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GAMING IN CALIFORNIA:
OR WHEN IS VIDEO KENO A SLOT MACHINE?

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INDIAN GAMING PAPER

I. SYNOPSIS

I. Gaming in the United States is big business, ranking just behind the nation's theme parks in dollar volume but ahead of the money spent on tickets for movies, theater, opera, and concerts. In 1994 there were 125 million visits to casinos at which some $36 Billion was lost, and last year the amount was up to $40 Billion. Gaming is fast growing with volume having doubled in five years. Indian gaming is growing faster yet with revenue doubling in only two years to $3 Billion in 1994 and some 200 Indian tribes participating nationwide. The largest Indian facility, the Foxwood Casino in Connecticut draws 15,000 visitors per day. In California there are some 262 card parlors in 145 cities and, in addition, 20-some tribes own gaming facilities with another 45 seeking approval.

A. In California the State Constitution and Penal Code were originally very restrictive prohibiting lotteries and games of chance; banking or percentage card or dice games; roulette; bookmaking; slot machines; or similar games of chance. This comprehensive legislative scheme has been eroded by the following amendments to the prohibitory provisions of Article IV, Section 19 of the California Constitution:

a. Horse racing and wagering permitted since 1933 (Business and Professions Code Sections 19400, et seq.).

b. Charitable bingo permitted in 1966 (Penal Code Section 326.5).

c. State Lottery permitted in 1984 by Proposition 37 (Government Code Sections 8880, et seq.).

d. Games of skill permitted in card clubs authorized by the local jurisdiction (Business and Professions Code Sections 19800, et seq.) [although these are outside of the Constitutional prohibition by definition].

A. The most important exception to the statewide policy against gambling is the State Lottery. State Lottery revenue is allocated: 50% prizes; 34% education; 16% administration. The Lottery is prohibited from conducting games using the "theme of" bingo, roulette, blackjack, poker, or slot machines, and no computer terminals may dispense coins or currency to players (Government Code Section 8880.28).

A. Notwithstanding such restrictions, in 1992 the Lottery began to conduct keno using computer terminals with video monitors. The gambler wagers an amount on 20 numbers selected from a card with 80 numbers. Every 5 minutes the central computer selects numbers, and the retailer can immediately pay off up to $599. In Western Telecon v. State Lottery (1995), the California Court of Appeal determined that

this keno game was a permitted lottery and refused to address whether the game was a prohibited slot machine, noting that as formatted, the terminal could not discharge coins or currency (although the retail owner could). Although on appeal, the case would permit the Lottery to conduct games with machines performing the same function as slot machines as long as the machine did not have "symbols like slot machines" or actually dispense money.

A. Another significant exception to the State's gambling policy are card clubs in which card games of skill are played, such as poker, where players play against each other instead of the house and pay a fee per hand or per time period for the right to play. Card clubs are regulated concurrently by state and local ordinance. A state license requires an investigation of the applicant's criminal record and financial background. Moreover, Business and Professions Code Section 19819 requires, after 1983, that any community wishing to authorize new card clubs must have the voters approve a measure permitting card clubs in the community. Generally, such measures have been difficult to pass and have failed except in unique circumstances. There has been a concern with criminal activities in card clubs. In general, the concern with the lack of strong state regulation and the lack of local regulation due to the economic and political influence of the card clubs in their local communities has led to an effort to adopt a more restrictive statewide scheme, spearheaded by Assemblyman Phil Isenberg (AB 2803). Conflicts over these legislative proposals have led to the enactment of a 3-year moratorium on new or expanded card clubs (SB 100). These conflicts seem to have been resolved by the Senate Democratic Leader Bill Lockyer and Attorney General Lungren's announcement in February 1996 of SB 1887.

A. "The relations of Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." Cherokee Nation v. Georgia (1831). Indian tribes are "dependent sovereign nations". The federal government has a trust responsibility of guardianship to its wards. Much of the source of federal authority comes from the Indian Commerce Clause of the Constitution allowing Congress to regulate "commerce" among the several states "and with the Indian tribes" (Article I, Section 2, Clause 3). State laws regulating the tribes are preempted by the Supremacy Clause of the Constitution (Art. VI, cl. 2).

A. In 1953 Public Law 280 was enacted giving a number of states, including California, certain jurisdiction in Indian country. With respect to criminal jurisdiction, the grant of jurisdiction was held to be broad. However, the United States Supreme Court construed almost identical language dealing with civil jurisdiction narrowly holding that it only made the state judicial system available to resolve disputes between private parties. Thus, the Court held that the states' civil jurisdiction over the Indian country did not permit imposition of a statewide personal property tax on a mobilehome. Bryan v. Itasca County (1976).

A. In 1987 the United States Supreme Court, in a 6-3 decision in Cabazon Band of Mission Indians v. California, approved the Cabazon Band's conduct of a high stakes bingo game within their gaming club even though state law only permitted charitable bingo. The Court ruled that since the State permitted a substantial amount of

gambling activity (including charitable bingo, card clubs, and the State Lottery), the State's legislative scheme was regulatory rather than prohibitory, and rather than having broad criminal authority under Public Law 280, the State's regulatory/civil reach was limited and did not extend to the reservation. (The Court was forced to unconvincingly distinguish Washington v. Confederated Tribes of Colville Indian Reservation (1980) wherein the Court upheld the collection of state sales tax on non-Indian customers from the sale of cigarettes at a tribal smoke shop).

A. The Cabazon decision created the potential for unregulated expansion of Indian gaming. In response, in 1988 Congress adopted the National Indian Gaming Regulatory Act, 25 USC 2701, et seq. ("IGRA"). The Act defined three classes of gaming: Social/traditional games (Class I); games permitted by state law but not banking card games or "electronic facsimiles" of any "game of chance or slot machine of any kind" (Class II); or all other games (Class III). A National Indian Gaming Commission was created to oversee Indian regulation of gaming. Tribes were to adopt regulatory ordinances requiring tribal ownership; auditing of the facility and all significant contracts; background investigations; and limiting allocation of revenues. Moreover, Class III Games could only be conducted pursuant to a state compact. If the state refused to negotiate, the federal courts were given jurisdiction to compel negotiation, and ultimately the Secretary of the Interior could promulgate regulations without state consent.

A. The National Indian Gaming Commission promulgated rules broadly defining what games constitute Class III Games subject to negotiation with the state. In Cabazon Band, et al. v. National Indian Gaming Commission (1994), the D.C. Circuit upheld the regulations against attack by the Cabazon Band and other tribes, ruling that although pull-tabs, like bingo, were a Class II Game, but when computerized, they became an "electronic facsimile" of a game of chance and were, therefore, not permitted except though a state compact.

A. States have generally refused to negotiate compacts permitting Class III Games. The Second Circuit in Mashantucket Piquot v. State of Connecticut (1990) found Connecticut's refusal improper relying on Cabazon v. California. Connecticut allowed charitable "Las Vegas Nights". Since the State permitted a substantial amount of gaming, its legislative scheme was regulatory, and it was required to negotiate. The Ninth Circuit, departing from its Cabazon precedent and ignoring the Second Circuit, ruled to the contrary in 1995 in Rumsey Indian Rancheria v. Wilson. Finding a "plain meaning" analysis more useful than the regulatory/prohibitory distinction, the Ninth Circuit said that the electronic gaming machines were slot machines prohibited by California law. "IGRA does 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." (At 1257-1258.) This decision is on appeal to the Supreme Court.

A. The paradoxes of this ruling are too rich for words. It was the Ninth Circuit which laid the ground work for the majority opinion of the Supreme Court in Cabazon, yet in Rumsey the Ninth Circuit seemed to follow the dissenters' approach in Cabazon. In Cabazon the Ninth Circuit ruled that if the state permits some legalized

gambling, then it loses criminal jurisdiction to prohibit the forms of gambling which it otherwise prohibits. However, in Rumsey, the Ninth Circuit argues that the state need not negotiate a compact to permit Class III Games otherwise prohibited in the state. But how does the state enforce its criminal statutes since under Cabazon it has lost jurisdiction? Moreover, what do we make of the State Appeals Court decision in Western Telecon which says that electronic keno can be conducted by the State Lottery even though it may technically be an electronic slot machine as long as no money is dispensed. Does this not undercut the Ninth Circuit's position that electronic gaming machines are prohibited by California law?

A. Notwithstanding the evidently surprising decision of the Ninth Circuit in Rumsey, it is just possible that the Ninth Circuit has captured the mood of the United States Supreme Court. The 1987 Cabazon decision was a 6-3 decision. Only Chief Justice Rhenquist of the six Justices in the majority remain, and Justices Stevens, O'Conner, and Scalia joined in a blistering dissent. The dissent ridiculed the argument that because some gaming was permitted, the state lost the right to sanction the specific forms of gaming criminal elsewhere in the state, saying, "[This argument] is tantamount to arguing that driving over 60 miles per hour is consistent with public policy because the state allows driving at speeds of up to 55 miles per hour." (At 224-225) This is the same rationale adopted by the Ninth Circuit in Rumsey so the outcome of the Rumsey appeal is anyone's guess.

A. The enforcement dilemma implicit in Rumsey is brought to the fore in Sycuan Band v. Roache, also decided by the Ninth Circuit in 1994. The State seized electronic pull-tab games and sought to prosecute several persons. Here the Ninth Circuit followed Rumsey saying that the State had no criminal jurisdiction under Public Law 280 since its legislative scheme was regulatory. Moreover, IGRA provides that if the State's criminal laws do apply, prosecution is vested in the federal authorities. The State has been reduced to trying to seize the machines on the freeways before they enter Indian country. However, the Ninth Circuit has recently reaffirmed that Federal authorities can prosecute gambling violations in a case involving the Cabazon Casino. United States v. E.C. Investments. The case held that it is the conduct of an "illegal gambling business" in violation of 18 USC Section 1955 for persons to operate video keno, poker, and other machines which are slot machines contrary to Penal Code Section 330(b). However, in general, the federal authorities are taking a wait-and-see attitude with respect to enforcement as the Rumsey and Western Telecon cases wind their ways through the appeal process.

A. Besides the conflicting approaches by the Second and Ninth Circuits on whether negotiation of a compact is required, an interesting variation is the Eleventh Circuit's 1994 decision in Seminole Tribe v. Florida and Poarch Creek v. Alabama. In these consolidated cases, the Eleventh Circuit ruled that the provisions of IGRA giving the federal courts jurisdiction to compel negotiation of a compact violated the sovereign immunity of the states and were unconstitutional under the Eleventh Amendment to the Constitution. However, the Court also ruled under the severability provisions of IGRA that since the courts had no jurisdiction, the Secretary to the Interior was empowered to promulgate regulations without the benefit of the negotiation process.

A. All of the above dilemmas and contradictions have been a part of Palm Springs' complicated relationship with gaming. Within Palm Springs, alternating sections (square miles) of land are a part of the 31,000-acre reservation of the Agua Caliente Band of Cahuilla Indians. The Tribe, watching the success of their neighbors, the Cabazon Band, and two other tribes in the Coachella Valley, the Tribe became interested in gaming as a means of economic development. They selected Caesars World and entered an agreement in July, 1993, for the financing and development of a $25 Million facility in downtown Palm Springs. For two to three percent of the gaming revenue, on September 7, 1994, the City's Redevelopment Agency approved a Disposition and Development Agreement agreeing to assist in site acquisition of certain parcels and to provide up to a $1.5 Million write-down of the land. The City was won over by its need for economic development downtown and the belief that if the Indians and Caesars had the ability to proceed without the City anyway, City involvement would assure a better project with more widespread benefit.

A. The Agency was sued first by two citizens and then by Attorney General Dan Lungren. In general, these suits contended that the City had never received voter approval of a gaming facility pursuant to Business and Professions Sections 19800, et seq.; that illegal Class III Games were intended within the facility; that when the City sold land to the Tribe, the State was divested of legal authority to protect the health, safety, and general welfare of the patrons; and that the City could not, through the guise of an agreement with the Tribe, do what it was not authorized to do otherwise. Although the Agency contended that the transaction was legal, the courts never reached these arguments ruling on November 7, 1994, and December 30, 1994, that the Tribe was an indispensable party to the transaction since they were a party to the contract, that the Tribe could not be sued without its consent, and that since the Tribe did not consent to be sued, the lawsuits must be dismissed. The cases are now on appeal.

A. While the litigation was ongoing, Caesars backed out of the project. This was, in part, because they could not get their contract with the Tribe approved by the National Indian Gaming Commission for a long enough period of time to finance the project. Perhaps as significant, at another Coachella Valley location, a tribe surreptitiously brought in electronic pull-tabs when the facility did poorly as a card club. The State of Nevada began proceedings to revoke the Nevada license of the Tribe's Nevada partner since California contended the games were illegal. The Nevada entity was forced to abandon a $10 Million investment. This certainly had to be of concern to Caesars. After their withdrawal, as an interim measure, the Agua Caliente Tribe modified their existing Spa Hotel and commenced a gaming operation, including the operation of 150 allegedly illegal electronic games.

A. Watching the actions of the Tribe, other interests in Palm Springs have also sought the benefit of gaming including an entity controlled by DeBartolo Corp., owners of the struggling downtown Desert Fashion Plaza Mall (and San Francisco 49ers). A card club measure was first presented to the Council which the Council declined to adopt due to opposition from the Tribe. Thereafter, an initiative measure was circulated which received three times the required signatures and was then adopted in November

1995 by a vote in excess of 60 percent. The effect of this measure is clouded by the statewide moratorium on new card clubs, although the measure was adopted before January 1. Finally, recognizing that the economic benefit of card clubs may be limited, a statewide ballot measure is being circulated to allow a further amendment to the State Constitution to permit Class III Gaming in Palm Springs. Evidently, half of the required signatures have so far been collected. This measure would probably strengthen the Indian argument for Class III Gaming since these games would now be permitted for some non-Indians.

I. INTRODUCTION

A. GENERAL

Gambling in America has traditionally been defined as a moral issue. Because of these moral issues: that gambling is contrary to the Puritan work ethic, that gambling addition is a social problem, that organized crime infiltrates and sponsors gambling; state and federal law has generally sought to prohibit or severely regulate gambling.

In the last decade two new perspectives have caused gambling to be seen in a new light. The first perspective is one of economic development. States and cities suffering financial distress have seen other states and cities discover gambling as a revenue source. Thus, California has turned to the State Lottery to raise money for education while cities have looked at the economic success of card clubs in Commerce, Bell, Bell Gardens, and other communities.

The second perspective is the effect of gambling in creating economic opportunity for a minority group in our society, native Americans (who we will refer to as Indians hereafter), a now protected class who have historically suffered misappropriation of property and discrimination to a level difficult for us to reconcile with the principles of our nation. Many reservations without any other significant resources have become vested with economic potential because of the development of Indian gaming law and the ability to market gaming opportunities not otherwise permitted by state law.

In no particular order of importance, this paper will develop some of the following issues:

What criminal or civil jurisdiction do states have in Indian country?

Congress has established the principle that Indian tribes should enjoy the same right to gaming as enjoyed by other persons in the state, but certain games should only be permitted through a negotiated compact between the state and the tribes. If a state's rules are somewhat inconsistent in the treatment of various games, must the state negotiate a compact only to the degree it permits the specific games, or must it allow all games in the class of games because some are permitted?

Can Congress give jurisdiction to the federal courts to order states to negotiate gaming compacts?

If states are not able to enforce certain criminal statutes in Indian country, can federal authorities be given the power to enforce state statutes in Indian country?

Does the fact that California permits wagering on horse racing, charitable bingo, card clubs, and the State Lottery mean that California merely regulates but does not prohibit gambling such that the State cannot enforce the prohibitions in the Penal Code against slot machines against the tribes?

Is the State Lottery's video keno game a "slot machine" within the meaning of the Penal Code, does the Lottery Act supersede the Penal Code, and are the tribes entitled, therefore, to conduct video keno or slot machines?

What level of state regulation is appropriate for the state's card clubs?

Is it proper national policy for Indian tribes to find economic health by being a safe haven where gambling can be conducted in a manner different from other parts of the state and where the tribes are, essentially, marketing an exemption from state gambling laws?

Is it appropriate for the Governor to refuse to negotiate compacts with the tribes until the tribes have removed the questionable games, and should the issue of good faith at the time of installation be relevant?

What should federal enforcement policy be while these issues are being litigated?

Will the changed composition of the United States Supreme Court cause it to follow the Ninth Circuit in taking a decidedly different approach to these issues from its 1987 ground-breaking decision in Cabazon Band v. California in the current case on appeal Rumsey v. Wilson?

Will the California Supreme Court deal with the conflict between the Lottery Act and Penal Code in the treatment of slot machines, and how will this effect the issues in Rumsey?

As City Attorney for Palm Springs, we have been in the center of this rapidly evolving story. Portions of downtown Palm Springs are within the Reservation of the Agua Caliente Band of Cahuilla Indians. When the Tribe saw other tribes succeeding with gaming, they turned to Caesars World to develop a $25 Million downtown casino. The City of Palm Springs supported the project in order to assist the City's struggling downtown core. We negotiated an agreement to provide Redevelopment Agency assistance for the project in exchange for a portion of the revenue from the facility. We then successfully defended the transaction from a lawsuit brought by the Attorney General, Dan Lungren. In the meantime, the City's Gambling Task Force recommended

adoption of a card club ordinance, which ordinance was eventually adopted by the voters just before a three-year state moratorium on new or expanded card clubs went into effect on January 1, 1996.

In trying to steer the City through these transactions, we have had to become familiar with the many legal developments in this area. The cases are complicated and contradictory, filled with subtle distinctions. The issues turn out to have Constitutional implications and go to the heart of our federal system and the relationship between the federal government, the states, and the tribes, those dependent sovereign nations which predated our own government.

The foregoing are just the highlights. The twists and turns of this story cannot really be given full justice in this paper. Nevertheless, I will try to explain the legal background of gaming in California, both non-Indian and Indian gaming, and then use this as a context to explain developments over the last several years and outline where gaming is headed.

A. GAMING IN THE UNITED STATES

Before plunging into this subject, it is useful to give some facts concerning gaming in the United States and particularly in California. Some form of gaming is permitted in all states of the United States except Hawaii and Utah. For several decades this has been the primary industry in the State of Nevada, but gaming began to be seen as an engine for economic development after Atlantic City, New Jersey, turned to gaming in. Now 36 states and the District of Columbia conduct state lotteries. As a recreational industry, gaming ranks just behind the nation's theme parks in dollar volume but ahead of cumulative ticket sales for movies, theater, opera, and concerts. In 1994 there were 125 million casino visits and some $36 Billion lost while the estimate last year was $40 Billion (this is up from $10 Billion in 1982). Thus, gaming is a major competitor for the entertainment dollar. (See Report 104-440 of House of Representatives accompanying HR 497, p.4; Time, "No Dice," April 1, 1996.)

Indian gaming is coming to be an increasingly important part of the gaming picture, as revenue from casinos on Indian reservations doubled in only two years from $1.5 Billion in 1992 to $3 Billion in 1994 and now estimated to be $6 Billion. A major impetus to Indian gaming came when the 217-member Mashantucket Pequot Tribe in Connecticut was given a state monopoly on the development of an Indian casino, and in January 1993 opened the Foxwood facility. This facility now has over 3,00 seats, more than 5,000 slot machines, draws 15,000 visitors a day, and is reported to have earned as much as $20 Million in profit in one month. Some 200 tribes in the nation are now engaged in some form of gaming.

In California, over $8 Billion was wagered in card clubs last year, which is some 20 percent of the gaming industry. This is four times as much as was spent in the State's Lottery. There are some 262 card parlors in 145 cities, and the growth has been tremendous. The some 1,500 card tables established in 1992 have grown to over 2,000 with applications before the Attorney General's office for another 3,000. In one year

earnings grew 134 percent. (Desert Sun, "13 Cities in California Vote on Cardroom Legislation," November 5, 1995.)

Despite this record of growth, gaming continues to be a highly controversial recreational activity. Congress is now proposing to establish a National Gambling Impact and Policy Commission, and the Report of the House Committee on Judiciary accompanying HR 497 provides interesting information concerning some of the negative perceptions on gaming (Rept. 104-440). The bankruptcy of a planned $800 Million Harrah's Casino in New Orleans has brought negative attention to the industry. Nine states which were recently considering gaming measures have defeated them. (Time, "No Dice," April 1, 1996.) A California Field Poll in August 1995 showed that 51 percent of the respondents opposed the expansion of gaming in California. (Desert Sun, "For the 3rd Time, State Rejects Gaming Panel," September 8, 1995.) In California seven of the last eight cities to consider gaming prior to November of 1995 defeated the measures. In November 1995, outside of the Coachella Valley where gaming measures passed in the Cities of Palm Springs and Coachella, gaming measures were soundly defeated in a number of cities ranging from the 80-20 margin in the City of Ontario to the 55-45 percentage in the City of Pomona. (Desert Sun, "Voters Reject Four Cardroom Measures; One Passing by 22 votes," November 9, 1995.)

It is this strong opposition to gaming that makes Indian gaming such an anomaly. As we shall see, the current California regulatory scheme gives residents a decisive voice in determining whether gaming can be introduced to their community. However, federal law allows all Indian tribes within a state to enjoy all forms of gaming which are permitted by state law subject to negotiation of a state compact. Moreover, as Indian tribes are dependent sovereign nations of the federal government, and as the Supremacy Clause gives federal law precedence over state law, Indian tribes are able to engage in whatever form of gaming is permitted by judicial interpretation of state law without being subject to any regulation of their facilities on the part of the state. This, then, creates a situation rife for political intrigue and legal conflict.

A. DEFINITION OF TERMS: CLASSES OF GAMING

Anyone familiar with lansquenet, rouge et noire, rondo, tan, fan-tan, and hokey pokey (all games prohibited by Penal Code 330) probably needs no definition of terms. for others, some definitions are helpful. In California we have traditionally distinguished between card club gaming and casino gambling. "Card club gaming" refers to those games legalized in the Business and Professions Code as games of skill. Casino gambling is used imprecisely in the California Constitution referring to "casinos of the type currently operating in Nevada and New Jersey" (Article IV, Section 19). Such casinos are illegal in California.

Terminology frequently used is to refer to games as being "banked" or "percentage." In a "banked" card game the gaming operator participates in the game with the players and acts as the house bank, paying all winners and retaining the losing players' losses. In a "percentage" card game the gaming operator has no interest in the outcome of the game but takes a percentage of all amounts wagered or won. These games are the

type played in casinos. See Rumsey Indian Rancheria v. Wilson, 64 F.3d 1250, 1255 fn. 2 (9th Cir. 1994) and Huntington Park v. County of Los Angeles (1988) 206 Cal.App.3d 241.

Since the adoption of the Indian Gaming Regulatory Act ("IGRA") enacted as Public Law 100-497 in 1988 and found at 25 U.S.C. 2701, et seq. (hereinafter referred to as IGRA,) we have come to refer to gaming as "Class I", "Class II", or "Class III". In Section 2703 IGRA provides:

> "(6) The term 'Class I Gaming' means 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.
> "(7)(A) The term 'Class II Gaming' means . . . (i) the game of chance commonly known as bingo (whether or not electronic computer or other technologic aids are used in connection therewith) . . . (ii) card games that . . .
> "(I) are explicitly authorized by the laws of the State, or
> "(II) are not explicitly prohibited by the laws of the State and are played at any location in the State . . . but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.
> "(B) The term 'Class II Gaming' does not include . . . (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or (ii) electronic or electro-mechanical facsimiles of any game of chance or slot machines of any kind. . . .
> "(8) The term 'Class III Gaming' means all forms of gaming that are not Class I Gaming or Class II Gaming . . . ."

As you might expect, there are significant legal issues concerning the classification of these games in California. This is ultimately due to economics. Although card clubs can be lucrative, they offer nothing like the potential of Class III Gaming.

It has been estimated that the cost of a computerized video cabinet is some $5,000. The earnings per day range from $62 in Reno to $380 at the Foxwood facility which the Pequot Tribe operates in Connecticut. Thus in 50 to 70 days these devices will pay for themselves. It is estimated that 100 machines could earn a tribe $20,000 per day and $7 Million per year. (Desert Sun, "Video Gaming Pays Off For Tribes," April 15, 1995.) There are 150,000 slot and related devices in Nevada and now some 8,000 in California. There are some 900 of these machines in the Morongo Casino, 150 at the Spa Hotel facility operated by the Agua Caliente Tribe in Palm Springs, and a total of some 2,000 at the four desert area casinos. The legal precedents we examine in this paper are largely a result of an economic war to see if this form of gaming can be exploited in California and who will reap the economic benefit.

I. NON-INDIAN GAMING

A. THE CALIFORNIA CONSTITUTION MAKES MANY FORMS OF GAMBLING ILLEGAL BUT PERMITS OTHERS

The original provision in the 1849 California Constitution (then Article IV Section 27) prohibited lotteries and the sale of lottery tickets in the state and remained unchanged for many years. This authority was the basis of comprehensive Penal Code prohibitions initially adopted in 1872 and extended during the early 1900's.

In 1933 the Constitution was amended to allow horse race meetings and wagering on the results (then Article IV Section 25a). In 1966 a provision was added to allow cities and counties to permit bingo games but only for charitable purposes. However, probably the most significant change to the constitutional scheme was Proposition 37 adopted by the voters on November 6, 1984, to create the California State Lottery while supposedly prohibiting "casinos of the type currently operating in Nevada and New Jersey". Thus, Article IV, Section 19 of the Constitution now provides as follows:

> "Section 19. (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the state.
>
> "(b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.
>
> "(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.
>
> "(d) Notwithstanding subdivision (a), there is authorized the establishment of a California State Lottery.
>
> "(e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey."

The current Constitutional provision thus creates several important exceptions to subsection (a)'s original broad prohibition, as supplemented by the 1872 Penal Code provisions prohibiting gambling. These exceptions include: horse racing (Business & Professions Code Sections 19400, et seq.), Charitable bingo (Penal Code Section 326.5), the State Lottery (Government Code Sections 8880, et seq.) and games of skill rather than chance in card clubs (Business & Professions Code Sections 19800, et seq.). We will next discuss the state statutory provisions in the Penal Code prohibiting gambling, or Class III Gaming, and will then discuss the exceptions: Charitable bingo (Class I Gaming); and the State Lottery, horse racing, and card clubs, all considered Class II Gaming since permitted by state law.

A. THE PENAL CODE EXTENSIVELY PROSCRIBES GAMBLING WITHIN THE STATE

The California Penal Code includes a comprehensive legislative scheme proscribing gambling in all its various forms. The critical Penal Code Sections dealing

with lotteries and gambling are long-standing and were enacted in 1872. Thus, Section 319 defines lotteries as:

> "Any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance . . . ."

Section 320 makes it a misdemeanor to contrive, prepare, propose, or draw any lottery. Section 330 broadly prohibits "banking or percentage games" in all forms, and provides:

> "Every person who deals, plays, or carries on, opens, or causes to be open, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, 7-1/2, 21, hokey pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor . . . ."

The Penal Code section against bookmaking was added in 1909 at 337(a), and was amended in 1911 at the same time that Section 330a was enacted prohibiting slot machines and making the possession of such a device a misdemeanor, and this Section was supplemented by Section 330(b) in 1950.[1] In 1950 numerous other provisions were added concerning slot machines making it a misdemeanor to manufacture, own, store, possess, sell, lease, or transport such slot machines (330.1) and permitting the seizure and disposal of all such machines and any money seized in connection therewith (330.3). However, Section 330(b) stated that "pinball and other amusement machines or devices which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not, are not intended to be and are not included within the term slot machine . . . ." (Emphasis added.)

Notwithstanding the foregoing, and pursuant to Article IV, Section 19 of the Constitution, the Penal Code at Section 326.5 permits charitable bingo. As most city attorneys are aware, charitable bingo is only permitted pursuant to a city ordinance which regulates the operation of bingo games in accordance with Section 326.5. In addition, horse racing is legally permitted in accordance with Business and Professions Code Sections 19400, et seq. originally enacted in 1933. This brings us to the critical portions of the constitutional provisions of Article IV, Section 19, which are subsections (d) and

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[1] Slot machines were defined as: "Any machine, apparatus or device is a slot machine or device within the provisions of this section if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, such machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value or additional chance or right to use such slot machine or device, or may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value.

(e) permitting the California State Lottery but prohibiting "casinos of the type currently operating in Nevada and New Jersey".

A. ALTHOUGH THE STATE LOTTERY IS PERMITTED, IT IS NOT CLEAR WHAT GAMES OF CHANCE ARE PERMITTED WITHIN THE LOTTERY

1. The State Lottery was Drafted to Prohibit Most Class III Gaming But Computer Terminals Were Permitted So Long As No Money was Dispensed

The California State Lottery Act of 1984 was adopted as Proposition 37, an initiative measure approved November 6, 1984. Proposition 37 amended Article IV, Section 19 of the Constitution and in addition adopted the Lottery Act (Government Code Sections 8880, et seq.). The Lottery Act was promoted on the basis of providing funding for public education and specified in Section 8880.4 that 34 percent of the annual revenue would be allocated to the benefit of public education, 50 percent returned to the public in the form of prizes and 16 percent retained for payment of expenses of the Lottery.

The Act created the State Lottery Commission to promulgate rules and regulations concerning the types of lottery games; the number and value of prizes; the method for determining winners; the price of tickets and shares; the validation and payment of prizes; the distribution of tickets and shares; and other matters.

How do the provisions of the Lottery Act harmonize with the Penal Code prohibitions? In Section 8880.6 the Lottery Act specifically exempts the State Lottery from certain of the above-cited Penal Code Sections.[2] The Section states that "this exemption applies only to the operators of the Lottery and shall not be construed to change existing law relating to lotteries operated by persons or entities other than the Lottery."

Section 8880.12 of the Lottery Act defines the term "Lottery" broadly 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." This authority to conduct lottery games was intended to be limited by Section 8880.28 which established limits on the types of games to be played.

> "The Commission shall promulgate rules and regulations specified and the types of Lottery Games to be conducted by the Lottery, provided:
>
> "(a) No Lottery Game may use the theme of bingo, roulette, dice, baccarat, blackjack, lucky sevens, draw poker, slot machines, dog racing, or horse racing . . .
>
> "(b) In games utilizing computer terminals or other devices, no coins or currency shall be dispensed to players from such computer terminals or devices."[3]

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[2] But only sections 320-326 and 328, not the 330 series pertaining to slot machines.

[3] Section 8880.28 was amended in the 1993-94 Regular Session to delete horse racing in Paragraph (a) and to also add a subsection to state that no changes in the types of games or mediums that did not exist

1. **In Western Telecon The California Court of Appeals Ruled Keno Video Terminals Are Permitted So Long As No Money Is Dispensed, And Avoided The Issue Of Whether They Are Illegal Slot Machines**

The question of whether there is a conflict between the broad reach of Section 8880.12 defining Lottery Games and Section 8880.28 prohibiting many Class III Games has been recently addressed in Western Telecon Inc. v. California State Lottery (1995) 41 Cal.App.4th 1668, review granted. The State Lottery in 1992 adopted regulations permitting keno. At the time of the lawsuit, keno computer terminals and video monitors were operated at some 5,800 locations statewide. In Keno, the retail operator provides the gambler with a play slip with 80 numbers on it and the gambler selects between 1 and 10 numbers and wagers an amount ranging from $1 to $20. The gambler can allow the computer terminal to make the selection. Every five minutes the central computer operated by the Commission draws 20 numbers and the gambler receives a return based upon the number of winning numbers the gambler has drawn. The retailer can immediately pay off up to $599.00 but awards can range to $250,000.

The horse racing industry opposed the State Lottery's conduct of keno. However, the State Lottery contended, and the California Court of Appeals agreed, that keno fit the definition of Lottery Game in Section 8880.12.

> "Keno as described in the keno regulations falls clearly within the definition of a form of a Lottery Game permissible under Section 8880.12. Keno is a 'procedure' authorized by the Commission. Money 'prizes' are 'distributed.' In order to win money, the bettor must have 'paid' for a ticket or 'tickets.' The ticket provides the wager with the 'opportunity to win such prizes' as a result of the draws held every five minutes or thereabouts." (At 1676).

Moreover, the Court found that keno was not an impermissible game as set forth in Section 8880.28 because keno does not "use the theme of bingo, roulette, dice, baccarat, blackjack, lucky sevens, draw poker, slot machines, or dog racing." The Court found that the use of the "theme of" language (as in prohibiting games using the "theme of slot machines") was ambiguous and that legislative history could be used to determine the voter's intent. The ballot argument in favor of Proposition 37 stated that "there are many lottery games: some have instant winners, others have period drawings. The Lottery Commission has the flexibility to conduct a variety of Lottery Games using any technology, including traditional tickets, on-line computers, and instant game video terminals (which can't dispense cash or have fruit symbols like a slot machine)." (At 1680).

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or were widely available or commercially feasible at the time of the enactment of the Lottery Act shall be made unless there is an expressed statutory amendment to the Lottery Act which comports with applicable State and Federal law. The Legislative history indicated that "questions of whether each living room shall become a casino or each telephone a slot machine have yet to be answered. One thing is clear, however: the technology to affect these changes now exists. Who then will decide whether such uncontemplated changes are consistent with the intent of the voters and whether they advance legitimate purposes of the Lottery? . . . The intent of SB 884 is to ensure that the authority to answer these questions is vested with the Legislature." (Letter from Senator Leslie found in Senate Daily Journal, p. 2449.)

With this analysis, the Court of Appeal dismissed all of the arguments brought by the California Horsemen's Benevolent and Protective Association ("Horsemen"). The Horsemen referred to the provision in Proposition 37 amending the Constitution to prohibit casinos "of the type currently operating in Nevada and New Jersey." The Court found that the establishment of video terminals at retail locations to permit the playing of keno did not constitute the creation of gambling casinos similar to those operated in Nevada and New Jersey.

The Court next looked at the Penal Code provisions prohibiting slot machines (Penal Code Section 330(b)). Although Section 8880.6 exempted the Lottery from certain Sections of the Penal Code, it did not exclude 330(b), and the Horsemen argued keno was a slot machine because an article is deposited in the device and a ticket is received redeemable for money while the action of the device is dependent on chance. The Court, however, concluded that keno was permitted regardless of whether it was technically a slot machine. The Court found that Section 8880.28 of the Lottery Act did not prohibit computer terminals falling within the scope of the Penal Code, but merely prohibited games which use the "theme" of a slot machine. Moreover, to the extent these games were deemed to be prohibited as slot machines, the provisions of the Lottery Act superseded Penal Code Section 330(b) since it was adopted later in time. The same argument was made in response to the Horsemen's argument that keno was a prohibited banking game under Penal Code Section 330. The Court summarized:

> "The foregoing statutory construction considerations lead us to the following conclusions: when narrowly construed, the language concerning 'theme . . . of slot machines' . . . was not intended to prohibit the use of computer technologies as means of determining winners; this is true even though the terminal may meet the statutory elements of a slot machine . . . the strictly construed language of Section 8880.28 . . . prohibits the use of terminals when coins or currency are discharged from the computer, something that never happens with the keno format; the commission utilizing its broad powers to develop betting formats could use computer technology so long as the terminal which may otherwise be a slot machine did not have symbols 'like a slot machine.' (At 1680-1681).

Interestingly enough, because of some of the political fallout over the case, the California State Lottery took the position that although they thought that keno was not a slot machine, if the Court determined that keno was a slot machine, then the California State Lottery could not operate the game. In fact, on appeal, the State Lottery specifically requested that the Court of Appeals determine whether or not keno was a slot machine and stated that they would discontinue the operation of keno if it was determined to be a slot machine. The Court refused to answer that question and instead ruled that the State Lottery could operate keno regardless of whether or not it was a slot machine. The Court stated that the determination of whether or not keno was a slot machine would be an advisory opinion. (P. 1681, see footnote 7.)

The other caveat of concern in the case is found on page 1672 at footnote 3.

> "Our conclusions are premised solely on the grounds discussed in this opinion. We do not address nor do we decide other questions including, but not limited to: (1) the effect of Proposition 37 on the rights of gambling operators on 'Indian lands' within the provisions of 25 U.S. Code Sections 2701, et seq.; (2) the extent to which the Legislature may expand the provisions of Proposition 37; (3) whether keno is a slot machine within the meaning of Penal

> Code Section 330(b); (4) whether keno is a banking game within the meaning of Penal Code Section 330; or (5) whether the prescription against casinos and initiative may render keno invalid if utilized injunction with other forms of gambling at a single location."

Notwithstanding the Court's painstaking efforts to state what it was not deciding, the implications are significant nonetheless. Remember the broad definition of a slot machine in Penal Code 330(b). They are machines or devices caused to operate by money, coin, or "other object", and as a result the user "may receive or become entitled to receive any piece of money, credit, allowance or thing of value or additional chance or right to use such slot machine or device . . . which may be exchanged for any money, credit, allowance or thing of value . . ." when such result is caused by hazard or chance. (Emphasis added.) The Lottery Act only prohibited such devices where the winnings were directly dispensed and the Court ignored the broader Penal Code language in accepting the narrower Lottery Act restriction on the use of computer terminals. The result of this distinction may ultimately be critical in the litigation over the reach of Indian gaming.

A. LEGALIZED GAMBLING AND WAGERING IN CALIFORNIA'S CARD CLUBS

1. Games of Skill Are Permitted by the Business and Professions Code in Card Clubs

The Penal Code prohibits games where the winnings are "to be distributed or disposed of by lot or chance" (Penal Code Section 319) and prohibits a series of specified games including roulette, blackjack, "or any banking or percentage game" (Penal Code Section 320) and prohibits slot machines (Penal Code Section 330(b)). What is not prohibited are games of skill where the players bet against each other instead of the house and pay a fee per hand or per time period (i.e., not percentage games) for the right to participate in the game. Since these games are not prohibited by state law, they are considered to be Class II Games and include all forms of poker (draw, seven card stud, Texas hold 'em, hi-lo, and low ball) and most Asian games (pai gow, panguingue).

The current regulations concerning permitted or legalized gaming are found in the Gaming Registration Act in Sections 19800, et seq. of the Business and Professions Code. The Act was adopted effective January 1, 1984 because of a concern over the growth of card clubs in the state. The Act prohibits ownership or operation without valid registration; provides for examination of an applicant's books and records and inspection of the premises; requires background checks for applicants; and requires employees to obtain a license or work permit. Games which can be played in such establishments include:

> "Any card game played for currency, check, credit, or any other thing of value which is not prohibited and made unlawful by [Sections 319 and 330, et seq. of the Penal Code] or by local ordinance." (Section 19802(d).)

Applications for registration may be denied or revoked for varying grounds, including conviction of a felony or criminal offense relating to the ownership or operation

of the gaming club; bookmaking or other illegal gambling activities; false or misleading advertising; fraud, misrepresentation, or concealment; failure to pay any monetary penalty; denial of access for any inspection or audit; or other similar grounds (Sections 19809 and 19810).

Section 19801 expressly states that it was the intent of the Legislature to have concurrent jurisdiction with local governments over gaming and "to provide uniform, minimum regulation of the operation of those establishments through registration by the Attorney General of those who own or manage gaming clubs." Section 19801 went on to read:

> "Nothing in this chapter shall be construed to preempt the authority of any city . . . from prohibiting gambling, for imposing any valid local controls or conditions upon gaming, from inspecting gaming premises to enforce applicable state and local laws, or for imposing any local tax or license fee."

From a city standpoint, the most critical section in the Gaming Registration Act is Section 19819. That Section required that gaming clubs would not be permitted within the territory of any city of county which had not permitted such gaming clubs prior to January 1, 1984, unless a majority of the voters approved a measure permitting gaming. Previously cities were able to regulate gaming establishments based upon their inherent police powers through zoning. The voters through initiative and referendum could exercise a voice in this process. By adopting the Act, the State Legislature gave residents the explicit authority to approve the introduction of gaming to their community. The Gaming Registration Act was supported by both those persons who opposed gaming and saw the Act as creating barriers to the expansion of gaming, as well as by the owners of existing card clubs who were interested in limiting the expansion of gaming opportunities.

1. Recent Concerns Over Card Clubs

Over the last several years there has been rising concern in the State of California with the issue of gaming. Some of this concern has been generated by the operation of the State's existing card clubs. The County of Los Angeles Sheriff's Department took aggressive action against card clubs in Bell Gardens and Huntington Park contending that the games played there were "percentage games" and illegal. See Huntington Park Club Corp. v. County of Los Angeles (1988) 206 Cal.App.3d 241 review denied, and City of Bell Gardens v. County of Los Angeles (1991) 231 Cal.App.3d 1563; also see Tibbets v. Van de Kamp (1990) 222 Cal.App.3d 389 review denied.

In Huntington Park the Court of Appeals found that pai gow would not be a percentage game if players were merely charged a rental fee for space per hour, nor a banking game if the house did not play and had no interest in the outcome. These actions and the subsequent litigation created some confusion over what games were and were not permitted under state law, particularly as new Asian games were introduced to the card club community. Based upon these trends, and in light of the continuing strongly negative reaction by much of the population of California to the subject of gaming, the

State Legislature began several years ago to look at whether state regulation in the area of gaming was adequate.

A second level of concern was generated due to the interest of the horse racing industry in other forms of gaming and the desire to compete with the legalized card club operations. In 1995 the Gaming Registration Act was amended to permit the owners of racetracks to conduct a card club on their premises. (This authority would be repealed on January 1, 1999, unless a comprehensive scheme regulating gaming under the jurisdiction of a Gaming Control Commission is enacted (Section 19809.5 Stats 1995 c. 387 (S.B. 100)).

A third area of concern which the state does not have the direct authority to regulate is the subject of Indian gaming. This is discussed in a later section of this paper.

Finally, the criminal activity associated with existing state gaming operations continues to be of great concern. As an example, the California Redevelopment Association, in a December 1995 issue of their Redevelopment Journal, published an article "Bell Gardens: Casino Catalyst for Economic Powerhouse" discussing the economic impact of card clubs in a positive tone. Assemblyman Phil Isenberg and Attorney General Dan Lungren wrote a stinging response stating that the article's contention that criminal activity was virtually non-existent was completely false. This response was published in CRA's March 1996 Journal:

> "This is an appalling misapprehension of the facts in Bell Gardens and the gambling environment statewide. You have missed the fact that one of the biggest issues in the State Legislature for the past four years has been state regulation of card room gambling. The overwhelming evidence has pointed to the incredible lack of local enforcement. Local officials either cannot afford the oversight that is necessary to ensure cleanly run card rooms or are attempted to 'look the other way' as card rooms become cash cows for the city's coffers. Card room revenue can constitute a substantial part of a city's general fund revenue, and, like the City of Bell Gardens, cities can become addicted to the money and experience lesser incentives to strictly enforce the law."[4]

1. State Legislative Proposals: AB 2803

These concerns have generated legislative proposals in the last several legislative sessions. Although various bills have been introduced, the one which became the most prominent was sponsored by Assemblyman Isenberg (AB 2803). AB 2803 would have repealed the Gaming Registration Act and replaced the Act with the Gambling Control Act, creating the California Gambling Control Commission to regulate gambling in the state. A division of Gambling Control would have been created within the State Department of Justice under the direction and control of the Attorney General. The

[4] The situation at the Bell Gardens club was further discussed in an article in the Los Angeles Times on March 20, 1996. The article reported on a hearing held by the Senate Subcommittee on Investigations chaired by Senator William V. Roth, Jr. The Bicycle Club was seized in 1990 by the Federal Government after it was proved that the club was built with $12 million in laundered Florida drug money. Roth described the Government's operation of the Bicycle Club as "One of the most bizarre stories in [the Committee's] long history of uncovering waste, fraud and mismanagement in government programs."

Commission would consist of seven members and be charged with the responsibility to investigate the qualifications of applicants, to issue licenses, to monitor the conduct of all licensees, to investigate complaints and suspected violations, and to initiate appropriate disciplinary action.

AB 2803's provisions were much more extensive than the existing Gaming Registration Act. For example, the requirement of registration extended not just to the owners and employees of the facility but any person having any beneficial or security interest in the gaming enterprise, any person who furnishes services or property, any person owning an interest in the real property, any person who does business on the premises, any agent of any ticket purveyor, tour operator, bus operator, and any similar entity.

Of particular interest, Section 19802 provided that nothing would prohibit any city or county from imposing more stringent local controls or from imposing any local tax or license or affect the responsibility of local law enforcement agencies to enforce the laws. Section 19851 indicated that a gambling license would be denied to any establishment that is not located in the city that has a comprehensive ordinance governing hours of operation, patron security and safety, location of the gaming establishments, wagering limits, and the number of gambling tables.

AB 2803 was extensively lobbied. Interest groups included the owners of existing card clubs, persons wishing to develop card clubs, the horse racing industry, Nevada gaming interests, law enforcement, and citizen groups opposed to gaming. For awhile the bill was expected to pass at the 1993-94 Regular Session, and when that did not happen, it was expected to pass in 1995-96. Although many persons speculate concerning what ultimately sidetracked the Legislation, whether it was the in-fighting between the Republicans and Democrats in the last session or other cause, one explanation seems to be the reluctance of the Democratically-controlled Senate to vest all of the legal authority for gaming in the office of Republican Attorney General Lungren. In addition, the State's Indian tribes take a very negative view of Dan Lungren's continuing legal opposition to Indian gaming.

1. Failure to Agree on Regulatory Scheme Leads to Moratorium

Given the legislative impasse, a bill sponsored by Senator Ken Maddy eventually became the compromise legislation. SB 100 was amended to enact a three-year moratorium on the granting of additional gaming licenses. The intent was to prevent any further expansion of card clubs in California for a period of three years while the State Legislature developed a comprehensive legislative scheme. It was expected that in some form alternate legislative scheme would implement most of the provisions of Isenberg's AB 2803.[5]

[5] On February 22, 1996, Attorney General Dan Lungren and Senate Leader Bill Lockyer announced and introduced the anticipated compromise legislation creating a part-time three-member commission appointed by the Governor and a $5.4 Million budget for expanded regulation of card clubs. The bill (SB 1887) is comprehensive containing some 140 pages and does include many of the AB 2803 concepts.

SB 100 was enacted as an urgency measure on August 7, 1995, and in its most critical section amending Business and Professions Code 19819.5 states as follows:

> "(a) On and after January 1, 1996, neither the governing body nor the electors of a county, city, or city and county that has not authorized legal gaming within its boundaries prior to January 1, 1996, shall authorize legal gaming.
>
> "(b) The ordinance in effect on January 1, 1996, that authorizes legal gaming within a county, city, or city and county, may not be amended to expand gaming in that jurisdiction beyond that permitted on January 1, 1996.
>
> "(c) This section shall remain in effect only until January 1, 1999, and as of that date is repealed, unless a later-enacted statute, which is enacted before January 1, 1999, enacts a comprehensive scheme for the regulation of gaming pursuant to this chapter under the jurisdiction of a Gaming or Gaming Control Commission." (Emphasis added.)

As a consequence of this legislation, a number of cities that had been contemplating card club ordinances rushed to get their measures adopted prior to January 1, 1996. Overwhelmingly these measures were defeated. There were some exceptions, however, and one which may have the most important implications statewide is in the City of Palm Springs. This is because of the statewide proposition which is now being circulated which is discussed below.

There are some curious aspects to the wording of Section 19819.5 in AB 100. Clearly, the voters must have authorized gaming within the boundaries of the city prior to January 1, 1996, and thereafter the ordinance may not be amended to "expand gaming" in the jurisdiction. The question is, if the voters had approved gaming and adopted an ordinance, what additional implementing actions would the governing body be authorized to take?

The California Legislative Counsel, Bion Gregory, in an opinion dated October 12, 1995, has opined:

> "Accordingly, an ordinance in effect on January 1, 1996, may not be amended on or after that date by the governing body to 'expand', for example, the number of gaming clubs that may be permitted in the city or the maximum number of tables permitted in a club, if doing so, would increase in any fashion comprehended by term 'expand' the extent of legal gaming in that jurisdiction. However, we do not think that an ordinance adopted by that city that would impose a local tax or a license fee on the operation of gaming clubs would constitute an authorization of gaming pursuant to subdivision (a) of Section 19819.5 or an expansion of gaming pursuant to subdivision (b) of Section 19819.5 in the city, and thus, in our opinion, such an ordinance could be adopted on or after January 1, 1996."

Among other things, SB 1887 would continue local regulation, but require gaming establishments to be grandfathered or approved by the voters, and extends the moratorium to January 1, 2001; enacts an extensive state revenue-raising scheme; permits denial of a license if it will cause local law enforcement problems, be too close to schools, churches, and other sensitive uses, or cause an over-concentration; designates the Governor as the state official who will represent California to the United States or to conduct any negotiation with an Indian tribe and requires that the Governor submit any compact to a joint committee of the Legislature.

Thus, the Legislative Counsel draws a line at any type of ordinance change which would increase the number of permitted gaming clubs or the number of tables in a club. However, other implementing measures are not proscribed. This opinion leaves unanswered the question of what if an ordinance were approved by the voters permitting a certain number of clubs or tables but the City Council had not approved the development of such clubs. Is it an expansion of gaming for the city to grant licenses for the development of clubs which are authorized by ordinance? Arguably, the section only prohibits the amendment of an ordinance for expansion, not the issuance of a permit or license.

Within the three-year period of the moratorium enacted by SB 100, the City of Palm Springs will have to deal with precisely this question due to the fact that the City's card club ordinance was enacted prior to the moratorium, but there was insufficient time to issue any permits.

1. Card Clubs Come to Palm Springs

Card clubs were brought to Palm Springs in large measure by the Agua Caliente Tribe, although ironically enough, in the end the Tribe spent a great deal of money trying to defeat the card club gaming measure in the November 1995 election. Because of the success of the Cabazon/Morongo Indian Casino on Interstate 10, a number of other tribes in the Coachella Valley began developing an interest in the subject of gaming. The Agua Caliente Band of Cahuilla Indians Tribe of Palm Springs eventually entered into an agreement with Caesars to develop a $25 Million Casino in downtown Palm Springs. The subject of gaming had previously been debated and rejected at various locations in the desert, but citizens began to wonder whether if the Tribe was going to bring gaming to Palm Springs anyway, why shouldn't there be gaming on non-reservation land which could be regulated by the City?

These questions led to the formation of a Palm Springs Gaming Task Force in late 1993. The Task Force issued their Report on June 15, 1994. The Report projected that the potential size of the gaming industry in Palm Springs could be from $100 Million to $200 Million in gross revenue. The Report projected that this would result in 500,000 to 1 Million new visitor days in Palm Springs. The Report projected a 50 percent increase in hotel occupancy resulting in millions of dollars to the City of Palm Springs whose revenue base is generated 25 percent by transient occupancy taxes. Furthermore, some 2,000 jobs were projected to be created. (Page 3.)

These assumptions were not based solely on the assumption of the development of card clubs in Palm Springs but rather on the assumption that Indian gaming would mean full-scale Class III casino gaming and that the non-Indian gaming would be developed in conjunction with the Indian gaming. The Task Force recommended development of a Gaming Regulatory Ordinance to facilitate development of controlled legalized gambling in Palm Springs. It was emphasized that this would be done to create an added dimension as a part of Palm Springs' destination resort image. "Palm Springs would not be converted into a gaming destination, but would simply have high quality gaming opportunities as an additional part of the recreation entertainment menu now in place."

(Page 9.) The concept would be that this would be a "Monte Carlo-type" opportunity and that it would be conducted in connection with destination resort projects.

Several developers were waiting in the wings with potential destination resort projects which would, it was presumed, become financeable if gaming was a part of the project. Upon presentation of the Task Force Report, one of these developers came forward and requested that the City Council proceed with adoption of an ordinance, and a draft ordinance was prepared. However, late in July 1994 when the City Council met to consider the ordinance, the Tribe and Caesars took a strong position against the ordinance. Caesars indicated that they would pull out of their project if the City Council adopted such an ordinance. The City Council, not wanting to endanger the $25 Million Caesars' project, or their long-term relationship with the Tribe, decided not to adopt the ordinance.

In the winter the developer began pressing forward with plans to circulate an initiative measure to place the ordinance on the ballot. Eventually an entity owned by the DeBartolo Corporation, owner of the downtown Desert Fashion Plaza shopping mall, joined in this effort. In the spring of 1995 they began gathering signatures, and eventually collected three times the required signatures. The ordinance was modified to allow gaming at three locations, two owned by the developer and the third one being the Downtown Mall in space vacated by I. Magnin. Despite sponsorship by the developer, the ordinance was largely the same that the City Council had developed the previous year. The election campaign was an expensive and hard-fought affair with the Tribe ultimately taking a strong position against the measure. Despite this effort, the measure passed overwhelmingly by a vote of approximately 5600 to 3400.

Neither the developer nor DeBartolo was ultimately able to get their financing sources in place in sufficient time to process the application prior to the January 1, 1996 deadline created by SB 100. Without full details concerning the ownership and financing, the application could not be completed nor approved. The applicants must also obtain their state licenses. Thus, although the ordinance has been enacted and authorizes the establishment of the gaming clubs, the City will be faced with the issue as to whether the SB 100 moratorium applies.

I. INDIAN GAMING

A. NATURE OF THE FEDERAL/STATE RELATIONSHIPS WITH INDIAN TRIBES

1. Constitutional Sources of Authority: Indian Commerce Clause

In Cherokee Nation v. Georgia (1831) 30 U.S. (5 Peter), Chief Justice John Marshall wrote that:

". . . [T]he condition of the Indian's relation to the United States is perhaps unlike that of any other two people in existence . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." (At 16).

Case law exhibits a tension between the broad federal power over Indian affairs and the fiduciary responsibility of the "special trust" obligation of the federal government to Indian tribes.

Indians are mentioned only three times in the Constitution. Article I and the Fourteenth Amendment both exclude Indians for purposes of apportioning taxes and representatives to Congress. However, the Commerce Clause of the Constitution is deemed to include the "Indian Commerce Clause" in the language that Congress is authorized to "regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes." (Article I, Section 8, Clause 3.) Other power to regulate Indian affairs is deemed to come from the Treaty Clause which grants the federal government exclusive authority to enter into treaties (Article II, Section 2, Clause 2). Although the Treaty Clause was probably the most important early source of federal authority, it was faded since the discontinuing of the making of Indian treaties by Congress.

One other clause of the Constitution which has been used as a source of federal authority, but which does not mention Indians, is the Property Clause which grants Congress the power to dispose of and regulate "the Territory or other Property belonging to the United States." (Article IV, Section 3, Clause 2.) Thus, occasionally courts have justified federal power over Indians from the fact that fee ownership of most Indian land is held by the United States and thus, "property belonging to the United States." Kleppe v. New Mexico (1976) 426 U.S. 529. However, the Indians are equitable owners of their property in that most Indian land is held in trust by the United States for the exclusive use and benefit of individual Indians or tribes.

The most significant source of federal authority over tribes remains the Indian Commerce Clause. Although on the surface it seems to regulate commerce with tribes, it has been held to apply to transactions with individual Indian members and also regulate non-Indians doing business within tribal reservations or with Indian members. McClanahan v. Arizona State Tax Commission (1973) 411 U.S. 164; United States v. Holiday (1866) 70 U.S. (3 Wall) 407; United States v. Mazurie (1975) 419 U.S. 544.

1. Limitations of Federal Authority Derived From Constitution and Trust Responsibility

The federal power over Indian affairs is subject to Constitutional limitations.[6] For example, an Indian would be entitled to just compensation for a taking of property. Shoshone Tribe v. United States (1936) 299 U.S. 476.

[6] Of course, this has been an evolving concept. For a time the concept was that the Acts of Congress concerning Indian affairs involved "political questions" not subject to judicial review. Cherokee Nation v. Hitchcock (1902) 187 U.S. 294, 308.

Besides the Constitutional limitations, the second limitation is the trust responsibility which the federal government has to the tribes as dependent sovereign nations. This concept evolved judicially beginning with Chief Justice Marshall's discussion in Cherokee Nation holding that although the Cherokee Nation was "a distinct political society," it was neither a state of the United States nor a foreign state. He said that Indian tribes "may more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage" with their relation to the United States resembling more that of a "ward to its guardian." (At 16, 17, 19-20.) The Constitutional standard for review of Congressional legislation is whether the legislation is "tied rationally" to the fulfillment of Congress' unique obligation to the Indians.

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Martin v. Mancari (1974) 417 U.S. 535.

Thus, Congressional legislation establishing a preference in employment for Indians in the Bureau of Indian Affairs was not a prohibited racial classification since the preferential treatment was justified by the "special relationship" with the Indian tribes.

Under the same principal, judicial canons of construction have been developed which are unique in the context of Indian law. These canons generally provide for broad construction where the legislation establishes or reserves rights for Indians and a narrow construction when Indian rights are limited. See Bryan v. Itasca County (1976) 426 U.S. 373 upholding the Indian's right to be free of state taxation despite the provision of Public Law 280 extending many state laws into Indian country. See United States v. Creek Nation (1935) 295 U.S. 103 holding the United States could be liable for money damages due to an incorrect federal survey improperly excluding land from a reservation which was subsequently sold to non-Indians. The Court ruled that the federal government should be held to a strict standard of compliance with its fiduciary duties. In Pyramid Lake Paiute Tribe v. Morton 354 Fed.Supp. 252 (DDC 1972), a federal regulation permitting diversions of water which adversely affected a downstream lake on an Indian reservation was held invalid because it violated the trust responsibility with the Tribe.

1. **State Regulations on the Reservation are Preempted by the Supremacy Clause**

The subject of state regulation within Indian reservations was dealt with early in our country's history and the precedent first established by Chief Justice John Marshall has been followed ever since. Non-Indian missionaries living within the Cherokee Reservation had been convicted by the courts of Georgia for failing to obtain a state license and complying with state regulations. The Court ruled that Georgia could not enforce its criminal statutes within the territory of the Cherokee Nation because the Cherokee Nation was a distinct political community which entered into treaties with the United States. The Court held the whole of the "intercourse" between the United States and the Cherokee Nation was vested in the government of the United States and that the

laws of Georgia were "repugnant to the Constitution, laws and treaties of the United States." Worcester v. Georgia (1832) 31 U.S. (6 Peter) 515, 562-63.

Thus, the Supreme Court has consistently invalidated state laws regulating Indians as a violation of the Supremacy Clause of the Constitution that federal treaties and statutes are "the supreme law of the land . . . any thing in the Constitution or laws of any state to the contrary notwithstanding." (Article VI, Clause 2.) The term now often referred to as "preemption." McClanahan v. Arizona State Tax Commission (1973) 411 U.S. 164, 172.

A. PUBLIC LAW 280 AND THE DEVOLUTION OF CRIMINAL AND CIVIL ENFORCEMENT AUTHORITY TO THE STATES[7]

We will now turn to the scope of federal preemption in the area of gaming.[8] The problems discussed in Footnote 7 concerning the conflict between federal and state jurisdiction where a reservation is within the corporate limits of a municipality have been going on for many years. In fact, in 1949 Congress passed a law attempting to deal with this problem (Act of October 5, 1949, Chapter 604, 63, Stat, 705). This statute conferred on California partial civil and criminal jurisdiction over the Agua Caliente Reservation. This statute was only partially successful. Books and articles were written concerning problems with the Agua Caliente Reservation (see The Golden Checkerboard). Although the trends in the evolution of federal and Indian relations are beyond the scope of this paper, in the early 1950's the concept of assimilation was in vogue. Rather than being a member of a race which was "set apart" from other citizens, the philosophy turned to assimilation of the Indian. Indians would be "given the same status" and access as other citizens of the state. Bryan v. Itasca County (1976) 426 U.S. 373, 382. Another principle concern seems to have been lawlessness on Indian reservations and the lack of adequate tribal mechanisms for law enforcement.

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[7] A significant early Federal anti-gaming statute was the Gambling Devices Transportation (Johnson) Act enacted in 1951 at 15 U.S.C. 1175. The Johnson Act made it a Federal crime to transport, possess or use any gambling device within Indian country. Although still on the books, the Johnson Act now has been significantly modified by the Indian Gaming Regulatory Act discussed below.

[8] The impact of the doctrine of preemption in a local community where every other section of land is within an Indian Reservation is worthy of a separate paper. About 30 percent of the 31,000-acre Agua Caliente Tribal Reservation is within the City of Palm Springs. Some of the most significant portions of the Reservation are within the City of Palm Springs downtown core. In prior litigation, the courts ruled that the Indian Reservation land was not subject to the City of Palm Springs' local land use regulations. The Tribe and the City negotiated a land use agreement in 1978. That agreement in general provided that anyone seeking to develop on Indian land would first apply to the City of Palm Springs and go through the City's normal planning process. They would be subject to all permits and fees the City required on non-Indian land. If the Indian developer were dissatisfied with the regulations or fees imposed by the City of Palm Springs, the developer could appeal to the Tribal Council who had final authority. Within the last several years, the City has encountered all of the following situations:

1. The Indian owner demanded compensation for dedicating the street right-of-way on the streets immediately adjacent to the project being undertaken on Indian land;
2. The Tribe has determined to retain half of the transient occupancy tax collected at The Spa Hotel which is located on the Reservation and now operated by the Tribe itself;
3. The Tribe has indicated that it will now permit billboards to be constructed on Indian land at certain entry points to the City while the City Sign Ordinance prohibits billboards all together;
4. The Tribe has waived the collection of development fees; and
5. When an assessment district was established and financed the construction of $4 Million worth of street infrastructure on Indian land, and the original lessees required to pay the assessment defaulted and their leases were terminated, when the properties were re-leased, the Tribe refused to impose the condition that the new lessee pay the assessment for the improvements.

The difficulties of developing a comprehensive set of land use regulations which will upgrade and beautify a world class resort community and not treat non-Indian owners of land in a nondiscriminatory manner can be imagined.

Against this background, in 1953, Public Law 280 was enacted providing six states, including California, with jurisdiction over Indian country and providing for the assumption of jurisdiction by other states. Broad criminal jurisdiction was given to the states over offenses committed by or against Indians within all Indian country, and, according to the courts, a more limited grant of civil jurisdiction. In the criminal area the grant of authority was as follows:

> "Each of the states . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the area of Indian country listed . . . to the same extent that such state . . . has jurisdiction over offenses committed elsewhere within the state . . ., and the criminal laws of such state . . . shall have the same force and effect within such Indian country as they have elsewhere within the state . . ." (Section 2(a) of Public Law 280 codified at 18 USC Section 1162(a).)

The granting of civil jurisdiction was as follows:

> "Each of the states . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such state . . . has jurisdiction over other civil causes of action, and those civil laws of such state that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state . . ." (Section 4(a) of Public Law 280 codified at 28 USC Section 1360(a).)

Notwithstanding the parallel structure of the language in the two sections above, the difference in the judicial interpretation has been dramatic. In Byran v. Itasca County (1976) 426 US 373, Minnesota sought to levy a personal property tax on the mobile home of a Chippewah Indian on trust land. The State of Minnesota argued that since its tax was a civil law and was of general application to private persons or private property, that its tax should have the same force and effect within Indian country as the rest of the state.

The United States Supreme Court, determining that the statute was "admittedly ambiguous", adopted the cannon of construction that statutes passed for the benefit of a dependent Indian tribe should be liberally construed in favor of the Indians. Relying on this cannon, the Court determined that there was no intent on the part of Congress to reverse prior law exempting Indians from state taxation. The Court drew a distinction between criminal statutes admittedly fully applicable to the reservation and civil laws. The civil jurisdiction, the Court ruled, was intended to be applicable only to civil litigation between private parties and did not authorize the extension of state civil authority to the reservation. This approval of a broad state authority with respect to criminal matters and narrow reading of its civil jurisdiction set the stage for the most important of the gaming cases California v. Cabazon Band of Mission Indians (1987) 480 U.S. 202.

A. FEDERAL POLICY INITIALLY SUPPORTS STATE EFFORTS TO CRIMINALIZE GAMBLING AT INDIAN CASINOS

Before turning to the Cabazon case, it is necessary to set the background. In 1970 Congress attempted to assist the states in enforcing the anti-gambling statutes in Indian country by adopting the Organized Crime Control Act of 1970 (18 U.S.C. 1955). The Act made it a crime punishable by a $20,000 fine and/or imprisonment for five years for persons who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business" defined as:

> "(i) is a violation of the law of a state or political subdivision in which it is conducted;
> "(ii) involves five or more persons . . .
> "(iii) has been and remains in substantially continuous operation for a period in excess of 30 days or has a gross revenue of $2,000 in a single day."

The Puyallup Tribe operated a casino near Seattle without any state license. Blackjack, poker, and dice were played in the casino. In United States v. Farris (624 F.2d 890 (9th Cir. 1980) cert. den. 449 U.S. 1111), the Ninth Circuit held that both Indians and non-Indians could be prosecuted under the Act for operating a large-scale gambling business, holding that

> "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 endanger the federal interest of protecting Interstate commerce and preventing the takeover of legitimate organizations by organized crime. . . . We find that Congress did not intend that Indians could freely engage in the large-scale gambling businesses that it forbad to all other citizens . . . . The policy underlying Section 1955 is that large-scale gambling is dangerous to federal interest wherever it occurs." (At 894-895.)

In reaching this broad conclusion, the Court dealt with several specific arguments. First, it found that unless there is a specific exception, federal laws generally applicable through the United States apply with equal force to Indians on reservations. (At 893.) Secondly, the Court recognized the Tribe's argument that Section 1955 only prohibited conduct which was a violation of state law, and Washington State gambling laws did not apply on the reservation since the State had no criminal jurisdiction. Contrary to this, the Court cited Public Law 280 which provided federal consent for states to take full criminal jurisdiction on Indian land. However, the State of Washington, although assuming jurisdiction over offenses committed on Indian land by "non-Indians" had not assumed such jurisdiction with respect to Indians. The Court therefore quickly concluded that prosecution could proceed against the non-Indian defendants. However, the Court went on to find a basis for jurisdiction over the Indian defendants as well. Here the Court discussed the Washington's strong "public policy" prohibiting the type of gambling business conducted by the defendants. Moreover, the Court found this in harmony with the strong federal policy against the "major evil of large scale gambling" creating "harm" to the national economy "regardless of whether a casino is on Indian or non-Indian land, especially when the clientele is not limited to Indians." (At 896.) This harmony of the state and federal policies permit the enforcement of Section 1955 against the Indians.

Farris demonstrated that in the early 1980's, the Ninth Circuit was willing to go to great lengths to uphold state enforcement of its penal statutes against Indian gaming. The Ninth Circuit was willing to broadly read the state's public policy against gambling even though the criminal jurisdiction permitted by Public Law 280 had not been fully assumed by the state. Six years later the Ninth Circuit reached a decidedly different conclusion in looking at the State of California's public policy concerning gaming in a state which had been granted full criminal authority under Public Law 280.

A. THE 25 MEMBERS OF THE CABAZON BAND SHAKE THE NATION

In 1987 California took a lead in the developing area of Indian Gaming Law, which it has yet to relinquish. The 25 members of the Cabazon Band and the 750 members of the Morongo Band of Mission Indians observed that although their reservations were devoid of almost all other resources, they adjoined Interstate 10, a principal corridor to the Coachella Valley desert resorts, the Colorado River, and Arizona. They also noted that some of Los Angeles County's card club operations had become extremely lucrative and that State law permitted charitable bingo, although not in card clubs. Taking these elements together, the Tribes decided, with the help of certain other business interests, to develop a card club on the I-10 Freeway in disregard of the limitations of Riverside County ordinances. The Tribe sued the County, the State of California intervened, and rulings adverse to the State and County were rendered in the District Court and at the Ninth Circuit. These decisions were affirmed by the United State Supreme Court in 1987 in Cabazon Band of Mission Indians California. However, the decision was 6 to 3, with a stinging dissent by Justices Stevens, O'Connor, and Scalia.

The principal issue in the case involved whether Public Law 280 had granted the State the right to regulate gaming within the Indian reservation. The case did not involve Class III-type games. Instead, the Cabazon's were seeking approval of bingo games which the State did permit for charitable organizations, and draw poker and similar games which were permitted under the Business and Professions Code to be played in card clubs.

The first question the Court addressed was whether it was dealing with civil or criminal statutes. If the statutes were termed criminal, then under Public Law 280 the state did have jurisdiction. Just as clearly, non-charitable bingo was not permitted anywhere in the State of California. However, in applying Bryan, the Supreme Court ruled that the State of California's regulations concerning gaming fell into a civil/regulatory category rather than criminal/prohibitory. The Court noted that California does not prohibit all forms of gambling, and itself operates the State Lottery in which it daily encourages its citizens to participate. The Court also noted that parimutuel horse race betting was permitted. Moreover, although certain enumerated games of chance were prohibited under the Penal Code, other games, games of skill, were permitted in the more than 400 card rooms which flourished in the State. Thus the Court ruled:

> "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. California argues, however, that high stakes, unregulated bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations. But that an otherwise 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." (At 211.)

Thus the Court concluded that:

> "If the intent of a state law is generally to prohibit certain conduct, it falls within Public Law 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue subject to regulation, it must be classified as civil/regulatory, and Public Law 280 does not authorize its enforcement on Indian reservation. The short hand test is whether the conduct at issue violates the state's public policy." (At 209.)

One of the first arguments which California made was based upon the United States v. Farris 624 F.2d 890 (9th Cir. 1980) decision authorizing application of Washington's gambling laws pursuant to the Organized Crime Control Act. The Supreme Court noted that the Ninth Circuit had distinguished Farris, finding that bingo was not contrary to California public policy, unlike the case in Washington. Moreover, the Supreme Court noted that the issue of public policy may not be relevant under the Organized Crime Control Act since enforcement of the Act was an exercise of federal rather than state authority, as suggested by the Sixth Circuit in United States v. Dakota (1986) 796 F.2d 186 (at 213).

More troubling to the Court (although not much more), was distinguishing several prior decisions including Moe v. Confederated Salish and Kootenai Tribes (1976) 425 U.S. 463 and Washington v. Confederate Tribes of the Colville Indian Reservation (1980) 447 U.S. 134, in which the Supreme Court upheld the collection of state sales taxes from non-Indian customers at tribal smoke shops located on Indian reservations. The Court based its argument on "traditional notions of Indian sovereignty and the Congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development". (At 479.) The Court noted that since 1974 the Secretary of the Interior had made grants and guaranteed loans for purposes of constructing bingo facilities. The Court indicated that these policies and actions demonstrated the federal government's active promotion of tribal bingo enterprises were necessary for the Cabazon and Morongo Reservations which had no natural resources, and whose only revenues were derived from the Tribal games.

The Court was also forced to deal with the fact that in the Washington case it had agreed with the State of Washington's position that the Tribes were merely marketing an exemption from state taxation. The Court had said that "it is painfully apparently that the value marketed by the smoke shops to persons coming from outside is not generated on the reservation by activities in which the Tribes have a significant interest." The Court actually had the nerve, hopefully in good humor, to distinguish the Washington case by analogizing bingo enterprises with Apache hunting and fishing resorts.

> "Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the

> reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide . . . . The tribal bingo enterprises are similar to the resort complex featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the concerted and sustained management of reservation land and wildlife resources." (At 219-220.)

With all these good reasons to support Indian gaming, the Court ruled that the State's interest in preventing infiltration of Tribal games by organized crime although, "legitimate", was insufficient to "escape the preemptive force for Federal and Tribal interest apparent in this case." (At 221.)

The dissent authored by Justice Stevens cited various cases where state regulation of commercial transactions between Indians and non-Indians had been upheld, citing both the Washington case and Rice v. Rehner (1983) 463 U.S. 713 (approving the requirement of a state liquor license for a tribal member operating a general store on an Indian reservation to sell liquor for off premises consumption). The dissent argued:

> "The State's policy concerning gambling is to authorize certain specific gambling activities that comply with a carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and prohibit all unregulated commercial lotteries that are operated for private profit. 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 per hour." (At 224-225.)

Moreover, Justice Stevens argued that just as in the Washington case, the value of the Tribe's monopoly exemption from California's gambling laws was the primary reason for their economic success. Noting that the Cabazon Tribe had only 25 members, the dissent stated:

> "How this small and formerly impoverished band of Indians could have attracted the investment capital for its enterprises without benefited of the claimed exemption is certainly a mystery to me. I am entirely unpersuaded by the Court's view that the State of California has no legitimate interest in requiring appellee's gambling business to comply with the same standards of the operators of other bingo games must observe. The state's interest is both economic and protective." (At 226.)

The Cabazon Band of Mission Indians case set the stage for everything which was to follow. Since the doors had now been thrown open to Indian gaming, it was necessary for Congress to adopt a statute to regulate gaming. Since the Cabazon Tribe had now been authorized to conduct bingo and draw poker, it was only a question of time before electronic devices would be introduced to allow them to conduct the Class III-type Games outlawed by the California Penal Code, and since the Court had now established that a statute with criminal penalties could be categorized as regulatory instead of prohibitory, the Court had opened the door to endless debate about the nature of the prohibitory/regulatory schemes of the various states which permit gaming. In fact, in Rumsey Indian Rancheria of Wintun Indians v. Wilson decided in August 1995, the Ninth Circuit in a decision contrary to the Second Circuit and arguably contrary to Cabazon has taken a dramatically different approach seemingly following the path of Justice Steven's dissent in Cabazon. The only sure bet was that the Cabazon case would spawn a barrage of litigation nationwide.

A. THE INDIAN GAMING REGULATORY ACT SAVES THE DAY, IF WE CAN FIGURE OUT WHAT IT MEANS

1. IGRA is Adopted to Allow Indians the Same Right to Gaming as Enjoyed by Non-Indians, but Requires Negotiation of a State Compact for Class III Games

The reaction of the states to the Cabazon case was one of panic. Arguably, if a state permitted gambling in any form, as most did, under Cabazon the courts could look beyond the state's criminal statutes on gambling and if the state's overall legislative scheme was found to be "regulatory" the state would thereafter lose its ability to limit Indian gaming (notwithstanding Public Law 280's evident attempt to vest states with criminal authority). On the other hand, the federal government had been promoting bingo as a form of Indian economic development and Indians now constituted a significant economic force for the continuation and expansion of gaming.

Trying to reconcile these interests, the National Indian Gaming Regulatory Act was adopted in 1988. 25 U.S.C. 2701, et seq. (hereinafter referred to as "IGRA.") Part of the statute has been previously described in the distinction between Class I, II and III Games. IGRA stated that existing federal law did not provide clear standards or regulations for the conduct of Indian gaming; stated that the principle goal of federal Indian policy is to "promote tribal economic development, tribal self-sufficiency, and strong tribal government;" and finally stated that Indian tribes should have the exclusive right to regulate gaming on Indian land "if the gaming activity is not specifically prohibited by federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." (Section 2701(3), (4), (5).)

To establish these goals, the National Indian Gaming Commission was established to consult with local law enforcement authorities concerning the issuance of gaming licenses by tribes; to authorize or revoke self regulation by the tribes; and to establish guidelines for the implementation of the Act.

The critical section of IGRA, Section 2710, provided for exclusive jurisdiction of Class I Gaming (social/charitable) to the tribes. Class II Gaming (state legalized) was regulated by requiring adoption of a tribal ordinance requiring sole ownership by the tribe; auditing of the gaming and of all significant contracts for supplies, services, and concessions; and background investigations on management and employees. IGRA also limited the distribution of all net revenues to the purposes of funding tribal government; promoting tribal economic development; providing donations to charitable organizations; or for local government.

With respect to Class III Games, these games could lawfully be conducted on Indian lands only if they were:

> "(A) Authorized by an ordinance or resolution that . . . (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (ii) meets the

requirements of subsection (b) of this section [regulations for Class II Gaming] and (iii) is approved by the Chairman,

"(B) Located in a state that permits such gaming for any purpose by any person, organization or entity, and for any purpose by any person

"(C) Conducted in conformance with a tribal/state compact entered into by the Indian tribe and the state . . . that is in effect." (Section 2710(d)(1).)

The statute contemplated that a state may be unwilling to negotiate a compact. To this end an elaborate process was specified in Section 2710. The process began by the Tribe requesting that the state enter into negotiations for a tribal/state compact. The state was required to negotiate "in good faith to enter into a compact." (Section 2710(d)(3)(A).) The compact was required to be approved by the Secretary of the Interior and published in the Federal Register. Section 2710 gave the federal courts jurisdiction over any cause of action arising from failure to negotiate a compact. Such action could be initiated 180 days after the date upon which the Indian tribe requested that the state enter into negotiations. If the District Court found that the state failed to negotiate in good faith, the Court shall order the state and tribe to conclude the compact within 60 days. If that does not occur, then the tribe and the state are required to refer the matter to a mediator appointed by the Court. The mediator is required to select the better of the two proposals and submit it to the tribe and the state. The state may then either approve the compact within 60 days or refuse its consent in which case the Secretary of the Interior establishes the procedures to regulate the tribe's Class III Gaming.

1. IGRA Commission has Broadly Defined Class III Games Requiring a State Compact

Pursuant to the Act, the National Indian Gaming Commission promulgated an extensive set of regulations. (25 C.F.R. Section 502.) The tribes believed that the regulations were too broad in classifying the Class III Games. (Certain Indian attorneys referred to this as "if it plugs in it's Class III.") Led by, who else, the Cabazon Band of Mission Indians, eight tribes sued the National Indian Gaming Commission. Fifteen states, including California, intervened in the lawsuit. The Court of Appeals for the District of Columbia Circuit ruled in 1994 against the tribes and in favor of the National Indian Gaming Commission. Cabazon Band of Mission Indians v. National Indian Gaming Commission 14 F.3d 633 (D.C. Cir. 1994) cert. den. ____ U.S. ____.

Although originally the tribes were challenging a broad array of games, the case eventually came to involve only the games known as "pull-tabs." In the paper version of pull-tabs, gamblers purchase cards from a deck, and paper tabs can be pulled off the cards to determine if a gambler is a winner. A gambler can compete against other gamblers in the hall. In the computerized version of pull-tabs, the computer selects the card, pulls the tab and displays the result. The computer can also be interconnected with other machines or banks of machines.

Pull-tabs are defined in Section 2703(7)(A) as a Class II Game. Moreover, the game of bingo is also a Class II Game "whether or not electronic, computer or other technological aids are used in connection therewith." However, under subsection (7)(B)(ii) "electronic or electro-mechanical facsimiles of any game of chance or slot machines of any kind" are excluded as Class II Games. Therefore, the question was

whether the computerized pull-tabs were "electronic, computer, or other technological aids" or "electronic or electro-mechanical facsimiles." The Court ruled:

> "Although there may be room for a broader interpretation of facsimile, the video version of pull-tabs falls within the core meaning of electronic facsimile. It exactly replicates the paper version of a game, and if it is not sufficient to make it a facsimile we doubt, as did Judge Lambert, that anything could qualify . . . . In short we agree with Judge Lambert that, at the least, the Act's exclusion of electronic facsimile's removes games from the Class II category when those games are wholly incorporated into an electronic or electro-mechanical version." (At 636.) (Accord, Sycuan v. Roache 54 F.3d 535, 541 (9th Cir. 1994))

Based on the regulations of the National Indian Gaming Commission, then, thus far the tribes have not been successful in obtaining a liberal interpretation of the categories created in IGRA so that they could conduct these games as Class II Games. Instead the tribes have been forced to go the route of negotiating compacts with the states. This has spawned much litigation as we shall see.

A. IS IT POSSIBLE TO NEGOTIATE WITH ONLY ONE PARTY AT THE TABLE?

Given that the tribes may only get Class III Gaming by negotiating with the states (unless they illegally introduce them), how successful has this process been? As discussed above, IGRA includes a very specific process if an agreement has not been negotiated within the required 180 days. This process involves a Court ordering negotiations within a 60 day period, reference to a mediator and if that is unsuccessful, then the Secretary of the Interior's imposition of a compact for Class III Gaming. The problem is that the establishment of the process begs the real question which is what games must the state negotiate? Remember, Section 2710(d)(1)(B) states that Class III Gaming is lawful on Indian land if the state "permits such gaming for any purpose by any person, organization, or entity . . ." The controversy has been whether if Class III Games are permitted in some form, must the state negotiate a compact which would permit Class III Gaming in all forms?

The Circuits have split on this issue with the Ninth Circuit, in an approach ironically different from that followed in Rumsey, supporting the more restrictive view. This issue will go before a U. S. Supreme Court that in the Rumsey case was divided 6-3, with five of the six members of the majority gone, and with the Court having become more conservative. Another Circuit has declared the portion of IGRA which requires states to negotiate a compact to be unconstitutional in violation of the Eleventh Amendment, which decision is also on review before the Supreme Court. The Supreme Court during this coming term will have the opportunity to reshape the law in this area.

1. The Mashantucket Piquot Approach in the Second Circuit Requires Negotiation Based on Cabazon

As earlier stated, the Mashantucket Piquot Tribe has established the most successful Indian gaming facility in the United States. Originally this was developed as a card club type operation with federal assistance. The big money started to accrue after the

Tribe decided to introduce Class III Gaming to the facility. The Tribe's opening was provided by the fact that Connecticut law allowed certain non-profit organizations to conduct "Las Vegas Nights" where the non-profit organization could conduct blackjack, poker, dice, roulette, baccarat, horse race games, and other Class III Games.

Therefore, in 1989 the Tribe requested the State of Connecticut negotiate a compact which would permit Class III Games within the Tribe's facility since Class III Games were permitted by the State for some persons by state law. The State refused to negotiate contending that Class III Gaming was only permitted for non-profit organizations under limited circumstances. Litigation ensued ultimately resulting in an opinion by the Second Circuit upholding the tribal position. Mashantucket Piquot v. State of Connecticut 913 F.2d 1024 (2nd Cir. 1990). The Second Circuit leaned heavily on the Supreme Court's interpretation in the Cabazon case, finding that such a substantial amount of gambling was permitted in California that the legislative scheme was merely regulatory rather than prohibitory. The Second Circuit cited a similar analysis by the Eighth Circuit in United States v. Sisseton-Wahpeton Sioux Tribe 897 F.2d 358 (8th Cir. 1990). Thus the Court concluded:

> "So here, the District Court concluded after a careful review of pertinent Connecticut law regarding Las Vegas Nights, that Connecticut 'permits games of chance, albeit in a highly regulated form. Thus such gaming is not totally repugnant to the State's public policy. Connecticut permits other forms of gambling such as State operated lottery, bingo, jai alai and other forms of parimutuel betting.' . . . Construing this provision in light of Cabazon and Sisseton-Wahpeton we conclude, in agreement with the District Court, that the Connecticut law applicable to Class III Gaming is regulatory rather than prohibitive. This really means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the reservation." (At 1031-1032.)

Finally, the Court rejected the State's contention that its failure to negotiate was in good faith since its interpretation of IGRA was sincerely held. The Court concluded there was no exception for sincere but erroneous legal analysis. Therefore, the Court could order that the compact be negotiated within 60 days instead of starting over with a new 180 day clock.

1. The Ninth Circuit Changes Course in Rumsey

After the Pequot decision in 1990, 16 California tribes began negotiations with the state in 1991 for a compact. The request to negotiate a compact included the operation of certain stand alone electronic gaming devices including pull-tab, video poker, video bingo, video lotto, video keno, live banking, and percentage card games. By late 1992, many of the terms of this compact were negotiated when impasse was reached on the scope of the gaming to be permitted. Notwithstanding Pequot, California took the position that its mandatory duty to negotiate extended only to exactly the forms of gaming specifically allowed by the state. The tribes argued that if some Class III Gaming was permitted in the state then the state was required to permit all forms of Class III Gaming.

In 1993 the tribes received a favorable federal District Court opinion. However, in November 1994 the Ninth Circuit reversed, denied both petitions for rehearing and rehearing in banc, but delayed the final decision until August of 1995. In an unusual

action, four judges wrote a dissent which is published along with the panel opinion. Rumsey Indian Rancheria v. Wilson 64 F.2d 1250 (9th Cir. 1995).

The most important obstacle the majority had to overcome was its own opinion in Cabazon which had lead to IGRA. The tribes contended that IGRA codified the "criminal/regulatory" test. If the gaming activity violates state public policy and is "criminal," then it is prohibited. However, if some gaming activity is permitted, then it is merely "regulated" and the subject of compact negotiations under IGRA.

As opposed to this approach the Court chose to rely upon the "plain meaning" test. Thus, the Court said that the plain meaning of the legislation should be conclusive. If the language is unambiguous, then legislative history is not relevant. Moreover, the Court indicated that the canons of construction which benefit Native Americans would not be employed to contradict the plain language of a statute. (See 1257.)

The Court turned to the language of IGRA cited before, that "Class III Gaming activities shall be lawful on Indian lands only if such activities are . . . located in a state that permits such gaming for any purpose by any person, organization or entity . . ." (At 1256; Section 2710(d)(1)(B).) Thus, if the state does not "permit" the gaming activity, the tribe has no right to engage in the gaming activity and the state has no duty to negotiate.

The Court summarized California law saying that the operation of banked or percentage card games is a misdemeanor under Penal Code Section 330. Moreover, stand alone electronic gaming machines are electronic slot machines and the ownership or possession of slot machines is a misdemeanor under Penal Code Sections 330a and b. Score Family Fun Center, Inc. v. County of San Diego (1990) 225 Cal.App.3d 1217, rehearing denied, held that such electronic machines fell within these prohibitions. However, the Tribes argued that video lottery terminals, parimutuel horse racing, non-bank, non-percentage card games are legal in California. Because such games function in the same manner as electronic games, the Tribes contended that California regulates and therefore permits these games within the meaning of IGRA.

The Ninth Circuit held that the question was really quite obvious:

> "Clearly, California does not allow bank or percentage card gaming. With the possible exception of video lottery terminals,[9] electronic gaming machines fitting the description of

[9] The Ninth Circuit's decision to reject the rehearing en banc was made on August 11, 1995. The Western Telecon decision was rendered by the California District Court of Appeals on July 26, 1995. The Ninth Circuit did not have the benefit of the Western Telecon decision in rendering its opinion although the reference to the "possible exception of video lottery terminals" was acknowledgment that California law did potentially permit electronic gaming machines fitting the description of "slot machines." (See Fn. 3 on page 1257.) The Rumsey panel termed the Tribes' argument that video keno permitted by the State Lottery did show that California allowed the operation of slot machines to be a "questionable argument." However, the Western Telecon decision showed that this may be more than simply a question of "questionable" argument since the California Court of Appeals actually adopted the argument that the video keno games were permitted notwithstanding that they had many similarities to slot machines. However, in Western Telecon the Court also stated that the video keno games lacked some of the requirements of slot machines including

> 'slot machines' are prohibited. The fact that California allows games that share some characteristics with banked and percentage card gaming - in the form of (i) banked and percentage games other than card games and (ii) non-bank, non-percentage card games, is not evidence that the state permits the Proposed Gaming Activities. . . . IGRA does 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. Instead, the statute says only that if a state allows a gaming activity 'for any purpose by any person, organization or entity,' that it must allow Indian tribes to engage in that same activity. . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." (At 1257-1258.)

The Court turned to legislative history of IGRA which discussed Class II Gaming. This legislative history referred to the Cabazon case and the prohibitory/regulatory distinction. The Ninth Circuit held that (i) legislative history could not be used to contradict an unambiguous statute, (ii) the legislative history pertained only to Class II, (iii) identical legislative language in the sections pertaining to Class III did not mean the same thing as such language when discussing Class II since "Congress envisioned different roles for Class II and Class III Gaming" (At 1259) and (iv) "Congress was less ebullient about tribes' use of Class III Gaming, however, and indicated that Class III Gaming would be more subject to state regulatory schemes." (At 1259.)

Finally, the Court cited the Mashantucket Piquot case stating that Piquot merely required that the state negotiate with the tribes where the state legislative scheme permitted charities to conduct Class III Games. Since charities have the right to conduct Class III Games, the State was compelled to negotiate whether the tribes could conduct such games. In California, however, Class III Games are not permitted (with the possible exception of video lottery terminals as noted by the Court). (Accord, Cheyenne River Sioux Tribe v. South Dakota 3 F.3d 278 (8th Cir. 1993) where the Eighth Circuit held that South Dakota's statutes permitting video keno and charitable bingos did not require it to negotiate a compact for casino-type gambling and traditional keno.)

The dissent which was published as a dissent from the denial of a rehearing en banc pulled no punches stating that Rumsey was directly contrary to the Second Circuit's decision in Piquot. The dissent cited Cabazon for the principle that the examination of California's public policy is "at a level of generality far above that of the individual gaming issue." (At 1254.) The dissent also cited Ninth Circuit's opinion in Sycuan Band of Mission Indians v. Miller 54 F.3d 535 (9th Cir. 1995) holding that the state could not allow or disallow Class II Gaming on a game by game basis. The dissent asserted that the panel should have focused on the phrase "such gaming" in the phrase "permits such gaming."

> "Did it mean the particular game or games in issues, or did it mean the entire category of Class III Gaming? The structure of IGRA makes clear that Congress was dealing categorically, and that a state's duty to bargain is not to be determined game by game. . . . The

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discharging coins or currency. More importantly, in Western Telecon the court expressly stated that it was not reaching the question of whether video keno was a slot machine and "the effect of Proposition 37 on the rights of gambling operators on `Indian lands' within the provisions of [IGRA]" (at Fn. 3 on page 1672)]. It is a mark of the complexity of the law in this area that the cases spend so much time specifying what they are not deciding.

> plain language cuts directly against Rumsey; Congress allows a tribe to conduct Class III Gaming activities (pursuant to a compact) if the state allows Class III Gaming by anyone." (At 1254.)

The dissent argued that the panel's reading of IGRA set the statute on its face and contradicted the legislative purpose of IGRA, which involved establishing specific time limits for negotiation, review by the Court, the potential appointment of a mediator, and, ultimately, the ability of the Secretary of the Interior to dictate the terms of the compact.

> "But under Rumsey this whole process is nipped in the bud if the tribe seeks to operate games that state law, criminal or regulatory, happens to prohibit. The state has no duty to begin negotiations, even though under IGRA a compact may permit the tribe to operate games that state law otherwise prohibits. . . . The state thus has no incentive to negotiate, and there is no system to require negotiation. IGRA is rendered toothless." (At 1253.)

Because of the conflict in the Circuits with the Eighth and Ninth Circuits on one side and the Second Circuit on the other, the U. S. Supreme Court has accepted the Rumsey case on appeal. The Supreme Court's decision will be critical for the negotiation of compacts throughout the country. Although the dissent in Rumsey may have something of the better argument on the basis of the Supreme Court's opinion in Cabazon (although the Cabazon decision is distinguishable as pre-IGRA) there has been an interesting change at the Supreme Court since the Cabazon decision in 1987. The Cabazon case was a 6-3 decision. The opinion was written by Justice White and joined in by Rehnquist, Brennan, Marshall, Blackmun and Powell. While now only Chief Justice Rehnquist remains of the majority, all three of the dissenters, Justices Stevens, O'Connor and Scalia, remain.

Thus, the Ninth Circuit's decision in Rumsey overlooking prejudicial precedents, ignoring legislative history and preserving as much latitude for state regulation as possible may find a forgiving audience in the Supreme Court. However, there is another alternative approach to the subject which has been followed in the Eleventh Circuit. That approach is to declare significant portions of IGRA unconstitutional.

1. The South (Eleventh Circuit) Advocates States' Rights Holding IGRA Provisions Giving Courts Jurisdiction to Order Negotiation of Compact Unconstitutional

Seminole Tribe of Florida v. State of Florida and Poarch Creek Indians v. State of Alabama 11 F.3d 1016 (11th Cir. 1994) are consolidated cases arising from the refusal of the States of Florida and Alabama to negotiate compacts pursuant to IGRA. The District Court decisions reached opposite results. The Eleventh Circuit in 1994 upheld the decisions of the states not to negotiate and this case is now also on appeal to the United States Supreme Court. The Eleventh Circuit's decision was based upon the Eleventh Amendment to the Constitution. The Court held:

> "We hold that, although decisions of the Supreme Court demonstrate that Congress does possess the power to abrogate the states' Eleventh Amendment sovereign immunity in certain cases, Congress did not possess that power when enacting IGRA under the Indian Commerce

> Clause, U. S. Constitution, Article 1, Section 8, Clause 3, thus the states retain their sovereign immunity and the federal courts do not have subject matter jurisdiction over suits brought under IGRA. Accordingly, these cases must be dismissed." (At 1019)

In 1890 the U. S. Supreme Court supported a broad interpretation of sovereign immunity in Hans v. Louisiana (1890) 134 U.S. 1. However, the states' sovereign immunity is not absolute, and three exceptions apply: (i) where the state has given consent, (ii) where the state's immunity has been abrogated by Congress, or (iii) the approach of Ex parte Young.

First, with regard to consent, consent can either be express, implied from the state's ratification of the Constitution or participatory due to the state's participation in a Congressional program. The Court found no basis for finding state consent under any of these three doctrines. Second, with regard to abrogation of the states' sovereign immunity, there is a two part test: Did Congress intend abrogation, and, if it did, did Congress possess the power to abrogate the state's sovereignty? The Court concluded that there was sufficient expression of Congressional intent in IGRA to make the state subject to suit. However, the real problem came in the analysis of whether Congress had the power to abrogate the state's sovereign immunity.

The Court stated that such authority existed only under Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause and that neither of these Constitutional provisions authorized Congress' regulation of Indian Gaming. There was no liberty or property interest under the Fourteenth Amendment to conduct gaming and while the regulation of organized crime would be authorized under the Interstate Commerce Clause, this did not seem to be the thrust of IGRA. Thus, the Court concluded that IGRA was authorized, if at all, only under the authority of the Indian Commerce Clause.

The Court then turned to whether the Indian Commerce Clause was sufficient Constitutional authority for Congress to abrogate the state's Eleventh Amendment immunity. The Court distinguished Pennsylvania v. Union Gas Company (1989) 491 U.S. 1 which upheld removal of sovereign immunity for the states in connection with the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") by stating that CERCLA was enacted under the Interstate Commerce Clause. The Court quoted Cotton Petroleum Corp. v. New Mexico (1989) 490 U.S. 163 holding that the Interstate Commerce and Indian Commerce Clauses have different applications:

> "In that case the Court acknowledge the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states in order to `maintain free trade among the states,' . . . By contrast, `the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.' . . . Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate that they be treated distinctly. As a result the unique abrogation power afforded Congress under the Interstate Commerce Clause in Union Gas cannot be extended to the Indian Commerce Clause.'"

The Court found that abrogation was authorized only where the states were partaking in an activity typical of private individuals, and not when the states' conduct was within the typical realm of state authority. Since the states' negotiations with the tribes were not outside their typical range of authority, "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity." (At 1028)

Finally, the Court dismissed the third exception permitting the abrogation of state sovereign immunity derived from Ex parte Young (1908) 209 U.S. 123. This doctrine which allows an individual to obtain an injunction against a state officer to force the officer to comply with federal law was found inapplicable to compel an executive official to undertake a discretionary task where the suit is really a suit against the state.

This then would seem to be a major victory for the state position. Is this a way out for the states which would avoid the Rumsey/Piquot dichotomy? Unfortunately, what the Court giveth the Court also taketh away. In the final section of the opinion, the Seminole Court addressed the argument that it had emasculated the statute. What remedy exists when a state refuses to negotiate in good faith and also will not consent to suit by the Indian tribes? The Eleventh Circuit found the answer simple. If a state pleads an Eleventh Amendment defense, then the suit must be dismissed and the Court does not have jurisdiction to order the state to negotiate. However, IGRA does contain a severability clause. Therefore, although all the steps in a process that involve a judicial order directed at the state are removed, the final step in the process remains and permits the Secretary of the Interior to promulgate regulations governing Class III Gaming on tribal land.

Thus, although the States of Florida and Alabama on behalf of all states vindicated the right of states not to be compelled to negotiate, this may be the true pyrrhic victory. If they refuse to negotiate the Secretary of the Interior can simply promulgate regulations without the benefit of any type of negotiation process. Thus, although the Eleventh Circuit's approach is on appeal to the United States Supreme Court, not too many states could want the Supreme Court to wholly adopt the Eleventh Circuit's analysis.

A. THEY CAN RUN AND THEY CAN HIDE: IT MAY BE ILLEGAL, BUT YOU CAN'T CITE THEM FOR IT

1. Ninth Circuit Holds Although Video Pull-Tabs Are Illegal, the State Cannot Prosecute in Sycuan

If you are not confused yet, perhaps we can make things a little more complicated. Once again we find the Ninth Circuit creating a nice dichotomy. While the Seminole decision upheld the state's sovereign immunity ruling that the tribes could not sue the state, Sycuan Band of Mission Indians v. Roache 54 F.3d 535 (9th Cir. 1994) held that the State of California could not prosecute four employees of a tribal casino where the games being conducted were Class III Games clearly illegal under California law. Accord, see U.S. v. Cook 922 F.2d 1026 (2d Cir. 1991) cert. den., 111 S.Ct. 2235; but see Lac du Flambeau Bank of Lake Superior Chippewa Indians v. Wisconsin 743 F.Supp. 645 (W.D. Wis. 1990) refusing to grant an injunction.

The County of San Diego raided gaming centers operated by the Barona, Sycuan, and Viejas Bands of Mission Indians on their reservations. Video pull-tab machines were seized, and the district attorney proceeded to prosecute four employees for conducting illegal games. The District Court granted injunctive relief precluding the State from prosecuting the officials under IGRA. However, the District Court ruled that the gaming devices did not need to be returned to the Tribe, but to their owner, because conduct of such games without a tribal/state compact was illegal. Both parties appealed.

The State argued that IGRA extended state criminal laws into Indian country and that even if it did not do so, California had preexisting authority to enforce its criminal laws in Indian country under Public Law 280. The Court ruled, first of all, that IGRA contained an explicit provision that although state criminal laws did apply, jurisdiction for the prosecution of such violations was vested in the federal government unless the tribe had consented to state jurisdiction. (See 18 U.S.C. 1166.) In answer to the State's second argument concerning its pre-existing Public Law 280 authority, the Ninth Circuit pointed to the Supreme Court decision in Cabazon holding that state law may be excluded from Indian country as "regulatory" even though there are criminal penalties associated with the enforcement of such regulatory laws. The State argued that Cabazon did not apply since it dealt with bingo games while the games in question were electronic pull-tabs; clearly games that California did not permit anywhere else.

The Court had two responses. First the Court ruled that the State did not have jurisdiction over the Band's gaming activities under Public Law 280 since the State's legislative scheme with respect to gaming was "regulatory" and civil regulatory jurisdiction was left in the hands of the tribes under Cabazon. "The State cannot regulate and prohibit, alternatively, game by game and device by device turning its public policy off and on by minute degrees." (At 539.)

Secondly, to the extent Class III Games are involved, prosecution was prohibited by the provisions of IGRA itself because IGRA vested exclusive jurisdiction for prosecution in the federal government, and the provisions of Public Law 280 were impliedly repealed by Section 1166(d).

> "If as we hold below, the Band's electronic pull-tab machines are Class III Gaming devices, then Section 1166(d) makes the State's law against such machines applicable in Indian country. Section 1166(d) also grants the federal government exclusive power to enforce that law. Even if there were some other route making that same state law applicable in Indian country, the federal government's right to enforce that law is still exclusive. If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by Section 1166(d)." (At 540.)

However, the Tribes did not win a complete victory. The Tribes argued that the video pull-tab games were Class II Games. This was the same argument made to the District of Columbia Circuit discussed above in Cabazon Band of Mission Indians v. National Indian Gaming Commission 15 Fed.3d 633 (D.C. Cir. 1994) cert. den., ___ U.S.___. For the same reason the Ninth Circuit rejected this argument and held that since the video pull-tab games were "an electronic or mechanical facsimile of a game of chance", categorized as a Class III Game, the Tribes could not employ them in the absence of a tribal/state compact. Therefore, the machines could not be returned to the Tribe but had to be returned to the owner/lessors.[10]

This case helps explain the curious situation of gaming currently in California. The State has won a decision in Rumsey saying that the State need not negotiate to permit Class III Games which would be illegal under California law. This case is on appeal to the United States Supreme Court. Moreover, the Ninth Circuit has determined that electronic games which are facsimiles of Class II-type games are, in fact, Class III Games and are illegal under IGRA. However, since these are the games that most people want to play, many tribes have gone forward and introduced these games into their gaming facilities anyway. Under Sycuan, the state is robbed of the authority to criminally prosecute for the conduct of these illegal games. However, federal enforcement is still available, as discussed below.

2. Ninth Circuit Upholds Federal Prosecution for Illegal Gambling Business for Operation of "Slot Machines" Contrary to Penal Code Section 330(b) in Cabazon Casino

Although under Sycuan, the state cannot prosecute violations of its laws, the Ninth Circuit has recently demonstrated in United State v. E.C. Investments, Inc., et al (96 Daily Journal D.A.R. 2135) (9th Cir. 1996) that the federal authorities, if they are so inclined, retain significant legal authority. As has been seen, the Cabazon Tribe had exerted great influence in the area of developing legal precedents concerning Indian gaming. The Tribe has also drawn significant attention from the law enforcement community (see "And the Dealer Stays" by Jonathon Littman in the January 1993 edition of California Lawyer -- The article recited that the bodies of the casino security chief and two of his friends were found by a fellow tribal member, each having been killed

[10] One alternative is to seize the machines before they enter the Reservation. This technique has been utilized when 29 machines being transported to the Spotlight 29 Casino seized from a rental truck on Interstate 10 and the "transporters" arrested near midnight on March 2, 1995. (Desert Sun, "Pull-tab Machines Seized," March 4, 1995.)

execution style with a single shot to his head). In 1994 a federal grand jury indicted the manager of the casino and certain other persons for conducting an "illegal gambling business" in violation of the Organized Crime Control Act, 18 U.S.C. 1955. The necessary predicate state law offense was using slot machines in violation of California Penal Code Section 330(b) in that the defendants operated video keno, poker, and other machines. The District Court had dismissed the indictment holding that California's public policy does not prohibit such gaming based upon the Supreme Court's decision in Cabazon.

The Court held that its analysis under Rumsey superseded the public policy test developed in Farris (Farris held that Washington's public policy prohibited gambling while in Cabazon it had been determined that California's public policy was regulatory rather than prohibitory.) Instead, under Rumsey the Ninth Circuit had now adopted the "plain meaning test". Since IGRA supersedes Public Law 280 with respect to Class III Gaming, instead of applying the public policy test of Public Law 280, as interpreted by Cabazon, the District Court should have looked at the plain language of IGRA stating that "all state laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State "(but excluding Class I and II Gaming and Class III Gaming when conducted pursuant to a tribal-state compact) 18 U.S.C. 1166(a)(c). Exclusive jurisdiction over criminal prosecution of State gambling is vested with the United States (1166(d)).

In an argument similar to that made in Farris, the Tribe argued that since California lacked jurisdiction to prosecute the crimes and jurisdiction was vested exclusively with the United States, there could be no prosecution under the California Penal Code. (See Sycuan, 54 F.3d 535, 540 (9th Cir. 1994) also holding that the State lacked jurisdiction to prosecute.) The Ninth Circuit held that state jurisdiction was not required under Section 1955 but merely that the offense be a violation of the law of the state. Moreover, the Court adopted a rationale similar to that in Farris where the Court had held that even though the State of Washington could not enforce its gambling laws against Indians on the reservation, because of the strong federal policy against gambling, the actions of the Indians on the reservation were a violation of state law.

> "Moreover, adopting the defendant's narrow reading of Section 1955 would mean that the kind of illegal gambling involved here (multiple persons conspiring to engage in continuous illegal gambling), which the government prohibits in Section 1955, would become immune from prosecution in Indian country. Such a result is insupportable . . . ("the policy underlying Section 1955 is that large scale gambling is dangerous to federal interest wherever it occurs [including on an Indian reservation].") (At 2136.)

Thus, although in Sycuan the Ninth Circuit has made it virtually impossible for California to enter the reservation to enforce its criminal statutes, E.C. Investments makes it clear that the federal authorities can do so and that video keno and poker are considered illegal at this time. Thus, persons engaging in these activities are at significant criminal risk. However, in general, the U.S. Attorneys in California are not aggressively pursuing enforcement at this time. The enforcement actions pertaining to the Cabazon Casino involve the history of law enforcement problems, as stated earlier. Many of the tribes which have Class III Gaming actually introduced them before IGRA after the State's early

reversals in the Rumsey case. The Western Telecon case has also confused the legal picture. Out of all these legal developments, the federal attorneys may have decided to wait and see how things develop before taking enforcement action. In any event, until further judicial or legislative action occurs, an impasse appears to have developed in enforcing State law with respect to gaming on the reservation.

I. IMPACT OF INDIAN GAMING LITIGATION IN CALIFORNIA

A. INDIAN GAMING EXPANDS RAPIDLY IN CALIFORNIA

As stated in Section I of this paper, Indian gaming is big business in California. Indian gaming may be 20 percent of the national gaming industry. In California some 23 tribes are recognized to conduct gaming and generate an estimated $1 Billion per year in revenue with another 45 tribes seeking the right.

The State of California's highest officials, Governor Pete Wilson and Attorney General Dan Lungren have engaged in a vigorous war with the tribes of California to prevent the spread of Class III Games through Indian country. The justification for their position in this war is as follows:

1. These games are illegal under the Penal Code and as state officials they are sworn to uphold the Constitution laws of the State of California.

2. The only reason for tribal success is that they are benefitting from a monopoly caused by their violation of the law and the State's inability to enforce the law.

3. Gaming by the tribes is completely unregulated by the State of California and subject to abuse. As dependent sovereign nations, the tribes are exempt from many of the laws of the State, including Health and Safety laws. Thus patrons of these facilities have lost the protection of the State.

4. The gaming industry itself is subject to abuse in an unregulated state. Thus the State of Nevada requires a minimum 75 percent payout and generally in Las Vegas the payout is 90 percent plus. The California Lottery requires that 50 percent of the revenue be returned as winnings. Patrons of Indian casinos have no such protection. (Desert Sun, "Pot Luck," December 10, 1995.)

5. Casino operations conducted by unsophisticated Indian tribes are subject to penetration by organized crime.

6. Gaming casinos have other negative moral and social effects including on those subject to gaming addictions. Components of the Republican Party who tend to support these Republican office holders are opposed to gambling on moral grounds.

While analysis of the merits of the above arguments is beyond the scope of this paper, it would be inappropriate not to mention the response of the tribes. That response includes the fact that Indian gaming is regulated by the Indian Gaming Regulatory Act; Indian gaming operations are no more subject to penetration by organized crime or to the other negative moral and social impacts of gaming than the State's legalized card clubs, lottery, horse racing, and other forms of gaming; many tribal reservations are still centers of poverty with few natural resources or potential for economic development; and this is just another example of the historic approach to Indian welfare which is to ignore Indians until they have found a way to make money or get ahead and then for White majority society to claim these benefits for themselves (thus the sign on Interstate 10 as you leave Palm Springs "No More Broken Treaties").

State officials say they are willing to negotiate compacts, but only if the tribes first remove the "illegal" games which have been installed, something the tribes have been unwilling to do (Desert Sun, "Wilson Says He'll Deal," September 25, 1994; "Lungren Affirms Stance Against Video Gaming," October 7, 1995.) The intense legal confrontation between the State of California's highest officials and California's Indian tribes which can properly be referred to as a "war". In this war the State has suffered significant defeats. The most significant early defeat was Cabazon in 1987. Then the District Court opinion in Rumsey seemed to seal the State's fate requiring negotiation of a compact for Class III Games. Finally in Sycuan, the Ninth Circuit held that the State could not prosecute persons operating Class III Games within a tribal casino.

Is it any wonder then that just prior to August of 1995 when the Ninth Circuit reversed the District Court opinion in Rumsey, it appeared likely that the State was headed down a dead end road. Many tribes became increasingly bold and introduced Class III Games into their existing operations. Moreover, Nevada interests began to believe in the inevitability of Class III Gaming coming to California. Although this would certainly negatively affect their Nevada operations, the sounder decision appeared to be to get in on the ground floor of Class III Gaming in California. Thus, at one time a number of cooperative arrangements existed between California tribes and Nevada-gaming organizations including the $22 Million Harrahs/Pala Casino proposal and the $10 Million Elsinore/Twentynine Palms Casino. These calculations have now been set on their head as a result of the Ninth Circuit opinion in Rumsey and also the criminal prosecution upheld in E.C. Investments.

A. LITIGATION INVOLVING CITY/INDIAN TRANSACTIONS

1. Palm Springs Redevelopment Agency Agrees to Provide Assistance to Agua Caliente Tribe/Caesars' Transaction

As has been previously described, much of the 31,000 acre Agua Caliente Indian Reservation is within the territorial limits of the City of Palm Springs. As the Southern Pacific was built through the Coachella Valley, every other section of land was given to the railroad and the remaining sections withdrawn for the Agua Caliente Indian Reservation by Executive Order in 1876 with the Reservation patented in 1896. Evenly

numbered sections are part of the reservation and the odd sections were eventually largely disposed by Southern Pacific to private interests.

The Tribe and Caesars proposed to build an 80,000 square foot casino on a 10 acre parcel in the heart of Palm Springs downtown. This location would have permitted easy access to the Hyatt, Hilton, Wyndham, Marquis and the Tribe's Spa Hotel, as well as to the DeBartolo Desert Fashion Plaza and all of the other shops lining the world- renown Palm Canyon Drive. The downtown business interests and the community at large, which had been suffering difficult economic times through California's devastating recession; (downtown vacancy level had reached 20 percent) were ecstatic concerning the project. The selection by the Tribe of Caesars was seen as associating two world class names in a project bringing world class gambling within two hours of the Los Angeles basin.

After the Tribe selected Caesars in November 1992, they then negotiated an exclusive agreement approved July 1993. Then they met with the City of Palm Springs and negotiated a memorandum of understanding ("MOU"). In consideration of the cost of police, fire and other municipal services, and of the economic assistance provided by the Redevelopment Agency, the Tribe agreed to give the City between 2 to 3 percent of the revenue from the Casino. Based on the MOU, the Palm Springs Redevelopment Agency proceeded to negotiate a disposition and development agreement ("DDA") with the Tribe.

Under the DDA, the Agency would convey various parcels of property to the Tribe which would be developed for parking and other accessory uses for the Casino. The DDA required the Agency to sell the Tribe two parcels of property it currently owned at the parcels' full appraised fair market value. The Agency would also attempt to acquire two other parcels, one owned by the United States in trust for a tribal member (and currently used as a portion of the post office parking) and another parcel privately owned. As the acquisition of these parcels would potentially involve condemnation, and as the exercise of condemnation required a public hearing, there was no obligation of the Agency to proceed with condemnation but if it did so, the Agency was required to convey the parcels to the Tribe.

The DDA did not require payment for these last two parcels. Instead, the consideration paid for the first two parcels was to create a fund to be used to acquire the other two parcels. In addition the DDA required the Tribe to provide street dedications and other facility improvements, including traffic signals, street improvements and drainage facilities. The amount of Agency assistance was estimated to be $1.5 Million. If Caesars did not proceed with the project, the Tribe was required to construct a facility for other uses permitted by the Redevelopment Plan. In the event the casino was not constructed, the Tribe agreed to share revenue with the City off of the alternative uses.

1. **Litigation to Stop Transaction**

The Agency approved the DDA on September 7, 1994. Two residents who objected to the "gift" of Agency funds brought suit contending that the DDA was illegal (Ebling v. Community Redevelopment Agency, Riverside County Superior Court, Case No. 078004; 4th App.Civ. No. E-015608. The argument was that the intent of the Agreement was to develop a casino with Class III Gaming managed by Caesars. They argued that the City should not be able, through the device of an agreement with the Tribe, to bring gambling to Palm Springs in violation of the Penal Code. Moreover, they argued that Class II Gaming was not permitted since the City had not adopted a card club ordinance pursuant to Business & Professions Code Sections 19800, et seq. Thus, the Court should rule the transaction null and void.

Substantively the City argued it did not mandate Class III Gaming and in fact envisioned that the Tribe could proceed with alternative uses. However, the City's most devastating argument was that the Tribe itself was an indispensable party under Code of Procedure Section 389 and in its absence the litigation could not proceed.

After a combined hearing on the Demurrer, the Preliminary Injunction, and the Writ action, the Trial Court issued its ruling on November 7, 1994 sustaining the Demurrer without Leave to Amend and granting the Agency's Motion to Dismiss, stating as follows:

> "The Tribe is a party to the DDA, has a substantial stake in the outcome of this action, and would be prejudiced by its absence here. See, e.g., Enterprise Management Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890 (10th Cir. 1989). Also, without the Tribe's presence, the Agency could face a suit in Federal Court by the Tribe and potentially inconsistent court judgments. Therefore the Tribe appears to be an indispensable party under C.C.P. 389 because of its sovereign immunity, the Tribe cannot be joined in this action without its consent."

The Court also ruled that petitioner's showed no likelihood of prevailing on the merits in their injunction action, ruled that the Writ could not be granted because the Petitioner's failure to supply the entire administrative record and to exhaust their administrative remedies.

Petitioners then took a Petition for Writ of Mandate to the Supreme Court of California which then was directed to the Court of Appeals. The Court of Appeals initially issued an interim stay pending further briefing, but after such briefing upheld the Trial Court's ruling and dissolved the State's pending appeal.

1. **Agency Faces Second Suit from Attorney General**

Flushed with success by the November 7, ruling in Ebling v. Community Redevelopment Agency, the City was devastated three days later upon learning that Attorney General Dan Lungren had filed a fresh lawsuit on November 10, 1994. Evidently the Attorney General had been following the progress of the prior lawsuit. With the ruling against the Petitioners, the Attorney General filed a second action this

time naming the Tribe as a party. California v. Community Redevelopment Agency of Palm Springs (Case No. 78706).

The Attorney General received a barrage of negative local press and a great number of letters written by the predominantly Republican business interests of the community. Congressman Sonny Bono also sought to bring his influence to bear on behalf of the City. The Attorney General stated that one of his principle concerns was that some of the property which was a part of the project, although originally part of the Reservation and still within the Reservation boundaries, was now in the fee ownership of the Agency and subject to the jurisdiction of the State. Moreover, the City was seeking to acquire other land where title would pass through the Agency to the Tribe. At the conclusion of the transaction the State would have lost the ability to enforce its laws on these properties and to protect the health and safety of its residents.

The Attorney General argued that this was an important precedent as these transactions were occurring on a statewide basis. For example the 140-member Makahmo Pomo Indian Nation became a federally recognized tribe in 1985 in the Santa Rosa area. This Tribe was now seeking not only to reacquire its original "homeland" but also to buy additional land on Highway 101 north of San Francisco to include within the reservation. Thereafter the Tribe intended to develop a casino. The Attorney General saw the potential for a proliferation of casinos throughout the State by Indian tribes acquiring land and then incorporating it within Indian reservations.

On a policy basis, the City made the argument that although it was true the City was selling land to the Tribe, this was always land which had been historically within the boundaries of the reservation. Moreover, the City argued that due to the peculiar location of this reservation, non-Indians would receive much of the benefit of gaming development at this site unlike the case of gaming on many other reservations. More to the point procedurally, the Tribe made a Motion to Quash service on the Tribe on the basis that due to sovereign immunity they could not be sued by the State without their consent. This motion was granted. Once this motion was granted the Agency reasserted its arguments that the matter must be dismissed on the basis that the Tribe was an indispensable party. Although before a different judge, the same result was reached:

> "In this action the Tribe has an interest in the litigation as a developer and party to the DDA with the Agency. The Tribe meets the criteria set forth in CCP 389(a) for a necessary party and that a disposition in the Tribe's absence could impair the Tribe's ability to protect its interests and the Tribe's right to collaterally attack an adverse judgment and this action exposes the Agency to inconsistent obligations Beresford Neighborhood Assn. v. City of Mateo (1989) 207 Cal.App.3d 1180.

This decision was rendered on December 30, 1994. An appeal is now pending. On appeal, a number of arguments are raised. An argument is made for implied waiver of sovereign immunity because of certain provisions of the DDA. However, the rule stated by the United States Supreme Court in Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58 is "it is settled that a waiver of sovereign immunity could not be implied but must be unequivocally expressed." This is because an Indian Tribe's immunity is coextensive with the United States immunity Wichita and Affiliates Tribes of Oklahoma v. Hodel 788

F.2d 765, 773 (10th Cir. 1986). It is argued without authority that there is no sovereign immunity with respect to the Tribe's conduct of commercial transactions, but the law is to the contrary Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe (1991) 498 U.S. 505, 510.

Fundamentally, the Attorney General's argument is that the application of sovereign immunity to this transaction places an entire category of public activities beyond the purview of the courts, unless consent is given by the Tribes. The Attorney General contends that the Agency's position shields the Agency from all judicial scrutiny absent consent of the Agua Caliente Band and that therefore such rule is unjust. As appealing as the Attorney General's argument may be on the surface, it fails to recognize that John Marshall's statement in 1831 "The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."

Interestingly enough, the Caesars aspect of the transaction changed dramatically with Caesars' withdrawal from the project announced April 4, 1995. One significant reason was the example set several weeks earlier by the Elsinore/Twentynine Palms situation. Elsinore Corporation, a Las Vegas gaming company, provided $10 Million in funding for the Spotlight 29 Casino which was opened as a card club. After several months of struggling economic performance, the 14-member Twentynine Palms Tribe one night introduced 72 video pull-tab machines. Elsinore brought suit against the Tribe to force them to remove the machines, but instead abandoned the project on March 29, 1995, the day after the Nevada Gaming Control Board threatened to revoke Elsinore's Nevada Gaming License unless it severed its ties with the Tribe or removed the machines. (Desert Sun, "Las Vegas Firm Cuts Casino Ties," April 29, 1995.) (The Tribe says it will repay the $10 Million.)

The Caesars investment would have been $25 Million instead of $10 Million, and the precedent set by the Elsinore situation certainly could not have been attractive. What if the Agua Caliente Casino was restricted to Class II Games and was economically successful? Would the Agua Caliente Tribe bring in Class III Games forcing Caesars to walk on their investment if their Nevada gaming license was imperiled? In fact, when the Agua Caliente Tribe opened their much smaller 10,000 square foot facility in the existing Spa Hotel they did bring in 150 video games and opened the facility 10 days earlier than they had announced they would. (Desert Sun, "Surprise Opening," April 11, 1995.)

The most important reason for Caesars' withdrawal involved the provisions of IGRA. As stated earlier IGRA contains a number of provisions to protecting Indian tribes in terms of the operation of casinos. Section 2710(d)(9) provides that any tribe could enter into a "management contract" for the operation of a Class III Gaming activity if the contract was submitted and approved by the Chairman of the National Indian Gaming Commission pursuant to Section 2711. Section 2711 contains the requirements for approval of a management contract for a Class II Gaming activity including provisions for a minimum guaranteed payment to the Indian tribe, an agreed ceiling or repayment of development construction costs, limitation of the amount of the management fee to the percentage of net revenue not exceeding 30 and in some cases 40 percent, and, most importantly, a limitation on the contract term to not exceed 5 years or 7 years in some

circumstances. With the statutory fee limitations, it was never clear how Caesars could recover its $25 Million investment in 5 to 7 years particularly if State law did not permit Class III Games for some significant portion of that period. As it became clear that the road to Class III Gaming in California would be longer than was perceived in the early 90's and as the State of Nevada acted promptly in respect to the Elsinore situation, it became clear that Caesars should abandon the project before it made its substantial investment.

I. THE FUTURE COURSE OF GAMING

A. PROPOSED CONSTITUTIONAL MEASURE FOR NOVEMBER 1996 BALLOT

Several of the same parties sponsoring the City of Palm Springs card club initiative have also developed a statewide Constitutional measure designed to permit Class III Gaming in Palm Springs. If passed, this measure may have the effect of allowing all Class III Games in Indian country since Class III Games would become permitted games in California for some persons. It is our understanding that over 600,000 signatures are required to place this measure on the November 1996 Ballot, and that as of the time of this paper, half of those signatures had been gathered.

The measure would legalize four new classes of controlled games and wagering: (1) California-style gaming, (2) house-banked games, (3) progressive jackpots, and (4) backline wagering. California-style gaming, defined as video slot or video card machines, would be allowed only in the City of Palm Springs. By authorizing play against the house, the provision on house-banked games effectively legalizes games such as blackjack. Progressive jackpots permit jackpot poker and pooled wagering. Backline wagering allows betting by non-players on the outcome of a player's hand.

This measure would broaden state regulatory authority over gaming and would incorporate many of the regulatory reforms sought in the Isenberg legislation (AB 2907). The measure would create a Gaming Control Commission and repeal the three-year moratorium on card rooms in SB 100. The Commission would be responsible for applicant background investigations, card room licensing and supervision, and gambling regulation enforcement. Card room owners, operators, and investors, gambling equipment manufacturers and distributors, and gambling enterprise employees would be subject to annual licensing by the Commission.

The measure does not preempt but retains local government control. The measure would require a two-thirds vote of the electorate of the community to establish new card rooms or increase existing tables by 10 percent or more per annum.

The measure does not address Indian gaming. However, since IGRA authorizes Indian tribes in any state to operate any gambling games that are otherwise legal in the state for any purpose, subject to a negotiated compact with the state, arguably the

expanded games and wagering authorized under the measure could also be allowed at Indian gaming establishments.

The measure would also authorize licensing fees, a per-machine fee of $250 and a gross revenue tax on the City of Palm Springs' slot machines. The tax on video slot and card machines would be 10 percent of the annual gross revenues. These funds must be distributed on a statewide basis, as Proposition 172 money, for support of local public safety functions.

A. FEDERAL REVIEW OF GAMING

In light of the controversy concerning gaming, both legal and otherwise, Congress is pushing forward legislation to create a national gambling impact and policy commission. HR 497 was favorably approved by the full Judiciary Committee on November 8, 1995. HR 497 would create a nine member commission with the budget of $4 million to spend two years studying the impacts of gaming.

The matters to be studied include the following:

(a) The economic impact of gambling on the federal government, the states, their counties and cities, and Indian tribes;

(b) The economic impact of gambling on other businesses;

(c) The political influence of gambling;

(d) An assessment of the relationship between gambling and crime and the review of the effectiveness of law enforcement;

(e) A review of demographics of gamblers and an assessment of pathological or problem gambling on individuals, families and social institutions;

(f) A review of the effectiveness of advertising in promoting gambling;

(g) A review of the extent to which casino gambling provides an economic opportunity to residents and to Indian tribes; and

(h) Other relevant issues.

The Nevada Gaming Interests and the National Indian Gaming Association were in general opposed to this study and contended that they believed there was an anti-gambling bias. Some Democrats also argued that the Republicans were being inconsistent and that they were wasting federal funds on a study interjecting the federal government into matters primarily of state concern as the federal government had no regulatory authority over gambling other than Indian gaming. In response the Committee report stated that:

> "The testimony about the social cost and problems associated with gambling operations, as well as testimony about the positive effects of gambling raise serious questions which should be thoroughly examined by an unbiased body. As a result, the Committee believed that there should be a comprehensive study of the impact of gambling nationwide. The tremendous growth of all forms of gambling is a national issue. Once the Commission completes its study, policymakers of all levels of government will have access to a broader ray of information so that they can make the best possible judgments." (At p. 6.)

Given the two year length of the study, two predictions are possible in the event HR 497 is enacted. The first is that gaming will continue its rapid expansion gathering more economic clout and potentially also engendering more opposition. Secondly, given the active litigation occurring throughout the country, undoubtedly the United States Supreme Court will have the opportunity to render significant opinions in this area before this study is completed. Perhaps this study will form the basis for a legislative reaction to judicial action.

A. STATE LEGISLATION

The Coachella Valley is in the Eightieth Assembly District represented by Jim Battin. Assemblyman Battin is the majority caucus chairman. With a number of tribes and tribal casinos in his district as well as a number of cities which have adopted card club ordinances, including the City of Palm Springs, Assemblyman Battin is vitally concerned with the gaming issue.

Assemblyman Battin has introduced AB 2438. AB 2438 recognizes that a number of tribal casinos are now operating with machines which under the IGRA regulations as interpreted by the Cabazon and Sycuan cases are illegal. However, many of these games were introduced before these decisions came down in 1994 when the tribes contended that the games were legal. Governor Wilson now refuses to negotiate compacts until the tribes remove the illegal games. Assemblyman Battin contends that his bill will codify the status quo as follows:

> "AB 2438 seeks to clarify two critical issues regarding the relationship between the State and tribal governments: (1) the Governor is the official authorized to negotiate and enter compacts; and (2) the Governor may negotiate over electronic gaming devices that 'do not dispense coins or currency.'"

The fate of this legislation will be quite interesting as it is sponsored by the Assemblymen's Majority Caucus Chairman. Undoubtedly the leader of the Republican party, Governor Wilson, and the heir apparent, Dan Lungren, are not likely to want to support this legislation which is contrary to all of the efforts that they have made on the subject of Indian gaming over the last several years.

Of course, the most important legislation now pending is SB 1887, the Lockyer/Lungren compromise legislation concerning state regulation of card clubs discussed earlier. Unlike the limited approach of AB 2438 attempting to stimulate State/Tribal negotiations, SB 1887 establishes a comprehensive scheme for gaming regulation including increasing the authority of the State regulatory commission. The legislation also strengthens the Governor's role in representing the State in its tribal

negotiations and provides for legislative review of the compact. Given the sponsorship of this legislation by probably the most important leaders of each party (on this subject), one suspects the chances of this legislation passing are excellent. Assemblyman Isenberg is also expected to resurrect a successor to AB 2807. Isenberg also has another piece of gaming legislation, AB 2063, which proposes to prohibit redevelopment agencies from providing assistance for casinos. This may be directed at Palm Springs-type transactions. The California Redevelopment Association has sought amendments permitting assistance when part of a larger transaction.

A. PREDICTIONS

With all the twists and turns gaming law has taken since Cabazon was decided in 1987, making any predictions as to where we will go from here is highly risky. Still, with all we have said on the subject, it seems cowardly to close this paper without offering some conclusions as to how the contradictions we have revealed will be resolved.

Some things seem relatively clear. The enforcement cases are correct. IGRA in 18 U.S.C. Section 1166 makes state laws licensing, regulating, or prohibiting gambling applicable in Indian country in Subsection (a) but vests exclusive jurisdiction for enforcement with the federal government in Subsection (d). Thus state criminal prosecution could be enjoined, Sycuan, but federal prosecution can proceed against non-Indians and Indians for the conduct of gambling enterprises where video keno and poker machines are conducted without a tribal/state compact and are classified as slot machines under state law. (18 U.S.C. Section 1955, E.C. Investments.)

Must California negotiate a compact for the inclusion of Class III Games? I think the dissenters in Cabazon will find a way to gain the majority position and uphold the Ninth Circuit in Rumsey. They will determine that the "public policy test" applied to Public Law 280 by Cabazon has been superseded rather than codified by IGRA with respect to Class III Games. This is because, as we have seen, the State's gambling laws form an intricate maze. To throw them all out using the generic "public policy test" because of the inconsistency in application to gaming is not mandated by IGRA. IGRA also specifically excluded banking card games and electronic facsimiles thereof from the definition of Class II Games and recognized the complexity of state regulation concerning Class III Games by requiring negotiation of individual compacts. Therefore, I believe that the Supreme Court will agree with Rumsey that in determining which games the state must permit in the compact, you will have to closely examine state law on a game-by-game basis to see if the game is permitted "for any purpose by any person" (18 U.S.C. Section 2710(d)(1)(c).

Rumsey went on to hold that California law was consistent in not allowing banked or percentage games or "slot machines", with the "possible exception of video lottery terminals" (at 1257). This, I think, will be the most troubling aspect of the case, and here our attention must shift to the California Supreme Court in the Western Telecon case. The Court of Appeals tried to limit its decision to a narrow interpretation of the Lottery Act, avoiding the broader implications. But somebody is going to have to decide whether the Lottery's video keno is a slot machine under the broad Penal Code definitions of a slot

machine. If video keno is permitted as a part of the State Lottery, then under IGRA the game is permitted "for any purpose by any person", and the State should have to negotiate a compact to allow the tribes the same rights as the State Lottery.

The Lottery Act itself is filled with contradictions. We need the Supreme Court to give a better analysis that we got from the Court of Appeal in Western Telecon. The use of the "theme of" language was intended to broaden the restrictions of Section 8880.28, not narrow them as the Court of Appeals ruled. Not only can you not have an actual slot machine, you cannot use the theme of a slot machine either. Computer terminals were clearly permitted by Section 8880.28 as long as no coins were dispensed. However, the Lottery Act in Section 8880.6 did not exempt the Lottery from the Penal Code provisions concerning slot machines (Section 330(b)).

The California Supreme Court could follow the Court of Appeals and duck the issue, in which case the Tribes will be justified in demanding a state compact allowing them to conduct video keno in the same manner as the Lottery. A counter to this argument would be that a few computer terminals at retail outlets throughout the state is one thing, assembling them into banks of machines in a casino setting is contrary to the Lottery Act, and contrary to Proposition 37's language amending the Constitution to prohibit casinos similar to New Jersey and Las Vegas. Surely this language must have some meaning. (But compare Morongo Casino with clearly legal Commerce and Bell Card Clubs).

If the California Supreme Court deals with the video keno/slot machine issue, surely the most troubling aspect is that the definition of slot machine applies not merely where coin or currency are dispensed by the "device", also prohibited by Section 8880.28 of the Lottery Act, but where any "object" is dispensed and is redeemable for a thing of value (Penal Code Section 330(b)). The Lottery allows retailers to immediately pay off up to $599. This arrangement, if not a slot machine, seems as close as it could possible be to one.

I will leave it to the reader to decide if video keno is a slot machine and to wonder whether, if it is not, how many other games fertile imagination will be able to conjure up to avoid the Penal Code prohibitions. I will offer this observation, although it may require the Lottery to give up video keno, this loophole would be correctable through a revision of the Lottery's regulations or amendment of the Lottery Act. Thus, in a very real sense, it will ultimately remain within the power of the State of California or its voters to define what Class III Games will be played in Indian country. The interplay between the State Legislature in defining the reach of gaming in California and federal authorities in enforcing state criminal law in Indian country will be critical in implementing a coherent policy and program.

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