

Indian Gaming

California: 2005 - The Convergence of Public Backlash, Tribal Competition and Political Scandals.

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Advisory Votes – the Will of the People:

From California to Capitol Hill and back again, public backlash, tribal competition and political scandal is converging on gaming interests, elected officials and tribes themselves. While a majority of the California public (64% in 2000) initially supported tribal gaming as an anti-poverty strategy, voters now appear increasingly restless about the direction of the tribal gaming industry.

“When IGRA was enacted in 1988, Indian gaming was a \$200 million dollar industry,” said U.S. Senator John McCain, the chairman of the Senate Indian Affairs Committee. “Today, the Industry earns \$19 billion a year and is spread throughout the nation”.¹

The rapid growth of tribal gaming reflects the need to re-evaluate what constitutes appropriate regulation of this rapidly changing industry. This sentiment is echoed by California citizens writing letters to news editors, particularly in communities where tribes and/or their investors acquire land after 1988 for new or expanded casino development. A typical letter from the public just now learning of the ability of tribes to continue to purchase and process land into trust states:

“Californians were fooled into generously voting to allow casinos on Indian lands...”²

However, letters from affected citizens have become emotional and express bitterness over what is a growing perception of special privileges and unequal treatment to correct historical wrongs. Clearly, the backlash over off-reservation gaming is sparking a greater deeper debate over the complex issues of inherent sovereignty, tribal governance, land acquisitions, and the federal recognition process. The backlash has occurred in part as a result of the greed of gaming investors, the actions of influence peddlers but also due to the actions of a few intransigent tribal governments.

Because of the potential for backlash in the local community, the need for citizen input has been recognized as important for Indian gaming, even though there is no process in IGRA that contemplates it. Consequently, in some states, like California, a mechanism for a non-binding advisory vote by the local community on proposed tribal gaming activities was developed as part of the compacting process. In 1998 California Governor Pete Wilson included a non-binding advisory vote in the “Pala” Compact. The advisory vote feature was not included in the 1999 compacts signed by Governor Gray Davis, but was restored by Governor Arnold Schwarzenegger, as stated in his May 18th Proclamation and as negotiated in his new and amended compacts with Indian tribes.

Advisory votes have the potential to assist Counties and Cities in the development of local intergovernmental agreements with tribes that are seeking off-reservation casinos or the expansion of existing casinos on established and historic Indian reservations. A no

vote by the local community, while not binding, may trigger the need to re-negotiate a tribal-county agreement, force a search for means to mitigate local adverse impact, defuse local opposition or to build public support for a project.

The advisory vote also has the potential of being a significant leverage tool for governors negotiating with or about to negotiate with tribes with whom he or she is obligated to negotiate in good faith, or, in some case, in offering alternate sites to tribes involved in long-standing conflicts with the State over the location of a proposed casino. However, a non-binding advisory vote should not be placed into state statute restricting a governor's executive authority to negotiate compacts with tribes and promote solutions. The advisory vote is something that each County or City already has the authority to provide the public.

Importantly, the non-binding advisory vote is in the sun-light of public scrutiny. The vote provides for an open debate over the legitimate issues of a proposed casino development. A vote provides a respectful forum for discussion and debate. Citizens want control over the management and growth of gaming in their hometowns restored. State statute requires local governments to submit for the approval of the majority of elector voters their desire to have a new gaming establishment or even the approval of the expansion of an existing state gaming facility. (California - Business and Professions Code Section 19961(a)) Citizens want this long-standing state policy for voter approval of state gaming operations to be applicable to tribal gaming proposals.

In the November 2005 special election, two of California's 58 counties (Yuba and Amador Counties) placed non-binding advisory measures on the ballot asking the voters to decide if they wanted a casino (and the perceived benefits and burdens of a casino) in their community. While the language of these measures differs, the specific intent was to give the public a voice on whether or not gambling was an accepted industry in their communities.

Yuba County Ballot:

“Should a destination resort/hotel and American Indian gaming casino be located within the sports/entertainment zone on Forty Mile Road in the County of Yuba?”

Yuba County Entertainment LLC, a local development partnership backed by Gerald Forsythe, from Chicago, contributed \$405,332 for passage of the measure. Two gaming tribes from outside of the County established their own campaign in opposition and funded it with \$300,000. The citizens of the community, made up of community groups, church groups and business associations spent less than \$15,000 to oppose it.

The leading opponents of the measure included the County Sheriff, the County Tax Assessor, a School Superintendent, Marysville and Wheatland City Council members, Yuba County Supervisor Dan Logue and two former County Supervisors. Roughly 14,022 ballots were cast, a total estimated campaign expenditure of \$47.00 for each vote cast. A staggering figure considering the measure was not legally binding. The “NO”

vote won 52.8% to 47.2%.³

Amador County Vote:

“Do you approve the establishment of any more casinos in Amador County?”

Amador County citizens gave a resounding 84.5 % NO vote to the casino measure. This vote was in response to two proposed projects in one of California’s smallest counties.

- The first proposal is by the 535 member Ione Band of Miwok Indians and their Mississippi casino developer is proposing a \$250 million hotel/casino complex off-reservation in the City of Plymouth.
- The second proposal, near the City of Ione, involves Wilmot of New York and Nevada Gold of Texas financing the one-woman tribe of the Buena Vista for a casino on land owned in fee in the name of individual Indians. This compact is currently being litigated on a potential violation of the Administrative Procedures Act challenging the land status of the tribe for gaming. *Amador County California vs. Norton et. al.* United States District Court for the District of Columbia, Civil Action No. 1:05CV00658 (RWR)

The opposition campaign was modestly funded and implemented with home made signs and letters to the news editor. A high profile campaign was hardly needed against the two casino proposals as the developers had already antagonized communities in the County with their heavy-handed tactics and alleged clandestine solicitations of Plymouth City officials. The first proposal was further compromised by the appearance of corruption and subsequent F.B.I investigation, noted below, of Bureau of Indian Affairs officials in organizing (and joining) the tribe. These events fell on the heels of the recall of three Plymouth City Council members and a call for the firing of a City Administrator who had supported the proposed project.

The Ione proposal caught the eye of the public in 2004 due to investigations by the FBI and the Department of the Interior Inspector General. At issue was/is the conflict of interest of federal officials whose responsibility it is to oversee the welfare of California tribes. In particular, certain employees of the Bureau of Indian Affairs will benefit when their family members receive profits from the proposed casino development.

The Buena Vista proposal was not without internal controversy. This proposed casino, by Wilmot from New York, pitted two Indian women in contentious litigation that resulted in a \$25 million dollar settlement for one, and the Rancheria land for the other.

The clear statement of public opinion of these two advisory votes has encouraged the Counties of Contra Costa and Glenn also to consider submitting advisory votes on gambling to their electorates.

Contra Costa County:

Contra Costa County with 4 proposed casino projects appears to be “ground zero” for

off-reservation urban gaming proposals. In a press event held in front of the County Court House and County Health Center, County Supervisor John Gioia called for an advisory vote to settle once and for all whether or not San Pablo and other West County residents want urban casinos. "You're going to see more business here at the courthouse and the (county) health center behind us as a result of the expansion of urban gaming," said Gioia.⁴

Glenn County:

The Board of Supervisors previously opposed an off-reservation casino in a 3-2 vote. The County Administrator has notified the Board that they may want to put it to an advisory vote schedule for June of 2006 since letters from the business community appear supportive. The Governor has indicated that his administration would require local government and public support as two of several necessary factors before the Governor would concur to the transfer of land into trust for an off-reservation casino. "The easiest way to document local public support would be the result of a non-binding advisory ballot initiative," states County Administrator David J. Shoemaker in a memo to the Glenn County BOS.⁵

While County Supervisors and City Officials continue to call for and place advisory votes before the public it must be remembered that an advisory vote is non-binding and the practical effect of those votes is yet to be determined.

Tribal Competition:

Tribal governments statewide and nationally are split on the issue of off-reservation gaming. To the novice eye this first appears only a gaming market competition issue. It is competition for gaming dollars, but it is also, much more. It is a rivalry layered with a struggle for political power and leadership of Indian Country statewide and nationally. It is a contest with serious consequences affecting the tribal gaming industry and the good working order and future of tribal governance.

Tribal gaming in California is at a significant crossroads. Two paths appear before gaming tribes: One path is marked by tribes attempting to use their sovereignty and newly acquired wealth and power to run roughshod over all those who they perceive as antagonists. And, there is a second path, a difficult path no doubt, but one which attempts, through dialogue and respect, to carve out an entirely new relation amongst all the inhabitants of California. Tribes that choose this path recognize that the well being of their own future as well as that of all Californians depends upon working with rather than against, nearby communities and the local government that represent them.

The California Tribal Business Alliance (CTBA) an organization of tribal governments in California was formed to act in partnership with federal, state and local governments and with business communities and civic organizations across California. CTBA member tribes actively seek productive alliances that are based on mutual respect and cooperation to protect and advance their status as sovereign nations. California's responsible tribes have voluntarily chosen to support long-standing state gaming policy and federal policy that disfavors off-reservation gaming. As CTBA states:

“If tribes are willing to voluntarily leave behind their traditional homelands, it will become more difficult to defend tribes against being forced from their lands against their will. Furthermore, when these tribes move, they end up in another tribe’s homeland compromising that tribe’s sovereign authority and cultural identity. In addition to damaging the sovereignty of all tribal governments, the practice of investors encouraging tribes to look outside their historical lands for placement of casinos is one of the biggest potential threats to the public’s long term good will towards tribal gaming.”⁶

In contrast to CTBA tribes, some of California’s tribes are traveling the other path and continue -- to the detriment of surrounding communities, state policy and in certain cases their brother tribes -- to fund political actions that serve only themselves. These actions have been motivated by (1) resistance to potential competition within the tribe’s gaming market area (2) prevention of the development of State policy establishing management of the growth of tribal gaming and regulation and siting of casinos; or (3) proposed off-reservation gaming due to tribal business partnerships.

This tribal behavior resulted in certain tribes opposing proposed casinos/compacts by other tribes. For example, in 2005 the Quechan and Yurok tribal governments had their tribal state class III gaming compacts before the State Legislature for ratification. The San Manuel Band of Mission Indians, the Morongo Band of Mission Indians, Pechanga Indian Reservation and Agua Caliente Mission Indians individually (fewer than 2000 enrolled members)⁷ and Tribal Alliance of Sovereign Indian Nations (TASIN), consisting of tribes with successful casino operations, opposed ratification of these compacts for our States poorest, largest and neediest Indian tribal governments. The Quechan and Yurok tribes have populations comprising over 8000 members to whom governmental services must be provided. The proposed casinos of these two tribes is located in desolate areas of the state and, fairly stated, would not impact the market areas of the tribes opposing their compacts.

In opposition, the tribes claimed the compacts would set a precedent unfavorable to their desired regulatory scheme. As publicly stated by TASIN:

“Many of the terms of the two proposed compacts will not impact the two tribes, but are being used by the Governor’s negotiators to impact TASIN tribes with 1999 gaming compacts, who may seek renegotiation.”⁸

Most critics agree that the shortcomings of California’s original tribal state compacts, executed in 1999,⁹ are what created the public and local government backlash to tribal gaming expansion throughout California. The obvious deficiencies of the 1999 tribal state compacts extend to both financial and social justice/environmental issues. The social, economic and political costs to citizens’ local governments and state agencies resulting from these deficiencies is the primary motivation for Governor Schwarzenegger to re-negotiate all of these compacts.

The tribes in opposition to the new and revised compacts must recognize that as their governments continue to become more involved with the greater non-tribal community, other governmental jurisdictions will be impacted and forced to do whatever they can to protect, their constituents, businesses, and shared natural resources. Tribal gaming operations, hotels, convention centers and other tribal businesses must become subject to the same regulatory and public safety considerations and requirements as other business operations. To ignore this inevitable process is a waste of tribal resources and socially detrimental to long-term tribal and non-tribal relationships within communities.

Political Scandals:

Voters are increasingly skeptical of tribes' outsized political contributions and influence with politicians. Clearly, tribal gaming money has the potential to corrupt and interfere with the political processes of local, state and federal governments. Tribal governments have become the largest political contributors in California spending more than \$175 million dollars since 1998 –2004 ¹⁰ and millions more that cannot be easily traced by individual tribal members.

The 2003 recall of Governor Gray Davis was a prime example of tribal governments exercising checkbook politics in jaw-dropping amounts. Seven tribal governments with a combined total of fewer than 2000 members contributed over \$11 million dollars in just a few days to Lt. Governor Bustamante's campaign for his run for Governor. This blatant attempt to use money to influence California's election process changed the public's view of tribes and tribal governments. Many have come to perceive gaming tribes as just another special interest industry manipulating governmental policy for personal gains.

Governor Schwarzenegger has made it a personal policy not to accept campaign contributions from tribes or investors involved or potentially involved in tribal state gaming compact negotiations. Yuba County gaming developer Gerald Forsythe, partnering with the Enterprise tribe for a casino development, made contributions in the last week of the November 2005 special election initiative campaign to the Governor. The funds were returned the very next day. As reported:

“A partner in a Yuba County tribal casino project gave Gov. Arnold Schwarzenegger \$200,000 this week; just three months after the governor's campaign committee returned a \$50,000 contribution from the same source.”¹¹

However, Phil Angelides, a potential opponent to Governor Schwarzenegger in 2006 for the governorship of California appears not to have a problem with accepting and soliciting tribal gaming dollars despite the fact that, as Governor, he would be the regulator and enforcer of tribal state compacts, calling of 'meet and confers' and State actions to remedy compact violations. The recent figures are astounding:

Band	Contribution	Date
Table Mountain Rancheria (Friant, CA)	\$10,000	12-05-2005
Mooretown Rancheria (Oroville, CAA	\$10,000	10-31-2005
Agua Caliente Band (Palm Springs,	\$ 7,300	06-21-2005

CA.)		
Agua Caliente Band (Palm Springs, CA.)	\$ 5,000	12-22-2004
Agua Caliente Band (Palm Springs, CA.)	\$25,000 to Standing Up For California	6-22-2005
Total	\$57,300.00	

Mr. Angelides is not alone. California State Senator Jim Battin has accepted more tribal gaming money than any other State Legislator and has carried and supported various pieces of special interest legislation for tribes. He currently faces allegations of 60 violations of California's Political Reform Act by the Fair Political Practices Commission (FPPC).¹² The next step for the FPPC will be preparation of a formal accusation and then an administrative hearing which, if proven, could ultimately lead to fines and a civil law suit. Since 2000, Senator Battin has received the following contributions.¹³

Band	Total
Agua Caliente	189,000.00
Barona	65,400.00
Morongo	30,000.00
Pechanga	6,200.00
San Manuel	157,500.00
Soboba	9,200.00
Sycuan	42,200.00
Twenty-Nine Palms	121,200.00
Viejas	22,500.00
Total	\$643,200.00

Senator Battin in early 2005 solicited Indian gambling interests for a position as public relations advisor through his private consulting business. While the Senator contends he had vetted this proposal with his private attorney, potentially serious ethics issues remain. California Legislators earn a base salary of \$110,880 a year, plus thousand more in tax-free per-diem payments. Legislators are barred from voting on matters in which they have a personal financial interest.¹⁴ When Battin's business scheme became public the Senator dropped his solicitation of tribes.

California Constitutional Officers and State Legislators should view with cautiousness the unfolding scandal surrounding lobbying, campaign contributions, access and influence related to tribal gaming dollars in Washington, D.C. It is a scandal reaching into all levels of government and numerous states. This scandal will not leave California unscathed. Influence peddling and corruption of Congressional Representatives and Executive Branch officials has set off an investigation of lobbyist Jack Abramoff, his associates and his clients which include the Agua Caliente Band of Cahuilla Indians. On January 3, 2006, Jack Abramoff signed a guilty plea agreement on Federal charges of conspiracy, mail fraud and tax evasion.

The guilty plea included a reference to a California tribe and Congressional action to assist in passing legislation regarding taxation of certain payments received by members of the tribe, and with an issue relating to a post office of interest to the California Tribe.

The Agua Caliente Band of Mission Indians hired Abramoff at the rate of \$150,000 per month (\$5000.00 per day) in June of 2002 and paid him at least \$10 million dollars over the course of their professional relationship.¹⁵

Congressman Weller from Illinois, who has membership in the Congressional Gaming Caucus, a bipartisan group of legislators who support gambling interest in Congress, is now found to have failed to report campaign contributions from a California tribe, the Morongo Band of Mission Indians.¹⁶ Of the top 20 contributors to federal races within the casino gambling industry, 13 were tribal governments that operate casinos. The Morongo Band of Mission Indian was the second-largest federal race contributor with \$474,445. www.opensecrets.org.

Influence of Gaming Money Continues

State Legislators – “It’s about the Money!”

California State Legislators were clearly befuddled in early 2005 when the proposed Lytton compact was reviewed in an informational hearing. The hearing was conducted by the Senate Governmental Organizations Committee (Senate G. O. Committee) to discuss all aspects of the proposed Lytton tribal state compact. Testimony was given in support of the casino, opposition to the casino and support of the comprehensive and necessary components of the tribal state compact.

The Senate G. O. Committee was clearly at a loss as to the correct course of action, due to (1) recognition that this would be the first metropolitan tribal casino and (2) the states wealthiest gaming tribes opposed new compacts for any tribe that include the new social justice and fair share payment components. The Senate G. O. Committee stalled on introducing ratification legislation uncertain of the consequences of their actions.

A move by the Senate G. O. Committee members to enhance their participation in tribal state compact negotiations occurred in Madera County when Senator Dean Florez, from Shafter, announced opposition to a \$250 million off-reservation casino on Highway 99, north of Madera. “He said he believes the proposal by North Fork Mono Tribe is an example of the latest and most controversial trend in Indian gaming—tribes buying land outside their reservations solely to build casinos in high traffic areas.”¹⁷ However, the Senator’s motivation is questioned by the Madera County BOS who view his position as ostensibly opposing off-reservation gaming but in reality carrying water for two nearby opposing casino tribes.

The legislature’s track record is mixed and unpredictable on tribal issues generally, but crystal clear on the influence of tribal gaming contributions. From January 1, 2000 through July 31, 2005, Tribes gave a total of \$15 million to state officials, \$81 million on propositions, 6 million to party PACs, and another \$31 million was spent on local races, statewide initiatives, or was otherwise not coded. (*See Exhibit 1*)

The contributions speak for themselves: The Agua Caliente Band made 5 of the largest 25 contributions to State Legislators; San Manuel made 6; Barona made 4. The top ten

State Legislators in terms of tribal contributions as a percentage of total campaign funds raised are: Bob Huff (R); Jim Battin (R); Ray Haynes (R); Ed Chavez (D); Dennis Hollingsworth (R); Jenny Oropeza (D); Denise Moreno Ducheny (D); Russ Bogh (R); Joe Coto (D); and George A. Plescia (R).

There are a total of twenty-six members on the G. O. Committees in both the Senate and Assembly. On average, G.O. committee members have raised a total of \$95,000 each from the gaming industry. An average of 74% of that total has been from tribes that have refused to sign the Schwarzenegger compact. These tribes have given Senate and Assembly G.O. committee members an average of 2.4 times more than other members. These tribes have given 6.5 times more money to G.O. Committee members than tribes that have signed the Schwarzenegger compact.

January 1, 2000 and July 31, 2005

G.O. Comm.	Count Of Members	Avg Of Total	Avg of Card Club	Avg of New Compact Tribes	Avg of Tribes Opposing New Compacts	Avg of Operators	Avg of Other Tribes	Avg of Racetrack
Yes	26	\$94,968.86	\$18,997.22	\$10,800.00	\$69,835.77	\$3,291.67	\$6,486.36	\$8,922.63
No	93	\$38,201.72	\$10,994.88	\$6,984.60	\$28,720.49	\$1,900.00	\$6,504.13	\$4,479.85

While State Senator Florez is opposed to the North Fork proposal on highway 99 outside of his district, simultaneously he and a number of other State Legislators carried special interest legislation for some of the states wealthiest tribal governments, including a number of tribes proposing off-reservation casinos. This legislation, SB 995, basically would give tribes the key to California's State treasury.

SB 995: This bill is currently inactive and is potentially awaiting a vote in the California Senate. It would potentially cost the State of California hundreds of millions of dollars, in lost revenue. The bill would provide tribal governments and their financial backers with access to tax-exempt bonds subsidized by the States taxpayers for the purpose of financing tribal economic activities. It would exempt from the State's income tax the interest on bonds of tribes issued to finance among other things, gaming-related facilities, such as hotels and parking structures. It provides that payment of interest on and principal of the bonds could be secured by casino revenues. California would be the only state in the Union to authorize this tax exemption for tribal bonds.

Fiscal year 2005-06 (FY 2005-06) presented another opportunity for tribes opposed to regulation to influence legislative decisions during Legislative Budget hearings and other Legislative hearings on Indian gaming. A number of gaming tribes opposed additional funding to the California Gambling Control Commission (CGCC). Many of the tribes expressed the belief that additional regulation was unnecessary; as they felt they successfully regulate their own gaming functions.

The CGCC initially requested \$4.8 million and 45.5 positions in the FY 2005-06 Governor's Budget. Due to opposition, the Commission reassessed its request and submitted a downscaled request for \$2.25 million and 23.5 positions. The rationale behind the original request was that the commission oversees 55 Indian casinos with

more than 57,000 slot machines and 94 card clubs. The request included additional staff to establish a State slot testing laboratory and additional staffing necessary to determine suitability of Tribal employees, various financial and compliance audits of tribes, and for legal and administrative functions.

Included in the CGCC's budget request was a slot testing laboratory (such as in Nevada) to ensure the integrity of gaming and to protect patrons - to ultimately ensure that gaming devices and games operate in accordance with the manufacturers' standards, technical standards are in place, and patrons receive appropriate prize amounts. Without a testing laboratory there is no framework to provide the CGCC the ability to develop independent internal expertise by which to assess and validate the complex technical reports produced by out-of-state labs for tribes.

While the CGCC continues to voice its need for additional funding in order to address the public's concerns over evolving regulatory problems, the State Legislature continues to contentedly accept political contributions and allows tribal gaming to grow unchecked in our State without even the minimal State oversight permitted under the 1999 compacts.

Critics argue that the influence of tribal gaming political contributions is demonstrated by the failure of the California State Legislature to address tribal gaming growth and regulation and this inaction invites organized criminal infiltration, political corruption and unprecedented scandals and social problems.

Tribe vs. Tribe over State Gaming Policy:

In November 2005, the State Legislature refused to approve two additional class III gaming compacts with two historical reservation tribes of California. These are Tribes whose needs and goals represent the intent and spirit of the Indian Gaming Regulatory Act (IGRA). This failure of State Legislators to ratify these compacts has the potential to bring about bad faith litigation against the State of California. Wealthy gaming tribes are the source of opposition to ratification of these compacts.

The States of New York, New Mexico and California have all been involved in litigation in the past over the compact negotiation and ratification process. In all cases up to now, after a court determined that legislative ratification was required in a particular state, that state's legislature has returned to ratify the tribal state compacts. Nevertheless, California is at a new crossroads with this current ratification process. The Legislature has yet to define the necessary criteria.

One Tribe, the Quechan, is moving to pull the State into an unexplored area of law in California. The Tribe has asked the Schwarzenegger administration to grant it the same terms as a compact approved last year for the Fort Mojave tribe or face a federal lawsuit.¹⁸

Tribal State Compact Ratification:

The Indian Gaming Regulatory Act was intended to foster a public policy climate and address public policy issues created by the expansion of tribal gaming and the nature of

tribal sovereignty. Individual states were authorized to set up an independent framework for the form, extent, scope and intensity of gaming. This public policy is formalized in a tribal state compact. California has both State Statute and Constitutional law authorizing the Governor to negotiate and conclude tribal state compacts. However, State Statute and Constitutional law appear to be in conflict as to the detail of the ratification process.

State Officials must develop and agree upon a process for tribal state compact ratification. Recent failure by the State Legislature to ratify compacts prevents the tribal state compacts from moving forward in the process for approval from the Secretary of the Interior. This presents California tribes with an opportunity to potentially sue the State for *bad faith* in state or federal court (California's waiver of the 11th amendment immunity with respect to compact negotiations is a surviving component of Proposition 5).

Moreover, the State Legislature must develop criteria with which to evaluate and analyze a tribal state compact for ratification. The Legislative criteria should mirror the factors defined in IGRA:

25 USC 2710 (d) (7) (B) iii

May take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities...

Do the compact components protect the welfare of the public, and the good working order of the state from many negative consequences of this disfavored industry? A basic list of components that Legislators may wish to give consideration to when evaluating tribal state compacts includes:

- revenue sharing with the state
- state regulatory oversight and police powers clarification
- patron or employee protections
- environmental mitigations and conservation of shared natural resources,
- a voice and continued role for local government
- meet and confer, arbitration and enforcement mechanisms

California's Unique Reservation Shopping Style

1988 – After Acquired Lands for Gaming:

Whether phrased as new lands, contiguous lands, or re-acquired lands, or any land acquired after 1988, it does not matter. The voting public who supported the economic development of California's native people now feel betrayed by the perceived broken promises of tribal governments and gaming investors. A backlash against the proliferation of unregulated tribal gaming, political influence and tribal infighting has soured public support.

California voters were promised that Propositions 5 and 1A ballot measures would be a limited exception to the prohibition on casino style gaming and would not result in the proliferation of urban casinos. Yet today California has more proposals than any other state all in varying stages of development. Off-reservation casinos pose a serious threat to the tribal gaming industry, as public support that tribal governments enjoyed in 2000, is evaporating. The California electorate now feels betrayed by the broken promises of no urban casinos.

California is significantly affected by tribes continuing to reservation shop for new casino sites off established reservations and without historic ties. Tribes and gaming investors continue to promote numerous exceptions under IGRA for off reservation casinos that allow for the development of gaming on lands acquired after the 1988 cut off. *Stand Up For California* prepared a list of land acquisitions proposed for gaming purposes¹⁹ which includes land acquisitions that do not require the Governor's concurrence, those that are discretionary requiring gubernatorial concurrence and several exceptions to acquire land for gaming in accordance with IGRA--such as contiguous lands, land settlements through litigation or *ad hoc* legislation. The list continues to document the influence of gaming industry dollars on federal Indian policy for land acquisitions and tribal recognitions.

Restored lands: Many California tribal groups qualify for gaming due to the enactment of Senator John McCain's 1994 legislation, known as the List Act (Technical Corrections Act of 1994, Section 5, Pub.L.103-263, 108 Stat. 707 (May 31, 1994)). Unintended consequences of the Act in California relate to Rancheria lands that were owned in fee—not in trust by the United States. The misapplication by the BIA of the Senator's amendment has allowed numerous land-based groups to be elevated to the federal recognition list despite legitimate questions surrounding tribal status and land status that remain unanswered. Many of the Rancheria tribal groups began to organize *for the first time* in the 1990's to develop off-reservation casinos. Unfortunately, a discussion of this issue is beyond the scope of this document.

But on a related note, while restored land claims have dominated the off-reservation proposals, some of our state's historic and prominent reservation tribes have also manipulated the fee-to-trust process to acquire new land or re-acquire land. This too has further aggravated the trust of the public. Off-reservation gaming has created a domino effect of impacts. It has created numerous instances of internal enrollment disputes over Indian lands, gaming money and power. It has produced tribal competition for gaming sites on a statewide and national scale. It has produced political and legal impacts for local governments and the surrounding communities of citizens.

Three Examples of Fee-to-Trust Manipulation:

Below are three examples of established Reservation Tribes manipulating the process of acquiring land for gaming after 1988:

(1) Agua Caliente Band of Mission Indians: In 2002 the Agua Caliente Tribal government had two casino expansion projects. The Spa Casino in downtown Palm Springs and the Rancho Mirage casino located on I-10. Both facilities required the

acquisition of land after 1988 for gaming. These projects mysteriously skirted or circumvented various aspects of the fee-to-trust federal regulations. For example:

Non-gaming Trust Acquisition of 2000: Agua Caliente purchased, as non-gaming property, 40 acres of restricted allotment land from a tribal member in 1999. The purchase price for this interstate highway frontage property was \$4.1 million. The transfer of title and governance over the land to the Tribe was pursuant to 25 CFR section 152 which grants authority to the Secretary of the Interior to sell or transfer restricted lands. However, the notification process followed by the Palm Springs office of the BIA, if any, remains at this time unknown. Repeated requests for information by the author remained unanswered.

Gaming Trust Acquisition of 2002: The Spa Casino required the purchase of former allotment land held in fee, which was sold to the City of Palm Springs Redevelopment Agency. Curiously, California has a state statute that prevents City Redevelopment Agencies from selling or negotiating agency land for any gaming activity whatsoever. (California Health and Safety Code § 33426.5)

Agua Caliente and Mr. Abramoff: Ultimately, special interest legislation was needed for Agua Caliente's casinos. The lobbying efforts of now disgraced lobbyist Jack Abramoff allegedly assisted in that endeavor. The Native American Technical Corrections Act of 2004 provided Agua Caliente with the language they needed to take land into trust circumventing authority of the State of California and local jurisdictions. This type of special interest legislation abuses the delicate balance of authority between States, Tribes and the Federal Government, framed by the Indian Gaming Regulatory Act. But Agua Caliente is not alone: Four of Abramoff clients had amendments in this Act as well as another California Tribe, the Barona Band. The legislation states:

• 108TH CONGRESS 1st Session

- **108-49**
MAKING TECHNICAL CORRECTIONS TO LAWS RELATING TO NATIVE AMERICANS, AND FOR OTHER PURPOSES
- *Section 130. Agua Caliente Band of Cahuilla Indians*
- **Section 130 authorizes the Department of the Interior to take land into trust for the Agua Caliente Band of Cahuilla Indians and extinguishes the restrictive covenant attached to that parcel.**

While the local BIA submitted their final corrected decisions in June of 2002, the grand opening of the Spa Casino expansion proceeded in November 2003, despite the fact that the land was not recorded as being in trust in the federal register until July 14, 2004. In other words, there was a period of time when the tribe operated a casino on land under the regulatory authority of State of California. This raises questions of the potential of requiring the payment of back taxes on the real property during this period of time.

Non-gaming Trust Acquisition of 2004: Inspector General Earl E. Devaney has issued reports of his recent investigation into tribes applying for trust acquisitions in which they allegedly falsely assert that the land is not intended for gaming. The Inspector General asserts 10 instances in which this has occurred.²⁰

The Agua Caliente's 2004 application for trust for 140.41 acres to complement the Rancho Mirage Casino on I-10 raises questions. The Tribe's stated goals for this land are:

- preservation and restoration of cultural, natural and scenic values,
- create a strong sense of place that reflects the cultural and natural history of the Tribe,
- creates an interpretation of Native American history and culture and
- generate sustained revenue for total support through public access and recreation.

The Tribe further states:

“The subject property is for the protection of sovereign rights and restoration of original trust lands. The property will eventually be used for economic development for the Tribe. The Tribe has no intention of changing the use of the property should the land be brought into trust status.”

Remarkably, there is no mention of the proposed gaming development that was announced March 13, 2000, or the fact the facility was built, widely advertised and has stood as a major landmark along I-10 and Bob Hope Avenue since 2001.

Critics argue that the Department of the Interior, Bureau of Indian Affairs Palm Springs Agency, has severely injured the Department's credibility as an unbiased agency tasked with processing fee-to-trust applications and differentiating between gaming and non-gaming developments. Nevertheless, in 2004 when the Department issued its 'Notice of Decision', it failed to recognize the land acquisition as gaming or gaming related and instead acknowledged the land acquisition as follows:

“This parcel is currently zoned as C=Commercial; RH= Resort Hotel; M+ Manufacture and 2B (2/5 ac) Zoning for the site will not be changed and therefore no jurisdictional problems are foreseen.” (June 22, 2004 Notice of Final Decision- BIA)

Without any discussion, the “Notice of Decision” blatantly ignores the obvious fact that a casino already exists. The “Notice of Decision” is silent on whether or not the Tribe must adhere to local zoning, ordinances, California Environmental Quality Act or pay past due local and state taxes on real property. (See recent U.S. Supreme Court ruling on *Sherrill vs. Oneida*)

In fact, in each of these applications, the failure of the Palm Springs Agency Bureau's final determination raises significant concerns for the Tribe about potential litigation before the U.S. District Court, either in California or the District of Columbia, against the

Secretary of the Interior for violating the Administrative Procedures Act (There is a 6 year statute of limitations to substantive challenges to an agency's application of an agency's final decision).

The problem will not go away. The Governor expressed his concerns over the legal status of the land for gaming in a letter dated October 11, 2005:

“We are also attempting to confirm aspects of Tribal and project site history to confirm the appropriateness of the proposed development under the Indian Gaming Regulatory Act (IGRA). Should any concerns arise, we shall provide supplemental comments to you.”²¹

(2) Chumash – ‘Land Banking’: One of the purposes for land acquisitions by Reservation tribes has been ‘land banking’. This is the notion that tribes must acquire lands to meet their needs by ‘land banking’ for future generations. Clearly the 1934 Indian Reorganization Act (IRA) did not consider this concept. The IRA requires tribes to demonstrate an immediate need for the acquisition for the land. Governor Schwarzenegger’s office recently commented on the proposed ‘land banking’ notion of the Santa Ynez Chumash in a letter dated August 26, 2005:

“Allowing up to 108 federally recognized tribes in California to place into trust land for which they have no aboriginal claim could involve more than 75 million acres—the amount of land many tribes in State have claimed would have been theirs had the United States ratified 19th century treaties granting the acreage. Congress rejected those treaties because of the impact that granting tribes that amount of land would have had on California in the 1850’s. Whatever impact those treaties might have had on California in the 19th Century pales in comparison to the impact of contemporary removal of a comparable amount of land from the States authority over land use and taxation both of which are fundamental attributes of its sovereignty. Such a result would constitute federal interference with the powers reserved to the State in a manner patently at odds with the intent of the Tenth Amendment.”²²

The issue of land banking will continue to move into the spotlight as more and more tribes seek to enlarge their sphere of influence at the expense of local, state and federal authority and the skeptics among us will believe that such land grabs are merely to allow expansion of gaming activities.

(3) San Manuel Band of Mission Indians Non-Gaming Acquisition: A land acquisition by the San Manuel in 1997 stated the intended use of the land as a community recreational area. Instead, the San Manuel Band of Serrano Mission Indians announced after the passage of Prop 1A in 2000, that it will use this land for expansion of its existing Bingo and Casino facility by 364,000 square feet, including 135,000 square feet for a meeting and banquet hall, 70,000 square feet of additional gambling area, 55,000 square feet of additional food service area, and 50,000 square feet of additional administration area. In addition, the Tribe constructed a six-level, 3,400 space parking structure, an

additional single level 200+ space parking lot, and a 1,400-1,800 seat event center, adjacent to three homeowner associations of single family residential areas, populated by 17,800 residents and in proximity to seven schools within the City of San Bernardino.

The application for land was presented at a sensitive period of time for the State of California at that time facing numerous un-compacted tribal gaming operations. One of California's four U. S. Attorneys was prosecuting a number of California tribes' slot machines for violations of the RICO Act -- and the defendants included the San Manuel. Many statements and actions -- such as assertions that the San Manuel's "recreational facility" would benefit the surrounding community -- were made by tribes at this time and used to win public support for legalizing tribal gaming.

Many of California's tribes like the San Manuel Tribe sought and received approved land acquisitions during this time of early, unsettled law in California. These changes in land use have fueled the flames of a public backlash with the disclosure that it will be used for gaming and ancillary use, creating new and legitimate concerns that no affected party has the ability to address because of the specific statements of proposed use made by the tribe in 1997.

As the hearings in the U.S. Senate have highlighted, a tightening of exceptions for lands acquired and re-acquired after 1988 must be established. The fee-to-trust process must not continue to be abused or adjusted simply to accommodate gaming investors seeking quick return on their casino investments. The statutory requirements of IGRA must be reviewed, applied and vetted by federal officials on a case by case basis before gaming begins. After all, tribal governments are no longer an island surrounded by a sea of undeveloped land. Our communities are intertwined and mutually benefit only when tribes and local government partner together.

New, Unchallenged Land Acquisitions:

The demand for tribal gaming in California is motivation for new methods of acquiring land after the 1988 cut-off. Gaming investors are ever-clever, coming up with new ways of acquiring new land in order to create new unchallenged exceptions for gaming. One such way is through "allotment lands":

- 1 The Alturas tribe is currently constructing a gaming facility on fractional interest allotment land over which it has just recently begun to exercise putative governance--land which is a significant distance from the tribe's established land base and recently proclaimed to be under the tribe's governance.²³
- 2 The Santana family, an individual Indian family owning trust allotment land as of 2000, is transferring governance of this very marketable location in the City of Cloverdale (population: 8,000) to the Hopland tribal government located approximately 50 miles away.²⁴
- 3 **"Tribe" Shopping:** Professional political consultants, Gorton/Moore International, recognized a window of opportunity with the attention being paid to Indian tribes by the state and federal government. The firm has sent a letter to

Native American peoples and groups to immediately assist in obtaining federal recognition due to, “A unique window of opportunity for Indian People unlikely to open more than once.” To the Wintoon/Wintu the consultants explained their motivation: “Our representation will cost you nothing out of your pocket. But as partners with the Wintoon/Wintu tribe in the struggle to be recognized, we will be partners with the tribe in future economic endeavors.”²⁵

- 4 Attorney Jonathan Stein of Santa Monica continues to promote a casino development for another of California’s petitioning tribal groups, the Gabrieleno Tongva of Los Angeles. His is a novel idea of state recognition for a full service tribal casino on a state reservation in the City of Compton. This proposal is inconsistent with State and federal gaming law, yet lawmakers continue to be solicited by Attorney Stein and former State Senator Richard Polanco.²⁶
- 5 **Investment “Opportunities”:** A Los Angeles man Tom Kelly sent out mail solicitation to prospective investors to develop an off-reservation tribal casino in Los Angeles County with the Shasta Nation, a non-recognized tribal group from Siskiyou County. But there is no contract with the tribe for the solicitation and it has been alleged that State securities laws were likely violated.²⁷

Setting the Bar High

The Rapid Growth of the Tribal Gaming Industry:

Californians never envisioned the grand scale of tribal casino complexes that we have today. Tribal gaming began as high-stakes Bingo in cinder block buildings or tent structures in out of the way locations, Tribal casino gaming started in California without the negotiation of tribal state compacts. Gaming machines were illegally shipped in from out-of-state and secretly transported in moving vans or refrigerator trucks.

But all has now changed dramatically. Tribal casinos currently include destination resorts, 300 ft. hotel towers, 5 star restaurants with entertainment venues, convention centers, shopping malls, spas and PGA golf courses. As reported by the NIGC:

Tribal gaming grew nationally from the \$200 million dollar industry in 1988, to the \$19.4 billion in revenue reported in 2004 – a 15.3 percent growth over \$16.8 billion posted in 2003. Tribal casino revenue grew by 13.7 percent from 2002 to 2003.²⁸

Many of California’s native peoples have moved from abject poverty to managing a multi-million dollar business in a very short and politically contentious period of time. California’s tribal gaming policy is much the result of federal and Congressional action or inaction, most of which has been litigated in protracted and difficult cases involving core questions of the balance of federal, state and tribal power. IGRA has become a broad national policy on gaming, but a policy enacted without any national ‘public’ debate or comment on the industry of gaming. However, that too is rapidly changing.

Shift In State and Federal Policy:

2005 has become a defining year for the industry of tribal gaming. Reservation shopping, coupled with an abuse of the fee-to-trust process, restorations, and reaffirmations to acquire lands after 1988 for gaming have created a public backlash stretching from California back to Capitol Hill. The political scandals and tribal competitions have converged and make clear an increased recognition that the tribal gaming industry needs more regulation. Clearer yet, federal legislation is necessary, as many tribes have been unwilling to address voluntarily off-reservation impacts.

State Policy Changes: In May 2005, Governor Arnold Schwarzenegger introduced a detailed Proclamation stating his general policy opposing off-reservation gaming. The Governor stated he would not negotiate with tribes for urban casinos, or with tribes that did not have eligible land for gaming or widespread local support. In addition, the project must serve “a clear, independent public policy, separate and apart from any increased economic benefit or financial contribution to the State, community or the Indian tribe that may arise from gaming.”²⁹

Federal Policy Changes: The Department of the Interior two days later in a letter that has become known as the ‘Warm Springs letter’ made a sweeping policy change making clear it would not approve tribal state compacts for tribes unless it was for gaming on Indian lands of such an Indian tribe. “Accordingly, under the new policy, suitable land must be taken into trust for gaming before the gaming compact will be approved.”³⁰

The Governor’s Proclamation and the Warm Springs letter left many tribes and their investors only one alternative. This alternative circumvents the need of gubernatorial concurrence by seeking a restored lands determination from the National Indian Gaming Commission (NIGC). To no one’s surprise the NIGC is preparing land determinations for 8 proposed casino sites in California. In testimony before Senator McCain’s committee, Acting Counsel Penny Coleman of the NIGC reported that the Commission was involved in the land status review of over 400 Indian casinos:³¹

“If we decide that a tribe should not have opened a facility because the lands did not qualify for gaming under the (Indian Gaming Regulatory Act), extensive litigation is guaranteed,” Coleman told the Senate Indian Affairs Committee in July.

Citizens have long awaited the State’s management of the location of tribal gaming facilities. In a September 9, 2005 letter addressed to Penny Coleman, Acting General Counsel, National Indian Gaming Commission, regarding the proposed casino on the Big Sandy Rancheria in Fresno County, the Governor’s Office wrote regarding the definition of Indian Country for eligible gaming:

“As the NIGC previously determined, IGRA’s ‘Indian lands’ definition is distinct from Indian Country as defined on other statutes. Indian Country” indicates that IGRA’s jurisdictional reach is not precisely equivalent to statutes which refer to “Indian Country”. Thus the Tribe’s “Indian

Country” analysis is misplaced.”

Despite the threat of litigation or attempts to circumvent the need for gubernatorial concurrence, the Governor appears to listen to local concerns. For example, on December 19, 2005 the Governor submitted a formal request for a ‘meet and confer’ under its compact with the Alturas Tribe. The Governor contends that the tribe is in ‘material breach’ of its compact and the Governor warns of the pending termination of their compact in 60 days if they do not meet to discuss a cure to the breach in 10 days:

“...the Tribe has commenced construction of a Gaming Facility on non-Indian lands near the City of Yreka, California, in violation of IGRA, 25 U.S.C. section 2710 (d) and in violation of Compact section 1.0, subdivision (b) and section 4.2.”

On December 20, 2005 the Governor sent a similar ‘meet and confer’ letter to the Jamul Tribe warning of a potential ‘material breach’ of the 1999 tribal state compact section 4.2:

“...to operate a gaming facility only on its Indian lands”.

In compliance with the law, the Governor is questioning the legal status of ‘Indian lands’ to comply with the definition of land eligible for gaming as defined in IGRA, 25 U.S.C 2703 (4). Because not all trust lands qualify for gaming, this review must be completed for established lands as well as newly acquired lands.

California’s Gaming Future:

New coalitions supporting common goals are beginning to form to influence state and federal Indian policies and gaming legislation. In recent months, the California State Association of Counties, California League of Cities and California State Association of Sheriffs and California District Attorneys have held public conferences with the California Tribal Business Alliance sharing information and common goals, airing concerns and suggesting both short-term and long-term mutually beneficial solutions. These organizations and progressive tribal leaders are moving forward in a new paradigm of mutual respect establishing a precedent setting policy of communication, cooperation and collaboration on common goals.

There is no dispute that the Governor’s Office wields the most influence. The Schwarzenegger compacts have emerged as a state model and set a standard of expectations for tribal gaming policy in California. The re-negotiated tribal state compacts address not only the economic implications and impacts, but also the social issues of public safety and the critical jurisdictional issues which allow for secure relationships between sovereign governments.

The new compacts address regulatory compliance, environmental concerns, and a process for patron and employee protections as well as an ongoing role for local government. Some of the State’s largest gaming tribes have signed these new gaming agreements and in doing so have established a long-term stable relationship with the State of California.

The new compacts are but one component of the solution to resolve the public backlash over tribal gaming and political scandal converging on Californians, elected officials and tribes themselves as they seek to address the impacts of gaming. While other components are needed (including portions of McCain's proposed amendments to IGRA), California has made significant steps toward resolving the financial and social justice components of tribal gaming.

Congressional Actions:

Both the Senate Indian Affairs Committee and the House Resources Committee have held hearings on processing land into trust, federal recognition, reservation shopping and the lobbyist scandals. Additional hearings continue to be scheduled. Amendments and modifications to IGRA have been introduced by a number of U.S. Senators and Congressmen. On November 18, 2005, Senator McCain introduced S 2078 to amend the Indian Gaming Regulatory Act. The Act reads like a wish list of the NIGC. One of the most important features is that it clarifies the authority to regulate class III gaming: "This amendment makes clear that NIGC continues to have the authority it has exercised until now to issue and enforce MIC's (minimum internal control standards), including the ability to inspect facilities and audit premises in order to assure compliance," McCain said.³²

However, the well intended modification to restrict after-acquired lands for gaming presents a significant disadvantage to California because it eliminates gubernatorial authority. Gubernatorial concurrence solves land-use problems such as casino development in sensitive environmental locations, adjacent to park lands or social concerns that result from casino placement near homes, churches and schools.

History demonstrates that fears regarding gubernatorial concurrence are misplaced and unwarranted. There have been only three instances of withholding of gubernatorial concurrence since the enactment of IGRA in 1988; however there have been at the very least 35 gaming and gaming related land acquisitions due to the exceptions of IGRA since that time.³³ Removing the exceptions and/or requiring *all* after acquired lands to meet the two-part determination through gubernatorial concurrence maintains the balance between tribal sovereignty and states' rights.

Gubernatorial concurrence balances a State's role in the implementation of national policy regarding tribal gaming. In the development of IGRA, Congress recognized this and gave powers to state governors, which the tribal community reluctantly agreed to in return for the gaming opportunity. Concurrence over after-acquired lands provides a governor with the significant capability to manage the growth and location of tribal gaming, thus protecting communities, local governments, state agencies, natural resources, even tribal market saturation and yet fairly provides the opportunity of economic self-reliance to tribes.

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Exhibit 1

Donor January 1, 2000 and July 31, 2005.	Category	Total Contributions
Commerce Casino	Card Club	\$4,176,323.28
Bicycle Club	Card Club	\$3,115,458.09
Hawaiian Gardens	Card Club	\$2,281,154.96
Normandie Club	Card Club	\$1,457,553.00
Lucky Chances	Card Club	\$914,850.00
Artichoke Joe's	Card Club	\$750,900.00
Hustler	Card Club	\$549,280.00
California Grand	Card Club	\$482,675.00
LA Casino PAC	Card Club	\$477,148.32
Crystal Park	Card Club	\$27,183.70
Rumsey	CTBA	\$12,557,293.44
Viejas	CTBA	\$12,534,705.53
Pala	CTBA	\$10,289,434.76
United Auburn	CTBA	\$9,839,571.91
Jackson	Support New comp	\$162,950.00
Alturas	Oppose New Compacts	\$10,000.00
Morongo	Oppose New Compacts	\$27,263,239.72
Agua Caliente	Oppose New Com	\$20,213,771.20
Pechanga	Oppose New Compacts	\$16,093,890.56
San Manuel	Oppose New Compacts	\$14,183,881.00
Barona	Oppose New Compacts	\$3,759,944.34
Sycuan	Oppose New Compacts	\$2,462,800.00
Santa Ynez	Oppose New Compacts	\$858,390.00
Twenty-Nine Palms	Oppose New Compacts	\$771,600.00
Cabazon	Oppose New Compacts	\$549,800.00
Station Casinos	Operators	\$481,437.05
Venture Catalyst	Operators	\$281,730.70
Paskenta Band of Nomlaki Indians	CTBA	\$505,116.00
Table Mountain	Other Tribe	\$435,886.35
Soboba	Other Tribe	\$352,479.00
Fort Mojave	Other Tribe	\$50,000.00
Redding	Other Tribe	\$44,307.39
Tule River	Other Tribe	\$14,400.00
LA Turf Club	Racetrack	\$6,007,561.17
Los Alamitos	Racetrack	\$3,121,802.25
Bay Meadows	Racetrack	\$2,974,200.00
Del Mar	Racetrack	\$463,850.28
Hollywood Park	Racetrack	\$365,513.98
Pacific Qtr Horse	Racetrack	\$107,000.00
Pinnacle	Suppliers	\$3,515,470.38
IGT	Suppliers	\$47,500.00

END NOTES

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- ²⁰ *Testimony of the Honorable Earl E. Devaney, Inspector General of the U.S. Department of the Interior, Senate Committee on Indian Affairs, 109th Congress (2005) available at <http://indian.senate.gov/2005hrsgs/042705hrsg/devaney.pdf>*
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- ³⁰ United States Department of the Interior Letter to Honorable Theodore R. Kulongoski, Governor, State of Oregon, May 20, 2005
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