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# Propositions 94, 95, 96, 97: Referendum on Amendment to Indian Gaming Compact

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# Referenda on Amendment to Indian Gaming Compact

## Propositions 94, 95, 96, 97: Referenda on Amendment to Indian Gaming Compact.

By

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### I. Executive Summary

The Indian Gaming Regulatory Act of 1988 ("IGRA") grants Indian tribes the right to enter into tribal-state compacts that regulate gambling on Indian lands. 25 U.S.C.A §§2701-2721. Under the IGRA, if an Indian tribe requests that a state negotiate over gaming activities that are permitted within that state, the state is required to negotiate in good faith toward the formation of a compact that governs the proposed gaming

activities. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994), opinion amended on denial of reh'g, 99 F. 3d 321 (9th Cir. 1996). Nationwide, there are 225 Indian tribes engaged in gaming operations. National Indian Gaming Agency, NIGA Resource Library, The Economic Impacts of Indian Gaming in 2006, <http://www.indiangaming.org/library/index.shtml> (accessed Oct. 21 2007).

In California, the governor has been authorized to negotiate and conclude compacts with Indian tribes, subject to ratification by the California legislature. These agreements can encompass the operation of slot machines, the conduct of lottery games, and banking and percentage card games. Cal. Const. Art. IV § 19(f). California is a party to 64 tribal-state compacts and has more gaming tribes than any other state, with 43 currently hosting some form of gambling. Institute of Government Studies Library, *Indian Gaming in California*, <http://igs.berkeley.edu/library/htIndianGaming.htm> (accessed Oct. 21, 2007).

Recently, the California legislature ratified four compacts with four California tribes (Pechanga, Morongo, Agua Caliente, and Sycuan) to install additional slot machines in their Casinos. California Senate Bills 174, 175, 903, and 957 (July 10, 2007). Propositions 94, 95, 96, and 97 are four referenda that will appear on the ballot for the California Presidential Primary Election on February 5, 2008. These referenda will give California voters a chance to overturn the compacts approved by the legislature and signed by the Governor. It will also send the governor and the legislature back to the negotiating table with the four tribes to tailor a different deal.

## **II. The Law**

### **A. Existing Law**

Currently there are four referenda on the February 2008 ballot. These referenda are targeting amendments to existing agreements with four of the major gaming tribes in California, the Big 4 (Morongo Band of Mission Indians, Sycuan Band of the Kumeyaay Nation, Pechanga Band of the Luiseño Mission Indians, and the Agua Caliente Band of Cahuilla Indians). The compacts were negotiated by the Governor and ratified by the Legislature as called for by California Constitution. Cal. Const. art. IV § 19.

The compacts with the respective tribes are similar in nature. The focus of the compacts revolves around an extreme increase in Class III Gaming Devices (slot machines) permitted in tribal casinos. The chart below illustrates the increase in slot machines approved by the current compacts:

<b>Tribe</b>	<b>Existing Gaming Devices</b>	<b>Additional Devices Permitted</b>	<b>Total</b>
Pechanga Band of Luiseño Indians	2,000	5,500	7,500
Morongo Band of Mission Indians	2,000	5,500	7,500
Agua Caliente Band of Cahuilla Indians	2,000	3,000	5,000
San Manuel Band of Mission Indians	2,000	5,500	7,500

\*Statistics taken from Tribal Compacts

Another important element of the compacts is the revenue they will generate for the State's General Fund. Within the expansive compacts there is a formula for calculating the revenue that the tribes will share with the State; *First Amendment to the Tribal-State Compact Between the State of California and the Agua Caliente Band of Cahuilla Indians*, pt. II, art. d (July 10, 2007).

(d) (i) For purposes of subdivision (b)(ii), the Net Win generated from the operation of all additional Gaming Devices over the existing 2,000 Gaming Devices shall be calculated by multiplying the average Net Win per Gaming Device for the quarter by the average number of Gaming Devices operated during that quarter in excess of 2,000.

(ii) The average Net Win is the total Net Win for the quarter divided by the average number of Gaming Devices present on the floors of the Tribe's Gaming Facilities during that quarter.

(iii) In turn, the average number of Gaming Devices for the quarter shall be determined by aggregating each day's total number of Gaming Devices present on the floors of the Tribe's Gaming Facilities for each day that the Gaming Facilities are open to the public during that quarter and dividing that total by the number of days in the quarter that the Gaming Facilities are open.

The formula setout above sets a revenue sharing method, where the state will receive a percentage of the net win of each machine calculated at the end of each month. This formula will only apply to new slot machines included in the current compacts. This formula differs from the original compact revenue sharing formula, which applied a flat fee paid directly to the State's General Fund for each slot machine.

The compacts differ between the tribes in dealing with the gaming facilities. The agreement with the Morongo Tribe authorizes the operation of the existing two casinos along with an auxiliary facility. CA Senate, Analysis on Bill 174 (June 28 2007). The Sycuan Tribe is authorized to operate two casinos on the existing reservation including any adjustment to its boundaries to include contiguous property as specified by the agreement. CA Senate, Analysis of Senate Bill 175 (June 28, 2007). The Pechanga Tribe is authorized to operate not more than two gaming facilities on its existing land. CA Senate, Analysis of Senate Bill 903 (June 28, 2007). The Agua Caliente Tribe is permitted to operate the existing two casinos as

well as an additional casino so long as the Tribe can show local support. CA Senate, Analysis on Senate Bill 957 (June 28, 2007).

The amended compacts also have shared provisions:

- 1) A requirement that the expanding tribes make payments to the Revenue Sharing Trust Fund that helps support non-gambling and gambling tribes that operate less than 350 slot machines;
- 2) A provision that ceases payments to the Special Distribution Fund which supports state regulatory costs, problem gambling and backfills the Revenue Sharing Trust Fund in case of shortfall;
- 3) An Exclusivity Agreement, which allows the tribes the option to either terminate their compact or modify the payments to the State as provided. This would occur if the Tribe's core geographic market was infringed by other Class III gaming activities;
- 4) A second Exclusivity Clause which provides the same options as the aforementioned clause in the event that any entity other than an Indian Tribe is authorized to engage in Class III banking and percentage card games;
- 5) A requirement of Slot Machine testing by state inspectors up to 4 times a year to ensure that the machines are working according to the manufacturer's technical standards;
- 6) Building Code Requirements;
- 7) Provisions dealing with patron disputes;
- 8) An agreement that Public and Workplace Health, Safety and Liability standards will be the same as or more stringent than state standards. However, under the agreements the tribes are not required to submit to the jurisdiction of county or state inspectors;
- 9) A tort liability ordinance that will allow for California tort law to govern all claims. The tribe must waive sovereign immunity and consent to binding arbitration enforceable in State or Federal Court. Tort liability also sets forth a minimum policy in the event of an occurrence;
- 10) A requirement that each tribe obtain Workers Compensation coverage through self-insurance or participation in the state workers compensation system;
- 11) Provisions requiring mitigation of off-reservation impacts mandating that the tribes to prepare environmental impact reports to assess possible effects of expansion. This clause also requires the Tribe to enter into agreements with the respective counties and any cities within a quarter mile from any portion of the casino or other structures;
- 12) Labor provisions which set forth standards no less stringent than standards contained in the Fair Labor Standards Act. California S. 174 (July 10, 2007); California S. 175 (July 10, 2007); California S. 903 (July 10, 2007); California S. 957 (July 10, 2007).

The new amendments to the compacts seek to benefit the Indian tribes with the expansion on gaming and to benefit California's General Fund with increased sharing in accordance with the compacts.

## **B. Effects of the Referenda**

In the February 2008 election California voters will have the opportunity to decide whether to repeal the compacts entered into by the Governor and ratified by the legislature. A YES vote will affirm the compacts already approved by the legislature and Governor. A NO vote will send the Governor back into negotiations with the tribes. Because a YES vote approves and a NO vote disapproves, referenda are confusing to some people who think that if they like a measure they should vote YES. Here, those who agree with the proponents of the measure should vote NO.

## **III. Drafting Issues**

The specific language for the proposed Referenda will not be of issue. The referenda seek to repeal the Amendments to already existing agreements between the Indian Tribes and the State of California.

## **Iv. Constitutional and Statutory Issues**

### **A. Referenda**

The California Constitution grants California citizens the power to directly affect the lawmaking process of California by voting on ballot propositions. Cal. Const. art. II, §§ 8, 9 (West 2007). There are two forms of ballot propositions: Initiatives and referenda. The initiative process is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them. Cal. Const. art. II, § 8. The referendum, on the other hand, is the power of the electors to approve or reject statutes or parts of statutes Cal. Const. art. II, § 9. Therefore, while initiatives ask voters to enact a new law, referenda allow voters to approve or disapprove laws that have already been enacted by the California Legislature. The referendum facilitates popular review of a law enacted through the Legislature. Proposition 94, 95, 96, 97 are referenda on Senate Bills 174, 175, 903, and 957, respectively.

### **B. State Constitutional Issues**

There are several state constitutional issues that have been litigated in this case and will likely continue to be litigated after the election if Propositions 94 through 97 should receive a majority of NO votes, repealing the compacts. In October 2007, three of the "Big 4" tribes whose compacts are at issue in the referenda filed lawsuits attempting to stop the California Secretary of State, Debra Bowen, from placing Propositions 94 through 97 on the ballot. *See, Macarro v. Bowen*, Case No. 07CS01359 (Sac. Super Ct., October 10, 2007) (Pechanga case); *Martin v. Bowen*, Case No. 07CS01355 (Sac. Super. Ct., October 10, 2007) (Morongo case); and *Milanovich v. Bowen*, Case No. 07CS01369 (Sac. Super.Ct., October 12, 2007) (Agua Caliente case).

The Pechanga and Morongo Bands of Mission Indians lawsuits alleged that the proponents of the initiative did not present the required signatures to the Secretary of State in due time and therefore, the referenda are invalid. *Martin v. Bowen*, supra, 07CS01355; *Macarro v. Bowen*, supra, 07CS01359. The Agua Caliente lawsuit challenged the referenda as improper uses of the Constitutional power guaranteed to the people in

the state constitution. *Milanovich v. Bowen*, supra, 07CS01369. The lawsuits were brought as petitions for writ of mandate directing the Secretary of State to refuse to place the Propositions on the ballot. All three writs of mandate were denied by Superior Court of Sacramento. *Martin, Macarro, Milanovich*, supra.

The tribes sought review in the California Court of Appeal for the Third District on an expedited basis because of the nature of the pre-election posture of the appeals. The Agua Caliente tribe brought two appellate cases; one a petition for writ of mandate directed toward the Sacramento County Superior Court, the other an appeal of the denial of the writ of mandate directed to Secretary of State Bowen. *Milanovich v. Superior Court*, Case No. C057517 (CA 3rd Dist., Dec. 3, 2007) and *Milanovich v. Bowen*, Case No. C057747 (CA 3rd Dist., Dec. 19, 2007). Petitions for review in the *Macarro* and *Martin* cases, concerning the question of whether proponents substantially complied with the timeline for qualifying a referendum pursuant to the California Constitution, were filed in November and subsequently denied. *Martin v. Bowen*, Case No. C057461 (CA 3rd Dist., Dec. 7, 2007) and *Macarro v. Bowen*, Case No. C057451 (CA 3rd Dist., Dec. 7, 2007). On the same day that the Pechanga and Morongo appellate writs were denied, Agua Caliente's petition for writ of mandate filed in the Third District Court of Appeal and directed to the Sacramento Superior Court was also denied. *Milanovich*, Case No. C057517 (CA 3rd Dist., Dec. 7, 2007). However, the appeal of the Superior Court opinion in the Agua Caliente case against Secretary of State Bowen is still an open case. *Milanovich*, supra, Case No. C057747. The resolution of this matter will await the outcome of the election. Essentially, this case focuses on whether the ratifications of compacts are statutes that can be subject to the referendum process. The Agua Caliente tribe also argues that the compacts relate to taxes, levies or appropriations and are not subject to the initiative and referendum process for this reason. Finally, the tribe makes a technical argument suggesting that the proponents did not comply with the "full text" requirement when they circulated the referendum. The first two of these questions go to the power of the electorate to vote on the referenda. The third relates to whether the proper steps were taken in the presentation of the petition. The court's failure to grant relief on these fundamental questions in a pre-election challenge may signal that it does not view the legal claims to be of considerable merit. Nonetheless, the litigation over this issue will likely continue on after the election on February 5, if the NO campaign is successful.

The Pechanga and Morongo, concerning the 90 day signature requirement, were summarily denied in the Court of Appeal. These cases turn on an interpretation of a particular provision of the California Constitution. In the Morongo case, *Martin v. Bowen* the tribe filed a petition for review with the California Supreme Court. *Martin v. Bowen*, Case No. S159084 (Cal. Dec. 14, 2007). The *Martin v. Bowen* petition for review was denied by the Supreme Court on January 3, 2008. *Id.* The same issue may be considered, though, by the *Macarro* suit, if the California Supreme Court decides to hear the case after the election. Generally, courts prefer to hear matters post-election, especially where statutory or constitutional interpretation is at issue and the power of the electorate is not. *Costa v. Superior Court*, 37 Cal.4th 986 (2006). Since interpretation of the 90 day qualification requirement (a provision that has been included in the California Constitution for almost 100 years) will be a case of first impression in the California Supreme Court, it is likely that the Court would want to wait until after the election to rule on the claim in order to provide adequate time for briefing of the issue and deliberation by the Justices.

Substantively, the 90 day claim will turn on whether precise or substantial compliance will be required for initiative and referendum petitions. If substantial compliance is the standard, the inquiry into whether that standard was met will be a somewhat factual one. The California Constitution provides in pertinent part, "referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the

enactment date of the statute, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors." Cal. Const. art. II, § 9. The issue addressed by the Pechanga and Morongo lawsuits is whether the 90 day period includes certification of the signature attached to the proposition by the Secretary of State, or whether submissions of signatures within 90 days is sufficient.

According to the California Secretary of State, 433,971 signatures were required to qualify each referendum. Secretary of State Website, Initiative Update as of October 18, 2007, [http://www.sos.ca.gov/elections/elections\\_j.htm#pending\\_sigs](http://www.sos.ca.gov/elections/elections_j.htm#pending_sigs) (accessed, Oct. 21, 2007). Scott Macdonald, a spokesman for the No on the Unfair Gambling Deals campaign, which opposes the tribal deals, said the campaign submitted about 700,000 signatures for each of the referenda by Monday Oct. 8, 2007, the last day of the state's 90-day deadline. *Id.* However, the tribes contend that the proponents of the referenda missed the deadline because simply turning in the signatures by Monday, October 8 did not suffice; the signatures should have been turned in *and* certified by the Secretary of State by October 8. Edward Sifuentes, Staff Writer, North County Times, [http://www.nctimes.com/articles/2007/10/11/news/sandiego/5\\_02\\_1410\\_10\\_07.txt](http://www.nctimes.com/articles/2007/10/11/news/sandiego/5_02_1410_10_07.txt) (accessed Oct. 21, 2007). Although the issue has never been considered by an Appellate Court, the Secretary of the State and her predecessors have been following a 1998 trial court ruling that the signatures submitted before the 90-day deadline can be counted and the time it takes for the state to verify the signatures does not run against the 90 day limit. *Id.*

According to the established principles of law, the court will have to decide whether the proponents of the Referendums have substantially complied with the words and spirit of the California Constitution. In determining this question, the court will look into whether the underlying purpose of the 90-day limit has been met, without requiring strict, literal compliance with the section. In *Costa v. Superior Court*, supra, the Supreme Court of California noted, "Particularly when a preelection challenge is brought against an initiative measure that has been signed by the requisite number of voters to qualify it for the ballot, the important state interest in protecting the fundamental right of the people to propose statutory or constitutional changes through the initiative process requires that a court exercise considerable caution before intervening to remove or withhold the measure from an imminent election." 37 Cal. 4th at 1007. Courts are generally hesitant to intervene before the election and strike down an initiative or a referendum on strict procedural grounds.

With respect to the substance of the initiative and referendum requirements, the *Costa* Court explained, "an unreasonably literal or inflexible application of constitutional or statutory requirements that fails to take into account the purpose underlying the particular requirement at issue would be inconsistent with the fundamental nature of the people's constitutionally enshrined initiative power and with the well-established 'judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'" 37 Cal. 4th at 1013 (quoting *Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976)). In *Costa*, the Attorney General sought a writ of mandate to prohibit the Secretary of State from placing a proposed initiative on the ballot, on the grounds that the version of the



initiative that was submitted to Attorney General differed from the version that was printed on petition forms and circulated for signatures among the voters. *Id.* at 986-992. The Court held that withholding the proposition from appearing on the ballot was not justified because the discrepancies between the two versions were immaterial and the proponents had complied with the underlying purpose of the requirement - to guarantee against misinforming and deceiving the electorate. *Id.* Reviewing the decisions of other California courts regarding this issue, the *Costa* Court noted,

Thus, when California courts have encountered relatively minor defects that the courts find could not have affected the integrity of the electoral process as a realistic and practical matter, past decisions generally have concluded that it would be inappropriate to preclude the electorate from voting on a measure on the basis of such a discrepancy or defect. In such cases, as long as the fundamental purposes underlying the applicable constitutional or statutory requirements have been fulfilled, the decisions have concluded that there has been substantial compliance with the applicable constitutional or statutory provisions and that invalidation of a petition and preclusion of a vote on the measure is not warranted.

*Id.* at 1013 (emphasis in original).

A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition. *Costa*, 37 Cal. 4th at 1013. As the Court noted in *Assembly v. Deukmejian*, 30 Cal. 3d 638, 652-653 (1982) "[t]he requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the ... petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirements of the law." Thus, "[o]ver the years, numerous relatively minor departures from the constitutional and statutory requirements applicable to initiative and referendum measures have been found to satisfy the substantial compliance test, so long as the court was able to conclude that the departure in question, as a realistic and practical matter, did not undermine or frustrate the basic purposes served by the statutory requirements in ensuring the integrity of the initiative or referendum process." *Costa*, 37 Cal. 4th at 1019 .

In the case at hand, the court will have to decide whether the initiative proponents substantially complied with the requirements of the California Constitution. In making this decision, the court will first have to consider the underlying purpose of the 90 day limit. As the Court noted in *Costa*, "[p]ast decisions establish that the principal purpose underlying the requirement that the proponents of an initiative measure submit a copy of it to the Attorney General prior to circulation is to enable that official to prepare an accurate and objective title and summary that must be prominently included in the circulated petition and that will provide the voters whose signatures are sought with an accurate and objective description of the general subject matter of the initiative and its main points." 37 Cal. 4th at 1023. Since it does not appear that the proponents of the referenda have either purposefully or inadvertently misled the voters, it is likely that the court would defer to the earlier opinion, relied on by the Secretary of State, and hold that the proponents of the current initiative have substantially complied with the requirements of the California Constitution, without violating the substantive requirements of the Constitution.

### **C. Federal Constitutional Issues**

If the referenda fail in February, the Big 4 Tribes may file a lawsuit to enforce the compacts that they negotiated with the governor and that were approved by the legislature. Such a suit will test whether publication of the compacts in the Federal Register by the Secretary of the Interior created a binding federal contract between the Big 4 Tribes, the Federal Government, and the state of California, and whether the Supremacy Clause of the United States Constitution requires the federal approval of the compacts to trump the disapproval of the compacts by the people of the State of California. This confrontation between state, federal, and administrative law developed due to a unique set of circumstances.

The four Indian Compacts were approved by the Legislature and signed by the Governor on July 10, 2007. California Statutes 2007, Chs. 38, 39, 40, 41. Therefore, under California law the four statutes signed by the Governor would not have become active until January 1, 2008. Cal. Const. art. IV, § 19. Following passage of the statutes, Jack Gribbon and others filed Referendum Petitions and valid signatures to suspend enactment of the compacts pending a vote on February 5, 2008. California Secretary of State, Official Voter Guide, <http://www.voterguide.sos.ca.gov> (accessed January 15, 2008).

During the time that the referenda were circulating but after the Secretary of State was aware that proponents were actively trying to qualify the referenda, the Secretary of State forwarded the compacts to the Department of Interior on September 5, 2007 for ratification by the federal government. At the time of transmission, the compacts had not yet taken effect, but the effective date of the statutes, like all other non-urgency statutes passed in the 2007 legislative session, was scheduled for January 1, 2008. The transmission of the compacts by the Secretary of State was done pursuant to the language of IGRA. 42 U.S.C. § 2710 (8) (a). Under IGRA after a state has negotiated a compact with a federally recognized Indian Tribe, the compact must be sent to the Department of the Interior to be approved or denied by the Secretary of the Interior. *Id.* This approval process has a specific timeframe. Under IGRA, the Secretary of the Interior must approve or deny the compacts within 45 days of receipt. If the Secretary does not act within this 45 day window, the compacts are deemed to be approved and become enforceable. *Id.*

In this case, no formal action was taken on the compacts within 45 days of the transmittal. Under pressure from the State of California and the tribes, the Secretary of the Interior published the compacts in the Federal Register on December 4, 2007. Jim Miller, *Gaming Compacts that Inspired Ballot Challenges Now Have Federal Approval*, The Press Enterprise (published December 4, 2007); Judy Lin, *Casino Deals Got a Nudge*, Sacramento Bee A1 (Jan. 17, 2008). The publication by the Secretary of the Interior may have been beyond his authority under IGRA. Under IGRA, Class III gaming can only be approved through an effectively negotiated compact between a federally recognized Indian Tribe and a state that allows gambling. 42 U.S.C. § 2710. Through IGRA each state defines how compacts are to be negotiated and ratified. *Id.* The California process calls for the Governor to negotiate a compact with a federally recognized Indian tribe, for the compact to then be submitted to the Legislature for approval by through a bill, and then for the Governor to sign the bill making it an effective statute. Cal. Gov. § 2710.

Due to the successful filing of the referenda, the statutes' effective dates were extended until after the February 2008 election. Cal. Const. art. II, § 9. Without an effective compact, the action by the Secretary of the Interior is probably beyond his authority under IGRA. Under IGRA, Class III gaming is permissible only if a State-Indian compact is in effect-no such effective compact existed when the Secretary of the Interior published the four compacts in the Federal Register. 42 U.S.C. § 2710. In the context of IGRA, an action by the Secretary of the Interior to publish a compact is without authority if the underlying compact was invalid. *Pueblo Santa Ana v. Kelly*. 104 F.3d 1546 (10<sup>th</sup> Cir. 1997).

In *Pueblo of Santa Ana v. Kelly* the Pueblo Tribe of New Mexico sought a declaration of validity concerning the gaming compacts entered into between the State of New Mexico and the Tribe under IGRA. 104 F.3d 1546. The question before the Tenth Circuit was whether the compacts that had been approved by the Department of the Interior and published in the Federal Register were valid although the New Mexico Supreme Court had invalidated them because Governor Johnson lacked legal authority to approve them. *Id.*

The compacts at issue in *Pueblo* were agreed to and signed by New Mexico Governor Gary Johnson in February 1995. *Id.* at 1550. They were then forwarded onto the Department of the Interior. The Secretary of the Interior approved the compacts and published them in the Federal Register in March of 1995. *Id.* After the compacts were published in the Federal Register, the Supreme Court of New Mexico in *State ex. rel. Clark v. Johnson* decided that Governor Johnson lacked the authority to sign them in July of 1995. 120 N.M. 562, 904 P.2d 11, 24 (1995). The court ruled that the compacts and amendments exceeded the limits of gaming allowed in New Mexico and that they were therefore void. *Id.*

The Tenth Circuit in *Pueblo* ruled that the actions by the Secretary of the Interior and publication of the compacts in the Federal Register did not validate the underlying compacts. 104 F.3d 1546 (10<sup>th</sup> Cir. 1997). The court held that IGRA imposed two obligations to create a valid compact: "the state must have 'entered into' a compact and the compact must be 'in effect' pursuant to Secretarial approval." *Id.* at 1554. The court noted that state law determined the procedure by which a compact was to be negotiated and agreed to and therefore the compacts at issue were invalid due to the New Mexico Supreme Court ruling them void, no action by the Interior Department or the Secretary could cure such a fundamental problem. *Id.*

As in the *Pueblo* case the Secretary of the Interior has again likely stepped outside the bounds of his authority by approving gaming compacts with tribes that have not yet been properly enacted under IGRA. As previously mentioned, the California process for enacting compacts involves negotiations between the Governor and a federally recognized Indian tribe and approval by the legislature of the compacts by enacted statute. Only after both of these prongs have been met is a valid state-tribe compact enacted under California law. Since California permits a mechanism for the people to postpone enactment of a statute through the referendum process, the compacts being voted on in February 2008 are not "in effect" yet under *Pueblo* and no action by the Secretary of the Interior can correct such a defect. The tribes will argue that the federal action trumps the state action and that IGRA only requires negotiation with the state and approval by the legislature. A court will decide what the federal law requires and whether the federal action was a valid and enforceable one that resulted in immunizing the tribal compacts from the effects of the election. This will likely be a major component of the post-election legal strategy of the Big 4 tribes if the compacts are disapproved on February 5.

## **V. Public Policy Issues**

### **A. Proponents**

The proponents of this initiative argue that voters should vote against the referenda for three reasons. First, the compacts with the four Indian tribes deny the taxpayers a fair share of the revenues. Second, the recent gaming compacts indicate a dramatic shift in the State's Indian Gaming Policy. And finally, these compacts unfairly benefit four wealthy tribes at the expense of other tribes.

In support of their first assertion that the new compacts deny taxpayers a fair share of the revenues, the proponents of this initiative point out that the projected revenue increase, estimated by the tribes, are wildly exaggerated and overly optimistic. No on the Unfair Gambling Deals Website,

<http://nounfairdeals.com/keyfacts/factsheet.htm> (accessed Oct. 21, 2007). The proponents note that "[r]ather than utilize past state revenue sharing formulas, such as an easily verifiable per machine fee, the new deals let tribes pay a percent of their "net win" -- as determined by the tribes themselves." *Id.* Therefore, California's Independent Legislative Analyst does not expect the compacts to provide even 1% of annual general fund revenues. *Id.*

Second, the proponents of the referenda contend that the recent compacts indicate a major shift in California's policy of moderate expansion of Indian gaming. "Whereas past compacts encouraged modest casino expansions with clear guidelines to share revenues with taxpayers, the Big 4 compacts encourage rapid casino growth and fail to include clear and fair revenue sharing formulas to benefit taxpayers." *Id.* The proponents of the referenda assert that the new compacts create "**one of the Largest Expansions of Casino Gambling in U.S. History**" by making California home to some of the largest casinos in the world, with more than twice the number of slot machines as the biggest casinos in Vegas. Therefore, those who support the former California policy of modest casino expansion should vote against the referenda to send the California government back to the negotiating table with the tribes to come up with a better and less expansive deal.

Finally, the proponents of the current referenda argue that the new compacts are unfair because they create an economic advantage for four wealthy tribes at the expense of other tribes in California. Just four of California more than 100 Indian tribes would get about one-third of the state casino gambling pie. It would give them an unfair competitive advantage over other gaming tribes, and could drive smaller tribal casinos out of business altogether. *Id.* Moreover, the new compacts fail to increase revenue sharing opportunities for even the poorest of non-gaming tribes. *Id.*

For all these reasons, the proponents of the current referenda urge California voters to vote against the referenda and send the California Government back to negotiating tables with the Indian tribes to come up with a better agreement.

### ***B. Opponents***

The opponents of the current referenda argue that in the face of recent budget deficits, the new historic gaming agreements between the four California Indian tribes and the state of California are extremely important to California citizens for three reasons. First, California will get more than \$9 billion over the next two decades without raising our taxes providing vitally needed new funding for our schools, public safety and other services. Second, the agreements will protect and create thousands of local jobs at the four tribes' casinos and provide tens of millions of dollars to help non-gaming tribes throughout California. Finally, the agreements strengthen protections for casino employees and the environment.

The opponents of the referenda assert that the new deals are particularly important to California because of California's current fiscal problems. Coalition to Protect California Budget and Economy Website, <http://www.yesforcalifornia.com/facts.php> (accessed Nov. 01, 2007). The opponents point to the fact that California continues to face chronic budget deficits and the state struggles to adequately fund education, public safety, traffic congestion relief, healthcare and other services. *Id.* In the face of such a grim fiscal situation, the new Indian gaming agreements are a source of income that California cannot afford to lose. *Id.*

The opponents contend that under the new agreements the four tribes will pay much higher percentages of their net gaming revenues (up to 25%) into the state General Fund. *Id.* These agreements will provide the state with more than \$200 million the first year (with revenues increasing significantly in future years) and

an estimated \$9 billion over the next two decades. *Id.* California can use this increased income to help balance its budget and pay for schools, roads and bridges, public safety and health care without raising taxes or increasing debt.

Second, the opponents of the referenda argue that the new agreements will create thousands of jobs for California citizens and provide help to non-gaming tribes. *Id.* The agreements benefit the tribes by allowing them to have additional slot machines at casinos on their existing tribal lands. *Id.* This in turn, the opponents argue, will create thousands of new jobs at the tribes gaming facilities. *Id.* In addition, under the new agreements, the four tribes will share tens of millions of dollars from their revenues with non-gaming tribes. *Id.* The new agreements also require the tribes to coordinate with local police and fire agencies, to compensate local governments for any local services that are needed, and to resolve disputes with surrounding communities through binding arbitration. *Id.* Therefore, the new agreements are beneficial not only to the tribes, but also to California citizens and the non-gaming Indian tribes.

Finally, the opponents of the referenda contend that the agreements strengthen protections for casino employees and the environment. *Id.* The new agreements preserve the right of Indian casino employees to be represented by unions chosen through secret ballots. *Id.* They also ensure that the tribes will comply with environmental review provisions that mirror the California Environmental Quality Act. *Id.*

For all these reasons, the opponents of the referenda urge California citizens to vote against the referenda and keep the gaming deals in place to the benefit of California and its citizens.

## **VI. Conclusion**

As a hotly debated topic in today politics, the Indian gambling issue will certainly gain the attention of many California voters. The referenda will allow the people to decide whether the compacts entered into by the Governor and ratified by the legislature were in accordance with the attitude of the people. Legal challenges, both those commenced pre-election and those that have yet to be litigated, will be pursued in the event the compacts are disapproved. A NO vote on Propositions 94 through 97 will likely trigger federal litigation to sort out the question of whether the publication of the compacts in the Federal Register late last year trumps the right of the people of California to decide the fate of the compacts. A NO vote may also mean continued litigation on the question of whether the 90 day requirement was satisfied by the proponents of the referenda and on the question of whether compacting statutes are an appropriate subject matter for the referendum process.