

## *The 2004 Amendment to California Tribal-State Gaming Compacts*

By Jane G. Zerbi<sup>1</sup>

### **Overview**

Last year, five large gaming tribes in California, motivated to secure exclusivity for Indian gaming, secure long-term stability by giving the state an interest in protecting and enhancing Indian gaming, and increase the number of slots at their facilities, negotiated an amendment to their 1999 gaming compacts with newly-elected Governor Arnold Schwarzenegger.<sup>2</sup>

The amendment, which became effective September 2, 2004, eliminates the previous cap on slot machines and enables these tribes to increase the number of slot machines at their casinos based upon market demand. It provides an enforceable promise of exclusive Indian gaming in these tribes' core geographic markets and extends the compact term to 2030.

The amendment offers additional consumer protections relating to third-party injuries, gaming disputes, slot testing, and building and fire inspections. It provides for intergovernmental agreements between tribes and local governments to mitigate, to the extent practicable, off-reservation environmental impacts and direct fiscal impacts resulting from expanding casinos.

The amendment increases the tribes' revenue share payment to the state, which the parties agree "provides for a fair contribution to the State from the Tribe's Gaming Operation." Revenue payments of more than \$100 million annually will be used to securitize a bond of up to \$1 billion, which will fund statewide transportation projects.

Any disputes with consumers, the state, and local governments are resolved through independent arbitration -- a key element for these tribes, who did not agree to submit to state court jurisdiction to enforce any of the provisions in the amendment. Resolving disputes by independent arbitration, as is common in treaties between sovereign nations and interstate compacts, enabled each government to respect the other's sovereignty.

### **Why Amend the 1999 Compact?**

There were several key factors that led the parties to commence negotiations and reach agreement.

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<sup>1</sup> Jane Zerbi is a partner in the law firm of Dickstein & Zerbi in Sacramento, California, which hosted the negotiations, and played an integral role in the negotiation and drafting of the 2004 amendment.

<sup>2</sup> These five Tribes are United Auburn Indian Community with Thunder Valley Casino, Viejas Band of Kumeyaay Indians with Viejas Casino, Rumsey Band of Wintun Indians with Cache Creek Casino & Resort, Pala Band of Mission Indians with Pala Casino, the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation with Casino Pauma. The full text of each Amendment is available on the website of the California Tribal Business Alliance at [www.caltba.org](http://www.caltba.org).

The tribes needed additional slot machines to support expansions and growing market demand. The 1999 compacts limit the number of slot machines each tribe can operate to 2,000, and more importantly include a cap on the total number of slot machines available statewide through a licensing allocation. As a result, irrespective of growing market demand, these five tribes were unable to expand beyond the number of slots in operation in 2002, which ranged from 1,050 to 2,000 at their casinos.

Indian gaming figured prominently in the campaign leading up to the gubernatorial recall election in the fall of 2003. Arnold Schwarzenegger, ran television spots promising to make California Indian gaming tribes pay their “fair share” if he was elected. The television spot was viewed by political observers as a turning point in the election with polling showing the public supported Schwarzenegger’s message. Large political contributions by some tribes to Schwarzenegger’s opponent resulted in headlines criticizing Indian gaming money in the political process. In the wake of the recall, California racetracks and cardrooms qualified a proposition seeking to legalize slot machines for select non-Indian urban cardrooms and racetracks in California. Entitled Proposition 68, it sought to amend the California Constitution and eliminate the exclusivity of Indian gaming in California. The urban location of these cardrooms and racetracks would effectively cut off the markets of tribes located in more remote areas.

The 1999 compacts provided no promise of exclusivity and no adequate remedy for these tribes if exclusivity was lost. Rather, the 1999 compacts gave the tribes two options: (1) terminate the compact, in which case the tribes would lose the right to operate slot machines and banked card games or (2) continue under the compact with the right to negotiate a reduction in revenue contributions to the state for some tribes.

Early polls reported significant public support for Proposition 68 and that the popular new Governor’s position would undoubtedly be a key factor in whether Proposition 68 would prevail.

These elements intensified the tribes’ desire to strengthen Indian gaming exclusivity and secure long-term stability through a partnership with the state in which California has a stake in the success of their casinos. The resulting amendments executed on June 21, 2004 reflect these objectives.<sup>3</sup> On the same day, the Governor announced his opposition to Proposition 68 and actively campaigned against it. His opposition was a key component in the resounding defeat of Proposition 68 by 84% of the voters.

## **2004 Amendment Provisions**

**(1) A promise of exclusivity and effective remedy.** The amendment provides for the issuance of a transportation funding bond of up to \$1 billion securitized by the tribes’

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<sup>3</sup> The amendments were signed by the Governor and Tribes in June of 2004 and ratified by the California Legislature on July 1. As required by the Indian Gaming Regulatory Act, the amendments were approved by the United States Secretary of the Interior on August 20, and then published in the Federal Register on September 2, 2004.

collective annual revenue payments to the state. The state promises that it “shall not authorize any person or entity other than an Indian tribe with a federally authorized compact” to operate slot machines or banked and percentage card games within each tribe’s core geographic market during the life of these bonds. If this promise is broken, the tribe has the right to enjoin this non-Indian gaming as a substantial impairment of the exclusivity promised to ensure the marketability of the bond, protect the bondholders, and “afford the Tribe the stability in its Gaming Operation bargained for.” These provisions are an important deterrent to amending the California Constitution to authorize non-Indian gaming, an expensive initiative process requiring signature gathering, campaigning, overcoming legal challenges, and majority vote of the electorate.

The parties intend to secure the bond issuance, but in the event it is not possible, then these tribes are relieved of all fee and revenue payments when operating up to 2500 slot machines if slots are authorized within their core market for any non-Indian entity. This would result currently in a state revenue loss of more than \$100 million annually, a figure likely to escalate as tribes expand and add machines. This loss highlights the state’s stake in the success and future of these Indian gaming operations.

**(2) A fair contribution of revenue to the state and unlimited slot machines.** Each tribe makes an annual flat fee payment to the state for 18 years based upon 10% of their respective 2003 net win, which collectively will be used to securitize the bond. After the 18 years and through the remainder of the compact term, each tribe will pay to the state either the annual flat fee payments or 10% of the current annual net win, whichever is less. This amounts to more than \$100 million annually.

The legislation ratifying the amendments directed up to \$1.5 billion bond proceeds for statewide transportation projects, benefiting a wide range of Californians, including local governments and businesses, and relieving the state’s General Fund of a debt obligation to the transportation special fund. This provides immediate relief to budget deficit.

In addition to the number of slots operated under the 1999 compact, the tribes may operate an unlimited number of additional machines by paying an incremental annual fee into the state’s General Fund. These fees currently generate about \$27 million annually for the state, and that amount will increase as the casinos expand to accommodate additional machines.

**(3) Continued revenue share with non-gaming and non-compact tribes.** In order to maintain existing licenses issued prior to 2002 to operate additional slot machines, the tribes make quarterly payments to the Revenue Sharing Trust Fund, the account from which payments are made to non-gaming and non-compact tribes. Those payments range from \$8.2 million to \$10 million annually, and collectively the five tribes’ contributions exceed the amount they previously contributed.

**(4) Enhanced consumer protections.** Each Tribe maintains commercial general liability insurance policies consistent with industry standards for non-tribal casinos which provide no less than \$10 million per occurrence for bodily injury, property damage and

personal injury, an increase from the \$5 million policy required by the 1999 compact. After exhaustion of tribal remedies, third parties may bring unresolved claims covered by the insurance policy to arbitration, which includes an appeal process. Disputes over the play or operation of a game may also be resolved by arbitration if the patron is dissatisfied with the Tribal Gaming Agency's resolution.

Prior to patron play, each slot machine is tested by the Tribal Gaming Agency to ensure the software and associated equipment has been certified by an independent or governmental gaming laboratory as operating in accordance with specified technical standards to ensure fair game play for patrons. Compliance with this requirement is verified by external auditors. The State Gaming Agency may inspect the slot machines on a quarterly basis to ensure they operate and play properly in accordance with technical standards.

The amendment provides enhanced fire suppression protections, and new facility construction must comply with the California Building Code and Public Safety Code.

**(5) Intergovernmental agreements to mitigate off-reservation environmental and fiscal impacts.** Prior to expansion of their gaming facilities, the tribes must prepare a comprehensive environmental evaluation, which is provided to the county, state and interested public for comment, and identifies potentially significant environmental impacts and mitigation measures to minimize significant environmental effects. The evaluation forms the basis of mandatory negotiations between the tribe and the local government for a period of at least 45 days. If they cannot reach agreement, their last best offer is submitted to an independent arbitrator who must choose one in binding arbitration. This process was designed to encourage parties to come to the table, make reasonable proposals, and reach agreement.

**(6) Additional labor provisions.** In these amendments, each tribe addressed the labor question individually. Three of the five tribes had existing agreements with unions and therefore there are no further labor provisions in their amendments. Two of the five tribes will amend their existing tribal labor ordinances to adopt a card check neutrality provision if the union agrees not to strike and not to engage in any other economic activity against the Tribe. In addition, the union agrees to waive its right to assert the jurisdiction of the National Labor Relations Board.

## **Conclusion**

The 1999 compact provides no protection for Indian gaming exclusivity and significantly restricts the ability of California's most prominent Indian casinos to capitalize on their markets due to limits on slots. These five tribes chose to exercise their sovereignty to amend their 1999 compacts and successfully accomplish their goals: the protection of Indian gaming exclusivity, a long-term partnership with the state, and the ability to operate as many slots as their markets will bear.