

INDIAN CASINOS IN CALIFORNIA

(excerpted from “Gambling in the Golden State 1998 Forward: California Research Bureau”. The full text of this document is found in our [Library](#). Illustrations were inserted by R.A.G.E.)

THE BASIC LEGAL FRAMEWORK

Several key principles underlie the special legal status that American Indian tribes enjoy in the United States. Most importantly, tribes are sovereign political entities with “inherent” rights that preceded European colonization, were recognized in treaties with the colonies and then the federal government, and continue today. The tribes are “...distinct political entities both protected by and subject to the laws and policies of the national government.”



Article I, Section 8 (3) of the U.S. Constitution reserves the power to regulate commerce with Indian tribes to the Congress. Thus tribal status can be modified by Congress but state laws do not apply to the tribes unless Congress consents.

Tribal Gaming

Tribal gaming as an economic development tool began with high-stakes bingo games offered by the Seminole and Miccosukee tribes in Florida in the 1970s. In California, the Cabazon and Morongo Bands of Mission Indians launched card games and bingo in their casinos approximately 25 years ago, leading to a dispute with county and state authorities and threatened criminal action. The legal basis of the dispute was anchored in Article IV, Section 19 (e) of California’s Constitution, which prohibits casino operations:

The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey (adopted by initiative, 1984).



In 1987, the United States Supreme Court found in *California v. Cabazon Band of Mission Indians* (480 U.S. 202, 1987) that federal law authorized gaming on federally recognized tribal lands and that the state did not have civil regulatory authority to proscribe gaming on those lands. The court further reasoned that since the state already allowed local communities to authorize card rooms and charity bingo games, these games did not violate the general public policy of the state and were therefore allowed on tribal lands. Indian gaming is conducted by tribal governments as an exercise of their sovereign rights.

In response to the Supreme Court’s decision in *Cabazon*, Congress enacted the Indian Gaming Regulatory Act (IGRA) to provide a statutory basis for the operation of gaming by Indian tribes on Indian lands, “...as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments...” IGRA created a comprehensive

regulatory framework, dividing Native American gaming into three categories or classes, each of which differs as to the extent of federal, tribal and state oversight. IGRA also established the National Indian Gaming Commission (NIGC) to exercise general regulatory oversight.

While class I traditional and social games are subject only to tribal government regulation, and class II games such as bingo are subject to tribal and federal oversight, class III casino-type gaming is regulated by the tribes, states and the federal government. In order for tribes to operate casino-type class III games, IGRA requires that a tribal-state compact be adopted. A tribe that wants to conduct class III gaming must formally request that the state enter into compact negotiations. Once approved by the state, the compact must be submitted to the Department of the Interior, which has 45 days to approve (sign or take no action) or disapprove it. NIGC approval is also required for tribal gaming ordinances and casino management contracts.

CLASS III INDIAN GAMING IN CALIFORNIA

Between 1990 and 1992, the State of California, through the California Horse Racing Board, entered into four compacts with federally recognized tribes to allow off-site betting on horse races on their lands. (The Board no longer has statutory authority to negotiate with tribes on behalf of the State.)

Then-Governor Wilson was resistant to expanding casino gambling to tribal lands. Nonetheless, some tribes installed a variety of video pull-tab games (under the legal theory, since disproved by the courts, that they were class II games) and nonbanked versions of Nevada casino games, leading to numerous legal actions.

In 1996, some California tribes had an estimated 496 table games and 14,407 video slot machines in their casinos, taking in more than \$652 million.⁴⁸ Thus there was large-scale class III gaming but no tribal-state compact as required by federal law, a violation of IGRA and the federal Johnson Act.

Also in 1996, in *Seminole vs. Florida*, the U.S. Supreme Court struck down as unconstitutional a provision in IGRA that permitted tribes to sue a state for failure to negotiate a compact in good faith. This decision increased states' negotiating leverage with tribes desiring to establish and/or expand gambling operations on their lands, and "...set the stage for highly politicized compact negotiations."⁴⁹ It is not clear, outside California, that a tribe has an effective legal remedy should a state refuse to negotiate a compact.*



California State-Tribal Compacts for Class III Gaming

In 1998, Governor Wilson entered into a compact with the Pala Band of Mission Indians, a non-gaming tribe, after 17 months of negotiations, permitting specific types of class III gaming on tribal lands. Ten other tribes subsequently signed similar agreements, which were approved by the legislature in August 1998. However other tribes found the compacts' provisions to be intrusive into traditional Indian sovereignty and circulated an initiative to essentially overturn the Pala compact. Concurrently the U.S. Department of Justice had forfeiture and injunction actions underway to seize tribal slot machines from gaming tribes operating without tribal-state compacts.

In November 1998, California voters approved Proposition 5, the "Tribal Government Gaming, and Economic Self-Sufficiency Act of 1998," by 63 percent. The initiative sponsored by the tribes authorized the full range of gambling on Indian lands in the state. At that time, this was the most expensive initiative campaign in U.S. history, with the tribes investing nearly \$70 million in support and Nevada casinos \$26 million in opposition. However since Proposition 5 was a statutory initiative, and the prohibition against casino gambling was in the state's Constitution, the state Supreme Court found the initiative to be unconstitutional in a 1999 decision.



Nonetheless, a number of tribes continued to operate an estimated 20,000 slot machines in about 40 casinos. Christiansen Capital Advisors estimated that California tribal casinos generated between \$800 million and \$1 billion in gross gambling revenues in 1999, while operating in a questionable legal environment that impeded ready access to capital for facilities. Many of the slot machines were supplied by companies under revenue-sharing agreements.

In March 2000, two-thirds of the state's voters voted in favor of Proposition 1A, which was placed on the ballot by the governor and the legislature and supported by more than 80 of the state's 108 federally recognized tribes. Proposition 1A authorized the governor, with the approval of the legislature, to negotiate and conclude compacts for the operation of slot machines, lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands. Proposition 17, passed in the same election, enabled the legislature to authorize private, nonprofit organizations to conduct raffles [*California Constitution*, Article IV, Section 19(f)]. The adoption of Proposition 1A provided a legal basis for tribal gaming in California.

In anticipation of the passage of Proposition 1A, in September 1999, Governor Davis and 58 of the state's 108 federally recognized tribes signed 20 year compacts giving the tribes a monopoly on slot machines and house-banked card games in the state. Sixty-one tribes ultimately signed the compacts, which were ratified by the legislature. In 2003, the Ninth U.S. Circuit Court of Appeals found Proposition 1A to be constitutional.

In 2004, an initiative sponsored by card rooms and horse tracks (Proposition 68) to allow card rooms and five tracks to have slot machines was defeated, receiving only 16.3 percent of the vote after the sponsors spent \$27 million. Proposition 70, sponsored by the Agua Caliente Band of Cahuilla Indians and several other Southern California tribes to expand Indian gaming, was also defeated in that election. Sponsors spent \$30.6 million.

The Proposition 1A Compact

The 37 page tribal-state gaming compact negotiated by Governor Davis and tribal leaders in September 1999, was hastily drafted over a 16 day period, with no public hearings or review. The compacts authorized the tribes to use up to 350 slot machines each, or more if they had more in operation as of September 1, 1999. Tribes could also purchase licenses to use as many as 2,000 machines. They could establish and operate up to two gaming facilities, offering slot machines and house banked card games. In addition, the tribes could offer class II games (bingo etc.), which the state does not regulate. The compacts were among the first in the nation to contain payments for non-gaming tribes, and to allow collective bargaining among casino employees.



The compact, signed by 61 tribes, has been subject to varying interpretations, sometimes resulting in litigation. Key terms are vague, leading to disputes such as over the number of slot machines allowed, which ranged from Governor Davis' figure of 45,000 to the Legislative Analyst Office's estimate of 113,000. The California Gambling Control Commission eventually placed the number of authorized slot machines at 61,957. The state's Indian casinos currently have around 58,100 slot machines in operation (although 66,507 have been authorized by the Commission), as well as 1,820 table games.

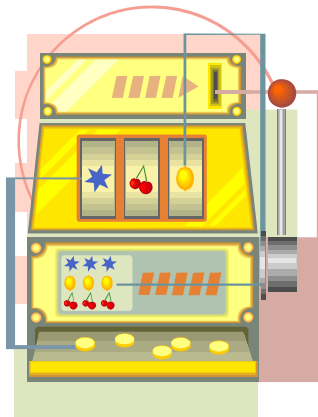
The compacts established a Revenue Sharing Trust Fund (RSTF), which is funded by fees paid by gaming tribes with licensed slot machines for distribution to non-compact tribes (defined as tribes with less than 350 slot machines). The compacts provide that non-gaming tribes are to receive \$1.1 million annually. As of September 2005, \$148 million had been distributed to eligible tribes. Including interest, payments to the fund totaled \$154.6 million.

Tribal contributions do not generate sufficient revenue to allow the RSTF to provide \$1.1 million annually to all non-gaming tribes, resulting in an aggregate shortfall to all eligible recipient Indian tribes in fiscal year (FY) 2004-05, of \$48,483,757, or \$692,625 per tribe.⁵² Government Code §12012.90 provides that the shortfall is to be paid from the Special Distribution Fund (SDF) through the state budget process.

The 1999 compacts provide that up to 13 percent of "net win" (the difference between gaming wins and loses before deducting costs and expenses) from slot machines in op-

eration on September 1, 1999, is contributed to the SDF. Tribes that did not have these gaming devices in operation prior to September 1, 1999, are not obligated to pay into the SDF. The funds can be appropriated by the legislature through the budget process for any purpose including, but not limited to, gambling addiction programs, reimbursement of regulatory costs, grants to state and local governments impacted by gaming, and to cover shortfalls in the RSTF. Payments to the SDF began in 2003, and totaled \$368.7 million (including interest) through September 2005. The fund has a balance of about \$92.9 million for FY 2005-06.

The 1999 compacts will expire at the beginning of 2021. However they provide for renegotiation at the request of either tribal leaders or the governor under specific circumstances. These include unresolved environmental issues in the development of a gaming facility, and/or a tribe's desire to operate more than the 2,000 gaming devices allowed by the compact. The compacts were opened for renegotiation over environmental issues in 2003, but Governor Davis sent a letter to tribes rescinding his formal request to renegotiate before he left office later that year.



In 2003, three tribes, the La Posta Band of Mission Indians, the Santa Ysabel Band of Mission Indians and the Torres-Martinez Desert Cahuilla Indians negotiated tribal-state gaming compacts with the Davis Administration that introduced revenue-sharing with the state (payments to the General Fund) for the first time. These compacts also contain stronger environmental language, requiring tribes to reach agreements with local governments on off-reservation impacts.

The La Posta and Santa Ysabel compacts provide that five percent of the net win from up to 350 gaming devices will go to the state, and that the tribes will enter into memoranda of understanding with local governments to mitigate the impact of their casinos. The Torres-Martinez compact creates a sliding scale beginning with three percent of net win the first year and topping at five percent the third year. These tribes do not currently have operating casinos.

The Schwarzenegger Compacts

Thirteen new or amended compacts have been negotiated between tribes and Governor Schwarzenegger, of which eight have been ratified by the legislature. These compacts build on the Davis Administration compacts and contain provisions providing for greater revenue sharing with the state, enhanced patron protections, stronger environmental, labor and building safety provisions, and most recently a problem gambling program. They also require agreements with local governments. These compacts are likely to be seen as models in future compact negotiations, a possibility opposed by some tribes.

- In January 2004, the governor successfully entered into negotiations with nine tribes; six were parties to the 1999 tribal-state compact and sought to offer more gaming devices, and three sought to enter into compacts for the first time. One of the new compacts, with the Lytton Rancheria of California, was not ratified by the legislature due to controversy over its proposed location and size. The other new and amended compacts were ratified, resulting in a total of 66 tribes with tribal-state gaming compacts in California (four of those tribes do not have casinos).
- In 2005, the governor negotiated four compacts (one amended, three new) that have not yet been ratified by the legislature. Compacts with the Yurok, Quechan, Big Lagoon Rancheria and Los Coyotes Band tribes were opposed by “smaller, powerful tribes with big casinos” who do not support some of the new provisions in the compacts, according to press accounts.

The casinos proposed in the Los Coyotes and Big Lagoon tribal-state compacts would be located in Barstow, where neither tribe has federal trust land. The tribes would have to secure federal and state approval and demonstrate local community support in order to gain federal trust land for gambling purposes, a long and uncertain process.

The Quechan tribe has sued the state in federal court alleging bad-faith by virtue of the Legislature’s failure to ratify the negotiated compact amendment, requesting that a mediator be empowered to choose the “last best offer” as a compact binding between the tribe and the state. If successful, this suit could obviate legislative ratification of the amended compact.⁵⁴ The tribe wants to build a larger facility with up to 1,100 slot machines in a better location than its existing casino. According to court filings submitted by the tribe, 67 percent of its members are unemployed.



The new and amended 2004-05 tribal state compacts strengthen Indian gaming exclusivity and in some cases allow more than 2,000 gaming devices per casino. Gaming devices are defined to include instant lottery game devices and video poker as well as slot machines, expanding the range of games that can be offered.

Tribal parties to the 2004 amended compacts agreed to fund a \$1 billion state transportation bond and share revenues with the state. These tribes make payments into three accounts: the Revenue Sharing Trust Fund, the state General Fund (based on the number of slot machines added since the amended compacts took effect), and a transportation bond fund.

All the recent compacts contain increased revenue sharing provisions with the state from ten to 25 percent of annual net win. However, the definition of annual net win is different from that typically used by the gaming industry and in the 1999 compacts. It allows deduction of limited operational expenses, including leasing fees for gaming de-

vices, thereby decreasing the revenue base on which payments to the state are calculated. As of September 2005, \$20 million had been contributed to the state's General Fund.

Unlike the 1999 compacts, the Schwarzenegger compacts require tribes to reach Memoranda of Understanding (MOUs) with local governments. The MOUs are to address local land use, environmental and public safety issues, as well as mitigate local impacts, such as increased traffic, that require infrastructure investments and increased police and fire services. These MOUs are enforceable in state superior court under a limited waiver of sovereign immunity.



The Viejas Band of Kumeyaay Indians recently agreed to pay San Diego County more than \$1.2 million for road improvements to address impacts of a planned \$18 million casino expansion, the first agreement reached in the county under the compacts negotiated by Governor Schwarzenegger. The tribe's expanded casino will have 2,500 slot machines, 68 table games, a 900-seat bingo hall and off-track betting. In addition, the neighboring Ewiiapaayp Band plans to develop a second casino on Viejas land, 24 California State Li-

brary, California Research Bureau pending federal approval, a plan endorsed by county supervisors as a means of concentrating the casinos' impact.

According to news accounts, the California Nations Indian Gaming Association, an association of 63 tribes, is developing guidelines for future compacts, "...driven by gaming tribes who fear that the Schwarzenegger administration is piecing together a tough template for the compacts." The tribes reportedly want to limit the amount of revenue the state can seek and to avoid other concessions such as collective bargaining and local impact agreements.