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Validity of Indian Gaming Regulatory Act

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Recognizing the importance of fostering tribal self-sufficiency and government, and the important role that gambling can serve toward that end, Congress in 1988 enacted the Indian Gaming Regulatory Act to provide a statutory basis for the operation of gaming by Indian tribes. It sets out three classes of gambling activities, the third of which includes banking card games, slot machines, and games of chance, and is subject to the strongest regulation. Such games are legal only if authorized by tribal resolution, located in states which otherwise permit gambling, and conducted in conformance with tribal-state compacts. On newly acquired tribal lands, gaming is generally prohibited unless found by the Secretary of the Interior to be beneficial, and approved by the state governor's concurrence. In Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S., 367 F.3d 650, 200 A.L.R. Fed. 713 (7th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3260 (U.S. Oct. 15, 2004), the court upheld the constitutional validity of this gubernatorial concurrence requirement. This annotation will discuss all of the federal cases that have considered the constitutional validity of IGRA.

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ARTICLE OUTLINE

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STATUTORY TEXTThe relevant portions of The Indian Gaming Regulation Act provide as follows:

§ 2701. Findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2702. Declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self–sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indi-

an Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

§ 2710. Tribal gaming ordinances

(a)–(c) [Omitted]

(d) Class III gaming activities; authorization; revocation; Tribal–State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal–State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A)–(D) [Omitted]

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal–State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B)–(C) [Omitted]

(4)–(6) [Omitted]

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal–State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal–State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(7)(B) [Omitted]

(8)(A)–(9) [Omitted]

(e) [Omitted]

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988…

(1)–(2) [Omitted]

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) [Omitted]

(2)–(3) [Omitted]

(c)–(d) [Omitted]

Table of Cases, Laws, and Rules

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18 U.S.C.A. § 1162(a). See 2[a]

25 U.S.C.A. § 2719(b)(1)(A). See 9[a], 9[b], 9[c]

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) — 2[a]

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Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) — 3

U.S. v. Mitchell, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) — 9[d]

U.S. v. Sioux Nation of Indians, 448 U.S. 371, 100 S. Ct. 2716, 65 L. Ed. 2d 844 (1980) — 9[d]

Seventh Circuit

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S., 367 F.3d 650, 200 A.L.R. Fed. 713 (7th Cir. 2004) — 9[a], 9[b], 9[c], 9[d]

Eighth Circuit

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I. PRELIMINARY MATTERS

§ 1[a] Introduction—Scope

This annotation will collect and discuss all of the federal cases that have considered the validity of the Indian Gaming Regulatory Act, excluding discussion of the relationship between IGRA and the tribal exhaustion doctrine.[1]

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

§ 1[b] Introduction—Related annotations

Related Annotations are located under the Research References heading of this Annotation.

§ 2[a] Background, summary, and comment—Generally

Many Native Americans refer to Indian gambling operations as the "New Buffalo,"[2] acknowledging that gambling, like the buffalo once did, has provided tribal nations with a viable means of maintaining an autonom-

ous existence. The gaming industry has allowed Indian tribes to provide a steady source of income, attract tourism, and increase employment, and in general has resulted in tribal self-government and economic self-sufficiency.

Before 1988 states had no power to regulate gambling conducted by Indian tribes on their reservations. Public Law 280[3] permitted six states, including California and Wisconsin, to exercise criminal jurisdiction over specified areas of Indian country within the states. Congress gave those states broad criminal jurisdiction over offenses committed by or against Indians within all Indian lands, as well as jurisdiction over private civil litigation involving reservation Indians in state court, but no general civil regulatory authority.

In 1987 a turning point occurred with the Supreme Court's decision in California v. Cabazon Band of Mission Indians.[4] In that case, the Supreme Court invalidated California's regulation of Indian bingo on the ground that such regulation was civil rather than criminal in nature and therefore was not authorized by Public Law 280. The Court noted that only Congress, under the authority granted it by the Constitution's Indian Commerce Clause,[5] could give states jurisdiction over Indian gaming. Shortly thereafter, Congress heeded this call and passed the Indian Gaming Regulatory Act (IGRA), whose main stated purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." In the Act, § 2704, Congress also established within the Department of the Interior the National Indian Gaming Commission (NIGC).

The IGRA represents a compromise solution to the many issues raised by Indian gaming activities, attempting to balance competing interests and satisfy both tribal needs and state concerns. Given that the Indian Commerce Clause gives plenary power to Congress, states would have no control whatsoever over Indian gaming if not for the allowances made in this Act.

The Act divides Indian gaming into three classes and provides a different regulatory scheme for each class. Class I gaming include social and ceremonial games, and is within the exclusive jurisdiction of the tribes. Class II games include bingo and nonbanking card games not illegal under state law, as well as banking card games operated on or before the Act's enactment on May 1, 1988, and these are within the jurisdiction of the tribes but subject to the Act. They are permitted where a state "permits such gaming for any purpose by any person, organization or entity," and the "governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman" of the National Indian Gaming Commission. Class III gaming is defined in § 2703(8) as "all forms of gaming that are not class I gaming or class II gaming," and includes banking card games, electronic games of chance, slot machines, dog racing, and lotteries. These games are the most heavily regulated of the three classes, and are lawful only if they are authorized by a tribal resolution approved by the NIGC's Chairman, located in states that permit such gaming "for any purpose by any person," and conducted in conformance with tribal-state compacts.

The tribal-state compact is the key to class III gaming under IGRA. Under such a compact, the federal government cedes its primary regulatory oversight role over class III Indian gaming, and permits states and Indian tribes to develop joint regulatory schemes through the compacting process. That process begins when a tribe requests negotiations with the state in which its lands are located. Both parties are required to negotiate in "good faith," and the Act provides jurisdiction in the federal courts to hear a claim by a tribe that a state has failed to so negotiate. A court's possible remedies in such a case include ordering a state and tribe to conclude a compact within 60 days or, if they are unable to agree to a compact within that amount of time, to submit their "last best offer for a compact" to a mediator who will then select the more appropriate plan.

In addition to gaming on existing Indian lands, Congress provided a mechanism for tribes to offer gaming on land that they did not own as of 1988. The Act prohibits all gaming on such land, with certain exceptions. The most notable exception permits the Secretary of the Interior to reach a determination "that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination."

In only one aspect has the IGRA been held to exceed Congress's authority, and that is in the federal jurisdiction granted where states allegedly do not negotiate compacts in good faith. The Supreme Court has held that, under the Eleventh Amendment,[6] Congress may not abrogate the states' sovereign immunity by forcing federal court jurisdiction where a state does not consent to be sued (§ 3).

Against all other constitutional challenges, IGRA has been upheld as valid. Perhaps the most obvious challenge to the Act, which clearly states a preference in the industry of gaming for tribes and tribal members, is the equal protection challenge. The claim would be that, as nontribal members are excluded from gaming opportunities, the Act is depriving them of their equal protection guarantees. Those courts that have addressed this challenge have rejected it (§ 4). The permissibility of preferences for Indians was clearly stated by the Supreme Court in its 1974 decision in Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290, 8 Fair Empl. Prac. Cas. (BNA) 105, 7 Empl. Prac. Dec. (CCH) ¶9431 (1974), when the Court upheld an employment preference for Native Americans seeking positions in the Bureau of Indian Affairs ("BIA"). The Supreme Court noted that, if it accepted the plaintiffs' equal protection charge, it would call into question the entirety of Congress' regulation of Indian affairs under the Indian Commerce Clause: "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.A.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." The Court concluded that the preference for Indians relied on a political, rather than a racial, classification, and therefore would be acceptable so long as reasonably related to Congress' "unique obligation toward the Indians" and the cause of furthering tribal sovereignty.

Though Congress attempted to compromise between Indian and state interests, neither side will always be satisfied. One constitutional challenge to IGRA proposed by the Indians was the claim that it violates their due process rights to self-determination, because Congress determined all the parameters of Indian gaming rather than giving the tribes the opportunity to decide what is in their best interest. This claim has been rejected, with the conclusion that IGRA does not violate constitutional due process guarantees (§ 5). From the states' point of view, there have been claims of unconstitutionality based on the Tenth Amendment,[7] arguing that IGRA's provisions for negotiating tribal-state compacts for Class III gaming violate the states' powers granted therein. This claim as well has been rejected, the ruling being that states are not in fact forced to enter into compacts (§ 6).

Another constitutional challenge was brought under Article III's judicial powers, with the argument that permitting federal court jurisdiction in cases where a state fails to enter good faith negotiations for a tribal-state compact restricts judicial powers in violation of the Constitution's Article III definition of the Judiciary and its powers. This claim, too, has been rejected, and IGRA found constitutionally valid (§ 7). Another case addressed the claim that tribal-state gaming compacts are "treaties" and therefore violate constitutional treaty-making limitations; the court held that such compacts do not constitute treaties and therefore, again, the Act is valid (§ 8).

Other constitutional challenges have been brought against IGRA for its gubernatorial concurrence provision. It has been claimed that this provision violates the Constitution's basic doctrine of separation of powers, as taking the traditional power and functions of the Executive and giving them to the states. Against the charge that this provision impermissibly reassigns the function of taking land in trust for the Indians from the Executive Branch to state governors, it has been held that it does not violate the nondelegation doctrine (§ 9[a]) or the Appointments Clause (§ 9[b]).[8] It has also been held that this provision does not violate the Tenth Amendment as forcing governors into federal service, that argument being rejected by the court (§ 9[c]), nor any alleged constitutionally mandated duty of the federal government to act as a trustee for the Indian tribes (§ 9[d]).

§ 2[b] Background, summary, and comment—Practice pointers

The Indian Gaming Regulatory Act (IGRA) does not provide a private right of action by an individual seeking to enforce compliance against a tribe, a state, the NIGC, or the federal government. In Hartman v. Kickapoo Tribe Gaming Com'n, 319 F.3d 1230 (10th Cir. 2003), one of many cases stating this point, the Tenth Circuit Court of Appeals noted that nowhere in its language does the IGRA provide for any such private cause of action, and in fact Congress expressly provided various causes of action in favor of tribes, states, and the federal government for certain violations of IGRA.

Under § 2703(4) of the Act, "Indian lands" refers to: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." In order to be considered "Indian land" under the IGRA, it has been held that it does not necessarily have to be located within an Indian reservation. The Eighth Circuit Court of Appeals in Cheyenne River Sioux Tribe v. State of S.D., 3 F.3d 273 (8th Cir. 1993), reiterated this definition in holding that "Indian land" under IGRA does not necessarily have to be located within a reservation, though it concluded that summary judgment was not appropriate without more facts to clarify the status of two particular areas.

Because IGRA does not specify which state officials may sign gaming compacts, it has been held that Congress intended that state law determine the procedure for executing such compacts. In Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997), the Tenth Circuit Court of Appeals held that the New Mexico Supreme Court was justified in ruling that a tribal-state gaming compact signed by the governor was invalid under IGRA as encroaching upon the legislature's authority under the state's constitutional separation of powers doctrine. Because the governor lacked the authority to enter into tribal compacts, they were invalid as a matter of federal law. Further, the court noted, the Secretary of the Interior cannot, under IGRA, give life to a compact which was void from its inception because the state governor who signed it lacked the authority under state law to sign on behalf of the state.

Whenever federal and tribal courts have concurrent jurisdiction over a claim, the doctrine of tribal exhaustion, a judicially created rule dictated by comity rather than jurisdictional concerns, requires federal courts to defer to the tribal courts, in order to encourage tribal self-government. What this generally means is that the parties to any case arising on Indian land or involving Indians must exhaust their tribal remedies before turning to the federal courts for relief. The doctrine applies even in cases brought under such federal statutes as IGRA, and it has been expressly held that application of IGRA does not preclude the requirement of tribal exhaustion.[9]

II. VIEW THAT IGRA CONSTITUTIONALLY INVALID IN PART

§ 3. Congress may not abrogate states' Eleventh Amendment sovereign immunity from suit

The following authority held that Congress was not authorized to abrogate the states' immunity from suit through the Indian Gaming Regulatory Act's (IGRA) provision of federal court jurisdiction in matters of tribal-state compact negotiations.

In Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) ¶43952 (1996), the Supreme Court held that Congress does not have the power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment sovereign immunity, and therefore § 2710(d)(7) cannot grant jurisdiction over a state that does not consent to be sued. The plaintiff tribe alleged that the State of Florida had refused to enter into any negotiations over a tribal-state compact in violation of the good faith requirement in § 2710(d)(7) of IGRA. Noting that it is inherent in the nature of sovereignty not to be amenable to suit without consent, the court held that the Constitution, in establishing federal judicial power, never contemplated federal jurisdiction over suits against unconsenting states. Since Congress used "unmistakably clear language" to convey its intent to abrogate the states' constitutionally secured immunity from suit, there was no way to avoid addressing this constitutional issue. Justice Souter argued in his dissent that the Court should have avoided a constitutional question by interpreting the Act to provide only suit against state officials rather than a state itself,[10] but the Court found such an interpretation unreasonable. It was irrelevant to the question of whether the states could be denied this basic right of sovereignty, the court noted, that IGRA grants the states power over Indian lands which they otherwise would not have; giving the states more power in one area does not allow Congress to abrogate an otherwise entitled power in another.[11] The Court concluded that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states for injunctive relief to enforce IGRA, and therefore affirmed the Eleventh Circuit's dismissal of the tribe's suit.

III. VIEW THAT IGRA CONSTITUTIONALLY VALID

§ 4. Special treatment for tribes to run gaming does not violate equal protection

The courts in the following cases held that the Indian Gaming Regulatory Act's (IGRA) allowances for Indian tribes to conduct gaming activities did not violate constitutional equal protection guarantees.

In Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003), cert. denied, 125 S. Ct. 51 (U.S. 2004), the Ninth Circuit Court of Appeals held that a state law authorizing class III gaming only for Indian tribes on Indian reservations or trust lands, and the negotiation of state-tribal compacts in compliance with the Indian Gaming Regulatory Act (IGRA), did not violate the equal protection rights of non-Indian card clubs and charities which were prohibited under that law from offering gambling activities. Constitutional avoidance requiring that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,"[12] was inapplicable, it held, because the award of exclusive class III gaming franchises to Indian tribes simply furthers the federal government's obligations to Indian tribes and helps promote their economic self-development. In addressing the equal protection claim, the court concluded that the distinction between Indian and non-Indian gaming interests was a political rather than racial classification, so that the rational basis standard of review would apply. The state's law, it reasoned, reflected the state's participation in the federal scheme readjusting jurisdiction over the Indians, and therefore was to be reviewed as if it were a federal law, to be upheld as long as rationally related to Congress' trust obligations to the Indians as well as to legitimate state interests. The state, the court noted, had a particular and very legitimate interest in limiting and regulating "vice" activities such as gambling. Legislative distinctions in such areas, therefore, would survive equal protection analysis, unless infringing fundamental rights or involving suspect classifications. The court affirmed the district

court's grant of summary judgment for the defendants,[13] holding that California's compacts with the tribes were rationally related to the furtherance of Congress' unique obligation to Indian tribes.

In American Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012 (D. Ariz. 2001), judgment vacated on other grounds, 305 F.3d 1015, 53 Fed. R. Serv. 3d 725 (9th Cir. 2002),[14] the court held that a decision by the governor to allow only Indian tribes to operate Class III gaming facilities would not violate equal protection guarantees. The plaintiffs were horse and dog racing permit holders seeking to enjoin the governor from entering new, renewed, or modified gaming compacts with Indian tribes. The court noted that scrutiny of laws such as the Indian Gaming Regulatory Act (IGRA), whose purpose is to encourage Indian self-government and economic self-sufficiency, would be under the rational basis test because preferences for tribal members are political rather than racial preferences, so long as the preferences relate to uniquely Indian interests. Finding that the limitation of gaming to tribes on tribal lands was sufficiently related to Indian sovereignty over tribal lands as to satisfy the rational basis standard, the court further concluded that the state law, enacted to carry out the federal law, was consistent with equal protection.

In Tworek v. U.S., 46 Fed. Cl. 82, 85 A.F.T.R.2d 2000–956 (2000), the Court of Federal Claims held that the Indian Gaming Regulatory Act (IGRA) did not violate the equal protection clause of the Fourteenth Amendment. The court rejected the claim by the plaintiffs, taxpayers seeking a refund of income taxes for income generated from unauthorized gambling, that the Wisconsin gambling laws, permitting lotteries and gambling by the state but not by private individuals, represented reverse discrimination. The government argued that the racial classification by which the state allowed gambling by Native Americans on federal reservations but not by others, was created by IGRA and not by the Wisconsin statute. The court noted that federally-recognized Indian reservations are in many ways separate jurisdictions from the states in which they are located and that gambling by Indians in Wisconsin was permitted only because the state itself legally sponsored a lottery. Finding that IGRA was based on "clear and valid congressional intent and recent Supreme Court decisions," the court rejected as "farcical" the plaintiffs' suggestion that either IGRA be repealed as invalid or that states must either prohibit all gambling or allow it to everyone.

§ 5. Congressional determinations of tribal welfare do not violate due process

The following authority held that the Indian Gaming Regulatory Act's (IGRA) pronouncements regarding relations with Indian tribes did not violate the tribes' due process rights to self-determination.

In Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990), the court upheld the constitutional validity of the Indian Gaming Regulatory Act (IGRA) as against arguments by an Indian tribe that it interferes with the fundamental tribal right to self-government in violation of the due process clause of the Fifth Amendment. To the plaintiffs' claim that the IGRA violated due process guarantees because it did not give the tribes an opportunity to decide what would be in their best interest, the court responded that the Act was reasonably related to Congress' trust responsibility to the Indians and arguably protected Indian tribes from infiltration by organized crime. The court agreed with the defendant's argument that, to the extent that any rights to self-determination were preserved by the Indians either explicitly by treaty or implicitly by failure to surrender aboriginal rights, they are subject to complete defeasance by Congress. The court noted that the Supreme Court had unquestionably ruled that Congress holds virtually unlimited power over the Indian tribes. Given Congress' restrictions of tribal sovereign power under its plenary power over Indian affairs, it was appropriate to apply rational relation scrutiny, rather than strict scrutiny as requested by the plaintiffs, to the due process question. Because Congress could reasonably address the concern of infiltration of organized crime into Indian gaming through passage of IGRA, and thereby fulfill its unique obligation to the Indians, the court concluded, the tribe's claim that the Act violates due process would fail.

§ 6. Tribal-state compact provisions do not violate Tenth Amendment state powers

[Cumulative Supplement]

The following authority held that the Indian Gaming Regulatory Act's (IGRA) provisions requiring negotiation for tribal-state compacts do not violate the Tenth Amendment.

In Cheyenne River Sioux Tribe v. State of S.D., 3 F.3d 273 (8th Cir. 1993), the Eighth Circuit Court of Appeals held that the Indian Gaming Regulatory Act (IGRA) does not violate the Tenth Amendment because it does not force the states to compact with Indian tribes regarding Indian gaming. The plaintiff tribe sought a tribal-state compact, and the state was willing to negotiate only for a particular model compact it had already developed for another tribe's gaming operations. The state argued that IGRA forced it to negotiate such compacts in violation of the Tenth Amendment. The court affirmed the district court's holding that the Act "gives states the right to get involved in negotiating a gaming compact because of the obvious state interest in gaming casino operations within the state boundaries, but does not compel it." Rather, the court noted, the Act provides three alternatives when an action is brought by a tribe against a state: Either the state and the tribe can continue to negotiate until a compact is reached, or they can negotiate but fail to agree in which case a court will determine whether their negotiation had been in good faith, or the state may refuse to negotiate at all in which case a court can require that a compact be concluded within sixty days or a mediator will select the tribe's proposed compact if it complies with applicable federal law. Therefore, the court concluded, IGRA does not force states to compact with Indian tribes and thus does not violate the Tenth Amendment.

CUMULATIVE SUPPLEMENT

Cases:

State legislature could authorize governor to enter tribal-state compacts with unnamed Indian tribes, pursuant to Indian Gaming Regulatory Act (IGRA), allowing Indian-operated casinos on non-Indian land; governor had authority under IGRA to make determination as to whether gaming on land held in trust for benefit of a tribe would be detrimental to surrounding community, which was not negated by state's constitutional prohibition on commercial gambling, and to extent that legislature had authority to make policy determinations as to what compacts should contain, it had already made those determinations and could properly delegate their implementation to governor. McKinney's Const. Art. 1, § 9; Indian Gaming Regulatory Act, § 20(a), (b)(1)(A), 25 U.S.C.A. § 2719(a), (b)(1)(A); McKinney's Executive Law § 12. Dalton v. Pataki, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180 (2005), cert. denied, 126 S. Ct. 739, 163 L. Ed. 2d 571 (U.S. 2005) and cert. denied, 126 S. Ct. 742, 163 L. Ed. 2d 571 (U.S. 2005).

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[END OF SUPPLEMENT]

§ 7. Federal court jurisdiction provision does not violate Article III judicial powers

The following authority held that the Indian Gaming Regulatory Act's (IGRA) provision for federal court jurisdiction does not restrict federal court powers in violation of Article III's definition of judicial power.

In Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990), the court held that the Indian Gaming Regulatory Act's (IGRA) provision for federal court jurisdiction where a tribe or state fails to enter into good-faith negotiation for a compact, does not violate Article III of the Constitution, defining the judicial power of the federal courts. The plaintiffs argued that the Act unconstitutionally restricts the power of the

federal courts because, although it provides for federal court jurisdiction in cases in which a tribe or state fails to negotiate a compact in good faith, it limits the relief the court may order and therefore denies the courts their constitutional function of resolving cases or controversies. Though acknowledging that judicial relief in such cases is limited to ordering the parties to conclude a compact within 60 days or to submit the dispute to a mediator, the court noted that the idea that the courts are somehow limited in their power if a full panoply of remedies is not available "has long since been disposed of by the Supreme Court." Further, the court rejected the plaintiffs' argument that resolution of tribal-state disputes over proposed compacts would involve nonjusticiable political questions inappropriate to the judiciary. Rather, it found, cases arising under IGRA's provisions for state-tribal compacts present fact issues of good faith or bad faith, which the courts can certainly resolve.

§ 8. Gaming compacts do not violate treaty-making limitations

The following authority held that tribal-state gaming compacts concluded pursuant to the Indian Gaming Regulatory Act (IGRA) are not "treaties" and therefore the Act does not violate constitutional treaty-making limitations.

In American Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012 (D. Ariz. 2001), judgment vacated on other grounds, 305 F.3d 1015, 53 Fed. R. Serv. 3d 725 (9th Cir. 2002), the court held that gaming compacts between a state and Indian tribes were not treaties concluded by a state and therefore did not violate constitutional limits on treaty-making authority. Noting that the United States Constitution allocates treaty-making authority exclusively to the President with the advice and consent of the Senate, and prohibits states from concluding treaties, the court rejected the claim that tribal-state compacts were "treaties," particularly considering the fact that "no one today, including the President of the United States, makes treaties with Indian tribes." Rather, the Indian Gaming Regulatory Act (IGRA) represents a congressional imposition of federal regulation on tribal gaming capacities, and tribal-state compacts are a creation of the federal statute.

§ 9[a] Gubernatorial concurrence provision held valid—Does not violate separation of powers—nondelegation doctrine

The courts in the following cases held that the Indian Gaming Regulatory Act's (IGRA) gubernatorial concurrence provision does not violate the Constitution's separation of powers provisions under the nondelegation doctrine.

In Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S., 367 F.3d 650, 200 A.L.R. Fed. 713 (7th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3260 (U.S. Oct. 15, 2004), the court held that the Indian Gaming Regulatory Act's (IGRA) gubernatorial concurrence requirement in 25 U.S.C.A. § 2719(b)(1)(A) does not violate the Constitution's nondelegation doctrine. The court declared that making the governor's concurrence a precondition to the executive branch's authority to waive the IGRA's general prohibition of gambling on after-acquired lands did not prevent the executive branch from accomplishing its delegated function or allow the governor to execute federal law. Congress may, the court explained, consistent with the Separation of Powers Doctrine, condition the delegation of authority to the executive branch on the approval of an actor external to the executive branch, and the IGRA's gubernatorial concurrence requirement did not entrust any legislative power to governors or wrongfully authorize any self-interested leader of private industry to regulate its competitors.

In Confederated Tribes of Siletz Indians of Oregon v. U.S., 110 F.3d 688 (9th Cir. 1997), the Ninth Circuit Court of Appeals held that the Indian Gaming Regulatory Act's (IGRA) gubernatorial concurrence provision is a valid delegation of legislative authority that does not violate constitutional principles of separation of powers. Rejecting the tribes' argument that the provision is unconstitutional as reassigning the function of taking land in

trust for Indians from the executive branch to state governors, the court noted that when a governor decides whether or not to concur, he is acting as a state official and performing a function related to his state office. Further, the court noted, the power to place public lands in trust for Native Americans is actually not an executive power at all, but rather a function of Congress' authority under the Constitution's Indian Commerce Clause and its Property Clause, which Congress then delegated to the Secretary of the Interior with certain limitations, making actual execution of the function contingent on gubernatorial concurrence. Since contingent legislation is a valid delegation of legislative authority, the court concluded, this provision of IGRA does not violate the separation of powers doctrine.

§ 9[b] Gubernatorial concurrence provision held valid—Appointments Clause

The courts in the following cases held that the Indian Gaming Regulatory Act's (IGRA) gubernatorial concurrence provision does not violate the Constitution's provisions for separation of powers as declared in the Appointments Clause.

In Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S., 367 F.3d 650, 200 A.L.R. Fed. 713 (7th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3260 (U.S. Oct. 15, 2004), the court held that the Indian Gaming Regulatory Act's (IGRA) gubernatorial concurrence requirement in 25 U.S.C.A. § 2719(b)(1)(A) does not violate the Constitution's appointments clause[15] because it did not effectively give the governor the power to execute federal law, and thus did not make the governor an officer of the United States. An Officer of the United States, the court reasoned, enjoys more than a merely "temporary, episodic" opportunity to act pursuant to federal law, enjoying instead a somewhat regular opportunity to issue enforceable decisions. Not only is a governor unable to issue the Interior Secretary's final decision regarding an Indian tribe's application under § 2719(b)(1)(A), the court observed, but a governor's opportunity to participate in the administration will arise irregularly, if it arises at all. Moreover, the court added, the influence of any one governor is temporary and limited to the particular application under review.

In Confederated Tribes of Siletz Indians of Oregon v. U.S., 110 F.3d 688 (9th Cir. 1997), the Ninth Circuit Court of Appeals held that the Indian Gaming Regulatory Act's (IGRA) gubernatorial concurrence provision in § 2719 does not violate the appointments clause because it does not vest a governor with authority significant enough to require appointment as a federal officer. The court affirmed the district court's ruling upholding the Secretary of the Interior's denial of the plaintiff tribes' application to have land taken in trust for its benefit for the purpose of establishing a gaming facility. But the instant court disagreed with the district court's grounds for that holding, namely, that this provision violates the appointments clause because it allows a veto of the Secretary's findings. The court found it beyond question that a governor is a state official and not a federal officer either by appointment or in fact. In addition, the court found that a governor, in exercising his right to concur or not in a decision to allocate land, which is not contiguous to a reservation for gaming purposes, is not performing a duty reserved for federal officers. Concluding that when a governor responds to the Secretary's request for a concurrence he is acting under state law as a state executive and pursuant to state interests, as well as complying with an express delegation of congressional power to control Indian lands, the court held that this provision does not implicate the appointments clause because it does not vest a governor with primary responsibility for protecting a federal interest.

§ 9[c] Gubernatorial concurrence provision held valid—Does not violate Tenth Amendment

The following authority held that the Indian Gaming Regulatory Act's (IGRA) gubernatorial concurrence provision does not violate the Tenth Amendment's reservation of powers to the states.

In Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S., 367 F.3d 650, 200

A.L.R. Fed. 713 (7th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3260 (U.S. Oct. 15, 2004), the court held that IGRA's gubernatorial concurrence requirement in 25 U.S.C.A. § 2719(b)(1)(A) does not violate the Tenth Amendment because it "does not conscript governors into federal service." The court said that in the view of the plaintiff tribes, § 2719(b)(1)(A) mandates that state governors participate in the federal regulation of property held in federal trust for the benefit of Indians. Disagreeing with this position, the court said that neither the states nor their governors are required to aid the federal administration of § 2719(b)(1)(A) in any way. Upon receiving the Secretary of the Interior's request for concurrence, the court observed, a governor might, consistent with the Indian Gaming Regulatory Act (IGRA), willfully ignore it. In that instance, said the court, the governor's inaction could not fairly be characterized as the administration or enforcement of a federal regulatory program. The court said that despite the impact of gubernatorial inaction under § 2719(b)(1)(A), the governor's role under that Section does not violate principles of federalism. Section 2719(b)(1)(A), the court declared, preserves state sovereignty by merely encouraging the states to decide whether to endorse federal policy and by reserving the ultimate execution of that policy to the federal government, which neither imposes on the states nor depends on them for the implementation of federal law. Nor, the court added, does the gubernatorial concurrence provision obstruct the political accountability of the dual sovereigns. Because the provision does not require a governor to respond, the court reasoned, each governor is solely responsible for the decision to grant, decline, or deny consideration of the request for concurrence, with the inability to shift blame to Congress for the decision ensuring that a governor will remain attuned to political pressure from his or her constituents. The court concluded that it is only when Congress mandates that state officials devote attention to a particular matter that the local electorate is rendered politically mute. In that instance, the court said, no amount of lobbying will resonate with local lawmakers because the state's agenda is no longer within their control.

§ 9[d] Gubernatorial concurrence provision held valid—Does not violate federal trust responsibility to Indians

There is authority to the effect that the gubernatorial concurrence provision of the Indian Gaming Regulatory Act (IGRA) does not violate any alleged federal constitutional duty to act in a trustee relationship to Indian tribes.

In Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S., 367 F.3d 650, 200 A.L.R. Fed. 713 (7th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3260 (U.S. Oct. 15, 2004), the court rejected the plaintiff tribes' contention that the Indian Gaming Regulatory Act (IGRA) violates an alleged federal constitutional duty to act in a trustee relationship to Indian tribes. The tribes argued that all legislation enacted pursuant to the Indian Commerce Clause must be "rationally tied to furthering the federal government's trust obligations," so that the gubernatorial concurrence provision did not meet that standard because it delegated to nontrustees the authority to make decisions that effect the administration of Indian affairs. The court determined that Congress's obligation to Indians is not so broad as to require invalidation of the provision at issue. First, the court said, the tribes argued that the trust doctrine could not be severed from the Indian Commerce Clause of the Constitution. The court acknowledged that the Supreme Court had acknowledged the "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people,"[16] and the "undisputed existence of a general trust relationship between the United States and the Indian people,"[17] yet, the court noted, the Supreme Court had not held that this obligation arises from any particular provision of the Constitution. Rather, the court said, the trust relationship arises from the United States' unfortunate history of Indian policy.[18] The court stressed that it was the common law, and not the Constitution, that recognized the Indian tribes as "the wards of the nation." Despite the trust doctrine's lack of foundation in the Constitution, the court continued, the tribes sought to persuade the court that all Indian legislation must be re-

lated rationally to furthering the federal government's trust obligation to Indians. The court, however, rejected this argument, saying that no authority requires that all legislation enacted pursuant to the Indian Commerce Clause be rationally related to the trust obligation. The Supreme Court, the court pointed out, had not yet invalidated a federal statute on the ground that it did not advance the federal government's trust obligation to Indian tribes. Indeed, the court said, even after concluding that an Act of Congress failed to comport with Congress's fiduciary responsibility to Indians, the Supreme Court refrained from acknowledging a cause of action on that ground.[19] The court concluded that since the Supreme Court had not yet held that an Act of Congress is subject to invalidation on the ground that it violates the federal government's general trust obligation to Indians, the court in the instant case would not invalidate the gubernatorial concurrence provision on that basis.

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Section 1[a] Footnotes:

[FN1] See Construction and Application of Federal Tribal Exhaustion Doctrine, 186 A.L.R. Fed. 71.

Section 2[a] Footnotes:

[FN2] Grant, Seminole Tribe v. Florida - Extinction of the "New Buffalo?", 22 Am. Indian L. Rev. 171 (1997)

[FN3] 18 U.S.C.A. § 1162(a): "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."

[FN4] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

[FN5] U.S. Constitution, Article I, Section 8, Powers of Congress … : "The Congress shall have Power To … [Section 8, Clause 3, Regulation of Commerce] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[FN6] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by

Citizens or Subjects of any Foreign State."

[FN7] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[FN8] U.S. Constitution Article II, § 2, cl. 2: The President shall appoint "all … Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law …"

Section 2[b] Footnotes:

[FN9] For more about tribal exhaustion, see Construction and Application of Federal Tribal Exhaustion Doctrine, 186 A.L.R. Fed. 71.

Section 3 Footnotes:

[FN10] Justice Souter further took the court to task for having raised the simple common law doctrine of state sovereign immunity to the status of constitutional law, as another example "of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law."

[FN11] Noting that that the Indian Commerce Clause is indistinguishable from the Interstate Commerce Clause, the Court overruled its 1989 plurality opinion in Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1, which had held that Congress' power to abrogate came from the states' cession of their sovereignty when they gave Congress plenary power to regulate commerce.

Section 4 Footnotes:

[FN12] Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991).

[FN13] Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002), aff'd, 353 F.3d 712 (9th Cir. 2003), cert. denied, 125 S. Ct. 51 (U.S. 2004).

[FN14] The Ninth Circuit Court of Appeals, in American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 53 Fed. R. Serv. 3d 725 (9th Cir. 2002), finding that the district court had abused its discretion in ruling that tribes with gaming compacts were not necessary and indispensable parties to this litigation, vacated and remanded with instructions to dismiss the action for failure to join indispensable parties. Because the action was dismissed on this threshold ground, the appellate court did not address the other issues, including constitutional validity.

Section 9[b] Footnotes:

[FN15] U.S. Const. Art. II, § 2, cl. 2 gives the President authority to appoint "all … Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law." The courts have read this provision as permitting only persons who are "Officers of the United States" to discharge functions properly discharged by officers. E.g., U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743, 9 I.E.R. Cas. (BNA) 313 (9th Cir. 1993).

Section 9[d] Footnotes:

[FN16] Seminole Nation v. U.S., 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480, 86 L. Ed. 1777 (1942).

[FN17] U.S. v. Mitchell, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983).

[FN18] Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290, 8 Fair Empl. Prac. Cas. (BNA) 105, 7 Empl. Prac. Dec. (CCH) ¶9431 (1974).

[FN19] U.S. v. Sioux Nation of Indians, 448 U.S. 371, 100 S. Ct. 2716, 65 L. Ed. 2d 844 (1980).

200 A.L.R. Fed. 367

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