



1-1-2014

Chapter 51: Approval of Tribal-State Gaming Agreements Governing California's First Off-Reservation Casino

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Recommended Citation

Nicholas Kump, *Chapter 51: Approval of Tribal-State Gaming Agreements Governing California's First Off-Reservation Casino*, 45 MCGEORGE L. REV. 521 (2014).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol45/iss3/11>

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Chapter 51: Approval of Tribal-State Gaming Agreements Governing California's First Off-Reservation Casino

Nicholas Kump

Code Sections Affected

Government Code § 12012.59 (new)
AB 277 (Hall); 2013 STAT. Ch. 51

I. INTRODUCTION

Tribal gaming in California has a distinctive history of pushing the legal limits.¹ Today, as the casino gambling market reaches its saturation point, tribes continue to push the limits by looking for ways into new markets and new opportunities.² Chapter 51 paves the way for California's first off-reservation casino project.³ The casino authorized by Chapter 51 belongs to a tribe that has land eligible for gaming in a remote location, but the casino will be in a different, more lucrative location some distance from the existing reservation land.⁴

The original reservation established for the North Fork Rancheria of Mono Indians (North Fork Tribe) in 1916 is located in North Fork, California⁵ along with the tribal government's current headquarters.⁶ Chapter 51 ratifies a tribal-state gaming agreement governing the operation of a casino in Madera, thirty-six miles from the North Fork Rancheria.⁷ Chapter 51 also ratifies a tribal-state gaming agreement with the Wiyot Tribe, which has agreed to abstain from pursuing gaming activities on its eighty-eight-acre reservation near the Humboldt Bay National Wildlife Refuge in exchange for payments from the North Fork

1. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987) (holding that California's gambling laws did not apply on Indian reservations); Peter L. Stahl, *California Propositions 94–97: Indian Gaming Compacts—NO*, CAL. PROGRESS REPORT (Jan. 7, 2008), <http://www.Californiaprogressreport.com/site/california-propositions-94%E2%80%9397-indian-gaming-compacts-%E2%80%93no> (on file with the *McGeorge Law Review*) (discussing four propositions that would permit twenty-five thousand more slot machines for four Indian tribes).

2. See Mike O'Donnell, *Indian Tribes Planning Online Assault*, CALVIN AYRE.COM (Feb. 19, 2013), <http://calvinayre.com/2013/02/19/casino/indian-tribes-planning-online-assault/> (on file with the *McGeorge Law Review*) (stating that in California “critical mass is being reached” and tribes are looking for new opportunities such as off-reservation casino projects and online gambling).

3. Greg Lucas, *State's First Off-Reservation Tribal Casino Poised for OK*, CAPITOL WEEKLY (June 24, 2013, 5:00AM), http://www.capitolweekly.net/article.php?_c=11j0q19eqw2psjh&xid=11j0itqxm51p1e&done=.11j0q19eqw2ysjh (on file with the *McGeorge Law Review*).

4. *Id.*

5. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 277, at 9 (June 21, 2013).

6. *Tribal Offices*, NORTH FORK RANCHERIA OF MONO INDIANS, <http://www.northforkrancheria.com/page.cfm?pageID=55> (last visited July 23, 2013) (on file with the *McGeorge Law Review*).

7. Lucas, *supra* note 3.

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Tribe.⁸ The law represents the first legislative approval of an off-reservation casino, as well as the first use of dependent compacts with direct revenue sharing between tribes.⁹ Thus, Chapter 51 changes California's policy toward Indian gaming in several key ways.¹⁰

II. LEGAL BACKGROUND

Section A of this Part summarizes the federal law that governs Indian gaming in California.¹¹ Section B discusses the California law that controls Indian gaming in the state.¹² Section C examines the process that the North Fork Tribe used to acquire the land in Madera for gaming in California.¹³

A. Indian Gaming Regulatory Act

In the United States, the Indian Gaming Regulatory Act (IGRA) governs Indian gaming.¹⁴ IGRA divides Indian gaming into three categories, with the lucrative Las Vegas-style slot machines classified as "class III."¹⁵ Casinos and gambling are generally prohibited in California, with limited exceptions including Indian gaming and the California Lottery.¹⁶ IGRA permits Indian tribes to engage in class III gaming on Indian land if the tribe adopts an ordinance authorizing gaming, the site is located in a state that permits class III gaming, and the tribe and state enter into a compact "governing the conduct of gaming activities."¹⁷ The Secretary of the Interior has the authority to disapprove the compact.¹⁸

8. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 277, at 12–13 (June 21, 2013).

9. *See infra* Part IV (explaining how Chapter 51 expands the matters that can be included in a tribal-state gaming compact and sets a precedent that tribes with existing land technically eligible for gaming can still acquire new land).

10. *Id.*

11. *Infra* Part II.A.

12. *Infra* Part II.B.

13. *Infra* Part II.C.

14. Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2702 (2006) ("The purpose of this chapter is . . . 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. . . .").

15. *See id.* § 2703 (6)–(8) (defining class I gaming as traditional social games for Tribes, class II as bingo and non-banked card games authorized by the State, and class III as "all forms of gaming that are not class I gaming or class II gaming"). The scope of class III games under the North Fork Compact is limited and does not include dice games or craps. TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE NORTH FORK RANCHERIA OF MONO INDIANS OF CALIFORNIA § 3.1 (2012), *available at* http://gov.ca.gov/docs/Final_Compact___North_Fork.pdf (on file with the *McGeorge Law Review*) [hereinafter NORTH FORK COMPACT] ("Nothing herein shall be construed to authorize the operation of the game known as roulette . . . or the operation of any game that incorporates the physical use of a die or dice.").

16. CA CONST. art IV, § 19.

17. 25 U.S.C. § 2710(d)(1), (2).

18. *Id.* § 2710(d)(8)(B) (stating that the Secretary can disapprove the compact if any provision of the

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The location of the casino must be on “Indian land,”¹⁹ as defined by IGRA.²⁰ Generally, the land must be taken into trust by the federal government for the tribe prior to October 17, 1988 with four exceptions.²¹ Under the first IGRA exception for tribes like North Fork with land already in trust, the tribe can acquire additional land for a casino if the Secretary of the Interior “determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe . . . and would not be detrimental to the surrounding community.”²² The governor of the state where the casino is to be built must also concur in these two determinations.²³

IGRA also provides specific matters that the compact may address,²⁴ including a final broad clause that allows for “any other subjects that are directly related to the operation of gaming activities.”²⁵ However, IGRA does not authorize states to impose taxes on tribes who engage in gaming.²⁶ While IGRA does not permit states to tax tribes, it does allow for the collection of costs related to regulating gaming.²⁷ Additionally, it does “not [prohibit] states from *negotiating* for such payments where ‘meaningful concessions’ are offered in return.”²⁸

compact violates “(i) any provision of this chapter, (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”).

19. *Id.* § 2710(d)(1).

20. *Id.* § 2719.

21. *Id.* § 2719(b) (stating that IGRA applies to land taken into trust by a tribe with existing land seeking additional land for gaming under a two-part determination, or land “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”).

22. *Id.* § 2719(b)(1)(A).

23. *Id.*

24. *Id.* § 2710(d)(3)(C)(i)–(vii) (discussing (i) application of laws related to licensing class III gaming; ii) enforcement of laws; iii) reimbursement of the State for costs of regulating class III gaming; iv) taxation by the tribe; v) remedies for contract damages; vi) standards for operation and maintenance of the casino; and vii) any subjects directly related to the operation of gaming activities).

25. *Id.* § 2710(d)(3)(C)(vii).

26. *Id.* § 2710(d)(4).

27. *Id.* § 2710(d)(3)(C)(iii).

28. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1036 (9th Cir. 2010); Letter from Larry Echohawk, Assistant Sec’y–Indian Affairs, U.S. Dep’t of the Interior, to Leona Williams, Chairwoman, Pinoleville Pomo Nation (Feb. 25, 2011) [hereinafter Echohawk Letter] (on file with the *McGeorge Law Review*) (“[A] ‘meaningful concession’ exists where the State concedes something it was not otherwise required to negotiate and to which the Tribe is not already entitled. Moreover, the parties must show that the purported ‘meaningful concession’ was not merely a necessary and ordinary result of good faith compact negotiations.”).

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B. Proposition 1A

As required by IGRA,²⁹ California approved Indian gaming with Proposition 1A in March 2000.³⁰ Proposition 1A amended the California Constitution to allow the governor to negotiate tribal-state compacts that establish the terms for tribes to operate casinos in California.³¹ Tribes supporting Proposition 1A specifically stated that they would “keep the gaming we have on our reservations” and rebutted concerns that casinos could pop up all over California.³² Californians voted to support Indian gaming with those assurances written on the voter information guide.³³

C. The North Fork Tribe Acquires Land in Madera

The North Fork Tribe acquired its land for gaming as a result of the two-part determination process in IGRA.³⁴ The Assistant Secretary of the Interior found that taking the land into trust in Madera was in the best interest of the North Fork Tribe and was not detrimental to the surrounding community.³⁵ Although the North Fork Tribe was not required to demonstrate a historic connection to the land under IGRA, the Assistant Secretary did find that the North Fork Tribe had a historic connection to Madera.³⁶ A year later, Governor Jerry Brown concurred with the Secretary’s decision to take the land in Madera into trust for the benefit

29. 25 U.S.C. § 2710(d)(1)(B)(2012) (requiring that the state in which the Tribe seeks to conduct gaming in legalizes Indian gaming).

30. MARCH 7, 2000 PRIMARY STATEMENT OF THE VOTE 146, *available at* <http://www.sos.ca.gov/elections/sov/2000-primary/sov-complete.pdf> (last visited Feb. 8, 2014) (on file with the *McGeorge Law Review*) (passing with 64.5 percent of the vote).

31. CA CONST. art IV, § 19(f).

[T]he Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts. *Id.*

32. Voter Guide, Gambling on Tribal Lands. Legis. Constitutional Amendment, *available at* <http://primary2000.sos.ca.gov/VoterGuide/pdf/1a.pdf> (on file with the *McGeorge Law Review*) (“Proposition 1A and federal law strictly limit Indian gaming to tribal land. The claim that casinos could be built anywhere is totally false.”) (quoting Carl Olson, former federal field investigator, Nat’l Indian Gaming Comm’n). Bruce Strombom, economist and author of the only comprehensive economic impact study of Indian gaming in California, also stated that “[t]he majority of Indian Tribes are located on remote reservations and the fact is their markets will only support a limited number of machines.” *Id.*

33. *Id.*; MARCH 7, 2000 PRIMARY STATEMENT OF THE VOTE, *supra* note 30.

34. Press Release, U.S. Dep’t of the Interior, Assistant Sec’y Echohawk Issues Four Decisions on Tribal Gaming Applications (Sept. 2, 2011) (on file with the *McGeorge Law Review*).

35. *Id.*

36. Letter from Larry Echohawk, Assistant Sec’y – Indian Affairs, U.S. Dep’t of the Interior, to Edmund G. Brown Jr., Governor, State of California (Sept. 1, 2011) (on file with the *McGeorge Law Review*).

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of the North Fork Tribe,³⁷ satisfying the governor's concurrence requirement in IGRA.³⁸

III. CHAPTER 51

Chapter 51 ratifies two tribal-state gaming compacts.³⁹ One compact is between the North Fork Tribe and the State of California (North Fork Compact),⁴⁰ and the second compact is between the Wiyot Tribe and the State of California (Wiyot Compact).⁴¹ Section A of this Part discusses the common provisions of Chapter 51 that relate to both tribal-state compacts.⁴² Section B examines the specifics of the North Fork Compact ratified by Chapter 51,⁴³ and Section C discusses the details of the Wiyot Compact.⁴⁴

A. *Provisions of Chapter 51 Concerning Both Compacts*

The Wiyot and North Fork compacts are detailed agreements between the tribes and State that specify the terms by which the North Fork Tribe may operate a Las Vegas-style casino in Madera, California.⁴⁵ The compacts provide that in exchange for the Wiyot Tribe agreeing not to pursue a casino on its sensitive lands in the Humboldt Bay, the North Fork Tribe will pay a percentage of the net win⁴⁶ from gaming devices⁴⁷ to the Wiyot Tribe.⁴⁸

37. Press Release, Office of Governor Edmund G. Brown, Governor Brown Concurs with U.S. Dep't of the Interior Decision, Signs Compact with North Fork Rancheria (August 31, 2012), *available at* <http://www.gov.ca.gov/news.php?id=17700> (on file with the *McGeorge Law Review*).

38. 25 U.S.C. § 2719(b)(1)(A)(2012). This concurrence by the governor regarding taking the land into trust in Section 2719(b)(1)(A) is a distinct requirement from the ratification of a tribal-state gaming compact required under IGRA to govern the gaming activities on the land. *Id.* § 2710(d)(1)(C).

39. *See* CAL. GOV'T CODE § 12012.59 (a)(1), (2) (enacted by Chapter 51) (ratifying compacts with the North Fork Tribe and the Wiyot Tribe).

40. *Id.* § 12012.59 (a)(1) (enacted by Chapter 51).

41. *Id.* § 12012.59 (a)(2) (enacted by Chapter 51).

42. *Infra* Part III.A

43. *Infra* Part III.B.

44. *Infra* Part III.C.

45. NORTH FORK COMPACT, *supra* note 15 (detailing the terms of the agreement in a 233-page document by which the North Fork Tribe operates a casino and the Wiyot Tribe agrees not to operate a casino); TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE WIYOT TRIBE (2012), *available at* http://gov.ca.gov/docs/Wiyot_Compact.pdf (on file with the *McGeorge Law Review*) [hereinafter WIYOT COMPACT] (agreeing not to open a casino on its reservation in exchange for payments from the North Fork Tribe).

46. NORTH FORK COMPACT, *supra* note 15, at § 2.25 (“‘Net Win’ means drop, plus the redemption value of expired tickets, less fills, less payouts, less that portion of the Gaming Operation’s payments to a third-party wide-area progressive jackpot system provider that is contributed only to the progressive jackpot amount.”).

47. *Id.* § 2.13 (“‘Gaming device’ means any slot machine within the meaning of article IV, section 19, subdivision (f) of the California Constitution . . . includ[ing] video poker. . .”).

48. *Id.* § 5.2; WIYOT COMPACT, *supra* note 45, at § 4.

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Chapter 51 acknowledges that both the Wiyot Tribe and North Fork Tribe are sovereign governments⁴⁹ and exempts several matters related to the execution of the two compacts from meeting the requirements of the California Environmental Quality Act (CEQA).⁵⁰ However, only the Tribal Governments are exempt from CEQA.⁵¹ None of the local government bodies that establish intergovernmental agreements with the tribes are exempt from the requirements of CEQA.⁵² The North Fork Compact still requires analysis of the environmental impacts of the North Fork Casino through a Tribal Environmental Impact Report examining the off-reservation impacts of the project.⁵³

B. North Fork Compact

The North Fork Compact authorizes the North Fork Tribe to operate a casino with up to two thousand slot machines and prohibits any other Indian tribe from opening a casino within a sixty-mile radius.⁵⁴ The North Fork Tribe must make quarterly payments to the State Gaming Agency for deposit into the Revenue Sharing Trust Fund to support non-gaming tribes in California.⁵⁵ This includes a payment to compensate the Chukchansi Tribe for the North Fork Casino's impact on Chukchansi's casino.⁵⁶ However, prior to the payment to the State Gaming Agency, the North Fork Tribe makes several deductions from the total, including its payments to the state for the impacts of the casino,⁵⁷ its payment to the Wiyot Tribe for agreeing not to operate a casino,⁵⁸ and several others.⁵⁹

The North Fork Compact mitigates the impact of the North Fork Casino on the nearby Chukchansi Gold Resort & Casino in Coarsegold, California.⁶⁰ For

49. CAL. GOV'T CODE § 12012.59 (b)(1) (enacted by Chapter 51).

50. *Id.* § 12012.59 (b)(1)(A)–(F) (enacted by Chapter 51).

51. *Id.* § 12012.59 (b)(1) (enacted by Chapter 51).

52. *See id.* § 12012.59 (b)(2) (enacted by Chapter 51) (“[T]his subdivision does not exempt a city, county, or city and county, or the Department of Transportation, from the requirements of the California Environmental Quality Act.”).

53. NORTH FORK COMPACT, *supra* note 15, at §11.8.1.

54. *Id.* § 4.1.

55. *Id.* §§ 4.6, 5.1 (starting with a payment of ten percent of net win from gaming devices in year one and accelerating up to fifteen percent in year six continuing until the compact expires).

56. *Id.* § 4.5.

57. *Id.* §§ 4.3, 4.7(a) (stating that the North Fork Tribe shall pay its “pro rata share” to reimburse the state’s costs of its duties under all Class III Gaming compacts including the California Gambling Control Commission, California Department of Alcohol and Drug Program, and others, with the pro rata share determined by the proportion of North Fork’s slots machines to the total number of slot machines in the state).

58. *Id.* § 4.7(b).

59. *See id.* § 4.7(c)–(h) (including mitigation payments made to the Chukchansi Indians, payments made pursuant to Memorandums of Understanding with Madera City, County, and Irrigation District, payments to the California Department of Transportation, and after six years for environmental mitigation as required in section 11 of the compact).

60. *Id.* § 4.5.

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example, the North Fork Tribe agrees not to open a hotel until July 2018,⁶¹ and between the time the North Fork Tribe secures financing and the casino opens, the North Fork Tribe agrees to make Chukchansi's payment into the Revenue Sharing Trust Fund pursuant to Chukchansi's 1999 compact.⁶² After gaming begins at the North Fork Casino, the North Fork Tribe agrees to pay between 2.5 and 3.5% of the net win on gaming devices to Chukchansi until 2020.⁶³ The North Fork Compact also provides that if Chukchansi publicly opposes the North Fork Compact, then this provision providing them payments is automatically eliminated.⁶⁴

The North Fork Compact also requires the North Fork Tribe to establish agreements to mitigate the impact of the North Fork Casino with the City of Madera, Madera County, Madera Irrigation District, and Cal Trans with approval by the Governor.⁶⁵ Under these agreements, the North Fork Tribe will pay more than \$110 million over twenty years for "public safety, education, economic development, housing, job training, parks and recreation, air and water conservation, infrastructure investment, and charitable contributions to local communities."⁶⁶

The North Fork Compact contains numerous provisions that extensively address the operations, procedures, and development of the North Fork Casino, including licensing, inspections, dispute resolution, public health and safety, and many others.⁶⁷ The North Fork Compact automatically expires on Dec. 31, 2033.⁶⁸

C. *Wiyot Compact*

The Wiyot Compact provides five conditions on the Wiyot Tribe's agreement to abstain from conducting gaming on its land.⁶⁹ The payment

61. *Id.* § 4.5(a).

62. *Id.* § 4.5(b) (not to exceed \$768,750 quarterly).

63. *Id.* § 4.5(c) (stating that if net win on the slot machines is zero to one hundred million dollars, Chukchansi receives 2.5 percent of net win on slot machines; one hundred to two hundred million dollars net win on slot machines, Chukchansi receives three percent of net win on slot machines; and if net win on slot machines exceeds two hundred million dollars, Chukchansi receives 3.5 percent of net win).

64. *Id.* § 4.5(f).

65. *Id.* § 4.4.

66. *North Fork Rancheria Project Fiction vs. Fact – Fact Sheet*, NORTH FORK RANCHERIA (Aug. 4, 2008), http://www.northforkrancheria.com/files/NFR%20Fact%20Vs%20Fiction_0806093.pdf (on file with the *McGeorge Law Review*).

67. NORTH FORK COMPACT, *supra* note 15, at §§ 6–13.

68. *Id.* § 14.2 (stating that the compact is in full effect until Dec. 31, 2033). Section 15 of the North Fork Compact provides the terms for renegotiating the compact before the compact expires. *Id.* § 15.

69. See WIYOT COMPACT, *supra* note 45, at § 3.2 (a)–(e) (listing the five conditions as: (a) North Fork Compact not ratified by July 1, 2014; b) State fails to negotiate in good faith; c) State Gaming Agency fails to make payments to Wiyot Tribe as required by the Wiyot Compact; d) if the Wiyot Compact is terminated pursuant to (a), (b), or (c) Wiyot Tribe may request to negotiate a new compact; and e) compact may also be

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schedule in the Wiyot Compact specifies that the Wiyot Tribe will be paid between 2.5 and 3.5 percent of the net win of gaming devices at the North Fork Casino quarterly.⁷⁰ The Wiyot Compact expires December 31, 2033,⁷¹ and can be amended at any time by agreement of the Wiyot Tribe.⁷²

IV. ANALYSIS

Section A of this Part examines how the North Fork Compact changes the scope of Indian gaming under Proposition 1A.⁷³ Section B analyzes the significance of the terms of the North Fork and Wiyot compacts under IGRA for future compacts in California.⁷⁴ Section C analyzes the fiscal impact of Chapter 51.⁷⁵

A. How Does the North Fork Compact Change the Scope of Proposition 1A?

The North Fork Casino will be the first off-reservation casino in California history.⁷⁶ The North Fork Tribe has land eligible for gaming under IGRA, but the logistical challenges make the property in the valley outside of Madera a more feasible alternative.⁷⁷ The Voter Guide presented Proposition 1A to voters in the context of keeping Indian gaming on Indian land, and supporters rebuffed accusations that investors would shop for tribes and reservations to establish lucrative casinos.⁷⁸ However, Chapter 51 opponents argued that is exactly what happened in the case of the North Fork Tribe, with Stations Casinos purchasing

terminated by Tribe pursuant to sections 6.2, 7.2, 7.4, and 7.5 of the Wiyot Compact).

70. *Id.* § 4.1.

71. *Id.* § 6.2(a).

72. *Id.* § 7.2.

73. *Infra* Part IV.A.

74. *Infra* Part IV.B.

75. *Infra* Part IV.C.

76. Marc Benjamin, *Legislators Want New Policy After North Fork Casino Approval*, FRESNO BEE (July 7, 2013), <http://www.fresnobee.com/2013/07/07/3378159/legislators-want-new-policy-after.html> (on file with the *McGeorge Law Review*) [hereinafter Benjamin, *Legislators Want New Policy*].

77. See U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION: TRUST ACQUISITION OF THE 305.49-ACRE MADERA SITE IN MADERA COUNTY, CALIFORNIA, FOR THE NORTH FORK RANCHERIA OF MONO INDIANS § 2.1.3 (2012), available at <http://www.northforkeis.com/documents/rod/ROD.pdf> (on file with the *McGeorge Law Review*) (explaining the original Rancheria is technically eligible for gaming under IGRA but that the land is held in trust for individual Indians rather than the Tribe, the land is steep and remote, and there would be significant community opposition to building a casino there).

78. Voter Guide, *Gambling on Tribal Lands*. *supra* note 32 (“Proposition 1A and federal law strictly limit Indian gaming to tribal land. The claim that casinos could be built anywhere is totally false.”) (quoting Carl Olson, former federal field investigator, National Indian Gaming Commission). Bruce Strombom, economist and author of the only comprehensive economic impact study of Indian gaming in California also stated that “[t]he majority of Indian Tribes are located on remote reservations and the fact is their markets will only support a limited number of machines.” *Id.*

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the parcel near Madera and the North Fork Tribe subsequently announcing it would pursue a casino on the land.⁷⁹

The intent of the voters who supported Proposition 1A was a major point of contention at the legislative committee hearings on Chapter 51.⁸⁰ The Governor's senior advisor, Jacob Applesmith, stated in a committee hearing that the North Fork Tribe is an exceptional circumstance.⁸¹ But the Enterprise Rancheria of Maidu Indians in Butte County is also seeking approval of an off-reservation casino project.⁸² Other tribes are also pursuing similar projects in Barstow⁸³ and Calexico,⁸⁴ among others.⁸⁵

The significant impact of California's first off-reservation casino led several legislators to question the current process for approving such controversial projects.⁸⁶ With numerous off-reservation projects in the works, some contend that Chapter 51 is the first step in the expansion of urban gaming.⁸⁷ However, as proponents of the law argue, it may well be that this project represents nothing more than a unique circumstance that is unlikely to be repeated.⁸⁸

79. Anthony York, *Casino Plan Spurs Critics' Reservations*, L.A. TIMES, June 5, 2013, at 1, available at 2013 WLNR 13763141 (on file with the *McGeorge Law Review*) ("Tribes that own some of California's largest gambling halls say North Fork leaders and their Nevada-based financial backers are 'reservation shopping' to put a casino in a prime location . . . North Fork made its claim to the land in question in 2004, a year after it was purchased by Nevada-based Station Casinos."); Brian Wilkinson, *Group Files to Put Mono Casino to Statewide Vote*, SIERRA STAR (July 16, 2013), <http://www.sierrastar.com/2013/07/16/63674/group-files-to-put-mono-casino.html> (on file with the *McGeorge Law Review*) ("They [the North Fork Tribe] have an established rancheria in North Fork and you would see no opposition from our organization if they were to propose the casino on that established Indian land—Their investors wanted a marketable location on a highway. This is about their investors . . . it's not about North Fork. . .") (quoting Cheryl Schmit, Director of Stand Up for California).

80. See Robert Smith, Chairman, Pala Band of Mission Indians, Testimony at Assembly Committee on Governmental Organization Hearing (April 24, 2013) ("[T]his [Chapter 51] is a dramatic change from what Prop 1A authorized. But this time, the voters [of] California do not get an opportunity to have their voice heard.").

81. Jacob Applesmith, Senior Advisor, Governor Edmund G. Brown Jr., Testimony at Assembly Committee on Governmental Organization Hearing (April 24, 2013).

82. Benjamin, *Legislators Want New Policy*, *supra* note 76.

83. Sam Pearson, *Northern California Off-Reservation Casino Could Be Model for Barstow*, DESERT DISPATCH (July 26, 2012), <http://www.desertdispatch.com/articles/barstow-13327-jobs-casino.html> (on file with the *McGeorge Law Review*).

84. *Is the Calexico Casino Still in the Works?*, IMPERIAL VALLEY PRESS (Dec. 12, 2012), http://articles.ivpressonline.com/2012-12-12/calexico-casino_35804847 (on file with the *McGeorge Law Review*).

85. See *Controversial Applications in Process*, STAND UP FOR CALIFORNIA!, <http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process> (last visited July 8, 2013) (on file with the *McGeorge Law Review*) (listing dozens of proposed off-reservation projects at various stages).

86. Benjamin, *Legislators Want New Policy*, *supra* note 76.

87. See Robert Smith, Chairman, Pala Band of Mission Indians, Testimony at Assembly Committee on Governmental Organization Hearing (April 24, 2013) ("Approval of this casino sends the sign to other Tribes that it does not matter where your reservation is located, California is willing to grant you [a] casino anywhere and in doing so, open the floodgates to urban gaming.").

88. See Howard Stutz, *Indian Casino Project Backed by Station Casinos Moves Ahead*, LAS VEGAS REVIEW-J. (July 8, 2013), <http://www.reviewjournal.com/business/casinos-gaming/indian-casino-project-backed-station-casinos-moves-ahead> (on file with the *McGeorge Law Review*) ("Nelson [Station Casinos']

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B. How Does Chapter 51 Change What Tribes Can Do in California Under IGRA?

IGRA provides specific items that gaming compacts may address, all of which are directly related to the operations and impact of the casino.⁸⁹ Chapter 51 provides for direct revenue sharing with two specific Tribal Governments⁹⁰ for the first time in a gaming compact.⁹¹ These provisions of the compacts serve the ultimate purpose of IGRA: to benefit tribes by sharing the revenue from one tribe's casino with other specific California tribes.⁹² However, the payments ratified by Chapter 51 to the Wiyot and Chukchansi tribes expand the scope of what can be negotiated in a tribal-state gaming compact because payments to other tribes are not listed as a permissible provision in IGRA.⁹³ Congress included these specific items that could be included in a compact to limit the prospect of states taking advantage of tribes who had little leverage to negotiate compacts.⁹⁴ Chapter 51 expands the meaning of "operation of gaming activities" because prior to Chapter 51, that provision only applied to the gaming activities of the tribe opening a casino.⁹⁵ Now, under Chapter 51, "operation of gaming activities" can include the gaming activities of other tribes.⁹⁶

Even if the North Fork Tribe paying the Wiyot Tribe not to operate a casino is considered related to the operation of gaming activities, IGRA also requires that the North Fork Tribe receive "meaningful concessions" in return for its

Chief Development Officer] speculated the North Fork project might be one of the last major Indian gaming developments to be built in California that would involve nontribal land taken into trust. He didn't see any other potential Indian gaming deals for the company.").

89. 25 U.S.C. § 2710(d)(3)(C)(i)-(vii)(2012) (listing (i) application of laws related to licensing class III gaming; ii) enforcement of laws; iii) reimbursal of the State for costs of regulating class III gaming; iv) taxation by the tribe; v) remedies for breach of contract; vi) standards for operation and maintenance of the casino; and vii) any subjects directly related to the operation of gaming activities).

90. See CAL. GOV'T CODE § 12012.59 (a)(1) (enacted by Chapter 51) (ratifying the North Fork Compact); NORTH FORK COMPACT, *supra* note 15, at §§ 4.5, 5.2(a) (listing the Chukchansi and Wiyot tribes).

91. Interview with Alison Harvey, Dir. of Gov't Affairs, United Auburn Indian Community, in Sacramento, Cal. (July 1, 2013) [hereinafter Harvey Interview] (notes on file with the *McGeorge Law Review*).

92. See Letter from Kevin Washburn, Assistant Sec'y-Indian Affairs, U.S. Dept. of the Interior, to Cedric Cromwell, Chairperson, Mashpee Wampanoag Tribe (Oct. 12, 2012) [hereinafter Mashpee Letter] (on file with the *McGeorge Law Review*) (stating that primary purpose of IGRA is to benefit Indian tribes).

93. See *supra* note 89 and accompanying text.

94. Mashpee Letter, *supra* note 92.

Congress expressly sought to prevent states from using gaming compacts to leverage power over sovereign tribes about matters unrelated to gaming. This is especially important because a tribe may be strongly tempted to agree to such terms for political expediency to obtain the state's agreement. The Department must preserve the important balance between tribal and state interests, and the singular focus on gaming, that Congress envisioned when it enacted IGRA. *Id.*

95. Harvey Interview, *supra* note 91.

96. See CAL. GOV'T CODE § 12012.59 (a)(1) (enacted by Chapter 51) (ratifying the North Fork Compact); NORTH FORK COMPACT, *supra* note 15, at § 5.2 (detailing the revenue sharing between the North Fork Tribe and the Wiyot Tribe).

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payments.⁹⁷ The Department of the Interior has rejected compacts that fail to provide “meaningful concessions” in exchange for casino revenue, determining that “meaningful concessions” do not include the ability to operate a casino, regions of complete exclusivity in the state, or low payments to the revenue sharing trust fund, among other things.⁹⁸ One possible “meaningful concession” in the North Fork Compact is in the Preamble where the North Fork Tribe suggests the State’s “meaningful concession” was the Governor concurring in the Secretary of the Interior’s decision to take the Madera land into trust for gaming in 2012 to benefit the North Fork Tribe.⁹⁹ Chapter 51 expands the meaning of “meaningful concession” because this is the first off-reservation casino ever in California and no tribal-state compact has ever used the acquisition of the casino site as the “meaningful concession” in the negotiations with the State.¹⁰⁰

Mitigating the impact of the North Fork Casino on the Chukchansi Casino was also a first of its kind—never in California has one Indian casino shared its revenue with another tribe because of the economic impact one casino has on the other.¹⁰¹ However, those mitigation payments are contingent on Chukchansi not opposing the North Fork Compact.¹⁰² After being warned that its conduct violated the terms of the North Fork Compact,¹⁰³ the Chukchansi Tribe continued to publicly oppose the North Fork Compact.¹⁰⁴ Under IGRA, tribal-state gaming compacts are only permitted to address discrete subject matters including the operation of “gaming activities.”¹⁰⁵ Therefore, the North Fork Compact provision providing for sharing revenue with the Chukchansi Tribe expanded the meaning of “gaming activities” because the provision addressed matters of competition between tribes rather than specific gaming activities at the casino approved by the compact.¹⁰⁶

97. Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019, 1036 (9th Cir. 2010).

98. Echohawk Letter, *supra* note 28 (rejecting the compact tribal-state compact and noting other items outside the scope of meaningful concessions: “a Compact term of 20 years . . . the lack of a requirement for the Tribe to enter into an intergovernmental agreement with the City of Ukiah; ‘State supported constitutional exclusivity’ pursuant to Proposition 1A . . . the conditional nature of the Tribe’s revenue contribution; and, the deduction of participation fees from the calculation of the Tribe’s net win).

99. NORTH FORK COMPACT, *supra* note 15, at Pmb1. (“[I]n consideration of the exclusive rights . . . to engage in certain Gaming Activities . . . the Governor’s decision to concur in the favorable Secretarial determination, and the other meaningful concessions offered by the State . . . the Tribe has agreed . . . to provide to the State . . . a portion of the Tribe’s revenues from Gaming. . .”).

100. Harvey Interview, *supra* note 91.

101. Jacob Applesmith, Senior Advisor, Governor Edmund G. Brown Jr., Testimony at Assembly Committee on Governmental Organization Hearing (April 24, 2013).

102. NORTH FORK COMPACT, *supra* note 15, at § 4.5.

103. Letter from Jacob Applesmith, Senior Advisor to the Governor, to Reggie Lewis, Chairman, Picayune Rancheria of the Chukchansi Indians (Oct. 4, 2012) (on file with the *McGeorge Law Review*).

104. Letter from Reggie Lewis, Chairman, Picayune Rancheria of the Chukchansi Indians, to California Legislators (May 2, 2013) (on file with the *McGeorge Law Review*).

105. See *supra* note 89 and accompanying text.

106. NORTH FORK COMPACT, *supra* note 15, at § 4.5 (detailing the revenue sharing between the North

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C. Fiscal Impact of Chapter 51

The purpose of Indian gaming is to benefit tribes, not the State's general fund.¹⁰⁷ To this end, any payments made to the State mandated by Chapter 51 must be directly related to expenses incurred by the State from the North Fork Casino.¹⁰⁸ As a result, the fiscal benefit to the State is indirect through economic incentives such as jobs, which explains why Chapter 51 is strongly supported by labor unions and some local Madera businesses.¹⁰⁹ The North Fork Tribe estimates that the North Fork Casino will create over five thousand jobs, making it a robust economic engine for union employees.¹¹⁰ The North Fork Casino will certainly benefit its employees as well as the North Fork Tribal members and the Wiyot Tribe, but the benefits may come at the cost of devastating the Chukchansi Tribe—replacing one impoverished Indian tribe with another and union jobs at one casino with union jobs at a different casino for minimal net gain.¹¹¹

Several Indian Tribes opposed Chapter 51.¹¹² The North Fork Tribe claimed this opposition was due to the generosity of the revenue sharing under the North Fork Compact and the precedent set for tribes negotiating new compacts in the future.¹¹³ However, because the North Fork Compact allows the North Fork Tribe to deduct all of its mitigation payments and other revenue sharing from its payment to the Revenue Sharing Trust Fund, the North Fork Tribe will not pay more than fifteen percent of the slot revenue.¹¹⁴ Therefore, the net revenue sharing is comparable to other tribal-state gaming compacts and likely not the opposition's primary motive.¹¹⁵

Fork Tribe and the Chukchansi Tribe). The payments ultimately be forfeited due to the Chukchansi Tribe's public opposition though. Letter from Jacob Applesmith, *supra* note 103.

107. 25 U.S.C. § 2702 (2012) ("The purpose of this chapter is . . . 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").

108. *See id.* § 2710(d)(3)(C)(i)–(vii).

109. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 277, at 14 (June 21, 2013); Lucas, *supra* note 3.

110. *Governor OKs North Fork Rancheria of Mono Indian Casino*, KFSN-TV (July 4, 2013), <http://abclocal.go.com/kfsn/story?section=news/local&id=9161347> (on file with the *McGeorge Law Review*).

111. Letter from Reggie Lewis, *supra* note 104 ("He [the Governor] offered a very small percentage of the North Fork revenue despite our pleas that it was meaningless given the 40% hit our revenue would take when North Fork opens their casino. . . . You would have heard how our hundreds of Tribal members will likely end up on the public welfare system once our casino closes and our tribal programs are forced to shut down.").

112. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 277, at 15 (June 21, 2013); Lucas, *supra* note 3 (quoting Marc Macarro, Chairman of the Pechanga Band of Luiseño Indians as saying "[t]he fact that every local tribe stands united in opposition to this project is evidence that the approval of the North Fork compact is not a sound solution").

113. *See* Lucas, *supra* note 3 ("It's been mentioned to us that (the other tribes) are worried we're giving too much away . . .") (quoting North Fork Tribe chairwoman Elaine Bethel Fink).

114. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 277, at 3 (June 21, 2013) ("[T]he Tribe may 'deduct such payments' from the RSTF [Revenue Sharing Trust Fund] and TNGF [Tribal Nation Grant Fund] payments, effectively capping the Tribe's total payment obligation under the Compact to 10-15% of Net Win.").

115. *See, e.g.*, AMENDMENT TO THE TRIBAL-STATE GAMING COMPACT BETWEEN THE STATE OF

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In terms of the broader fiscal impact for the State, California Indian casinos consistently stimulate the local economy, so the State and community can probably expect those same benefits from the North Fork Casino.¹¹⁶ However, under IGRA, the purpose of Indian gaming is to benefit tribes, thus any benefit to the State's general fund or local community is incidental and not the State's rationale for approving Chapter 51.¹¹⁷

V. CONTINUING CHALLENGES TO CHAPTER 51

The opponents of Chapter 51 are some of the most powerful interests in California.¹¹⁸ These groups and individuals have a strong interest in exhausting all avenues to prevent the North Fork Casino, thus opponents pursued lawsuits,¹¹⁹ a statewide referendum,¹²⁰ and administrative procedures¹²¹ to stop the North Fork Casino.¹²² As a result, it is possible that the North Fork Casino will ultimately be

CALIFORNIA AND THE SHINGLE SPRINGS BAND OF MIWOK § 4.3.1 (2012), available at http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Shingle_Springs_Compact.pdf (on file with the *McGeorge Law Review*) (requiring twenty to twenty-five percent of slot revenue to be paid to the State); Dale Kasler, *Long-Struggling Red Hawk Casino Edges Closer to Financial Makeover*, SACRAMENTO BEE (July 21, 2013), <http://www.sacbee.com/2013/07/21/5582904/red-hawk.html> (on file with the *McGeorge Law Review*) (“The [Red Hawk] casino would only have to pay the state 15 percent of its slot-machine profits. That represents a significant drop-off from the current 25 percent – believed to be the highest percentage of any tribal casino in California.”). The amended Shingle Springs Compact that reduced the tribe's burden from twenty-five percent to fifteen percent passed both houses of the legislature unanimously. Complete Bill History of AB 1267, http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1267_bill_20130530_history.html (last visited August 27, 2013) (on file with the *McGeorge Law Review*).

116. See Amy Quinton, *Study Shows California Tribal Gaming Casinos Have Big Economic Impact*, KPBS, (August 8, 2012), <http://www.kpbs.org/news/2012/aug/08/study-shows-california-tribal-gaming-casinos-have/> (on file with the *McGeorge Law Review*).

117. See, e.g., Mashpee Letter, *supra* note 92 (rejecting the compact partially because of its excessive revenue sharing with the State and stating that “the Compact provides a significant share of the Tribe's gaming revenue to the Commonwealth, undermining the central premise of IGRA that Indian gaming should primarily benefit tribes”).

118. See, e.g., Carla Marinucci, *California Gaming Tribes Top Campaign Donors*, S.F. CHRONICLE (Nov. 24, 2009, 4:00 AM), <http://www.sfgate.com/politics/article/California-gaming-tribes-top-campaign-donors-3210072.php> (on file with the *McGeorge Law Review*). Numerous large gaming tribes oppose the law including the Morongo Band of Mission Indians, Pechanga Band of Luiseno Indians, Paskenta Band of Nomlaki Indians of California, and others. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 277, at 15 (June 21, 2013).

119. Marc Benjamin, *Judge Examines Jerry Brown's OK of Planned Madera County Casino*, FRESNO BEE (July 16, 2013), <http://www.fresnobee.com/2013/07/16/3390506/madera-county-judge-examines-governors.html> (on file with the *McGeorge Law Review*).

120. *Qualified Statewide Ballot Measures*, CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm> (last visited Jan. 22, 2014) (on file with the *McGeorge Law Review*).

121. The Secretary of the Interior ultimately approved the North Fork Compact. Marc Benjamin, *Feds Give Final OK to North Fork Indians' Casino on Highway 99*, FRESNO BEE (October 22, 2013), <http://www.fresnobee.com/2013/10/22/3567231/feds-give-final-ok-to-north-fork.html> (on file with the *McGeorge Law Review*).

122. *Supra* notes 126–28 and accompanying text.

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rejected and the changes to California law enacted by Chapter 51 will not come to fruition.¹²³

One lawsuit challenges the Governor's authority to concur with the Secretary of the Interior's decision to take land into trust for gaming.¹²⁴ The relief sought is a declaration that the concurrence is invalid,¹²⁵ and if the relief is granted, the court has the authority to compel the Department of the Interior to take the land out of trust.¹²⁶ The North Fork Compact also provides that if the Governor's concurrence is not valid, then the compact "shall be deemed null and void."¹²⁷ As a result, if the lawsuit succeeds, the land in Madera may be taken out of trust or it may remain in trust but not be eligible for gaming.¹²⁸

Under the California Constitution, the public has the right through the referendum process to overturn an act of the legislature.¹²⁹ Stand Up For California qualified a referendum on Chapter 51, so the public will ultimately determine whether to ratify the North Fork Compact in November 2014.¹³⁰ No referendum has ever effectively overturned a tribal-state gaming compact ratified by the legislature.¹³¹ However, if the referendum passes, Chapter 51 will no longer be valid law and the federal, state, and tribal governments involved will need to negotiate a new compact or explore administrative remedies.¹³²

VI. CONCLUSION

Chapter 51 authorizes the first off-reservation casino project in California history.¹³³ Indian gaming was authorized in California to benefit tribes,¹³⁴ and the

123. See *supra* Part IV (explaining the effects of Chapter 51).

124. Complaint at 5–6, *Stand Up For California v. Brown*, No. MCV062850 (Sup. Ct. Madera County Mar. 27, 2013).

125. *Id.* at 6–7.

126. Ruling on Submitted Matter & Order, *United Auburn Indian Community v. Brown*, No. 34-2013-80001412 (Sup. Ct. Sacramento County Aug. 19, 2013) (stating that the court has the authority to compel the Department of the Interior to take the land out of trust in a similar challenge to the Governor's concurrence for Enterprise Rancheria in Yuba County).

127. NORTH FORK COMPACT, *supra* note 15, at §14.2(d).

128. Email from Cheryl Schmit, Director, Stand Up For California, to author (Aug. 29, 2013) (on file with the *McGeorge Law Review*).

129. CA CONST. art II, § 9.

130. *Qualified Statewide Ballot Measures*, *supra* note 120.

131. Proposition 29 in 2000 was a referendum on the Pala Compact(s) that was approved by voters and remains good law in California because voter approval restored the governor's ability to waive or retain the state's sovereign immunity to lawsuits from tribes. Email from Cheryl Schmit, *supra* note 128. However, a second superseding proposition on the same ballot (Proposition 1A) also passed and included in its terms the approval of additional compacts that displaced the original Pala Compact(s). *Id.* Additionally, Propositions 94, 95, 96, and 97 in 2008 sought to overturn legislative approval of four tribal-state gaming compacts, but did not pass after the four tribes outspent the opposition four to one. *Id.*

132. *Id.*

133. See CAL. GOV'T CODE § 12012.59 (a)(1) (enacted by Chapter 51) (ratifying the North Fork Compact); Lucas, *supra* note 3.

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compacts approved by Chapter 51 do so by providing revenue for the Wiyot, North Fork, and conditionally for the Chukchansi tribes.¹³⁵ However, Chapter 51 sets a new precedent regarding the definition of Indian land and permissible casino locations.¹³⁶ Without greater clarity on what made this case such a unique circumstance,¹³⁷ Chapter 51 may act as a turning point, dramatically expanding the number of California sites eligible for an Indian casino and changing the way tribes in California approach Indian gaming projects.¹³⁸ On the other hand, the referendum and lawsuits may nullify all of the changes to California's Indian gaming policy that resulted from Chapter 51.¹³⁹

134. 25 U.S.C. § 2702 (2012).

135. See CAL. GOV'T CODE § 12012.59 (a)(1) (enacted by Chapter 51) (ratifying the North Fork Compact); NORTH FORK COMPACT, *supra* note 15, §§ 4.5, 5.2, pmbl.

136. See CAL. GOV'T CODE § 12012.59 (a)(1) (enacted by Chapter 51) (ratifying the North Fork Compact); see also Benjamin, *Legislators Want New Policy*, *supra* note 76 (on file with the *McGeorge Law Review*) (discussing need for new approach toward off-reservation proposals).

137. Letter from Edmund G. Brown Jr., Governor, State of California, to Kenneth L. Salazar, Sec'y of the Interior, U.S. Dep't of the Interior (Aug. 30, 2012), available at <http://gov.ca.gov/news.php?id=17700> (on file with the *McGeorge Law Review*) ("I expect there will be few requests from other tribes that will present the same kind of exceptional circumstances to support a similar expansion of tribal gaming land.").

138. Anthony York, *Jerry Brown Authorizes California's First Off-Reservation Tribal Casinos*, L.A. TIMES (Aug. 31, 2012, 5:06 PM), <http://latimesblogs.latimes.com/california-politics/2012/08/jerry-brown-authorizes-californias-first-off-reservation-tribal-casinos-1.html> ("These decisions change the face of tribal gaming as we know it in California . . . They will create a new 'gold rush' as investors scramble to move tribes to the most profitable markets with many financially-strapped municipalities that will welcome them with open arms.") (quoting David Quintana, political director of the California Tribal Business Alliance).

139. See *supra* Part V (explaining the remaining challenges to Chapter 51).