A.G.'s effort working with
8 the National Governors Association to see if some sort of
9 amendments can be fashioned to the Indian Gaming Act.
10 So, throughout the course of this year, we have met
11 at least eight, nine times in place throughout the country,
12 sitting down, face to face, talking about what the problems are
13 and how we can come to solving them.
14 But what I'd like to do is go to the heart of what
15 Senator Maddy has asked, and that is: what brought all this
16 about at the federal level?
17 I would submit that for most of the governors in the
18 country, it happened sometime in 1991, when the district court
19 in Wisconsin decided the Lac du Flambeau case. Not too long
20 thereafter, in 1992, the Sycuan Band of Mission Indians case was
21 decided here in California. And it is language like this that
22 sent governors scurrying to their Indian gaming lawyers and
23 attorneys general to say: what is going on?
24 Judge Huff in Sycuan Band ruled that, although
25 California prohibits the operation of slot machines in most
26 instances, California permits a great deal of other gaming
27 within the state. And because it permits a substantial amount
28 of gaming, the court concluded that the slot machine prohibition

1 is a civil regulatory law.
2 In short, several courts essentially pierced the
3 criminal prohibitions that existed within a state against
4 machine gaming and said it's just civil regulatory, no longer
5 criminal prohibitory, because the state permits other gaming, or
6 the state has a public policy in favor of gaming. And so, that
7 sent a lot of governors side ways. They weren't -- they weren't
8 prepared to understand that the Indian Gaming Act, and Cabazon
9 being incorporated into the central findings and the provisions
10 of the act, meant that if they have a state lottery, and they
11 prohibit casinos if they have a state lottery, and they prohibit
12 slot machines, that they have to give slot machines and casino
13 gaming to the tribes because they have a lottery. It just
14 didn't make sense.
15 And you've heard lawyers up here talking to you until
16 they're blue in the face, and we have argued until we're blue in
17 the face in front of federal judges and state judges, but it
18 didn't make sense to the governors. And so, on February 2nd,
19 1993, the National Governors Association, in their meeting,
20 passed a resolution that passed 49-1. Forty-nine governors of
21 this country voted in favor of this resolution, and only
22 Governor Finney of Kansas voted against it. Kansas, however,
23 makes no distinction between a lottery and a non-lottery; all
24 gaming is prize, consideration and chance, and their lottery is
25 in the same category as any other non-lottery gaming.
26 Forty-nine governors, however, asked that Congress
27 take action, and that it clarify that a tribe can operate those
28 specific games of the same type allowed in the state, and that

1 in particular, it should be clarified to state that a state is
2 not obligated to negotiate a compact to allow a tribe to operate
3 any and all forms of Class III gaming simply if the state
4 operates or allows one form of Class III gaming.
5 This is the origin of what people call the "any
6 equals all" dispute, and you will hear from the tribal attorneys
7 that that's a false distinction. And particularly in cases like
8 Minnesota, Wisconsin and Kansas, where there's no distinction
9 between lottery and non-lottery games, it may well be an
10 academic dispute. But it is not a dispute when you see
11 something like this coming out of Judge Huff, where other gaming
12 in the state opens the door for slot machines.
13 The governors then also requested that the Congress
14 clarify the meaning of good faith in the act so that it apply
15 evenly to both sides in the negotiating team between the state
16 and the tribes. Under the current law, only the state may be
17 found in bad faith; under the current law, only the state has an
18 obligation to negotiate in good faith.
19 That's not to suggest that the tribes don't negotiate
20 in good faith, but I'm just suggesting that it was clear to the
21 governors that it appeared to be one-sided to them. And the
22 reason why it was one-sided, Congress knew why it was one-sided;
23 Congress passed the law to provide a hammer on the states to
24 make sure that the tribes had some power in the negotiating
25 process because they may well not have had it otherwise. But
26 still, it didn't seem fair to the governors, and the governors
27 requested that that be evened out in its burden.
28 And finally, they request that the state's governor

1 has an absolute right to essentially bar gaming on land taken
2 into trust by the Secretary after the enactment of the act in
3 1988, and set it up for -- in trust for the purposes of gaming,
4 such as a plot in downtown Salem, Oregon, or a plot in downtown
5 Los Angeles, or anywhere. If the United States took that,
6 placed it into trust and permitted it to be used for gaming, the
7 governor should be able to essentially say yea or nay as to
8 whether the surrounding community -- whether it be adverse to
9 the surrounding community and the like. That right was not
10 entirely clear at the time the governors looked at this, and in
11 fact, it is still the subject of litigation.
12 And so, the governors, one, two, three, put these in
13 their resolution, and passed it in February by a vote of 49-1.
14 Then, as soon as that happened, the policy statement
15 in February raised to a more intense level interest in the issue
16 of Indian gaming and the issues relating to the expansion of
17 gaming beyond that which the states appeared to allow.
18 Secretary of Interior Bruce Babbitt, present at our meeting of
19 governors, then stated that he thought that IGRA permitted the
20 tribes a competitive advantage by offering and allowing the
21 tribes to have that kind of gaming which the states do not
22 allow, and that the tribes would thereby get a competitive
23 advantage. And he pointed to public opinion polls that -- and
24 court decisions that sided with the tribes' position for this.
25 But after much discussion with the governors, he
26 essentially backed down, and in a February 23rd letter to
27 Governor Bob Miller of Nevada, said that he had not yet decided
28 how it should be implemented, and that he noted that the states

1 had a legitimate question, and that they should play a primary
2 and substantial role in determining how IGRA should be
3 implemented.
4 After several meetings throughout March, and finally
5 by May, Senator Inouye and Vice Chairman McCain, and their
6 committee staff, arranged for a series of opportunities for
7 those two Senators and their staff to meet with governors, with
8 attorneys general, and with tribal leaders. And they did so
9 with the tribal leaders and the attorneys general on May 2nd in
10 Denver and exchanged views.
11 And at that point in time, the attorneys general made
12 it very clear that the need for clarifying the act revolved
13 around the question of the act needed to be more game-specific.
14 And by game-specific, what the attorneys general were referring
15 to was getting the act to express clearly, and not in a vague,
16 general, public policy Cabazon analysis, but very clearly: what
17 is it that states must negotiate when they sit down with the
18 Indian tribes. It just is not clear, and they asked that that
19 be the subject of it.
20 Immediately on the tail of those meetings, and on
21 May 26th of this year, Representative Robert Torricelli of New
22 Jersey, who clearly represents Atlantic City, introduced HR
23 2287, and on the same day, Senator Reid introduced S 1035, both
24 measures which reformed IGRA by restricting Class III tribal
25 gaming to the specific games and methods of play of gaming
26 activities expressly authorized by a state.
27 There are those who feel that this goes too far by
28 limiting the law solely to what the state expressly authorizes.

1 There is, of course, clearly the possibility that a state may
2 prohibit gaming in general and doesn't authorize anything, or
3 that it has exceptions to prohibitions and clear authorization
4 may not stand there. But in any case, both bills went forth in
5 the Congress, and with the introduction of the Reid and
6 Torricelli bills as a backdrop, Senator Inouye and Senator Reid
7 thought that it was important to start and continue the process
8 of a dialogue for and on behalf of the Senate Indian Affairs
9 Committee, because I think it's very clear that the Senate
10 Indian Affairs Committee would prefer to be in the lead on this
11 and not have Senator Reid or Mr. Torricelli, who represent
12 states and districts that are essentially commercial gaming
13 areas, that the committee come up with a bill, and that the
14 committee come up with a bill that satisfied the concerns of the
15 governors as well as the concerns of the tribes.

16 There was a meeting, then, on July 2nd, which I think
17 Mr. Levine referred to, in Washington, D.C. with tribal leaders,
18 governors, attorneys general, and a good number of the members
19 of the Senate Indian Affairs Committee to discuss the whole
20 question. And questions were regularly raised by the states'
21 side as to whether the state lotteries opened the door for
22 casino gambling.

23 Senator McCain asked the question directly to Mr.
24 Feldman, and the answer was: it depends. It depends on the
25 states; it depends on the state law; it depends on Cabazon; it
26 depends on the public policy of the state and how you analyze it
27 and look at it. And federal judges can analyze that and come up
28 with the answer.

That's not the answer the governors want. The governors have asked for an act that clarifies what it is they're expected to negotiate, and that governors cannot all read Cabazon the same way. In fact, there're as many people who read Cabazon as there are interpretations of what Cabazon means. But governors, as opposed to federal judges, ought to be able to know what it is that they're going to sit down and negotiate.

All that came out of that meeting on July 2nd was an agreement that IGRA should be amended: to resolve the outstanding differences and litigation between the tribes; agreement that certain law enforcement concerns would be addressed in any effort to amend the act; that no proposed amendments would be offered by the committee until there was consensus on all the amendments, so that it wouldn't go piecemeal, part by part; and the formation of a working group to sit down between state staff and tribal attorneys to meet and develop appropriate language or amendments to IGRA that would then be the joint product of the parties and the committee, and it would become then the committee's bill. And as Senator Inouye then said, if it's the committee's bill, it will be the Senate's bill; if it's the Senate's bill, it will be the Congress's bill.

The staff level meetings then proceeded throughout the rest of this year, where a number of proposals floated around that would streamline the Indian Gaming Act in such a way that compacts would be reached sooner and earlier, and without certain constitutional impediments that the states have offered as part of the problem in the Indian Gaming Act.

1 The tribes have strongly supported those. Those
2 generally were the suggestion of the states, however. And so,
3 there was a good deal of give and take with the states and the
4 tribes on a lot of the process about how IGRA could be amended
5 to work better.
6 But the final sticking point and remains the
7 game-specific question, which is just where you are today, right
8 here in California. And the states have proposed, had proposed,
9 and have asked that the gaming act, the federal gaming act, be
10 amended in such a way that it makes clear distinctions between
11 certain types of gaming, particularly those that have lotteries
12 and don't permit casinos. Particularly those that have
13 lotteries and don't allow, as a matter of criminal prohibitory
14 law, slot machines. And there's been no success so far.
15 The committee has asked, and is urging, that the
16 tribal attorneys and the states' staff attorneys continue to
17 work, continue to work out some sort of dialogue on that. The
18 governors are reviewing some of the questions of where we are at
19 in that process. The tribal attorneys and the tribal chairs are
20 reviewing where we are at in that process, and the time probably
21 will tell. I'm not sure that there's an easy answer.
22 But you can appreciate, and I think the point of what
23 I'm trying to get at, you can appreciate that what the
24 negotiators have faced at the federal level is precisely the
25 question that you have in front of you here in California, and
26 that is: just exactly what is it in a state opens the doors to
27 what in tribal-state negotiations?
28 And all the governors have asked, and the whole

purpose of this exercise, was to get the act to reflect those distinctions, as opposed to leaving it to federal judges in each case.

Thank you.

CHAIRMAN DILLS: Questions or comments?

MR. LEVINE: May I just comment, just briefly?

CHAIRMAN DILLS: Yes, sir.

MR. LEVINE: Just in response to one or two of the remarks that Mr. Gede made.

The issue of what is game-specific goes back to that core issue of whether or not the state law, as it is written, is going to apply to a reservation. And that's the core issue of the degree to which states can, in fact, control activities on reservations.

That in turn goes to the very thing that we've been discussing for over a hundred years now, and that is this balance between tribal government needs and tribal governments' ability to regulate, and states' need to regulate. And that's something that the Supreme Court took into account very seriously when it decided the Cabazon case, and that was a 6-3 decision. That was also something that was taken into account when the Indian Gaming Regulatory Act finally emerged after several years of very hard negotiations. In fact, negotiations in which the states had no role at first.

So that, we have reached this delicate point of balancing those, and I just submit to you that it is a very difficult and a very complex question of how one clarifies what is not a bright-line test, and may never be able to be a bright-

line test without violating years and years of a relationship that tribes have had with states.

Thank you.

CHAIRMAN DILLS: Thank you.

All right, going along now with the program for the afternoon, the future of Indian gaming in California, projected growth and revenues, and economic impact on tribes and local communities. Mr. Pico, Chairman, Viejas Indian Gaming.

MR. PICO: Members of the Committee, thank you very much for giving me the opportunity to be here again. It's going to be a long afternoon with all the people to speak. I'm going to go as fast as I can.

In regards to economic impacts on Indian reservations and off Indian reservations, especially in those areas, and I speak specifically for San Diego County, San Diego County has three Indian reservations there: Verona, Viejas, and Sycuan. Ninety percent of the people that are involved in those casinos there are non-Indian people. Casinos on reservations in San Diego County are located in pockets of poverty, and there are a lot of people out there that are on welfare.

Several studies have been done nationwide with regard to the effects of gaming on off-reservation. California does not have a similar statewide study. The reservations have not yet completed one, but we're certainly -- we find that as a need to convince and to show others that there are tremendous amounts of benefits that are going on off the reservation.

Just as an example, though, a thumb-nail sketch, Sycuan employs over 800 people with an annual payroll of $12

1 million. And almost 90 percent of the employees are
2 non-Indians. Total expenditures in the county by the Sycuan
3 Band from 1992 totaled $21 million.
4 The last five years, Sycuan has not received a single
5 tax dollar, operating its tribal government and reservation
6 program solely with gaming revenues. This is, of course,
7 exactly the type of economic self-sufficiency that the Indian
8 Gaming Regulatory Act was intended to promote.
9 Under Section C of your three-ring binder, there are
10 some statistics there in regards to Sycuan about the financial
11 benefits of off-reservation and on-reservation. So, I'm just
12 going to make this real brief, and I think that's going to be
13 it, because I think you just go ahead and look at it yourself.
14 I think you want to get moving as fast as possible.
15 Thank you.
16 CHAIRMAN DILLS: Thank you very much.
17 Any questions?
18 All right, we have the Chairwoman, San Manuel Tribe,
19 Norma Manzano.
20 MS. MANZANO: Good afternoon. My name is Norma
21 Manzano. I'm the Chairperson for San Manuel Band of Mission
22 Indians in San Bernardino, California.
23 Prior to being elected Chairperson, I served on our
24 tribal council for 13 years.
25 Before discussing where Indian gaming appears to be
26 going in our tribe, it is important to understand where we have
27 been.
28 My ancestors once lived in an approximately 80-square

1 mile area, what they call the Inland Empire, for thousands and
2 thousands of years. In the late 1800s, in the name of progress
3 for others, not ours, but not for us, those of my tribe who were
4 not wiped out by disease from the Europeans were rounded up and
5 chased by the state militia onto a one-square mile hillside.
6 That is steep, rocky and bare, right over the San Andreas Fault.
7 San Manuel Indian Bingo seats 2700 people and
8 employs over 300. On my reservation, our children had no
9 interest in finishing school, no hopes, no dreams. Just like on
10 other reservations that didn't have any economic development,
11 alcohol and drugs were a problem, only because they thought they
12 had no future.
13 Those conditions continued until we opened our gaming
14 project in 1986. Indian gaming is giving us a future, not only
15 for our children, but for our older -- for our other tribal
16 members as well.
17 Education, Indian gaming revenue has given us the
18 opportunity to give our children the education they need to
19 survive in this world. Without education, it is impossible to
20 hold a decent job. We have an education program that gives our
21 children full scholarships that start from kindergarten to
22 college age to trade school, not only for our children, but we
23 give it to the children in the community. Now they have hopes,
24 and dreams, and goals that are coming true.
25 Employment, our bingo hall employs over 300 people,
26 not only my tribal members but community members as well.
27 Employment for tribal members starts from maintenance to payroll
28 to management.

1 Health care, you know how health care is so important
2 to all of us, just as it's important to everybody right now.
3 Now my members have health care and insurance. Now we don't
4 have to depend on state or federal government for health care.
5 Housing, Indian gaming has given us the opportunity
6 to buy back our land that was taken away from us hundreds of
7 years ago. Now we can provide housing to our tribal members.
8 We have given millions of dollars to the community of
9 San Bernardino for community use, no strings attached. We want
10 to work with the community. We buy over a million dollars in
11 supplies and goods from local vendors. We gave $20,000 to the
12 senior citizen program near us so it wouldn't close, so they
13 could get hot lunches.
14 We plan on using Indian -- we plan on using gaming
15 revenue to expand our medical clinic on my reservation so the
16 urban Indians and community can get the health care they
17 desperately need.
18 I hope you understand how important it is to us.
19 Without this enterprise, we wouldn't have education, health
20 care, housing, employment. Our tribal members are now off the
21 welfare roll and now on the tax roll.
22 Please don't make us go back to living on welfare.
23 Thank you.
24 CHAIRMAN DILLS: Thank you.
25 Any questions, comments?
26 All right, Barbara Murphy.
27 MS. MURPHY: Good afternoon, elders, honorable
28 statesmen. I guess that's what you are.

1 CHAIRMAN TUCKER: It's questionable.

2 CHAIRMAN DILLS: We're statesmen until we run for
3 office, then we're politicians.

4 MS. MURPHY: Okay. We'll I'm also having to run for
5 office every year, because that's what I am, a legislator in my
6 community. I'm a council member, but I'm also a member of that
7 community.

8 CHAIRMAN DILLS: You're from where my daughter lives.

9 MS. MURPHY: I hope she comes and plays bingo at Win
10 River Bingo.

11 I would like to start out by saying, I haven't
12 prepared my speech. I listened today, and what I have to say
13 comes from my experience from a tribal perspective, from a
14 community perspective, and from someone who's a native
15 Californian, native to this country, and to my area.

16 Our people on our rancheria, which I'll profile for
17 you. It's 30.89 acres, which was set aside for homeless Indians
18 in the 1930s by the State of California and the federal
19 government.

20 On my rancheria, the people that settled there at
21 that time were Wintun Noralmic, which is the Band, Pit River
22 Madacy, and then there are some Yannahs that are mixed with the
23 Pit River people.

24 Now, there are no Yannahs, according to the
25 historians, left in the universities here today. The Ishi, the
26 film Ishi, is the last Yannah; that's not true. Some Yannahs
27 escaped to Pit River country in eastern Shasta County, and
28 that's some of my family.

1 Our rancheria, like most rancherias, was given -- our
2 tribal government was given a task in an open election of an
3 obligation, a duty, a responsibility to ensure that the social
4 and economic needs of our people are looked after.
5 I want to start again. I want to apologize first,
6 because that's my way; that's my people's way, to apologize if I
7 offend you today, because some of the statements I might say are
8 going to be very strong. They're going to reinforce some
9 statements I heard earlier about the attitudes, and getting back
10 -- the Indian people getting back at the non-Indians, and this
11 gaming somehow is characterized in that way.
12 I know when I stand up here before you that I'm not
13 going to change your attitudes, your conditioning, and your
14 beliefs. But your are also not going to change my beliefs, my
15 conditionings, and my feeling about what is right for us.
16 What I need to say, and I'm shaking very badly, I'm
17 sorry, is that --
18 CHAIRMAN TUCKER: Just relax and take your time.
19 MS. MURPHY: The Indians in California did not sell
20 their sovereignty, did not sell their right to self-government,
21 did not sell their right to self-sufficiency for 41 cents an
22 acre. And that is what the State of California purchased from
23 us, our land and all of the resources that went with it for 41
24 cents an acre. My family each received $160 each. Later on,
25 they got another $640. That winter, my mother got a coat, the
26 first coat she'd ever had since I was born. There were nine
27 children in the family. But that's what she got, was a coat for
28 her land, her rights.

1 But what we didn't give up was a little old piece of
2 land that had been set aside so we would have a place to live.
3 But what we didn't give up, like I say again, was our right to
4 govern ourselves, our right to sovereignty, and our right to be
5 self-sufficient in this world.

6 Redding Rancheria has looked at gaming. We
7 re-established our tribal government in 1986, and immediately
8 upon us establishing our tribal government, we had contract
9 managers and investors coming out our ears. We went through at
10 least four of those contract managers before we decided on a
11 management agreement with a company that was located in
12 Albuquerque, New Mexico. And the reason we decided to go with
13 this particular contract manager for bingo only was because of
14 the ten years of experience that this individual, president of
15 the company, had.

16 The other thing that sold us on the contract manager,
17 president of the company, was the fact that when we went out to
18 look at the enterprise in Albuquerque, we looked at the internal
19 controls. We looked at the way that they handled cash. We
20 looked at the respect that the tribe itself had for this
21 manager. And then we met with the tribal officials, absent of
22 this individual, and we talked tribe to tribe. We talked about
23 what the experience of this person was, that person's integrity,
24 that person's credibility, that person's honesty, that person's
25 capability. We talked about all the things you would look for
26 in a business partner, and that's exactly what we were looking
27 for, a business partner.

28 We had no money. We didn't have five cents. In

1 fact, we funded our own travel. Our tribal government was just
2 getting started. We had very little Bureau of Indian Affairs
3 moneys to -- and you can't use that to develop economic
4 development. At that point in time, you couldn't use it.
5 But we would not take five cents from a contract
6 manager or an investment firm because we felt that that would
7 obligate us in some way, and we could not sit down and negotiate
8 honestly; we could not negotiate in a way where our hands were
9 completely clean.
10 We had no attorney. We had no funds for an attorney,
11 so we wrote the contract ourselves, and we negotiated it,
12 meeting after meeting. It took us 18 months from what I call
13 "from the stump to the dump," because I used to be in logging.
14 I used to be a log scaler and a lumber grader, so I'll talk
15 about "stump to dump." That was from the day we started
16 negotiating it until we had the Bureau of Indian Affairs'
17 approval. We had done everything we were supposed to do, and we
18 had a contract that we could live with.
19 The contract did not waive sovereignty. We refused
20 to waive sovereignty. It has a nonbinding arbitration, so if we
21 get into a dispute with our contract manager, we're not bound by
22 the arbitrator's decision. It was a split that in those times
23 was unheard of.
24 We had tribal preference. We have control over who's
25 hired. We have control over all contracts exceeding $25,000.
26 And we were able to use the Indian Gaming Regulatory Act to
27 guide us in negotiating, because we said it's in the act, and
28 that's what's got to be there. It's very hard for somebody to

1 sit on the other side of the table and say, "No, we can't do
2 that."
3 When we got down to the final requirements of the
4 Bureau of Indian Affairs, which now, I look back and say they
5 were probably good ideas that they had, and we took them into
6 account because they had had their experiences with gaming
7 ventures that, somehow, something had gone wrong with them, so
8 they were using their experiences to tell us things that were
9 needed. One of the things we have is a minimum guarantee
10 payment. If the enterprise doesn't make five cents, our tribe
11 makes 120,000 a year, without us doing anything.
12 The second thing that they required was for, in our
13 management agreement, was to make as the second payment was a --
14 on the loan that we owed was priority payment, so that we would
15 pay in five years, pay off the loan.
16 Now, when you are going out, and you're going to ask,
17 think about yourself in business. You're going to ask somebody
18 to invest in an enterprise with, according to most people's
19 attitudes about Indian tribes and Indians, no business
20 experience, they have elections every year, their council
21 changes, and you're going to ask them to invest close to $3
22 million to build a building, equip it, and start-up capital.
23 And what are you going to have for collateral? You can't own
24 the land. You can't own the building. You can't own the
25 equipment, unless they waive sovereignty.
26 So right now, today, when we opened the doors on May
27 the 1st this year, we own the land. It's on our rancheria. We
28 own the building; we own every bit of equipment lock, stock and

1 barrel. Everything belongs to the tribe. And we have a $2.8
2 million debt, and we have to pay it off in five years. And to
3 do that, we've got to be good business people, and we've got to
4 have good business managers.
5 And we currently are into Shasta County, busing
6 people from Oregon. Instead of people leaving California to
7 gamble into Nevada, we're busing them from Oregon into
8 California, and they stay in Northern California in motels and
9 hotels that we have arrangements with. And they spend their
10 money in Shasta County. They spend it on goods and services.
11 You might wonder what our membership felt like when
12 we started to get this thing off the ground. We did a
13 referendum, like a lot of tribes did. We said: do you want
14 gaming, or do you not want gaming, and here are some of the
15 adverse impacts, et cetera. And overwhelming, our people were
16 in favor of gambling on our rancheria.
17 And I'll tell you, it's dead set right in the middle
18 of our rancheria. We have children playing all up and down the
19 road. We purchased homes from people who'd lived there all
20 their lives to get land, and now there's pavement. We lost some
21 of our trees, but still, because of where the people are coming
22 from in terms of their future, and the future of the elders, and
23 the future of our children, they were willing to let this --
24 this 40,000 square foot building be built right in the middle of
25 their community. As soon as we got the road back, we put speed
26 bumps in because we're worried about our children.
27 We had to develop legislation. We had to have a
28 gaming ordinance. And in that gaming ordinance, it spells out

1 specifically all the requirements for background checks,
2 licensing, who can and who can't do what. It's our law for
3 gaming on our rancheria.
4 We had to have an environmental impact study done,
5 which had to be approved with the management agreement by the
6 Bureau of Indian Affairs. That environmental impact study had
7 to be done by a firm licensed, qualified to do it. And there
8 was a range of mitigation measures that were necessary to
9 protect the surrounding environment, including our neighbors,
10 the road. And we have paid our fair share all the way along
11 whenever we had to. We've never not paid for what we impacted
12 on.
13 In terms of developing our tribal council, one of the
14 things that we do is, we know how to read a business statement,
15 income statement, financial statement. And there are programs
16 underway in terms of looking at where are we going with future
17 economic development, because that's what they see gaming as, as
18 a business, and as a business it has to be run as a business.
19 In addition to our gaming enterprise, our tribe
20 employs another 66 people in tribal government. We have a
21 comprehensive health clinic in Redding where we provide -- we
22 have a full-time -- we have a pharmacy. We have medical,
23 dental, physiotherapy. We have a full-fledged primary health
24 clinic. We provide health care to 8500 -- it's 8,900 registered
25 patients. Those are Indians, Indians and their families, who
26 are from that area.
27 Those dollars for that health program are federal
28 dollars. Our tribes receives no state dollars. We have never

1 applied for, and never intend to apply for, state dollars
2 because we see our relationship one with the federal government
3 and the tribe.

4 While we tend to be living in the State of
5 California, and our reservation is located there, the
6 relationship we have with the federal government is one which is
7 what sustains us. They call it a trust relationship. In some
8 cases, it's not always been the best and well-meaning trust
9 relationship from their perspective, but it's one which has been
10 fought for by our people in treaties that are in existence all
11 through the country. In California, those treaties weren't
12 ratified, but that doesn't mean that the same intent is not in
13 this state.

14 Since May, our -- we have a charity game, and we've
15 given away $18,000 since May to local charities. We're going to
16 spend this year, just on our gaming enterprise, about $120,000
17 in local supplies. And those are all local vendors. We insist
18 on using local vendors. Our payroll in our gaming enterprise is
19 1.6 million; in our tribe, it's 1.5 million.

20 When we first started, the unemployment rate for our
21 people was 85 percent. Did that mean our people are lazy? Our
22 people don't want to work, or what? I don't know. But in our
23 gaming enterprise and in our tribe, we're 98 percent Native
24 American employed, and the majority of those Native Americans
25 are from our area, are either our tribal members or our people
26 from our area. We were, again, very adamant in the management
27 agreement that we did not want to have people brought in, even
28 though they're Native Americans, from outside, and coming in,

1 when we have local people who don't have jobs.
2 We have people working in our enterprise who've never
3 ever rented an apartment. They've never had a bank account.
4 They've never purchased a car. In fact, a lot of them have
5 never had a driver's license. But they are now seeking help
6 with obtaining those basic necessities of life.
7 That's what our gaming enterprise has done in our
8 area. There's pride. There's self-esteem, and there's --
9 there's a feeling in our community of hope, and that hope
10 signifies itself in that we have, for three months now, a sweat
11 house. And you have, I know in Shasta County, I don't know how
12 many churches there are, but there's lots of churches. And for
13 us, our churches are sweats. And for three months, we have now
14 actively, three times a week, people who never knew their songs,
15 people who never understood who they were, people who don't
16 understand what their religion is, actually coming and sweating,
17 and learning about themselves. And it's like a revitalization
18 of our -- of our spiritual -- it's a spiritual awakening in our
19 community.
20 And you can spout all the legal ramifications about
21 the citizens you're elected to look after, but I'm telling you
22 what it's like in our community for those citizens we're elected
23 to look after. Every time -- and many of those people that are
24 in those sweats, we're looking, and we know who they are. They
25 come out of your prisons. I don't know how much it costs to
26 keep them there, but it costs you, taxpayer, you, Legislator,
27 lots of money. It cost you money, but it cost their families
28 heartache and grief.

1 But those people are in those sweats, and I believe
2 they're going to make it. And there is work for them in our
3 enterprise because we believe in them. We believe in what they
4 can do and what we're about.
5 Our management -- another one of our things we
6 insisted on was that everyone of our managers had to be a tribal
7 member. And we have no manager who's over 30 years old.
8 They're being trained to run the enterprise because, in five
9 years, we don't intend to split with anybody our profits. Those
10 profits are going to be plugged back into our community, into
11 housing, education, economic development, because we're going to
12 be self-sufficient like the Sycuans.
13 And it won't matter what happens to the deficit. It
14 won't matter what happens in the State of California in terms of
15 all the banks, and whatever else, because somehow, we will have
16 looked after our own self, and that's where it's at.
17 I'm not going to say any more, except I know you have
18 a difficult decision. I know you have the power in this state
19 to make change.
20 I'm asking you to think like an Indian. And I don't
21 know whether that's possible or not, but I'll tell you, our
22 people have struggled, survived, and we're still here. And what
23 we've got today is -- and what you've got today is because we
24 shared it with you.
25 Now we're asking you to share with us economic
26 future, because this is one way on those pieces of rocks or
27 little mountains, like she talked about, that we can change our
28 lives and our children's lives.

1 I thank you very much.

2 CHAIRMAN DILLS: Thank you.

3 I want to say to you, and I'm sure I express the
4 opinion of all the Members of the committee and witnesses here,
5 that you don't need to write down anything. You said it all,
6 and you said it beautifully.

7 One of the nice things about this having been
8 recorded, this is a story that I will love to read to my
9 grandchildren.

10 Assemblyman Baca has a comment or a question.

11 ASSEMBLYMAN BACA: Thank you, Mr. Chair.

12 As an individual who was raised up in poverty,
13 realizing that hope, realizing, of course, the need for health,
14 education, housing, and recreational facilities, knowing that
15 there is economic stability within each of the areas, as I look
16 at the 14 or 15 Indian tribal games, the possibility of
17 establishing them, I asked the question only from a point of
18 being concerned in the area of the infrastructure in the
19 surrounding communities, and wondering if you have done any
20 forecasting or planning with Caltrans, with local law
21 enforcement? As we look at the possibility of growth in the
22 area of more people going, and utilizing the gaming, if in fact
23 it is established, and people have an opportunity, I'm concerned
24 with the infrastructure in that area, and the traffic congestion
25 which effects in those communities as well.

26 As we've seen development go on in areas, it affects
27 the other communities, not only the economic aspect of growth in
28 that one area, but how it affects the surrounding communities.

1 I look at a couple of them when I look at Morongo, and I look at
2 San Manuel, and where they're located, and its effects on the
3 economy and the infrastructure in that area.
4 What is being done in the forecasting and the
5 planning with the surrounding communities as you begin to grow?
6 MS. MANZANO: I'd like to answer that.
7 From San Manuel, we have tribal security. Tribal
8 security is off-duty or retired police from San Bernardino.
9 We have worked with the council of San Bernardino to
10 make sure that we understand what the concerns were of the
11 community around us, the neighborhoods around us.
12 We're not just trying to -- our enterprise, we don't
13 want to put a hardship on the neighborhood around us, so we make
14 sure that we -- that the traffic flow isn't interrupting the
15 neighborhoods around us.
16 ASSEMBLYMAN BACA: Norma, what I'm really saying is
17 that you need to work closely with Caltrans and other areas as
18 you begin to forecast in the traffic congestion in that area.
19 As you expand and more and more people have an opportunity to
20 utilize the gaming, it's going to affect that area.
21 So, what I'm saying is that somewhere along the
22 tribal -- you, as a Chair, have to begin to work with them in
23 forecasting, and developing, and planning what needs to be done
24 to meet the growth. If you look at future growth of the State
25 of California, future growth within those communities, which
26 means more people will utilize the gaming, but it'll affect
27 those areas.
28 MS. MANZANO: Okay. Now, my tribal attorney, Jerry

1 Levine, just reminded me that we have given San Bernardino
2 $700,000 for them to be able to take care of that problem. So,
3 we have been giving money to San Bernardino to make sure they
4 took care of that.

5 CHAIRMAN TUCKER: Plus, she was also pointing out
6 earlier that all of those particulars will be worked out in a
7 compact --

8 MS. MANZANO: Right.

9 CHAIRMAN TUCKER: -- when and if the state and the
10 tribes ever sit down and hammer out an Indian gaming compact.

11 MS. MURPHY: Well, I'd like to answer.

12 We're a member of the Chamber of Commerce. We meet
13 regularly with the Economic Development Corporation of Shasta
14 County.

15 We have had meetings with Caltrans. We have had
16 meetings with the Board of Supervisors. We've had meetings with
17 the City of Redding.

18 In fact, we've not been successful in obtaining
19 water. We need water desperately. We have a well which is for
20 our facility. We need to be able to negotiate an agreement with
21 the City for water. But for whatever reason, we've stalled with
22 them because they want to control the land use. That's not
23 possible, yet our concerns are the same as theirs. When
24 somebody drives into our rancheria to play in our establishment,
25 we want them to drive in and be safe getting in and out. We
26 want them to come back and play. We also want to have water,
27 enough so that if there is a fire, we have sprinklers that will
28 stop a fire.

1 We are negotiating an agreement with the CDF so that
2 we're going to be paying a fee to them for fire services. We
3 don't have to, but we are willing to do those kind of things,
4 reach agreement on government-kind of measures which impact on
5 the surrounding area.
6 We are very willing to sit down and spend money to
7 ensure that those patrons who visit our rancheria and spend
8 their money and go away, and spend their money in the community
9 outside there, are safe and secure.
10 So, I think most tribes, most gaming tribes that I
11 know of, work real hard at doing that. I know that in the
12 compact negotiations, we're going to be required to ensure that
13 those things are looked after.
14 CHAIRMAN TUCKER: Any more questions, comments?
15 MR. PICO: Ditto.
16 CHAIRMAN TUCKER: All right, I couldn't have said it
17 better myself.
18 Let's move on to our last portion, Section G,
19 Federation of California Racing Associations, Norm Towne.
20 Before you start, we are going to take a ten-minute
21 break, then we will have testimony from Lou Sheldon and Rodney
22 Blonien on the last panel.
23 [Thereupon a brief recess was taken.]
24 CHAIRMAN TUCKER: Please take your seats and we'll
25 bring this committee home for closure within the next half hour.
26 Mr. Towne.
27 MR. TOWNE: Thank you, Chairman Dills, Chairman
28 Tucker, Members of the committee. I'm Norm Towne, representing

1 the Federal of California Racing Associations.
2 I was reading a front page article in the U.S.A.
3 Today not too long ago that, according to a statistic they cited
4 in there, said that Americans have a new national pastime: 70
5 million people attended major league baseball games last year,
6 while 88 million attended casinos.
7 And the horseracing industry is well aware of these
8 statistics, and we're not here today to debate the merits of
9 Indian gaming, nor do we come here with our heads buried in the
10 sand when it comes to gambling in general.
11 While today's hearing is centered on Indian gaming,
12 the real issue for horseracing has nothing to do with Native
13 Americans and everything to do with casino gambling. What is
14 critical to the future existence of horseracing as we currently
15 know it is the public policy question towards gambling in
16 general, and casino gambling in particular.
17 I would submit that earlier, Assemblyman Richter and,
18 I believe, Senator Maddy and Senator Torres briefly touched on
19 the point that this Legislature can do something about
20 California's public policy toward gaming. We don't have to wait
21 for negotiations to take place between the Governor's Office and
22 the Indian tribes. We don't have to wait for the steamroller of
23 gambling in general just to force us into a position.
24 I believe that the question is still open, and that
25 this Legislature can affect that process.
26 Horseracing is not a Johnny-come-lately when it comes
27 to gambling. For 60 years, the horseracing industry has been a
28 strong and successful business, a viable part of California's

economy, and gambling has been an integral part of that success.

Racing is also a major tourist attraction which entertains millions of people annually and produces great economic benefits for this state. For example, just recently the Oak Tree Racing Association and Santa Anita Race Track brought the Breeder's Cup to California. The Breeder's Cup is the equivalent of the Super Bowl of horseracing, if you will. This focused international attention on California. Millions of people worldwide watched the event and set a North American record by wagering in excess of $80 million on the seven Breeder's Cup races. This was the fourth time in the ten-year history of the Breeder's Cup that California has hosted the event.

California's race tracks are in the forefront of racing nationally and internationally. Six of our tracks are in the top ten in terms of attendance and handle in this country, and only New York has any tracks that split those top six.

Now, the Breeder's Cup is just one day. It brings a lot of attention to California, and most observers this year said this was the best Breeder's Cup and probably the finest competitive event in thoroughbred racing's history.

But it is racing's day-to-day activity that generates more than 30,000 jobs and a $3 billion annual economic impact, a positive one, to the State of California.

Additionally, horseracing is the only privately operated gambling enterprise that directly benefits the state General Fund. Since its inception, horseracing in California has contributed more than $3½ billion directly to state funds.

1 And just in the last ten years alone, these taxes, known as
2 license fees, have amounted to $1.4 billion.
3 In addition to those direct revenues, California's
4 race tracks contribute more than $2 million annually to
5 charities across this state. We are an important part of the
6 agricultural sector of the state. The horseracing and breeding
7 industries preserve more than 22,500 acres of land for the
8 breeding and raising of thoroughbred race horses alone.
9 More than 14 million people attended California's
10 race tracks and satellite facilities last year, and 11 million
11 people, additional to that, attended California's fairs. These
12 people and those visits provide direct and indirect economic
13 benefits to local communities.
14 But despite all these benefits to the state, the
15 horseracing industry finds itself in competition with the state.
16 This competition is in the form of the California Lottery. Make
17 no mistake about it, the California Lottery is in direct daily
18 competition with horseracing.
19 But despite strict regulation and restrictive laws,
20 more money is wagered annually on horseracing than on the State
21 Lottery. And this is true, even though the Lottery has, and get
22 this, more than 500 times as many outlets than horseracing has.
23 Now, back to the issue of the day. As I indicated
24 earlier, the race tracks have nothing against tribal gaming
25 operations. In fact, we do business with various tribes who
26 conduct satellite wagering.
27 The fear that race tracks have is unfettered
28 competition in the form of full-scale casino gambling. As you

1 know, casino gambling is becoming prevalent all over the
2 country. We've got riverboats and Indian gaming and land-based
3 casinos run by private operators everywhere, and all indications
4 are that this rapid proliferation will continue.
5 The race track executives are very concerned because,
6 evidence is overwhelming in jurisdictions where race tracks are
7 in close proximity to casinos that race tracks lose. They are
8 severely impacted and, in most cases, cease operation
9 altogether.
10 The primary example to date is in Minnesota. In
11 Minnesota, with Indian casinos operating in just 15 locations,
12 and we heard earlier there are 99 or 100 tribes in California,
13 horseracing has been shut down altogether. And this despite the
14 fact that Canterbury Downs, a close to $100 million
15 state-of-the-art facility, built not by novices but by Santa
16 Anita Race Track, and subsequently operated by Ladbrook, had its
17 live handle drop 47 percent in the first year of Indian gaming,
18 and 70 percent the first two years. It was recently offered for
19 sale at a price of less than 10 percent of its cost to build
20 just eight short years ago.
21 The Minnesota State Planning Agency estimates that
22 shutting the horseracing industry down in Minnesota has cost
23 that state $250 million a year.
24 In New Jersey, another state that -- where casinos
25 are not quite as close to the race track and the results aren't
26 quite as grim, the University of Louisville recently conducted a
27 study there in February of '92, and they concluded that the
28 impact of casinos on horseracing in that state was a negative

1 33.9 percent.

2 A drop of this magnitude in California would be
3 devastating to the horseracing industry and the state's general
4 economy. We estimate that the direct impact to state funds
5 would be in excess of $50 million and 10-12,000 jobs would be
6 lost in the process. And the magnitude of this hurt would
7 increase in each year of competition.

8 With new casinos opening in Illinois and Louisiana,
9 we are also carefully watching what happens in those states.
10 Both of those conduct major horseracing.

11 But not only is horseracing in a changing
12 environment, we also are changing ourselves. We recognize that
13 there is increased competition. The industry is taking positive
14 steps to meet that competition. We are looking at marketing
15 programs, joint efforts by both statewide and nationally, and
16 other things to keep horseracing viable. But this task is going
17 to be extremely difficult if full-scale casino gambling comes to
18 California. The heavily taxed, highly regulated horseracing
19 industry, which it is, because we were once a monopoly in this
20 business -- we're not here today crying about that -- but we
21 cannot be expected to, nor will we be able to, compete with
22 unfettered, unregulated, untaxed gambling on Indian reservations
23 or elsewhere.

24 We in racing agree with the conclusions published by
25 the Rockerfeller Institute of Government released in October,
26 that, quote: "Gambling is no panacea for ailing state budgets."
27 We believe that the proliferation of gambling is a mistake, that
28 gaming in and of itself, with no underlying economic or social

1 basis, is not the answer for an ailing economy in this state on
2 Indian reservations, or anywhere else in this country.
3 If it is inevitable, however, that casino gambling is
4 in California's future, then the only way that the horseracing
5 industry can hope to have a future is to be part of that action.
6 We have to be afforded the same opportunities to conduct casino
7 gambling as anyone else has, recognizing the need for
8 regulation, the need for taxation, to ensure the integrity of
9 the games, and to provide some degree of public benefit. For
10 us, it is a matter of survival.
11 I'll conclude with that, and thank you for letting us
12 appear here today. I'll entertain any questions you may have.
13 CHAIRMAN TUCKER: Thank you very much.
14 I don't see any questions, so I guess we'll go to the
15 next presenter, Mr. Blonien.
16 MR. BLONIEN: Thank you, Mr. Chairman and Members.
17 Rod Blonien representing the Commerce Club.
18 I have 38 pages of notes I'd like to read to you at
19 this time, my thoughts after listening to the other speakers.
20 I'm here on behalf of the Commerce Club, but I would
21 also like to sort of paint the picture, at least as it exists
22 in Los Angeles County, in terms of card clubs, which it means to
23 the economy, and what it means to local government.
24 In Los Angeles County, there are six card clubs that
25 we would have to classify as large card clubs. They employ
26 together over 5,000 people. The people that are employed at
27 card clubs are approximately 50 percent comprised of individuals
28 from minority groups. Many of the jobs in the clubs are

1 entry-level jobs that give individuals an opportunity to come
2 in, work as a busboy, a waiter, a dealer, et cetera, work their
3 way up into management, or go to school while they're working,
4 and benefit themselves and their families substantially due to
5 the entry-level employment that they're able to acquire at the
6 card club.
7 Card clubs in Los Angeles County pay a tax to the
8 local government entity, the city in which they are situated.
9 Our club, the Commerce Club, pays approximately 13.2 gross
10 revenues to the City of Commerce. The other cities [sic] in Los
11 Angeles County pay between 8 and 13 percent to the cities.
12 In terms of what this means to the city budgets, it
13 can mean anywhere from 40 percent in total revenues for those
14 cities to 20 percent of the revenues for the cities. Card
15 clubs, at least in Los Angeles County, are probably among the
16 highest taxed businesses in the State of California. We pay not
17 only our local taxes, but state taxes, federal taxes, employment
18 taxes, corporate taxes, and then income taxes paid by our point
19 holders and shareholders who receive the dividends from the
20 clubs.
21 We do not begrudge the Native Americans anything.
22 The stories that we've heard here today, I think, are heart-
23 rendering; they're warm; they're excellent examples of
24 entrepreneurship and people working themselves to try and better
25 their state in life and the people involved with their tribes,
26 and we applaud them for that.
27 We, however, are concerned as to the impact that the
28 Indian casinos will have upon our businesses and our card clubs

1 throughout the state. We don't know that we can compete on a
2 level playing field if they have the ability to have machines
3 and other games which we are prohibited from having by the State
4 of California.

5 We heard some testimony here today about individuals
6 having buses running to the casinos. In Sacramento, there are
7 buses that run to the Cache Creek Casino. There are buses that
8 run to the Rumsey Casinos. In Los Angeles County currently,
9 there are buses running to the casinos in Riverside County and
10 San Diego County.

11 It is having currently impact upon the business of
12 the card clubs in Los Angeles County. If the casinos are able
13 to expand, bring in more machines, perhaps video poker and other
14 things, we fear that it will have a substantial impact upon our
15 business. It will have impact upon our employees; it will have
16 an impact upon the cities in which our clubs are situated, and
17 the cities that so heavily depend upon revenues from the card
18 clubs.

19 We heard earlier Norm Towne talk about the impact
20 upon race tracks. We think the impact on card clubs will be
21 virtually the same. Individuals will want to go to clubs where
22 there is a greater variety of games, greater opportunity to
23 participate in sophisticated gaming, and in machine gaming,
24 which we would be prohibited from having.

25 We're not certain what the answer is. We're
26 concerned, and we will watch this issue very carefully and hope
27 that a level playing field can be created that will give us an
28 opportunity to compete on an equal basis with the Indians.

1 Thank you.

2 CHAIRMAN TUCKER: Any questions?

3 Reverend Sheldon.

4 MR. SHELDON: Thank you, Mr. Chairman, Mr. Tucker and

5 Chairman Dills, and the Senate.

6 Let me just first start out by saying that I

7 certainly appreciate the fairness that has been shown here, and

8 the fairness that I've always found from both of you in your

9 deliberations in your respective committees here in the

10 Legislature.

11 Without a vote of the people, or a vote of the

12 Legislature, to change California's long-standing policy against

13 casino gambling, dozens of communities around the state are now

14 about to have fostered upon them the equivalent of full-scale

15 casino-type gambling.

16 CHAIRMAN TUCKER: Excuse me, Reverend. Let me

17 interrupt you for just a second.

18 Would you state your name for the record.

19 MR. SHELDON: Yes, I will. I'm Reverend Lou Sheldon,

20 Chairman of the Traditional Values Coalition. We represent

21 about 7800 churches in the State of California. I'm here on

22 their behalf.

23 Without a vote of the people, we are about to have

24 this fostered upon several dozen communities. The grassroots in

25 this state who truly believe in the representative form of

26 government, and with all the duest [sic] humble respect to the

27 Native Americans, who live in this state also, we who find

28 ourselves living in this generation, in this culture, are not

1 about ready to say the sins of our forefathers and even the sins
2 of our present generation, should justify that our community
3 should have fostered upon it a casino-type gambling without us
4 being able to vote.
5 This is what I'm hearing. I'm hearing it all the
6 time, again and again. Therefore, we'd like to recommend
7 several things.
8 First, to insist on legislative approval of any
9 compacts. With all due respect to our current Governor, who is
10 clearly not in favor of legalized casino gambling in California,
11 we believe that the compacts under the Indian Gaming Regulatory
12 Act should be reviewed and approved by the Legislature before
13 they take effect. This is the only way we can be sure that
14 there are sufficient regulatory and enforcement mechanisms in
15 place to protect the public, and that the state is acting to
16 protect the interests of nearby communities.
17 So, people can come to the Legislature, they can come
18 to the Senate committee, they can come to the Assembly
19 committee, they can call the Governor, and they can go on and
20 on.
21 I would have thought the Legislature itself would be
22 more interested in asserting its own prerogatives over what
23 amounts to be major public policy decisions.
24 Second, to clarify the Lottery Act, make clear that
25 the Lottery Act is not exempt from California's laws against
26 casino gambling, and that it therefore may not be -- may not
27 operate anything like a slot machine or a video facsimile, or
28 any other game. This would still allow the Lottery to do what

1 it is currently doing, and would give tribes the right to
2 negotiate for the same lottery games on Indian reservations.
3 But the Lottery would not open the door for slot machine-like
4 devices.
5 And third, push for limits on the number of machines.
6 If, and God forbid, that California ultimately loses its court
7 battles and is forced to negotiate for casino gambling, then the
8 negotiators should limit the number of machines and tables to
9 those which provide a respectable income to meet the needs of a
10 given tribe. That was the ultimate intent of the Indian Gaming
11 Regulatory Act after all, to encourage economic development on
12 the reservations, to address conditions we are all concerned
13 about of severe poverty, substandard educational opportunities,
14 and a variety of social problems that arise from these
15 conditions.
16 It may be possible to legislate some guidelines for
17 compact negotiations that would fairly balance the legislative
18 needs of the tribes with other concerns I've mentioned above.
19 An example, there is a Palm Springs tribe with about 258 members
20 that expects to net a profit of $30 million. This means
21 $116,000 for each man, woman and child, and that's just from
22 bingo and card games, a major intended benefit of IGRA.
23 How much further do we have to go before asserting
24 legislative interest of local communities to be free from the
25 adverse impacts of huge gaming enterprises?
26 CHAIRMAN TUCKER: Reverend, can I stop you there for
27 just a second. I'm dying to ask you a question.
28 Who is to determine how much money a tribe should

1 have? How would you make that determination?

2 MR. SHELDON: Well I think that -- well, let's put it

3 this -- good -- I'll answer your question by saying this.

4 When we had an inequity in the school districts, we

5 passed a law in this Legislature that said that Beverly Hills,

6 that had a high tax basis, verses a poorer district in another

7 part of the state should be equalized.

8 And I believe that if you're saying that this is the

9 purpose, to help the Native Americans, then we should equalize

10 this so that the tribes have the right to equalize their money

11 across California.

12 CHAIRMAN TUCKER: But see, I think the difference is

13 that we are not letting them do this. They're doing it because

14 they have the legal authority to do it. We cannot say: you can

15 only now raise, earn, a certain amount of money.

16 MR. SHELDON: I'm here to say that, very clearly,

17 that the grassroots is going to have a major reaction if we have

18 casino-type gambling on every piece, potential piece, of Indian

19 reservation land in California. It isn't going to fly in the

20 long run, because there is no such thing as a fast buck. If it

21 comes easy, it's going to go fast.

22 And those of us that have worked our way up in this

23 system cannot allow the system to be so deteriorated by simply

24 handing this kind of money -- and granted, there has been

25 inequity. No one is denying that. But is this the answer? And

26 this is what we're saying.

27 So in conclusion, let me say that until now,

28 California gambling policy has been cautious, deliberate, and

1 respectful of the need of local communities to control their own
2 destinies. And for many years, we have had a general policy
3 against casino gambling. That policy was put into the
4 Constitution at the same time that the Constitution was amended
5 to allow the California State Lottery exclusive right to conduct
6 lotteries. The horseracing industry is closely regulated, and
7 rightly so. And the state allows card clubs only when approved
8 by voters.
9 And again, what is going to really regulate this in
10 terms of the tax basis? On much of this money, we have no
11 guarantee it will be taxed. We know that if an industry comes
12 to this state, it is taxed according to the laws of the state.
13 But right now, what basis do we have to tax the money that
14 changes hands there on the reservation?
15 Given this as a backdrop, it is simply outrageous
16 that the Congress and the courts are effectively repealing the
17 policy for the communities that happen to be located in the
18 vicinity of Indian lands.
19 I believe it's the Legislature's responsibility to do
20 whatever you can to stem the tide of casino-type gambling and
21 reassert California's carefully developed public policy on
22 casino gambling.
23 Thank you.
24 CHAIRMAN TUCKER: Thank you very much, Reverend
25 Sheldon.
26 Do we have any closing comments? Senator Dills,
27 would you like to make a closing comment?
28 CHAIRMAN DILLS: First of all, I'd like to compliment

1 the Chair of the G.O. Committee of the Assembly and his staff
2 and, of course, the staff of the G.O. Committee in the Senate,
3 on what I think is one of the best organized and noteworthy
4 meetings that I've ever attended. And I've been here a few
5 years.

6 I appreciate also the intensity with which people
7 look at this problem or opportunity. I'm persuaded, however,
8 that we're not going to solve all of California's problems by
9 gambling. If that were the case, why, we may have already had
10 them solved.

11 Nonetheless, it's here, and will be here, and
12 reasonable steps should and will be taken to see to it that it
13 doesn't get completely out of hand so that nobody comes out in
14 the end a winner.

15 No business being said at this time, except that I
16 felt that way.

17 And I don't know where all of this money is going to
18 come from to support our football teams, the basketball teams,
19 the rock groups. And all of this so-called discretionary money,
20 whenever I have 10 percent plus, I have probably 20 percent
21 unemployment in my district among the minority groups, and it's
22 a minority district right now.

23 So, extension of gambling may not necessarily be the
24 solution to our problems. However, we have made attempts in the
25 past, and I'm sure there will be additional attempts in the
26 future, to keep kind of a reasonable hold upon the thing so that
27 it doesn't get completely out and everyone suffers.

28 Thank you. I didn't intend to get into the preaching

1 business, but we've had a couple of ministers today, and so I
2 might as well add the layman's remarks.
3 SENATOR BEVERLY: Mr. Chairman.
4 CHAIRMAN TUCKER: Senator Beverly.
5 SENATOR BEVERLY: Mr. Chairman, I was going to
6 suggest that inasmuch as we opened the meeting with an
7 invocation in the form of an Indian prayer, perhaps the Attorney
8 General should deliver the benediction.
9 [Laughter.]
10 CHAIRMAN TUCKER: Ms. Manzano, you would like to make
11 one closing statement, one brief closing statement?
12 MS. MANZANO: Very brief.
13 I just want to say thank you for giving us your time,
14 listening to us, listening to everything that we are working
15 very hard for.
16 And we may not solve all the solutions with gaming,
17 but we will solve a lot of solutions with education: educating
18 you on gaming, and educating us on our business enterprise and
19 educating that really -- that don't understand how important
20 this is to us. To give us a right to be able to have an
21 education and housing, and keeping us off of the welfare.
22 Thank you.
23 CHAIRMAN TUCKER: Ms. Manzano, I want to thank you.
24 I want to thank everyone that came here today.
25 This was not an easy hearing. I know it's been a
26 long one, but I do believe that I speak for the entire committee
27 when I say we've learned a tremendous amount today about what is
28 going to be the changing face of gambling in the California.

1 And the nature of this was informational, for you to share with
2 us, and educate us, as to what we will be dealing with, and what
3 we'll be facing in the years to come.
4 I want to thank you for being patient with me, and I
5 want to thank everyone for coming up. I want to thank the
6 Membership for being patient and staying and learning.
7 We will continue this tomorrow when we do Part 2 of
8 this whole gaming issue.
9 This meeting is now adjourned.
10 [Thereupon this joint hearing of
11 the Senate and Assembly Committees
12 on Governmental Organization was
13 terminated at approximately
14 5:00 P.M.]
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CERTIFICATE OF SHORTHAND REPORTER

I, EVELYN J. MIZAK, a Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing Joint Hearing of the Senate and Assembly Committees on Governmental Organization on Indian Gaming in California was reported verbatim in shorthand by me, Evelyn Mizak, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of December, 1993.

EVELYN J. MIZAK
Shorthand Reporter

APPENDIX A

Steve White, Chief Assistant Attorney General, *Frederick R. Millar, Jr.*, Supervising Deputy Attorney General, *Rudolph Corona, Jr.*, Deputy Attorney General, *Gerald J. Geerlings*, *Peter H. Lyons*, and *Glenn R. Salter*.

Glenn M. Feldman argued the cause for appellees. With him on the brief were *Barbara A. Karshmer* and *George Forman*.*

JUSTICE WHITE delivered the opinion of the Court.

The Cabazon and Morongo Bands of Mission Indians, federally recognized Indian Tribes, occupy reservations in Riverside County, California.[1] Each Band, pursuant to an

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, *Anthony B. Ching*, Solicitor General, *Ian A. Macpherson*, *Brian McKay*, Attorney General of Nevada, and *Paul Bardacke*, Attorney General of New Mexico; and for the State of Washington et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Timothy R. Malone*, Assistant Attorney General, *Bronson C. La Follette*, Attorney General of Wisconsin, and *John J. Kelly*, Chief State's Attorney of Connecticut.

Briefs of *amici curiae* urging affirmance were filed for the Chehalis Indian Tribe et al. by *Henry J. Sockbeson* and *Stephen V. Quesenberry*; for the Jicarilla Apache Tribe et al. by *Alan R. Taradash*; for the Oneida Indian Nation of New York by *William W. Taylor III* and *Christine Nicholson*; for the Pueblo of Sandia et al. by *L. Lamar Parrish*, *Theodore W. Barudin*, *Michael D. Bustamante*, and *Scott E. Borg*; for the San Manuel Band of Mission Indians by *Jerome L. Levine* and *David A. Lash*; and for the Seminole Tribe of Florida et al. by *Bruce S. Rogow*.

Briefs of *amici curiae* were filed for the State of Minnesota by *Hubert H. Humphrey III*, Attorney General, and *James M. Schoessler*, Assistant Attorney General; for the Pueblo of Laguna et al. by *W. Richard West, Jr.*, *Thomas W. Fredericks*, *Rodney B. Lewis*, *Carol L. Barbero*, *John Bell*, *Rodney J. Edwards*, and *Art Bunce*; and for the Tulalip Tribes of Washington et al. by *Allen H. Sanders*.

[1]The Cabazon Reservation was originally set apart for the "permanent use and occupancy" of the Cabazon Indians by Executive Order of May 15, 1876. The Morongo Reservation also was first established by Executive Order. In 1891, in the Mission Indian Relief Act, 26 Stat. 712, Congress declared reservations "for the sole use and benefit" of the Cabazon and Morongo Bands. The United States holds the land in trust for the Tribes.

ordinance approved by the Secretary of the Interior, conducts bingo games on its reservation.[2] The Cabazon Band has also opened a card club at which draw poker and other card games are played. The games are open to the public and are played predominantly by non-Indians coming onto the reservations. The games are a major source of employment for tribal members, and the profits are the Tribes' sole source of income. The State of California seeks to apply to the two Tribes Cal. Penal Code Ann. § 326.5 (West Supp. 1987). That statute does not entirely prohibit the playing of bingo but permits it when the games are operated and staffed by members of designated charitable organizations who may not be paid for their services. Profits must be kept in special accounts and used only for charitable purposes; prizes may not exceed $250 per game. Asserting that the bingo games on the two reservations violated each of these restrictions, California insisted that the Tribes comply with state law.[3] Riverside

The governing bodies of both Tribes have been recognized by the Secretary of the Interior. The Cabazon Band has 25 enrolled members and the Morongo Band has approximately 730 enrolled members.

[2]The Cabazon ordinance authorizes the Band to sponsor bingo games within the reservation "[i]n order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues" and provides that net revenues from the games shall be kept in a separate fund to be used "for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes." App. to Brief for Appellees 1b–3b. The ordinance further provides that no one other than the Band is authorized to sponsor a bingo game within the reservation, and that the games shall be open to the public, except that no one under 18 years old may play. The Morongo ordinance similarly authorizes the establishment of a tribal bingo enterprise and dedicates revenues to programs to promote the health, education, and general welfare of tribal members. *Id.*, at 1a–6a. It additionally provides that the games may be conducted at any time but must be conducted at least three days per week, that there shall be no prize limit for any single game or session, that no person under 18 years old shall be allowed to play, and that all employees shall wear identification.

[3]The Tribes admit that their games violate the provision governing staffing and the provision setting a limit on jackpots. They dispute the

CALIFORNIA ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-1708. Argued December 9, 1986—Decided February 25, 1987

Appellee Indian Tribes (the Cabazon and Morongo Bands of Mission Indians) occupy reservations in Riverside County, Cal. Each Band, pursuant to its federally approved ordinance, conducts on its reservation bingo games that are open to the public. The Cabazon Band also operates a card club for playing draw poker and other card games. The gambling games are open to the public and are played predominantly by non-Indians coming onto the reservations. California sought to apply to the Tribes its statute governing the operation of bingo games. Riverside County also sought to apply its ordinance regulating bingo, as well as its ordinance prohibiting the playing of draw poker and other card games. The Tribes 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 the reservations. The Court of Appeals affirmed.

Held:

1. Although state laws may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by Pub. L. 280 or by the Organized Crime Control Act of 1970 (OCCA). Pp. 207–214.

(a) In Pub. L. 280, the primary concern of which was combating lawlessness on reservations, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State but more limited, nonregulatory civil jurisdiction. When a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the state law is criminal in nature and thus fully applicable to the reservation, or civil in nature and applicable only as it may be relevant to private civil litigation in state court. There is a fair basis for the Court of Appeals' conclusion that California's statute, which permits bingo games to be conducted only by certain types of organizations under certain restrictions, is not a "criminal/prohibitory" statute falling within Pub. L. 280's grant of criminal jurisdiction, but instead is a "civil/regulatory" statute not authorized by Pub. L. 280 to be enforced on Indian reservations. That an otherwise regulatory law is enforceable (as here) by criminal as well as civil means does not necessarily convert it into a criminal law within Pub. L. 280's meaning. Pp. 207–212.

(b) Enforcement of OCCA, which makes certain violations of state and local gambling laws violations of federal criminal law, is an exercise of federal rather than state authority. There is nothing in OCCA indicating that the States are to have any part in enforcing the federal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. California may not make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes. Pp. 212–214.

2. Even though not expressly authorized by Congress, state and local laws may be applied to on-reservation activities of tribes and tribal members under certain circumstances. The decision in this case turns on whether state authority is pre-empted by the operation of federal law. State jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. The federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development, are important, and federal agencies, acting under federal laws, have sought to implement them by promoting and overseeing tribal bingo and gambling enterprises. Such policies and actions are of particular relevance in this case since the tribal games provide the sole source of revenues for the operation of the tribal governments and are the major sources of employment for tribal members. To the extent that the State seeks to prevent all bingo games on tribal lands while permitting regulated off-reservation games, the asserted state interest in preventing the infiltration of the tribal games by organized crime is irrelevant, and the state and county laws are pre-empted. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted since the asserted state interest is not sufficient to escape the pre-emptive force of the federal and tribal interests apparent in this case. Pp. 214–222.

783 F. 2d 900, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which O'CONNOR and SCALIA, JJ., joined, *post*, p. 222.

Roderick E. Walston, Supervising Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *John K. Van de Kamp*, Attorney General,

ited.[7] In *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), we interpreted § 4 to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. *Id.*, at 385, 388–390. We held, therefore, that Minnesota could not apply its personal property tax within the reservation. Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations. *Id.*, at 379–380. The Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society. *Id.*, at 387. We recognized that a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

The Minnesota personal property tax at issue in *Bryan* was unquestionably civil in nature. The California bingo statute is not so easily categorized. California law permits bingo

laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . :

"California .... All Indian country within the State."

[7] Section 4(a), codified at 28 U. S. C. § 1360(a) (1982 ed. and Supp. III) provides:

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

"California .... All Indian country within the State."

games to be conducted only by charitable and other specified organizations, and then only by their members who may not receive any wage or profit for doing so; prizes are limited and receipts are to be segregated and used only for charitable purposes. Violation of any of these provisions is a misdemeanor. California insists that these are criminal laws which Pub. L. 280 permits it to enforce on the reservations.

Following its earlier decision in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal.* v. *Duffy*, 694 F. 2d 1185 (1982), cert. denied, 461 U. S. 929 (1983), which also involved the applicability of § 326.5 of the California Penal Code to Indian reservations, the Court of Appeals rejected this submission. 783 F. 2d, at 901–903. In *Barona*, applying what it thought to be the civil/criminal dichotomy drawn in *Bryan* v. *Itasca County*, the Court of Appeals drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. Inquiring into the nature of § 326.5, the Court of Appeals held that it was regulatory rather than prohibitory.[8] This was the analysis employed, with similar results,

[8] The Court of Appeals questioned whether we indicated disapproval of the prohibitory/regulatory distinction in *Rice* v. *Rehner*, 463 U. S. 713 (1983). We did not. We rejected in that case an asserted distinction between state "substantive" law and state "regulatory" law in the context of 18 U. S. C. § 1161, which provides that certain federal statutory provisions prohibiting the sale and possession of liquor within Indian country do not apply "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . ." We noted that nothing in the text or legislative history of

by the Court of Appeals for the Fifth Circuit in *Seminole Tribe of Florida* v. *Butterworth*, 658 F. 2d 310 (1981), cert. denied, 455 U. S. 1020 (1982), which the Ninth Circuit found persuasive.[9]

We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan*'s construction of Pub. L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. But in the present case, the court reexamined the state law and reaffirmed its holding in *Barona*, and we are reluctant to disagree with that court's view of the nature and intent of the state law at issue here.

There is surely a fair basis for its conclusion. California does not prohibit all forms of gambling. California itself operates a state lottery, Cal. Govt. Code Ann. § 8880 *et seq.* (West Supp. 1987), and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Cal. Bus. & Prof. Code Ann. §§ 19400–19667 (West 1964 and Supp. 1987). Although certain enumerated gambling games are prohibited under Cal. Penal Code Ann. § 330 (West Supp. 1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. Brief for

§ 1161 supported the asserted distinction, and then contrasted that statute with Pub. L. 280. "In the absence of a context that might possibly require it, we are reluctant to make such a distinction. Cf. *Bryan* v. *Itasca County*, 426 U. S. 373, 390 (1976) (grant of civil jurisdiction in 28 U. S. C. § 1360 does not include regulatory jurisdiction to tax in light of tradition of immunity from taxation)." 463 U. S., at 734, n. 18.

[9] *Seminole Tribe* v. *Butterworth* was an action by the Seminole Tribe for a declaratory judgment that the Florida bingo statute did not apply to its operation of a bingo hall on its reservation. See also *Mashantucket Pequot Tribe* v. *McGuigan*, 626 F. Supp. 245 (Conn. 1986); *Oneida Tribe of Indians of Wisconsin* v. *Wisconsin*, 518 F. Supp. 712 (WD Wis. 1981).

Appellees 47–48. Also, as the Court of Appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18. Indeed, the permitted bingo games *must* be open to the general public. Nor is there any limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games which a participant may play, or the amount of money which a participant may spend, either per game or in total. In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.[10]

California argues, however, that high stakes, *unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations. But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.

[10] Nothing in this opinion suggests that cockfighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California. See *post*, at 222. The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory. The lower courts have not demonstrated an inability to identify prohibitory laws. For example, in *United States* v. *Marcyes*, 557 F. 2d 1361, 1363–1365 (CA9 1977), the Court of Appeals adopted and applied the prohibitory/regulatory distinction in determining whether a state law governing the possession of fireworks was made applicable to Indian reservations by the Assimilative Crimes Statute, 62 Stat. 686, 18 U. S. C. § 13. The court concluded that, despite limited exceptions to the statute's prohibition, the fireworks law was prohibitory in nature. See also *United States* v. *Farris*, 624 F. 2d 890 (CA9 1980), cert. denied, 449 U. S. 1111 (1981), discussed in n. 13, *infra*.

This view, adopted here and by the Fifth Circuit in the *Butterworth* case, we find persuasive. Accordingly, we conclude that Pub. L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 326.5 (West Supp. 1987) within the Cabazon and Morongo Reservations."[11]

California and Riverside County also argue that the Organized Crime Control Act (OCCA) authorizes the application of their gambling laws to the tribal bingo enterprises. The OCCA makes certain violations of state and local gambling laws violations of federal law.[12] The Court of Appeals re-

[11] Nor does Pub. L. 280 authorize the county to apply its gambling ordinances to the reservations. We note initially that it is doubtful that Pub. L. 280 authorizes the application of any local laws to Indian reservations. Section 2 of Pub. L. 280 provides that the criminal laws of the "State" shall have the same force and effect within Indian country as they have elsewhere. This language seems clearly to exclude local laws. We need not decide this issue, however, because even if Pub. L. 280 does make local criminal/prohibitory laws applicable on Indian reservations, the ordinances in question here do not apply. Consistent with our analysis of Cal. Penal Code Ann. § 326.5 (West Supp. 1987) above, we conclude that Ordinance No. 558, the bingo ordinance, is regulatory in nature. Although Ordinance No. 331 prohibits gambling on all card games, including the games played in the Cabazon card club, the county does not prohibit municipalities within the county from enacting municipal ordinances permitting these card games, and two municipalities have in fact done so. It is clear, therefore, that Ordinance No. 331 does not prohibit these card games for purposes of Pub. L. 280.

[12] OCCA, 18 U. S. C. § 1955, provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more that $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section —

"(1) 'illegal gambling business' means a gambling business which —

"(i) is a *violation of the law of a State or political subdivision* in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." (Emphasis added.)

jected appellants' argument, relying on its earlier decisions in *United States* v. *Farris*, 624 F. 2d 890 (CA9 1980), cert. denied, 449 U. S. 1111 (1981), and *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal.* v. *Duffy*, 694 F. 2d 1185 (1982). 783 F. 2d, at 903. The court explained that whether a tribal activity is "a violation of the law of a state" within the meaning of OCCA depends on whether it violates the "public policy" of the State, the same test for application of state law under Pub. L. 280, and similarly concluded that bingo is not contrary to the public policy of California.[13]

The Court of Appeals for the Sixth Circuit has rejected this view. *United States* v. *Dakota*, 796 F. 2d 186 (1986).[14] Since the OCCA standard is simply whether the gambling business is being operated in "violation of the law of a State," there is no basis for the regulatory/prohibitory distinction that it agreed is suitable in construing and applying Pub. L. 280. 796 F. 2d, at 188. And because enforcement of OCCA is an exercise of federal rather than state authority, there is no danger of state encroachment on Indian tribal sovereignty. *Ibid.* This latter observation exposes the flaw in appellants' reliance on OCCA. That enactment is indeed a federal law that, among other things, defines certain federal crimes over which the district courts have exclusive jurisdiction.[15] There is nothing in OCCA indicating that the States

[13] In *Farris*, in contrast, the court had concluded that a gambling business, featuring blackjack, poker, and dice, operated by tribal members on the Puyallup Reservation violated the public policy of Washington; the United States, therefore, could enforce OCCA against the Indians.

[14] In *Dakota*, the United States sought a declaratory judgment that a gambling business, also featuring the playing of blackjack, poker, and dice, operated by two members of the Keweenaw Bay Indian Community on land controlled by the community, and under a license issued by the community, violated OCCA. The Court of Appeals held that the gambling business violated Michigan law and OCCA.

[15] Title 18 U. S. C. § 3231 provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government.[16] Whether or not, then, the Sixth Circuit is right and the Ninth Circuit wrong about the coverage of OCCA, a matter that we do not decide, there is no warrant for California to make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes.

II

Because the state and county laws at issue here are imposed directly on the Tribes that operate the games, and are not expressly permitted by Congress, the Tribes argue that the judgment below should be affirmed without more. They rely on the statement in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 170–171 (1973), that "'[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply'" (quoting United States Dept. of the Interior, Federal Indian Law 845 (1958)). Our cases, however, have not established an inflexible *per se* rule pre-

[16] See S. Rep. No. 99-493, p. 2 (1986). Federal law enforcement officers have the capability to respond to violations of OCCA on Indian reservations, as is apparent from *Farris* and *Dakota*. This is not a situation where the unavailability of a federal officer at a particular moment would likely result in nonenforcement. OCCA is directed at large-scale gambling enterprises. If state officers discover a gambling business unknown to federal authorities while performing their duties authorized by Pub. L. 280, there should be ample time for them to inform federal authorities, who would then determine whether investigation or other enforcement action was appropriate. A federal police officer is assigned by the Department of the Interior to patrol the Indian reservations in southern California. App. to Brief for Appellees D-1—D-7.

cluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.[17] "[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 331–332 (1983) (footnotes omitted). Both *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976), and *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), are illustrative. In those decisions we held that, in the absence of express congressional permission, a State could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian

[17] In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. In *Montana* v. *Blackfeet Tribe*, 471 U. S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Id.*, at 765. We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated statements "to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. . . . Even so, *in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n*, [411 U. S. 164

customers. Both cases involved nonmembers entering and purchasing tobacco products on the reservations involved. The State's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the State was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators.[18]

This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Mescalero*, 462 U. S., at 333, 334. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Id.*, at 334–335.[19] See also,

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(1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Ibid.* (emphasis added).

[18] JUSTICE STEVENS appears to embrace the opposite presumption—that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 151 (1980), in the context of an assertion of state authority over the activities of non-Indians within a reservation, "[t]hat is simply not the law." It is even less correct when applied to the activities of tribes and tribal members within reservations.

[19] In *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 335, n. 17, we discussed a number of the statutes Congress enacted to promote tribal self-government. The congressional declarations of policy in the Indian Financing Act of 1974, as amended, 25 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), and in the Indian Self Determination and Education Assistance Act of 1975, as amended, 25 U. S. C. § 450 *et seq.* (1982 ed. and Supp. III), are particularly significant in this case: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibil-

Iowa Mutual Insurance Co. v. *LaPlante*, *ante*, p. 9; *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143 (1980).

These are important federal interests. They were reaffirmed by the President's 1983 Statement on Indian Policy.[20] More specifically, the Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises.[21] Under the Indian Financing Act of 1974, 25

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ity for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U. S. C. § 1451. Similarly, "[t]he Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U. S. C. § 450a(b).

[20] "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. of Pres. Doc. 99 (1983).

[21] The Court of Appeals relied on the following official declarations. 783 F. 2d, at 904–905. A policy directive issued by the Assistant Secretary of the Interior on March 2, 1983, stated that the Department would "strongly oppose" any proposed legislation that would subject tribes or tribal members to state gambling regulation. "Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983. . . . A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced." The court also relied on an affidavit submitted by the Director of Indian Services, Bureau of Indian Affairs, on behalf of the Tribes' position:

"It is the department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self sufficiency, the economic development of reservations and tribal self

U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), the Secretary of the Interior has made grants and has guaranteed loans for the purpose of constructing bingo facilities. See S. Rep. No. 99–493, p. 5 (1986); *Mashantucket Pequot Tribe* v. *McGuigan*, 626 F. Supp. 245, 246 (Conn. 1986). The Department of Housing and Urban Development and the Department of Health and Human Services have also provided financial assistance to develop tribal gaming enterprises. See S. Rep. No. 99–493, *supra*, at 5. Here, the Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. See H. R. Rep. No. 99–488, p. 10 (1986). The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U. S. C. § 81, and has issued detailed guidelines governing that review.[22] App. to Motion to Dismiss Appeal or Affirm Judgment 63a–70a.

These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal gov-

determination. All of these are federal goals for the tribes. Furthermore, it is the Department's position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan's Indian Policy Statement of January 24, 1983."

[22] Among other things, the guidelines require that the contract state that no payments have been made or will be made to any elected member of the tribal government or relative of such member for the purpose of obtaining or maintaining the contract. The contractor is required to disclose information on all parties in interest to the contract and all employees who will have day-to-day management responsibility for the gambling operation, including names, home and business addresses, occupations, dates of birth, and Social Security numbers. The Federal Bureau of Investigation must conduct a name-and-record check on these persons before a contract may be approved. The guidelines also specify accounting procedures and cash management procedures which the contractor must follow.

ernments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

California seeks to diminish the weight of these seemingly important tribal interests by asserting that the Tribes are merely marketing an exemption from state gambling laws. In *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S., at 155, we held that the State could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services, because the Tribes had no right "to market an exemption from state taxation to persons who would normally do their business elsewhere." We stated that "[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Ibid.* Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games.[23] The tribal bingo enterprises are

[23] An agent of the California Bureau of Investigation visited the Cabazon bingo parlor as part of an investigation of tribal bingo enterprises. The agent described the clientele as follows:

"In attendance for the Monday evening bingo session were about 300 players. . . . On row 5, on the front left side were a middle-aged latin couple, who were later joined by two young latin males. These men had to have

similar to the resort complex, featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the "concerted and sustained" management of reservation land and wildlife resources. *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 341. The Mescalero project generates funds for essential tribal services and provides employment for tribal members. We there rejected the notion that the Tribe is merely marketing an exemption from state hunting and fishing regulations and concluded that New Mexico could not regulate on-reservation fishing and hunting by non-Indians. *Ibid.* Similarly, the Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest.

The State also relies on *Rice* v. *Rehner*, 463 U. S. 713 (1983), in which we held that California could require a tribal member and a federally licensed Indian trader operating a general store on a reservation to obtain a state license in order to sell liquor for off-premises consumption. But our decision there rested on the grounds that Congress had never recognized any sovereign tribal interest in regulating liquor traffic and that Congress, historically, had plainly anticipated that the States would exercise concurrent authority to regulate the use and distribution of liquor on Indian reservations. There is no such traditional federal view governing the outcome of this case, since, as we have explained, the current federal policy is to promote precisely what California seeks to prevent.

The sole interest asserted by the State to justify the imposition of its bingo laws on the Tribes is in preventing the infiltration of the tribal games by organized crime. To the extent that the State seeks to prevent any and all bingo

the game explained to them. The middle table was shared with a senior citizen couple. The aisle table had 2 elderly women, 1 in a wheelchair, and a middle aged woman. . . . A goodly portion of the crowd were retired age to senior citizens." App. 176. We are unwilling to assume that these patrons would be indifferent to the services offered by the Tribes.

games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant and the state and county laws are pre-empted. See n. 3, *supra*. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted. The State insists that the high stakes offered at tribal games are attractive to organized crime, whereas the controlled games authorized under California law are not. This is surely a legitimate concern, but we are unconvinced that it is sufficient to escape the pre-emptive force of federal and tribal interests apparent in this case. California does not allege any present criminal involvement in the Cabazon and Morongo enterprises, and the Ninth Circuit discerned none. 783 F. 2d, at 904. An official of the Department of Justice has expressed some concern about tribal bingo operations,[24] but far from any action being taken evidencing this concern—and surely the Federal Government has the authority to forbid Indian gambling enterprises—the prevailing federal policy continues to support these tribal enterprises, including those of the Tribes involved in this case.[25]

We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enter-

[24] Hearings on H. R. 4566 before the House Committee on Interior and Insular Affairs, 98th Cong., 2d Sess., 15–39, 66–75 (1984); App. 197–205.

[25] JUSTICE STEVENS' assertion, *post*, at 226, that the State's interest in restricting the proceeds of gambling to itself, and the charities it favors, justifies the prohibition or regulation of tribal bingo games is indeed strange. The State asserted no such discriminatory economic interest; and it is pure speculation that, in the absence of tribal bingo games, would-be patrons would purchase lottery tickets or would attend state-approved bingo games instead. In any event, certainly California has no legitimate interest in allowing potential lottery dollars to be diverted to non-Indian owners of card clubs and horse tracks while denying Indian tribes the opportunity to profit from gambling activities. Nor is California necessarily entitled to prefer the funding needs of state-approved charities over the funding needs of the Tribes, who dedicate bingo revenues to promoting the health, education, and general welfare of tribal members.

prises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club. We therefore affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, dissenting.

Unless and until Congress exempts Indian-managed gambling from state law and subjects it to federal supervision, I believe that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders. Congress has not pre-empted California's prohibition against high-stakes bingo games and the Secretary of the Interior plainly has no authority to do so. While gambling provides needed employment and income for Indian tribes, these benefits do not, in my opinion, justify tribal operation of currently unlawful commercial activities. Accepting the majority's reasoning would require exemptions for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises. As the law now stands, I believe tribal entrepreneurs, like others who might derive profits from catering to non-Indian customers, must obey applicable state laws.

In my opinion the plain language of Pub. L. 280, 67 Stat. 588, as amended, 18 U. S. C. § 1162, 28 U. S. C. § 1360 (1982 ed. and Supp. III), authorizes California to enforce its prohibition against commercial gambling on Indian reservations. The State prohibits bingo games that are not operated by members of designated charitable organizations or which offer prizes in excess of $250 per game. Cal. Penal Code Ann. § 326.5 (West Supp. 1987). In § 2 of Pub. L. 280, Con-

gress expressly provided that the criminal laws of the State of California "shall have the same force and effect within such Indian country as they have elsewhere within the State." 18 U. S. C. § 1162(a). Moreover, it provided in § 4(a) that the civil laws of California "that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U. S. C. § 1360(a) (1982 ed., Supp. III).

It is true that in *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), we held that Pub. L. 280 did not confer civil jurisdiction on a State to impose a personal property tax on a mobile home that was owned by a reservation Indian and located within the reservation. Moreover, the reasoning of that decision recognizes the importance of preserving the traditional aspects of tribal sovereignty over the relationships among reservation Indians. Our more recent cases have made it clear, however, that commercial transactions between Indians and non-Indians—even when conducted on a reservation—do not enjoy any blanket immunity from state regulation. In *Rice* v. *Rehner*, 463 U. S. 713 (1983), respondent, a federally licensed Indian trader, was a tribal member operating a general store on an Indian reservation. We held that the State could require Rehner to obtain a state license to sell liquor for off-premises consumption. The Court attempts to distinguish *Rice* v. *Rehner* as resting on the absence of a sovereign tribal interest in the regulation of liquor traffic to the exclusion of the States. But as a necessary step on our way to deciding that the State could regulate all tribal liquor sales in Indian country, we recognized the State's authority over transactions, whether they be liquor sales or gambling, between Indians and non-Indians: "If there is any interest in tribal sovereignty implicated by imposition

of California's alcoholic beverage regulation, it exists only insofar as the State attempts to regulate Rehner's sale of liquor to other members of the Pala Tribe on the Pala Reservation." *Id.*, at 721. Similarly, in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), we held that a State could impose its sales and cigarette taxes on non-Indian customers of smokeshops on Indian reservations.

Today the Court seems prepared to acknowledge that an Indian tribe's commercial transactions with non-Indians may violate "the State's public policy." *Ante*, at 209. The Court reasons, however, that the operation of high-stakes bingo games does not run afoul of California's public policy because the State permits some forms of gambling and, specifically, some forms of bingo. I find this approach to "public policy" curious, to say the least. The State's policy concerning gambling is to authorize certain specific gambling activities that comply with carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and to prohibit all unregulated commercial lotteries that are operated for private profit.[1] To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour.

[1] The Court holds that Pub. L. 280 does not authorize California to enforce its prohibition against commercial gambling within the Cabazon and Morongo Reservations. *Ante*, at 212. The Court reaches this conclusion by determining that § 4(a) of Pub. L. 280, 28 U. S. C. § 1360(a), withholds from the States general civil regulatory authority over Indian tribes, and that the State's rules concerning gambling are regulatory rather than prohibitory. In its opinion, the Court dismisses the State's argument that high-stakes, unregulated bingo is prohibited with the contention that an otherwise regulatory law does not become a prohibition simply because it "is enforceable by criminal as well as civil means." *Ante*, at 211. Aside from the questionable merit of this proposition, it does not even address the meaning of § 2(a) of Pub. L. 280, 18 U. S. C. 1162(a) (1982 ed., Supp. III), a provision which is sufficient to control the disposition of this case. See *supra*, at 222.

In my view, Congress has permitted the State to apply its prohibitions against commercial gambling to Indian tribes. Even if Congress had not done so, however, the State has the authority to assert jurisdiction over appellees' gambling activities. We recognized this authority in *Washington* v. *Confederated Tribes*, *supra;* the Court's attempt to distinguish the reasoning of our decision in that case is unpersuasive. In *Washington* v. *Confederated Tribes*, the Tribes contended that the State had no power to tax on-reservation sales of cigarettes to non-Indians. The argument that we rejected there has a familiar ring:

> "The Tribes contend that their involvement in the operation and taxation of cigarette marketing on the reservation ousts the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. The primary argument is economic. It is asserted that smokeshop cigarette sales generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations. Most cigarette purchasers are outsiders attracted onto the reservations by the bargain prices the smokeshops charge by virtue of their claimed exemption from state taxation. If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-à-vis businesses in surrounding areas." *Id.*, at 154.
>
> "What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation." *Id.*, at 155.

In *Confederated Tribes*, the tribal smokeshops offered their customers the same products, services, and facilities that other tobacconists offered to their customers. Al-

though the smokeshops were more modest than the bingo palaces involved in this case, presumably they were equally the product of tribal labor and tribal capital. What made them successful, however, was the value of the exemption that was offered to non-Indians "who would normally do their business elsewhere." *Id.*, at 155.

Similarly, it is painfully obvious that the value of the Tribe's asserted exemption from California's gambling laws is the primary attraction to customers who would normally do their gambling elsewhere. The Cabazon Band of Mission Indians has no tradition or special expertise in the operation of large bingo parlors. See Declaration of William J. Wallace, ¶2, App. 153, 171. Indeed, the entire membership of the Cabazon Tribe—it has only 25 enrolled members—is barely adequate to operate a bingo game that is patronized by hundreds of non-Indians nightly. How this small and formerly impoverished Band of Indians could have attracted the investment capital for its enterprise without benefit of the claimed exemption is certainly a mystery to me.

I am entirely unpersuaded by the Court's view that the State of California has no legitimate interest in requiring appellees' gambling business to comply with the same standards that the operators of other bingo games must observe. The State's interest is both economic and protective. Presumably the State has determined that its interest in generating revenues for the public fisc and for certain charities outweighs the benefits from a total prohibition against publicly sponsored games of chance. Whatever revenues the Tribes receive from their unregulated bingo games drain funds from the state-approved recipients of lottery revenues—just as the tax-free cigarette sales in the *Confederated Tribes* case diminished the receipts that the tax collector would otherwise have received.

Moreover, I am unwilling to dismiss as readily as the Court does the State's concern that these unregulated high-stakes bingo games may attract organized criminal infiltration.

Brief for Appellants 25–26, 29; Reply Brief for Appellants 1[illegible] Comprehensive regulation of the commercial gambling ven[illegible] tures that a State elects to license is obviously justified as [illegible] prophylactic measure even if there is presently no crimina[illegible] activity associated with casino gambling in the State. Indeed, California regulates charitable bingo, horseracing, and its own lottery. The State of California requires that charitable bingo games may only be operated and staffed by members of designated charitable organizations, and that proceeds from the games may only be used for charitable purposes. Cal. Penal Code Ann. § 326.5 (West Supp. 1987). These requirements for staffing and for dispersal of profits provide bulwarks against criminal activity; neither safeguard exists for bingo games on Indian reservations.[2] In my judgment, unless Congress authorizes and regulates these commercial gambling ventures catering to non-Indians, the State has a legitimate law enforcement interest in proscribing them.

Appellants and the Secretary of the Interior may well be correct, in the abstract, that gambling facilities are a sensible way to generate revenues that are badly needed by reservation Indians. But the decision to adopt, to reject, or to define the precise contours of such a course of action, and thereby to set aside the substantial public policy concerns of a sovereign State, should be made by the Congress of the United States. It should not be made by this Court, by the temporary occupant of the Office of the Secretary of the Interior, or by non-Indian entrepreneurs who are experts in gambling management but not necessarily dedicated to serving the future well-being of Indian tribes.

I respectfully dissent.

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[2] The Cabazon Band's bingo room was operated under a management agreement with an outside firm until 1986; the Morongo Band operates its bingo room under a similar management agreement. App. to Brief for Appellees, C–1 to C–3; Morongo Band of Mission Indians Tribal Bingo Enterprise Management Agreement, ¶4B, App. 97–98.

County also sought to apply its local Ordinance No. 558, regulating bingo, as well as its Ordinance No. 331, prohibiting the playing of draw poker and the other card games.

The Tribes sued the county in Federal District Court seeking a declaratory judgment that the county had no authority to apply its ordinances inside the reservations and an injunction against their enforcement. The State intervened, the facts were stipulated, and the District Court granted the Tribes' motion for summary judgment, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations. The Court of Appeals for the Ninth Circuit affirmed, 783 F. 2d 900 (1986), the State and the county appealed, and we postponed jurisdiction to the hearing on the merits. 476 U. S. 1168.[4]

State's assertion that they do not maintain separate funds for the bingo operations. At oral argument, counsel for the State asserted, contrary to the position taken in the merits brief and contrary to the stipulated facts in this case, App. 65, ¶24, 82–83, ¶15, that the Tribes are among the charitable organizations authorized to sponsor bingo games under the statute. It is therefore unclear whether the State intends to put the tribal bingo enterprises out of business or only to impose on them the staffing, jackpot limit, and separate fund requirements. The tribal bingo enterprises are apparently consistent with other provisions of the statute: minors are not allowed to participate, the games are conducted in buildings owned by the Tribes on tribal property, the games are open to the public, and persons must be physically present to participate.

[4] The Court of Appeals "affirm[ed] the summary judgment and the permanent injunction restraining the County and the State from applying their gambling laws on the reservations." 783 F. 2d, at 906. The judgment of the District Court declared that the state statute and county ordinance were of no force and effect within the two reservations, that the State and the county were without jurisdiction to enforce them, and that they were therefore enjoined from doing so. Since it is now sufficiently clear that the state and county laws at issue were held, as applied to the gambling activities on the two reservations, to be "invalid as repugnant to the Constitution, treaties or laws of the United States" within the meaning of 28 U. S. C. § 1254(2), the case is within our appellate jurisdiction.

I

The Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975), and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 154 (1980). It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided. Here, the State insists that Congress has twice given its express consent: first in Pub. L. 280 in 1953, 67 Stat. 588, as amended, 18 U. S. C. § 1162, 28 U. S. C. § 1360 (1982 ed. and Supp. III), and second in the Organized Crime Control Act in 1970, 84 Stat. 937, 18 U. S. C. § 1955. We disagree in both respects.

In Pub. L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country[5] within the States and provided for the assumption of jurisdiction by other States. In § 2, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State.[6] Section 4's grant of civil jurisdiction was more lim-

[5] "Indian country," as defined at 18 U. S. C. § 1151, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." This definition applies to questions of both criminal and civil jurisdiction. *DeCoteau* v. *District County Court*, 420 U. S. 425, 427, n. 2 (1975). The Cabazon and Morongo Reservations are thus Indian country.

[6] Section 2(a), codified at 18 U. S. C. § 1162(a), provides:

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

APPENDIX B

United States Code

Public Law 100-413

An Act

SECTION 1. SHORT TITLE.
"Parimutuel Licensing Simplification Act of 1988".

SEC. 2. SUBMISSION BY ASSOCIATION OF STATE REGULATORY OFFICIALS.

(a) IN GENERAL.—An association of State officials regulating parimutuel wagering, designated for the purpose of this section by the Attorney General, may submit fingerprints to the Attorney General on behalf of any applicant for State license to participate in parimutuel wagering. In response to such a submission, the Attorney General may, to the extent provided by law, exchange, for licensing and employment purposes, identification and criminal history records with the State governmental bodies to which such applicant has applied.

(b) DEFINITION.—As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

SEC. 3. EFFECTIVE DATE.
This Act shall take effect on July 1, 1989.

Public Law 100-497

An Act

To regulate gaming on Indian lands.

FINDINGS

SEC. 2. The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

DECLARATION OF POLICY

SEC. 3. The purpose of the Act is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

DEFINITIONS

SEC. 4. For purposes of this Act—

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act.

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this Act, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after the date of enactment of this Act, to negotiate a Tribal-State compact under section 11(d)(3).

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

NATIONAL INDIAN GAMING COMMISSION

SEC. 5. (a) There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) (1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2) (A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4) (A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b) (6).

(d) Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) (1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5, United States Code.

(3) All members of the Commission shall be reimbursed in accordance with title 5, United States Code, for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

POWERS OF THE CHAIRMAN

SEC. 6. (a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

(1) issue orders of temporary closure of gaming activities as provided in section 14(b);

(2) levy and collect civil fines as provided in section 14(a);

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 11; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 11(d) (9) and 12.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

POWERS OF THE COMMISSION

SEC. 7. (a) The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 18;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 16; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b) (2).

(b) The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this Act;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act.

(c) The Commission shall submit a report with minority views, if any, to the Congress on December 31, 1989, and every two years thereafter. The report shall include information on—

(1) whether the associate commissioners should continue as full or part-time officials;

(2) funding, including income and expenses, of the Commission;

(3) recommendations for amendments to the Act; and

(4) any other matter considered appropriate by the Commission.

COMMISSION STAFFING

SEC. 8. (a) The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of title 5, United States Code.

(b) The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Act, unless otherwise prohibited by law.

(e) The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

COMMISSION—ACCESS TO INFORMATION

SEC. 9. The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

INTERIM AUTHORITY TO REGULATE GAMING

SEC. 10. Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the date of enactment of this Act relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

TRIBAL GAMING ORDINANCES

SEC. 11. (a)(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b)(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2) (B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2) (B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B) (i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2) (B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a) (1) for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act.

(iii) Within sixty days of the date of enactment of this Act, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) (1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b) (2) (F) (ii) (II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act; and

(B) has otherwise complied with the provisions of this section may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b);

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D).

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (a) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3) (C) (iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3) (A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B) (vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A) (i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3) (A).

(ii) In any action described in subparagraph (A) (i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A) (i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause

(iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12.

(e) For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is

submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

MANAGEMENT CONTRACTS

SEC. 12. (a) (1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11 (b) (1), but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1) (A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) (1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reasons for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a) (1) (A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a) (2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

(i) The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

REVIEW OF EXISTING ORDINANCES AND CONTRACTS

SEC. 13. (a) As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section.

(b) (1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 11 (b) of this Act.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) conforms to the requirements of section 11 (b), the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) does not conform to the requirements of section 11 (b), the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c) (1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 12.

(2) If the Chairman determines that a management contract submitted under subsection (a), and the management contractor under such contract, meet the requirements of section 12, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a), or the management contractor under a contract submitted under subsection (a), does not meet the requirements of section 12, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to the date of enactment of this Act, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

CIVIL PENALTIES

SEC. 14. (a) (1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this Act, by regulations prescribed under this Act, or by tribal regulations, ordinances, or resolutions, approved under section 11 or 13, that may result in the imposition of a fine under subsection (a) (1), the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) (1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this Act, or regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

(d) Nothing in this Act precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this Act or with any rules or regulations adopted by the Commission.

JUDICIAL REVIEW

SEC. 15. Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

SUBPOENA AND DEPOSITION AUTHORITY

SEC. 16. (a) By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such a deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the

name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as herein before provided.

(e) Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are plaid for like services in the courts of the United States.

INVESTIGATIVE POWERS

SEC. 17. (a) Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this Act as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5, United States Code.

(b) The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) The Attorney General shall investigate activities associated with gaming authorized by this Act which may be a violation of Federal law.

COMMISSION FUNDING

SEC. 18. (a) (1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each class II gaming activity that is regulated by this Act.

(2) (A) The rate of the fees imposed under the schedule established under paragraph (1) shall be—

(i) no less than 0.5 percent nor more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000, of the gross revenues from each activity regulated by this Act.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $1,500,000.

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall, subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b) (1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 19, in an amount equal the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

AUTHORIZATION OF APPROPRIATIONS

SEC. 19. (a) Subject to the provisions of section 18, there are hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission.

(b) Notwithstanding the provisions of section 18, there are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989.

GAMING ON LANDS ACQUIRED AFTER ENACTMENT OF THIS ACT

SEC. 20. (a) Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act; or

(2) the Indian tribe has no reservation on the date of enactment of this Act and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) (1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials 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; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2) (B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of this Act unless such other provision of law specifically cites this subsection.

DISSEMINATION OF INFORMATION

SEC. 21. Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of Title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

SEVERABILITY

SEC. 22. In the event that any section or provision of this Act, or amendment made by this Act, is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act, and amendments made by this Act, shall continue in full force and effect.

CRIMINAL PENALTIES

SEC. 23. Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1166. Gambling in Indian country

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

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

"(c) For the purpose of this section, the term 'gambling' does not include—

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

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

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

"§ 1167. Theft from gaming establishments on Indian lands

"(a) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value of $1,000 or less belonging to an establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $100,000 or be imprisoned for not more than one year, or both.

"(b) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $250,000, or imprisoned for not more than ten years, or both.

"§ 1168. Theft by officers or employees of gaming establishments on Indian lands

"(a) Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value of $1,000 or less shall be fined not more than $250,000 and be imprisoned for not more than five years, or both;

"(b) Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value in excess of $1,000 shall be fined not more than $1,000,000 or imprisoned for not more than twenty years, or both."

CONFORMING AMENDMENT

SEC. 24. The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following:

"1166. Gambling in Indian country.
"1167. Theft from gaming establishments on Indian lands.
"1168. Theft by officers or employees of gaming establishmenhts on Indian lands.".

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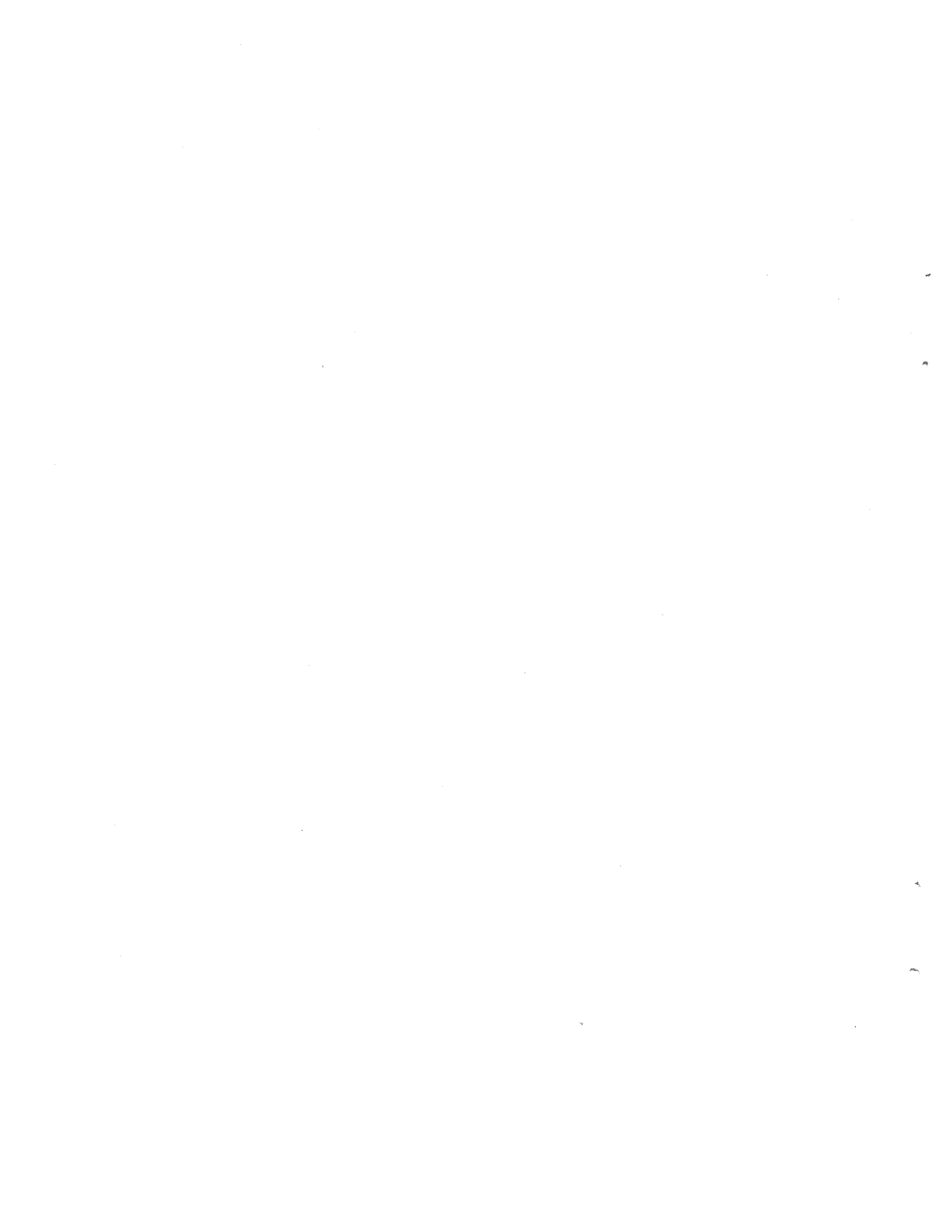
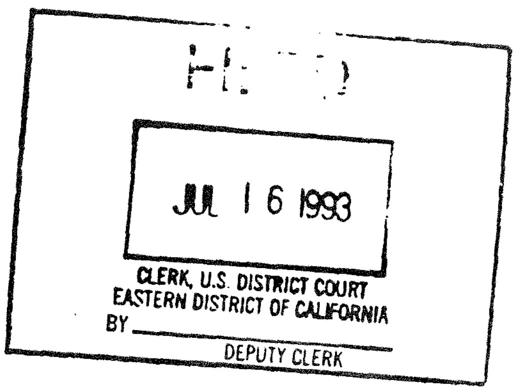
APPENDIX C





IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS, TABLE MOUNTAIN RANCHERIA; CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA; SAN MANUAL BAND OF MISSION INDIANS; VIEJAS RESERVATION OF THE CAPITAN GRANDE BAND OF DIEGUENO MISSION INDIANS; HOPLAND BAND OF POMO INDIANS,

Plaintiffs,

v.

GOVERNOR PETE WILSON; STATE OF CALIFORNIA,

Defendants.

AND CONSOLIDATED CASES

CIV-S-92-812 GEB

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs are federally-recognized Indian tribes (the "Tribes") having tribal lands within the State of California. The Tribes currently engage in various gaming activities and wish to operate

additional games. Accordingly, the Tribes requested the State to negotiate Tribal-State compacts permitting certain new games on their lands. The State refused to negotiate, claiming that the games proposed by the Tribes are prohibited in California. Moreover, the State contends that the new games are contrary to public policy and may not be permitted in a Tribal-State compact.

The Indian Gaming Regulatory Act ("IGRA") permits Indian tribes in California to operate any game that California permits to be played "for any purpose by any person." 25 U.S.C. § 2710(b)(1)(A). A gaming activity will not violate California's public policy unless such activity is prohibited, rather than regulated, under California law. California v. Cabazon, 480 U.S. 202 (1987). As the California lottery operates games that are extremely similar to the electronic games requested by the Tribes, those electronic games are permitted by the State within the meaning of § 2710(b)(1)(A). Moreover, those games do not violate California's public policy and are permissible on Indian land under IGRA.

Not all the Tribe's proposed games are comparable to State Lottery games or comport with the State's public policy. The State has consistently maintained a strong public policy prohibiting casino gambling, including banking card games and percentage card games. Accordingly, such games are prohibited in California, are against the State's public policy, and may not be operated by the Tribes.

II. BACKGROUND

This declaratory relief action was filed pursuant to a stipulation between the parties seeking a determination whether California law or public policy prohibits any or all of the Tribes' proposed games to be played within California's borders.

A. <u>The Games Proposed By The Indian Tribes</u>

The Tribes seek to augment their gaming activities by adding several new games. The proposed games are characterized as banking card games, percentage card games, electronic pull-tab games, electronic poker games, video bingo, lotto and keno games and other electronic number or symbol matching games. Banking card games are card games in which the gaming operator both participates in the game with the players and acts as a house bank. As the house bank, the operator pays all winners and retains all the other players' losses. Blackjack is a well-known example of a banking card game.

Percentage card games are card games in which the operator has no interest in the outcome of the game and simply takes a percentage of the amount wagered or won. The operator does not play in the game or against any of the players. Accordingly, players in a percentage card game bet against each other rather than the gaming enterprise.

Electronic pull tab games are simply an electronic version of games commonly known as "pull-tabs." In pull-tab games, a player purchases a ticket or a play from a finite pool of tickets containing a fixed number of winners. Each ticket contains concealed numbers or symbols which the player exposes to determine whether the ticket contains a winning combination. Electronic pull-tabs use a programmed computer chip to randomly select an electronic "ticket" from a deal containing a finite number of plays with a fixed number of winners. A printer produces a winning receipt which is then presented to the gaming operator.

Electronic poker games are an electronic rendition of draw poker. A computer randomly "deals" five "cards" to the player from a fifty-two card deck and visually displays the cards on the video screen. A

player may discard from one to five cards, and is "dealt" replacement cards by the computer. Players who match pre-determined winning poker "hands" are awarded credits which can be used for replays or cash prizes.

Video bingo, lotto, keno and other electronic video games are video versions of bingo and keno or other matching games. These electronic matching games are substantially similar to electronic pull-tab games, except that the computer, rather than the player, selects symbols or numbers to be played. Moreover, these electronic video games are extremely similar to electronic poker games, except that instead of cards, numbers or symbols are selected by the computer for the player. In electronic matching games, like electronic pull-tab and poker games, the player wins if his or her symbols or numbers match the symbols or numbers chosen by the computer. In these games the computer may be programmed to pay out a fixed percentage of the amount wagered.[1]

B. Gaming Activities Permitted in California

By any measure, California permits a substantial amount of gambling activity. See Cabazon, 480 U.S. at 212. For example, California allows parimutuel horse-race betting (Cal. Const., art. 4, § 19(b); Cal. Bus. Prof. Code Ann. §§ 19400-19667), gambling card games not expressly named by statute (Cal. Penal Code Ann. § 330) and bingo games. In addition, California operates a lottery and "daily encourages its citizens to participate in this state run gambling." Cabazon, 480 U.S. at 211.

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[1] None of the electronic devices plaintiffs wish to operate would dispense coins or currency, nor would they utilize a drum or reel or be activated by a handle such as mechanical slot machines.

In the six years since the Cabazon Court examined California's gaming activity, the State has significantly expanded the types of games played by the State Lottery. The State Lottery no longer simply consists of the familiar weekly drawing. The State Lottery Commission introduced a new game called Scratchers after approving the necessary regulations on February 21, 1991. That game is played by removing the latex covering from a ticket to expose the ticket symbols. Various game themes are permitted under the regulations.[2] Scratchers, along with all of its game-theme variations, is essentially a pull-tab game.[3]

Another State Lottery game is called Fantasy 5. To play Fantasy 5, a player either selects, or requests the computer to randomly select, five numbers from a field of 1 to 39. Each Tuesday, Thursday and Friday the winning Fantasy 5 numbers are randomly selected with the aid of a computer or mechanical device. Prizes are paid on a parimutuel basis, except that fixed prizes are paid to players who match three out of the five numbers.

Finally, the State Lottery offered electronic Keno to the California public following approval of new regulations on October 14, 1992. Keno is an on-line, interactive lottery game in which a player selects from one to ten numbers from a field of 80 numbers on a

[2] These game themes include matching three play symbols, matching two symbols and the variant, matching three identical play symbols in a horizontal row, adding all of the play symbols to exceed the required total amount, revealing three play symbols either diagonally, vertically, or horizontally on a nine symbol grid, matching the key play symbol and others.

[3] In addition, Scratcher players may be eligible to participate in the Big Spin, in which a large wheel with a ball inside is spun. The player wins the amount of money printed on the space where the ball comes to rest as the wheel stops.

computer terminal. Players may even avoid the deliberation necessary to select which numbers to play by simply requesting the computer to automatically and randomly generate the player's numbers. A Lottery Information Display System or lottery monitor displays the 20 winning numbers selected by computerized draw equipment. During gaming hours, new draws are held and winning numbers are displayed every five minutes. Players win and are paid fixed dollar prizes according to the number of winning numbers they have matched. In addition, players who match ten winning numbers may win a parimutuel prize.

III. ANALYSIS

A. Jurisdiction

The court has subject matter jurisdiction under 28 U.S.C. § 1362.[4] The impasse between the Tribes and the State in negotiating a Tribal-State compact based upon the application of State law to the disputed games is an actual controversy warranting declaratory relief. Spokane Indian Tribe v. U.S., 972 F.2d 1090, 1092 (9th Cir. 1992); Oneida Tribe of Indians v. State of Wis., 951 F.2d 757, 759 (7th Cir. 1991)("actual controversy" was present when Tribal-State compact

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[4] 28 U.S.C. § 1362 provides that:

> The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

It is undisputed that the plaintiff tribes are federally recognized within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5) and that this case arises under the same federal statute.

negotiations reached an impasse because of disagreement over the term "lotto").[5]

B. The Relationship Between State Law and Indian Gaming

1. Regulatory and Prohibitory State Laws: the Cabazon Public Policy Test

This dispute represents a new phase in the ongoing relationship between the Tribes and the State of California concerning Indian gaming. Prior to 1982, the Cabazon and Morango Bands of Mission Indians began operating bingo games on tribal property.[6] The State challenged the Indian's operation of the bingo games claiming that the games violated California Penal Code § 326.5. The Indians agreed that their bingo games violated requirements in § 326.5 that such games be operated and staffed by unpaid members of designated charitable organizations and award prizes not exceeding $250 per game. The Indians asserted, however, that the state laws and county ordinances were inapplicable to bingo games operated on tribal lands. Cabazon, 480 U.S. 202. Accordingly, the tribes sought declaratory relief in federal court when California insisted that they comply with the State's bingo laws.

The Supreme Court recognized at the outset that under Public Law 280, California had been granted comprehensive criminal jurisdiction over offenses committed by or against Indians within Indian country in

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[5] The State waives objection to jurisdiction based upon immunity from suit under the Eleventh Amendment and consents to the present suit. Port Authority Trans-Hudson Corp. v. Feerey, 495 U.S. 299 (1990).

[6] All references to tribal property or tribal gaming activities shall refer to property and gaming activities within the State of California.

California. 18 U.S.C. § 1162.[7] However, the statute granted California only limited civil jurisdiction over Indians and their land. 28 U.S.C. § 1360(a), § 4 of Public Law 280.[8] Accordingly, the Court observed:

> when a State seeks to enforce a law within an Indian reservation under the authority of Public Law 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

Cabazon v. California, 480 U.S. at 210 (quoting Bryan v. Itasca County, 426 U.S. 373, 385, 388-90 (1976)).[9]

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[7] 18 U.S.C. § 1162(a) provides:

> [California] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that [it] . . . has jurisdiction over offenses committed elsewhere within the State . . . and the criminal laws of [California] . . . shall have the same force and effect within such Indian country as they have elsewhere within the State. . . .

[8] Section 4(a) of Public Law 280, codified as 28 U.S.C. § 1360(a) provides:

> [California] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

[9] In Cabazon, California also argued that the Organized Crime Control Act (OCCA) enabled the State to apply California's laws to tribal bingo enterprises. California v. Cabazon, 480 U.S. at 213. Under the OCCA, it is a crime to conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business. 18 U.S.C. § 1955(a). An illegal gambling business is defined as a gambling business which violates the law of a State or political subdivision in which it is conducted. 18 U.S.C. § 1955(b)(1)(i). The Supreme Court rejected California's argument stating that OCCA is a federal law enforceable by the federal government exclusively in district courts and grants no authority to the State.

In Cabazon, the Supreme Court warned that the crucial determination of whether a law is criminal or civil in nature must depend upon more than merely assessing whether the law imposes a criminal penalty. Rather, the proper test is whether the conduct proscribed by the law "violates the State's public policy." Id. at 209. Public policy must be approached as a global concept and, accordingly, any inquiry into the nature of a particular state law must extend beyond the confines of the law's own provisions. "In an inquiry such as this we must examine more than the label itself to determine the intent of the State and the nature of the statute." Quechan Indian Tribe v. McMullen, 984 F.2d 304, 307 (9th Cir. 1993).

A state's public policy must be gleaned from the totality of the laws enacted by the state affecting the conduct in issue. If the totality of state law manifests an intent to prohibit certain conduct, then such conduct violates its public policy. Conversely, if state law generally permits the conduct, notwithstanding exceptions, the conduct does not violate its public policy. In the latter instance, the state law is regulatory and not prohibitory.

> Concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory -- civil regulatory test. That concern leads us to resolve any doubts about the statute's purpose in favor of the Indians.

Confederate Tribes v. State of Wash., 938 F.2d 146, 149 (9th Cir. 1991)

Assessing a State's public policy and whether it prohibits certain conduct is a subtle process not subject to a bright-line rule. Id. at 210. Under Cabazon, determining whether a particular state statute is criminal/prohibitory or civil/regulatory in nature involves a two step process: (1) identifying the conduct prohibited by the

statute and (2) ascertaining the state's public policy in connection with that conduct. This second step focuses on whether

> the prohibited activity is a small subset or facet of a larger, permitted activity -- high-stakes unregulated bingo compared to all bingo games -- or whether all but a small subset of a basic activity is prohibited.

Confederate Tribes, 938 F.2d at 149. It is the second task which is most pivotal and most arduous.

The Cabazon decision affords valuable guidance for defining California's public policy as the issues confronting the Court were closely related to those involved in this case. Employing the public policy test, the Supreme Court in Cabazon endeavored to ascertain California's public policy as it related to bingo gaming. Despite the fact that the Indian's bingo operation violated a Penal Code section, the Court pursued a broader perspective, observing:

> [B]ingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18.

Id. at 211. The Court also noted that "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery." Id.

Based on the foregoing, the Cabazon Court concluded that the State's public policy permits bingo playing as "California regulates rather than prohibits gambling in general and bingo in particular." Id. The Court held that the Indian's bingo gaming operation was not contrary to public policy, despite its violation of Penal Code § 326.5. Under California's public policy, the statute violated by the Indian's bingo operation was civil/regulatory, not criminal/prohibitory, and did not apply on Indian land.

1 2. IGRA

2 In the wake of the Cabazon decision, Congress passed the Indian
3 Gaming Regulatory Act ("IGRA") in 1988. Congress explicitly
4 recognized in the opening text of IGRA that:

5 (1) numerous Indian tribes [had] become engaged in or [had] licensed gaming activities on Indian lands as a means of
6 generating tribal governmental revenue; . . .

7 (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
8
(4) a principal goal of Federal Indian policy is to promote
9 tribal economic development, tribal self-sufficiency, and strong tribal government; and
10
(5) Indian tribes have the exclusive right to regulate gaming
11 activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a
12 State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.[10]
13
25 U.S.C. § 2701.
14
The underlying intent of IGRA is to provide a statutory framework
15
for:
16
(1) the operation of gaming by Indian tribes as a means of
17 promoting tribal economic development, self-sufficiency, and strong tribal governments; and . . .
18
(2) the regulation of gaming by an Indian tribe to shield it
19 from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming
20 operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; . . . .
21
25 U.S.C. § 2702.
22
IGRA divides gaming into three classes. Class I gaming "means
23
social games solely for prizes of minimal value or traditional forms
24
of Indian gaming engaged in by individuals as a part of, or in
25
connection with, tribal ceremonies or celebrations." 25 U.S.C.
26

27

28 [10] The last item effectively incorporates the Supreme Court's decision in Cabazon into the statute.

§ 2703(6). Indian tribes have exclusive jurisdiction to regulate Class I gaming. 25 U.S.C. § 2710(a)(1).

Class II gaming means "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and card games that (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State," provided those card games are played under the State laws and regulations regarding hours of operation and wager or pot size limitations. 25 U.S.C. § 2703(7). The tribes also have jurisdiction over Class II gaming, subject to the express requirements of IGRA and the oversight of the National Indian Gaming Commission. 25 U.S.C. § 2710(b).[11]

Class III gaming includes all forms of gaming that are not Class I or II gaming. 25 U.S.C. § 2703(8). The parties agree that the games in dispute here are Class III games. Class III gaming may only be conducted on tribal lands if it is (A) authorized by an approved Tribal ordinance or resolution, (B) located in a State that permits

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[11] IGRA permits Class II gaming only if it is conducted "within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by federal law)." 25 U.S.C. §2710(b)(1)(A). The statute also limits the uses of gaming revenues, provides for outside audits of gaming and contracts for supplies or services, requires that gaming be conducted in a safe manner, and requires background checks of management and key employees. State criminal laws which would otherwise apply to Class I or II gaming are assimilated into federal law under IGRA, but the United States has exclusive jurisdiction over criminal prosecutions of violations of State gambling laws made applicable to Indian country. See Keetoowah Indians v. State of Oklahoma, 927 F.2d 1170 (10th Cir. 1991).

such gaming **for any purpose by any person, organization or entity**, and (C) conducted in conformance with a Tribal-State compact between the Indian Tribe and the State. 25 U.S.C. § 2710(d)(1)(emphasis added).

A tribe wishing to conduct Class III gaming upon its lands must "request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). Upon such a request, the State must negotiate with the Indian tribe in good faith. Id.[12]

The Senate Report accompanying IGRA's passage provided the following guidance to courts construing the phrase "located within a State that permits such gaming for any purpose by any person, organization, or entity" found in IGRA:

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether [Class III][13] games are allowed in certain States. This

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[12] Plaintiffs assert Cabazon's determination that California regulates rather than prohibits gambling in general is entitled to issue preclusion effect in this case. The cases do involve the same defendant, as well as some of the same plaintiffs, but that is not enough for issue preclusion to apply.

Relitigation of issues is precluded only if the second case reaches issues "actually litigated and necessarily decided in prior proceedings." Robi v. Five Platters, Inc., 918 F.2d 1439, 1442 (9th Cir. 1990). The Cabazon Court found California's gaming laws in general to be regulatory, precluding relitigation of this issue. However, Cabazon directed courts to examine "applicable state laws [] in detail before they can be characterized as regulatory or prohibitory." 408 U.S. at 211 n.10. Cabazon examined California's bingo laws while California's statutes relating to electronic games of chance and banked and percentage card games are at issue in this case. Therefore the issue whether California's laws prohibiting the proposed games are criminal or regulatory is not precluded.

[13] The Senate Report was specifically referring to this phrase as found at 25 U.S.C. § 2710(b)(1)(A) regarding Class II (continued...)

1 distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in Cabazon.

2

3 S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N.
4 3076. This passage from the Senate Report, in conjunction with the
5 express language of section 2701(5),[14] makes it clear that Congress
6 intended IGRA to incorporate and be applied consistently with Cabazon.
7 Thus, Congress incorporated the Cabazon criminal/prohibitory-
8 civil/regulatory analysis into IGRA.

9 3. IGRA and Cabazon Apply Conjunctively

10 The combined effect of IGRA and Cabazon is that a two step
11 analysis must be used to determine whether the proposed Class III
12 games are the proper subject of a Tribal-State compact. First, the
13 court must ascertain whether the State permits each proposed game to
14 be played "for any purpose by any person." If a game is permitted,
15 then the plain language of IGRA establishes that the game is the
16 proper subject of a Tribal-State compact. This effect of IGRA is
17 premised on the notion that if the proposed Class III game is
18 permitted by the State to be played for any purpose by any person, the
19 game does not violate the State's public policy.

20 In the case where a proposed game has not been permitted by the
21 State, the court must proceed to the second step of its analysis. In
22 such instance, Congress has directed the courts to employ the Cabazon

23

24

[13](...continued)
25 gaming. However, this legislative history is "instructive with respect to the meaning of the identical language in section
26 2710(d)(1)(B), regarding Class III gaming." Mashantucket Pequot Tribe v. State of Conn., 913 F.2d 1024, 1030 (2d Cir. 1990); U.S.
27 v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 365 (8th Cir. 1990).
28

[14] See text of 25 U.S.C. § 2701(5). See supra pp. 10-11.

analysis to determine whether the proposed game violates the State's public policy. Under Cabazon, the court must ascertain the state's public policy as it relates to the gaming activity by examining the State's entire statutory scheme. If the State's public policy, as determined from the totality of its laws, does not prohibit the game, then the game is the proper subject of a Tribal-State compact. This remains true notwithstanding any particular law of the state which, under Cabazon, regulates rather than prohibits the game. Conversely, when the State's public policy prohibits the proposed game, the Class III game cannot lawfully be operated on Indian lands within the State.

The effect of IGRA is simply to provide a shortened application of the Cabazon rule where a game is found to be played within a State. In such instance, no further analysis is necessary to find the game is proper for a Tribal-State compact. In every other case, however, Cabazon retains its full vitality and a game will only be prohibited on Indian lands if it violates the State's public policy.

C. The Proposed Games

At the outset this court must identify the conduct in issue. As described above, the Tribes seek to operate several new games within the Class III description of IGRA.[15] The new games may be divided into two distinct groups: electronic games and card games.[16]

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[15] Class III designation simply establishes that the games are not Class I or Class II games. This characterization has no particular descriptive value and serves only to indicate which IGRA provisions are applicable. Under the IGRA, Class III games may only be played on Indian lands if the three conditions stated in 25 U.S.C. § 2710(d)(1) are satisfied.

[16] At the outset, the court must decide whether, under the IGRA and Cabazon Class III games are considered collectively or individually when determining whether they are an appropriate subject of a Tribal-State compact. Plaintiffs argue that if (continued...)

1. Electronic Games

Each of the electronic games in this category involves a machine or video terminal used to play games which the State otherwise permits. The State argues that the use of electronic gaming devices to play such games violates California's prohibition against "slot machines." Cal. Penal Code §§ 330, 330a, and 330b.[17] Plaintiffs contend that the electronic games they propose are indistinguishable from the video lottery terminals operated by the California State Lottery and permitted punchboards, and therefore are games that the

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[16](...continued)
California permits any Class III games to be played, all Class III games should be negotiable in a Tribal-State compact. The State contends that Class III is "less a category than a residuum" and urges an activity by activity analysis. Class III includes a wide variety of games and legislative history and prior cases demonstrate that the "activity" is not to be too narrowly defined. Courts which have applied the Cabazon prohibitory/regulatory distinction have conducted a broad review of the state's gaming laws but are careful to examine the specific gaming activity which has been proposed. See Mashantucket Pequot Tribe, 913 F.2d at 1032; Sisseton-Wahpeton Sioux Tribe, 897 F.2d at 368. This court has found no authority for the proposition that a state's public policy construed as permitting a single Class III game must be found to permit all Class III gaming activities. Accordingly, this court adopts the method of review used by other courts, mindful that Cabazon found that California's gaming laws in general are regulatory.

[17] The California Penal Code defines a slot machine as "a machine that is adapted . . . for use in such a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, such machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value or additional chance or right to use such slot machine or device, or any check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value." Cal. Penal Code § 330b(2).

State permits to be played by any person for any purpose. Plaintiffs claim that they are entitled to play the electronic games on Indian lands regardless of whether the equipment used may be deemed illegal slot machines so long as the State sponsors an identical type of game.[18]

In this case it is not the rules or type of play associated with the proposed electronic games that is the focus of their controversy. Rather it is the use of electronic equipment to play the games. The court's first task is to determine whether California permits games to be played with electronic equipment by any person for any purpose. In the event that the State permits games to be played using electronic equipment, by any person for any purpose, then the Tribes' operation of games using similar equipment is a proper subject for a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(B).

If the games are not permitted by the State to be played with electronic equipment, the court proceeds to determine whether Penal Code § 330(b) is criminal/prohibitory or civil/regulatory in nature by ascertaining California's public policy regarding the use of electronic gaming devices. If the use of electronic gaming equipment violates California's public policy, then § 330(b) must be construed as criminal/prohibitory in nature and applicable to the Indian's operations. Conversely, if public policy does not preclude the use of such equipment, § 330(b) must be regulatory in nature and inapplicable to Indian gaming.

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[18] The Tribes, therefore, have agreed with the State to assume for the purposes of these proceedings that the devices are "slot machines" as defined by California Penal Code § 330b(2). In California, it is a misdemeanor to manufacture, repair, own, possess, transport or permit the operation of a slot machine. Cal. Penal Code § 330b(1).

1 As the Tribes point out, the State has authorized the State
2 Lottery to operate electronic games virtually identical to the
3 electronic games requested by the Tribes.[19] Moreover, from the
4 record, it appears that equipment similar if not identical to that
5 proposed by the Tribes is currently employed by the State in its
6 electronic gaming operations. Given the express purposes and intent
7 of IGRA to facilitate Indian revenue generation and governmental
8 autonomy, the Tribes should not be deprived of the opportunity to
9 enhance their gaming operation and revenues in the same manner, and
10 with the same modern equipment, that the State has used to enhance its
11 operations. IGRA expressly precludes such result and requires that
12 the use of electronic equipment on the Tribe's lands be held a proper
13 subject for a Tribal-State compact.[20]

14 2. Banked and Percentage Card Games

15 The Tribes propose to operate banked and percentage card games.
16 The State contends that these card games are prohibited by Cal. Penal
17 Code § 330 and violate California's public policy against casino

18

19 [19] The State argues that the video lottery terminals are distinct from electronic games because the electronic machine which
20 records numbers for the player is different from the central computer at lottery headquarters which selects the winning numbers
21 and transmits them to the video lottery terminals. It argues that the draw of the winning numbers is not "activated" by the lottery
22 terminal, but by the central computer. This distinction is not significant from the player's perspective. Moreover, from a
23 regulatory standpoint, the same controls are relevant to assure that the winning numbers are randomly drawn whether they are drawn
24 locally or by a central computer.

25 [20] The State attempts to avoid this result by arguing that the State Lottery video terminals are not "slot machines." See
26 infra note 18. Although this court does not reach that question, due to the substantial similarities between the State's equipment
27 and the Tribes' proposed equipment, to the extent the State is correct, the Tribes would be entitled to use the same equipment in
28 their gaming operation since the "slot machines" prohibition would not apply.

games. The Tribes do not dispute the State's point that it does not permit banked or percentage card games, but contend that other types of banked and percentage games as well as various card games are played within the State. As a result, the Tribes assert, banked and percentage card games do not violate the State's public policy.

Following the analysis required by IGRA and Cabazon, the first inquiry is whether the State permits banked or percentage card games to be played for any purpose by any person. If so, under IGRA, the proposed games are a proper subject for negotiation of a Tribal-State compact. If banked and percentage card games are not permitted in California, the court must follow Cabazon and ascertain the State's public policy regarding the operation of such games.

Under Cabazon, the proposed games violate California's public policy and the Tribes may not negotiate a Tribal-State compact to operate them, if the intent of the State's laws is to prohibit them. Cabazon, 480 U.S. at 210. Conversely, the proposed games do not violate the State's public policy if the court finds that the State's laws regarding banked and percentage card games permit the games. Id. In such case, the parties could negotiate a Tribal-State compact permitting the Indians to operate banked and percentage card games.

a. Whether the State Permits Banked or Percentage Card Games

The Tribes contend that California permits many banked and percentage games. For example, the Tribes assert that the State Lottery's games which have fixed prizes are banked games since the State Lottery cannot know how much prize money it will have to pay out for any given "play" involving fixed prizes. Such uncertainty typifies banked games. Although the State urges that payments are

made from an accumulation of player's money, the fact remains that a fixed prize game with a potentially unlimited number of winners is fundamentally a banked game.[21]

Similarly, it is not difficult to find that many percentage games are played in California. The State Lottery's main games are percentage games, where the pot is based upon the receipts from players, less a certain percentage for education and for administrative costs. Moreover, California's horse racing industry operates percentage gaming. Cal. Bus. § Prof. Code § 19610 (requiring horse racing associations to deduct a set percentage of the total amount wagered). Although many banked and percentage games are played in California, it is an altogether different matter to find any banked or percentage card games permitted by the State. To the contrary, California specifically prohibits banked or percentage card games, even in the State licensed card rooms. See generally Sullivan, 189 Cal. App. 3d at 683. Accordingly, the Tribes' request to operate such games does not pass the test specified in IGRA as California does not permit banked or percentage card games to be played by any person for any purpose.

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[21] The parties agree that draw poker is a banked game. In the State Lottery games, like draw poker, players receive or select numbers or symbols which they hope will "win" by matching or exceeding the "bank's" random draw. The "bank" uses the player's wagers to cover the wins of other players, to the extent they are available. The "bank" remains obligated to pay all winners, however, even if the payout to winners exceeds the wagers of the other players. Thus, the "bank" has the potential of paying its own funds to cover the winnings of the players. The State is in the unique position of operating games having many, many participants, which fact reduces the statistical risk that any one "play" will require a payout exceeding the intake from the individual game. The fact that the State Lottery retains adequate reserves from prior game revenues does not change the fundamental gaming principles involved.

1
b. <u>Whether Banked and Percentage Card Games Violate California's Public Policy</u>
2

3 The second step of the analysis is whether banked and percentage
4 card games violate California's public policy. The Tribes assert that
5 since the State permits so many banked and percentage games, banked
6 and percentage card games could not violate the State's public policy.
7 The State contends that the statutory prohibition of banked and
8 percentage games and the prohibition of traditional casino games
9 illustrates the State's public policy against the card version of such
10 games.

11
(1) <u>The Public Policy Prohibiting Commercial Gambling</u>
12

13 The State's public policy against banked and percentage games can
14 be understood by examining the State's intent underlying the relevant
15 laws. <u>Cabazon</u>, 480 U.S. at 210. California prohibits banked or
16 percentage games played with cards, dice, or any device, for money or
17 other representative of value. Cal. Penal Code § 330. Banked games
18 are games in which the "house" or "bank" is a participant in the game,
19 taking on all comers, paying all winners and collecting from all
20 losers. <u>Sullivan v. Fox</u>, 189 Cal. App. 3d 673, 678 (1987). The
21 "house" or "bank" has an interest in the outcome of banked games as
22 its profits increase when the "house" wins the game.

23 In contrast, percentage games are games in which the house takes
24 a percentage of the amount wagered, the amount won, or the money
25 changing hands. <u>Id.</u> at 679. The house has no stake in the outcome of
26 a percentage game, but benefits from an increased volume of play.
27 Banked and percentage games are defined so that when combined, all
28 potential forms of commercial gambling, or gambling which generates

revenue, are prohibited. Id. However, California permits gaming wherein the operator rents a game table or seats, or collects a flat fee from players. Under these circumstances, the operator neither enters into play nor has an interest in the game or the volume of gaming. Id. at 683.

Notwithstanding the prohibition of banked and percentage games, the State both permits and sponsors banked and percentage games. The State permits parimutuel horse race wagering in California and also permits off-track or satellite horse race wagering. Cal. Const. Art. 4, § 19(b); Cal. Bus. & Prof. Code §§ 19411, 19605. Moreover, California's State Lottery includes both banked and percentage games, as discussed above. In addition, California permits the playing of card games in several hundred private establishments, provided that the operator does not participate as a player and the establishment has no interest in the outcome.

Since California engages in and permits commercial banked and percentage wagering operations, it cannot establish that commercial banked and percentage wagering operations violate its public policy, notwithstanding the absolute statutory prohibition of banked and percentage games. Moreover, card games in particular do not violate any apparent public policy in California. California permits several hundred card rooms, indicating that California's public policy does not oppose the activity of playing cards. Thus, California's statute prohibiting commercial wagering does not establish a public policy which precludes commercial card game wagering.

(2) The Public Policy Prohibiting Casino Gaming

The State further argues that it's public policy prohibiting casino gambling prohibits the proposed banked and percentage card games. The State points to a Constitutional provision added by voter initiative in 1984 which provides as follows:

> (e) The Legislature has no power to authorize, and shall prohibit casinos of the types currently operating in Nevada and New Jersey.

Art. 4, § 19(e).[22] The State's public policy regarding casino gambling is also revealed in a statute restricting the State Lottery from sponsoring games utilizing certain traditional casino themes, including roulette, dice, baccarat, blackjack, Lucky 7's, draw poker, slot machines and dog or horse racing. Cal. Gov't Code § 8880.28(a). Moreover, certain traditional casino card games may not be played in California, even in its card rooms. Cal. Penal Code § 330. These sources reveal a California public policy prohibiting traditional casino gambling.

Banked or percentage card games using traditional casino game themes would clearly violate California's public policy against casino gaming.[23] These games would include blackjack and poker. Whether

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[22] Unfortunately, the State provides no explanation or definition of the critical phrase "casinos of the types currently operating in Nevada and New Jersey." The State asserts, without factual support, that the gambling and devices prohibited by Penal Code § 330, 330a and 330b are commonly understood to be casino games and are in fact conducted in casinos in Nevada and New Jersey.

[23] Another potential public policy concern is that casinos offer a collection of games under one roof. Plaintiffs responded in oral argument that California currently permits multiple games to be played under one roof. For instance, they assert California currently permits a card room at a parimutuel horse racing track. (continued...)

1 commercial wagering on other card games would also violate
2 California's public policy is unclear, without a greater description
3 of those games. Thus, the parties must negotiate their difference
4 over the remaining banked and percentage card games through the
5 Tribal-State compacting process. Such negotiations are part of the
6 procedural framework established by Congress to address the differing
7 interests at issue here.

8 D. Tenth Amendment

9 The State argues that IGRA violates the Tenth Amendment by
10 imposing an impermissible mandate on the States to negotiate with
11 Indian tribes over what gaming activity is allowed on Indian lands
12 located within a State's borders.[24]

13 The Supreme Court recently restated the limits imposed by the
14 Tenth Amendment on Congress' power to direct or otherwise motivate the
15 States to regulate in a particular way. New York v. United States,
16 112 S. Ct. 2409, 2414 (1992). The Court acknowledged that "the
17 Framers explicitly chose a Constitution that confers upon Congress the
18 power to regulate individuals, not States." Id. at 2423. Congress'
19 power to regulate or prohibit certain actions does not give Congress
20
21

22 [23](...continued)
The issue before the court, however, is what types of games may be
23 included in a Tribal-State compact. The number of different games
and gaming devices permitted under one roof should be determined
24 through the negotiation of a Tribal-State compact. 25 U.S.C. §
2710(3)(C).
25

[24] Assuming, arguendo, that the IGRA was found to be
26 unconstitutional under the Tenth Amendment, the State would still
be confronted by the Tribe's request to operate the proposed games.
27 Moreover, without the IGRA, Cabazon holds that the Tribes would be
able to operate those games which do not violate the State's public
28 policy. The result the court reaches in this decision would not
change under a pure Cabazon analysis.

power to compel the States to regulate or prohibit the same actions. Id.

This limitation, however, does not restrict Congress from offering incentives to encourage States to act in certain ways. These incentives must involve a choice. For example, Congress may offer States the choice of regulating an activity according to federal standards or having state law pre-empted. Id.; Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)(federal statute did not compel states to enforce federal standards, expend state funds or participate in federal regulatory program where federal government assumed the full regulatory burden if states chose not to comply).[25] "However, a choice between two unconstitutionally coercive regulatory techniques is no choice at all." New York, 112 S. Ct. at 2428; Board of Natural Resources of the State of Washington v. Brown, No. 92-35004, (9th Cir. May 4, 1993)(invalidating a federal statute which presents an alternative which Congress has no authority to command).

Turning to IGRA, the State argues that the plain language of the statute exhibits an unconstitutional mandate that the State negotiate with the tribes to reach a compact. Courts which have found that IGRA violates the Tenth Amendment have construed this requirement to negotiate in good faith as foreclosing the State from refusing to act.[26] This construction of the statute is only required if the

---

[25] The rationale is that the state officials must remain free to act in accordance with and be accountable to the best interests of the citizens of the state. New York at 2424 and 2427.

[26] Confederated Tribes v. Washington, CIV-92-988-T, E.D. Wa. (June 3, 1993), Pueblo of Sandia v. New Mexico, CIV No. 92-0613 JC, D. N.M. (November 3, 1992), Ponca Tribe of Oklahoma v. Oklahoma, (continued...)

mandatory language is read without considering the language and design of the statute as a whole.

Under statutory rules of construction, "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the court [should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." New York, 112 S. Ct. at 2425. This rule of statutory construction favors declination of the State's invitation to construe the negotiation requirement as an unconstitutional command.

Construing the statute as a whole reveals that the process of negotiating a compact does not require a state to assume any responsibility for regulating. Three levels of analysis support this conclusion. First, the plain language mandates the State to negotiate rather than regulate. Second, the Congressional intent and purpose of IGRA as a whole emphasize that the relationship between the State and the Tribes is that of two sovereign entities cooperating to reconcile potentially competing interests, but remaining subject to federal regulation and authority. Finally, the legislative history further illustrates Congress' intent in enacting the statute was "to provide a statutory basis for operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2701(4).

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[26](...continued)
CIV No. 92-9888T, W.D. OK (September 9, 1992). Contra Yavapai-Prescott Indian Tribes v. State of Ariz., 796 F. Supp. 1292, 1297 (D. Ariz. 1992) [concluding that the IGRA does not violate the Tenth Amendment].

1. The Mandate to Negotiate

The first distinction between IGRA's mandate to the states and Tenth Amendment precedents is that IGRA does not coerce any state to regulate Indian gaming activities, but only to negotiate with the Tribes over what regulations would best protect the state's interests as a neighboring sovereign.[27] Negotiating the compact does not implicitly require the State to regulate the gaming activities. However, a state may negotiate for those regulatory controls which it opines must be undertaken to protect it's interests. 25 U.S.C. § 2710(d)(3)(C). The negotiations are simply a method by which states and Indian tribes may share their concerns and express opinions, as they seek to reach a compact designed to address the concerns of both. The negotiating process might facilitate the elimination of some areas

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[27] 25 U.S.C. § 2710(d)(3)(C) provides that the Tribal-State compact may include provisions relating to:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

of disagreement between the State and the Indian Tribes as to what Class III gaming could be conducted under a compact and under what conditions the games would be operated. There is no compulsion inherent in this process, direct or implicit, that the State regulate. The eventual compact, rather than the negotiations, prescribe the regulatory scheme.

Through IGRA, Congress implicitly attempts to design a compact process that respects each state's public policy on gaming. The State's laws are relevant for determining that public policy. First, federal law permits Indian tribes to operate only those Class III games which the state prohibits as a matter of state criminal law and public policy under the Cabazon analysis. Second, the state may negotiate with the Indian tribes to obtain their consent to the extension of state civil/regulatory laws onto Indian lands through the compacting process.[28] Therefore, IGRA does not change the federal government's historical retention of civil regulatory jurisdiction over Indian gaming.

Without a compact, the Tribes may not conduct class III gaming unless the Secretary of the Interior prescribes procedures or gaming regulations pursuant to § 2710(d)(7)(B)(vii)(I)-(II). Yavapai-Prescott Indian Tribe, 796 F. Supp. at 1296-1298. Moreover, no

[28] Federal law rather than State law governs the determination of what Class III games may be negotiated in a Tribal-State compact. The State has negotiated for compacts governing other games without asserting that the mandate to negotiate violates its Tenth Amendment rights. The State's primary opposition to the proposed games is that they are "unlawful" in California. However, whether a Class III game may be played on Indian lands within California is purely an issue of federal rather than State law.

Tribal-State compact is effective without the approval of the Secretary of the Interior in compliance with 25 U.S.C. § 2710(d)(3)(B). In conclusion, the statute's requirement that the state negotiate with a fellow sovereign having territory within its borders does not contravene the Tenth Amendment.

2. IGRA Statutory Scheme as a Whole

We discern the plain meaning of a statute by looking "to the particular statutory language at issue, as well as the language and design of the statute as a whole." Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1341 (9th Cir. 1990). Construing IGRA in its entirety reveals that its requirement that a State negotiate for a Tribal-State compact does not use the states as implements of regulation in violation of the Tenth Amendment. See Board of Natural Resources v. Brown, No. 92-35004, (9th Cir. May 4, 1993).

The Congressional findings codified in IGRA provide that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). This federalization of each state's public policy on what gaming activity is authorized on Indian lands appears to have been important to the Congressional balancing of the various interests implicated by Indian gaming. In its codified findings, Congress also expressly finds that "a principal goal of Federal Indian policy is to promote tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). Moreover, IGRA declares its purpose is to "provide a statutory basis for the regulation of gaming by an Indian tribe

1 adequate to shield it from organized crime and other corrupting
2 influences. . ." 25 U.S.C. § 2701(2).
3 A state's only potential role in this entire scheme involves
4 negotiating in good faith for a Tribal-State compact governing Class
5 III gaming. 25 U.S.C. § 2710(d)(3). Failing to negotiate in good
6 faith subjects a state to a potential finding by a federal court that
7 the state failed to negotiate in good faith. 25 U.S.C. §
8 2710(d)(7)(A) and (B). The court may then order the State to conclude
9 a compact within 60 days. Id. If a compact is not reached in those
10 60 days, the tribe and the state must each submit their last best
11 offer for a compact to a court-appointed mediator. Id. The state
12 then has 60 days to choose whether to consent to this compact. Id.
13 If the state does not approve the Secretary shall prescribe procedures
14 under which Class III gaming may be conducted on "the Indian lands
15 over which the Indian tribe has jurisdiction." Id. If the Secretary
16 prescribes such procedures, the Secretary then has the right to
17 enforce those procedures in federal court. Id.
18 Examining this process reveals that the requirement for the State
19 to negotiate need not be construed in a strictly mandatory sense. If
20 the state takes no action, it does not incur a penalty. Nor does the
21 statute effect a coercion upon states who elect not to participate.
22 Failing the state's participation, the Secretary of the Interior
23 prescribes on a tribe-by-tribe basis procedures under which the tribe
24 may operate Class III gaming. Therefore, the federal government
25 regulates the Class III gaming if the state either chooses not to
26 participate or cannot obtain what it considers to be necessary tribal
27 concessions of jurisdiction to the state. If the tribe and state do
28

not agree on the terms of a compact, the federal government retains final authority to decide the dispute.

This conclusion is strengthened when the statutory negotiating process is examined in the context of federal Indian policy. State law is only applicable on Indian lands within its borders if federal law expressly incorporates the state law. Cabazon, 480 U.S. at 208. Moreover, federal law does not incorporate state civil regulatory law. Further, federal law incorporates only those state criminal laws which are deemed "criminal/prohibitory" after examining the state's public policy relating to the specific conduct. Id. at 210.

When selecting the compact negotiating process, rather than imposing a federal regulatory scheme, Congress implicitly attempts to use a "local approach" that permits Class III gaming to constantly evolve as a state's gaming policy changes. Under this approach, any federal regulatory scheme must continually be tailored to the particular state's changing public policy. The compacting process permits the state and tribe the greatest opportunity to distill that public policy and to write a mutually-satisfactory regulatory scheme. Failing agreement, however, the federal government, and not the state, assumes the full burden of regulating. 25 U.S.C. § 2710(d)(7)(vii) (providing that the Secretary of the Interior, in consultation with the Indian tribe, shall proscribe the procedures under which Class III gaming may be conducted on the Indian lands).

The State next argues that many Indian tribes are not capable of regulating the gaming at this time and that Congress recognized States were the governmental unit most likely to have an appropriate, existing regulatory scheme. States are coerced into regulating, the State argues, to prevent a vacuum of federal regulation.

The federal government's failure to regulate, even if true, does not violate the Tenth Amendment. Tenth Amendment concerns arise only when the state is forced to choose between regulating consistently with federal policy or facing a consequence the federal government has no constitutional authority to impose. See New York, 112 S. Ct. at 2428. In this case, the state has neither alternative. The state is not permitted to regulate without the consent of the tribe obtained through the negotiation process, and the federal government has exclusive authority to regulate. The coercion the State complains of, therefore, does not arise from a violation of the Tenth Amendment.

3. IGRA's Legislative History

Although it may be unnecessary to conduct further inquiry, the legislative history of IGRA affirms that IGRA does not permit or coerce the state to regulate Indian gaming in violation of the Tenth Amendment. IGRA gives States the unique opportunity to participate in the civil regulation of Indian gaming, recognizing that both the tribe and state have legitimate interests in the manner in which Class III gaming is conducted. See S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3083-84. "[C]ongress clearly was cognizant of the Tenth Amendment when it acknowledged that a State need not forgo any State governmental rights to engage in or regulate Class III gaming except whatever it may voluntarily cede to a tribe under a compact." Yavapai-Prescott Indian Tribe v. State of Ariz., 796 F. Supp. 1292, 1297; S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3083-84.

The legislative history shows that Congress extended to the states a unique opportunity to acquire jurisdiction over Indian lands that states do not otherwise have. In creating this mutually

1 beneficial opportunity for the states and tribes, the Senate Indian
2 Affairs Committee noted the "strong concerns of states" that their
3 laws and regulations be respected on Indian lands although such laws
4 and regulations did not apply before IGRA. On the other hand, the
5 Committee recognized the strong tribal opposition to any imposition of
6 State jurisdiction over Indian lands. "The Committee concluded that
7 the compact process is a viable mechanism for settling various matters
8 between <u>two equal sovereigns</u>. S. Rep. No. 446, 100th Cong., 2d Sess.,
9 reprinted in 1988 U.S.C.C.A.N. 3083 (emphasis added). This
10 opportunity was not intended to give the States the power to in effect
11 veto the tribes' attempt to engage in Class III gaming simply by
12 refusing to participate in the State-tribal process.

13 Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands
14 which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws . . . and
15 State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands
16 for the regulation of Indian gaming activities . . . . This legislation is intended to provide a means by which tribal and
17 State governments can realize their unique and individual governmental objectives, while at the same time, work together to
18 develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws
19 regulating the conduct of gaming activities are applied.

20 S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N.
21 3083-84.

22 Examination of the plain language of IGRA's mandate to <u>negotiate</u>,
23 the statutory context of the mandate, and the legislative history,
24 thus refutes the State's assertion that IGRA coerces the State to
25 regulate Indian gaming in violation of the Tenth Amendment.

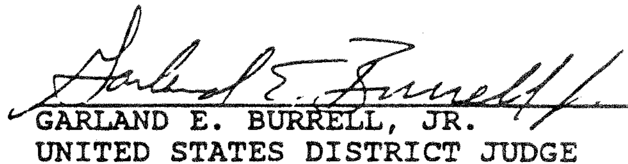
26 CONCLUSION

27 For the reasons discussed above, the court declares that the
28 proposed electronic games are a proper subject of negotiation in a

Tribal-State compact, and that other than blackjack, poker and other traditional casino card games, that the Tribes and the States should negotiate to determine whether other banked and percentage card games will be permitted under a Tribal-State compact. Moreover, the mandate to the State to negotiate, in good faith, a Tribal-State compact does not violate the Tenth Amendment.

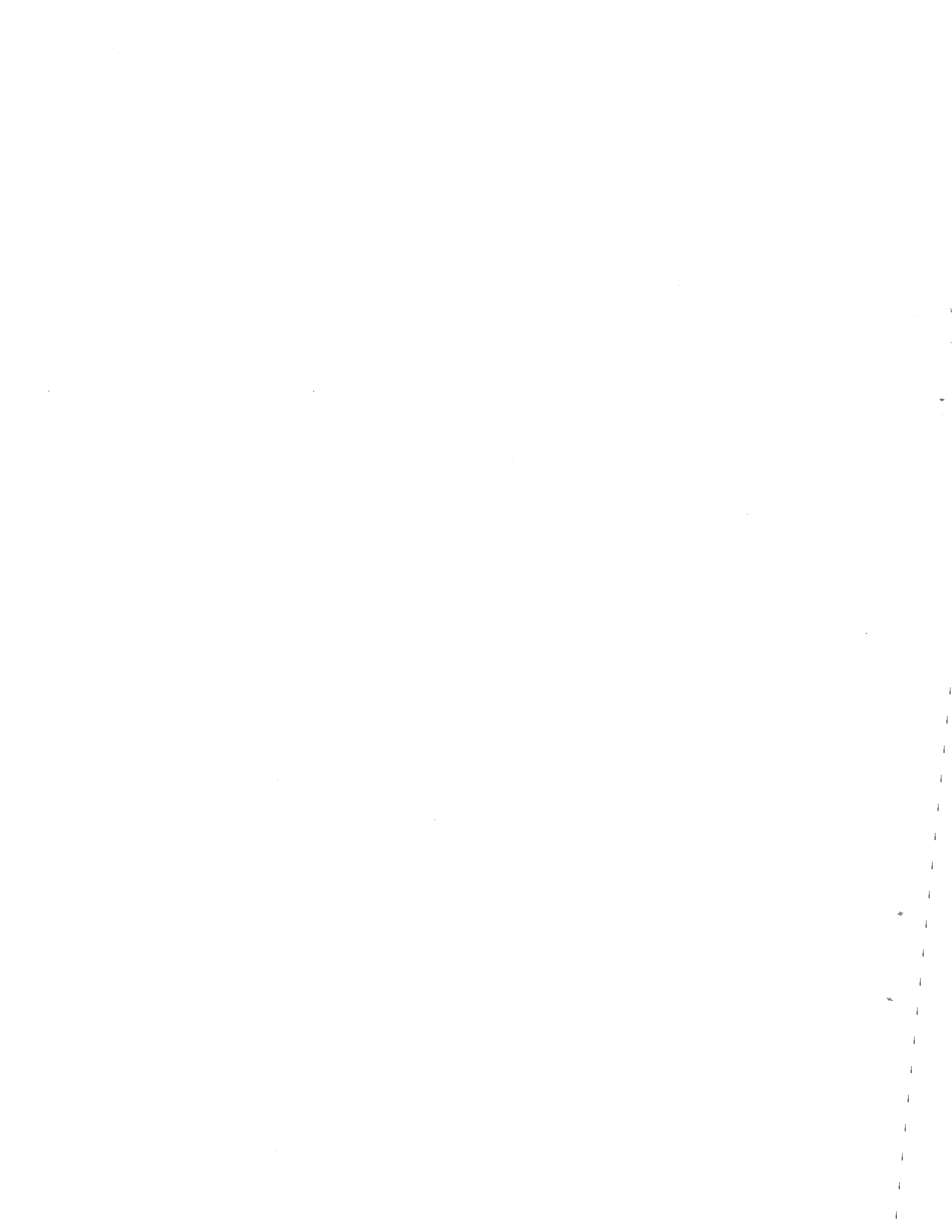
IT IS SO ORDERED.

DATED: July 16, 1993



GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D



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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

CALIFORNIA HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION, INC., Plaintiff, v. THE CALIFORNIA STATE LOTTERY and DOES 1 through 50, Defendants.	CASE NO. BC071209 CASE NO. BC071229 CONSOLIDATED **ORDER PURSUANT TO CODE OF CIVIL PROCEDURE § 437C(g)**
WESTERN TELCON, INC., dba PACHINKO PALACE, Plaintiff, v. CALIFORNIA STATE LOTTERY; DOES 1 through 50, Defendants.	**DATE:** 8/18/93 **TIME:** 8:30 a.m. **DEPT:** 18
CALIFORNIA NEVADA INDIAN GAMING ASSOCIATION, an unincorporated association, Intervenor-Defendant.	

I. INTRODUCTION

Cross-motions of plaintiffs and defendant for summary judgment, and

1 intervenor's application for leave to intervene, came on regularly for
2 hearing before this Court in Department No. 18, Hon. Eric E. Younger,
3 Judge presiding. Jerry M. Hill, Alexander H. Pope, and David D. Jacobson
4 appeared for plaintiff Western Telcon, Inc.; Robert Forgnone appeared
5 for plaintiff California Horsemen's Benevolent & Protective Association,
6 Inc.; Deputy Attorneys General Cathy Christian and Manuel M. Medeiros
7 appeared for defendant California State Lottery; and Howard L. Dickstein,
8 Jerome L. Levine, and Frank R. Lawrence appeared for intervenor-defendant
9 California Nevada Indian Gaming Association.

10 After full consideration of the evidence, the separate statements of
11 each party, the authorities submitted by counsel, counsels' oral
12 arguments and plaintiff California Horsemen's Objections to defendants
13 "Memorandum Opinion and Order [Proposed]", the Court:

14 1) **Finds** there is no triable issue of material fact in this action,
15 and that the defendant is entitled to summary judgment as a matter of
16 law;

17 2) **Denies** plaintiffs' cross motion for summary judgment; and

18 3) **Grants** intervenor's application for leave to intervene.

19 **II. DISCUSSION**

20 The sole question before the Court is whether the particular game
21 called "Keno" as put on by defendant California State Lottery (the
22 "Game") violates California law.

23 It does not.

24 Plaintiffs in this consolidated action[1] contend that the Game
25 violates the California Constitution's prohibition against "casinos of
26

27 [1] These two cases were consolidated by Stipulation and Order
28 on February 26, 1993.

1 the type currently operating in Nevada and New Jersey," Cal. Const. art.
2 IV, § 19(e), the Penal Code's prohibition against banking and percentage
3 games and slot machines, Penal Code §§ 330, 330a, and 330b, and the
4 Lottery Act's proscription against the California State Lottery's use of
5 certain themes in its games, Government Code § 8880.28.

6 The defendant Lottery denies that its Game is a "banking" game.
7 Intervenor California-Nevada Indian Gaming Association (hereinafter
8 "CNIGA") argues that the State Lottery is excepted by operation of
9 California Government Code section 8880.2 from California's statutory
10 restrictions against gaming that may have existed at the time the Lottery
11 Act was enacted by voter initiative in 1984.

12 The Game is played pursuant to detailed regulations promulgated by
13 the California Lottery Commission, and there are no disputed facts
14 concerning how the Game is played. Where facts are uncontradicted, a
15 question of statutory construction is one of law. Sanchez v. Grain
16 Growers Ass'n of California, 123 Cal. App. 3d 444, 176 Cal. Rptr. 655
17 (1981); Mel v. Franchise Tax Board, 119 Cal. App. 3d 898, 174 Cal. Rptr.
18 269 (1981).

19 The Court will address each alleged basis of illegality urged by the
20 plaintiffs in turn.

21 A. ARTICLE IV, SECTION 19(E) OF THE CALIFORNIA CONSTITUTION DOES NOT PROHIBIT GAMES
22

23 The Court agrees with plaintiffs that the defendant California State
24 Lottery is bound by Article IV, Section 19(e) of the California
25 Constitution, which provides that the "[l]egislature has no power to
26 authorize, and shall prohibit casinos of the type currently operating in
27
28

1 Nevada and New Jersey." Cal. Const., art. IV, § 19(e).[2] But this
2 constitutional prohibition on "casinos" - types of physical places - does
3 not, on its face, bar any specific "games" whatsoever, including the Game
4 herein.

5 **B. DEFENDANT IS EXPRESSLY EXCEPTED FROM THE PROSCRIPTIONS OF PENAL CODE SECTIONS 330, 330A, AND 330B**
6

7 Plaintiffs next contend that the Game is unlawful because it
8 violates Penal Code section 330's prohibition against banking games,[3] and
9 the prohibition against slot machines found at Penal Code sections 330a
10 and 330b.[4] The parties have expended substantial effort in arguments

11
[2] Section 19 provides that:
12 (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the
13 State.
(b) The legislature may provide for the regulation of horse races and horse race meetings and wagering on the
14 results.
15 (c) notwithstanding subdivision (a); the Legislature by statute may authorize cities and counties to provide for
16 bingo games, but only for charitable purposes.
(d) Notwithstanding subdivision (a), there is authorized the establishment of a California State Lottery.
17 (e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in
18 Nevada and New Jersey.
Cal. Const., Art. IV, § 19 (Amended Initiative Measure, approved by
19 the people Nov. 6, 1984, added subdivisions (d) and (e)).

20 [3] Section 330 defines gaming as:
faro, monte, roulette, lansquenet, rouge et noire, rondo,
21 tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey,
or any banking or percentage game played with cards, dice
22 or any device, for money, checks, credit, or other representative of value . . . .
23 Cal. Penal Code § 330.

24 [4] The Penal Code defines a "slot machine" as:
Any machine, apparatus or device [that] . . . as a result
25 of the insertion of any piece of money or coin or other object, or by any other means, such machine or device is
26 caused to operate or may be operated, and by reason of any element of hazard or chance . . . the user may
27 receive or become entitled to receive any piece of money . . . .
28 Cal. Penal Code § 330b(2). Functionally equivalent definitions of

1 regarding whether or not the Game is a "banking game" within the meaning
2 of Penal Code section 330, and whether it employs "slot machines" within
3 the meaning of Penal Code sections 330a and 330b, but this effort
4 erroneously presupposes that the answers to these questions are of
5 consequence to the outcome of this litigation.

6 At section 8880.2 the California Lottery Act[5] expressly excepts the
7 California State Lottery from all other state gaming laws in existence at
8 the time the Lottery Act became law by providing that:

9 > Except for the state-operated lottery established by this Chapter, nothing in this Chapter shall be construed to repeal
10 > or modify existing State law with respect to the prohibition of casino gambling, punch boards, slot machines, dog racing, video
11 > poker or blackjack machines paying prizes, or any other forms of gambling.
12 > Cal. Gov't. Code § 8880.2 (emphasis added).[6]

13 Under the plain meaning of this law, California's gaming statutes -
14 such as Penal Code sections 330, 330a, and 330b - do not bind the
15 California State Lottery and render the question of whether the Game is
16 indeed a banking game or slot machine moot. Even if the Court were to
17 assume arguendo that the Game were one of those, it would nevertheless be
18
19

20 "slot machines" are also found at California Penal Code sections 330a, 330.1, and 330c.

21

22 [5]The California Lottery Act was added to the Government Code, at §§ 8880-8880.72, by initiative approved by the people on November 6, 1984.

23

24 [6]In addition to the exemptions stated supra, the Lottery Act also exempts the California State Lottery from California Penal
25 Code sections 320-26, 328, pertaining to lotteries. Cal. Gov't. Code § 8880.6. Plaintiffs argue that this exception precludes the Court's reading of Government code section 8880.2. Given that the
26 Penal Code addresses lotteries and gaming in two distinct chapters of Title 9 -- chapter 9 governs "lotteries," while chapter 10
27 governs "gaming" -- the fact that the Lottery Act separately articulates exceptions from lottery and gaming statutes in no way
28 undermines the plain meaning of Government Code section 8880.2.

lawful because of the exemption.[7]

C. THE LOTTERY ACT'S LIMITATIONS ON "THEMES" DOES NOT BAR THE DEFENDANT'S "KENO" GAME

The Lottery Act limits the types of "themes" which the Lottery Commission may use in its games by providing that:

> (a) No Lottery Game may use the theme of bingo, roulette, dice, baccarat, blackjack, Lucky 7's, draw poker, slot machines, dog racing, or horse racing.

Cal. Gov't. Code § 8880.28 (emphasis added).

"Keno" is not among the "themes" prohibited by Government Code section 8880.28 so the prohibition against the use of certain themes does not render the Game unlawful.

D. CNIGA'S MOTION TO INTERVENE IS PROPERLY GRANTED

Code of Civil Procedure section 387 is construed liberally in favor of intervention. Simpson Redwood v. California, 196 Cal. App. 3d 1192, 1200, 242 Cal. Rptr. 447, 451 (1987); Mary R. v. B. & R. Corporation, 149 Cal. App. 3d 308, 315, 196 Cal. Rptr. 871, 875 (1983). The Court has broad discretion to permit intervention. Jade K. v. Viguri, 210 Cal. App. 3d 1459, 1468, 258 Cal. Rptr. 907, 912 (1989); Simpson Redwood, 196 Cal. App. 3d at 1199, 242 Cal. Rptr. at 450. An application to intervene must be timely. See Cal. Code of Civ. Proc. § 387(a); Northern California Psychiatric Society v. City of Berkeley, 178 Cal. App. 3d 90, 109, 223 Cal. Rptr. 609, 618 (1986). In addition to the timeliness

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[7] The Court notes that the admissible evidence submitted by plaintiffs and intervenor pretty strongly supports a conclusion that the lottery's keno game is a "banking game" within the meaning of Penal Code section 330. While the slot machine issue is a closer question, again the admissible evidence submitted by plaintiffs and intervenors appears to support a finding that the defendant's electronic gaming terminals are "slot machines" as defined by the Penal Code.

1 requirement, a three-part test governs resolution of applications for
2 intervention. First, the intervenor must have a direct and immediate,
3 rather than merely consequential, interest in the outcome of the
4 litigation. Kuperstein v. Superior Court, 204 Cal. App. 3d 598, 600, 251
5 Cal. Rptr. 385, 386 (1988); People ex rel. Rominger v. County of Trinity,
6 147 Cal. App. 3d 655, 660-61, 195 Cal. Rptr. 186, 189 (1983). Second,
7 intervention should not enlarge the issues raised by the original
8 parties. Kuperstein, 204 Cal. App. 3d at 600, 251 Cal. Rptr. at 386;
9 Rominger, 147 Cal. App. 3d at 661, 195 Cal. Rptr. at 189. Finally, the
10 intervenor should not "tread on the rights of the original parties to
11 conduct their own lawsuit." Kuperstein, 204 Cal. App. 3d at 600, 251
12 Cal. Rptr. at 386.

13 Consideration of the policies underlying Code of Civil Procedure
14 section 387 also compels the conclusion that intervention is appropriate.
15 First, section 387 promotes fairness by involving all parties potentially
16 affected by a judgment. Simpson Redwood, 196 Cal. App. 3d at 1199, 242
17 Cal. Rptr. at 450. Thus, intervention is especially appropriate where,
18 as here, the applicant's interests cannot be adequately served by the
19 participation of the existing parties. Id., 196 Cal. App. 3d at 1203,
20 242 Cal. Rptr. at 453. Because both plaintiffs' and defendant's
21 positions conflict directly with the views of CNIGA, the parties cannot
22 possibly protect CNIGA's interests. Thus, here, as in Simpson Redwood,
23 intervenor's "interest in the litigation . . . is singular and indeed
24 unique, and powerfully militates in favor of intervention." Simpson
25 Redwood, 196 Cal. App. 3d at 1204, 242 Cal. Rptr. at 453. Section 387 is
26 also intended to "obviate delays and prevent a multiplicity of suits
27 arising out of the same facts." Simpson Redwood, 196 Cal.App. 3d at
28

1 1203, 242 Cal. Rptr. at 453; See also Catello, 152 Cal. App. 3d at 1013,
2 200 Cal. Rptr. at 7. Here, if CNIGA were not permitted to intervene it,
3 or its member tribes, might be forced to bring a separate action or
4 actions against the Lottery. Such action would likely be brought in this
5 court and be consolidated with this action in any case. See Simpson
6 Redwood, 196 Cal.App. 3d at 1203, 242 Cal. Rptr. at 453. Thus, concerns
7 of judicial economy also militate in favor of intervention.
8
9 III. ORDER

10 IT IS THEREFORE ORDERED that defendant's motion for summary judgment
11 is GRANTED and plaintiffs' motions for summary judgment are DENIED, and
12 that judgment shall be entered forthwith in favor of defendant and
13 against plaintiffs.
14 IT IS FURTHER ORDERED that the California Nevada Indian Gaming
15 Association's motion to intervene is GRANTED.
16
17 DATED: October 14, 1993

18 Hon. Eric E. Younger
19 Superior Court Judge
20
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

CALIFORNIA HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION, INC., Plaintiff, v. THE CALIFORNIA STATE LOTTERY and DOES 1 through 50, Defendants.	CASE NO. BC071209 CASE NO. BC071229 CONSOLIDATED **JUDGMENT BY COURT PURSUANT TO CAL. CODE CIV. PROC. § 437c** [PROPOSED]
WESTERN TELCON, INC., dba PACHINKO PALACE, Plaintiff, v. CALIFORNIA STATE LOTTERY; DOES 1 through 50, Defendants.	**DATE:** 8/18/93 **TIME:** 8:30 a.m. **DEPT:** 18
CALIFORNIA NEVADA INDIAN GAMING ASSOCIATION, an unincorporated association, Intervenor-Defendant.	

This Court, having on ______________, 1993, granted the motion for summary judgment by defendant California State Lottery and having ordered entry of judgment as requested in said motion.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs CALIFORNIA HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION, INC., and WESTERN TELCON, INC., dba PACHINKO PALACE, shall take nothing, and that defendant CALIFORNIA STATE LOTTERY and intervenor-defendant CALIFORNIA NEVADA INDIAN GAMING ASSOCIATION shall recover from said plaintiffs costs of suit in the sum of $__________.

DATED: OCT 14 1993, ~~1993~~

ERIC E. YOUNGER

Hon. Eric E. Younger
Superior Court Judge

j:\cniga\sj\judgment

California Horsemen's Benevolent & Protective Association, Inc., v. The California State Lottery, et al.

Los Angeles County Superior Court Case Numbers BC071229 and BC071209

DECLARATION OF SERVICE

I, TRISH BRIEL, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of Sacramento, and not a party to the within action; my business address is 2001 P Street, Suite 100, Sacramento, California 95814.

I am familiar with this company's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in a U.S. mailbox in the City of Sacramento, California, during the normal course of business on the same day it is placed in the designated area.

On September 29, 1993, I served the **JUDGMENT BY COURT PURSUANT TO CAL.CODE CIV. PROC. § 437c [Proposed]** on all parties in said action by placing a true copy thereof enclosed in a sealed envelope with first class postage affixed in the designated area for outgoing mail addressed as set forth in the attached service list.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 1993, at Sacramento, California.

/original signed by:/

TRISH BRIEL

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APPENDIX E

A REPORT TO CONGRESS ON THE STATUS OF COMMERCIAL GAMING ON INDIAN LANDS

A Publication of the Conference of Western Attorneys General
March 17, 1993

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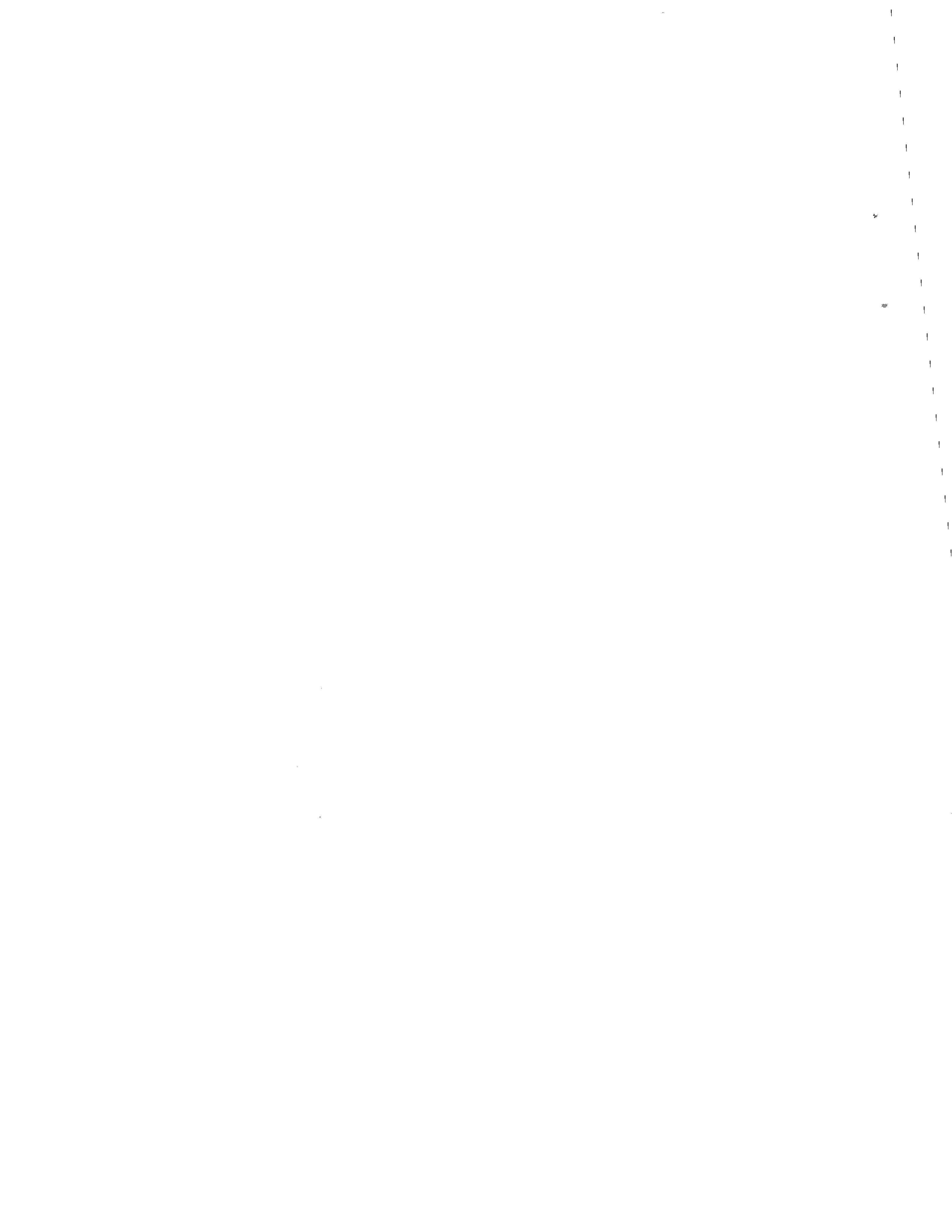

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I. EXECUTIVE SUMMARY

Among the intricate problems that will face the 103rd Congress is the persistent controversy surrounding commercial gambling on Indian lands. The regulation and control of gaming on Indian lands is governed by a frail compromise embodied in the Indian Gaming Regulatory Act of 1988.

Since bingo operations commenced on the Penobscot Nation reservation in Maine and the Seminole Tribe reservation in Florida, gambling activities on Native American lands have steadily expanded. Two hundred sixty (260) tribal gaming operations encompass one hundred seventy (170) Indian reservations in twenty (20) states and generate an estimated annual gross gaming revenue exceeding $1 billion. Native American gaming operations involve a variety of activities, including simple punchboards, high-stakes bingo operations, sophisticated slot machines, and casinos similar to the corporate gaming businesses commonly associated with Nevada and New Jersey. Understandably, tribal governments have become increasingly reliant upon this new economic development tool and are energetic in efforts to preserve and enlarge this source of revenue as a means of furthering Native American self-determination.

During the decade between the introduction of gambling on Indian lands and the enactment of the Indian Gaming Regulatory Act, state, county and municipal governments became increasingly concerned regarding the regulation and control of commercial gaming on Indian reservations. From the perspective of the states, three primary issues emerged with respect to tribal gaming operations. First, state and local law enforcement officials predictably determined that gaming operations on Indian reservations, like any gambling enterprise, attract the interest of criminals and unsavory individuals. Second, state government officials became alarmed by the ability of Indian tribes to maintain gambling operations on reservations within a state that were markedly different in form and scope than the gaming activities legally permissible in the adjacent

non-Indian lands. Third, in those jurisdictions that authorized certain types of gaming for purposes of generating charitable donations or government revenues, state and local governments discovered that Indian reservations provided havens from existing regulatory schemes that could be exploited to the competitive disadvantage of businesses and governmental agencies operating on non-Indian lands.

Until 1985, the federal government, which has comprehensive authority over Native American tribes, exerted little leadership in resolving the jurisdictional tensions that emerged between tribal governments and the several states relative to reservation gaming operations. Congressional consideration of a legislative answer was protracted and ultimately was hastened by the 1987 decision of the Supreme Court of the United States in California v. Cabazon Band of Mission Indians. The Cabazon decision essentially concluded that federal Indian policy favored tribal sovereignty and economic development to the exclusion of state law enforcement concerns. Absent Congressional action, gambling in Indian country could be conducted by tribes fettered only by existing federal statutes. Following the Cabazon decision, considerable political pressure focused on Congress to promptly resolve the emerging political and economic issues surrounding gaming on Indian lands. After two years of debate, the national legislature adopted the Indian Gaming Regulatory Act in order to address these concerns. Expectedly, this new law was a medley of political compromises between the competing tribal, state, and federal interests.

In the last three years, the Indian Gaming Regulatory Act has been implemented primarily through the cooperative efforts of the states and tribal entities in the context of negotiating Tribal-State Compacts, or as a result of judicial decisions in litigation between the federal government, states and tribes. The federal government has demonstrated little commitment to assuming a dynamic leadership role in the regulation and control of Class II gaming or in fostering the intergovernmental relationships necessary for an orderly development of Class III gaming regulatory schemes.

Under these circumstances, states and tribes have had to resort to expensive protracted litigation. Many state legislatures have been compelled to react to the requirements of the Indian Gaming Regulatory Act both fiscally and by adoption of substantive laws. The Congress is on the verge of revisiting the delicate political and economic balance of federal, state and tribal interests embodied in the Indian Gaming Regulatory Act. During the 103rd Congress, federal legislators can anticipate the introduction of bills amending the Indian Gaming Regulatory Act. These legislative proposals undoubtedly will focus on the scope of permissible gaming activities on Indian lands, the role of state law in determining the scope of such gambling, the legal rights and obligations of state and tribal governments in compact negotiations for Indian casinos, the authority of states to prevent the tribes from obtaining new trust lands for gaming establishments and various issues related to civil and criminal law enforcement procedures under the federal statute.

The purpose and objective of this Report is to assist new members of Congress to understanding the Indian Gaming Regulatory Act and to aid these national legislators in evaluating the current regulatory scheme for gaming control relative to gambling operations on Indian lands.

The citations in this Report refer to publicly available material to the maximum extent possible. Those materials and the unpublished materials cited have been compiled into a Resourcebook at the CWAG office which contains a variety of information to facilitate a study of this area. The Resourcebook includes the Indian Gaming Regulatory Act, as well as the legislative history of that statute, the adopted and proposed regulations of the National Indian Gaming Commission, a compendium of relevant judicial decisions, a digest of typical Tribal-State Compacts, and an index of over 3000 newspaper and magazine articles on the topic of gaming on Indian lands published between 1984 and 1992. Because the Resourcebook is several hundred pages long it has not been sent with this Report. However, copies of all or portions of

the Resourcebook material are available upon request to the CWAG office.

Gaming can be either an uncontrolled social plague or, if properly harnessed, a positive economic tool. With vigilance, flexibility and foresight the national experiment with gaming on Indian lands can be only the latter.

II. HISTORICAL PERSPECTIVE

A. EMERGENCE OF COMMERCIAL GAMING ON INDIAN LANDS

As early as 1970, tribal governments were endeavoring to establish commercial gambling operations on reservation lands. On October 1, 1970, the Rincon Band of Mission Indians adopted a tribal ordinance authorizing operation of a card room on Indian lands located in the unincorporated area of San Diego County, California.[1] Although unsuccessful in securing a federal court injunction of local law enforcement actions to prevent the card room operation, the Rincon Band's resort to commercial gambling for economic development was a harbinger of future events.

In 1977, a bingo operation was opened on the reservation of the Penobscot Nation in Kennebec County, Maine.[2] After investing approximately $900,000.00, to construct a bingo hall near Fort Lauderdale, Florida, in 1979, the Seminole Tribe obtained a federal court decree enjoining the Broward County Sheriff from enforcing a state charitable bingo statute.[3] The legal victory of the Seminole Tribe in the Butterworth decision launched an intergovernmental struggle for jurisdiction over commercial gambling on Indian lands that is still a source of great political, economic and legal contention.

B. COMPETING SOVEREIGN INTERESTS

1. Comprehensive Federal Jurisdiction Of Indian Affairs

The Constitution of the United States confers upon Congress plenary and primary jurisdiction of Native Americans and their form of government.[4] In exercising this

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[1] *See* Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (S.D. Cal. 1971) *aff'd* 495 F.2d 1 (1974).

[2] *See* Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983).

[3] *See* Seminole Tribe of Florida v. Butterworth, 491 F.Supp. 1015 (S.D. Fla. 1980) *aff'd* 658 F.2d 310 (5th Cir. 1981), *cert denied*, 455 U.S. 1020 (1982).

[4] *See* United States v. Wheeler, 435 U.S. 313, 319 (1978).

authority, Congressional policy toward Indians has shifted dramatically throughout our nation's history.[5]

Until 1887, the basic approach to dealing with Native Americans was conquest and segregation to designated territories or reservations. During this period, Congress expressed minimal interest in tribal governance.[6]

Between 1887 and 1934, the federal government implemented a program directed at assimilating Indians into the dominant culture by terminating the reservation system and dismantling tribal governments.[7] This approach to federal Indian affairs was changed in 1934 when Congress enacted the Indian Reorganization Act.[8] Under the auspices of this legislation, the federal government encouraged tribal sovereignty and self-governance and advanced Native American culture. The Indian Reorganization Act discontinued the allotment of reservation land to individual Indians, discouraged the sale of Indian lands to non-Indians and appropriated federal funds to foster programs to aid Native Americans.[9]

From 1953 to 1968, Congress reestablished the strategy of promoting assimilation of Indians into mainstream America.[10] Congress repudiated this brief policy deviation in 1968 and since then the basic federal scheme of fostering tribal

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[5] *See* L.C. Kelly & F.W. Porter, III, FEDERAL INDIAN POLICY, 9-11 (1990).

[6] *See id.* at 37-56.

[7] *See, e.g.,* Indian General Allotment Act of 1887, 25 Stat. 388 (1887); Indian Depredation Act of 1891, 26 Stat. 851 (1891); Indian Omnibus Law Act of May 29, 1908, ch. 216, 35 Stat. 444 (1908).

[8] Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C.S. §§ 461-479 (Law. Co-op 1988 & Supp. 1992)).

[9] *See, e.g., id.*; Indian Arts and Crafts Act of August 27, 1935, ch. 748, 49 Stat. 891 (1935); Indian Affairs Administration Act of August 8, 1946, ch. 907, 60 Stat. 939 (1946).

[10] *See, e.g., infra* notes 16-17, and accompanying text; Indian Long-Term Leasing Act, Act of August 9, 1955, ch. 615, 69 Stat. 539 (1955).

independence and sovereignty has enjoyed consistent application.[11]

2. Tribal Independence And Sovereignty

Under the Constitution of the United States, tribal governments retain many attributes of their independent character as "distinct political communities" based upon the historical sovereignty of Indian tribes.[12] Tribal sovereignty, however, is subordinate to the overriding authority and jurisdiction of the federal government, because Native American tribes have become incorporated within the territorial sovereignty of the United States. Accordingly, tribal governments may not exercise powers in conflict with the interests of the comprehensive sovereignty of the federal government.[13] Similarly, the sovereign powers of Indian tribes are circumscribed by the treaties of the United States and the authority of Congress to alter the retained sovereignty of Indian tribes by federal legislation.[14]

3. Traditional State Jurisdiction Under Police Power

Each state within the union of the United States is a sovereign government. The states possess their sovereignty concurrent with the sovereign power of the federal government subject only to limitations expressly imposed by the Constitution of the United States or as validly restricted by Congress under the supremacy clause.[15]

Accordingly, under the federal constitution, the jurisdiction of state, county and

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[11] *See, e.g.,* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968); Indian Financing Act of 1974, Pub. L. No. 93-292, 88 Stat. 77 (1974); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203; Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978); Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605 (1982).

[12] McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 173 (1973); Worcester v. Georgia, 6 Pet. 515, 557, 8 L. Ed. 483, 499 (1832).

[13] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

[14] *See* United States v. Wheeler, 435 U.S. 313, 319-323 (1978).

[15] *See, e.g.,* Tafflin v. Levitt, 493 U.S. 455 (1990); F.E.R.C. v. Mississippi, 456 U.S. 742 (1982).

municipal governments does not extend to Native Americans on Indian lands. Congress may confer this authority upon the states or local government through explicit federal statutes enacted under the plenary powers over Indian tribes vested in the federal government.

In Public Law 280, Congress specifically granted five states, California, Minnesota, Nebraska, Oregon and Wisconsin, civil and criminal jurisdiction over certain Indian lands.[16] Until 1968, Public Law 280 prescribed a mechanism for other states to accept civil and criminal jurisdiction over Native American lands through specific legislative action.[17]

The federal courts have narrowly interpreted Public Law 280, determining that Congress intended only state "criminal" or "prohibitory" laws to be enforceable on Indian lands in the designated states and locales.[18] In a series of judicial rulings between 1982 and 1987, culminating in the decision of the United States Supreme Court in California v. Cabazon Band of Mission Indians, the federal courts refined the standard for application of Public Law 280 in the specific context of gambling operations on Indian lands.[19] In the Cabazon decision, the court explained the test applicable to deciding whether a state's gambling law could be enforced on Indian lands under Public Law 280. Specifically, the Court ruled that:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct

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[16] Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C.S. § 1162 (Law. Co-op 1979 & Supp. 1992)); 28 U.S.C.S. § 1360 (Law. Co-op 1988 & Supp. 1992).

[17] *See id.*

[18] *See, e.g.,* Bryan v. Itasca County, 426 U.S. 373 (1976).

[19] Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); *see also* Barona Group of Capital Grande Bank v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Oneida Tribe of Indians v. Wisconsin, 518 F.Supp. 712 (W.D. Wis. 1981).

> at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the state's public policy.
>
> . . .
>
> In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that ***California regulates rather than prohibits gambling in general and bingo in particular.***[20]

The apparent sweeping scope of the conclusion, however, was immediately limited by the footnote appended to it. Footnote 10 reads:

> Nothing in this opinion suggests that cockfighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California. . . . The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory.

From the perspective of the states, the Cabazon decision must be considered in light of the preeminent authority of the state's police powers relative to gambling. The expansive nature of this police power was reaffirmed by the Supreme Court of the United States only months before the Cabazon ruling was issued. In Posadas de Puerto Rico Assoc. v. Tourism Company,[21] the Court explained that the power of a state legislature "to completely ban casino gambling necessarily includes the lesser power" to regulate gaming even where that regulation may restrict constitutionally protected free speech.[22]

C. CONGRESSIONAL STUDY AND COMPROMISE

The Congress first became interested in the regulatory problems associated with gambling in Indian country in 1982. In the 98th Congress, the national legislature began to consider federal Indian gaming legislation. After conducting hearings, no other

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[20] Cabazon, 480 U.S. at 211.

[21] 478 U.S. 328 (1986).

[22] *See id.* at 345-347.

action was taken by the Senate and House of Representatives in 1984.[23]

During the 99th Congress, numerous legislative proposals were introduced and committee hearings were conducted. The legislative debate on these bills focused upon the definitions of Class II gaming (bingo) and Class III gaming (casino games), as well as the methodology for providing regulatory oversight for these categories of gaming on Indian reservations. The House passed a legislative proposal that provided that the "National Indian Gaming Commission and the tribes . . . regulate both class II and III gaming. Class III gaming would have been regulated in accordance with State rules and regulations . . . [h]owever, no jurisdiction over Indian lands was conferred on States."[24]

Although the Senate did not pass legislation before the 99th Congress adjourned, the Senate Indian Affairs Committee did report an amended bill to the Senate on September 15, 1986. The proposal contained in the "revised committee bill affirmatively recognized tribal jurisdiction over class I and class II gaming but provided an additional Federal regulatory system for class II activities. The bill prohibited class III gaming."[25]

A significant factor that contributed to Congressional inaction during the 99th Congress was the June 10, 1986, action of the Supreme Court of the United States, granting certiorari in the case of California v. Cabazon Band of Mission Indians.[26] On February 25, 1987, the Court announced the Cabazon decision. The Court held that traditional notions of Indian sovereignty and the federal government's interest in the economic development of Indian tribes outweighed the interests of the individual states in regulating and enforcing criminal statutes in order to prevent the infiltration of

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[23] Senate Select Committee Report on Indian Gaming Regulatory Act, S. Rep. 446, 100th Cong., 2d Sess. 3 (1988)(hereinafter "Senate Report").

[24] *Id.*

[25] *Id.* at 4.

[26] 480 U.S. 202 (1987); *see also* Senate Report at 4.

organized crime into Native American commercial gambling activities.[27] In this ruling, however, the Court did declare that state law could be applied to tribes engaged in gaming activity on their reservations had Congress so provided.[28]

In 1987, seven versions of legislation were introduced by members of Congress to address the issue of Indian gaming.[29] Proposed solutions to the Indian gaming problem were both "interim,"[30] and "permanent."[31]

The "permanent" proposals had several common elements. Each legislative proposal categorized gaming into three classes. Class I gaming was uniformly defined as religious, ceremonial, or social gaming activities (traditional Indian gaming) regulated exclusively by the tribe. Class III gaming was consistently defined as all other types of gaming other than Class I or II type gaming, generally considered complex gaming enterprises such as pari-mutuel racing, jai alai, and casino operations. The definition that bridged the gap between Class I and Class III type gaming, that is Class II gaming, varied from proposal to proposal. The proposals generally authorized Class II gaming if that gaming was conducted in a state where both the state and the federal statutes permit such gaming. Although some versions of the legislation provided for regulatory jurisdiction of Class II gaming by the Commission, other legislative proposals provided that this category of gaming would be regulated pursuant to a negotiated tribal-state compact.

These legislative proposals also created a National Indian Gaming Commission composed of a chairman and four members, with no more than three members being

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[27] Cabazon, 480 U.S. at 221-222.

[28] *Id.* at 214-215.

[29] *See* Senate Report at 4-5 (H.R. 964, H.R. 1079, H.R. 2507, H.R. 3605, S. 555, S. 1303, and S. 1841).

[30] *See id.* (S. 1841 and H.R. 3605).

[31] *See id.* (H.R. 964, H.R. 1079, H.R. 2507, S. 555, and S. 1303).

from one political party. Each piece of legislation further provided that the Commission possess authority to impose annual assessments, exercise investigative and regulatory powers over Indian gaming facilities, approve management contracts for tribal gaming operations, promulgate appropriate regulations, and impose civil penalties for regulatory violations.

Major inconsistencies also existed between the pieces of proposed legislation. The definitions of Class II gaming deviated between those including various card games, those that included bingo and lotto, but not card games, and those that included electronic or electromechanical facsimiles such as slot machines and video poker, in addition to other forms of Class II gaming. Some proposals stated that Class III gaming was within the jurisdiction of the tribe, provided that type of gaming is allowed under existing state and federal law. Other proposed legislation declared that Class III gaming was unlawful on Indian lands. Further differences existed between the bills with respect to the actual composition of the Commission, Commission funding, the imposition of criminal penalties and the authority of the Commission chairman.

The interim bills presented three (3) interesting variations on the basic theme. First, the interim bills provided for a jurisdictional solution that would last ten years. Second, the interim regulatory scheme placed, contrary to other legislative proposals, video electronic and electromechanical facsimiles, including slot machines, within the definition of Class III gaming. Third, the interim proposals provided that Class III gaming would be prohibited on Indian lands and the more traditional types of Indian gaming would be subject to the jurisdiction of the tribes and, for limited licensing purposes, the jurisdiction of the Secretary of the Interior.

Despite the disparate legislative proposals pending before the 100th Congress, the imperative to enact a regulatory scheme governing gaming on Indian lands emerged in 1988. As early as February of 1988, Representative Udall submitted amendments of

H.R. 2507 intended to address the regulatory concerns of state officials.[32] Other compromise attempts revolved around the classification of electronic devices as Class III gaming. The ultimate compromise was reached in the fall of 1988 with the passage of S. 555.

[32] Memorandum from Morris K. Udall to Democratic Committee Members Re Indian Gaming Bill Compromise (Feb. 2, 1988).

III. SYNOPSIS OF INDIAN GAMING REGULATORY ACT OF 1988

A. STATUTORY SUMMARY

The Indian Gaming Regulatory Act (the "Act" or "IGRA") has three basic components. First, the Act categorizes and defines the forms of gambling that are lawful on Indian lands. Second, the IGRA contains a Congressional allocation of exclusive or concurrent jurisdictional authority to regulate and control gaming operations on Indian reservations between the federal government, the several states, and tribal governments depending upon the classification of the gambling activity. Third, the IGRA endeavors to create mechanisms for the orderly implementation of regulation and control of existing gaming operations by Native Americans under the new law.

1. Classification Of Permissible Gaming Activities

The IGRA describes three separate categories of lawful gaming activities. Class I gaming consists of traditional tribal games such as social games for prizes of minimal value or traditional Indian gambling played in connection with tribal ceremonies or celebrations.[33]

Class II gaming includes:

1. Games of chance known as bingo or lotto, including pull tabs, punchboard, tip jars, and other games similar to bingo; and,
2. Nonbanking card games expressly authorized or not prohibited by laws of the situs state when played in conformity with state law.[34]

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[33] Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 3(6), 102 Stat. 2467, 2468 (1988)(codified at 18 U.S.C.S. §§ 1166-1168 (Law. Co-op 1988 & Supp. 1992); 25 U.S.C.S. §§ 2701-2721 (Law. Co-op Supp. 1992)).

[34] *See* 25 U.S.C.S. § 2703(7)(A) (Law. Co-op Supp. 1992).

Class II gaming does not include any banking games (*e.g.*, baccarat, chemin de fer, blackjack), electronic or electromechanical facsimiles of any games of chance, or slot machines.[35]

Class II gaming treatment was also afforded on a limited basis to two categories of gambling otherwise deemed Class III gaming. First, card games already in existence on or before May 1, 1988, in the states of Michigan, North Dakota, South Dakota, and Washington. In order to qualify for this exemption, the effected Indian tribe had to be actually operating the exempt card games in the enumerated states by May 1, 1988. Card games qualifying for this exemption are governed by the provisions of the Act related to Class II gaming.[36] Second, electronic or electromechanical facsimiles of games of chance or slot machines legally operated on Indian lands on or before May 1, 1988, are considered Class II games for a period of one year following enactment of the IGRA if the tribe requests the situs state to negotiate a Tribal-State Compact.[37]

Class III gaming is a residual category. This category of gaming includes all forms of gambling not included within Class I or Class II gaming, namely complex gaming activities such as pari-mutuel horse and dog racing, jai alai, banking card games, slot machines, other and casino games.[38]

<u>2. Allocation Of Regulatory Jurisdiction</u>

The Act apportions the legal power to regulate and control gaming operations on Indian lands between federal, state, and tribal governments by assigning varying

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[35] *See id* § 2703(7)(B).

[36] *See id* § 2703(7)(C).

[37] *See id* § 2703(7)(D).

[38] *See id.* § 2703(8).

degrees of governmental oversight of these classes of gaming. Class I gaming is subject to the exclusive jurisdiction of a tribe.[39]

Class II gaming is under the jurisdiction of a tribe within a state where such gaming is permitted and is not otherwise prohibited by federal law. This class of gaming is also subject to the supervision of the National Indian Gaming Commission which was created by the IGRA.[40]

Class III gaming is lawful only if an approved tribal ordinance exists, the proposed Class III gaming activity is conducted within a state that allows the Class III gaming activity, and such gaming is conducted in conformity with a Tribal-State Compact. The Tribal-State Compact may provide for the application of criminal and civil laws of a tribe or state directly related to such gaming activity, the allocation of criminal and civil jurisdiction between the state and a tribe, assessments by the state for reimbursement of the costs of regulation, taxation by a tribe in comparable amounts to those assessed by the state for similar gaming activities, remedies for breach of the compact, standards for the operation and maintenance of gaming facilities, and other subjects directly related to the operation of gaming activities.[41]

Under the provisions of the IGRA, a tribe must request the state to enter into negotiations with respect to the Tribal-State Compact.[42] Once a request is made, the state has the obligation to negotiate with the requesting tribe in good faith.[43] The Act grants to the United States District Courts original jurisdiction over any cause of action that may be initiated by a tribe arising from the failure of a state to enter into negotia-

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[39] *See id.* § 2710(a)(1).

[40] *See id.* § 2710(b); *see infra* notes 65-86 and accompanying text.

[41] *See id.* § 2710(d); *see infra* text at 49-51.

[42] *See* 25 U.S.C.S. § 2710(d)(3)(A) (Law. Co-op Supp. 1992).

[43] *Id.*

tions with the tribe to formulate a Tribal-State Compact. Alternatively, the federal district courts may entertain a claim by a tribe that the effected state has failed to conduct negotiations in good faith once commenced on the subject of Class III gaming operations.[44] The district courts also have jurisdiction over any cause of action initiated by the Secretary of the Interior to enforce mediation procedures with respect to the Tribal-State Compact.[45]

In addition, the Act sets forth relevant time parameters for consideration by the tribe and the state in order to evaluate good faith efforts to negotiate and time frames for the initiation of suits in the district court.[46] The Act bars tribal litigation to obtain a Tribal-State Compact until one hundred eighty days (180) after the tribe's initial request for negotiations.[47] Finally, the legislation authorizes a federal cause of action initiated by the tribe or state to enjoin Class III gaming activity conducted in absence or violation of a Tribal-State Compact.[48]

3. Transitional Regulatory Provisions

The Act endeavors to create mechanisms for the orderly implementation of regulation and control of existing gaming operations by Native Americans under the new law. Pursuant to this end, the IGRA contains several interim or transitional provisions.

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[44] *See id.* § 2710(d)(7)(A)(i).

[45] *See id.* § 2710(d)(7)(A)(iii).

[46] *See id.* § 2710(d)(7)(B).

[47] *See id.* § 2710(d)(7)(B)(i).

[48] *See id.* § 2710(7)(A)(ii).

Recognizing that the appointment and organization of the Commission would not be immediate, Congress specifically provided for the Secretary of the Interior to exercise interim authority to regulate gaming on Indian lands.[49]

In addition to vesting the interim regulatory authority with the Secretary of the Interior, the Act also provides various transitional provisions with respect to the regulation of Class II gaming activities, which comprised the majority of the gaming operations existing on Indian lands at the time that Congress enacted the IGRA.[50] The first significant transitional provision is a "grandfather clause" that provides for the inclusion within the definition of Class II gaming, card games played in the states of Michigan, North Dakota, South Dakota, and Washington that were actually operated in those states by an Indian tribe on or before May 1, 1988. This classification of card games is confined to the extent and nature of the card game as those games were operated on May 1, 1988.[51]

A second significant transitional provision with respect to Class II gaming is a one-year grace period for certain electronic or electromechanical devices. If these devices were legally operated on Indian lands on or before May 1, 1988, such devices may continue to be classified as Class II gaming if the tribe requests the state, no later than thirty (30) days after the enactment of the Act, to negotiate a Tribal-State Compact.[52]

In general, the IGRA provides that a person other than a member of the Indian tribe is not eligible to receive a license for or own a Class II gaming establishment

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[49] *See id.* § 2709.

[50] By 1988, over a hundred tribal bingo operations existed on reservations located within states where bingo was not expressly prohibited by law. *See* E.J. Swanson, The Reservation Gaming Craze: Casino Gambling Under the Indian Gaming Regulatory Act of 1988, 15 HAMLINE L. REV. 471, 473 (1992).

[51] *See* 25 U.S.C.S. § 2703(7)(C) (Law. Co-op Supp. 1992).

[52] *See id.* § 2703(7)(D).

unless that person would be eligible to receive such license under state law.[53] Section 11(a)(4)(B) of the Act, however, provides an exception to this rule of general application for those individually owned Class II gaming operations that existed as of September 1, 1986. The continued operation of such games is not barred provided the operation is licensed and regulated by the Indian tribe pursuant to an ordinance reviewed by the Commission in accordance with section 13 of the Act, the income to the tribe is used for limited purposes, not less than sixty percent of the net revenue is income to the tribe, and the owner of the operation pays an appropriate assessment to the Commission.[54]

Pursuant to section 11(c)(3) of the IGRA, any tribe that operates a Class II activity which has continually conducted such activity for a period of not less than three years, including at least one year after the enactment of the Act, and has otherwise complied with the provisions of the IGRA, may petition for a certificate of self-regulation. The NIGC shall issue such a certificate if the Commission finds that the tribe has conducted the gaming activity effectively and honestly, has a reputation for safe, fair, and honest operation, is generally free of criminal or dishonest activity, and has adopted adequate systems for accounting, investigation, licensing, and enforcement.[56]

Finally, the IGRA provides for Commission review of existing management agreements between any tribe and a management contractor for gaming operations. Section 13 of the Act provides that as soon as practicable after the organization of the NIGC, notification shall be given to the tribes or the management contractor that any management contract must be submitted for review. The chairman of the Commission must then review the contract to determine if it complies with the terms of the Act.

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[53] *See id.* § 2710(b)(4).

[54] *See id.* § 2710(b)(4)(B).

[56] *See id.* § 2710(c)(4).

Any gaming activity conducted pursuant to the management contract will be valid under the IGRA unless it is disapproved in accordance with the provisions of section 13 of the Act.[56]

B. LEGISLATIVE INTERPRETATION

1. Prevalent Legislative Views

Although the IGRA was the byproduct of political compromise, at the time of enactment the Congress unequivocally expressed certain views about the legislation. A complete understanding of the Act requires an appreciation of these legislative views as expressed in the Senate Report that accompanies S. 555 and comments of Senators and Members of Congress at the time that the IGRA was adopted.

(a) Future Reliance On the Cabazon Decision. Congress explained the limitations on future reliance upon the Cabazon ruling in construing the Act. For example, the Senate Report states:

> S. 555 is intended to ***expressly preempt*** the field in the governance of gaming activities on Indian Lands. Consequently, Federal courts should not balance competing Federal, State and tribal interests to determine the extent to which various gaming activities are allowed . . .. [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether Class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in Cabazon. Under Public Law 83-280, the prohibitory/regulatory distinction is used to determine the extent to which Laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 States. ***The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of federal law, to either allow or prohibit certain activities . . .***[57]

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[56] *See id.* § 2712.

[57] *See* Senate Report at 6 (emphasis added).

Congress recognized that in Cabazon, the Supreme Court of the United States utilized a balancing test between competing federal, state and tribal interest and "found that tribes, in states that otherwise allowed gaming, have a right to conduct gaming activities on Indian lands unhindered by state regulation."[58] Nevertheless, the Senate Report establishes that Congress intended to preempt judicial consideration of the prohibitory/regulatory distinction in interpreting the Act.[59] Consequently, in construing the IGRA, the distinction between a state's civil and criminal laws exclusively determines whether a body of state law is applicable, as a matter of federal law, to either allow or prohibit certain gaming activities on Indian lands.[60]

(b) Traditional Indian Gambling Explained. The definition of Class I gaming describes types of gambling activity that are either played socially for minimum value prizes or gaming that is a traditional component of ceremonies or celebrations for the particular Indian tribe. In this regard, the Senate Report indicated that:

> Indian tribes engage in traditional gaming activities such as the "stick" or "bone" games that are played by tribes in conjunction with ceremonies, pow wows, feasts or other celebrations . . .. Similarly, where rodeos, horse races, or other kinds of gaming with purses or prizes, have traditionally been held in conjunction with such activities for members and guests, including publicly invited guests, such games ***are not*** to be considered Class II or Class III gaming.[61]

Congress intentionally created in the definition of Class I gaming a situation where limited commercial gambling might be conducted without the benefit of independent regulatory oversight.

(c) Commercial Gaming Envisioned By The IGRA. The legislative record contains several discussions that elucidate the type and scope of commercial gaming

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[58] *See* Senate Report at 2.

[59] *See* Senate Report at 6.

[60] *See* id.

[61] *See* Senate Report at 11 (emphasis added).

activities that Congress envisioned under the Act. A passage in the Senate Report succinctly explained:

> S. 555 recognizes primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For class III casino, parimutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.[62]

Unfortunately, this statement of congressional policy did not resolve all of the questions surrounding the classification of games under the Act. For instance, the IGRA states that Class II gaming includes the game of "lotto." During consideration of this provision of the IGRA, a concern emerged as to the meaning of this term. The floor debates related to this question establish that this term does not mean a "lottery," and that a lottery, such as those conducted by several states, is categorized as Class III gaming.[63]

Another issue that emerged was the concept of interstate satellite transmission of bingo games. These bingo games are established by satellite transmission of a single bingo game to several Indian reservations in a number of states in order to accumulate large prizes and expand the patron pool. For a given tribe to participate in such a bingo game, bingo must be allowed in the state pursuant to the definition of Class II gaming. Although there are other federal regulatory requirements governing interstate transmission of gaming information,[64] for the purposes of the IGRA, these bingo transmissions would receive Class II jurisdictional treatment. Congress unequivocally anticipated the possibility, and approved the practice, of interstate transmission of Class II gaming.[65]

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[62] *See* Senate Report at 3.

[63] 134 Cong. Rec. S. 12643, S. 12650, S. 12655 (daily ed. Sep. 15, 1988)(statements of Sen. Domenici & Sen. Burdick).

[64] *See, e.g.,* Lionel Sawyer & Collins, SELECT FEDERAL GAMBLING, HORSE RACING AND LOTTERY LAWS (1992).

[65] *See* Senate Report at 9.

Section 4(7)(D) of the Act creates a narrow exception to the application and enforcement of the Johnson Act. The Johnson Act specifically prohibits the use of gambling devices on federal and Indian lands in states prohibiting the use or possession of such devices.[66] Although the specific language of the IGRA does not provide for an exemption from the Johnson Act, Section 4(7)(D) constitutes a waiver of the Johnson Act in the very limited situations where the tribe has negotiated a Tribal-State Compact for Class III gaming in a state where the operation of gaming devices is lawful. Senator Inouye's comments on this subject during the floor debates are instructive:

> The Bill as reported by the Committee would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gaming devices operated pursuant to a Compact with the state in which the tribe is located. The Bill is not intended to amend or otherwise alter the Johnson Act in any way.[67]

Congress intended that the operation of Class III games on Indian lands conform with state laws and regulations and that tribal governments conduct only those Class III games explicitly authorized by state law. Congress explained that the phrase "located . . . in a State that permits such gaming" as delineated in Section 2710(b)(1)(A) [and by analogy Section 2710(d)(1)(B)] meant the form or forms of gaming "not prohibited by the State in which the tribes are located."[68]

After six years of study and debate, Congress determined that if a tribe desired to engage in Class III gaming, "the most realistic option appeared to be State regulation."[69] Congress concluded that "it is simply not realistic for any but a few tribes

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[66] *See* 15 U.S.C.S. §§ 1171, 1175 (Law. Co-op 1982).

[67] 134 Cong. Rec. S. 12643, S. 12650-51 (daily ed. Sep. 15, 1988)(statement of Sen. Inouye).

[68] *See* Senate Report at 12.

[69] *See id.*

to set up regulatory systems" and "the establishment of a Federal regulatory mechanism to duplicate what already exists at the State level" was not "meritorious."[70]

Realizing that tribal governments opposed a unilateral transfer to the states of jurisdiction over gaming activities on Indian lands, Congress created the Tribal-State Compact process.[71] Under the compact process, "[t]ribes that do not want any State jurisdiction on their lands are precluded from operation of what the [Act] refers to as Class III gaming," and conversely, "tribes that choose to engage in gaming may only do so if they work out a Tribal-State Compact with the State."[72]

Congress acknowledged that before Class III could be conducted on Indian lands through the negotiation of a compact, there must be an "implicit tribal agreement to ***the application of State law***."[73] Tribes that wanted to operate Class III gaming would need to recognize that because "gambling is a unique situation" states would be given a "say in matters that are usually in the exclusive domain of tribal governments."[74] There is no question that Congress recognized the "adoption of State law" and the potential for a total "accession to State jurisdiction" under the provisions of the IGRA governing Class III gaming.[75] What Congress envisioned in the compacting process was not an intergovernmental debate over the forms of Class III gaming that could be conducted by tribes, but rather negotiation on the terms of and responsibility for regulating those games explicitly authorized by state law, including such matters as "days and hours of

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[70] *See id.*

[71] *See* Senate Report at 5-6; 134 Cong. Rec. S. 12643, S. 12650 (daily ed. Sep. 15, 1988)(statement of Sen. Inouye).

[72] *See id.*

[73] *See* Senate Report at 14.

[74] *See* 134 Cong. Rec. S. 12643, S. 12651 (daily ed. Sep. 15, 1988)(statement of Sen. Evans).

[75] *See* Senate Report at 13-14.

operation, wager and pot limits, types of wagers and size and capacity of the tribal gaming facility.[76]

Legislators in both the Senate and the House of Representative explained that the types of Class III games that would be the subject of Tribal-State Compact negotiations were those games expressly permitted under state law. This was necessary because "[d]isparate treatment of the same activities within a State would not only create tremendous strains between the tribes and State law enforcement officials, it would also accord preferential treatment to one group of gaming operators."[77] The provisions of the Act establishing the Tribal-State Compact process were intended to "ensure the Indians are given a level playing in order to install ***gaming operations that are the same as the State's in which they reside***."[78] The legislative history establishes that the Act "does not authorize gambling on Indian reservations, but rather establishes regulatory schemes for ***gambling which is otherwise legal under existing law***."[79]

Congressional opponents of the Act recognized that the Act provided for "[t]he direct and indirect application of state law in Indian country,"[80] and that a tribe currently operating Class III games that were unlawful under state laws is "going to have jerked from it its very important source of revenue."[81] Similarly, opponents of the grandfather

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[76] *See* Senate Report at 14.

[77] 134 Cong. Rec. H. 8146, H. 8157 (daily ed. Sep. 26, 1988)(statement of Rep. Bilbray).

[78] *See* 134 Cong. Rec. S. 12643, 12653 (daily ed. Sep. 15, 1988)(statement of Sen. McCain)(emphasis added).

[79] *See* 134 Cong. Rec. H. 8146, H. 8153 (daily ed. Sep. 26, 1988)(statement of Rep. Udall)(emphasis added).

[80] *See* 134 Cong. Rec. S. 12643, S. 12657 (daily ed. Sep. 15, 1988)(statement of Sen. Daschle).

[81] *See* 134 Cong. Rec. H. 8146, H. 8157 (daily ed. Sep. 26, 1988)(statement of Rep. Frenzel).

provision for Class II gaming recognized that this portion of the Act allowed certain tribes to avoid compliance with the state law governing Class III gaming under Section 2710(b)(1)(B), and permitted these otherwise illegal grandfather Class III games to operate in contravention of state law.[82]

(d) ***Shared Sovereignty And Tribal-State Compacts***. The legislative record related to S. 555 also demonstrates the unique nature of shared sovereignty envisioned by Congress through the adoption of the Tribal-State Compact scheme for the regulation and control of Class III gaming. The Senate Report on the legislation declares that "it is the responsibility of Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust where appropriate, the jurisdictional framework for regulation of gaming on Indian lands."[83] In this respect, the IGRA was explained as follows:

> [T]he Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extended to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.
>
> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of State laws to activities conducted on Indian land is the Tribal-State Compact . . ..
>
> It is also true that S. 555 does not contemplate and does not provide for the conduct of Class III gaming activities on Indian lands in the absence of a Tribal-State Compact. In adopting this position, the Committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal government and the need to fashion a means by which different public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State government can realize their unique and individual governmental objectives, while at the same

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[82] *See* 134 Cong. Rec. H. 8146, H. 8155 (daily ed. Sep. 26, 1988)(statement of Rep. Henry); *Id.* statement of Rep. Oberster.

[83] *See* Senate Report at 3.

time, work together to develop a regulatory and jurisdictional patter that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.[84]

With respect to Class III gaming, Congress recognized that both the states and the tribes have legitimate interests in regulating Class III gaming. On this subject, the Senate Report provides:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of Class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and State. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency in Indian self-determination and regulating activities of persons within its jurisdictional borders. A State's governmental interest with respect to Class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirements for Class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.[85]

For these reasons, Congress promulgated the legislative provisions that allow concurrent jurisdiction of Class III gaming to exist between the tribes and the states. Congress utilized existing state regulatory systems as the standard for Class III gaming control and regulation. Since the states only have regulatory systems in place to address the types of Class III gaming permitted by those states, the tribes are likewise constrained to operate only those types of Class III gaming permitted by the situs state.

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[84] *See* Senate Report at 5-6; *accord* 134 Cong. Rec. S. 12643, S. 12650 (daily ed. Sep. 15, 1988)(statement of Sen. Inouye).

[85] *See* Senate Report at 5-6, 13-14.

During the floor debate on S. 555, Congress further elaborated on the concept of shared sovereignty under the Tribal-State Compact procedures. As Senator Inouye stated:

> [T]he idea is to create a consensual agreement between the two sovereign governments and it is up to those entities to determine what provisions will be in the compacts . . .. I hope the States will be fair and respectful of the authority of the tribes in negotiating these compacts and not take unnecessary advantage of the requirement for a compact.[86]

Senator Evans further explained:

> As noted earlier, the compact should be a negotiation between two sovereigns. It is entirely conceivable that a particular state will have no interest in operating any part of the regulatory system needed for a Class III Indian gaming activity, and there will be no jurisdictional transfer recommended by the particular tribe and State. Each compact will need to consider, among other items, the experience and expertise of the particular tribe and State with gaming, and the existence of regulatory mechanisms within each government. Congress should expect a reasoned and rational approach to these compacts, and not simply a demand that tribes come under a State system.[87]

<u>2. Congressional Oversight And Reconsideration</u>

Since enacting the IGRA in 1988, Congress has amended the Act on three occasions. On October 23, 1989, the Act was modified to extend by an additional year the grace period for tribal operation of electronic and electromechanical gaming devices legally operated on Indian lands in Minnesota on or before May 1, 1988, provided the affected tribe had timely requested the situs state to negotiate a Tribal-State Compact.[88] A similar enlargement of the grace period for two years was included in the IGRA in 1990 for Indian lands in Wisconsin and Montana.[89] On October 24, 1992, Congress

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[86] 134 Cong. Rec. S. 12643, S. 12651 (daily ed. Sep. 15, 1988)(statement of Sen. Inouye).

[87] *Id.* (statement of Sen. Evans).

[88] *See* Act of October 23, 1989, Pub. L. No. 101-121, § 118, 103 Stat. 722.

[89] *See* Act of May 24, 1990, Pub. L. No. 101-301, § 6, 104 Stat. 209 (codified at 25 U.S.C.S. § 2703(7)(E) (Law Co-op Supp. 1992)).

enacted a bill allowing Indian gaming to resume in Montana for six months pending compact negotiations between the tribes and state.[90]

In 1992, Congress conducted limited oversight hearings to examine the implementation of the IGRA.[91] These hearing addressed a number of topics including allegations of corruption in Indian gaming operations, ineffective enforcement of the IGRA relative to Class III gaming operations, acquiring trust lands for gaming purposes, management contract irregularities and the proper regulatory treatment of video gaming devices. On December 31, 2992, the Inspector General for Audits of the Department of Interior issued a report critical of federal, state and tribal efforts to implement the IGRA.[92]

A number of federal legislators have publicly discussed the potential need to amend the IGRA. For instance, United States Senator Harry Reid (D.- Nevada), has stated that Congress must amend the IGRA to "assure the law is fairly and strictly enforced."[93] United States Senator Daniel K. Inouye (D.- Hawaii), the primary sponsor of the IGRA, has repeatedly declared that the IGRA must be given time to work as intended,[94] and the law should not be amended until Congress conducts hearings to assess public views on the need to change the Act.[95]

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[90] *See* Act of October 24, 1992, Pub. L. No. 102-497, § 14, 106 Stat. 3261.

[91] *See* Oversight Hearing on the Implementation and Enforcement of the Indian Gaming Regulatory Act Before the House Committee on Interior and Insular Affairs, 102nd Cong., 2d Sess (Jan. 9, 1992); Hearing on the Indian Gaming Regulatory Act Before the Senate Select Committee on Indian Affairs, 102nd Cong., 2d Sess (Feb. 5, 1992).

[92] *See* U.S. Dep't of Interior, Office of Inspector General, *Memorandum Survey Report* (dated Dec. 31, 1992), *reprinted in* Congressional Resourcebook § 3E.

[93] *See, e.g.,* Reno Gazette-Journal, Sep. 7, 1992, at 2F.

[94] *See* P. Hevener, *Inouye: Give Indian Gaming Act A Chance*, 12 INT'L GAMING & WAGERING BUS. 1, 9 (Aug. 15, 1991-Sep. 14, 1991).

[95] *See* Reno Gazette-Journal, Nov. 20, 1992, at 4D.

Late in the 102nd Congress, two proposals to amend the IGRA were introduced in the House of Representatives. Congressman Peter Hoagland (D. Neb.) introduced H.R. 6172 to limit Tribal-State Compacts to gaming activities specifically authorized by the situs state's law. H.R. 6172 also addressed regulatory problems associated with charitable gaming, electronic facsimiles, the "good faith" negotiation standard, newly-acquired lands for gaming and the composition of the National Indian Gaming Commission. A second bill, H.R. 6158, was authored by Rep. Esteban Torres (D-Cal.). H.R. 6158 was directed to the single issue of eliminating the sovereign immunity defenses that states were claiming in "good faith" negotiation litigation. Neither H.R. 6172 nor H.R. 6158 were acted upon by the Congress in 1992.[96]

C. Overview of Federal Commission

1. Institutional Structure And Membership

The National Indian Gaming Commission (hereinafter the "NIGC" or "Commission") is composed of three full-time members. The Commission chairman is appointed by the President and the two associate members are appointed by the Secretary of the Interior. At least two members of the NIGC must be enrolled members of federally recognized Indian tribes.[97]

Even though the Commission was established by IGRA in 1988, appointments of the NIGC members were not completed until April, 1991.[98] The NIGC chairman is Anthony J. Hope, a graduate of Georgetown University and Harvard Law School.[99] Before appointment to the NIGC, Chairman Hope was a senior vice president of the

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[96] *See* Staff Report, Conference of Western Attorneys General: "Proposed Amendments to the Indian Gaming Regulatory Act of 1988", 2 (Nov. 20, 1992).

[97] *See* U.S.C.S. § 2704(b) (Law. Co-op Supp. 1992).

[98] *See* Nat'l Indian Gaming Comm'n, Biography of Jana McKeag (1991)(hereinafter "McKeag Biography") *reprinted in* Resourcebook § 3, at B-3.

[99] *See* J. Moskal, Hope's Son To Head National Indian Gaming Commission, Gannett News Service (May 22, 1990); Nat'l Indian Gaming Comm'n, Biography of Anthony J. Hope (1990) *reprinted in* Resourcebook § 3, at B-1.

Mutual of Omaha-United of Omaha Insurance Companies and a partner in the public accounting firm of Touche Ross & Company. Chairman Hope was the director of the finance division of the Overseas Private Investment Corporation under the Ford administration.

Joel M. Frank, Sr., an enrolled member of the Seminole Tribe of Florida, was appointed an associate member of the NIGC on November 25, 1990.[100] Immediately preceding his appointment, Commissioner Frank was the executive administrator of the Seminole Tribe of Florida. Commissioner Frank has been employed in various administrative positions with the Seminole Tribe and Miccosukee Tribe, as well as several posts in other intertribal associations.

The third member of the Commission is Jana McKeag, a member of the Cherokee Nation of Oklahoma.[101] A graduate of Harvard University's Kennedy School of Government, Commissioner McKeag has held administrative positions with the United States Departments of Agriculture and Interior, as well as the National Congress of American Indians.

The Commission is charged with the responsibility of monitoring Class II gaming on a continuing basis, inspecting all Class II gaming facilities, conducting background investigations, performing audits, holding hearings, and promulgating appropriate guidelines and regulations.[102] The regulatory authority of the Commission extends to the approval of an annual budget, the adoption of regulations concerning assessments and collections of civil fines, the establishment of fees, the issuance of subpoenas, and

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[100] *See* Nat'l Indian Gaming Comm'n, Biography of Joel M. Frank, Sr. (1991) *reprinted in* Resourcebook § 3, at B-2.

[101] *See* McKeag Biography, *supra* note 98.

[102] *See* U.S.C.S. § 2706(b) (Law Co-op Supp. 1992).

the ability to make permanent temporary orders issued by the chairman that close errant gaming operations.[103]

The IGRA further provides for Commission regulation of management contracts entered into by the tribe for the operation of gaming activities. These management agreements must include, among other things, adequate accounting procedures and an effective time period, not to exceed five years. The chairman of the Commission also has authority to approve the actual management fee.[104]

Congress appropriated $2,190,000 for the operation of the NIGC in fiscal year 1992. Only $215,000 of these funds are used for investigatory services and the balance of the federal appropriation is expended for GSA space rental, operating expenses, travel costs and the salaries and benefits of the Commission's permanent staff of approximately fifteen.[105]

2. Status Of Agency Rulemaking

In April 1992, the Secretary of Interior announced certain recommendations of the Task Force on Indian Gaming Management, a Department of Interior committee first formed in December 1991, to implement the IGRA.[106] Among the recommendations that were considered worthy for implementation are (1) issuance of cease and desists orders to unlawful tribal gaming operations; (2) scrutinizing management compacts; and, (3) conducting background investigations of individuals involved in tribal gaming operations.[107]

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[103] *See id.* § 2706(a).

[104] *See id.* §§ 2711(a)(3), (b)(1), (b)(5).

[105] *See* National Indian Gaming Commission, Report To Congress 8-12 (Dec. 31, 1991)(hereinafter "1991 NIGC Report"), *reprinted in* Resourcebook § 3, at A.

[106] *See* F. Mikelberg, *Trendline: Indian Gaming*, 13 INT'L GAMING & WAGERING BUS. 10 (Apr. 15, 1992-May 14, 1992).

[107] *See id.*

The NIGC has adopted three series of administrative rules. On August 15, 1991, the Commission adopted a final rule imposing a 1 percent "preliminary" annual fee upon tribal Class II gaming operations to generate operating funds for the NIGC.[108]

On April 9, 1992, the NIGC promulgated final regulations that interpret and implement the IGRA by furnishing much needed definitions to statutory terms.[109] These regulations assist in resolving a number of difficult and divisive questions emerging under the IGRA relative to the legal parameters of Class II gaming and Class III gaming.

For example, the administrative rules limited the Class II games of bingo and lotto by adopting a description of the customary method of playing these games, while recognizing the availability of technical aids to augment playing the traditional forms of bingo and lotto.[110] Similarly, the NIGC regulations limited the ability of Class II gaming operations to offer non-banking games played with cards to the precise games and method of play available under the law of the situs state.[111]

In the NIGC rules, the definition of Class III gaming was refined by supplying a list of examples of these games.[112] Likewise, the regulations define the important statutory concepts of "electronic, computer or other technological aid" and "electronic or electromechanical facsimile."[113] These definitions explicitly provide that video gaming devices and slot machines as described by the Johnson Act are Class III games.[114]

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[108] *See* 56 Fed. Reg. 56, 278-56,282 (Aug. 15, 1991)(codified at 25 C.F.R. § 514.1 (1991)).

[109] *See* 57 Fed. Reg. 12,382-12,393 (Apr. 9, 1992)(codified at 25 C.F.R. § 502 (1992)).

[110] *See* 25 C.F.R. § 502.3 (1992).

[111] *See id.*

[112] *See* 25 C.F.R. § 502.4 (1992).

[113] *See* 25 C.F.R. §§ 502.7-502.8 (1992).

[114] *See id.*

Additionally, the administrative rules further develop the scope of the licensing requirements under the IGRA by identifying the management contracts, management officials, persons with financial interests and key employees that are subject to NIGC oversight and approval.[115]

However, implementation of the rules has been stayed pending resolution of a challenge to them filed in federal court, focused primarily on the question of whether certain electronic games were correctly defined as Class III games.[116]

The third set of rules were adopted on January 22, 1993. They concerned adoption of tribal gaming ordinances, procedures for background investigations and gaming licenses, management contract requirements and procedures, and compliance and enforcement procedures.[117]

3. Survey Of Enforcement Activity

The NIGC has not initiated any administrative or civil enforcement action under the Act. Apparently, the Commission has concluded that enforcement actions cannot be commenced until certain regulations are adopted.[118]

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[115] *See, e.g.,* 25 C.F.R. §§ 502.14, 502.17-502.19 (1992).

[116] Cabazon Band of Mission Indians v. National Indian Gaming Commission, CIV No. 92-1103(RCL) (D.D.C., filed May 11, 1992).

[117] *See* 25 C.F.R. § 501, 519, 522-524, 556 and 558.

[118] *See* 1991 NIGC Report at 7.

IV. IMPLEMENTATION OF THE FEDERAL ACT

A. Interpreting The IGRA Through Litigation

In the last three years, the federal government, sixteen States and twenty-seven Tribes have vigorously litigated the interpretation of the IGRA.[119] Contrary to the stated objectives of Congress, the Act has not resolved, but rather fostered more controversy over gambling activities on Indian lands.[120] At least thirty lawsuits have been filed to secure judicial intervention in controversies involving the interpretation and application of the IGRA.

This litigation may be classified into four general categories. First, cases involving the appropriate scope of commercial gaming on Indian lands based upon the law of the situs states. Second, controversies related to the lack of good faith in a state's negotiation of a Tribal-State Compact for Class III gaming operations on Indian lands. Third, litigation pertaining to the sovereign immunity of the states from suit by Indian tribes to enforce the IGRA. Fourth, miscellaneous issues related to regulatory oversight of gaming on Indian lands.

1. The Scope Of Permissible Gaming Activity

The scope of permissible Class II gaming and Class III games has been the issue in more than fifteen cases litigated since 1988.[121] The courts have consistently ruled that the IGRA establishes a comprehensive federal regulatory scheme for the operation of Class II tribal bingo games. Consequently, the Act preempts any enforcement or

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[119] *See infra* notes 121-155, and accompanying text.

[120] *See* Senate Report at 1-2.

[121] *See* J.T. McCoy, Status Of Litigation Under The Indian Gaming Regulatory Act 1-2 (North American Gaming Regulators Ass'n Aug. 31, 1992)(hereinafter "McCoy Report") *reprinted in* Resourcebook.

application of state laws governing the licensure, regulation and method of play of bingo, lotto and related Class II games on Indian lands.[122]

In interpreting the card parlor grandfather provision under the Act, a federal court held that the statutory phrase regarding the "nature and the scope of the games actually in operation" referred only to the type of card game and pot and wagering limitations. The court determined, therefore, that the tribal gaming operation could expand hours of operation and numbers of games for the IGRA grandfathered blackjack despite conflicting state law in certain states, including South Dakota.[123]

In Mashantucket Pequot Tribe v. State of Conn.,[124] the federal court determined that since Connecticut law permitted limited casino gaming in the form of "Las Vegas Nights" for the purpose of ***charitable*** fundraising, Indian tribes were justified in demanding that the state enter compact negotiations for Class III ***commercial*** casinos on Indian lands.[125] Similarly, in Lac du Flambeau Band Indians v. State of Wis.,[126] the federal court concluded that if Wisconsin's laws permitted one form of Class III gaming,

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[122] *See* Keetoowak Indians v. State of Oklahoma ex rel. Moss, 927 F.2d 1170 (10th Cir. 1991). The court rejected the argument that the Assimilative Crimes Act, 18 U.S.C.S. § 13 (Law. Co-op 1979 & Supp. 1992), empowered Oklahoma to indirectly enforce on Indian lands the State laws governing the operation of charitable bingo games. *See also* Seneca-Cayuga Tribe v. Oklahoma, 874 F.2d 709 (10th Cir. 1989). A federal court ruled in State of Rhode Island v. Narragansett Tribe of Indians, CA. No. 92-0425P (D.R.I., March 5, 1993) that the IGRA preempted the "Settlement Act" between the state and the tribe, which made state civil law applicable on Indian lands.

[123] *See* United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir. 1990).

[124] 737 F.Supp. 169 (D. Conn. 1990) *aff'd* 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1620 (1991).

[125] 913 F.2d at 1029-1034.

[126] 770 F.Supp. 480 (W.D.Wis. 1991) *appeal dismissed* 957 F.2d 515 (7th Cir. 1992).

then a tribe was entitled to negotiate a compact that allows all forms of Class III gaming not expressly prohibited by state statute.[127]

However, in Cheyenne River Sioux Tribe v. South Dakota, the federal court ruled that South Dakota was required to negotiate over video keno, which the state allowed, but not over stand-alone keno, which was not permitted by the state.[128]

A federal court has ruled that the gambling game of "Lotto" referred to in the IGRA is a form of bingo which is Class II gaming and that this term could not be construed to authorize operation of "Lotto" gambling devices that are essentially lotteries, a Class III game.[129] Electronic "lotto" machines were also declared Class III games in Spokane Tribe of Indians v. United States[130] Likewise, the federal courts have held that keno is a house banking game and, therefore, is properly categorized as Class III gaming.[131]

2. Failure To Negotiate Compact In Good Faith

(a) The Meaning Of Good Faith Negotiations. Nearly twenty recent lawsuits involve Indian tribe claims that the situs state failed to negotiate in good faith a Tribal-State Compact for Class III Gaming operations.[132] In Mashantucket Pequot Tribe, the court held that "[w]hen a state wholly fails to negotiate, . . . it obviously

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[127] *See id.*

[128] Civ. 92-3009 (D.S.D., Jan. 8, 1993).

[129] Oneida Tribe v. State of Wisconsin, 742 F.Supp. 1033 (W.D.Wis. 1990) *aff'd* 951 F.2d 757 (7th Cir. 1991).

[130] 782 F.Supp. 520, 521-525 (E.D.Wash. 1991) *aff'd* 1992 W.L. 190289 (9th Cir. Aug. 12, 1992).

[131] *See* Sisseton-Wahpeton Sioux Tribe v. United States, 804 F.Supp. 1199 (D.S.D. 1992); Shakopee Mdewakanton Sioux Community v. Hope, 798 F.Supp. 1399 (D.Minn. 1992).

[132] *See* McCoy Report at 2-4. With the exception of a few initial cases involving good faith negotiation claims, the vast majority of these lawsuits are being defended on the grounds of sovereign immunity. *See infra* notes 137-142, and accompanying text.

cannot meet its burden of proof to show that it negotiated in good faith."[133] Likewise, relying upon the Cabazon case, the court in Lac du Flambeau Indians v. State of Wis. ruled that a state may not justifiably assert that "the state is required to bargain only over gaming activities that are operating legally within the state," and must negotiate relative to all forms of Class III gaming if state law permits any form of Class III gaming.[134]

Despite the number of good faith negotiation claims filed by tribal governments, the meaning of "good faith" in the context of the Tribal-State compacting process has not been further refined beyond the early discussions in the Mashantucket Pequot Tribe and Lac du Flambeau Indians decisions. At least one legal commentator, however, has examined the applicability to the IGRA of various doctrines surrounding the concept of good faith, including the Uniform Commercial Code, labor agreement negotiations and insurance contract transactions.[135]

(b) Mutuality Of The Good Faith Requirement. In a decision declaring that the IGRA does not unconstitutionally interfere with a tribe's fundamental right to self-government, a federal court has determined that the Act confers jurisdiction in cases where ***either*** tribes or states fail to enter compact negotiations in good faith.[136] Apparently, the principal reason for the paucity of federal court rulings on the meaning of good faith is that most tribal claims on this topic are subject to sovereign immunity claims by the involved states.

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[133] *See supra*, note 124, 913 F.2d at 1032 (2nd Cir. 1990).

[134] 770 F.Supp. 480, 485 (W.D.Wis. 1991), *appeal dismissed* 957 F.2d 515 (7th Cir. 1992).

[135] *See* Comment, *The Meaning of Good Faith in the Indian Gaming Regulatory Act*, 27 GONZAGA L. REV. 471 (1992).

[136] *See* Red Lake Band of Chippewa Indians v. Swimmer, 740 F.Supp. 9 (D.D.C. 1990).

3. State Sovereign Immunity Cases

An important development in current litigation under IGRA is the inclination of state governmental agencies to respond to tribal claims of bad faith negotiation by raising a sovereign immunity defense. At least fourteen pending cases involve this question.[137]

In these cases, the states are asserting that Congress did not have authority to abrogate the Eleventh Amendment immunity from suit of the several states by enacting the IGRA pursuant to the Indian Commerce Clause of the Constitution of the United States. A number of federal courts have concluded that the states are entitled to invoke their sovereign immunity in good faith negotiation litigation under the IGRA.[138] Other courts have held to the contrary.[139]

The states are also defending good faith negotiation litigation initiated by the tribes on the grounds that the reservation of nondelegated powers to the states under the Tenth Amendment[140] prevents the Congress from utilizing the Indian Commerce Clause to force the states to regulate gaming activities on Indian lands pursuant to the IGRA. Several courts have ruled for the states on this claim.[141] Others have concluded that this constitutional problem can be avoided by ruling that the "IGRA's terms do not

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[137] *See* McCoy Report at 3-4.

[138] *See, e.g.,* Ponca Tribe v. State of Oklahoma, No. Civ-92-988-T, sl (W.D.Okla. Sept. 8, 1992); Spokane Tribe of Indians v. State of Wash., 790 F.Supp. 1057 (E.D.Wash. 1991) (state but not its officials); Poarch Band of Creek Indians v. State of Alabama, 776 F.Supp. 550 (S.D.Ala. 1991).

[139] *See, e.g.,* Seminole Tribe of Florida v. State of Fla., 801 F.Supp. 655 (S.D.Fla. 1992); Yavapai-Prescott Indian Tribe v. State of Ariz., 796 F.Supp. 1292 (D.Ariz. 1992); Cheyenne River Sioux Tribe v. South Dakota, *supra*, note 128.

[140] See New York v. United States, 112 S.Ct. 2408 (1992).

[141] *See, e.g.,* Ponca Tribe v. State of Oklahoma, *supra*, note 138 Pueblo of Sandia v. New Mexico, CIV 92-0613 (D.N.M., Nov. 13, 1992); Apache Tribe of Mescalero Reservation v. New Mexico, CIV 92-0076M (D.N.M., Dec. 22, 1992); Sault Ste. Marie Band of Chippewa Indians v. State, 800 F.Supp. 1484 (W.D.Mich. 1992).

force the State to enter into a compact, it only demands good faith negotiation in order to meet state, as well as tribal and federal, interests."[142]

4. Regulatory Oversight

*(a) **Sustaining NIGC Rulemaking Powers***. In two decisions, federal courts have dismissed tribal claims challenging the rulemaking authority of the NIGC. These courts held that the Commission is empowered to adopt administrative regulations that interpret or elucidate the IGRA. The NIGC rulemaking decisions are entitled to deference by reviewing courts unless the agency actions are arbitrary and capricious or based on an unreasonable interpretation of the Act.[143]

*(b) **IGRA Enforcement Authority***. A series of cases in California involve the state's seizure of gaming devices operated at a number of locations on Indian lands in violation of a state statute prohibiting the operation of slot machines.[144] In this regard, the federal court decided that the IGRA confers exclusive criminal enforcement jurisdiction with the federal government and that Public Law 280 does not empower state law enforcement of IGRA violations absent a crossdesignation as a federal prosecutorial agency under Rule 41(a) of the Federal Rules of Criminal Procedure.[145] The federal courts have explained that the IGRA did not preempt or impliedly repeal the provisions of the Johnson Act,[146] prohibiting the operation of slot machines contrary to

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[142] *See* Yavapai-Prescott Indian Tribe v. State of Ariz., *supra*, note 21, 139 1297.

[143] *See* Sisseton-Wahpeton Sioux Tribe v. United States, 804 F.Supp 1199 (D.S.D. 1992); Shakopee Mdewakanton Sioux Community v. Hope, 798 F. Supp. 1399 (D.Minn. 1992).

[144] *See, e.g.,* Sycuan Band of Mission Indians v. Roache, 788 F.Supp. 1498 (S.D.Cal. 1992).

[145] *See id.* at 1502-1513.

[146] 15 U.S.C.S. §§ 1171-1178 (Law. Co-op 1982 & Supp. 1992).

state law.[147] In an Oklahoma case, the federal court held that slot machines permitted by a compact but otherwise prohibited under state law were not legal under the Johnson Act, because the IGRA requires that such machines be both permitted under a compact and be legal under state law.[148]

In another case, a tribe unsuccessfully challenged the authority of the State of California to impose an indirect tax on an off-track wagering parimutuel pool that included operators located on Indian lands.[149]

On a related subject, a federal court has enjoined municipal and county officials from adopting or enforcing local law to prevent a tribe from operating video gaming devices within the city's territorial jurisdiction. The court decided that where the tribe and the state entered a compact permitting the operation of the gaming devices, local government agencies could not use local laws to enforce a prior written agreement by the tribe that the devices would not be operated within the city.[150]

*(c) **Standards Governing Management Contracts***. Although the NIGC has not adopted regulations governing management contracts entered under the IGRA, federal courts have started to decide cases involving disputes between tribal entities and management contractors. For instance, in Tamiami Partners Ltd. v. Miccosukee Tribe,[151] the court held that the federal courts should refuse to resolve disputes under a management agreement for gaming operations, including complete termination of the

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[147] United States v. Burns, 725 F.Supp. 116 (N.D.N.Y. 1989) *aff'd sub nom.* United States v. Cook, 922 F.2d 1026 (2d Cir. 1991).

[148] Citizen Band Potawatomie Indian Tribe of Oklahoma v. Joe Heaton, No. CIV-92-2095-W (W.D.Okla., Feb. 2, 1993).

[149] *See* Cabazon Band of Mission Indians v. State of Cal., 788 F.Supp. 1513 (E.D.Cal. 1992).

[150] *See* Forest County Potawatomi Community v. Doyle, 1992 W.L. 232322 (W.D.Wis., Sept. 1, 1992).

[151] 788 F.Supp. 566 (S.D.Fla. 1992).

contract, until the casino operating company completely exhausts legal remedies under tribal law.[152] Similarly, a federal court has determined that the equitable defense of estoppel cannot be applied to preclude a tribe from repudiating the validity of a management contract based upon the failure to obtain the approval of the Secretary of the Interior.[153]

In Rita, Inc. v. Flandreau Santee Sioux Tribe,[154] the court explained that the common law implied covenant of good faith and fair dealing was imputed to management contracts. The court determined that despite the lack of federal government approval of the applicable management contract, a tribe could not terminate a management company that had invested substantial capital in a tribal casino without according the manager some relief.[155]

B. CLASS III GAMING AND TRIBAL-STATE COMPACTING

1. Synopsis Of Existing Compact Negotiations

Since adoption of the IGRA, eighteen of the thirty-one states with Indian lands have entered Tribal-State Compacts for the operation of Class III gaming.[156] At the present time there are sixty-seven executed compacts.[157] Other states are currently

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[152] *See id.*

[153] *See* Potawatomi Indian Tribe v. Enterprise Management & Consultants, Inc., 734 F.Supp. 455 (W.D.Okla. 1990).

[154] 798 F.Supp. 586 (D.S.D. 1992).

[155] *See id.*

[156] *See* McCoy Report at 6-14; F. Mikelberg, *Trendline: Indian Gaming*, 13 INT'L GAMING & WAGERING BUS. 22 (Jan. 15, 1992-Feb. 14, 1992)(hereafter "IGWB Report"); Gaming Division, Bureau of Indian Affairs, personal contact March 16, 1993.

[157] *See id.*

negotiating their first compacts with Indian tribal representatives.[158] Negotiations are pending on a minimum of thirty-four Tribal-State Compacts in ten states.[159]

2. Summary Of Compacting Process

Section 11(d)(3) of the Act provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.
>
> . . . .
>
> Any Tribal-State compact negotiated . . . may include provisions relating to--
>
> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) the taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activities and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.[160]

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[158] *See* IGWB Report at 22; McCoy Report at 6-14.

[159] *See id.*

[160] *See* 25 U.S.C.S. § 2710(d)(3)(A), (C) (Law. Co-op Supp. 1992).

No particular substantive provision must be included in a Tribal-State Compact under the permissive language of Section 2710(d)(3)(C) of the IGRA. Essentially, the Act contains guidelines for compact provisions, realizing that each compact must be styled to address the unique concerns of the individual states and tribes involved, as well as the particular type of gaming activities concerned.

Existing Tribal-State Compacts exhibit great diversity.[161] Nevertheless, a survey of these compacts demonstrates that these agreements have many common aspects. Although the exact gaming permitted in each case differs, every type of Class III gaming is addressed in the compacts, including pari-mutuel wagering, sports pools, horse racing, characteristic casino and card games, jai alai, lotteries, keno, video gaming devices and slot machines. Typically, the states maintain criminal and civil jurisdiction of non-Indians patronizing tribal casinos. Under many compacts, state law enforcement officials are empowered to inspect and supervise tribal gaming operations. In a few instances, the state or local law enforcement agencies are vested with ***all*** criminal and civil law enforcement authority.

Each of the compacts provide licensing schemes for operators, employees and frequent suppliers. Many compacts prescribe that the state is the licensing agency. Other Tribal-State agreements empower the state to object to or challenge tribal licenses or approvals. A majority of the compacts limit ownership of the casino to the tribe and prescribe permissible uses of casino profits. Compacts frequently include hours of operation, limit wagering to adults and prohibit credit play. Interestingly, some of the compacts provide for telephone wagering accounts, authorize certain games of Oriental origins, limit the use of firearms on gaming establishment premises and empower the state to impose civil fines for violation of the compact terms.

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[161] *See* Resourcebook.

C. State Legislative Initiatives

At least a dozen state legislatures have enacted or are studying statutes that address legal questions precipitated by the passage of the IGRA. Ten states have adopted new laws that empower the Governor or a particular state executive agency with the authority to negotiate, execute and implement Tribal-State Compacts for Class III gaming operations on Indian lands.[162] A number of these statutes include provisions compelling public hearings or the advise and consent of state gaming regulatory agencies or legislative committees.[163] This type of legislation was essential in many states in order to implement the compacting requirements of the IGRA. In at least one instance, litigation was necessary to resolve the legal authority to enter compacts under state law.[164]

At least five state legislatures have or are considering fundamental modifications to the existing statutes legalizing and regulating gaming in their respective jurisdictions. While the ability of Indian tribes to engage in gaming activities is not the only factor affecting these legislative proposals, the effect of the IGRA on changes to state gaming laws has been an important consideration in these states.

In Arizona, the state legislature debated a number of proposed changes to laws that govern the types of lawful gaming activities permitted by statute and the impact these modifications might have on the negotiations and the litigation involving Indian gaming operations.[165] On March 5, 1993, the Governor signed a measure to ban all types of casino gaming, including previously unregulated charitable gaming.[166] Idaho's

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[162] *See* McCoy Report at 6-14 for the first nine; Kansas became the tenth in February, 1993.

[163] *See id.*

[164] *See* Kansas v. Finney, 836 P.2d 1169 (Kan. 1992).

[165] *See* McCoy Report at 7; Arizona Republic, Apr. 4, 1990, at B4.

[166] *See* Arizona Republic, March 6, 1993, at A1.

Legislature put on the ballot and the people enacted a constitutional change that explicitly limited permissible gaming in that state to a particular form of the state lottery and parimutuel horseracing.[167] The Oregon Legislature approved a proposal to expand the types of gambling games permissible under state law, including the operation of video gaming devices.[168] In Minnesota, the state legislature enacted provisions authorizing the sale and operation of gaming equipment on Indian lands when used pursuant to activities permitted by a valid Tribal-State Compact.[169] Wisconsin passed legislation that repealed portions of the state's Lottery Act and placed restrictions on the manner in which the lottery could be conducted. The new law included provisions rendering unlawful slot machines and casino gambling.[170]

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[167] *See* Idaho Statesman, Aug. 10, 1992, at C1.

[168] *See* Salem Statesman Journal, Oct. 13, 1992, at D18.

[169] *See* McCoy Report at 10.

[170] *See* McCoy Report at 14.

V. VIABILITY OF THE INDIAN GAMING REGULATORY ACT

A. CURRENT IMPACT OF COMMERCIAL GAMING ON NATIVE AMERICANS

1. Gambling In Indian Culture

Gambling was a prevalent facet of traditional Native American culture. Anthropologists have cataloged the existence of games of chance "among 130 tribes belonging to 30 linguistic stocks."[171] Based upon the findings of gravesites, pottery etchings and other archaeological studies, gambling games were an established part of Indian life in the pre-Columbian era.[172]

Although subject to local variation, tribes throughout North America wagered extensively upon sporting events and games of chance. Tribal social events were natural occasions for games of physical skill including wrestling, foot races, tugs-of-war, jumping and the hoop and pole.[173] Three basic forms of traditional Native American games of chance existed, namely dice games, hand games and stick games.[174]

Wagering was typically a limited stakes pastime among family or tribal members.[175] There are accounts, however, of inter-tribal gambling events where "[s]ome men got rich and their families lived in high estate. Others went poor and often

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[171] *See* S. Culin, GAMES OF THE NORTH AMERICAN INDIANS 45 (1907).

[172] *See* Indian Country Today, Winners Circle Special Edition: Games of chance, an Indian tradition 22 (Nov. 5, 1992)(hereinafter "Winner's Circle").

[173] *See, e.g.,* R.W. Andrews, INDIAN PRIMITIVE 59-61 (1960); J.L. Haley, APACHES: A HISTORY AND CULTURAL PORTRAIT 161-164 (1981).

[174] *See id.*

[175] *See* Winner's Circle at 22.

into slavery, their women and children with them."[176] Despite the cultural basis for gambling among Native Americans, the historical use of reservation lands for commercial gaming operations designed to attract non-Indian patrons is an ***economic*** phenomenon of the last twenty years.[177]

2. Economics Of Gaming On Indian Lands

Recently published statistics indicate that gross annual wagering activity at gaming operations on Indian lands exceeds $5.4 billion.[178] Class II gaming activity rose eight percent (8%) in the last year to an estimated $1.4 billion wagered with a gross revenue to the tribes exceeding $419 million.[179] Tribal Class III gaming activity experienced a two hundred percent (200%) rise in both handle ($4.038 billion) and gross revenue (approximately $301 million) for the tribes.[180] Commentators expect that tribal gaming operations will earn in excess of $1 billion in 1992.[181]

Undeniably, the revenues from tribal gaming operations are currently the single most important source of economic development funding for Native Americans.[182] For over a decade, congressional appropriations for Indian programs have declined by 15 percent and the federal government has encouraged tribal governments to exploit

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[176] R. W. Andrews, INDIAN PRIMITIVE 59 (1960).

[177] *See* H.C. Cashen & J.C. Dill, *The Real Truth About Indian Gaming and the States*, STATE LEGISLATURES 23 (Mar. 1992)(hereinafter "Cashen & Dill").

[178] *See* E.M. Christiansen, P.A. McQueen & J. Cesa, *1991 Gross Annual Wager Of The United States——Part I: Handle*, 13 INT'L GAMING & WAGERING BUS. 22, 25, 34-35 (Jul. 15, 1992-Aug. 14, 1992)(hereinafter "I 1991 IGWB Wagering Report").

[179] *See* I 1991 IGWB Wagering Report at 34-35; E.M. Christiansen, P.A. McQueen & J. Cesa, *1991 Gross Annual Wager Of The United States——Part II: Revenue*, 13 INT'L GAMING & WAGERING BUS. 16, 20, 50, 53. (Aug. 15, 1992- Sep. 14, 1992)(hereinafter "II 1991 IGWB Wagering Report").

[180] *See* I 1991 IGWB Wagering Report at 22; II 1991 IGWB Wagering Report at 16.

[181] *See id.* at 20.

[182] *See* Los Angeles Times, Oct. 9, 1991, at A1;

reservation gambling operations as a means of generating approximately 50 percent of the funds needed by Native American communities.[183] This federal policy has been clearly evidenced by the laissez-faire stance of the Bureau of Indian Affairs towards Indian gaming.[184]

(a) ***Minnesota Case Study.*** Although there are no published national statistics on the subject,[185] a series of studies on the impact of commercial gaming on Minnesota provides a useful case study.[186] There are thirteen tribal gaming operations in Minnesota. In fiscal year 1991, an estimated $900 million was wagered in these casinos and the nine Indian reservations earned net revenue of approximately $54 million from the facilities.

From 1988 to 1992, these tribal gaming operations created 5,750 new casino related jobs with an annual payroll of $78,227,000. This employment sector is expected to increase to 11,300 by 1994. Native Americans comprise approximately 24 percent of the employees in these tribal gaming operations.

The thirteen Indian gaming facilities generate in excess of $11,800,000 in social security and Medicare tax revenue annually and an estimated $9,260,000 in other state and federal taxes. Between 1987 and 1991, public assistance spending by Minnesota state agencies had decreased by 16 percent in the counties with tribal gaming facilities while the statewide number of recipients increased 15 percent for the same period.

(b) ***Similar Native American Success Stories.*** Native American officials validly maintain that the net income from reservation games has funded tribal

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[183] *See* The San Francisco Chronicle, Oct. 6, 1988, at A23;

[184] *See* Los Angeles Times, Oct. 6, 1991, at A1.

[185] *See* 1991 NIGC Report at 13.

[186] *See* Minnesota Planning, HIGH STAKES: GAMBLING IN MINNESOTA 1 (Mar. 1992); Minnesota Indian Gaming Association, ECONOMIC BENEFITS OF TRIBAL GAMING IN MINNESOTA 1 (Mar. 1992); Midwest Hospitality Advisors, IMPACT: INDIAN GAMING IN THE STATE OF MINNESOTA I-1 (Feb. 1992).

government operations, built housing, schools, day care and health care facilities, provided desperately needed employment for Indians, and furnished job training and higher education opportunity to tribal members on Indian lands. Tribal leaders cite a number of examples in support of these claims.

California's twenty-five member Cabazon Band operates a tribal casino that earns $540,000 in tax revenues on approximately $40 million in annual gross receipts. The tribe has provided full employment, complete medical and dental care, housing and educational assistance for tribal members, as well as financing necessary reservation government infrastructure.[187] The Oneida Tribe of Wisconsin employs over 1,110 in a tribal gambling operations that earn $43 million in annual revenues that aid in funding health care, education, housing and social services on the reservation.[188] In New Mexico, the Sandia Tribe's gaming revenues exceeded $16 million in 1991. The unemployment rate on that Pueblo reservation has decreased from 14 percent to 3 percent and per capita income has increased by nearly 27 percent.[189] Connecticut's Mashantucket Pequot Tribe employs 3,600 at the Foxwoods Casino which generates $10 million in annual gaming profits.[190] In San Diego County, California, the Sycuan Reservation casino earns a gross gaming revenue of $80 million annually and employs 700 tribal and non-Indian workers. The ninety-five member tribe has constructed homes, built a medical clinic, established professional police and fire departments and created a tribal scholarship program.[191]

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[187] *See* Winner's Circle at 31; J. Littman, *And The Dealer Stays*, 13 CAL. LAW. 45, 46 (Jan. 1993)(hereinafter "Littman").

[188] *See id.*

[189] *See id.*

[190] *See id.* at 32; Wall Street Journal, Aug. 5, 1991, at B1, B3.

[191] *See id.*; Winner's Circle at 32; Littman at 46.

Under these circumstances, the ardent claims of tribal leaders that reservation gaming is critical for Native American economies and self-determination are not surprising.[192] As demonstrated by a review of the litigation between tribal governments and states, many of the successful Indian casinos depend upon the continued ability of tribal attorneys to secure from the federal courts favorable interpretations of the IGRA.[193]

Economic success in tribal gaming, however, has not been uniform or routine. While statistics are incomplete, there is growing evidence that commercial gaming on Indian lands is not the panacea claimed by tribal leaders. Many reservation gaming operations do not succeed, leaving a legacy of debt and misallocated resources.[194]

3. Social Consequences Of Gaming On Indian Lands

Even when financially successful, tribal revenue, jobs and reservation infrastructure are not the only result of gaming operations on Indian lands. Commercial gaming has had a profound and frequently adverse impact on Native Americans. Among the most alarming adverse consequences are instances of severe intratribal conflict, dramatic increases in criminal activity on reservations and the related problems of substance abuse and gambling addiction.

***(a) Intratribal Conflict*.** Tribal discord over reservation gaming operations is a recurrent problem. The most renown example of intratribal conflict over gambling was the 1989 tribal "civil war" on the St. Regis Mohawk Reservation in New York. After years of conflict over the illegal operation of reservation casinos profiting a few tribal members, Mohawks opposed to the gambling invaded the facilities and destroyed slot machines. State and local law enforcement officials seized the gaming devices and

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[192] *See, e.g.,* Reno Gazette-Journal, Nov. 20, 1992, at 4D; Winner's Corner at 13 & 25; Los Angeles Times, Oct. 10, 1991, at A3, A20, A22..

[193] *See, e.g.,* Cashen & Dill at 23-25; Reno Gazette-Journal, Dec. 14, 1992, at 1A, 4A; *see supra* text at 43-47.

[194] *See* Los Angeles Times, Oct. 6, 1991, at A1.

a tense confrontation between tribal members and state police ensued. Violence erupted again when the tribal members owning the casinos replaced the slot machines and reopened the facilities. The casinos were rampaged, buildings burnt and automatic weapon fire claimed the lives of two Mohawks. Subsequent state police investigations resulted in the prosecution of organized crime associates for illegal transportation of slot machines.[195]

There are other illustrations of social and political controversy among tribal groups over commercial gaming.[196] Frequent disputes arise among tribal members related to the financial wisdom of resorting to gambling for economic development on the reservation.[197] Some Native Americans fear the effect of tribal gaming economies upon traditional values and institutions.[198] Conflict over discriminatory per capita payments to tribal members or other inequitable distribution of gaming profits is a situation repeatedly discussed in media accounts.[199]

(b) ***Crime And Related Problems***. Despite protestations to the contrary by tribal leaders and federal officials, investigative reporters have argued persuasively that gaming operations on Indian lands are a target of infiltration and influence by criminals and unscrupulous business enterprises.[200] Organized crime participation in or control of gaming operation on Indian lands has been alleged in several locations throughout the

[195] *See, e.g.,* Hartford Courant, May 17, 1992, at G3; Los Angeles Times, Oct. 6, 1991, at A1, A32-A33; Wall Street Journal, Sep. 15, 1989, at B1.

[196] *See, e.g.,* Tucson Citizen, May 13, 1992, at 1A; *see generally* Resourcebook § 6, at B.

[197] *See, e.g.,* The Tulsa Tribune, Jun. 18, 1991, at 7A; Dallas Morning News, Oct. 7, 1992, at 15B.

[198] *See, e.g.,* Los Angeles Times, Oct. 6, 1991, at A1.

[199] *See, e.g.,* Saint Paul Pioneer Press, Nov. 22, 1992, at 1A, 14A.

[200] *See, e.g.,* Chicago Tribune, Jan. 11, 1992, at 5C; Los Angeles Times, Oct. 7, 1991, at A1, A22; Wall Street Journal, Aug. 5, 1991, at B1, B3; Congressional Quarterly, Feb. 18, 1989, at 314-317; *see also* Resourcebook § 6, at B.

United States. Tribal leaders have been murdered for questioning the manner in which gambling profits are distributed, and general accounts of crime and corruption surrounding tribal games is regularly discussed in the nation's newspapers.[201]

(c) ***Other Impacts Of Reservation Gambling***. Limited attention has been accorded the adverse social effects of tribal gaming operations upon Native Americans. Initial studies are disclosing a myriad of problems associated with commercial gambling on Indian reservations.

For instance, Native Americans comprise only between 20 percent and 28 percent of the employees of tribal gaming operations surveyed in Minnesota.[202] The ability to live upon tribal gaming profit-sharing checks is frustrating efforts to encourage job training and education among many Native Americans and especially the youth.[203] Tribal gaming operations contribute to an atmosphere that fosters increased alcohol and drug consumption, threatening to exacerbate already high rates of substance abuse experienced on many reservations.[204] Gambling addictions and related financial problems are a new crisis emerging among Native Americans, and there is clinical evidence that Indians may be at greater risk than others relative to gambling abuse.[205] In addition, the entire litany of social ills experienced with commercial gaming elsewhere, such as

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[201] *See generally* articles collected in Resourcebook.

[202] *See supra* note 16.

[203] *See, e.g.,* Saint Paul Pioneer Press, Nov. 22, 1992, at 1A, 14A.

[204] *See id.*

[205] *See, e.g.,* Winner's Corner at 12; *see generally* J.M. Burger, *The Effect of Desire for Control in Situations with Chance-Determined Outcomes: Gambling Behavior in Lotto and Bingo Players*, 25 JOURNAL OF RESEARCH IN PERSONALITY 196-204 (1991); A. Martinez-Pina, el al., *The Catalonia Survey: Personality and Intelligence Structure in a Sample of Compulsive Gamblers*, 7 JOURNAL OF GAMBLING STUDIES 275-299 (1991).

prostitution, theft and violent crime and transient populations can similarly be expected soon to accompany tribal gaming operations.[206]

B. Effect Of Commercial Indian Gaming On Non-Indians

Equally problematic is the effect of widespread gaming operations on Indian lands upon the relationship between Native Americans and non-Indians. In many locales throughout the United States, the general populations living near tribal gambling facilities are agitated by the various adverse social effects of commercial gambling in their communities.[207] Furthermore, many communities resent the efforts of tribal governments to acquire new urban land for a "reservation" with the single objective of constructing a tribal casino.[208]

Gaming activities sponsored by religious and charitable institutions are losing funds for social programs as tribal gaming operations increase their share of the gambling market. Likewise, state governments are alarmed by the effect upon state revenues resulting from Indian gaming operations.[209] Similarly, segments of the commercial gaming industry appear threatened by the impact of tribal gaming upon businesses like casinos in Nevada, New Jersey, South Dakota and Colorado, river boat operations on the Mississippi and parimutuel wagering at horse and dog tracks.[210]

The proliferation of court decisions mandating states to compact for casino gaming activities for tribes which are not allowed to others in those states inevitably

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[206] *See, e.g.,* J. Atkins, *The States' Bad Bet*, CHRISTIANITY TODAY 16-21 (Nov. 25, 1991); Omaha World Herald, Dec. 1, 1991, at 33A; C. Welles, *America's Gambling Fever*, BUSINESS WEEK 112 (Apr. 24, 1989); The Sacramento Bee, Jun. 7, 1991, at B7.

[207] *See generally* Resourcebook § 6, at B.

[208] *See, e.g.,* Omaha World Herald, Apr. 3, 1992, at 10.

[209] *See, e.g.,* Los Angeles Times, Oct. 10, 1991, at A3, A21; I 1991 IGWB Wagering Report at 22-37; II 1991 IGWB Wagering Report at 16-52.

[210] *See, e.g,* Los Angeles Times, Oct. 10, 1991, at A3, A21-A22; Indian Country Today, Oct. 13, 1992, at A1.

brings demands by non-Indians for the same privileges. The power of the economic forces involved threatens a gaming "arms race", in which permitted games rachet upward, pushing long-held state social polices limiting gaming aside in the scramble to share in the proceeds while they last. If tribes lose their monopolies, their new-found wealth is likely quickly to disappear, because most tribal gaming casinos are located a substantial distance from metropolitan centers. The resultant economic crash may leave tribes poorer than when the rush for gold began.

C. An Agenda For Congressional Action

There is no doubt that the many tasks before the 103rd Congress will include reexamination of the IGRA. Tribal gaming operations consider the further expansion of Class III casino games imperative to the continued growth and success of Native American commercial gambling ventures. Regulatory, judicial and political impediments to tribal casino expansion, such as restrictive NIGC regulations, the sovereign immunity of the several States, and gubernatorial opposition to new urban reservations for tribal casinos, will motivate Native Americas to press for amendments of the Act.

State governments will be spurred to pursue modifications of the IGRA that will ensure that State law determines the scope of permissible Class III games on Indian lands, that criminal activity affecting tribal gaming operations is deterred and that a fair balance between state and tribal interests is restored.

The commercial gaming interests will exert pressure on Congress to amend the Act to resolve that industry's concern about perceived competitive advantages that tribal gaming operators enjoy. Additionally, philanthropic organizations may seek revisions to the Act in order to prevent occasional charitable games from opening the door to the expansion of tribal gambling operations.

Although no action was taken on the legislative proposals, two bills amending the IGRA were introduced during the final weeks of the 102nd Congress. Moreover, several congressional leaders have pledged to renew efforts in 1993 to examine needed

modifications to the Act.[211] Congress will, therefore, need to reconsider the compromises incorporated into the IGRA and clarify the language of the federal statute. Furthermore, Congress should amend the IGRA to codify the definitional regulations adopted by the NIGC

A report prepared by state attorneys familiar with the IGRA and the litigation it spawned recommends a number of specific changes in the Act to improve its workings.[212] They are:

1. To confirm in unambiguous language that Indian tribes may conduct (or authorize another person to conduct) only that type of class III gaming activity on Indian lands that is expressly permitted by state law and that is not specifically prohibited by state law.

2. To specify the particular Class I and Class II games that Indian tribes may conduct or may authorize another person to conduct on Indian lands, including a precise description of games permitted by name and a detailed explanation of the method of play for such permitted games.

3. To provide that the Indian Gaming Regulatory Act of 1988 does not authorize an Indian tribe to conduct unlimited Class III casino-type games without regard to the limitations placed upon such games by applicable state laws merely because the law of affected state allows bona fide not-for-profit organizations to conduct limited "Casino Nights" or "Las Vegas Nights" to raise charitable contributions.

4. To clarify, by definition or description, the meaning of the phrase "failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith" as used in section 11(d)(7)(A)(B) of the Indian Gaming Regulatory Act of 1988.

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[211] *See supra* text at 29-30.

[212] Staff Report, Conference of Western Attorneys General: "Proposed Amendments to the Indian Gaming Regulatory Act of 1988", Nov. 20, 1992.

5. To confirm, consistent with the opinion of the Interior Solicitor, that section 20(b)(1)(A) of the Indian Gaming Regulatory Act of 1988, confers upon the governors of the several states the right to veto a determination of the Secretary of the Interior siting a gaming establishment on lands newly acquired by an Indian tribe where the affected governor does not concur with the Secretary of the Interior that such gaming establishment would not be detrimental to the surrounding community.

6. To clarify that the term "Indian lands," as defined in section 4(4) of the Indian Gaming Regulatory Act of 1988, does not include lands that, although located within the exterior boundaries of an Indian reservation, are owned by a nonmember.

7. To clarify that individually-owned Class II gaming operations subject to section 11(b)(4)(A) of the Indian Gaming Regulatory Act of 1988, must be conducted in accordance with all limitations, including those on purposes, hours or periods of operation, wager or pot limits, and the type of entity authorized to conduct the particular form of gaming, that at least as restrictive as those limitations imposed under state law.

8. To clarify the effect of state law or tribal ordinance amendments adopted subsequent to entry into an effective Tribal-state compact, that prohibit or no longer specifically authorize all types of gaming permitted under the compact.

9. To clarify that secretarial procedures prescribed under section 11(d)(7)(B)(vii) of the Indian Gaming Regulatory Act of 1988, may not authorize gaming whose periods or hours of operation and wager or pot limits are less restrictive than those imposed under state law with respect to the particular form of gaming.

10. To clarify that Class III gaming conducted in accordance with state law on Indian lands is not proscribed by the Indian Gaming Regulatory Act of 1988 where no effective Tribal-state compact exists.

11. To clarify that gaming conducted in accordance with secretarial procedures prescribed under section 11(d)(7)(B)(vii) of the Indian Gaming Regulatory Act of 1988, are excluded from the definition of "gambling" in 18 U.S.C. §1166(c).

12. To clarify that states with criminal jurisdiction over Indian lands under Public Law No. 83-280, (codified in part as amended at 18 U.S.C. §1162, 25 U.S.C. §§ 1321-1325 & 25 U.S.C. § 1360), have such jurisdiction concurrent with the United States under 18 U.S.C. § 1166(d).

Unquestionably, Native American tribes have also encountered problems they feel should be addressed during consideration of amendments to the IGRA. Most commonly mentioned are a desire to resolve the issues connected with the immunity defenses of the states under the Tenth and Eleventh Amendments.

There can be no question that Congress sought a fair solution to the multitude of problems facing both tribes and states when the Act was passed. Equally, there can be no question that time has exposed many weaknesses in the legislation as enacted. Fairness dictates that Congress re-visit IGRA and determine what solutions can be devised to achieve the praiseworthy goals which motivated the initial effort to resolve the issues connected with Native American gaming.

APPENDIX F

TRIBAL GAMING: MYTHS AND FACTS

Several states, led by Nevada and supported by organized non-Indian gambling interests, recently have called upon Congress to curtail or utterly destroy the tribal gaming activities that have become the most -- indeed, in many cases, the only -- successful economic development initiative in the history of Indian country. This campaign, long on generalities and devoid of specifics or alternatives, rests on myths and misconceptions, the cumulative essence of which is that tribal gaming facilities have been unconstitutionally inflicted upon helpless and unconsenting states and communities surrounding reservations by the Indian Gaming Regulatory Act of 1988 ("IGRA", 25 U.S.C. §2701, et seq., and that these facilities are or will become unregulated magnets for organized crime that drain the resources and tax coffers of surrounding governments, while better economic development alternatives are available.

Set forth below is a summary of the major myths and misconceptions about tribal gaming, and the truth about each.

Detailed position papers documenting the Tribal perspective on these points are attached and referenced below.

1. MYTH: IGRA created Tribal gaming.

FACT: Large-scale tribal gaming predated IGRA by about 10 years. In California v. Cabazon and Morongo Bands, 480 U.S. 202 (1987), the Supreme Court held that a federal law ("P.L. 83-280," 18 U.S.C. §1162, 28 U.S.C. §1360) that had given criminal jurisdiction over Indian country to California and several other states only gave jurisdiction to enforce criminal prohibitory laws, not civil regulatory laws. The Supreme Court found that California's gambling laws are civil regulatory, and thus could not be enforced against tribal gaming on a reservation.

RESOURCE: "The Development and Context of the Indian Gaming Regulatory Act" DOCUMENT 1

2. MYTH: Indian gaming involves tribes engaged in commercial, for profit, gaming.

FACT: Gaming on Indian reservations is operated by tribes to fund governmental programs. Tribal governments, like local and state governments, have responsibility for the lives and well-being of their citizens. Like non-Tribal governments, Tribes must face the housing, medical, hunger, education and job training needs of their members. Tribes are thus neither charities nor commercial enterprises. They are governments and have been recognized as such for hundreds of years, most recently by the last six Presidents. Because of such needs, IGRA provides that no less than 60% of the net

profits from a gaming activity must be received by the Tribe. In practice, the percentage is often significantly higher. Many tribes are able to self-manage their gaming projects and retain 100% of the profits. IGRA requires that all such revenues be solely used for governmental or charitable purposes.

RESOURCE: "The Development and Context of the Indian Gaming Regulatory Act" DOCUMENT 1

3. MYTH: Tribal gaming has little public support among non-Indians.

FACT: Recent public opinion surveys, both nationally and within various states, conclusively demonstrate that the public strongly supports expanded gaming on Indian reservations while continuing to resist off-reservation gambling. A national Harris poll in October, 1992 and polls in Arizona, California, Washington and Kansas all show that the general public favors casino-style gaming on Indian lands at the same time that it is ambivalent about or opposes expanding non-Indian gaming opportunities. The reasons given for supporting tribal gaming are consistent with the purposes behind IGRA: the revenues will help the tribes become economically self-sufficient and tribes should have the right to govern their own lands.

RESOURCE: "Public Opinion Strongly Supports Indian Gaming" DOCUMENT 2

4. MYTH: IGRA has not worked and cannot work.

FACT: IGRA cannot be blamed for the fact that the Bush Administration took three years to fully constitute the National Indian Gaming Commission. Where states have negotiated with Tribes in good faith, such as in Minnesota and Connecticut, IGRA has worked well. Only where states have tried to sabotage IGRA has the class III compact process not been employed to the mutual benefit of tribes and states. States have now refused to allow IGRA to work in over ten instances by simply refusing to negotiate a tribal-state compact on anything but a "take it or leave it" basis. When a tribe refuses, and seeks judicial relief as IGRA provides, these states invoke technical constitutional defenses based on the 10th and 11th Amendments.

RESOURCE: "Tribal-State Gambling Compacts Under the Provisions for Class III Gaming In the Federal Indian Gaming Act" DOCUMENT 3

5. MYTH: In passing the IGRA, Congress intended that Indian gaming should fully conform to state laws and regulations and that tribal governments should only conduct those games fully authorized under state law.

FACT: The March 17, 1993 Report of the Western Attorneys General to Congress presents a false and misleading account of the legislative history of the Act. As demonstrated in the attached detailed refutation of that report, Congress made it clear, both in the text of the Act and in its legislative history, that, under compacts negotiated between sovereign entities, tribes possessed broad rights to conduct gaming of the sort the states permitted by any person for any purpose, without necessarily following all the details of state gaming laws. The present efforts of the states to claim broader sway over Indian gaming is nothing more than an attempt to involuntarily impose the state's jurisdiction over Indian gaming that Congress denied when it passed the IGRA.

RESOURCE: "A Refutation of the Report of the Conference of Western Attorneys General on the Scope of Permissible Class III Gaming under the Indian Gaming Regulatory Act" DOCUMENT 4

6. MYTH: Congress invaded state sovereignty in passing the IGRA and violated the Tenth and Eleventh Amendments to the U.S. Constitution by 1) subjecting the states to suit in federal district court for failing to negotiate in good faith with tribes for compacts allowing Indian gaming and 2) requiring the states to regulate Indian gaming within their borders.

FACT: The States' jurisdiction over Indian tribes is limited to what has been delegated to them by Congress. The provisions of IGRA that are under attack by the states on Tenth and Eleventh Amendment grounds were requested by the states in 1988 in order to achieve a substantial role in the regulation of Indian gaming. Under controlling Supreme Court precedent, Congress' plenary power under the Commerce Clause is broad enough to sustain the IGRA compact suit provisions. Despite the lack of merit to the States' defenses, they have successfully used these defenses to coerce tribes into unwarranted compacts and to cause lengthy delays in litigation brought by tribes.

RESOURCE: "States Wrongly Assert that IGRA Violates the Tenth and Eleventh Amendments to Avoid Fair Dealing With Tribes" DOCUMENT 5

7. MYTH: Under the IGRA a state must compact with a tribe to operate all forms of class III gaming if it allows one form of class III gaming within its boundaries.

FACT: The NGA paper seriously misconstrues existing law when it states that a state will be required to negotiate a compact to allow a tribe to operate all forms of class III gaming merely because the state allows one form of class III gaming. In fact, no court has held that this is the case. In each instance in which a court has reached this question, the court has made a factual determination that the proposed class III gaming is a type of gaming that does not violate the State's public policy. In fact, the Lac du Flambeau case and the Arizona mediator's decision, (which does not have any precedential effect since it was not decided by a federal court) both of which are used by certain Western Governors to support their call for changes in the IGRA, do nothing more than examine the existing laws of Wisconsin and Arizona and base their decisions on that state's public policy and law.

RESOURCE: "The Scope of Permissible Class III Gaming Under IGRA: Debunking the 'Any Means All' Myth" DOCUMENT 6 AND DOCUMENT 4

8. MYTH: IGRA's requirement that a state negotiate tribal-state compacts in "good faith" is unduly vague.

FACT: The "good faith" standard in negotiations is a commonly used legal standard in contract, commercial, labor and bankruptcy law. Since the standard is well-established and functional in those contexts, there is no practical reason why it should be considered any more vague and unworkable in the context of IGRA negotiations.

RESOURCE: "'Good Faith' under the Indian Gaming Regulatory Act" DOCUMENT 7

9. MYTH: The "good faith" negotiation standard is unfair to states because it lacks mutuality.

FACT: While it is true that IGRA only requires states to negotiate in good faith, if it were not structured in that way the Act would create a tremendous imbalance in bargaining positions from the outset. The simple fact is that a state does not have to deal with a tribe in order to engage in economic development. But under the IGRA, a tribe must compact with a state if it is to reap any of the benefits of class III gaming. Thus, a tribe must exercise good faith if it expects to come to terms with the state. More importantly, however, if states were not held to a good faith standard, states would be free to take arbitrary and overreaching positions with tribes at will, and virtually dictate the terms of any compact. Indeed, historically that has been the case where no standard or outside oversight was provided.

RESOURCE: "'Good Faith' under the Indian Gaming Regulatory Act" DOCUMENT 7

10. MYTH: Indian tribes are capable of acquiring trust land for gaming purposes in states with which they have no connection.

FACT: The Secretary of Interior has decreed that no Indian tribe may acquire land in trust for gaming purposes unless that tribe already has land in that state.

RESOURCE: "Off-Reservation Acquisition of Land for Gaming Purposes" DOCUMENT 8

11. MYTH: IGRA needs to be amended to give governors veto power over decisions about taking off-reservation land into trust for Indian gaming purposes.

FACT: The Secretary of Interior has complete authority under existing law to approve, modify or reject tribal fee to trust requests for gaming on off-reservation lands. The IGRA does not need to be amended so long as the Secretary narrowly applies his authority to approve off-reservation lands for gaming in appropriate situations. Giving governors veto authority over off-reservation land acquisitions would be an nonconsensual diminishment of tribal sovereignty. Decision-making authority needs to be preserved in the Secretary where tribal and state interests can be weighed and balanced.

RESOURCE: "Off-Reservation Acquisition of Land for Gaming Purposes" DOCUMENT 8

12. MYTH: Tribal gaming drains resources and tax dollars from surrounding non-Indian governments and communities.

FACT: As federal, state and local governments struggle to fund basic services, as Nevada uses money spent by California gamblers to lure California businesses and jobs, and as the Clinton Administration is proposing to spend billions of federal dollars to stimulate economic growth and create jobs, tribal gaming facilities have become powerful economic engines not only for Indian reservations, but for surrounding non-Indian communities as well. In San Diego County alone, tribal gaming has been responsible for the creation of more than 1500 good-paying new jobs, with a payroll of $22 million per year (and associated payroll taxes and employee income taxes). For example, the Sycuan Band employs 800 people, 84% of whom are non-Indians. In Minnesota, Indian gaming has become the seventh largest employer in the entire state. And in Connecticut, a single Indian gaming facility will provide more revenues to the state than its largest taxpayer, which is one of the country's largest defense contractors. Moreover, because there are no other

commercial businesses on most reservations, virtually all services such as grocery stores, service stations and the like in surrounding non-Indian communities benefit from increased visitors to the reservations.

Tribal gaming facilities have spent millions of dollars for construction. In addition, they spend many more millions per year for goods and services. Almost all of that money is spent locally, purchasing food and beverages, paper goods, maintenance supplies and the like almost entirely from local sources. These facilities also pay out tens of millions of dollars annually in prizes, which are recirculated locally, and donate millions annually to local charities.

Tribal gaming has reduced unemployment and welfare dependency substantially on reservations, thus removing the economic pressures that were forcing tribal members to leave their communities. Gaming revenues are being used to replace decrepit housing and dangerous water and sanitation facilities with decent homes and facilities that are safe and healthful for reservation residents and surrounding communities. Tribes also are using their gaming revenues to create and maintain 24-hour, professionally-staffed tribal police, fire and ambulance services (which also serve surrounding areas under first-response agreements), health and child-care services, programs of educational assistance, cultural enhancement, and numerous other amenities that non-Indian communities for years have taken for granted, but until now have been non-existent on reservations. These services and programs are being provided at no cost to state or local governments, and in many cases at no cost to federal taxpayers. Thus, the state, its subdivisions and its people are substantial net beneficiaries of tribal gaming.

RESOURCE: "Three Studies of the Positiive Economic Impact of Indian Tribal Gaming Industries" DOCUMENT 9

13. MYTH: Better economic development alternatives to gaming are available to tribes.

FACT: Many reservations are in remote, inconvenient locations on lands that nobody else wanted. Before tribal gaming, there had been little successful public or private sector economic development on reservations. The states have not proposed and cannot afford any specific or credible alternatives to Indian gaming as a meaningful source of tribal revenues and jobs.

14. MYTH: The National Governors Association's (NGA) position paper on Indian Gaming is an accurate reflection of the position of the majority of states on Indian gaming issues.

FACT: This document was only one of a number of position papers quickly adopted at the end of a recent meeting of the NGA. Through confidential and high level sources, the tribes have discovered the paper was actually drafted and introduced by a small faction of governors led by Governor Miller of Nevada whose constituency has always opposed the economic competition that Indian gaming represents to Nevada casinos. It is important to realize that many of the governors present at that meeting have no Indian tribes within their boundaries and thus have no "serious concern" about this issue.

It is fair to say that the language in the IGRA which gives states a role to play in Indian tribal class III gaming activities was and remains a great victory for states and a catastrophic loss for tribes. What the governors now propose is even more disastrous.

RESOURCE: "Rebuttal of the National Governors' Association Position Paper on the Indian Gaming Regulatory Act" DOCUMENT 10

15. MYTH: The Governors are truly concerned about the economic welfare of Indian tribes.

FACT: It is ironic that the NGA's position paper begins by stating that the "Governors support the efforts of Native Americans to create better and more prosperous lives" when the positions in that paper call upon Congress to undermine the singularly most successful economic development program available to tribes. Studies of the economic impact of Indian gaming clearly show that it has been the first and often the only initiative that has resulted in a true decrease in devastating unemployment, unprecedented cuts in welfare dependence and serious improvements in the health, housing and education statistics for on-reservation Indian people. Funds earned by Indian gaming now build roads, clinics, schools and homes that local, federal and state budgets have not, will not and cannot afford to pay for. These funds also provide services to the elderly, head start programs for children and scholarships for students who previously had no chance to go to college. Thus, tribes cannot understand how the NGA can purport to support better and more prosperous lives for Indian people while it is at the same time seeking amendments to eliminate the only source of funds available to accomplish this goal.

16. MYTH: Tribal gaming is an unregulated magnet for organized crime.

FACT: This myth has two parts. First, even before IGRA created a federal framework for regulating certain forms of tribal gaming, tribes themselves successfully regulated reservation gaming activities by exercising their inherent police powers and, when necessary, taking violators to court. See, e.g., Morongo Band v. Rose, 893 F.2d 1074 (9th Cir. 1990); Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989). Second, although the States tried to raise the specter of organized crime

infiltration before the courts in Cabazon and in Congress during the development of IGRA, no evidence ever has been produced to support this claim. In fact, in oversight hearings before the Senate Select Committee on Indian Affairs in 1992, the Department of Justice testified at the request of concerned Committee members that a special inquiry had been made and that no such infiltration had been discovered. The tribes, as governmental agencies, are the first to be vigilant in protecting the integrity of projects they rely upon to feed, clothe, educate and employ their constituents.

APPENDIX G

LEGALIZED GAMBLING IN THE UNITED STATES OF AMERICA BY STATE

The following state-by-state listing of legalized gaming in the United States demonstrates that gaming is both encouraged and regulated in the United States. To argue otherwise is to ignore reality.

ALABAMA
- Bingo
- pari-mutuel wagering on live horses, harness and dog racing

ALASKA
- Bingo, raffles, pull-tabs, fish derbies, dog musher contests, Monte Carlo events and lotteries

ARIZONA
- Bingo and raffles (including banking and non-banking card games, roulette, craps and slot machines
- Pari-mutuel wagering on live and simulcast horse and dog races
- Instant games and lotto

ARKANSAS
- Pari-mutuel wagering on live horse and dog races and wagering on simulcast horse races at licensed tracks

CALIFORNIA
- Bingo
- Pari-mutuel wagering on live and simulcast horse and harness races
- Card rooms
- Lottery

COLORADO
- Blackjack and poker
- Instant games, keno and lotto
- Pari-mutuel wagering on live and simulcast horse and dog races
- Casino gambling and slot machines
- Bingo, raffles, pull-tabs and casino events

CONNECTICUT
- Bingo, raffles, sealed tickets, bazaars and Las Vegas nights
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, on-line numbers, lotto and Lotto America
- Pari-mutuel wagering on jai-alai

DELAWARE
- Bingo, raffles, pull-tabs and casino nights
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, on-line numbers, lotto and Lotto America

DISTRICT OF COLUMBIA
- Bingo, raffles and Monte Carlo nights
- Instant games, on-line numbers, lotto and Lotto America

FLORIDA
- Bingo and raffles
- Pari-mutuel wagering on live and simulcast horse, harness and dog races
- Instant games, on-line numbers and lotto
- Pari-mutuel wagering on jai-alai

GEORGIA
- Bingo

IDAHO
- Pari-mutuel wagering on live and simulcast horse and dog races
- Instant games, pull-tabs, on-line numbers, lotto and Lotto America

ILLINOIS
- Bingo, pull-tabs, jar games, blackjack, keno, money wheels, roulette and casino
- Excursion boat gambling, baccarat, twenty-one, poker, craps, slot machines, video games of chance, roulette wheels, klondike tables, punch boards, faro, keno, number tickets, push cards, jar tickets, or pull tabs
- Pari-mutuel wagering on live and simulcast horse and harness races
- Slot-Video machines
- Instant games, on-line numbers and lotto

INDIANA
- Bingo, raffles and Monte Carlo nights
- Pari-mutuel wagering on live horse and harness races
- Instant games, lotto and Lotto America

IOWA
- Bingo, raffles, games of skill and chance and annual casino nights roulette
- Blackjack, dice games, slot machines, video games of chance and roulette
- Instant games, keno, pull-tabs, on-line numbers, lotto and Lotto America
- Pari-mutuel wagering on live and simulcast horse, harness and dog races
- Social gambling games like chess, backgammon, darts and dominoes

KANSAS
- Bingo
- Pari-mutuel wagering on live horse, harness and dog races
- Instant games, keno, pull-tabs, lotto and Lotto America

KENTUCKY
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, pull-tabs, on-line numbers, lotto and Lotto America

LOUISIANA
- Bingo, electronic bingo devices, raffles, pull-tabs, keno and casino nights
- Excursion boat gambling
- Pari-mutuel wagering on live horse races
- Slot/Video machines
- Instant games and lotto
- Casino gambling

MAINE
- Bingo, beano, games of chance and Las Vegas casino nights
- Pari-mutuel wagering on live harness races
- Instant games, on-line numbers, Tri-State lotto and Lotto America

MARYLAND
- Bingo, raffles, casino nights and slot machines
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, on-line numbers and lotto

MASSACHUSETTS
- Beano, raffles, bazaars and Las Vegas nights
- Pari-mutuel wagering on live and simulcast dog races
- Instant games, on-line numbers and lotto

MICHIGAN
- Bingo, raffles, millionaire parties, crane games and pull-tabs
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, keno, on-line numbers and lotto
- Craps and roulette

MINNESOTA
- Bingo, pull-tabs, tip boards, paddlewheels and raffles
- Pari-mutuel wagering on live and simulcast horse races
- Instant games, on-line numbers and Lotto America

MISSISSIPPI
- Bingo and raffles
- Excursion boat gambling
- Casino gambling
- Pari-mutuel wagering
- Slot/Video machines

MISSOURI
- Bingo and pull-tabs
- Casino gambling
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, pull-tabs, on-line numbers, lotto and Lotto America

MONTANA
- Non-banking card games
- Bingo, keno, raffles, calcutta pools, card games, sports tab games, sports pools, video gambling, fantasy sports leagues, shake-a-day, fishing derbies, wagering on natural occurrences and limited casino nights
- Pari-mutuel wagering on live horse and harness races
- Video gaming machines (bingo, keno and draw poker)
- Instant games, lotto and Lotto America

NEBRASKA
- Bingo, raffles, pull-tabs, keno and lottery
- Pari-mutuel wagering on live and simulcast horse races

NEVADA
- Casino gambling
- Lottery
- Pari-mutuel wagering on live and simulcast horse, harness and dog races
- Slot/Video machines
- Sport pools

NEW HAMPSHIRE
- Bingo, raffles, pull-tabs and Monte Carlo nights
- Pari-mutuel wagering on live and simulcast horse, harness and dog races
- Instant games, on-line numbers, lotto and Tri-State Lotto

NEW JERSEY
- Blackjack, craps, baccarat, mini-baccarat, red dog, sic bo, pai gow, roulette, big six wheels and slot machines
- Bingo and raffles
- Pari-mutuel wagering on live and simulcast horse races
- Instant games, on-line numbers and lotto

NEW MEXICO
- Bingo, raffles and pull-tabs
- Pari-mutuel wagering on live and simulcast horse races

NEW YORK
- Bingo, raffles, blackjack, roulette and Las Vegas nights
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, on-line numbers, keno and lotto

NORTH CAROLINA
- Bingo and raffles

NORTH DAKOTA
- Poker and twenty-one
- Bingo, raffles, pull-tabs, punch boards, calcuttas, sports pools, paddlewheels
- Pari-mutuel wagering on live horse and harness races

OHIO
- Bingo, raffles, pull-tabs and Las Vegas nights
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, on-line numbers and lotto

OKLAHOMA
- Bingo
- Pari-mutuel wagering on live and simulcast horse and harness races

OREGON
- Social gambling
- Bingo, lotto and raffles
- Pari-mutuel wagering on live and simulcast horse, harness and dog races
- Video lottery
- Instant games, on-line numbers, sports action, keno, and Lotto America

PENNSYLVANIA
- Bingo, raffles, lotteries, pull-tabs and punch boards
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, on-line numbers and lotto

RHODE ISLAND
- Bingo, raffles, Las Vegas nights, certain money wheels, dice games, poker and blackjack
- Pari-mutuel wagering on live and simulcast horse and dog races
- Instant games, on-line numbers, lotto and Lotto America
- Pari-mutuel wagering on jai-alai

SOUTH CAROLINA
- Bingo

SOUTH DAKOTA
- Blackjack, and poker
- Bingo, pull-tabs and lottery
- Pari-mutuel wagering on live horse, harness and dog races
- Instant games, Lotto America and video lottery games
- Slot machines

TENNESSEE
- Pari-mutuel wagering on live and simulcast horse and harness races

TEXAS
- Bingo, pull-tabs and raffles
- Pari-mutuel wagering on live horse and dog races

VERMONT
- Bingo, raffles and casino nights
- Pari-mutuel wagering on live horse and dog races
- Instant games, on-line numbers, lotto and Tri-State Lotto

VIRGINIA
- Bingo and raffles
- Pari-mutuel wagering on live and simulcast horse and harness races
- Instant games, on-line numbers and lotto

WASHINGTON
- Non-banking card games
- Bingo, raffles, pull-tabs, punch boards, golfing sweepstakes, turkey shoots, Las Vegas nights
- Pari-mutuel wagering on live and simulcast horse races
- Instant games, on-line numbers and lotto

WEST VIRGINIA
- Bingo and raffles
- Pari-mutuel wagering on live and simulcast horse and dog races
- Video lottery devices
- Instant games, on-line numbers, lotto and Lotto America

WISCONSIN
- Bingo and raffles
- Pari-mutuel wagering on live and simulcast horse, harness and dog races
- Instant games, pull-tabs, on-line games and Lotto America
- Wagering and snowmobile races

WYOMING
- Bingo, raffles, pull-tabs and calcuttas
- Pari-mutuel wagering on live and simulcast horse and harness races

Since the enactment of the Indian gaming Regulatory Act into law on October 17, 1988, the States of Colorado, South Dakota, Iowa, Mississippi, Illinois, Louisiana and Missouri have enacted legislation permitting casino gambling.

In addition to casino gaming, the States of Washington, Oregon, California, Montana, Nevada, North Dakota, Colorado, South Dakota, Iowa, Illinois, Mississippi, Louisiana and New Jersey all authorize card games.

Charitable gaming is authorized in Washington, Oregon, California, Alabama, Alaska, Arizona, Colorado, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada,

New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

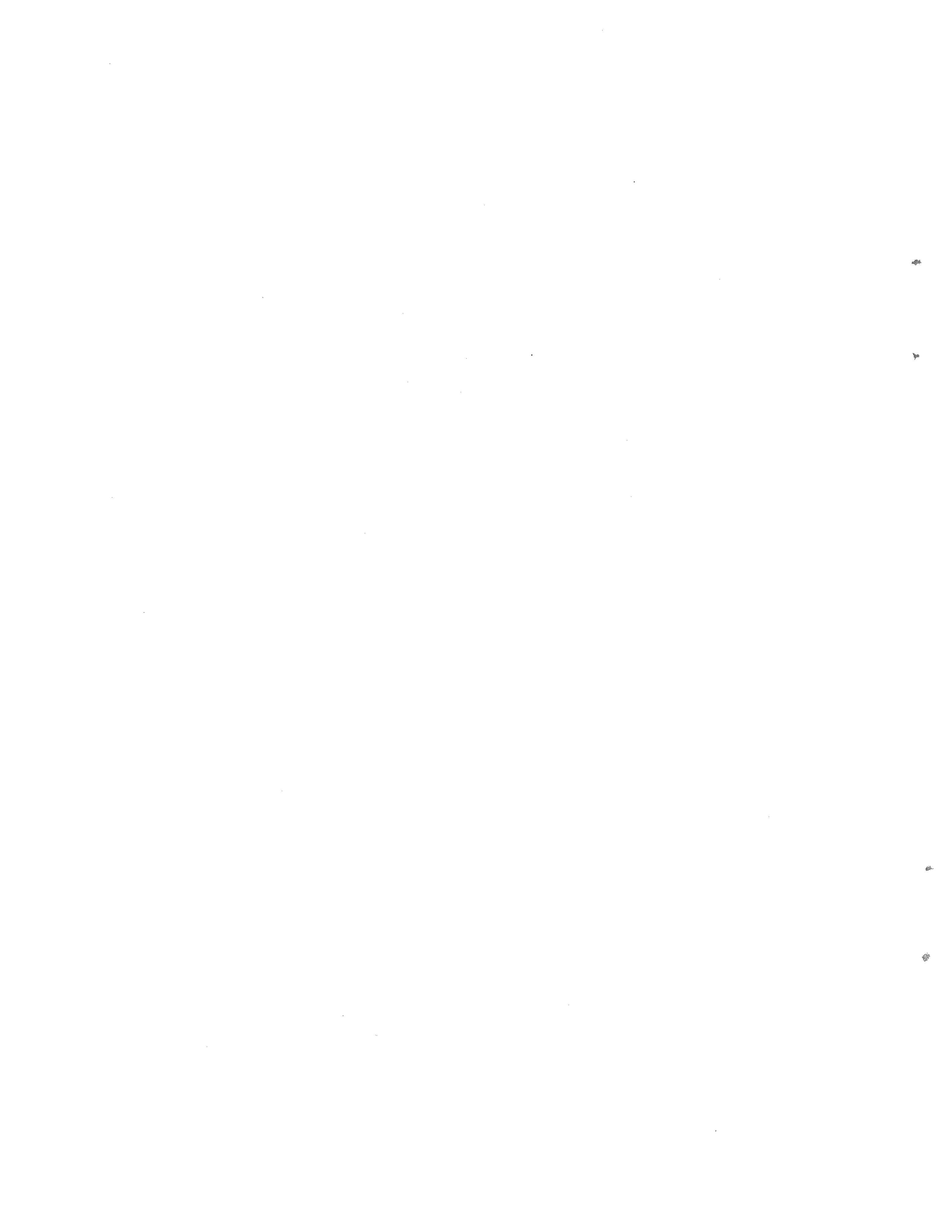
Further, pari-mutuel horse and dog racing are conducted in Oregon, Idaho, Nevada, Arizona, Colorado, South Dakota, Kansas, Texas, Wisconsin, Iowa, Arkansas, Alabama, Florida, West Virginia, Vermont, New Hampshire, Connecticut, and Rhode Island.

Pari-mutuel horse racing is authorized and conducted in Washington, California, Montana, Wyoming, New Mexico, North Dakota, Nebraska, Oklahoma, Minnesota, Missouri, Louisiana, Illinois, Michigan, Indiana, Ohio, Kentucky, Virginia, Tennessee, Delaware, Maryland, Pennsylvania, Maine, and New York. Finally, pari-mutuel dog track racing is authorized in the State of Massachusetts.

Slot devices, video lottery devices are permitted for one purpose or another in the States of Oregon, Nevada, Montana, South Dakota, Arizona, Iowa, Illinois, Missouri, Louisiana, Mississippi, West Virginia, Maryland, South Carolina and New Jersey. Jurisdictions which permit possession of antique slot machines such as New York are not set forth.

The following states operate or are initiating state lotteries: Washington, Oregon, California, Idaho, Montana, Colorado, Arizona, South Dakota, Kansas, Texas, Minnesota, Iowa, Missouri, Louisiana, Wisconsin, Michigan, Illinois, Indiana, Ohio, Kentucky, Florida, Virginia, West Virginia, Delaware, Maryland, New Jersey, Pennsylvania, New York, Rhode Island, Connecticut, New Hampshire, Massachusetts, Maine, and Nebraska.

What is clearly apparent, though not being communicated, is that the various states authorize and operate a wide variety of games. To argue that gambling is anything other than encouraged and regulated in the United States simply ignores reality.



APPENDIX H

APPENDIX J

National Conference of State Legislatures
State Statutes Concerning State-Tribal Gaming Compacts
July 1993

(Update to *State Legislative Report: States and the Indian Gaming Regulatory Act*, July 1992)

Fourteen states have enacted statutes addressing state-tribal gaming compacts under the federal Indian Gaming Regulatory Act. Nine states specifically authorize governors to negotiate and/or enter into state-tribal gaming compacts; five states grant that authority to a commission or other state department or agency.

States Authorizing Governors to Negotiate State-Tribal Gaming Compacts

Arizona *Ariz Rev. Stat. section 5-601 (Supp. 1992)*
Colorado *Colo. Rev. Stat. section 12-47.2-101 to -103 (West 1990 & Supp. 1991)*
Idaho *1993 Idaho Sess. Laws, Chap. 408, Chap. 367, Chap. 249*
Kansas *1993 Kan. Sess. Laws, Chap. 4*
Louisiana *1990 La. Acts, P.A. 888 (La. Rev. Stat. Ann. section 14:90 note)* (West 1986 & Supp. 1992)) and *1993 La. Acts 817*
Minnesota *Minn. Stat. Ann. section 3.9221 (West 1977 & Supp. 1992)*
Nebraska *1993 Neb. Laws, L.B. 231 (Effective June 11, 1993)*
Oklahoma *Okla. Stat. Ann. tit. 74, secs. 1221-1222 (West 1987 & Supp. 1993)*
Wisconsin *Wis. Stat. Ann. section 14.035 (West 1986 & Supp. 1991)*

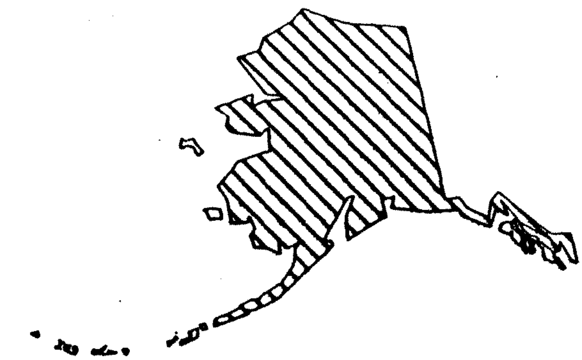
States Authorizing Other State Entities to Negotiate State-Tribal Gaming Compacts

California (Racing Board) *Cal. Business and Professions Code section 19445 (West 1987 & Supp. 1992)*
Iowa (Department of Inspections and Appeals) *Iowa Code Annotated section 10A.104(10)* (West 1989)
Montana (public agencies) *Mont. Code Ann. section 18-11-101 to 111 (1991)* (addresses state-tribal agreements of all types)
South Dakota (Indian Affairs Commission) *S.D. Codified Laws section 42-7B-11(8) (Michie 1991) and 1-4-25 (Michie 1992)*
Washington (Gambling Commission) *Wash. Rev. Code Ann. sections 9.46.360 and 43.06.010(15) (Supp. 1993)*

Idaho, Kansas, and Oklahoma authorize governors to negotiate compacts, but also require legislative approval of the compacts. Idaho law provides for legislative monitoring of all compact negotiations and requires legislative ratification of any compact that appropriates funds or authorizes forms of gaming otherwise prohibited by Idaho law. In Kansas, state-tribal compacts must be approved by the legislature, or if the legislature is not in session, the Legislative Coordinating Council. Kansas' legislation establishes a six-member Joint Committee on Gaming Compacts, which is authorized to develop guidelines to consider in reviewing compacts, hold public hearings on proposed compacts, and recommend changes to any proposed compacts. In Oklahoma, the Joint Committee on State-Tribal Relations oversees and approves all types of state-tribal agreements.

Other provisions of state laws include requirements for public hearings concerning proposed gaming compacts and requirements that governors report periodically to the legislature on compact negotiations. In addition, several states designate specific departments or agencies to oversee and monitor Indian gaming (e.g., Arizona Department of Racing, Idaho State Lottery director, Oklahoma State Bureau of Investigation). Louisiana authorizes the governor to appoint an Indian Gaming Commission to serve as the formal negotiating agent of the state.

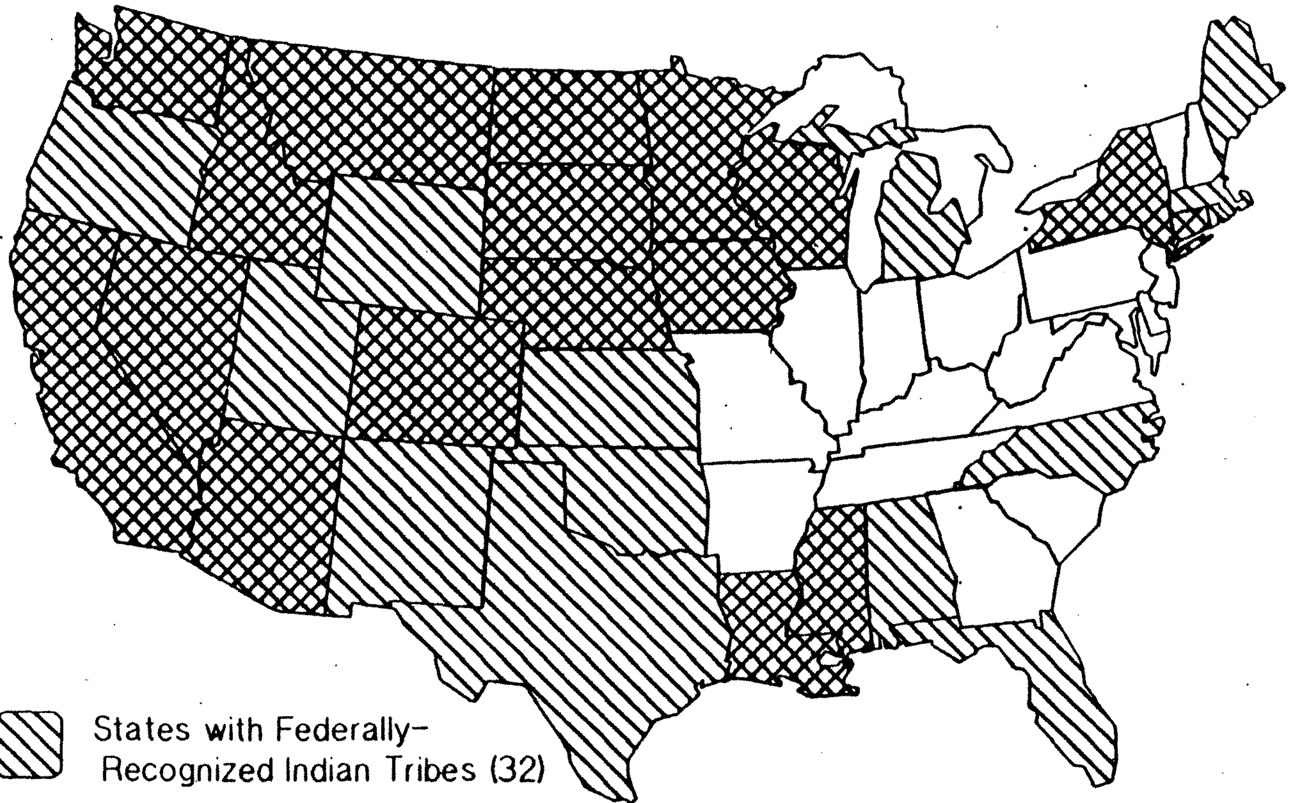
Additional developments in three states are significant, although their effect on Indian gaming in the future is unclear. In 1993, Arizona and Wisconsin enacted legislation specifically banning casino gambling, and Idaho voters approved a constitutional amendment prohibiting casino gambling.

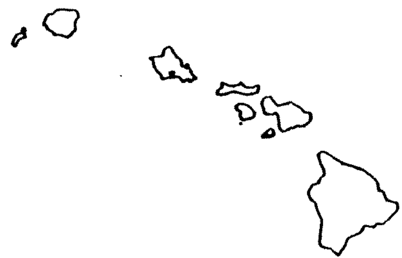


National Conference of State Legislatures

State-Tribal Compacts for Class III Gaming

(As of July 1, 1993)

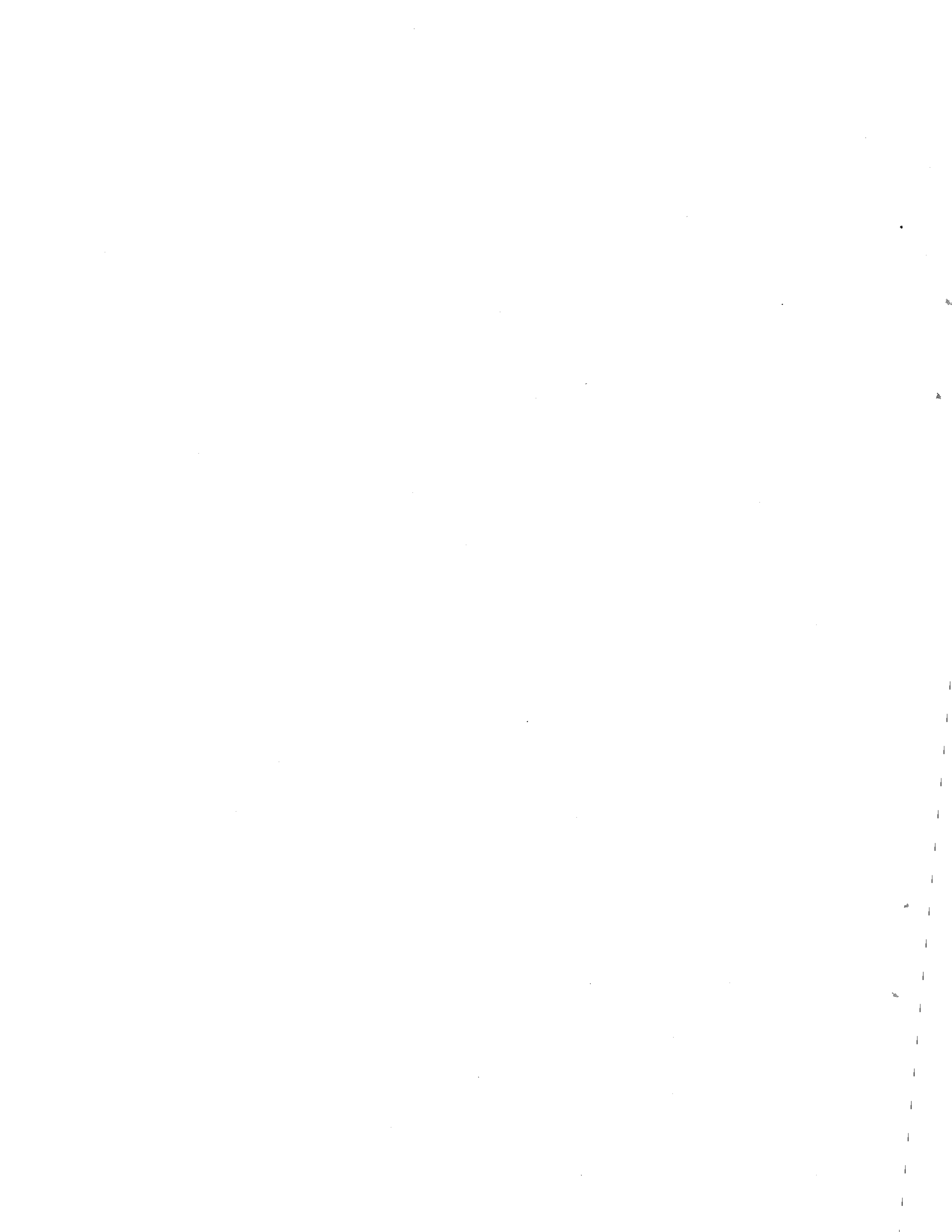




States with Federally-Recognized Indian Tribes (32)

States with Approved State-Tribal Gaming Compacts (17)

APPENDIX K



GLOSSARY OF TRIBAL GAMING TERMS

11TH AMENDMENT - The 11th Amendment is a defense used by states to prevent being sued by tribes when they, the states, refuse to negotiate in good faith for Class III gaming.

BANKING CARD GAMES - Banking card games are card games in which the gaming operator both participates in the game with the players and acts as a house bank. As the house bank, the operator pays all winners and retains all the other players' losses.

BURRELL DECISION (See Rumsey Vs. Wilson)

CALIFORNIA VS. CABAZON - On Feb. 25, 1987, the Supreme Court ruled in California Vs. Cabazon that Public Law 280 did not authorize enforcement of state bingo and card room laws on Indian reservations because those laws are regulatory, rather than criminal. The ruling also stated that application of state and county gaming laws to the reservation was not authorized by the Organized Crime Control Act. In the Supreme Court's majority opinion, they attached great weight to the federal policy of encouraging tribal self-sufficiency and economic development, and noted that gaming activities provide the sole source of revenues for the operation of the tribal governments and are the major sources of reservation employment for tribal members.

CLASS I GAMING - Class I gaming includes traditional Indian gaming, including social games of minimal value and gaming associated with ceremonies or celebrations.

CLASS II GAMING - Class II gaming includes bingo and related games, including pulltabs and punchboards, as well as non-banking card games (percentage card games) that are not prohibited by state law..

CLASS III GAMING - Class III gaming includes casino-style games, pari-mutual wagering and video terminal games.

CNIGA (California Nevada Indian Gaming Association) - CNIGA is a non-profit organization of gaming and non-gaming tribes founded in the mid 1980s to collect and distribute information regarding all aspects of tribal goverment gaming. CNIGA meets once every month in various locations and holds its annual meeting and election of officers every November. There are currently 19 members.

COMPACT - A compact is an agreement between tribes and states that provides for the application of laws, jurisdiction and enforcement of laws. Every tribe is required to have a compact with the state in order to operate Class III gaming.

(continued on next page)

IGRA (INDIAN GAMING RIGHTS ACT) - IGRA was enacted by congress in 1988 to provide a legal basis for the operation and regulation of gaming by Indian tribes. IGRA recognizes the sovereignty of the tribes and outlines the powers and responsibilities as they relate to gaming: (1) Tribes must enact regulatory laws for regulation of all gaming on the reservation; (2) Tribes have civil and criminal jurisdiction over gaming offenses by tribal members; and (3) Tribes must enter into a compact to conduct Class III gaming.

JOHNSON ACT - The Johnson Act restricts the transport and use of gaming devices on a reservation. Under the Indian Gaming Regulation Act (IGRA), tribes that have a compact with a state are exempted from compliance with the Johnson Act because an alternate regulatory scheme for use of these devices is provided in the compact.

PERCENTAGE CARD GAMES - Percentage card games are games in which the operator has no interest in the outcome of the game and simply takes a percentage of the amount wagered or won.

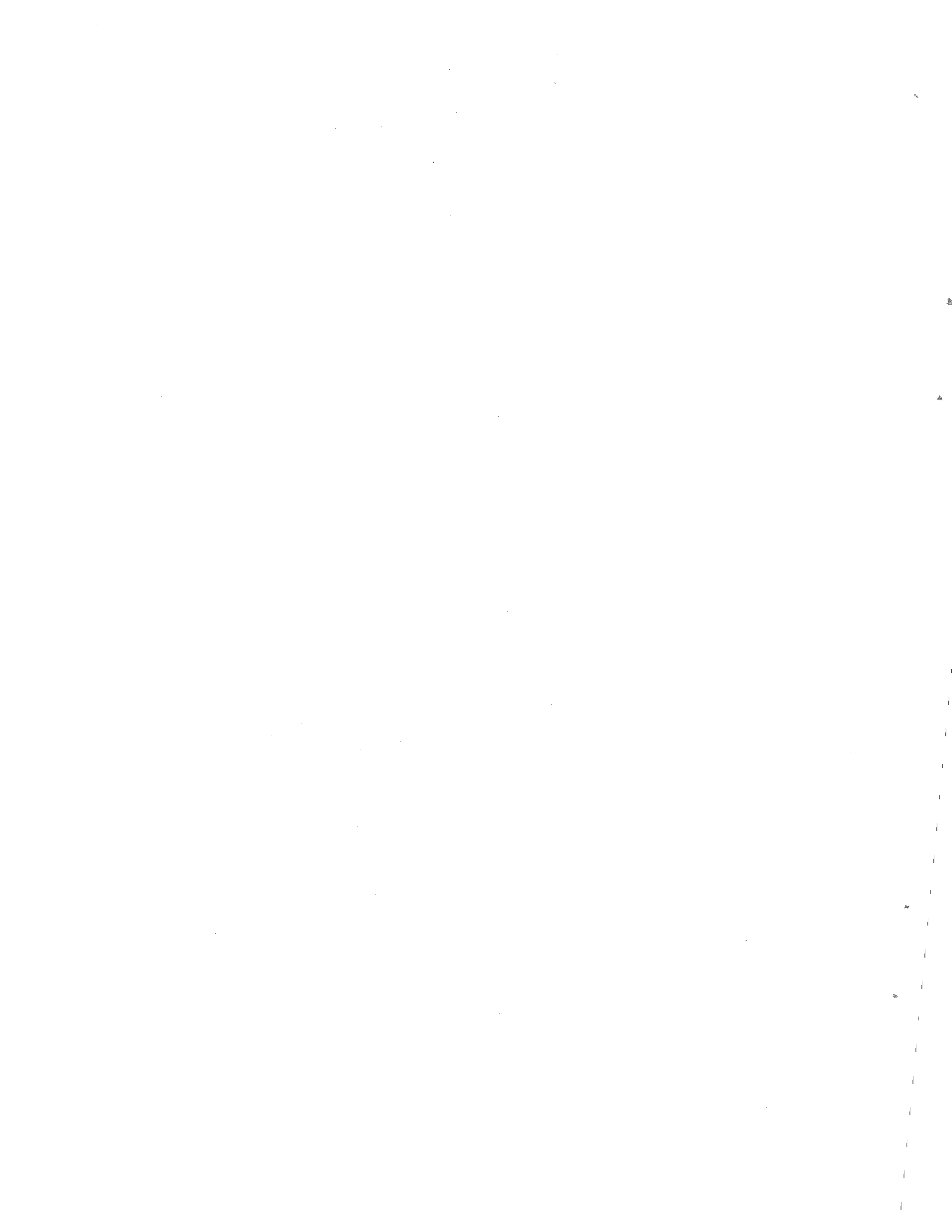
PUBLIC LAW 280 - States initially believed that Public Law 280 gave them the right to regulate Indian gaming. The courts however, ruled that Public Law 280 did not give states that authority.

RUMSEY VS. WILSON - U.S. District Judge Garland Burrell, Jr. ruled in Rumsey Vs. Wilson that the games and electronic devices Indians proposed for inclusion in their compacts are substantially similar to California's lottery devices, together with certain banking and percentage card games, and must be negotiated into compacts with the tribes.

SOVEREIGNTY - Indian tribes were sovereign before the United States came into existance, and that sovereignty continues to this day. The United States Supreme Court has stated that Indian tribes "have a right to make their own laws and be governed by them."

TAXATION - There is a persistent myth that idividual Indians do not pay taxes. The only exemption an Indian has from paying federal taxes is on income "directly derived" from lands held in trust by the United States. Income from employment in gaming is not "directly derived," and is taxable. Indians are not subject to state taxes for their earnings when they reside and are employed on the reservation. However, state sales taxes are imposed on transactions between Indians and non-Indians on the reservation where the non-Indian is required to pay the tax. When Indians make ordinary purchases or earn income off the reservation, they are subject to state tax.

APPENDIX L



NATIONAL INDIAN GAMING COMMISSION

National Indian Gaming Commission
1850 M Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 632-7003

Commissioners	Term Expiration
Anthony Hope, Chairman	May '93
Joel Frank	May '93
Jana McKeag	May '95

Contacts: Fred Stuckwisch, Chief of Staff/Executive Director
Michael Cox, General Counsel
Linda Hutchinson, Public Liaison

National Indian Gaming Commission

(A) Established within Interior Department

There is established within the Department of the Interior a commission to be known as the National Indian Gaming Commission.

(B) Composition of Commission; investigation; term of office; removal

(1) The Commission shall be composed of three full-time members, who shall be appointed as follows:

(a) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(b) two associate members, who shall be appointed by the Secretary of the Interior.

(2) (a) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(b) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty (30) days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4) (a) Except as provided in subparagraph (b), the term of office of the members of the Commission shall be three years.

(b) Of the initial members of the Commission --

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission who --

(a) has been convicted of a felony or gaming offense;

(b) has any financial interest in, or management responsibility for, any gaming activity; or

(c) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act.

(6) A commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

2705 Powers of the Chairman

(A) Orders of temporary closure; civil fines; approve tribal ordinances; resolutions and management contracts

The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to --

(1) issue orders of temporary closure of gaming activities as provided in section 14(b);

(2) levy and collect civil fines as provided in section 14(a);

(3) approve tribal ordinances or resolutions regulating Class II gaming and

Class III gaming as provided in section 2; and

(4) approve management contracts for Class II gaming and Class III gaming as provided in sections 11(d)(9) and 12.

2706 Powers of the Commission

(A) Annual budget approval; adopt civil fines; establish fees; authorize subpoenas; make orders permanent

The Commission shall have the power, not subject to delegation --

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by an affirmative vote of no fewer than two (2) members, to establish the rate of fees as provided in section 18;

(4) by an affirmative vote of no fewer than two (2) members, to authorize the Chairman to issue subpoenas as provided in section 16; and

(5) by affirmative vote of no fewer than two (2) members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b)(2).

(B) Duties to monitor and inspect gaming premises; investigate; access to records; use mail; contracts; hearings; oaths; regulations

The Commission --

(1) shall monitor Class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which Class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books and records respecting gross revenues of Class II gaming

conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this Act;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable federal laws and regulations;

(7) may enter into contracts with federal, state, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act.

(C) Report to Congress

The Commission shall submit a report with minority views, if any, to the Congress on December 31, 1989, and every two years thereafter. The report shall include information on --

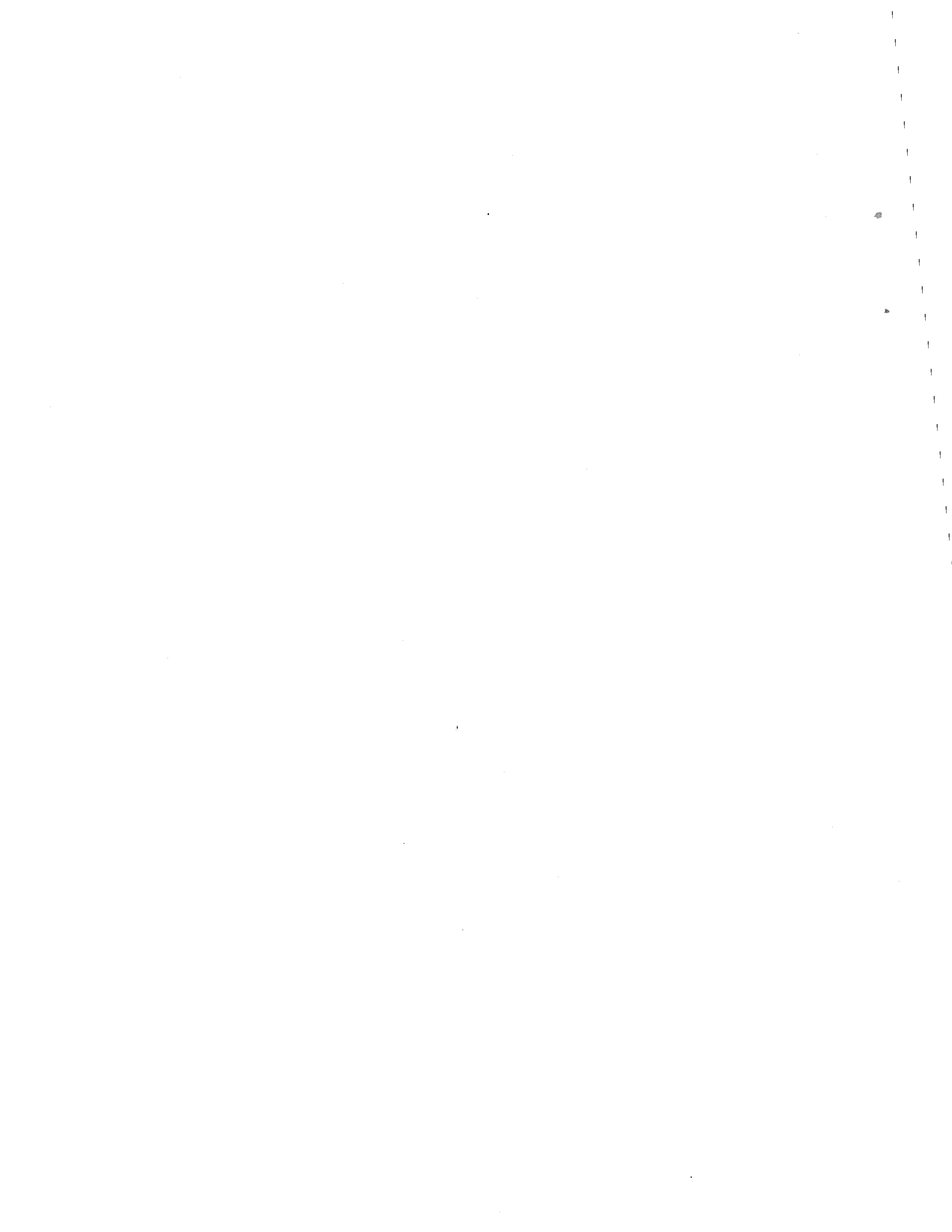
(1) whether the associate commissioners should continue as full-time or part-time officials;

(2) funding, including income and expenses, of the Commission;

(3) recommendations for amendments to the Act; and

(4) any other matters considered appropriate by the Commission.

APPENDIX M



Sac Bee

11/30/93

DAN WALTERS

Intense battle over gambling

"Interim" hearings of legislative committees – so-called because they are conducted when the Legislature is between sessions – rarely attract more than token attention.

The Capitol's largest hearing room was filled to near-capacity Monday, however, as two legislative committees staged a joint session on an issue with potent political and financial overtones: the expansion of gambling on dozens of California Indian reservations.

Federal law and a series of court decisions grant Indian tribes the right to expand reservation gaming beyond bingo but just how far they may go is not clear, the subject of both litigation and lengthy negotiations between the Indians and state officials. Some tribes already are pushing the legal envelope by offering certain forms of gambling, such as electronic games and a blackjack-like card game, that state officials contend are not allowed.

The potential financial stakes of Indian gambling in California are immense, at least $1 billion a year, and those who now cater to Californians' urges to wager–horse racing tracks, poker parlors and Nevada casinos – are worried about the competition. That's why dozens of lobbyists representing those interests and others showed up for the meeting of the Senate and Assembly Governmental Organization committees.

Tribal officials also showed up in large numbers. And they have hired their own lawyers, lobbyists and public relations operatives who contend that expanded reservation gambling reduces welfare dependency, creates jobs and keeps Californians' wagering dollars from flowing into Nevada. Firms that would operate [illegible] reservation casinos,

Federal law requires the Indians and the state government, represented by Gov. Pete Wilson and Attorney General Dan Lungren, to negotiate agreements on the more intense forms of gambling. The state officials have been openly hostile to a broad expansion – if for no other reason than two of their bedrock constituent groups, police and the religious right, oppose it.

Lungren proposed the creation of a state gaming commission but got nowhere in the Legislature. Wilson, meanwhile, vetoed one multi-part gambling bill this year but indicated in his veto message that he'd like the Legislature to become involved in specifying what additional games, if any, are approved, apparently to share the political burden.

Members of the committees indicated that they don't want to be left out of the deal. Historically, there's been a close relationship between lawmakers and gambling interests, especially horse racing.

A consensus seems to be developing that California, like many other states, will sanction increased gambling. That was indicated in 1984 when voters passed a lottery initiative. The question is who will control that gambling, both politically and financially.

If Wilson and Lungren continue to lose their court battles, they will be compelled to negotiate a broader expansion than they want. And if reservation casinos, many of which are located in or near major cities, begin offering a broad array of betting games, it's inevitable that other gambling interests, especially the cardroom operators, will ask the Legislature for similar permission.

Lungren's proposal to create a state gaming commission that would oversee the entire industry makes a lot of sense. If California is to have more gambling, which would seem to be inevitable, it should be closely policed and properly taxed.

This week's legislative hearings are an indication that gambling will be one of the more intense political issues of the 1990s.

DAN WALTERS' column appears daily, except Saturday. Write him at P.O. Box 15779, Sacramento, 95852, or call (916) 321-1195.

DAN WALTERS

Huge casino clue to future

LEDYARD, Conn. – It looms over a picturesque Connecticut valley like some medieval castle, an immense structure of stone and steel.

Foxwoods, however, is not a centuries-old monument to a king's ego. It is a $300 million wager by a tiny, almost extinct tribe, the Mashantucket Pequots, and overseas investors that federal and state authorities will be compelled to allow Indians to conduct full-scale gambling on tribal lands.

So far, it's paying off. Foxwoods, the only casino in New England, is halfway between New York and Boston, and attracts 18,000 gamblers a day. It's the largest casino in the Western Hemisphere, with more than 3,000 slot machines and 200-plus gaming tables, but there are still lines of gamblers awaiting their turns.

Foxwoods reportedly is earning $1 million a day in profits, enough to cover the investment in a single year of operation. And it's all based on a single court decision, interpreting a 1988 federal law, that Indians can offer a wide array of gambling on their tribal lands.

Foxwoods, which opened 1½ years ago, is expanding rapidly into a full-fledged destination resort with hotel rooms, shops, golf courses and other amenities. Clearly, those who own and operate the complex are hoping that regardless of what happens on the judicial front, Foxwoods will be so valuable to Connecticut as a generator of jobs that the state would not dare pull the plug.

Foxwoods could be a harbinger for California, whose own Indian tribes want to cash in on Californians' obvious yen for gambling.

Several tribal bingo parlors are expanding their operations. One, near San Diego, already offers slot machines and off-track betting on horse races. The Agua Caliente Indians, who own the land under downtown Palm Springs, have signed a contract with Caesars World, a big Nevada gambling company, to build and operate an 80,000-square-foot casino.

The Palm Springs casino would be limited initially to the forms of gambling, such as bingo, that are clearly legal under current law – but would be ready to expand into blackjack, roulette and other heavy-duty games should the law allow. The Agua Calientes and their financial backers are not yet willing to take the same chance as the Pequots.

About 30 California tribes have already asked the state to negotiate the gambling agreements that the court decision mandates. But Attorney General Dan Lungren and Gov. Pete Wilson oppose the expansion of Indian gambling in California because they fear its potential to generate crime. They are among the state officials who have filed appeals to the federal court decision, which was based in part on the fact that states, including California, already are in the gambling business themselves with lottery games.

The irony attached to the Indian gambling issue is nothing short of delicious. When white settlers came to California and other states, they pushed Indians onto the poorest pieces of real estate and then formalized their actions through the creation of reservations.

For generations, Indians existed in poverty and despair, dependent on an indifferent federal government for handouts. But even the low-intensity Indian gambling that has opened up in the last five years has brought new prosperity to the tribes. Full-scale gambling could mean real riches, given California's population.

Lungren, Wilson and other opponents of reservation gambling should back off, negotiate the agreements – including strict regulation and a share for government – and allow California's Indians to enjoy their good fortune while keeping gambling money from flowing to Nevada. Given the history of white-Indian relations, it's the least they could do.

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Caesars Plans $25-Million Palm Springs Indian Casino

■ **Gambling:** Tribal council sets aside downtown site. Pact is seen as an opening for Vegas-style gaming in Southland.

By TOM GORMAN
TIMES STAFF WRITER

PALM SPRINGS—Caesars World Inc. unveiled plans Monday to build a $25-million Indian gambling casino in this community's struggling downtown, positioning itself as the prime player in bringing Las Vegas-style gambling to Southern California.

The 80,000-square-foot facility will be built on land owned by the Agua Caliente band of Cahuilla Indians—on whose checkerboard reservation half of the city is situated. The complex will feature the casino, restaurants, retail shops and entertainment venues.

The gambling area will equal the size of Caesars' casino at Lake Tahoe. The casino, half of the overall facility, will be dedicated to high-stakes bingo, various card games, paper pull-tabs and other forms of gambling currently permitted on California Indian reservations under state law.

But Richard Milanovich, chairman of the Agua Caliente tribal council, said he expects California to have entered compacts with his and other Indian tribal councils around the state—which would allow full-scale Las Vegas-style gambling—by the time the casino opens in 1995.

The attorney general's office currently is appealing a federal judge's ruling that orders the state to negotiate such gambling com-

Please see CASINO, A34

CASINO: Palm Springs

Continued from A1

pacts in good faith. The judge based his decision on the fact that because the state offers Lotto games, it cannot deny the same level of gambling at Indian enterprises that it enjoys for itself.

The judge's ruling is one of several, in California and nationwide, that have opened the door for Indians to offer greater varieties of gambling, including the introduction of video machines that, short of dispensing actual coins, are virtual clones of slot machines. Some proponents of legalized gambling argue that it also opens up the prospect of blackjack and other popular card games in the state.

About 30 Indian reservations in California have asked the state to negotiate gambling agreements—including Agua Caliente in Palm Springs, the Cabazon and Twentynine Palms Indians in Indio and the Morongo Indians near Banning. The Cabazon and Morongo Indians currently operate casinos with lower levels of gambling.

Gambling experts say the Palm Springs region is poised to emerge with the highest concentration of gambling casinos in the state.

The partnership between Agua Caliente and Caesars shows that the growth of Indian gambling in California "has finally reached a level of maturity," said I. Nelson Rose, a professor at Whittier Law School in Los Angeles and a visiting scholar at the Institute of Gambling and Commercial Gaming at the University of Nevada, Las Vegas.

Indian gambling, he said, "started off with ma-and-pa operators, then small entrepreneurs, then larger companies, and now we've got multinational companies that are heavily licensed and regulated, and which can't afford to get into anything that is at all shaky. With Caesars, it shows the industry in California has reached full legitimacy."

Caesars and the Agua Caliente tribal council announced a year ago a pact to build a casino; Monday's announcement detailed the level of financial commitment and designated the actual casino site: an eight-acre parcel a block west of the Palm Springs Convention Center and across from the Spa Hotel, owned by the Agua Caliente Indians.

Even though city permission is not needed to construct the facility, city officials were euphoric in heralding the coming of the casino as a long-needed economic shot in the arm to invigorate the struggling downtown district.

The operation will "enhance the economic viability and beauty of Palm Springs," said Mayor Lloyd Maryanov. "It will jump-start our economy. Palm Springs is back on the move, and this is the jewel of the crown."

A preliminary architectural rendering suggests a building with dominant use of glass, domes and archways. "They didn't want a Southwestern look," one Caesars executive said of the Indians.

In addition to creating between 700 and 2,000 jobs—more than can be filled by the 258 Agua Caliente Indian tribal members themselves—the tribal council agreed to share a percentage of its profits with the city to help pay for the cost of added police and fire protection. Maryanov said the project will generate about $500,000 a year for the city coffers in addition to helping fill downtown hotel rooms and restaurants.

"We'll still be known for golf and tennis and for sitting in the sun," the mayor said. "But this adds one more dimension—a major dimension—to Palm Springs."

Milanovich said Caesars prohibited the tribal council from developing other casinos in Palm Springs until a certain level of profit is generated by the first operation. If the tribe does develop other parcels for gambling, Caesars has the first right of refusal.

Until two years ago, the Agua Caliente Indians had eschewed gambling altogether as a source of revenue, but finally decided to join the growing ranks of Indians who have embraced the industry and asked gambling companies to bid for the contract.

Milanovich would not disclose Caesars' share of the revenue, in exchange for funding and managing the casino, or how the Agua Caliente Indians plan to spend their profits. He said the casino is expected to make a net profit of $30 million a year.

Henry Gluck, chief executive officer of Caesars, said the company competed with about a dozen other gambling interests to win the Agua Caliente contract, banking on projections of revenue the current level of Indian gambling is expected to generate.

Even with the level of gambling now allowed, Gluck said, a casino in Palm Springs would attract a Los Angeles marketplace unwilling to travel to Las Vegas or Laughlin, and would be another motive for international travelers already considering a Palm Springs destination.

"We feel we can make a major impact by weaving the best that Caesars has with the best that Palm Springs has," Gluck said.

Howard Dickstein, a Sacramento attorney who represents several Indian reservations seeking enhanced gambling operations, said the Caesars casino "adds credibility to Indian gaming. It gives an indication that significant and sophisticated financial interests think it's here to stay."

More casino operators looking at California

□ Despite an appeal on tribal gaming, many firms are negotiating compacts for future Indian casinos.

By John G. Edwards
Review-Journal

Speculators are starting to look at California with greedy eyes almost 150 years after Gold Rush of 1849.

This time, the gold mines appear to be casinos on Indian reservations in the country's most populated state.

The speculators will be mining for the stock of companies poised to profit from an anticipated expansion of the types of games that can be played in California casinos.

A federal judge has ruled that California must negotiate with the tribes for video gambling as well as some "banked and percentage" card games, such as Caribbean Stud poker and Pai-Gow. The electronic games proposed by the tribes include pull-tab games, video poker, video bingo, Lotto, keno and other number- and symbol-matching games, according to Raymond James & Associates of St. Petersburg, Fla.

In a suit brought by Ramsey Indian Rancheria and others, U.S. District Judge Garland Burrell Jr. of Sacramento, Calif., upheld the state's right to bar traditional casino games such as blackjack and baccarat that are played in Las Vegas and Atlantic City, N.J.

California is appealing the decision, but the state also is negotiating compacts with the 16 Indian tribes who sued subject to a determination on appeal, said Howard Dickstein, lead attorney for the tribes in negotiations.

The tribes are asking the 9th Circuit Court of Appeals to give the case priority so that a decision could be made as soon as early 1994. Even if the court doesn't expedite the case, Dickstein said he expects an ruling by the end of next year.

While the National Governors Association is polling members on a proposed federal law that would limit the types of Indian gaming, Dickstein expects California tribes to take the advantage and offer electronic games before the proposal could become law. The law won't be retroactive, Dickstein predicts.

The judgment in the Ramsey case could be explosive.

Most revenue generated by casinos in Nevada and New Jersey comes from electronic games, Dickstein said. "If we're successful in these negotiations, the revenues generated by the (California) Indian casinos is going to increase many times."

Once California enters into Indian compacts, any tribe could offer electronic games, Dickstein said. "There already are about 15 casinos that are economically viable in the state" offering a limited menu of games, he said.

While California has about 100 tribes, Dickstein predicts no more than 20 or 30 will opt for casinos under new rules. He bases his estimate on the number of reservations with good road access and those within two hours driving time of major metropolitan areas.

None are in Los Angeles or Orange County, said I. Nelson Rose, a professor at the Whittier Law School in Los Angeles and a gaming expert.

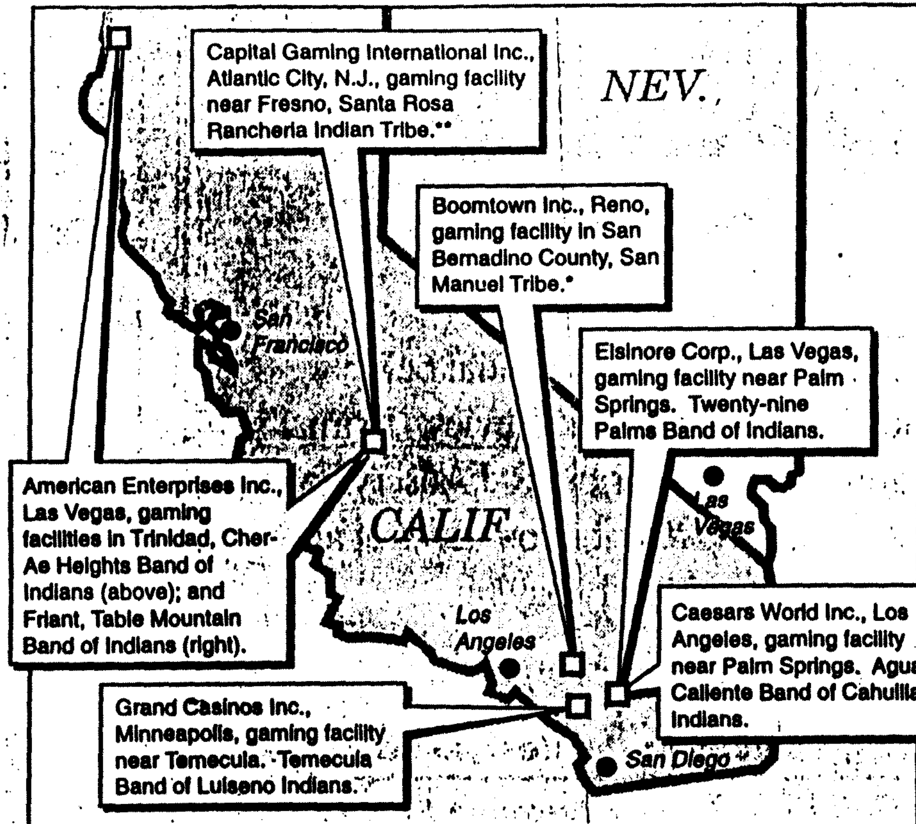
While the Ramsey case could open the door wider to casino gaming in California, a little-known case could throw it wide open, said Rose, a visiting professor at the University of Nevada, Reno.

A couple of weeks ago, a Superior Court judge in Los Angeles said he will enter a judgment against the California Horsemens' Benevolent and Protective Association, which sought a ban on California lottery keno games based on a provision in the state constitution. The judge said the California constitution prohibits casinos such as those operated in Nevada and Atlantic City, but didn't prohibit casino games, Rose said.

Because tribes are entitled to offer all of types of gambling permitted in a state, "the casino case would give (tribes) everything," Rose said.

"It seems that the timing of compacts in California will be compressed," said Mike Moe, a gaming analyst with Dain Bosworth Inc. of Minneapolis. "We will

Please see TRIBES/19E



*Boomtown has an option to acquire a management agreement for gaming on San Manuel Tribe land.
**Capital Gaming has an exclusive management and economic development agreement with the Santa Rosa Rancheria Indian Tribe.

Las Vegas Review Journal
October 17

Tribes

From 17E

have California Indian gaming sooner rather than later."

After showing little interest for several years, casino operators are starting to announce Indian gaming contracts and projects in California, said Martin Cosgrove, an analyst with Wedbush Morgan Securities of Los Angeles.

"The industry in California will at some point have a good chance or receiving some types of casino games, and people are showing up and knocking" at tribes' doors, Cosgrove said.

On Wednesday, Capital Gaming International Inc. of Atlantic City announced it signed a management agreement and plans to expand an existing casino on Santa Rose Rancheria Indian Tribe land near Fresno.

In September, Boomtown Inc. of Reno said it obtained an option to pay $19 million for the management consulting agreement for the San Manuel Bingo Hall and Casino near San Bernadino. The tribe operates a 2,400-seat bingo parlor and intends to open a 40,000-square-foot casino in December.

In July, Caesars World Inc., the parent of Caesars Palace, said it agreed to develop a $25 million, 80,000-square foot casino on the Agua Caliente Indian Reservation near Palm Springs.

Also in July, Grand Casinos Inc. of Minneapolis agreed to develop and manage 60,000-square-foot gaming facility halfway between Los Angeles and San Diego for the Temecula Band of Luiseno Indians.

Two Las Vegas companies took earlier steps to enter the market. Elsinore Corp., the parent of the Four Queens, plans a casino near Palm Springs, and American Enterprises Inc. holds management contracts for two California casinos.

Elsinore, a Las Vegas company, in January formed a partnership with a California company to develop a $10 million casino 20 miles east of Palm Springs on land owned by the Twenty-nine Palms Band of Mission Indians.

It holds an 85 percent interest in the partnership. Elsinore raised funds for the 80,000-square-foot Palm Springs project and another planned Indian casino 45 miles north of Seattle through a $60 million private placement of notes.

Elsinore expects to make profits with the initial offering of bingo, poker, Asian games and off-track betting, said Dick Levasseur, senior vice president. But it will add video poker and video keno when the law permits.

"If they can have machines, the profits will double," said Rose, a stockholder in Elsinore's partner, Native American Casino Corp.

Elsinore plans to open the Palm Springs casino within eight months after ground breaking, which will be as soon as regulatory approval is obtained.

The Twenty-nine Palms casino probably will have a bigger effect on Elsinore's financial results and stock than the other Palm Springs casino would have on Caesars World, analysts say. Caesars World has $233 million in annual revenue; Elsinore, $49 million.

But American Enterprises is "the only pure play in Indian gaming in California," according to a recent report by analyst Ian Gilson of L.H. Friend, Weinress & Frankson Inc. of Irvine, Calif.

The company manages a 33,000-square-foot high-stakes casino called Table Mountain Rancheria Casino in Friant, 17 miles north of Fresno. In July, it signed a five- year contract to manage a casino in Trinidad, south of Redwood National Park for the Cher-Ae Heights Band of Indians.

In a July report, Gilson estimated the company's revenues could increase from $1.1 million last year to $5.2 million in 1994.

Another public company that could profit is Sodak Gaming Inc. The Rapid City, S.D., company dominates the electronic gaming machine distribution market on reservations and is the exclusive distributor of International Game Technology products on reservations in most states and Canada.

California is the most populous state, and the opening of that market could have a big impact on Sodak, said Clay Trulson, chief financial officer.

If California is opened to electronic gaming, there's no reason why it couldn't maintain its market share, Trulson said. Sodak holds a 70 percent market share in Indian gaming.

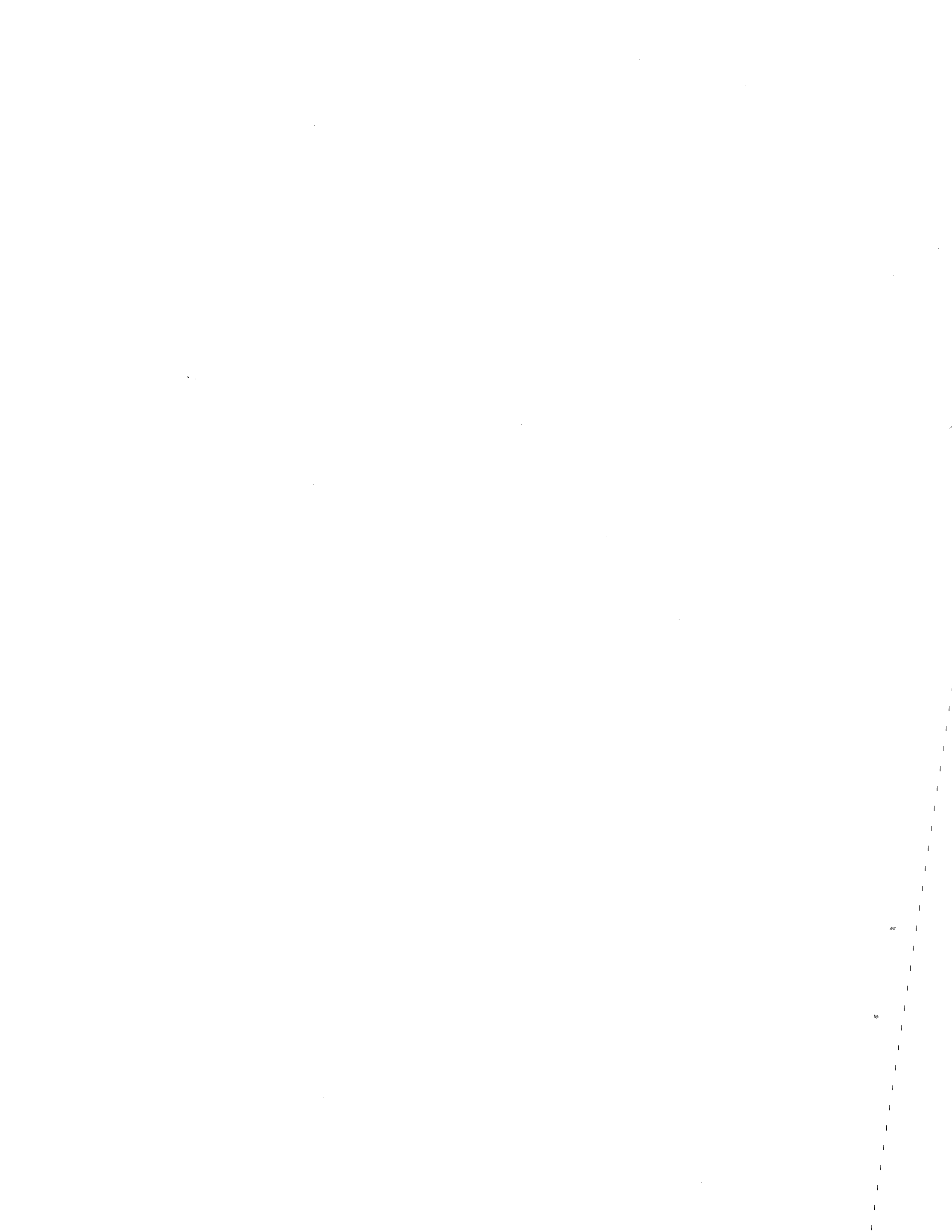
Trulson said he has one concern: "If the demand is there and the manufacturer can't keep up with it, casinos will obviously go where they can get machines faster," he said. He said he doubts IGT will become backlogged and lose sales in California, however.

What effect is this going to have on Las Vegas casinos and the companies that operate them?

Some analysts doubt it will cripple the gaming industry in Nevada.

"I think we've got two separate markets here," Cosgrove said. "Las Vegas attracts people that are coming for other entertainment values in addition to gaming."

Most reservations would be day-trips for California gamblers, Cosgrove said. "They would pull the day-tripper gambler as opposed to the person coming for a long weekend. ... Laughlin might be hurt more than Las Vegas."



APPENDIX N

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ADMITTED
CALIFORNIA & HAWAII BARS

TESTIMONY November 29, 1993 - Joint Hearing
Calif. State Assembly & Senate Governmental Organization Committees

I am a full Professor of Law with tenure at Whittier Law School in Los Angeles. For Fall 1993 & Spring 1994 I am on sabbatical to be the first Visiting Scholar at the Institute for the Study of Gambling and Commercial Gaming, College of Business Administrations, University of Nevada Reno.

To give you something of my background, I have worked with national, state and local governments, Indian tribes, race tracks, card clubs and licensed casinos. I have testified as an expert for the New Jersey Attorney General's Department of Gaming Enforcement, which regulates all of the casinos in Atlantic City. This year I advised the Federal Goverment of Canada on Indian gaming.

Although I am also a licensed attorney, I am not here as an advocate. Anyone who has followed my writing for the last 17 years knows I always try to be objective. Sometimes it is difficult.

I am Vice President of the California Council on Compulsive Gambling. Last year I helped draft a bill which would have given one-quarter of one percent of the State Lottery's revenue to help fund a help line for problem gamblers, including potential suicides. These committees endorsed the bill, and I thank you; but it failed to get two-thirds vote on the floor of the Senate. We gave a copy of the bill to Texas, which passed it verbatim. The Texas State Lottery now devotes $2 million a year to compulsive gamblers; California gives nothing. If California is going to continue to promote gambling the State must take some responsibility for the social problems it creates. I urge you to dedicate some small share of gambling revenue to the California Council on Compulsive Gambling.

I have been consulting with California card rooms for ten years and am developing casinos on Indian land in Southern California. I hope and believe my analysis of the law has not become biased. For example, for years I have told tribes not to put in slot machines, because I concluded they were class III.

I am absolutely opposed to self-regulation of any form of gambling. This has nothing to do with the ability of a tribe to govern itself. It has to do with gambling, which is a cash business with no paper records and a history of corruption. Would we allow a Las Vegas casino to regulate itself? The State of California, one of the largest governments in the world, has not done such a great job in regulating its own State Lottery.

By the way, Indian gaming does at least have some outside regulation. Class II is regulated by the Federal Government;

Class III by the State. By contrast, charity bingo in California has no regulation at all, which means it has the largest potential for cheating, skimming and scandal.

The present state of the law in Indian gaming is clear. Federal cases and statutes in this area are controlling. Unless Congress and the President amend the Indian Gaming Regulatory Act California has no legal power at all to prevent true casinos from opening on Indian land.

Indian tribes are dependent sovereigns of the federal government. They came into the union like other nations, like the Republic of California, for example, retaining much of the power of nations. California may not like a tribe the size of the Cabazons being considered a sovereign any more than it might like a jurisdiction as small as Rhode Island being considered a state, but the question is entirely federal and has been settled for over 150 years.

Three recent decisions leave no doubt as to the legality of Indian casinos in California.

[DEMONSTRATE PAPER PULL-TAB]

Paper pull-tabs are legal under both federal and state law as a form of bingo. Put an image of one on a video screen and you have a Video Pull-Tab, which plays like a slot machine.

The federal Court of Appeals in Washington D.C. has tentatively ruled 2 to 1 that Video Pull-Tabs are Class II. Which means so long as California has Bingo, tribes here can have gaming machines without any input at all from the State.

The <u>Rumsey</u> case went further, declaring that the State must negotiate to allow tribes to have Video Lottery Terminals. The South Dakota State Lottery operates these devices. They are indistinguishable from Nevada video poker machines. They take money, you play directly against the machine, there is a random number generator. The only difference between a VLT and a casino slot machine is the Video Lottery Terminal does not directly dispense coins. To cash out, you have to press a button to print a slip of paper.

A state court went even further. On October 14th L.A. Superior Court Judge Younger ruled in the Keno case that the State Lottery, and therefore California's Indian tribes, are exempt from all of the restrictions on gambling, including, specifically, Penal Codes sections 330 and 330a, banking games, blackjack and slot machines.

I urge the State to reach a compromise now with its tribes if it wants to have some power to regulate and tax. Because, if the State continues to close its eyes, the tribes can and will go to federal courts and the State will get nothing.

Thank you.

APPENDIX O

The Future of Indian Gaming

I. Nelson Rose, J.D.
Whittier College

The legal right for Native Americans to administer gambling on their land provides them with probably the most profitable opportunity currently available to generate tribal income. The federal Indian Gaming Regulatory Act which guarantees this right is frequently invoked in instances where Indian gaming is competitive with state or private commercial gambling interests. This article examines multiple aspects of the competitive conflicts which arise and provides some speculation about the future of Indian gaming.

INTRODUCTION

The future of gambling is on Indian land. Although hard statistics are impossible to obtain, it is safe to say that a business that has gone from literally zero to billions of dollars per year in wagers in just over a decade has to be considered the fastest growing industry in the world.

Address correspondence and reprint requests to I. Nelson Rose, J.D., Whittier College School of Law, 5353 West 3rd Street, Los Angeles, CA 90020.

[Since Professor Rose prepared this manuscript, several significant events and legal/regulatory decisions have been made regarding Indian gaming. The Journal is not able to provide space for expansion of Professor Rose's comments on the relevance of these events for his original analysis, but the reader should be aware that he has informed us that he is aware of the significance of these events regarding his original analysis. We suggest that the interested reader contact Professor Rose to be informed on how they may be kept currently appraised of his analysis of these important policy issues. See his address for reprints.]

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The stakes are not small. Without legal gambling, unemployment runs as high as 70% on some reservations. According to the trade journal *Gaming & Wagering Business*, in 1989 high stakes tribal bingo alone brought in over $120 million in profit (Christiansen, 1990). This is a very conservative estimate and does not even attempt to include other forms of Indian gaming, such as pull-tabs, card games, off-track betting, lotteries, slot machines, and casino games. Anecdotal evidence indicates paper pull-tabs produce 50% of the revenue total for a charity bingo hall operation. There is no reason to believe the sales mix would be any different for Indian bingo, leading to the conclusion that tribal bingo games alone produced at least $240 million in 1989.

With the growing acceptance of state lotteries as a form of voluntary tax, and riverboat and resort casinos as a tool for revitalizing a local economy, discussions of gambling today often revolve more around questions of cost/benefit analysis rather than morality. Still, the issue is controversial. Although many Indian leaders took it as a personal affront, the need for some type of federal or state governmental regulation of gambling was clear. Every government that has legalized gambling has soon realized that it has to institute tough controls on this most morally suspect of cash businesses.

Now that the federal government has established a National Indian Gaming Commission and a firm legal basis for the industry, legal gambling on Indian land will begin to attract large investors and experienced, licensed operators. The result will be a feeling of professionalism, now mostly lacking, and an even greater expansion of the games.

Although the broad picture is clear, it is difficult to predict the exact future of legal gambling on Indian land. Every state and every tribe in every state has its own law and history. Indian gaming law is actually more politics than law; a small number of individuals, judges, commissioners, governors, and members of tribal councils can determine what is legal. For example, if everyone in a position of power says a certain device is a Class II "video pull-tab" and not a Class III "slot machine," then the device is not a slot machine, and nobody has the legal right to say otherwise. In the eyes of the law, no one else has "standing" to fight the officials' decision.

Still, it is possible to state with some accuracy and precision how the law of Indian gaming will develop over the next two or three decades.

THE THIRD WAVE OF LEGAL GAMBLING

It is important to remember the history of gambling in America, both on and off Indian land. We are in the middle of what this author has called the Third Wave of Legal Gambling (Rose, 1986). This is the third time in American history that gambling has been available nearly everywhere. Twice before, gambling was made legal in virtually every state, only to come crashing down in scandal and the passage of restrictive laws.

Gambling was last outlawed at the turn of the century. It slowly came back during the Depression with the introduction of racetracks and the re-legalization of casinos in Nevada. Bingo and other forms of social and charity gambling did not become legal until the 1950s. But it was the rediscovery of the state lottery that really kicked off the current craze.

New Hampshire started the first state lottery in this century in 1964; this year, state lotteries will sell over $20 billion in tickets, more than all movie theaters and record stores combined. Yet there are federal statutes over a century old, which are still on the books, that make it a crime to send a lottery ticket through the U.S. Mail.

INDIANS' LEGAL STATUS

Native American tribes have had a special legal status since before there was a country. Like the individual states, they are sovereigns, but also like the states, they are subject to the supremacy of the federal government. The legal phrase used to describe their unique legal situation is "dependent sovereigns."

In 1979 the Seminole Tribe in Florida won the right to run high-stakes bingo games free from state governmental control (Seminole, 1981). In 1987 the United States Supreme Court confirmed that policy in the landmark *Cabazon* case (California, 1987). Congress acted the next year by passing Senate Bill 555, which became the Indian Gaming Regulatory Act, often abbreviated as "IGRA" (PL 100-497, 1988; see also, Eadington, 1990).

Purely as a legal historian, it is interesting to speculate that Congress may have over-reacted to the decisions by the courts. The *Seminole* case arose out of Florida, while *Cabazon* came from California.

Both Florida and California are Public Law 280 states, meaning there is a specific Act of Congress, widely known as Public Law 280 (1953), giving those states complete criminal jurisdiction but only limited civil jurisdiction over Indian land. The courts have consistently interpreted Public Law 280 to mean that if something is completely prohibited in a state, such as murder, it is also prohibited on Indian land within that state. On the other hand, Public Law 280 states do not have the power to regulate non-criminal activity on Indian land, such as zoning; that is left to the tribes. So once bingo was made legal for charities in Florida or California, though limited to low jackpots, the tribes in those states could offer the games with million dollar jackpots. But it is interesting to note that this would not necessarily have been the law in states not subject to Public Law 280.

In any case, Congress did react, and the result was the Indian Gaming Regulatory Act. IGRA is a creature of politics. The major architects of the great Indian gambling compromise were Senators Daniel K. Inouye (D. Hawaii) and Daniel J. Evans (R. Washington). Although IGRA is designed to end the heated debate, it actually only shifts the arenas to the states, federal courts and a new federal National Indian Gaming Commission.

IGRA requires that at least two of the Commissioners must be Indians. Presidents Reagan and Bush took nearly three years, until April 1991, to name the full Commission, and the Commission as of the end of 1991 was still having trouble obtaining adequate funding. Despite this seemingly low priority within the Executive Branch, the first Commissioners were carefully chosen to be exceptionally competent for their difficult task of creating from scratch such a politically sensitive regulatory body. The Chairman, Anthony Hope, was an experienced regulatory attorney, educated at Harvard. Commissioner Jana McKeag also had a Harvard degree, in Public Administration, and worked on Indian programs in the Departments of Interior and Agriculture. Commissioner Joel Frank had actual hands-on experience as Chairman of the Seminole Tribe and was Chairman of the National Indian Gaming Association.

IGRA does lay down some fairly detailed guidelines, which answer the most important questions. The Congressional negotiators attempted to resolve the controversy over gambling on Indian land by breaking the problem into many different parts.

Those forms of gambling that are considered the most harmless, social games and traditional Indian games, are called Class I and are

left entirely under Indian control. Class II games include bingo, very broadly defined, and non-banking card games such as pai gow poker, as well as a few grandfathered-in Indian casinos in Michigan, North Dakota, South Dakota, and Washington. Class II games are subject to some regulation by the new Commission.

The most dangerous forms of gambling, casino games, pari-mutuel betting, and lotteries, are called Class III and are governed by a complicated system designed to mollify the states' concerns. Congress acknowledged the Indian tribes as sovereigns; however, it recognized that the individual states are also considered sovereigns, and further, that one of the things a sovereign does is negotiate treaties with other governments. Therefore, Congress declared that a sovereign Indian tribe can operate a casino, race track, off-track betting parlor or lottery, if, but only if, it can reach an agreement, called a compact, with the state in which it sits.

Indian leaders were concerned that no state would agree to allow a tribe to operate a competing game. So Congress wrote into the law a unique set of provisions, requiring the states to negotiate in good faith and allowing the Indians to file a federal law suit if a state refused to sign a compact within six months. Such suits are becoming fairly common, and the Indians are almost always winning everything they ask for.

Although everyone expected the states to fight the tribes, in many cases the state government has gone out of its way to help the tribes set up legal gaming. In fact, sometimes the states give the tribe even more than seems allowed under federal law. Compacts have been approved between the state of Minnesota and its tribes for "video games of chance," even though Minnesota law does not allow anyone in the state to operate slot machines. Video poker machines are up and operating, without challenge, under these compacts.

Many tribes perceived IGRA as an attack on their sovereignty, since it requires tribes in some cases to negotiate with states for the right to operate legal games. A few of these tribes were so unhappy that they filed suits to have IGRA declared unconstitutional. Federal courts have rejected most challenges to IGRA, reconfirming the doctrines of "dependent sovereignty" and the right of Congress to pass laws to regulate activities, including gambling, on Indian land (Red Lake Band, 1990).

In *Cabazon* the Supreme Court declared that once a state has legalized any form of gambling the Indians in that state had the right to

offer the same game, but without any governmental restrictions. Three years ago, this author wrote that Congress intended IGRA to codify that decision, that is, write the *Cabazon* standard into the statute books, while setting up some regulatory controls (Rose, 1990). Other commentators disagreed, but recent court decisions have shown the correctness of that position. The basic test under IGRA remains the same as under *Cabazon*: if anyone in the state can offer a form of gambling, even though strictly limiting the game to charities and small wagers, then tribes in that state can offer the same game with virtually no limits.

Today, every state must abide by the criminal/prohibitory versus civil/regulatory test laid down in *Cabazon* to determine whether legal gambling is allowed on a particular reservation. In May, 1991 national attention was centered on a landmark suit between the Mashantucket Pequot Tribe and the state of Connecticut. The U.S. Supreme Court refused to hear the appeal, allowing the lower courts' decisions to stand: Connecticut was ordered to enter into a compact with the tribe allowing the tribe to open a casino. The *Pequot* decision was correctly decided under IGRA: once the state of Connecticut allowed charities to run "Las Vegas Nights" for prizes of value, tribes in that state could open full-scale casinos (Mashantucket Pequot, 1990).

Two years ago this result was predicted. In a paper delivered at the First North American Conference on Indian Gaming, this author wrote:

> Congress expects Class II games [primarily bingo] to be the major form of gambling on Indian reservations. . . . But Congress may be in for a surprise. Class III gaming is the catch-all for every other form of gambling: lotteries; parimutuel betting on dogs, horses, and men; sports betting; slot machines; and casino games. It is, in fact, possible for the Indians to operate Class III gaming on their reservations. . . . I predict that many Indians will be able to be operating dog tracks, off-track betting, and blackjack, craps, and even slot machines. . . .
>
> Perhaps of more importance is the ability of Indians to force a state to negotiate regarding Class III gaming. Nevada, of course, has the most to lose and has already entered into negotiations to allow Indians to open casinos subject to state regulation.
>
> But casino gambling is not limited to Nevada or even to New Jersey. Arizona has a new statute allowing any person to set up a blackjack or crap table in a bar, so long as the bar does not take a cut of the action. The South Dakota Constitution has been amended to allow low-limit casinos in Deadwood; Iowa just did the same for riverboat gambling; while North Dakota allows charity blackjack in hotel/casinos. In fact, charities are allowed to run "Las Vegas nights" with virtually all casino games in 14 states, including Washington, Michigan, and New York. Louisiana allows commercial casino gambling within its borders on federally navigable rivers. The Indians in all of these states will soon be demanding their right to set up their own casinos (Rose, 1990, pp. 9-10).

Technically, the *Mashantucket Pequot* decision is binding only on federal courts in the states of Connecticut, New York and Vermont. But it is difficult to see how a court in another state could ignore the history and public policy of IGRA: if a tribe can offer high-stakes bingo because the state allows a charity to offer low-stakes bingo, a tribe must be allowed to offer high-stakes blackjack when the state allows a charity to offer low-stakes blackjack.

This does not mean everything goes. In a pre-IGRA case, a federal court ruled that a tribe in New Mexico could not open a dog track, even though the state allowed betting on horses (Pueblo of Santa Ana, 1987). This decision was correct under the case law of the time and is still correct under the new statute. The tribes would like to be able to open dog tracks; a horse track is too expensive. And disregarding humanitarian reasons, there is no significant difference between betting on one animal rather than another; if anything, eliminating the human rider ought to lessen the chances for corrupting the race. But the basic law remains: only that specific form of gambling allowed by state law will be allowed on Indian land.

The reason for this limit goes back to the Third Wave: gambling is still viewed as a vice. In every jurisdiction, including the state of Nevada, gambling is completely outlawed; those games that are allowed are considered exceptions to the public policy of absolute prohibition.

LIMITS ON INDIAN GAMING

One of the major problems the states created for themselves was sloppy legal work over the last 100 years. Following the outlawing of all gambling during the Victorian era, any time an operator was caught running a game he was arrested. Unfortunately for the states, the charges were sometimes not brought as "gambling" but as illegally

running a "lottery." " 'Gambling,' 'lottery,' what difference does it make?", thought the prosecutors and courts, "it is all illegal anyway."

But today the states themselves are running lotteries, and those old cases are coming back to haunt them. Since Indians can run any game allowed in the state, the tribes can run lotteries if there is a state lottery. It is possible to find old cases that describe operating a roulette wheel or a slot machine as running a lottery. Therefore, under the strict interpretation of the law, tribes can operate roulette and slots.

Although logically correct, the courts should not perpetuate the fuzzy thinking that defined "lottery" as meaning all forms of gambling. This reflects the fight going on in 1991 in Wisconsin. In June, 1991 U.S. District Judge Barbara Crabb ruled that because the Wisconsin Constitution was amended to allow the state to run a lottery, the state's public policy toward all forms of gambling is now regulatory rather than prohibitory. She ordered Governor Tommy Thompson to enter into compacts within 60 days to allow the Lac du Flambeau and Mole Lake, or Sokaogon, bands of Chippewa Indians to operate full casinos.

Politically, Governor Thompson has virtually no options: he can negotiate and allow these two tribes to open legal casinos, something the state has outlawed since its founding, or he can try and stop the casinos and look like he is discriminating against the Indians. Legally, he was correct when he said that when the people of Wisconsin voted for legal gambling they thought they were only authorizing the lottery and dog and horse racing, not casinos. Although elections for lotteries and racing have been almost universally successful throughout the country for the past 30 years, no statewide election has voted in favor of high-stakes casinos since New Jersey authorized Atlantic City in 1976.

Whether Thompson decides to appeal or negotiate, a case involving the limits of the term "lottery" will eventually make it to the federal appellate courts. Judge Crabb's ruling should not stand, and other courts will probably eventually find that Congress intended in IGRA that there be careful distinctions drawn between various forms of gambling and that the creation of a state lottery means the tribes can run traditional lottery games, but nothing more.

A similar issue, at least in theory, is whether a state can prevent Indian casinos by outlawing all of its gambling. In Connecticut and Washington, attempts were made to ban all charity casino nights. In Wisconsin, Attorney General James Doyle has said that under Judge Crabb's decision the state may have to eliminate its own state lottery.

Although legally interesting, these are, practically speaking, non issues: a state legislature is simply not about to outlaw the state lottery or decimate its charities by eliminating "Las Vegas Nights."

If a state could go against the national trend and outlaw all its games, the tribes would be blocked. If the state has a public policy completely prohibiting a game, then no one can operate that game even if they are on Indian land. Look at Utah, for example, which bans all gambling and has prevented its tribes from opening any games.

But what about the millions of dollars already invested in an Indian casino if a state should change its law? The answer is that jurisdictions change their public policy all the time. Even in this century legal gambling has come and gone and come back again; there have been a number of short-lived experiments in legalizing slot machines and New York outlawed all of its racetracks in 1910. The size of the investments in a legal industry can not, as a matter of law, prevent a government from changing its public policy; think of the millions of dollars invested in legal breweries that were lost when Prohibition was enacted.

A more universal question is the controversy over Class II games and devices. Entrepreneurs have developed video pull-tabs, lotto machines and bingo devices, all of which they are claim are Class II and thus can be played without a compact. The devices range from video poker machines to those that are undeniably aids to conventional bingo. The question of where to draw the line between Class II and Class III devices may be the 1990s equivalent of asking how many angels can dance on the head of a pin, but that burden has been placed on the Commission and the courts. The only guidance these decision-makers have is history and the law.

First, the law: Class II gaming is defined in pertinent part as follows:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers of designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards

including (if played in the same location) pull tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . [PL 100-497, §4(7) (A)].

Also included in Class II are non-banking card games (very important for Indian casinos in California) and a few grandfathered-in Indian casinos' banking games. Specifically excluded are:

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
(ii) electronic or electromechanical facsimiles of any game of chance or slot machine of any kind [PL 100-497, 1988; §4(7) (B)].

What is the difference between permitted "electronic, computer, or other technologic aids" and prohibited "electronic or electromechanical facsimiles?" For that matter, what is meant by "lotto . . . instant bingo, and other games similar to bingo?"

Since the language of the statue is not clear, the courts have looked to the legislative history. In a Report accompanying Senate Bill 555, the Senate Select Committee on Indian Affairs stated:

> Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends in [the section defining Class II gaming] that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays with or against a machine rather than with or against other players (Report 100-466, 1988)

Class II gaming is clearly intended to encompass bingo games taking place simultaneously at more than one location, such as Gamma International's "MegaBingo." But it is also clearly intended that the traditional standard stand-alone slot machine, including video poker where it is one against the machine, are Class III. To remain consistent with the purpose of the statute, to differentiate between Class II and Class III games, courts may limit video bingo devices to inter-linked machines, such as "Lightning Bingo."

This does not mean games have to be limited to one game every 15 minutes; linked video machines can be programmed to play a game every 60 seconds, or faster. The machines can take coins, pay coins, and have a progressive jackpot, but they must be bingo, where the first player having a winning pattern wins. They can never be one against the machine.

Similarly, electronic versions of any form of game "similar to bingo" will not be allowed if it changes the game from bingo to a lottery. "Lotto" is listed as a Class II game in IGRA, but this is meant to refer to the Italian board game, which is similar to bingo, not the 6/49 game played by state lotteries. The decision of the federal court in Wisconsin was thus correct when it refused to allow a tribe to call a straight-forward lottery played with video devices a Class II "lotto" game. (Oneida Tribe, 1990)

This does not mean that tribes can never use lotto machines. In a state that runs a lottery, any tribe can demand the right to enter into a compact to have lottery devices. The problem is they are simply Class III and not Class II.

The most important question is: What are the limits on pull-tabs? Paper pull-tabs can be sold by vending machines and be imprinted with bar codes so that winners can be paid automatically. Vendors can sell pull-tabs at the table games so long as all games are all conducted under one roof. Las Vegas casinos would love to be able to have their slot machines walk up to the tables while the cards are being shuffled.

But the major question is whether eliminating the paper altogether might be considered changing the nature of the game. At the time IGRA was enacted, the electronic aids for bingo consisted of computers and satellites to help "MegaBingo" function, and "Bingo-Master" and other devices to allow players to play more cards faster. Pull-tabs were restricted to paper devices, sold from booths or by walking vendors, and redeemed by human agents. However, as the

conduct a lottery across state lines, at least into other states that have state lotteries. This opens the door for tribes to create a national network of linked video lottery terminals; in effect, slot machines on every reservation. If the Commission refuses to allow any devices as Class II, we can expect tribes across the country to immediately ask for compacts for Class III "video lottery terminals."

And yet another issue: what happens when a tribe wants to acquire land to set up a casino? Although the law could be written clearer, IGRA requires the Governor to agree before an Indian tribe can acquire new, non-contiguous land for gambling. Otherwise, Indians will be buying prime locations all over the country. The Indian Gaming Act was not intended to create Indian casinos in downtown Manhattan.

STATE VERSUS FEDERAL CONTROL

The new National Indian Gaming Commission is supposed to be the final arbiter in deciding what devices are Class II and what are Class III. However, both the states and federal law enforcement continue to claim a role. From a legal point of view there are two separate issues: who has power to make arrests or get injunctions, and which laws apply.

Section 23 of IGRA adds a new section to the federal crimina code, (18 U.S.C. §1166) which states that the federal government now has exclusive criminal jurisdiction and all state laws pertaining t gambling now apply to Indian country, with the significant exceptio of games which are made legal under the Act. This means there is n room for state involvement in Indian gaming. On the other hand, i has now become a new federal crime to violate a state gambling la while on Indian land.

This new section has the somewhat bizarre effect in Public La 280 states of requiring state law enforcement agents, such as count sheriffs, to enforce all of the state's criminal laws on Indian land, exce for the state's anti-gambling laws, which are solely within the power federal agencies, namely the U.S. Attorneys. Stated another way, sta law enforcement cannot make arrests for gambling violations. B federal law enforcement can make arrests for violations of not on federal law, such as IGRA, but also for violating a state's gambli

law. This places an unfortunate burden on the U.S. Attorneys, since they have virtually no other interest in what occurs on Indian land.

Of course, in an egregious situation, the federal authorities will become involved. When three-reel slot machines were found on the St. Regis Mohawk reservation in New York, criminal charges were filed. Convictions were affirmed all the way up to the U.S. Supreme Court (United States, 1991) not only under IGRA, but also under the Organized Crime Control Act, (18 U.S.C. §1955) and the Johnson anti-slot machine Act (15 U.S.C. §1175). The use of these two other federal criminal statutes was correct for two separate reasons: IGRA itself says that the Johnson Act will continue to apply to slot machines on Indian land that are not legal; and, the Organized Crime Control Act is designed to go after large, criminal organizations and not just illegal gambling. It is an old, established doctrine of criminal law that a person can be convicted both of a crime, such as bank robbery, and the separate offense of conspiracy to commit that crime, because criminal organizations are inherently dangerous to society.

On the other hand, when state authorities in both Wisconsin and Oklahoma tried to close down Indian games through prosecutions and civil injunctions, the courts stated explicitly that there is no room for state involvement in Indian gaming, even if the state tries to use a federal statute as its sword (*Lac du Flambeau*, 1990; *United Keetoowah Bank of Cherokee Indians*, 1990).

THE FUTURE OF INDIAN GAMING

What does the future hold? Indian gaming centers, casinos, have the potential to be major competitors to all other forms of legal gambling, especially the state lotteries, Atlantic City and riverboat casinos, charity bingo and local racetracks. As merely one example, Indian gaming is exempt from all restrictions on advertising over television, radio and through direct mail. While casinos in Nevada and Atlantic City are restricted to showing pictures of their restaurants, Indian casinos can show players at video bingo machines putting in coins and winning multi-thousand dollar jackpots.

It is this author's opinion that in about three years Congress will realize the door it opened and will move to limit new high stakes games. Thus, tribes should look now at getting their games up and

Senate report makes clear, Congress intended to allow the tribes to use new technology as it is developed, particularly where it will make for a better, and more secure game.

The tribes have two additional strong arguments in favor of video pull tabs and other games and devices reasonably similar to the games described in IGRA as being declared Class II. Under IGRA and the cases that preceded it, states are not free to impose their regulatory definitions to bar other forms of a game once they have legalized any form of the game. In a pre-IGRA case (Lac du Flambeau, 1986), the court ruled that the state of Wisconsin had no authority to enforce the state law against pull-tabs on Indian land because the state had legalized raffles and bingo. The state's express interpretation of the words "raffle" and "bingo" as excluding pull-tabs was held to be a mere civil regulatory control which could not be imposed on Indians. The later *Cabazon* decision and passage of IGRA reinforce this ruling that tribes are not subject to such civil limits once a state has legalized any form of a gambling game.

Perhaps more importantly, the courts are coming out strongly in favor of interpreting IGRA in favor of the Indians. Unless the law is unequivocally against a particular game, the courts will allow the game on Indian land; any ambiguity will be resolved in favor of the tribe.

The best example is the 1990 *Sisseton-Wahpeton* case (United States, 1990). In a significant decision, the federal Court of Appeals ruled that IGRA must be interpreted liberally to fulfill its purpose of aiding Indian enterprises and that the standard to be applied was that laid down in *Cabazon* and its predecessors. Thus, the Indians in that case were not bound by the regulatory limits imposed on blackjack by South Dakota state law. To illustrate just how liberally IGRA is being interpreted, it is important to note that South Dakota did not have any legal blackjack at the time the tribe was operating its casino; it was not until later that the state Constitution was amended to allow low limit blackjack in Deadwood. Thus, the Court of Appeals "grandfathered-in" an entirely illegal game, which would not have been allowed even under *Cabazon*. The Court simply said the Act allows it, and the law would be liberally interpreted, even though this means that a game that was played illegally would be allowed to continue.

Probably the strongest argument in favor of video pull-tabs being declared Class II has come from California, where the Los Angeles County Sheriff's Department in May, 1991 declared a machine that perfectly mimics a paper pull-tab legal as a form of bingo. Law enforcement particularly likes the skim-proof accounting of electronic devices. But, regardless of the reasons, the decision puts the federal National Indian Gaming Commission in a bind: how can the Commission declare a game as not being bingo when a state has specifically declared it to be bingo? The Commission will probably decide that Class II devices include linked bingo machines and video pull-tabs which are merely electronic enhancements of the paper game, taking cassettes or programmed in other ways to have "packets" rather than random number generators.

Besides gaming devices, the most important, and as yet almost untapped area for Indian casinos, are table bingo games. These can be run with a parimutuel pot, like "Speed Bingo," or as straight casino banking and percentage games, like "French Bingo." Numbers can be drawn by traditional blowers, electronic random number generators, or even with a dealer using playing cards or dice. The only requirements are that each player be given one or more cards, that players cover the markings on their cards, and that the game is won by the first person obtaining a winning pattern. Most importantly, these are all Class II games: bingo table games and devices allow tribes to open up full casinos without having to negotiate a compact with the state.

Another interesting question is whether tribes can conduct their Class III lotteries across state lines. Under long-established federal law, lotteries are by definition games that are not played at a single location (Stone, 1880). The possibility of Indian lotteries was specifically acknowledged in the Senate debate over IGRA, as the following dialogue indicates:

> Mr. DOMENICI. Mr. Chairman, I want to thank you for including an amendment to clarify that lotto games are played only at the same location as bingo games which are class II games under the bill. I believe there are other Senators who have questioned whether lotto and lotteries are interchangeable terms. This amendment makes it clear that they are not and that traditional type lottery games are indeed class III. As such, lotteries may only be conducted by a tribe if such games are otherwise legal in the State and if the tribe and the State have reached a compact to regulate such games (Congressional Record, 1988).

IGRA expressly exempts Indian games from the federal anti-lottery laws, which were designed solely to prevent the interstate sale of lotteries. If a compact can be reached, it seems that a tribe could

running, so that they can be grandfathered-in if new restrictions are imposed.

Three years ago, a lot of criticism was levied at this author for saying that the new Indian Gaming Regulatory Act was one of the greatest things that has ever happened to Native Americans. Since then, we have seen an economic revitalization of reservations unequaled at any time in American history. And it does not take a large traditional casino to join in the prosperity.

On a mountain top near San Diego, a thirty minute drive up a winding, unlit road, lies the Sycuan reservation. In October, 1990, the tribe opened a casino, limited to Class II games and off-track betting. It has paper and video bingo, with $100,000 jackpots; satellite Mega-Bingo with $1 million jackpots; quick "Action Bingo" and lottery-like "Circle 8 Jackpots"; Pick-six, exactas and straight off-track betting on harness and thoroughbreds; pai gow poker, "California Aces," Pan 9 and other revolving deal games; 7 card stud, Hold 'Em, Hi/Lo, and Omaha poker; pai gow (Chinese dominoes); and paper pull-tabs (paper slot machines). It is planning to put in machines to dispense paper pull-tabs, and video pull-tab devices. The casino cost $3 million to build; in January, 1991, the tribe's share of the net gaming revenue was running at $1.2 million per month.

Many of the tribes looking at legal gaming have no other alternatives, no other resources to fight their high unemployment and accompanying incidents of alcoholism, crime, and disease. Unfortunately, most tribal land is situated too far from population centers. But for those tribes with land in good locations, the Indian Gaming Regulatory Act was, and will continue to be, one of the greatest things that has ever happened to Native Americans.

Editor's Note: Professor Rose is developing a chain of casinos on Indian land in Southern California.

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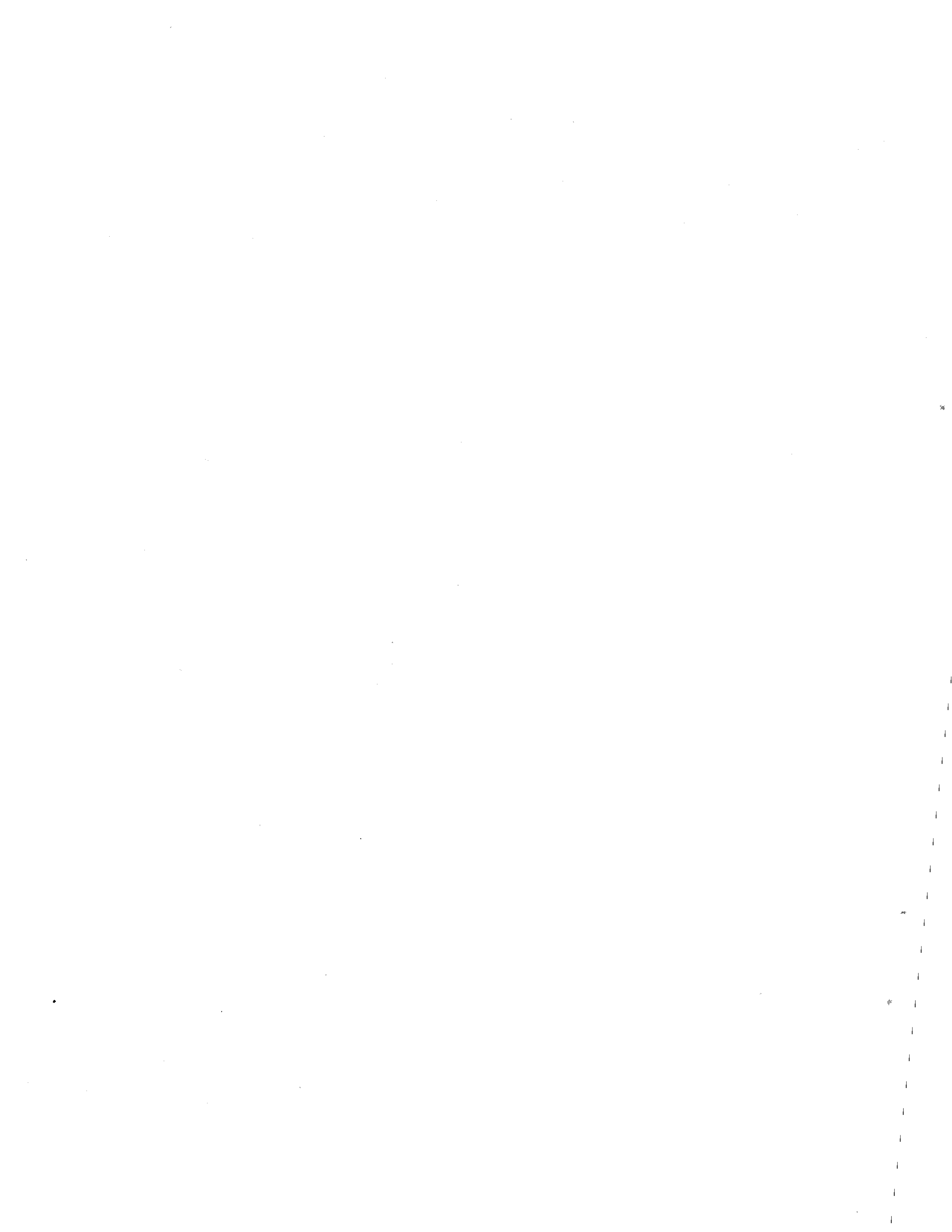

APPENDIX P

Federation of California Racing Associations, Inc.

Joint Hearing of the Assembly and Senate
Governmental Organization Committees

INDIAN GAMING IN CALIFORNIA

Testimony by Norm Towne
Executive Director of the Federation of California Racing Associations

Good afternoon, my name is Norm Towne and I am speaking on behalf of the Federation of California Racing Associations.

According to a recent statistic cited in *USA Today* Americans have a new national pastime. During 1993 70 million people attended Major League Baseball games, while 88 million people visited casinos. The horse racing industry is well aware of these kinds of statistics. We are not here today to debate the merits of Indian gaming nor do we come here with our heads buried in the sand when it comes to other forms of gambling, and while today's hearing is centered on Indian gaming, for the horse racing industry the real issue has nothing to do with Native Americans and everything to do with Casino Gambling. What is critical to the future existence of horse racing in California, as we currently know it, is the whole question of the public policy of this state toward gambling in general and toward casino gambling in particular. Horse racing is not a Johnny Come Lately when it comes to gambling.

For 60 years the Horse Racing Industry has been a strong and successful business, a viable part of California's economy and gambling has been an integral

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part of that success. Racing is a major tourist attraction which entertains millions of people annually and produces great economic benefits for the state. For example, just recently, the Oak Tree Racing Association and Santa Anita focused international attention on California by hosting the Breeder's Cup, horse racing's equivalent of the Super Bowl. Millions of people worldwide watched the event and set a North American record by wagering more than $80 million as racing's finest thoroughbreds battled to determine this year's champions. This is the 4th time in the 10 year history of the Breeder's Cup that California has hosted the event, no other state has hosted it more than twice. California's race tracks are nationally and internationally prominent. Six of the top ten tracks in the country in terms of handle and attendance are located in California. Many longtime observers have proclaimed this year's Breeder's cup as the best day of competition in the history of thoroughbred horse racing. This is just one day which garners a great deal of attention and produces many positive impacts, but it is horse racing's day-to-day activities that generate more than 30,000 jobs and a $3 billion annual positive effect on this state's economy.

Additionally, horse racing is the only privately operated gambling enterprise that directly benefits the State General Fund. Since its inception Horse Racing in California has contributed more than $3.5 billion in direct revenue to state funds in the form of taxes known as license fees. Over the past decade alone these taxes have amounted to more than $1.4 billion in direct revenues to the state. In

addition to these direct revenues consider the following:

- California's race tracks and horsemen's groups contribute more than $2 million annually to charity.
- The Horse Racing and Breeding industries are an important part of the agricultural sector of this state preserving more than 22,500 acres of land in the breeding and training of thoroughbred race horses alone.
- More than 14 million people visit California's race tracks and satellite facilities annually and another 11 million attend California's fairs providing great direct and indirect economic benefits to the local communities.

But despite these benefits to the state, the horse racing industry finds itself in direct competition with the state. This competition is in the form of the California Lottery. Make no mistake about it, the California Lottery is a state operated monopoly which competes directly and daily with horse racing. But, despite strict regulation and restrictive laws, more money is wagered annually on horse racing than on the state lottery, even though the Lottery has 500 times as many outlets as horse racing,

And now back to the issue of the day. As I indicated earlier the race tracks have nothing against tribal gaming operations, in fact we do business with various tribes who conduct satellite wagering. The fear that racetracks have is unfettered competition in the form of full-scale casino gambling. As you know, Casino gambling is becoming prevalent all over the country, riverboats, Indian gaming and land based casinos run by private enterprise are popping up everywhere, and all

indications are that this rapid proliferation will continue. Race track executives are very concerned because the evidence is overwhelming in jurisdictions where race tracks and casinos are in close proximity that horse racing is severely impacted and ultimately ceases operations. The primary examples to date are in Minnesota and New Jersey. In Minnesota with Indian casinos operating in just 15 locations (there are 99 Indian tribes in California) horse racing has been shut down. Canterbury Downs, a state-of-the-art horse race track built at a cost of nearly $100 million, had its live handle drop 47% in the first year of Indian gambling, 70% in the first two years and the plant was recently offered for sale at a price of less than 10% of its cost to build, just eight short years ago. The Minnesota State Planning Agency estimates that the shutting down of horse racing has resulted in a $250 million annual loss to that state's economy. In New Jersey the casinos are not quite as close and the results are not quite as grim. However, a University of Louisville study conducted in February of 1992 by the Equine Administration School of Business quantified the impact of casino gambling on horse racing with 12 casinos operating in Atlantic City at a negative 33.9%. A drop of this magnitude in California would be devastating to the horse racing industry and the state's general economy. It is estimated that the direct impact to state funds would be in excess of $50 million and 10,000 to 12,000 jobs would be lost in the process these losses would increase in magnitude in subsequent years. With new casinos opening in Illinois and Louisiana, we in California are keeping a close watch on the situation in

those two states both of which conduct horse racing.

Not only is horse racing in a changing environment, but also Horse racing itself is changing both in California and across the country. The industry is taking positive steps to meet the competition and to stay in business. This task will be extremely difficult, however, if full-scale casino gambling on Indian reservations comes to California. The heavily taxed, highly regulated horse racing industry cannot be expected to nor will it be able to, compete with the unregulated, untaxed faster paced casino gambling on tribal lands. We in racing agree with the conclusions published by the Rockefeller Institute of Government released in October that "Gambling is no panacea for ailing state budgets." We believe that the proliferation of gambling is a mistake; that gaming in and of itself with no underlying economic and social basis is not the answer for an ailing economy in California, on Indian reservations or across this country. If it is inevitable, however, that casino gambling is in California's future then the only way that horse racing could even hope to <u>have</u> a future is by being afforded the same opportunities to conduct casino gambling as everyone else; recognizing the need for regulation and taxation in order to insure the integrity of the games and to provide some degree of public benefit. For us it is a matter of survival.

Thank you for giving us the opportunity to appear before you today and I would be happy to answer any questions you may have regarding this testimony.

APPENDIX Q

BARBARA E. RISLING & ASSOCIATES
LEGISLATIVE AND GOVERNMENTAL AFFAIRS
5644 BOLTON WAY, ROCKLIN, CA 95677
TEL: (916) 632-9163
FAX: (916) 624-3670

November 30, 1993

Hon. Ralph Dills, Chairman
Senate Governmental Organization Committee
State Capitol
Sacramento, CA 95814

RE: Testimony for Interim Hearing on Indian Gaming

Dear Senator Dills:

Please include the attached testimony of the Hoopa Tribe from Northern California in the interim hearing report for the hearing on Indian gaming held on November 29, 1993.

I contacted Steve Hardy from your Committee last week and asked if a representative from the Hoopa Tribe could be added to the agenda and was told that would be no problem. I was present at the hearing and prepared to give testimony, but was not invited to speak.

The Hoopa Tribe is very concerned that the issues presented be recognized and addressed.

Thank you for your consideration. If you have further questions, please contact me at the above number.

Sincerely,

BARBARA E. RISLING

Enc.

TESTIMONY OF

BARBARA RISLING, CONSULTANT

REPRESENTING THE

HOOPA VALLEY TRIBE

BEFORE THE

JOINT HEARING OF THE CALIFORNIA STATE

SENATE AND ASSEMBLY GOVERNMENTAL ORGANIZATION

COMMITTEES

HEARING ON

INDIAN GAMING IN CALIFORNIA

NOVEMBER 29, 1993
9:00 A.M.

ROOM 4202
STATE CAPITOL
SACRAMENTO, CA.

CHAIRMEN AND MEMBERS

MY NAME IS BARBARA RISLING, AND I'M HERE REPRESENTING THE HOOPA VALLEY TRIBE FROM NORTHERN CALIFORNIA.

I'D LIKE TO THANK THE CHAIRMEN AND MEMBERS OF THIS COMMITTEE FOR THE OPPORTUNITY TO SHARE OUR CONCERNS ON THE ISSUE OF INDIAN GAMING IN CALIFORNIA.

BEFORE I START, I WOULD LIKE TO STATE THAT I BELIEVE THAT PORTIONS OF THIS TESTIMONY REFLECTS THE SENTIMENT OF A LARGE NUMBER OF CALIFORNIA TRIBES THAT WERE UNABLE TO ATTEND TODAY AND TOMORROW'S HEARING.

BACKGROUND

JUST A SHORT BACKGROUND ON WHERE HOOPA IS WITH REGARD TO GAMING AND LAW ENFORCEMENT..

SINCE THE EARLY '80'S, WE HAVE HAD A SMALL HIGH STAKES BINGO OPERATION AND HAVE BEEN ACTIVELY INVOLVED IN THE INDIAN GAMING ISSUE NATIONALLY, REGIONALLY AND LOCALLY.

HOOPA, ALONG WITH MANY OTHER TRIBES, SUBMITTED THEIR LETTER TO THE GOVERNOR, AND HAS BEEN WAITING SINCE LAST YEAR, FOR NEGOTIATIONS TO BEGIN FOR A CLASS III GAMING COMPACT.

THE HOOPA TRIBE HAS THE ONLY FULLY ESTABLISHED TRIBAL COURT SYSTEM IN CALIFORNIA WHICH DEALS NOT ONLY WITH GAMING LAWS, BUT WITH VIOLATIONS OF OTHER APPLICABLE LAWS, SUCH AS:

NATURAL RESOURCES (FISHING, HUNTING,

TIMBER AND OTHER AGRICULTURAL HARVESTING

ENVIRONMENTAL PROTECTION

BUILDING AND ZONING

LAND USE

ALCOHOL AND DRUG ABUSE

INDIAN CHILD WELFARE

AND BECAUSE OF THE REMOTENESS OF THE AREA, THE DEPARTMENT PARTICIPATES REGULARLY IN MUTUAL ASSISTANCE TO OTHER LAW ENFORCEMENT AGENCIES.

THE HOOPA TRIBE HAS A LAW ENFORCEMENT DEPARTMENT WITH FOUR EXISTING TRIBAL OFFICERS, BEING P.O.S.T. CERTIFIED AND CROSS-DEPUTIZED WITH THE COUNTY OF HUMBOLDT; AND THREE ADDITIONAL OFFICERS WHICH WILL BE ADDED UPON THE COMPLETION OF THEIR P.O.S.T CERTIFICATION WHICH WILL BE WITHIN A FEW MONTHS.

THE HOOPA TRIBE IS CURRENTLY IN THE PROCESS OF PREPARING FOR RETROCESSION FROM PUBLIC LAW 83-280,

TO REASSUME CRIMINAL JURISDICTION BACK FROM THE STATE.

THIS PORTION OF THIS TESTIMONY IS INTENDED TO INFORM THE CHAIRMEN AND MEMBERS OF THE COMMITTEE THAT TRIBAL GOVERNMENTS ARE INDEED CAPABLE OF SUCCESSFULLY REGULATING AND ENFORCING ALL LAWS APPLICABLE ON RESERVATION LANDS.

POSITION

THE HOOPA TRIBE'S POSITION ON GAMING ON RESERVATION LANDS, IS SIMPLY THIS:

- WE VIEW GAMING ON INDIAN LANDS AS AN ECONOMIC DEVELOPMENT OPPORTUNITY TO GENERATE THE MUCH NEEDED REVENUE FOR PROGRAMS AND SERVICES TO BENEFIT THE TRIBE'S CONSTITUENCY, ------AND THOSE NON-TRIBAL MEMBERS LIVING ON AND NEAR INDIAN LANDS; ----------PROGRAMS, SERVICES AND REVENUE

WHICH ARE CURRENTLY EITHER NON-EXISTENT OR SEVERELY UNDER FUNDED, DUE TO BUDGETARY CONSTRAINTS.

AND YOU MUST REMEMBER, THE MAJORITY OF THIS REVENUE WHICH IS RECEIVED BY TRIBES WITHOUT GAMING, IS REVENUE WHICH IS RECEIVED VIA THE FEDERAL AND/OR STATE BUDGETARY PROCESS.

- WE VIEW GAMING AS A TOOL BY WHICH TRIBES CAN ACCUMULATE INVESTMENT CAPITAL TO EXPAND INTO OTHER ECONOMIC DEVELOPMENT VENTURES.

  IT IS DIFFICULT, IF NOT IMPOSSIBLE FOR MOST TRIBES TO SECURE FUNDING FROM FINANCIAL INSTITUTIONS WITHOUT SUFFICIENT COLLATERAL. THUS MAKING ECONOMIC GROWTH ON RESERVATIONS VIRTUALLY NON-EXISTENT.

CONCERNS

THE MAJOR CONCERN OF THE HOOPA TRIBE DEALS WITH THE ISSUE OF THE TRIBAL/STATE COMPACT NEGOTIATION PROCESS.

- PROBLEM NO. 1

  IN DECEMBER , 1991, TRIBAL LEADERS FROM SEVERAL TRIBES CAME TO SACRAMENTO TO MEET WITH THE GOVERNOR TO BEGIN CLASS III COMPACT NEGOTIATIONS. THE GOVERNOR SENT HIS REPRESENTATIVE.

NOW, ITS ALMOST TWO YEARS LATER, TRIBAL LEADERS STILL HAVEN'T MET WITH THE GOVERNOR. THE NEGOTIATION TEAM CONSISTS MAINLY OF ATTORNEYS;' ATTORNEYS FOR THE TRIBES AND ATTORNEYS FOR THE STATE. I UNDERSTAND A VERY, VERY FEW TRIBAL LEADERS ATTEND THOSE NEGOTIATION MEETINGS. WHICH MEANS, WITH THE EXCEPTION OF THOSE FEW CHAIRMAN THAT

ATTEND THOSE MEETINGS, THOSE THAT SIT ON THE NEGOTIATIONS TEAM HAVE NEITHER THE POWER NOR THE AUTHORITY TO NEGOTIATE OR ENTER INTO A GAMING COMPACT.

THE HOOPA TRIBE IS NOT USED TO SEEING THE TYPE OF FORUM WHICH THE STATE HAS ESTABLISHED TO NEGOTIATE THESE CLASS III COMPACTS.

WHERE LEGAL AND TECHNICAL PEOPLE SPEAK ON BEHALF OF TRIBES, IN MANY CASES MAKING DECISIONS FOR TRIBES. DECISIONS ON THE SOVEREIGNTY --JURISDICTIONAL ISSUES THAT MAY HAVE FAR REACHING AND DEVASTATING EFFECTS ON ALL TRIBAL GOVERNMENTS ACROSS THE COUNTRY.

IN THE HOOPA TRIBE, ONLY THE TRIBAL LEADERS SPEAK AND MAKE THE DECISIONS ON SUCH IMPORTANT ISSUES.

THE COMPACT NEGOTIATIONS HAVE BEEN ISOLATED TO A SMALL GROUP OF TRIBES. THE STATE IS EXCLUDING AND IS OTHERWISE NOT ATTEMPTING TO REACH OUT TO THOSE OTHER TRIBES WHO ARE ALSO INTERESTED IN THE NEGOTIATION PROCESS.

EVERY TRIBE SHOULD BE TREATED WITH RESPECT AND HAVE EQUAL ACCESS TO THE GOVERNOR DURING THE COMPACT NEGOTIATIONS .

FURTHER, IT IS THE RESPONSIBILITY OF THE STATE TO CLARIFY THEIR PROTOCOL BEFORE ADDRESSING THE ISSUE OF TRIBAL/STATE NEGOTIATIONS IN ACCORDANCE WITH THE IGRA, AND THE TRIBE FEELS THE GOVERNOR MUST PLAY A MAJOR ROLE IN THE NEGOTIATION PROCESS.

THE STATE NEEDS TO MAKE THIS CLARIFICATION IN A TIMELY FASHION SO AS NOT TO VIOLATE THE INTENT OF THE LAW.

- PROBLEM 2

THE HOOPA TRIBE IS CONCERNED WITH THE LACK OF INFORMATION IN THE CURRENT NEGOTIATIONS PROCESS. INFORMATION IS NOT BEING PROVIDED TO THOSE OTHER TRIBES THAT ARE NOT INCLUDED IN THE SMALL SPHERE OF THE NEGOTIATIONS.

UNLESS THE STATE PLANS TO NEGOTIATE WITH EACH AND EVERY TRIBE ON A SEPARATE AND DISTINCT COMPACT (WHICH I DOUBT THEY WILL, IF THEY FOLLOW THE EXAMPLE SET IN THE OFF-TRACT SATELLITE WAGERING COMPACTS),

TRIBES MUST HAVE THE OPPORTUNITY TO STUDY AND PROVIDE INPUT INTO THE ISSUES BEING DISCUSSED IN THE CURRENT COMPACT NEGOTIATION PROCESS.

THE STATE MUST MAKE EVERY EFFORT TO SOLICIT AND UTILIZE INPUT FROM ALL TRIBES INTERESTED IN

CONGRESS HAS CLEARLY AND PURPOSEFULLY ELIMINATED STATE JURISDICTION OVER TRIBAL GOVERNMENTS AND THE COURTS HAVE REAFFIRMED THAT POSITION.

THE HOOPA TRIBE WOULD LIKE TO GO ON RECORD TODAY TO SAY, WITH THE EXCEPTION OF THOSE TRIBES WHO WILLING CONCEDE THEIR REGULATORY AND ENFORCEMENT RIGHTS TO THE STATE, THE HOOPA TRIBE WILL STRONGLY OPPOSE THE STATE ASSUMING JURISDICTION ON INDIAN LANDS, OR REGULATORY AND ENFORCEMENT AUTHORITY OVER TRIBAL GAMING, OR ANY OTHER FORCED CONCESSIONS MADE BY THOSE TRIBES EAGER TO CONCLUDE COMPACT NEGOTIATIONS THAT WOULD ULTIMATELY AFFECT ALL TRIBES.

THE HOOPA TRIBE WILL WORK TOWARD WHATEVER MEANS NECESSARY TO ASSURE THAT CALIFORNIA TRIBES

MAINTAIN THEIR RIGHT TO SELF-REGULATION, WITHOUT COMPROMISING THEIR SOVEREIGNTY.

IN CONCLUSION, WE ALSO WOULD LIKE TO INVITE THE MEMBER OF THIS COMMITTEE TO TRAVEL TO NATINOOK, (WHERE THE TRAILS RETURN - THE HOOPA VALLEY) TOUR OUR RESERVATION, AND MEET THE NA-TINI-XWE (PEOPLE OF THE VALLEY).

THANK YOU

BARBARA E. RISLING & ASSOCIATES
LEGISLATIVE AND GOVERNMENTAL AFFAIRS
5644 BOLTON WAY, ROCKLIN, CA 95677
TEL: (916) 632-9163
FAX: (916) 624-3670

November 30, 1993

Hon. Curtis Tucker, Jr., Chairman
Assembly Governmental Organization Committee
State Capitol
Sacramento, CA 95814

RE: Testimony for Interim Hearing on Indian Gaming

Dear Assemblyman Tucker:

Please include the attached testimony of the Hoopa Tribe from Northern California in the interim hearing report for the hearing on Indian gaming held on November 29, 1993.

I contacted Steve Hardy from the Senate Governmental Organization Committee last week and asked if a representative from the Hoopa Tribe could be added to the agenda and was told that would be no problem. I was present at the hearing and prepared to give testimony, but was not invited to speak.

The Hoopa Tribe is very concerned that the issues presented be recognized and addressed.

Thank you for your consideration. If you have further questions, please contact me at the above number.

Sincerely,

BARBARA E. RISLING

Enc.

APPENDIX R

Gregory R. Cox
647 Windsor Circle, Chula Vista, California 91910
Telephone: (619) 420-3104

December 3, 1993

Senator Ralph Dills
Assembly Governmental Organization Committee
P.O. Box 942848
Sacramento, CA 95814

Dear Senator Dills,

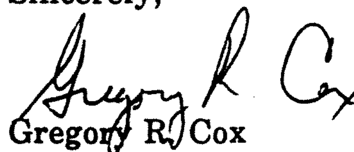
I attended the Joint Hearing of the Assembly and Senate Governmental Organization Committees this past Monday, November 29, 1993. The subject of that meeting, "Indian Gaming in California," is an issue of great importance to all Californians. I commend you on the conduct of the hearing and on your obvious interest in the subject.

I hoped to have an opportunity to address the Joint Hearing on my concerns about the expansion of Indian gaming. Unfortunately, because of the length of the hearing and the lateness of my request to speak, I was unable to provide my oral testimony.

I respectfully request that my enclosed testimony be incorporated into the legislative record for the "Indian Gaming" interim hearing.

Thank you for your consideration of this request. If you have any questions, please contact me at 619/585-7007 (office) or 619/420-3104 (home).

Sincerely,



Gregory R. Cox

Testimony of Gregory R. Cox

before the Joint Hearing of the
Assembly and Senate Governmental Organization Committees:
"Indian Gaming in California"

November 29, 1993

My name is Greg Cox. As a former locally-elected official, I have several concerns regarding the expansion of Indian gaming in California.

I was Mayor of the City of Chula Vista from 1981-1990. For 5 1/2 years prior to my service as Mayor, I was a member of the City Council. During 1991-92, I was Deputy Director for Local Government in Governor Wilson's Office of Planning and Research. In 1987-1988, I had the opportunity to serve as the President of the League of California Cities.

As you might imagine, I am a strong advocate of local control, and of the ability of cities and Indian tribes to determine what is in the best interest of their respective communities.

I would like to preface my comments by emphatically stating that I am not opposed to gambling per se, and that I do not begrudge Indian tribes the opportunity to host legalized gaming on their reservations, if that is their choice. Clearly, gaming on Indian reservations has created a new economic opportunity.

However, in dealing with gaming on Indian reservations, Indian tribes should be treated no differently than other legal gaming operations in the State. A level playing field for all gaming operations in California is needed.

Indian tribes and local communities should have the same option to determine whether or not they want to host gaming. The menu of games allowed to be played in California should be the same menu allowed on reservations.

In evaluating how Indian gaming should be addressed in California, several issues come to mind. First, Indian casinos should be held to the same standards as any other business. If there are demonstrable impacts on surrounding communities, those impacts should be mitigated. Infrastructure deficiencies that create problems for adjoining communities should be resolved prior to the opening of a casino. Issues such as access points, adequacy of traffic improvements, provision for police and fire services, and the social consequences of gaming should be dealt with on the "front end" of the process.

Second, Indian tribes should not be allowed to expand their gaming operations outside the original tribal reservation unless

they comply with all local land use regulations applicable to non-reservation land. Similarly, all normally-collected taxes and fees should be paid to the host jurisdiction.

The experience of the State of Connecticut with Indian gaming should provide a valuable lesson to the State of California. The Foxwoods Casino located on the Mashantucket Pequot Reservation, recently doubled the size of its Indian gaming facility. The Foxwoods, which has only slot machines, is reportedly grossing $26 million a month. The present reservation encompasses approximately 1,850 acres. The Indian tribe has recently initiated an effort to purchase an additional 8,000 acres which are currently under the jurisdiction of two adjoining Connecticut communities -- the towns of Ledyard and Preston.

Clearly, the intent of the Indian tribe is to go through the Federal process to annex the purchased acreage into their reservation. The impact of such an action would be devastating to the local government that will lose this land. Local government will lose all current property tax, sales tax, and transient occupancy tax, plus any future revenue that could have been reasonably anticipated through expansion and/or redevelopment of the property. In addition, the local government will lose all zoning authority, ability to regulate the quality of construction through the issuance of building permits and inspections during construction, and will be unable to control ingress and egress or traffic circulation. This will happen on land that was purchased and subsequently annexed into the reservation.

Closer to home, we have seen the beginnings of similar efforts in Santa Rosa and most recently San Diego County's unincorporated community of Jamul. The Jamul reservation is located southeast of the City of El Cajon and consists of six acres and 23 tribe members. The tribal chiefs recently signed an agreement with a Las Vegas company to manage their casino and is seeking to buy land for a proposed multi-million dollar casino. A successful attempt to purchase approximately 100 acres adjacent to the current reservation lands could be added into tribal trust lands. This action would be at the financial expense of the County of San Diego and would remove this property from further zoning control.

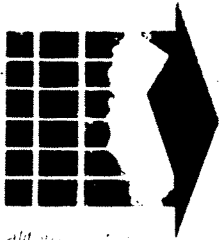
In summary, local government should be closely involved in the decisions made concerning Indian gaming. At the October 1993 Annual Conference of the League of California Cities, a resolution was passed establishing the League's policy to seek legislation which could require gaming establishments to reimburse cities for direct impacts and to defray the direct and indirect costs of public services. Cities should not have to incur additional costs because of the expansion of Indian gaming.

Cities should not have to be concerned with the loss of jurisdiction within their incorporated boundaries through the purchase and subsequent annexation of that property into Indian

reservations. If Indian tribes wish to purchase non-reservation land, they should be required to abide by local land use controls and should pay applicable taxes.

Thank you for the opportunity to address you on this important issue.

APPENDIX S



League of California Cities

1400 K STREET • SACRAMENTO, CA 95814 • (916) 444-5790

Tucson 4016

41. RESOLUTION RELATING TO GAMING ACTIVITIES

Source: Committee on Revenue and Taxation
Referred to: Committee on Revenue and Taxation

WHEREAS, state and federal law now permit various forms of gaming in local areas with or without the consent or concurrence of city officials; and

WHEREAS, various forms of gaming increase the public service demands upon local entities, particularly cities, to provide increasing law enforcement, fire safety, and social welfare services to the gaming establishments and to residents using such facilities, even though often not within city limits; and

WHEREAS, the State of California should recognize its responsibility to provide some form of reimbursement from gaming revenues to offset such costs incurred by local communities, and to negotiate in the determination of amounts of such costs to be reimbursed, and the state should then pass on to cities the portion of such reimbursements related to city services; and

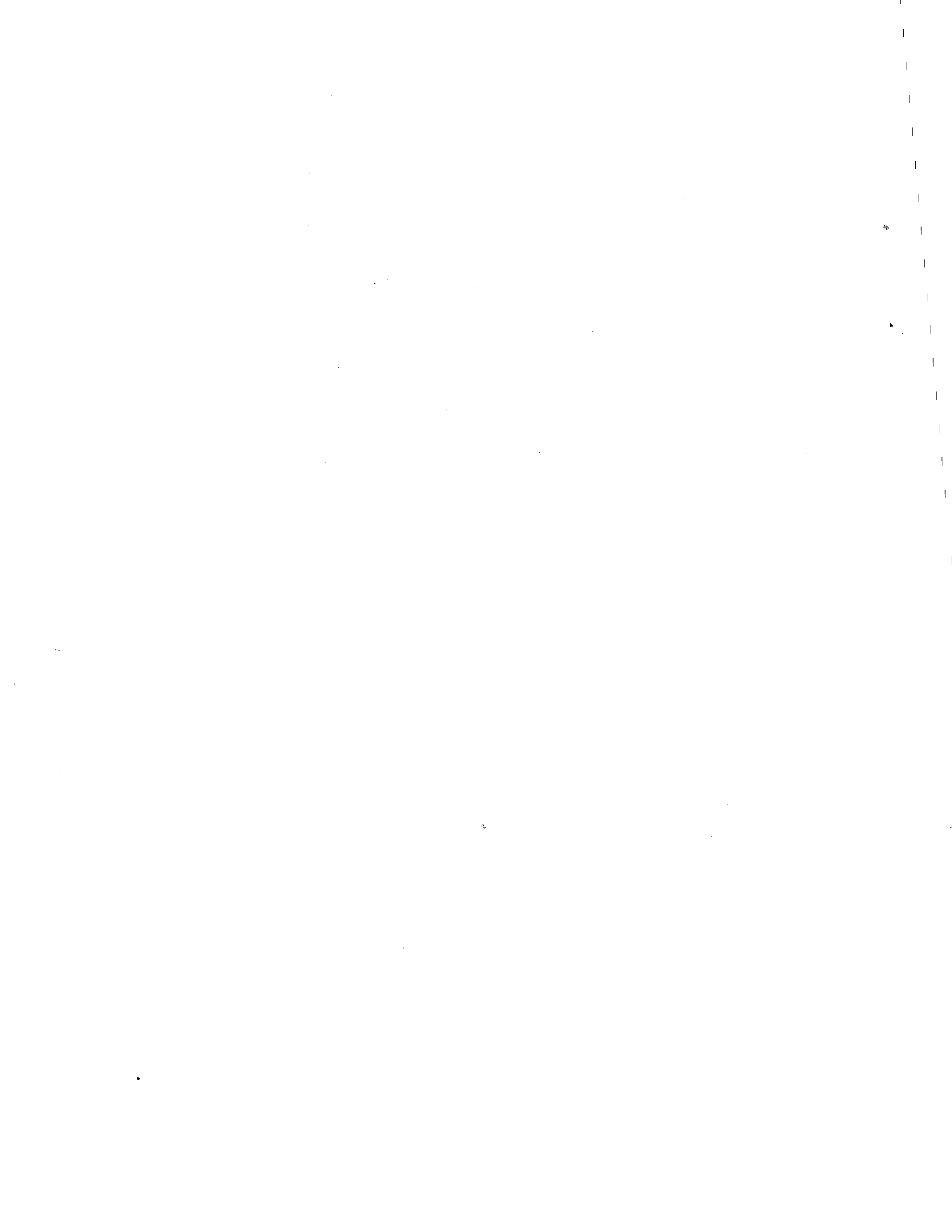
WHEREAS, the League neither supports nor opposes any particular form of gaming, or gaming in general, but is convinced that where gaming occurs, cities should receive reimbursement for the extraordinary costs imposed upon them as a direct result of such gaming activities to mitigate the societal and financial impacts of state-approved gaming; now, therefore, be it

RESOLVED, by the General Assembly of the League of California Cities assembled in Annual Conference in San Francisco, October 19, 1993, that the League support for all gaming, other than locally regulated gaming, the following:

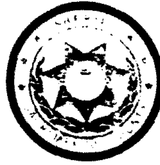
1. The State of California should take the lead in providing reimbursement to cities, and in assuring that any approval or adoption of any new or expanded forms of gaming shall include a provision for reimbursement to cities to defray the direct and indirect costs of public services, and to mitigate the special financial and social impacts of gaming activities in the vicinity of cities, which impacts include increased demands on law enforcement, fire safety, and the often unrecognized social welfare costs arising from the presence of gaming establishments in and near cities; and

2. The State of California should, as part of any gaming negotiations, include in gaming compacts a provision for payment to the state to defray the full direct costs of regulation, including local regulation, and the state should then pass through to cities a reasonable portion of such payments to reimburse local agencies for the costs they incur.

Excerpted from the League of California Cities' 1993 Resolutions



APPENDIX T

SACRAMENTO COUNTY  SHERIFF'S DEPARTMENT

Glen Craig
Sheriff

December 8, 1993

Senator Ralph Dills, Chairman
Senate Governmental Organization Committee
P. O. Box 942848
Sacramento, CA 95814

Dear Senator Dills:

Re: <u>Indian Gaming in California</u>

I was unable to personally attend the Joint Hearing on the issue of "Indian Gaming in California," therefore I am forwarding my comments and concerns to you by letter. Please consider this letter as my written testimony, and incorporate it directly into the legislative record for the Indian Gaming hearing.

In my 38 years as a law enforcement officer, and as a law enforcement official, I can recall no other issue that has the potential to drastically shape the future and direction of this state. For more than 80 years, Californians have consistently voted against casino gambling, because experience in other jurisdictions has shown that gambling creates significant law enforcement and social consequences. Despite this fact, California is now in a position where it must negotiate with the tribes for casino gambling. With 104 tribes in this state -- more than any other state in the Union -- California must take a lead role to ensure that any gaming will be strictly and fairly controlled. Unless we do so, we risk facing a casino landslide that would be catastrophic to the citizens in this State.

The Federal Indian Gaming Regulatory Act was passed to guarantee that Indian tribes would have the ability to operate gambling establishments that offer the same games that are already legal elsewhere in the state, and to do so with less state and local oversight. Unfortunately, this law is so poorly written that tribes throughout the country have interpreted it very broadly and have established full-scale casino operations in states where such operations are patently illegal.

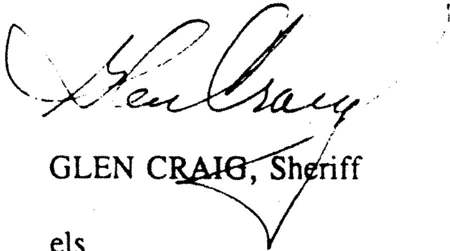
The Federal Gaming Law is simply too broad, and allows for little governmental regulation or enforcement. Unregulated gaming attracts organized crime and other criminals, and degrades public safety in communities. And, because Indian gambling is exempt from taxes, any necessary enforcement or regulatory action would be a burden upon state and local government, and would have to be funded by either raising taxes or diverting funds from other programs. Either way, the taxpayers get the bill.

I am also concerned about the broad interpretation the District Court of Appeal has applied to Indian gaming establishments. The courts have held that any property held in trust for the tribe, regardless of the location or when it was acquired, can be used for the purpose of Indian gaming. The opportunities for graft are very obvious and very real. As long as that property is held in trust for the tribe, the tribe can sublet it to anyone else, and it could still be utilized as a gambling operation. In addition, our port cities of San Francisco, Los Angeles and San Francisco have been clamoring for a return to cruise ship gambling off the coast to boost local revenue. Indian reservations are seeking authority to conduct casino gambling for much the same reason. Therefore, if we allow cruise-ship gambling, then we also allow tribes to operate full-scale casino gambling, pursuant to the provisions of the Federal Indian Gaming Regulatory Act.

For these reasons, I strongly oppose the expansion of Indian Gaming in California, both as a concerned law enforcement official and as a concerned citizen of this state. The establishment of a State Gaming Commission, and the agreement upon a compact with the Indian tribes to set limits on the operation and location of gaming facilities are the key elements to ensure that unscrupulous or criminal elements do not gain control here in California.

Thank you for the opportunity to provide my opinion and comment.

Very truly yours,



GLEN CRAIG, Sheriff

els

APPENDIX U

INDIAN GAMING

by M. J. HANNIGAN
Commissioner
California Highway Patrol

I'm Maury Hannigan, Commissioner of the California Highway Patrol. I appreciate the opportunity to give you my perspective on the issue of indian gaming and its impact on our State.

Congress virtually dropped a hot potato in the lap of every State that is home to Native American Indian tribes when they produced the Indian Gaming Regulatory Act (IGRA) of 1988.

There is no question that Native Americans have every right to seek ways to better support their tribes. Where the law allows, that would include negotiating agreements for legal gaming on tribal lands.

What we, also California citizens, have every right to expect, is that these gaming activities will be subject to the same laws and restrictions as any other gaming activity under California State Law.

States <u>must</u> have the authority to determine what is in their own best interests. The IGRA places California in the same situation as the other 49 states. However, as a bigger and more complicated State, our uniqueness is often both an advantage and a disadvantage.

With indian gaming, the disadvantages become more obvious and more pronounced. California's unique geography, its complicated social structure, and the wide cultural and economic differences within the State, all contribute to this.

California has over 40 main tribes. When we add to that figure the recognized sub-groups that make up tribes, the total number of indian tribes in the State swells to well over 100.

The demands of gaming laws are widespread; cruise ship operators are pressuring for gambling on ships off the coast of our three large port cities, threatening to take their business elsewhere if they are not allowed to partake of this revenue generating activity.

At the same time, however, California voters have consistently voted against casino gambling. Wholesale gambling, while <u>very</u> revenue generating, brings with it a whole host of social consequences and law enforcement confrontations.

Without safeguards in place to adequately address the criminal influences, and to protect the tribes from incompetent management, the public, as well as the tribes, are, and will continue to be, subjected to large scale fraud.

The IGRA is filled with loopholes and ambiguous language that the tribes have interpreted very broadly. The courts have generally agreed with the tribes, and unfortunately, have ignored the original intent of Congress.

We, as leaders, are now left to ferret out our responsibility and to act in the best interests of the 31 million citizens of this State. It is important that changes must be made soon to the IGRA.

Congress must address the problems this legislation has caused, and when addressing the problems, give states regulatory oversight over gaming on tribal land.

APPENDIX V

JOINT

LEGISLATIVE

COMMITTEE

ON

GOVERNMENTAL

ORGANIZATION

JOINT LEGISLATIVE COMMITTEE ON GOVERNMENTAL ORGANIZATION

CHAIRMAN: CURTIS TUCKER

SUBJECT: INDIAN GAMING

INTRODUCTION:

San Diego County is the second largest county in the State of California with an overall population of over two-million. Just across the border, in Mexico, are several million people who have easy access to San Diego. With these combined populations, we have an enormous market for casino gambling.

The county is home to nineteen Indian Reservations of varying geographic size and population. At present, there are three major Indian gaming facilities in San Diego

County. These Indian gaming operations are located on the Barona, Sycuan and Viejas Reservations.

Pala, Rincon and San Pasqual Indian tribal leaders are currently negotiating with Indian gaming management companies. San Diego County could have as many as seven Indian gaming facilities in the near future.

On April 15, 1983, the first bingo operation in California opened on the Barona Indian Reservation. In 1981, the Barona Indians had signed a contract with AMERICAN MANAGEMENT & AMUSEMENT. That company was a Los Angeles-based corporation with documented ties to East Coast organized crime families.

Shortly after the opening of the Barona Indian gaming casino, the San Diego Sheriff's Department started receiving numerous complaints. Members of the management company and workers at the casino were accused of skimming profits and rigging the games. Although drawing large crowds, the casino was losing money. Through informants and other sources, it was determined that an

enormous amount of money was being "skimmed" from the bingo operation through "Shill" players.

In December 1985, a search warrant was executed at the Barona Casino. Stewart SIEGEL, the general manager of the Barona Casino, was subsequently indicted by a grand jury for his part in the skimming. Stewart SIEGEL had many ties to organized crime. SIEGEL is known to have assisted a group involved in a double homicide in Los Angeles. A member of that group was also involved in a triple homicide in Las Vegas. This subject frequently visited SIEGEL at the Barona Casino.

The Barona bingo hall was closed prior to the end of the investigation. Several management companies then attempted to revive the operation. A new management company, BINGO ENTERPRISES, INC. reopened the bingo operation and installed illegal slot machines.

On April 27, 1989, thirty illegal slot machines were seized by the San Diego Sheriff's Department. The Indians request for their return was refused and the machines were ordered destroyed. The bingo hall again closed and BINGO ENTERPRISES filed for protection and financial reorganization under Chapter 11. The company said that the loss of the slot machines caused the bankruptcy.

In December of 1991, the bingo casino reopened under the management of NATIONAL GAMING INC. Emmett MUNLEY, a principal of NATIONAL GAMING INC., is known to have ties to organized crime.

While NATIONAL GAMING INC. was managing the bingo operation at Barona, the INLAND CASINO CORPORATION opened a cardroom at the casino. Don SPEER is a principal in the INLAND CASINO CORPORATION. SPEER is an associate of Emmett MUNLEY. When MUNLEY left Barona, INLAND CASINO CORPORATION assumed the management of the entire casino.

On October 30, 1991, ninety illegal slot machines were seized from the BARONA Casino.

On December 9, 1991, a federal judge issued an injunction in San Diego prohibiting local authorities from enforcing gaming laws on San Diego County Indian reservations. However, the same federal judge refused the tribes' request that the slot machines be returned to the casinos. Instead, the judge ordered the Sheriff's Department to return the slot machines to their respective manufacturers.

After the tribe negotiated a compact with the California Horse Racing Board, a 250 seat off-track wagering facility opened at the Barona Casino on July 4, 1992.

Currently, there are 600 to 800 illegal slot machines at the Barona Casino. Presently under construction is a 36,000 square foot structure which will house about 400 more illegal slot machines.

SYCUAN INDIAN GAMING:

On November 25, 1983, a 1400 seat bingo hall opened on the Sycuan Indian Reservation. The tribe signed an agreement with PAN AMERICAN MANAGEMENT, a Florida corporation. PAN AMERICAN MANAGEMENT was believed to be an off-shoot of SEMINOLE MANAGEMENT. SEMINOLE MANAGEMENT started the first Indian bingo operation on the Seminole Indian Reservation in 1979. A principal in SEMINOLE MANAGEMENT had ties to Meyer LANSKY who was considered the financial wizard of organized crime.

On August 22, 1984, a search warrant was served on the Sycuan gaming facility. The management company had constructed an elaborate casino on the second floor of the bingo hall. The casino offered such games as "Bingo-jack", "Bingo Horse Racing" and "Do-It-Yourself Bingo". These games were actually blackjack and variations of keno. Numerous gaming tables and gaming devices were seized.

In March 1985, a Municipal Court judge ruled that the seized tables and devices were illegal. This equipment was subsequently destroyed by order of the court.

In January 1987, Sycuan opened a 24-hour, 7-day-a-week cardroom.

In December 1987, the Sycuan tribe successfully petitioned in federal court to have PAN AMERICAN MANAGEMENT removed from their bingo operation. The Sycuan tribe desired to manage their own gaming facility.

Richard GORDON was brought in to manage the cardroom. GORDON was implicated in the Stardust Hotel skimming investigation. As a result of that investigation, GORDON was convicted of tax evasion in 1982. In 1989, GORDON was fired by the tribe for the alleged use and sales of narcotics on the reservation.

In November 1988, the Sycuan Indians entered into a five-year agreement with FIRST ASTRI CORPORATION. FIRST ASTRI CORPORATION

financed and developed the three million dollar gaming complex now in operation on the reservation.

In September 1989, a compact was negotiated with the California Horse Racing Board, for off-track satellite wagering.

In 1990, the new Sycuan Gaming casino opened. The facility included a bingo hall, a cardroom, restaurant and off-track wagering.

On October 30, 1991, a search warrant was served at the Sycuan casino. A total of 49 illegal slot machines were seized at that time.

The full service casino at Sycuan offers all types of gambling including Pai Gow poker. Pai Gow is a separate entity within the casino. Persons involved in money laundering and skimming activities are drawn to Pai Gow because there is a lack of accountability as to how much money is run through the operation.

As of November, 1993, there are in excess of 100 illegal slot machines at the Sycuan casino.

VIEJAS INDIAN GAMING:

In 1985, a company from Texas, called EAGLE MISSION, proposed to operate a gaming facility at Viejas. They met with the Sheriff's Department and displayed a set of

elaborate plans for the construction of a casino and hotel complex. Two of the subjects listed on the proposal as operators of the casino were Emmett MUNLEY and Don SPEER. This operation failed due to a legal battle among investors.

In 1989, the 230 member tribe formed its own subsidiary, the WILLOWS CORPORATION. Richard GORDON, the convicted tax evader and former manager of SYCUAN bingo, was hired to manage their card room.

In February 1990, Viejas opened the VIEJAS VALLEY CASINO, a 10,000-square foot Las Vegas-style gambling hall.

In 1991, Richard GORDON was fired by the tribe because he allegedly embezzled over $400,000 from the operation.

In September, 1991, after extensive remodeling financed by new investors, VIEJAS CASINO held a grand opening. Two of the new investors were found to have been convicted of violating Michigan State gambling laws. The two men, Imad ("Detroit Eddie") SAMOUNA and Fred SALEM, were excluded and ruled off all racetracks worldwide. It is believed money acquired through the illegal gambling enterprises in Michigan was invested into the Viejas operation.

M&D FOODS applied for and received an Alcoholic Beverage License to operate at the Viejas Casino. One of the owners of M&D FOODS is Isodoro ("Teddy") MATRANGA who has ties to Detroit organized crime.

On October 30, 1991, 146 illegal slot machines were seized at the Viejas casino. This warrant service was in conjunction with the warrant service at the Barona and Sycuan casinos.

Several weeks ago, there were approximately 400 illegal slot machines at the Viejas casino. It is believed that recently three truck loads of the machines were brought in from Arizona.

On March 30, 1992, all of the slot machines confiscated from the three casinos were found to be illegal under federal guidelines. The federal judge would not permit the return of these machines to the casinos. The San Diego Sheriff's Department was ordered to release the machines to their respective manufacturers. Since the return of the seized illegal slot machines to their respective manufacturers, all three casinos have new illegal slot machines at their facilities.

RINCON INDIAN GAMING:

On March 10, 1984, the first bingo hall opened on the Rincon Indian Reservation. The management company, S-G & ASSOCIATES, was

owned by two subjects, Charles SCHLEGEL and Henry GADSDEN. GADSDEN had a three-page rap sheet containing a multitude of felony charges.

On June 20, 1985, the Rincon bingo operation closed their doors. The Indians claimed that S-G & ASSOCIATES owed them $400,000. The tribe never received any money from this operation.

On May 31, 1986, Rincon bingo re-opened under the management of SOUTHWEST INDIAN CONSULTANTS and, in October of 1986, a poker casino opened adjacent to the bingo hall under the management of Craig PHILLIPS.

PHILLIPS is known to be an associate of Long Beach area bookmakers. Organized crime subject, Chris PETTI, and convicted bookmaker, Joe BASSI, had been frequently observed together at the Rincon poker casino.

On November, 1986, Craig PHILLIPS abandoned the Rincon card room operation and left San Diego. Glen CALAC, an Indian with relatives at Rincon, started managing the poker casino. Prior to becoming manager, CALAC was a security guard for the operation. While CALAC was operating the casino, he refused to turn over any of the proceeds to the tribe. CALAC has an extensive arrest record including an arrest for murder.

On December 12, 1986, a search warrant was served at the Rincon casino. All illegal gaming equipment was seized. Twenty-nine players were arrested for participating in illegal games.

In April 1989, the Rincon tribe signed a contract with a of Los Angeles management company who promised to put $500,000 into the bingo operation. One of the principals of this company is believed to have connections to Chinese organized crime. The hall opened May 20, 1989 and remained open for approximately three days when a problem with the electrical system caused it to close. The bingo hall never re-opened.

In the summer of 1987, federal and San Diego county law enforcement agencies

initiated an investigation pertaining to the infiltration of the Rincon Indian gaming operation by Chicago organized crime. The case involved a roving wire-tap on San Diego organized crime figure, Chris PETTI. PETTI, who came to San Diego from the Chicago area, had long been connected with Chicago organized crime. The case was developed through wire-taps, surveillance, and undercover operations. Early in 1993, the following people were convicted of attempting to use the Rincon Indian gaming operation as a vehicle for money laundering and skimming: John DIFRONZO (Boss of the Chicago Mob), Donald ANGELINI (AKA:"The Wizard of Odds"), Chris PETTI (renowned San Diego organized crime figure), and Glen CALAC (related to Rincon Tribal members).

CONCLUSION:

In the ten-plus years that Indian gaming has been in existence in San Diego County, it has been the target of organized crime, thieves and con men. Bookmakers frequent Indian gaming casinos without restriction, frequently acting as the "bank" in card games. Unscrupulous managers have exploited the tribes. Ever increasing numbers of illegal gaming machines are appearing in Indian gaming casinos throughout San Diego county.

It appears that gaming is the economic hope for the future of California Indian tribes. It is obvious that there must be guidelines established to protect them from the criminal element. Nevada, New Jersey and

some states with Indian gaming, have established gaming commissions. Management personnel and key employees must submit to extensive background investigations. Until California establishes a gaming commission of its own, Indian tribes will continue to be exploited.

Indian gaming investigations have been taken out of the hands of local law enforcement by the courts. Public Law 280, however, still gives the San Diego Sheriff's Department the responsibility for law enforcement on San Diego County's Indian reservations.

By 1996, it is anticipated that San Diego County will have seven Indian gaming casinos

SONOMA JOE'S
CASINO
RESTAURANT - SPORTS BAR

FAX TO: CHAIRMEN DILLS AND TUCKER
FROM: MIKE LIPPITT, PARTNER, SONOMA JOE'S CASINO ML
DATE: DECEMBER 3, 1993

I sat in utter amazement at your joint committees' endurance, patience and commitment during the recent "Indian Gaming" hearings in Sacramento. I was also clearly impressed by the committees' awareness of how gaming is being politicized and treated as an unsavory enterprize rather than a viable industry.

As a small cardroom owner, coming to this business through recreational play, I must add my voice to others you heard who discussed the significant policing that goes on at the local level. In fact, our local ordinance is much more restrictive than State regulations.

I want to make two additional points which were not made, per se. First, gaming certainly needs regulation, but oversite must be by an entity that encourages the business aspects of the industry. Gaming is now under the auspicies of an Office which defines the industry by its most negative aspects and potential.

Secondly, in spite of Mr. Hardy's somewhat disparaging remarks about Indian Gaming, the more important point is the complete competitive disadvantage cardrooms have compared to Indian casinos. The potential for significant general fund revenue will come from:

1) defining casino games allowed in California, and,

2) making these games available to Class I cardrooms and then taxing revenues from that new income stream.

Those options may solve a number of problems, including the possiblity of addressing pending legal issues, not overtaxing current cardroom incomes which already heavily support some local jurisdictions, and creating a level playing field between Indian Gaming and the Cardroom Industry.

I'm sure you and your committee members are aware of the points I'm raising. But, being civic-minded, I felt compelled to both thank you for your sincere interest and add my thoughts to the input you've already received.

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