

Proposition 48:
Referendum on Indian Gaming Compacts

Referendum Statute

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I. EXECUTIVE SUMMARY

Indian gaming has enabled some California Indian tribes to rise from abject poverty and political disenfranchisement to being one of the most influential interest groups in the state with large tribal government offices and large per capita payments to tribal members.¹ However, not all tribes have benefited equally from Indian gaming, with unemployment and government dependency still high on the reservations of many non-gaming tribes.² As a result, many tribes are looking outside their existing reservations to identify ways to take advantage of all the benefits Indian gaming has created for other tribes.³ Proposition 48 would, for the first time in California, approve an agreement between an Indian tribe and the State that would permit the tribe to operate a casino off of the tribe's existing reservation.⁴

Indian gaming in California is regulated by a combination of federal and state laws. At the federal level, Indian gaming is governed by the Indian Gaming Regulatory Act (IGRA).⁵ At the state level, California voters amended the California Constitution in 2000 to authorize Indian tribes to operate "Las Vegas-style" casinos featuring slot machines and house-banked card games⁶ on Indian reservations throughout the state.⁷ This amendment authorized the governor to negotiate compacts⁸ with tribes, subject to ratification by the Legislature, governing gaming

¹ JAY MICHAEL & DAN WALTERS WITH DAN WEINTRAUB, *THE THIRD HOUSE: LOBBYISTS, MONEY, AND POWER IN SACRAMENTO* 57–59 (2001).

² Alison Owings, Op-Ed, *The Ka-Ching Doesn't Ring for Everyone / Indian Casinos are Thriving but They Haven't Made Most Indians Wealthy, and They Can't Solve the Myriad Problems that Exist on Reservations*, S.F. CHRONICLE, Feb. 11, 2007, <http://www.sfgate.com/opinion/article/The-ka-ching-doesn-t-ring-for-everyone-Indian-2618214.php>.

³ See *Controversial Applications in Process*, STAND UP FOR CAL., <http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process> (last visited Aug. 24, 2014) (listing dozens of proposals by tribes to acquire new land for economic development).

⁴ Greg Lucas, *State's First Off-Reservation Tribal Casino Poised for OK*, CAPITOL WEEKLY (June 24, 2013), <http://capitolweekly.net/states-first-reservation-tribal-casino-poised-ok/> (describing the impacts of the underlying statute that is subject to a referendum by Proposition 48). The tribe in this case though takes the position that the casino is not "off-reservation" because the tribe followed the "rule and letter of the law" in obtaining additional reservation land for its casino. *Facts vs. Faction: The North Fork Rancheria Project – Fact Sheet*, NORTH FORK RANCHERIA (Jan. 1, 2011), available at <http://www.northforkrancheria.com/files/NFR%20Project%20Fact%20vs%20Fiction%20312121.pdf>.

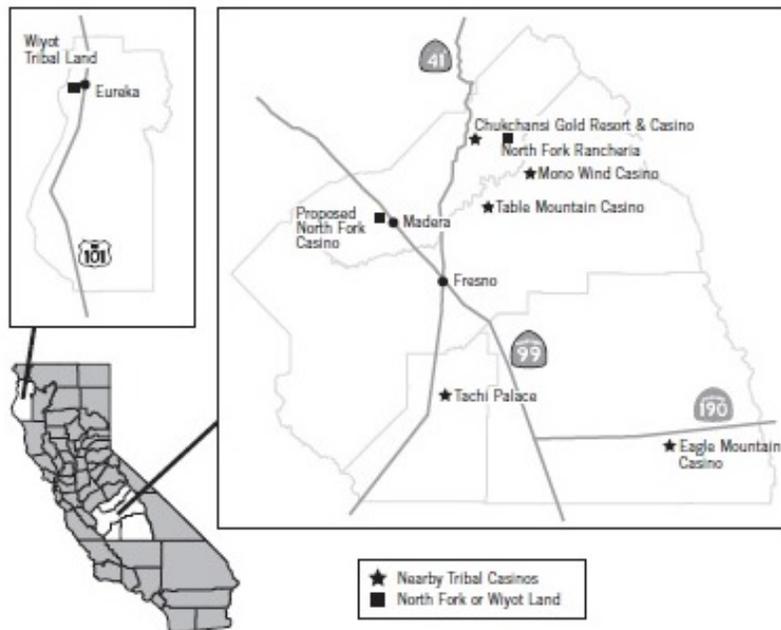
⁵ Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721. See *supra* Part II. A. for more information on IGRA.

⁶ House-banked game is defined in the California Penal Code and is distinguishable from a nonhouse-banked game because the house occupies the role of the banker rather than players betting against each other. CAL. PENAL CODE § 330.11.; see also *Sullivan v. Fox*, 189 Cal. App. 3d 673, 678 (1987) ("Banking game has come to have a fixed and accepted meaning: the 'house' or 'bank' is a participant in the game, taking on all comers, paying all winners, and collecting from all losers."). Blackjack and Baccarat are common examples of house-banked games and IGRA defines this type of game as class III gaming. 25 U.S.C. § 2703(8).

⁷ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY, MARCH 7, 2000, at 4–5, available at <http://vig.cdn.sos.ca.gov/2000/primary/pdf/2000ballot1.pdf>.

⁸ A compact, or tribal-state gaming compact, is an intergovernmental agreement between a tribe and State governing the conduct of gaming activities. 25 U.S.C. § 2710(d)(3)(A).

Figure 1
Location of Proposed North Fork Casino and Wiyot Tribal Land



operations at tribal casinos in accordance with federal law.⁹ California has negotiated and ratified compacts with seventy-one Indian tribes;¹⁰ as of 2014 there are sixty casinos operated by fifty-eight tribes throughout the state.¹¹

Proposition 48 is a referendum on the Legislature’s ratification of a compact between the North Fork Rancheria of Mono Indians (the North Fork Tribe) and the State of California.¹² The North Fork Tribe is a federally-recognized Indian tribe with its original reservation and government headquarters

located in North Fork, California.¹³ While this land is eligible for gaming,¹⁴ Proposition 48 would authorize the North Fork Tribe to build and operate a casino in a more lucrative location off of Highway 99 near Madera, California, thirty-six miles away from its reservation.¹⁵ Proposition 48 would also ratify a tribal-state gaming agreement with the Wiyot Tribe, which has

⁹ CAL. CONST. art. IV § 19(f).

¹⁰ The North Fork and Wiyot Compacts are not included in this total.

¹¹ *Ratified Tribal-State Gaming Compacts (New and Amended)*, CAL. GAMBLING CONTROL COMMISSION, <http://www.cgcc.ca.gov/?pageID=compacts> (last visited Sept. 13, 2014).

¹² See Figure 1 for proposed location of the North Fork Casino in relation to other casinos and cities. Figure 1 courtesy of the November 2014 Voter Guide. CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 4, 2014, at 43, available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf#page=74> [“NOVEMBER 2014 VOTER GUIDE”].

¹³ *Tribal Offices*, NORTH FORK RANCHERIA OF MONO INDIANS, <http://www.northforkrancheria.com/page.cfm?pageID=55> (last visited Aug. 24, 2014).

¹⁴ See U.S. DEP’T OF THE INTERIOR, RECORD OF DECISION: TRUST ACQUISITION OF THE 305.49-ACRE MADERA SITE IN MADERA COUNTY, CALIFORNIA, FOR THE NORTH FORK RANCHERIA OF MONO INDIANS § 2.1.3 (2012), available at <http://www.northforkeis.com/documents/rod/ROD.pdf> (explaining the original rancheria is technically eligible for gaming under IGRA but that the land is held in trust for individual tribal members rather than the tribe, the land is steep and remote, and there would be significant community opposition to building a casino there).

¹⁵ Letter from Larry Echohawk, Assistant Sec’y – Indian Affairs, U.S. Dep’t of the Interior, to Edmund G. Brown, Jr., Governor, State of Cal. at 6 (Sept. 1, 2011).

agreed to abstain from pursuing gaming activities on its eighty-eight-acre reservation near the Humboldt Bay National Wildlife Refuge in exchange for payments from the North Fork Tribe.¹⁶ Influential elected officials and organizations are on both sides of Proposition 48.¹⁷ Proponents of Proposition 48 contend the North Fork Tribe followed a procedure provided in federal law to acquire the land and a casino will allow the North Fork Tribe to be self-sufficient and bring thousands of jobs to a region with high poverty and unemployment. Opponents argue that the North Fork Compact breaks promises that Indian tribes made in 2000 to limit gaming to existing reservations. Both proponents and opponents of Proposition 48 are financially supported by out-of-state gaming interests whose genuine concerns for the welfare of Indian tribes, the California economy, and environmental impacts are questionable.¹⁸

California law requires the governor to develop the substance of a tribal-state gaming compact, and thus the Legislature is precluded from amending the compact terms when it ratifies the compact with a statute. As a result, a statute ratifying a tribal-state gaming compact is distinguishable from other statutes. Should Proposition 48 fail, the North Fork Tribe will undoubtedly seek legal relief and argue that the North Fork Compact should not have been subject to a referendum.

In addition to whether a compact can be the subject of a referendum, there are also other provisions in IGRA that could provide causes of action for the North Fork Tribe to secure a compact—and thus a lucrative casino—regardless of the outcome of Proposition 48.¹⁹ Some commentators have even suggested that in light of the Legislature’s authority to amend or repeal referendum statutes,²⁰ rejecting Proposition 48 would simply result in the governor and the North Fork Tribe negotiating a new compact for the Legislature to ratify.²¹ However, this simple

¹⁶ TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE WIYOT TRIBE (2012), available at http://gov.ca.gov/docs/Wiyot_Compact.pdf [“WIYOT COMPACT”].

¹⁷ For a detailed list of the proponents and opponents of Proposition 48 see *infra* notes 149 and 175.

¹⁸ The YES campaign is largely funded by Station Casinos LLC of Las Vegas and the NO campaign is largely supported by Wall Street banks with an interest in a casino that would compete with the North Fork Casino. *Campaign Finance: YES On Prop. 48. – All Contributions Received*, CAL. SECRETARY ST., [http://cal-](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received)

[access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received) (last visited Sept. 13, 2014) (listing Station Casinos LLC as a major source of funding); *Campaign Finance: NO On Prop. 48. – All Contributions Received*, CAL. SECRETARY ST. [http://cal-](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359207&session=2013&view=received)
[access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359207&session=2013&view=received](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359207&session=2013&view=received) (last visited Sept. 13, 2014) (listing Brigade Capital Management, LLC and affiliated entities as major contributors).

¹⁹ *Infra* Part IV. B, C (explaining two possible methods through IGRA that could provide for a valid compact).

²⁰ CAL. CONST. art. II § 10(c) (“The Legislature may amend or repeal referendum statutes.”).

²¹ See Omid Shabani & Daniel Reid, *Proposition 94, 95, 96, 97: Referenda on Amendment to Indian Gaming Compact*, CAL. INIT. REV., (Fall 2008) available at <http://www.mcgeorge.edu/Documents/Publications/2008ReferendaonAmendmenttoIndianGamingCompact.pdf> (contending that voter rejection of tribal-state gaming compacts in 2008 would send the tribes and State “back to the negotiating table”). However, while courts have not considered the issue in the context of a referendum, courts are cautious about allowing the Legislature to contradict the will of California voters. See *In re Estate of Claeysens*, 161 Cal. App. 4th 465, 471 (2008) (repealing a legislatively-

solution of ratifying a newly-negotiated compact in 2015 seems unlikely given the political consequences of reversing the will of California voters with a statute that barely passed in the Assembly by one vote and then only after reconsideration was granted.²²

Even if voters approve Proposition 48, the opponents of the North Fork Compact still have several opportunities to challenge the North Fork Casino.²³ As a result, no matter what happens in November, Proposition 48 will likely not be the end of the story for the North Fork Tribe and its proposed casino. It will be just the latest chapter in California's history of Indian gaming.

II. THE LAW

A. Brief History of Indian Gaming in California

Modern Indian gaming in California has its roots in the early 1970s when the Rincon Band of Mission Indians adopted a tribal ordinance authorizing the establishment of a card room on the tribe's 3500-acre reservation in eastern San Diego County.²⁴ Fearing the reservation would become a "little Las Vegas," San Diego County officials sued in federal court arguing that the card room violated the County's gambling ordinance.²⁵ The district court found that the County had jurisdiction over the reservation, but the Ninth Circuit reversed the district court's decision on appeal in a 2-1 decision.²⁶

Throughout the 1970s and 80s other tribes in California opened small card rooms and bingo halls, including the Cabazon Band of Mission Indians in Riverside County. With local law enforcement and state officials looking for guidance on regulating these gaming operations, the Supreme Court defended the sovereign right of Indian tribes to govern themselves and the activities on their land in *Cabazon Band of Mission Indians v. County of Riverside* in 1986.²⁷ The court held that local and state governments did not have jurisdiction to enforce their gambling laws on Indian reservations in California.²⁸

enacted statute that conflicted with a voter-enacted statute and stating that "[a]ny doubts should be resolved in favor of the initiative and referendum power, and amendments that *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinance, where the original initiative does not provide otherwise").

²² Complete Bill History of AB 277, <http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml> (last visited Sept. 13, 2014). Additionally, Senate President Pro Tem Elect Kevin de León is not likely to support another compact for the North Fork Tribe after urging Governor Brown to stop submitting compacts for off-reservation casinos to the Legislature until a proper policy could be developed. Letter from Kevin de León, Senator, Cal. State Senate, to Edmund G. Brown, Jr., Governor, State of Cal. (July 29, 2013).

²³ *Infra* Part IV. D (describing the ongoing legal challenges to the North Fork Compact).

²⁴ *Rincon Band of Mission Indians v. San Diego Cnty.*, 324 F. Supp. 371, 373 (S.D. Cal. 1971) *rev'd*, 495 F.2d 1 (9th Cir. 1974).

²⁵ *Id.*

²⁶ *Rincon Band of Mission Indians v. San Diego Cnty.*, 495 F.2d 1 (9th Cir. 1974) (reversing on a procedural error after finding the district court lacked subject matter jurisdiction to hear the case).

²⁷ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

²⁸ *Id.* at 221–22.

In response to the *Cabazon* decision, Congress passed IGRA in 1988 and created a framework for the regulation of Indian gaming throughout the United States.²⁹ Under IGRA, tribes have a right to conduct gaming on Indian land³⁰ to the extent permissible under state law and states have an obligation to negotiate compacts in good faith with Indian tribes governing the proposed gaming activities.³¹

Following Congress' enactment of IGRA, many California tribes operated gaming establishments largely unregulated for several years. California Governor Pete Wilson asserted the state's interest to regulate gaming under IGRA in 1998 when he negotiated the first tribal-state gaming compacts with several California Indian tribes.³² The compacts, known as the Pala Compacts, strongly favored state interests, but eleven tribes joined to support the compacts in exchange for the right to operate Las Vegas-style casinos in California.³³ Other California tribes opposed the Pala Compacts, claiming that the compacts infringed on tribal sovereignty³⁴ due to the burdensome conditions imposed on tribes.³⁵ These tribes collected signatures to place Proposition 5 on the ballot in November 1998 to establish a compact process more favorable to tribal interests than the Pala Compacts. Accordingly, Proposition 5 sought to enact a statute allowing tribes to play a more active role in negotiating the terms of their compacts than under the Pala Compacts.³⁶

Proposition 5 was the most expensive initiative campaign ever at the time,³⁷ which included well-funded opposition from Nevada casino corporations including the same Station Casinos involved in Proposition 48 in 2014.³⁸ Voters passed Proposition 5,³⁹ but the California

²⁹ 25 U.S.C. § 2702.

³⁰ Defined in IGRA section 2703(4) as: “(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.”

³¹ *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1253 (9th Cir. 1994) *opinion amended on denial of reh'g*, 99 F.3d 321 (9th Cir. 1996).

³² Aaron Peardon, *Jackpot! A Legal History of Indian Gaming in California* at 124 (May 2011) (unpublished M.A. thesis, University of Nevada, Las Vegas).

³³ *Id.* at 127.

³⁴ The concept of tribal sovereignty recognizes that Indian tribes are dependent sovereign nations, with distinct political communities, although they are under the “protection and dominion of the United States.” *Picayune Rancheria of Chukchansi Indians v. Brown*, No. C074506, 2014 Cal. App. LEXIS 864, at *22 n.6 (Cal. App. 3d Dist. Sept. 24, 2014).

³⁵ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 3, 1998, at 22–23, available at http://librarysource.uchastings.edu/ballot_pdf/1998g.pdf.

³⁶ *See id.* at 20–21.

³⁷ Michelle DeArmond, *Indian Tribes Take Early Lead in Ballot Initiative Battle Over Tribal Casinos*, LAS VEGAS SUN, Nov. 3, 1998, <http://www.lasvegassun.com/news/1998/nov/03/indian-tribes-take-early-lead-in-ballot-initiative/>.

³⁸ *List of Contributions Received in Support of Proposition 5: Tribal-State Gaming Compacts*, CAL. SECRETARY ST., <http://www.sos.ca.gov/prd/bmgeneral98/prop5.htm> (last visited Sept. 30, 2014).

Supreme Court invalidated most of the statute holding that it conflicted with the California Constitution's prohibition against "Las Vegas-style" casinos.⁴⁰

Following the court's invalidation of Proposition 5, California voters amended the state's constitution in March of 2000⁴¹ through Proposition 1A.⁴² Amending the constitution addressed Proposition 5's conflict with the constitution by creating an exception in the constitution itself allowing for Indian gaming.⁴³ Proposition 1A also resulted in the approval of gaming compacts with fifty-seven tribes that the Legislature had ratified and governor negotiated, but which required the constitutional change to be effective.⁴⁴

The March 2000 ballot also contained a referendum on the eleven Pala Compacts, which the Legislature had ratified and compact opponents sought to reverse.⁴⁵ While voters approved Proposition 29 53.1 percent to 46.9 percent,⁴⁶ voters more strongly supported Proposition 1A 64.5 percent to 35.5 percent.⁴⁷ As a result, the eleven compacts approved by Proposition 29 were superfluous in light of the constitutional amendment in Proposition 1A and the compacts previously negotiated under the terms of Proposition 1A prevailed.⁴⁸

The years that followed saw a dramatic expansion of Indian gaming in California. In 2008, voters supported the Legislature's ratification of gaming compacts with four Indian tribes through the referendum process.⁴⁹ The referenda allowed each tribe to significantly increase the number of slot machines at its casino.⁵⁰ Today there are approximately 63,835 slot machines in

³⁹ 62.4 percent in support and 37.6 percent against. CAL. SEC'Y OF STATE, STATEMENT OF THE VOTE: GENERAL ELECTION NOVEMBER 3, 1998, at 85, *available at* <http://vote98.sos.ca.gov/Final/sov/SOV98.pdf>.

⁴⁰ *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 615 (1999). The court found one portion, the portion waiving the state's sovereign immunity, was still valid. *See infra* Part IV. C.

⁴¹ Prior to the passage of SB 202 (Chapter 558, Statutes of 2011), referendum and initiatives could be presented to the voters at the primary or general election. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 202, at 1 (Sept. 9, 2011). After July of 2011 referendum and initiatives can only be placed on the ballot for the general election. *Id.* at 2.

⁴² CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY, MARCH 7, 2000, at 4, *available at* <http://vig.cdn.sos.ca.gov/2000/primary/pdf/2000ballot1.pdf>.

⁴³ *Id.*

⁴⁴ The fifty-seven tribes included the eleven tribes that also had signed the Pala Compacts. *Id.*

⁴⁵ *Id.* at 78.

⁴⁶ CAL. SEC'Y OF STATE, STATEMENT OF THE VOTE: PRIMARY ELECTION MARCH 7, 2000, at 161, *available at* <http://www.sos.ca.gov/elections/sov/2000-primary/sov-complete.pdf>.

⁴⁷ *Id.* at 146.

⁴⁸ CAL. CONST. art. II § 10(b) ("If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.").

⁴⁹ Propositions 94, 95, 96, 97. The measures passed by near identical margins with Propositions 94 and 95 getting 55.6 percent of the vote and propositions 96 and 97 getting 55.5 percent. CAL. SEC'Y OF STATE, STATEMENT OF THE VOTE: PRIMARY ELECTION FEB. 5, 2008, at 62, 65 *available at* <http://www.sos.ca.gov/elections/sov/2008-primary/2008-sov.pdf>.

⁵⁰ Propositions 96 and 97 allowed the Sycuan Band of the Kumeyaay Nation and Agua Caliente Band of Cahuilla Indians to increase from 2000 to up to 5000 machines and propositions 94 and 95 allowed the Pechanga Band of Luiseño Mission Indians and Morongo Band of Mission Indians to increase from 2000 to up to 7500 slot machines. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE

the state⁵¹ with the largest casino operating 4900 machines at Pechanga Resort & Casino in Temecula.⁵²

B. Factual Background of Proposition 48

Proposition 48 seeks to reverse the Legislature's ratification of the North Fork and Wiyot Compacts. Even before the North Fork Compact was subject to a referendum, the North Fork Tribe's casino project near Madera was a lightning rod for controversy.

The North Fork Tribe began its pursuit of a casino in 2004 with the announcement of a partnership with casino management corporation Station Casinos of Las Vegas.⁵³ The tribe applied to the United States Department of the Interior to take the land near Madera into trust for gaming in 2005⁵⁴ and the Secretary of the Interior approved the application in September 2011 through the two-part determination process authorized by IGRA.⁵⁵ The two-part determination process in IGRA allows tribes to open a casino on land other than existing reservation land.⁵⁶ This was the first time a tribe in California had successfully completed this process.⁵⁷ In September 2012, Governor Brown concurred with the Secretary of the Interior's decision to permit a casino for the North Fork Tribe near Madera,⁵⁸ as required by IGRA.⁵⁹

SUPPLEMENTAL: CALIFORNIA PRIMARY ELECTION, TUESDAY, FEBRUARY 5, 2008, at 12, 20, 28, 36, available at <http://vig.cdn.sos.ca.gov/2008/feb/lang/english-sup.pdf>.

⁵¹ *California Casinos*, 500 NATIONS, http://500nations.com/California_Casinos.asp (last visited Sept. 30, 2014).

⁵² *California's Largest Indian Casinos*, 500 NATIONS, http://500nations.com/California_Casinos_Largest.asp (last visited Sept. 30, 2014).

⁵³ *Project Overview*, NORTH FORK RANCHERIA OF MONO INDIANS, <http://www.northforkrancheria.com/page.cfm?pageID=21> (last visited Sept. 30, 2014).

⁵⁴ Trust land is land that the federal government holds title to for the benefit of an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation. 25 U.S.C. § 2201(4)(i).

⁵⁵ Press Release, U.S. Dep't of the Interior, Assistant Sec'y Echohawk Issues Four Decisions on Tribal Gaming Applications (Sept. 2, 2011).

⁵⁶ The two parts of the determination are: 1) the Department of the Interior determining that taking land into trust for a casino is in the best interest of the tribe and would not be detrimental to the surrounding community; 2) the governor concurring in that decision. 25 U.S.C. § 2719(b)(1)(A).

⁵⁷ The Estom Yumeka Maidu Tribe of the Enterprise Rancheria received approval at the same time through the same process. Press Release, U.S. Dep't of the Interior, Assistant Sec'y Echohawk Issues Four Decisions on Tribal Gaming Applications (Sept. 2, 2011). This process is controversial because the governor unilaterally has the authority to concur with the Secretary of the Interior's decision to permit Indian gaming on a proposed parcel of land. *Briefing Report: Making Tribal Land Gaming-Eligible Through the 'Two-Step Determination Process'*, REPUBLICAN CAUCUS CAL. ST. SENATE, <http://cssrc.us/content/briefing-report-making-tribal-land-gaming-eligible-through-two-step-determination-process> (last visited Sept. 13, 2014) ("The most controversial aspect of the two-part determination process arises over the governor's role in the concurrence.").

⁵⁸ Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Concurs with U.S. Dep't of the Interior Decision, Signs Compact with North Fork Rancheria (Aug. 31, 2012), available at <http://www.gov.ca.gov/news.php?id=17700>.

⁵⁹ 25 U.S.C. § 2719(b)(1)(A) (requiring the governor of the state where the land is located to concur with the findings of the Secretary of the Interior).

At the same time Governor Brown announced his concurrence allowing the North Fork Tribe to build a casino near Madera, he also announced that he had signed a compact with the North Fork Tribe governing gaming activities at the proposed casino.⁶⁰ Pursuant to the California Government Code,⁶¹ the Legislature ratified the North Fork Compact by passing AB 277 on June 27, 2013 and Governor Brown signed the bill on July 3, 2013.⁶²

On October 22, 2013, the Secretary of the Interior published notice that the North Fork Compact had “tak[en] effect” in accordance with federal law.⁶³ California Secretary of State Debra Bowen certified that a sufficient number of signatures had been submitted to qualify a referendum on AB 277 on November 20, 2013.⁶⁴

C. Existing Law and Proposition 48

Proposition 48 is a referendum on the November 2014 ballot regarding Indian gaming compacts enacted by AB 277 (Chapter 51, Statutes of 2013).⁶⁵ Proposition 48, and the underlying statute Chapter 51, Statutes of 2013, represents compacts ratified by the Legislature and negotiated by Governor Brown with the North Fork Tribe and Wiyot Tribe.⁶⁶ The Wiyot and North Fork Compacts are closely intertwined.⁶⁷ The North Fork Tribe’s compact authorizes the tribe to offer class III⁶⁸ gaming on land in Madera County outside of the North Fork Tribe’s existing reservation.⁶⁹ The Wiyot Tribe’s compact prohibits the tribe from constructing and operating a casino on tribal land in environmentally sensitive areas near Humboldt Bay.⁷⁰ In exchange, the Wiyot Tribe will receive between 2.5 and 3.5 percent of the

⁶⁰ Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Concurs with U.S. Dep’t of the Interior Decision, Signs Compact with North Fork Rancheria (Aug. 31, 2012), *available at* <http://www.gov.ca.gov/news.php?id=17700> (announcing both the concurrence to allow the federal government to take the land in Madera into trust and the signing of a compact with the North Fork Tribe).

⁶¹ CAL. GOV’T CODE § 12012.25 (explicitly requiring that ratification be by statute).

⁶² Complete Bill History of AB 277, http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0251-0300/ab_277_bill_20130703_history.html (last visited September 9, 2014).

⁶³ 78 Fed. Reg. 62649 (Oct. 22, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-10-22/pdf/2013-24350.pdf> (“This notice publishes the Class III Gaming Compact between the North Fork Rancheria of Mono Indians and the State of California taking effect.”).

⁶⁴ Press Release, Cal. Sec’y of State, Referendum Qualifies for November 2014 California Ballot (Nov. 20, 2013) <http://www.sos.ca.gov/admin/press-releases/2013/db13-052.htm>.

⁶⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 40.

⁶⁶ *Id.*

⁶⁷ *See id.* at 41–42 (explaining the relationship between the Wiyot and North Fork Compacts).

⁶⁸ Defined in IGRA section 2703(8) as all forms of gaming that are not class I or II, but understood to mean house-banked games such as blackjack and slot machines. For more information on house-banked games see *supra* note 6.

⁶⁹ TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE NORTH FORK TRIBE at Preamble & § 1 (2012), *available at* http://gov.ca.gov/docs/Final_Compact_-_North_Fork.pdf [“NORTH FORK COMPACT”].

⁷⁰ WIYOT COMPACT, *supra* note 16.

North Fork Tribe's revenue from the North Fork Casino.⁷¹ The Wiyot Compact a twenty-year term that expires on December 31, 2033.⁷²

Chapter 51, Statutes of 2013, includes specified exemptions from the requirements of the California Environmental Quality Act (CEQA).⁷³ However, the CEQA exemptions are limited to activities undertaken by the tribal government itself and do not extend to any intergovernmental agreements made with local governments for projects undertaken in support of tribal activities.⁷⁴ The North Fork Compact requires that the tribe complete a Tribal Environmental Impact Report studying the impact of a casino near Madera on environmental resources outside Indian land.⁷⁵ Thus, there will be an environmental review of the project, but a more limited review than would be required under CEQA.

Under the terms of the North Fork Compact, the tribe is allowed to build and operate a casino in Madera County with up to 2000 slot machines and no other tribe can build a casino within sixty miles of this facility.⁷⁶ The North Fork Tribe agreed to quarterly payments to the State Gaming Agency's Revenue Sharing Trust Fund, which supports the activities of non-gaming California Indian tribes.⁷⁷ The North Fork Compact authorizes the tribe to make deductions from its revenue prior to making payments into the Revenue Sharing Trust Fund for reimbursement to the State for services provided, the tribe's payment to the Wiyot Tribe, and mitigation payments to local agencies.⁷⁸

The North Fork Compact is extremely prescriptive, setting out explicit requirements for development and oversight of operations that encompasses state licensing, state inspections, dispute resolutions, compliance with state public health and safety law and regulations, and myriad other requirements.⁷⁹ The term of the North Fork Compact is twenty years expiring on December 31, 2033.⁸⁰

D. Effects of the Referendum

In the November 2014 General Election, California voters will decide whether the Legislature's ratification of the North Fork and Wiyot Compacts should stand. A YES vote will affirm the compacts. A NO vote will reverse the Legislature's ratification of the compacts. Referenda, by their very structure can be confusing to many voters, your authors included. However, voters who wish to affirm the compacts negotiated by Governor Brown and approved by the Legislature should vote YES. Those who want to reject the compacts should vote NO. In this paper we will refer to those groups who want voters to vote "No" and reject the compacts as

⁷¹ *Id.* § 4.1.

⁷² *Id.* § 7.2.

⁷³ CAL. GOV'T CODE § 12012.59 (b)(1)(A)–(F).

⁷⁴ *Id.* § 12012.59 (b)(1)–(b)(2).

⁷⁵ NORTH FORK COMPACT, *supra* note 69, at § 11.8.1.

⁷⁶ *Id.* § 4.7(b).

⁷⁷ *Id.* §§ 4.6, 5.1. For additional explanation of the fiscal impacts of Proposition 48 see *infra* Part V. C.

⁷⁸ *Id.* §§ 4.3, 5.7(a)–(h).

⁷⁹ *Id.* §§ 6–13.

⁸⁰ *Id.* § 14.2.

the opponents. Those groups that want voters to vote “Yes” and affirm the compacts will be referred to as the proponents.⁸¹

III. DRAFTING ISSUES

The language of Proposition 48 is not in dispute nor is it ambiguous. If passed, the referendum would affirm the North Fork and Wiyot Compacts as approved by the Legislature and Governor by AB 277 (Chapter 51, Statutes of 2013). If not approved, the referendum would overturn the ratification of the compacts.

IV. CONSTITUTIONAL AND STATUTORY ISSUES

The story of the North Fork Tribe and its proposed casino near Madera will not be over when polls close on November 4. The tribe will still have several options in court to obtain a compact if voters reject the compacts and Proposition 48 fails. First the tribe can argue that the statute ratifying the North Fork and Wiyot Compacts is not the proper subject of a referendum.⁸² Second, Proposition 48 cannot annul the Secretary of the Interior publishing a valid compact in the Federal Register, which is all that IGRA requires.⁸³ The North Fork Tribe can also argue that the State negotiated in bad faith so the Secretary of the Interior should impose a compact.⁸⁴ Finally, if Proposition 48 passes and voters approve the Legislature’s ratification of the compacts, the opponents of the North Fork Compact will have several causes of action as well.⁸⁵

A. Subjecting a Compact to a Referendum

AB 277 is distinguishable from other statutes that are normally subject to a referendum because AB 277 is the ratification of an agreement between two sovereign governments rather than a statute subject to amendments, hearings, and voting in policy committees.⁸⁶ The referendum process allows voters to affirm or reject statutes or parts of statutes enacted by the Legislature.⁸⁷

⁸¹ This simplification is necessary as technically the groups on the “No” side of Proposition 48, such as Stand Up for California and the Chukchansi Tribe, were the supporters of subjecting AB 277 to a referendum and obtained the signatures to put the North Fork and Wiyot Compacts on the ballot. However, in order to avoid the confusion that would result if we were to refer to “No” side as the proponents and the “Yes” side as the opponents, we will refer to the “No” side as the opponents and the “Yes” side as the proponents.

⁸² *Infra* Part IV.A.

⁸³ *Infra* Part IV.B.

⁸⁴ *Infra* Part IV.C.

⁸⁵ *Infra* Part IV.D.

⁸⁶ There are also implications with tribal sovereignty at issue here because the voters of California are dictating to a sovereign tribal government the terms of the activities on its land, but this discussion is outside the scope of this article.

⁸⁷ CAL. CONST. art. II § 9.

The question whether the North Fork Compact could properly be subject to a referendum was decided by the Madera County Superior Court in June 2014.⁸⁸ The court held that ratification of the North Fork Compact was a legislative act properly subject to the referendum process.⁸⁹ The North Fork Tribe has appealed the decision to the Fifth District Court of Appeal.⁹⁰ On appeal, the appellate court will consider whether the referendum power extends to statutes that merely ratify negotiated agreements.⁹¹

While California voters' initiative and referendum powers are expansive and protected by the California Constitution, the powers are still not unlimited. In *American Federation of Labor v. Eu*, the California Supreme Court held the voters' initiative power is restricted to the adoption or rejection of laws.⁹² The court went on to explain that a law must be "declared by some authority possessing sovereign power over the subject."⁹³ The court found the voters lacked the authority through initiative to compel the Legislature to adopt a resolution urging Congress to submit a balanced budget amendment to the state.⁹⁴

Similarly, in *People's Advocate, Inc. v. Superior Court*, the California Supreme Court held that the voters' initiative power did not extend to determining the process for the appointment of legislative leadership, how legislative committee assignments were made, and how legislative personnel were hired.⁹⁵ Rather, the court found that the rules and resolutions enacted by voter initiative were outside the scope of permitted subject matter that the people could legislate through the initiative.⁹⁶ The court concluded "[i]n sum, the people through the electorate have been given the power to make statutes, i.e. the power to make laws for all the people, but not the power to make rules for the selection of officers or rules of proceeding or rules which regulate the committees or employees of either or both houses of the Legislature."⁹⁷

In contrast, in *Legislature v. Eu*, the California Supreme Court held that constitutional provisions adopted through an initiative imposing term limits on legislators and reducing legislative funding levels were valid.⁹⁸ The statutes under review did "not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever

⁸⁸ *North Fork Rancheria of Mono Indians v. California*, No. MCV062850, (Madera Cnty. Super. Ct. June 26, 2014) (ruling on demurrers to cross-complainant's cross-complaint).

⁸⁹ *Id.* at 6–10.

⁹⁰ *North Fork Rancheria of Mono Indians v. California*, No. MCV062850, (Madera Cnty. Super. Ct. Sept. 4, 2014) (notice of appeal).

⁹¹ Cases in other jurisdictions have held that a legislature's approval of a compact is a legislative act because it is a policy decision that changes state law. *See e.g., Florida House of Representatives v. Crist*, 999 So.2d 601 (Fla. 2008); *Saratoga Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003).

⁹² *Am. Fed'n of Labor v. Eu*, 36 Cal. 3d 687 (1984).

⁹³ *Id.* at 711.

⁹⁴ *Id.* at 692.

⁹⁵ *People's Advocate, Inc. v. Superior Court*, 181 Cal. App. 3d 316, 334 (Ct. App. 1986).

⁹⁶ *Id.* at 326.

⁹⁷ *Id.*

⁹⁸ *Legislature v. Eu*, 54 Cal. 3d 492, 535 (1991).

laws it deems appropriate.”⁹⁹ In addition, the court found “[t]he challenged measure alters neither the content of those laws nor the process by which they are adopted.”¹⁰⁰

In the context of tribal-state gaming compacts, ratification takes the form of a traditional statute, yet the act taken by the Legislature is more like rule or resolution making. If the Government Code required a resolution rather than a statute to ratify a compact¹⁰¹ then it would be clear in light of the holding in *People’s Advocate* that voters lack the power to reverse the action of the Legislature by referendum. While ratification is simply a yes or no vote much like a resolution, the Legislature required ratification through a statute, suggesting that it intended a referendum to be possible. On its face, Proposition 48 does not change the internal structure of the Legislature and is essentially a measure that allows voters to reconsider a policy decision made by the Legislature through a statute. However, after carefully analyzing the meaning of ratification, the appellate court will need to consider whether ratification is more like compelling the Legislature to adopt a resolution and making rules for the Legislature, or more similar to a policy decision of a traditional statute.

These arguments regarding whether the compact could be subject to a referendum are intertwined with other questions of federal law discussed below.¹⁰² As a result, these arguments will likely also surface in federal question litigation¹⁰³ in federal court where the court may be less likely to follow California courts’ obligation to “jealously guard” the people’s right to a referendum under California law.¹⁰⁴

B. Effect of Publication of Compact in Federal Register

If the referendum fails and the Legislature’s ratification of the North Fork Compact is reversed, the North Fork Tribe may file a lawsuit arguing that its compact is effective and valid because the Secretary of the Interior published the compact in the Federal Register. By this reasoning, Proposition 48 is a superfluous exercise because the compact was effective after it was negotiated by Governor Brown, approved by the Legislature, and published by the Secretary of the Interior in the Federal Register.

IGRA specifies the procedure for a compact to be effective. Among other requirements not in contention here, IGRA permits class III gaming on Indian land if gaming is conducted in conformance with a tribal-state compact entered into by the tribe and state and approved by the Secretary of the Interior.¹⁰⁵ A compact takes effect under IGRA “only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary [of the

⁹⁹ *Id* at 292.

¹⁰⁰ *Id.*

¹⁰¹ Or even if the Government Code was silent and the ratification process was ambiguous.

¹⁰² *Infra* Part IV.B (questioning whether legislative approval and publication in the Federal Register finalized the compact).

¹⁰³ Federal question jurisdiction is ability of a federal court to hear a case because it involves a question of federal law.

¹⁰⁴ *Rossi v. Brown*, 9 Cal. 4th 688, 695 (1995).

¹⁰⁵ 25 U.S.C. § 2710(d)(1).

Interior] in the Federal Register.”¹⁰⁶ The North Fork Tribe’s argument would hinge when exactly a compact is entered into and effective.

The argument that a compact is *per se* valid because the Secretary of the Interior published it in the Federal Register was rejected by the Tenth Circuit in *Pueblo of Santa Ana v. Kelly (Pueblo)*.¹⁰⁷ In that case, the tribe argued that the compacts were valid because the Secretary of the Interior published the compacts in the Federal Register even though the New Mexico Supreme Court had invalidated the compacts.¹⁰⁸ Despite this argument, the court held that because the Governor of New Mexico did not have authority to validly “enter into” the compacts, the underlying compacts were invalid and the publication in the Federal Register did not cure the flaws.¹⁰⁹ The court made clear that a valid compact is a two-step inquiry: “(1) the compacts must be validly ‘entered into’ under applicable state law and (2) they must be ‘in effect’ pursuant to Secretarial approval and notice.”¹¹⁰

While *Pueblo* would seem to preclude the North Fork Tribe from arguing the validity of their compacts based on their publication in the Federal Register, the North Fork Tribe can argue its compact is distinguished from the *Pueblo* case. Unlike the compacts in *Pueblo*, there has been no determination from California’s Supreme Court that the North Fork Compact is invalid, and thus, the North Fork Tribe can argue that the compact was validly entered into pursuant to state law. The North Fork Compact was not void *ab initio* as the *Pueblo* compacts were.

Also importantly, California Secretary of State Debra Bowen did not certify Proposition 48 for the ballot until November 20, 2013,¹¹¹ nearly a month after the North Fork Compact appeared in the Federal Register on October 22, 2013.¹¹² The span of time in which the North Fork Compact was “in effect” before Proposition 48 qualified for the ballot makes a stronger argument that publication in the Federal Register was all the North Fork Tribe needed to make the compact effective.

However, in fulfilling her duty to transmit the North Fork and Wiyot Compacts to the Department of the Interior, California Secretary of State Debra Bowen made the Department of the Interior aware of the possible referendum on the statute ratifying the compacts.¹¹³ Secretary of State Debra Bowen stated that California statutes, including Chapter 51 ratifying the

¹⁰⁶ *Id.* at § 2710(d)(3)(B).

¹⁰⁷ *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).

¹⁰⁸ *Id.* at 1548.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1553. These same two requirements are also provided in the North Fork Compact itself in section 19.1, which states that the compact is not effective until it is ratified in accordance with state law and notice of approval is published in the Federal Register.

¹¹¹ Press Release, Cal. Sec’y of State, Referendum Qualifies for November 2014 California Ballot (Nov. 20, 2013) <http://www.sos.ca.gov/admin/press-releases/2013/db13-052.htm>.

¹¹² 78 Fed. Reg. 62649 (Oct. 22, 2013) available at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-22/pdf/2013-24350.pdf>.

¹¹³ Letter from Debra Bowen, Sec’y of State, State of Cal., to Paula Hart, Dir., Office of Indian Gaming (July 16, 2013).

compacts, did not become effective until January 1, 2014¹¹⁴ or if a referendum qualified, the day after the election.¹¹⁵ Consequently, the North Fork Tribe and the Department of the Interior had notice that the compacts did not necessarily go into effect after publication in Federal Register.

As the court in *Pueblo* stated, IGRA “does not define what is necessary for a tribe and state to ‘enter[] into’ a compact,” rather state law determines the required procedure.¹¹⁶ The California Constitution provides that the governor negotiates compacts and the Legislature then ratifies them.¹¹⁷ Although the California Constitution is silent on the ratification procedures, the California Government Code provides that compacts “shall be ratified by statute” and goes on to describe that a majority is required in each house along with the governor’s signature.¹¹⁸ As described above,¹¹⁹ the North Fork Compact was negotiated by Governor Brown and approved by a majority of both the Assembly and Senate before it was signed by Governor Brown and published in the Federal Register. The North Fork Tribe will argue that this process was faithfully followed and as a result the compact was validly “entered into” as required by IGRA.

The opponents of Proposition 48 will argue that the compact was not validly “entered into” because the California Constitution allows for a referendum to reverse a statute passed by the Legislature.¹²⁰ Article II, section 9, of the California Constitution defines the referendum power as “the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state.”¹²¹ As a result, the compact will not be validly “entered into” until the voters have decided whether to affirm the statute.¹²²

The opponents will point out that other compacts have been passed as urgency measures, which precludes the referendum process.¹²³ If the Legislature had sought to similarly exempt the North Fork Compact, it could have done so by passing an urgency measure.

¹¹⁴ CAL. CONST. art. IV § 8(c) (Absent an urgency clause, “a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute . . .”).

¹¹⁵ Letter from Debra Bowen, Sec’y of State, State of Cal., to Paula Hart, Dir., Office of Indian Gaming (July 16, 2013).

¹¹⁶ *Pueblo*, 104 F.3d at 1546.

¹¹⁷ CAL. CONST. art. IV § 19(f).

¹¹⁸ CAL. GOV’T CODE § 12012.25(c).

¹¹⁹ *Supra*, Part II. A.

¹²⁰ CAL. CONST. art. IV § 1 (“The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”).

¹²¹ CAL. CONST. art. II § 9.

¹²² *Id.* at § 10(a) (stating that a statute subject to a referendum does not go into effect until the day after the election).

¹²³ Compacts with the Shingle Springs Band of Miwok Indians and Pinoleville Pomo Nation were passed as urgency statutes. CAL. GOV’T CODE § 12012.53 available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_3051-3100/ab_3072_bill_20080926_chaptered.pdf (noting that the statute is an urgency statute); CAL. GOV’T CODE § 12012.551 available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1401-1450/ab_1418_bill_20111002_chaptered.pdf (noting that the statute is an urgency statute).

Ultimately, the opponents will rely on the Tenth Circuit’s statement in *Pueblo* that the Secretary of Interior’s approval of a compact in the Federal Register “cannot, under [IGRA], vivify that which was never alive.”¹²⁴ The court will have to decide if the referendum process can “un-ratify” a compact or whether the approval by the Legislature was sufficient ratification regardless of Proposition 48.

C. An Alternative Compact Process Through IGRA

If Proposition 48 fails and voters reverse the Legislature’s ratification of the North Fork Compact, the North Fork Tribe may seek to invoke a provision in IGRA that allows the Secretary of the Interior to impose a compact without ratification by the Legislature. IGRA provides two avenues for a tribe to obtain a compact authorizing class III gaming. First, the tribe may request the state negotiate a compact in good faith and the tribe and state may voluntarily enter into a compact governing gaming activities.¹²⁵

If the first method is unsuccessful,¹²⁶ a tribe can sue the state seeking a determination that the state did not negotiate in good faith and compel the Secretary of the Interior to impose a compact.¹²⁷ If a tribe obtains a declaration from a federal court that the state failed to negotiate in good faith, the court will order the state and the tribe to conclude a compact within sixty days.¹²⁸ Should the tribe and state not conclude a compact within sixty days, the tribe and state will each provide their last, best offer for a compact to a court-appointed mediator.¹²⁹ The mediator will select a compact from the two options submitted, and the state will have sixty days to consent to the compact.¹³⁰ If the state fails to consent, the Secretary of the Interior works with the tribe to impose gaming procedures consistent with the compact selected by the mediator.¹³¹

As a preliminary matter, California waived its sovereign immunity, opening the state to a lawsuit arising from the state’s failure to conduct good faith negotiations with a tribe.¹³² Many states have not waived their sovereign immunity in suits related to compact negotiations, precluding tribes from seeking this remedy provided in IGRA.¹³³

¹²⁴ 104 F.3d at 1557.

¹²⁵ 25 U.S.C. § 2710(d)(3)(A).

¹²⁶ Which would be the case if the voters reject the North Fork Compact.

¹²⁷ 25 U.S.C. § 2710(d)(7)(A)(i). The purpose of this section in IGRA is to provide tribes an expeditious means to engage in class III gaming even if negotiations between the tribe and State break down. *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1033 (2d Cir. 1990).

¹²⁸ 25 U.S.C. § 2710(d)(7)(B)(iii).

¹²⁹ *Id.* § 2710(d)(7)(B)(iv).

¹³⁰ *Id.* § 2710(d)(7)(B)(v),(vi).

¹³¹ *Id.* § 2710(d)(7)(B)(vii).

¹³² *Hotel Employees & Rest. Employees Int’l Union v. Davis*, 21 Cal. 4th 585, 615 (1999) (striking down an initiative that authorized various forms of tribal gaming, but finding the waiver of sovereign immunity portion was separable and remained in effect).

¹³³ Gregory R. Mulkey, *Texas v. United States: The Legality of the Secretarial Procedures Following Seminole Tribe of Florida v. Florida*, 33 AM. INDIAN L. REV. 525, 525 (2009).

The state has the burden of showing that the negotiations were conducted in good faith,¹³⁴ and if the court determines the state negotiated in good faith, the tribe's proposal fails.¹³⁵ Only one tribe in California has ever obtained a declaration from a court that the state negotiated in bad faith.¹³⁶ In that case, the court found bad faith after the state took a "hardline" approach to the negotiations and attempted to include provisions in the compact outside the scope of what IGRA permitted.¹³⁷

Before reaching the question of bad faith, the first hurdle for the North Fork Tribe is showing that the referendum is properly considered part of the negotiations.¹³⁸ After all, the actual negotiation process in which Governor Brown and the North Fork Tribe bargained to identify the mutually agreeable terms of the North Fork Compact concluded in 2012.¹³⁹ This is distinguishable from the *Rincon* case in which the governor was still conducting the negotiations so the court was able to immediately reach the question of good or bad faith. With the North Fork Tribe, it is the electorate acting in the place of the Legislature to ratify the compact negotiated by the governor.

IGRA provides that the state must "negotiate . . . in good faith to enter into . . . a compact,"¹⁴⁰ while California law creates the distinction between ratification and negotiation.¹⁴¹ A court would need to find that IGRA's broader directive of negotiating to enter into a compact includes the ratification, in which case the court can then consider the question of good or bad faith negotiations in the context of a referendum.

If the court is willing to consider the referendum as part of the negotiations, the court must next determine that the negotiations over the North Fork Compact are within the scope permitted by IGRA and were conducted in good faith. IGRA provides factors for courts to

¹³⁴ 25 U.S.C. § 2710(d)(7)(B)(ii)(II).

¹³⁵ *Texas v. United States*, 497 F.3d 491, 494 (5th Cir. 2007).

¹³⁶ Staff, *Rincon Band Becomes First California Tribe To Renegotiate Tribal-State Gaming Compact With Federal Courts*, INDIAN COUNTRY TODAY (Feb. 13, 2013), <http://indiancountrytodaymedianetwork.com/2013/02/13/rincon-band-becomes-first-california-tribe-renegotiate-tribal-state-gaming-compact>; *Rincon Band of Luiseño Mission Indians of Rincon Reservation v. Schwarzenegger (Rincon)*, 602 F.3d 1019 (9th Cir. 2010).

¹³⁷ *Rincon*, 602 F.3d at 1031, 1042.

¹³⁸ Some experts do not even consider this hurdle an obstacle and assume a state referendum is part of negotiations amounting to bad faith. See Marc Benjamin, *Outcome of Proposition 48 May Have No Bearing on North Fork Casino Project*, FRESNO BEE, Oct. 24, 2014, http://www.fresnobee.com/2014/10/24/4197065_outcome-of-proposition-48-may.html?rh=1 (quoting Michigan attorney Bryan Newland, a lawyer who worked for the Department of the Interior when the North Fork Tribe's application for federal trust land was approved, stating that ultimate approval is with the Department of the Interior and the North Fork Tribe has a right to sue for bad faith because they have a right to negotiate for class III gaming).

¹³⁹ Defining the parties in this litigation will create an awkward circumstance for Governor Brown and the California government. On the one hand, Governor Brown negotiated the North Fork Compact so he presumably would be content to see it implemented. On the other hand, if the voters rejected the compact, the attorney general would still have an obligation to defend the voters' ability under the referendum process to reverse legislation enacted by the Legislature.

¹⁴⁰ 25 U.S.C. § 2710(d)(3)(A).

¹⁴¹ CAL. CONST. art. IV § 19(f).

consider when determining whether negotiations were conducted in good faith.¹⁴² Those factors include: “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.”¹⁴³

If the court is considering whether voters rejecting Proposition 48 is bad faith, the opponents of the North Fork Compact should argue that the voters’ rejection was not bad faith because the voters rejected the compact for permissible reasons under IGRA. The opponents superficially included these reasons in the November 2014 Voter Guide but would have been able to make this argument much stronger if the voter guide had expressly stated that voters should reject the North Fork Compact because of adverse impacts to other casinos and public safety concerns. The opponents note the casino will bring crime and pollution to the Central Valley,¹⁴⁴ but the arguments are largely focused on the expansion of Indian gaming off of existing reservations and other similar arguments.¹⁴⁵ While these broad policy arguments could be considered the “public interest,” the connection is much more tangential—and thus a larger leap for a court to make—than explicitly stating specific criminal consequences and other public safety impacts.

On the other side, the North Fork Tribe would need to show the exact opposite—that voters rejected the compacts for impermissible reasons. In *Rincon*, the court found bad faith because the taxes the state sought were outside the scope of the negotiations authorized by IGRA.¹⁴⁶ However, the North Fork Tribe’s argument for bad faith is much less certain because notwithstanding the voter guide, there is no way to know why voters vote in a particular way. Moreover, the referendum is not part of the traditional negotiation process so there is no provision in the compact that the tribe can point the court to as constituting bad faith. Although the State backing out of a ratified agreement would seem to be bad faith,¹⁴⁷ the possibility of a referendum undoing the ratification would not be a surprise to the North Fork Tribe considering referenda have occurred in the past.¹⁴⁸

¹⁴² 25 U.S.C. § 2710(d)(7)(iii).

¹⁴³ *Id.* § 2710(d)(7)(iii)(I).

¹⁴⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46 (this is the only mention of crime in the entire argument against Proposition 48 and is contained in the quote from Madera County Supervisor Dave Rogers).

¹⁴⁵ *Id.* at 47 (The first line of the opponents’ argument against Proposition 48 states “Keep Indian gaming on tribal reservation land only.”).

¹⁴⁶ *Rincon*, 602 F.3d at 1033. The scope of permissible negotiations is delineated in IGRA and includes: (i) application of laws related to licensing class III gaming; (ii) enforcement of laws; (iii) reimbursal of the State for costs of regulating class III gaming; (iv) taxation by the tribe; (v) remedies for breach of contract; (vi) standards for operation and maintenance of the casino; and (vii) any subjects directly related to the operation of gaming activities. 25 U.S.C. § 2710(d)(3)(C)(i)–(vii).

¹⁴⁷ Timm Herdt, *What Prop. 48 Will and Won't Decide*, CONTRA COSTA TIMES, Oct. 22, 2014, http://www.contracostatimes.com/opinion/ci_26779849/timm-herdt-what-prop-48-will-and-wont (“The federal law requires states to negotiate tribal compacts in good faith; renegeing on a signed compact would seem to be the definition of bad faith.”).

¹⁴⁸ Referenda on tribal-state gaming compacts have been on the ballot twice since 2000. Proposition 29 (2000) (eleven Pala Compacts); Propositions 94, 95, 96, 97 (2008) (compacts with the Sycuan Band of the Kumeyaay Nation, Agua Caliente Band of Cahuilla Indians, Pechanga Band of Luiseño Mission Indians, and Morongo Band of Mission Indians).

Importantly, the burden is on the state to show good faith and not on the tribe to show bad faith.¹⁴⁹ In *Rincon*, the state attempted to overcome its burden by arguing that the provisions in the compact providing revenue to the state general fund were not bad faith because they should be considered “other subjects that are directly related to the operation of gaming activities”¹⁵⁰ and thus within the scope negotiation permitted by IGRA. The court rejected this argument and emphasized the limited nature of the negotiations.¹⁵¹ Accordingly, the state will rely heavily on the court considering the public interest as a factor in overcoming its burden of proving the negotiations were not bad faith.

Ultimately, if the North Fork Tribe can overcome the question of whether the referendum is part of the negotiation process, the tribe has a compelling argument that the voters’ rejection was bad faith because it was outside the scope of IGRA. If Proposition 48 is rejected by voters and the North Fork Compact is not ratified, this litigation is likely to be a component of the proponents’ post-election legal strategy.

D. Other Causes of Action

If voters approve Proposition 48 and the Legislature’s ratification is not reversed, the opponents will still have multiple causes of action to challenge the North Fork Compact. However, these claims are all outside the scope of the validity of the referendum and speak more to the validity of the North Fork Compact itself and the procedure used for the taking the land for the proposed casino into trust.

The following cases are noted below to demonstrate that the North Fork Casino is not finalized by the outcome of Proposition 48 as it will be months or years before these cases are resolved.

Picayune Rancheria of the Chukchansi Indians v. Edmund G. Brown, Jr., Case No. C074506 in the California Third District Court of Appeal – on September 24, 2014 the appellate court issued its opinion and held that the governor is not a public agency under CEQA, so the governor was not required to complete an environmental impact report prior to his decision to transfer land to the federal government for the North Fork Casino. As of this writing, the decision is not finalized and the petitioner has not appealed.

Stand Up For California! v. Dept. of the Interior, Case No. 1:12-cv-02039 in the D.C. District Court – alleging the decision by the Department of the Interior to take land into trust for a casino for the North Fork Tribe was arbitrary and capricious and violated the National Environmental Protection Act.

Stand Up For California! v. Brown, Case No. F069302 in the California Fifth District Court of Appeal – alleging that Governor Brown violated the California Constitution’s

¹⁴⁹ 25 U.S.C. § 2710(d)(7)(B)(ii)(II).

¹⁵⁰ *Rincon*, 602 F.3d at 1033–34.

¹⁵¹ *Id.*

separation-of-powers by making a policy decision to concur with the Department of the Interior’s decision to take the land into trust for the North Fork Casino.

If the voters approve Proposition 48 and affirm the North Fork and Wiyot Compacts, these continuing legal challenges may still result in judicial invalidation of the compacts. These ongoing legal challenges demonstrate the intensity of the opposition to the compacts. Although the proponents may succeed if the voters affirm the compacts, the opponents may ultimately triumph if they can convince a court to overturn the compacts on other grounds.

V. PUBLIC POLICY ISSUES

A. Supporters of the Compacts

The proponents of this referendum, who support the compacts and urge a yes vote, argue that the compacts negotiated by Governor Brown and approved by the Legislature are advantageous to both the tribes and California.¹⁵² First, the construction and operation of a casino will create thousands of direct and indirect jobs.¹⁵³ Second, the proponents contend that the casino will generate new state and local revenue.¹⁵⁴ Third, the proponents argue that approval of the compacts, in their current form, respects the concept of local control.¹⁵⁵ Finally, the approval of the compacts will result in the protection of a scenic wildlife area.¹⁵⁶

The supporters of the compacts, who urge a yes vote on the referendum, assert that the construction and operation of the casino will result in thousands of new jobs including— temporary construction jobs, long term operations jobs, and indirect jobs in the local community.¹⁵⁷ The proponents note that “[t]he project will create over 4000 jobs as the result of hundreds of millions of dollars in private investment, boosting state and local economies.”¹⁵⁸

Robby Hunter, President of the California State Building and Construction Trades Council is quoted by the proponents in support of the project: “Voting YES guarantees good jobs for Californians and new economic opportunities for one of our state's poorest regions.”¹⁵⁹ In addition, the Central California Hispanic Chamber of Commerce “support[s] the North Fork gaming compact to help bring jobs and business to Madera, Fresno, and the entire San Joaquin

¹⁵² Proponents include Governor Edmund G. Brown, Jr., Republican state and local legislative representatives, cities of Madera and Chowchilla, numerous local chambers of commerce, the Madera Co. Sheriff, labor groups, environmental groups, ethnic groups and chambers of commerce, state and local Democratic organizations and clubs and over 70 California tribal groups. *Who Supports It, YES ON PROP 48*, <http://www.voteyes48.com/who-supports-it/> (last visited Sept. 6, 2014).

¹⁵³ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Valley.”¹⁶⁰ These statements demonstrate the broad support from diverse business and labor groups for the referendum and approval of the project.¹⁶¹

Second, the supporters of the compacts assert that the construction and operation of a casino in Madera County will generate new revenue for both the state and local governments.¹⁶² The supporters contend that “[v]oting YES provides crucial funding for public safety, schools, parks, roads and other public services.”¹⁶³ Madera County Sheriff John Anderson states, that if passed, “[t]his project will fund local sheriff, police, fire, and other first responders.”¹⁶⁴

The Legislative Analyst’s Office states, that if approved, Madera County will receive a onetime payment of \$6.9 million to \$17.9 million and annual payments over the life of the compact of \$3.8 million.¹⁶⁵ The City of Madera, if the referendum is successful, will receive a onetime payment between \$6.3 to \$10.3 million and annual payments of \$1.1 million once the casino is open for the term of the compact.¹⁶⁶ The Madera Irrigation District will receive annual payments of \$47,500 with a provision increasing that amount if water usage is higher than anticipated.¹⁶⁷ In addition, the North Fork Tribe is required to make annual payments of \$3.5 million to other local governments for the life of the compact.¹⁶⁸

Third, the supporters argue that this project respects local control of economic development and urban planning.¹⁶⁹ Tom Wheeler, Chairman of the Madera County Board of Supervisors, stated in support of Proposition 48: “Our region will benefit economically from this project. We can’t allow New York hedge-fund operators with financial ties to a competing casino to determine our economic future. Vote YES to protect local control.”¹⁷⁰ The supporters make this claim based on the Chukchansi Tribe’s partnership with Brigade Capital—an out-of-state hedge fund operator and investment advisor with offices in New York City and Zurich, Switzerland.¹⁷¹

However, while local control is an argument used by proponents because the North Fork Tribe and local governments negotiated agreements related to the casino, Stations Casinos LLC

¹⁶⁰ *Id.*

¹⁶¹ *Who Supports It*, YES ON PROP 48, <http://www.voteyes48.com/who-supports-it/> (last visited September 6, 2014).

¹⁶² NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 44.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 46.

¹⁷⁰ *Id.*

¹⁷¹ Ian Lovett, *Tribes Clash as Casinos Move Away From Home*, N.Y. TIMES, March 3, 2014 http://www.nytimes.com/2014/03/04/us/tribes-clash-as-casinos-move-away-from-home.html?_r=0 (“The Chukchansi and their Wall Street backers — Brigade Capital Management, an investment firm [and others] have spent more than \$2 million to place a question on the statewide ballot in November about whether the North Fork tribe should be allowed to build its casino.”).

of Las Vegas has been a major contributor to the Yes on Proposition 48 campaign.¹⁷² The casino corporation has an agreement to manage the North Fork Casino and stands to profit significantly if the casino is approved. The contributors to the Yes on Proposition 48 campaign also include the statewide Democratic Central Committee.¹⁷³

Fourth, the supporters of the compacts assert that voting yes of Proposition 48 will result in the protection of scenic wildlife areas. The supporters state “[a] YES vote avoids potential casino construction in the Sierra foothills near Yosemite and near the Humboldt Bay National Wildlife Refuge.”¹⁷⁴ Dan Cunning, representing the Yosemite Sierra Visitors Bureau, argues, “[a] yes vote on Proposition 48 protects two of California’s most environmentally precious areas.”¹⁷⁵ The State expressed concern about the negative environmental impact upon the Humboldt Bay National Wildlife Refuge if the Wiyot Tribe were to build on land the tribe owns near the refuge.¹⁷⁶ These concerns were significant enough that the State included a provision in the Wiyot Compact prohibiting the Wiyot Tribe from building a casino near the refuge in exchange for 2.5 to 3.5 percent of the annual slot machine net revenue from the North Fork Tribe’s casino.¹⁷⁷

The supporters of the compacts contend that voters who wish to create thousands of jobs in the Central Valley, generate state and local revenue for governments in Madera County, protect local control of development, or protect scenic wildlife areas should vote yes on Proposition 48 and allow the Legislature’s approval of the compacts to stand.

B. Opponents of the Compacts

The opponents of Proposition 48 urge the voters to overturn the ratification of the compacts for three fundamental reasons.¹⁷⁸ First, the compacts set a precedent that could result in a massive increase in off-reservation gambling while breaking the tribes’ promise in 2000 to limit Indian gaming to existing tribal land.¹⁷⁹ Second, the North Fork Compact will result in more pollution and negative social impacts in the Central Valley.¹⁸⁰ Finally, the North Fork

¹⁷² For a more detailed overview of contributors for and against the Proposition 48 see *supra* note 18.

¹⁷³ *Campaign Finance: YES On Prop. 48. – All Contributions Received*, CAL. SECRETARY ST., <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received> (last visited Sept. 13, 2014).

¹⁷⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46.

¹⁷⁵ *Id.*

¹⁷⁶ WIYOT COMPACT, *supra* note 16, at Preamble.

¹⁷⁷ *Id.* § 4.1.

¹⁷⁸ There is no complete list of groups and individuals who have formally opposed Proposition 48 on the opponents’ website; however, included in the Arguments Against Proposition 48 in the November 2014 voter Guide are the following individuals and organizations: Senator Diane Feinstein, Fresno County Supervisor Henry Perea, Manuel Cunha, Jr., President of Nisei Farmers League, Gary Archuleta, Tribal Chairman Mooretown Rancheria, Madera County Supervisor, David Rogers, and Stand Up For California. NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46–47.

¹⁷⁹ *Id.* at 47.

¹⁸⁰ *Id.*

Compact will not result in new money being given by the tribe to the state general fund or schools.¹⁸¹

The opponents of the compacts assert that the approval of this compact will set a precedent of tribes “reservation shopping,” where rural tribes in remote areas will seek to have urban land, far from their historic reservations, taken into trust to build and operate new casinos.¹⁸² The opponents state that Proposition 48, if passed, would “allow the North Fork Tribe to build an off-reservation, Vegas-style 2,000 slot machine casino more than an hour’s drive from the tribe’s established reservation land, closer to major freeways and Central Valley communities.”¹⁸³ In addition, several major newspapers have editorialized that these compacts will result in a massive shift in California’s Indian gaming policy that will likely result in the growth of Indian gaming outside of traditional, recognized, Indian land.¹⁸⁴

Additionally, the opponents of the compacts argue that when voters originally approved Indian gaming in 2000, it was with the understanding that such gaming was limited to existing Indian land and the approval of off-reservation casinos such as the North Fork Tribe’s breaks that understanding.¹⁸⁵ “Years ago, California Indian Tribes asked voters to approve limited casino gaming on Indian reservation land. They promised Indian casinos would ONLY be located on the tribes’ original reservation land.”¹⁸⁶ In addition, “[w]hile most tribes played by the rules, building on their original reservation land and respecting the voters’ wishes, other tribes are looking to break these rules and build casino projects in urban areas across California.”¹⁸⁷ Therefore, voters who want to continue the original, voter-approved policy of allowing tribes to build and operate casinos on their traditional, rural reservations and take a position against expansion into urban, more densely populated areas, should vote no on Proposition 48.¹⁸⁸

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ The newspapers quoted in the oppositions’ argument against Proposition 48 include the Fresno Bee, Bakersfield Californian, Los Angeles Times, and San Diego Union Tribune. *Id.* The San Francisco Chronicle, Sacramento Bee, Modesto Bee, Orange County Register, and San Jose Mercury News also recently editorialized specifically against Proposition 48. Editorial, *Time to Draw the Line on ‘Reservation Shopping’*, S.F. CHRONICLE, Sept. 7, 2014 <http://www.sfgate.com/opinion/article/Time-to-draw-the-line-on-reservation-shopping-5736926.php>; Editorial, *Vote No on Proposition 48, Enough Gambling Expansion*, SACRAMENTO BEE, Sept. 7, 2014 <http://www.sacbee.com/2014/09/07/6683079/endorsements-vote-no-on-proposition.html>; Editorial, *Prop. 48 Would Build Casino in Madera; We Don’t Need It*, MODESTO BEE, Sept. 7, 2014 http://www.modbee.com/2014/09/07/3522787_prop-48-would-build-casino-in.html?rh=1; Editorial, *Expanding Tribal Casinos a Bad Bet for California*, ORANGE COUNTY REGISTER, Sept. 18, 2014 <http://www.ocregister.com/articles/indian-635600-gaming-casino.html>; Editorial, *Keep a Lid on Indian Casinos*, SAN JOSE MERCURY NEWS, Oct. 8, 2014, http://www.mercurynews.com/opinion/ci_26688978/mercury-news-editorial-keep-lid-indian-casinos.

¹⁸⁵ *Home*, STOP RESERVATION SHOPPING, <http://stopreservationshopping.com/> (last visited September 6, 2014).

¹⁸⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 47.

¹⁸⁷ *Id.* at 46.

¹⁸⁸ *Id.* at 47.

The opponents of the compacts also argue that approving the compact and allowing the North Fork Tribe to develop a casino and resort near Madera will result in negative social and environment impacts in Madera County.¹⁸⁹ Opponents also argue that Proposition 48 is “opposed by Central Valley businesses, farmers, and community leaders because it means MORE air pollution, MORE traffic, and the loss of open space.”¹⁹⁰ In addition, the operation of a casino and resort in this location will create a “greater burden on an already limited water supply.”¹⁹¹ The opponents argue that voters who value the current environmental quality of Madera County, the larger Central Valley, and ultimately California, should vote no on Proposition 48.

Finally, the opponents of Proposition 48 contend that the Wiyot and North Fork Compacts fail to increase revenue for the general fund and schools.¹⁹² The opponents note that “[u]nlike prior Indian gaming compacts this deal provides NO money for California’s schools and NO additional money for our state general fund.”¹⁹³ Therefore, voters who believe that former compacts requiring tribes to pay a percentage of their gaming revenue to the general fund and schools was an advantageous policy should vote no on Proposition 48.

While “reservation shopping” and social impacts are concerns expressly listed by opponents of Proposition 48 in the voter guide, the identity of the major financial backers of the No on Proposition 48 campaign suggests other motives. The financial backers of the No on Proposition 48 include the Picayune Rancheria of Chukchansi Indians (Chukchansi Tribe) and the Table Mountain Rancheria, which both operate casinos whose revenue would be significantly impacted by a new casino in the region.¹⁹⁴ The financial backers also include hedge fund manager Brigade Capital, which is the financial backer of the Chukchansi Tribe’s casino.¹⁹⁵ This list of supporters suggests that the actual financial backers of the campaign are more concerned with protecting their own investments than the concerns expressed in the voter guide.

The opponents of the compacts contend that voters who are concerned about the potential spread of Indian gaming beyond traditional reservations into populated urban areas, the environmental quality in Madera County and the Central Valley, or the lack of revenue to the state should vote no on the referendum and reject the North Fork and Wiyot Compacts.

C. Fiscal Impact of Proposition 48

The economic benefits to the State of California of a casino and resort in Madera County are uncertain.¹⁹⁶ According to the Legislative Analyst’s Office, the economic impact will depend on several factors including the size and type of casino constructed, the extent to which the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Sudhin Thanawala, *California Tribe's Casino Plan to Go Before Voters*, ASSOCIATED PRESS, October 4, 2014, <http://www.sfgate.com/news/article/California-tribe-s-casino-plan-to-go-before-voters-5801482.php>

¹⁹⁵ *Id.*

¹⁹⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 44 (stating that fiscal effects are “uncertain” and “depend on several factors”).

casino impacts the revenue of other tribal and nontribal revenue generating activities, and the manner in which payments to state and local governments are implemented.¹⁹⁷

Although the North Folk Tribe is required to make payments to the State, these payments are compensation for the State's expenditures related to regulatory monitoring and transportation improvements.¹⁹⁸ While opponents compare the North Fork Compact to previous compacts providing for payments to the state general fund,¹⁹⁹ the absence of payments to the state general fund is consistent with IGRA, which only authorizes payments to the state for direct reimbursement of expenses incurred by the state.²⁰⁰

The lack of payment to the state general fund is also consistent with the federal policy that Indian casinos are for the economic development of the tribes, their self-sufficiency, and strengthening of tribal governments rather than as a revenue stream for a state.²⁰¹ According to the Legislative Analyst's, any changes in revenue for the state will come at the expense of other gambling enterprises and from a shift in other forms of discretionary spending.²⁰²

The direct economic impact upon local governments is clear—there will be large onetime payments in the first year the casino is in operation followed by much smaller annual payments for the life of the North Fork Compact.²⁰³ Madera County as well as the City of Madera will receive onetime payments between \$16 million and \$35 million in compensation for services to the casino once the casino is in operation.²⁰⁴ In addition, the compact will result in Madera County, the City of Madera, and the Madera Irrigation District receiving about \$3.5 million a year for the duration of the compact.²⁰⁵ Also, both the state and the local governments will experience a decrease in direct tax revenue as tribal land is not subject to state and local taxes.²⁰⁶ However, the Legislative Analyst's Office classifies this loss of revenue as “not significant.”²⁰⁷

There will also be an increase in economic activity in the region, and commensurate increase in local and state tax revenue, as more people come into Madera County and spend money on goods and services.²⁰⁸ Indian casinos generally stimulate local economies and a

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See supra*, Part V.B.

²⁰⁰ 25 U.S.C. § 2710(d)(3)(C)(i)–(vii) (specifying what provisions may be included in tribal-state gaming compacts).

²⁰¹ *Id.* § 2702 (stating the purposes of IGRA); *see also Rincon*, 602 F.3d at 1042) (holding the State negotiated in bad faith when it tried to use the tribe's casino as a revenue stream for the State by attempting to require the tribe pay a percentage of net win directly to the State general fund).

²⁰² NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 45.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Madera casino will likely do so as well.²⁰⁹ However, this increased activity will most likely be redirected from other surrounding counties rather than be truly new revenue.²¹⁰

The economic benefit of this compact for the North Fork Tribe is unknown, but is likely significant. However, any revenue generated by the North Fork Tribe comes at the direct expense of the Chukchansi Tribe and their Chukchansi Gold Resort & Casino in the mountains above Highway 99.²¹¹ The Chukchansi Tribe estimates a 40 percent loss in revenue from the North Fork Tribe's casino in Madera County, which will purportedly result in the closing of the Chukchansi Gold Resort & Casino.²¹² Chairman Reggie Lewis of the Chukchansi Tribe describes the impact as a “devastating economic blow to my people from which I do not know how we will recover.”²¹³

VI. CONCLUSION

To its opponents, Proposition 48 represents much more than one casino, for one tribe, in the Central Valley—it represents whether California voters are willing to allow an expansion of Indian gaming off of existing reservations and closer to urban areas. To the North Fork Tribe and those most closely tied to the success of the tribe's casino near Madera, Proposition 48 represents an opportunity to join other tribes in the state as wealthy and influential political entities.

Regardless of the outcome in November, litigation is sure to follow. If voters reject Proposition 48, the North Fork Tribe is sure to contend that the compacts should never have been subject to the referendum process, and if Proposition 48 passes, opponents are sure to claim that Governor Brown never had the authority to approve the land transfer for the North Fork Tribe.

For voters on the outside looking in though, it is important to put the measure into its proper context. The Fresno Bee succinctly frames the issue: “There are no angels in this fight. A Las Vegas casino corporation wants to expand, while a New York hedge fund wants to protect its investment. Some tribes would benefit, and others might lose.”²¹⁴ It is up to the voters to determine who those winners and losers will be.

²⁰⁹ See Amy Quinton, *Study Shows California Tribal Gaming Casinos Have Big Economic Impact*, KPBS (Aug. 8, 2012), <http://www.kpbs.org/news/2012/aug/08/study-shows-california-tribal-gaming-casinos-have/> (describing the overall economic impact of tribal casinos on communities).

²¹⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 45.

²¹¹ Letter from Reggie Lewis, Chairman, Picayune Rancheria of the Chukchansi Indians, to Cal. Legislators (May 2, 2013).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Editorial, *Vote ‘No’ on Prop. 48 — Stop Highway 99 Casino*, FRESNO BEE, Sept. 6, 2014, <http://www.fresnobee.com/2014/09/06/4108812/our-viewvote-no-on-prop-48-stop.html#storylink=cpy>.