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Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements

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SPREADING THE WEALTH: INDIAN GAMING AND REVENUE-SHARING AGREEMENTS

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"Nobody cared about the tribes when they had nothing. Now we're looking at an era of transformation between Indian governments and surrounding communities."

—Sycuan Band of the Kumeyaay Nation attorney George Forman[1]

"For [California Governor Arnold Schwarzenegger], these [compact] negotiations are about much more than money. . . .They're about improving the lot for communities across the board."

—Schwarzenegger spokesperson Vince Solitto[2]

I. INTRODUCTION

In little more than a decade and a half, Indian gaming has become big business in the United States: with nearly $17 billion in revenues in 2003, tribal gaming accounts for a significant portion of the gambling industry nationwide, and it continues to grow, nearly doubling in just the past five years.[3] Across the country, thirty states are home to more than 300 Indian

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1. Chet Barfield, *Indian Casinos Raising Stakes*, SAN DIEGO UNION-TRIB., May 22, 2004, at A1.

2. James P. Sweeney, *4 Holdout Tribes Offer Alternative Gaming Deal*, SAN DIEGO UNION-TRIB., June 18, 2004, at A1.

3. NAT'L INDIAN GAMING COMM'N, NIGC ANNOUNCES INDIAN GAMING REVENUE FOR 2003 (July 13, 2004), *at* http://www.nigc.gov/nigc/documents/releases/pr_revenue_2003.jsp (last visited May 14, 2005) [hereinafter NIGC, 2003 REVENUE]. This figure represents all gaming

gaming facilities operated by over 200 tribes that decided to pursue gaming as a means of tribal economic development.[4]

For tribes that have chosen to open casinos, the overriding impetus has been relatively consistent: socioeconomic adversity. Reservations historically have exemplified many of the most difficult living conditions in the United States. Many Native Americans, particularly those residing on reservations, were poor, unemployed, and living in overcrowded and inadequate housing in communities with minimal government services.[5] Today, while conditions on many reservations still lag significantly behind those of other ethnic groups, there have been marked improvements for many Native American communities, largely due to gaming revenue.[6]

Indian gaming clearly is a tool of tribal economic development. For many tribes, gaming is a significant source of government revenue, catalyzing a renaissance of sorts on reservations throughout the United States. But Indian gaming's beneficiaries are not limited to tribes; non-tribal jurisdictions benefit from tribal casinos, as well. On balance, states with Indian gaming operations, as well as the numerous non-reservation communities located near tribal casinos, have realized extensive economic and social benefits from tribal gaming operations, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged.[7] Tribal gaming assists states by promoting economic development in underdeveloped rural areas while leveraging growth and development in surrounding non-tribal communities.[8] Increasingly though, states are

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operations; that is, Class II (bingo) as well as Class III (casino-style) gaming. We discuss the legal distinctions among classes of gaming under federal law in Part II, *infra*.

4. *See* ALAN MEISTER, INDIAN GAMING INDUSTRY REPORT, 2004-2005 REV. ED. 1 (2004).

5. *See* DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 15-16 (4th ed. 1998).

6. NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 6-2 (1999), *available at* http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html (last visited May 14, 2005) [hereinafter NGISC FINAL REPORT]; *see generally* STEVEN CORNELL ET AL., AMERICAN INDIAN GAMING POLICY AND ITS SOCIO-ECONOMIC EFFECTS: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION (1998), *available at* http://indiangaming.org/library/studies/1004-erg_98rept_to_ngisc.pdf (last visited May 14, 2005).

7. *See generally, e.g.*, MEISTER, *supra* note 4; JONATHAN B. TAYLOR, MATTHEW B. KREPPS, & PATRICK WANG, THE NATIONAL EVIDENCE ON THE SOCIOECONOMIC IMPACTS OF AMERICAN INDIAN GAMING ON NON-INDIAN COMMUNITIES (2000), *available at* http://www.ksg.harvard.edu/hpaied (last visited May 14, 2005). *But cf., e.g.*, WILLIAM N. THOMPSON, RICARDO GAZEL, & DAN RICKMAN, THE ECONOMIC IMPACT OF NATIVE AMERICAN GAMING IN WISCONSIN (1995) (discussing negative social and economic impacts of tribal casinos in Wisconsin).

8. *See generally* MEISTER, *supra* note 4; TAYLOR, KREPPS, & WANG, *supra* note 7; Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAPMAN L. REV. 47 (2002).

attempting to acquire a direct share of Indian gaming revenue through revenue-sharing agreements with gaming tribes.

To some, revenue sharing is political coercion at tribes' expense. The state simply wields its greater political clout, flouting tribal rights and federal law. To others, tribal-state revenue-sharing agreements represent cooperative economic development between tribes and states. The state, through compact negotiations and state public policy, facilitates successful Indian gaming within its borders, while the tribe pays the state a "fair share" of the resulting revenue. We argue, however, that the issue does not necessarily lend itself to a single, right-or-wrong answer. Revenue-sharing agreements may be right for some tribes, but not for others. Such agreements are strategic decisions made within a broad and complex context by both tribal and state actors that have both short-term and long-term economic and public policy impacts.[9] This article sets forth the necessary legal and political background to explore the issue of tribal-state revenue-sharing agreements.

Part II summarizes the key provisions of the federal Indian Gaming Regulatory Act[10] (IGRA) relating to revenue sharing. Most importantly, in order to operate casino-style gaming, a tribe must enter into a compact with the state in which it is located. We also discuss the most significant legal development since IGRA's passage in 1988: the United States Supreme Court's decision in *Seminole Tribe v. Florida*,[11] in which the Court struck down IGRA's federal cause of action against a state for failure to negotiate in good faith a tribal-state compact. *Seminole Tribe* set the stage for highly politicized compact negotiations. Part III turns to the increasing emphasis on tribal-state revenue sharing after *Seminole Tribe*. We describe typical revenue-sharing agreements in detail and discuss their economic impacts. To illustrate the political and legal factors that influence revenue sharing, Part IV examines the highly controversial and widely influential compact negotiations in California, from the Wilson administration to the recent agreement reached by Governor Arnold Schwarzenegger and five successful gaming tribes. Part V offers a number of observations about revenue sharing and tribal economic development in relation to recent trends in the law, politics, and public policy of Indian gaming.

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9. *See generally* Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262 (2004); *see also* STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005).

10. 25 U.S.C. §§ 2701-21 (2000).

11. 517 U.S. 44 (1996).

II. INDIAN GAMING AND TRIBAL-STATE COMPACTS

As defined by federal law, "Indian gaming" is gaming conducted by an "Indian tribe" on "Indian lands"—that is, by a federally recognized tribal government on federal reservation or trust lands.[12] Indian gaming is fundamentally different than most forms of gambling, from church bingo nights to the slots at Las Vegas's MGM Grand Casino, because it is conducted by tribal governments as an exercise of their sovereign rights. Tribal sovereignty, a historically rooted doctrine recognizing tribes' inherent rights as independent nations preexisting the United States and its Constitution, is the primary legal and political foundation of federal Indian law and policy and thus, Indian gaming.[13]

Stemming from the legal doctrine of tribal sovereignty, in *California v. Cabazon Band of Mission Indians*,[14] the United States Supreme Court held that Indian gaming was outside the realm of permissible state regulation.[15] The Cabazon and Morongo Bands of Mission Indians conducted bingo and card games on their reservations in Riverside County, California.[16] The games were open to the public and frequented mostly by non-tribal members.[17] Both the State of California and Riverside County sought to apply existing regulations to the Bands' gaming.[18] The lower courts held that neither the state nor the county had any authority to enforce gambling laws on the reservations,[19] and the Supreme Court affirmed.[20]

First, the Court decided that Public Law 280,[21] which grants certain states, including California, criminal jurisdiction and some nonregulatory

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12. *See* 25 U.S.C. §§ 2701(4), 2703(4)-(5).

13. As noted by numerous commentators, the legal doctrine of tribal sovereignty is not the only understanding of its theoretical or practical meaning. *See, e.g.*, DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 20 (1997) (asserting there is "a bewildering array of interpretations of the nature and extent of tribal sovereignty"). Among Indian law scholars, both those accepting of the legal doctrine and those critical of it, there is relative consensus that tribal sovereignty has both political and cultural valences. *See, e.g.*, Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society*, 5 U. PA. J. CONST. L. 357, 358 (2003) (noting that "Indian nations enjoy both political and cultural sovereignty as an aspect of their inherent status as separate governments"). In this article, for practical purposes we focus on the legal and political dimensions of tribal sovereignty in relation to Indian gaming.

14. 480 U.S. 202 (1987).

15. *Cabazon*, 480 U.S. at 221-22.

16. *Id.* at 204-05.

17. *Id.* at 205.

18. *Id.* at 205-06.

19. *Id.* at 206.

20. *Id.* at 222.

21. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1984), 28 U.S.C. § 1360 (1993)).

civil jurisdiction over tribal lands within their borders,[22] did not allow California to apply its bingo laws to tribal bingo operations because the laws were regulatory rather than prohibitory in nature.[23] Likewise, the Court held that the Organized Crime Control Act of 1970,[24] which makes certain violations of state gambling laws federal criminal violations, did not authorize states to enforce the federal law with respect to these violations.[25] Finally, and most significantly, the Court determined that federal and tribal interests in tribal self-determination and economic development preempted state law regulating bingo operations as applied to tribal on-reservation bingo operations.[26] This preemption ruling implicitly recognized gaming as a way to address the economic problems of tribes.[27] *Cabazon*'s bottom line was that if a state did not prohibit a type of gambling altogether as a matter of public policy, then the state could not regulate that type of gambling on tribal lands.[28]

In holding that states could not regulate Indian gaming, the *Cabazon* Court "threw the ball into Congress's lap to do something, fast."[29] By the

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22. In *Bryan v. Itasca County*, the Supreme Court interpreted Public Law 280 narrowly and held that a state could only exercise civil jurisdiction to the extent necessary to resolve civil disputes between Native Americans and private individuals. 426 U.S. 373 (1976). The Court determined that Public Law 280 did not contain "anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations," recognizing that "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers . . . it would have expressly said so." *Id.* at 390. Thus, *Bryan* drew a distinction between state laws that were civil/regulatory and those that were criminal/prohibitory. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

23. *Cabazon*, 480 U.S. at 207-12.

24. 18 U.S.C. § 1955 (1984).

25. *Cabazon*, 480 U.S. at 212-14.

26. *Id.* at 214-22. On this last point, the *Cabazon* Court stated,

> 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." 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 216-17 (citations and footnote omitted) (alterations of internal quotation in original).

27. Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 718-19 (1996).

28. *Cabazon*, 480 U.S. at 210-11.

29. I. Nelson Rose, *The Indian Gaming Act and the Political Process*, *in* INDIAN GAMING AND THE LAW 3 (William R. Eadington ed., 1990). One commentator has called *Cabazon* an invitation to legislate, because the Court did not hold that the tribes are sovereign and therefore can operate gaming facilities free of state regulation; rather, the Court balanced tribal interests against state interests. Jerome H. Skolnick, *Alternative Perspectives and Implications*, *in* INDIAN GAMING AND THE LAW, *supra*, at 140-41.

early 1980s, Congress had determined that unregulated tribal gaming posed a problem and, at the time of the *Cabazon* decision, was in the midst of debating how best to regulate Indian gaming. A key issue was the state's role in regulating tribal gaming. The debates were heated; some tribal leaders voiced fears that state authority over Indian gaming would undercut tribal sovereignty and generally, therefore, favored a complete ban on high-stakes gaming rather than acquiescence to state regulation.[30] When the Supreme Court granted certiorari in *Cabazon,* tribal concerns turned. At that time, tribes expected an adverse ruling from the Court, and accordingly, some were willing to compromise on the bill.[31] Just before the Supreme Court's decision in *Cabazon*, Senators Daniel Inouye (D-Hawaii), Thomas Daschle (D-South Dakota), and Daniel Evans (R-Washington) introduced Senate Bill 555,[32] intended as a compromise between competing interests. On the one hand, the states, along with other non-Native gaming interests, argued for state control over Indian gaming. On the other hand, both the federal government and tribes wanted to foster tribal gaming as a means of reservation economic development and tribal self-sufficiency. Further, tribes strongly opposed state regulation on sovereignty grounds. The bill, which struck a balance among these varied and conflicting interests, eventually was passed as IGRA.

Congress based its enactment of IGRA on the "principal goal of Federal Indian policy": "promot[ing] tribal economic development, tribal self-sufficiency, and strong tribal government."[33] IGRA provides that a tribe can exercise a sovereign right to operate gaming activity if that activity is not prohibited by federal or state law.[34] IGRA's key innovation was its categorization of Indian gaming for purposes of regulation. Stated simply, IGRA allocates jurisdictional responsibility for regulating tribal gaming according to the type of gaming involved. In so doing, IGRA establishes three classes of gaming: Class I, or social or traditional tribal games, which fall under exclusive tribal regulation; Class II, or bingo and similar games as well as nonbanked card games, which are regulated by the tribe with some federal oversight; and Class III, or casino-style games, which fall under the purview of tribal, federal, and state regulation.[35]

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30. Rose, *supra* note 29, at 4.

31. *Id.* Following the Court's decision in *Cabazon,* some tribes, not surprisingly, opposed any legislation regulating Indian gaming. Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 505 (1995).

32. S. 555, 100th Cong., 1st Sess. (1987).

33. 25 U.S.C. § 2702(1) (2000).

34. *Id.* § 2701(5).

35. *See generally id.* § 2710.

Under IGRA, Class III gaming includes all other games not included in Class I or Class II.[36] These games, typically high-stakes, include slot machines; banked card games such as baccarat, chemin de fer, blackjack, and pai gow poker; lotteries; pari-mutuel betting; jai alai; and other casino games such as roulette, craps, and keno.[37] A tribe may operate Class III gaming on tribal lands only in states that permit such gaming for any purpose by any person, and, through the compact requirement, the state has a say in how Class III gaming is regulated.[38]

A valid tribal-state compact is a prerequisite for casino-style tribal gaming. To operate Class III games, a tribe must enter into such an agreement with the state in which the games will be located. This requirement created an active role for states in regulating casino-style gaming within their borders by both requiring the tribe to negotiate an agreement with the state and giving the state, along with the tribe, the power to sue in federal court to enforce the provisions of a tribal-state compact by seeking to enjoin any Class III gaming activity that violates the governing compact.[39]

If a tribe wants to conduct Class III gaming, it first must formally request that the state enter into compact negotiations with the tribe. Once the state receives the tribe's compact negotiation request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact."[40] A compact (and, by logical extension, the negotiations between the state and the tribe) may include provisions concerning (1) the application of the state's and the tribe's criminal and civil laws and regulations "that are directly related to, and necessary for, the licensing and regulation" of Class III games, (2) allocation of criminal and civil jurisdiction between the state and the tribe "necessary for the enforcement of such laws and regulations," (3) payments to the state to cover the state's costs of regulating the tribe's Class III games, (4) tribal taxation of Class III gaming, limited to amounts comparable to the state's taxation of similar activities, (5) remedies for breach of contract, (6) operating and facility maintenance standards, including licensing, and (7) "any other subjects that are directly related to the operation of gaming activities."[41] IGRA expressly prohibits states from seeking, through a tribal-state compact, to tax or charge the tribe a fee,

36. *Id.* § 2703(8).

37. 25 C.F.R. § 502.4 (2004).

38. 25 U.S.C. § 2710(d)(1)(B) (2000).

39. *Id.* § 2710(d)(7)(A)(ii).

40. *Id.* § 2710(d)(3)(A).

41. *Id.* § 2710(d)(3)(C). Some states have sought to include in tribal-state compacts provisions not expressly authorized by IGRA, such as restrictions on tribal hunting and fishing treaty rights. *See generally* Steven A. Light & Kathryn R.L. Rand, *Do "Fish and Chips" Mix? The Politics of Indian Gaming in Wisconsin*, 2 GAMING L. REV. 129-42 (1998).

other than the reimbursal of the state's regulatory costs.[42] Under IGRA, if a state fails to negotiate in good faith, the tribe then can sue the state in federal court, triggering a specific mediation process.[43] In determining whether a state has negotiated in good faith, the court may consider the public interest and public safety, criminality and financial integrity, and adverse economic impacts on existing gambling interests.[44] Notably, IGRA also requires that the court "shall consider any demand by the State for direct taxation of the Indian tribe . . . as evidence that the State has not negotiated in good faith."[45]

As a compromise between tribal and federal interests on the one hand and state interests on the other, IGRA's compact provisions reflect a carefully constructed balancing of competing concerns. To ensure fair compact negotiations between tribes and states, IGRA created a mechanism to enforce the state's duty to negotiate in good faith. As conceived, IGRA encourages tribal-state compacts and therefore Class III gaming as a means of reservation economic development, at least in those states where casino-style gambling does not violate state public policy.

In its landmark decision in *Seminole Tribe v. Florida*,[46] however, the United States Supreme Court upset IGRA's balance of state power and tribal rights by holding that the Eleventh Amendment's grant of state sovereign immunity prevents Congress from authorizing such suits by tribes against states.[47] Thus, the *Seminole Tribe* Court held that a state could not be sued in federal court by a tribe under IGRA without the state's

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42. Except for defraying the costs of regulation,

> 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.

25 U.S.C. § 2710(d)(4). Additionally, "no State may refuse to enter into the negotiations . . . based upon the lack of authority . . . to impose such a tax, fee, charge, or other assessment." *Id.* Although IGRA does not dictate that a tribal-state compact must provide for state regulation of Class III gaming, compacts typically have done so. Carole E. Goldberg et al., *Amici Curiae Brief of Indian Law Professors in the Case of* Hotel Employees and Restaurant Employees International Union v. Wilson, *in* INDIAN GAMING: WHO WINS? 62 (Angela Mullis & David Kamper eds., 2000). The tribe retains the right to concurrent regulation of its Class III gaming, so long as tribal regulation is not inconsistent with or less stringent than the state's regulation as provided in the compact. 25 U.S.C. § 2710(d)(5).

43. 25 U.S.C. § 2710(d)(7).

44. *Id.* § 2710(d)(7)(B)(iii).

45. *Id.* § 2710(d)(7)(B)(iii)(II).

46. 517 U.S. 44 (1996).

47. *Seminole Tribe*, 517 U.S. at 72. The Eleventh Amendment provides that "[t]he [j]udicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

consent.[48] In effect, the Court invalidated Congress's carefully crafted compromise between state interests and tribal and federal interests.

Without the enforcement mechanism against the states, the states' duty to negotiate compacts in good faith lacked teeth. In the wake of the Court's decision in *Seminole Tribe*, a state effectively could prevent a tribe from engaging in Class III gaming simply by refusing to negotiate a tribal-state compact. Indeed, no Class III tribal-state compact was finalized for over two years following *Seminole Tribe*, as states took advantage of the Court's holding.[49] For some states that did wish to negotiate compacts, *Seminole Tribe* widened the range of permissible compact provisions, including, arguably, a negotiated state "tax" or "fee" on tribal gaming operations in the form of revenue-sharing agreements.

III. REVENUE-SHARING AGREEMENTS

As the Indian gaming industry continues to grow, and a few tribal casinos find extraordinary financial success near the nation's population centers, an increasing number of states have negotiated revenue-sharing provisions as part of Class III compacts. In a revenue-sharing agreement, a tribe commits to paying a portion of its gaming revenues to the state in exchange for the right to conduct casino-style gaming in the state, sometimes including a guarantee of exclusivity. The Mashantucket Pequots and Connecticut reached the first revenue-sharing agreement in 1992, in which the tribe agreed to pay the state twenty-five percent of its slot revenues in exchange for the exclusive right to operate slot machines in the state.[50]

Through the mid-1990s, revenue-sharing provisions were a rarity, perhaps limited to the nearly unparalleled market of the Pequots' Foxwoods and the peculiarities of Connecticut's gambling laws.[51] Following the

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48. Most commentators agree that IGRA's severability clause protects IGRA's remaining provisions, so that *Seminole Tribe* invalidates only the tribe's cause of action against the state, rather than the entire Act. *See* 25 U.S.C. § 2721 (2000) ("In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect."). *But see* United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301 (9th Cir. 1998) (reasoning that because Congress would not have enacted IGRA without the tribal cause of action against the state for failing to negotiate in good faith, the Supreme Court's invalidation of that provision calls into question the entire statute).

49. *See* Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 430 (2001).

50. NGISC FINAL REPORT, *supra* note 6, at 6-21. Under the terms of the agreement, the tribe could consent to abrogate exclusivity, as it did to allow the Mohegans to negotiate a compact and build the Mohegan Sun Casino. *Id.*

51. When the Pequots first approached Connecticut to negotiate a compact, the state took the position that although it allowed charities to operate casino-style gaming for "Las Vegas Nights" fund-raisers, Class III games, and especially slot machines, were contrary to state public policy,

Supreme Court's decision in *Seminole Tribe*, which coincided with both steadily increasing Indian gaming profits and state budget crises, more states, including Wisconsin, New Mexico, New York, and California, have sought their "fair share" of tribal casino profits.[52] Without the ability to challenge a state's demand for revenue sharing in federal court under IGRA (unless, of course, the state consents to suit, as has California), the danger for tribes is that states can simply charge tribes what, in practice, amounts to a multi-million-dollar fee to conduct Class III gaming, in direct contravention to tribes' sovereign right under *Cabazon* and Congress's intent under IGRA.[53] At the same time, the Court's decision in *Seminole Tribe* as a practical matter arguably gave states and tribes greater flexibility in tailoring compacts to meet individualized needs and concerns. The United States Secretary of the Interior's position on revenue sharing reflects this confidence in the "give and take" nature of compact negotiations. Although IGRA prohibits state taxation of tribal casinos as a condition of signing a tribal-state compact, as interpreted by the Interior Secretary, tribes can make payments to states in return for additional benefits beyond the right to operate Class III gaming.[54] Tribes thus have agreed to make "exclusivity payments," in which they pay a percentage of casino revenues to the state in return for the exclusive right to operate casino-style gaming.[55]

The federal National Indian Gaming Commission (NIGC) reported that the Indian gaming industry generated $16.7 billion in revenue in 2003, a fourteen percent increase over the prior year, while the tribal National Indian Gaming Association (NIGA) estimated the industry has created

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and so Connecticut refused to negotiate a compact to allow the tribe to operate such games. *See* Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1025 (2d Cir. 1990). The Pequots sued under IGRA's then-valid cause of action and the United States Court of Appeals for the Second Circuit, after examining the Las Vegas Nights law, determined that casino-style gaming was not against Connecticut's public policy, thus obligating the state to negotiate a compact with the tribe. *Id.* at 1026-32. Because slot machines were not allowed under state law and were not specifically addressed by the Second Circuit's decision, Connecticut and the Pequots reached the revenue-sharing compromise to allow the tribe to operate slot machines.

52. *See generally* Eric S. Lent, Note, *Are States Beating the House? The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 1 GEO. L.J. 451 (2003); Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER, RACE & JUST. 487 (2002).

53. In *Cabazon*, the Supreme Court recognized tribes' right to conduct reservation gaming free of state regulation as an aspect of tribal sovereignty. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987). In enacting IGRA, Congress specifically provided that nothing in the statute should be interpreted "as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity." 25 U.S.C. § 2710(d)(4).

54. *See generally* Lent, *supra* note 52; Contreras, *supra* note 52.

55. NGISC FINAL REPORT, *supra* note 6, at 6-20.

roughly 400,000 jobs.[56] In his third annual study on the Indian gaming industry, one of the authors found that tribal gaming generated $16.2 billion in gaming revenue and $1.5 billion in non-gaming revenue in 2003.[57] These figures highlight the continued growth of the tribal gaming industry, representing a twelve percent and sixteen percent increase, respectively, over 2002.[58] Overall, Indian gaming contributed roughly $43 billion in output, $16.3 billion in wages, and 460,000 jobs to the national economy,[59] generating $5.3 billion in tax revenues shared by federal, state, and local governments.[60]

The most direct economic impact of Indian gaming on state and local governments occurs when tribes make payments pursuant to revenue-sharing agreements. Current revenue-sharing agreements with state and local governments take a number of forms, including percentage payments, fixed compact payments, impact/mitigation fees and taxes, contributions to community funds, and redistribution to non-gaming tribes.[61]

The majority of revenue-sharing payments are based on a percentage of gaming revenue.[62] Some tribes pay a fixed percentage directly to the state, like Connecticut's twenty-five percent take of slot revenue.[63] Other tribes make payments based on a sliding percentage scale contingent upon varying criteria.[64] For example, as of 2003, California tribes made payments to the state ranging from zero to thirteen percent of gaming machine revenue based on number of operational gaming devices,[65] while New Mexico tribes currently pay three to eight percent of gaming machine revenue, dependent

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56. NIGC, 2003 REVENUE, *supra* note 3; NAT'L INDIAN GAMING ASS'N, INDIAN GAMING FACTS, *at* http://www.indiangaming.org/library/index.html#facts (last visited Jan. 20, 2005).

57. *See* MEISTER, *supra* note 4, at 9. Tribes are not subject to public information disclosure requirements because of their status as political sovereigns. Reliable data on economic impacts thus may be difficult for researchers and policymakers to obtain. Accordingly, some have called for Congress to remove IGRA's exemption from the federal Freedom of Information Act. *See, e.g.*, William N. Thompson, *Economic Issues and Native American Gaming*, 7 WISC. INTEREST 5, 5 (1998). Meister's studies of the Indian gaming industry rely on a number of publicly available data; confidential sources including tribes, casinos, and gaming associations; and economic modeling. *See* MEISTER, *supra* note 4, at 4-6.

58. MEISTER, *supra* note 4, at 9.

59. *Id.* at 21. The economic benefits of Indian gaming to states and non-tribal communities are spurred by tribal revenue-sharing agreements with state and local governments, the economic multiplier effects induced by gaming revenue, and tribes' charitable and civic contributions. *See generally id.*

60. *Id.* at 22.

61. *Id.*

62. *See generally id.* at 22-23.

63. *Id.* at 23.

64. *Id. at 22.*

65. *Id.* Payments are based on machines that were in operation prior to September 1999. *Id.* at 26 n.24.

upon Class III gaming machine revenue.[66] In New York, tribal payments begin at eighteen percent of electronic gaming revenue and top out at twenty-five percent after the current compact's seventh year.[67] A small and decreasing number of compacts require tribes to make fixed annual payments to the state; for instance, until a number of Wisconsin tribes renegotiated their tribal-state compacts in 2002 and agreed to make payments based on annual revenue, each of the state's eleven gaming tribes made flat annual payments.[68]

A growing number of tribes have signed revenue-sharing agreements with local governments, and some also contribute to special community funds.[69] Tribes in Arizona, California, Louisiana, Michigan, and Washington make payments directly to local governments.[70] After Idaho voters approved a ballot initiative containing a tribal-state revenue-sharing agreement, tribes agreed to contribute five percent of gaming revenue to local schools and education programs.[71] Tribes in Oregon pay between five and six percent of net gaming revenue to a community benefit fund.[72] Tribes also contribute to state and local programs seeking to lessen the effects of problem and pathological gambling. Arizona's tribes, for instance, contributed approximately $760,000 to the state's Department of Gaming—more than double the amount contributed by the Arizona Lottery.[73]

Depending on the type of agreement and, most importantly, the amount of gaming revenue tribes realize, annual revenue payments to state and local governments can add up rapidly, contributing significant revenue to state coffers. Tribes provided $759 million to state and local governments in 2003, nearly a one-third increase over the prior year.[74] Connecticut tribes paid the state about $400 million, and California tribes provided approximately $132 million, while Arizona tribes paid roughly $43 million, and Michigan tribes provided about $32 million to state and local

66. *Id.* at 23.

67. *Id.*

68. *Id.*

69. *See id.* Although unusual, direct payments to states also come in the form of fees and taxes. As part of the general requirements for all qualified entities wishing to conduct charitable gaming in Alaska, for example, tribes pay permit and licensing fees to the state. *Id.* at 22. Alaska also presents a special case in terms of taxation. In addition to a fixed revenue payment to the state if annual revenues exceed $20,000, tribes pay a tax on the cost of pull-tabs and local sales tax. *Id.*

70. *Id.* at 22-23.

71. *Id.* at 22.

72. *Id.* at 23.

73. John Stearns, *Tribes Work to Stem Gambling Addictions*, ARIZONA REPUBLIC, June 19, 2004, *available at* 2004 WL 84742931.

74. MEISTER, *supra* note 4, at 22.

governments.[75] Following a protracted tribal-state compact renegotiation process, Wisconsin tribes in early 2004 agreed to a five-fold increase in annual revenue payments to the state, from $20 million to more than $100 million, in return for exclusivity and the ability to operate additional casino-style games.[76]

Clearly, a growing number of states have requested that tribes interested in operating gaming facilities share gaming revenue or have sought to renegotiate existing compacts or revenue-sharing agreements to provide larger revenue transfers from gaming tribes. California, in many respects, exemplifies recent trends.

IV. REVENUE SHARING IN CALIFORNIA

With over 100 federally recognized tribes and some 35 million residents, California boasts both more tribes and more people than any other state in the continental United States and, as such, represents a vast potential market for the continued expansion of Indian gaming.[77] Generating $4.7 billion in revenue in 2003,[78] Indian gaming in California, conducted by fifty-four tribes, far outpaces other states, earning as much as a third of the Indian gaming industry's total revenue and ranking California's total gambling revenue third after only that of Nevada and New Jersey.[79] California, along with Connecticut, also leads the nation in setting precedents for tribal-state political interactions over gambling, particularly with regard to revenue sharing. Two gubernatorial administrations, two ballot initiatives, and two key court decisions resulted in tribal-state compacts in California with two revenue-sharing provisions. In exchange for allowing tribes the exclusive right to conduct casino-style gambling in the state, the tribes agreed to make payments to two funds under then-Governor Gray Davis's model tribal-state compact.[80] A third gubernatorial administration under current Governor Arnold Schwarzenegger changed all that.

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75. *Id.* at 22, tbl.15.

76. Ashley Grant, *Tribal Casino Compacts Go Under Microscope*, GRAND FORKS HERALD (N.D.), Feb. 15, 2004, at 4A. At the time of this writing, these compacts were under renegotiation because a portion of the compacts was deemed unconstitutional by the Wisconsin Supreme Court. *See* Patrick Marley, *Quarter of Casino Payments a Sure Bet*, MILW. J. SENT., June 7, 2004, *available at* 2004 WL 58823125; *see also* Panzer v. Doyle, 680 N.W.2d. 666 (Wis. 2004) (holding that Governor Jim Doyle exceeded his authority under state law in negotiating the compacts).

77. *See* U.S. Census Bureau, California Quick Facts, http://quickfacts.census.gov/qfd/states/06000.html (last visited Jan. 20, 2005).

78. NIGC, 2003 REVENUE, *supra* note 3.

79. MEISTER, *supra* note 4, at 10, 17.

80. *See infra* text accompanying notes 94-102.

Proposition 5 was a response to then-Governor Pete Wilson's refusal to include slot machines in tribal-state compact negotiations for Class III gaming in California. Wilson asserted that slot machines violated the state's otherwise relatively permissive stance on gambling, a position validated by a federal appellate court in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*.[81] *Rumsey* was quickly followed, however, by a California Supreme Court decision which indicated that state law allowed some electronic gaming devices, possibly including slot machines with revised prize systems, thus making Wilson's failure to negotiate over slot machines a potential violation of IGRA's good faith requirement.[82] Wilson then begrudgingly negotiated a model compact with one tribe.[83] Many tribes found Wilson's model compact unacceptable, however, and decided to take the issue directly to California voters through the 1998 ballot initiative Proposition 5, which guaranteed that any tribe in California eligible to game under IGRA would be allowed to operate certain types of Class III games, including slot machines.[84]

In campaigning for Proposition 5's passage, the tribes faced the well-funded opposition of Nevada and California commercial gaming interests, religious conservatives, organized labor, and Governor Wilson.[85] The tribes spent liberally on a public relations campaign couched in terms of tribal self-reliance and economic development. Following what was at the time the most expensive voter initiative campaign in United States history (the tribes spent $63 million while Proposition 5's opponents spent $29 million)[86] the tribes successfully transcended party lines in their appeal to California's rank-and-file voters, as the initiative passed by a two-thirds majority. The tribes' victory was short-lived, though, as less than a year after its passage, the California Supreme Court struck down Proposition 5 on the ground that it authorized Las Vegas-style casinos in violation of a state constitutional provision prohibiting the type of casinos "currently found in Nevada and New Jersey."[87]

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81. 64 F.3d 1250, 1255-56 (9th Cir. 1994).

82. *See* Chad M. Gordon, *From Hope to Realization of Dreams: Proposition 5 and California Indian Gaming*, *in* INDIAN GAMING: WHO WINS?, *supra* note 42, at 7-8; *see also* Western Telcon, Inc. v. Cal. State Lottery, 917 P.2d 651 (1996) (interpreting "lottery" under state law).

83. Gordon, *supra* note 82, at 5.

84. *See id.* at 6-7. Posited as a "win-win" for Native Americans and non-tribal members alike, Proposition 5 required gaming tribes to share revenue with non-gaming tribes, reimburse the state for the regulatory costs of gaming, and fund the establishment of statewide emergency services. *Id.*

85. *Id.* at 7.

86. *Id.* at 7-8.

87. Hotel Employees & Rest. Employees Int'l Union v. Davis, 981 P.2d 990, 1000 (1999).

Yet the November election had ushered in more than just Proposition 5: Democrat Gray Davis was elected as California's new governor.[88] Supported by many tribes, who contributed more than $1 million to Davis's 1998 election and 2002 reelection efforts, Davis quickly drafted a model gaming compact that largely tracked Proposition 5's terms.[89] Widespread tribal acceptance of this model compact, however, was conditioned on the passage of Proposition 1A, a voter initiative that would amend the state constitution to exempt tribes from the prohibition on Las Vegas-style casinos in California.[90] California voters revalidated their support for tribal gaming by approving Proposition 1A in 2000.[91]

Under the newly authorized Davis compacts, tribes agreed to make payments to two funds. The first of these, the Special Distribution Fund, is available for appropriation by the state legislature for a number of gaming-related purposes[92] and essentially is a limited-purpose revenue-sharing agreement with the state. Under the terms of the model compact, tribes pay a graduated percentage of gaming machine revenue, up to thirteen percent, based on the number of machines operated by the tribe prior to September 1999.[93] In one of the few court cases addressing the legality of tribal-state revenue-sharing agreements,[94] the United States Court of Appeals for the Ninth Circuit held that the restrictions on the state legislature's use of the tribal gaming revenue and the bargained-for tribal exclusivity over casino-style gaming sufficiently complied with both IGRA and congressional intent: "We do not find it inimical to the purpose or design of IGRA for the State, under these circumstances, to ask for a reasonable share of tribal gaming revenues . . . ."[95]

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88. *In re* Indian Gaming Related Cases, 331 F.3d 1094, 1102 (9th Cir. 2003).

89. *See* Gordon, *supra* note 82, at 9-10; *see also In re Gaming Related Cases*, 331 F.3d at 1094 (describing history of compact negotiations in California).

90. Gordon, *supra* note 82, at 10.

91. *See In re Gaming Related Cases*, 331 F.3d at 1103.

92. The Special Distribution Fund may be used for,

> (a) grants for programs designed to address gambling addiction; (b) grants for the support of state and local government agencies impacted by tribal gaming; (c) compensation for regulating costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the compact; (d) payment of shortfalls that may occur in the [Revenue Sharing Trust Fund, discussed below]; and (e) any other purposes specified by the legislature.

Id. at 1106. As construed by the federal court, the last provision is limited to any other purposes "directly related to gaming." *Id.*

93. *Id.*

94. Earlier in the protracted litigation over Indian gaming in California, the state had consented to suit, waiving its Eleventh Amendment immunity under *Seminole Tribe* and thus allowing the federal court to hear the issue. *See* Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1255 n.3 (9th Cir. 1994).

95. *In re Gaming Related Cases*, 331 F.3d at 1115.

The second fund into which the tribes are required to pay is the Revenue Sharing Trust Fund.[96] This fund is unique in that it established "tribe-to-tribe" revenue sharing.[97] Tribes pay a per-machine licensing fee into the fund. The fee structure ranges from $900 to $4,350 per machine annually, depending on the number of slot machines operated by the tribe.[98] For a tribe operating 2,000 slot machines prior to September 1999, the maximum number of machines allowed under the model compact, the licensing fee would be just under $4.6 million each year. With the fees paid into the Revenue Sharing Trust Fund, each non-gaming tribe in California is paid up to $1.1 million each year.[99] In 2003, gaming tribes in California paid about $130 million into the two funds.[100]

Indian gaming under the Davis compacts appeared secure for at least the next two decades, the minimum duration of the model compact.[101] But just two years later, faced with a budget shortfall of nearly $35 billion, Davis proposed renegotiating the tribal-state compacts.[102] Looking to examples like Connecticut, where the state's two tribal casinos pay the state an estimated $400 million per year, and perhaps conscious of the Ninth Circuit's reasoning in upholding the Special Distribution Fund, Davis offered to consider increasing the maximum number of slot machines a tribe could operate at its casinos in exchange for annual revenue payments

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96. *Id.* at 1111.

97. California's novel "tribe-to-tribe" revenue sharing requirement has been lauded as a way to spread the wealth of the Indian gaming industry more equitably among all tribes. *See id.* According to the Ninth Circuit, the provision advances the congressional goal of promoting tribal economic development, tribal self-sufficiency, and strong tribal governments "by creating a mechanism whereby all of California's tribes—not just those fortunate enough to have land located in populous or accessible areas—can benefit from class III gaming activities in the state." *Id.* Others, however, see the provision as an infringement of tribal sovereignty, akin to requiring California to share its tax revenue with Nevada. As to the wide variation in tribal casino profitability, former NIGA chair Rick Hill asked, "Would it be any surprise that the Massachusetts Lottery generates more revenue than the New Mexico Lottery?" Rick Hill, Letter to the Editor [of the *Boston Globe*] (Dec. 20, 2000), www.indiangaming.org/info/bostonglobe.shtml (on file with the authors).

98. For the first 350 machines, there is no license fee; for the next 400 machines, the license fee is $900 per year per machine; for the next 500 machines, the fee is $1,950 per year per machine; for the next 750 machines, the fee is $4,350 per year per machine. TRIBAL-STATE GAMING COMPACT, MODEL COMPACT FOR STATE OF CALIFORNIA, *available at* http://www.cfk.com/final%20compact.htm (last visited Jan. 20, 2005). The number of slots any one tribe may operate is capped at 2,000. *Id.*

99. *In re Gaming Related Cases*, 331 F.3d at 105.

100. *See* MEISTER, *supra* note 4, at 22, tbl.15.

101. *See generally In re Gaming Related Cases*, 331 F.3d 1094 (describing history of compact negotiations in California).

102. Eric Bailey & Jeffrey L. Rabin, *The Recall Campaign: Casinos Bet on Bustamonte and McClintock*, L.A. TIMES, Sept. 29, 2003, at A17; Glenn F. Bunting & Dan Morain, *Tribes Take a Wait-and-See Recall Stance*, L.A. TIMES, Aug. 17, 2003.

to the state of $1.5 billion.[103] Davis also required tribes entering into new compacts to agree to make payments directly to the state treasury, bypassing the use limitations of the model compact's Special Distribution Fund.[104] Not surprisingly, Davis' suggestion was ill-received by the tribes. By mid-2003, Davis had reduced his revenue-sharing proposal to $680 million per year, but in the meantime, his political viability was fading fast.[105] Republicans and others dissatisfied with Davis' performance had successfully initiated a fall recall election, and Hollywood actor Arnold Schwarzenegger entered the race.[106]

Schwarzenegger launched a series of attacks on tribal casinos during his campaign, criticizing California's gaming tribes for being "special interests" who should "pay their fair share," which he estimated as similar to Connecticut's twenty-five percent take of the Pequots' and Mohegans' slot revenues, to help reduce the state's enormous budget deficit.[107] In California, a quarter of tribal gaming revenue could amount to more than $1 billion in annual payments to the state. Davis lost the recall election, and Schwarzenegger became the new governor of California. Schwarzenegger soon sought to renegotiate compacts that would have been in effect for twenty years with a few tribes.[108] At the time of this writing, Schwarzenegger and five tribes had reached agreements in renegotiating their compacts.[109] The new compacts remove the existing limit on the number of slot machines in exchange for increased contributions to the state, including additional licensing fees for all new machines and substantial annual payments.[110] "What's changed [since the negotiation of

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103. Bailey & Rabin, *supra* note 102; Bunting & Morain, *supra* note 102.

104. Bailey & Rabin, *supra* note 102; Bunting & Morain, *supra* note 102.

105. Bailey & Rabin, *supra* note 102; Bunting & Morain, *supra* note 102.

106. Bailey & Rabin, *supra* note 102.

107. Louis Sahagun, *The State Point Man for Gaming Tribes Is Bold Leader*, L.A. TIMES, Jan. 18, 2004, at A1; Dan Morain, *Tribe's Measure Offers Tax Deal*, L.A. TIMES, Jan. 22, 2004, at A1.

108. *See* Morain, *supra* note 107, at A1. Said Schwarzenegger, "[W]e want to protect the Indian gaming, we want to have the Indian gaming tribes pay their fair share to the state." John M. Broder, *Deal Is Near on Casinos in California*, N.Y. TIMES, June 17, 2004, at A20.

109. *Id.*

110. Annual payments will be used to securitize the revenue stream in the form of bonds issued by the State of California. In effect, this is an upfront payment to the state that will be paid back by tribes over the life of the compact. *See* AMENDMENTS TO TRIBAL-STATE COMPACTS (PALA BAND OF MISSION INDIANS, PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, RUMSEY BAND OF WINTUN INDIANS, UNITED AUBURN INDIAN COMMUNITY, AND VIEJAS BAND OF KUMEYAAY INDIANS), *available at* http://www.governor.ca.gov/state/govsite/gov_homepage.jsp (last visited Jan. 20, 2005). At the time of this writing, the specifics of some of the new compacts were not yet finalized. *See, e.g.*, *Accord Scales Back Casino Deal*, N.Y. TIMES, Aug. 23, 2004, at A13 (reporting that negotiations

Davis's model compact]?" asked a gaming consultant about the state's demands for higher payments. "The state economy is in the toilet and Indians have stuff."[111]

Schwarzenegger's announcement that he would pursue California tribes' "fair share" of gambling revenues generated the sponsorship of wildly divergent ballot initiatives for the fall of 2004.[112] The Agua Caliente Band of Cahuilla Indians qualified a ballot initiative that would open the door for an expansion of tribal gaming in exchange for an annual tribal payment to the state of 8.8 percent of net casino revenues, identical to the state's corporate income tax.[113] The initiative was intended to undercut the model agreement negotiated by Schwarzenegger in mid-2004 with five tribes in which the tribes would pay the state at least $1 billion in the first year.[114] California commercial gaming interests introduced a competing ballot initiative that would tax tribal gaming revenue at a rate of twenty-five percent and require tribes to submit to state law and state court jurisdiction concerning gambling.[115] If any one of the state's gaming tribes refused to comply, the initiative would abrogate tribal exclusivity and allow sixteen racetracks and cardrooms to operate some 30,000 slot machines, with one-third of the revenue allocated to state and local programs.[116] The governor responded by forming Schwarzenegger's Committee for Fair Share Gaming Agreements to raise funds to defeat both ballot initiatives.[117]

V. IMPLICATIONS

Our discussion of revenue sharing with a particular focus on recent events in California leads us to raise several implications for the future of such agreements in relation to the law and developing politics of Indian gaming.

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between Governor Schwarzenegger and the Lytton Band of Pomo Indians had been modified to reduce the number of slot machines in the tribe's planned casino near Oakland).

111. Sahagun, *supra* note 107 (quoting Michael Lombardi).

112. Associated Press, *Governor Bets on His Plan for Indian Gaming*, DESERT SUN (Palm Springs, Cal.), June 17, 2004, *at* http://www.thedesertsun.com/news/stories2004/state/20040617000931.shtml# (on file with the authors).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* California voters defeated each proposition by a wide margin. A. J. Naff, *What Passed, What Failed . . .*, INDIAN GAMING, Dec. 2004, at 20.

A. STATES WILL CONTINUE TO PRESS TRIBES FOR REVENUE SHARING

The same rhetorical question raised by recent negotiations in California, what has changed since prior compacts were negotiated, might be posed in other states, such as Minnesota. The state's recent efforts to renegotiate the existing tribal-state compacts reflect the influence of negotiations, particularly of revenue-sharing agreements, in other states, as well as the highly politicized relationship between state and tribal governments.

Minnesota was the first state to sign tribal-state compacts allowing Class III gaming, with mixed results.[118] Some tribes in Minnesota, located in the state's more rural northwest, have only modestly successful casinos due to the constrained consumer market.[119] A couple of tribes in Minnesota, however, have seen extensive benefits from the fifteen-year-old tribal-state compacts since they are located near major cities.[120] On the whole, Minnesota tribes have been relatively successful; in 2003, Minnesota ranked third in terms of Indian gaming revenue, behind only California and Connecticut.[121]

Minnesota's compacts, which remain in effect indefinitely, provided for the tribes to cover the state's annual regulatory costs of $150,000.[122] As other states negotiate tribal revenue-sharing payments in the tens and hundreds of millions and, depending on the ultimate outcome in California, perhaps even billions of dollars, state leaders in Minnesota have looked to Indian gaming to help solve the state's own budget crisis. With a projected $185 million deficit in 2004, Governor Tim Pawlenty sought ways to reduce the deficit without raising taxes.[123] To pressure tribes to renegotiate the perpetual compacts, Pawlenty threatened to consider a "racino" project at Canterbury Downs, a horseracing facility near one of the more successful Indian gaming facilities in the state.[124] And in what some say may be a divide-and-conquer approach, the state proposed a joint tribal-state off-

118. Minnesota House of Representatives, *House Research on Indian Gaming*, http://www.house.leg.state.mn.us/hrd/issinfo/gambind.htm (last visited Ma 14, 2005).

119. *See* Patricia Lopez & Dane Smith, *Lure of Gambling Riches is Strong*, MINNEAPOLIS STAR-TRIB., Feb. 8, 2004, at 1B.

120. *Id.*

121. Indian gaming generated approximately $1.4 billion in Minnesota in 2003. MEISTER, *supra* note 4, at 9, 12.

122. Patrick Howe, *Pawlenty Looks for Bargaining Leverage with Tribes*, DULUTH NEWS-TRIB., Feb. 5, 2004, *at* http://www.duluthsuperior.com/mld/duluthtribune/7885378.htm (last visited May 14, 2005).

123. *See generally* Brian Bakst, *Casino Fight Adds Up to Big-Money Battle*, GRAND FORKS HERALD (N.D.), June 24, 2004, at 6B; Mark Brunswick, *Gambling in Minnesota: A New Deal?*, MINNEAPOLIS STAR-TRIB., Mar. 28, 2004, at 1A.

124. Brunswick, *supra* note 123.

reservation casino venture with three tribes. One proposed location for the jointly owned casino was near the Twin Cities' infamous Mall of America, which already attracts some 42 million visitors each year,[125] and would likely create direct competition for at least some existing Indian gaming facilities. Whether Minnesota ultimately will be successful in its demands for revenue sharing remains to be seen. One thing seems certain, however: as in Minnesota and California, states likely will attempt to acquire a share of Indian gaming revenue as they negotiate new compacts or renegotiate existing ones.

B. NEW PERMUTATIONS OF REVENUE-SHARING AGREEMENTS WILL ARISE

In the absence of federal action to clarify what is permissible, whether through congressional amendment of IGRA to provide guidelines for the negotiation and realization of revenue-sharing agreements, or through a formal legislative ruling by the Secretary of the Interior regarding the legality of revenue sharing under IGRA's existing provisions,[126] new permutations of revenue-sharing agreements will continue to arise on a case-by-case basis, contingent on the economic and political circumstances particular to a given situation.

Connecticut law prohibits casino-style gaming and slot machines by commercial gaming interests.[127] Thus, the tribes' operation of casino gaming benefits from a relatively high level of exclusivity. As legal scholar Kevin Washburn described it, in states with restrictive gaming laws, tribal casinos can be "islands of gaming permissiveness in an ocean of gaming intolerance,"[128] thus attaching a significant value to the state's agreement to maintain tribal exclusivity over casino-style gaming.

But other states have offered less than total or absolute exclusivity over casino-style gaming in exchange for revenue sharing.[129] In Massachusetts, for example, the state has agreed to limit, but not prohibit, commercial casino gambling in exchange for annual payments of $90 million from the Wampanoag Tribe's planned casino.[130] The Interior Secretary's position on

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125. Mall of America, *Mall Information: Leasing*, http://www.mallofamerica.com/about_the_mall/leasing.aspx (last visited Feb. 10, 2005).

126. *See* Contreras, *supra* note 52, at 510-11.

127. CONN. GEN. STAT. ANN. § 53-278a (West 2001).

128. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 294 (2004).

129. *See* Contreras, *supra* note 52, at 496-97 (using the terms "absolute" and "qualified" to describe the differing levels of exclusivity in current revenue-sharing agreements).

130. *Id.* at 496-97.

revenue sharing appears to allow a state to offer a tribe less than total exclusivity, but just how much less is not clear.[131] With revenue sharing occupying a decidedly gray area of the law, it seems likely that in negotiating such agreements, states will push the envelope on how much they should get in return for granting tribes absolute or more limited exclusivity. Some tribes may be willing to agree to pay the states higher percentages of gaming revenue in return for absolute exclusivity, or to concede to qualified exclusivity in return for a successfully negotiated compact.

C. CALIFORNIA MAY SET THE NEW REVENUE-SHARING BENCHMARK

The decade-old experiences of tribes and the state of Connecticut continue to pave the way for the future of tribal-state revenue sharing. While the revenue-sharing agreements negotiated first by the Pequots and then by the Mohegans obviously have been extremely lucrative for the tribes, Connecticut's willingness to "give up" absolute exclusivity to the tribes benefited the state in three major ways: the state negotiated a then-unprecedented twenty-five-percent share of tribal gaming revenue, the grant of absolute exclusivity placed the state on the safest footing with the Secretary of the Interior in its interpretation of the permissibility of revenue sharing under IGRA, and the state managed to preserve the politically popular appearance of opposing the expansion of legalized gambling. Although Californians appear to favor public policy supporting gambling more than Connecticut voters, the state is fairly typical of those with minimal legalized gambling outside of Indian gaming facilities. In such states, it most likely will prove politically viable for the state to use the negotiation of revenue-sharing agreements to strike the balance between fostering Indian gaming as a means of tribal economic development and self-determination and controlling the spread of legalized gambling generally.

Recent tribal-state interactions in California hint at their potential for establishing the benchmark for the negotiation and realization of new revenue-sharing agreements. The key shift in the developing revenue-sharing paradigm has been the move to renegotiate existing tribal-state compacts. By renegotiating existing compacts to pursue greater revenue payments from tribes, the actions of the Schwarzenegger administration, as a follow-up to prior events during the Davis regime, demonstrate how compacts can become impermanent manifestations of changing state

131. *See id.* at 497-98; Lent, *supra* note 52, at 469-70.

political goals rather than codified tribal-state agreements negotiated to further common interests and in recognition of tribes' sovereign status.

D. A COOKIE-CUTTER APPROACH TO REVENUE SHARING MAY BE SHORT-SIGHTED

Kris Olson, the chair of the Board of Trustees of Oregon's Spirit Mountain Community Fund, recently bemoaned a "cookie-cutter approach" to negotiating new tribal-state compacts in that state.[132] A similar one-size-fits-all approach by other states in seeking to negotiate new compacts or to renegotiate existing compacts to institute "fair-share" agreements may constitute short-sighted public policy.

First, this approach undercuts stated goals of federal Indian policy, decreasing tribal economic development opportunities (and by extension, those of surrounding non-tribal communities and the state) and threatening the long-term viability of Indian gaming. The cookie-cutter approach is of particular concern to tribes in rural locales with limited gaming markets, such as North Dakota. Tribes in that state use their relatively modest casino profits to fund tribal government operations and programs and to create employment opportunities on the reservation.[133] Should the state follow California's lead and demand a revenue-sharing agreement from the tribes, the result could endanger the viability of the five tribal casinos in the state. This would impact not only the tribes' ability to provide essential government services on the reservation, but also the continued positive economic impacts of the casinos felt both on and off the reservation.[134] The

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132. Amanda Pennelly, *Compacts Tie Bets to Giving*, PORTLAND TRIB., Apr. 16, 2004, *at* http ://www.portlandtribune.com/archview.cgi?id=23965 (last visited May 14, 2005).

133. *See generally* Kathryn R.L Rand & Steven A. Light, *Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota*, 5 GAMING L. REV. 329 (2001) (describing profitability and use of gaming revenue of North Dakota's tribal casinos); Rand, *supra* note 8.

134. *See* Rand & Light, *Raising the Stakes*, *supra* note 133, at 335.

> Together, North Dakota's five tribal casinos have directly created more than 2,000 jobs in the state. Over eighty percent of the casino jobs are held by Native Americans, many of whom previously were unemployed and receiving public assistance. The casinos' total payroll exceeds $30,000,000 each year.
>
> According to calculations using economic multipliers, the annual economic benefits to the state resulting from the casinos' payroll top $93,000,000. Of these benefits, over $22,000,000 accrue to the retail sector in the state, which is located primarily off the reservations. Thus, while most employees live on or near the reservations, much of their wages are spent off the reservation.
>
> In addition to payroll, the state's five casinos spend over $18,000,000 on goods and services each year. Applying economic multiplier calculations to goods and services purchased by the casinos, the annual benefits to the state exceed $31,000,000. The bulk of these benefits goes to the retail sector, which is located primarily off the reservations.

steady increase in tribal-state revenue sharing is "not good math on our behalf," said J. Kurt Luger, executive director of the North Dakota and Great Plains Indian Gaming Associations.[135] "We're very concerned about revenue sharing, especially in the Great Plains."[136]

Second, the cookie-cutter approach banks on Indian gaming revenue as a short-term means to make up for state budgetary shortfalls that must be addressed instead through long-term planning. Gambling policy is dynamic and unpredictable; even in Connecticut, where tribal gaming has helped to reinvigorate the state's economy, Indian gaming remains highly controversial and politically charged.[137] As tribes are often cautioned, states should be wary of overdependence on gaming profits to support their economies.

VI. CONCLUSION

Indian gaming generates economic growth and development on reservations as well as in surrounding non-tribal communities. For states and localities plagued by budgetary shortfalls, tribal gaming increasingly is perceived as a means to recoup losses or even to grow regional economies. With the advent and growth of tribal-state revenue-sharing agreements, tribes like those in California, Minnesota, and elsewhere increasingly are being asked to pay their "fair share" of Indian gaming revenue.

In view of the stated long-term goals of federal Indian policy and the law governing Indian gaming of maximizing tribal self-governance, self-determination, and economic self-sufficiency, one might caution that short-term revenue-sharing agreements may be negotiated at the expense of tribal economic development and even of tribal sovereignty. Moreover, states themselves may lose out in the long run from short-sighted public policy driven by an overreliance on tribal gaming revenues. By contrast, recognition of shared political and economic interests generated by Indian gaming creates potential win-win outcomes for tribes and states alike.

> The economic effects of North Dakota's casinos in terms of payroll and purchases, then, benefit the state to the tune of nearly $125,000,000 each year. This makes tribal gaming one of the state's top economic engines.

Id. at 335-36 (footnotes omitted) (citing N.D. INDIAN GAMING ASS'N, OPPORTUNITIES AND BENEFITS OF NORTH DAKOTA TRIBALLY OWNED CASINOS (2000)).

135. Jodi Rave, *Tribes' Payout to States Growing Faster than Gambling*, MISSOULIAN (Mont.), July 8, 2004, *available at* http://www.missoulian.com/articles/2004/07/08/news/mtregional/news08.txt (on file with the authors).

136. *Id.*

137. *See generally* Rand, *supra* note 8, at 60-67 (describing public debate over the Mashantucket Pequots' Foxwoods Resort Casino in Connecticut).

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