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Jackpot! A legal history of Indian gaming in California

Aaron Peardon

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JACKPOT! A LEGAL HISTORY OF INDIAN GAMING IN CALIFORNIA

by

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Bachelor of History
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1998

A thesis submitted in partial fulfillment
of the requirements for the

Master of Arts in History
Department of History
College of Liberal Arts

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May 2011

ABSTRACT

Jackpot! A Legal History of Indian Gaming in California

by

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Indian Gaming has transformed the economic, political, and sociological landscape of California. The growth of Indian casinos has had a profound impact on both Indian and non-Indian communities alike. California tribes took the lead in legalizing Indian Gaming throughout the nation. The efforts of California tribes in the legislative and political process have enabled many tribal groups to rise out of poverty and to gain prosperity that would otherwise be impossible to achieve. They have also brought increased revenue to local communities and have provided thousands of jobs to all Californians.

This thesis discusses the historical relationships between Native American groups and the various government entities with which they have interacted. Starting with a general overview of the legal history of major legislative and judicial decisions affecting all aspects of tribal-government relations, the topics narrow to a discussion of the direct impact of court decisions both major and minor on Indian Gaming throughout the United States. These decisions led to congressional action including the Indian Gaming Regulatory Act which provided the foundation for legalized Indian Gaming.

California Tribes were at the forefront of these decisions, and as the legal playing field continued to change, native groups adapted by taking their cause to the citizens of

their state. The thesis provides a detailed explanation of the compacting process, a discussion of tribal struggles through the use of the direct initiative, and an illustration of how this battle led to unforeseen benefits for tribal enterprises. The thesis concludes in the year 2009 with a discussion of the current status of Indian Gaming in California and future concerns that face native governments in their ongoing effort towards greater tribal sovereignty.

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PREFACE

Driving through the California desert on a warm spring afternoon, I begin to take note of the landscape. Among the unfinished housing projects, evidence of urban sprawl and an uncontrolled population boom that is forcing people further away from the cooler coastal areas and into the hotter, yet more affordable desert, are countless numbers of billboards beckoning people to a variety of casinos. It is what one might expect, and is probably very familiar to anyone who has traveled Interstate 15 North beyond Barstow and towards the glistening lights of Las Vegas; however, this is not the 15 North. It is Interstate 10 East. These billboards are not for the Luxor, Flamingo, or Circus Circus in Las Vegas, but for Fantasy Springs, Agua Caliente, Pechanga, and Saboba. These billboards, mixed among the ominous steel windmills that bring thoughts of a future that might resemble science fiction, are a true sign of California's present and future. The signs promise entertainment and excitement to all who travel Interstate 10, including Southern California's large Asian population, as is evidenced in an advertisement for Fantasy Springs Casino that is written in several different Asian and Pacific languages. It is well known throughout Southern California that the Asian population is one of the largest patron groups to the gaming industry. Yet, it is clear that gaming is not simply attractive to the Asian population of California, but to all types of Californians regardless of race, ethnicity, or sex. It is also apparent that Indian gaming has gained a foothold in California, one that was not easily obtained, but one that is clearly here to stay, and is destined to be an integral part of California's future. This realization crosses my thoughts and my words as I travel Interstate 10 towards the Cabazon Reservation in Indio, California.

As we continue our drive towards Indio, I begin to list each of the Indian casinos that I can think of off the top of my head. There is Sycuan, Barona, Viejas, Harrah's Rincon, Pauma, and Pala in the San Diego County area. Pechanga, Saboba and San Manuel are all relatively close to the Riverside area, while Fantasy Springs (Cabazon), Agua Caliente, Spa, Morongo, and Trump 29 are in the vicinity of resort-centered Palm Springs. I am almost taken back at the sheer number of casinos that have seemed to simultaneously sprout up throughout Southern California. Realizing that I have most likely neglected to name every Indian casino in Southern California, I ask myself; "Are the majority of these casinos new or are they simply becoming more prominent and thus, more visible?" I do not recall there being so many casinos when I left for Nevada in 1998. It is now March of 2003, and as I am approaching the Cabazon Reservation, I realize that I am also approaching the culmination of five years of delays and frustrations. After many setbacks and thoughts of simply giving up, I was finally coming to the point where I could actually begin to write this thesis.

Pulling into the parking lot of Fantasy Springs Casino, I notice the stark contrast as compared to a typical Las Vegas casino. The structure is relatively small containing the casino itself and an adjoining bowling alley, but lacking are any accommodations for overnight stays except for a small motel down the street. This layout is typical of many California Indian casinos; however, in recent years, some of the more successful enterprises such as Pechanga and Pala have built, or are currently building, resort-style hotels that rival those of Las Vegas. The second impression that strikes me is the ease in which Fantasy Springs can be accessed in comparison to other properties that I have visited in California. Many Indian casinos are located on remote reservations that are

often difficult to access. Some are located along two lane highways that, until recently, have seen little traffic. Such is the case with Casino Pauma in northern San Diego County. It is located in the middle of a large orange grove off of State Route 76. Without the few signs telling one to “turn left ahead,” one would most likely drive past without ever realizing that, mixed among the citrus, were people wagering thousands of dollars. In comparison to Pauma, Fantasy Springs is adjacent to Interstate 10, which can attract the eyes of anyone travelling towards Phoenix or Los Angeles.

We park next to the entrance of the Indio Pow Wow, a conglomeration of makeshift stands that in some ways resemble a swap meet. This should not be surprising considering the fact that a pow wow is traditionally a gathering place for trade. License plates on cars hail from all parts of the country: Arizona, Oklahoma, Wisconsin, Kansas, and others. It is apparent from the various bumper stickers displaying slogans of Native pride that we are among dignified people. My favorite of all the slogans reads, “Sure you can trust the government, just ask an Indian.” The Pow Wow is about to open, so we decide to head towards the entrance.

Upon entering the Indio Pow Wow, we are handed a coupon inviting us to join the casino’s “Player’s Club.” The coupon guarantees that we will make back at least the amount of the price of admission to the Pow Wow by taking a free pull at their designated slot machine. This is a clear example of how the past, present, and future of California’s Indian population is directly connected to and affected by their gaming enterprises. Even as we symbolically take a step into the past, we are reminded of how casino funds make the present and future possible.

We are some of the first to arrive for the day's festivities, and thus, we decide to walk around the various stands selling a variety of Native American crafts and products. Immediately, my eye is caught by a young Apache man selling hats with the names of different Indian Nations: Comanche, Navajo, Arapahoe, and many others. Attempting to connect with my native heritage, I ask, "Do you have anything Pawnee?" Sure enough, there is a hat that I instantly purchase, neglecting to try it out for size. As we walk away, my girlfriend chuckles. I am sure that a 225 pound white guy who looks like he has never seen a day of sunlight, wearing a hat that is a size too small for his gargantuan head with the word "Pawnee" written across it is very amusing. Even I laugh at myself, however, I truly begin to feel a connection to the people about whom I desire to write.

The Pow Wow is truly a magnificent experience. People from across the country have gathered to honor their ancestral traditions while praying for the well being of their loved ones. Many of these loved ones have just begun to fight in the invasion of Iraq. The master of ceremonies proclaims: "Those who once fought against the flag, now fight for the flag that gives us our freedom. They are our warriors!" This statement evidences the fact that Native Americans are an integral part of our society. Native dancers range in age from senior citizens to toddlers, and they dance and sing with all of their soul and strength. It is the little ones, the children, that touch my heart. They are the real future of Native America. They along with their parents, grandparents, and future generations may reap the benefits of better education, housing, and health care that Indian gaming makes possible.

The Santa Ynez Chumash Nation of California's use of casino revenues exhibits this success. Over one-hundred Santa Ynez Chumash tribal students are currently

enrolled in colleges, universities and trade schools throughout the United States. Tribal Chairman Vincent Armenta stated “Today, thanks to the revenue from our Chumash Casino Resort, we established a generous scholarship fund that has helped our tribal children take educational paths that were not previously available to many of our tribal members.”¹

It is now 2011; at the time of originally writing this introduction in 2003 I felt that the setbacks of a mostly economic sense would easily be overcome and that I would soon finish my degree. Little did I realize the challenges that I would face over the next eight years. Among those challenges was the loss of several important people in my life; people that left this world before their time. They include my father and my mother-in-law who both lost battles to cancer. They also include two of my mentors and original advisors, Dr. Willard Rollings and Dr. Hal Rothman. With the stresses of life and working in an industry that attempts to prevent people from losing their jobs during hard economic times, there have been many instances where I felt that this portion of my life would never be completed. However, through the inspiration of my wife Nicole, my sons Nicholas and Samuel, my mother Debra, and my Aunt Pat I have persevered. Also with the assistance and extreme patience of the kind and understanding professors at UNLV including Dr. Maria Raquel Casas and Dr. Sondra Cosgrove, I have finally come to the point of completion. God has given me the strength to overcome adversity and to refuse to quit no matter how many times it seemed like a viable option. Therefore, I present the following.

¹ Vincent Armenta, et al, “The Benefits of Indian Gaming,” Tribal Leader Roundtable, 1 April, 2011, http://www.santaynezchumash.org/links/2010_articles/April%202010%20newsclips/Apr10_TLR.pdf (accessed April 6, 2011).

INTRODUCTION

As stated in the preface to this work, the writing of this thesis has been an adventure that has lasted more than a decade. I recall reading David Unruh's The Plains Across when I was in Dr. Willard Rolling's class in 1999 and thinking to myself, how could anyone take ten years of their life to write a single book? Well, I've managed to take longer than that.

I sit here today writing the introduction to this work one month away from graduating and nearly thirteen years after beginning my quest for a Master of Arts in History from the University of Nevada Las Vegas. It is also following the successful defense of my thesis in which my committee members suggested some revisions and additional clarifying information including this introduction. I am thankful to Dr. Maria Raquel Casas, Dr. David Tanenhaus, Dr. William Bauer, and Dr. John Tumen for their suggestions and guidance. Some questions included: What does this work contribute to the field you are studying? For that case, what field does it fall into? Is it Indian, gambling, legal or political history? What is the underlying argument and purpose for writing this paper?

I had to really stop and think about these questions. Both gambling and Indian history have always intrigued me, but for different reasons. When I was six years old, my father took me on a cross-country trip to Wisconsin. My parents were divorced, and I didn't quite understand it at the time, but he was permanently moving across country. During the trip, we stopped in Las Vegas. He allowed me to play a slot machine in which I won sixty cents. I thought it was the greatest thing in the world. Ever since, I have been

interested in gambling, not just for the action aspect, but for the atmosphere of casinos, the history, the different games, and the impact that casinos have on communities. A few years later, my mother and aunt took me again on a cross country trip, this time from California to Florida to Washington, D.C. and back. We stopped at every historical marker that we could find. From that point on, I was a history junky.

Following high school, I attended Pepperdine University. It was during this time that I began to research my own family history and discovered that I had Pawnee ancestry. That opened my intrigue into Native American history. For my senior thesis, I wrote a brief history of the Indian Claims Commission Act of 1946. I was overwhelmed in reading the injustices that Indian Nations suffered not only prior to the ICC, but in the actual administration of the act. At this point I decided to focus on Native American history as a field.

When first coming to Las Vegas, my goal was to become a teacher. It was in Dr. Willard Rollings' seminar class that I had to think of a topic for my thesis. I was in Las Vegas, and was studying about Indian history. It was kind of like a Reese's peanut butter cup, the perfect mix of chocolate and peanut butter; Why not write about Indians and casinos? But what to write about? At the time of writing, there was a scarcity of literature on Indian gaming. In fact the two works that stand out, W. Dale Mason's Indian Gaming: Tribal Sovereignty and American Politics and Indian Gaming: Who Wins? edited by Angela Mullis and David Kamper were not published until 2000 following my initial research.

What really drove me into writing this paper is what I explained in the preface. Living in California and seeing a few small Indian casinos that were either in tents such

as Pechanga, or connected to bowling alleys like Fantasy Springs, I wanted to understand why these casinos were so different. I asked myself several questions: Why did players have to pay a commission to play games? Why were casinos located in remote areas? How was all of this possible? What made it legal? Was California unique?

To answer the questions we first discussed, this work spans various fields. It is Native American history, legal history, gambling history, California history, and socio-economic history combined. However, as you will read, the overall focus is on the legal aspects of Indian gaming specific to California. One cannot understand those aspects without looking to the broader field of Indian gaming. Therefore this paper begins with a chapter regarding the history of tribal-governmental relationships. Historians of Native America familiar with Francis Paul Prucha's The Great Father will recognize most of this information. The understanding of the legal precedent established in the history of tribal-governmental relationships is central to understanding the development of Indian gaming law.

Indian gaming law did not simply develop from the opening of the first tribal casino. The second chapter of this work focuses on cases that helped to establish the framework for Indian gaming law primarily focusing on taxation cases and the initial attempt of local governments to close down tribal bingo halls and card rooms. Chapter three is devoted to the Indian Gaming Regulatory Act and the *Cabazon* decision in which California Indian Nations led the way in challenging state and local interference into tribal sovereignty. Chapter four examines court cases both within and outside of California that challenged both the interpretation of the *Cabazon* decision and the Indian Gaming Regulatory Act.

California has been at the center of the Indian gaming debate for several decades. The first attempt to open an Indian casino was in California. Major court cases have involved California Indian Nations. Chapter Five is dedicated to the development of Indian gaming in California including the transition from small operations to the use of the initiative process in order to force the state to negotiate tribal-state compacts culminating in the passage of Proposition 1A in 2000 which is the basis for California's current Indian casinos. The final chapter deals with legal challenges and changes to tribal-state compacts during the Schwarzenegger administration.

The underlying purpose of this paper is to give a narrative legal history of the development of Indian gaming specific to California. In reading actual case law and working backwards, the research for this work was predominantly done through the use of primary sources using the opinions of the justices involved in the cases as well as the governmental acts, propositions and tribal-state compacts specific to this study. One area that I failed to utilize was law journals. At the time of writing, I was more interested in the actual primary documents from the cases themselves rather than interpretation of these cases; however, in hindsight they may have been a helpful resource.

This work fits into a newly developing and growing field of Indian gaming history. Most of the writing and research for this paper was completed in 2004. As mentioned, at the time, the two major works that I found useful covering Indian gaming were W. Dale Mason's Indian Gaming: Tribal Sovereignty and American Politics and Indian Gaming: Who Wins? edited by Angela Mullis and David Kamper. Both works offer excellent information on the development of Indian gaming. Mason's monograph however, is focused primarily on New Mexico and Oklahoma with only brief mention of

California. Indian Gaming Who Wins? is an excellent source for researching California Indian gaming, however it is a collection of essays rather than a monograph. Further it is a bit dated as, at the time of publishing, several issues such as the passage of Proposition 1A had yet to be resolved.

Since 2004, new works have been and continue to be published as the field of Indian gaming continues to expand. The University of North Dakota has been instrumental in the growth of this field. Steven Andrew Light and Kathryn Rand directors of the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota have written several works on this topic. Indian Gaming and Tribal Sovereignty: The Casino Compromise (2005) not only devotes more time to California, but also looks at the socio-economic aspects of Indian gaming. The authors point out that there are a lot of misconceptions about the impacts that casinos have on the community and show that many individuals who criticize Indian gaming are often misguided or uninformed. This work is also important as it examines the benefits that Indian Nations have received as a direct result of casino revenue. Rand and Light have also published two works that I personally have not read, but that would undoubtedly have been useful in writing this paper. Those works are a collection of the majority of legal acts and cases that have impacted Indian gaming entitled Indian Gaming Law and Policy (2006) and Indian Gaming Law: Cases and Materials (2008). Having these works in 2000-2004 could have saved a lot of time, but it is good to see that this field is growing. Finally, the University of Nevada press has just published the work of Kenneth N. Hansen entitled The New Politics of Indian Gaming: The Rise of Reservation Interest Groups (2011). I

look forward to reading this book; I know first-hand from my current line of work that without money, you can't be a player in the political game.

I hope that the readers of my work find an interesting story of how Indian gaming has legally developed in California. The story however, has not ended. California continues to evolve and I am confident that my work will be expanded upon in the future. Again I thank my committee members especially Dr. Casas, the University of Nevada Las Vegas, and most importantly my family. It has been a long journey and I hope that the readers of this work find my efforts helpful and enjoyable.

.

CHAPTER 1

A HISTORY OF TRIBAL-GOVERNMENTAL RELATIONSHIPS

Unlike the wildflower that seemingly sprouts overnight and then quickly withers and dies, the growth of Indian gaming is more akin to the mighty oak with a slow progression as it sinks its roots into the loose American soil. The roots of Indian gaming then do not trace to the first poker game dealt or slot machine played this century on native lands, but goes much farther back to the relationship forged between the federal government and Indian nations at the very birth of the United States. Consequently, understanding the evolution of this dynamic, complex, and often precarious relationship is key to comprehending the development of Indian gaming. Therefore, an initial review of U.S.-Indian relations is essential, as the history of these interactions provides the groundwork for the contemporary issues surrounding Indian gaming.

Continuing the British pattern of Indian-government relations, the federal government established a prominent position in Indian matters from the very inception of the United States and, as time passed, its role as paternal guardian greatly increased.¹ The Articles of Confederation, precursor to the Constitution, inaugurated the principle that the federal government, and not the states, maintained authority over official government-tribal interaction:

The United States in Congress assembled shall also have the sole and exclusive right and power of... regulating trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.²

¹Francis Paul Prucha, The Great Father: The United States Government and the American Indians (Lincoln: University of Nebraska Press, 1984), x.

²Ibid., 14.

In 1787, four years after gaining independence from England, the Northwest Ordinance declared:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, these shall never be invaded or disturbed unless in just and lawful wars authorised by congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs done to them, and for preserving peace and friendship with them.³

The idea that Congress held jurisdiction in Indian affairs became solidified this same year in Philadelphia. The Commerce Clause of the Constitution included the term “and with the Indian tribes,” thus establishing the plenary power of the U.S. government over Indian Nations.⁴ Although benign in tone, the founders established the precedent for government intervention in tribal affairs on a federal rather than state level, regardless of whether or not tribal leaders desired such action.

Treaties and commerce, intertwined hand-in-hand, entrenched the idea that the federal government, rather than state or local governments, was to maintain official interaction between whites and Indians. This does not negate the fact that daily interactions between neighboring communities existed, but on a bureaucratic level, the federal government was supreme. The 1789 Fort Harmar treaties with the Iroquois Confederacy established the practice that the Senate must approve all treaties before they took effect.⁵ Adopting treaties as a legal instrument bestowed a classification of autonomy upon tribes; however, it was not a grant of full sovereignty. The federal

³Prucha, The Great Father, 18.

⁴Ibid., 19.

⁵Ibid., 19-22.

treaties prohibited tribal governments from directly dealing with foreign nations, states, or individuals.⁶ Further, the United States declared its right to “pre-emption,” the idea that if and when a tribal government ever decided to sell its land, only the federal government could purchase it. In the eyes of most government officials, the question was not “if” the tribes would sell, but “when.” In their view, the Indians were simply occupying the land for the time being; they did not possess ultimate ownership over their territories. Land was not the only property right within the realm of federal supervision. Congress also declared its sole authority to regulate all forms of commerce between whites and Indians as is evident in the many trade and intercourse laws passed during the late eighteenth and early nineteenth centuries.

The trade and intercourse laws enlarged federal jurisdiction over a vast array of white-Indian interaction. The first law, passed July 22, 1790, made all purchase of Indian lands void unless performed by public treaty between the respected tribal governments and the United States. It also provided for punishment of crimes committed by whites against Indians, particularly murder.⁷ Congress first designated an “Indian Territory” in the May 19th, 1796, Intercourse Law. A boundary line was drawn to protect Creek and Cherokee lands from white incursions in Tennessee and Georgia. And in 1796 Congress also instituted the death penalty for any white that murdered an Indian while in Indian territory. If an Indian left his land and murdered a white, retribution against the accused was expected to issue from the tribe. In 1817, Congress modified the previous law to include punishment of Indians who committed crimes against whites within Indian

⁶Prucha, The Great Father, 21.

⁷Ibid., 31-32.

territory. In the case of murder, the federal government forced tribal governments to surrender the accused with the threat of military interaction and abduction of hostages. Yet, if an Anglo-American murdered an Indian, the government paid the family of the victim in goods typically equal to a sum between \$100 and \$200, thus putting a price on the value of an Indian's life.⁸ As the laws regulating white-Indian interaction evolved, the Supreme Court soon found itself interpreting those laws.

The Supreme Court became very active in the arena of Indian affairs during the tenure of Chief Justice John Marshall. During the period of 1823-1832, Marshall rendered decisions in three landmark cases collectively referred to as the "Marshall Trilogy."⁹ These rulings set precedent for future litigation concerning relations between federal and tribal governments. In the 1823 decision of *Johnson & Graham's Lessees v. McIntosh*, Chief Justice Marshall declared that Indian claims to land, while not entirely void, were nonetheless secondary to federal claims.¹⁰ This case arose from a dispute between plaintiff Joshua Johnson who purchased land directly from the Illinois and Piankeshaw tribes in 1773 and 1775, and defendant William McIntosh who bought parts of this same land from the United States in 1818.¹¹ In ruling, Marshall relied upon the "doctrine of discovery" which, translated in simple terms, is equivalent to the phrase "to the victor goes the spoils." As a result of the American "discovery" of "new" lands, the conqueror was intrinsically granted a greater claim to land in dispute than that of the

⁸Prucha, *The Great Father*, 31-34.

⁹W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* (Norman: University of Oklahoma Press, 2000), 14-42.

¹⁰ *Johnson & Graham's Lessees v. McIntosh*, 21 U.S. 543 (1823).

¹¹David E Wilkins and K Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Indian Law* (Norman: University of Oklahoma Press, 2001), 53-63.

conquered. In the historically influential work Uneven Ground, American Indian Sovereignty and Federal Law, David E. Wilkins and K. Tsianina Lomawaima assert that the doctrine of discovery “reduces Indian tribes to mere tenants, whose legal claims to their aboriginal homelands are secondary to the claims of the discoverers.”¹² Although Marshall stopped short of completely abolishing any rights to their native land, his opinion was clearly a setback for Native rights.

The subsequent Marshall Trilogy decisions dealt both directly and indirectly with the Cherokee Nation. One of the “Five Civilized Tribes,” the Cherokee adopted many aspects of Anglo-American culture. The Cherokee were not nomadic, but had acculturated by adopting the sedentary agricultural lifestyle that Anglo-society so adamantly proclaimed as the bedrock of civilization. A large number of tribal members were not only literate in their own language, but could also speak and understand English. The publication of a tribal newspaper, “The Cherokee Phoenix,” written in both Cherokee and English is testament to this fact.¹³ On July 16, 1827, tribal leaders took the monumental step of adopting a written constitution formulated on the example of the United States Constitution.¹⁴ Yet, these efforts were not enough to prevent white encroachment onto Cherokee lands. Many in government including the “Great Father,” President Andrew Jackson, believed it necessary to move the tribe west beyond the areas that white farmers desired. Jackson did not view Indian tribes as sovereign, and found it absurd to deal with tribal leaders as if they were independent of the laws of the United

¹²Wilkins and Lomawaima, Uneven Ground, 53-63

¹³Prucha, The Great Father, 66.

¹⁴Ibid., 67.

States. Although Jackson publicly declared that, “This emigration should be voluntary, for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land,”¹⁵ it is clear that he planned their removal at any cost. Congressional allies drafted a Removal Bill and, despite the protests of the Cherokee and some white sympathizers, the bill passed. The final vote was 28-19 in the Senate and 102-97 in the House of Representatives.¹⁶ This meant nothing to the Cherokee who were not simply going to give up and leave their traditional homelands. They decided to appeal their case to the Supreme Court.

The second decision in the Marshall Trilogy addressed the status of Indian tribes among legal entities. The Cherokee Nation of Georgia attempted to prevent the state of Georgia from enforcing its laws on tribal territory. The tribe argued that they were sovereign under Article 3, section 2, clause 2 of the United States Constitution.¹⁷ This portion of the Constitution gives the Supreme Court jurisdiction over cases in which a “state” is a party. The Cherokee contended that they were protected under this clause as a “foreign nation, not owing allegiance to the United States, nor to any State of the Union.”¹⁸ Chief Justice Marshall, however, did not support this notion in his 1831 opinion of *Cherokee Nation v. Georgia*. Rather than independent nations, Marshall labeled Indian Tribes as “domestic dependent nations.” Marshall’s view reflected the contemporary opinion that Indians were occupants rather than owners of land. The President, known as the “Great Father,” granted title of the land for Indian use. However,

¹⁵Prucha, The Great Father, 69.

¹⁶Ibid.,75.

¹⁷Mason, Indian Gaming, 18.

¹⁸Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

this was not “ownership” in the Anglo sense of the word. In Anglo-American opinion, Indian peoples did not and could not comprehend the concept of private ownership. It was the divine right and duty of the Anglo-populace to take the land from Indian tribes and cultivate it into a reflection of European ideals. Marshall held strongly to this ideology, believing that Indian title to land would inevitably cease, enabling the federal government to obtain possession. While demonstrating sympathy for Native Americans that exceeded that of the majority of his fellow citizens, Marshall pictured Indians not as social equals, but as children stating, “Their relation to the United States resembles that of a ward to his guardian.”¹⁹ Ultimately, Marshall concluded that the Cherokee were not protected under Article 3 of the Constitution, but he did not address the question of whether Georgia could enforce state laws upon Indian nations within its territory. That question would be answered in 1832.

Considering Chief Justice Marshall’s rulings in the previous two cases, the 1832 decision of *Worcester v. Georgia* is somewhat of a surprise. This case involved Samuel Worcester, one of two missionaries arrested for violating Georgia state law. State law mandated non-Indians to obtain a license and sign an oath of loyalty prior to entering Indian territory. Worcester neglected to do this when visiting the Cherokee, so Georgia accused Worcester and his partner Elizur Butler of encouraging the Cherokee to resist removal efforts. The state deemed Worcester and Butler as threats and subsequently attempted to remove the missionaries. When they would not voluntarily leave, both were arrested, tried, and sentenced to four years of “hard labor.”²⁰ The convicted men

¹⁹*Cherokee*, 30 U.S.; Mason, *Indian Gaming*, 18-19.

²⁰Mason, *Indian Gaming*, 18.; Prucha, *The Great Father*, 75-77.

appealed to the Supreme Court, giving John Marshall yet another chance to address the issue of jurisdiction over Indian lands.

In contrast to *Johnson v. McIntosh* and *Cherokee Nation v. Georgia*, *Worcester v. Georgia* contained favorable language for Native Americans. Although the Cherokee were still a “weaker power” in Marshall’s view, the nation did not “surrender its independence – its right to self-government, by associating with a stronger, and taking its protection.”²¹ Contrary to previous opinions, Marshall stated that the laws of Georgia did not extend to Indian territories, declaring the Cherokee Nation to be:

A distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.²²

The Chief Justice further looked to the Commerce clause of the United States Constitution Article 1, Section 8, clause 3, which expressly gave Congress the power “to regulate Commerce with foreign Nations, among the several States, and with the Indian tribes.”²³ Marshall used this foundation in declaring, “The treaties and laws of the United States contemplate the Indian Territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.”²⁴ The states lacked the authority to interfere or intervene in Indian affairs unless expressly authorized to do so by an act of Congress. In accordance with this ruling, only the federal government could directly deal with Indian nations.

²¹*Worcester v. Georgia*, 31 U.S. 515 (1832).; Prucha, *The Great Father*, 77.

²²*Id.*

²³U. S. Constitution, art. 1, sec. 8.

²⁴*Worcester*, 31 U.S.; Mason, *Indian Gaming*, 19.

The language of Marshall's decision was clearly a setback for the state of Georgia. However, Marshall's ruling failed to prevent the removal of the Cherokee and the other "civilized" tribes to the west. The use of a technicality enabled the state to bypass the court's decision. Georgia simply ignored the court's mandate to reverse the convictions of Worcester and Butler and to release them. If the state formally refused the court's instructions, then the court could order federal marshals to Georgia in order to free the men. By not acting, the state prevented such action. Jackson stated, "The decision of the Supreme Court has fell still born, and they cannot coerce Georgia to yield to its mandate."²⁵ The court adjourned before resolving the issue, and Jackson quickly seized the opportunity to act. The president asked Georgia's governor to pardon the missionaries and he complied. The American Board of Commissioners for Foreign Missions persuaded their missionaries to accept the offer of pardon, thus bringing a settlement to the original cause of action for the case.

Jackson ignored the remaining aspects of Marshall's decision and proceeded with his plan to remove the Indians to the west. He authorized removal treaties drawn up for the Choctaw, Creek, Chickasaw, and most famously the Cherokee. The Seminole of Florida attempted to prevent emigration, and fought the U.S. in two wars. Some Seminoles managed to stay on their lands, but inevitably the government forced many from their Native homes. The federal government forced more than 60,000 people from the "Five Civilized Tribes" west. The removal caused great discontent and factionalism between groups that advocated leaving traditional lands and those who adamantly opposed leaving. The journey itself was disastrous for many, most notably the scores of

²⁵Prucha, The Great Father, 77.

Cherokee that died on the “Trail of Tears.”²⁶ Jackson’s policy of removal not only affected the tribes of the east, but set the precedent for removing Indians from any lands that the federal government deemed desirable. Jackson and his supporters believed that migration west was a permanent solution to the “Indian problem,” however it simply delayed the issue. As the American nation continued to grow and expand west, conflicts ensued between whites and Indians, forcing the federal government to act.

While Chief Justice John Marshall and the judicial branch of government established the foundational groundwork for Native American litigation, the legislative branch created a special department to deal specifically with Indian issues. On March 11, 1824, without any type of Congressional authorization, Secretary of War John C. Calhoun initialized the Bureau of Indian Affairs, also known as the Office of Indian Affairs. He appointed Thomas L. McKenney, former Superintendent of Indian Trade, to head the bureau.²⁷ A philanthropic man, McKenney appears to have been generally concerned with the well being of Native Americans. McKenney gained valuable experience during his tenure with the Office of Indian Trade during which time he was the strongest proponent of the “factory system.” George Washington initiated the factory system in which government trading houses provided Indians essential items such as rifles for hunting, clothing, cooking utensils, and agricultural equipment on a fair trading basis. The idea was not to create a profitable business, but to provide the Natives with a means for becoming “civilized.” McKenney expanded upon this idea by promoting education and instruction in becoming an ideal farmer. He advocated opening a national

²⁶Prucha, The Great Father, 87.

²⁷Ibid., 59.

school system for Indians paid for with funds accrued by expanding the factory system. This did not sit well with traders (such as John Jacob Astor, owner of the American Fur Company) who were in the business of making profits. Astor's political connection in Washington, Senator Thomas Hart Benton, accused McKenney of mismanagement of goods and convinced Congress to instead abolish the factory system in 1822.²⁸ This defeat did not prevent McKenney from continuing his efforts of civilizing the Indians, however, in his new position as head of the Bureau of Indian Affairs.

During McKenney's leadership, from 1824-1830, Indian affairs had been treated as a special category of the War Department. Now with much of the focus being placed upon managing appropriations for annuities and administering the civilization of Indians, it became apparent that creating a separate department for Indian matters that handled more than war was necessary. Following McKenney's departure, Congress officially created the Indian Department in 1832. Under the supervision of the War Department, this subdivision was at first a loose conglomeration of all individuals assigned to Indian matters throughout the government. In 1834, although still under the canopy of the War Department, the Bureau of Indian Affairs officially became a separate entity within the federal government charged with the duty of managing Indian concerns. The Bureau of Indian Affairs in effect acted as a conduit of the paternalistic ideals promulgated from the executive, legislative, and judicial branches from the inception of the nation.²⁹ In the Bureau's view, Native Americans simply did not know what was best for themselves.

²⁸Prucha, The Great Father, 35-41.

²⁹Ibid., The Great Father, 56-60.

Therefore, it was up to the bureau to enlighten them with the proper way to become civilized.

At the turn of the nineteenth century, the Second Great Awakening energized a new zeal of Protestant Christianity throughout the country. This missionary spirit lasted throughout the century and was reflected in the leadership and goals of the Bureau of Indian Affairs. Adopting the principles of evangelicalism, the Bureau began to endow the Native people with a biblical desire to tame the land. The views of the Bureau merely reflected the ideals of contemporary society: agriculture and private property were the key elements to civilization. The desire to nomadically hunt and communally share had to be replaced with the aspiration to farm on an individual and privately owned basis. The Bible commanded the people to be “tillers of the soil,” and in order to meet that command, the Bureau found it necessary to provide the means for Indians to become horticulturalists. Therefore, the Bureau continued the policy of giving presents and providing annuities practiced during the factory system.

Annuities were grants of money or goods given to tribes as a result of treaties between tribal governments and the U.S. As the name implies, they were usually distributed on an annual or semiannual basis. Extra money was often granted in order to pay off any debts that the tribe might owe to local traders. The federal government viewed traders as a vice that weakened their efforts among Native groups by bringing in alcohol or causing great indebtedness because of unfair trade practices. The Bureau intended that the supply of goods was to create peace and to benefit tribal members by providing agriculture supplies, guaranteeing a fair price for trade, and preventing the negative effects of vices such as alcohol which was illegal to trade; however, the policy

often had the deleterious effect of making groups dependent upon the federal government. If annuities did not arrive on time, or were simply neglected, disastrous effects such as starvation could occur.³⁰

As the century progressed, the idea of persuading Indians to adapt to the ways of white society transformed into the belief that tribes must be forced to conform. Treaties were no longer agreements between two separate powers, but instead a means by which the federal government could achieve its objectives under a legal guise. This shift is reflected in a comparison of the language of T. Hartley Crawford commissioner of Indian Affairs from 1838 to 1845, and Luke Lea, commissioner from 1850 to 1853. Crawford viewed Indians as equals that simply needed time to adapt:

It is proved, I think, conclusively, that it is in no respect inferior to our own race, except in being less fortunately circumstanced. As great an aptitude for learning the letters, the pursuits, and arts of civilized life, is evident; if their progress is slow, so has it been with us and with masses of men in all nations and ages.³¹

Contrarily, Lea believed that Native Americans were simply full of “haughty pride” and should be forced to “resort to agricultural labor or starve.”³² Thus, the formation of a reservation system became paramount to the Bureau. By segregating the Indians from the white populace, the Bureau believed that it could force civilization upon tribal members while removing an impediment to national progress. The principle of civilizing the Indians and making them a reflection of general society no longer was a suggestion, but a command.

³⁰Prucha, The Great Father, 99-107.

³¹Ibid., 100.

³²Ibid., 112-113.

As the American populace continued its westward expansion, the “Indian Problem” became increasingly troublesome. In 1849, the Bureau of Indian Affairs moved from the War Department to the newly organized Department of the Interior. Despite the change, the Bureau remained steadfastly focused upon removing any obstacles that Native societies posed in preventing the advancement of western civilization. The method of choice in achieving this goal was the forced placement of tribal members upon reservations secluded from the white populace. In this manner, tribes would not only be out of the path of expansion, but their acculturation and refinement to the ways of white civilization could be expedited without interference. The Civil War briefly interrupted the efforts of the Bureau as some southern tribes, including the “Five Civilized Tribes,” signed treaties with the Confederacy. Many groups appear to have been treated in a more favorable manner by the Confederate government than with the Union. However, with the end of the war, any gains that tribal leaders made with the Confederacy became moot. With the war behind them, the Bureau resumed its efforts of placing Indian people on reservations with the full backing of the federal government.³³

Following the Civil War Christians resumed their role as civilizing agents. Corruption among agents led Congress and the president to appoint Christian men that they assumed were morally superior to oversee Indian affairs. On April 10, 1869, Congress established the Board of Indian Commissioners, a group of Christian leaders that equally shared the responsibility for disbursement of appropriations to Indians with the Secretary of the Interior.³⁴ The Board wanted to shift away from the granting of

³³Prucha, The Great Father, 136-151.

³⁴Ibid., The Great Father, 158.

monetary annuities, which in their opinion led to idleness, and to do away with the treaty making system. Congress also deemed Indians to be defeated and therefore not worthy of treaties. Indian agencies were split amongst several different religious organizations which eventually led to interdenominational rivalry. Often, groups appeared to be more interested in simply maintaining their Christian image in comparison with other church affiliations rather than actually focusing on helping the Native peoples under their charge. Christian men did no better at running Indian affairs than non-Christians as they were untrained in running large bureaucracies.

Despite these problems, the influence of religious doctrine upon the federal government remained profound. The beliefs preached by theological groups became policy in 1871, as the Indian Appropriation Act ended the era of treaty making.³⁵ Anglo-society no longer viewed Indian tribes as semi-independent entities, but solely as wards of the government that eventually were to be assimilated, individualized, and made into citizens. Assimilation could only be achieved by giving up the Indian way of life and moving to a reservation. On the reservation, one would be free to learn the superiority of agriculture, individual ownership of property, and Christianity away from the corrupting influence of white society. If this was not done voluntarily, then military force would compel the Indians to live on reservations. Leaders in the federal government believed that they were looking out for the best interest of the Indians. Resistance, in their view, was simply a reflection of the fact that Indian people did not know what was truly beneficial for themselves and for the future of the nation as a whole. Through

³⁵Prucha, The Great Father, 165.

concentrating Indians on reservations, the Government could achieve its true goal of opening the remaining Indian territory to white settlement.

Possessed of a standing army for the first time following the Civil War the federal government set out to defeat its native population once and for all. By the last two decades of the nineteenth century, following several “Indian Wars,” the majority of Indians within the country were placed upon reservations. Using the standards set in earlier decades, the government was close to achieving its goals. The obstacles to westward expansion had been removed, and the efforts to civilize Indians could proceed. However, a shift in ideology occurred among the religious leadership that directly affected government policy. Reformers who had worked with freed slaves introduced this new ideology; they wanted to treat Indians the same as the emancipated slaves and to integrate them into white society. Reservations, the saving grace of Indian life, were now viewed as an obstacle to the ultimate goal of citizenship. Indians did not fall under the protections and guidelines of the law as did the rest of white society. In the eyes of many, this was unfair to the Indians themselves, “we owe it to them, and to ourselves, to teach them the majesty of civilized law, and to extend to them its protection against the lawless among themselves.”³⁶

The Indian Rights Association, a Christian organization founded in Philadelphia in 1882, believed that Indians were treated unfairly because they were not under the law. The group was concerned that unscrupulous individuals might find an ignorant Indian who did not know that he was being taken advantage of and swindle him. Additionally, in their view, reservations promoted segregation rather than assimilation. Indians were

³⁶Prucha, The Great Father, 195.

supposed to learn the benefits of agriculture and private ownership of land; however, the disbursement of annuities and rations led many Christian reformers to believe that Indians were simply being taught laziness and dependency upon the government. Most in American society pointed to the great amount of “excess” land that they believed reservation Indians were not utilizing. The public began to call for the opening of this land to white settlement, and for the allotment of land to Indians in a specified acreage amount. It was believed that an individual only needed a certain amount of land to sustain himself and his family. By selling the land that was not in use, it could be opened to cultivation by white farmers. They, in turn, could show by example the benefits of agriculture and teach the Indians how to be self-sufficient. Any proceeds from the sale of land could be used to promote civilization and education within the tribe.

The idea of allotting land to individual Indians became official policy in the 1887 Dawes Act. Originally proposed by Texas Senator Richard Coke, the act took its name from Massachusetts Senator and chairman of the Committee on Indian Affairs, Henry L. Dawes.³⁷ The legislation enabled the President to designate one-hundred and sixty acre lots to each head of family within a tribe. Smaller acreage amounts could be granted to single individuals and minors. Tribal members were allowed to choose their allotments pending approval by the Secretary of the Interior. If an individual did not select suitable land for himself within four years, then the President or Indian agent would make the selection. A patent was given to each land-owner stating that the government would hold title for a twenty-five year trust period. At the end of this time, the government relinquished title and granted the land to the tribal member in fee simple. All excess land

³⁷Prucha, The Great Father, 200-225.

became open to negotiation for sale. The proceeds of such sale were to be placed into a Treasury fund solely for education and civilization purposes. Most importantly, once an Indian received his allotment, he became a U.S. citizen.

In theory, the government envisioned allotment as a means of turning Indians into mirror-images of their white neighbors. The practical application of allotment exhibited the problems in this theory, however. To begin, the Dawes Act did not universally apply to all Indian tribes. Within Indian Territory, the “Five Civilized Tribes” (Cherokee, Choctaw, Chickasaw, Creek, and Seminole), the Osage, Miami, Peoria, and Sac and Fox, were excluded from the act. In addition, the Seneca of New York, and some Santee/Dakota in Nebraska were also exempt. Second, allotment did not bring about a sudden adoption of agriculture as reformers had intended. In many cases, people such as the elderly or students away at school, were incapable of tending to their land. To resolve this, Congress allowed the disabled and those who had an “inability” to utilize their allotment to lease out their land. This, however, was a further hindrance to the attempts to turn Indians into farmers. Many simply used rented land as a source of income without attempting to cultivate the soil themselves. The Dawes Act accomplished the reduction of Native holdings. Territory belonging to Indian tribes was reduced by fifty percent in a twenty year span declining from 155,632,312 acres in 1881 to 77,865,373 acres in 1900.³⁸ Only 5,409,430 acres were allotted to individuals. The Dawes Act increased opportunities for prosperity for the majority of Americans at the expense of the tribal

³⁸Prucha, The Great Father, 227.

minorities. Despite the results, the drive to assimilate Native Americans into the American mainstream continued, all in the name of progress.

A general call to make Native Americans subject to the nation's laws accompanied support for allotment. Most in society believed that holding Indians to a different standard was not only unfair to whites, who were expected to obey the law, but also an injustice to the Indians themselves who were denied the privilege of living in a lawful society. The United States Supreme Court exacerbated this belief in the ruling of *Ex Parte Crow Dog*, decided December 17, 1883.³⁹ The court tried Crow Dog, a member of the Brule' band of the Lakota nation, for murder in the death of Chief Spotted Tail, also a member of the Brule'. The territorial court of Dakota sentenced Crow Dog to death with the execution to be carried out on January 14, 1884.⁴⁰

Walter H. Smith and A.J. Plowman appealed the case to the Supreme Court on behalf of Crow Dog. In the prayer of their petition, counsel asked the court to grant a writ of habeas corpus in order to free their client from an alleged illegal imprisonment. They argued that the United States did not hold jurisdiction over crimes committed by one Indian against another. The court agreed in a review of section 5339 of the Revised Statutes which stated, "every person who commits murder ... within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States ... shall suffer death."⁴¹ The court considered the fact that Title 28 of the Revised Statutes directly dealt with Indians and included punishment

³⁹Prucha, *The Great Father*, 229.

⁴⁰*Ex Parte Crow Dog*, 109 U.S. 556, 3 S. Ct. 396, 27 L. Ed. 1030 (1883).

⁴¹*Id.* at 558.

for crimes. However, these punishments focused solely on crimes committed by Indians against whites or whites against Indians. They did not provide any basis for reprimanding an Indian who acted against another Indian. In fact, section 2146 specifically stated, “The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian ...”⁴² The court pointed to this exclusion as a primary basis for deeming the conviction of Crow Dog as “illegal and void.” Although the territorial court held jurisdiction over Indian versus white or white versus Indian offenses, it could not prosecute purely Indian matters. Further, the court expressed the opinion that it was unreasonable to expect tribal members to be subject to a code of law that was unknown to them:

It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality.⁴³

Ultimately, the court determined that to concur with the federal government’s argument would necessitate a reversal of the long standing policy of leaving purely internal matters to the jurisdiction of tribal governments. Crow Dog was thus ordered released and spared execution.

Neither the general public nor political leaders were pleased with the decision of the court. Only an act of Congress could change the jurisdictional boundaries of federal law; thus, Congress acted quickly to make Indians subject to certain criminal acts. The

⁴²Ex Parte Crow Dog, 109 U.S. at 558.

⁴³Id. at 571.

Major Crimes Act of 1885 enumerated seven offenses: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.⁴⁴ The federal government could punish any Indian that committed one of these offenses against another Indian. Congress granted the jurisdictional power that the federal government so adamantly desired, however, it was not long before this authority was questioned. A little more than a year after Congress passed the Major Crimes Act, the Supreme Court determined its constitutional validity.

United States v. Kagama came to the Supreme Court on a Certificate of Division of Opinion between the circuit judge and district judge for the district of California.⁴⁵ The two judges could not reach the same conclusion in deciding the fate of Kagama, also known as “Pactah Billy,” or his accomplice Mahawaha, also known as “Ben.” Both were members of the Hoopa Valley reservation and were charged in the murder of a fellow tribal member Iyouse or “Ike.” The crime of murder was one of the seven listed in the Major Crimes Act, thus making the actions of Kagama subject to federal authority. The Court, however, questioned whether Congress had violated the Constitution and thus created an invalid law. They first studied the language of the Major Crimes Act which provided a clear distinction between crimes committed within a territory and those within a state. If one of the seven major crimes was committed within a territory of the United States, then the laws of that territory were observed. The proper venue for any judicial proceedings was the territorial courts. It made no difference whether the crime was

⁴⁴18 USC § 1153. The Major Crimes Act has been amended several times since its original passage. In addition to the original crimes listed, the act currently covers seven additional offenses: kidnapping, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, assault with intent to commit rape, robbery, and felonious sexual molestation of a minor.

⁴⁵*United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1886).

committed on or off of a reservation.⁴⁶ Conversely, if the crime was committed within the boundaries of a state, then the federal government maintained control over all proceedings. In addition, the crime must have been committed within the boundaries of a reservation for these aspects to apply. As the court observed, this legislation was new in the fact that these provisions were specifically written for crimes committed by one Indian against another.

The Court found little assistance from the Constitution itself, and declared that the document is “almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.”⁴⁷ In the minds of the justices, the Commerce Clause was not intended to be used as a basis for the formulation of a system of criminal laws. Looking to John Marshall’s opinion in *Cherokee Nation v. Georgia*, the Court reiterated the point that Indian tribes were neither states nor nations containing full sovereignty, but were domestic dependent nations with a semi-independent status.⁴⁸ Following this definition, Justice Samuel F. Miller, author of the court’s opinion, stated that only two types of sovereignties existed within the geographical boundaries of the United States. These classifications were federal and state. As Miller declared, “There may be cities, counties, and other organized bodies, with limited legislative functions, but they are all derived from, or exist in subordination to one or the other of these.”⁴⁹ Citing case law in the matter of *Murphy v. Ramsey*, the Court determined that the United States drew its power from “the ownership of the

⁴⁶Kagama, 118 U.S. at 376-377.

⁴⁷Id. at 378.

⁴⁸Cherokee, 30 U.S.

⁴⁹Kagama, 118 U.S. at 379.

country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else.”⁵⁰ This statement restated the position that Indian tribes merely maintained a “possessory right to the soil,” but the United States held ultimate title to the land.

Following the Indian Appropriation Act of 1871, the relationships between Indian tribes and the United States were no longer governed by treaties, but dictated solely by Congressional acts. In *Ex Parte Crow Dog*, the Court pointed to the lack of Congressional action regarding the act of murder by one Indian against another as a justification for the release of Crow Dog. To fill that gap, Congress passed the Major Crimes Act. Justice Miller agreed with the position that Congress maintained the right to create and enforce laws that were within the realm of federal authority. The Major Crimes Act was an extension of this authority, and thus was not a violation of the Constitution. The only remaining question was whether the defendants Kagama and Mahawaha fell under federal or state jurisdiction. The crime in this instance was committed entirely within the physical limitations of a reservation located in an existing state. These conditions determined that the federal government held the right of prosecution at the exclusion of the state.

United States v. Kagama not only solidified the position of the federal government in intervening in Indian affairs, but established an important precedent that would limit the ability of state governments from interfering in Indian matters. A state could not pass a law concerning Indian tribes. Only the federal government, through an

⁵⁰Murphy v. Ramsey, 114 U.S. 44; S.C. Sup. Ct. Rep. 747 (1885).

act of Congress could create laws that affected Indian rights. This premise would stand until later in the twentieth century.

Early in the twentieth century, new challenges forced the legislature and judiciary to examine existing policies governing Native Americans. On October 23, 1902, arguments commenced in the case of *Lone Wolf v. Hitchcock*.⁵¹ Counsel for the plaintiff Lone Wolf, a Kiowa Indian, contended that allotment of tribal lands and subsequent sale of “excess” lands of the Kiowa, Comanche, and Apache tribes was a violation of the 1867 Medicine Lodge treaty and therefore an abuse of congressional power. Within the terms of the treaty, the United States and respective tribal leaders agreed that any cession of reservation land would be invalid “unless executed and signed by at least three-fourths of all the adult male Indians occupying the same.”⁵² Plaintiffs argued that not only were there not enough signatures to constitute three-fourths of the male population, but that a large portion of the collected signatures were obtained through coercion or by forgery. The case was taken under submission and ruled on January 5, 1903.

Justice Edward D. White’s written opinion reinforced the view maintained by the majority of the American populace that Indian nations were subordinate to the federal government and through that government to the will of the majority. Regardless of whether the United States violated the treaty of Medicine Lodge, congressional power was absolute and unquestionable: “Plenary authority over the tribal relations of the Indians has been exercised from the beginning, and the power has always been deemed a

⁵¹*Lone Wolf v. Hitchcock*, 187 U.S. 533, 23 S. Ct. 216 47 L. Ed. 299 (1903).

⁵²*Id.* at 554.

political one, not subject to be controlled by the judicial department of the government.”⁵³ The court reiterated the sentiment of former Supreme Court opinions that Indians simply held a right of occupancy to land. Actual title and ultimate ownership of the land belonged to the United States. Treaty provisions such as the three-fourths rule of Medicine Lodge could “deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.”⁵⁴ Therefore, Justice White explained that it was a necessary and inherent congressional right to abrogate treaty requirements. The court did not expand upon the definition of an “emergency,” but declared that Congress would only act in the best interests of the nation’s wards: “We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of government exercised its best judgment in the premises.”⁵⁵ It would appear that this logic contradicted the Indian Appropriation Act of 1871 that specified, “but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3d, 1871, shall be hereby invalidated or impaired.”⁵⁶ Yet, in a somewhat puzzling manner, the court pointed to this very passage as justification of the authority of Congress to overturn or bypass the Medicine Lodge treaty. The fact that Indians had been decimated and reduced to more of a nuisance than a threat empowered the Court to feel that there would be no negative repercussions or public scrutiny in breaking treaty agreements.

⁵³Lone Wolf, 187 U.S. at 565.

⁵⁴Id. at 564.

⁵⁵Id. at 568.

⁵⁶Section 2079 of the Revised Statutes.

Two years after *Lone Wolf*, the Supreme Court delivered another blow to tribal interests; however, unlike former decisions, the ruling of *In the Matter of the Application of Albert Heff, for a Writ of Habeas Corpus* was equally detrimental to federal authority.⁵⁷ The case directly concerned the arrest of Heff, a non-Indian, for the sale of alcohol to an Indian. Heff contended that his arrest and subsequent conviction under the Congressional Act of January 30, 1897, was unconstitutional. The act made sale of any kind of liquor to an Indian that had either received an allotment held in trust by the government or was still currently a ward of the government, illegal and punishable by imprisonment and monetary fines.⁵⁸ Justice David J. Brewer delivered the opinion of the court, which determined that the matter was beyond federal control.

In ruling that the federal government had overstepped its authority, the Supreme Court superseded congressional intention in the 1887 Dawes Act. Justice Brewer stated that, upon accepting allotment, an Indian became a citizen of the United States and the respective state in which he or she resided regardless of whether or not the allotment was currently held in trust by the federal government:

In the first place, it is hardly to be supposed that Congress would legislate twenty-five years in advance in respect to the general status of these Indians ... So far as his political status is concerned, the allottee is declared to be a citizen, -- not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued.⁵⁹

Having become a citizen of the state in which he or she resided, an Indian was no longer subject to federal policing power, but was entirely under the laws of that state.

⁵⁷*In Re Heff*, 197 U.S. 488, 25 S. Ct. 506, 49 L. Ed. 848 (1905).

⁵⁸*Id.* at 490.

⁵⁹*Id.* at 502-503.

Jurisdictional authority in this manner either belonged to the state or to the federal government, it could not be split between both as Justice Brewer declared, “There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two.”⁶⁰ Attempts to claim that liquor sales fell under the Commerce Clause of the constitution or internal revenue laws were moot. The Supreme Court granted Heff’s petition for a writ of habeas corpus, and released him.

Beyond the manifest issue of liquor sales to Indians, a brief passage within the court’s decision held the potential to dramatically transform the tribal-federal relationship paradigm. The statement read:

Of late years a new policy has found expression in the legislation of Congress, -- a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned.⁶¹

By this definition, Congress could arbitrarily decide to simply remove its protection over Indian tribes and cease to provide assistance to tribal members. This surpassed the scope of *Lone Wolf* as Congress could not only abrogate treaty stipulations, but could completely renege on all promises made to Indians. The court in *Heff* pointed to what they viewed as a congressional and popular trend of legislation that was leading towards the goal of terminating the federal trust relationship. In the court’s view, this goal was

⁶⁰In Re Heff, 197 U.S. at 506.

⁶¹Id. at 499.

achieved once an Indian became a citizen; receipt of allotment denoted citizenship status, which ended the federal government's trust responsibility. The door was now open for Congress to end its role as guardian and provider for Indian nations.

Congress was not ready to end the special relationship with its "wards" and was equally reluctant to give up jurisdictional authority to the states. In response to *Heff*, Congress passed the Burke Act in 1906. The Burke Act amended the 1887 Dawes Act in a manner that delayed citizenship to Indian allottees and reaffirmed federal control in Indian matters. The act specifically stated, "That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee..." Indians would become citizens and subject to the civil and criminal laws of the state or territory in which they resided.⁶² Further, Congress made clear, "That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."⁶³ The Burke Act clearly demonstrated that the Supreme Court had misinterpreted congressional intention in the Dawes Act in its *Heff* ruling. While the idea of eventually ending the guardianship role of the federal government may have floated around the halls of Congress, the legislature demanded that the timing of such an event be left in their hands.

A decade after the Burke Act, the Supreme Court acknowledged Congress' objection to their opinion in *Heff* and reversed the ruling of the prior court. *United States v. Nice*, decided June 15, 1916, proclaimed the principle that, "Citizenship is not

⁶²Burke Act of 1906, 34 Stat. 183.

⁶³Id. at 183. The Burke Act of 1906 amended the 1887 Dawes Act, but did not apply to Indians within Indian Territory (modern day Oklahoma).

incompatible with tribal existence or continued guardianship.”⁶⁴ Similar to the issue in *Heff*, *United States v. Nice* directly addressed congressional authority in regulating liquor trade to Indians. Justice Willis Van Devanter’s opinion examined many of the same documents that Justice David J. Brewer had reviewed in 1905. Contrary to the previous conclusion, Van Devanter found that Congress did not exceed its limits over Indian matters. Not only did the Commerce Clause support the federal government’s position; but further, allotment under the Dawes Act did not indicate termination of the government’s role as guardian to Indian nations. Van Devanter stated, “According to a familiar rule, legislation affecting the Indians is to be construed in their interest, and a purpose to make a radical departure is not lightly inferred.”⁶⁵ The *Heff* decision was a complete change in policy and one which was unfavorable to Indian interests, thus violating this rule. In scrutinizing the language of the Dawes Act, Van Devanter concluded that the premise that the words “were to be taken with some implied limitations, and not literally, is obvious.”⁶⁶ The fact that an Indian received an allotment, or even gained citizenship did not make him fully subject to state laws. Congress expressly retained control over matters such as education, civilizing efforts, and liquor trafficking. State laws could not impede upon federal goals. The question of which laws a state could enforce and the jurisdictional struggle between state and federal governments would continue throughout the twentieth century.

⁶⁴*United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916).

⁶⁵*Id.* at 241.

⁶⁶*Id.*

Two significant events influenced federal Indian policy in the 1920s. The first was the passing of the Indian Citizenship Act in 1924. Many Native Americans had already achieved citizenship status before this act. In 1901, all of the Indians within Oklahoma, the former Indian Territory, became citizens. The government also granted citizenship to Indians who adapted Anglo-American culture and left tribal existence. In 1919, Congress determined that any soldier that had fought in World War I and was given an honorable discharge could gain citizenship without losing any rights to tribal property.⁶⁷ As an outgrowth of this patriotic ideal, the American public called for the extension of such a privilege to all Indians. Congress heeded this call in 1924, making all Indians United States citizens. This label, however, did not end the right of an individual to also be a tribal member. Congress protected property rights and ensured that the federal trust responsibility remained intact. As the court in *United States v. Nice* had determined, citizenship and tribal existence could coexist.

The second event was the introduction of John Collier as a major player in the formation of Indian policy. Historian Francis Paul Prucha labels Collier the most prominent figure in the history of American Indian policy. Collier's work for the People's Institute of New York City, a group that helped immigrants adapt to life in America by offering cultural lectures, exhibited his belief in building communities through cooperative work rather than competition and a desire to replace materialistic values with moral ones. A visit to the Pueblo Indians in the early 1920s led Collier to believe that he could restore Indian culture, autonomy, and return the land to communal ownership rather than individual allotment. Collier formed the American Indian Defense

⁶⁷Prucha, The Great Father, 267.

Association in 1923 as a means of protecting Indian rights. The association strongly criticized the Bureau of Indian Affairs for a lack of concern for Indian needs. They pointed to the failure of schools, poor health conditions on reservations, and the tremendous loss of tribal land. Rather than forcing failed procedures upon tribes, Collier advocated reforms that would recognize cultural pride and maintain traditional values. His efforts were recognized at a national level, leading President Franklin D. Roosevelt, with persuasion by Secretary of the Interior Harold L. Ickes, to appoint Collier as Commissioner of Indian Affairs.⁶⁸ Collier took office on April 21, 1933 during a decade that became a watershed in federal Indian policy. A strong opponent of allotment, Collier prepared legislation to attempt to reverse the disastrous consequences of this failed initiative.

The Wheeler-Howard Act, also known as The Indian Reorganization Act passed Congress on June 18, 1934.⁶⁹ Excluding the Natives of Oklahoma and Alaska, the act ended allotment across the rest of the nation and extended the trust period placed on Indian lands for an indefinite amount of time, which could only be ended by congressional action. The federal government returned remaining surplus lands that had not been allotted to tribal ownership. The act prohibited sale or exchange of lands unless the Secretary of the Interior deemed the exchange to be favorable to the goal of consolidating Indian holdings. It created monetary funds to assist Indian nations including \$250,000 per year for tuition in vocational or trade schools, \$10,000,000 in a revolving fund for loans to foster economic development, and \$250,000 per year for the

⁶⁸Prucha, The Great Father, 317.

⁶⁹Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. §461 et seq.

formation of chartered corporations and other tribal organizations.⁷⁰ The establishment of these corporations under Section 16 of the act was a step in the direction of granting some autonomy to tribal groups. Any tribe could adopt a constitution and bylaws which would become effective once approved by a majority of all adult members. The law gave tribal governments the power to employ legal counsel, to prevent the sale or lease of tribal lands, and to negotiate with federal, state, and local governments. However, one overshadowing aspect of paternalism existed in all of these provisions; the Secretary of the Interior still approved or denied everything. The Wheeler-Howard Act was not arbitrarily forced upon Indian tribes. In a special election, each group had the choice to accept or deny the act by majority vote. One-hundred and eighty one tribes accepted the act, seventy-seven rejected it, and the government defaulted fourteen into acceptance by failure to vote. Within ten years, ninety-three tribes had constitutions and bylaws and the Secretary of the Interior granted charters to seventy-three groups.⁷¹

The Wheeler-Howard Act was just one of several ways that John Collier attempted to promote the well-being of Native people. Collier also helped to organize several organizations that mirrored those of Roosevelt's New Deal. Roosevelt approved the creation of the Indian Civilian Conservation Corps to combat poverty on reservations. Much like the larger Civilian Conservation Corps, the Indian version maintained camps for single and married men to help conserve reservation land and teach industrial skills.⁷² Other agencies such as the Public Works Administration, Works Progress

⁷⁰Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. §461 at §§ 9, 10, 11.

⁷¹Prucha, The Great Father, 324.

⁷²Ibid., The Great Father, 320.

Administration, and Agricultural Adjustment Administration were beneficial to Indian needs.

Despite these efforts, and the passing of the Wheeler-Howard Act, Collier faced the political opposition that is common place in bureaucratic settings. His desire to create an Indian Claims Commission to settle tribal land claims against the government faced defeat in the Senate in 1937.⁷³ Many politicians claimed that Collier's initiatives called for a reversion to tribalism and were against civilization and citizenship. The Senate Committee on Indian Affairs prepared two vindictive reports that greatly harmed Collier's reputation and damaged his efforts to complete his vision for Indian tribes. Finally in 1945, Jed Johnson, chairman of the House Appropriations sub-committee on Interior Appropriations, threatened to cut tribal appropriations if Collier did not resign. Tired of the political bickering, on January 19, 1945, Collier stepped down from his position as Commissioner of Indian Affairs.

Collier's plans held some shortcomings, including the fact that larger tribal governments (such as the Navajo who rejected the act) did not always work for groups accustomed to operating on a smaller traditional basis. While Collier believed that he was reintroducing traditional culture among Indians, most Indians saw his efforts as interference on the same level as past reformers. Additionally, the creation of tribal organizations often led to factionalism within the tribe. In spite of these issues, Collier's perhaps misguided actions promoted cultural heritage and pride, gained respect for Indian cultures amongst many whites, and gave impetus to the movement for tribal sovereignty. At the time of his resignation, the idea of pan-Indian movements was taking hold. One

⁷³Prucha, The Great Father, 333.

such movement was founded in 1944; the National Congress of American Indians promoted native interests on a national level.

International conflict also brought national recognition to Indians. As they had in World War I, a large number of Native Americans answered the call of duty and enlisted during World War II. Many lost their lives fighting side-by-side with fellow white Americans. During war times at least, Native Americans gained a sense of equality with their white counterparts.⁷⁴ Many others also worked in defense industries, making a good living wage. The access to earning good money both in defense and in the military was the key to prosperity. However, the government did not see the fact that war times brought access to good paying jobs for Indians; the government simply thought that getting Indians off of reservations would lead to success. The postwar era brought a new calling for a shift in Indian Policy. This change was the desire of the federal government to once and for all end the federal trust responsibility over tribes, and bring Native Americans under the same legal umbrella as the rest of mainstream society. The Termination era had arrived.

The initial phase of termination brought the Indian Claims Commission. Although the Senate had turned down the idea of a governing body to determine claims during Collier's time, the House of Representatives enacted the Indian Claims Commission Act on August 13, 1946 and this time the Senate gave its approval.⁷⁵ The commission was designed to grant Indian tribes access to the courts, an action that had previously required special permission from Congress. The I.C.C. gave tribes the

⁷⁴Prucha, The Great Father, 317-338.

⁷⁵Indian Claims Commission Act, August 13, 1946, H.R. 4497. Public Law 726.

opportunity to file any claim within a five year period. Congress believed that all claims could be resolved within a ten year period, at which time the Indian problem would finally be laid to rest. The I.C.C. was flooded with claims and its life was repeatedly continued until it was finally dissolved in 1978. Although the commission allowed suit concerning a variety of disputes, the majority of cases dealt specifically with land.

The Indian Claims Commission, originally comprised of a three person panel that was expanded to five persons in 1967, held the task of first determining whether a tribe held “original” or “recognized” title to land. The commission defined “original” title as having exclusive rights to the area since “time immemorial.”⁷⁶ In essence, if another tribe disputed title to any holdings, the government could claim that it was incapable of determining which group should be awarded compensation. In order to combat this tactic, many tribes, including long time enemies such as the Pawnee and Lakota, agreed to stipulations specifying clear boundaries between their lands. “Recognized” title had been established in the past through various means such as treaties. However, as seen through case law including the Marshall Trilogy, the difference between original and recognized title mattered little. The fact remained that the government had long held the point of view that it held ultimate title to the land being occupied by native groups. Following the formality of naming the type of title a tribe held, the commission determined the value of land, the amount of U.S. liability in each claim, and what amount of value could be deducted for “gratuitous offsets.” Gratuitous offsets included appropriations given for the tribe’s benefit.⁷⁷

⁷⁶United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1942).

⁷⁷Indian Claims Commission Act, August 13, 1946, H.R. 4497. Public Law 726.

The problems of the Indian Claims Commission were profound. Its existence of thirty-two years beyond Congress' original goal is testament to this fact. In 1978, when the commission was finally disbanded, a total of three-hundred and forty-two claims had resulted in awards to tribes. The total monetary value of these awards equaled \$818,172,606.⁷⁸ While this may appear to be a large sum, it is a small fraction of which tribes were suing. On a consistent basis, the I.C.C. would devalue the price of land in dispute, despite the fact that attorneys representing tribes were already asking for prices well below market value. In addition, the payment assessed was valued in terms reflecting the cost of land at the time of sale, not at the time of hearing. No consideration was given for inflation, and interest was out of the question. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use, without just compensation."⁷⁹ If an average citizen sued and was victorious in the Federal Court of Claims, then judgment would include both interest and inflation. However, it appears that the I.C.C. could not afford to grant this Fifth Amendment protection because in reality it had the potential of bankrupting the federal government. Along this same line of thought, only a very few claims granted land such as the Lakota of the Black Hills and Western Shoshone of Nevada. Congress only offered money to the overwhelming majority of claims. The government could not possibly give back land that was now owned by millions of individual citizens. If it had, the legal process would continue indefinitely.

⁷⁸Indian Claims Commission, Annual Report, 1978.

⁷⁹U.S. Constitution, amend. 5.

The most nonsensical aspect of granting the final monetary award to tribes was the subtraction of “gratuitous offsets.” Rather than taking the opportunity to further promote economic well being of tribes, the government deducted for any assistance that they may have provided even though those services were granted to the Indians in treaties. This simply seems contradictory to the goal of making tribes self-reliant. Overall, the Indian Claims Commission failed to achieve its goals. While the commission did settle many claims, it did not end the federal trust responsibility and it did not satisfy the needs of tribal members.

While the Indian Claims Commission was in the primary stage of receiving claims, the federal government was attempting to terminate tribal relations by other means. In testimony held on February 8, 1947, before the Senate Committee on Civil Service, Commissioner of Indian Affairs William Zimmerman classified Indian tribes into three groups for means of relieving the costly federal burden to tribes. The classification was broken down into three separate time periods in which the federal government could reduce or end any type of support or services. The first group would be separated from government protection immediately, the second within ten years, and the third would take more than ten years.⁸⁰ Zimmerman insisted that his testimony was not intended for the purpose of full-fledged termination, but Congress used his words as an opportunity to proceed with termination plans.

The Legislative Reorganization Act of 1946 shifted Indian matters into the hands of the Committee on Public Lands, later named the Committee on Interior and Insular

⁸⁰Prucha, The Great Father, 343.

Affairs.⁸¹ The committee exhibited a strong bias for termination reflecting the dominance of western politicians who desired to end the federal trust relationship in the one geographic area where Indians were still seen as an impediment to white civilization.

The most adamant of these politicians, Arthur V. Watkins of Utah helped in the adoption of House Concurrent Resolution No. 108. The resolution stated:

It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the U.S. subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the U.S. and to grant them all of the rights and prerogatives pertaining to American citizenship.⁸²

Congress expressed its belief that all services should end and all offices of the Bureau of Indian affairs should be closed within the states of California, Florida, New York, and Texas. Additionally, Congress believed that the individual tribes of the Flathead of Montana, the Klamath of Oregon, the Menominee of Wisconsin, the Potawatomi, and a portion of the Chippewa who belonged to the Turtle Mountain Reservation in North Dakota should also be terminated. Although House Concurrent Resolution 108 did not hold the effect of law, the impetus to shift jurisdiction away from the federal government had begun. Congress followed House Concurrent Resolution with one of the most important, controversial, and debatable pieces of legislation concerning Indian affairs.

On August 15, 1953, Congress passed Public Law 280. This law amended Title 18 of the United States code by granting both criminal and civil jurisdiction over Indian matters, with minor exceptions, to the states of Minnesota, Nebraska, Oregon, Wisconsin,

⁸¹Prucha, The Great Father, 346.

⁸²H. Con. Res. 108, 83rd Congress, August 1, 1953, 67 Stat. B132.

and California.⁸³ A mere two pages long, Public Law 280's language led to many disputes and controversies between state's rights and tribal activists. The states listed under Public Law 280 contend that they received full jurisdiction over Indian lands. Tribal leaders instead argue that Public Law 280 grants only limited authority to states. Section 4 (c) reads:

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.⁸⁴

This is problematic in that determination of whether an Indian law was inconsistent with a state civil law was often unclear. In the following decades this became an issue of great concern, particularly in regards to Indian gaming. Congress initially named only five states in Public 280, however section seven (7) allowed any state to adopt the act's provisions.⁸⁵ With the hope that more states would assume jurisdiction, the federal government actively pursued relinquishing responsibility over Indians.

Following the passage of Public Law 280, Congress initiated termination legislation specific to individual tribes. The objective was to draw up a final tribal roll, divide tribal property among enrolled members, and transfer trust property to individuals.⁸⁶ On June 17, 1954, the Menominee became the first federally terminated tribe. The Klamath of Oregon and a steady flow of groups including California Rancherias followed. Termination was disastrous for the Menominee; they were ill

⁸³Pub. L. No. 83-280, 67 Stat. 588, 18 U.S.C. §1162.

⁸⁴Pub. L. No. 83-280, 67 Stat. 588, at § 4.

⁸⁵Pub. L. No. 83-280, 67 Stat. 588, at § 7.

⁸⁶Prucha, The Great Father, 347.

prepared to cope with economic and societal realities alone. With federal aid gone, their economy faltered and soon they found themselves destitute and plagued with bitter factionalism causing division among their leaders. The first experiment with termination was an utter failure. Congress grossly underestimated the profound economic and psychological complications that would come with such a sudden transition.

A shift from Republican to Democratic leadership in the 1956 congressional elections slowed the tide of termination. In 1962, the Ponca of Nebraska became the final tribe to experience termination. Overall, the actual number of tribes terminated was very small; a mere three percent of land and population was affected.⁸⁷ However, Indian groups lost most, if not all, of the little faith they held in the federal government. Further legislation was met with skepticism and concern that the federal government was abandoning the relationship that they were bound to recognize. Tribal leaders called for restoration of land and assistance to terminated tribes. They also demanded a greater role in their own future and the right to make decisions concerning their own people. As the 1960s began and the age of termination ended, the new era of Indian sovereignty, rights, and self-determination came to the forefront of American Indian policy.

Social change throughout the 1960s motivated individuals, both Indian and non-Indian, to call attention to the problems existing within Native American communities. Many of the issues were identical to those expressed by past generations such as poverty, poor health care, and education. The failures of the federal government in addressing these issues led activists to demand greater attention to Indian needs. However, those calling for change believed the determination of which problems existed and their

⁸⁷Prucha, The Great Father, 348-349.

subsequent solutions should not be left solely to bureaucrats. They argued that tribal governments and individual members should have the power to determine their own future. The first step in achieving this goal was to bring some semblance of equality to Indian people. Following the tide of the Civil Rights Movement in the 1960s that transformed relations with historically neglected ethnic groups such as African Americans and Hispanic Americans, Native Americans began asserting their positions in a national forum. As a result of Native American activism and the precedent established in the Civil Rights Act of 1964, Congress passed the Indian Civil Rights Act.⁸⁸

The Indian Civil Rights Act of April 11, 1968, acknowledged the right of self-government for Indian tribes with some limitations. Title II outlined ten limitations upon tribal governments that guaranteed certain freedoms to tribal members. These limitations were largely based upon the U.S. Constitution, and although this section is not an exact replication of the U.S. Bill of Rights, its influence is clearly seen. Freedom of religion, speech, the press, and assembly are outlined in section one. Other sections include protection from illegal search and seizure, double jeopardy, and self-incrimination. One difference from the U.S. Bill of Rights appears in section seven which puts a limitation of six months imprisonment and/or a five-hundred dollar fine for punishment in tribal courts for any single offense.⁸⁹

Title III provided a “model code” for governing tribal courts which declared that defendants being tried in an Indian court would be granted “the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen

⁸⁸Pub. L. No. 90-284, 25 U.S.C. § 1301, et seq.

⁸⁹Pub. L. No. 90-284, at Title 2 § 202.

of the United States being tried in a federal court for any similar offense.”⁹⁰ Regardless of limitations the Indian Civil Rights Act placed upon tribal governments, the fact that Congress recognized a tribal right to some form of self-government was an important step towards the goal of self-determination.

One of the key elements of the Indian Civil Rights Act was title IV which drastically altered the ability of state governments to obtain jurisdictional authority over Indian tribes. As previously mentioned, Public Law 280 granted full jurisdiction with minor exceptions to the states of Minnesota, Nebraska, Oregon, Wisconsin, and California. Section seven of the law allowed any state to pass legislation enabling the state to assume jurisdiction over Indian matters without tribal consent.⁹¹ Title IV altered this dynamic by specifically stating that the consent of the tribe was prerequisite to any transfer of authority.⁹² This consent could only be achieved by holding a special election of all adult members of a specific tribe in which a majority vote was necessary for approval. However, a specific requirement stipulated that either the tribal council or twenty percent of adult members must first request that the election be held. A state could not arbitrarily call for an election. These specifications were in great contrast to those found in the termination era.

Section 403 of Title IV dealt the greatest blow to termination by repealing section seven of Public Law 280. Congress asserted an ultimate position of control while granting limited powers to tribes at the exclusion of state governments. However, section

⁹⁰Pub. L. No. 90-284, at Title 3 § 301.1.

⁹¹Pub. L. No. 83-280, 67 Stat. 588, at § 7.

⁹²Pub. L. No. 90-284, at Title 4 §§ 401-402.

403(b) is problematic. Congress repealed section seven of Public Law 280, however, the repeal only applied to areas that had not already been brought under state regulation: “Section 7 of the Act of August 15, 1953 is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.”⁹³ While Section 403(a) authorized a state that had enacted section seven of Public Law 280 to voluntarily give jurisdiction back to the federal government, nothing in the act mandated such action. Further, the Indian Civil Rights Act made no mention of the states that were initially named in Public Law 280 including California. This created a potential conflict between federal, state, and tribal governments that would come to fruition in the debates over Indian gaming.

The movement for self-determination and Indian rights did not stop with the passage of the Indian Civil Rights Act. A new pan-Indian movement brought the plight of Native Americans to the forefront of the social agenda. On November 20, 1969, Native American activists seized Alcatraz Island in the San Francisco Bay, mockingly offering \$24.00 worth of beads for its purchase. The seizure lasted more than eighteen months and gained substantial national media attention. The American Indian Movement (AIM) followed with the “Trail of Broken Treaties.” Led by Dennis Banks, an Assiniboine, and Russell Means, an Oglala Lakota, A.I.M. took a large caravan of people to Washington D.C. hoping for acknowledgment of problems through peaceful negotiations. When federal authorities declined to talk, the group occupied the Bureau of Indian Affairs headquarters and refused to leave.⁹⁴

⁹³Pub. L. No. 90-284, at Title 4 § 403.

⁹⁴Prucha, The Great Father, 366.

The most poignant moment in the Indian rights movement occurred in 1973 at the Pine Ridge Reservation of South Dakota. This event originated from an internal dispute amongst Oglala Lakota leaders and turned into an internationally publicized event. Russell Means, A.I.M leader, accused tribal chairman Richard Wilson of being a Bureau of Indian Affairs minion instead of representing tribal members and interests.⁹⁵ Members of A.I.M. seized control of the Wounded Knee trading post on February 27, 1973. Federal agents soon surrounded the village and an intense armed stand-off ensued. For seventy-one days, tensions ran high as press from around the world covered the event. In the end, two members of A.I.M, Oglala Buddy Lamont and Cherokee Frank Clearwater, died in the daily gunfire.⁹⁶ While the Lakota Nation felt the aftermath of Wounded Knee strongest, a reported sixty-four tribal members died of mysterious causes in the following three years. The international media coverage offered the world a view of the depravity and wide-spread problems existing on Native American reservations.⁹⁷

From pre-revolutionary times to the seizure of Wounded Knee, the relationship between the federal government and Indian nations was one of great complexity and constant transformation. By the 1970s it was clear that Indian nations could no longer be classified as “children” that were simply cared for by their “Great Father.” They did not need or desire for the federal government to dictate their lives or future; yet they still strongly believed that the government held a responsibility to care for them. They feared termination and desired self-determination and tribal sovereignty. After decades of being

⁹⁵Prucha, The Great Father ,366-67.

⁹⁶William Redhawk, “Wounded Knee Siege: 1973: AIM,” Redhawk’s Lodge <http://siouxme.com/siege.html> (accessed October 10, 2004).

⁹⁷Ibid.

ignored or disregarded as incompetent, tribal leaders, many of whom took an example from the American Indian Movement, demanded that their concerns be heard. It was with this political atmosphere that the courts reviewed several cases that either directly or indirectly affected Indian gaming

CHAPTER 2

THE BIRTH OF INDIAN GAMING

The relationship forged among federal, tribal, and state governments, through nearly two centuries of contact and conflict, became the prism through which the courts handed down Indian gaming decisions. The 1960s atmosphere of social reform and indigenous demand for self-determination carried through the 1970s and into the 1980s. With federal backing, tribal governments asserted aspects of self-rule, but state governments were reluctant to grant tribal sovereignty in areas state officials believed were subject to their jurisdiction. State trial courts, federal district and appeals courts, and the U.S. Supreme Court soon found themselves adjudicating disputes between state and tribal governments. Each of the following cases, whether directly or indirectly, exerted profound ramifications for the existence of Indian gaming.

The Rincon Band of Mission Indians, located in San Diego County, made the first attempt to open a tribal casino. On October 1, 1970, tribal leaders passed an ordinance permitting the operation of a card room. The San Diego County Sheriff who believed that the reservation might become a “little Las Vegas,” threatened the tribal participants with arrest for violation of a local county ordinance.¹ The tribe filed suit with the United States District Court, Southern District of California. In *Rincon Band of Mission Indians v. County of San Diego*, District Judge Howard B. Turrentine issued an opinion reminiscent of the days of termination. In referring to Public Law 280, the judge stated, “The purpose of the legislation to make the Indians full and equal citizens, suggests that

¹*Rincon Band of Mission Indians v. Cty. of San Diego*, 324 F. Supp. 371 (1971).

the local governments would assume the same role in relation to Indian citizens as they occupy with respect to the other citizens of the state.”² He further declared, “There is no reason to assume that local governments are not qualified and disposed to render fair treatment to all of their citizens.”³ Through these statements, Judge Turrentine expressed the belief that Public Law 280 granted full civil jurisdiction to state governments and expanded this definition to include local governments. In the opinion of Turrentine, tribal governments were inferior to state and local authorities, pronouncing that the state must “protect the Indian from himself...”⁴ Consequently, Turrentine rendered judgment against the Rincon declaring, “The court holds that the San Diego County gambling ordinance is in full force and effect on the Rincon Reservation and may be enforced there by defendants.”⁵

The Rincon appealed Turrentine’s decision to the Ninth Circuit Court of Appeals where, on March 18, 1974, the appellate court issued an interesting ruling. In a 2-1 decision, the Ninth Circuit reversed the lower court and dismissed the case entirely. Referring to Article III of the United States Constitution, the court found that this case did not meet the “case or controversy” requirement.⁶ This means that a true dispute must exist in order for the court to hear the case. San Diego had threatened to enforce its local ordinance upon the Rincon; however, this ordinance had never previously been enforced upon anyone. Therefore, the court concluded that a simple threat did not necessarily

²Rincon, 324 F. Supp. at 371.

³Id. at 375.

⁴Id. at 376.

⁵Id. at 378.

⁶Rincon Band of Mission Ind v. Cty of San Diego, 495 F. 2d 1 (9th Cir. 1974).

translate into an inevitable arrest by county authorities. Before the court would hear the case, the county would have to first arrest Rincon members or enforce the action against another group. San Diego County did neither; thus, the Ninth Circuit declared that the District Court had exceeded its jurisdiction and should never have accepted the case.⁷

The sole dissenter in this matter, Judge James Browning, believed that the threat of arrest was sufficient to warrant examination. If Judges Ozell Trask and Thomas Murphy had agreed with Browning, the court may have addressed a wide variety of issues related to Indian gaming; however, due to the court's dismissal, Judge Turrentine's opinion became moot. As a result, the case itself is rarely mentioned in the judicial record and is not referenced as case law. The only mention is when a determination is made as to whether litigation meets the "case or controversy" standard.

From the court records it appears that the Rincon abandoned their pioneering efforts and closed the club, yet they made their historical mark as the first Indian Nation to attempt to open a tribal casino. Many other tribes within and outside of California eventually followed their lead. Prior to judicial forays into gaming, though, the courts addressed many issues that, while not directly dealing with Indian gaming, indirectly created profound ramifications for future gaming cases.

The 1973 Supreme Court ruling in *McClanahan v. Arizona State Tax Commission* originated from a dispute over a mere \$16.20.⁸ The appellant was a member of the Dine' Nation of Arizona who earned all of her income from tribal sources on reservation land. The State of Arizona imposed a state income tax upon her earnings and withheld \$16.20.

⁷Rincon, 495 F. 2d 1.

⁸McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

While this was not a large sum of money, it potentially established a troubling precedent. Simply paying implied that the state had the right to tax income earned on reservation land. The Dine´ viewed this action as a violation of tribal sovereignty. Tribal leaders knew that if the state was allowed to impose such a tax, it could lead to state taxation on reservations across the nation. This would profoundly impact tribal self-governance. Fortunately, in a unanimous decision, the court ruled that “The State of Arizona has no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation and whose income is wholly derived from reservation sources...”⁹ A victory for Indian sovereignty, this decision involved much more than taxation.

In deciding *McClanahan v. Arizona State Tax Commission*, the court addressed several important issues. First, the court defined the specific class of Indians who were the subject of this decision declaring, “This case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation.”¹⁰ The court was unconcerned with Indians who were not residents of a reservation, with reservation residents who worked off reservation, or with non-Indians conducting business on a reservation. The court stated that the issue inherent in *McClanahan* was the necessity to “reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.”¹¹ The court relied upon John Marshall’s opinion in *Worcester v. Georgia* when defining Native Americans as having a “semi-autonomous status.” The special

⁹*McClanahan*, 411 U.S. at 168.

¹⁰*Id.*

¹¹*Id.* at 165.

relationship between federal and tribal governments at the exclusion of state authority is omnipresent in the court's opinion, "Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress."¹² Lacking this congressional act, it followed that the State of Arizona was exceeding its jurisdictional limits. The court however, did not base its ruling on a simple interpretation of *Worcester v. Georgia* which would allow the claim of tribal sovereignty as an irrefutable defense in litigation involving issues of tribal self-government: "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."¹³

As detailed in the previous chapter, the concept of Indian sovereignty has undergone many modifications since the time of John Marshall. Changing circumstances such as tribal members leaving the reservation and entering the "general community" forced the court to adjust the principles of *Worcester* to contemporary times; "Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians." The court noted that in instances where "essential tribal relations were not involved and where the rights of Indians would not be jeopardized," state courts have tried cases involving non-Indians on reservation land.¹⁴ Cases that solely involved "tribal Indians," a term used to classify members of a tribe living on a reservation as opposed to non-Indians or "urban" Indians, were left to federal

¹²U.S. Dept. of the Interior, Federal Indian Law 845 (1958).

¹³McClanahan, 411 U.S. at 172.

¹⁴*Id.* at 171.

discretion. The opinion of the court states, “the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.”¹⁵ Tribal leaders could not simply claim sovereignty as a means of preventing state interaction. Concurrently, without specific legislation from Congress, a state could not simply interfere in tribal affairs: “Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”¹⁶ The confusion inherent in these statements would lead to many arguments concerning the limitations of state authority and tribal sovereignty, particularly in regards to Public Law 280.

An underlying issue with the court in *McClanahan* and in the majority of cases concerning Indian sovereignty is the interpretation of Public Law 280. Reviewing the details of Public Law 280 discussed in the first chapter, when the act passed in 1953, five states received full legal authority over civil matters concerning Indians. Arizona was not one of these states, but did have the opportunity to assume jurisdiction under section seven without tribal consent. When the Indian Civil Rights Act became law in 1968, Title IV amended section seven to require a majority tribal vote before accepting state control. Arizona failed to act, however, within the fifteen year time period between Public Law 280 and the Indian Civil Rights Act.¹⁷ Therefore, the state had to acquire the Dine’s consent before asserting taxation authority. The *McClanahan* court clearly demonstrated that Arizona had not met this requirement. Arizona, thus, could not tax

¹⁵*McClanahan*, 411 U.S. at 172.

¹⁶*Id.* at 171-172.

¹⁷Court documents do not indicate why Arizona neglected to assume jurisdiction, however the reasons why they did not act are not as important as the simple fact that they did not.

individual tribal members or the tribe itself as a legal entity. “In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination.”¹⁸

Even if the Dine´ had accepted state taxation, the court would not have necessarily been willing to approve state action. For example, in the case of *Kennerly v. District Court*¹⁹ the Blackfeet Tribe of Montana voted to accept state jurisdiction, yet, even though the Blackfeet consented, the state failed to follow federally prescribed procedural steps for assuming control. While this was a technicality, it effectively stopped Montana’s efforts. The court ruled that while the right to tribal self-government had not been infringed, the state still could not proceed in asserting authority over the tribe. Following suit, the *McClanahan* court stated, “If Montana may not assume jurisdiction over the Blackfeet by simple legislation even when the Tribe itself agrees to be bound by state law, it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement.”²⁰ In concluding their reversal of the Arizona Court of Appeals, the Supreme Court ruled that, “the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax.”²¹ The court had granted a victory to tribal sovereignty; however, the battle between state and tribal governments was far from over. In 1976, the Supreme Court again faced the issue of state taxation on reservation Indians. This time a greater discussion and clarification of the intent of Public Law 280 was addressed.

¹⁸*McClanahan*, 411 U.S. at 179.

¹⁹*Kennerly v. District Court*, 400 U.S. 423 (1971).

²⁰*McClanahan*, 411 U.S. at 180.

²¹*Id.* at 181.

The Supreme Court decided *Bryan v. Itasca County* on June 14, 1976. Similar to *McClanahan*, the dispute concerned Minnesota's implementation of state property tax on the mobile home of Russell Bryan. Bryan was an enrolled member of the Assiniboine Nation living within the boundaries of the tribal reservation. Once again, the issue was not the \$147.95 requested by the state, but the fact that the state was taxing Indian-held, reservation property. Minnesota contended that Public Law 280 granted civil jurisdiction under Section 4 (a) included taxing authority. The state used the principle of "negative implication" in reaching this conclusion.

The use of negative implication is similar to "reading between the lines." An illustration will clarify the concept. Reading a list of restricted food products for a child with allergies that includes peanuts, almonds, walnuts, and pecans, one might conclude that cashews are acceptable. Because the list does not restrict all nut products or by-products, the negative implication is that cashews are harmless to the child. However, if the omission of cashews is an oversight, the consequences of giving the child this nut could result in serious harm and even death. The state of Minnesota addressed section 4 (b) of Public Law 280 in a similar manner to this example. Section 4 (b) excluded the taxation of property held in trust by the United States for Indian peoples.²² Congress specifically prohibited taxation of trust property and did not express a position on non-trust property; therefore the state Supreme Court presumed that taxation of non-trust property was permissible. The Assiniboine objected to such a broad interpretation of Public Law 280 and sought the United States Supreme Court's intervention. Referencing *McClanahan*, the U.S. Supreme Court stated that precedent had been established in

²²*Bryan v. Itasca County*, 426 U.S. 373 (1976), at 374-376.

dealing with the question of taxation. Only by a clear desire of Congress could states assume such jurisdictional authority as the right to tax. It was now the objective of the court to determine whether Congress had made such an intention in the passing of Public Law 280 or whether the omission of taxation of non-trust property was a simple oversight.

In a similar manner to the decision of *McClanahan v. Arizona State Tax Commission*, the court in *Bryan v. Itasca* emphatically rejected the Minnesota Supreme Court's ruling and reversed its decision. Taking a narrower interpretation than that of the state court, the U. S. Supreme Court declared that, "Public Law 280 was plainly not meant to effect total assimilation."²³ The court reached this conclusion by examining the legislative history behind the act. The court claimed that Congress passed Public Law 280 with the main concern of solving the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions."²⁴ Further, the court contended that the focus of Public Law 280 was on criminal rather than civil actions as many tribes simply lacked the resources for dealing with criminal activity.²⁵ Thus, Congress granted the states the authority to control this problem and nothing more. In a similar fashion, in cases where tribal groups lacked adequate forums for the resolution of civil actions Congress granted access to state courts for the resolution of civil disputes.²⁶ Minnesota interpreted this as a congressional grant of civil jurisdiction over Indian tribes. The Supreme Court, however, strongly disagreed with this position. The court explained

²³*Bryan*, 426 U.S. at 374.

²⁴*Id.* at 379.

²⁵*Id.* at 380.

²⁶*Id.* at 383.

that, within the language of Public Law 280, there was an “Absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.”²⁷ Rather, “the primary intent of Section 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court.”²⁸ Congress granted tribes voluntary access to the courts, not forced allegiance to them.

The court further addressed the fact that Congress had implemented several individually distinct “termination acts” that made certain Indian groups subject to state authority. Public Law 280 was a precursor to these specific termination acts, and communicated congressional intent to transfer aspects of federal authority to the states; however, its language was not as explicit as the later acts, thus leaving it open to judicial interpretation. The court concluded that Congress, if it so desired, had the capability of putting tribal governments under the total jurisdiction of state governments. Yet in Public Law 280, this was clearly not the intention of Congress, “...if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so.”²⁹ The court, thus, used the principal of negative implication in an opposite manner than that of the state courts. Because express language was not included in Public Law 280 as it had been in several termination acts, it became negatively inferred that Congress did not intend to bring tribal governments completely under the jurisdiction of the state. Rather

²⁷Bryan, 426 U.S. at 381.

²⁸Id. at 385.

²⁹Id. at 388.

than an interpretation that allowed taxation, the Supreme Court declared that, “Congress did not mean in Section 4 (a) to subject reservation Indians to state taxation.”³⁰

It is important to understand the struggle between state and tribal governments as a backdrop to the gaming issue. In both *McClanahan v. Arizona State Tax Commission* and *Bryan v. Itasca*, the issue of the congressional intent of Public Law 280 is paramount. The dichotomy of “criminal/prohibitory” versus “civil/regulatory” was evolving through both cases. This debate soon became the focal point of the majority of future litigation between state and tribal leaders. An illustration can, hopefully, provide further clarity. The Clerk’s Office at the Orange County Superior Court in Santa Ana, California is separated into two main departments: civil and criminal.³¹ In criminal matters, if a person is charged with a crime, then he or she must face prosecution to defend themselves against the accusation or plead guilty to the offense. Either way, they have no choice in whether to go to court. Conversely, if a dispute is considered a civil matter, the issue does not necessarily have to go to trial. A party seeking restitution can settle out of court, seek mediation, or choose to disregard the matter entirely. It takes a voluntary action by at least one individual to initiate a case in the civil division.

Applying this example to congressional intent in Public Law 280, the *McClanahan* and *Bryan* courts determined that, in states where jurisdiction had been transferred from the federal government, Indians were compelled to adhere to state laws in criminal matters, but were not forced into similar adherence in civil issues. In both *McClanahan* and *Bryan*, the respective courts found that state governments had exceeded

³⁰Bryan, 426 U.S. at 390-393.

³¹ Technically there are four divisions including traffic and family law, but for the purpose of this example only mentioning civil and criminal is sufficient.

their authority in implementing civil laws over tribal governments. While on the surface the cases specifically addressed taxation, the core issue was Congress not intending for Public Law 280 to grant states full civil authority over tribal governments, but rather to give tribal governments a forum in which to resolve civil disputes if they so desired.³² Those groups that maintained adequate tribal courts to resolve private civil disputes were exempt from filing actions in state court.

Expanding upon the definition of “civil/regulatory” versus “criminal/prohibitory,” if a state completely prohibits an action it is classified as “criminal.” Conversely, if an action is simply regulated it is deemed “civil.” For example, using cocaine in any manner is illegal and punishable in criminal court within California, yet drinking alcohol is not illegal if the consumer is over the age of twenty-one. It can lead to illegal activity such as public intoxication or drunken driving, but the act in itself is not prohibited, but regulated. One example of this type of regulation is laws mandating that businesses must obtain a license in order to sell alcohol. Derived from the Supreme Court’s definition of the two classifications, disagreements ensued over which laws should be treated as civil/regulatory and which should be criminal/prohibitory. So, while Indian gaming was entering its infancy, state and federal courts were struggling with the question of what constituted sovereignty and self-determination and what was a violation of the law and public policy. This debate continued with the opening of a casino on reservation land in the state of Washington.

In 1978 and 1979, Native American and “non-Indian” entrepreneurs operated a casino within the borders of the Puyallup reservation. Located one mile from Tacoma and twenty-five miles from Seattle, the casino catered to a large number of non-Indian

³²Bryan, 426 U.S. at 387-392.

customers including out of state visitors. The casino's success drew the attention of groups including state officials and law enforcement personnel who arrested the casino's owners. The District Court for the Western District of Washington convicted the four Puyallup owners: Harold Farris, Jody Satiacum, Bertha Turnipseed, and Mackenzie Turnipseed along with the five non-Indian owners: Allen Dudley Powell,³³ Louis J Baker, Ray Turnipseed, David Painter, and Melvyn Lockwood, of violating Title 18 of the United States Code, section 1955 entitled the Organized Crime Control Act of 1970.³⁴ Although the title "Organized Crime Control Act" would seem to encompass a wide range of activities associated with the mafia, the act solely deals with illegal gambling. Gambling is defined as "pool selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games or selling chances therein."³⁵ If five or more individuals operate a gambling business that "is a violation of the law of a State or political subdivision in which it is conducted," they may face prosecution resulting in up to five years imprisonment and/or monetary fines.³⁶ The act further stated that gambling establishments in continuous operation for thirty days, or those making in excess of \$2,000.00 in any single day, were in violation of the law; however, for purposes of obtaining warrants for arrest and/or investigation, officials only needed to suspect a business of operating for two or more consecutive days and profiting

³³Powell was one-fourth Cherokee; however, the Court found him to be a "non-Indian" for purposes of this case, as the Cherokee were not a tribe organized within the state of Washington.

³⁴United States v. Farris, 624 F.2d 890 (9th Cir. 1980).

³⁵18 U.S.C. § 1955 at § 2.

³⁶18 U.S.C. § 1955 at § 1.

more than \$2,000.00 in any twenty-four hour period.³⁷ Finally, any property used in an illegal casino could be seized and forfeited to the federal government.³⁸ Using the Organized Crime Control Act, government authorities claimed the “possibility” of mob take over as the argument to prevent casino gaming on Indian lands. This act provided the background for the ruling of the Ninth Circuit Court of Appeals in *United States v. Farris*.

Circuit Judge Herbert Choy’s written opinion for the Ninth Circuit Court reads more as a personal vendetta against gambling as a whole, rather than a decision based purely upon legal fact. Instead of stating that Congress must specifically prohibit an action by tribal governments, as the Supreme Court did in both *McClanahan* and *Bryan*, Judge Choy asserted that “there would have to be specific language permitting gambling” within the treaty formulated between the United States and the Puyallup.³⁹ It is difficult to imagine that during the treaty making process, either the federal or tribal government would have thought to include specific language concerning casino style gambling within the terms agreed upon. Using this logic, any advancement in technology leading to a specific action would require the amending of the original treaty. This is simply illogical. However, this statement was less disturbing to advocates of Indian gaming than the Judge’s apparent bias against any form of gambling:

Puyallup casinos in the Tacoma-Seattle area would flourish as mightily as those in such areas as Las Vegas and Atlantic City. Casinos on Indian land would defeat or

³⁷18 U.S.C. § 1955 at §§ 2-3.

³⁸Congress amended the Organized Crime Control Act in 1986 to exempt bingo, lotteries, or other similar games operated by charitable organizations. 18 U.S.C. § 1955 at § 3(e).

³⁹*Farris*, 624 F. 2d at 893.

endanger the federal interests of protecting interstate commerce and preventing the takeover of legitimate organizations by organized crime.⁴⁰

Moreover, the other major evil of large-scale gambling- the harm to the national economy- arises regardless of whether a casino is on Indian or non-Indian land, especially when the clientele is not limited to Indians.⁴¹

These statements did not appear to be based upon the legal issue at hand. Judge Choy made a speculative assumption that casinos upon reservation land could flourish and rival those of Las Vegas or Atlantic City. Further, Choy did not provide any factual evidence that gambling “harms the national economy.” Judge Choy’s declaration that gambling was “evil” can be viewed as a subjective personal opinion.

Judge Choy based his opinion upon a broad interpretation of the Organized Crime Control Act. He declared that the underlying policy behind section 1955 is that “large-scale gambling is dangerous to federal interests wherever it occurs.”⁴² In Judge Choy’s opinion, “The casino operations placed the tribe in danger of mob takeover, whether it realized it or not.”⁴³ It was of little concern that there appeared to be no proof of any such takeover. The simple idea that it could become a possibility made the act an illegality in Judge Choy’s mind. The mythology of mob control seemed to consume the judge, “Moreover, the harm to the federal interests protected by section 1955 of a casino on Puyallup land would be as great as that flowing from a similar casino in San Francisco or Chicago.”⁴⁴

⁴⁰Farris, 624 F. 2d at 893.

⁴¹Id. at 895.

⁴²Id.

⁴³Id.

⁴⁴Id. at 896.

Choy came to the conclusion that the Organized Crime Control Act's congressional intent of limiting or preventing large scale gambling outweighed the federal interests of granting self-rule to Indian tribes. Further, because the casino serviced a large number of non-Indians, Choy believed that jurisdiction fell to the state rather than the tribe: "Also, operating a casino with a non-Indian clientele is not an offense committed by one Indian against the person or property of another Indian."⁴⁵ The opinion notes the fact that Public Law 280 did not include jurisdiction over Puyallup land; however, in 1963 the State of Washington passed legislation under section seven of the act to assume criminal and limited civil jurisdiction. Washington enacted this legislation before the Civil Rights Act of 1968; therefore, the Puyallup's consent to state control was not required. The state specifically took jurisdiction over eight subject areas, none of which included gambling.⁴⁶ Judge Choy conceded the fact that, "Washington cannot enforce its gambling laws against the Puyallup appellants for their actions on Puyallup trust lands..." Despite this concession, he found that, "Washington public policy prohibits the type of gambling business conducted by appellants."⁴⁷ Therefore, he found casino gambling to be a prohibitory action and subject to criminal jurisdiction described under Public Law 280. Choy cited the Ninth Circuit's previous decision of *United States v. Marcyes*⁴⁸ that declared the possession of fireworks, whether sold by Indian or non-Indian merchants, to be a public hazard and therefore a prohibitory act. He stated that "Washington's prohibitory (but not regulatory) laws can be enforced by the

⁴⁵Farris, 624 F. 2d. at 897.

⁴⁶Id. at 894.

⁴⁷Id. at 895.

⁴⁸United States v. Marcyes, 557 F. 2d 1361 (9th Cir. 1977).

federal government on the Puyallup reservation.” Yet, in ruling, Choy expanded the definition of civil/regulatory versus criminal/prohibitory. No longer was the classification simply based on written law, but on an interpretation of public desire. This finding would prove vital to future decisions, and would help to open the debate as to what constitutes a violation of public policy.

An underlying problem in the *Farris* decision is that the ruling is self-contradictory. Judge Choy conceded that the Puyallup appellants were beyond the jurisdiction of the state; yet, he still declared them guilty of “violating the law of a state” under section one of the Organized Crime Control Act. In sum, although the State of Washington had no means by which to punish the Puyallup appellants, they nevertheless could convict them of breaking the law. If this statement seems confusing, it is because of the fact that it is just that, confusing. Choy argued that the Indian appellants were aware of their actions and declared that, “Moreover, these appellants were not tripped up by a detail, but flagrantly violated the core of the state law, albeit they were beyond the state’s jurisdiction.”⁴⁹ In a 2-1 decision, the Ninth Circuit affirmed the conviction of the Puyallup appellants.

Judge Choy’s decision led to many questions: If the appellants knew that they were under state jurisdiction, why would they purposely break a law in a manner that would draw so much attention upon themselves? Was this not self-destructive and a risk to their profitable business? Did the Puyallup simply believe that they operated under tribal law and had created a successful enterprise? Finally, how can a court find that a group is beyond a state’s jurisdiction, have no means of punishing the accused

⁴⁹Farris, 624 F. 2d at 897.

defendants, but still find them guilty and uphold their convictions? The one vote to reverse the convictions addressed some of these questions.

The lone dissenter in this case, Judge James Browning, harshly criticized the majority opinion. Although he concurred in the conviction of non-Puyallup appellants, Browning felt that Choy's interpretation of the Organized Crime Control Act was "untenable." Taking a more narrow reading of the act, Browning concluded that, "The idea that a person can transgress state law by conduct not punishable under that state law is inconsistent with minimum notions of notice and fairness."⁵⁰ Browning argued that Choy's contention that a person could be convicted for a crime that they could not in turn be punished for was irrational. Further, the idea that the Organized Crime Control Act denounced of all gambling was, in Judge Browning's opinion, contrary to the legislative history of the act. Congress was simply concerned with illegal gambling, not gambling itself: "Congress was not concerned with gambling per se. The statute was addressed to what Congress perceived as a vicious circle of illegal gambling resulting in large profits which the criminal element then used to corrupt local officials..."⁵¹ In Browning's view, the Puyallup were not vulnerable to this corruption because they were beyond the sphere of state influence. Unlike areas where the mafia controlled illegal gambling, the Puyallup had nothing to gain in bribing state officials: "In the case at hand, for example, there was no need for the Puyallups to bribe state officials when there was no law under which the

⁵⁰Farris, 624 F. 2d at 898.

⁵¹Id. at 899.

state could prosecute them.”⁵² According to Browning, the threat of organized crime was simply not as strong as Judge Choy had envisioned.

Overall, Judge Browning contended that the state should not impede tribal sovereignty, “Congress did not intend to assert federal jurisdiction where state law allowed no local law enforcement at all.” The State of Washington did not assume jurisdiction over gambling when it utilized section seven of Public Law 280. Therefore, gambling upon the Puyallup reservation was a regulatory rather than prohibitory action and should not be subject to criminal laws. Judge Browning concluded, “Because no state or local law prohibited the actions of the Puyallup defendants, 18 U.S.C. section 1955 does not apply. The convictions of these defendants should be reversed.”⁵³

Unfortunately, he was a lone dissenter. The Puyallup convictions were upheld. Browning held no objections to the convictions of the non-Indian appellants and concurred in the affirmation of their convictions. Unlike the dismissal in *Rincon Band of Mission Indians v. County of San Diego*, the Ninth Circuit’s ruling in *United States v. Farris* provided a substantial beginning to court involvement in Indian gaming. While, the decision did not resolve the debate between civil/regulatory and criminal/prohibitory, it set an important precedent in making public policy an important factor in determining which laws were criminal or civil. Although *United States v. Farris* involved a majority of non-Indian owners and operators, it would only be a short time before the courts would be faced with the issue of casinos owned solely by Native Americans.

⁵²*Farris*, 624F. 2d at 899.

⁵³*Id.*

Casino gaming came to the forefront of Indian matters during the 1980s. Rather than imitating large Las Vegas style establishments, Indian casinos initially operated on a small scale. Instead of slot machines and table games, tribal operations focused in large part on one facet of gaming: bingo. The opening of several reservation bingo halls led to court intervention in the struggle between state and tribal interests concerning gaming. Three different courts in Wisconsin, Florida, and California respectively, heard separate cases within the span of seventeen months. These courts questioned whether tribal bingo operations were within state jurisdiction or were an aspect of tribal sovereignty. The cases were virtually identical in their factual background and circumstances that led to litigation. They were so similar that each written opinion often cross-referenced one or possibly both of the other decisions. Collectively, the cases were of great importance to the attempts of tribal governments in operating gaming free of state involvement.

The United States District Court, Western District of Wisconsin handed down their opinion in *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin* on July 27, 1981.⁵⁴ Shortly thereafter, on October 5, 1981, the United States Court of Appeals, Fifth Circuit rendered judgment in *Seminole Tribe of Florida v. Butterworth*.⁵⁵ Concluded less than three months apart, these cases are mirror images of each other. In both, the respective tribes had enacted tribal ordinances for the regulation of bingo parlors. Oneida tribal members operated their bingo hall, without any outside assistance, as a means of “promoting the health, education and welfare of the members of the Tribe and the Oneida

⁵⁴Oneida Tribe of Indians of Wis. v. State of Wis., 518 F. Supp. 712 (1981).

⁵⁵Seminole Tribe of Florida v. Butterworth, 658 F. 2d 310 (5th Cir. 1981).

Community.”⁵⁶ The Seminole held the same goal of improving the quality of life for their tribal members; however, unlike the Oneida, the Seminole contracted a private partnership to construct and manage their business in exchange for a percentage of the profits from bingo games.⁵⁷ In either case, the principal function of bingo halls was to raise money to promote the well-being of each respective tribe. Besides the costs of overhead, and in the case of the Seminole, management fees, all monies went to the greater benefit of the tribe, and not for personal gain. The Oneida and Seminole made it clear that these were not efforts to make some individuals wealthy. Despite visions of societal improvement, state officials threatened to close tribal businesses.

On February 1, 1980, the Oneida tribe received a letter threatening “enforcement action” from Brown County, Wisconsin assistant District Attorney Royce A. Finne. On December 15th of the same year, the Brown County Sheriff informed the tribe that they were in violation of Wisconsin Statute 163 which allowed for the prosecution of individuals operating unauthorized bingo games.⁵⁸ In Florida, Broward County Sheriff Robert Butterworth issued a similar warning. He declared that the Seminole were in violation of Florida Statute Section 849.093, and would suffer adverse consequences if they did not shut down.⁵⁹ Neither the Oneida nor Seminole accepted what they viewed as a blatant infringement upon their right to self-government. Both tribes sought judicial intervention to prevent interference from either Wisconsin or Florida. Once again, the

⁵⁶Oneida, 518 F. Supp. at 713.

⁵⁷Seminole, 658 F. 2d at 1.

⁵⁸Oneida, 518 F. Supp. at 713.

⁵⁹Seminole, 658 F. 2d at 2.

respective courts addressed the criminal/prohibitory versus civil/regulatory classification issue.

The Fifth Circuit Court of Appeals and the United States District Court, Western District of Wisconsin reached identical conclusions in deciding this matter. State views held that the statutes regulating bingo were criminal/prohibitory based upon the premise that violation of these laws could result in criminal prosecution. The tribal governments, on the contrary, contended that the state's role was merely regulation of bingo, not prohibition. Tribal attorneys illustrated that both Wisconsin and Florida allowed "charitable or fraternal" organizations to operate bingo games.⁶⁰ While the states limited the amount of prizes or the number of games allowed, they nonetheless permitted the playing of bingo. Both courts relied heavily upon Judge Choy's previous definition of "public policy" in *United States v. Farris*. As mentioned, Choy cited the case of *United States v. Marcyes* in which the State of Washington successfully prohibited the Puyallup Indians from selling fireworks. Washington prohibited any individual, regardless of race or status from selling fireworks. The state believed that fireworks were unsafe and a public hazard; therefore, the Puyallup were violating the public policy of the state. Although Judge Choy incorrectly applied this prescript to the Puyallup gaming efforts, he established the principle that the classification of a law as criminal/prohibitory or civil/regulatory relied largely upon the public policy of each individual state.⁶¹

Wisconsin and Florida both claimed that, since penal sanctions could be enforced for violation of bingo statutes, their laws were inherently criminal/prohibitory. The

⁶⁰*Oneida*, 518 F. Supp. at 713-715; *Seminole*, 658 F.2d at 1.

⁶¹*Farris*, 624 F. 2d at 892-97.

courts disagreed with these contentions. The simple fact that a statute might include the possibility of criminal prosecution did not automatically classify it as criminal/prohibitory.⁶² The precedent established in *Farris* required that the public policy of a state must be accounted for in determining the proper classification of a particular law. The *Oneida* and *Seminole* decisions similarly concluded that tribal bingo operations were not in opposition to public policy. In *Wisconsin*, the court declared that, “Congress intended to limit the exercise of that jurisdiction to enforcement of laws generally prohibiting activities that the state determined are too dangerous, unhealthy, or otherwise detrimental to the well-being of the state’s citizens.”⁶³ The courts could not believe that either state felt that bingo caused a threat to the general welfare of its citizens. Additionally, Wisconsin and Florida allowed people to participate in games operated by a variety of organizations. To allow these games at the exclusion of tribal bingo halls would be discriminatory. The courts found it clear that Wisconsin and Florida chose to regulate rather than to prohibit the playing of bingo by the general populace; making the bingo statutes of each state clearly civil/regulatory. These conclusions greatly influenced all tribes wishing to pursue Indian gaming, including those in California.

Following the rulings of the United States District Court and the Fifth Circuit Court of Appeals, California had the chance to address the issue of Indian bingo operations. On April 20, 1981, the Barona Tribe, located in San Diego County, enacted a tribal ordinance permitting bingo games within their reservation. Like the Seminole in Florida, the tribe contracted an outside corporation to manage their bingo hall. On June

⁶²*Oneida*, 518 F. Supp. at 718.

⁶³*Id.* at 720.

25, 1981, officers representing San Diego Sheriff John Duffy declared that the Barona violated California Penal Code section 326.5, which regulated the operation of bingo games.⁶⁴ A state trial court denied the Barona tribe's motion for summary judgment which included a request for injunctive and declaratory relief against Sheriff Duffy. The tribe appealed this denial at the federal level.⁶⁵

On December 20, 1982, the Ninth Circuit Court of Appeals issued a very brief opinion in *Barona Group of Capitan Grande Band v. Duffy*.⁶⁶ The similarities that *Barona* shared with the *Oneida* and *Seminole* cases simplified the Ninth Circuit's decision making process. As in Wisconsin and Florida, California permitted "charitable organizations" to conduct bingo games. The court found that this fact illustrated that bingo was not a violation of California's public policy. As Circuit Judge Robert Boochever wrote in the court's opinion, "This intent to better the Indian community is as worthy as the other charitable purposes to which bingo proceeds are lawfully authorized under the California statute."⁶⁷ The court could not comprehend how the state intended to justify allowing one group to participate in bingo while prosecuting another group for the same act. The Ninth Circuit reversed the lower court's decision and remanded the

⁶⁴Barona Group of Capitan Grande Band v. Duffy, 694 F. 2d 1185 (9th Cir. 1982), at 1187.

⁶⁵A motion for summary judgment is a method in which a party attempts to convince the court that judgment should be entered in their favor based on the legal merits of a case without going to trial. The Barona felt that the state held no legal grounds for prohibiting their bingo games and therefore felt that a trial would simply be a waste of everyone's time. Injunctive relief means that, through a court order, a particular action is prevented from occurring. In the case of the Barona, the tribe sought to prevent Sheriff Duffy from enforcing California's penal code against their bingo hall. Declaratory relief means that, without awarding damages or ordering any type of action, a court declares that a party has particular legal rights under a contract or statute. In this case, the Barona were seeking a declaration from the court that they held the right to operate bingo halls according to legal statute.

⁶⁶Barona, 694 F. 2d 1185.

⁶⁷Id. at 1190.

case back to the trial court for purpose of entering summary judgment in favor of the Barona. This case represented the first victory for Indian gaming rights in California; however, as casinos expanded from bingo to other forms of gambling, California continued to be a focal point in the Indian gaming controversy.

On May 24, 1980, the Cabazon Band of Mission Indians located in Riverside County, California enacted Tribal Ordinance No. 5.7.⁶⁸ This ordinance regulated a card club similar to others in the metropolitan Los Angeles area. The ordinance permitted the wagering upon and playing of draw poker, lowball draw poker, and panguingue (a game similar to rummy and often referred to as Pan 9). The club was on the Cabazon reservation, catering to tribal members and the general public alike. On October 18, 1980, a mere two days after opening, the Chief of Police for the City of Indio, Samuel Cross, along with several Indio Police officers raided the club. Citing local city code sections 15.15, 15.16, and 15.17, the officers issued over 100 citations to employees and customers alike, both tribal members and non-members.⁶⁹ The Cabazon filed suit with the District Court for a restraining order and a preliminary injunction. The court denied the restraining order and granted the preliminary injunction, but later dissolved this injunction. The tribe then filed a motion to vacate judgment that the court denied; however, the court restored the injunction against the City of Indio pending appeal. The Ninth Circuit Court of Appeals heard the Cabazon case and rendered decision on December 14, 1982.⁷⁰

⁶⁸Cabazon Band of Mission Ind. v. City of Indio, 694 F. 2d 634 (9th Cir. 1982), at 636.

⁶⁹Id at 636.

⁷⁰Id.at 635.

The Ninth Circuit found that *Cabazon Band of Mission Indians v. City of Indio* posed three issues. The first concerned the city's attempted annexation of reservation land in 1970. The second question raised was whether the city of Indio held jurisdiction to enforce its ordinance on the reservation. And lastly, if Indio did have jurisdiction, did that jurisdiction extend to non-Indians on the reservation? Of these three questions, the court addressed only the first. In a brief opinion, Circuit Judge Thomas Tang ruled that the City of Indio's annexation of Cabazon land was void "ab initio," meaning "from the beginning."⁷¹ The city failed to gain the consent of either the federal government or the Cabazon when claiming reservation land for its own purposes. This was a violation of former California Government Code sections 35470-71. The city claimed that the statute of limitations for a challenge of annexation had expired; however, the Ninth Circuit refuted this weak argument. Essentially, the court found that Indio's purported annexation was ineffective, and therefore, tribal land was not within their jurisdiction. The court declared that, "Absent federal consent, Indio had no authority to act at all."⁷² Thus, the final two issues proposed on appeal became moot. The court would not even entertain these questions stating: "We need not reach the issues presented by Cabazon Band's preemption and infringement arguments, nor its arguments regarding the construction of 18 U.S.C. § 1162, because we hold the annexation void."⁷³ The Cabazon continued operation of their gambling establishment; however, their struggle was merely

⁷¹*Cabazon*, 694 F. 2d 634 at 638.

⁷²*Id.* at 638.

⁷³*Id.* at 639.

beginning as Riverside County and California state authorities would attempt to shut down what the City of Indio could not.

On February 15, 1983, the Riverside County Sheriff's Department sent sixteen officers to raid the tribe's card club.⁷⁴ The Sheriff issued citations for violating county and state ordinances to more than thirty people, including Cabazon officials. The officers seized cash in the amount of \$3,000.00, casino files, playing cards, and casino chips.⁷⁵ Once again, this action forced the Cabazon to litigate. Rather than facing city authorities, they now had to contend with county and state representatives. This time around, they were joined in their struggle by a fellow Riverside County tribe, the Morongo Band of Mission Indians. The Morongo who were members of the same familial group as the Cabazon, the Cahuilla, had also attempted to operate a gambling enterprise. Like the Cabazon, the Morongo operated bingo games for the general population; however, they did not operate a card club. The tribes united in their stand against local and state interference and filed a motion for summary judgment and for an issuance of a permanent injunction barring the state or county from enforcing its gambling laws on reservation land. The United States District Court for the Central District of California granted these requests, but the County of Riverside and State of California appealed to the Ninth Circuit Court of Appeals.

The state formulated its argument in *Cabazon Band v. County of Riverside*, decided February 25, 1986, along the same lines that previous state authorities relied on

⁷⁴Mason, Indian Gaming, 49.

⁷⁵Ibid.

in the cases discussed thus far.⁷⁶ First, California pleaded that state and local laws were enforceable by Public Law 280. Consequently, in the state's view, the laws were also admissible under the Organized Crime Control Act. The third contention brought a fresh approach to this debate, as the state declared their actions justifiable under "federal common law." The Ninth Circuit addressed each of these points in a unanimous opinion written by Circuit Judge J. Blaine Anderson.

Judge Anderson began by attacking the contention that Public Law 280 granted jurisdiction to state and local authorities over tribal gaming. Looking to the Ninth Circuit's previous decision, Anderson stated that, "we are bound by the precedent established by this circuit in *Barona* which is factually and legally indistinguishable from the case at bar."⁷⁷ The decisions rendered by previous courts particularly in *Barona* and *United States v. Farris* had already determined the fact that the distinction between the civil/regulatory and criminal/prohibitory classification depended on a state's public policy. The *Barona* court determined that tribal bingo halls were consistent with California's public policy of allowing charitable or fraternal organizations to operate bingo games. Following this precedent, Judge Anderson declared, "Therefore, we hold that the gambling activities of the Tribes on the Indian reservation do not violate California's public policy."⁷⁸ Further, "Because we have concluded that bingo games are not contrary to the public policy of California, the activity is not violative (sic) of the OCCA."⁷⁹

⁷⁶Cabazon Band v. County of Riverside, 783 F. 2d 900 (9th Cir. 1986).

⁷⁷Id. at 902-903.

⁷⁸Id. at 903.

⁷⁹Id. at 903.

While the operation of tribal card clubs is noted in the factual background section of the opinion, it is not directly mentioned in the core of the court’s decision. In addressing the applicability of Public Law 280 and the Organized Crime Control Act, the court did not differentiate between tribal bingo and the card games. It is apparent that Judge Anderson classified these games under the general heading of “gambling activities.” Although the court did not state it, the existence of card clubs throughout California, particularly in the Los Angeles area, demonstrated that they were not violations of public policy. In fewer than two pages, the court completely dismantled the state’s first two points.

The state’s case thus depended on their claim that the Supreme Court had “adopted a federal common law in determining the applicability of state laws on Indian reservations.”⁸⁰ “Common law” refers to the use of unwritten law; that lacking a particular legislative act, the courts could look to past decisions to determine judicial and congressional intent. The Ninth Circuit concluded that through a “particularized inquiry” they could examine the interests of state, local, and tribal governments and determine whether the state’s position held any validity. The “particularized inquiry” was an examination of case law pertaining to a variety of Native American issues beyond the scope of this study. What is important from this investigation is the determination that “state laws may be applied to Indian reservations unless such application would (1) interfere with reservation self-government, or (2) impair a right granted or reserved by federal law.”⁸¹ The court found that there was no federal law preempting the application

⁸⁰Cabazon v. Riverside, 783 F. 2d. at 903

⁸¹Id..

of state or local gambling laws upon reservations. Subsequently, federal law was not a barrier to state jurisdiction. However, this was only one portion of the applicability test and thus, the court turned to the question of whether state law would infringe upon the right of reservation self-government. Judge Anderson addressed state, federal, and tribal interests separately and then ranked the overall strength of each in making a final determination of jurisdiction. If federal or tribal interests outweighed those of the state, “then these laws may not be applied on the reservation under the federal common law’s particularized inquiry test.”⁸²

In Anderson’s opinion, the state’s interest was very weak. Contrary to the declaration of Judge Choy in *United States v. Farris* that “Casino operations placed the tribe in danger of mob takeover whether it realized it or not,”⁸³ Judge Anderson found that, “There is no evidence whatsoever that organized crime exists on these reservations.”⁸⁴ In addition, the laws of California did not make it a crime for non-Indians to participate in the gambling made available by reservation members; they simply regulated the operation of such activity. The court thus concluded that the state’s position was meager, especially in comparison to federal and tribal interests.

The Ninth Circuit looked to the presidential policy of Ronald Reagan as a significant indicator of the federal government’s interest in Indian affairs. In his “Indian Policy Statement” of January 24, 1983, the President exhibited a fervent desire for tribal self-determination. President Reagan said that tribes needed to “reduce their dependence

⁸²*Cabazon v. Riverside*, 783 F. 2d. at 905.

⁸³*Farris*, 624 F. 2d at 895.

⁸⁴*Cabazon v. Riverside*, 783 F. 2d at 904.

on federal funds by providing a greater percentage of the cost of their self government.”⁸⁵ Following this policy, the Department of the Interior declared that tribal bingo operations were consistent with the President’s desires and were in fact a “revenue-producing possibility” that should be protected. The Bureau of Indian affairs concurred remarking that, “tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination.” These declarations made it clear to the court that the federal interest was strong and only secondary to that of the tribes themselves.

The investment of the Cabazon and Morongo in their own existence and future was strongest among all parties involved. Not only was gaming the sole source of income for the tribes, it was also the major source of employment for tribal members. Gaming provided revenue for the operation of tribal government and allowed for essential services to tribal members that would otherwise be unattainable. The state ignored these facts and attempted to convince the court that tribal interests were weak. California argued that the Cabazon and Morongo were “marketing an exemption” from state laws to non-Indians. The state claimed that the tribes were simply providing an activity, designed for profit, which was otherwise illegal for non-Indians to participate in within California. However, the Ninth Circuit found that this statement was based on an erroneous interpretation of the Supreme Court ruling in *Washington v. Confederated Tribes of the Colville Reservation*. In this case, the Supreme Court found that the state of Washington’s implementation of an excise and sales tax upon cigarettes sold on

⁸⁵Statement by the President: Indian Policy, The White House, January 24, 1983.

reservation land was valid.⁸⁶ The tribe was offering nothing but an exemption from state taxation that would otherwise be enforced off of the reservation. Washington, however, was not prohibiting the tribe from selling cigarettes. California was attempting to prevent the actual activity which provided revenue and employment to tribal members.

The Cabazon and Morongo were not depriving the state of revenues by simply reselling products whose profits would otherwise be used to provide off-reservation services. Rather, the tribes were offering an activity that did not deplete state revenue, but provided the necessary income to relieve some of the burden from non-tribal entities. Again, the state was refuted in their pleadings. Finally, California took the stance that the Cabazon or Morongo lacked any tradition of commercialized gaming. While this may have been true, Judge Anderson explained that it was not the gambling tradition that was pertinent, but the tradition of self government: “The focus in determining whether a tribal tradition exists should instead be on whether the tribe is engaged in a traditional governmental function, not whether it historically engaged in a particular activity.”⁸⁷

Each of the efforts put forth by the State of California and County of Riverside came to naught. The Ninth Circuit found federal and tribal interests of providing a means for self-determination and self-government to greatly outweigh the state’s interest of preventing organized crime. Therefore, the state could not rely on the federal common law’s particularized inquiry test. Additionally, precedent had established the gambling laws of Riverside County and California to be of a civil/regulatory nature rather than criminal/prohibitory. It is again important to note that the court made no distinction

⁸⁶Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L. Ed. 2d 10 (1980).

⁸⁷Cabazon v. Riverside, F. 2d at 906.

between the operation of bingo halls and card clubs. In the court’s opinion, neither violated state public policy, but rather were both beneficial to tribal self-government: “We find no basis upon which to distinguish the Tribe’s bingo activities from the Tribe’s card parlor games. Therefore, our discussion in this case, although specifically addressing the bingo games, applies with equal force to the card games.”⁸⁸

Despite the setbacks faced by the Rincon and Puyallup, Native Americans gained victories through District and Appellate decisions in *Oneida*, *Seminole*, *Barona*, and the two *Cabazon* rulings. Casino gaming was becoming a viable source of income and tribal sovereignty; however, as casino gaming was still in its infancy, so was the battle against state interference. As gaming expanded and became increasingly profitable, the attention of outsiders grew stronger. If gaming had failed, state authorities would not have focused so much attention on the rural tribes. Success brought envy, followed by greed, and the desire to share in such a profitable enterprise. The state of California and states across the nation believed that they were being cheated out of a great source of revenue. As a result, the *Cabazon* and *Morongo* would shortly find themselves before the highest court in the land, and Congress would become involved in the issue of Indian gaming.

⁸⁸*Cabazon v. Riverside*, F. 2d at 906.

CHAPTER 3

CABAZON AND THE INDIAN GAMING REGULATORY ACT

Following defeats in Federal District Court and the Ninth Circuit Court of Appeals, the state of California appealed to the highest court in the nation. On December 9, 1986, the United States Supreme Court began hearing arguments in what would become the most significant Indian gaming case. Addressing the applicability of state and local laws on reservation land per Public Law 280 and the Organized Crime Control Act, the court reviewed case law regarding Indian bingo and similar forms of gambling on reservations. California argued, as they had in the Cabazon cases, that Public Law 280's grant of civil jurisdiction included the authority to apply California Penal Code § 326.5 regarding the operation of bingo games. Furthermore, the Organized Crime Control Act prohibited the type of casinos located on the Cabazon and Morongo reservations. The Supreme Court disagreed with both assertions.

On February 25, 1987, the court rendered judgment in *California v. Cabazon Band of Mission Indians*.¹ Justice Byron White delivered the court's opinion in a 6-3 decision. In determining the extent of Public Law 280 over Indian tribes, White first referenced the decision in *Bryan v. Itasca County*.² The justice declared that in *Bryan*, "we recognized that a grant to states of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values."³ The court

¹*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

²*Bryan v. Itasca County*, 426 U.S. 373 (1976).

³*Cabazon*, 480 U.S. at 208.

clearly did not wish to destroy tribal rights to self-government; however, the issue of bingo was not as clear-cut as that of taxation on reservation land: “The Minnesota personal property tax at issue in *Bryan* was unquestionably civil in matter. The California bingo statute is not so easily categorized.”⁴ The court found it necessary to again examine the civil/regulatory versus criminal/prohibitory dichotomy. Justice White reviewed the Fifth Circuit’s decision of *Seminole Tribe of Florida v. Butterworth*⁵ and the Ninth Circuit’s opinion in *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*.⁶ In both cases, the respective courts ruled that whether or not a law violated a state’s public policy determined its classification as criminal or civil. The Supreme Court was “persuaded that the prohibitory/regulatory distinction is consistent with *Bryan*’s construction of Public Law 280.”⁷ Yet, the distinction was not, in the Supreme Court’s view, “a bright-line rule.”⁸ California’s argument that their gambling laws were criminal and not civil did “hold some weight” with the court; however, a review of California’s laws and public policy led the Supreme Court to agree with the Ninth Circuit’s findings in *Barona* that California’s statute regarding bingo was indeed civil.

The Supreme Court pointed out the fact that California permitted its citizens to participate in many forms of gambling throughout the state. In addition to charitable bingo games, the state allowed horse racing and more than four-hundred card clubs. These were facts that the state did not dispute. Most notably, California adopted a lottery

⁴Cabazon, 480 U.S. at 208.

⁵Seminole Tribe of Florida v. Butterworth, 658 F. 2d 310 (5th Cir. 1981).

⁶Barona Group of Capitan Grande Band v. Duffy, 694 F. 2d 1185 (9th Cir. 1982).

⁷Cabazon, 480 U.S. at 210.

⁸Id.

in 1984, in which the state “daily encourages its citizens to participate in this state-run gambling.”⁹ In regards to bingo, the state did not prohibit how many games an individual could play, or how much money one could spend; the state only limited the value of prizes. Further, the state exhibited “no effort to forbid the playing of bingo by any member of the public over the age of eighteen.”¹⁰ As with previous courts, the Supreme Court saw no justification of the state’s contention that Indian gaming enterprises were violations of state public policy, when the state itself permitted and even promoted gambling on a daily basis:

In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.¹¹

California argued that, although it allowed limited forms of gambling, operation of a large “unregulated bingo” game, that might attract organized crime, was classified as a misdemeanor under state law. In response, the Supreme Court reiterated the *Seminole v. Butterworth* opinion: because a regulatory law is “enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Public Law 280.”¹² The court held that if it allowed California and other states to expand the definition of civil jurisdiction under Public Law 280, the federal goal of tribal self-government and self-initiative would be compromised and “total assimilation

⁹Cabazon, 480 U.S. at 210-211.

¹⁰Id. at 211.

¹¹Id.

¹²Id.

permitted.”¹³ Justice White declared that California could not assume such authority under Public Law 280, and turned his attention to the Organized Crime Control Act.

The *Barona* court ruled that “whether a tribal activity is ‘a violation of the law of a state’ within the meaning of OCCA depends on whether it violates the ‘public policy’ of the State.”¹⁴ While the Supreme Court found that the Cabazon and Morongo casinos were not in violation of the Organized Crime Control Act, they disagreed with the public policy test implemented in *Barona*. Rather, Justice White cited the Sixth Circuit Court of Appeals decision of *United States v. Dakota*.¹⁵ This ruling declared the enforcement of OCCA to be solely “an exercise of federal rather than state authority.” States had no right to close Indian casinos based upon the premise that they were violating federal laws. White stated, “There is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not affect.”¹⁶ Regardless of whether the Cabazon and Morongo gambling establishments violated state public policy, the state could not use OCCA to shut them down; this power could only be exercised by the federal government.

The Supreme Court ruled against California using Public Law 280 and the Organized Crime Control Act. Yet, the court did not simply affirm the judgment in favor of tribal governments as the tribes had desired. Quoting the case of *New Mexico v. Mescalero Apache Tribe*, the court stated that, “Under certain circumstances a State may

¹³*Cabazon*, 480 U.S. at 211.

¹⁴*Id.* at 213.

¹⁵*United States v. Dakota*, 796 F. 2d 186 (1986).

¹⁶*Cabazon*, 480 U.S. at 213-214.

validly assert authority over the activities of nonmembers on a reservation, and... in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.”¹⁷ An example of such an instance was seen in *Washington v. Confederated Tribes of Colville Indian Reservation*, discussed in the previous chapter.¹⁸ Recall that the court found in this case that the tribe was simply “marketing an exemption” from state sales tax on cigarettes. They were not offering anything but a discount on tobacco that non-Indians could not get elsewhere. In *Cabazon*, the court found it necessary to determine whether or not the Cabazon and Morongo were marketing an exemption from state laws, and whether the federal government pre-empted state attempts to assume jurisdiction.

Justice White concluded that the Cabazon and Morongo were not marketing an exemption from state laws. Further, he noted that the federal government’s interest in tribal self-government pre-empted any state attempt to assume jurisdiction. Unlike the situation in *Washington v. Confederated Tribes*, people visiting the Cabazon and Morongo reservations were not simply purchasing a discounted item and then leaving. The court compared the casinos to the Mescalero Apache’s hunting and fishing resort operated in New Mexico. In the case of *New Mexico v. Mescalero Apache Tribe*, the court had stated that a state could intervene in tribal matters on rare occasions; however, the operation of a resort complex was not one of those instances.¹⁹ In the court’s opinion, the Mescalero Apache were not marketing an exemption from state hunting and fishing

¹⁷*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) at 331-332.

¹⁸*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

¹⁹*New Mexico*, 462 U.S. at 324.

regulations. Therefore, the state was prohibited from regulating these on-reservation activities. The tribe's desire to procure funds to benefit tribal members pre-empted New Mexico's desire to regulate hunting and fishing. The Cabazon and Morongo held similar interests in the operation of their casinos. Neither reservation contained any type of exploitable natural resource. Therefore, casinos became a necessity for tribal survival. Only through well-run, modern facilities could the tribes gain the necessary funds to promote the well-being of their members. Additionally, the federal government recognized that tribal bingo operations were vital to the existence of many tribes. The Indian Financing Act of 1974, the Department of Housing and Urban Development, and the Department of Health and Human Services had all "provided financial assistance to develop tribal gaming enterprises."²⁰ The federal government hoped that, through the development of tribal bingo, tribes could not only help themselves, but relieve some of the financial burden from the United States. In the court's view, federal interests clearly outweighed those of the state.

California's final claim to state jurisdiction relied on the case of *Rice v. Rehner*. In that case, the Supreme Court held that, if a tribal business sold alcohol for off-reservation consumption, California could require the business' owner to obtain a state liquor license.²¹ The court distinguished *Cabazon* from *Rice*, observing that:

Congress had never recognized any sovereign tribal interest in regulating liquor traffic and that Congress, historically, had plainly anticipated that the States would exercise concurrent authority to regulate the use and distribution of liquor on Indian reservations.²²

²⁰*Cabazon*, 480 U.S. at 217-218.

²¹*Rice v. Rehner*, 463 U.S. 713 (1983).

²²*Cabazon*, 480 U.S. at 220.

Unlike alcohol, a traditional federal view regarding gambling did not exist. This did not mean that a federal view opposing gambling could not be created. Justice White explained that, “surely the Federal government has the authority to forbid Indian gambling enterprises.”²³ Congress had not expressed such a position, and in White’s opinion, “the federal policy is to promote precisely what California seeks to prevent.”²⁴ Therefore, the court affirmed the Ninth Circuit’s decision declaring that, “State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county’s attempted regulation of the Cabazon’s card club.”²⁵ The decision, however, was not unanimous.

It is important to review the dissenting opinion in *Cabazon* in order to gain perspective into the thought pattern of those opposing Indian gaming. Justice John P. Stevens wrote the dissenting opinion joined by Justices Sandra Day O’Connor and Antonin Scalia. Stevens argued that, absent Congressional exemption, Indian gaming should be subject to state law. Although gaming provided “needed employment and income” for many tribes, Stevens feared the repercussions of permitting casinos: “Accepting the majority’s reasoning would require exemptions for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable businesses.”²⁶ Stevens also disagreed with the majority’s belief that gambling was consistent with California public policy stating:

²³*Cabazon*, 480 U.S. at 221.

²⁴*Id.* at 220.

²⁵*Id.* at 222.

²⁶*Id.* at 222.

To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour.

Justice Stevens appeared to have a moral objection to gambling reminiscent of that of Judge Choy in *United States v. Faris*. Stevens' comparisons exhibited a still widely held Protestant Christian belief in America that classified certain "vice" activities as immoral. This can be seen in his comparison of gambling to cockfighting and prostitution. In a footnoted response to the dissenting opinion, Justice White stated, "Nothing in this opinion suggests that cockfighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California."²⁷ Indian gaming advocates further saw no comparison between casino gaming, which they advocated for improving tribal life, with driving five miles over the legal speed limit.

In declaring the minority's view that the Cabazon were marketing an exemption from state laws, Justice Stevens highlighted the fact that the tribe only had twenty-five members, an amount "barely adequate to operate a bingo game that is patronized by hundreds of non-Indians nightly."²⁸ Stevens added, "How this small and formerly impoverished Band of Indians could have attracted the investment capital for its enterprise without benefit of the claimed exemption is certainly a mystery to me."²⁹ Indian gaming advocates might have asked themselves how the number of Indians belonging to any particular tribe had any bearing upon their right to operate a casino? The fact that the tribe was "small and impoverished" is the entire reason why they needed

²⁷*Cabazon*, 480 U.S. at 211.

²⁸*Id.* at 226.

²⁹*Id.* at 226.

to open and operate a casino. It also confirmed the federal government’s position that Indian gaming was an important means of bringing tribes out of poverty.

Stevens further declared that the Cabazon and Morongo casinos “drain funds from the state-approved recipients of lottery revenues.”³⁰ Justice White responded to this statement as “strange,” stating, “It is pure speculation that, in the absence of tribal bingo games, would-be patrons would purchase lottery tickets or would attend state-approved bingo games instead.”³¹ There are many individuals who prefer playing cards or bingo, who will not even think of playing the lottery. Similarly, there are people who will occasionally play the lottery, but will not think to go into a casino to play cards or bingo. Justice Stevens’ provided no factual basis to his contention that Indian gaming affects state lottery revenue.³² Finally, in addressing the issue of organized crime, which the minority felt was a threat to Indian casinos, Stevens wrote, “Indeed, California regulates charitable bingo, horseracing, and its own lottery.”³³ Stevens’ own words clearly deem California gambling laws to be regulatory and not prohibitory, yet the justice did not see this fact. Fortunately, for Indian tribes, these sentiments were part of the minority and not the majority opinion. The minority felt that Congress and not the court should be determining the legality of Indian gaming. They would soon get their wish.

Despite support from three justices, California again failed to assume state jurisdiction over Indian gaming. The state could not convince the court’s majority that

³⁰Cabazon, 480 U.S. at 226.

³¹Id. at 222.

³²Further explanation of this assertion will be discussed in Chapter 6 in a comparison between revenues of California Indian Casinos and the California Lottery from 1999 to 2008. See Chapter 6 and Appendices D & E.

³³Cabazon, 480 U.S. at 227.

Public Law 280 granted full civil authority; and their own promotion of a state lottery proved that gambling was not against state public policy. Even if California had shown proof of organized crime infiltration in Indian casinos, which it did not, the court prevented the state from applying the Organized Crime Control Act, as it was purely a federal law. The court recognized tribal and federal interests in maintaining casinos as a means of promoting tribal well-being. The *Cabazon* decision presented tribes across the nation an opportunity; however, the issue was not yet resolved. As the court heard *California v. Cabazon*, Congress took initial steps towards federal intervention.

Following the court's decision, Congress became directly involved in Indian gaming.

Congress began hearings regarding Indian gaming in 1985. At the time, the Department of the Interior estimated that close to eighty tribes were operating gaming facilities, primarily providing bingo. Of those tribes, twenty to twenty-five operated high stakes bingo, with some groups profiting nearly one-million dollars per month.³⁴

Politicians from both sides of the political spectrum felt the need for specific legislation regarding Indian gaming. Senator John McCain (R. Arizona) strongly supported tribal rights to sovereignty and self-determination and Senator Tom Daschle (D. South Dakota) believed that Indian gaming was instrumental in bringing tribal members out of poverty.³⁵ Representative Mark Udall (D. Colorado) introduced HR 1920 in the House of Representatives on April 2, 1985. The proposed bill, entitled the Indian Gaming Control

³⁴ Sioux Harvey, "Winning the Sovereignty Jackpot," in *Indian Gaming Who Wins?* eds. Angela Mullis and David Kamper (Los Angeles: Regents of the University of California, 2000), 14-34.

³⁵ Harvey, "Winning the Sovereignty Jackpot," 18-24.

Act, sought to establish “federal standards for gaming activity on Indian lands.”³⁶ The act passed the House on April 21, 1986, in which the Senate then referred it to the Committee on Indian Affairs. In the Senate, Daniel K. Inouye (D. Hawaii) and Daniel J. Evans (R. Washington) took the lead in supporting what Udall had begun.³⁷ Following the *Cabazon* decision, Congress needed to act as soon as possible in order to establish some type of federal guidelines regarding Indian gaming before casino expansion grew out of control. On October 17, 1988, Congress passed Public Law 100-497, entitled the Indian Gaming Regulatory Act (IGRA).³⁸

The purpose of the Indian Gaming Regulatory Act was 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.”³⁹ Further, the act intended to prevent organized crime and “to assure that gaming is conducted fairly and honestly by both the operator and players.”⁴⁰ To achieve these goals, the act created a committee to oversee and enforce federal regulations regarding Indian gaming. Under the supervision of the Department of the Interior, the National Indian Gaming Commission is comprised of three individuals. The President, with Senate approval, appoints a chairman for a maximum of three years. The Secretary of the Interior then selects two associate members, one who serves for three years, and the other who serves

³⁶ US House of Representatives Committee on Interior and Insular Affairs, *Indian Gambling Control Act*, 99th Congress, 1st sess., 14 November 1985 (Washington, DC: Government Printing Office, 1987), 37.

³⁷ Harvey, “Winning the Sovereignty Jackpot,” 17.

³⁸ Pub. L. 100-497, Sec. 2, Oct. 17, 1988, 102 Stat. 2467.

³⁹ 25 U.S.C. §2702.1.

⁴⁰ 25 U.S.C. §2702.2.

for one year. The three members vote to determine who will become the vice chairman. IGRA provides that members of the commission must come from both political parties, at least two must be enrolled members of an Indian tribe, and no member can have a criminal background or have financial interest in any gaming operation. The commission must meet at least once every four months, and at least two members must be present to constitute a quorum. It is responsible for oversight and enforcement of IGRA, and must submit a written report to Congress every two years.⁴¹

IGRA's specific provisions begin with the separation of types of gaming into three distinct classifications. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."⁴² These games are played purely for traditional cultural purposes, they do not involve casino style gaming. Class II gaming is specifically defined as bingo, or card games that "are explicitly authorized by state laws or are not explicitly prohibited by the laws of the State." Tribes can offer games for monetary prizes of any size in bingo, but must conform to state laws regarding regulation of wagers or pot sizes in card games. Class II gaming however, does not refer to all card games. Class II does not include, "any banking card games, including baccarat, chemin de fer, or blackjack (21)."⁴³ Class II gaming also does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."⁴⁴ The last classification of gaming, Class III, is defined as "all

⁴¹25 U.S.C. §2704.

⁴²25 U.S.C. §2703.6.

⁴³25 U.S.C. §2703.7.

⁴⁴25 U.S.C. §2703.7.

forms of gaming that are not Class I gaming or Class II gaming.”⁴⁵ This terminology is very broad, and would lead to future debates regarding classification of specific games.

In addition to classification as I, II, or III, casino games can be grouped into three categories: house banked, percentage, or non-house banked/non-percentage. California penal code §330 prohibits playing of any house banked or percentage game. The California Court of Appeals defined “house banked” as a game in which the house “is a participant in the game, taking on all comers, paying all winners, and collecting from all losers.”⁴⁶ For example, in blackjack, if a player wagers \$10.00 and wins, the casino pays \$10.00 from its own money. Conversely, in games such as poker, players play against each other and the casino simply takes a percentage of the pot, called a “rake,” as a fee for playing. The casino does not have a direct interest in the outcome of the game, but makes its money based on how much is wagered. This is an example of a percentage game, defined as “encompassing any game of chance from which the house collects money calculated as a portion of wagers made or sums won in play, exclusive of charges or fees for use of space and facilities.”⁴⁷

In California card clubs, the rules of games or methods of collecting fees from patrons are formatted in a way that avoids classification as a house banked or percentage game. In poker, rather than taking a percentage of the pot, casinos take the same sum of money from all games at a particular table regardless of the amount wagered. This is

⁴⁵25 U.S.C. §2703.8.

⁴⁶Sullivan v. Fox, 189 Cal. App. 3d 673 (1987).

⁴⁷Id.at 679.

referred to as a “collection” and falls under the legal term of a “facility fee.”⁴⁸ Rather than charging a percentage of wagers made or won, the casino charges a flat fee based upon hours played, or simple use of their facility. It is equivalent to renting the table, dealer, chips, and entire atmosphere of the casino. In this manner, the casino has no interest in the outcome of any game. Another example of the casino modifying rules and acting in a passive role is seen in the manipulation of the rules of blackjack. § 330 specifically prohibits “blackjack or 21.” To avoid this prohibition, casinos play to 22 rather than 21 and rename the game to titles such as “California 22.” Each player must pay a nominal fee, usually fifty cents, for each hand played. A player at the table acts as the bank, paying all winnings from his or her own money and collecting all losses from other players. The position of banker, however, must rotate amongst players. Otherwise, a player with a large sum of money can dominate play and change the classification from non-banked/non-percentage to a house banked game.

The individual classification of a gaming activity as I, II, or III determines which authority maintains jurisdiction over it. Class I gaming is solely left to tribal governments. It is not subject to any of the provisions within IGRA. Tribal governments also maintain jurisdiction over Class II games, but the National Indian Gaming Commission (NIGC) has oversight and regulatory authority. A tribe may participate in Class II gaming if their casino is “located within a State that permits such gaming for any purpose by any person, organization or entity and such gaming is not otherwise specifically prohibited on Indian lands by Federal law.”⁴⁹ The tribal government must

⁴⁸Oliver v. County of Los Angeles, 66 Cal. App. 4th 1397 (1998).

⁴⁹25 U.S.C. §2710.

adopt an ordinance or resolution regarding the desired gaming and the chairman of the NIGC must approve this ordinance. The chairman will approve only if the tribe shows it “will have the sole proprietary interest and responsibility for the conduct of any gaming activity.” Further, net revenues from gaming must be used to: (1) fund tribal government operations or programs; (2) provide for the general welfare of the Indian tribe and its members; (3) promote tribal economic development; (4) donate to charitable organizations; (5) help fund operations of local government agencies.⁵⁰ Tribes participating in Class II gaming must provide the NIGC with outside audits of their gaming operations.

IGRA clearly states its goal as development of entire tribal groups, not individual wealth. If tribes choose to make per capita payments to tribal members, the tribe must first prove that each of the above goals have been met, including protecting the interests of minors and those who can not care for themselves. These payments are subject to federal taxation.⁵¹ IGRA provides an exemption for individually owned Class II facilities in operation before September 1, 1986. These casinos, however, must give at least 60 percent of all revenues to the local Indian tribe. Congress rejected closing successful operations; and the federal government wanted to ensure that the largest proportion of funds went to the betterment of entire tribes.⁵²

In addition to approving or denying ordinances regarding Class II gaming, the NIGC has the authority to issue orders of closure or impose civil fines for casinos that

⁵⁰25 U.S.C. §2710.

⁵¹25 U.S.C. §2710.

⁵²25 U.S.C. §2710.

violate IGRA. The commission also performs background checks on all key casino employees before issuing gaming licenses. Commission officers inspect and examine all Class II facilities, and can demand access to any documents pertaining to casino revenues. The commission collects fees from each Class II operation, and sets the percentage of fees to be paid annually. The fees cannot exceed more than 2.5 percent of the first \$1.5 million in gross revenues for any single operation, and no more than 5 percent of revenue in excess of that amount. In total, all fees collected from every operation cannot total more than \$8 million.⁵³

If a tribe has demonstrated the ability to operate a fiscally and economically sound Class II casino for more than three years, including proper accounting, licensing, and monitoring procedures, it may apply for a certificate of self-regulation. Tribes may also enter into management contracts with outside corporations to operate their casinos. These are two important aspects of tribal sovereignty; however, the NIGC still maintains the final authority over these provisions. The commission, after holding a hearing with tribal leaders, may revoke a certificate of self-regulation if it feels that just cause warrants such action.⁵⁴ Tribes may contract with outside corporations for management of either Class II or Class III facilities. Management contracts must go to the commission for approval and are limited to five years, during which an outside corporation can only take a maximum of 30 percent of the casino's net revenues. In rare cases, the NIGC may approve a contract of seven years and up to 40 percent of revenues, but the majority of

⁵³25 U.S.C. §2717.

⁵⁴25 U.S.C. §2710.

contracts are limited to the five year/30 percent restriction.⁵⁵ At the end of the contract's term, the tribe can choose to self-manage the casino, or if they employ outside management, the corporation must turn full control over all activities to the tribal government.⁵⁶

Class III gaming operations have the most money making potential; therefore, they are important not only to the tribes, but also to the associated states. To appease state officials, who feared losing all say in Indian gaming, Congress significantly changed the regulation of Class III gaming. Like Class II gaming, an Indian tribe must approve and adopt an ordinance or resolution regarding gaming which states that gaming can only be "located in a State that permits such gaming activity for any purpose by any person, organization, or entity." Unlike Class II gaming, Class III must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the state."⁵⁷ These compacts are binding, and all gaming activity is fully subject to their terms and conditions. Unlike Class II operations, tribes now found that they had to negotiate with states in order to open Class III casinos. The federal government was not removed from the process as tribal-state compacts must be approved by the Secretary of the Interior, and IGRA established specific procedures for entering into negotiations. This created the means for preventing states from simply not negotiating.

To enter into a tribal-state compact, an Indian tribe informs the state, in writing, of its intentions to negotiate. IGRA requires the state to act in "good faith" and enter into

⁵⁵ 25 U.S.C. §2711.

⁵⁶ Joseph G Jorgensen, "Gaming and Recent American Indian Economic Development," in Indian Gaming Who Wins?, 97.

⁵⁷ 25 U.S.C. §2710.

negotiations with the tribe. Compacts may include provisions regarding: (1) the application of state and tribal civil or criminal laws to gaming; (2) assessments by the state of gaming activities in amounts as are necessary to defray the costs of regulating such activity (e.g. fees or revenue sharing); (3) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities (e.g. if an individual hits a jackpot, he or she must pay state or federal taxes); (4) remedies for breach of contract; (5) standards for the operation of such activity and maintenance of the gaming facility including licensing; (6) any other subjects that are directly related to the operation of gaming activities. In exchange for entering into a tribal-state compact, the federal government waives Title 15 § 1175 of the United States Code. This section, known as the Johnson Act, made possession, transportation, manufacturing, or selling of any gambling device, unlawful on Indian lands.⁵⁸ Without this exemption all slot machines would be illegal.

Key to negotiations is the fact that states cannot refuse to negotiate simply because they want to tax Indian gaming. Section 2710.4 of IGRA clearly states:

Except for any assessments that may be agreed to under paragraph (3) (c) (iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a Class III activity. No State may refuse to enter into the negotiations described in paragraph (3) (a) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.⁵⁹

While state officials may not like this aspect of IGRA, it is an important provision in protecting tribal rights to request negotiations.

⁵⁸15 U.S.C. §1175.

⁵⁹25 U.S.C. §2710.4.

Further protections to tribal interests are the remedies that IGRA provides to tribes if a state refuses to negotiate and acts in “bad faith.” If a state fails to respond within one-hundred and eighty days of a tribe’s request to negotiate, the tribal government may initiate a cause of action in the United States District Court. The burden of proof in showing that the state has indeed acted in good faith is placed upon the state. If the court finds that the state did not act in good faith, the court orders the state to complete a compact within sixty days. The court takes into account any state concerns regarding public interest, safety, criminality, financial integrity, or adverse economic impacts on existing gaming activities. If a compact is still not reached, both the tribal government and state must submit a final proposal to a court appointed mediator. The mediator is responsible for choosing the compact that best meets federal goals and complies with federal laws. If the state refuses to accept the mediator’s decision, a tribe may enter into a compact directly with the Secretary of the Interior. If the Secretary of the Interior fails to act within forty-five days, the compact is defaulted into legal acceptance and becomes binding.⁶⁰

IGRA established a statutory foundation for Indian gaming. Tribal governments gained the ability to regulate Class I gaming with no outside interference, and Class II gaming with minimal federal interference. This was a great victory for tribal sovereignty and self-determination; however, the provisions of Class III gaming left tribes with the monumental task of negotiating with state governments. Although IGRA required state governments to act in good faith, the tribal-state compact process was anything but easy. In California especially, tribes struggled to gain compacts that would be beneficial to their people, as state officials returned to the old dispute over jurisdiction and the new

⁶⁰25 U.S.C. §2710.7.

debate of which classification particular games fell under. Again, tribal and state leaders landed in court and the Supreme Court would soon deal a blow to tribal sovereignty by negating the IGRA protections that forced states to act in good faith.

CHAPTER 4

THE COURTS CONTEMPLATE IGRA

The Indian Gaming Regulatory Act provided a statutory framework for Indian tribes desiring to operate Class II and Class III casinos. Tribal leaders across the nation viewed IGRA as an opportunity to open new casinos, or to secure legal status for casinos already in operation. States, however, were not as eager to rush into the process of negotiating over Class III gaming. Tribal and state leaders held conflicting views as to what IGRA required of the other. Arguments arose over when a state was required to enter into negotiations, and whether a state could be taken to court if it refused to negotiate as IGRA specified. The court decisions of the 1990s were a mixture of setbacks and successes for tribal leaders. Differing courts held conflicting views over congressional intent and implementation of IGRA. Court rulings, both within and out of California, directly affected tribal attempts to gain compacts for the legal operation of Indian casinos on California's reservations.

The first significant post-IGRA court decision occurred in Connecticut, not California. The Mashantucket Pequot Tribe requested that Connecticut enter into negotiations for a tribal-state compact for Class III gaming. When the state did not comply within the one-hundred and eighty day required by IGRA, the tribe sued in district court. The court ordered the state to complete a compact within sixty days per § 2710 (d) (7) (B) (iv) of IGRA. The state appealed to the Second Circuit Court of Appeals contending it did not have to enter into negotiations because tribal leaders wished to negotiate over games that were illegal within the state. The state also argued that the

tribe failed to pass a tribal ordinance before requesting negotiations, thus violating an IGRA requirement. Tribal leaders countered, declaring that the state allowed charitable organizations to participate in “Las Vegas Nights” that offered Class III games. They also stated that the only precondition to negotiations was a simple request to negotiate, regardless of whether or not a tribal ordinance was already in place.¹

The Second Circuit decided *Mashantucket Pequot Tribe v. State of Connecticut* on September 4, 1990. The court disagreed with the state’s contention that a tribal ordinance was a prerequisite to negotiation stating, “Nothing in that provision requires sequential satisfaction of its requirements, nor does its legislative history suggest that a tribal ordinance must be in place before a state’s obligation to negotiate arises.”² In the court’s view, IGRA’s specification that gaming would be subject to the terms and conditions of a tribal-state compact indicated Congress’ intent that negotiations occur before the adoption of a tribal ordinance: “Obviously, if a state does not permit ‘such gaming,’ the matter is at an end, and the adoption of a tribal ordinance will never occur.”³ The court further noted that the “such gaming” requirement of § 2710 referred to the class of gaming to be negotiated, not a specific individual game.

The court used the Senate Report accompanying IGRA to illustrate the proper manner to determine whether a class of gaming is allowed; this was to use the “Cabazon rationale” of whether or not an activity was a violation of public policy and thus civil/regulatory or criminal/prohibitory.⁴ Although the report was specific to Class II

¹*Mashantucket Pequot Tribe v. State of Conn.*, 913 F. 2d 1024 (2nd Cir. 1990) at 1027.

²*Id.* at 1028.

³*Id.* at 1028-29.

⁴Senate Report at 6, U.S. Code Cong. & Admin. News 1998, 3076.

gaming, the court found that the same principle applied to Class III. The state's allowance of "Las Vegas Nights" exemplified the fact that Class III gaming was not against Connecticut's public policy. If the court agreed with the state, then compacts would only be reached through the "acceptance of, the entire state corpus of laws and regulations governing such gaming."⁵ In the court's view, this made the compacting process, the key element of IGRA, a "dead letter."⁶ If the state had no reason or incentive to negotiate, then it would not. IGRA, however, gave states the opportunity to play a vital role in the regulation of Indian casinos within their borders. The court did not declare that a state must accept every demand of tribal leaders, but that it must at least negotiate in good faith:

This ruling means only that a State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation. We necessarily leave to those negotiations the determination of whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation.⁷

The court declared that Connecticut did not meet the requirement of negotiating in good faith, and thus, affirmed the district court judgment ordering the state to negotiate a compact within sixty days.

Three years after the Second Circuit's decision, the Eighth Circuit Court of Appeals addressed a similar issue of a state refusing to negotiate in good faith. The Eighth Circuit decided *Cheyenne River Sioux Tribe v. State of South Dakota* on August

⁵Mashantucket, 913 F. 2d at 1031.

⁶Id. at 1031-32.

⁷Id.

23, 1993.⁸ The State of South Dakota refused to negotiate with the Cheyenne River Sioux over the topic of keno. The state permitted the playing of various forms of Class III games in the historic town of Deadwood including slot machines, blackjack, and video keno. The state set limitations on the number of games that each casino could maintain and set a maximum wager limit of \$5.00.⁹ South Dakota successfully negotiated tribal-state compacts with six of the nine tribes located within their borders. The first of these compacts, with the Flandreau Santee Tribe, became a model for all future compacts. If a tribe wanted a compact with more favorable terms, the state demanded concessions such as expanded criminal jurisdiction.¹⁰

Tribal leaders pointed to the differences between the Cheyenne River reservation and the Flandreau reservation. The Cheyenne River reservation was nearly the size of the state of Connecticut, contained ten times as many tribal members, but was not located near a population center. Therefore, the tribe believed it was necessary to make their casino more attractive to customers. Facilitating this goal included placing a casino on trust land located near areas of greater population such as the town of Pluma or the state capitol of Pierre, and offering expanded gaming with higher bet limits, such as keno. To bolster its case, the state argued that the video keno permitted was different from traditional keno, state law fixed bet limits, and a casino could only be located within the tribe's reservation. South Dakota also argued that the tribe's lawsuit should be dismissed

⁸Cheyenne River Sioux Tribe v. State of S.D., 3F. 3d 273 (8th Cir. 1993).

⁹Id. at 279-280.

¹⁰Id. at 277.

based on protections guaranteed under the Tenth and Eleventh Amendments of the constitution.¹¹

In a completely opposite manner than that of *Mashantucket Pequot Tribe*, the Eighth Circuit held that the state “need not negotiate traditional keno if only video keno is permitted in South Dakota.”¹² The court based this contention upon the belief that “The ‘such gaming’ language of 25 USC § 2710 does not require the state to negotiate with respect to forms of gaming it does not presently permit.”¹³ Rather than interpreting “such gaming” to mean the general classification of a game, the court declared that a state could refuse to negotiate on a game per game basis. This negated the Second Circuit’s purpose of simply attempting to get both sides to negotiate and then decide which games to permit. Under the Eighth Circuit’s interpretation, a state could simply say “no” before even discussing a particular game. The ruling created a further problem in that two equally authoritative courts reached opposing decisions on a similar situation. This created the potential of conflicting precedents for future cases. The court also prevented the Cheyenne River Sioux Tribe from discussing higher wager limits stating that they were established as a matter of state law.¹⁴

Not all aspects of the court’s opinion were detrimental to the tribe or to Indian gaming advocates across the nation. The court declared that neither the Tenth nor Eleventh Amendments bared the suit against the state. While the Tenth Amendment grants states powers that are not specifically delegated to the federal government, the

¹¹Cheyenne River, 3F. 3d. at 278.

¹²Id. at 279.

¹³Id. at 280.

¹⁴Id.

court found that, because a state ultimately can never be forced into agreeing to a compact, those powers were not violated. Under § 2710 of IGRA, if a state refuses to negotiate or to agree to a mediator's proposed compact, the tribe can deal directly with the Secretary of the Interior.¹⁵ The court further found that the state could not claim sovereign immunity under the Eleventh Amendment. In the court's opinion, Congress clearly intended to abrogate a state's immunity to suit through IGRA, and in this case, the state had willingly negotiated with other tribes: "In addition, the state actively engaged in negotiating tribal-state compacts and has reaped the benefits from these negotiations..."¹⁶ Of great significance to both the Cheyenne River Sioux and many other rural tribes throughout the country was the court's statement that, "We disagree with the state's contention that land must be located within an Indian reservation to be considered Indian lands under the IGRA."¹⁷ This statement granted economic opportunity to tribes that would be unable to gain from Indian gaming based merely on their geographical location.

Following the decisions concerning Connecticut and South Dakota tribes, California tribes were involved in several significant court cases. The first of these matters did not directly involve the state of California, but rather a dispute between the Cabazon and the National Indian Gaming Commission. *Cabazon Indians v. National Indian Gaming Commission*, decided January 28, 1994, concerned the classification of a particular game as Class II or Class III.¹⁸ Seven other tribes joined the Cabazon in arguing that the NIGC had improperly designated their electronic pulltab machines as a

¹⁵25 U.S.C. at § 2710.

¹⁶*Cheyenne River*, 3F. 3d at 281.

¹⁷*Id.* at 280.

¹⁸*Cabazon Indians v. Natl. Indian Gaming Com'n*, 14 F. 3d 633 (D.C. Cir. 1994).

Class III game. In this game, players simultaneously played against each other in groups of machines called “pods.” The computer contained a set number of winners and revealed the ticket to the player, in which the player then instructed the computer to reveal whether the pulltab was a winner or loser. The tribes argued that this was simply an electronic aid of a game that the NIGC had already designated as Class II.¹⁹

The court sided with the NIGC in declaring that the electronic pulltab machine was a Class III game. In spite of the fact that players were not directly playing against the house, the game was not viewed as an electronic aid. Section 2703 of IGRA states that Class II gaming “does not include electronic or electromechanical facsimiles of any game of chance.”²⁰ Unlike electronic equipment used to simulcast bingo games to more than one location, the pulltab machines were not simply aiding in the play, but were an exact copy of a game of chance in electronic form. This opinion led to further controversy as some tribes continued to operate the games despite the court’s ruling.

In San Diego County, sheriff’s officers raided the Barona, Sycuan, and Viejas tribal casinos. Reminiscent of the days before the Cabazon decision, the officers seized the respective tribe’s pulltab machines, cash, and records. In response, the tribes sued San Diego County Sheriff Jim Roache in district court. The district court granted the bands declaratory and injunctive relief stating that “county officials were precluded by IGRA from jurisdiction to execute the warrants and prosecute the tribal gaming

¹⁹Cabazon Indians v. Natl. Indian Gaming Com’n, 14 F. 3d at 635.

²⁰25 U.S.C. at § 2703 (7) (B) (ii).

officials.”²¹ The county appealed the decision, in which the Ninth Circuit Court of Appeals decided *Sycuan Band of Mission Indians v. Roache* on September 26, 1994.

Circuit Judge William Canby wrote an opinion that, like *Cheyenne River Sioux*, contained some positive and negative components for Indian gaming advocates. The court upheld the district court’s ruling in all aspects, including granting declaratory and injunctive relief to the tribes, but also preventing the tribes from reclaiming the pulltab machines. The court reiterated that pulltabs were electronic facsimiles and thus Class III games, regardless of whether or not the players played against each other or against the house. Because there was no tribal-state compact, the court denied the motion to return the machines directly to the tribes. Instead, the court ordered the games returned to Video Autotab, Inc the lessor of the machines.²²

County officials, however, lacked jurisdiction to raid the tribal casinos. The federal government maintained authority to enforce state laws regarding gambling on Indian reservations despite the state’s futile attempt to again claim Public Law 280 jurisdiction: “Whether IGRA has made broader inroads on Public Law 280 we need not decide; it has clearly made criminal enforcement of the State’s laws prohibiting ‘slot machines’ the exclusive province of the federal government.”²³ The court also found that the state could not attempt to regulate Class II gaming on a game by game basis:

We express no opinion concerning Class III, but at least insofar as the State’s argument is directed at Class II-type gaming, of the sort engaged in by the Tribes in *Cabazon Band*, the state cannot regulate and prohibit, alternately, game by

²¹*Sycuan Band of Mission Indians v. Roache*, 54 F. 3d 535 (9th Cir. 1994) at 537.

²²Id. at 539-541.

²³Id. at 540.

game and device by device, turning its public policy off and on by minute degrees.²⁴

Unfortunately the court did not express an opinion as to Class III gaming to help clarify the discrepancy between the *Mashantucket Pequot* and *Cheyenne River* decisions.

Further, the state's citation of Title 18 of the United State's Code as granting jurisdiction over Class III games came to naught:

It is true that under section 1166(a), all state Class III gambling laws 'apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.' But in the same breath, Congress granted the United States exclusive jurisdiction to enforce those state laws.²⁵

Regardless of classification, in this case the state lacked the authority to enforce its laws.

The state did not have control over games classified as Class II as a result of the *Cabazon* decision. If it was Class III, then the state lacked jurisdiction without a tribal-state compact, which it did not have with the Barona, Viejas, or Sycuan.

California tribes continued to struggle when Governor Pete Wilson refused to negotiate on "stand-alone" electronic gaming devices he deemed illegal slot machines, as well as on live banking and percentage card games he claimed violated California penal code §330. The Ninth Circuit landed in the position of choosing between precedents established in *Mashantucket Pequot Tribe* and *Cheyenne River Sioux*. In a controversial decision, the court sided with the Eighth Circuit's interpretation of IGRA, and completely disregarded the foundations of the *Cabazon* decision. *Rumsey Indian Rancheria of*

²⁴*Sycuan*, 54 F. 3d at 539.

²⁵*Id.* at 541.

Wintun Indians v. Wilson was originally decided on November 15, 1994.²⁶ Four Ninth Circuit judges disagreed with the case’s panel of judges and requested that the trial be reheard “en banc.” When a trial is reheard en banc, the entire circuit rules on the case rather than the regular panel of three judges. Chief Judge John C. Wallace, who ruled on the original hearing, denied the petition to rehear the case en banc, leading Judge Canby to write a scathing dissent.

Judge Diarmuid O’Scannlain declared, “Where a state does not ‘permit’ gaming activities sought by a tribe, the tribe has no right to engage in these activities, and the state thus has no duty to negotiate with respect to them.” Tribal leaders expressed their belief that IGRA reinforced the *Cabazon* rationale of a public policy test that showed that California clearly did not prohibit gambling as a whole. The state ran a lottery, permitted horse racing, and non-banked/non-percentage card games. The court, however, “rejected this reading of IGRA” based upon the “plain language” of the statute.²⁷ In the court’s opinion, it was clear that California did not “permit” the type of gaming that the tribes wished to operate:

The fact that California allows games that share some characteristics with banked and percentage card gaming- in the form of (1) banked and percentage games other than card games and (2) non-banked, non-percentage card games is not evidence that the State permits the Proposed Gaming Activities.²⁸

The Ninth Circuit concurred with the Eighth Circuit that IGRA did “not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming.” The court continued this sentiment stating, “In

²⁶Rumsey Ind. Rancheria of Wintun Ind. v. Wilson, 64 F. 3d 1250 (9th Cir 1994).

²⁷Id. at 1257.

²⁸Id. at 1258.

other words, the state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.”²⁹

IGRA’s legislative history seemed to contradict the Ninth Circuit’s opinion, however, the court found it unnecessary to conduct a thorough review of this history: “Because we find the plain meaning of the word “permit” to be unambiguous, we need not look to IGRA’s legislative history.”³⁰ The court glanced at the Senate Report from *Mashantucket Pequot Tribe*, but again reached a conclusion different from the Second Circuit. Rather than using the maxim that “identical language in a statute should be interpreted to have the same meaning,” the Ninth circuit interpreted the language to have a different intent. Because the Senate Report specifically named Class II gaming and was silent on Class III gaming, the court negatively inferred that silence expressed congressional intent for Class III gaming to receive greater state regulation. From this inference, the court determined that the State of California need not negotiate over specific games that it deemed illegal.³¹

Judge Canby’s dissent and denial of rehearing en banc signaled that the court misinterpreted congressional intent and IGRA’s entire purpose. Canby argued that the Ninth Circuit confirmed the Second Circuit’s fear that, without giving states an incentive to negotiate, IGRA would be rendered “toothless.” In Canby’s view, “The whole idea was to foster these compacts. That goal is defeated if the details of the state’s regulatory schemes, allowing some games and prohibiting others, apply if the state does nothing.”³²

²⁹*Rumsey*, 64 F. 3d at 1257.

³⁰*Id.* at 1258-59.

³¹*Id.*

³²*Id.* at 1253.

Canby also believed that the court focused on the wrong word when reviewing IGRA's requirements for negotiation. The word "permit" was not as important as the term "such gaming." In concurrence with the Second Circuit, Canby stated that "such gaming" referred to a class of gaming, not a particular individual game. By seeing a negative inference that simply was not there, the court had misinterpreted IGRA and restricted the tribal-state compacting process. As with the Second Circuit and Connecticut, Canby did not want California forced into accepting every tribal demand, he desired only that the state be open to negotiations. Interestingly, if Judge Canby had offered an opinion regarding regulation of Class III gaming in his *Sycuan* decision, he might have set precedent and deterred the Ninth Circuit from reaching the conclusion it did.³³

The different circuit courts had the opportunity to rule on disputes between tribes and states refusing to negotiate. On October 6, 1994, the Ninth Circuit received another tribe's claim that the state acted in bad faith; however, in this situation the tribe and state had already entered into a tribal-state compact that the state refused to honor. *Cabazon Band of Mission Indians v. Wilson* dealt specifically with compacted simulcast pari-mutuel horse racing.³⁴ Both parties agreed that horse racing fell under Class III gaming. Per IGRA, the tribe and state entered into a compact, but disagreed over the imposition of a state licensing fee on the tribe's simulcast wagering facility. The state admitted that the fee was indeed a tax, something that the tribe contended was prohibited under § 2710 (d) (4) of IGRA. This section stated that IGRA did not confer upon the state the "authority

³³*Sycuan*, 54 F. 3d at 539.

³⁴*Cabazon Band of Mission Indians v. Wilson*, 37 F. 3d 430 (9th Cir. 1994).

to impose any tax, fee, charge, or other assessment upon an Indian tribe...”³⁵ In what Indian gaming advocates viewed as a seriously flawed interpretation of the statute, the court stated that the lack of authority to tax was not a prohibition against taxation. The court referenced the case of *Catholic Social Services, Inc v. Thornburgh*, a matter dealing with illegal immigration.³⁶ The court stated that the phrase “nothing in this section shall be construed as authorizing petitioners’ admission into the country...,” did not prohibit admission under the same statute. This may have been true in this instance, but illegal immigration and taxation under IGRA are two completely separate issues not easily compared. Thankfully for the tribes, this passage can be disregarded as mere dicta; remarks used in reaching a decision that lack the full legal force of establishing precedent. The court thus turned to the question of whether tribal interests preempted state intervention.

The court illustrated that Southern California Off Track Wagering Inc, a quasi-governmental organization of racing associations, agreed to pay the tribes a rate of 2.33 percent of all money wagered at their location. Two percent is the standard fee given to all simulcast locations, while the additional 0.33 percent was contracted as an additional fee to go directly to tribal governments. With the state’s imposed licensing fee, taken directly from Southern Californian Off Track Wagering Inc based upon the amount wagered at the tribal facility, the state ended up making more money than the tribe. From March 1, 1990, to February 28, 1991, the state collected \$292,075 compared to only \$217,386 for the Cabazon. In addition, the Sycuan tribe, who were co-plaintiffs in this

³⁵25 U.S.C. at § 2710 (d) (4).

³⁶*Catholic Social Services, Inc. v. Thornburgh*, 956 F. 2d 914, 923 (9th Cir. 1992).

case, received \$318,743 for the period of November 1, 1990 to March 3, 1991 in comparison to \$440,175 for the state.³⁷ The state agreed in the compacting process that if the district court ruled in favor of the tribes, then it would turn over all collected fees to the tribes. While the district court did not rule in favor of the tribes, the circuit court did. The Ninth Circuit determined that the imposition of state fees was an economic burden on the tribes, and that “contrary to the conclusion of the district court, the bands do indeed have a ‘right’ to the unpaid fees.”³⁸ The state claimed its interest in the gaming activity was equal to the tribes’ because the actual activity occurred off the reservation. The court disagreed with this contention stating that, “It is not necessary, as the district court appears to posit, that the entire value of the on-reservation activity come from within the reservation’s borders.”³⁹ The court found that tribal interests clearly preempted those of the state and thus reversed the district court’s decision, ordering that judgment be entered for the tribes and that the state turn over all collected fees.

In 1996, Indian gaming reached the Supreme Court of the United States for the first time since the *Cabazon* decision a decade earlier. *Seminole Tribe of Florida v. Florida*, decided on March 27, 1996, was one of the most damaging cases to Indian gaming interests.⁴⁰ In a 5-4 decision, that would only have taken one swing vote to change, the court ruled that the Eleventh Amendment of the U.S. constitution prevented tribes from suing states without first gaining consent. This ruling completely undermined IGRA’s provision that states could be sued for failure to negotiate in good faith. Further,

³⁷*Cabazon*, 37 F. 3d 430 at 433-34.

³⁸*Id.* at 434.

³⁹*Id.* at 435.

⁴⁰*Seminole Tribe of Fla v. Florida*, 517 U.S. 44 (1996).

the court ruled that a tribe could not sue an officer of the state, particularly the governor, under the *Ex Parte Young* doctrine. Chief Justice William Rehnquist delivered the opinion of the court.

The Eleventh Amendment states: “The Judicial 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 Citizens or Subjects of any Foreign State.”⁴¹ While the Chief Justice admitted that, “Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts,”⁴² he noted that the amendment contained a “background principle” that was essential for understanding proper jurisdictional limitations. In the justice’s opinion, the court has “understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition...which it confirms.”⁴³ Essentially, rather than taking the amendment at face value, the court decided to read between the lines. The majority relied upon the 1890 decision of *Hans v. Louisiana* that held that each state was sovereign entity within the federal system and should not be susceptible to suit by an individual without its consent.⁴⁴ The only two exceptions to this rule in past court decisions involved the Fourteenth Amendment or the interstate commerce clause as determined in the case of *Pennsylvania v. Union Gas Co.*⁴⁵

⁴¹U.S. Constitution, XI Amendment.

⁴²Seminole, 517 U.S. 44 at 54.

⁴³*Id.* at 54.

⁴⁴Hans v Louisiana, 134 U.S. 1, 13 (1890).

⁴⁵Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

Tribal attorneys argued that while IGRA did not deal with Fourteenth Amendment issues, Congress' desire to abrogate a state's sovereign immunity to suit under the Indian Commerce Clause was similar to the Interstate Commerce Clause basis of *Union Gas Co.* The majority, however, disagreed and declared that their previous ruling of *Union Gas Co.* was incorrect and thus overturned. The majority based this ruling on the premise that a majority of the court in *Union Gas* did not reach a consensus as to the power of Congress regarding the Eleventh Amendment and that the decision had caused much confusion for the lower courts. Rehnquist stated this because Justice Byron White had agreed in part and dissented in part on the issue. Using this logic, the same argument could overturn this decision as it was so closely contested. Rehnquist declared that, although IGRA clearly showed Congress' intent to abrogate a state's sovereign immunity to suit, Congress nevertheless, did not have the power to enforce such an action.⁴⁶

Rehnquist further declared that the *Ex Parte Young* doctrine did not permit tribes to sue state officials.⁴⁷ Under *Ex Parte Young*, the federal government maintains jurisdiction over suits seeking injunctive relief in order to end a "continuing violation of the law." Rehnquist, however, stated that when "Congress has prescribed a remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*."⁴⁸ The Chief Justice feared using this doctrine could

⁴⁶*Seminole*, 517 U.S. 44 at 54-70.

⁴⁷*Ex Parte Young*, 209 U.S. 123 (1908).

⁴⁸*Seminole*, 517 U.S. 44 at 74.

expose a state official to the full force of the law including possible sanctions. He pointed to IGRA's remedies under § 2710 as the main reason to avoid this possibility. One glaring problem was missed in Rehnquist's logic, however. If the court had just ruled unconstitutional the portion of § 2710 that allowed tribes to sue states for failing to negotiate in good faith, how could these remedies be used to prevent an action against an officer under *Ex Parte Young*?

Justices John Paul Stevens and David Souter's separate dissents strongly criticized the majority's opinion. Justice Souter's dissent is a very long and detailed explanation that traces the origin of congressional power to colonial times. Souter argues that in its formation the United States did not adopt English common law in its entirety. The founders clearly rejected granting states absolute power as the King had before the American Revolution. During the Constitution's implementation, early American politicians had two choices concerning the Eleventh Amendment. Theodore Sedgwick proposed the following text:

No state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.⁴⁹

Using this passage, the court would be correct in stating that a tribe, or any other entity, does not have the right to sue a state under the Eleventh Amendment. This text, however, was replaced with the more limited language. Souter used this fact to declare that, "The history and structure of the Eleventh Amendment convincingly show that it reaches only

⁴⁹Seminole, 517 U.S. 44 at 111.

to suits subject to federal jurisdiction sovereignty exclusively under the Citizen-State Diversity Clauses.”⁵⁰

Souter and Stevens’ dissenting opinions further contradicted that of the majority. The Eleventh Amendment clearly prohibits suit “by Citizens of another State, or Citizens or Subjects of any foreign state.” Souter argued that, the main reason behind the Eleventh Amendment was to prevent newly formed states from being sued over war debts from the recently completed revolution.⁵¹ Nowhere does the amendment mention suits concerning a state’s own citizens, corporations, or entities such as tribal governments. By declaring that a state has sovereign immunity unless it consents to be sued, the majority opinion essentially grants ultimate power to state governments. This is something that not only affects tribal governments and undermines IGRA, but also affects any citizen or corporation that has a dispute with a state. Why would a state consent if they can simply claim sovereign immunity and not have to worry about their actions, or in the case of Indian gaming, inactions? Further, why would a tribe or other entity be barred from suing a state official for violation of a law? Souter poses the same question in this manner:

Why would Congress not have wanted IGRA to be enforced by means of a traditional doctrine giving federal courts jurisdiction over state officers, in an effort to harmonize state sovereign immunity with federal law that is paramount under the Supremacy Clause?

As Souter concludes, “There are no plausible answers to these questions.”⁵²

⁵⁰Seminole, 517 U.S. 44 at 111.

⁵¹Id. at 130-142.

⁵²Id.at 182.

Before California could claim sovereign immunity from suits concerning Indian gaming, the California Supreme Court heard a case with ramifications for tribes attempting to operate casinos in California. *Western Telcon, Inc v. California State Lottery*, decided June 24, 1996, involved the state lottery's operation of a keno game.⁵³ The plaintiffs, a game manufacturing company, and the California Horsemen's Benevolent and Protective Association, Inc, sued the lottery claiming its keno game was an illegal house banked game and therefore essentially a slot machine. The California-Nevada Indian Gaming Association intervened on behalf of the lottery arguing that the games were not illegal house banked games, nor slot machines. The tribal interests sided with the lottery, because they desired to operate their own "video lottery terminals," currently prohibited as Class III electronic facsimiles of games of chance.

The California State Supreme Court examined state law and determined that a lottery and a banking game were mutually exclusive. The court separated gambling into three distinct categories: gaming, lotteries, and betting. Gaming was defined as "the playing of any game for stakes hazarded by the players." Within gaming, a lottery was defined as "any procedure authorized by the commission whereby prizes are distributed among persons who have paid, or unconditionally agreed to pay, for tickets or shares which provide the opportunity to win such prizes." Finally, betting equaled "promises to give money or money's worth upon the determination of an uncertain or unascertained event in a particular way, and may involve skill or judgment."⁵⁴ Unlike house banked games, lotteries make their money simply on the number of tickets sold, not on the

⁵³*Western Telcon, Inc v. California State Lottery*, 13 Cal. 4th 475 (1996).

⁵⁴*Id.* at 482.

outcome of a particular game. They use the principle of a “player’s pool prize” wherein the money gained from ticket sales is pooled into a large amount that determines the amount of the prize contested. It is not a “bilateral” wager between two parties.⁵⁵

In the California State Lottery’s keno game, a video terminal was used in which a player selected a certain amount of numbers, up to ten total, numbered from one to eighty, and made a wager of between \$1.00 and \$20.00. A centralized computer randomly drew twenty numbers to determine whether the player won or lost. The game repeated every five minutes giving the opportunity for continuous play. The court determined that because the payoff amounts of the game were fixed, the keno game was not a lottery, but in fact an illegal house banked game. While the game met the qualifications of subtracting fifty percent of all ticket sales for winnings, and did not dispense coins or currency, as specified in the California Constitution and government code respectively, the amount of the winning prize was fixed and not determined on the amount of tickets sold.⁵⁶ The court, however, proclaimed that:

The feature that makes CSL Keno a banking game rather than a lottery is not that it is a numbers game or is played through a computer and video terminal, but that it offers fixed payoffs to a number of bettors determined by the draw, and that the operator therefore has a stake in the play of the game.⁵⁷

Through this statement, tribal leaders gained the concession that they were seeking; their video lottery terminals were not necessarily prohibited facsimiles of a game of chance. The determination of whether a game was illegal did not depend on the machine that it was played on, but on the nature of the betting itself. Because the court refused to answer

⁵⁵Western Telcon, 13 Cal 4th at 486.

⁵⁶California State Constitution, Article IV, §19.; Gov. Code, §8880.28 Gov’t subd. (a) (1), (3).

⁵⁷Western Telcon, 13 Cal. 4th at 494.

whether the video lottery terminal was a prohibited slot machine, tribal gaming advocates gained a bargaining chip in arguing that video machines were not prohibited if operated as player's pool prize lotteries rather than house banked games.

Seizing upon the United States Supreme Court's ruling that a state may claim sovereign immunity from suit, California completely ignored the Ninth Circuit's 1994 order to turn over fees collected from the simulcast horse racing operations of California tribes. The Cabazon, Sycuan, Barona, and Viejas tribes joined to sue California. On appeal from district court, the Ninth Circuit decided the case of *Cabazon Band of Mission Indians v. Wilson* on September 2, 1997. In order to avoid confusion from the previous court decisions, the court labeled the first district court ruling as "Cabazon I," and the Ninth Circuit's decision in 1994 as "Cabazon II."⁵⁸ In this particular case, the state argued four main points as to why they did not release the funds, and why they should not be subject to this suit: (1) the state is immune from suit under the Eleventh Amendment; (2) the state never agreed to surrender the license fees it collected from the racing industry to the Bands unless the court determined they were an impermissible tax on the Bands; (3) the compacts are invalid because the racing associations and the horsemen, not the Bands, are the primary beneficiaries; (4) the Bands materially breached the compacts by operating illegal slot machines.⁵⁹

Circuit Judge Stephen S. Trott had little trouble in declaring that each of the state's arguments was "unavailing."⁶⁰ First, the state willingly entered into negotiations

⁵⁸Cabazon Band of Mission Indians v. Wilson, 124 F. 3d 1050 (9th Cir. 1997).

⁵⁹Id. at 1056-1057.

⁶⁰Id.

with the tribes in question, they did not refuse to negotiate at all, and therefore waived their sovereign immunity under the Eleventh Amendment. Second, the clear language of the compact stated that the tribes “shall seek declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether deduction and distribution of the state license fee...are permissible under the Act.”⁶¹ Not only did the state consent to suit, it also clearly stated that if it lost, it would return the fees. When a state enters into a compact, “the compact terms, not state law, govern the resolution of a dispute.”⁶² The court answered the state’s third point in an equally dismissive manner. Although the license fee fell upon the racing association, the court showed that “The Bands bear the actual burden of the license fee.”⁶³ The court rejected the state’s underhanded method of attempting to claim that the compacts should become void because the tribes were not primary beneficiaries. Finally, using the principle established in *Sycuan v. Roache*, Judge Trott ruled that the state held no jurisdiction to enjoin slot machines and banked and percentage card games because the state did not have a compact regarding those issues. The federal government held sole authority to prohibit these activities when the tribes had not consented to state jurisdiction. Once again, the court ordered judgment in favor of the tribes and for the state to turn over the licensing fees.

On January 29, 1998, the Eighth Circuit reinforced that the federal government has authority to enjoin tribal gaming activities in violation of IGRA. *United States v.*

⁶¹*Cabazon*, 124 F. 3d 1050 at 1057.

⁶²*Id.* at 1058.

⁶³*Id.*

Santee Sioux Tribe was an appeal of the United States District Court's refusal to enforce the National Indian Gaming Commission chairman's temporary closure order.⁶⁴ In February of 1996, following three years of failed negotiations, the Santee Sioux Tribe of Nebraska decided to open a casino offering video slot machines, video poker, and video blackjack. The tribe also sued the state in district court for failure to negotiate in good faith. Following the Supreme Court's decision in *Seminole Tribe of Florida*, the district court dismissed the tribe's suit because of sovereign immunity. The district court failed to note the Ninth Circuit's ruling that when a state entered into negotiations, it voluntarily waives immunity from suit.⁶⁵

On April 25, 1996, the NIGC's chairman entered a notice of violation and order of temporary closure. The NIGC cited the fact that the tribe did not have a tribal-state compact, and therefore, was in violation of IGRA. The tribe complied for nearly two months before reopening their casino. The district court ruled that because the tribe had appealed the chairman's order to the NIGC, and that appeal had not yet been finalized, the district court could not grant civil injunctive relief to enjoin the tribe's activities. The NIGC finalized their closure order on July 31, 1996, and again filed a motion with the district court seeking civil injunctive relief. The district court denied this motion stating that the NIGC could seek criminal prosecution, but not civil injunctive relief. The NIGC then appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit held that the Attorney General may seek enforcement of closure orders and that the district court erred in refusing to enforce such an order. In

⁶⁴United States v. Santee Sioux Tribe, 135 F 3d 558 (8th Cir. 1998).

⁶⁵Id. at 559-61.

matters concerning the federal government, the Attorney General is the one to act; therefore, even though IGRA is “silent on the matter of enforcing closure orders or fines,” the court assumed that Congress intended for him to enforce the order.⁶⁶ The court also found that the district court was incorrect in failing to issue an order to enjoin any further conduct of Class III gaming. They based this conclusion on the fact that Nebraska law prohibited the specific type of gaming that the tribe was conducting. They also declared that Title 18 of the United States Code allowed the federal government to enforce all state gaming laws, which under Nebraska state law included the possibility of granting civil injunctive relief. The court reached the correct conclusion in this aspect. Unlike San Diego County’s attempts to enforce state gambling laws in *Sycuan v. Roache*, this involved the federal government enforcing state laws. The court correctly granted jurisdiction over Indian gaming to the federal government because of the lack of a tribal-state compact.⁶⁷

Court decisions from 1990-1998 were more detrimental than beneficial to tribal gaming interests. Minor victories in *Mashantucket Pequot Tribe*, and *Cabazon v. Wilson* were overshadowed by the defeats of *Cheyenne River Sioux*, *Rumsey*, and *Seminole Tribe v. Florida*. California tribes faced negotiating compacts with the disadvantage of the state being able to simply claim sovereign immunity. California’s tribes, however, had never backed away from a challenge. In this high stakes showdown, the state appeared a bit nervous over video lottery terminals being considered legal within the state. Additionally, the *Seminole Tribe v. Florida* decision could potentially eliminate all state

⁶⁶*United States v. Santee*, 135 F 3d 558 at 562-63.

⁶⁷*Id.* at 564-66.

interests. Amending IGRA to completely bypass state involvement was beginning to float through the halls of Congress. Beginning in 1998, Indian gaming in California would undergo a tremendous transformation. While some negative consequences came from tribal competition and disagreements, the majority of California's tribes exhibited a remarkable sense of resourcefulness and ingenuity. If tribal desires could not fit within California law, then perhaps California law could be changed to fit tribal desires.

CHAPTER 5

CALIFORNIA

Following the *Western Telcon* decision, California Governor Pete Wilson appeared to retreat from his firm stance against Indian gaming. Tribes being able to legally operate gaming machines in the form of video lottery terminals without having to negotiate with the governor undoubtedly led to this more open approach¹ Beginning in October of 1996, Wilson began negotiations with the Pala Band of Mission Indians. Located in rural northern San Diego County, with a membership of 867 people and located on a 12,000 acre reservation, the Pala were a fairly large tribe by California standards.² They did not operate a casino when negotiations commenced and viewed working with Wilson as an opportunity for economic improvement; Wilson equally viewed the negotiations opportunistically. He desired a tribe without a casino in operation to negotiate a Class III compact. Wilson wanted to avoid problems of arguing with the tribe over a reduction in current gaming activities or the prohibition of casino games that the tribe might already offer. The Pala entered negotiations with a clean slate; anything was an improvement over nothing. Wilson believed the Pala negotiations could produce a model compact for all California gaming tribes. After seventeen months of

¹Chad M. Gordon, "From Hope to Realization of Dreams: Proposition 5 and California Indian Gaming," in *Indian Gaming Who Wins?*, ed. Angela Mullis and David Kamper (Los Angeles: Regents of the University of California, 2000), 4-6.

²Stand Up for California, "Testimony of Robert Smith, Chairman of the Pala Band of Mission Indians, before the National Gambling Impact Study Commission, 29 July 1998," http://www.library.ucla.edu/mgi/campaign/1998gen/props/prop5/website-no2/statements/robert_smith_1998_july_29.html (accessed October 10, 2004).

negotiations, the two parties reached an agreement and signed the Pala Compact in March of 1998.³

The Pala Compact would be effective for ten years with the option of two renewals of five years each. Compact provisions included a prohibition against complimentary drinks or the extension of credit to gamblers. The age limit for casino activities was 21.⁴ State and tribal leaders shared responsibility for licensing gaming employees, and the state performed background checks on non-tribal employees.⁵ Tribes were required to provide annual financial audits, and the Department of Justice received authority to inspect casino property.⁶ To protect patrons, tribes had to carry \$5 million worth of liability insurance, and could not use sovereign immunity as a bar.⁷ The compact also included an acceptable method of arbitrating patron disputes, worker protections such as worker's compensation and the right to collective bargaining for non-gaming employees, and cooperation with local governments on road improvements and fire safety.⁸ The tribe bore responsibility for reimbursement of any state regulatory costs.⁹

The Pala Compact's terms were extremely favorable to state interests. The state allowed adopting tribes to operate Class III gaming activities through video lottery

³Pala Compact.

⁴Id. at §§ 9.1-9.3.

⁵Id. at §§ 5.1.7, 5.2.4.3.

⁶Id. at §§ 6.1, 6.2, 7.1.

⁷Id. at §§ 11.1,11.2.

⁸Id. at §§ 10.3, 12.3, 12.6, 13.1, 13.3, 13.7.

⁹Id. at § 18.1.

terminals. Class II card games were permitted, but the state required tribes to erect a physical barrier between Class II card games and Class III video terminals.¹⁰ Sierra Designs of Reno, Nevada, received an exclusive state contract to develop approved video lottery terminals for Indian casinos.¹¹ Consequently, the state completely controlled technical aspects of the game, and eliminated worrying about compact violations regarding a lottery system versus a house banked game. Each adopting tribal government of the Pala Compact received a base allocation of 199 machines. As a method of revenue sharing with tribal governments that could not, or did not want to operate casinos, the state granted individual tribes the ability to lease a single machine for \$5,000.00. Larger casinos could thus exceed their base allocation and operate up to a total of 975 machines. Non-gaming tribes that leased out their total allocation of 199 machines could, in return, earn close to \$1 million annually.¹² State-wide, the total number of machines in operation was capped at 19,900 machines. This figure was calculated by multiplying the estimated number of federally recognized tribes in California (100), by the base allocation of 199 machines.¹³ This number was open to renegotiation in March of 1999; however, the state's formula caused many tribes an immediate problem. Some groups already operated more machines than the base allocation allowed. According to Professor Joseph G. Jorgenson of the University of California, Irvine, the state's plan

¹⁰Pala Compact at §§ 9.1, 9.2, 9.3.

¹¹Sam Delson, "Indians, Wilson Showdown Possible," San Diego Union-Tribune, 9 May 1998, p. A-1.

¹²Pala Compact at §§ 9.4.1-9.6.2.

¹³"Legislative Analysis," California Voter Information Guide, Primary Election, March 7, 2000.

would result in a 38 percent net reduction of video terminals state-wide.¹⁴ Additionally, these tribes maintained contracts with outside companies for their current machines, or simply owned them outright. Making tribes change to only state approved terminals would further reduce profits and increase costs.

While ten other tribes joined the Pala in accepting Wilson’s proposal, a majority of California’s tribes rejected the compact. In addition to problems of reducing non-state approved gaming terminals, tribal leaders found other serious problems with the state’s proposal. Foremost was Wilson’s authoritarian declaration that “any tribe seeking to enter into future compact negotiations would have to agree ‘in advance’ to the provisions contained in the Pala Compact or face immediate closure...”¹⁵ Tribal leaders viewed this as a blatant disregard of tribal sovereignty. To force a group to choose between a compact in which they were not a negotiating party or immediate closure gave tribes no real say in their future. Mary Ann Martin Andreas, Chairwoman of the Morongo Band of Mission Indians, depicted the choice as “suicide or slow death.”¹⁶ Further, tribal leaders opposing the compact found its terms to be heavily weighted toward state interests. The state demanded tribes voluntarily relinquish sovereignty over environmental controls and regulation of tribal operations in exchange for very limited gaming.

Especially troubling was the compact’s creation of “economic development zones.” The legislature established economic development zones, areas of business on tribal lands not related to Indian gaming. The state would grant technical and financial

¹⁴Joseph G. Jorgenson, “Gaming and Recent American Indian Economic Development,” in Indian Gaming Who Wins?, ed. Angela Mullis and David Kamper (Los Angeles: Regents of the University of California, 2000), 100-101.

¹⁵Gordon, “From Hope to Realization of Dreams,” 6.

¹⁶Delson, “Indians, Wilson Showdown Possible,” p. A-1.

assistance to encourage tribal businesses and improve tribal economies. While this in itself was a good idea, the provision had one major catch; the compact reduced machines in proportion to 50 percent of the net income tribal economic zones generated.¹⁷ The more successful zone businesses became, the fewer video terminals a tribe could operate. This provision was counterproductive, and revealed the state truly rejected tribes operating casinos. Under Wilson's compact, casinos were simply a temporary fix to tribal economic woes. This was problematic as it again hobbled tribal sovereignty and self-determination; the idea of economic development zones forced tribes to accept the state's plan for economic success rather than allowing Indians to make their own decisions. The state negated incentives for operating a successful business. Why make one business venue successful if that success prevents profit in another form? Further, what prevented tribes from becoming equally successful at both operating casinos and new forms of business? Could not the tribes become simultaneously economically independent through both means? Apparently, the state thought not. The leaders of eighty-eight California tribes rejected what they viewed as a one-sided and very flawed compact. Rather than argue with Wilson, they decided to take their cause directly to California's voters.

On October 10, 1911, the voters of the State of California adopted the initiative; a means of direct democracy that bypassed the Legislature.¹⁸ Through the initiative process, an individual citizen may appeal directly to the citizens of the state in order "to

¹⁷Pala Band of Mission Indians, "Wilson Signs Compact with Five Additional Indian Tribes," <http://www.palaindians.com/docs/071398pr.htm> (accessed October 10, 2004).

¹⁸California Secretary of State, "A History of California Initiatives," http://www.ss.ca.gov/elections/elections_initiatives.htm (accessed October 12, 2004).

place an issue of interest on the ballot for voter approval or rejection.”¹⁹ Proponents of any particular issue must first present their proposed initiative to the Attorney General. The Attorney General will provide an official title and summary. The individual or group then has 150 days to collect as many signatures as possible in support of placing the issue on the ballot. To qualify, an initiative designed to change California statutes, requires that signatures collected exceed 5 percent of the total number of registered voters that cast a vote in the previous gubernatorial election. If the initiative amends the state constitution, the petitioners must collect signatures that exceed 8 percent of the same criteria. The office of the Attorney General then verifies the signatures, typically by examining a random sample of names on the petition.²⁰

Tribal leaders opposed to Wilson’s Pala Compact placed Proposition 5 on the November 3, 1998 ballot through the initiative. Entitled “The Tribal Government Gaming and Economic Self-Sufficiency Act of 1998,” their initiative sought to change California’s casino gaming statutory law. Proponents, therefore, had to collect signatures in an amount equal to 5 percent of the previous votes cast in the gubernatorial election, or 419,260. Proposition 5 advocates collected nearly 1.2 million signatures in only three weeks.²¹ The campaign, however, proved more arduous than the initial collection of signatures. Opposition came from several fronts, including tribes who already signed the Pala Compact, groups adamantly anti-gaming, and most notably Nevada casino operators who viewed California tribal gaming as a threat to their profit. Corporations such as

¹⁹California Secretary of State, “A History of California Initiatives.”

²⁰Ibid.

²¹ Joseph G. Nelson, “California High Court Strikes Down Indian Gaming in *Hotel Employees and Restaurant Employees International Union v Davis*,” in *Indian Gaming Who Wins?*, ed. Angela Mullis and David Kamper (Los Angeles: Regents of the University of California, 2000), footnote 79.

Circus Circus, Mirage Resorts, and Hilton Hotels each gave in excess of \$4 million to defeat Proposition 5; while Station Casinos, Primadonna Resort, Imperial Palace Hotel, and Harvey's Casino Resorts also contributed substantially. Of the \$14.56 million reportedly raised in the third quarter before the election, Nevada casinos gave \$14.55 million.²² These casinos clearly feared losing the metropolitan, southern-California market located only 260 miles away on Interstate 15. Overall, Proposition 5 opponents contributed in excess of \$29 million.

Opponents declared Proposition 5 allowed for “a dramatic expansion of unregulated and untaxed casino gambling throughout California.”²³ They argued that “less than 15 percent of California Indians will receive benefits from this initiative. Proposition 5 is a grab for advantage by a few wealthy Indian tribes at the expense of all Californians.”²⁴ They also alleged that exemption from environmental laws could result in “great environmental damage to California.”²⁵ While these arguments came from non-Indians, the battle over Proposition 5 also caused inter-tribal factionalism. Indian opponents, particularly Pala leaders, also vociferously opposed Proposition 5. On July 29, 1998, Pala Chairman Robert Smith provided testimony to the National Gambling Impact Study. Smith portrayed the Pala Compact as “fair to our tribe and the public interest,” and “truly a ‘model’ that other tribes have successfully built on and gone

²²Jake Henshaw, “Prop. 5 Spending Likely To Set Record,” Gannett Sacramento Bureau, 6 October 1998.

²³“Argument Against Proposition 5,” California Voter Information Guide, General Election, November 3, 1998.

²⁴“Rebuttal to Argument in Favor of Proposition 5,” California Voter Information Guide, General Election, November 3, 1998.

²⁵“Argument Against Proposition 5,” California Voter Information Guide, General Election, November 3, 1998.

beyond.”²⁶ In labeling Proposition 5 a “cookie-cutter compact imposed on all Tribes and the State,” Smith essentially turned the Pala Compact opposition’s argument, that of forced acceptance, against themselves.²⁷ He pointed to environmental and worker’s protections incorporated in the Pala Compact and declared that these guarantees were missing from Proposition 5. Smith further stated that the initiative was “penny wise and pound foolish for tribes.”²⁸ He believed that because the initiative changed only a statute, but not the California Constitution, it therefore provided any group an opportunity to propose an initiative to allow casino gaming for their own interests. This then negated the special relationship between tribes and the government concerning gaming. Proponents of Proposition 5, however, questioned whether that relationship was truly special, and were the economic benefits of the Pala Compact substantial enough to sacrifice sovereignty? Proposition 5 supporters answered no.

Realizing the opposition’s strength, Proposition 5’s proponents, calling themselves “Californians for Indian Self-Reliance,” countered with a strong campaign accusing Nevada casinos of “scare tactics.”²⁹ Tribal interests spent over \$62 million countering the opposition’s \$29 million, making Proposition 5 the most expensive initiative in U.S. history.³⁰ Much of this campaign included television commercials

²⁶Stand Up for California, “Testimony of Robert Smith, Chairman of the Pala Band of Mission Indians, before the National Gambling Impact Study Commission, 29 July 1998,” http://www.library.ucla.edu/mgi/campaign/1998gen/props/prop5/website-no2/statements/robert_smith_1998_july_29.html (accessed October 10, 2004).

²⁷Ibid.

²⁸Ibid.

²⁹“Rebuttal to Argument Against Proposition 5,” California Voter Information Guide, General Election, November 3, 1998.

³⁰Gordon, “From Hope to Realization of Dreams,” footnote 20.

depicting tribal members belonging to strong communities and desiring the right to make unhindered decisions and determine their own economic future.³¹ To achieve economic independence, tribes asked voters to support a proposition that would benefit both tribal and state interests. Proposition 5's authors realized some sacrifice of sovereignty was necessary to work cooperatively with the state; however, Proposition 5 differed from the Pala Compact in that the tribes voluntarily relinquished sovereignty, instead of being forced to do so.

The text of Proposition 5 began with the statement:

The people of the State of California find that, historically, Indian tribes within the state have long suffered from high rates of unemployment and inadequate educational, housing, elderly care, and health care opportunities, while typically being located on lands that are not conducive to economic development in order to meet those needs.³²

To rectify this, Proposition 5 legalized specific forms of Class III gaming, under IGRA guidelines, on tribal lands. Californians for Indian Self-Reliance declared these gaming facilities, whether proposed for the future, or already in operation, were “materially different” from casinos in Nevada or New Jersey.³³ This distinction was important since the California Constitution specifically prohibited “casinos of the type currently operating in Nevada and New Jersey.”³⁴

Proposition 5's supporters highlighted these distinct differences. The text of the proposition stated that casinos in Nevada and New Jersey offered “their patrons a broad spectrum of house-banked games, including but not limited to house-banked card games,

³¹Gordon, “From Hope to Realization of Dreams,”8.

³²Proposition 5 at § 98001(a).

³³Id. at § 98001(c).

³⁴California Constitution (1849), art. 4, § 19(e).

roulette, dice games, and slot machines that dispense currency or coins...”³⁵ Proposition 5, conversely, limited gaming to electronic gaming terminals, similar to those that the state offered under Pala; lottery games including drawings, raffles, match games, and instant lottery tickets; off-track simulcast horse wagering; and certain Class III card games.³⁶ Like Pala, Proposition 5 did not promote the expansion of house-banked gaming, but dictated that all games “shall pay prizes solely in accordance with a players’ pool prize system.”³⁷ This clearly differed from Nevada and New Jersey style gaming in the simple fact that the forms of gaming allowed under the proposition were much less profitable than those found in Las Vegas or Atlantic City. Lower profitability did not derive from the smaller size of Indian casinos, but from the casino not having a direct stake in the games played. Unlike Nevada and New Jersey’s house banked games, Proposition 5’s tribal casinos held no house advantage over their players, thus greatly reducing the profit margin. Further, profits gained from Nevada or New Jersey style casinos could be used for any purpose, whereas profits from Indian gaming were specifically allocated for tribal improvements.

Similar to the Pala Compact, Proposition 5 offered revenue sharing that would assist non-gaming tribes; however, Proposition 5, unlike Pala, benefitted both the general public and communities that Indian gaming impacted. In exchange for the exclusive right to operate Class III gaming enterprises, tribal governments agreed to contribute to three separate trust funds on a quarterly basis. Proposition 5 proposed a mathematical formula

³⁵Proposition 5 at § 98001(c).

³⁶Id. at § 98004.4.1.

³⁷Id. at § 98004.4.1(a).

that deducted three distinct percentages of the average net win of all gaming terminals a tribe operated.³⁸ Since Proposition 5 did not limit the number of terminals that a tribe might operate, this number could vary. First, casinos were to declare their total number of machines per quarter of the year, and determine the average net win of these machines. They were then to contribute money to each of the three funds based on a specific percentage rate.

Two percent of the average net win was allocated to the non-gaming tribal assistance fund. Tribes that had not participated in any form of gaming within the previous twelve months were eligible to evenly share in quarterly distributions from this fund.³⁹ This provision was potentially more beneficial than the Pala revenue sharing plan. Under Pala, the maximum money a non-gaming tribe could receive from leasing their 199 machine allotment was \$995,000.00. Proposition 5 did not have a maximum benefit. As tribal casinos became more successful, their contributions to the trust funds would increase, and the benefit to non-gaming tribes would grow proportionately. Additionally, Proposition 5, unlike Pala, did not advocate the economic development zones. Thus, tribal casinos were safe from losing casino revenue due to forced conversion to non-gaming businesses.

In addition to helping non-gaming tribes, Proposition 5 offered assistance to local communities and governments. Three percent of the average net win was allocated for emergency medical assistance to the county in which a casino was located and for developing programs to address problem gambling. Of the 3 percent collected, 2.5

³⁸Proposition 5 at § 98004.5.1.

³⁹Id. at § 98004.5.2.

percent was appropriated for emergency medical assistance. The trust fund was to distribute monies based upon a state approved formula that “takes into account the population, ratio, and emergency medical needs of persons over 55 years of age in each county...”⁴⁰ These monies could be used to fund paramedics, emergency phone operators, or other concerns based on a county’s needs. The remaining 0.5 percent was set aside to help prevent or treat compulsive and addictive gambling. It may seem contradictory for a casino to voluntarily help to stop someone from losing money at their establishment, but problem gambling creates a public relations morass for casinos. In addressing the issue and helping those with problems, casinos improve their image while reducing their liability. Although they cannot prevent every problem gambler from making a bet, much like a liquor store cannot prevent an alcoholic from buying a drink, the effort to help is important for maintaining a good public image, and it is the morally correct thing to do. The final trust fund received a one percent contribution given for local government assistance. Tribal and local government leaders, both on a city and county level, were to discuss community needs on a “government-to-government basis.”⁴¹ Local governments were to submit written requests, after which a committee comprised of local government and tribal leaders would grant or deny the request for funds.

A brief illustration highlights the complexity of the formula for determining the amount of money contributed to each fund. After calculating the quarterly terminal base, and determining the average net win, the specified percentages were to be deducted and

⁴⁰Proposition 5 at § 98004.5.3.2.

⁴¹Id. at § 98004.5.4.1.

assigned to each fund. The formula, however, was not as simple as it appeared. The first 200 terminals that a tribe operated were exempt from making any contributions. The next 200 contributed at one-half of the specified percentage rate. Any number of terminals that exceeded these first 400 contributed at the full percentage rate. Using simple, even numbers, is the easiest way to understand this breakdown; therefore, we will use 1000 as the quarterly terminal base with a total net win of \$100,000.00. Using these numbers, the average net win equals \$100.00 per machine. Supposing that we are calculating the contribution to the non-gaming tribal assistance fund, 2 percent of \$100.00 equals \$2.00. The first 200 machines, however, are exempt and the next 200 are only charged at one-half of the percentage rate. Therefore, the total contribution would be calculated as follows: $(0 \times 200) + (\$1.00 \times 200) + (\$2.00 \times 600) = \$1,400.00$. This amount represents the total contribution to this fund due in the specified quarter. Using the same equation, we can calculate the 3 percent emergency medical fund, and 1 percent local government fund respectively:

$$\text{Emergency fund} = (0 \times 200) + (\$1.50 \times 200) + (\$3.00 \times 600) = \$2,100.00.$$

$$\text{Local government fund} = (0 \times 200) + (\$0.50 \times 200) + (\$1.00 \times 600) = \$700.00.$$

A casino with 1000 terminals and a total win of \$100,000 would therefore, contribute a total of \$4,200.00 to the three different funds. It is important to remember that this example uses simple math and a small figure for the total win. In reality, a casino with 1000 machines would typically have a total win that greatly exceeds this example, even if those machines were forced to use the player's pool prize system rather than the more profitable house banked format.

Proposition 5 established ground rules for individual tribes. Each operation was to be “owned solely by the Tribe.”⁴² If a tribe contracted with an outside corporation for management of their casino, the management contract had to provide for advancement of tribal members to key positions, and the contractor was to ensure that its primary goal “is to prepare the Tribe to assume the control and conduct of the operation and facility.”⁴³ The minimum age for casino patrons was set at 18 with the possibility of higher age limits depending on the availability of alcohol at any specific establishment.⁴⁴ Tribal property building and safety codes had to meet tribal standards and had to “meet the standards of either the building and safety codes of any county within the boundaries of which the site of the facility is located or the Uniform Building Codes (of the state).”⁴⁵ Tribal operations had to conform with United States Public Health Service requirements for food and beverage handling, and also to federal regulations regarding safe drinking water.⁴⁶ Tribal governments were to carry two million dollars in public liability insurance, and the tribe had to “provide reasonable assurance that those claims will be promptly and fairly adjudicated, and that legitimate claims will be paid.”⁴⁷ Tribes, however, were not forced to accept claims for attorney’s fees or punitive damages. No mention is made in Proposition 5 regarding sovereign immunity from suit regarding a monetary matter.

⁴²Proposition 5 at § 98004.6.2.

⁴³Id. at § 98004.6.2.

⁴⁴Id. at § 98004.6.3.

⁴⁵Id. at § 98004.6.4.2.

⁴⁶Id. at § 98004.10.1.

⁴⁷Id. at § 98004.10.1.

A key difference between Proposition 5 and the Pala Compact was that the regulation of gaming facilities and licensing procedures fell primarily upon the tribal gaming agency rather than the state. State authorities were not entirely without influence nor were tribal governments able to approve any measure *carte blanche*. Tribal governments had to ensure that their operations were “generally free from criminal and dishonest elements and would be conducted honestly.”⁴⁸ In granting tribal gaming licenses, an applicant had to be “a person of good character, honesty, and integrity.”⁴⁹ Tribal governments had to perform background investigations to forestall hiring anyone with a criminal record or who posed a threat to the honest operation of the casino. The state also had recourse to licensing non-tribal gaming employees. If the state so desired, it could object to the hiring of an individual employee by writing to the tribal gaming agency. The tribal gaming agency, however, had the power to take action. If the tribal gaming agency disagreed with the state’s assessment, it could refuse to act until the issue was resolved through the dispute resolution process.⁵⁰ In this process, both parties agreed to meet in good faith to negotiate a solution to any dispute. If an agreement was not reached within twenty days of the first meeting, then both parties would seek binding arbitration.

Proposition 5 could potentially benefit all of California’s citizens, both Indian and non-Indian alike, and in a manner that preserved tribal sovereignty by giving tribal governments an active role in establishing provisions and guidelines for tribal-state

⁴⁸Proposition 5 at § 98004.6.4.3.

⁴⁹Id. at § 98004.6.4.2.

⁵⁰Id. at § 98004.6.5.6.

compacts. This differed from the Pala Compact which was strongly favored towards state interests and excluded the opinions of the majority of California's tribes.

Proposition 5 provided guarantees for the state such as the ability to inspect casino property and audit financial records.⁵¹ It also gave protections to patrons and employees alike. On November 3, 1998, the people of California overwhelmingly expressed their support for Indian self-reliance as Proposition 5 received 5,092,446 yes votes (62.38%) as opposed to 3,071,422 no votes (37.62%). The victory was a great one for California's gaming tribes; however, it was to be short lived.

Less than a year after passage, the California Supreme Court heard a challenge to the constitutionality of Proposition 5. A service union, the Hotel Employees and Restaurant Employees International Union (HERE) disliked the fact that Proposition 5 did not allow for collective bargaining of employees. The union felt casino employees, especially non-gaming employees, deserved representation regardless of whether these employees asked for it. Therefore, on November 20, 1998, HERE filed for a writ of mandate (a court order to a government agency to correct previous actions, cease illegal activities and to follow the law) and stay pendente lite (Latin for pending litigation) arguing that Proposition 5 violated article IV, section 19(e) of the California Constitution which prohibited casinos of the type operated in Nevada and New Jersey. These actions would prevent Proposition 5 from going into effect pending the outcome of litigation. On December 2, 1998, the Fourth District Appellate Court granted the writ of mandate and stay deciding to hear the matter themselves rather than to allow a lower court to address the issue. Because of the stay the Governor did not execute the agreements within the

⁵¹Proposition 5 at § 98004.7.4.3.

measure's 30 day provision. Therefore, the Secretary of the Interior disapproved all compacts requested under Proposition 5 on January 22, 1999. Again, the courts were called upon to determine the legality of Indian gaming in California.⁵²

On August 23, 1999, the California Supreme Court invalidated Proposition 5 in the case of *Hotel Employees & Restaurant Employees International Union v. Davis*.⁵³ A 6-1 decision, the ruling contained an apparent misinterpretation of the court's own previous opinion in *Western Telcon Inc v. California State Lottery*.⁵⁴ In the former case, the court determined that the California State Lottery's operation of a keno game was an illegal house banked game. The court found that the lottery did not derive its profits based upon the amount of people playing, but on the immediate outcome of each individual game. The lottery in essence acted as a bank, taking on all players, collecting from all losers, and paying all winners. The court did not state, however, that keno could not be operated as a lottery. It simply declared that, because the California Lottery had a direct interest in the outcome of each game, in its present state keno was a house banked game.⁵⁵

Justice Kathryn Werdegar delivered the majority opinion in *Hotel Employees v. Davis*, in which the court declared Proposition 5 to be a violation of article IV, section 19(e) of the California Constitution. In the majority's view, Proposition 5 would allow tribal casinos that were similar to those operated in Nevada and New Jersey. The court determined that the player's pool prize system did not act as a lottery, but rather as a

⁵²*Hotel Employees & Restaurant Emps. Int. Un. v. Davis*, 21 Cal. 4th 585 (1999).

⁵³Id.

⁵⁴*Western Telcon, Inc v. California State Lottery*, 13 Cal. 4th 475 (1996).

⁵⁵Id. at 486-494.

house banked game. The court based this belief on the theory that the house held an interest in the outcome of each game played, stating:

The more the players' pool collects from losers and the less it pays to winners, the lower the tribal operator's costs – the less likely it will be compelled to lend seed money to the players' pool in the future, the more likely it will be able to obtain repayment of seed money lent to the pool in the past. Conversely, the less the pool collects and the more it pays, the higher the operator's costs.⁵⁶

The court reasoned that the casino would desire players to lose as a way of lowering costs and therefore increasing profits. This logic contradicts the basic definition of a player's pool prize system. Using the court's interpretation, all forms of gaming including California's legal poker rooms and the lottery itself would be considered house banked. For example, if nobody wins the lottery, then the jackpot grows larger and larger. As the amount of the prize increases, more people tend to play which increases sales, and thus generates more revenue which can offset costs such as advertising. Therefore, under the court's ruling, the lottery technically would also be a house banked game. The court believed that a casino with a player's pool prize system would be interested in whether players won or lost. However, casinos with this type of gaming are more concerned with simply keeping gamblers playing for as long as possible. The longer that someone plays; the more fees a casino may collect. In fact, in games such as poker, if too many players lose too quickly, the game may shut down and prevent the casino from making any further profits.

The court further negated the contention of Proposition 5 supporters that Indian casinos were materially different from those of Las Vegas or Atlantic City. In the court's opinion, the fact that tribal gaming terminals operated on a player's pool prize system,

⁵⁶Hotel Employees, 21 Cal. 4th at 608.

did not dispense coins or currency, and could not be operated by a lever did not differentiate them from traditional slot machines. Justice Werdegard adamantly stated, “Nor would the voters on the 1984 constitutional amendment likely have understood section 19(e) to permit casinos so long as the slot machines therein were activated by buttons rather than levers, and dispensed chips or electronic credits rather than coins.”⁵⁷ Additionally, the prohibition against free alcohol, absence of craps or roulette, and the fact that casinos were individually owned on isolated reservations, did not sway the opinion of the court. The court stated, “These asserted characteristics, however, fail meaningfully to distinguish casinos authorized under Proposition 5 from those prohibited by section 19(e).”⁵⁸

Although Proposition 5 stated that tribal casinos were “materially different” from those in Nevada and New Jersey, the court held that this assertion was not a finding of legislative fact, but rather an interpretive “construction of the anti-casino provision of section 19(e).”⁵⁹ The power to interpret the California Constitution was left to the judiciary, not the legislative branch of government. Having concluded that tribal casinos violated a constitutional provision, the court determined that the legislative body of California, either the Legislature or the people, could not permit tribal casinos as a matter of statutory law. Section 19(e) prevented “any future legislative authorization of such casinos without constitutional amendment.”⁶⁰ The court thus invalidated Proposition 5 because it was not a constitutional amendment. The only portion of Proposition 5 that the

⁵⁷Hotel Employees, 21 Cal. 4th at 609.

⁵⁸Id. at 609.

⁵⁹Id. at 608.

⁶⁰Id. at 603.

court found to be severable was the State’s waiver of sovereign immunity from suit. Although the remainder of Proposition 5 was voided, this declaration was key in that California would be forced to at least negotiate with tribes over casino gaming, as it had been required to do prior to the *Seminole* decision.

The lone dissenter in *Hotel Employees*, Justice Joyce L. Kennard contended that the proposed gambling under Proposition 5 was not a violation of the California Constitution. She argued that a player’s pool prize system was not a house bank, and that the power to authorize or prohibit Indian gaming was entirely a federal matter. Kennard declared that, “A players’ pool prize system has none of the characteristics of a banking game.”⁶¹ She pointed to the obvious differences in that the house does not have a direct interest in the outcome of each individual game, and that even if players lose and build a larger pool of funds for prizes, the casino itself does not keep any of the additional money. Further, the fact that the pool collects from all winners and pays all losers does not depict that it is a bank, as Kennard stated, “those functions necessarily occur in every form of gambling.”⁶² Regardless of whether the games in question were banked or pooled, Kennard maintained that only the federal government could authorize or prohibit gaming. A state may “shape the contours of the federal authorization,” but it cannot “directly prohibit Indian gambling as such.”⁶³ In Kennard’s view, the California Supreme Court was exceeding its jurisdiction as the power to prohibit Indian gaming was beyond the limits of the state’s sovereignty: “California can no more authorize gambling

⁶¹*Hotel Employees*, 21 Cal. 4th at 625.

⁶²*Id.* at 627.

⁶³*Id.* at 620.

on Indian lands than it can authorize gambling in another state.”⁶⁴ Citing *Cabazon* and IGRA, Kennard concluded that federal jurisdiction preempted that of the state, and therefore Proposition 5 could not be a violation of the California Constitution, since Indian gaming was not subject to it. Despite Kennard’s approach to the subject, the majority’s opinion was the one that mattered to Indian gaming advocates. Faced with yet another obstacle, California’s Indian tribes would have to regroup and adjust in order to achieve their goal.

In addition to Proposition 5, the 1998 election provided another event of significance to California Indian gaming. The election of Gray Davis as governor marked a change in the ideological position of the executive branch towards Indian gaming. Davis’ Republican predecessor, Pete Wilson, had adamantly opposed most tribal efforts to incorporate gaming. When Wilson agreed to negotiate, he did so on a level that was heavily favored towards his own interests. Davis, a Democrat, at first remained neutral on the issue. During the *Hotel Employees* case, the court ordered the governor to file a return by way of answer as a response to the petition for writ of mandate. Davis withdrew the response of former governor Wilson that supported the Union’s objections to Proposition 5 and filed his own response refusing to state a position supporting either side.⁶⁵ However, following the court’s ruling, Davis exhibited a willingness to negotiate with tribes. It is important to note that Indian gaming is not a partisan issue. Supporters and objectors come from all over the political spectrum. It is therefore, important to examine key elements that may have led Davis to take such an open approach.

⁶⁴*Hotel Employees*, 21 Cal. 4th at 621.

⁶⁵*Id.* at 591.

Several factors most likely influenced Davis' relationship with supporters of Indian gaming. First, the election clearly showed the people of California in favor of granting tribes the right to operate casinos. The proposition passed by an overwhelming majority of more than two million votes. Second, despite California Supreme Court's ruling, tribal leaders declined to quit efforts to legalize Indian gaming. The court upheld Proposition 5's clause declaring California had waived its sovereign immunity to suit; therefore, Davis knew he could not use the Eleventh Amendment as a means of avoiding future negotiations. Finally, the most influential issue was Congressional efforts to amend IGRA. For several years, members of Congress had advocated amendments to IGRA, but those efforts had always stalled in committee.

In 1999, Colorado Senator Ben Nighthorse Campbell introduced Senate Bill 985 entitled the "Intergovernmental Gaming Agreement Act of 1999." The proposed amendment had two major provisions that would change the foundation of negotiations between tribes and states. To maintain centralized dispute resolution, the U.S. District Court for the District of Columbia would maintain jurisdiction over all legal action regarding Indian gaming compacts. These disputes, however, would no longer necessarily include states. To rectify the *Seminole* decision, which allowed states to exercise Eleventh Amendment sovereign immunity, Campbell suggested changing the term states "shall" negotiate with tribes upon request, to states "may" negotiate. If a state refused to negotiate, then tribal leaders could completely bypass the state and negotiate directly with the Secretary of the Interior. Indian gaming advocates such as Richard G. Hill, president of the National Indian Gaming Association, hailed Campbell's proposal for "providing a politically neutral solution to the current 'right but no remedy' situation

created by the *Seminole* decision.”⁶⁶ Hill believed IGRA was useless if it granted Indian tribes the right to negotiate gaming contracts without a way to enforce this right.

Raymond C. Scheppach, executive director of the National Governors’ Association, took an opposite viewpoint. He believed that Senate Bill 985 took away incentives for tribes to negotiate with states and would infringe upon a state’s sovereignty. Scheppach contended that the *Rumsey* and *Seminole* decisions had clearly demonstrated the judiciary’s belief that a state held sovereign immunity from suit. Changes in IGRA would, in Scheppach’s opinion, make the National Indian Gaming Commission more important than “state constitutions, laws, and regulations.”⁶⁷ Senate Bill 985, like its predecessors, stalled in committee, and never made it to the floor. The simple threat, however, that state governments might be bypassed had the undoubted effect of causing governors to rethink staunch anti-gaming policies in favor of more open approaches. One such governor was Gray Davis.

In September of 1999, less than one month after the California Supreme Court invalidated Proposition 5, Gray Davis negotiated and the legislature approved tribal-state compacts with fifty-eight tribes, including those that had signed the Pala Compact.⁶⁸ Unlike the Pala Compact, which had taken seventeen months to negotiate, the text of the model compact that Davis offered took merely two weeks to draft.⁶⁹ Davis’ compact

⁶⁶Congress, Senate, Committee on Indian Affairs, Testimony of Richard G. Hill, Chairman National Indian Gaming Association, Intergovernmental Gaming Agreement Act of 1999: Hearing before the Senate Committee on Indian Affairs, 106th Cong., 1st sess., 21 July 1999.

⁶⁷Congress, Senate, Committee on Indian Affairs, Statement of Raymond C. Scheppach on behalf of The National Governors’ Association, Intergovernmental Gaming Agreement Act of 1999: Hearing before the Senate Committee on Indian Affairs, 106th Cong., 1st sess., 21 July 1999.

⁶⁸“Legislative Analysis,” California Voter Information Guide, Primary Election, March 7, 2000.

⁶⁹Gordon, “From Hope to Realization of Dreams,” 9.

borrowed key elements from both Pala and Proposition 5. The governor was adamant on guaranteeing workers the right to unionize. Many tribal leaders viewed this as an infringement upon sovereignty, and a survey of California's tribal casino employees showed that their benefits, hours, and compensation were far superior to comparable jobs in Nevada.⁷⁰ Despite these objections, tribal leaders knew that to gain favorable contracts, they had to be willing to make some concessions. They therefore agreed to Davis' demand for worker's protections and the right to collective bargaining. What they received in exchange was a compact that was far superior to either Pala or Proposition 5.

The court's nullification of Proposition 5 in the *Hotel Employees* decision turned out to be a blessing in disguise for California's gaming tribes. This was due to one key difference between what Davis offered in comparison to the former compacts; the new compacts specifically authorized certain forms of house banked Class III games, including all card games and slot machines.⁷¹ Rather than simply collecting a fee from players for the use of their facilities, Indian casinos could directly wager their money against that of the player. Since all casino games contain a house advantage, this signaled the potential for much larger profits than could be gained under the player's pool prize system. Additionally, the compact defined "gaming device" specifically as a "slot machine."⁷² This definition put an end to the controversy of whether or not a gaming device was a video lottery terminal or a slot machine. Slot machines are the biggest money makers for casinos, taking in more than 80 percent of all gambling losses.

⁷⁰Gordon, "From Hope to Realization of Dreams," 10.

⁷¹Model Tribal-State Gaming Compact at § 4.1.

⁷²Id. at § 2.6.

Casinos might have been marginally profitable under the Pala Compact, and even more so under Proposition 5, but with Davis' compact, Indian tribes truly hit the jackpot.

Tribes were allowed no more than two gaming facilities each and the maximum number of slot machines that a tribe could operate under the compact was set at 2,000.⁷³ This limitation, however, did not guarantee that all tribes would be granted 2,000 machines each. Tribes were initially entitled to operate the same number of terminals that were in use at their casino on September 1, 1999. If a tribe had not previously offered casino gaming, or operated less than 350 machines, then its initial base allocation of games was set at 350.⁷⁴ These terminals were classified as "entitlements." Machines that were already in existence were "grandfathered" games, while "additional entitlements" referred to the number of machines required to bring a tribe's total up to 350. In an interview, Frank Lekner of the California Gambling Control Commission stated that the total number of entitlements was 29,806 machines of which 19,005 were grandfathered, and 10,801 were additional entitlements.⁷⁵ Beyond the original entitlements, tribes could acquire licenses in order to increase the total number of machines that they maintained. The total number of licenses available, however, was fixed at a specific amount based upon a complex mathematical formula.⁷⁶ According to Frank Lekner of the California Gambling Control Commission, this figure was

⁷³Model Tribal-State Gaming Compact at § 4.3.2.2.

⁷⁴Id. at § 4.3.1.

⁷⁵Frank Lekner of the California Gambling Control Commission, interview by author, telephone, Stevens Point, Wi., 19 October 2004.

⁷⁶Model Tribal-State Gaming Compact at § 4.3.2.2. The compact states "The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this section shall be a sum equal to 350 multiplied by the number of non-compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1."

determined to be 32,151.⁷⁷ To ensure fairness and equality among the groups requesting licenses, tribes with the least number of machines received priority in drawing.

According to Frank Lekner, the limited number of available licenses did not cause any immediate problems. Not all tribes were capable of, or even desired, operating 2,000 machines; therefore, every group that requested a specific number of licenses from the first round of draws received that amount.

Like Pala and Proposition 5, the model compacts signed with Governor Davis provided for a method of revenue sharing. This method, although of greater benefit to tribal interests, was more complex and confusing than the formulas espoused in the previous compacts. The Davis Compact consisted of two separate trust funds, “The Revenue Sharing Trust Fund” and “The Special Distribution Fund.”⁷⁸ Tribes that acquired licenses for additional machines beyond their original entitlements were required to pay into the Revenue Sharing Trust Fund. For every licensed machine gained, the tribe was to pay a one-time fee of \$1,250.00. If a tribe received more than 350 licenses, then it was assessed an additional annual fee that was to be paid on a quarterly basis. The payment scale was broken down as follows:

<u>Number of Licensed Devices</u>	<u>Fee Per Device Per Annum</u>
1-350	\$0.00
351-750	\$900.00
751-1250	\$1950.00
1251-2000	\$4350.00 ⁷⁹

⁷⁷Frank Lekner of the California Gambling Control Commission, interview by author, telephone, Stevens Point, Wi., 15 October 2004.

⁷⁸Model Tribal-State Gaming Compact at § 4.3.2.

⁷⁹Id. at § 4.3.2.2.

As an example, if a tribe that operated 500 machines as of September 1, 1999, acquired licenses to obtain 500 additional machines, the following payments would be made to the fund: One-time fee of \$625,000.00 (500 x \$1,250.00), quarterly fee of \$33,750.00 (First 350 licenses x \$0.00 + 150 licenses x \$900.00 annual fee per device / 4 quarterly payments).⁸⁰ The money paid into this fund was designated solely for disbursement to “non-compact” tribes. Non-compact tribes were described as groups without any gaming, or casinos that operated 350 machines or less. Each non-compact tribe was granted an equal share in the funds collected with the maximum payment set at \$1.1 million per tribe.⁸¹ This guaranteed that all California tribes would benefit from Indian gaming regardless of whether or not they directly participated in casino operations.

The second of the two funds, the Special Distribution Fund was established to help alleviate the costs of state regulation while helping the public in general. Monies collected were first given to the state for reimbursement of regulatory costs. The remaining funds were allocated for programs to address gambling addiction, and to support local governments. Frank Lekner of the California Gambling Control Commission indicated that \$3 million is set aside for problem gambling, and all monies left over are used to assist local governments with problems such as road and sewage repair, emergency police and medical services, or any other issues that may arise as a

⁸⁰The determination of this figure was achieved only after intense scrutiny of the compact and the author’s telephone interview with Mr. Lekner of the California Gambling Control Commission. An initial reading of the compact would appear to indicate that the annual fees would be charged based on the total number of machines in operation. It is necessary, however, to deduct machines classified as “entitlements” in order to find the true amount of strictly “licensed” terminals, as those are the ones used in determining how much a tribe is required to pay to the fund.

⁸¹Model Tribal-State Gaming Compact at § 4.3.2.1.

result of casino gambling within a local community.⁸² A provision was included which allowed the state to backfill any shortfalls in the Revenue Sharing Trust Fund with money from the Special Distribution Fund. This created the potential of lowering the availability of Special Distribution funds.

Contributions to the Special Distribution Fund were determined by §5.0 of the compact which provided a payment schedule that calculated specific percentages of the average net win of any tribe based upon the number of terminals that were in operation on September 1, 1999:

<u># of Terminals in Quarterly Base</u>	<u>Percentage of Average Net Win</u>
0-200	0%
201-500	7%
501-1000	7% on machines #201-500, plus 10% on #501-1000.
1000+	7% on machines #201-500, plus 10% on #501-1000, plus 13% on any number more than 1000. ⁸³

It is important to understand that the fund applied only to the number of machines in operation on September 1, 1999. Tribes that operated less than 200 machines, including those that did not have any type of gaming did not have to pay into the fund.

Additionally, the percentage of the average net win that tribes owed to the Distribution Fund did not change if they added additional machines. The only obligation that tribes

⁸²Frank Lekner of the California Gambling Control Commission, interview by author, telephone, Stevens Point, Wi., 19 October 2004.

⁸³Model Tribal-State Gaming Compact at § 5.1.

shouldered for adding machines were the licensing fees owed to the Revenue Sharing Trust Fund.

A hypothetical example illustrates exactly what amounts a tribe paid under this formula. On September 1, 1999, Tribe A has exactly 1000 machines. Through the licensing process, they acquire additional machines until they reach their current level of 1500 machines total. Their total net win for all 1500 machines for the quarter is \$1.5 million; therefore the average net win per machine is \$1,000.00. The total amount of money paid to both the Revenue Sharing Trust Fund and the Special Distribution Fund would be calculated as follows:

Revenue Sharing Fund

$(500 \text{ licenses} \times \text{one-time fee of } \$1,250.00) = \$625,000.00.$
 $(350 \text{ licenses} \times \$0.00) + (150 \text{ licenses} \times \$900 \text{ annual fee}) / 4 \text{ quarters} = \$33,750.00.$

Special Distribution Fund

$(200 \times \$0.00) + (300 \times 7\% \text{ of } \$1,000.00) + (500 \times 10\% \text{ of } \$1,000.00) =$
 $(200 \times \$0.00) + (300 \times \$70.00) + (500 \times \$100.00) = \$71,000.00.$

It is important to note that the last 500 machines were not included in the calculation of the Special Distribution Fund, but were instead part of the Revenue Sharing Fund. They are, however, included in determining the quarterly average net win for purposes of the Special Distribution Fund. The key aspect of all of the calculations is that, under the Davis Compact, tribes were obligated to pay portions of their profits gained from slot machines to separate funds for the benefit of other Indian tribes and the general public while relieving the burden placed upon state and local governments.⁸⁴

⁸⁴Table games were not included in either of the funds. In our interview, Frank Lekner indicated that there are no limits on the number of table games that a tribe may operate, and that all profits gained from table games go directly to the tribe without any type of revenue sharing.

The procedural provisions of Davis' compact varied little from those of Proposition 5. Tribal and state gaming agencies shared in the procedures of licensing gaming employees. Tribal gaming agencies were responsible for background investigations and the initial licensing of employees. Candidates for employment were to be free from "criminal and dishonest elements," and were to exhibit, "good character, honesty, and integrity."⁸⁵ The state gaming agency maintained the right to review and possibly revoke gaming licenses. The state's power, however, was limited. Tribal gaming agencies could decline to revoke the license of any gaming employee who was also a tribal member. Additionally, during the original licensing process, tribes could retain certain non-tribal employees the state had refused to license. If a tribal casino already employed an individual for at least three years prior to the new compact, and the state's denial of a license was based on activities that occurred before the new application, the tribal gaming agency could keep that employee.⁸⁶ In this manner, tribal gaming agencies maintained a level of sovereignty.

In addition to licensing procedures, Davis' compact contained other provisions similar to those found in Proposition 5. State gaming agencies could investigate tribal operations with respect to Class III gaming only. Agents could inspect public areas of any facility at any time during normal business hours without prior notice. Inspection of private areas of the facility, including the copying of any papers, books, or records for auditing purposes, could be conducted immediately after an agent identified him or

⁸⁵Model Tribal-State Gaming Compact at § 6.4.2.

⁸⁶Id. at § 6.4.3.

herself to the tribal gaming agency.⁸⁷ To ensure honest operation and prevent illegal activity, no specific amount of time was required as prior notification. An agent could appear at any time and request access to casino information. Like Proposition 5, building and safety codes were to be equivalent to those of the county that a property was located in or the Uniform Building Codes.⁸⁸ Tribes were required to carry \$5 million in liability insurance, in which claims were to be settled in a prompt and just manner. Again, tribes were not required to pay punitive damages or attorney's fees.⁸⁹ The compact further dictated that, in the event of a disagreement between a patron and casino over the outcome of any game, "the matter shall be handled in accordance with, industry practice and principles of fairness..."⁹⁰ Every assurance was made between the state and respective tribal gaming agencies that all operations would be maintained in a safe, healthy, and honest manner. To ensure a good public image, it was in the best interest of tribal gaming agencies that the conditions of the compact be followed as precisely as possible. If a casino was viewed as violating the compact, it could create a poor public image which could result in less patronage and therefore less profit.

Section ten of the model compact exhibits Gray Davis' insistence on expanded worker's protections and rights. Tribal gaming agencies were required to provide a work environment that met or exceeded federal standards regarding occupational health and safety.⁹¹ Although tribal members could be granted preferential hiring for key positions,

⁸⁷Model Tribal-State Gaming Compact at §§ 7.4.1-7.4.3.

⁸⁸Id. at § 6.4.2.

⁸⁹Id. at § 10.2.

⁹⁰Id. at § 8.1.10.

⁹¹Id. at § 10.2 (e).

tribal gaming agencies could not discriminate against any current or potential employee on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.⁹² Davis gave tribes the choice of participating in the state's workers' compensation system or providing a similar system for guaranteeing that work-related claims or grievances be resolved through insurance offered by the tribes.⁹³ The state did not offer a choice in regards to unemployment insurance. All tribes signing the model compact were obligated to withhold state taxes from the paychecks of all non-tribal employees for the purpose of unemployment insurance.⁹⁴ Davis demanded employees have the right to organize. If by October 13, 1999, tribal leaders did not provide the state with an acceptable procedure for allowing workers to seek organized representation, then the compact would be voided.⁹⁵ Tribal leaders, therefore, exchanged a portion of their sovereignty for a workable and acceptable compact. One important benefit of taking such action was that unions such as the Hotel Employees and Restaurant Employees International Union no longer opposed Indian gaming.

On September 10, 1999, Gray Davis signed tribal-state compacts with fifty-eight California tribes. Once ratified, the compacts were effective for twenty years, until December 31, 2020.⁹⁶ Ratification, however, was entirely dependent upon the outcome of the March 7, 2000, primary election. Proposition 5 was deemed void because it

⁹²Model Tribal-State Gaming Compact at § 10.2 (g).

⁹³Id. at § 10.3.

⁹⁴Id. at § 10.3 (b), (c).

⁹⁵Id. at § 10.7.

⁹⁶Id. at § 11.2.1.

violated section 19(e) of the California Constitution. The new compacts would face the same fate if the California Constitution was not amended. As a result of the *Hotel Employees* decision, and the desire of the governor to negotiate legitimate compacts, the Legislature proposed State Constitutional Amendment 11. Amendments to the California Constitution require a two-thirds majority vote in both the Assembly and the Senate, and approval from the state's voters.⁹⁷ State Constitutional Amendment 11 clearly passed, 75-4 in the Assembly and 35-0 in the Senate.⁹⁸ Following approval, the Legislature presented State Constitutional Amendment 11 to the voters as Proposition 1A. Unlike Proposition 5, Proposition 1A proposed a direct constitutional amendment rather than a simple statutory change. The text of the amendment specifically permitted "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."⁹⁹ Passage of Proposition 1A would exempt Indian gaming from the restrictions of section 19 (e). The fate of California's Indian people once again was in the voters' hands.

Proposition 1A faced opposition from the usual anti-gambling factions that predicted California would become a "Las Vegas-by-the-Sea."¹⁰⁰ They proposed the passage of Proposition 29 as an alternative to Proposition 1A. Proposition 29 advocated

⁹⁷Andrew Rolle and John S. Gaines, The Golden State: California History and Government (Wheeling, Illinois: Harlan Davidson, Inc., 1990), 232.

⁹⁸"Analysis by the Legislative Analyst, Proposition 1A," California Voter Information Guide, Primary Election, March 7, 2000.

⁹⁹Proposition 1A.

¹⁰⁰"Argument for Proposition 29," California Voter Information Guide, Primary Election, March 7, 2000.

the ratification of the Pala Compacts that had not yet become law. Although the Legislature had ratified former Governor Wilson's compacts in August of 1999, many individuals in California opposed any form of Indian gaming. Besides the initiative, the California Constitution allows for an additional method of direct democracy: the referendum.¹⁰¹ If the people oppose the actions of the Legislature, they may circulate a petition in order to force the issue to a state-wide vote. The opponents of Indian gaming collected enough signatures to place Proposition 29 on the March 2000 ballot. Although not entirely opposed to any forms of gaming, proponents of Proposition 29 believed that its passage would give California's tribes the ability to operate gaming enterprises without rampant and unregulated casino expansion. The voters were therefore, given a choice between Proposition 1A and Proposition 29.

On March 7, 2000, the voters of California approved Proposition 29 by a 53.1 percent to 46.9 percent margin; however, they also overwhelmingly supported Proposition 1A with a 64.5 percent to 35.5 percent margin and a difference of more than two million votes.¹⁰² With both propositions passing, Proposition 29 became obsolete. Proposition 1A offered a superior compact that fifty-eight tribes, including those who signed the Pala Compact, accepted and therefore was deemed the legally binding contract between California and the tribes. Thirty years after the Rincon tribe of San Diego County first attempted to open a tribal casino, thirteen years after the Cabazon tribe gained victory in the Supreme Court for tribes across the nation, twelve years after Congress provided the groundwork for legalized Indian gaming, following years of

¹⁰¹California Constitution (1849), art. 2, § 9.

¹⁰²California Secretary of State, "Statement of Vote 2000 Primary Election March 7, 2000," http://www.ss.ca.gov/elections/sov/2000_primary/contents.htm (accessed October 11, 2004).

setbacks from the Ninth Circuit in *Rumsey*, the U.S. Supreme Court in *Seminole*, and the California Supreme Court in *Hotel Employees*, surviving years of Pete Wilson and an unacceptable compact, and twice taking their cause to the voters of California, California's Indian tribes finally had legalized Class III casino gaming.

CHAPTER 6

SCHWARZENEGGER AND THE FUTURE

From the beginning, relations between federal, state, and local governments and sovereign Indian nations have been complex and evolving. The executive and legislative branches have, through the years, promoted various Indian policies varying from co-existence to removal, from guardianship to assimilation, and from termination to self-determination. Through each stage, the judiciary has dominated in defining each sovereign power's rights and responsibilities in relation to one another. Court opinions throughout the nineteenth and twentieth centuries, particularly the Marshall trilogy, laid the foundation for later decisions on Indian nations and casino gaming. From the first known attempt to open a casino on the Rincon reservation in San Diego County, to the Cabazon and Morongo bands' victory in the Supreme Court, California tribes led the effort to legalize Indian gaming. Whether through court action, or direct democracy, California's tribes persevered through setbacks and obstacles and became the example of success through unwavering determination.

Their strength and resolve produced Proposition 1A and legalized Indian gaming in California today; the struggle, however, has not yet ended. California's Indian gaming remains in flux and still faces various obstacles. One challenge came from California's horse tracks and card clubs. These groups, that legally operate limited forms of gambling, including Class II card games such as poker, argued the state unfairly granted Indian tribes a monopoly on Class III gambling. Two separate court cases addressed similar complaints that Proposition 1A violated both the Indian Gaming Regulatory Act

and equal protection guarantees of the U.S. Constitution. Larry Flynt, owner of *Hustler Magazine* and the Hustler Casino in Gardena, filed suit that led to the California Court of Appeals case of *Flynt v. California Gambling Control Commission*.¹ In Northern California, the owners of a card club filed a similar suit that the Ninth Circuit Court of Appeals heard as *Artichoke Joe's California Grand Casino v. Norton*.² Plaintiffs argued that section 2710 of IGRA “intended that such gaming would only take place in states that permitted non-Indians to conduct similar gaming activities.”³ In their opinion, since California had not previously granted other groups the right to conduct “such gaming,” Proposition 1A went against Congress’ intent in IGRA. Further, Plaintiffs contended that Proposition 1A’s guarantee of a “tribal monopoly on Class III gaming amounts to a racial preference for Native Americans...” which infringed upon their rights to equal protection under the Constitution.⁴

The two courts reached identical conclusions in ruling that Proposition 1A neither contradicted congressional intent in IGRA nor violated the equal protection laws of the Constitution. In reviewing its legislative history, the courts found that Congress did not intend IGRA to “serve as a means of policing equality between Indian and non-Indian gaming operations in the context of Class III gaming.”⁵ Rather, the purpose of the compacting process was to balance tribal and state interests. Even if the “such gaming” terminology used in section 2710 of IGRA was ambiguous, the courts were obliged to

¹Flynt v. California Gambling Control Comm., A098186 (Cal. App. 4th 2002).

²Artichoke Joe's Ca Grand Casino v. Norton, 353 F. 3d 712 (9th Cir. 2003).

³Flynt, A098186 at § III (c).

⁴Artichoke Joe's, 353 F. 3d at 731.

⁵Id. at 728.

follow the “trust doctrine” that ambiguous statutes involving Indian law were to be construed in a manner that favors Indian tribes.⁶ As the *Flynt* court stated, “Quite simply, Congress exhibited no desire to command states to enact gaming laws so that private, non-Indian enterprises would enjoy the same rights as Indian tribes.”⁷ Having found that Proposition 1A was consistent with the purposes of IGRA, the courts consequently rejected the claims that it violated equal protection laws. In the opinion of both courts, the preferential treatment exhibited towards Indian tribes was not racial in nature, but political. Precedent established that states could make distinctions between various political locales when deciding whether to impose stricter regulations or exempt certain areas from state-wide bans on certain “vice activities” such as drinking, smoking, prostitution, or gambling.⁸ Therefore, individual counties or cities within a state could impose prohibitions against activities such as alcohol consumption and be labeled “dry” without violating the constitution. Similarly, states, such as California, could permit a particular political entity or locale, in this case Indian Nations, to permit an activity such as gambling at the exclusion of other groups without compromising their constitutional rights to equal protection. In both cases, the courts upheld the legality of Proposition 1A and the right of California’s tribes to operate casinos.

Even with judicial confirmation of Proposition 1A’s legality, Indian gaming in California continues to evolve. The most significant change has been from a uniform compact for all of California’s gaming tribes to a multitude of compacts. As of August

⁶*Artichoke Joe’s*, 353 F. 3d at 729.

⁷*Flynt*, A098186 at § III (c).

⁸*Artichoke Joe’s*, 353 F. 3d at 738.

2009, six new compacts and twelve amended compacts which differ from the original model compact signed in 1999 have become effective. These compacts share many common points including mandatory requirements of filing environmental impact reports on any proposed projects, entering into memorandums of understanding with local communities regarding impacts to environment and public safety including traffic, and expanded roles for organized labor including the right to organize.⁹ It is the economic differences in these compacts however, that have been the greatest diversion from the 1999 compacts. In 2003, Governor Davis signed three new compacts with the La Posta Band of Diegueno Mission Indians, Santa Ysabel Band of Diegueno Mission Indians, and the Torres-Martinez Band of Cahuilla Mission Indians. Each of these compacts contained provisions that greatly changed the basis for revenue sharing. Rather than paying into the Revenue Sharing Trust fund or Special Distribution Fund, the three tribes agreed to pay 5 percent of their net win directly to the State General Fund.¹⁰ These compacts started a trend in which the state looked for ways to gain greater payments from tribes in exchange for the right to operate new casinos or to expand on existing ones.

In June of 2004, Governor Arnold Schwarzenegger renegotiated compacts with five tribes. These new compacts granted the Pala Band of Mission Indians, the Pauma Band of Luiseno Indians, the Rumsey Band of Wintun Indians, the Viejas Band of Kumeyaay Indians, and the United Auburn Indian Community the right to operate an unlimited number of slot machines and a ten year extension on their original compacts.

⁹Charlene Wear Simmons, Gambling in the Golden State 1998 Forward (Sacramento: California Research Bureau, 2006), 23.

¹⁰La Posta and Torres-Martinez compacts at § 4.3.1. Note: the Torrez-Martinez compact allowed for a gradual increase starting from 3 percent up to 5 percent after three years, whereas, the La Posta and Santa Ysabel compacts required an immediate 5 percent payment.

In exchange for this exclusive right, the tribes promised a one-time payment of \$1 billion to pay for state transportation projects. To pay this money, the tribes pledged to sell public bonds. They further agreed to pay additional fees for every slot machine over the original base of 2000 machines. These fees were much higher than those under the Davis compacts, ranging from \$12,000.00 for the additional machines up to 2500, and \$25,000.00 for every machine over 4500. The tribes also agreed to submit to binding arbitration relating to union issues, patron disputes, and off-reservation issues with local governments.¹¹

While the new compacts appeared as quick fixes to California's budget woes, and it is true that tribes had the sovereign right to negotiate individual compacts, the new compacts portend serious long-term problems. The greatest threat is potential factionalism and fighting between tribes. Many tribes immediately opposed the new compacts believing Schwarzenegger had negotiated similar to Pete Wilson, ignoring the majority of tribes to deal with a select few. Three tribes that signed with Schwarzenegger, the Pala, Rumsey, and Viejas, were original signers of the Pala Compact. Deron Marquez, chairman of the San Manuel Band of Mission Indians in San Bernardino County called the deal a "slap in the face."¹² Pechanga Tribal Chairman Mark Macarro, influential in passing Proposition 5 and Proposition 1A, viewed the compact's provision requiring binding arbitration as "an abrogation of our tribal

¹¹Hanh Kim Quach and John Gittelsohn, "Tribes Sign Compacts," The Orange County Register, 22 June 2004.

¹²James P Sweeney, "Governor, Five Tribes Sign Gambling Agreement With Wide Implications," Copley News Service, 21 June 2004.

sovereignty.”¹³ Rincon Tribal Chairman John Currier feared the real possibility that, “These new gaming compacts will create a number of mega-casinos that could put smaller tribes like Rincon out of business and force many of our tribal members back on public assistance.”¹⁴

The purpose of Indian gaming is to foster economic development and security for all of California’s tribes. It is true that we live in a free market society, and it is equally true that tribal governments have the sovereign right to determine their own future; however, tribal leaders must realize that Indian gaming can only succeed through a cooperative effort. If Indian tribes become too factionalized and competitive with each other, they will become counter-productive and could consequently cause their own demise.

In September of 2004, the Schwarzenegger compacts took effect, but were dependent upon the outcome of the November 2, 2004 election. Two initiatives, Proposition 68 and Proposition 70 had the potential of once again transforming California Indian gaming. If either proposition was approved, the Schwarzenegger compacts would have become null and void. Card room and horse track owners, including Larry Flynt, put Proposition 68 on the ballot. The proposed constitutional amendment would have forced tribal casinos to pay “their fair share” of revenue to the state. This fair share equaled 25 percent of the net win. Purporting to be concerned citizens that wanted to help the state’s budget problem, the true motive behind this measure was the fact that if

¹³Pechanga Band of Luiseno Indians, “Statement of the Honorable Mark Macarro Tribal Chairman Pechanga Band of Luiseno Indians,” <http://www.pechanga.net> (accessed October 12, 2004).

¹⁴Jake Henshaw, “Governor’s Plan Will Spawn ‘Megacasinos,’ Tribe Official Says,” Desert Sun, 29 June 2004.

tribes did not agree to pay the 25 percent, tracks and card rooms could have operated 30,000 slot machines.¹⁵ Proponents continued to portray their image as concerned citizens by promising to give 33 percent of their profits to state and local governments in order to assist educators, police officers, and firefighters. The terms of the proposition also demanded changes to tribal compacts that would have submitted tribes to the jurisdiction of state courts. The terms of the proposition were non-negotiable and were set to go into effect unless every single tribe voluntarily agreed to them.¹⁶

Proposition 68 can be labeled as nothing other than a total and complete scam. The backers of the initiative did not care about the contributions that Indian tribes made to the state; they knew that California's tribes would never agree to be forced into giving 25 percent of their net win, nor would they submit to blatant violations of tribal sovereignty. These owners simply wanted to operate their own slot machines. Section 2(n) of Proposition 68 claimed that Indian tribes have attempted to purchase non-reservation lands in urban areas for the purpose of opening casinos. The text then stated, "Gaming on these newly acquired lands would be detrimental to the surrounding communities."¹⁷ Yet the properties that would gain slot machines under Proposition 68 were almost entirely located within residential urban areas. These include Hawaiian Gardens Casino, Hustler Casino, Commerce Casino, Los Alamitos Race Track and many others which are located in metropolitan Los Angeles. It is hard to imagine any other area of business or politics where an outside entity can attempt to force changes into a

¹⁵"Text of Proposed Laws," California Voter Information Guide, General Election, November 2, 2004, Proposition 68 at §§ 2(c), (d), 19(i).

¹⁶Id. at § 2(d).

¹⁷Id. at § 2(n).

legal contract in which they are not included. Proposition 68 clearly violated IGRA's intent, and its backers knew this. Section 2 (s) stated that the provisions of Proposition 68 would go into effect, "regardless of court decisions regarding Indian gaming, regardless of changes in federal law, or regardless of any challenges or efforts by the Indian tribes or others to delay or circumvent this act."¹⁸ It appears that the authors of this initiative believed that they were omnipotent and could ignore federal law or court orders.

The second proposed initiative, Proposition 70, provided a more realistic option to appease those calling for a greater contribution from Indian tribes. In exchange for the exclusive right to operate unlimited Class III gaming including craps and roulette, those tribes that amended their compacts would pay a portion of their net win that is equivalent to the corporate tax rate under the state's Revenue and Taxation Code, equaling 8.84 percent.¹⁹ This amount would be in addition to the monies that tribes already paid under Proposition 1A. Contrary to opponents' claims that tribes would not be subject to audits, that they would place casinos in urban environments, and that tribal governments would not be subject to conducting environmental impact reports, Proposition 70 would have ensured that each of these issues were adequately addressed.²⁰ Proposition 70 would not have changed the portions of Proposition 1A that provide the state access to financial records or the requirement that casinos only be located on tribal lands. Additionally, section 19.2 of Proposition 70 clearly stated that tribes must prepare environmental

¹⁸"Text of Proposed Laws," Proposition 68 at § 2(s).

¹⁹"Text of Proposed Laws," California Voter Information Guide, General Election, November 2, 2004, Proposition 70 at § 19.1.

²⁰"Argument Against Proposition 70," California Voter Information Guide, General Election, November 2, 2004.

impact reports that “meet the objectives of the National Environmental Policy Act and the California Environmental Quality Act...”²¹

Opponents also feared that Proposition 70’s addition of new games and unlimited slot machines would spawn “mega-casinos.” First, adding craps or roulette would have been no more than an aesthetic change to California’s casinos. Many tribes already offered those games in modified forms. Because Proposition 1A only approved slot machines and house banked card games, casinos have ingeniously found ways to play craps and roulette with cards. The games are essentially the same; changing the Constitution to permit these games would have only allowed casinos to offer the traditional form of the game rather than the modified one. Second, Governor Schwarzenegger’s previously signed compacts granted unlimited slot machines to five tribes, so mega-casinos were already a possibility. The difference in Proposition 70 is that it would have granted every tribe the chance to have a uniform compact. Proposition 70 was a fair alternative to Proposition 68 and the governor’s compacts. Its only downside was that the amended compacts would be extended for ninety-nine years. The uncertainty that, if any unforeseen problems arose from the compacts, there may be no way to abrogate them, led to great opposition.

Both Proposition 68 and 70 were crushed at the polls. Over 76 percent of voters were against Proposition 70 and over 83 percent voted no on Proposition 68.²² The defeat of Proposition 68 solidified the Pala, Pauma, Rumsey, Viejas, and United Auburn

²¹“Text of Proposed Laws,” Proposition 70 at § 19.1.

²² California Secretary of State, “November 2004 General Election Results,” http://www.sos.ca.gov/elections/sov/2004_general/formatted_ballot_measures_detail.pdf (accessed March 14, 2009).

compacts; however, as Governor Schwarzenegger continued to negotiate new and amended compacts, outside influences would begin to affect both the implementation of negotiated contracts and the rate at which tribes desired to enter into these compacts.

In August of 2006, Governor Schwarzenegger negotiated amended compacts with four of Southern California's largest gaming tribes: Pechanga, Morongo, Sycuan, and Agua Caliente. The amended compacts allowed for 3,000 additional slot machines over the 1999 limit of 2,000 for the Sycuan and Agua Caliente tribes and 5,500 additional machines for the Pechanga and Morongo tribes. The compact lasted through December 31, 2030, and increased each tribe's payment to the Revenue Sharing Trust Fund to \$2 million dollars per year for Pechanga, Morongo and Agua Caliente, and \$3 million per year for Sycuan payable in quarterly installments. Each tribe also agreed to pay annual payments to the state general fund ranging from \$23 million to \$45 million per year for the first 2,000 machines. Further, an escalator clause was included requiring additional payments to the state general fund of 15 to 25 percent of net win for all machines in excess of the first 2,000.²³

In June 2007, the California State Legislature passed Senate Bills 903 (Pechanga), 174 (Morongo), 175 (Sycuan), and 957 (Agua Caliente) which approved the compacts with the tribes. The compacts were set to go into effect on January 1, 2008, however, Jack Gribbon of Unite-Here, the same labor group that sued and overturned Proposition 5, desired stronger organizing rights than what was outlined in the compact. Gribbon hoped to have the compacts rejected; he therefore filed a referendum and collected

²³ California Secretary of State, "2008 Official Voter Information Guide," http://www.primary2008.sos.ca.gov/voterguide/analysis/prop_94_analysis.html (accessed March 14, 2009).

enough signatures to put approval of the compacts to a public vote.²⁴ Propositions 94 (Pechanga), 95 (Morongo), 96 (Sycuan), and 97 (Agua Caliente) were placed on the California Presidential Primary Election ballot held on February 5, 2008. Each proposition passed with 55.5 percent of voters approving.²⁵ This event however, set another potential hurdle for future tribes seeking new or amended compacts. Not only do tribes have to negotiate with the state, if they sign a compact, it has to be approved by the legislature and potentially could be forced to a public vote. This puts tribes at a greater disadvantage and clearly has evolved beyond IGRA's intent.

Another impediment to tribal self sufficiency and sovereignty came from the Department of the Interior's (DOI) denial of land trust applications to the Los Coyotes Band of Cahuilla and Cupeño Indians and the Big Lagoon Rancheria of Chemeheuvi Indians. Both groups were located on very remote lands. The Los Coyotes reservation is located in mountainous terrain surrounded by national forests, and only received electricity in 1998. Under the Bush administration, DOI had approved taking land up to 300 miles from a tribe's reservation into trust for gaming purposes. The City of Barstow initially approached the Los Coyotes band and Governor Schwarzenegger asked the band to include the Big Lagoon Rancheria in their plans for opening gaming facilities in Barstow. In 2005, both groups signed compacts with the governor and began working with DOI on taking land in Barstow into trust. The initial application was filed in March

²⁴James P Sweeney, "Indian casino union formed in Conn. not a sure bet in Calif." Copley News Service, 24 December 2007.

²⁵ California Secretary of State, "February 2008 Primary Election Results," http://www.sos.ca.gov/elections/sov/2008_primary/contents.html (accessed June 1, 2009).

of 2006, a public hearing was held in May of 2006, and environmental impact reports were completed in 2007 and submitted to DOI for final review.²⁶

On January 3, 2008, in a controversial move, Secretary of the Interior Dirk Kempthorne sent letters denying requests to take land into trust to several tribes throughout the nation including the Los Coyotes and Big Lagoon tribes. The letters exemplified the Secretary of Interior's complete lack of comprehension of IGRA's intent. The opening paragraph of the letters showed that the department's concern was not with the well-being of Indian peoples, but was in addressing their own administrative problems: "Processing these applications is time-consuming and resource-intensive in an area that is constrained by a large backlog and limited human resources." Kempthorne declared that the 1934 Indian Reorganization Act regulated the acquisition of trust lands and that it "has nothing directly to do with Indian gaming." While there may not be a direct connection, especially given the fact that IRA was written in 1934 prior to Indian gaming, the Secretary completely missed the issue that IGRA was designed to promote tribal self-sufficiency and therefore makes acquisition of trust lands an integral part of achieving this goal. Kempthorne further stated that a major benefit of off-reservation gaming facilities is the opportunity for tribal employment. He reasoned that if a casino was too far from a tribe's reservation it would prevent the opportunity for tribal members to seek employment and would require residents to leave the reservation for extended period of time resulting in "serious and far-reaching implications for the remaining tribal

²⁶Tom Shields, "Tribe Blasts Secretary of Interior for Illegal Denial of Land into Trust Application," Los Coyotes Band Press Release, 6 January 2008.

community.”²⁷ Secretary Kempthorne’s complete lack of understanding that revenue from these off-reservation casinos would have brought individuals and their families out of poverty is dumbfounding. As of August 2009, several groups are considering initiating legal action.

Currently the biggest obstacle to expansion of Indian gaming in California is the recession which began in 2007. Governor Schwarzenegger last signed an amended compact on June 30, 2008, with the Shingle Springs Band of Miwok Indians. Since that time, the economic meltdown on a world-wide basis has directly affected Indian gaming in California. Unlike past years in which either the state or tribes attempted to alleviate state budgetary issues by amending or creating new compacts, the expansion of Indian gaming has been minimal. Two explanations can be given for this fact. First, the state has come to the realization that Indian Gaming may not be the savior to state budgetary problems. In Fiscal Year 2004-2005, the state expected new and amended compacts to generate \$300 million dollars for the General Fund. The actual amount received was only \$35 million dollars an over estimate of \$265 million dollars nearly 90 percent less than expected. The state had made their estimate based on an assumption that each tribe would immediately operate the maximum allotment of machines; however, many tribes did not increase their slots as rapidly as expected.²⁸ Second, the economy has hit tribes hard. Despite the common belief that so called “vice activities” increase during hard

²⁷Dirk Kempthorne, Secretary of the Interior, Letter to Regional Directors, Bureau of Indian Affairs, 3 January 2008.

²⁸Simmons, Gambling in the Golden State, 52.

times, revenues in Indian casinos have fallen.²⁹ The Sycuan, who spent several years and over \$6 million to amend their compact and expand operations, withheld final approval of the amended compact and walked away. Rather than implementing employee layoffs due to the recession, Sycuan leaders decided that the additional mandatory payments were simply too much to bear.³⁰ The decision cost the state millions and potentially could cost Sycuan multi-millions of dollars in unrealized profits. With double digit loses, Indian tribes have taken their foot off of the gas, but when the economy recovers, it is expected that tribes will continue the effort to expand Indian gaming in California.³¹

Indian gaming in California will continue to evolve. The most important issue for California's tribes to guarantee a successful and prosperous future is maintaining a good public image. Regardless of tribal sovereignty, Indian casinos are reliant upon the people of California who, as a voting populace, are very unpredictable. Although recent trends have been to vote for Democratic presidents, voters overwhelmingly recalled a Democratic governor and replaced him with a Republican celebrity. Public image was a major factor in this action. If Indian casinos have a poor public image, voters may favor

²⁹It is interesting to note that California Lottery sales have declined at the same time as casino revenues have. Opponents to Indian gaming, such as Justice Stevens in the *Cabazon* decision, have often claimed that Indian casinos take away revenue that would have otherwise gone to the state lottery. Statistics from the California Lottery prove this assertion to be false. In 1999/2000, the year California legalized Indian Gaming, California Lottery revenues were around \$2.6 billion. From 2003 to 2006, the lottery set records with revenues topping out at over \$3.5 billion. During the recession those numbers have come down to just over \$3 billion in 2008. While the increase and decrease in revenue may not be as high as that of Indian gaming the overall trend is comparable. Gambling goes up and down with the economy and Indian casinos have not negatively impacted the California Lottery. See appendices D & E.

³⁰James P Sweeney, "Sycuan walks away from gambling compact," San Diego Union Tribune, 4 December 2008.

³¹Mary Lynne Vellinga, "California's Indian casinos see gamblers spend less," Sacramento Bee, 18 January 2009.

adverse initiatives or they could simply withhold their patronage. Unlike other states, Californians have easy access to Class III casinos in Nevada.

To maintain a good public image, tribal casinos must address a few important issues. First, tribal factionalism and fighting amongst tribes must cease. California's tribes must be united in public regardless of sovereignty. Groups cannot continue to negotiate contracts at the expense of others, something often reported negatively by the media. Public images of greed negates the idea that casino gaming is intended to relieve poverty among all California Indians. Second, another negative blot on gaming derives from publicized stories of tribal members being banished.³² In October of 2005, 31,623 members of California gaming tribes shared in a net win of over \$5.7 billion. This equates to a net annual share of \$188,000 per member.³³ Tribes have the sovereign right to settle internal matters, but if these matters are publicized, one conclusion triumphs above all others in the general public's mind: the member was banished to circumvent the sharing of casino profits.³⁴ Regardless of the truth, the public's perception is what's important.

The California Gambling Control Commission reports some tribes fail to pay their required share of net winnings to the Revenue Sharing Trust Fund (RSTF) on a timely basis. Before the passage of Assembly Bill No. 673 in 2003, fund shortfalls resulted in payments to non-compact tribes being lower than their entitlement. After passage of 673, shortcomings are covered by monies from the Special Distribution Fund (SDF), which

³²Juliana Barbassa, "Court To Hear Tribal Exile Case," The Orange County Register, 8 August 2004.

³³Simmons, Gambling in the Golden State, 56.

³⁴Jim Marino, "Who is a Native American Indian," The Santa Ynez Valley Journal, 25 June 2009.

then results in less money for local governments.³⁵ Either way, Indian tribes are viewed as not fulfilling their obligations. Payments to the fund must be made on time; the public accepts no excuses. Additionally, since 2004 no new or amended compacts have provided for payments to the SDF. Under current law, the state is under no obligation to fund the RSTF from General Fund monies. If this trend continues in the future, Schwarzenegger's compacts will have created the potential to completely exhaust all resources in the SDF. Since this is now the primary funding source for shortfalls in the RSTF, there is a great danger that those non-compact tribes that are in the most need of assistance will not receive the \$1.1 million annual payments promised to them under the 1999 compacts. All parties must address this issue.

Finally, Indian casinos must continue to address problem gambling, which is a disease that afflicts up to one million Californians. To their credit California's tribes have contributed over \$3 million to the state's Office of Problem Gambling. This far outpaces California State Lottery contributions; totaling only \$65,000.00 per year during the office's six year span from 1999 to 2004 despite \$40 billion in ticket sales since the lottery's creation in 1984 to 2004.³⁶ Prevention programs, literature, limits on the availability of finances through credit or automatic teller machines, and even granting casino employees power to stop further gambling have been included in the most recent compacts with the Yurok Tribe in 2007 and the Shingle Springs Band of Miwok Indians

³⁵California Gambling Control Commission, "Indian Gaming Special Distribution Fund and Indian Gaming Revenue Sharing Trust Fund Supplemental Report to Legislature per Assembly Bill 673, Chapter 210, Statutes of 2003 (Government Code section 12012.90)," http://www.cgcc.ca.gov/rstfi/Indian%20Gaming%20Special%20Distribution%20Fund_042804.pdf. (accessed October 23, 2004).

³⁶Robert Salladay, "Scant Attention For a Gambling Byproduct," Los Angeles Times, 3 August 2004.

in 2008.³⁷ Even if the problem gambler gets more money, or moves to another casino to continue gambling, it is the image of the Indian casino trying to help that matters most. If the public believes rates of problem gambling and subsequent consequences, such as higher rates of crime and suicide, are increasing due to tribal casinos, their opposition to Indian gaming will increase.

The legal history of Indian gaming nationwide and particularly in California has been one of complexity and continued change. Indian gaming in California will continue to evolve throughout the lifetime of the current tribal-state compacts and will adjust to shifts in the political, legislative, or judicial realms. Its survival is important as Indian gaming continues to bring California's native population out of the depths of poverty and into the reach of prosperity. Funds from Indian gaming have provided basic needs such as water, electricity, and sewage. They have also created health care, educational, and vocational programs that were previously unaffordable. Indian gaming has provided valuable assistance to governments on the state and local level. As of September 2005, over \$543 million in combined payments has been paid to the RSTF, SDF, and General Funds.³⁸ Despite many setbacks and tremendous obstacles, California's Indian tribes have succeeded in their quest for legalized Indian gaming. By maintaining open and amicable relationships with state and local officials on a sovereign-to-sovereign basis and by cultivating a positive public image, Indian gaming should continue to thrive and further the goals of self-sufficiency and self-determination for California's Indian tribes for generations to come

³⁷Shingle Springs compact at § 8.5 and Yurok compact at § 9.1(p).

³⁸Simmons, Gambling in the Golden State, 56.

APPENDIX A

CALIFORNIA'S GAMING TRIBES¹

Agua Caliente Band of Cahuilla Indians
Alturas Indian Rancheria
Augustine Band of Cahuilla Mission Indians
Barona Group of Capitan Grande Band of Mission Indians
Bear River Band of the Rohnerville Rancheria
Berry Creek Rancheria of Maidu Indians
Big Sandy Band of Western Mono Indians
Big Valley Band of Pomo Indians
Bishop Paiute Tribe
Blue Lake Rancheria
Cabazon Band of Mission Indians
Cachil Dehe Band of Wintun Indians of the Colusa Indian Community
Cahto Tribe of the Laytonville Rancheria
Cahuilla Band of Mission Indians of the Cahuilla Reservation
Campo Band of Diegueno Mission Indians of the Campo Indian Reservation
Chemehuevi Indian Tribe of the Chemehuevi Reservation
Cher-Ae Heights Indian Community of the Trinidad Rancheria
Chicken Ranch Rancheria of Me-Wuk Indians

¹This list is comprised from a combination of two lists, one provided from the National Indian Gaming Commission at <http://www.nigc.gov>, and the other from the California Gambling Control Commission at <http://www.cgcc.ca.gov>.

Coyote Valley Band of Pomo Indians
Dry Creek Rancheria Band of Pomo Indians
Elk Valley Rancheria
Fort Independence Indian Community of Paiute Indians of the Fort Independence
Reservation
Fort Mojave Indian Tribe
Hoopa Valley Tribe
Hopland Band of Pomo Indians
Jackson Rancheria Band of Me-Wuk Indians
La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation
La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation
Lytton Rancheria of California
Middletown Rancheria of Pomo Indians of California
Mooretown Rancheria of Maidu Indians of California
Morongo Band of Cahuilla Mission Indians of the Morongo Reservation
Pala Band of Luiseno Mission Indians of the Pala Reservation
Paskenta Band of Nomlaki Indians of California
Pauma Band of Luiseno Mission Indians of the Pauma- Yuima Reservation
Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation
Picayune Rancheria of Chukchansi Indians
Pit River Tribe
Quechan Indian Tribe
Redding Rancheria

Rincon Band of Luiseno Mission Indians of the Rincon Reservation
Robinson Rancheria of Pomo Indians
Round Valley Indian Tribes of Round Valley Reservation
Rumsey Indian Rancheria of Wintun Indians of California
San Manuel Band of Serrano Mission Indians
San Pasqual Band of Diegueno Mission Indians of California
Santa Rosa Indian Community of the Santa Rosa Rancheria
Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation
Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation
Sherwood Valley Rancheria
Shingle Springs Band of Miwok Indians
Smith River Rancheria
Soboba Band of Luiseno Indians
Susanville Indian Rancheria
Sycuan Band of the Kumeyaay Nation
Table Mountain Rancheria
Torres Martinez Desert Cahuilla Indians
Tule River Tribe of the Tule River Reservation
Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria
Twenty Nine Palms Band of Mission Indians
United Auburn Indian Community of the Auburn Rancheria
Viejas Group of Capitan Grande Band of Mission Indians of the Viejas Reservation

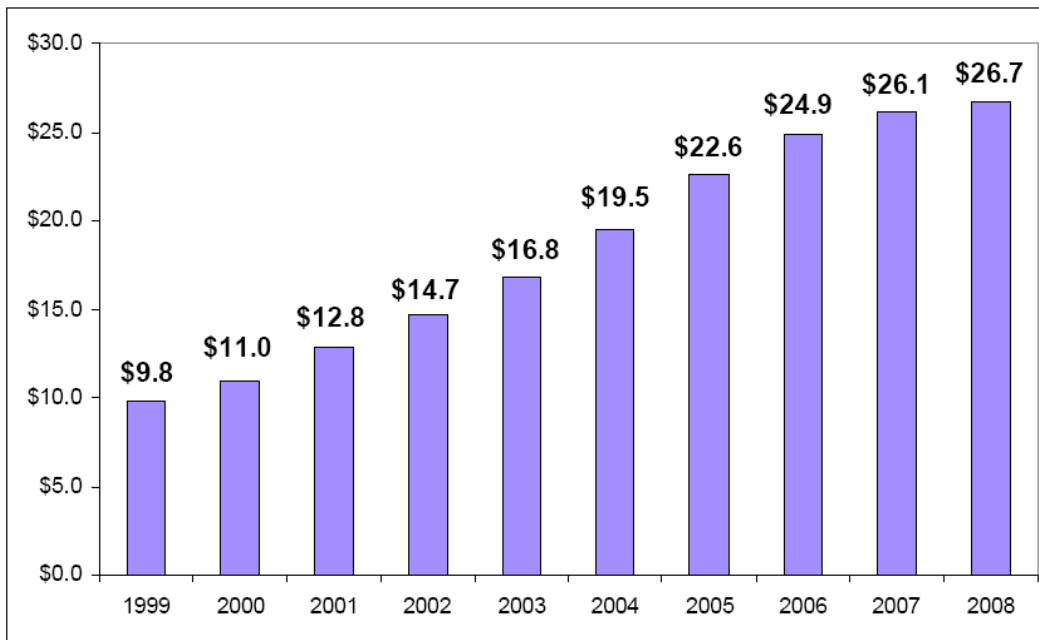
APPENDIX B

GROWTH IN INDIAN GAMING

Source: National Indian Gaming Commission¹



Growth in Gaming Revenues (in Billions)



¹Graph taken from the National Indian Gaming Commission website at <http://www.nigc.gov>.

APPENDIX C
NATIONAL INDIAN GAMING COMMISSION
TRIBAL GAMING REVENUES 2004-2008¹

¹Chart taken from the National Indian Gaming Commission website at <http://www.nigc.gov>.

NIGC Tribal Gaming Revenues

Gaming Revenue Range	Number of Operations	Revenues (in thousands)	Percentage of		Mean (in thousands)	Median (in thousands)
			Operations	Revenues		
Gaming operations with fiscal years ending in 2008						
\$250 million and over	23	11,197,566	5.7%	41.9%	486,851	415,966
\$100 million to \$250 million	47	7,764,163	11.6%	29.0%	165,195	164,918
\$50 million to \$100 million	52	3,605,181	12.8%	13.5%	69,330	67,054
\$25 million to \$50 million	66	2,286,574	16.3%	8.6%	34,645	32,179
\$10 million to \$25 million	85	1,409,292	21.0%	5.3%	16,580	16,214
\$3 million to \$10 million	69	408,109	17.0%	1.5%	5,915	5,867
Under \$3 million	63	67,941	15.6%	0.3%	1,078	908
Total	405	26,738,826				
Gaming operations with fiscal years ending in 2007						
\$250 million and over	22	10,999,559	5.6%	42.1%	499,980	417,707
\$100 million to \$250 million	47	7,807,413	12.0%	29.9%	166,115	158,777
\$50 million to \$100 million	46	3,281,581	11.8%	12.6%	71,339	71,113
\$25 million to \$50 million	58	2,070,824	14.8%	7.9%	35,704	33,423
\$10 million to \$25 million	90	1,529,902	23.0%	5.9%	16,999	16,192
\$3 million to \$10 million	67	396,957	17.1%	1.5%	5,925	5,699
Under \$3 million	61	57,236	15.6%	0.2%	938	755
Total	391	26,143,472				
Gaming operations with fiscal years ending in 2006						
\$250 million and over	23	11,006,025	5.8%	44.2%	478,523	413,556
\$100 million to \$250 million	40	6,730,419	10.2%	27.0%	168,260	157,987
\$50 million to \$100 million	45	3,185,470	11.4%	12.8%	70,788	66,955
\$25 million to \$50 million	64	2,241,013	16.2%	9.0%	35,016	32,652
\$10 million to \$25 million	73	1,241,706	18.5%	5.0%	17,010	17,363
\$3 million to \$10 million	67	416,098	17.0%	1.7%	6,210	6,423
Under \$3 million	82	68,293	20.8%	0.3%	833	347
Total	394	24,889,022				
Gaming operations with fiscal years ending in 2005						
\$250 million and over	21	9,691,959	5.4%	42.9%	461,522	379,129
\$100 million to \$250 million	39	6,206,788	9.9%	27.5%	159,148	145,771
\$50 million to \$100 million	43	2,897,277	11.0%	12.8%	67,379	63,211
\$25 million to \$50 million	58	2,019,686	14.8%	8.9%	34,822	33,116
\$10 million to \$25 million	75	1,267,891	19.1%	5.6%	16,905	16,383
\$3 million to \$10 million	68	411,501	17.3%	1.8%	6,051	5,474
Under \$3 million	88	83,698	22.4%	0.4%	951	417
Total	392	22,578,800				
Gaming operations with fiscal years ending in 2004						
\$250 million and over	15	7,200,911	4.0%	37.0%	480,061	376,449
\$100 million to \$250 million	40	6,277,698	10.7%	32.2%	156,942	155,160
\$50 million to \$100 million	33	2,240,010	8.8%	11.5%	67,879	67,233
\$25 million to \$50 million	60	2,144,496	16.0%	11.0%	35,742	33,391
\$10 million to \$25 million	71	1,180,438	18.9%	6.1%	16,626	16,035
\$3 million to \$10 million	58	354,050	15.5%	1.8%	6,104	6,040
Under \$3 million	98	81,531	26.1%	0.4%	832	530
Total	375	19,479,134				

Source: Compiled from gaming operation audit reports received and entered by the NIGC through 5/11/09.

APPENDIX D

National Indian Gaming Commission

Tribal Gaming Revenues (in thousands) by Region

Fiscal Years 1999-2008¹

National Indian Gaming Commission
Tribal Gaming Revenues (in thousands) by Region
Fiscal Year 2008 and 2007

	Fiscal Year 2008		Fiscal Year 2007		Increase (decrease)		
	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Revenue Percentage
Portland (fka Region I)	47	\$2,376,025	46	\$2,263,950	1	\$112,075	5.0%
Sacramento (fka Region II)	59	\$7,363,493	58	\$7,796,488	1	(\$432,995)	-5.6%
Phoenix (fka Region III)	46	\$2,773,715	46	\$2,874,052	0	(\$100,337)	-3.5%
St. Paul (fka Region IV)	115	\$4,402,311	111	\$4,224,866	4	\$177,445	4.2%
Tulsa (Eastern part of fka Region V)	62	\$1,699,940	57	\$1,438,228	5	\$261,712	18.2%
OK City (Western part of fka Region V)	48	\$1,347,242	45	\$1,146,047	3	\$201,195	17.6%
Washington (fka Region VI)	28	\$6,776,100	28	\$6,399,841	0	\$376,259	5.9%
Totals	405	\$26,738,826	391	\$26,143,472	14	\$595,354	2.3%
Source: Compiled from gaming operation audited financial statements received by the NIGC through May 11, 2009.							
Portland	Alaska, Idaho, Oregon, and Washington.						
Sacramento	California, and Northern Nevada						
Phoenix	Arizona, Colorado, New Mexico, and Southern Nevada.						
St. Paul	Iowa, Michigan, Minnesota, Montana, North Dakota, Nebraska, South Dakota, Wisconsin and Wyoming						
Tulsa	Kansas, and Eastern Oklahoma.						
OK City	Western Oklahoma and Texas.						
Washington	Alabama, Connecticut, Florida, Louisiana, Mississippi, North Carolina, and New York.						

¹Charts taken from the National Indian Gaming Commission website at <http://www.nigc.gov>. Some charts appear differently due to formatting of NIGC website.

National Indian Gaming Commission
Tribal Gaming Revenues (in thousands) by Region
Fiscal Year 2007 and 2006

	Fiscal Year 2007		Fiscal Year 2006		Increase (decrease)		
	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Revenue Percentage
Region I	43	2,208,190	46	2,080,369	(3)	127,821	6.1%
Region II	58	7,796,488	56	7,674,794	2	121,693	1.6%
Region III	44	2,840,585	45	2,718,914	(1)	121,672	4.5%
Region IV	109	4,217,960	122	4,069,940	(13)	148,021	3.6%
Region V	100	2,553,034	98	2,125,906	2	427,127	20.1%
Region VI	28	6,399,841	27	6,219,100	1	180,742	2.9%
Totals	382	26,016,098	394	24,889,022	(12)	1,127,075	4.53%
Source: Compiled from gaming operation audited financial statements received by the NIGC through June 10, 2008.							
Region I	Alaska, Idaho, Oregon, and Washington.						
Region II	California, and Northern Nevada						
Region III	Arizona, Colorado, New Mexico, and Southern Nevada.						
Region IV	Iowa, Michigan, Minnesota, Montana, North Dakota, Nebraska, South Dakota, Wisconsin and Wyoming						
Region V	Kansas, Oklahoma, and Texas.						
Region VI	Alabama, Connecticut, Florida, Louisiana, Mississippi, North Carolina, and New York.						



Tribal Gaming Growth
2006 and 2005

	Fiscal Year 2006		Fiscal Year 2005		Increase (decrease)		
	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Revenue Percentage
Region I	45	2,080,337	49	1,829,276	(4)	251,061	13.7%
Region II	56	7,675,432	57	6,992,784	(1)	682,648	9.8%
Region III	45	2,927,711	48	2,529,128	(3)	398,583	15.8%
Region IV	117	4,050,080	118	3,983,635	(1)	66,445	1.7%
Region V	97	2,123,169	92	1,729,842	5	393,327	22.7%
Region VI	27	6,219,100	28	5,514,135	(1)	704,965	12.8%
Totals	387	25,075,829	392	22,578,800	-5	2,497,029	11.1%
Source: Compiled from gaming operation audited financial statements received by the NIGC through May 31, 2007.							
Region I	Alaska, Idaho, Oregon, and Washington.						
Region II	California, and Northern Nevada						
Region III	Arizona, Colorado, New Mexico, and Southern Nevada.						
Region IV	Iowa, Michigan, Minnesota, Montana, North Dakota, Nebraska, South Dakota, Wisconsin and Wyoming.						
Region V	Kansas, Oklahoma, and Texas.						
Region VI	Alabama, Connecticut, Florida, Louisiana, Mississippi, North Carolina, and New York.						

National Indian Gaming Commission
Tribal Gaming Revenues (in thousands) by Region
Fiscal Year 2005 and 2004

	Fiscal Year 2005		Fiscal Year 2004		Increase (decrease)		
	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Revenue Percentage
Region I	47	1,829,195	45	1,601,710	2	227,485	14.2%
Region II	57	7,042,686	54	5,822,114	3	1,220,572	21.0%
Region III	48	2,529,128	45	2,159,872	3	369,256	17.1%
Region IV	118	3,984,449	117	3,815,857	1	168,592	4.4%
Region V	93	1,729,981	87	1,258,717	6	471,264	37.4%
Region VI	28	5,514,136	27	4,820,864	1	693,272	14.4%
Totals	391	22,629,575	375	19,479,134	16	3,150,441	16.2%

Source: Compiled from gaming operation audited financial statements received by the NIGC through June 29, 2006; 12 operations' revenue figures compiled from fee worksheets, as audited financial statements of those operations were not received.

Region I	Alaska, Idaho, Oregon, and Washington.
Region II	California, and Northern Nevada
Region III	Arizona, Colorado, New Mexico, and Southern Nevada.
Region IV	Iowa, Michigan, Minnesota, Montana, North Dakota, Nebraska, South Dakota, Wisconsin, and Wyoming
Region V	Kansas, Oklahoma, and Texas.
Region VI	Alabama, Connecticut, Florida, Louisiana, Mississippi, North Carolina, and New York.

National Indian Gaming Commission
Tribal Gaming Revenues (in thousands) by Region
Fiscal Year 2004 and 2003

	Fiscal Year 2004		Fiscal Year 2003		Increase (decrease)		
	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Revenue Percentage
Region I	44	1,601,346	46	1,441,488	(2)	159,858	11.1%
Region II	52	5,788,332	54	4,699,889	(2)	1,088,443	23.2%
Region III	43	2,133,116	43	1,898,522	0	234,594	12.4%
Region IV	117	3,815,763	109	3,597,005	8	218,758	6.1%
Region V	84	1,248,089	82	867,088	2	381,001	43.9%
Region VI	27	4,820,864	24	4,322,134	3	498,730	11.5%
Totals	367	19,407,510	358	16,826,126	9	2,581,384	15.3%

Source: Compiled from gaming operation audit reports received and entered by the NIGC through July 7, 2005.

Region I	Alaska, Idaho, Oregon, and Washington
Region II	California, and Northern Nevada
Region III	Arizona, Colorado, New Mexico, and Southern Nevada
Region IV	Iowa, Michigan, Minnesota, Montana, North Dakota, Nebraska, South Dakota, and Wisconsin
Region V	Kansas, Oklahoma, and Texas
Region VI	Alabama, Connecticut, Florida, Louisiana, Mississippi, North Carolina, and New York

**National Indian Gaming Commission
Tribal Gaming Revenues (in thousands) by Region
Fiscal Year 2003 and 2002**

	Fiscal Year 2003		Fiscal Year 2002		Increase (decrease)	
	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues
Region I	43	1,439,516	47	1,230,194	(4)	209,322
Region II	54	4,699,889	51	3,678,095	3	1,021,794
Region III	43	1,898,522	40	1,782,874	3	115,648
Region IV	91	3,547,360	109	3,537,227	(18)	10,133
Region V	75	822,727	79	651,841	(4)	170,886
Region VI	24	4,322,134	22	3,835,825	2	486,309
Totals	330	16,730,148	348	14,716,056	(18)	2,014,092

Source: Compiled from gaming operation audit reports received and entered by the NIGC through June 30, 2004

Region I	Alaska, Idaho, Oregon, and Washington.
Region II	California, Northern Nevada.
Region III	Arizona, Colorado, New Mexico, and Southern Nevada.
Region IV	Iowa, Michigan, Minnesota, Montana, North Dakota, Nebraska,
Region V	South Dakota, and Wisconsin
Region VI	Kansas, Oklahoma, and Texas.

**NATIONAL INDIAN GAMING COMMISSION
TRIBAL GAMING REVENUES (in thousands) BY REGION
FY 2002 and 2001**

	FY 2002		FY 2001		Increase (decrease)	
	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues	Number of Operations	Gaming Revenues
Region I	72	\$1,196,178	75	\$1,013,470	(3)	\$182,708
Region II	52	3,594,401	48	2,891,522	4	702,879
Region III	38	1,782,310	34	1,633,957	4	148,353
Region IV	75	3,523,690	79	3,254,151	(4)	269,539
Region V	71	580,524	72	437,397	(1)	143,127
Eastern Region	22	3,819,897	21	3,591,206	1	228,691
Totals	330	\$14,497,000	329	\$12,821,703	1	\$1,675,297

Compiled from gaming operation audit reports received and entered by the NIGC through 6/30/03.

States Serviced by Regions

Region I	Alaska, Idaho, Montana, Oregon, and Washington.
Region II	California and Northern Nevada.
Region III	Arizona, Colorado, New Mexico, and Southern Nevada.
Region IV	Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming
Region V	Kansas, Oklahoma, and Texas.
Eastern Region	Alabama, Connecticut, Florida, Louisiana, Mississippi, North Carolina, and New York.

APPENDIX E

CALIFORNIA STATE LOTTERY REVENUES 2000-2008¹

<u>YEAR</u> <u>previous year</u>	<u>Revenue Amount</u>	<u>Percentage Increase (Decrease) over</u>
2007/2008	\$3,049,620,915	(8.10%)
2006/2007	\$3,318,346,505	(7.44%)
2005/2006	\$3,584,996,251	7.54%
2004/2005	\$3,333,620,669	12.09%
2003/2004	\$2,973,975,717	6.92%
2002/2003	\$2,781,569,856	(3.96%)
2001/2002	\$2,896,372,533	0.07%
2000/2001	\$2,894,481,523	11.40%
1999/2000	\$2,598,378,990	N/A

¹Information gathered from California Lottery website at <http://www.calottery.com>. The purpose of this chart is to show that Indian Gaming has not had a negative effect on the California Lottery. While the growth of Indian Gaming may have outpaced that of the lottery, lottery revenues have not decreased as a result of Indian Gaming. Lottery revenues decreased as a result of the economic recession beginning in 2007 similarly to revenues of California's Indian Casinos as exhibited in Appendix D.

APPENDIX F

STATEWIDE TRIBAL GAMING DEVICE COUNT 2006¹

No.	Tribe Name	Casino Name	Total Gaming Devices
1	Agua Caliente Band of Cahuilla Indians	Agua Caliente Casino	1,039
2	Agua Caliente Band of Cahuilla Indians	Spa Resort Casino	961
3	Alturas Indian Rancheria	Desert Rose Casino	148
4	Augustine Band of Mission Indians	Augustine Casino	751
5	Barona Group of Mission Indians	Barona Casino	2,000
6	Bear River Band of Rohnerville Rancheria	Bear River Casino	316
7	Berry Creek Rancheria	Gold Country Casino	900
8	Big Sandy Rancheria	Mono Wind Casino	329
9	Big Valley Rancheria	Konocti Vista Casino	518
10	Bishop Paiute-Shoshone Indians	Paiute Palace Casino	329
11	Blue Lake Rancheria	Blue Lake Casino	700
12	Cabazon Band of Mission Indians	Fantasy Springs Casino	1,956
13	Cahto Indian Tribe	Red Fox Casino	83
14	Cahuilla Band of Mission Indians	Cahuilla Creek Casino	302
15	Campo Band of Diegueno Mission Indians	Golden Acorn Casino	750
16	Chemehuevi Indian Tribe	Havasu Landing Casino	230
17	Cher-Ae Heights Indian Community	Cher-Ae-Heights Casino	341
18	Chicken Ranch Rancheria	Chicken Ranch Bingo & Casino	255
19	Colusa Indian Community	Colusa Casino	846
20	Coyote Valley Band of Pomo Indians	Shodakai Casino	280
21	Dry Creek Rancheria	River Rock Casino	1,600
22	Elk Valley Rancheria	Elk Valley Casino	342
23	Hoopla Valley Tribe	Lucky Bear Casino	98
24	Hopland Band of Pomo Indians	Sho-Ka-Wah-Casino	563
25	Jackson Rancheria	Jackson Rancheria Casino	1,500
26	La Jolla Band of Mission Indians	La Jolla Slot Arcade	0
27	Middletown Rancheria	Twin Pine Casino	429
28	Mooretown Rancheria	Feather Falls Casino	999
29	Morongo Band of Cahuilla Mission Indians	Morongo Casino Resort & Spa	2,045
30	Pala Band of Luiseno Mission Indians	Pala Casino Resort and Spa	2,268
31	Paskenta Band of Nomlaki Indians	Rolling Hills Casino	773
32	Pauma Band of Luiseno Mission Indians	Casino Pauma	1,049
33	Pechanga Band of Luiseno Mission Indians	Pechanga Resort & Casino	2,139
34	Picayune Rancheria	Chukchansi Gold Resort and Casino	1,800
35	Pit River Tribe	Pit River Casino	156
36	Quechan Tribe	Quechan Paradise Casino and Bingo	349
37	Redding Rancheria	Win-River Casino	951

¹Chart taken from the California Gambling Control Commission website at <http://www.cgcc.ca.gov>

No.	Tribe Name	Casino Name	Total Gaming Devices
38	Rincon Band of Luiseno Mission Indians	Harrah's Rincon Casino & Resort	1,599
39	Robinson Rancheria of Pomo Indians	Robinson Rancheria Bingo and Casino	595
40	Rumsey Indian Rancheria	Cache Creek Casino Resort	2,589
41	San Manuel Band of Mission Indians	San Manuel Indian Bingo and Casino	2,000
42	San Pasqual Band of Mission Indians	Valley View Casino	1,261
43	Santa Rosa Indian Community	The Palace Indian Gaming Center	1,950
44	Santa Ynez Band of Chumash Indians	Chumash Casino Resort	1,998
45	Sherwood Valley Rancheria	Black Bart Casino	227
46	Smith River Rancheria	Lucky 7 Casino	262
47	Soboba Band of Luiseno Indians	Soboba Casino	2,000
48	Susanville Indian Rancheria	Diamond Mountain Casino	221
49	Sycuan Band of Diegueno Mission Indians	Sycuan Casino & Resort	1,996
50	Table Mountain Rancheria	Table Mountain Casino	2,000
51	Tule River Indian Tribe	Eagle Mountain Casino	1,384
52	Tuolumne Band of Me-Wuk Indians	Black Oak Casino	1,024
53	Twenty-Nine Palms Mission Indians	Spotlight 29 Casino	2,000
54	United Auburn Indian Community	Thunder Valley Casino	2,722
55	Viejas Group of Mission Indians	Viejas Casino & Turf Club	2,197
		Totals	58,120

APPENDIX G

CALIFORNIA GAMBLING CONTROL COMMISSION REVENUE SHARING

TRUST FUND RECIPIENTS MAY 28, 2009¹

¹Chart taken from the California Gambling Control Commission website at <http://www.egcc.ca.gov>

	TRIBE	CASINO	LOCATION
1	Alturas Indian Rancheria	Desert Rose Casino	Alturas
2	Bear River Band of Rohnerville Rancheria	Bear River Casino	Loleta
3	Benton Paiute Reservation	N/A	Benton
4	Big Lagoon Rancheria	N/A	Trinidad
5	Big Pine Reservation	N/A	Big Pine
6	Big Sandy Rancheria	Mono Wind Casino	Auberry
7	Big Valley Band of Pomo Indians	Konocti Vista Casino	Lakeport
8	Bishop Paiute Tribe	Paiute Palace Casino	Bishop
9	Bridgeport Paiute Indian Colony	N/A	Bridgeport
10	Buena Vista Rancheria	N/A	Ione
11	Cahto Indian Tribe of Laytonville Rancheria	Red Fox Casino	Laytonville
12	Cahuilla Band of Mission Indians	Cahuilla Creek Casino	Anza
13	California Valley Miwok Tribe	N/A	Stockton
14	Cedarville Rancheria	N/A	Alturas
15	Chemehuevi Indian Tribe	Havasu Landing Resort and Casino	Havasu Lake
16	Cher-Ae Heights Indian Community	Cher-Ae-Heights Casino	Trinidad
17	Chicken Ranch Rancheria	Chicken Ranch Bingo and Casino	Jamestown
18	Cloverdale Rancheria	N/A	Cloverdale
19	Cold Springs Rancheria	N/A	Tollhouse

	TRIBE	CASINO	LOCATION
20	Colorado River Indian Tribes	N/A	Parker, AZ ¹
21	Cortina Rancheria	N/A	Williams
22	Coyote Valley Band of Pomo Indians	Coyote Valley Shodakai Casino	Redwood Valley
23	Death Valley Timba-Sha Shoshone Tribe	N/A	Death Valley
24	Elem Indian Colony	N/A	Clearlake Oaks
25	Elk Valley Rancheria	Elk Valley Casino	Crescent City
26	Enterprise Rancheria	N/A	Oroville
27	Ewilaapaayp Band of Kumeyaay Indians	N/A	Alpine
28	Federated Indians of Graton Rancheria	N/A	Novato
29	Fort Bidwell Indian Community	N/A	Fort Bidwell
30	Fort Independence Reservation	N/A	Fort Independence
31	Fort Mojave Indian Tribe	N/A	Needles
32	Greenville Rancheria	N/A	Greenville
33	Grindstone Rancheria	N/A	Elk Creek
34	Guidiville Rancheria	N/A	Talmage
35	Habematolel Pomo of Upper Lake	N/A	Upper Lake
36	Hoopa Valley Tribe	Lucky Bear Casino	Hoopa
37	Inaja-Cosmit Mission Indians	N/A	Escondido
38	Ione Band of Miwok Indians	N/A	Ione
39	Jamul Indian Village	N/A	Jamul

¹ The Colorado Valley Indian Tribes are located in California and Arizona. Tribal headquarters are located in Parker, Arizona.

	TRIBE	CASINO	LOCATION
40	Karuk Tribe of California	N/A	Happy Camp
41	La Jolla Band of Luiseno Indians	Slot Arcade ²	Pauma Valley
42	La Posta Band of Mission Indians	La Posta Casino	Boulevard
43	Lone Pine Reservation	N/A	Lone Pine
44	Los Coyotes Band of Cahuilla Indians	N/A	Warner Springs
45	Lower Lake Rancheria	N/A	Healdsburg
46	Lytton Rancheria	N/A ³	Santa Rosa
47	Manchester Point Arena Rancheria	N/A	Point Arena
48	Manzanita Band of Mission Indians	N/A	Boulevard
49	Mechoopda Indian Tribe	N/A	Chico
50	Mesa Grande Mission Indians	N/A	Santa Ysabel
51	Northfork Rancheria	N/A	North Fork
52	Pinoleville Rancheria	N/A	Ukiah
53	Pit River Tribe	Pit River Casino	Burney
54	Potter Valley Rancheria	N/A	Ukiah
55	Quartz Valley Indian Community	N/A	Fort Jones
56	Ramona Mission Indians	N/A	Anza
57	Redwood Valley Rancheria	N/A	Redwood Valley
58	Resighini Rancheria	N/A ⁴	Klamath

² The Slot Arcade operated by the La Jolla Band of Luiseno Indians has been closed since August of 2004.

³ The Lytton Rancheria operates a cardroom (Casino San Pablo) with Class II gaming.

⁴ The Resighini Rancheria's casino closed in July 2007.

	TRIBE	CASINO	LOCATION
59	Round Valley Indian Tribe	N/A	Covelo
60	Santa Rosa Band of Cahuilla Mission Indians	N/A	Anza
61	Santa Ysabel Mission Indians	Santa Ysabel Resort & Casino	Santa Ysabel
62	Scotts Valley Band of Pomo Indians	N/A	Lakeport
63	Sherwood Valley Rancheria	Sherwood Valley Rancheria Casino	Willits
64	Smith River Rancheria	Lucky 7 Casino	Smith River
65	Stewarts Point Rancheria	N/A	Santa Rosa
66	Susanville Indian Rancheria	Diamond Mountain Casino	Susanville
67	Table Bluff Reservation	N/A	Loleta
68	Torres-Martinez Mission Indians	Red Earth Casino	Thermal
69	Washoe Tribe of Nevada and California	N/A	Gardnerville, NV ⁵
70	Yurok Tribe of the Yurok Reservation	N/A	Eureka

NOTE: Each eligible RSTF recipient receives \$275,000 per quarter, for a sum of \$1.1 million per fiscal year.

⁵ The Washoe Tribe of Nevada and California is located in both states. Tribal headquarters are located in Gardnerville, Nevada.

APPENDIX H
TRIBES CURRENTLY CONTRIBUTING TO THE INDIAN GAMING SPECIAL
DISTRIBUTION FUND NOVEMBER 19, 2008¹

¹Chart taken from the California Gambling Control Commission website at
<http://www.egcc.ca.gov>

	TRIBE	CASINO	CASINO LOCATION
1	Barona Band of Mission Indians	Barona Valley Ranch Resort and Casino	Lakeside
2	Big Sandy Band of Mono Indians	Mono Wind Casino	Auberry
3	Big Valley Rancheria	Konocti Vista Casino and Bingo	Lakeport
4	Bishop Paiute Tribe	Paiute Palace Casino	Bishop
5	Cabazon Band of Mission Indians	Fantasy Springs Resort	Indio
6	Cahuilla Band of Mission Indians	Cahuilla Creek Casino	Anza
7	Chicken Ranch Rancheria	Chicken Ranch Bingo and Casino	Jamestown
8	Colusa Indian Community	Colusa Casino	Colusa
9	Hopland Band of Pomo Indians	Sho-Ka-Wah Casino	Hopland
10	Jackson Rancheria Band of Miwuk Indians	Jackson Rancheria	Jackson
11	Mooretown Rancheria	Feather Falls Casino	Oroville
12	Redding Rancheria	Win-River Casino	Redding
13	Robinson Rancheria	Robinson Rancheria Casino and Bingo	Nice
14	Santa Rosa Rancheria	The Palace	Lemoore
15	Santa Ynez Band of Chumash Indians	Chumash Casino Resort	Santa Ynez
16	Soboba Band of Mission Indians	Soboba Casino	San Jacinto
17	Sycuan Band of Mission Indians	Sycuan Casino and Resort	El Cajon
18	Table Mountain Rancheria	Table Mountain Casino	Friant
19	Tule River Indian Tribe	Eagle Mountain Casino	Porterville
20	Twenty-Nine Palms Band of Mission Indians	Spotlight 29 Casino	Coachella
21	Tyme Maidu Tribe Berry Creek Rancheria	Gold Country Casino	Oroville

APPENDIX I

TRIBES CURRENTLY CONTRIBUTING TO THE GENERAL FUND MARCH 4,
2009¹

	TRIBE	CASINO	LOCATION
1	Agua Caliente Band of Mission Indians	Agua Caliente Casino and The Spa Resort Casino	Rancho Mirage Palm Springs
2	Coyote Valley Band of Pomo Indians	Coyote Valley Shodakai Casino	Redwood Valley
3	La Posta Band of Mission Indians	La Posta Casino	Boulevard
4	Morongo Band of Mission Indians	Morongo Casino Resort and Spa	Cabazon
5	Pala Band of Luiseno Mission Indians	Pala Casino Resort and Spa	Pala
6	Pauma Band of Luiseno Mission Indians	Casino Pauma	Pauma Valley
7	Pechanga Band of Mission Indians	Pechanga Resort and Casino	Temecula
8	Quechan Indian Tribe	Quechan Paradise Casino	Winterhaven
9	Rumsey Indian Rancheria	Cache Creek Casino Resort	Brooks
10	San Manuel Band of Mission Indians	San Manuel Indian Bingo and Casino	Highland
11	Santa Ysabel Band of Diegueno Indians	Santa Ysabel Resort & Casino	Santa Ysabel
12	Shingle Springs Rancheria	Red Hawk Casino	Shingle Springs
13	Torres Martinez Desert Cahuilla Indians	Red Earth Casino	Salton Sea Beach
14	United Auburn Indian Community	Thunder Valley Casino	Lincoln
15	Viejas Group of Mission Indians	Viejas Casino & Turf Club	Alpine

¹Chart taken from the California Gambling Control Commission website at <http://www.cgcc.ca.gov>

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