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INDIAN LAW—Economic Development, Gambling on Continued Federal Interest: *California v. Cabazon Band of Mission Indians*

I. INTRODUCTION

In *California v. Cabazon Band of Mission Indians*,[1] the United States Supreme Court held that California's bingo and card game laws did not prohibit tribal gaming operations on Indian reservations.[2] The Court determined that neither Public Law 280 nor the Organized Crime Control Act of 1970 authorized California to enforce its gambling laws on the reservations.[3] The Court also determined that federal and tribal interest in tribal self-government, including tribal self-sufficiency and economic development, outweighed the state's interest in regulating bingo and card games.[4]

This Note examines the Court's use of federal administrative Indian policy, as well as subsequent congressional acts and legislative history, in determining the congressional intent behind Public Law 280. This Note traces the Court's development and affirmation of the criminal/prohibitory, civil/regulatory distinction in interpreting Public Law 280. This Note also discusses the Court's recognition of tribal economic development as strong justification for federal protection of tribal sovereignty. The Court's consideration of tribal economic interests as a separate barrier to state interference in reservation affairs extends the significance of this case beyond the narrow confines of Indian bingo.

II. STATEMENT OF THE CASE

The Cabazon and Morongo Bands of Mission Indians occupy separate reservations in Riverside County, California.[5] Each Tribe conducts commercial bingo games on its reservation in accordance with an ordinance approved by the Secretary of the Interior.[6] The Cabazon Band also operates a card club at which

1. 107 S.Ct. 1083 (1987) [hereinafter *Cabazon*].
2. *Id.* at 1083.
3. *Id.*
4. *Id.*
5. *Id.* at 1086 n.1. The Cabazon Reservation was originally set apart by Executive Order on May 15, 1876. *Id.* The Morongo Reservation was established by a series of executive orders beginning on August 25, 1877. *Id.* Both reservations were reconfirmed by the Mission Indian Relief Act, 26 Stat. 712 (1891). Each Band has government-to-government relations with the United States, 46 Fed. Reg. 35,360, 35,361 (July 8, 1981), and the governing body of each Band has been recognized by the Secretary of the Interior, *Cabazon*, 107 S.Ct. at 1086 n.1. The Cabazon Band has 25 enrolled members and the Morongo Band has approximately 730 members. *Id.*
6. *Id.* at 1086 & n.2. The Cabazon ordinance authorizes the Band to sponsor bingo games on the reservation "in order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues" and provides that the net profits shall be kept in a separate fund to be used "for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for

draw poker and other card games are played.[7] The games are open to the public and are played primarily by non-Indians coming onto the reservations for that purpose.[8] Profits from the games are the Tribes' sole source of income and operation of the games is a major source of employment for tribal members.[9]

In 1983, Riverside County attempted to enforce its ordinances regulating bingo[10] and prohibiting draw poker and gambling on card games.[11] The Cabazon and Morongo Tribes sued the County in federal district court, seeking a declaratory judgment that the County had no authority to enforce its ordinances on the reservations and an injunction against enforcement.[12] The State of California intervened in the suit, insisting that the Tribes comply with a state law permitting bingo games only under certain conditions.[13]

After stipulation to the material facts, the parties filed cross motions for summary judgment.[14] The district court granted the Tribes' motion for summary judgment, finding that neither the State nor the County had authority to enforce its gambling laws on the reservations.[15] The Court of Appeals for the Ninth Circuit affirmed[16] and the State and County appealed.[17] The United States Supreme Court affirmed, holding that, absent express congressional consent, federal pre-emption defeated state jurisdiction in this case.[18]

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other tribal purposes." Brief for Appellees at App. B 1-3, *Cabazon*, 107 S.Ct. 1083 (1987) (No. 85-1708). The ordinance also provides that no one other than the Band is authorized to sponsor a bingo game on the reservation, and that no one under 18 years old may play. *Id.* The Morongo ordinance similarly authorizes the establishment of a tribal bingo enterprise and dedicates the profits to programs to promote the health, education, and general welfare of tribal members. *Id.* at App. A 1-6.

7. *Cabazon*, 107 S.Ct. 1083, 1086 (1987).

8. *Id.*

9. Cabazon Band v. County of Riverside, 783 F.2d 900, 901 (9th Cir. 1986) [hereinafter *Cabazon Band*]. The Morongo games are operated under a contract with non-Indian professional operators who receive a percentage of the profits. Joint Appendix (J.A.) at 84, 92-118, *Cabazon*, (No. 85-1708). Since July 20, 1984, such contracts must be approved by the Secretary of the Interior as must all contracts with the Tribes. *See, e.g.*, U.S. ex rel. Shakopee Mdewahanton Sioux Community v. Pan American Management Co., 616 F.Supp. 1200 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986) (contract void without Secretary's approval pursuant to 25 U.S.C. §81 Contracts (1982)). The Cabazon games are managed directly by the Tribe. The Cabazons terminated their management contract because it failed to meet the Secretary's 4-7-86 guidelines. Brief for Appellees at App. C 1-3, *Cabazon*, (No. 85-1708).

10. Ordinance No. 558. Under California's Constitution, bingo is allowed in counties at local option in accordance with State regulations. Brief for Appellants at 22-24, *Cabazon*, (No. 85-1708).

11. J.A. at 63, 66, *Cabazon*, (No. 85-1708). Ordinance No. 331 prohibits the playing of card games for money in the unincorporated areas of the county. A local option is available for incorporated municipalities and, in fact, the cities of Lake Elsinore and Blythe allow similar games. Brief for Appellees at 48 n.35, *Cabazon*, (No. 87-1708).

12. *Cabazon*, 107 S.Ct. at 1086-87.

13. *Id.* CAL. PENAL CODE ANN. §326.5 (West Supp. 1987) does not entirely prohibit the playing of bingo. It sets forth regulations by which designated charitable organizations may conduct bingo games otherwise prohibited. The Tribes admitted that their games violated state provisions regarding staffing and jackpot limits, but denied the State's assertion that the tribal games failed to maintain bingo profits in a separate fund used only for charitable purposes. *Id.* at 1086 n.3.

14. *Id.* at 1087.

15. *Id.* The district court did not enter findings of fact or conclusions of law in connection with its rulings. Brief for Appellants at 1, *Cabazon*, (No. 87-1708).

16. *Cabazon Band*, 783 F.2d 900, 901 (9th Cir. 1986).

17. *Cabazon*, 107 S.Ct. at 1083.

18. *Id.*

III. DISCUSSION AND ANALYSIS

Justice White, writing for the Court,[19] analyzed two basic components:

A) whether there was express congressional consent to the State's jurisdiction, and

B) whether, absent express congressional consent, federal pre-emption defeated the State's jurisdiction.

The Court determined that neither Public Law 280 (Pub. L. 280) nor the Organized Crime Control Act (OCCA) provided express congressional consent to the State to enforce its bingo regulations on the reservations. Further, the Court determined that the State's interest was not strong enough to overcome the presumption that federal and tribal interests pre-empt state jurisdiction on the reservations.

A. Congress Had Not Expressly Consented to State Jurisdiction

The Court recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory"[20] and that this "tribal sovereignty is dependent on, and subordinate to only the Federal Government, not the States."[21] The Court also recognized that Congress may expressly authorize the application of state laws to tribal Indians on their reservations.[22] California contended that Congress had twice given its express consent: 1) in Public Law 280[23] and 2) in the Organized Crime Control Act of 1970.[24] The Court denied both of the State's contentions.[25]

1. Public Law 280 Does Not Authorize State Civil/Regulatory Jurisdiction in "Indian Country".

In Pub. L. 280, Congress expressly granted six states, including California, jurisdiction over specified areas of "Indian country"[26] within those states.[27] California argued that the criminal jurisdiction granted by Pub. L. 280 authorized state enforcement of its gambling laws on the reservations;[28] however, the Court

19. Rehnquist, C.J., and Brennan, Marshall, Blackmun, JJ., joined; Justice Stevens filed a dissent in which O'Connor and Scalia, JJ., joined. *Id.* at 1086.

20. *Id.* at 1087 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

21. *Id.* (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980)). These principles date from Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); however, the application of these principles has varied over time with changing federal fashions in Indian relations and consequent variation in Supreme Court interpretation of federal intentions both express and implied.

22. *Cabazon*, 107 S.Ct. 1083, 1087 (1987).

23. 67 Stat. 588, as amended, 18 U.S.C. §1162, 28 U.S.C. §1360 (1982 & Supp. III 1985).

24. 84 Stat. 937, 18 U.S.C. §1955 (1982).

25. *Cabazon*, 107 S.Ct. at 1087.

26. *Id.* at 1087 n.5. "Indian country", as defined at 18 U.S.C. §1151, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." This definition applies to questions of both criminal and civil jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). The Cabazon and Morongo Reservations are thus "Indian country".

27. *Cabazon*, 107 S.Ct. 1083, 1087 n.5 (1987).

28. *Id.* at 1088.

denied the State's interpretation of the extent of jurisdiction granted and its characterization of the nature of its gambling laws.[29]

Section 2 of Pub. L. 280 granted California broad criminal jurisdiction over offenses committed by or against Indians in all "Indian country" within the state.[30] Section 4 granted limited civil jurisdiction.[31] In *Bryan v. Itasca*,[32] the Court interpreted the grant of civil jurisdiction under section 4 to include jurisdiction over private civil actions involving reservation Indians in state court, but not to include general state civil/regulatory authority.[33]

a. The *Cabazon* Court affirms the *Bryan* Court's criminal/prohibitory, civil/regulatory distinction for Pub. L. 280.

The *Bryan* Court determined that Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on Indian reservations[34] and that Congress had not intended to effect total assimilation of Indian tribes into mainstream American society.[35] In reaching this conclusion, the Court considered developments in federal Indian policy subsequent to the enactment of Pub. L. 280.[36] At the time Pub. L. 280 was enacted, federal Indian policy was directed toward assimilation of Indians, termination of special federal relations with Indians and enhancement of state jurisdiction.[37] Nevertheless, the *Bryan* Court recognized that granting the states general civil/regulatory power over Indian reservations would eventually destroy tribal institutions and values.[38] Consequently, the Court adopted a criminal/civil distinction in analyzing cases where a state seeks to enforce a law on an Indian reservation under the authority of Pub. L. 280.[39]

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29. *Id.* at 1087-88.

30. *Id.* at 1087 n.6. Section 2(a), codified at 18 U.S.C. § 1162(a) (1982 & Supp. III 1985), provides:

> "Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . : California. . . . All Indian country within the State."

31. *Cabazon*, 107 S.Ct. at 1087 n.7. Section 4(a), codified at 28 U.S.C. § 1360(a) (1982 & Supp. III 1985), provides:

> "Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
> California. . . . All Indian country within the State."

32. 426 U.S. 373 (1976)(Minnesota could not apply its personal property tax within the reservation under Pub. L. 280.).

33. *Id.* at 385, 388-90.

34. *Id.* at 379-80.

35. *Id.* at 387. In *Rincon* however, the court read the intent of Pub. L. 280 as assimilative and quoted legislative history to that effect at the time of its passage. *See infra* note 85.

36. *Bryan*, 426 U.S. at 386-87.

37. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 152, 175-77 (1982 ed.). It was not until the Indian Civil Rights Act of 1968 that Pub. L. 280 was amended to require Tribal approval of any further assumption of jurisdiction by the states. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§401-02, 82 Stat. 73, 78-79 (codified at 25 U.S.C. §§ 1321-22 (1982)).

38. *Cabazon*, 107 S.Ct. 1083, 1088 (1987)(reviewing the *Bryan* decision).

39. *Id.*

Although the Ninth Circuit followed the criminal/civil distinction of *Bryan* in *Cabazon Band*, the Ninth Circuit did question the continued vitality of that distinction.[40] The Ninth Circuit noted that the Court's rejection of a proposed substantive/regulatory distinction in *Rice v. Rehner*[41] might indicate disapproval of the *Bryan* distinction.[42] The *Cabazon* Court, however, pointed out that *Rice* was argued and decided in the context of 18 U.S.C. § 1161[43] and not under Pub. L. 280.[44] Under Pub. L. 280, if the law is criminal in nature, it is fully applicable on the reservation.[45] If the law is civil in nature, it is applicable on the reservation only as it may be relevant to private civil litigation in state court.[46]

b. Violation of public policy, not criminal penalties, determines the nature of state law for criminal jurisdiction under Pub. L. 280.

If the state law prohibits certain conduct, the law falls within Pub. L. 280's grant of criminal jurisdiction.[47] On the other hand, if the state law permits the conduct at issue, but subjects it to regulation, the law must be classified as civil/regulatory.[48] Pub. L. 280 does not authorize enforcement of civil/regulatory laws on an Indian reservation.[49] California contended that its state bingo law[50] was criminal in that it prohibited certain conduct.[51] In rejecting this contention, the Court agreed with the Ninth Circuit and held that the law was regulatory in nature.[52]

The Ninth Circuit had previously addressed the application of section 326.5

40. 783 F.2d 900, 902 & n.4 (1986).

41. 463 U.S. 713 (1983)(holding that a state liquor license was required on the reservation by an Indian seller of liquor for off-premises consumption).

42. *Cabazon Band*, 783 F.2d at 902 n.4.

43. *Cabazon*, 107 S.Ct. at 1088 n.8. 18 U.S.C. § 1161 provides that certain federal statutory provisions prohibiting the sale and possession of liquor within Indian country do not apply "provided that such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country. . . ." *Id.*

44. *Id. Rice* was also decided in the historic context of federal regulation of the liquor trade on Indian reservations. *See infra* notes 128-32 and accompanying text. Statutory and historical context is often significant in limiting the reach of holdings. *See, e.g.*, Rice v. Rehner, 463 U.S. 713, 721 (1983)(*United States v. Mazurie* did not establish tribal sovereignty over liquor control but rather that tribal sovereignty was sufficient to exercise delegated federal liquor authority); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 146-47 (1973)(the State authority over Tribal fishing activities recognized by *Organized Village Activities of Kake v. Egan* was in the context of off-reservation activities not otherwise protected by federal statute). In looking at the statutory language and legislative history of 18 U.S.C. § 1161, the *Rice* Court was unable to find any provision for a "substantive/regulatory" distinction comparable to the criminal/prohibitory, civil/regulatory distinction of Pub. L. 280. *Cabazon*, 107 S.Ct 1083, 1088 n.8 (1987). The Supreme Court would not agree with the court of appeals that Pub. L. 280 provides no basis for the criminal/civil distinction. *Compare Cabazon*, 107 S.Ct. at 1087-88 *with Cabazon Band*, 783 F.2d 900, 902 (1986).

45. *Cabazon*, 107 S.Ct. 1083, 1088 (1987).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See supra* note 13.

51. *Cabazon*, 107 S.Ct. 1083, 1088 (1987). California law permits bingo games to be run only under certain specified conditions. *Id.*; *see also supra* note 13. Violation of the law is a misdemeanor. *Cabazon*, 107 S.Ct. at 1088.

52. *See Cabazon Band*, 783 F.2d 900 (9th Cir. 1986).

of the California Penal Code[53] to Indian reservations.[54] The court rejected the State's attempt to characterize section 326.5 as a criminal law.[55] Seeking to apply the criminal/civil distinction of *Bryan*, the Ninth Circuit distinguished between state "criminal/prohibitory" laws and state "civil/regulatory" laws by looking to the intent of the state law which the state sought to apply.[56] In short, the test for a criminal law is whether the conduct at issue violates the state's public policy.[57]

The Fifth Circuit, in *Seminole Tribe of Florida v. Butterworth*,[58] employed similar public policy analysis.[59] If the state allows the conduct (bingo) or similar conduct (horse racing, jai alai) under state control, then the conduct per se does not violate public policy.[60] In *Cabazon Band*, the Ninth Circuit found this line of reasoning persuasive.[61] In *Cabazon*, the Court was persuaded that the prohibitory/regulatory distinction adopted by the two Circuits was consistent with *Bryan's* construction of Pub. L. 280.[62]

The Court admitted that the distinction does not provide a bright line rule;[63] however, the Court found ample basis for the Ninth Circuit's conclusion: California does not prohibit all forms of gambling,[64] indeed it encourages gambling in the state lottery;[65] nor does California prohibit all bingo[66] or even regulate all aspects of legally operated bingo games.[67] The Court also found that the nature of the law was not transformed by the existence of criminal penalties into a criminal law within the meaning of Pub. L. 280 and remained essentially reg-

53. *See supra* note 13.

54. Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983)[hereinafter *Barona*].

55. 694 F.2d at 1186.

56. *Cabazon*, 107 S.Ct. 1083, 1088 (1987); *Barona*, 694 F.2d at 1188.

57. *Cabazon*, 107 S.Ct. at 1088; *Barona*, 694 F.2d at 1189.

58. 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). Seminole Tribe brought an action seeking a declaratory judgment that the Florida bingo statute did not apply to the Tribe's operation of a bingo hall on its reservation. *Id.* at 310. Although not one of the original Pub. L. 280 states, Florida assumed jurisdiction over reservation Indians by legislative enactment in 1961. FLA. STAT. ANN. §285.16 (Harrison 1982) (covering "criminal offenses" and "civil causes of action"). *See also* Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986); Oneida Indians of Wisconsin v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

59. 658 F.2d at 314-15.

60. *Id.*

61. 783 F.2d 900, 902-03 (9th Cir. 1986).

62. 107 S.Ct. at 1089.

63. *Id.*

64. *Id.* California permits pari-mutuel horse-race betting. CAL. BUS. & PROF. CODE ANN. §§19400-19667 (West 1964 and Supp. 1987). Although certain enumerated gambling games are prohibited under CAL. PENAL CODE ANN. §330 (West Supp. 1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The State does not dispute the Tribe's assertion that over 400 card rooms similar to the Cabazon card club flourish in California. Brief for Appellees at 47-48, *Cabazon*, (No. 87-1708).

65. *Cabazon*, 107 S.Ct. at 1089. California operates a state lottery, CAL. GOV'T CODE ANN. §8880 (West Supp. 1987), and daily encourages its citizens to participate in this form of state-sponsored gambling. *Id.*

66. *Id.* Bingo is legally sponsored by many organizations and is widely played in California. *Id.* There is no effort to forbid the playing of bingo by members of the public over the age of 18. *Id.*

67. *Id.* There is no limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games a participant may play, or the amount of money which a participant may spend, either per game or in total. *Id.*

ulatory.[68] Therefore, concluded the Court, Pub. L. 280 does not authorize the State to enforce California Penal Code section 326.5 on the Cabazon and Morongo Reservations.[69]

c. Characterization of the conduct may determine a court's conclusion as to the nature of the state law.

The Court has clearly indicated that, at least for Pub. L. 280 states, conduct prohibited statewide is prohibited on Indian reservations within the state.[70] This requires a detailed examination of the state's laws to determine if the conduct in question is prohibited or regulated.[71] California attempted to characterize the activity as "high stakes, unregulated bingo" and therefore prohibited conduct, *i.e.*, criminal.[72] The majority rejected this characterization and the dissent predicted that the reasoning of the majority would exempt from state law other profitable but illegal commercial enterprises, *e.g.*, cock fighting, tattoo parlors, prostitution.[73]

The strategy of characterization is a significant one. The consensus may be that cock fighting, tattoo parlors, and prostitution are "prohibited" in California. In *United States v. Marcyes*,[74] it was, in part, the characterization of the conduct as selling "dangerous fireworks" that enabled the court to find the conduct "against public policy"[75] because selling "fireworks" was regulated and not prohibited in Washington.[76] Although the Court expressed its confidence in the ability of the lower courts to identify the nature of state laws,[77] the process provides opportunities for disputed characterizations of the conduct.

d. County gambling ordinances are not "state" law under Pub. L. 280.

The *Cabazon* Court said that Pub. L. 280 did not authorize the County to enforce its gambling ordinances on the reservations.[78] Section 2 of Pub. L. 280

68. *Id.* at 1089.

69. *Id.*

70. *Id.* at 1089 & n.10.

71. *Id.*

72. *Id.* This characterization was adopted by the dissent. *Id.* at 1095. "[T]he plain language of Pub. L. 280 . . . authorizes California to enforce its *prohibitions* against commercial gambling on Indian reservations. The State *prohibits* bingo games that are not operated by members of designated charitable organizations or which offer prizes in excess of $250 per game." *Id.* [Emphasis added.]

73. *Id.*; *see also supra* note 71.

74. 557 F.2d 1361 (9th Cir. 1977).

75. *Id.* The Assimilative Crimes Act (ACA), 18 U.S.C. §13 (1982) includes as crimes activities "against public policy." Like OCCA, the ACA authorizes federal prosecution, not state. *See also infra* notes 84-91 and accompanying text regarding the OCCA analysis.

76. The dissent ignores the major role played by the federal government in approving tribal ordinances, contracts and other details regarding activities carried out on Indian reservations. For example, in Moapa Band of Paiute Ind. v. U.S. Dept. of Inter., 747 F.2d 563 (9th Cir. 1984), the court upheld the Department's recission of a tribal ordinance which would have permitted prostitution on a reservation in Nevada. The Department viewed the activity as against federal policy despite the fact that the activity was regulated and not prohibited within the state. *Id.* Significantly, the Moapa Tribal Constitution requires Department approval of all tribal ordinances. *Id.*

77. *Cabazon*, 107 S.Ct. 1083, 1089 n.10 (1987).

78. *Id.* at 1089 n.11.

provides that the criminal laws of the "State" shall have the same force and effect within "Indian country" as they have elsewhere.[79] The Court said that this language seems to exclude local laws.[80]

Although the Court did not decide the issue of whether Pub. L. 280 authorizes the enforcement of any local ordinances on Indian reservations,[81] it did indicate that such authorization was doubtful.[82] This reasoning refutes the reasoning advanced by the California federal courts in three cases decided in 1971.[83] Although these cases were reversed on various jurisdictional grounds, the rationale of the district courts lurked ominously in the background of Pub. L. 280.[84]

2. The Organized Crime Control Act Authorizes Federal Prosecution Based on State Criminal Laws, Not State Prosecution.

The State and County also argued that the Organized Crime Control Act (OCCA) authorized them to enforce their gambling laws on the reservation.[85] The OCCA makes violations of some state and local gambling laws violations of federal law.[86] The Court said that although OCCA authorizes federal prose-

79. *Id.*; *see also supra* note 31.

80. *Id.*

81. *Id.* Even if Pub. L. 280 does authorize the enforcement of local criminal/prohibitory laws, the ordinances in question are civil/regulatory in nature. *Id.* The bingo ordinance is similar to §326.5. *Id.* Although Ordinance No. 331 prohibits gambling on all card games in the unincorporated areas of the county, the County allows municipalities within the county to enact their own ordinances permitting cards games such as those played in the Cabazon card club. *Id.*; *see also supra* notes 11, 63.

82. *Cabazon*, 107 S.Ct. at 1089 n.11.

83. *See* Rincon Band of Mission Indians v. Co. of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971); Ricci v. Co. of Riverside, Civ. No. 71-1134-EC (C.D. Cal. Sept. 9, 1971); Madrigal v. Co. of Riverside, Civ. No. 70-1893-EC (C.D. Cal. Feb. 16, 1971), all three *rev'd on other grounds*, 495 F.2d 1 (9th Cir. 1974). The district courts held that county ordinances were "state law" within the meaning of Pub. L. 280 and applied with full force on the reservation as within the rest of the county. *Rincon*, 324 F. Supp. at 375, 378.

84. The Ninth Circuit later held that county housing ordinances were not "state law" within the meaning of Pub. L. 280. Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). The *Bryan* Court cited *Santa Rosa* with approval for the proposition that even if Pub. L. 280 were assimilationist when enacted, Congress had subsequently rejected that policy and courts should take cognizance of that change. 426 U.S. 373, 388 & n.13, 389 n.14 (1976). The *Cabazon* Court, however, did not cite *Santa Rosa* or rule directly on this point.

85. *Cabazon*, 107 S.Ct. at 1090.

86. OCCA, 18 U.S.C. §1955 (1982), provides in part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) illegal gambling business means a gambling business which—
>
> (i) is a *violation of the law of a State or political subdivision* in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." (Emphasis added.)

cution,[87] it does not provide for state authorities to enforce federal law or to make arrests on the reservation.[88]

Having decided that California had no authority under OCCA to enforce state gambling laws on Indian reservations,[89] the Court declined to resolve the issue of whether OCCA's "violation of the law of a State or political subdivision" was subject to a "violation of public policy" test as is Pub. L. 280.[90] As the Court noted, if state officials were legitimately concerned that the Tribes' gambling operations were in violation of OCCA, they could report the matter to federal authorities for federal investigation and determination.[91]

B. Absent Express Congressional Consent, Federal Pre-emption Defeated the State's Jurisdiction

Having found no express congressional consent to the application of the state and county gambling laws in question, the Court considered whether the operation of federal law pre-empted state authority.[92] Pre-emption analysis in the context of federal and state authority on Indian reservations is unique.[93] Traditional notions of tribal sovereignty and the recognition of this sovereignty in congressional Acts to promote tribal sovereignty and economic development, inform the analysis.[94] Thus, the Court derives congressional intent not only from statutes and treaties but also from the underlying broad policies and historic notions of tribal sovereignty.[95]

87. There have been federal OCCA prosecutions for the operation of casino type gambling businesses on reservations in states where such businesses are prohibited. *See* United States v. Farris, 624 F.2d 890 (9th Cir. 1980) (Washington), *cert. denied*, 449 U.S. 1111 (1981); United States v. Dakota, 796 F.2d 186 (6th Cir. 1986) (Michigan). *Cabazon*, 107 S.Ct. 1083, 1090 (1987). The Court noted that it was not aware of any federal effort to use OCCA to prosecute the playing of bingo on Indian reservations. *Id.* at 1091. Indeed, the federal government has by and large encouraged the development of Indian bingo. *Id.* There are currently over 100 such operations in the U.S., many of which have been in existence for several years. *Id.*

88. *Id.* at 1091.

89. *Id.*

90. *Id.* at 1090. The Ninth Circuit, in United States v. Farris, used the same "violation of public policy" test to analyze whether a tribal activity violates state law within the meaning of the OCCA that it used for Pub. L. 280 in *Barona* and *Cabazon*. 624 F.2d 890, 895 (9th Cir. 1980). The Sixth Circuit rejected this approach in United States v. Dakota, finding no basis for regulatory/prohibitory distinction in analyzing OCCA cases and therefore no need for such a test. 796 F.2d 186, 189 & n.3 (6th Cir. 1986). The Sixth Circuit reasoned that there was no danger of state encroachment on tribal sovereignty in OCCA because OCCA is the exercise of federal rather than state authority. *Id.*

91. *Cabazon*, 107 S.Ct. 1083, 1091 n.16 (1987); *cf.* Pueblo of Santa Ana v. Hodel, 663 F.Supp. 1300, 1303 (D.D.C. 1987)(New Mexico State Attorney General asserted that pari-mutuel dog racing was illegal in New Mexico and should be considered a criminal activity under the ACA. Court agreed that State's legalization of "pari-mutuel horse racing" did not legalize "pari-mutuel dog racing" for purposes of ACA.).

92. *Cabazon*, 107 S.Ct. at 1092.

93. Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982).

94. *Id.*

95. *Id.* In *Ramah*, the Court found that state taxation was pre-empted, not by specific Act of Congress, but rather by the extent of federal interest in tribal development which would be hampered by the state taxation.

Generally, state jurisdiction is pre-empted on Indian reservations.[96] In the area of state taxation of Indian tribes and tribal members, the Court has found *per se* pre-emption.[97] The Court has also found that "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."[98] Therefore, the question of federal pre-emption of state jurisdiction requires a determination of whether the exercise of state jurisdiction "interferes or is incompatible with federal and tribal interest reflected in federal law," or if "the state interests at stake are sufficient to justify the assertion of state authority."[99] Here also, considerations of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development, informed the Court's inquiry.[100]

1. Federal Interest in Tribal Self-Government, Self-Sufficiency and Economic Development Favors Pre-emption of State Jurisdiction.

The Court considered a variety of sources to ascertain the federal interest in tribal self-government, self-sufficiency and economic development.[101] As evidence of the congressional interest in these matters, the Court relied heavily on congressional declarations of policy in the Indian Financing Act (IFA) of 1974[102] and in the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975.[103] The Court also looked to statements by the Executive branch, beginning with President Reagan's 1983 Statement on Indian Policy.[104]

The Court found evidence of federal support for Indian bingo in various administrative acts designed to carry out these policies.[105] The Secretary of the

96. *Cabazon*, 107 S.Ct. 1083, 1091-92 (1987). The Tribes urged that, absent express congressional consent, state law was per se pre-empted and no further analysis was necessary. *Id.* The Court refuted this assertion and cited two cases in which it had held that, absent express congressional consent, a state could require a tribal smokeshop to collect the state cigarette sales tax from non-Indian customers on the reservation. *Id.* (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976)).

97. *Id.* at 1091 n.17.

98. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983)(footnotes omitted). The cases cited in the footnotes are limited to collection of state cigarette taxes from non-tribal members and regulation of on-reservation fishing to conserve a scarce state resource.

99. *Id.* at 333, 334.

100. *Cabazon*, 107 S.Ct. 1083, 1092 (1987); *see also* 462 U.S. at 334-35.

101. *See supra* note 95.

102. 25 U.S.C. §§1451-1543 (1982 & Supp. III 1985). The IFA declared in part that it was "the policy of Congress . . . to develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." *Id.* at §1451.

103. 25 U.S.C. §450a-n (1982 & Supp. III 1985). The ISDEAA expressed Congress' interest in transferring from federal domination of Indian programs to Indian planning, conduct and administration of Indian programs. *Id.* at §450a(b).

104. 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983). The President reaffirmed the federal interest in the concept of Indian self-government and the importance of economic development and self-sufficiency to that concept, saying, "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." *Id.*

105. *Cabazon*, 107 S.Ct. 1083, 1093 (1987)(referring to S. Rep. No. 99-493, (1986)[hereinafter SRP] and H.R. Rep. No. 99-488 (1986)[hereinafter HRP]).

Interior made grants and guaranteed loans for the purpose of constructing bingo facilities,[106] approved tribal ordinances establishing and regulating the gaming activities involved,[107] reviewed tribal bingo management contracts,[108] and issued detailed guidelines governing that review.[109] The Department of Housing and Urban Development and the Department of Health and Human Services also provided financial assistance to develop tribal gaming enterprises.[110] The Director of Indian Services, Bureau of Indian Affairs submitted an affidavit on behalf of the Tribes' position, which confirmed that it was the department's view that bingo enterprises were consistent with federal goals of tribal economic development, self-sufficiency and self-determination as explicated by President Reagan's Indian Policy Statement.[111]

Federal policies are not static. They differ in regard to different subjects, *e.g.*, liquor or taxes, and vary over time. While *Cabazon* was before the Court, Congress was considering legislation for national regulation of on-reservation Indian gambling.[112] The Tribes argued that potential federal legislation was further evidence of overriding federal interest in the area.[113] The dissent argued that the absence of positive congressional action on the matter deprived the Executive branch of any authority to assert a pre-emptive federal interest against state regulation.[114] The dissent's position ignores other sources of broad Executive authority over reservation Indian activities.[115] Nevertheless, the dissent's comments, perhaps even more than the similar comments of the majority and the Tribes, highlight the critical nature of federal support for tribal enterprises.

2. Tribal Interest in Self-Government, Self-Sufficiency and Economic Development Favors Pre-emption of State Jurisdiction.

The Tribes' interests parallel the federal interests in this situation.[116] The Cabazon and Morongo Reservations contain no natural resources which can be exploited for income or employment.[117] Self-determination and economic de-

106. *Id.* (referring to SRP, p. 5).

107. *Id.* (referring to HRP, p. 10).

108. *Id.*; *see also supra* note 9.

109. *Cabazon*, 107 S.Ct. 1083, 1093 n.22 (1987). The first guidelines were issued on July 20, 1984; more detailed guidelines were issued on April 7, 1986. J.A. 61a-70a, *Cabazon*, (No. 87-1708); *see also supra* note 9.

110. *Cabazon*, 107 S.Ct. at 1093 n.22 (referring to SRP, p. 5).

111. *Id.* at 1092 n.21; *see also supra* note 104.

112. Brief for Appellees at 23 & n.20, *Cabazon*, (No. 87-1708).

113. *Id.* at 24.

114. *Cabazon*, 107 S.Ct. at 1095, 1098.

115. Five sources of the Secretary of the Interior's authority over Indian activities are: 1) 25 U.S.C. §2 and §9 vesting the management of Indian affairs in the Commissioner of Indian Affairs and authorizing the President to prescribe such regulations as he might think necessary to carry out various Acts of Congress relating to Indian affairs; 2) section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476, authorizing Tribes to adopt constitutions and bylaws subject to approval by the Secretary; 3) the general trust responsibility as exemplified by 25 U.S.C. §81 Contracting; 4) the judicially established guardian-ward relationship; and, 5) the policies of review and approval invested in the Secretary by the Tribes in their Constitutions. M. PIERCE AND R. CLINTON, LAW AND THE AMERICAN INDIAN 299-300 (2nd. ed. 1973).

116. *Cabazon*, 107 S.Ct. at 1092 n.21.

117. *Id.* The Cabazon Band occupies 1700 acres of desert terrain, the Morongo Band has 32,000 acres of such terrain. J.A. at 24, *Cabazon*, (No. 87-1708).

velopment are not within the Tribes' reach if the Tribes cannot raise revenues and provide employment for their members.[118]

Anticipating a balancing test between its interests on the one hand and the federal and tribal interests on the other, the State attempted to minimize the weight of the tribal interests at stake here.[119] In the past, the Court has given little weight to tribal economic interest in marketing non-Tribal products on the reservation. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[120] the Tribes argued that a ruling against them would cause devastating economic harm by eliminating their competitive advantage.[121] The Court, however, found that the Tribes were attempting to "market an exemption from state taxation" and were not marketing a product "generated on the reservations by activities in which the Tribes [had] a significant interest."[122]

In *Cabazon*, the State argued that the Tribes were merely marketing an exemption from the state's bingo regulations;[123] however, the Court recounted a variety of factors which distinguished the Cabazon and Morongo bingo operations from the Colville cigarette sales.[124] The Court concluded that the Tribes were not merely importing a product onto the reservation for immediate resale to non-Indians as in the cigarette sales,[125] but were instead engaged in "concerted and sustained" management of tribal resources similar to the Mescalero Apache Tribe's operation of a resort complex, featuring hunting and fishing on tribal lands.[126] The concept of a "value added" factor helps to distinguish and to reconcile the apparently diverse holdings of *Colville, Mescalero* and *Cabazon*.

The State also argued that the Tribes were required to comply with state bingo regulations in light of the Court's decision in *Rice v. Rehner*.[127] But, the Court distinguished *Rice*[128] as being informed by the particular history of federal regulation of liquor traffic to the Indians.[129] That history demonstrates that Congress never recognized any sovereign tribal interest in liquor regulation and that Congress anticipated concurrent federal and state regulation.[130] In *Cabazon*, the Court found no such federal tradition and, in fact, federal policies promote the very tribal activities with which the State sought to interfere.[131]

The significance of the economic development factor in resolving *Cabazon* extends beyond these Tribes, beyond bingo. Economic development is a common

118. *Cabazon*, 107 S.Ct. at 1092 n.21.

119. *Id.* at 1093.

120. 447 U.S. 134 (1980).

121. *Id.* at 154; *see also supra* note 99.

122. 447 U.S. at 155.

123. *Cabazon*, 107 S.Ct. 1083, 1093 (1987).

124. *Id.* at 1093-94. The Court noted: building and maintaining facilities, providing ancillary services to the bingo patrons, and overall quality control efforts to increase attendance. *Id.* at 1097 (disagreeing with the significance of these "services").

125. *Id.* at 1094.

126. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983). The Court rejected the State's contention that the Tribe was merely marketing an exemption from state hunting and fishing regulations and concluded that New Mexico could not regulate on-reservation hunting and fishing, even by non-Indians.

127. 463 U.S. 713 (1983).

128. *Cabazon*, 107 S.Ct. 1083, 1096 (1987)(disagreeing with the majority's distinguishing of *Rice*).

129. *Id.* at 1094.

130. *Id.*; *see also supra* notes 41-46 and accompanying text.

131. *Id.*; *see also supra* notes 105-15 and accompanying text.

tribal problem.[132] The growing tribal emphasis on financial activities not directly related to federal support[133] has expanded not only tribal entrepreneurship but tribal sovereignty.[134] Federal "interest" in tribal economic development and Indian self-sufficiency has fluctuated and has been motivated, at least in part, by a desire to decrease Indian need for land[135] and Indian demands on the federal budget.[136] In the past this has led to such misguided, and for the Indians disastrous, federal efforts as the Allotment Acts[137] and Termination Acts.[138] Tribal interests may not only parallel the federal interest but exceed it.

3. State Interest in Preventing Infiltration by "Organized Crime" Is Not Sufficient to Overcome Federal and Tribal Interests Favoring Pre-emption of State Jurisdiction.

As a counterweight to these strong federal and tribal interests, California offered an alleged interest in preventing the infiltration of the tribal games by organized crime.[139] The Court found this concern insufficient to justify an absolute ban on tribal bingo games while allowing state regulated games in other parts of the state, or even to justify state regulation of the games on the reservations.[140] The Court credited the State with a legitimate concern, but found, given the total lack of evidence as to any such infiltration, that the concern was insufficient to overcome the pre-emptive force of federal and tribal interests.[141]

IV. CONCLUSION

Cabazon illustrates the perpetual tension between Tribal and State sovereign interests. The criminal/prohibitory, civil/regulatory distinction is now well established for Pub. L. 280 states.[142] These states are authorized to prohibit conduct on Indian reservations that is prohibited throughout the state as being against the public policy of the state.

No similar line of cases has developed for states without a statutory grant of state criminal authority over "Indian country". Although the federal government has prosecuted actions against tribal gambling activities in non-Pub. L. 280

132. D. GETCHER AND C. WILKINSON, FEDERAL INDIAN LAW (2nd ed. 1986).
133. *Id.* at 16.
134. *Id.*
135. F. COHEN, *supra* note 38, at 128, 153.
136. *Id.* at 132, 155-56.
137. *Id.* at 127-43.
138. *Id.* at 152-80.
139. *Cabazon*, 107 S.Ct. 1083, 1094 (1987).
140. *Id.* The State asserted, in briefs and stipulations, that all tribal bingo was prohibited. *Id.* at 1086 n.3. However, in oral argument before the Court, the State claimed it would include Indian Tribes as designated charitable groups and authorize them to conduct bingo games subject to compliance with state regulations. *Id.*
141. *Id.* at 1094. The Department of Justice expressed similar concerns in hearings on H.R. 4566, House Committee on Interior and Insular Affairs, 98th Cong., 2d Sess., 15-39, 66-75 (1984). *Id.* at 1094 n.24. The State, however, stipulated that there was no evidence of organized crime infiltration. Motion Brief for Appellees at 20, *Cabazon*, (No. 87-1708). Despite these concerns, the Federal Government continues to support tribal bingo enterprises. Brief for Appellees at 23 & n.20, 24, *Cabazon*, (No. 87-1708).
142. Based on *Bryan* and *Cabazon*.

states, the cases concerned casino-type gambling operations that were illegal in the state and not approved by the federal government.[143] The federal response to *Cabazon* in relation to other tribal commercial activities, including gambling, is uncertain.[144] Despite the uncertainty, the criminal/prohibitory, civil/regulatory distinction of *Bryan* and *Cabazon* has already influenced legislation in New Mexico.[145]

The reasoning in *Cabazon* does reinforce the potent impact of the Court's perception of federal policies on its interpretation of the relative weights of state and tribal interests. Other courts have already taken notice of the *Cabazon* Court's affirmation of the significance of federal policy promoting tribal self-sufficiency and economic development.[146] In *Crow*, the Ninth Circuit considered tribal economic interests as a barrier to state regulation/taxation in two ways. First, the Ninth Circuit found that tribal economic interests in tribal coal and federal support for tribal economic development pre-empted state taxes that interfered with those interests.[147] This strong federal interest has broad pre-emptive effect, especially where Tribes are generating value by tribal activities.[148]

Second, the Ninth Circuit found that tribal self-government was a separate barrier to state regulation and that economic development was a necessary component of tribal sovereignty.[149] The court found that revenue raising for tribal services and tribal employment was a significant component of tribal self-government[150] and that management of tribal territory and resources was an inherent aspect of tribal sovereignty.[151] For the Tribes, federal support for tribal economic development may be a better long term gamble than federal support for bingo.

LINDA S. LONSDALE

143. *See supra* note 89.

144. *See supra* note 90.

145. New Mexico is a non-Pub. L. 280 state. New Mexico legislators, concerned about competition for charitable bingo from unregulated, higher jackpot tribal bingo operations, considered introducing legislation to outlaw bingo in New Mexico. *Bill Would End Bingo*, THE NEW MEXICAN, Dec. 6, 1987, at A-1, col. 2. No such bill was introduced. Conversely, Senate Bill 311 was passed, allowing video gaming for non-profit charitable and fraternal organizations. THE NEW MEXICAN, Feb. 20, 1988, at A-5. The Governor vetoed this bill because of his concerns about the state's ability to control another form of gambling, noting that if video gaming were allowed in the state, "our Indian nations will seek the opportunity to use this gambling device." *Veto Scuttles Video Gaming Legislation*, THE NEW MEXICAN, Mar. 10, 1988, at A-1.

146. Crow Tribe of Indians v. Montana, 819 F.2d 895, 898 (9th Cir. 1987), *aff'd*, 108 S.Ct. 685 (1988).

147. 819 F.2d at 898-900.

148. *Id.* at 899.

149. *Id.* at 902.

150. *Id.* at 902-03.

151. *Id.* at 902.