

Native American Gambling in California

Kaisen Lin

I. Historical Background

Ever since California became a state of the Union in the mid 19th century, the state has had its fair share of scuffles with the native tribes already there. California has always wanted strict control of tribal reservations and it's no surprise that they did as much as they could when they learned that native tribes were running gambling operations, something clearly illegal in the state. The state had its first legal battle with Indian casinos when the Cabazon and Morongo Indians offered card games at their casinos in the early 1980s. Because California did not allow gambling, the state threatened criminal action. This battle eventually made it to the United States Supreme Court in 1987, known as "California vs. Cabazon Band of Mission Indians." In this ruling the Supreme Court ruled 6-3 that gambling could only occur on Indian casinos if it were already legal in the state for non-Indian purposes. Seeing it as a potential precedent setting ruling, the US Congress introduced the Indian Gaming Regulatory Act of 1988 (IGRA). This act required all Indian tribes to register with their respective states before being allowed to conduct business in the gambling industry. Although it looked promising for the future of Native American sovereignty, Indians saw it as yet another undeliverable promise, but like before, they had no real choice, but to accept it. It turns out that this landmark piece of legislation is so big, that it has been dubbed to be the first Indian victory since the battle at Little Bighorn.

In the 1990s, Governor Pete Wilson commenced negotiations with the Pala Indian tribe under the new jurisdiction of the IGRA. Governor Wilson chose the Pala tribe because they did not yet have casinos, but were planning to begin operating them. This meant they were not yet in

violation of the IGRA, and thus could be legally negotiated with. The other Indians had no objections towards Wilson's decision because the Pala tribe was a relatively large tribe and had experience in business negotiations. Thus the Pala tribe became the chief representative of all the Indians regarding Indian casinos. In April 1998, California and the Pala tribe reached an agreement known as the Pala Compact. The compact restricted the number of casinos, number of gambling machines, amount of profit that Indian tribes could earn, and the exact machines that could be used. Tribes that already had operating casinos were forced to both sign the Pala Compact and stop gambling until the legal gambling machines were decided or negotiate their own deal with the state of California. If they still had not decided in 60 days, then US attorneys would step in. In November 1998, the Pala Compact formally went on the ballot as Proposition 5 and was quickly approved [1]. Unfortunately in 1999, the California Supreme Court ruled that the Pala Compact was unconstitutional because it violated the 1984 Lottery Act. A month after this decision, California governor Gray Davis renegotiated with Indian tribes and the legislature ratified the new deals. However, this time the deals would directly amend the state constitution rather than merely the state law. This new ballot item was officially known as Proposition 1A in the year-2000 election, and passed with a 65% approval rating [4]. This proposition is not to be confused with the one in 1998, which helped UC Berkeley seismically retrofit its buildings.

II. Casino Operations

Currently over 60 Indian tribes have an agreement with California; of these tribes there are 53 Indian casinos in operation as of November 2003 [1]. The games at these casinos consist of electronic gaming machines, blackjack, and other house-banked card games. Electronic gaming machines are systems that allow you to play your favorite card games against a computer. It's like playing Yahoo games, except with real money, and a casino like environment giving you the feeling

of a high roller. In contrast, house-banked and player-banked card games are ones you would typically see with human dealers. For those that are unfamiliar with casino terms, house-banked means that you bet against the house, whereas player-banked means you gamble against other players. There are also some specific regulations regarding, which games are allowed and which games are not. Under the federally passed IGRA, games are divided into three categories. Class I games are social games with relatively low winnings and are usually involved with tribal ceremonies. These games are not regulated by the state of California. Class II games include some card games and bingo, but no electronic games. For the most part, Class II games are also, for the most part, regulated by the Indian tribes themselves provided that they follow state rules and regulations. They must also follow some rules from the National Indian Gaming Commission (NIGC). Class III games are the most restrictive and these include slot machines and games that are typically operated at Nevada or Atlantic City style casinos [6]. These types of casinos are like the Mirage, MGM Grand, and numerous other casinos you see in Oceans Eleven. In order for these types of games to operate, the Indian tribes must follow pass an ordinance within the tribe, approve a compact with the state, and have that compact approved by the United States Secretary of Interior.

Tribal casinos are not allowed to do whatever they want with the profit. Certainly that would draw much political fire if they were able to frivolously spend it on luxury goods. Profits from tribal casinos must fund activities that promote the welfare of Native Americans. Some activities of this include tribal government operations, tribal economic development, or distributed to tribal members under a plan from the Bureau of Indian Affairs. In terms of federal taxation, Indian tribes and tribal corporations including gaming casinos are not separately taxed because the US government views them as government institutions for tax purposes. Normal corporations are taxed at the corporate income level and again at the personal income level when salaries or dividends are paid. Tribal

casinos operate more like US S-corporations, however, where income is only taxed at the personal level. If these gaming profits are paid to tribal members though, the tribal members must of course still pay federal income tax. In addition, transactions made on Indian reservations do not need to pay state sales taxes, provided the usage of the goods being purchased stay on the reservation, though this applies less to casinos, since casinos operate more as services than as goods dealers.

The regulation of Indian gaming casinos is enforced at three different levels. The individual tribal government is at the forefront of it all. The tribal government must run the day-to-day operations of the casino, such as enforce ordinances, issue licenses for employees, and provide law enforcement. The NIGC provides the next level of support by approving management contracts, conducting background checks, and enforcing federal gaming laws. The NIGC can fine violators up to \$25,000 a day or even shut them down if the problem is severe enough [1]. Finally, the US Department of Justice is at the end of the regulatory system. They also enforce federal gaming laws, as well as conduct background checks on the big fish employees at Indian gaming casinos. This three-tiered system ensures that all Indian gaming casinos operate within their legal boundaries. The state of California also has several other restrictions regarding the operation of tribal casinos.

Most Indian tribes in California fall under the Pala Compact as explained previously. Under the Pala Compact, tribal casinos must use state approved gaming machines if they are used at all. An independent lab must inspect the machine to make sure that the games are fair and that the probabilities are correct. This is so house-banked machines cannot be rigged by a disgruntled engineer and have the machine probabilistically lose or win a skewed percentage of the time. These activities are designed to increase consumer faith in the machines. The Pala Compact also demands that tribal casinos cannot extend credit for gambling. The reasoning behind this is so that pathological gamblers do not run huge liabilities and resort to violent activities to repay debt.

Furthermore, tribal casinos cannot service people under the age of 21. This contrasts the legal age of 18 for the state lottery. Aside from regulations on the specific machines, the Pala Compact also provides a quota for the number of machines that are available to the tribal casinos. Each tribe in California is allowed to have 199 gaming machines [1]. It is unclear where these numbers came from, since 199 is certainly not a nice round number. They can either decide to operate the machines or lease it to other tribes who want to operate more than 199 gaming devices. Without getting too political, this is similar to the Kyoto protocol where countries can either pollute or trade their right to pollute. However, even if a tribe acquires rights to machines from many other tribes, it cannot operate more than 975 of them under the Pala Compact [1]. There are also many bizarre restrictions on gaming machines, such as the machines must emit paper tickets, and it cannot have sounds that mimic bells, whistles, or the dispensing of coins. That seems like a rather odd restriction because it limits the advertising capability of the machines. If the tribal casino really wanted to operate these types of machines, I don't see anything hard about reengineering the machines to just stay within these absurd legal requirements.

In addition to actual gaming laws that tribal casinos must follow under the Pala Compact, they must also follow some environmental laws. Tribal casinos must have an agreement within the county to make sure all operations follow building codes and standards, as well as offsite traffic. Apparently some people have complained about the casinos drawing too much traffic and creating bottlenecks on major roads. Labor laws also play a role in the operation of tribal casinos. Tribal casinos are under jurisdiction of California workers' compensation laws, as well as occupational health and safety laws. Tribal casinos must also maintain state disability and unemployment insurance funds. The reason for this is because many of the employees at tribal casinos are in fact hired from nearby areas and not actual tribal members.

III. Contemporary Issues

Nationwide, the tribal gambling industry is a \$4.5 billion industry (as of 1997). California alone accounts for \$600 million. However, as the tribal gaming industry increases, people are beginning to challenge its legitimacy. One of the problems is determining what exactly is a Class III game. Some games are clearly Class III such as video poker and blackjack, but there are games, which blur the line between Class II and Class III. Video pull-tabs are an example of this because the way this game is played is very similar to Bingo (which is a Class II game), video pull-tabs should also fall under this category. Video pull-tabs are basically preprinted tickets dispensed with winning numbers. However, because video pull-tabs electronically increase the number of people who can play it simultaneously, it has been classified as a Class III game. Electronic keno is also classified as a Class III game, but the California State Lottery (CSL) has Quick Pick Keno, which operates similarly. The debate ended up in the California Supreme Court, which ruled that CSL's keno was in fact illegal because it was not a lottery. The difference between a "banking game" like keno and a true lottery is that the winner of a lottery gets a fixed amount relative to the size of the pot, rather than a variable amount based on how accurate his bets are. To make this explanation more concrete, suppose you play a game of CSL lottery. You try to guess six numbers out of 52 and pay one dollar to guess. This effectively represents your bet. If you win, then you get everyone else's bet. However, in a game of Keno, you do not always win everyone else's bet. Rather you win a ratio of how much you, yourself, bet. Another distinction is that in theory, the CSL does not win anything, because whatever money it wins must be paid out to the winner, whereas keno operators do keep the money, if the players lose their bet. This actually turned out to be known as "Western Telcon v. California State Lottery" and it also touched upon the question of tribal sovereignty.

In addition to the legality surrounding regarding tribal casino operations, there is also much economic talk about the impact tribal casinos and how it will affect the industry. What industry changes will affect the Nevada casinos and consumers like you and me? Currently, it is estimated that 30 million Californians go to Nevada to gamble. Some people argue that the opening of tribal casinos will improve gambling odds because it will make the gambling industry more competitive. On the other hand, others argue that the increased competition will lead to cost cutting policies, which will decrease the gaming experience at the casinos. Despite the competition tribal casinos may create, California still sees tribal casinos as a lucrative investment and may partially solve California's unemployment woes. Let us step through an example of what goes through the construction and operation of a tribal casino. In order to build a casino, outsider construction workers are typically hired. This creates jobs for nearby towns and as we know from the trickle down effect, these new workers will drive economic growth in the towns. In 1998, it was estimated that 90% of tribal casino workers were in fact not Native American [3]. When the casino is built, the tribes again rely on outsiders to staff positions such as card dealers, machine operators, caterers, etc. This again creates jobs in the local area. On the consumer side, people go through the casino to gamble and the instant money is transacted, a tax is made. In a recent report, California earned as much as \$120 million from tribal casinos in state and local taxes, \$36.6 million in personal state income taxes alone [3]. The income generated from tribal casinos also helped the state in that welfare payments decreased by \$50 million. A survey was also taken on what customers would have done had their been no tribal casinos. 74% of the people surveyed said that they would have just gone to Nevada to gamble [2]. This is essentially tax dollars going to Nevada instead of California!

Tribal gaming policies have also been redefined most recently by the governor's recall. New governor Arnold Schwarzenegger urged tribal casinos to increase their donations to ease California's enormous debt during his recall campaign. One current proposition by the governor is to allow tribes to have more gaming machines. The purpose of the quota increase is to increase the profits of the casinos, thus giving California more tax revenues. Another initiative in the works is the Gambling Revenue Act of 2004. This act would force all tribal casinos to pay 25% of all slot machine revenues to the state government or else racetracks and card clubs would be able to run slot machines. This would effectively increase competition on slot machines, and drive the profitability of them down. Some Native Americans have been fighting this initiative with their own initiative. Their initiative calls for a tax rate similar to what corporations pay right now and the release of restrictions on the size of the casino's gambling capabilities. This would be the Laissez-Faire approach to tribal gaming and it is doubtful that Californians would support such an initiative. However, this plan would create a tax at the casino level and thus could help California's budget problems.

During the California Recall, Native American tribes overwhelmingly supported Cruz Bustamante, and they spent millions of dollars to defeat Schwarzenegger. Schwarzenegger wanted to rewrite compacts to be more in favor California even though the current compacts had not expired. This, in turn, angered many tribal casino owners. However, after Schwarzenegger took office, he changed his views and even claimed that he had nothing against letting tribal casinos move into urban areas as long as they paid their fair share. Most importantly, however, Schwarzenegger and tribal casinos can make whatever legal changes they wish without being accused of briberies. The reason for this is because tribal casinos gave Schwarzenegger no money during his recall campaign. Had other candidates such as Bustamante won, Bustamante might have

been accused of paying off his supporters. The election of Schwarzenegger not only made it possible for tribal casinos to expand, and to do it without accusations of political graft. Essentially the heart of Schwarzenegger's tribal casino campaign boils down to how much tribal casino revenues must be shared with the state and what the California government will give in return. Tribal gaming in California is still uncertain especially in the long run. The reasons for this are that tribal gaming is relatively recent and casino revenues are private to the company, thus making it hard to do statistical analysis on it. In addition, because tribal gaming is largely dealt with on the state level rather than the federal level, it is hard to develop standardized benchmarks.

Another key issue with tribal gaming today has to do with sovereignty. As seen with the "Western Telcon v. California State Lottery" case, rather than let tribal casinos have electronic keno, the courts decided to shut down CSL keno operations. Some supporters of tribal casinos see this as a move to restrict what tribal casinos can operate. Questions also arise as to whether or not tribal reservations should be treated as separate states or part of the state they reside in. Sovereignty was originally addressed in both the Articles of Confederation and the Constitution, but numerous Supreme Court cases have changed the interpretation of how Native American nations are treated. Three key cases by Chief Justice John Marshall in the 20th century redefined Native American sovereignty and Marshall's jurisdictions are now recognized as modern Indian law. Based on these rulings, Indian tribes were viewed as distinct political entities. Currently, tribal sovereignty is largely a states right, but that might change in the future, just how many other Native American policies have changed.

Bibliography

[1] Dunstan, Roger. "Indian Casinos in California." California Research Bureau, Sept. 1998. Sacramento, California.

[2] Economic Impact of Indian Gaming. 25 March 2004. National Indian Gaming Association. <http://www.indiangaming.org/info/pr/presskit/statistics.shtml>

[3] Hill, Elizabeth. "Gambling in California: An Overview." Legislative Analyst's Office, Jan. 1998. Sacramento, California.

[4] Indian Gaming in California. 25 March 2004. Institute of Governmental Studies, University of California. 2004 March. <http://www.igs.berkeley.edu/library/htIndianGaming.htm>

[5] Lombardi, Michael. "Long Road Traveled I: From the Treaty of Temecula to the Pala Compact." California Nations Indian Gaming Association. 26 March 2004.

[6] Wilson, Richard. Indian Gaming in California. 25 March 2004. Public Law Research Institute at UC Hastings. <http://www.uchastings.edu/plri/spr96tex/indgam.html>