

## **Sovereign Indian Nations and the ABC**

**(Or: Why can the ABC Regulate Alcohol Sales on Indian Reservations?)**

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Rules for wine in the sovereign nation of France are determined by the French. The United Kingdom defines how much beer really is in a pint. Individual Provinces decide whether to allow sales of alcoholic beverages to 19 year old Canadians. Indian tribes in American are sovereign nations, or so we are told. So, in California do sovereign Indian nations define their own rules for license applications sales. No. Does the ABC have authority to regulate alcohol sales in sovereign Indian nations? Yes. But how can that be?

Each of the fifty U.S. states may enact their own liquor regulations. All sovereign nations may also, from no laws to no liquor.

The relationship between the United States government and Indian nations south of Canada and north of Mexico is “sovereign-to-sovereign,” and Congress is authorized by the Constitution to regulate commerce “with the Indian tribes” (107 Harv.L.Rev. 381 Dec. 1993). Why then does the State of California Department of Alcoholic Beverage Control have jurisdiction over the sovereign nations within its boundaries?

While an Indian Tribe in California may, with little or no local intervention, build a casino of unlimited size and expense, may construct and staff a fire department, police department, medical facilities and sophisticated libraries and school systems that Indian

Tribe cannot sell alcoholic beverages unless it has been granted that authority by the ABC following the same application process with which licensees are so familiar.

In many municipalities, a Conditional Use Permit must be granted before the ABC can issue that license. On the reservation, with exceptions set by compact, the Tribe dictates exclusively what will be built and how and where and what that site's uses will be. However, before alcohol is sold, an ABC license is required. Since an ABC license application process is necessary, Indian tribe applicants frequently find themselves surrounded by angry protestors who don't want the reservation adjacent to their land, don't want the Tribe in the neighborhood, don't want the Las Vegas style casino within view and don't want casino guests driving on "their" streets to and from the reservation. Protesting neighbors have no other realistic forum to complain about any of that and complain anyway, while Indians frequently voluntarily try appeasement. For example, on Tuesday May 6 in Sonoma County:

An overflow crowd packed a town hall meeting Tuesday to hear how they can stop or contain an (sic) casino proposed at Sonoma's doorstep.

With more than 400 people in attendance, Sonoma's community center was so jammed that some stood outside and listened through open windows. The overriding sentiment was made apparent when county Supervisor Valerie Brown, who organized the meeting, asked for a show of hands as to how many would join a new organization called "No Las Vegas in Sonoma." Nearly everyone raised their hands. (May 7, 2003, Press Democrat)

Meanwhile, in San Bernardino on Monday the 6<sup>th</sup> of May:

Neighbors of the San Manuel Band of Mission Indians asked San Bernardino leaders at Monday's City Council meeting for an opportunity to observe talks between the city and the tribe about its casino expansion.

San Bernardino Mayor Judith Valles told neighbors she's confident the tribe will address many of their concerns, based on a two-hour meeting Friday with tribal leaders. Both she and City Attorney James Penman noted, however, that they're not sure whether the tribe's council will approve the measures when it meets Wednesday. (May 7, 2003, Press-Enterprise)

But where hostile neighbors have no genuine way to halt construction of a casino, they can protest the liquor license application. And they do. Sometimes in a coordinated fashion.

When Indian nations entered into Eighteenth and Nineteenth Century treaties with the new United States, these were contracts dictated by a conquering power, negotiated and written in a language foreign to the Indians. But in Worcester v. Georgia (United States Supreme Court, 1832) Chief Justice John Marshall opined that Indian Treaties were not acts of surrender but were reservations by the tribes of all rights not clearly granted to the United States. Hence the term "reservation" for retained tribal lands (107 Harv. L. Rev. at page 402).

The lines of division between state or federal law and tribal authority are not always easily discerned. In FPPC v. Agua Band of Cahuilla Indians (Superior Court, Sacramento County February 2003), the court found that California has jurisdiction to

pursue an Indian tribe for state election campaign disclosure violations. In Flynt v. California, (Court of Appeal 2002) the California – Tribal gambling compact was upheld as constitutional so Indian tribes continue casino gambling under the compact. Civil litigation against an Indian nation may be barred by sovereign immunity unless such immunity is waived (as part of a contract, for example).

About 150 years after Worcester, the United States Supreme Court in Rice v. Rehner, (1983) upheld California's right to require an ABC license before alcohol could be sold on an Indian reservation. Eva Rehner was a federally licensed trader operating a general store on the Pala Indian reservation. Recall that by the constitution, Congress regulates commerce with Indian tribes. The Ninth Circuit Court of Appeal opined that Rehner did not need an ABC license to purchase alcohol from wholesalers and sell alcohol from her store on the Reservation. Justice O'Conner in a six – three decision disagreed. The Court founded its decision on three concepts: 1) Tradition “has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians.” 2) The Courts have found concurrent jurisdiction at state and federal levels for “the use and distribution of alcoholic beverages in Indian country.” 3) “Congress has authorized state regulation over Indian liquor transactions by enacting” certain federal statutes.

In dissent, Justice Blackmun noted that a “State could not require” a state cigarette sales permit on an Indian reservation and “could not impose a use tax on personalty installed in ski lifts at a tribal resort.” The Court majority held that history and tradition and federal statute all lined up in favor of state regulation of alcohol sales on Indian reservations ; therefore the State of California could require an ABC license before

alcohol sales could occur on Indian territory. The dissent pointed to historical and pervasive federal regulation of alcohol matters pertaining to Indian tribes. Justice Blackmun argued, “Because nothing in the language or legislative history of [Federal Statute] indicates any intent to confer licensing authority on the States, I would hold that California's attempt to require Indian traders to obtain state liquor licenses is pre-empted by federal law.”

More recently, in Fort Belknap Indian Community v. Mazurek (1994) the Ninth Circuit Court of Appeal cited Rice v. Rehner and upheld Montana’s authority to prosecute criminal violations of state liquor law indicating: “...[T]he Rice Court found that it was not necessary that Congress expressly indicate that the State had jurisdiction to regulate liquor....The same reasoning applies here. Given the unique context of liquor regulation and enforcement, it would not be a severe erosion of tribal sovereignty to interpret [Federal Statute] as authorizing the prosecution of Indians in state court for liquor violations on reservations.”

States derive their independent power to regulate alcohol from the Federal Constitution. But the Constitution grants no authority to states with respect to sovereign nations sited within state boundaries. The Twenty-First Amendment to the United States Constitution reads, in part:

“Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

Indian tribes are neither states, nor territories or possessions of the United States. The Twenty-First Amendment could have but does not make reference to Indian

reservations. Until 1983 and Rice v. Rehner, nothing authorized California to intrude into Indian sales of alcohol on reservations

If the Indian – Federal treaties are really grants of authority from Indian Tribes to the United States with all not granted being reserved to the tribes, Rice v. Rehner is wrong. The Indian tribes did not clearly give government power over alcoholic sales and dispensation on Indian reservations. None of the bases for imposing state jurisdiction over alcohol sales in Rice v. Rehner can stand up under honest scrutiny.

If Indian tribes in California are sovereign nations, state agencies including the ABC should not be involved in Indian affairs unless the Tribes clearly authorize that intrusion. Someone might just convince a court of that injustice one day. Or perhaps the key resides in Sacramento by initiative or legislation. There is precedent for Indians ejecting the government from places the government doesn't belong, so don't bet against the Indians.

**"Solomon, Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Use Permits, Variances, Police and Fire permits, Entertainment law, and Gambling Law; as well as Business and Personal Injury litigation. Solomon, Saltsman & Jamieson can be reached at 800 405 4222."**