Jane Zerbi

The Development of Indian Gaming in California

BY JANE ZERBI

Readers of the inaugural issue of this publication know that *economically* California Indian tribes are leaders in tribal gaming revenue nationwide – accounting for 25 percent of all tribal gaming revenue in the United States and exceeding $7 billion per year in 2014 and 2015.[1] So it seems fitting that, in addition, California Indian tribes paved the *legal pathway* for the establishment and growth of Indian gaming nationwide.

In the 1980s, as tribes began to open gaming halls with high stakes bingo and card games across the country, it was two California tribes that led the way to the U.S. Supreme Court in the seminal case of *California v. Cabazon Band of Mission Indians*.[2] This landmark 1987 decision reaffirmed the sovereign right of Indian tribes to conduct gaming on tribal lands independent of state regulation, as long as that the state permits some form of gaming, such as lotteries and charitable gaming. The *Cabazon* decision is generally acknowledged as having opened the door for the phenomenal nationwide growth of Indian gaming that quickly followed.[3]

So does this mean that the road to successful Indian gaming was easy after Cabazon? Hardly.

At the immediate urging of states following the *Cabazon* decision, Congress conducted a series of hearings and ultimately acted to pass legislation to regulate Indian gaming. Enacted in October 1988, the Indian Gaming Regulatory Act ("IGRA"), curtails the sovereignty otherwise affirmed by the U.S. Supreme Court in *Cabazon*.

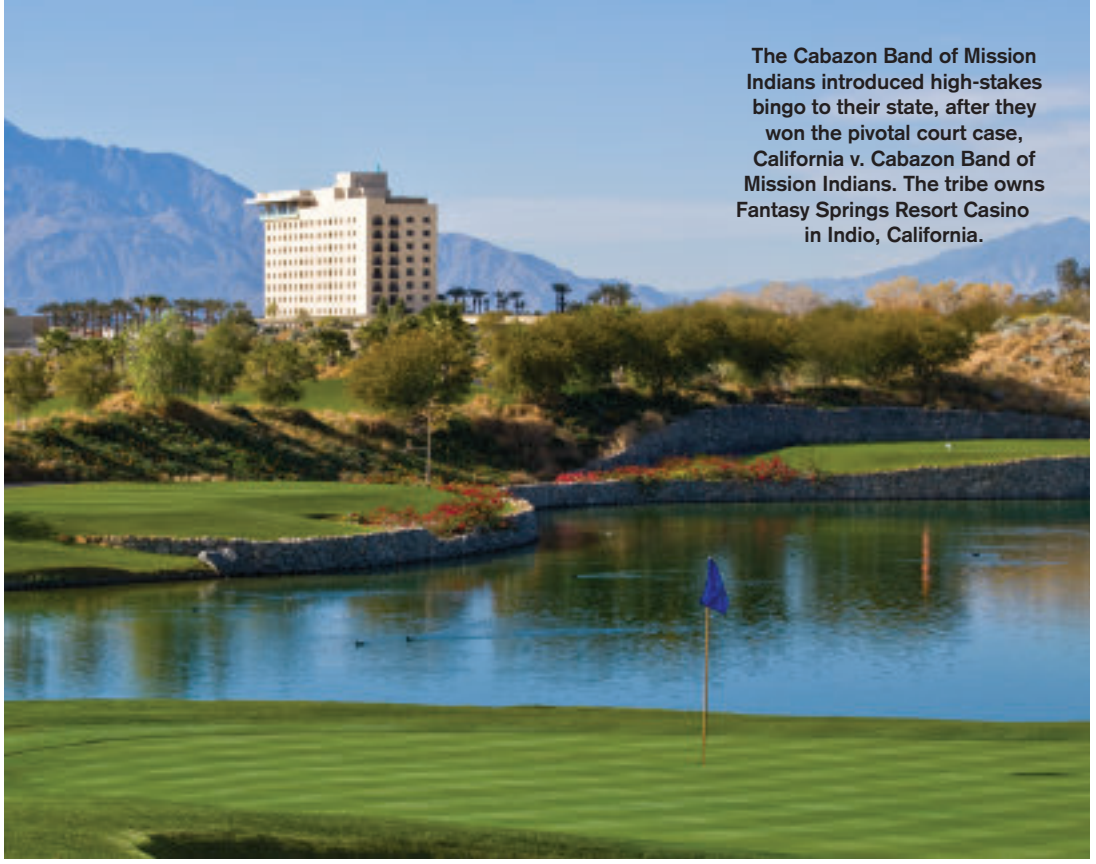
IGRA established the National Indian Gaming Commission to regulate Class II gaming (generally defined as "bingo" or certain non-banking card games) jointly with tribes, excluding a role for states. In order to conduct high stakes Class III gaming, such as slots and banked card games, the tribe must be "located in a State that permits such gaming for any purposes by any person, organization," and have negotiated a tribal-state compact that has been approved by the U.S. Secretary of Interior, or, or in the alternative, the Secretary has approved Class III gaming procedures under federal regulatory authority ("federal secretarial procedures").

IGRA requires states to negotiate in good faith with tribes for such compacts, which were intended to serve as a mechanism by which jurisdictional issues and conflicts could be resolved, and by its terms conferred federal court jurisdiction over actions brought by tribes against states for failure to negotiate in good faith. In addition, IGRA outlined permissible subjects for negotiation, such as for the operation of gaming activity and maintenance of the gaming facility, including licensing, the assessment by the state of such activities in amounts as are necessary to defray the costs of regulating such activities, and "any other subjects that are directly related to the operation of gaming activities."[4]

For tribes in California, the negotiation and execution of a tribal-state compact proved to be a long and tumultuous process throughout the 1990s – including federal and state civil litigation, years of compact negotiations, federal forfeiture actions, enactment of a state statute via the initiative process, a change in governors, and finally amending the state constitution via the process under which the California Legislature placed the amendment on the ballot.

In the early 1990s, tribes requested then-Governor Wilson to negotiate over stand-alone electronic gaming devices and live banking and percentage card games, but he refused, taking the position that such games were illegal in California and thus not "permitted" under IGRA. California's Constitution at Article IV Section 19(e) prohibited "casinos of the type currently operating in Nevada and New Jersey," and the state penal code made unlawful slot machines and banked games.

The governor and several groups of tribes entered into a stipulation to seek a judicial determination of whether the state was obligated to negotiate with the tribes over the proposed scope of gaming. The tribes filed a complaint for declaratory judgment under IGRA and argued the governor was obligated to negotiate over slot machines and banking and percentage card games because the state permitted gaming, such as the California State Lottery. The tribes initially prevailed in district court, but on appeal, in 1994 the Ninth Circuit, in *Rumsey Indian Rancheria et. al. v. Wilson*, split with the Second Circuit and reversed and remanded, holding that "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….In other words, a state need only allow Indian tribes to operate games that others can operate, but need



The Cabazon Band of Mission Indians introduced high-stakes bingo to their state, after they won the pivotal court case, California v. Cabazon Band of Mission Indians. The tribe owns Fantasy Springs Resort Casino in Indio, California.

> "This landmark 1987 decision reaffirmed the sovereign right of Indian tribes to conduct gaming on tribal lands independent of state regulation, as long as that the state permits some form of gaming, such as lotteries and charitable gaming."

not give tribes what others cannot have."[5] The court remanded the "limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise," which the district court ultimately answered in the negative.[6]

Judge William Canby (also the author of *American Indian Law in a Nutshell*) dissented from this Ninth Circuit decision, vehemently arguing it was contrary to *Cabazon* and the intent and meaning of IGRA, which was to foster compacts and require states that do not otherwise prohibit gaming to negotiate to reach an accommodation between their interests and the strong tribal interests in gaming.

In addition to the tribes being dealt this blow, the U.S. Supreme Court in *Seminole Tribe v. Florida* found that the Eleventh Amendment prevents a tribe from enforcing the remedial provisions of IGRA against a state in federal court absent state consent.[7] This case rendered the tribes without a remedy to enforce the state's obligation to negotiate in good faith.

While the *Rumsey* remand question was still pending, compact negotiations began with Governor Wilson, who would only agree to negotiate with tribes that had not already opened a gaming facility. The negotiations initially included representatives from various tribes. Due to the Ninth Circuit *Rumsey* decision, the negotiations focused on a hybrid electronic lottery device, and the state also requested certain regulatory provisions that some tribes found to be an unacceptable infringement on their sovereignty.

These compact negotiations and the remand litigation continued amidst the threat of federal forfeiture actions filed by U.S. Attorneys against some tribes to shut down tribal gaming operating without a compact, playing a role in maintaining the status quo, which now included during this period approximately 40 tribal gaming facilities with an estimated collective revenue of between $800 million to $1 billion.[8] Ultimately, in the spring of 1998, compacts were executed with some tribes. They were ratified by the legislature, but were never implemented. Governor Wilson's final term as governor was set to expire in November 1998.

In November 1998, tribes in California used an aspect of California state law, the initiative process,[9] to qualify a ballot measure Proposition 5, also known as the Tribal Government Gaming and Economic Self Sufficiency Act. It required the state to enter into a specific compact allowing certain Class III gambling activities on Indian lands with tribes that sign such an agreement. The measure also required the state to negotiate a separate tribal-state compact with any tribe that wanted a different compact and waived the state's immunity in any action initiated by tribes for failure to negotiate in good faith under IGRA. The type of gaming authorized included electronic gambling devices that allow an individual to play any game of chance but which do not dispense coins or currency and could not be activated with a handle, and with a player's pool prize system, any card game played in a tribal operation on or before January 1998, and any lottery game.[10] Proposition 5 passed by an overwhelming majority of 62.4 percent of California voters in favor, affirming Californians' general support for tribal gaming.

Proposition 5 was immediately challenged as unconstitutional, and in August 1999 the California Supreme Court in *HERE v. Davis*,[11] struck it down, finding it violated the state's constitutional prohibition on Nevada-style gaming, with only the state's waiver of sovereign immunity to bad faith lawsuits under IGRA surviving.

In addition, around this time "the U.S. Department of Justice announced that it planned to proceed with enforcement actions against certain California tribes engaged in un-compacted class III gaming if those tribes did not enter into compacts with the state before October 13, 1999."[12]

In September 1999, the new Governor Gray Davis negotiated compacts with tribes for slot machines and banking and percentage card games, expressly subject to the passage of a constitutional amendment — Proposition 1A on the March 2000 ballot, which proposed to amend the California Constitution to authorize such games for tribes. These compacts, which were hastily negotiated in order

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to be taken up and approved by the California Legislature prior to the end of session, were signed by 57 tribes.

Proposition 1A was a legislatively referred constitutional amendment, placed on the ballot by the California Legislature. It passed with an overwhelming 64.5% of voters in favor, amending California's Constitution at Article 19 Section IV to authorize the governor to negotiate compacts with tribes for the exclusive right to operate slot machines and banking and percentage card games.[13] Proposition 1A and the 1999 compacts survived the legal challenges that followed.[14]

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These compacts, however, included a per-tribe and statewide cap on the number of slots, and as time went on, pressures for new and amended compacts led to successful negotiations for some tribes and lawsuits under IGRA for others.[15] Due to the state's waiver of immunity in Proposition 5 that was upheld in the *HERE* case, California tribes, unlike many other tribes in the country due to the *Seminole* decision, are able to sue the state for bad faith negotiation. The Rincon Band did just this, resulting in another California case that significantly impacted the parameters for compact negotiations.

In *Rincon v. Schwarzenegger*, the Ninth Circuit affirmed the district court finding that the state negotiated in bad faith by conditioning its agreement to expand the tribe's class III gaming rights on the tribe's agreement to pay a percentage of its revenues to the state's general fund. The court held that "a state may not take a 'hard line' position in IGRA negotiations when it results in a 'take it or leave it offer' to the tribe to either accept non-beneficial provisions *outside the scope of permissible scope of Sections 2710(d)(3)(B)(iii)(I) and 2710(d)(4)*, or go without a compact."[16] The court also reiterated its holding that: "The SDF [Special Distribution Fund] was clearly "directly related" to gaming because all uses of SDF funds were earmarked for gaming-related purposes…The RSTF [Revenue Sharing Trust Fund] funds similarly were related to gaming because, by redistributing gaming funds from gaming to non-gaming tribes, they are entirely consistent with the IGRA goal of using gaming to foster tribal economic development."[17]

In 2013, after seven years of litigation, the Rincon Band became the first California tribe, and third tribe in the country since the enactment of IGRA, to obtain a compact through federal secretarial procedures.

Today California tribes and compacts continue to forge new legal ground. Here are some hot trends in 2016:

Governor Brown has been actively negotiating new compacts that amend or replace existing compacts, concluding four in 2015, and so far in 2016, eleven more. All have undoubtedly been

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[1] *See* Alan P. Meister, Ph.D, "The Economic Evolution of Indian Gaming," Indian Gaming Lawyer Vol. 1, No. 1, Spring 2016; "2016 Edition of the Indian Gaming Industry Report by Dr. Alan Meister," www.indiangamingreport.com.

[2] 480 U.S. 202 (1987).

[3] In *Cabazon*, the State of California argued that the tribe's high stakes bingo and poker games violated state law and regulation. The tribe argued that these state gambling laws were civil regulatory in nature and thus under Public Law 280 did not apply in Indian country. The Supreme Court held that because California state law did not prohibit gambling as a criminal act, and in fact authorized gambling like the state lottery, such laws are civil regulatory in nature (rather than criminal/prohibitory) and cannot be enforced by the state in Indian country.

[4] 25 U.S.C. Section 2710 (d)(3)(C). IGRA is codified at 25 U.S.C. Section 2701 et. seq. and provides the comprehensive jurisdictional framework for tribal gaming. Among other requirements, it requires tribes to adopt tribal ordinances which must be approved by the NIGC, restricts land on which gaming may be conducted, and regulates the purposes for which tribes may use gaming net revenue.

[5] 64 F.3d 1250 (9th Cir. 1994), *amended by* 99 F.3d 321 (9th Cir. 1996).

[6] See 39 F. Supp.2d 1227 (1998). In another significant gaming case, the California Supreme Court in *Western Telecon v. California State Lottery*, 13 Cal.4th 475 (1996) held that the lottery's electronic keno game was not a lawful lottery game, but an illegal banking game that is prohibited in California.

[7] 517 U.S. 44 (1996).

[8] Gambling in the Golden State 1998 Forward, Charlene Wear Simmon Ph.D, Cal. Research Bureau, May 2001, citing Sebastian Sinclair, "California's New Rush," *International Gaming & Wagering Business*, July 2000, p.10.

[9] The California Constitution at Article II provides for the initiative power of the electors to propose statutes and amendments to the constitution and to adopt or reject them. Section 8 specifies: "An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the constitution, of the votes for all candidates for governor at the last gubernatorial election. The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The governor may call a special statewide election for the measure. An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." See also https://oag.ca.gov/initiatives for more information.

impacted by the Ninth Circuit *Rincon* decision.

These recent compacts redirect revenue share toward ensuring the solvency of two innovative funds established for the sole benefit of non-gaming and limited gaming tribes, called the Revenue Sharing Trust Fund and Tribal Nations Grant Fund. These funds enable non-gaming tribes and tribes with facilities operating less than 350 slot machines to enjoy the fruits of tribal gaming and develop tribal government, self-sufficiency, and economic development. Some new compacts also create a California Native American Education and Scholarship Fund.

Recent compacts establish a credit system that enables tribes to deduct from payments otherwise due costs associated with infrastructure projects that benefit the gaming operation and local community, as well as services and projects that diversify the tribe's economic base, further tribal government services such as fire protection, education and healthcare, and provide grants to other federally recognized tribes for governmental and general welfare purposes. Credit categories include renewable energy and water conservation projects and recycling facilities.

Recent compacts include provisions for payments to the Special Distribution Fund, on a *pro rata* basis, for the state's regulatory costs, defined as "actual and reasonable 25 U.S.C. Section 2710(d)(3)(C) costs."

These compacts include 25-year extended terms, creating stability for tribes for exclusive Class III gaming in the state. The recent compacts also increase business opportunities for those doing business in Indian gaming, authorizing an additional number of slot machines, more flexible financial source provisions, and incentives for infrastructure projects and other economic development both on and off reservations.

California Governor Edmund Gerald "Jerry" Brown, Jr.

Additionally, in July and August 2016, two more California compacts were established through federal secretarial procedures, following court decisions in favor of the tribes.

Today California tribes continue to actively pave the way with innovative new compacts established through negotiation and secretarial procedures, and there will most certainly be more to come. ❄

"Governor Brown has been actively negotiating new compacts that amend or replace existing compacts, concluding four in 2015, and so far in 2016, eleven more. All have undoubtedly been impacted by the Ninth Circuit Rincon decision."

Jane Zerbi has been practicing Indian law in California for over 20 years, representing California Indian tribes in gaming and governmental matters. She has negotiated tribal-state gaming compacts and amendments to compacts, including recently in 2015 and 2016 for three tribal governments. She advises tribal clients on implementation of and compliance with gaming compacts. She specializes in tribal gaming regulatory matters, serving as legal counsel for tribal gaming agencies and commissions. She is the managing officer of the Law Office of Jane Zerbi in Sacramento, California, and is a general member of IMGL. Jane has been selected annually since 2005 by her peers for inclusion in The Best Lawyers in America in the areas of Gaming Law and Native American Law, and has been named Best Lawyer's Sacramento Gaming Law Lawyer of the Year for 2012. She graduated Order of the Coif from Berkeley CA Law School, and from Northwestern University BA with Highest Distinction. She clerked for the Chief Judge of the U.S. District Court for the Eastern District of California. Jane can be reached at jane@zerbi-law.com.

[10] See www.lao.ca.gov//ballot/1998/5_11_1998.htm. The California Legislative Analyst Office summarized the ballot measure at the time, including that "It is unclear if the games authorized by this compact would result in "Nevada-or New Jersey-type casinos" and therefore violate the State Constitution. Since there is no current definition of this phrase, the question would almost certainly have to be decided by a court." According to some of the tribal attorneys involved in the initiative process, the short timeline for gathering the necessary signatures impacted the choice to enact a statute rather than amend the constitution.

[11] 21 Cal.4th 585 (1999).

[12] *In re Indian Gaming Cases* (Coyote Valley II), 331 F.3d 1094 (9th Cir. 2003).

[13] As a result of Proposition 1A, the California Constitution at Article IV, Section 19(f) now provides that notwithstanding the constitutional prohibition on "casinos of the type currently operating in Nevada and New Jersey," and any other provision of state law, "the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

[14] See *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (Ninth Circuit rejected claim that Proposition 1A violated the Equal Protection Clause of the US Constitution or IGRA) ; See also *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) (holding state negotiated 1999 compact in good faith and finding the Revenue Sharing Trust Fund, Special Distribution Fund, and Tribal Labor Relations Ordinance proper subjects of negotiation under IGRA).

[15] As new tribes came to the table, Governor Davis no longer offered the 1999 "model" compact and replaced it with compacts individual to each tribe. Following Davis' recall from office, Governor Schwarzenegger entered into compact amendments in 2004 and 2006, and numerous new compacts followed after Governor Brown was elected in 2011. This article does not address the many varied compacts throughout California history. Nor does it address all of the lawsuits initiated by tribes against the state, which included expanding the number of slots available statewide under the 1999 compacts and a recent $36.2 million damages award for a tribe against the state for the former Governor Schwarzenegger's misrepresentation of the number of slot gaming licenses available.

[16] 602 F.3d 1019 (9th Cir. 2010), cert. denied, 131 S.Ct. 3055 (2011).

[17] Id. at 5898, citing In re Indian Gaming Cases (Coyote Valley II), 331 F.3d 1094, 1103 (9th Cir. 2003).