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## Gaming, Pot and Tribal Resistance As Economic Development

**By Anthony Broadman**

The most durable myth surrounding Indian gaming is that casinos were given to tribes by the federal government. They weren't. Modern Indian gaming was born when tribal governments refused to follow state gambling laws.

This is a common refrain for tribal economic development. Resist inapplicable law; enter pitched legal battle; preserve victories with delicately balanced inter-governmental agreements. Today, the battles fought by gaming pioneers, and the disputes over fuel taxes and the Indian tobacco trade, shape both state and tribal legal approaches to new tribal ventures. Nowhere is this more apparent than with the passage in April of HB 2000,<sup>1</sup> which authorized the governor to enter into marijuana compacts with Washington Indian tribes.

For lawyers and elected leaders working in tribal economic development today, the history of gaming affects how tribes and Indian businesses view and assess new economic opportunities. Tribal economic development is shaped by tribes' historic refusal to be governed by laws that do not apply to them.

This is complicated by the fact that on one hand federal law recognizes tribes as distinct political communities with the right of self-government.<sup>2</sup> On the other, the same legal system facilitated "the expropriation of Indian lands, the forced assimilationist attack on Indian landholding patterns and Indian culture, and the destruction of the Indian economies in ways that precluded distinct evolution to successful new forms consistent with

tribal desires[.]"<sup>3</sup>

In other words, the very federal system that recognizes tribes as sovereigns has been used consistently to enforce the occupation and economic oppression of tribal nations. It's no wonder then that resistance to that occupation underlies almost every aspect of Indian law and commerce.

Individual Native Americans have long relied on civil disobedience as a tool of political discourse.<sup>4</sup> From the Occupation of Alcatraz to Idle No More,<sup>5</sup> these critical moments of Indian activism have had profound effects on larger governmental policy and law. But tribal governments as sovereigns have also used resistance to further their economic and political goals — indeed little has been achieved without such fights.

The story of Indian law is marked by these battles, these moments of resistance. Quite appropriately, given the modern tobacco tax strife between states and tribes, the U.S. Supreme Court's 1871 entry into the tribal tax fray is marked by the refusal of Cherokee leader Elias C. Boudinot and his uncle Stand Wattie to pay federal taxes on tobacco.<sup>6</sup>

Tobacco, and resistance to state tax laws, has since consumed some corners of Indian Country so thoroughly that state-tribal cigarette tax disputes are often characterized as "war,"<sup>7</sup> and marked with actual physical conflict, burning tires and injured police.<sup>8</sup> In many jurisdictions, this changed after decades of pitched battle.

Fast-forward to 2001 in Washington, for instance, where Olympia realized its

victories in the tobacco wars were "hollow" given a court-recognized right to taxes, but without a remedy for collection.<sup>9</sup> When the State took an interest-convergence rather than enforcement approach, tobacco-tax compacts were born. The agreements generally satisfied the tax parity interests of the State while providing significant tax revenue for tribes. Washington's tribal fuel tax agreements — and the litigation that spurred them — followed a close path.

Indian gaming follows a similar archetype. Tribes in the early 1980s seeking to develop their economies opened bingo facilities that would have been illegal under state law.<sup>10</sup> Tribes didn't typically ask permission; rather they began gaming and were busted by local authorities, which they then sued.

Tribes throughout the U.S. did this until the question became too large not to answer. And in 1987, the U.S. Supreme Court held in *California v. Cabazon Band of Mission Indians* that state regulation of Indian gaming "would impermissibly infringe on tribal government."<sup>11</sup> A year later, Congress passed the Indian Gaming Regulatory Act, which effectively codified *Cabazon* and forced states to enter into compacts for certain types of tribal gaming.<sup>12</sup>

There was no reason to believe that the introduction of the marijuana economy into Indian Country would go any differently — until it did. The U.S. Department of Justice decided in late 2014 that it would apply the same federal enforcement priorities in Indian Country as it did in states, "including in the event

that sovereign Indian nations seek to legalize the cultivation or use of marijuana in Indian Country.”<sup>13</sup>

In doing so, it opened the door for tribes to choose to regulate (still federally illegal) marijuana within their jurisdictions. However, instead of triggering state-on-tribe litigation and the usual resistance-capitulation cycle of diplomacy, Washington chose to preemptively do the right thing.

HB 2000,<sup>14</sup> signed by Gov. Jay Inslee on May 8, allows the governor to enter into compacts with Washington tribes related to marijuana on tribal land. While tribes undoubtedly have the authority without compacts to do many of the things contemplated in the law, this legislation can dramatically simplify relations on the topic between the governments.

Importantly, under the pot compacts, the State achieves tax parity and abandons any claim to I-502 taxes on the tribal pot economy. While nothing is win-win and one can certainly expect significant disputes, the interest convergence un-

derlying HB 2000 could have promising repercussions for a well-regulated marijuana industry.

It would not have been possible had generations of tribal leaders and entrepreneurs not resisted the inapplicable laws foisted upon tribes by states. Just as important, however, Washington recognized tribal resistance and planned around it. ■

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<sup>1</sup> <http://app.leg.wa.gov/billinfo/summary.aspx?bill=2000&year=2015#documents>

<sup>2</sup> *Worcester v. Georgia*, 6 Pet. 515, 559 (1832).

<sup>3</sup> Robert N. Clinton, “Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law,” 46 Ark. L. Rev. 77, 81 (1993).

<sup>4</sup> Robert Odawi Porter, “Tribal Disobedience,” 11 Tex. J. on C.L. & C.R. 137 (2006).

<sup>5</sup> Tony Penikett, “An Unfinished Journey: Arctic Indigenous Rights, Lands, and Jurisdiction,” 37 Seattle U. L. Rev. 1127 (2014).

<sup>6</sup> *The Cherokee Tobacco*, 78 U.S. 616 (1870).

<sup>7</sup> <http://www.seattlepi.com/local/article/Tribe-is-ready-to-roll-its-own-1142599.php>

<sup>8</sup> <http://www.nytimes.com/1992/07/17/nyregion/senecas-clash-with-police-over-tax-ruling.html>

<sup>9</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162 (1980): “It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.” See also Stuart Thronson, “Intergovernmental Tax Agreements: Washington State’s Experience With Cigarette Tax Compacts” 4 (2006) (noting the “hollow victory” of *Colville*) (on file with author).

<sup>10</sup> Joshua L. Sohn, “The Double-Edged Sword of Indian Gaming,” 42 Tulsa L. Rev. 139, 140 (2006).

<sup>11</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222, 107 S. Ct. 1083, 1095 (1987).

<sup>12</sup> Pub. L. 100–497, 25 U.S.C. § 2701 *et seq.*

<sup>13</sup> Monty Wilkinson, Director, U.S. Dep’t of Justice, Executive Office for United States Attorneys, Policy Statement Regarding Marijuana Issues in Indian Country, Oct. 28, 2014, available at <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>. Prior to the Wilkinson Memo, DOJ, in conjunction with the U.S. Department of the Interior’s Bureau of Indian Affairs, had indicated that it would not hesitate to enforce the Controlled Substances Act in Indian Country, even if state law was being complied with.

<sup>14</sup> <http://lawfilesexternal.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Passed%20Legislature/2000.PL.pdf>