

Deal

State Lawmakers Willing to Play for a Piece of the Gaming Pie

By Jeff Hinkle

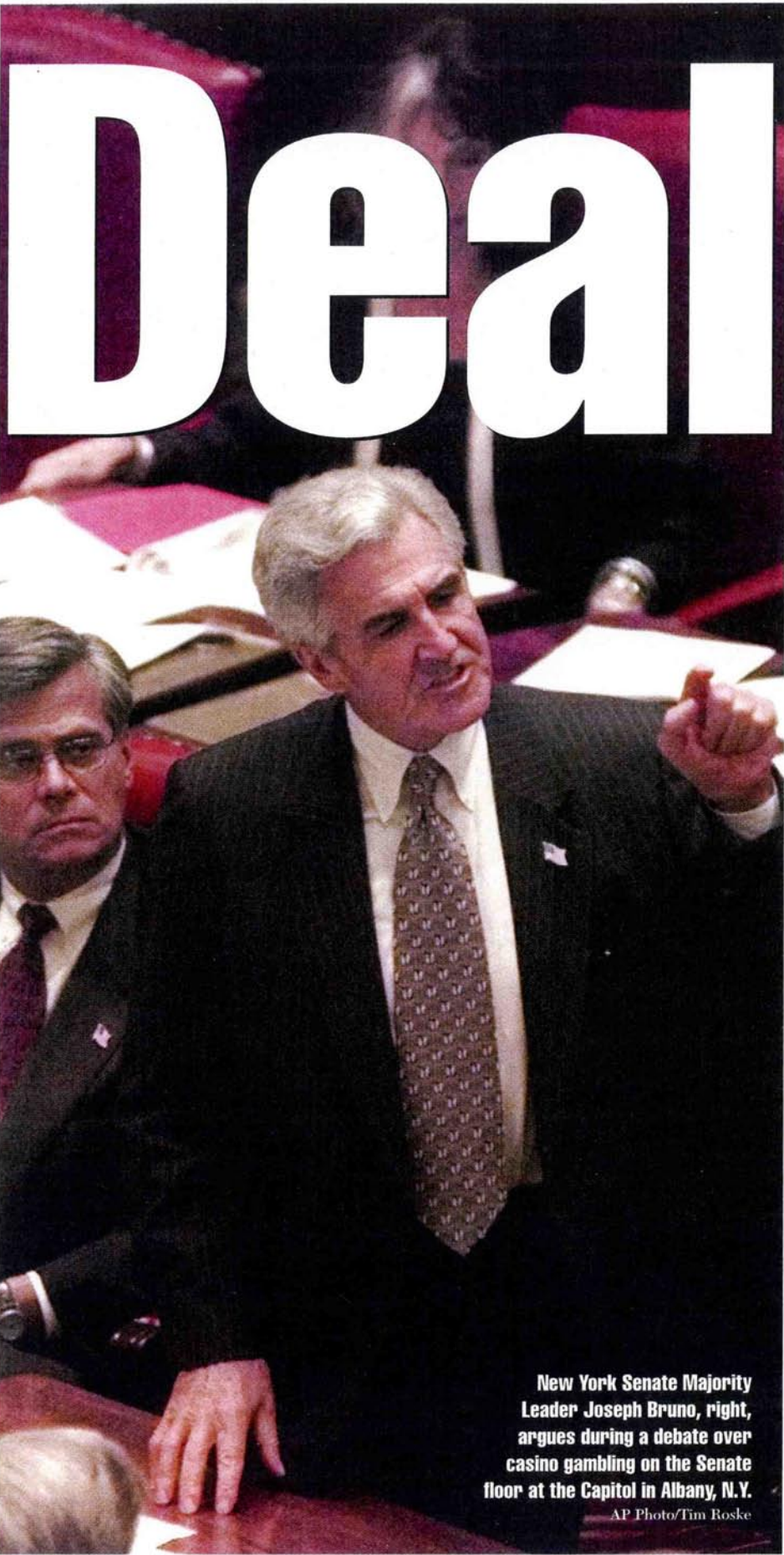
WHEN THE BUREAU OF INDIAN Affairs reversed the federal recognition bid by the Nipmuc of Massachusetts last fall, tribal officials immediately announced they were challenging the decision. Now they have legal fight in front of them and their much-ballyhooed plans to open a casino in central Massachusetts are on hold.

But the BIA's reversal — which undid a last-minute tribal recognition approval by Clinton-era officials at the agency — also puts Massachusetts residents in limbo. Like their Nipmuc neighbors, they too must now wait and see if an Indian casino will be doing business in their neck of the woods anytime soon. Some were excited about the prospect, others less so.

Like the residents of many states, the people of the Bay State have been hearing lawmakers argue the pros and cons of tribal gaming for years. Massachusetts State Representative Reed Hillman says his constituents have made up their minds. The people of Sturbridge, Mass. — the town he represents — are against a casino operating near their bucolic community, he says, which is why he has adamantly opposed the Nipmuc plan since it was first announced.

"It comes down to quality of life issues," says Hillman. "There is a surge in traffic. There is a surge in crime. It puts pressure on the local infrastructure and schools. It cuts into local businesses by offering services that are non-taxed. Casinos do create jobs, but they are not the kind of jobs we want for our kids: busboys, waitresses."

But Mark Carron, who also represents Sturbridge voters in the state house, is not so sure.



New York Senate Majority Leader Joseph Bruno, right, argues during a debate over casino gambling on the Senate floor at the Capitol in Albany, N.Y.

AP Photo/Tim Roske

By Carron's count, the people of his district favor a casino "three-, four-, five-to-one," he says. And the "quality of life issues" that Hillman fears are mere facts of life in Carron's eyes.

"When people say casinos bring increases in traffic and crime to an area, I say any new business brings more traffic and crime to an area because new businesses mean increased growth," he says. "We have a convenience store in Sturbridge that gets robbed every six months. Do you then argue that convenience stores bring more crime to an area?"

But perhaps more significant than Carron's amiable attitude toward gaming is his acknowledgment that a casino might be just what the doctor ordered for the financially troubled central Massachusetts region he represents. If the Nipmucs manage to convince BIA officials that they do indeed deserve a second shot at recognition, Carron says he plans to sit down with tribal leaders and talk.

"Tribes look to gaming because they have concerns about education and housing and health care for their people," he says. "Well, we have needs in our community as well. My constituents have concerns not unlike [the tribes'] concerns. If they get their recognition, I'd like to be at the table with my laundry list. I'd like to say to them: 'Here is *our* wish list; these are the needs of the people in my area.' And I'd like to see where the Nipmucs are willing to participate."

Carron is not alone. Where once many state legislatures took a dim view of the Indian gaming, more and more of them are now looking at tribal casinos as a potential source of revenue in increasingly tough times. And tribes — once steadfast in the refusal to share the pot with states because they wanted nothing to do with anything that resembled local taxes — are now more likely to compromise with politicians in hopes of improving their odds and dodging costly court battles.

In recent months, deals have been struck in several states where it appears everyone — tribes, local governments and even anti-Indian gaming lobbies — are walking away from the table winners. Last November an out-of-court settlement was inked in New Mexico where 11 tribes agreed to share a percentage of their casino revenues with the state. Politicians in other states, such as Wisconsin, Mississippi and Arizona, are also rethinking their existing compacts to ensure the state coffers see a piece of the action. And, perhaps most significantly, New York lawmakers — reacting to projected money woes following the terrorist attacks of September 11 — recently approved a deal that clears the way for as many as six new Indian casinos to open in that state. And New York politicians have not been shy about their plans to share in the pot.

It looks like one more twist in the ever-morphing world of Indian gaming, and industry observers predict it is a trend that is here to stay.

Not that long ago it looked like Indian tribes contemplating the casino game held all the cards. The language of the Indian Gaming Regulatory Act (IGRA) of 1988 and a handful of key court decisions in the early 1990s made it clear — when push came to shove — that sovereign Indian nations had final say over the operation of casinos.

"Following the passage of IGRA, most states were surprised when it came to the question of sovereignty with respect to Indian tribes," says William Eadington, director of the University of Nevada at Reno's Institute for the Study of Gambling and Commercial Gaming. "It was a rude awakening for state governments. They found that they didn't have a lot of control over the [Indian gaming] industry. States felt that they should be the ones making decisions, which is why many of them fought for control in the courts, but the courts generally favored tribes."

But Eadington says there were "inconstancies" right from the start within IGRA, and as states and tribes began draft an array of dissimilar gaming compacts, those inconsistencies became clear. Even before IGRA, the Supreme Court handed down a confusing but important ruling in 1987's *California v. Cabazon Band of Mission Indians*, that declared states could not regulate gaming, unless it was determined that Indian gaming offended local values.

The policy makers who committed IGRA to paper paid little attention to the inconstancies though, Eadington says, because few thought Indian gaming would amount to much.

"When IGRA was passed, many believed it was all about bingo," he says. "Lawmakers thought tribes would open bingo parlors and that that it would only happen in states that already allowed for bingo, lotteries and race-tracks. But then you had states such as Minnesota and South Dakota, which began negotiating compacts with tribes early on when there was no other form of gambling allowed in the state."

Meanwhile, some states governors were dragged kicking and screaming to the negotiating tables forced by judges to sign compacts with tribes bent on gaming. While

in other states, such as California, lawyers worked around the clock trying to find a compromise while confident tribal leaders advertised illegal class III slot machines in their bingo halls.

It made for a confusing picture, but Eadington says two things happened that sharpened the focus for everyone. One of those was a string of conservative judicial decisions in the mid-1990s that favored state rights over tribal rights. Key amongst those was a 1996 verdict by the Supreme Court that ruled Congress had overstepped its authority when drafting IGRA by allowing tribes to sue uncooperative state governments.

From a lawyer's perspective it began to look like state authorities were being dealt a winning hand.

But more important to the industry than the judicial setbacks, says Eadington, was victory of sorts — the jackpot deal struck between Connecticut and the Mashantucket Pequots that made everyone sit up and take notice.

"Everything changed after Foxwoods," he says, referring to the celebrated billion-dollar-a-year casino that was opened by the Pequots in 1991.

"The Pequots offered the state 25 percent of all slot machine revenue with a guarantee of \$100 million per year as long as they had exclusive rights to class III gaming. That deal was later re-negotiated when the Mohegans opened their casino. Each tribe agreed to give the state something like \$70 million, so Connecticut made out better with two such deals," says Eadington.

That promised stream of revenue forced many state officials to think twice about their opposition to tribal gaming. And now, with the country at war, the economy in a nose dive, state budgets being stretched tight and tribal gaming a \$10 billion-a-year business, profit-sharing arrangements between states and tribes that



mimic the Connecticut deal are looking more and more like a sure thing.

That certainly appears to be the case in New York, where Gov. George Pataki says his state will reap a 25 percent share of gross slot revenues from the six new tribal casinos being planned for his state. The newly inked St. Regis Mohawk deal is typical. If the tribe's proposed \$500 million Catskills resort becomes a reality, the tribe has agreed to share a quarter of its slot profits with the state, another 30 percent will go to their partners, casino giant Park Place Entertainment, and another \$15 million will go the county coffers each year.

Now Pataki is working on a similar arrangement with the Seneca Nation for their proposed operation near Niagara Falls.

"There is a lot of panic behind New York's recent decision. Their motivation is primarily fiscal," says Eadington. "They are surrounded by states that offer gaming: Connecticut, Ontario [Canada] and New Jersey. They see this as a solution to their problems."

Although it's true that the New York officials fast-tracked expanded gaming in the state in the wake of last September's tragedy, it is also true that Pataki, tribal executives and casino representatives have been wooing local politicians for years.

According to a recent story in the *New York Times*, lobbyists representing tribes, casino chains and developers spent \$2 million this year swaying local lawmakers. The newspaper reports that many state lawmakers have long resisted the idea, but that they changed their tune when faced with an anticipated \$9 billion dollars in state losses after the Sept. 11 attacks. Their hastily prepared gambling expansion bill flew through both branches of the state house with little opposition, no doubt spurred in part by the promise of 25 percent profit sharing.

Actually, "revenue sharing" is the preferred term among those who draft the deals and how the deals are worded means everything.

"It's a fine line between revenue sharing and placing a tax on tribes," says John Harte, general counsel for the National Indian Gaming Association (NIGA). "For us to be satisfied we have to see that the tribes are getting something out of the arrangement."

NIGA supports such arrangements, but not with a lot of enthusiasm.

"When you look at IGRA, states are not permitted to tax tribes. But as long as the arrangements are negotiated and voluntary, we feel the state of affairs make revenue sharing a practical solution. If you look at the way court decisions have been going lately — particularly with regard to the higher courts — they have not looked favorably on tribal gaming," says Harte.

Which is why 11 tribes in New Mexico recently agreed to an out-of-court settlement rather than face lengthy, costly and dicey court battles between those tribes and the Governor's office.

"It was a decision as to whether we wanted to enter in the court system that has not been very friendly to tribal gaming," says Frank Chaves, co-chairman of the New Mexico Indian Gaming Association. "Do we want to take the case on?"

The answer was no. What was at stake was not just the future of Indian gaming in that state, but also millions of dollars in unpaid revenue sharing that was promised to New Mexico by the Indians who signed a 1997 compact.

"I would say whoever is behind that hasn't figured out that Indians are governments, and one government cannot tax another."

That compact came complete with Connecticut-like aspirations on the part of New Mexico requiring tribes to pay 16 percent of gross casino revenues.

A dozen tribes originally signed the 1997 deal, but most regretted it before the ink was dry. For others it took a little longer.

"Since the compact was signed, some tribes have not paid anything," says Chaves. "Others started paying and then stopped."

Haggling, threats and counter-threats followed, but last November, 11 of those tribes and Gov. Gary Johnson agreed to a new compact. The new package would keep everyone out of court by allowing tribes to operate slots and allowing the state to share in 8 percent of the gross slot revenue. The tribes also agreed to pay a lump sum settlement of \$91 million to the state to cover the unpaid money from the previous compact. Two New Mexico tribes — the Mescalero Apaches and the Pojoaque Pueblo — so far have refused to sign the new agreement, saying it violates IGRA — a point they intend to prove in court.

Interior Department officials had similar concerns and asked David McCumber, Gov. Johnson's chief of staff, how New Mexico could justify its 8 percent slice of the pie, since IGRA prohibits state taxes. McCumber responded by quoting from a 1995 letter from Assistant Secretary for Indian Affairs Ada Deer, who said such payments represent tribes "purchasing a valuable right from the state."

Apparently Interior officials bought the argument because just before Thanksgiving they

too approved the out-of-court settlement, making it a done deal.

Eadington says the Interior Department's support of revenue sharing is a significant development. "Originally they were against such plans. They saw it as extortion."

Whether it is classified as "extortion," "taxes," the "purchase of a 'valuable right,'" or "revenue sharing," Chaves believes the tribes he represents — as well as Indians across the country — have little choice but to plan on dealing state authorities in on future casino prospects.

"Since tribes can no longer sue state governments, they have no recourse. Considering the type of position that tribes are in where casinos are a good source of income, jobs, housing — revenue sharing is a very pragmatic approach," says Chaves.

No doubt state legislators who agreed to less advantageous gaming compacts a few years ago might now think they made sucker bets. Certainly some of the California officials who signed on to the quickly prepared Proposition 101A

three years ago — which allowed for widespread Indian gaming expansion in that state — are kicking themselves. That agreement, which locked gaming in place for next 20 more years, delivers "what will amount to one-half of one percent of gross revenues to California, which is insignificant," says Eadington. "But keep in mind when California signed that deal they had a \$10 billion surplus, instead of the financial crisis they are going through now."

One local lawmaker in Mississippi, state Sen. Jack Gordon, is rethinking that state's agreement with the Choctaws. He has proposed taxing that tribe's multimillion-dollar-producing Silver Star casino as well as the tribe's forthcoming Golden Moon Casino to help put the state books in order. Proponents of the plan say that the 30 state-regulated casinos in Mississippi are taxed at 12 percent, and they question why the Choctaws should be allowed to operate tax-free.

"I would say whoever is behind that hasn't figured out that Indians are governments," says Eadington, "and one government cannot tax another."

Choctaw Chief Philip Martin declines to comment on Gordon's proposal, but did issue a press release reminding Mississippi voters that since 1994, the tribe has collected nearly \$6 million in state payroll taxes and contributed more than \$600,000 to local law enforcement. The tribe also claims its operations have created nearly 8,000 jobs in Mississippi, and non-Indians hold most of those.

Harte says people need to be reminded of those contributions occasionally.

"We at the NIGA have documented that nationally, gaming tribes have donated \$60 million to various charities and worthwhile causes. Part of what makes revenue sharing plans acceptable to our group is we see these plans as simply a way for states to codify those contributions," he says.

Which might be true except that there are no promises that these codified payments are going towards charities. It's just as likely that the tribal money will be used to ease state shortfalls.

That appears to be the case in Arizona, where Gov. Jane Hull campaigned a few years ago on the promise that tribal gaming expansion would stop in her state. Her rallying cry convinced the state's greyhound-racing lobby to support her efforts, which they did to the tune of nearly \$14,000 in campaign contributions. But now,

That decision comes as bad news for racetracks in the state, that, like their industry counterparts nationwide, have proven a threatened and feisty foe to tribal gaming industry — at least when it comes to fighting it out at the ballot box or in the courtroom.

When the judge put the freeze on existing Arizona compacts last summer, it inspired dog-track owners in Kenosha, Wis., to file a suit requesting a similar block be placed on gaming compacts in the Dairy State, which their governor had been renegotiating in anticipation to their 2004 expiration.

Track owners, says Eadington, are simply reading the writing on the wall.

"Racetracks are shrewd businesses," he says. "They recognize that there is not much future in their industry. The smart ones in Wisconsin,

Perhaps the recent New Mexico compact sailed so smoothly past its legal hurdles because it was designed to please all sides. Included in the contract is an important footnote, allowing New Mexico track owners to step up gaming devices, or slots, at their facilities.

"It was all part of the compromise," says Chaves.

Back in the Commonwealth of Massachusetts, such compromises are a long way off, but the possibility of tribal gaming still looms on the horizon, so undoubtedly those compromises will come.

"Just because the Nipmucs lost their federal recognition does not mean gaming is a dead issue," says Rep. Hillman. "Between here and Connecticut, there are at least 20 groups that are trying to gain federal recognition. If any of them do receive it, there will be a lot of pressure on us to open up the state to slots. If New Hampshire approves slots, that will put even more pressure on us. People are going to [ask why we are] letting all this money leave the state[.] Let's keep the money here in Massachusetts."

Hillman says one town in his state, Fall River, has made it known that they would welcome a tribal casino to their community with open arms. City leaders in nearby Worcester, Mass., have done the same. Both cities have been hit hard by uncertain economic times.

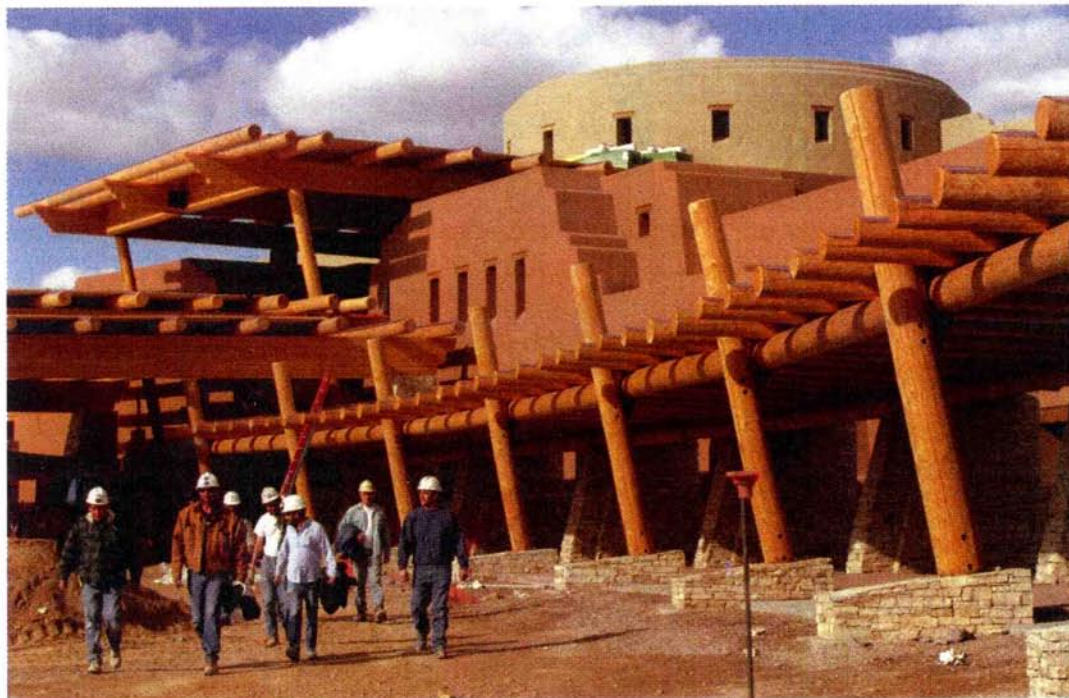
Hillman says he has no problem with slot machines or casinos operating in those locales; he just does not want such a business in his community.

"They should open a casino where one is wanted," he says.

His colleague, Mark Carron, is more philosophical.

"There is a [yin] and a yang to it," he says. "People talk about how Indians are getting rich off this. So what? When the head of Lucent Technologies drives a Rolls Royce, people see that as a sign of healthy development. Gaming is an attractive industry. Massachusetts has one of the most successful lotteries in the country. We talk about all the money it has brought to our state and what it has done for our school system. We don't talk about the fact that many of the people who are buying scratch tickets are the poorest of the poor. We don't say anything about how they probably should be spending their money on something else.

"Bringing casinos to our state is not much different," he says. "It's a way to redistribute the wealth. We are still trying to run our state on the backs of the poor." □



Construction workers leave the Sandia Casino being built at Sandia Pueblo, in Albuquerque, N.M.

AP Photo/Pat Vasquez-Cunningham

faced with a half-a-billion-dollar budget crunch, Hull has warmed up to Indian gaming. Up until last summer, when a federal judge prohibited her from negotiating any new compacts while the existing ones were scrutinized by the courts, Hull was floating plans for new agreements that would allow tribes to expand slots and house-backed blackjack.

One tribe waiting to see how Hull's compact problems go are the Navajos, who, faced with an unemployment rate of 40 percent, recently voted to allow for slot gaming on their reservation. At least twice before the Navajos voted down gaming, but tribal officials approved the plan in November, citing a grim financial picture for the tribe, serving as a reminder that it is not just Anglo governments that opt for casinos when faced with hard times.

Louisiana and Arizona are now calling for the right to put slot machines at their tracks rather than trying to fight tribal gaming outright."

But Eadington says it is a mistake to write off the racing industry. In fact, he predicts, down the road, the interest offering the highest ante to state politicians will be the form of gambling that ultimately prevails in a region.

"Who gets gaming is becoming a political issue," he says. "The real question in the future for politicians is going to be, Why confine this to just Indian tribes?"

He points to a lawsuit that asks that very question, as a privately owned card club in California is questioning why just local Indians can offer patrons slots.

"It could prove disruptive to tribes in California," Eadington says.