Indian Gaming

California: 2007 Represents the Evolution of the Legislature's Role in Tribal-State Compact Ratification

Legislative power is fundamental to our system of government, it directly represents the People. Thus Compact ratification by the Legislature must be a thoughtful and deliberate process establishing gaming policy based on criteria ensuring the welfare of all citizens of the State.

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A Thoughtful and Deliberate Process

This paper focuses on the legal and political evolution of the Legislative ratification process for Tribal-State Compacts. For Tribes, a tribal gaming Compact means the difference between operating a legitimate governmental program that raises substantial revenues for the Tribe versus being forced to operate limited non gaming enterprises that are dependent on federal funding. For States and affected citizens, a tribal gaming Compact resolves jurisdictional and substantive disputes and provides a process for solutions.

The Legislature's role in deciding whether to ratify Tribal-State compacts requires it to balance its responsibility to create a healthy environment for business but also to protect the integrity of gaming and protect the interest of the citizens of California. Therefore the Tribal-State compact ratification process should thoroughly examine the agreement to ensure that all affected parties have had a voice in vetting and working out any and all unintentional consequences of this long-term agreement.

Casino development in Indian Country requires the explicit recognition of risk factors, which include consideration of the capabilities of the tribal government, the Tribe's geographical location, and public attitudes towards gaming. Pains-taking attention must be dedicated to the concerns of affected states and local governments. Moreover, and it cannot be overstated, significant attention must be paid to the special interest that influence these political bodies.

While a Tribal-State compact is an agreement to permit gaming it also an important and vital agreement that maintains the delicate balance of powers between Tribes, states and the federal government. It is an agreement that should be carefully constructed while recognizing the powers and authorities vested in the executive and legislative branches of government. It is an agreement that should recognize and ensure the continued rights of <u>all</u> citizens of the State.

Compacts are all-inclusive documents between independent government entities affecting directly or indirectly all public policies of a state and a tribe. As such, a Compact should be given careful public review and debate in both houses by committees that have expertise and whose constituencies are affected. Review, evaluation and analysis of Compacts by multiple committees is essential to a thoughtful and deliberate process.

The Business of Gaming

The business of gaming in Indian Country is both a legal and a political activity. Casino-style gaming in Indian Country, unlike any other Indian owned and operated business, is subject to regulation under the terms of the Indian Gaming Regulatory Act

and by the terms of a Tribal-State Compact. The Compact establishes a system between tribes and states for the authorization of Class III gaming. At its best, a Compact should foster a tribal relationship with local government jurisdictions and enhance a tribe's ability to acquire necessary services for the development of its gaming operation.[1]

A Compact also affects business agreements with investors, consultants, manufactures, local governments, patrons and employees. For example, a tribe's gaming resource providers must be cleared by the State in accordance with the California Compact.[2] Patrons and employee protections must also be protected. Intergovernmental agreements must be reached regarding off-reservation impacts with local governments. Failure to address these issues can and should ultimately impact a tribe's ability to comply with the terms of its Compact or ultimately achieve ratification of a new or amended Compact.

All tribes must have a compact with the state in order to conduct casino-style Class III gaming. Progressive and thoughtful solutions to both the legal and political issues raised by tribal gaming are best achieved in a comprehensive Compact. The development of a comprehensive Compact between a tribe and a state resolves jurisdictional and substantive disputes and recognizes with respect each entity's sovereignty. A good Compact provides the significant benefit of the delivery of social services, an opportunity for tribal economic and government advancement and the ability of the state to manage shared scarce natural resources. A good compact can provide for cooperation and coordination with local governments rather than conflict.

Authorities:

The Indian Gaming Regulatory Act (IGRA) provided a system for joint regulation by tribes and the federal government over class II gaming on Indian lands and a system for Compacts between tribes and states for regulation of class III gaming. The negotiation of a Tribal-State Compact allows states to control the growth of gaming expansion and manage the location of gaming.

IGRA was intended to foster a public policy climate whereby individual states would set up an independent framework for the form, extent, scope and intensity of gaming. The intent was to match tribal rights with the states for gaming. This public policy was to be formalized in a Tribal-State Compact for Class III gaming. IGRA obligates the "State" to negotiate in good faith with tribes for a Compact for the types of gaming legal in the State. IGRA does not specifically mention a role for a State Legislature.

IGRA obligates the State to negotiate in good faith. It is then up to each state to define who and how to negotiate as well as bind a state to the terms of the Compact. In California it is clear that without legislative ratification the State cannot be bound to a Compact; legislative ratification is required under Article IV, section 19 of the state Constitution. Not all states have clear constitutional language prescribing a method for negotiating and ratifying compacts which has raised serious and complex questions about the validity of compacts in those states.

California Legislature in Uncharted Territory

California is in the minority of states that have had the foresight to include the Legislature in the Tribal-State Compact ratification process. Out of 32 states with tribal casinos there are only a handful that have placed into statute the requirement of legislative ratification. This confers a very significant power and responsibility on the Legislature.

Questions have arisen in a number of court cases on the issue of "Separation of Power". In general, Legislative power is the power to make, amend or repeal laws. The executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws to actual controversies. The separation of Power is a threshold issue in determining who has the authority to enter into compacts and how a state is bound to the terms of the Compact.

This threshold issue has not been limited to nonfederal forums. There have been at least two disputes that have begun in state court, where a definitive construction of state law was secured and then were taken into federal court by a tribe dissatisfied with the state court determination. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Narragansett Indian Tribe v. Rhode Island*, Nos. 94-0618-T, et al., (D.R.I. Feb. 13, 1996); see also *Kickappoo Tribe v. Babbitt*, 43 F.3d 1491 (D.C.Cir. 1995) (because state was indispensable party, complaint by tribe challenging Secretary's refusal to approve compact dismissed without prejudice).

The following cases have upheld the 'separation of Power' and the role of Legislative ratification even when language was not expressly stated in a states statue or constitution.

In *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992}, the Supreme Court of Kansas addressed the question of whether the Governor of Kansas "had the authority independent of statute to negotiate [a tribal-state gaming] Compact and bind the State terms." The Court answered this question in the negative, holding that "the Governor had the authority to enter into negotiations with the Kickapoo Nation, but, in the absence of an appropriate delegation of power by the Kansas Legislature or legislative approval of the Compact, the Governor has no power to bind the State to the terms' thereof." 836 P.2d at 1185.

> "It is noteworthy, we believe, that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a state to an Indian gaming compact, and in every state whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence." *(see, Jicarilla Apache Tribe v. Kelly, 129 F3d 535, 537; Kickapoo Tribe of Indians v. Babbitt, 827 F Supp 37, 46, revd on other grounds 43 F2d 1491; McCartney v. Attorney General, 231 Mich App 722, 727-728, 587 NW2d 824, 827, lv denied 460 Mich 873, 601 NW2d 101; Narragansett Indian Tribe of R.I. v. Rhode Is., 667 A2d 280,*

> *292 [RI]; State ex rel. Clark v. Johnson, 120 NM 562, 574, 904, P2d 11, 23; State ex rel. Stephan v. Finney, 251 Kan 559, 582-583, 836 P2d 1169, 1185).”*

In the State of New York, *Saratoga County, Chamber of Commerce Inc. v. Pataki, 293 AD2d 20, 24. [2003]*, the appellate court wrote:

> “Unsurprisingly, every state high court to consider the issue has concluded that the State Executive lacks the power unilaterally to negotiate and execute tribal gaming compacts under IGRA. New Mexico, Kansas and Rhode Island have each concluded that gaming compacts incorporate policy choices reserved for the Legislature *(see State ex rel. Clark v Johnson, 904 P2d 11 [NM 1995]; State ex rel. Stephan v Finney, 836 P2d 1169 [Kan 1992]; Narragansett Indian Tribe v Rhode Island, 667 A2d 280 [RI 1995]; see also McCartney v Attorney General, 587 NW2d 824, 827 [Mich App 1998], appeal denied 601 NW2d 101 [Mich 1999]* ["[T]he Governor has the ability to enter into compacts with Indian tribes, subject to the approval of the Legislature"]). Today we join those states in a commitment to the separation of powers and constitutional government.”

Conclusion: The Legislative power of approval is legal and legitimate.

Legislative Objectives and Goals:

To properly exercise the power it is necessary to have a process and standards in place so that a legislative record is memorialized in the event there is litigation over ratifying or not ratifying a Compact.

- **The State Legislature has the ability to create a ‘thoughtful and deliberate’ process that defines its role in the ratification of the Tribal-State Compacts negotiated by a governor.**

- **The State Legislature must develop a ‘pragmatic process’ by which to evaluate components in Tribal-State Compacts and the effectiveness of the components over time. Are there unintended consequences?**

It is up to a Legislature to ensure that Tribal-State Compacts include tough regulations, cover environmental concerns, patron and employee protections and provide a voice for local government in the ongoing development of tribal gaming expansion. Without such standards, growing public, local government and industry tensions over the tribal gaming industry in California will not subside.

An Open, Fair and Objective Process:

Compact ratification must be an open, fair and objective process providing opportunity to all affected parties to make comment. State Agencies, Local elected officials, members of law enforcement, vested gaming interests, labor and community groups should be extended an invitation to participate in public comment during informational and/or ratification hearings. There is simply no room for secrecy by gaming tribes if the Legislature is going to bind the State to an agreement that lasts for

10, 20 or an undetermined number of years. Such an agreement requires and demands public "sunshine".

In California the Legislative leadership has yet to use the full measure of its legislative powers in a well defined ratification process. A Legislature has a number of analytical tools at its disposal. These include: informational hearings, Legislative Counsel or Attorney General Opinions, investigative reports by Commissions such as the Hoover Commission, the California Gambling Control Commission, Division of Gambling Control, the California State Research Library and numerous Committees to review, scrutinize the language and submit detailed committee reports and recommendations.

An open debate protects the integrity of the Legislative body and the political reputations of elected members. A process free from obsessive secrecy serves a dual process of memorializing a legislative record to protect the integrity of the decision makers in the event of a challenge.

Politics and Gambling:

Compacts have routinely been sent to only the Governmental Organization Committee (G. O. Committee), which hears legislation concerning gambling. Committees by nature become the focus of the constituencies they serve, and particularly the constituencies with money. The G. O. Committee is no exception. In the new era of tribal gaming wealth review by only this one committee has been emblematic of this phenomenon.

There are a total of twenty-six members on the G. O. Committees in both the Senate and Assembly. On average, G.O. committee members have raised a total of $95,000 each from the gaming industry. An average of 74% of that total has been from tribes that have refused to sign the 2004/2005 Schwarzenegger compacts and instead are now presenting to the 2007 Legislature sub standard compacts for ratification. These tribes have given Senate and Assembly G.O. committee members an average of 2.4 times more than other members. These tribes have given 6.5 times more money to G.O. Committee members than tribes that have signed the 2004 compacts. This both looks bad and is bad from the public perspective.

January 1, 2000 and July 31, 2005

G.O. Comm.	Count Of Members	Avg Of Total	Avg of Card Club	Avg of 2004/2005 Compact Tribes	Avg of Tribes Opposing 2004/2005 Compacts	Avg of Operators	Avg of Other Tribes	Avg of Racetrack
Yes	26	$94,968.86	$18,997.22	$10,800.00	$69,835.77	$3,291.67	$6,486.36	$8,922.63
No	93	$38,201.72	$10,994.88	$6,984.60	$28,720.49	$1,900.00	$6,504.13	$4,479.85

The relationship between politics and gambling receives considerable attention especially since tribal gaming governments are big players spending millions on lobbying, candidates and ballot initiatives. This was evidenced in the recent election cycle in California. Tribes seeking Compact ratification organized and funded a new committee.

The newly formed TEAM 2006 sponsored by California Sovereign Indian Nations (TASIN) is made up of seven tribes, The Agua Caliente Band of Cahuilla Indians of Palm Springs, Sycuan Band of the Kumeyaay Nation of El Cajon, the Morongo Band of Mission Indians of Banning, Pechanga Band of Luiseno Indians of Temecula, San Manuel Band of Mission Indians of Patton, Santa Ynez Band of Chumash Indians of Santa Ynez and Soboba Band of Luiseno Indians of San Jacinto.[3] TEAM 2006 funded its Political Action Committee (PAC) almost instantly, with no less than 10 million dollars. Understandably, tribal gaming contributions have raised significant public concerns about the impacts on the political process.

Recently the California Supreme Court ruled that the state may sue Indian tribes to enforce the State's campaign finance rules, saying that the State's interest in clean elections trumps tribal autonomy.[4] The Fair Political Practice Commission (FPPC) filed suit against the Agua Caliente for making unreported or late reported donations to the tune of almost $9 million. *Fair Political Practices Commission vs. Agua Caliente Band of Cahuilla Indians* S123832 Ct. App 3 C04371. Writing for the majority, Justice Ming Chin stated:

> "Allowing the tribe immunity from suit in the context would allow tribal members to participate in elections and make campaign contributions …unfettered by regulations designed to ensure the system's integrity. Allowing tribal members to participate in our state electoral process while leaving the state powerless to effectively guard against political corruption puts the state in an untenable and indefensible position without recourse."

Multiple committees reviewing Compacts expands tribal relationships and integrates tribal matters into the mainstream of the daily life of California government. This is an important step in long-term Tribal-State relations and protects the delicate balance of powers between Tribes and the State.

Multiple committee review is a more democratic practice and demonstrates a Legislature that is less susceptible to being dominated by a single special interest. Multiple committee review provides direct representation to all affect parties.

The Evolving Process of Legislative Negotiations

To Ratify or Not Ratify:

There is an inherent tension between the suspect and disfavored nature of gambling and its commercial nature as "entertainment". This public attitude affects the development of gaming policy and has inevitably led it in an erratic fashion. California's gaming policy so far has been the result of federal and Congressional action, most of which has been litigated in protracted and difficult cases involving core questions of the balance of federal, state and tribal powers. These actions are further aggravated by federal mandates and a unique Indian legal framework.

The five newly negotiated Tribal-State Compact amendments with Morongo, Pechanga, Agua Caliente, Sycuan and San Manuel provide fertile ground for examination, debate and analysis. These amendments demonstrate the need for the Legislature to assert the sovereignty of the state against the sovereignty of the Tribes over legitimate issues. These agreements are filled with unintended consequences having far reaching impacts harmful and destructive to the welfare of the public and the credible operation of government.

The following are sections from the pending Compacts that deserve special attention and critical language modification to protect the political powers of elected officials, the interests of the State and all its citizens. For example:

Missing:

Missing in the Agua Caliente, San Manuel, Pechanga, Sycuan and Morongo Compacts is a component found at Section 4.3.5 in the 2004 Compacts. (From Viejas 2004 Compact)

> Except pursuant to the express concurrence of the Governor the tribe may operate the Gaming Devices …"on its Indian lands existing as of July 1, 2004, **at the location of the Tribe's existing gaming Operation** located in [San Diego] County.

This language coupled with the environmental, building code and licensing fee schedule found in the 2004/2005 Compacts provides financial disincentives to uncontrolled growth of gaming expansion. In essence, Tribes can still have two casinos as permitted in the 1999 Compacts; however the additional slot machines can only be located at the existing facility.

This is important language to both tribal and non tribal citizens as many of these gaming facilities are located in rural communities with extremely limited transportation systems and water supplies. This language prevents unfair competition between the existing gaming Tribes, it helps to maintain a stable industry, secure employment and government-to-government relationships. This is important as in many locals; tribal casinos are now the number one employer. Further this language eliminates unintended consequences to the limited shared natural resources and provides greater opportunity to local governments and state agencies to control the growth of gaming and its impacts.

Section 10.2 (d) Patron Tort Claims:

The language in (i) that requires the Tribe to waive its right to assert sovereign immunity up to the limits of the Policy (commercial general liability insurance policy $10,000,000.00 per occurrence) is good. The language fails when the discussion of the tribal ordinance is outlined. Only a tribal government can enforce its own ordinance. Compacts have no third party enforcement, even where the interest being protected are non tribal. The State should have a role at the minimum.

Additionally, the Agua Caliente Compact 'obligates' the State to negotiate in *good faith* the arrangements by which a tribal court system will adjudicate claims of bodily injury, property damage, or personal injury covered under its Compact. This component expands tribal sovereignty over non-Indian citizens in California. This is an expansion of tribal sovereignty that is not supported by federal law. If the state refuses the terms of the tribes proposed court system, will the tribe then challenge the State in a *bad faith* negotiation[5] and seek a court mediated agreement to provide tribal authority over non Indian citizens? Will the tribe use the litigation as leverage for the development of state legislation to further expand its authority and jurisdiction of non Indian citizens and local governments?

- This component requires debate in the Public Safety and Judiciary Committees.

Section 10.3 Workers' Compensation:

Workers' compensation was a concept first floated in the 19th century by Otto Von Bismark (1870). It was adopted in California in 1913 with the intent to prevent the courts from being backlogged in worker complaints. The system has provided a process by which injured employees can be reasonably compensated and employers not needlessly overburdened. The Agua Caliente Compact obligates the State to accept a "tribal system of workers compensation". On its face this appears to be a conflict of interest.

Here again, will the tribe attempt to claim that the State has not negotiated in *good faith* and seek judicial mediation for the establishment of a workers' compensation program? Will this component be used as leverage to seek State Legislation allowing Tribes to sell workers compensation insurance? The State has previously asserted,

> **"…because a Tribes worker's insurance plan was not state regulated, the businesses did not have acceptable workers' compensation coverage for the employees."[6]**

- This component requires debate in the Labor and Industrial Relations Committee as well as the Judiciary Committee.

Neither of the aforementioned components is appropriate for Tribal-State compact negotiations. Both of these issues create systems that do not exist now and has never previously been authorized by the State Legislature. This is an overreaching of executive authority and makes this compact ripe for a challenge on Separation of Power grounds. Power exclusively conferred upon one branch of government is by necessary implication, power denied to the other, absent a specific exemption.

Section 10.8 Mitigation of off reservation impacts

- Local Government, Environment or Water and Parks Committees deserve review of these agreements.

Several Tribes have promoted Casinos on or adjacent to State Park lands or Lands that are adjacent to or within the boundaries of a National Park. These are State lands and sometimes federal lands (including Bureau of Land Management- BLM[7] [8]) that have been set aside for the use of the Public. Often these lands are water shed or aquifer recharge areas. Casino development has significant impacts on the intended public access and shared resources of these lands that must be addressed.

'Water Wars' have been brewing in Southern California for a number of years over intensive use of shared aquifers and springs not explicitly covered by federal law.[9] Citizens residing next door to tribal casino operations have experienced unfair outages or diminished water supplies due to casino development.[10] In many instances this will require State action to resolve conflicts, to approve new water districts and corresponding funding.

Section 4.3.1 Revenue Contribution

- Appropriations or Revenue and Taxation Committees should have review of these agreements.

There has been discrepancy in the calculations of payments and revenue by the Governor's office and that which has been received in some of the new compacts. This has created unnecessary controversy. Calculations independent of the Governor's office and the Legislature should be requested, of the Bureau of State Audits, the Treasurer or Controller. There must be an accurate accounting. The Compacts must require a credible accounting system with set standards.

Actions and Consequences

Once committee review of the Compact is complete and conclusions are reached on the foregoing provisions and others, a Compact will either be acceptable for approval or not. Here is how each conclusion plays out.

A Positive Vote:

If a Compact meets the new high standard of gaming policy, only a positive vote by the Legislature will bind the State to the terms of the Compact. IGRA requires that a state and a tribe must enter into a gaming compact independent of the requirement that the compact be in effect, pursuant to approval by the Secretary of the Interior, before class III gaming is authorized. Thus a compact must be validly entered in accordance with each states law before it can go into effect via secretarial approval.

Once legislation is chaptered and becomes law it may be sent to the Secretary of the Interior for approval. The Secretary of the Interior has 45 days to approve, disapprove or deem approved the Compact. Once approved by the Secretary the Compact must then be noticed in the Federal Register to take effect. 25 U.S.C. 2710(d)(3)(B). Nevertheless, here again, decision makers must be concerned about having the integrity of their decisions challenged, as there is a six year statute of

limitations on final federal actions. (See *Amador County vs. Secretary of the Interior* Civil Action No. 1:05CV00658 (RWR) United States District of Columbia)

How to deal with Insufficiencies:

If a state Legislature does not approve of certain provisions in a Compact negotiated by the Governor, and refuses to ratify it, the Compact could be returned to the Tribe and the Governor, preferably with a detailed explanation of the reasons the Legislature denied ratification. The Legislature should not negotiate, but simply communicate its conclusions. This Legislature's explanation of its reasons may include Committee Reports, opinions by Legislative Counsel and the Attorney General, transcripts of public debate from committee hearings, as well as debate conducted by the Legislature itself. Also commission reports and letters from affected government officials and the public.

There is significant precedent for what happens if a Legislature refuses to ratify a compact. As a matter of federal law, the State is obligated to "negotiate" with tribes, so one possible resolution is to re-open negotiations. Rather than just allow the Compact to languish, the Governor could notify the Legislature that he/she no longer supports the agreement and will seek further negotiations with the Tribe. The Tribe could file suit in state or federal court alleging that the refusal to ratify the negotiated Compact constitutes "*bad faith*" and ask for mediation or for procedures for Class III gaming to be prescribed by the Secretary of the Interior.

The Good Faith Requirement:

Unfortunately, IGRA only provides incentives for litigation rather than negotiation. A Tribe initiates a **"***bad faith*" challenge. A state may wish to define good faith is "substantially similar" to existing state laws. A provision in IGRA outlines the defensive and legitimate arguments for a court to consider in a *bad faith* challenge:

25 CFR 2710 (d) (7) (B) iii

"May take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities …"

The Legislature will carry the burden of proof that their body has attempted to ratify the agreement in *good faith*, or that the Compact as written does not protect the legitimate interests of the state as outlined in IGRA. The Legislature has a responsibility to assert the sovereignty of the state against the sovereignty of the Tribe over legitimate concerns. As in all such litigation, the quality and credibility of the Legislative record memorializing its review will be key to the issue.

A State Legislature can provide an incentive for negotiation. Litigation is time consuming and costly and answers only small questions that fail to provide the broad public policies needed when negotiating with sovereigns in long-term agreements. Legislatures can demonstrate great wisdom over the development of public policy by sending Compacts back to Tribes and the Governor with suggested language changes. However, these changes must be accompanied by clear and indisputable evidence of

legitimate public concerns that have been memorialized in Senate and Assembly Hearings.

Since California has waived its 11th amendment immunity, the litigation process found in IGRA applies. The State and the Tribe would have to battle out the claim of *bad faith* in federal court. If the State loses, the court appoints a mediator. If the mediator is unable to secure an agreement between the Tribe and the State, the last best offer is submitted to the Secretary of the Interior. The Secretary of the Interior develops procedures for class III gaming. The procedures raise another set of questions, who will regulate class III gaming in a federal agreement if the State is not a party to the agreement?[11] What is the term of the agreement? How will the agreement be renegotiated? What if conflicts arise, who has jurisdiction and how will they be resolved?

If the State wins a "*bad faith*" challenge, the Tribe and State can renegotiate.

Pragmatic Process – Decisive Factors

The following is a basic list of components for Legislators to consider when analyzing and evaluating gaming Compact components with Tribes. By no means should the analysis and evaluation be limited to these basic criteria, but these are key. As the tribal gaming industry continues to grow new issues will arise and must be considered.

Regulatory Framework:

A regulatory issue which has recently developed and requires serious consideration of the Legislature is the new ruling in the *Colorado River Indian Tribes v. NIGC***.** The five newly negotiated Tribal-State Compact amendments with Morongo, Pechanga, Agua Caliente, Sycuan and San Manuel lack a sufficient regulatory framework.

These agreements as did their predecessors assume the primary regulatory and oversight role will be performed by the National Indian Gaming Commission (NIGC). However, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Washington D.C. Federal District Court's August 2005 ruling in *Colorado River Indian Tribes v. NIGC,* (D.D.C. Aug. 2005).

> "The District Court had held that IGRA does not authorize the NIGC to promulgate or enforce its Minimum Internal Control Standards (MICS) against Class III Indian gaming. The District Court reasoned that IGRA directs Tribes and States to negotiate the regulatory roles for Class III gaming through the Compacting process, and limits the NIGC's role over Class III gaming to audit review and ordinance oversight and approval."[12]

With NIGC stripped of any significant Class III oversight, the Tribal-State Compacts are absolutely critical to ensuring close, independent, and effective regulatory oversight and strong internal controls. This is consistent with the spirit and intent of the Indian Gaming Regulatory Act (IGRA).

Congress in its wisdom included in the purposes of IGRA the requirement to develop a regulatory structure adequate to "shield (tribal gaming) from organized crime and other corrupting influences…and to ensure that gaming is conducted fairly and honestly by both the operator and players." 25 USC 2702 (2)

> **Chairman Hogen of the NIGC recently stated that "Without independent oversight, he fears the growing gaming industry could become fraught with corruption." [13]**
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> **In a December 9 speech to the Senate, Sen. John McCain, R-AZ. At that time, Chairman of the Senate Committee on Indian Affairs, stated, "I do not believe that self-regulation without oversight is real regulation."[14]**

Jim Sweeney of Copley New Service in the San Diego Union Tribune writes:

In 37 audits conducted since the standards were introduced in January 2001, the federal commission found more than 2,355 violations – an average of 64 per casino. Six audits of California casinos uncovered 410 violations. Federal inspectors commonly found tribes had failed to secure machine jackpots, failed to investigate and resolve cash variances, and had inadequate surveillance. In the process the commission referred more than 30 cases of suspected criminal activity to federal law enforcement agencies.[15]

The Legislature may wish to urge the California Gambling Control Commission (CGCC) which currently has authority to adopt the NIGC MICS as emergency uniform regulations -- applicable under many of the Compacts, to fill the current regulatory vacuum.[16] This is necessary to protect the public from consumer fraud, problem and compulsive gaming and organized criminal infiltration.

It is important to keep in mind the unique nature of the gambling industry is an activity which society has deemed worthy of regulation because of its propensity for criminal and fraudulent behavior. Gambling is not a simple commercial activity like growing and selling rice or making shoes. There are higher risks for money laundering, loan sharking, skimming, rigging the books, sophisticated financial frauds and the funding and its attraction to other criminal activities and enterprises that places casino gambling in a different category from other commercial enterprises.

Enforcement Mechanisms and Review

A significant component that must be included in each and every gaming Compact is the need for enforcement mechanisms. These mechanisms must be both active and proactive. The State can be proactive by (1) inviting Tribes to join the State and review the terms of the Compacts from time to time to ensure appropriateness and effectiveness; (2) Providing a "re-opener" in the Compact for re-negotiations to address new issues as gaming continues to expand; (3) setting up "Meet and Confers" to discuss potential conflicts or disputes between tribes and the State; and (4) providing for an Arbitration process in an attempt to resolve problems before entering the court system.

Preventing difficult and protracted litigation over contentious issues is an important aspect of enforcement mechanisms.

Revenue Sharing – Exclusive Rights

The voters of California gave tribes a lucrative monopoly on March 7, 2000. Citizens voted overwhelmingly (64%) in favor of a limited exception to the State's restrictions on casino-style gaming. The non-tribal taxpayers of California should not be asked to subsidize mega casino resort complexes with scarce funds from local government coffers.

Critics of revenue sharing argue that IGRA provides for the payments to states for regulatory oversight, and does not provide for payments to states for non-regulatory purposes. These same critics point to IGRA's specific language in three areas, the Congressional findings and declaration of policy, the stipulations for use of tribal gaming revenues and the statement of categories of proper subjects to be covered by tribal Compacts. Nevertheless, the Secretary of the Interior is approving or deeming approved Compacts that include revenue sharing payments to States.

The Department of the Interior approves revenue sharing payments on the basis that a tribe is purchasing a valuable right from the State. The payment is considered an operating cost deducted from gross revenues which does not violate IGRA. This payment could be considered under net revenues if used to promote tribal economic development, a use that is clearly sanctioned by IGRA, 25 U.S.C. Section 2710(b)(2)(B)(iii). This satisfies the language of IGRA because the Tribe is exchanging the revenues for an exclusive right to commercial operation of slot machines within the State.

The component of "exclusivity" is important leverage in Tribal-State Compact negotiations. Exclusivity can be authorized in a number of ways. For example, in California only federally recognized tribal Governments may operate slot machines or banking and percentage card games on Indian lands in California.[17] California constitutional law provides no limits or cap on the number of slot machines, banking or percentage card games that could be authorized, but it does provide for a geographic restriction: "…Indian lands in California in accordance with federal law".

The geographical exclusivity component of the 2004/2005 Compacts is currently being litigated. *California Commerce Casino, Inc. vs. Arnold Schwarzenegger*[18] While tribal gaming exclusivity already expressly exists in the California State Constitution this challenge to the *core geographic areas* is being seriously reviewed by the Appellate Court. The success of the challenge remains undecided.

Nevertheless, geographic exclusivity including limited gaming by other entities has been approved by the Department of the Interior in a prior Tribal-State Compact. In a letter addressed to the Honorable Gary Johnson, Governor of New Mexico on November 21, 2001, the Assistant Secretary approved seven Tribal-State Compacts which entitled

Tribes to an unlimited number of slots but precluded non-tribal entities from operating within 100 miles of an Indian casino.

As a means of slowing down the growth of urban gaming, geographic exclusivity was included in the California Lytton Compact prohibiting any other gaming within a 35 mile radius. In Compacts negotiated with Big Lagoon and Los Coyotes, a 40 mile radius zone was created prohibiting any additional tribal gaming facilities that did not meet the same or better terms of those Compacts and receive a two thirds vote (4-0 or better) of the affected City Council. Clearly geographic exclusivity can be used to the benefit of tribal governments to protect its gaming market area.

Nonetheless, the question remains, is the provision of geographic market areas an overreaching of executive authority? The provision creates a system that has never previously been authorized by the State Legislature. Tribal gaming is limited to Indian lands in the California Constitution. Is this an expansion of tribal sovereignty over non-Indian lands? Arguably this language asserts tribal authority over non-Indian people living under the governance of cities and counties who may choose to authorize expanded gaming. Yet tribal governments have no responsibility or obligations to protect the health and welfare of the non-tribal public. Tribal governments suffer no loss of rights, authority or law enforcement or emergency service obligations over lands outside of the exterior boundaries of a reservation. Plainly, the People inherently reserve the right to amend their own initiative statues by further initiatives.

Regulatory Funding:
Lack of Funding through the Special Distribution Fund (SDF)

The 1999 gaming Compacts promised oversight for which the public has a reasonable expectation. The State Legislature has thus far declined to provide adequate funding. The State of California must re-negotiate the tribal Compacts in order to address the lack of funding to the regulatory agencies of the State.

The 1999 Compacts in section 5.2 (c) require the development of legislation that provides for "compensation for regulatory costs incurred by the State gaming Agency and the State Department of Justice in connection with the implementation of administration of the Compact." The Division of Gambling Control (DGC) and the California Gambling Control Commission (CGCC) need employees to perform regulatory tasks, such as background checks of key gaming employees and resources suppliers.

The funding formula in current law was drafted by a committee of Riverside County local governments and Riverside Tribes. San Diego has the same number of casinos as Riverside, yet it gets one seventh as much money. The 1999 Compacts promised that every county would get money to cover the off-reservation casino costs. But while casinos are increasing statewide, the size and allocation of the SDF doesn't reflect this reality.

New and amended compacts must require effective agreements with local governments impacted by casinos so that we can move away from the SDF. The current SDF formula sunsets in 2009 and provides the opportunity and need to re-write the

legislation. The SDF should be allocated to local governments on a player position basis. Each player position whether it is a slot machine or a position at a table game generates approximately 13 car trips per day. These trips include patrons, employees, technical support and vendors. This number of trips creates substantial impacts beyond traffic circulation to be mitigated through this fund.

Environment – local agreements:

Intergovernmental agreements between Tribes and regional governments have become a device of necessity. Both Tribes and local governments whether Cities or Counties have recognized the benefits of negotiated agreements for the effective delivery of services necessary to the successful development of destination casino resorts. The 2004/2005 Tribal-State Compacts established a clear process for the development of judicially enforceable agreements that was fair and comprehensive.

Worker Protections:

Tribal gaming is creating a growing labor force. In many areas there is no affordable housing for these employees. In Riverside County there have been reports of a growing group of homeless identified as the "mobile homeless".[19] Some of these are casino workers living in their cars and parking in different areas each night to avoid arrests of vagrancy. It is in the best interests of these multi million dollar facilities to work with local government to address the shortage in low income housing. In many cases Tribes have failed to provide adequate health insurance to employees or health insurance is provided by taxpayers through California Healthy Families program. Appropriate language for Labor can be found in the 2004 Compacts at section 10.7 Exhibit C:

> **". . .(ii) not express or imply any opposition to Eligible Employees choosing to be represented by a union for purposes of collective bargaining, as guaranteed in this TLRO, nor express or imply any opposition to the selection by Eligible Employees of that particular union to be their representative in collective bargaining or any preference for another union."**

Or better yet, the Quechan Compact adopts all state and federal work place health and safety standards and accepts the jurisdiction of the appropriate State Agencies over these issues. This Tribe's recognition of evolving federal law is both progressive and consistent with the court rulings published over the last several years. International Counsel to UNITE HERE writes:

> **"The federal courts' decisions have made it clear that Native American tribes are not going to be allowed to engage in the businesses indistinguishable by those operated by non Indians but free of any of the regulatory laws to which their non Indians competitors are subject." [20]**

Torts Remedies for Patrons:

The 2004/2005 Compact established a clear process for the resolution of patron tort claims and consumer allegations of cheating. The arbitration process is provided by

JAMS. The Tribes have agreed to pay for the process win or loose. However in the new amended agreements, while the language is provided for arbitration and includes a waiver of sovereignty to the insurance policy, there is also a provision which allows the Tribe to require injured persons to adhere to the tribal Tort Ordinance. Tribal tort ordinances can only be enforced by a tribal government. A plain reading of many of the ordinances indicate they are based on tribal law and tribal customs. How does an injured party access each individual Tribes, tribal law or tribal customs? Who decides when the administrative remedies are exhausted?

> **(D) The Ordinance may require that the claimant <u>first exhaust the Tribe's administrative remedies</u>, if any, for resolving the claim…" (From Sycuan amended Compact)**

Casino Siting and Gubernatorial Concurrence:

IGRA embodies a "national policy" on gaming which often forces casinos into areas of states that would never have supported a casino. Thus it is important in Compacts to make casinos 'site specific'. This is vital as in the 1999 agreements, a number of tribes received compacts that did not have land in trust or the land was acquired well after 1988. Because the Compact lacked site specific language the Bureau of Indian Affairs (BIA) considered the compacts to grant gubernatorial concurrence. This misstep in process prevented many local jurisdictions from effective participation in the fee to trust process.

In May of 2005, the Department of the Interior sent a letter to the Honorable Theodore R. Kulongoski, Governor of the State of Oregon.[21] (The letter has become known as the "Warm Springs Letter") The letter provides the important and necessary guideline for **<u>when to consider</u>** a Tribal-State compact for ratification that has been negotiated and concluded. The Warm Springs Letter represents a shift in federal policy clarifying that there would be no approval of Tribal-State compacts for tribes unless it was for gaming on Indian lands of such an Indian tribe. "Accordingly, under the new policy, suitable land must be taken into trust for gaming before the gaming compact will be approved." This policy restores adequate safeguards to all affected parties to express their concerns through participation in the federal fee to trust process. A process that must precede a Compact for after acquired lands.

Gubernatorial concurrence restores to states authority the control over the "location" of casino development and the "growth" of the industry. The authorization of gubernatorial concurrence[22] found in the Indian Gaming Regulatory Act clearly foresaw the need for 'flexibility' for state governors to locate gaming facilities consistent with long standing state policy regarding class III gaming. Gubernatorial concurrence is an exercise of "executive powers" but only on an *infrequent and episodic* basis. Moreover, in a positive ruling for California in the Proposition 1A challenge, the Ninth Circuit Court of Appeals relied upon the State's restriction of tribal gaming *"to carefully limited locations"* as a reasonable means of serving the State's interest in protecting the public health, safety, welfare and good order.

Problem Gambling:
A Compact has the ability to require significant funding for addressing the impacts of problem and compulsive gambling. Tribes must be required to adhere to the guidelines and comply with the America Gaming Association Code of Conduct. This allows for both voluntarily and involuntarily exclusion from the casino. This provides training of casino personnel to identify problem and compulsive gaming. Help line numbers must be required in casinos as well as on the ATM machines. "More than 350,000 Californians may fall into that category (problem and compulsive), according to the California Research Bureau report, which extrapolated that figure from national studies. A direct study of problem gambling prevalence is California is expected in 2007."[23]

Problem gamblers

Tribal casinos have become the gambling preference of the vast majority of callers to the state's gambling helpline, according to statistics compiled for fiscal years 1999, 2003 and 2005.

	1999	2003	2005
Indian casino	29.6%	78.2%	73.9%
Non-California casino	21.4%	6.9%	6.1%
Card rooms	13.6%	3.9%	7.6%
Horse racing	9.0%	3.5%	2.4%

Source: California Council on Problem Gambling Sacramento Bee/Mitchell Brooks [24]

Legislative Impact on the Business of Tribal Gambling

Legislative power is a critically important power of government; it represents the People. Legislative power is a vital function directing and controlling the whole operation of civil authority and providing a respectful forum for discussion of significant issues of interests to the State. The establishment of tribal gaming facilities and the development of trust lands out of the regulatory authority of the State and the nature of tribal sovereignty affect every public policy in the State. Therefore, Compact ratification must be a thoughtful and deliberate process based on decisive criteria protecting all citizens of the State while permitting and regulating the business of tribal gaming.

The California State Legislature rushed to rubber stamp the 1999 Compacts. The failure of the 1999 Tribal-State compacts is what has created the public and local government backlash to tribal gaming expansion throughout California. The failure of the 1999 Tribal-State compacts extends to both financial and social justice issues. The social economic and political costs to citizens, local government and state agencies resulting from this failure is the primary motivation for compact renegotiation.

Legislative leadership and a committed political will are all that is needed to address the serious and critical problems associated with the growing impacts of the tribal casino industry. The Legislature has a responsibility to create a healthy environment for the tribal gaming industry but also to protect the integrity of gaming and protect the interest of the citizens of California.

The time has come for California regulatory policies to catch-up with California's tribal gaming industry. This task is daunting yet California needs to establish a sound and reasoned gambling policy.

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[1] California Tribal-State Compact Section 10.8. Compare sub-standard language of 1999 Compacts with new language of 2004/05 Compacts.
[2] California Tribal-State Compact Section 10.2(d). Compare sub-standard language of 1999 Compacts with language of 2004/05 Compacts.
[3] Jake Henshaw, Desert Sun, 10-13-06, *Tribes form new committee*
[4] Claire Cooper, Sacramento Bee 12-22-06, *Tribal immunity rejected in political funding case*
[5] Section 12.3 of the 1999 Tribal-State Compact Amendments are governed, controlled and conducted in conformity with the provision and requirements of IGRA, including those provisions regarding the obligation of the State to negotiate in *good faith* and enforcement of the obligation in federal court.
[6] Karyn-Slobhan Robinson, HR Magazine, April 2004, *Calif. tribes battle over workers' comp*
[7] H.R. 4908 108th 2d Session July 22, 2004, a bill giving 990.ac of BLM Land to Pechanga Band of Mission Indians – Land currently used by the public for recreational use, also a significant water shed area for local wells. (This legislation was not successful)
[8] The land exchange described in the Multiple Species Habitat Conservation Plan MSHCP involves approximately 3,800 acres that the Tribe purchased outside of the Reservation area and within the Plan's Santa Rosa and San Jacinto Mountains Conservation Area. It is not known at this time how much of the 3,800 acres would ultimately be exchanged for BLM acreage elsewhere in the Coachella Valley. The stated purpose of the exchange is for BLM to consolidate its holdings in the Santa Rosa and San Jacinto National Monument and for the Tribe to consolidate its holdings in the external boundaries of the Reservation area. The Tribe intends to place the land into trust which will prevent public use and State authority though CEQA over any and all developments. (This exchange at present time is stale.)
[9] Marc Lifsher, Los Angeles Times, 7-4-2004, *Battle Springs Up over Water Rights*
[10] Chet Barfield, San Diego Union Tribune, August 20, 2006, *Neighbors Seeking Water Relief*
[11] 25 CFR Part 291 Class III Secretarial Procedures, Northern Arapahoe of Wyoming and Seminole of Florida.
[12] National Indian Gaming Association Press Release October 20, 2006.
[13] Josh Rabe, The Oklahoman Dec. 2, 2006, *U.S. auditors claim relations with state Tribes still good.*
[14] Peter Hecht, The Sacramento Bee, 12-26-06, *Ruling leaves casino oversight gap*
[15] Jim Sweeney, San Diego Union Tribune, December 17, 2006, *Indian casino watchdogs kept in check*
[16]1999 Tribal-State Compact Section 8.4.1(d) provides the CGCC with the authority to implement in "exigent circumstances" emergency regulation when there is imminent threat to public health and safety
[17] Cal Const. Section 19 Article IV (f)
[18] *California Commerce Casino, Inc. vs. Governor Arnold Schwarzenegger*, Case No. BS097163, Superior Court of the State of California in and for the County of Los Angeles unlimited jurisdiction.
[19] Gregor McGavin, The Press Enterprise, April 20, 2006, *Mobile Homeless*
[20] Richard G. McCracken, Davis, Cowell and Bowe, San Francisco, CA. International Council to United HERE *San Manuel Indian Bingo and Casino Centrally located in the Broad Perspective of Indian Law*
[21] United States Department of the Interior Letter to Honorable Theodore R. Kulongoski, Governor, State of Oregon, May 20, 2005.
[22] **Gubernatorial concurrence has twice been litigated.**

- Once in the 9th Circuit Court of Appeals. The Siletz Tribe sued the Governor of Oregon for refusing to concur. The court upheld gubernatorial concurrence and ruled in favor of the Governor.
- In the 7th Circuit Court of Appeals the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, in an action against the U. S., argued that the Governor of a state was not a Presidential Appointee and therefore violated the Appointments clause of the U. S. Constitution or the principles of separation of powers. The Court upheld gubernatorial concurrence because governors' powers under IGRA are anticipated to be "*episodic and infrequent"* and therefore Constitutional.

Federal law anticipates gubernatorial concurrence to be ***"episodic and infrequent".*** California law limits tribal gaming ***"to carefully limited locations".***

There is a degree of hysteria involved in the off reservation activity, but the hysteria is misplaced in blaming gubernatorial concurrence. The failing in the process is with the improper procedure of the National Indian Gaming Commission for the determination of *"restored lands" or "initial reservations"*.

[23] John Hill, Sacramento Bee, 12-24-06, *Betting Addicts will have new help*

[24] John Hill, Sacramento Bee, 12-24-06, *Betting Addicts will have new help*