

**NLWJC - Kagan**

**Counsel - Box 021- Folder 002**

**Gambling-Indian Issues [1]**

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Internal opinion

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Call: Leahy

Stevens



## United States Department of the Interior

OFFICE OF THE SOLICITOR

OCT 2 1996

Honorable Curtis Hertel, House Democratic Leader  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Dear Mr. Hertel:

Solicitor Leshy has asked me respond to your letter of July 12, 1996. In that letter you discuss the analysis set forth in Mr. Leshy's letter to you dated April 30, 1996 and incorporate by reference a letter from Mr. John Martin to me dated July 11, 1996. You and Mr. Martin reiterate your view that the Secretary has the authority under section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719, to authorize gaming on newly acquired trust lands despite the failure of a Governor to concur in the Secretary's determination that gaming is in the tribe's best interests and not detrimental to the surrounding community.

The Solicitor and I have carefully considered your analysis, but must respectfully disagree with your views on the law.

You argue that we should revise our advice to the Secretary because a case we cited, Spokane Tribe of Indians v. Washington, 28 F.3d 991 (9th Cir. 1994), was vacated in the wake of Seminole Tribe v. Florida, 116 S.Ct. 1114 (1996). We relied on Spokane for the general proposition that in adopting IGRA, Congress generally intended to provide states with a voice in the conduct of Indian gaming. The fact that the Supreme Court ruled in Seminole that Congress lacks the power to waive state sovereign immunity under the Indian Commerce Clause has no bearing on the proposition that Congress intended to provide states with a role respecting class III gaming. Moreover, there is nothing in Seminole casting any doubt on the validity of IGRA's section 20.

We previously responded to the arguments that you reiterate, to the effect that the appointments clause is violated by the gubernatorial consent provision. We continue to believe that Congress did not, in IGRA, assign Governors federal regulatory functions. Instead, it has simply placed a condition on the conduct of off-reservation gaming on lands acquired after 1988. While the Secretary is free to take such land in trust for tribes, a tribe may not game on that land unless the Governor concurs in certain Secretarial findings.

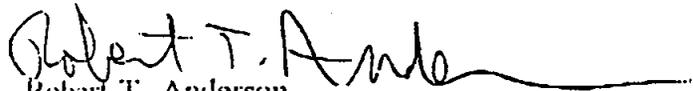
Finally, you refer to a letter to me from Mr. John Martin dealing with the non-delegation doctrine and the position taken by the United States in its petition for certiorari in Department of Interior v. South Dakota, No. 95-1956. We agree that the availability of judicial review is

a factor in determining whether a delegation from Congress is permissible and for that reason have modified our position to permit judicial review of decisions to take land in trust under 25 U.S.C. § 465. That reasoning has no application here, however, since the gubernatorial concurrence provision is simply a condition on the exercise of a federal power, which does not implicate the non-delegation doctrine.

Moreover, the issue at hand is whether the Secretary can ignore the plain language of section 20, not whether judicial review is available. In any event, judicial review may well be available to tribes rebuffed under section 20 of IGRA by governors. The Supreme Court in Seminole rejected the notion that actions to force good faith negotiations may be brought under Ex Parte Young because gaming compacts must be entered into by states. Thus, simply requiring a governor or other state official to negotiate would be of no avail in the several states where legislative action is required for the consummation of compacts. Here, however, section 20 calls for action by a governor and a suit against a governor for alleged violations of federal law might not be precluded. Thus, Seminole has no direct bearing on this matter.

I trust this answers your inquiry. Should you have any additional questions or need further clarification, please contact me at 208-3401.

Sincerely,



Robert T. Anderson

Associate Solicitor

Division of Indian Affairs

cc: John Martin

DIA  
Docket  
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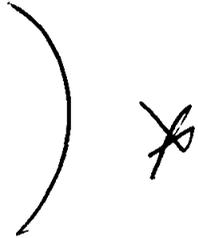
SOL/IA/RAnderson/ra 10-1-96

TRANSLATION

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(GS, Harold Ickes or Sosnick or Alexis?)

Leon/JQuinn

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kw To Elena.  
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a response to Purus asap.

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JR

Waiting for B. Anderson's  
letter (Tuesday)

Call

THE PRESIDENT HAS SEEN  
7-16-96



DEMOCRATIC LEADER O

Curtis Hertel  
2nd District

July 12, 1996

John D. Lesby, Solicitor  
Office of the Solitor, MS6352  
United States Department of the Interior  
1849 C. Street, N.W.  
Washington, D.C. 20240

Re: Sault Ste. Marie Tribe of Chippewa Indians / Application for Gaming on After Acquired Property

Dear Mr. Lesby:

By letter dated April 30, 1996, you responded to my letter to Secretary Babbitt, dated September 22, 1995 ("Lesby letter"). My letter, which was also signed by Pat Gagliardi, the Michigan House Democratic Floor Leader, and Edward McNamara, Wayne County Executive, urged the Secretary to proceed to take a parcel of land into trust in the Greektown section of downtown Detroit and authorize that gaming take place thereon, notwithstanding Governor John Engler's failure to concur in the Secretary's favorable findings under 25 U.S.C. § 2719(b)(1)(A) ("§ 20") of the Indian Gaming Regulatory Act ("IGRA" or "the Act").<sup>1</sup> Your April 30 letter raised several issues to which this letter responds.

As you correctly observed in your letter, the Tribe has argued that the Governor's concurrence power under § 20 constitutes a power to veto the Secretary's determination to permit gaming at Greektown, and therefore violates the Appointments Clause of the Constitution, U.S. CONST. art II, § 2, cl. 2. In a decision carefully analyzing § 20 of the Act, a district court has agreed with the Tribe's contention. Confederated Tribes of the Siletz Reservation v. United States, 841 F. Supp. 1479 (D. Ore.), appeal docketed, Nos. 94-35304, 94-35373, 94-35374 (9th Cir. 1994).

Notwithstanding the Siletz decision, you contend that the separation of powers doctrine has not been violated by § 20 because "Congress simply provided state governors with the power to preclude off-reservation gaming activity." Lesby letter at 2. You cite Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir. 1994), for the proposition that Congress tried to fashion a plan allowing states a voice in the operation of Indian gaming.

<sup>1</sup>Your April 30, 1996 letter also responded to "arguments the Tribe and its attorneys have recently advanced," presumably referring to a letter to Robert T. Anderson, Associate Solicitor, Division of Indian Affairs, from Bruce R. Greene, counsel to the Sault Ste. Marie Tribe of Chippewa Indians, dated April 9, 1996.

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of Representatives  
itol Building  
Michigan 48913  
17) 373-1983

John D. Leshy  
July 12, 1996  
Page 2

Were the proposition as simple as you stated, perhaps the Siletz court would have reached a different result. Your contention regarding Congress' conferral of power on state governors ignores the plain meaning of § 20 of the Act, which unambiguously confers on Governors the power to override a narrow and focused determination of the Secretary, made on a case-by-case basis, to allow gaming to take place on a specific parcel of property.

Reliance on Spokane is misplaced for two reasons. First, of course, the Supreme Court's subsequent decision in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), reached precisely the opposite conclusion reached by the Ninth Circuit. Indeed, after Seminole was decided, the Supreme Court vacated Spokane and remanded it to the Ninth Circuit for further consideration. Washington v. Spokane Tribe of Indians, 116 S. Ct. 1410 (1996). Second and more importantly, the language cited in Spokane refers to an entirely different section of IGRA (25 U.S.C. § 2710(d)) relating to the role of states in the class III compacting process. That role requires states and tribes to enter into compacts before class III gaming may occur on any Indian lands. There is no issue regarding a governor's power to override the Secretary's determination in connection with the compacting process because the Act simply does not give the governors such authority. In contrast to § 2710(d) of the Act, § 2719(b)(1)(A) explicitly purports to empower governors to override prior secretarial decisions regarding whether gaming will take place on after acquired property.

You also rely on North Dakota v. United States, 460 U.S. 300 (1983), in support of the proposition that you "know of no court decisions (other than the district court decision in the Siletz case) that use separation of powers grounds to strike down congressional schemes that condition Executive Branch action on the concurrence of state officials." Leshy letter at 2. Of course, the statutory scheme at issue in North Dakota v. United States was vastly different from the concept embodied in § 20 of IGRA. There the Court was interpreting three different but related statutes concerning the protection of migratory birds and their habitat. In particular, the statutory scheme contemplated the federal acquisition, over an extended time period, of easements designed to protect waterfowl breeding grounds. The statute provided that the governor or an appropriate state agency was required to consent to these acquisitions, which the State of North Dakota did in 1931. After a later statute was enacted in 1961, North Dakota again consented to acquisitions by the United States. The litigation arose when the state sought to revoke its prior consent to participate in the acquisition program with regard to future acquisitions and the Supreme Court held that it could not.

Your reliance on North Dakota v. United States is also misplaced because of your mischaracterization of the issue presented by § 20 of IGRA. The issue is not whether Congress can "condition Executive Branch action on the concurrence of state officials." Leshy letter at 2. Clearly it can under certain conditions, such as those presented in connection with the legislation protecting migratory birds, where prior approval by a state to participate in a federal acquisition program was required by Congress and implicitly upheld by the Supreme

John D. Lesby  
July 12, 1996  
Page 3

Court in North Dakota v. United States. Contrast that scheme with that embodied in § 20 of IGRA. Prior approval of the state to participate in decisions to allow Indian gaming on after acquired property is not what § 20 provides. Rather, § 20 contemplates that a governor may veto a specific determination by the Secretary after he has decided to allow gaming to take place on a particular parcel of land. It is this veto power of the Secretary's prior determination, which was not presented by the migratory bird statutes, that contravenes the separation of powers doctrine and the Appointments Clause of the Constitution.

You also argue that there can be no Appointments Clause issue under § 20 because the Governor is a state official, not a federal official, citing Seattle Master Builder's Ass'n v. Pacific Northwest Elec. Power & Planning Council, 786 F.2d 1359 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987), and that "the federal statute simply adds federal authority to a pre-existing state office." Id. at 1365. This argument also misses the point. Obviously, there can be no question that a governor of a state is a state official. The question, however, presented by § 20 of IGRA is whether that state official has the power to veto a decision made by a federal official who was appointed by the President and confirmed by the Senate. The district court in Siletz properly conceptualized the issue presented by § 20 when it concluded that the governor lacked authority to override such decisions made by the Secretary because, unlike the Secretary, governors are not appointed by the President and confirmed by the Senate. 841 F. Supp. at 1489.

In addition, Seattle Master Builder's Ass'n dealt with a statutory scheme that once again bears no relationship to the language of § 20 of IGRA. In Seattle Master Builder's Ass'n, the question was whether Congress could consent to the creation of an interstate planning council consisting of two members each, appointed by the governors of four designated states. The Council had certain planning functions that directly related to the activities of the Bonneville Power Administration, a federal agency. One issue before the appeals court concerned whether the Council violated the Appointments Clause because it "exercises significant authority over the federal government but has not been appointed by the President." Seattle Master Builder's Ass'n, 786 F.2d at 1363.

The appeals court concluded that the Council was a compact agency, not a federal agency, and that "[t]here is no bar against federal agencies following policies set by nonfederal agencies." Id. at 1364. The court of appeals said that it knew of no court that had found that the Appointments Clause prohibited "the creation of an interstate planning council with members appointed by the states." Id. at 1365. The court concluded that:

The Council violates neither the compact nor appointments clauses of the United States Constitution. The Act establishes an innovative system of cooperative federalism under which the

John D. Lesby  
July 12, 1996  
Page 4

states, within limits provided in the Act, can represent their shared interests in the maintenance and development of a power supply in the Pacific Northwest and in related environmental concerns.

Id. at 1366. Thus, unlike § 20 of IGRA, there was no issue in Seattle Master Builder's Ass'n regarding the power of the Council to veto a final decision regarding a specific determination made by the secretary of a department of the federal government. In short, Seattle Master Builder's Ass'n is not dispositive of the issue presented by § 20 of IGRA.

You also argue that there is "[n]othing in the statute [that] suggests that the Secretary has the power to review the basis of the Governor's decision." Lesby letter at 2. Put another way, you contend the Governor has unbridled authority to reach any conclusion he or she desires and that there are no standards applicable to the Governor's concurrence or lack thereof. Of course, this interpretation ignores the plain meaning of the statute, which contains a specific standard overseeing a governor's power. Section 20 specifically provides that the governor's power is limited to concurring with the Secretary's findings; and those findings are explicitly stated: the Secretary, in the first instance, must determine "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 . . . ." 25 U.S.C. § 2719(b)(1)(A).

John Martin of Patton Boggs, L.L.P., in a letter to Robert T. Anderson, your Associate Solicitor for Indian Affairs, dated July 11, 1996, thoughtfully sets forth reasons why your interpretation of § 20 -- that the governor's authority is unrestricted and not subject to judicial review -- renders it particularly vulnerable to constitutional challenge. We will not repeat Mr. Martin's arguments, but endorse them because of their persuasiveness. To interpret Congress' delegation of authority to the governors as one without standards leaves it vulnerable to the nondelegation challenge, which was embraced by the Eighth Circuit in South Dakota v. Department of the Interior, 69 F.3d 878 (8th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3823 (U.S. June 3, 1996) (No. 95-1956).

Finally, your letter refers to the recent district court decision in Keweenaw Bay Indian Community v. United States, 914 F. Supp. 1496 (W.D. Mich. 1996). That decision was discussed in Mr. Greene's letter to Mr. Anderson, referred to in note 1 in this letter, and also will not be repeated here. However, your April 30 letter contains an argument purportedly distinguishing Keweenaw Bay Indian Community's situation from that of the Sault Tribe on the grounds that the Sault Tribe's class III gaming compact contained explicit language regarding § 2719(b)(1)(A) not found in the Keweenaw Bay compact. However, your argument is wrong because in fact the compacts for the Sault Tribe and Keweenaw Bay are virtually identical. Thus, they both contain the same sections 2(C) quoted on page 3 of your April 30 letter.

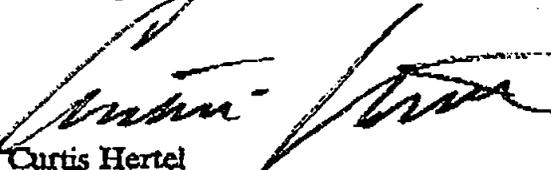
John D. Lesby  
July 12, 1996  
Page 5

All of the Michigan tribal/state gaming compacts were negotiated collectively and simultaneously. They were signed by the Governor on the same date, August 20, 1993; they were approved by the Michigan Legislature collectively and simultaneously; and their approval by the Secretary is contained in the same notice published in the Federal Register. See 58 Fed. Reg. 63262 (Nov. 30, 1993). The language in all seven compacts is identical, except for a minor difference in the Saginaw Chippewa Indian Tribe of Michigan's compact, not pertinent to the subject at hand. Thus, the Sault Tribe's reliance on Keweenaw Bay Indian Community v. United States continues and is not addressed by your erroneous contention regarding the provisions of the compacts.

✓ In summary, we remain unpersuaded by your arguments regarding why the Secretary may not proceed to take the Greektown parcel into trust and authorize that gaming take place thereon, pursuant to 25 U.S.C. § 2719(b)(1)(A). We urge you to advise the Secretary to stand by his favorable findings under the Act and to proceed with the final steps associated with the fee-to-trust application of the Sault Ste. Marie Tribe. With all due respect, we believe there are no legal impediments to the Secretary proceeding as we have urged.

Thank you for consideration.

Sincerely,



Curtis Hertel  
House Democratic Leader

cc: Pat Gagliardi  
Edward McNamara  
Bernard Bouschor  
John C. Martin  
Daniel T. Green  
Bruce R. Greene



United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

TRANSMITTAL SHEET

Date: 7/29/96

# of pages: 9

TO: Elena Kagan

Agency / Bureau: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Fax Number: 456-1647

Subject: Greentown

FROM: Bob Anderson

Department of the Interior  
Office of the Solicitor  
Division of Indian Affairs  
6456 MS/MIB  
Washington, D.C. 20240

Transmission #: 202/219-1791  
Confirmation #: 202/208-3401

REMARKS: \_\_\_\_\_

I'll be working up a response to the  
July 16 letter & will get you a copy.

Bob



# United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

MAY 11 1996

Memorandum

To: Tom Shea

From: Associate Solicitor, Division of Indian Affairs *Robert T. Ash*

Re: Greektown Acquisition

Attached is a letter sent to John Martin of Patton, Boggs in response to the arguments presented in the wake of the Seminole decision. I have discussed this with Elena Kagan on several occasions, so you might talk to her about it.

You will notice that I do not discuss the Seminole decision in any detail. The Tribe's argument is that since Seminole makes judicial review of state action unavailable, there is an increased likelihood of a non-delegation doctrine violation. That premise leads to their conclusion that the Secretary should construe the statute to allow him to review (and reverse) the decisions of Governors. As explained in my letter, however, the gubernatorial consent provision does not even present a non-delegation issue. Accordingly, there is no need to even consider the bearing of the Seminole case's limitation of judicial review on the matter.

Let me know if I can be of further assistance.

cc: Elena Kagan  
Anne Shields  
John Duffy  
John Leshy  
Heather Sibbison



# United States Department of the Interior

OFFICE OF THE SOLICITOR

APR 30 1996

John C. Martin, Esq.  
Patton, Boggs, LLP  
2550 M Street, N.W.  
Washington, D.C. 20037

Dear Mr. Martin:

This responds to your request that the Solicitor's Office advise the Secretary that he has the authority to override Governor Engler's decision not to concur in the Secretary's positive findings as to gaming on a proposed trust land acquisition in Detroit. I have carefully considered your arguments and discussed them with lawyers from the Justice Department.

Your argument is based in large part on the effect of the Supreme Court's recent decision, Seminole Tribe of Florida v. State of Florida, 116 S. Ct. 1114 (1996), read in tandem with the non-delegation doctrine. You argue that the combined effect of the lack of judicial review of state actions under the Indian Gaming Regulatory Act (IGRA) and the lack of constraints on gubernatorial action under section 20, 25 U.S.C. § 2719, of IGRA requires a narrowing construction by the Secretary. The proposed construction would authorize the Secretary to take off-reservation land in trust unless the Secretary concluded that a Governor's failure to concur under section 20 was based on a reasoned evaluation of the Secretary's prior determination under that section. In other words, a Governor's failure to concur in a trust acquisition could be overridden by the Secretary.

The non-delegation doctrine requires that Congress "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (quoting American Power and Light v. SEC, 329 U.S. 90, 105 (1946)). While this doctrine generally has been invoked in cases involving delegations to coordinate branches of the federal government, it also applies to delegations to private or state actors. You argue that:

If the gubernatorial concurrence provision were read to give the Governor unfettered discretion, it would be standardless, and thereby run afoul of the nondelegation

principle. Courts have often used "narrowing interpretations" to avoid nondelegation problems: [t]he Supreme Court has continued to use the [nondelegation] doctrine in an interpretive mode, finding statutory texts conferring powers on the Executive should be construed narrowly where a broader construction might represent an unconstitutional delegation." Synar v. United States, 626 F. Supp. 1374, 1384 (D.D.C., aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986)). It is thus incumbent on the Secretary to interpret Section 20(b)(1) as requiring both the Secretary and the Governor to apply the same statutory standards: benefit to the Tribe and detriment to the surrounding community.

Patton, Boggs Memorandum at 2-3 (undated -- hand delivered to Associate Solicitor Robert Anderson on April 24, 1996).

I agree that courts and agencies have severed congressional veto provisions from other statutes. The basis for such action, however, was violation of the separation of powers doctrine -- not the non-delegation doctrine. See, e.g., INS v. Chadha, 426 U.S. 919 (1983). And while I agree with your general description of the non-delegation doctrine, I do not agree that IGRA's gubernatorial consent provision implicates that doctrine.

In the case of the IGRA, Congress carefully balanced the interests of States, tribes and local entities and developed a process for Secretarial determinations of whether to take land in trust for off-reservation gaming purposes. Sensitive to State concerns, Congress conditioned the acquisition of off-reservation land for gaming purposes on gubernatorial concurrence. Attaching such a condition to Secretarial action is neither unusual, nor unconstitutional. See, e.g., 16 U.S.C. § 715k-5 (no land shall be purchased using migratory bird conservation funds absent approval of the Governor); 33 U.S.C. §§ 1311(g), (h), (m) and (n), 1312(b) (EPA may modify effluent limitations under the Clean Water Act only "upon concurrence of the State"); 42 U.S.C. 3171 (Secretary of Commerce may establish economic development districts with the "concurrence of the States in which such districts will be wholly or partially located.").

In Currin v. Wallace, 306 U.S. 1 (1939) the Court evaluated the Tobacco Inspection Act's provisions authorizing the Secretary to establish standards for handling, marketing and grading tobacco products. The Secretary is authorized to make market area designations, but those designations do not take effect "unless two-thirds of the growers, voting at a prescribed referendum, favor it." Id. at 6. The Court rejected the argument that Congress had unlawfully delegated authority to the Secretary and tobacco growers. The Secretary of Commerce, like the Secretary of Interior under IGRA, initially made certain factual determinations and developed a recommendation. The Court noted that the requirement of a referendum simply called for an expression of the wishes of the growers and concluded that the "provisions of the Act are well within the principle of permissible delegation." Id. at 18. See

North Dakota v. United States, 460 U.S. 300 (1983). In neither of the foregoing cases did the Court even hint that the concurrence provisions implicated the non-delegation doctrine.

The non-delegation doctrine deals with Congress' assignment of federal regulatory programs to outside actors. In IGRA, Congress assigned certain duties to the Secretary and spelled out with great specificity the manner in which his discretion is to be exercised. The fact that Congress attached the additional requirement of gubernatorial concurrence does not make the statute suspect on non-delegation grounds. Rather, Congress simply has limited the Secretary's authority to take land in trust for gaming purposes based on Congress' view of the appropriate role of state policy makers in this area. I thus can not agree that the concurrence provision violates the non-delegation doctrine.

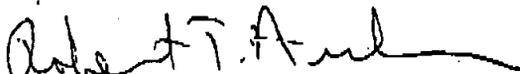
You also argue that the United States already has agreed that section 20 must be read to require that the Governor evaluate the same standards as the Secretary. Citing Siletz v. United States, Nos. 94-35304, 94-35373, 94-35374 (9th Cir.), Answering/Opening Brief for the United States at 15.

First, the Justice Department brief that you cite does not state that the Governor must engage in an inquiry identical to the Secretary's. The language you quote from the brief simply reflects the fact that in the Siletz case the Governor had in fact undertaken the identical inquiry. Second, and most important for our purposes, an evaluation of the reasoning underlying a Governor's decision to concur or not is appropriate only if the Secretary has the authority to review the Governor's decision. The statute does not expressly provide the Secretary with such authority and it would require a substantial rewrite of the statute to infer such authority. Such a rewrite would be contingent on a finding that there are constitutional infirmities in the concurrence scheme. As explained above and in the attached letter from Solicitor Leshy, we do not believe there are any constitutional problems with the concurrence provision.

As I mentioned in our meeting, the Secretary supports Indian gaming in Detroit, but Congress has provided that such activity may only

take place with the concurrence of the Governor of the State. Under these circumstances we cannot advise the Secretary that he has authority to authorize gaming absent gubernatorial concurrence.

Sincerely,



Robert T. Anderson  
Associate Solicitor  
Division of Indian Affairs

Enclosure



# United States Department of the Interior

OFFICE OF THE SOLICITOR

APR 30 1996

Honorable Curtis Hertel, House Democratic Leader  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Honorable Pat Gagliardi, House Democratic Floor Leader  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Honorable Edward McNamara, Wayne County Executive  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Dear Messrs. Hertel, Gagliardi and McNamara:

The Secretary of the Interior (Secretary) has asked me to respond to your letter requesting that he accept the "Greektown" property in Detroit in trust for the Sault Ste. Marie Tribe of Chippewa Indians. To summarize what follows, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, permits the Secretary to take off-reservation land in trust for gaming purposes, subject to certain conditions. One of those conditions has not been met here. While the Secretary has determined that it would be in the best interest of the Tribe and not detrimental to the surrounding community to take the land in trust, Governor Engler has refused to concur in the Secretary's determination. Absent such concurrence, IGRA precludes the Secretary from taking the action you request.

Our analysis of the legal issues follows, along with our response to arguments the Tribe and its attorneys have recently advanced.

Trust land acquisitions generally are governed by the criteria at 25 C.F.R. Part 151, but when an off-reservation acquisition is intended for gaming purposes, Congress has imposed additional constraints. Section 20 of IGRA, 25 U.S.C. § 2719, prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. One exception to this prohibition is when the Secretary, after consultation with the Indian tribe and appropriate State and local officials, determines that a gaming establishment on newly acquired lands: (1) would be in the best interest of the Indian tribe and its members; and (2) would not be detrimental to the surrounding community, but only if the Governor of the State concurs in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A).

Because Governor Engler did not concur with the Secretary's August 18, 1994, favorable two part determination, the clear language of the statute precludes the Tribe from using the land for gaming. While the Department is disappointed that the trust acquisition may not proceed, that result is mandated by law.

The Tribe has argued that the IGRA provision vesting Governors with concurrence authority violates separation of powers principles and the Appointments Clause and is therefore unconstitutional. One federal district court has agreed, but the case is now pending before a federal court of appeals. Confederated Tribes of Siletz Indians of Oregon v. United States, 841 F. Supp. 1479, 1488 (D. Oregon 1994), appeals docketed, Nos. 94-35304, 94-35373, 94-35374 (9th Cir.). The United States has argued throughout this litigation, including in our appeal brief to the Ninth Circuit, that the provision does not violate the Constitution.

The separation of powers doctrine bars one branch of government from usurping functions reserved to another branch. Mistretta v. United States, 488 U.S. 361, 382 (1989). Cases striking down statutes for violating separation of powers typically involve situations where an executive branch action is made subject to approval of a Member of Congress, a House of Congress, or an official responsible to Congress. See Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991); INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986).

This is not the case with section 20 of IGRA. There Congress simply provided State governors with the power to preclude off-reservation gaming activity. See Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir. 1994) ("[In IGRA Congress] tried to fashion a plan that would enable the states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws."). We know of no court decisions (other than the district court decision in the Siletz case) that use separation of powers grounds to strike down congressional schemes that condition Executive Branch action on the concurrence of state officials. All relevant authority is to the contrary. See, e.g., North Dakota v. United States, 460 U.S. 300 (1983). Thus we cannot agree that section 20's consent provision violates the separation of powers doctrine.

Nor does the concurrence provision violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2., which provides the exclusive mechanism by which an officer of the United States may be appointed. See Buckley v. Valco, 424 U.S. 1, 124-37 (1976) (per curiam). This issue was recently dealt with in a definitive and binding opinion of the Justice Department. The United States' position is that "it is a conceptual mistake to argue that federal laws delegating authority to state officials create federal 'offices,' which are then filled by (improperly appointed) state officials." Memorandum from Office of Legal Counsel at 14 (Dep't. of Justice Sept. 7, 1995) ("Constitutional Limitations on Federal Government Participation in Binding Arbitration"). Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office. This means that the delegation of federal authority can present no Appointments Clause difficulties, because the individuals serve as state officials rather than as federal officials. See Seattle Master Builders' Ass'n v. Pacific Northwest Elec. Power & Planning Coun., 786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987) ("because the Council members do not serve pursuant to federal law," is "immaterial whether they exercise some significant executive or administrative authority over federal activity").

The Tribe further argues that IGRA ought to be construed to allow the Secretary to reject a Governor's refusal to concur if the Secretary determines that the Governor's reasons are insufficient. We do not believe the statute can reasonably be so interpreted. Section 20 authorizes taking lands in trust for gaming purposes "only if the Governor of the State where the gaming activity is to be conducted concurs in the Secretary's determination." (emphasis added) Nothing in the statute suggests that the Secretary has the power to review the basis for the Governor's decision. Moreover, section 20 requires the Governor to act affirmatively only if he or she consents to taking lands in trust in such circumstances. Because section 20 does not require the Governor to set forth reasons for not acting, it is unreasonable to construe that section as

allowing the Secretary to question the basis for the Governor's inaction, and to choose to proceed with the acquisition anyway.

The Tribe also advances an argument based on the recent decision in Keweenaw Bay Indian Community v. United States, No. 2:94-CV-262 (W.D. Mich. 1996). The Keweenaw Bay Indian Community acquired off-reservation land in trust in 1990 and executed a tribal-state compact authorizing gaming on "Indian lands." The compact became effective upon approval by the Secretary in 1993. The district court ruled that compliance with section 20 was not necessary on these facts because upon approval of the compact, its terms - rather than IGRA - controlled the regulation of class III gaming. The court observed that it would make little sense to require section 20 approval when the Governor and Secretary had, through the compacting process, already approved gaming on all "Indian lands."

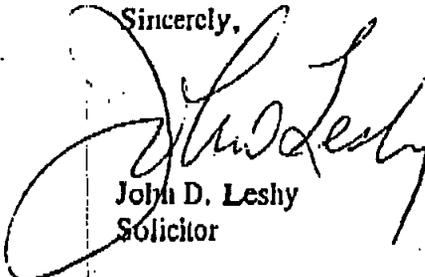
We believe the district court decision is incorrect, and we have asked the court for reconsideration. We do not believe the Keweenaw Bay Compact could waive the statutorily mandated requirement of concurrence. More important, its reasoning is inapplicable to the Sault Ste. Marie Tribe. Section 2 (C) of the Sault Ste. Marie Tribe's compact provides that:

any lands which the Tribe proposes to be taken in trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C. § 2719 or any successor provision of law.

Thus, even if the Keweenaw Bay Community decision were upheld, any reading of the terms of the Sault Ste. Marie Compact requires that proposals to take land in trust be governed by the terms of § 20. It is undisputed that the land on which the "Greektown" facility would be operated is not now in trust. Therefore the compact itself requires the Governor's concurrence.

I trust this answers your inquiry. Should you have any additional questions or need further clarification, please contact Associate Solicitor for Indian Affairs Robert Anderson at 208-3401.

Sincerely,



John D. Lesly  
Solicitor

cc: Sault Ste. Marie Tribal Chairman



## United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

MAY 11 1996

Memorandum

To: Tom Shea

From: Associate Solicitor, Division of Indian Affairs *Robert J. Ash*

Re: Greektown Acquisition

Attached is a letter sent to John Martin of Patton, Boggs in response to the arguments presented in the wake of the Seminole decision. I have discussed this with Elena Kagan on several occasions, so you might talk to her about it.

You will notice that I do not discuss the Seminole decision in any detail. The Tribe's argument is that since Seminole makes judicial review of state action unavailable, there is an increased likelihood of a non-delegation doctrine violation. That premise leads to their conclusion that the Secretary should construe the statute to allow him to review (and reverse) the decisions of Governors. As explained in my letter, however, the gubernatorial consent provision does not even present a non-delegation issue. Accordingly, there is no need to even consider the bearing of the Seminole case's limitation of judicial review on the matter.

Let me know if I can be of further assistance.

cc: Elena Kagan  
Anne Shields  
John Duffy  
John Leshy  
Heather Sibbison



## United States Department of the Interior

OFFICE OF THE SOLICITOR

APR 30 1996

John C. Martin, Esq.  
Patton, Boggs, LLP  
2550 M Street, N.W.  
Washington, D.C. 20037

Dear Mr. Martin:

This responds to your request that the Solicitor's Office advise the Secretary that he has the authority to override Governor Engler's decision not to concur in the Secretary's positive findings as to gaming on a proposed trust land acquisition in Detroit. I have carefully considered your arguments and discussed them with lawyers from the Justice Department.

Your argument is based in large part on the effect of the Supreme Court's recent decision, Seminole Tribe of Florida v. State of Florida, 116 S. Ct. 1114 (1996), read in tandem with the non-delegation doctrine. You argue that the combined effect of the lack of judicial review of state actions under the Indian Gaming Regulatory Act (IGRA) and the lack of constraints on gubernatorial action under section 20, 25 U.S.C. § 2719, of IGRA requires a narrowing construction by the Secretary. The proposed construction would authorize the Secretary to take off-reservation land in trust unless the Secretary concluded that a Governor's failure to concur under section 20 was based on a reasoned evaluation of the Secretary's prior determination under that section. In other words, a Governor's failure to concur in a trust acquisition could be overridden by the Secretary.

The non-delegation doctrine requires that Congress "clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (quoting American Power and Light v. SEC, 329 U.S. 90, 105 (1946)). While this doctrine generally has been invoked in cases involving delegations to coordinate branches of the federal government, it also applies to delegations to private or state actors. You argue that:

If the gubernatorial concurrence provision were read to give the Governor unfettered discretion, it would be standardless, and thereby run afoul of the nondelegation

principle. Courts have often used "narrowing interpretations" to avoid nondelegation problems: [t]he Supreme Court has continued to use the [nondelegation] doctrine in an interpretive mode, finding statutory texts conferring powers on the Executive should be construed narrowly where a broader construction might represent an unconstitutional delegation." Synar v. United States, 626 F. Supp. 1374, 1384 (D.D.C., aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986). It is thus incumbent on the Secretary to interpret Section 20(b)(1) as requiring both the Secretary and the Governor to apply the same statutory standards: benefit to the Tribe and detriment to the surrounding community.

Patton, Boggs Memorandum at 2-3 (undated -- hand delivered to Associate Solicitor Robert Anderson on April 24, 1996).

I agree that courts and agencies have severed congressional veto provisions from other statutes. The basis for such action, however, was violation of the separation of powers doctrine -- not the non-delegation doctrine. See, e.g., INS v. Chadha, 426 U.S. 919 (1983). And while I agree with your general description of the non-delegation doctrine, I do not agree that IGRA's gubernatorial consent provision implicates that doctrine.

In the case of the IGRA, Congress carefully balanced the interests of States, tribes and local entities and developed a process for Secretarial determinations of whether to take land in trust for off-reservation gaming purposes. Sensitive to State concerns, Congress conditioned the acquisition of off-reservation land for gaming purposes on gubernatorial concurrence. Attaching such a condition to Secretarial action is neither unusual, nor unconstitutional. See, e.g., 16 U.S.C. § 715k-5 (no land shall be purchased using migratory bird conservation funds absent approval of the Governor); 33 U.S.C. §§ 1311(g), (h), (m) and (n), 1312(b) (EPA may modify effluent limitations under the Clean Water Act only "upon concurrence of the State"); 42 U.S.C. 3171 (Secretary of Commerce may establish economic development districts with the "concurrence of the States in which such districts will be wholly or partially located.").

In Currin v. Wallace, 306 U.S. 1 (1939) the Court evaluated the Tobacco Inspection Act's provisions authorizing the Secretary to establish standards for handling, marketing and grading tobacco products. The Secretary is authorized to make market area designations, but those designations do not take effect "unless two-thirds of the growers, voting at a prescribed referendum, favor it." Id. at 6. The Court rejected the argument that Congress had unlawfully delegated authority to the Secretary and tobacco growers. The Secretary of Commerce, like the Secretary of Interior under IGRA, initially made certain factual determinations and developed a recommendation. The Court noted that the requirement of a referendum simply called for an expression of the wishes of the growers and concluded that the "provisions of the Act are well within the principle of permissible delegation." Id. at 18. See

North Dakota v. United States, 460 U.S. 300 (1983). In neither of the foregoing cases did the Court even hint that the concurrence provisions implicated the non-delegation doctrine.

The non-delegation doctrine deals with Congress' assignment of federal regulatory programs to outside actors. In IGRA, Congress assigned certain duties to the Secretary and spelled out with great specificity the manner in which his discretion is to be exercised. The fact that Congress attached the additional requirement of gubernatorial concurrence does not make the statute suspect on non-delegation grounds. Rather, Congress simply has limited the Secretary's authority to take land in trust for gaming purposes based on Congress' view of the appropriate role of state policy makers in this area. I thus can not agree that the concurrence provision violates the non-delegation doctrine.

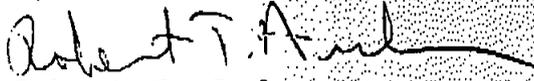
You also argue that the United States already has agreed that section 20 must be read to require that the Governor evaluate the same standards as the Secretary. Citing Siletz v. United States, Nos. 94-35304, 94-35373, 94-35374 (9th Cir.), Answering/Opening Brief for the United States at 15.

First, the Justice Department brief that you cite does not state that the Governor must engage in an inquiry identical to the Secretary's. The language you quote from the brief simply reflects the fact that in the Siletz case the Governor had in fact undertaken the identical inquiry. Second, and most important for our purposes, an evaluation of the reasoning underlying a Governor's decision to concur or not is appropriate only if the Secretary has the authority to review the Governor's decision. The statute does not expressly provide the Secretary with such authority and it would require a substantial rewrite of the statute to infer such authority. Such a rewrite would be contingent on a finding that there are constitutional infirmities in the concurrence scheme. As explained above and in the attached letter from Solicitor Leshy, we do not believe there are any constitutional problems with the concurrence provision.

As I mentioned in our meeting, the Secretary supports Indian gaming in Detroit, but Congress has provided that such activity may only

take place with the concurrence of the Governor of the State. Under these circumstances we cannot advise the Secretary that he has authority to act in the absence of gubernatorial concurrence.

Sincerely,



Robert T. Anderson  
Associate Solicitor  
Division of Indian Affairs

Enclosure

6-13-96 Telecon w/ Kathy Whalen

Indian Gaming Comm'n

same time  
Minto - "like" to be removed

For cause removal.

Failure to administer

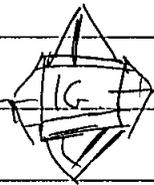
consult w/ other mbrs of Comm

report to work.

Deal w/ staff ~~in~~ w/ respect

KW -

used indic by



lost article - abt comm'n generally

Sevlines

Part problems - re club support

ANPR

6-9 mos.

severability - no way!

altern method to protect tribes

3) Secy's role?

need general policy

do rulemaking.

2 April 11 for ANPR? Issued yet?

↳ Get later version

sub comments on auth to promulgate procedures

11th cir solution

(9th cir has indicated disagreement)

ANPR

severable?

secy able to prescribe process?

what is applying process he

doing so?

✓ AS 1:00 pm 62640

Product 472

69300

66683

Paul W

Petition - free

airline - Pres

campaign

Could Pres sign?

65372

Conv. w/ J. Lesby 4-11-96

Frank + Shields talked Monday

AS said: we'll send you draft.

Faxed to him/wanting to hear.

Wednesday.

Stretch from 6 to 11 years?

when exclu is only six.

This addresses elliptically in p. 2 #3

Earlier version -- payments beyond - pre-empt  
illegal unless can show just stretched  
out.

relate back to  
negotiated figure  
agreed upon as to  
value of exclusivity.

Assume value of exclusivity  
Agreed - 90 m per yr  
 $\times 6$   
540 per yr

If just deferring it -  
then we won't have a  
problem.



Call between 10-11:30

208-4423

Diff. of opinion here on this -  
more on bright line

(Angelo never asked)

BF - said he wd get back to  
I. as to what changes he  
wants in this A re exclu.

Now having what seems to  
be constructive talks  
w/ BF. Seems to be going OK.

He doesn't seem to be grasping  
this s<sub>2</sub> at the moment.  
Diff. of opinion in st leg - BF  
wishes to deal w/ Frank.

Seminol  
notice of proposed Rule -  
What do we do now?  
Start to buy time - then electric

Fund on pressure?  
will get sued?  
very soon.  
need to have  
in place.

Takes pressing to have key preside procs.  
States would be made very unhappy.

Fax me current w/ly version of ADPR.  
Coord w/ Bill Waxman.

Bablitt has sent Panetta memo.



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

## TRANSMITTAL SHEET

Date: 4-26-96

# of pages: 4

TO: Elena Kagan

Agency / Bureau: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Fax Number: 456-1647

Subject: \_\_\_\_\_

FROM: Bob Anderson

Department of the Interior  
Office of the Solicitor  
Division of Indian Affairs  
6456 MS/MIB  
Washington, D.C. 20240

Transmission #: 202/219-1791  
Confirmation #: 202/208-3401

REMARKS: \_\_\_\_\_

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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



# United States Department of the Interior

## OFFICE OF THE SOLICITOR

John C. Martin, Esq.  
Patton, Boggs, LLP  
2550 M Street, N.W.  
Washington, D.C. 20037

Dear Mr. Martin:

This responds to your request that the Solicitor's Office advise the Secretary that he has the authority to override Governor Engler's decision not to concur in the Secretary's positive findings as to gaming on a proposed trust land acquisition in Detroit. I have carefully considered your arguments and discussed them with lawyers from the Justice Department.

Your argument is based in large part on the effect of the Supreme Court's recent decision, Seminole Tribe of Florida v. State of Florida, 116 S. Ct. 1114 (1996), read in tandem with the non-delegation doctrine. You argue that the combined effect of the lack of judicial review of state actions under the Indian Gaming Regulatory Act (IGRA) and the lack of constraints on gubernatorial action under section 20, 25 U.S.C. § 2719, of IGRA requires a narrowing construction by the Secretary. The proposed construction would authorize the Secretary to take off-reservation land in trust unless the Secretary concluded that a Governor's failure to concur under section 20 was based on a reasoned evaluation of the Secretary's prior determination under that section. In other words, a Governor's failure to concur in a trust acquisition could be overridden by the Secretary.

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If the gubernatorial concurrence provision were read to give the Governor unfettered discretion, it would be standardless, and thereby run afoul of the nondelegation

principle. Courts have often used "narrowing interpretations" to avoid nondelegation problems: [t]he Supreme Court has continued to use the [nondelegation] doctrine in an interpretive mode, finding statutory texts conferring powers on the Executive should be construed narrowly where a broader construction might represent an unconstitutional delegation." Synar v. United States, 626 F. Supp. 1374, 1384 (D.D.C., aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986)). It is thus incumbent on the Secretary to interpret Section 20(b)(1) as requiring both the Secretary and the Governor to apply the same statutory standards: benefit to the Tribe and detriment to the surrounding community.

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In the case of the IGRA, Congress carefully balanced the interests of States, tribes and local entities and developed a process for Secretarial determinations of whether to take land in trust for off-reservation gaming purposes. Sensitive to State concerns, Congress conditioned the acquisition of off-reservation land for gaming purposes on gubernatorial concurrence. Attaching such a condition to Secretarial action is neither unusual, nor unconstitutional. See, e.g., 16 U.S.C. § 715k-5 (no land shall be purchased using migratory bird conservation funds absent approval of the Governor); 33 U.S.C. §§ 1311(g), (h), (m) and (n), 1312(b) (EPA may modify effluent limitations under the Clean Water Act only "upon concurrence of the State"); 42 U.S.C. 3171 (Secretary of Commerce may establish economic development districts with the "concurrence of the States in which such districts will be wholly or partially located.").

In Currin v. Wallace, 306 U.S. 1 (1939) the Court evaluated the Tobacco Inspection Act's provisions authorizing the Secretary to establish standards for handling, marketing and grading tobacco products. The Secretary is authorized to make market area designations, but those designations do not take effect "unless two-thirds of the growers, voting at a prescribed referendum, favor it." Id. at 6. The Court easily brushed aside a challenge to the statute on the ground that it constituted an unconstitutional delegation of power. The Secretary of Commerce, like the Secretary of Interior under IGRA, initially made certain factual determinations and developed a recommendation. The Court noted

that the requirement of a referendum simply called for an expression of the wishes of the growers and concluded that the "provisions of the Act are well within the principle of permissible delegation." Id. at 18. See North Dakota v. United States, 460 U.S. 300 (1983). In neither of the foregoing cases did the Court even hint that the concurrence provisions implicated the non-delegation doctrine.

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You also argue that the United States has already agreed that section 20 must be read to require that the Governor evaluate the same standards as the Secretary. Citing Siletz v. United States, Nos. 94-35304, 94-35373, 94-35374 (9th Cir.), Answering/Opening Brief for the United States at 15.

First, the Justice Department brief that you cite does not state that the Governor must engage in an inquiry identical to the Secretary's. The language you quote from the brief simply reflects the fact that in the Siletz case the Governor had in fact undertaken the identical inquiry. Second, and most important for our purposes, the discussion of the nature of a Governor's determination to concur or not is relevant only if it is determined that the Secretary has the ability to review that determination. The statute does not expressly provide the Secretary with such authority and it would require a substantial rewrite of the statute to infer such authority. Such a rewrite would be contingent on a finding that there are constitutional infirmities in the concurrence scheme. As explained above and in the attached letter from Solicitor Leshy, we do not believe there are any constitutional problems with the concurrence provision.

As I mentioned in our meeting, the Secretary supports Indian gaming in Detroit, but Congress has provided that such activity may only

take place with the concurrence of the Governor of the State. Under these circumstances we cannot advise the Secretary that he has authority to authorize gaming absent gubernatorial concurrence.

Sincerely,

Robert T. Anderson  
Associate Solicitor  
Division of Indian Affairs

Enclosure



United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20210

FILE COPY  
SURNAME:

R. Anderson


Honorable Curtis Hertel, House Democratic Leader  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Honorable Pat Gagliardi, House Democratic Floor Leader  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Honorable Edward McNamara, Wayne County Executive  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Dear Messrs. Hertel, Gagliardi and McNamara:

The Secretary of the Interior (Secretary) has asked me to respond to your letter requesting that he accept the "Greektown" property in Detroit in trust for the Sault Ste. Marie Tribe of Chippewa Indians. To summarize what follows, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, permits the Secretary to take off-reservation land in trust for gaming purposes, subject to certain conditions. One of those conditions has not been met here. While the Secretary has determined that it would be in the best interest of the Tribe and not detrimental to the surrounding community to take the land in trust, Governor Engler has refused to concur in the Secretary's determination. Absent such concurrence, IGRA precludes the Secretary from taking the action you request.

Our analysis of the legal issues follows, along with our response to arguments the Tribe and its attorneys have recently advanced.

Trust land acquisitions generally are governed by the criteria at 25 C.F.R. Part 151, but when an off-reservation acquisition is intended for gaming purposes, Congress has imposed additional constraints. Section 20 of IGRA, 25 U.S.C. § 2719, prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. One exception to this prohibition is when the Secretary, after consultation with the Indian tribe and appropriate State and local officials, determines that a gaming establishment on newly acquired lands: (1) would be in the best interest of the Indian tribe and its members; and (2) would not be detrimental to the surrounding community, but only if the Governor of the State concurs in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A).

Because Governor Engler did not concur with the Secretary's August 18, 1994, favorable two-part determination, the clear language of the statute precludes the Tribe from using the land for gaming. While the Department is disappointed that the trust acquisition may not proceed, that result is mandated by law.

The Tribe has argued that the IGRA provision vesting Governors with concurrence authority violates separation of powers principles and the Appointments Clause and is therefore unconstitutional. One federal district court has agreed, but the case is now pending before a federal court of appeals. Confederated Tribes of Siletz Indians of Oregon v. United States, 841 F. Supp. 1479, 1488 (D. Oregon 1994), appeals docketed, Nos. 94-35304, 94-35305, 94-35306 (9th Cir.). The United States has argued throughout this litigation, including in our appeal brief to the Ninth Circuit, that the provision does not violate the Constitution.

The separation of powers doctrine bars one branch of government from usurping functions reserved to another branch. Misredua v. United States, 488 U.S. 361, 382 (1989). Cases striking down statutes for violating separation of powers typically involve situations where an executive branch action is made subject to approval of a Member of Congress, a House of Congress, or an official responsible to Congress. See Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991); INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986).

This is not the case with section 20 of IGRA. There Congress simply provided State governors with the power to preclude off-reservation gaming activity. See Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir. 1994) ("[In IGRA Congress] tried to fashion a plan that would enable the states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws."). We know of no court decisions (other than the district court decision in the Siletz case) that use separation of powers grounds to strike down congressional schemes that condition Executive Branch action on the concurrence of state officials. All relevant authority is to the contrary. See, e.g., North Dakota v. United States, 460 U.S. 300 (1983). Thus we cannot agree that section 20's consent provision violates the separation of powers doctrine.

Nor does the concurrence provision violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2., which provides the exclusive mechanism by which an officer of the United States may be appointed. See Buckley v. Valeo, 424 U.S. 1, 124-37 (1976) (per curiam). This issue was recently dealt with in a definitive and binding opinion of the Justice Department. The United States' position is that "it is a conceptual mistake to argue that federal laws delegating authority to state officials create federal 'offices,' which are then filled by (improperly appointed) state officials." Memorandum from Office of Legal Counsel at 14 (Dep't. of Justice Sept. 7, 1995) ("Constitutional Limitations on Federal Government Participation in Binding Arbitration"). Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office. This means that the delegation of federal authority can present no Appointments Clause difficulties, because the individuals serve as state officials rather than as federal officials. See Seattle Master Builders's Ass'n. v. Pacific Northwest Elec. Power & Planning Coun., 786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987) ("because the Council members do not serve pursuant to federal law," it is "immaterial whether they exercise some significant executive or administrative authority over federal activity").

The Tribe further argues that IGRA ought to be construed to allow the Secretary to reject a Governor's refusal to concur if the Secretary determines that the Governor's reasons are insufficient. We do not believe the statute can reasonably be so interpreted. Section 20 authorizes taking lands in trust for gaming purposes "only if the Governor of the State where the gaming activity is to be conducted concurs in the Secretary's determination." (emphasis added) Nothing in the statute suggests that the Secretary has the power to review the basis for the Governor's decision. Moreover, section 20 requires the Governor to act affirmatively only if he or she consents to taking lands in trust in such circumstances. Because section 20 does not require the Governor to set forth reasons for not acting, it is unreasonable to construe that section as

allowing the Secretary to question the basis for the Governor's inaction, and to choose to proceed with the acquisition anyway.

The Tribe also advances an argument based on the recent decision in Keweenaw Bay Indian Community v. United States, No. 2:94-CV-262 (W.D. Mich. 1996). The Keweenaw Bay Indian Community acquired off-reservation land in trust in 1990 and executed a tribal-state compact authorizing gaming on "Indian lands." The compact became effective upon approval by the Secretary in 1993. The district court ruled that compliance with section 20 was not necessary on those facts because upon approval of the compact, its terms - rather than IGRA - controlled the regulation of class III gaming. The court observed that it would make little sense to require section 20 approval when the Governor and Secretary had, through the compacting process, already approved gaming on all "Indian lands."

We believe the district court decision is incorrect, and we have asked the court for reconsideration. We do not believe the Keweenaw Bay Compact could waive the statutorily mandated requirement of concurrence. More important, its reasoning is inapplicable to the Sault St. Marie Tribe. Section 2 (C) of the Sault St. Marie Tribe's compact provides that:

any lands which the Tribe proposes to be taken in trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C. § 2719 or any successor provision of law.

Thus, even if the Keweenaw Bay Community decision were upheld, any reading of the terms of the Sault St. Marie Compact requires that proposals to take land in trust be governed by the terms of § 20. It is undisputed that the land on which the "Greektown" facility would be operated is not now in trust. Therefore the compact itself requires the Governor's concurrence.

I trust this answers your inquiry. Should you have any additional questions or need further clarification, please contact Associate Solicitor for Indian Affairs Robert Anderson at 208-3401.

Sincerely,

John D. Lesly  
Solicitor

cc: Sault Ste. Marie Tribal Chairman

Telecon Karen Marcus - re Indians. 2/23/96

statute - gaming not allowed on lands taken into trust  
after [Oct 98]

exception - Secy determines... but only if Gov agrees

Secy made determin

Gov didn't concur

Interim - no problem under trust w/ this stat language.

→ appurtenance clause

Secy's auth cond'ed on Gov's conc. OK.

Claim under IGRA? No.

They say Gov didn't abide by terms of statute

No - stat doesn't limit him etc.

Class 3 gaming - compacts  
res. d.

on Ind lands

Here, tribe has entered compact,  
in res.

Provisos spoke to poss that  
others <sup>lands</sup> would be taken into  
trust.

"Bad faith" to refer to concur  
given prior contemplation.

If something in compact  
which suggests...

Really, a K claim.

IGRA.

Negotiations in bad faith?

If state and this as bargaining  
chip?

mat'l mis reps?

Possible.



DEMOCRATIC LEADER OF THE HOUSE

Curtis Hertel  
2nd District

Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913  
Phone: (517) 373-1983

September 22, 1995

Mr. Bruce Babbit  
U.S. Department of the Interior  
Office of the Secretary  
Washington, D.C. 20240

Dear Secretary Babbit:

We are writing to urge you to proceed to take lands into trust in the City of Detroit for the Sault Ste. Marie Tribe of Chippewas (the Tribe) for the purpose of off-reservation gaming even though Governor John Engler has not concurred in your preliminary favorable determination concerning the Tribe's application.

As we outline below, it is our belief that the Governor has not only exceeded the scope of his authority delegated to him by the Congress but in doing so he has acted in bad faith. In this context, we believe that his rejection by press release of your findings is lacking in force and effect.

**BACKGROUND SURROUNDING THE CASINO PROPOSAL**

As you are aware, in September 1992, the Tribe submitted an application to the Department of Interior seeking to take land into trust in an area of the City of Detroit known as Greektown for the purpose of operating a casino. The casino, which would include approximately 120,000 square feet of gaming space, would be owned by the Tribe and operated by a local developer, 400 Monroe Associates, a Michigan general partnership. It was projected that the casino would create approximately 4,500 permanent jobs and an additional 5,500 indirect jobs in surrounding businesses that would serve the casino and its patrons. The casino was anticipated to attract approximately 8.4 million visitors annually and to generate 750,000 room nights of lodging annually.

Based on economic projections, the proposed Greektown casino would benefit the City of Detroit by approximately \$40 million per year with a portion of that funding earmarked for a community redevelopment fund that would provide seed money for start-up minority businesses.



Mr. Bruce Babbit  
September 22, 1995  
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The Tribe also agreed to reimburse the City for additional operating costs associated with the casino, e.g. the costs of police and fire protection.

As a result of the operation of the casino, the State was projected to receive approximately \$25 million per year for the Michigan Strategic Fund, a State managed economic development program.

### THE GOVERNOR'S PURPORTED REJECTION OF THE GREEKTOWN PROPOSAL

Under 25 USC 2719, authorization to take lands into trust for off-reservation gaming purposes exists to the extent that you determine that the "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". Your letter to Governor Engler of August 18, 1994, reached the foregoing conclusion. A Governor's concurrence requires the same determination.

Since the language of IGRA is very specific on this point, it is our position that the press statements made by the Governor on June 27, 1995, do not in fact reflect a determination that taking the proposed Greektown site into trust is either contrary to the best interest of the Tribe and its members or detrimental to the surrounding community. In his public statement on the issue, Governor Engler cited the following reasons for his rejection by press release:

- Fairness, i.e. there should not be a state sanctioned monopoly for any group.
- A flawed process which does not allow for input from the public, the legislature and the local community.
- A lack of regulatory oversight.
- Overstated economic benefits.
- The cost to society in terms of social ills.

None of the reasons cited go to the issue of the impact on the Tribe or the surrounding community and, to some extent, ignore reality.

**a. Fairness versus a State sanctioned monopoly.**

Approval of off-reservation gaming does not constitute a sanctioned monopoly. To the extent that Michigan law does not currently allow privately operated casino gaming for profit, the Governor may conceptually be accurate. However, the reality in Michigan is that there

Mr. Bruce Babbitt  
September 22, 1995  
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already is a state sanctioned monopoly for casino gaming, i.e. private charitable organizations are allowed to apply for and be granted state licenses to operate "millionaire parties". In general, these licenses are granted to religious organization, veterans groups and community service groups. While this practice which is authorized by an initiated amendment to Mich Const 1963(Art 4, § 41) certainly falls short of operation of a casino, the concept is the same: there is legalized gaming in Michigan for certain purposes and organizations, over and above the gaming authorized under IGRA.

Furthermore, it is this constitutional provision as implemented by law and interpreted by our courts which served as the legal basis for the negotiation of tribal/state compacts. Governor Engler not only entered into negotiations for such compacts with Michigan's Indian Tribes but signed such documents approving class III gaming on reservation lands.

Although we will discuss this issue later in this correspondence, we want to emphasize here that as part of those negotiations, the Tribes agreed to dismiss a federal court case against the State for failure to negotiate an agreement on this issue.

**b. The process for approving off-reservation casinos is flawed.**

The process which has been undertaken and completed with regard to the proposed Greektown casino is far from flawed, as alleged by the Governor. Contrary to his assertions, it has involved the Executive, the Legislature and the City of Detroit. It has not been a closed process which does not allow for competition or for "input from the public, the legislature, and the local community", as alleged by the Governor. Specifically, the following steps were undertaken to bring Michigan to the point where this issue is before the Governor:

1. In 1993, Governor Engler's Assistant Legal Counsel negotiated compacts between Michigan's then federally recognized Indian Tribes and the State. Those compacts which authorized class III gaming on reservation lands in Michigan, specifically referenced off-reservation gaming in Section 9. The compacts were signed by the Governor on August 22, 1993. We have also been advised that negotiations are underway with newly recognized Indian Tribes. Clearly the Governor and his staff have had extensive input into the issue and on the direction that off-reservation gaming applications would take.

2. The compacts referenced above were approved in House Concurrent Resolution 439 by both Houses of the Michigan Legislature in September 1993, after being signed by Governor Engler and after at least one public hearing in each Chamber. Certainly, there was an opportunity for public input in those hearings.

3. Subsequent to the approval of the compacts by the Governor and the Legislature, the

Mr. Bruce Babbitt  
September 22, 1995  
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compacts were approved by you and official notice was published on November 30, 1993, in the Federal Register.

4. After approval of the compacts by the Governor, the Legislature, and yourself, two ballot issues were presented to the residents of the City of Detroit. One of those issues specifically addressed the proposal by the Tribe to acquire land in the Greektown area for operation of an off-reservation casino. Both of the proposals were overwhelmingly approved by the voters of the City on August 2, 1994.

5. After conclusion of the referenda on the question of off-reservation gaming in Detroit, the Detroit City Council approved an ordinance authorizing casino gaming.

6. Finally, the Tribe entered into and successfully negotiated an agreement with the Mayor of the City of Detroit which approved the Greektown proposal and established specific costs to be reimbursed by the Tribe and economic benefits which would accrue to the City. That agreement was unanimously approved by the Detroit City Council on April 13, 1995.

In light of the foregoing, there is no way in which the Governor can conceivably argue that there has not been public input or participation in the process. The process which has been undertaken with regard to the application by the Tribe has been slow and arduous but at each step in the process, there has been an opportunity for public input and the expression of support or opposition. This process is neither flawed nor closed.

**c. There is not a lack of regulatory oversight of Indian run gaming operations.**

The Governor's assertion that there is insufficient regulatory controls over Indian run casinos is inaccurate. Indian casinos are the most heavily regulated casinos in the country. They are regulated by a tribal gaming commission, as is the case here and by the National Indian Gaming Commission. Furthermore, the proposed Greektown casino would be regulated by the City of Detroit under the agreement entered into between the Tribe and the City, and by the State under the tribal/state gaming compact approved by the Governor, the Michigan Legislature, and yourself.

If the Governor is claiming that the compact he entered into with the Tribe does not adequately regulate the proposed casino, he must bear that responsibility.

**d. The Governor's own Blue Ribbon Commission supported casino gambling and cited major economic benefits to the State that would accrue as a result of limited expansion of gaming operations.**

Mr. Bruce Babbit  
September 22, 1995  
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On September 7, 1994, Governor Engler responded to your letter of August 18, 1994, advising him of your determination that the application by the Tribe "will be in the best interest of the Tribe and its members, and will not be detrimental to the surrounding community." In his response, Governor Engler indicated that he did "not concur at this time with the conclusions" of your letter. He went on to cite a number of concerns which "require careful consideration and will be addressed by my Blue Ribbon Commission on Michigan gaming." On the same day, he issued Executive Order 1994-24 creating the Blue Ribbon Commission (the Commission) which was directed to answer a series of questions and to make recommendations to the Governor concerning all types of potentially legalized gaming in Michigan.

After months of delay, the Commission issued its report which projected significant economic benefits to the City of Detroit and the State of Michigan if casino gaming is authorized. Their findings were based on a detailed analysis of the issue by a nationally respected accounting firm: Deloitte & Touche LLP. In its report to the Commission, DeLoitte & Touche projected Indian and non-Indian casino revenues would directly enter the Michigan economy in three ways: through the full time employment of 4,782 individuals (\$131.1 million); through operational expenditures on goods and services (\$91 million); and, through gaming taxes (\$185-\$231 million). The study also projected the one-time expenditure of \$119 million on construction. Finally, the study projected the recapture of \$705 million in current expenditures by Michigan residents on gaming in other jurisdictions as well as \$306 million in expenditures by non-Michigan residents.

Even if these projections are high, they clearly reflect a significant as well as beneficial impact on the State and local communities if the State was to have a combination of off-reservation and privately operated casinos. This is a potential economic impact which the State and the City of Detroit are not in a position to ignore or denigrate.

Furthermore, the Province of Ontario authorized casino gambling in Windsor beginning May 17, 1994. Over \$1.5 million leaves Detroit and Southeast Michigan each day for the Windsor casino. A second casino is currently under construction in Windsor and the Ontario Casino Commission has authorized a riverboat casino as well. This is a negative economic impact which the State and the City of Detroit are not in a position to ignore or denigrate.

The Commission recommended that there be, inter alia, a limited number of Indian casinos in the State, including within the City of Detroit.

e. The Governor has been unclear about the supposed social ills attributable to operation of an off-reservation casino.

We are unclear as to what the Governor is relying upon in his assertion that there are

Mr. Bruce Babbit  
September 22, 1995  
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social ills attributable to gaming which are ignored by the proponents. At no time has anyone argued that Indian gaming has resulted in ties to organized crime or increased crime rates on reservations. Further, the US Department of Justice has repudiated that assertion as recently as one year ago.

If the Governor is concerned about gambling addiction, he cannot argue that casinos operated by Indians are any more or less addictive than any other casinos or gambling operations. Those individuals in Southeast Michigan who are addicted to gambling already have several easily accessible outlets for their addiction: a legalized lottery operated by the State of Michigan; legalized millionaire parties operated by private organizations under State license; legalized horse racing; legalized bingo operated by private organizations under State license; and a 24-hour per day casino being operated across the Detroit River in Windsor. Surely, the addition of one or more off-reservation casinos operated by Michigan's Indian tribes is not going to worsen this problem, if it is one.

**THE GOVERNOR AND THE TRIBES CLEARLY ENVISIONED OFF  
RESERVATION GAMING AS A POSSIBILITY.**

In 1993, Michigan's then seven federally recognized Tribes entered into good faith negotiations with the State of Michigan for the purpose of securing a Tribal State Compact authorizing class III gaming on Indian lands. As part of those negotiations, both the State and the Tribes clearly envisioned the possibility of the Department of Interior taking lands into trust for off-reservation gaming purposes. If this was not true, there would have been no reason for the compacts which were approved by the Governor and ratified by the Legislature to include provisions relative to off-reservation gaming. (Section 9) Further, if this was not the case, there would have been no reason for the Tribes to subsequently negotiate and enter into a revenue sharing agreement, as requested by the Governor and memorialized in Section 9, relative to any revenues arising out of the operation of an off-reservation casino by one or more Tribes. That revenue sharing agreement was reached on May 25, 1994.

**THE GOVERNOR EXCEEDED THE SCOPE OF HIS DELEGATED AUTHORITY**

As noted previously, IGRA provides that gaming may take place on after acquired property if:

[T]he Secretary . . . 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

Mr. Bruce Babbitt  
September 22, 1995  
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State in which the gaming activity is to be conducted concurs in the Secretary's determination . . . 25 USC 2719(b)(1)(A)

As this language makes evident, the authority delegated to the Governor by Congress is specific and limited. The Governor may concur or decline to concur in the Secretary's determination that a proposed off-reservation casino is (1) in the best interests of the tribe making the application and (2) not detrimental to the surrounding community. A Governor may **not** disapprove an application by a tribe and a preliminary determination of approval by the Secretary because:

--he wants to "develop a framework that limits and controls the expansion of [all] gambling.", apparently including within the scope of this goal, gaming on tribal lands.

--he has determined that the Congress has enacted a "loophole" to "circumvent state law that says that gambling is a crime".

--he opposes an alleged "state sanctioned monopoly for any one group -- Indian or otherwise."

--he has concluded that a process which includes a State's chief executive, legislature and local units of government is flawed and therefore not worthy of recognition or acceptance.

--he has concluded that casinos "have consistently failed to produce the economic benefits that have been promised."

--he believes that "the expansion of gambling . . . brings with it an increase in a whole range of social ills that cannot be underestimated or ignored, including crime, prostitution and addition."

Finally, a Governor is not authorized by IGRA to require prior legislative approval and a statewide referendum before he is willing to concur or non-concur in a determination made by you.

An examination of all of the reasons cited by Governor Engler during 1994 and in 1995 lead to the inescapable conclusion that Governor Engler purported to exercise powers not delegated to him by the Congress. For these reasons, his failure to concur in your determination is of no force and effect.

Mr. Bruce Babbitt  
September 22, 1995  
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**THE GOVERNOR'S FAILURE TO CONCUR SHOULD NOT PREVENT THE  
PROJECT FROM PROCEEDING.**

Section 2917(b)(1)(A) of IGRA should be construed as giving the Governor no more than an advisory role in the process of authorizing gaming on after acquired property. If, to the contrary, the Governor's power under IGRA is construed as the power to veto the project, constitutional conflict arise.

A United States District Court Judge in Oregon has held that the Governor's concurrence is mandatory under §2719(b)(1)(A) and that the Governor has, in effect, final authority over whether a tribe can conduct gaming on after acquired property. However, as a veto, the statute violates the Appointments Clause of the Constitution. US Const art II, §8, cl 17 In reaching this conclusion, the Court said:

Congress unconstitutionally delegated to a state official, who was not a properly appointed federal officer . . . the power to overrule a determination that would otherwise have been exercised solely by an agency of the Executive Branch, power that an individual house of Congress could not unilaterally exercise . . . and power that a state official could not constitutionally exercise. Confederated Tribes of Siletz Indians of Oregon v. United States, Civ No 92-1621-BU (D Ore., Jan. 21, 1994)

We believe the District Court erred in its interpretation of the statute. Furthermore, we believe the Court ignored the canon of construction that statutes must be liberally construed in favor of Indian tribes, as well as the rule that courts are obliged, whenever possible, to construe statutes in a manner that renders them constitutionally valid. Mistretta v United States, 488 US 361 (1989); and Communications Workers of America v Beck, 487 US 735 (1988)

For these reasons, we urge you to treat the Governor's concurrence as advisory in nature. Under IGRA, the Secretary is obliged to consider a variety of views before making a final determination under § 2719(b)(1)(A). Thus, he must consult with Indian tribes and appropriate state and local officials. Surely Governor Engler's views are relevant. However, the question which must be answered is "are they more relevant than those of the Legislature, the Mayor and City Council of the City of Detroit, and, most importantly, the voters of the City of Detroit?"

In order to avoid constitutional infirmities, it is our contention that you, as Secretary of the Interior, must make the final determination whether gaming may or may not take place on after acquired property. Your determination must be the last word on the subject, even if the Governor disagrees.

Mr. Bruce Babbit  
September 22, 1995  
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With the foregoing in mind, we strongly urge you to proceed to approve the application of the Tribe for the operation of a casino on after acquired property in Greektown within the City of Detroit. We are making this request because the Governor has failed to comply with the provisions of §2719(b)(1)(A) to the extent his apparent denial is by press release is not based on

a determination that approval of the casino would be detrimental to either the Tribe or the surrounding community. Further, it is our belief that only by your taking affirmative action will we avoid the taint of the State of Michigan having acted in bad faith when it negotiated the compacts and sought federal court approval of a dismissal of federal litigation arising out of the State's previous failure to negotiate a tribal/state compact on gaming.

Thank for your consideration of this request. If there is further information or assistance we could provide on this matter, please feel free to contact us.

Sincerely,



**CURTIS HERTEL**  
House Democratic Leader



**PAT GAGLIARDI**  
House Democratic Floor Leader



**EDWARD McNAMARA**  
Wayne County Executive

cc: John Duffy, Counsel to the Secretary



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240



Honorable Curtis Hertel, House Democratic Leader  
Honorable Pat Gagliardi, House Democratic Floor Leader  
Honorable Edward McNamara, Wayne County Executive  
Michigan House of Representatives  
State Capitol Building  
Lansing, Michigan 48913

Dear Messrs. Hertel, Gagliardi and McNamara:

Thank you for your letter dated September 22, 1995, requesting Secretary Babbitt to accept, in trust, title to land in the City of Detroit, Michigan on behalf of the Sault Ste. Marie Tribe of Chippewa Indians (Tribe). The property is known as the "Greektown Property." Since you expressed concerns with an Indian gaming issue, your letter was referred to this office for response.

In your letter, you encourage Secretary Babbitt to utilize the authority under 25 U.S.C. § 2719 to take the land in trust on behalf of the Tribe, notwithstanding Governor Engler's failure to concur with the Secretary's determination in this matter. You explain that the Secretary's acceptance of the land in trust would enable the Tribe to proceed with development of its proposed gaming facility which would have positive economic impacts on the Tribe as well as the citizens of the City of Detroit and the State of Michigan.

As a matter of policy, the decision to place land in trust for the benefit of an Indian tribe is committed to the discretion of the Secretary of the Interior (Secretary) after consideration of the criteria found in Title 25, Code of Federal Regulations (CFR), Part 151. When the acquisition is intended for gaming, the decision is made after consideration of the requirements of Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, in addition to the requirements of 25 CFR § 151.

Trust acquisitions are subject to the approval of the Secretary and must be made pursuant to general and specific statutory authority. The statutory authority most commonly used in the acquisition of land in trust is the Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 465), which authorizes land to be taken into trust for Indian tribes.

Section 20 of IGRA, 25 U.S.C. § 2719, is not a statutory authority to acquire land in trust. Instead, it prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, date of enactment of IGRA, unless specifically exempted, or when the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby tribes, determines, pursuant to 25 U.S.C. § 2719(b)(1)(A), that a gaming establishment on newly acquired lands: (1) would be in the best interest of the Indian tribe and its members, and (2) would not be detrimental to the surrounding community, but only if the Governor of the State concurs in the Secretary's determination. Since Governor Engler did not concur with the Secretary's August 18, 1994, favorable two-part determination, the Tribe may not use the land for gaming. It is the opinion of the Department that 25 U.S.C. § 2719(b)(1)(A) as enacted is constitutional. In Confederated Tribes of Siletz Indians of Oregon v. United States, No. 92-1621-JU (D. Ore.), the Department of Justice has filed briefs that reflect our position on this matter. We do not believe, as you advocate, that this statutory provision should be construed as giving the Governor anything more than an advisory role in the process of authorizing gaming on after acquired property, nor do we believe that any other statutory interpretation leads to Constitutional infirmities.

The land may still be acquired in trust on behalf of the Tribe for purposes other than gaming pursuant to the Secretary's discretionary authority. The Governor's failure to concur did not diminish the ability of the Secretary to accept the land in trust utilizing his discretionary authority. If the Tribe still wants the Secretary to consider taking title to the land in trust for purposes other than gaming, it must make a written request to the Secretary. The Tribe's request will be evaluated pursuant to the criteria in 25 CFR § 151.

It is unfortunate that the Governor did not concur in the Secretary's two-part determination as we, too, believe the economic benefits of the Tribe's endeavor would be beneficial to both the Tribe and the surrounding community.

We regret that we cannot provide you with a more favorable response to this issue. Should you have any additional questions or need further clarification, please feel free to contact the Indian Gaming Management Staff Office at (202) 219-4066.

Sincerely,

Ada E. Deer  
Assistant Secretary - Indian Affairs

cc: Sault Ste. Marie Tribal Chairman

Gov req'd to approve?

Any exemption - unlawful  
gov behavior

Are they right that  
gov is acting unlawfully?

Emph. rejection by press release.

Any formal vs? can he do it?

What are criteria for rejection?

(looks to me as if he can - wholly within his power just "not to occur" - don't need any formal determination or findings.

Gov has only advisory role???

Otherwise, unconst.?

Appointments of

(D. Ore.)

Yes say: NO.

① Does the statute require Governor to approve?

② Are there exemptions if the governor acts unlawfully as alleged in letter from Members of Cong?

③ Are docs right that Gov acted unlawfully?

Name	Date
<i>Dimitrie Nisusko</i>	<i>2/25/99</i>

*Couard*

THE WHITE HOUSE  
WASHINGTON

November 21, 1996

MEMORANDUM FOR DAVID FEIN, OFFICE OF THE GENERAL COUNSEL

FROM: Emily Bromberg, Intergovernmental Affairs

SUBJECT: Department of Interior/Governors Issue

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The Department of Interior (DOI) last May issued an advance notice of proposed rule-making (ANPR) on the question of whether the Secretary has the authority to prescribe "procedures" for the conduct of class III Indian gaming when a state asserts its sovereign immunity from suit in a federal court action brought under the Indian Gaming Act. DOI is currently reviewing the comments. The National Governors Association (NGA) has written a letter to the President that questions the Secretary's authority to prescribe such procedures and asks that the President intervene on their behalf. The NGA letter is attached.

I understand that there are restrictions on White House contact with federal agencies during the rule-making process. Would you please advise me regarding whether contact with DOI is permissible, particularly given the rule-making status? I can be reached at 6-2896. In my absence, please contact John Emerson who may also be reached at 6-2896. Thank you.

*Kevin O'Keefe*



Bob Miller  
Governor of Nevada  
Chairman

George V. Voinovich  
Governor of Ohio  
Vice Chairman

Raymond C. Scheppach  
Executive Director

Hall of the States  
444 North Capitol Street  
Washington, D.C. 20001-1512  
Telephone (202) 624-5300

November 13, 1996

The President  
The White House  
Washington, DC 20500

Dear Mr. President:

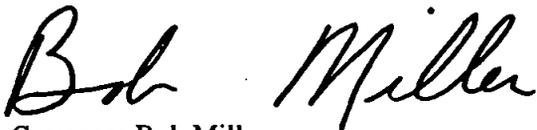
The Governors continue to have concerns that the secretary of the U.S. Department of the Interior intends to establish a procedure to permit Indian tribal operation of Class III gaming, independent of the process established in the Indian Gaming Regulatory Act of 1988 (IGRA). The Governors do not believe that the secretary has such authority, and we urge you to intervene in this matter.

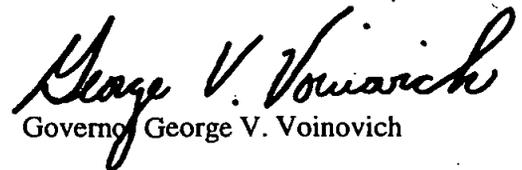
The question of whether the secretary can provide relief to tribes arises as a result of the U.S. Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, where the Court affirmed the states' Eleventh Amendment defense to suit. States and Indian tribal governments have worked successfully in most cases to implement IGRA. The fact that there are more than 100 tribes in compacts with twenty-four states is proof that states and tribes can work out their differences if they continue to negotiate. The *Seminole* decision provides an incentive to keep the parties in negotiation and out of court.

The Governors strongly oppose the assertion of authority by the secretary to develop or implement a procedure that could result in tribal Class III gaming in the absence of a tribal-state compact, as required by law. Such a move by the secretary would tie up precious federal, state, and tribal resources in litigation and could possibly halt the efforts underway to reform this act.

The Governors remain willing to participate in the resolution of the numerous conflicts arising out of IGRA implementation. However, we strongly oppose unilateral action by the secretary.

Sincerely,

  
Governor Bob Miller

  
Governor George V. Voinovich

Attachment

c: The Honorable Bruce Babbitt, Secretary of the U.S. Department of the Interior  
Leon Panetta, Chief of Staff

# DRAFT

Honorable Steven V. Angelo  
Commonwealth of Massachusetts  
House of Representatives  
State House, Boston 02133-1054

Dear Mr. Angelo:

Thank you for your letters of October 11, and November 21, 1995, and your February 22, 1996, letter regarding the proposed Tribal-State Compact between the Commonwealth of Massachusetts (State) and the Wampanoag Tribe of Gay Head (Tribe). We apologize for the delay in responding to your inquiries. This response addresses questions raised in all three of your letters.

Your first question concerns the statutory time frame for approval of Tribal/State compacts under 25 U.S.C. § 2710(d)(8)(C) of the Indian Gaming Regulatory Act (IGRA). Your understanding of this provision of IGRA is correct. The Secretary has to approve or disapprove a compact before the date that is 45 days after the compact is received by the Department. Thus, the clock begins to run upon actual submission to the Secretary, and not upon signature of the compact by the Tribe and appropriate State officials. In this case the compact was submitted to the Department on September 29, 1995, and a decision had to be made before November 13, 1995. There are no other statutes or regulations governing the review and approval process for Tribal-State compacts.

Second, you ask whether the Wampanoag compact can be amended by the Massachusetts Legislature. As you may be aware, we disapproved the Compact because we believed that it could be amended by the State legislature, and as such, was not yet a final document binding on the parties.

Third, you ask whether the Wampanoag Compact's provision authorizing non-Indian gaming "affects Indian exclusivity called for under IGRA," and whether the manner in which exclusivity is defined within the proposed Compact adversely affects the approval process. As a preliminary matter, we do not believe that IGRA "calls for Indian exclusivity." Subsections (3) and (4) of Section 11(d) of IGRA, 25 U.S.C. §§ 2710(d)(3) and (4), govern the compact negotiation process. The negotiations are conducted for the purpose of developing mutually acceptable terms for the conduct of class III gaming. There is no statutory exclusivity right in IGRA. The exclusivity issue arises only when a State seeks payments of tribal gaming revenues for purposes not specifically authorized in IGRA.

Honorable Steven V. Angelo

**DRAFT**

2

Unquestionably, the manner in which exclusivity is defined in the Compact will be considered in determining whether to approve the Compact. Pursuant to Section 11((d)(8) of IGRA, 25 U.S.C. § 2710(d)(8), the Secretary may disapprove a compact if it violates any provision of IGRA, any other non-jurisdictional provision of Federal law, or the trust obligations of the United States to Indians. IGRA provides that Tribal-State compacts may contain provisions relating to the assessment by the State of amounts necessary to defray the costs of regulating gaming activities. See 25 U.S.C. § 2710(d)(3)(C)(iii). IGRA goes on to provide that, with that single exception, nothing in the IGRA shall be construed as conferring upon a State authority to impose any tax, fee, charge, or other assessment upon an Indian Tribe to engage in a class III activity. See 25 U.S.C. § 2710(d)(4).

The Department has approved 146 Tribal-State compacts to date. Only a few have called for Tribal payments to States other than for direct expenses the States incur in regulating gaming authorized by the compacts. The Department has approved compacts containing such payments only when those payments are for the economic value of a scope of gaming that exceeds what a Tribe is already permitted in a State under IGRA. To date, the Department has approved payments to a State only when the State has agreed to total exclusivity, i.e., to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place.

The proposed Wampanoag Compact contemplates annual payments, based on a formula, of no more than \$90 million per year to the State for six years in exchange for certain restrictions on non-Indian gaming in certain areas of the State, and additional annual payments up to the termination of the compact after the restrictions on non-Indian gaming expire. Since payments to the State, other than those relating to the cost of regulation or the payment for exclusivity, are prohibited by IGRA, any payments to the State beyond the six-year period of exclusivity would appear to be illegal.

As a matter of policy, the Department has determined that it will not approve compacts that call for tribal payments in exchange for less than substantial exclusivity for Indian gaming. Our rationale is that anything less than substantial exclusivity gives States an effective opportunity to leverage very large payments from the Tribes, in derogation of Congress' intent not to permit States to exact a tax, fee charge or other assessment upon an Indian Tribe to engage in Class III gaming activities. In addition, the Department has a trust responsibility to Indian Tribes to ensure that benefit received by the State in a compact -- in this case up to \$90 million in annual fees -- is appropriate in light of the benefit conferred on the Tribe.

Although the language of the compact is unclear, we have been informed by the State and the Tribe that the intention of the parties to the Compact is to give the Tribe the exclusive right to conduct casino gaming in Massachusetts, except for a single casino in Hampden County, Massachusetts and no more than 700 slot machines at each of the four race tracks, now licensed in the State. We believe that this constitutes the minimum

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Honorable Steven V. Angelo

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exclusivity that we could consider sufficient under our policy of substantial exclusivity, and under our trust responsibility to the Tribe, to justify the proposed payments in the compact. We recommend that the language of the Compact be clarified to express this intent.

Finally, in your November 21, 1995, letter, you ask whether the Tribe's temporary facility would be required to be located on trust land, or whether the Tribe would be required to operate its temporary facility on its permanent site location. As you know, Subsection 2(j) and Subsection 5(c) of the proposed Compact authorize the Tribe to conduct class II and class III gaming, under the terms of the Compact, in an off-reservation facility within the boundaries of the City of New Bedford, Massachusetts, and located on land which is neither held in trust nor otherwise owned by the Tribe. There is no requirement in the proposed Compact for the temporary facility to be located on trust land. The proposed Compact authorizes the temporary facility to be located on lands that fall outside the definition of the term "Indian lands" in IGRA. See 25 U.S.C. § 2703(4). The IGRA specifically provides that Tribal/State compacts govern gaming activities on Indian lands as defined in Section 4 of IGRA. See 25 U.S.C. § 2710(d)(3). The Tribe's conduct of class II and class III gaming on lands that are neither trust nor restricted is not governed by the provisions of IGRA; and, therefore, we can offer no opinion on its legality under either State or Federal law.

We hope that this information will be of help to you and the Joint Committee on Government Regulations in the legislative review of the proposed Compact.

Sincerely,



United States Department of the Interior



OFFICE OF THE SECRETARY  
Washington, D. C. 20240

TRANSMISSION NOTICE

THIS MESSAGE WAS ELECTRONICALLY TRANSMITTED

TRANSMISSION NUMBER: Commercial 202/208-6956

VERIFICATION NUMBER: Commercial 202/208-7351

TO: Kris Balderston; Janet Murguia; Elena Kagan

FAX NO: 456-6704  
456-2604 PHONE NO: \_\_\_\_\_  
456-1647

DATE: 5/1/96 TIME: \_\_\_\_\_

FROM: Anne Shields, Chief of Staff

NO. OF PAGES: 5

Barney concurred with the attached. We're still coordinating the letter to the tribal chair with him.



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

APR 29 1996

Honorable Steven V. Angelo  
Commonwealth of Massachusetts  
House of Representatives  
State House, Boston 02133-1054

Dear Mr. Angelo:

Thank you for your letters of October 11, and November 21, 1995, and your February 22, 1996, letter regarding the proposed Tribal-State Compact between the Commonwealth of Massachusetts (State) and the Wampanoag Tribe of Gay Head (Tribe). We apologize for the delay in responding to your inquiries. This response addresses questions raised in all three of your letters.

Your first question concerns the statutory timeframe for approval of Tribal/State compacts under 25 U.S.C. § 2710(d)(8)(C) of the Indian Gaming Regulatory Act (IGRA). Your understanding of this provision of IGRA is correct. The Secretary has to approve or disapprove a compact before the date that is 45 days after the compact is received by the Department. Thus, the clock begins to run upon actual submission to the Secretary, and not upon signature of the compact by the Tribe and appropriate State officials. In this case the compact was submitted to the Department on September 29, 1995, and a decision had to be made before November 13, 1995. There are no other statutes or regulations governing the review and approval process for Tribal-State compacts.

Second, you ask whether the Wampanoag Compact can be amended by the Massachusetts Legislature. As you may be aware, we disapproved the Compact because we believed that it could be amended by the State legislature, and as such, was not yet a final document binding on the parties.

Third, you ask whether the Wampanoag Compact's provision authorizing non-Indian gaming "affects Indian exclusivity called for under IGRA," and whether the manner in which exclusivity is defined within the proposed Compact adversely affects the approval process. As a preliminary matter, we do not believe that IGRA "calls for Indian exclusivity." Subsections (3) and (4) of Section 11(d) of IGRA, 25 U.S.C. §§ 2710(d)(3) and (4), govern the compact negotiation process. The negotiations are conducted for the purpose of developing mutually acceptable terms for the conduct of Class III gaming. There is no statutory exclusivity right in IGRA. The exclusivity issue arises only when a State seeks payments of tribal gaming revenues for purposes not specifically authorized in IGRA.

Unquestionably, the manner in which exclusivity is defined in the Compact will be considered in determining whether to approve the Compact. Pursuant to Section 11((d)(8) of IGRA, 25 U.S.C. § 2710(d)(8), the Secretary may disapprove a compact if it violates any provision of IGRA, any other non-jurisdictional provision of Federal law, or the trust obligations of the United States to Indians. IGRA provides that Tribal-State compacts may contain provisions relating to the assessment by the State of amounts necessary to defray the costs of regulating gaming activities. See 25 U.S.C. § 2710(d)(3)(C)(iii). IGRA goes on to provide that, with that single exception, nothing in the IGRA shall be construed as conferring upon a State authority to impose any tax, fee, charge, or other assessment upon an Indian Tribe to engage in a class III activity. See 25 U.S.C. § 2710(d)(4).

The Department has approved 146 Tribal-State compacts to date. Only a few have called for tribal payments to States other than for direct expenses the States incur in regulating gaming authorized by the compacts. The Department has approved compacts containing such payments only when those payments are for the economic value of a scope of gaming that exceeds what a Tribe is already permitted in a State under IGRA. To date, the Department has approved payments to a State only when the State has agreed to total exclusivity, i.e., to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place.

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As a matter of policy, the Department has determined that it will not approve compacts that call for tribal payments in exchange for less than substantial exclusivity for Indian gaming. Our rationale is that anything less than substantial exclusivity gives States an effective opportunity to leverage very large payments from the Tribes, in derogation of Congress' intent not to permit States to exact a tax, fee charge or other assessment upon an Indian Tribe to engage in Class III gaming activities. In addition, the Department has a trust responsibility to Indian Tribes to ensure that benefit received by the State in a compact -- in this case up to \$90 million in annual fees -- is appropriate in light of the benefit conferred on the Tribe.

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exclusivity, and under our trust responsibility to the Tribe, to justify the proposed payments in the compact. We recommend that the language of the Compact be clarified to express this intent.

On this same point, we note that the Compact requires the Tribe to make payments to the State forever, over and above the cost of regulation and law enforcement, even if all restrictions on gambling by other entities are removed. We realize that the parties consider the removal of tribal exclusivity to be an extremely remote possibility, and deem it is highly unlikely that all or even most of the above referenced restraints on non-tribal gambling would be removed in the foreseeable future. This very unlikelihood, however, underlines the fact that this requirement is problematic. We strongly advise that the provision be rewritten, because we believe that a requirement that the Tribe make indefinite payments to the State beyond the cost of regulation even if the State removes all restrictions on competitive gambling renders the Compact legally vulnerable. The best view of lawyers in the Federal Government is that such payments would be found to be beyond the scope of the statute and that the Courts would so rule. Reasonable payments for a significant degree of exclusivity can be defended within the framework of the statute, and it is wholly legitimate for the State to be reimbursed for the cost of regulation and law enforcement. But precisely because we as a Department have an interest in seeing that Tribes are able to take full advantage of the benefits offered to them by the IGRA, we believe it is our responsibility to point out that the inclusion of this provision, dealing as we acknowledge with what is a highly unlikely contingency, presents a serious legal obstacle to this Compact. Since, as you have asked us and as we have noted, the State legislature retains the right to amend this Compact, and since we have been advised that this appears a very remote contingency, and since as discussed above we have advised you that the level of payments proposed by the Compact for the amount of exclusivity provided for in the Compact (once it is clarified as discussed above) would meet legal guidelines, we assume that this is a matter that those interested in allowing this Compact to go forward in its essentials will resolve.

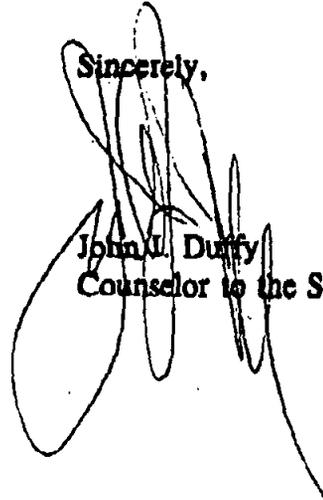
Finally, in your November 21, 1995, letter, you ask whether the Tribe's temporary facility would be required to be located on trust land, or whether the Tribe would be required to operate its temporary facility on its permanent site location. As you know, Subsection 2(j) and Subsection 5(c) of the proposed Compact authorize the Tribe to conduct Class II and Class III gaming, under the terms of the Compact, in an off-reservation facility within the boundaries of the City of New Bedford, Massachusetts, and located on land which is neither held in trust nor otherwise owned by the Tribe. There is no requirement in the proposed Compact for the temporary facility to be located on trust land. The proposed Compact authorizes the temporary facility to be located on lands that fall outside the definition of the term "Indian lands" in IGRA. See 25 U.S.C. § 2703(4). The IGRA specifically provides that Tribal/State compacts govern gaming activities on Indian lands as defined in Section 4 of IGRA. See 25 U.S.C. § 2710(d)(3). The Tribe's conduct of Class II and Class III

Honorable Steven V. Angelo

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gaming on lands that are neither trust nor restricted is not governed by the provisions of IGRA; and, therefore, we can offer no opinion on its legality under either State or Federal law. We hope that this information will be of help to you and the Joint Committee on Government Regulations in the legislative review of the proposed Compact.

Sincerely,

A handwritten signature in black ink, appearing to read "John J. Duffy". The signature is stylized with large loops and a long tail.

John J. Duffy  
Counselor to the Secretary

THE WHITE HOUSE

WASHINGTON

April 24, 1996

MEMORANDUM FOR JENNIFER O'CONNOR

FROM: ELENA KAGAN *EK*

SUBJECT: WAMPANOAG COMPACT

John Leshy, Solicitor of the Interior Department, sent the attached to me this morning. You'll recall that Interior had given Barney Frank an advance look at letters to be sent to representatives of the Wampanoag Tribe and the State of Massachusetts. Frank, as you will see, asked that Interior include an additional paragraph in the letters; Interior has inserted this paragraph with some minor editing. Yesterday, Interior again sent the letters to Frank for final approval.

Leshy tells me that Anne Shields believes that the Department and Frank are now engaged in a "constructive dialogue." Let me know if you hear anything to the contrary.



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

## MEMORANDUM

TO: Congressman Barney Frank

FROM: Anne Shields *Anne Shields*

DATE: April 23, 1996

RE: Wampanoag Letter

Please see the attached revised letters on the Wampanoag compact. We have added your suggested paragraph with some edits, which I believe are clearly marked. Please let me know if you have any further concerns.

cc: Janet Murguia  
Elena Kagan

# DRAFT

DRAFT  
4/23/96

Honorable Beverly M. Wright  
Chairperson  
Wampanoag Tribe of Gay Head (Aquinnah)  
20 Black Brook Road  
Gay Head, MA 02535-9701

Dear Chairperson Wright:

As you know, on November 8, 1995, we disapproved the Tribal-State Compact (Compact) between the Wampanoag Tribe of Gay Head (Tribe) and the State of Massachusetts (State), executed on September 29, 1995, because we determined it was inappropriate for us to approve the Compact before its enactment by the Massachusetts General Court and approval of such enactment by the Governor of the Commonwealth of Massachusetts, as required by Section 35 of the Compact.

Although we believe that the Compact was submitted prematurely, we have completed our initial review of the proposed Compact, and note the following areas of concern.

Subsection 2(j) and Subsection 5(c) of the proposed Compact authorize the Tribe to conduct class II and class III gaming, under the terms of the Compact, in an off-reservation facility within the boundaries of the City of New Bedford, Massachusetts, and located on land which is neither held in trust nor otherwise owned by the Tribe. There is no requirement in the proposed Compact for the temporary facility to be located on trust land. The proposed Compact authorizes the temporary facility to be located on lands that fall outside the definition of the term "Indian lands" in IGRA. See 25 U.S.C. § 2703(4). The IGRA specifically provides that Tribal/State compacts govern gaming activities on Indian lands as defined in Section 4 of IGRA. See 25 U.S.C. § 2710(d)(3). The Tribe's conduct of class II and class III gaming on lands that are neither trust nor restricted is not governed by the provisions of IGRA; and, therefore, we can offer no opinion on its legality under either State or Federal law.

Subsection 3 (z) of the Compact defines net gaming revenues as "the total sum wagered on all gaming conducted within the gaming facility less amounts paid out as winnings and prizes." This definition differs from the definition of "net revenues" in the IGRA, 25 U.S.C. § 2703(9). IGRA defines "net revenues" as gross revenues of an Indian gaming activity less amounts paid out as, or paid for , prizes and total operating expenses, excluding

management fees. We do not believe that it is appropriate for the Compact to redefine a term that has a precise meaning in the IGRA. We recommend that the term "net revenues" in the Compact be changed to "net win" to avoid a conflict with the definition of "net revenues" in the IGRA.

Subsection 4 (xxiii) of the Compact makes it automatic for the Tribe and the State to add games without Interior approval. The Secretary will disapprove a compact if it violates the IGRA, other federal law or the Secretary's trust responsibility. The scope of permissible games is a term of the compact and any amendment to this term should also be subject to the Secretary's approval. In exercising his trust responsibility, the Secretary could not sanction an automatic approval provision when there is a possibility that an amendment will violate the IGRA, other federal laws or the Secretary's trust responsibility to the Tribe. Therefore, this provision of the Compact may violate Federal law.

Subsection 9 (e) of the Compact contemplates that the National Indian Gaming Commission (NIGC) will have enforcement authority over provisions of the Compact. The NIGC has enforcement authority over Class II gaming and approval authority for management contracts and Class III tribal gaming ordinances. See 25 U.S.C. §§ 2705, 2706, and 2710. The remedy provided in the IGRA for violations of a tribal-state compact is a suit in federal district court to enforce the provisions of the compact. See 25 U.S.C. § 2710(d)(7)(A)(ii). The NIGC is not an agency with the authority to regulate Class III gaming, a function specifically reserved to the tribes and the states. An agreement between the Tribe and the State cannot expand the authority of the NIGC. Therefore, this provision of the Compact may violate Federal law.

Subsection 27 (h) of the Compact provides that if the Tribe loses the exclusivity described in paragraphs (d) and (e) of Section 27 of the Compact within six years of opening its gaming facility, the Tribe agrees to pay for the actual costs of regulation, licensing, and Compact oversight of the Tribe's gaming facility. If the Tribe loses exclusivity after six years, it agrees to make a cash contribution equal to the greater amount of a) the State's actual costs of regulation, licensing, and Compact oversight of its gaming facility, plus 15% of the amount the Tribe would have paid to the State under this Compact if the exclusivity had been maintained, or b) an amount calculated at the lowest rate which is paid to the State by any other casino in the Commonwealth of Massachusetts. This provision contemplates that if the Tribe loses exclusivity rights after the first six years, it will be required to continue to pay the State an amount in excess of actual costs to regulate gaming.

The Department has approved 146 Tribal/State compacts to date. Only a few have called for Tribal payments to States other than for direct expenses the States incur in regulation gaming authorized by

**DRAFT**

the compacts. The Department has approved compacts containing such payments only when those payments are for the economic value of a scope of gaming that exceeds what a Tribe is already permitted in a State under IGRA. To date, the Department has approved payments to a State only when the State has agreed to total exclusivity, i.e., to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place.

As a matter of policy, the Department has determined that it will not approve compacts that call for tribal payments in exchange for less than substantial exclusivity for Indian gaming. Our rationale is that anything less than substantial exclusivity gives States an effective opportunity to leverage very large payments from the Tribes, in derogation of Congress' intent not to permit States to exact a tax, fee charge or other assessment upon an Indian Tribe to engage in Class III gaming activities. In addition, the Department has a trust responsibility to Indian Tribes to ensure that benefit received by the State in a compact -- in this case up to \$90 million in annual fees -- is appropriate in light of the benefit conferred on the Tribe.

Although the language of the compact is unclear, we have been informed by the State and the Tribe that the intention of the parties to the Compact is to give the Tribe the exclusive right to conduct casino gaming in Massachusetts, except for a single casino in Hampden County, Massachusetts and no more than 700 slot machines at each of the four race tracks, now licensed in the State. We believe that this constitutes the minimum exclusivity that we could consider sufficient under our policy of substantial exclusivity, and under our trust responsibility to the Tribe, to justify the proposed payments in the compact. We recommend that the language of the Compact be clarified to express this intent.

On this same point, we note that the Compact requires the Tribe to make payments to the State forever, over and above the cost of regulation and law enforcement, even if all restrictions on gambling by other entities are removed. We realize that the parties consider this the removal of tribal exclusivity to be an extremely remote contingency possibility, and that deem it highly unlikely that all or even most of the above referenced restraints on non-tribal gambling will would be removed in the foreseeable future. Indeed, that this very unlikelihood, however, underlines the fact that this requirement is problematic. We strongly advise that the provision be rewritten, because we believe that given the state of the law, a requirement that the Tribe make indefinite payments to the State beyond the cost of regulation even if the State removes all restrictions on competitive gambling renders the Compact legally vulnerable to legal challenge. The best view of lawyers in the federal government is that in the current legal situation, such payments would be found by the courts to be beyond the scope of the statute. Reasonable payments for a significant degree of exclusivity can be defended within the framework of the statute, and it is wholly legitimate for the State to be reimbursed for the cost of regulation and law enforcement. But precisely because we as a Department have an interest

In seeing that Tribes are able to take full advantage of the benefits offered in this Compact, we believe it is our responsibility to point out that the inclusion of the provisions dealing with the acknowledgment with what is a highly unlikely contingency presents the one potential serious legal obstacle to this Compact. Since, as you have asked us and as we have noted, the State legislature retains the right to amend this Compact, and since we have been advised that this appears a very remote contingency, and since as discussed above we have advised you that the level of payments proposed by the Compact for the amount of exclusivity interests appear to be provided for in the Compact (once it is clarified as discussed above) would meet legal guidelines, we assume that this is a matter which those interested in allowing this Compact to go forward in its essentials can will resolve.

We would be happy to meet with representatives of the State and the Tribe to discuss our concerns with the Compact. Please do not hesitate to contact the Indian Gaming Management Staff at (202) 219-4066 if you believe that such a meeting is desirable.

Sincerely

Ada E. Deer  
Assistant Secretary - Indian Affairs

**DRAFT**

Honorable Steven V. Angelo  
Commonwealth of Massachusetts  
House of Representatives  
State House, Boston 02133-1054

Dear Mr. Angelo:

Thank you for your letters of October 11, and November 21, 1995, and your February 22, 1996, letter regarding the proposed Tribal-State Compact between the Commonwealth of Massachusetts (State) and the Wampanoag Tribe of Gay Head (Tribe). We apologize for the delay in responding to your inquiries. This response addresses questions raised in all three of your letters.

Your first question concerns the statutory time frame for approval of Tribal/State compacts under 25 U.S.C. § 2710(d)(8)(C) of the Indian Gaming Regulatory Act (IGRA). Your understanding of this provision of IGRA is correct. The Secretary has to approve or disapprove a compact before the date that is 45 days after the compact is received by the Department. Thus, the clock begins to run upon actual submission to the Secretary, and not upon signature of the compact by the Tribe and appropriate State officials. In this case the compact was submitted to the Department on September 29, 1995, and a decision had to be made before November 13, 1995. There are no other statutes or regulations governing the review and approval process for Tribal-State compacts.

Second, you ask whether the Wampanoag compact can be amended by the Massachusetts Legislature. As you may be aware, we disapproved the Compact because we believed that it could be amended by the State legislature, and as such, was not yet a final document binding on the parties.

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Honorable Steven V. Angelo

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The Department has approved 146 Tribal-State compacts to date. Only a few have called for Tribal payments to States other than for direct expenses the States incur in regulating gaming authorized by the compacts. The Department has approved compacts containing such payments only when those payments are for the economic value of a scope of gaming that exceeds what a Tribe is already permitted in a State under IGRA. To date, the Department has approved payments to a State only when the State has agreed to total exclusivity, i.e., to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place.

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# DRAFT

Honorable Steven V. Angelo

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activities on Indian lands as defined in Section 4 of IGRA. See 25 U.S.C. § 2710(d)(3). The Tribe's conduct of class II and class III gaming on lands that are neither trust nor restricted is not governed by the provisions of IGRA; and, therefore, we can offer no opinion on its legality under either State or Federal law.

We hope that this information will be of help to you and the Joint Committee on Government Regulations in the legislative review of the proposed Compact.

Sincerely,

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

17-Apr-1996 10:25am

TO:            Elena Kagan

FROM:          Jennifer M. O'Connor  
                Office of The Chief of Staff

SUBJECT:      RE: tribes

Kris Balderston is pulling together a meeting, hopefully today on this. Interior will be invited. They should bring the people who can describe who Babbitt has talked to, how the tribes reacted yesterday, how the states will react, etc.

EXECUTIVE OFFICE OF THE PRESIDENT

17-Apr-1996 11:47am

TO: (See Below)

FROM: Kris Balderston  
Office of Cabinet Affairs

SUBJECT: Quick Mtg on Seminole Decision

There will be a meeting at 5 pm today with representatives from the Interior Department on the Seminole decision in Room 472. Interior has to move quickly on this important matter.

Distribution:

TO: John C. Angell  
TO: Kathryn Higgins  
TO: Jennifer M. O'Connor  
TO: Elena Kagan  
TO: Michael T. Schmidt  
TO: Ray Martinez  
TO: Marcia L. Hale  
TO: R. Lawton Jordan III  
TO: Marsha Scott  
TO: T J Glauthier

CC: David Wofford

THE WHITE HOUSE

WASHINGTON

April 15, 1996

MEMORANDUM FOR JENNIFER O'CONNOR

FROM: ELENA KAGAN *EK*

SUBJECT: RESPONSE TO SEMINOLE TRIBE

I am attaching (1) a memorandum from Bruce Babbitt to Leon and (2) a draft Advance Notice of Proposed Rulemaking (ANPR) from the Interior Department. As stated in the memorandum, Interior proposes to issue the ANPR in order to gather comments on the following question (and a couple of associated ones): whether, in the wake of Seminole, the Secretary himself should prescribe the terms of gaming compacts in cases where a State has failed to bargain with a Tribe in good faith. (Prior to Seminole, the Tribe would sue the State in federal court in such a case; Seminole closed off this means of recourse, leaving open the question of what remedies now remain.)

Interior anticipates that the process of gathering comments should take between six and nine months. The Tribes will support a strong Secretarial role in prescribing the terms of compacts; the States will oppose such a role. Interior expects to issue a proposed rule at the end of this initial comment period.

## MEMORANDUM

To: Leon Panetta  
From: Bruce Babbitt  
Subject: Response to Seminole Tribe of Florida v. Florida  
Date: April 8, 1996

Issue

The Administration must react promptly to the uncertainty that the U.S. Supreme Court's recent Seminole decision injected into the process established by the Indian Gaming Regulatory Act (IGRA) for forming the State-Tribal compacts required by IGRA to authorize casino gaming on Indian reservations.

Response

The Department of the Interior intends to issue before the end of this week an advanced notice of proposed rulemaking asking for comments on the severability of the portion of IGRA that the Supreme Court held unconstitutional from the rest of the statute; the appropriate role of the Secretary in the compacting process; and guidelines pursuant to which the Secretary's role, if any, should be exercised absent new legislation from Congress. After comments have been considered, the Department may ask for additional comments on particular points or develop and issue proposed regulations, if appropriate, and seek comments on them. The entire process should take six to nine months to complete.

Background

Since passage of the Act in 1988, more than 125 compacts in more than 20 States have been successfully negotiated by Governors and Tribes. Prior to enactment, States generally were precluded from any regulation of gaming on Indian reservations short of State-wide prohibition of all gaming. IGRA requires an Indian Tribe that wants to conduct casino type ("Class III") gaming on its reservation to negotiate a "compact" of terms and conditions for such gaming with the State in which the reservation is located. IGRA also provides that if the State fails to bargain in good faith, the Tribe can sue the State in Federal court to enforce the remedial provisions provided by the statute. Under these provisions, if a court found a State to be bargaining in bad faith, or not bargaining at all, it would order both the State and the Tribe to: (1) negotiate a compact within 60 days, and if

Leon Panetta

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that failed; (2) submit a "last best offer" compact to a court-selected mediator. The mediator would then hear arguments, and choose one of the two proposed compacts. If the mediator selected the State's compact, the Tribe would be required to sign it. If the mediator selected the Tribe's compact, and the State refused to sign it, the mediator forwarded the compact to the Secretary, who was required to "prescribe procedures" under which the Tribe would conduct its gaming activities.

In Seminole Tribe of Florida v. Florida, the Supreme Court affirmed a decision by the Eleventh Circuit Court of Appeals holding the provision authorizing Tribal suits against States unconstitutional. The decision leaves in doubt the process now to be followed by Tribes who cannot secure State cooperation in the compacting process. It does not, however, preclude the compacting process from proceeding as prescribed by statute (including litigation) so long as a State does not assert its Eleventh Amendment immunity.

In its decision below, the Eleventh Circuit suggested that, faced with an uncooperative State, a Tribe could go directly to the Secretary to obtain authority to establish casino gaming. The court reasoned that IGRA's unconstitutional judicial enforcement mechanism could be severed from the statute, thus leaving it to the Secretary to prescribe "procedures," i.e., the terms of the particular compact. The Supreme Court expressly declined to consider the validity of this part of the Eleventh Circuit's opinion, and we expect Florida's cross-petition for review of this issue to be dismissed by the Court. In a recent opinion in a case similar to Seminole, Spokane Tribe of Indians v. Washington, 28 F.3d 991 (9th Cir. 1994) the Ninth Circuit described the Eleventh Circuit's proposal to sever IGRA as a perversion of the statutory scheme. Id. at 997.

#### Discussion

The first question is whether the provision held unconstitutional by the Supreme Court may be severed from the Act. If so, the rest of IGRA, and the compacts already negotiated under it, will remain in full force and effect. If it is not severable and the entire statute were to fail, the result might be a disruptive, forced closure of hundreds of existing casino facilities on Indian reservations. In addition, no mechanism would exist to legalize Indian casinos that now are operating outside of the law, and these would have to be closed by U.S. Attorneys.

Severability can be sustained, however, only if a mechanism is provided for creating compacts in those situations in which a State refuses to bargain with the Tribe. As now written, IGRA makes the creation of a State-Tribe compact a prerequisite to the Tribe conducting casino gaming, but it also provides that if a

Leon Panetta

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State refuses to bargain, the Tribe may ultimately have casino gaming authorized by the Secretary. Without the safety valve of Secretarial procedures, Tribes would have no remedy should States refuse to negotiate compacts, thus providing States with a de facto veto over casino gaming. While Congress clearly intended States to have a role in Indian gaming, it was equally clear in its intent to foreclose any such veto.

In the absence of an immediate Congressional response to the Seminole decision, which seems unlikely, we need to address the following: (1) the severability of IGRA; (2) the establishment of an alternative method to protect Tribes from a State refusal to negotiate; and (3) the Secretary's role in the compacting process. Both States and Tribes have an interest in our resolution of these issues, and both groups already have expressed their desire to have input into it. Moreover, if we are required to create a Secretarial process to approve Tribal gaming, we should clearly delineate our approach and administrative standards as opposed to proceeding on an ad hoc basis. Finally, we will want to avoid having to address individual requests for compacts now on a case-by-case basis. A rulemaking would address all of these concerns. In addition, a rulemaking would satisfy the Tribes' desire to see the Administration begin developing a regulatory solution that could operate without reliance on additional legislation. The anticipation of such an administrative solution would motivate the States, which would have no reason otherwise to support legislative action, to cooperate with a legislative solution.

We intend to issue the advanced notice of proposed rulemaking as soon as possible this week. Our target release date is April 11, 1996.

[XXXXXXXX]

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

25 CFR Part XXX

RIN XXXXXXXX

Regulations Establishing Departmental Procedures To Authorize Class III Governing Indian Gaming On Indian Reservations when a States Refuses to Engage in the Judicial Enforcement/Mediation Scheme Process Provided for by the Indian Gaming Regulatory Act

AGENCY: Bureau of Indian Affairs, Interior

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of the Interior seeks comments on its authority under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710, gives notice of a rule-intent-to-propose to promulgate "procedures" to authorize which Indian gaming on Indian reservations when a States refuses to engage in the process of judicial supervision of negotiations with Indian tribes prescribed by the Act, and on other related

~~matters~~ This advance notice is the result of the Supreme Court decision in Seminole Tribe of Florida v. State of Florida, 116 S.Ct. 1114 (1996).

**DATES:** Written public comment is invited and will be considered in the development of a proposed rule. Comments on this advance notice of proposed rulemaking must be received no later than June 21, 1996 to be considered.

**ADDRESSES:** Any comments concerning this notice, including sections regarding conformance with statutory and regulatory authorities, may be sent to: XXXXXX

**FOR FURTHER INFORMATION CONTACT:**

**SUPPLEMENTARY INFORMATION:**

#### **Background**

Since passage of the IGRA in 1988, more than 100 compacts in more than 20 States have been successfully negotiated and entered into by States and Tribes. Prior to enactment, States generally were precluded from any regulation of gaming on Indian reservations short of State-wide prohibition of all gaming. IGRA requires an Indian Tribe that wants to conduct casino type ("Class III") gaming on its reservation to negotiate a "compact" of terms and

conditions for such gaming with the State in which the reservation is located. IGRA also provides that if the State fails to bargain in good faith, the Tribe can sue the State in Federal court to enforce the remedial provisions provided by the statute. Under these provisions, if a court found a State to be bargaining in bad faith, or not bargaining at all, it would order both the State and the Tribe to: (1) negotiate a compact within 60 days, and if that failed; (2) submit a "last best offer" compact to a court-selected mediator. The mediator would then hear arguments, and choose one of the two proposed compacts. If the mediator selected the State's compact, the Tribe would be required to sign it. If the mediator selected the Tribe's compact, and the State refused to sign it, the mediator forwarded the compact to the Secretary, who was required to "prescribe procedures" under which the Tribe would conduct its gaming activities. In practice, only a handful of cases have required resort to IGRA's judicial enforcement mechanism.

In Seminole Tribe of Florida v. Florida, the Supreme Court affirmed a decision by the Eleventh Circuit Court of Appeals holding the provision authorizing Tribal suits against States unconstitutional. The decision leaves in doubt the process now to be followed by Tribes who cannot secure State cooperation in the compacting process.

In its decision below, the Eleventh Circuit suggested that the compacting process could proceed as prescribed by statute (including litigation) so long as a State did not assert its Eleventh Amendment immunity. Faced with an uncooperative State, -a-Tribe-could-go-directly-to-the Secretary-to-obtain-authority-to-establish-Class-III-gaming. The court reasoned that IGRA's unconstitutional judicial enforcement mechanism could be severed from the statute, thus leaving it to the Secretary to prescribe "procedures," *i.e.*, the terms of the particular compact. The Supreme Court expressly declined to consider the validity of this part of the Eleventh Circuit's opinion, and Florida's cross-petition for review of this issue remains pending before the Court. In its recent opinion, however, in Spokane Tribe of Indians v. Washington, 28 F.3d 991 (9th Cir. 1994), a case similar to Seminole, the Ninth Circuit described the Eleventh Circuit's proposal to sever IGRA as a perversion of the statutory scheme. *Id.* at 997.

In light of this controversy over the severability of IGRA and the Department's authority to prescribe procedures, the Department seeks comments from interested parties. In addition, assuming that IGRA is severable and that the Department has authority to prescribe procedures, the Department seeks comments on an appropriate process for doing so.

It has also been suggested that the United States might bring suit on behalf of tribes against States that which refuse to negotiate in good faith and then assert their sovereign immunity from suit.

Because of the importance of the issues to Indian Tribes, States and the general public, the Department seeks comment from the public on the proper approach to follow in the wake of Seminole.

#### SUBJECT MATTER OF POTENTIAL RULEMAKING

The Department seeks comments on the following specific issues, and on other issues directly related to the subject matter of this notice.

- 1) Whether the section of the IGRA held unconstitutional in Seminole Tribe of Florida v. Florida is severable from the remainder of the statute. If it is, how should it be severed, and if it is not, what are the consequences of the Court's decision in Seminole.
- 2) Whether, and under what circumstances, the Secretary of the Interior is empowered to prescribe "procedures" for the conduct of Class III Indian gaming when a State and a Tribe are unable to agree on the terms of a compact;

- 3) ~~What is an appropriate process for the development of Secretarial procedures.~~ What process should be followed if a State refuses to negotiate at-all and announces its refusal to waive its immunity
- What processes can be, and should be, utilized for determining legal issues in dispute, such as the scope of gaming permitted under State law;

#### Public Review and Comment

Comments on this advance notice of proposed rulemaking may be submitted in writing to the address identified at the beginning of this rulemaking by June 21, 1996. Comments received by that date will be considered in the development of any proposed rule.

#### Conformance with Statutory and Regulatory Authorities

#### National Environmental Policy Act Compliance -

All or portions of the changes contemplated by this advance notice of proposed rulemaking may be appropriate for issuance as a final interpretive rule or be subject to a categorical exclusion from the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C). Appropriate compliance with NEPA will be completed before a final rule is issued.

The REST IS BOILERPLATE  
↓

THE WHITE HOUSE

WASHINGTON

March 24, 1996

*To Elena*  
*KW*

MEMORANDUM FOR JACK QUINN

CC: KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: BARNEY FRANK/GAMING COMPACT

Harold recently reported to Barney Frank that OLC had confirmed Interior's conclusion that the proposed compact between Massachusetts and the Wampanoag Tribe violated the Indian Gaming Regulatory Act (IGRA). (The problem, as you'll recall, was a provision requiring annual payments from the Tribe, with no end date, even after the expiration of the Tribe's partial monopoly.)

Frank responded by asking Harold to get an informal legal opinion from OLC on a new proposal. Under this proposal, the Tribe would get a partial monopoly for six years, in exchange for which it would make annual payments over the course of 11 years; at the end of that time, the Tribe could choose whether to (1) continue making the annual payments under the Compact; (2) cancel the Compact; or (3) renegotiate the Compact.

Kathy and I thought that we should deal with this request by using the same procedure we followed last time: first ask for an opinion from Interior; then ask OLC to review it. Harold wants this all done by Thursday (in time for another meeting with Frank), but I'm not sure that will be possible. In any event, unless I hear differently from you, I'll start this process rolling and try to get an answer for Harold (and Frank) as soon as possible.

*that ok - I assumed  
say to the thing (Mass.) will  
years to payments over 11  
value of agreement the  
monopoly in the 6th year  
should be to yes; that  
Jack*

THE WHITE HOUSE

WASHINGTON

March 24, 1996

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CC: KATHY WALLMAN  
FROM: ELENA KAGAN *EK*  
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Karen Thoms. 3/27/56

Need to see - ??

skill mt be a problem

Theoretically -

operating  
expense

payments have to be a real amt,  
as comp to bens of exlc

1.

But after 11 yrs - vol. electric

↳ how an operating expense?? how??

can't classify anymore as payment for  
exclusivity.

2.

Given 3 options



looks like: to paying or the price of compact (gaining)  
just payment for running price itself.

IGRA doesn't allow him to make such an exp.

MIT ripe?  
↓  
speculative

2 options on:

cancel or renegotiate  
compact -  
need not be indef.

Poss. mt 221062B

- 4/11/88 news went to me of 5 things.

"lofal mt" - what does that mean?

Formula used to calculate payments?

Payment tapered to other gaming estab.  
problematic - looks like fee.

Karen Stevens

For Secy to approve,  
it would at least have to go to one of approved  
sources.

What would it do?

would it strike optic right away?

wf strike that piece. right away.

maybe wait if didn't then know where <sup>source</sup>

it would go (to approved or unapproved ~~it~~)

*Jeremy* → 218 L *0208*

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KAREN CARDEN WALSH  
GARY L. WATTS  
DANNY C. WILLIAMS  
DOUGLAS A. WILSON

March 18, 1996

*Wants to bring  
(7 people total)  
to meet w/ someone  
at WH w/in month.  
Tribal Leaders + 2  
Lawyers - understand  
will need to go to agency*

Mr. Mack McLarty  
Attention: Ms. Patty McHugh  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

(VIA FACSIMILE 202-456-2215)

Re: Cheyenne-Arapaho Tribes of Oklahoma

Dear Mack:

*(Materials previously  
sent to Anne  
Shields, Sec. Babbitt's  
CoS.)*

Pursuant to your request, I have prepared this brief summary of the situation regarding the Ft. Reno land claim of the Cheyenne-Arapaho Tribes of Oklahoma. I hope this will prove a useful introduction and will serve as a starting point for discussions which will result in the return of the Ft. Reno reservation to the Tribes and the creation of a national Veterans cemetery on the Ft. Reno site.

The Tribes hope to secure the return of approximately 7,000 acres which were taken by the government for the Ft. Reno military post for military purposes in 1883. The original Ft. Reno reservation encompassed approximately 9,500 acres. Of this land, the Bureau of Prisons currently operates the El Reno Federal Correctional Institution (FCI) on approximately 2,500 acres. The balance of the 7,000 acres comprises the Department of Agriculture's Agricultural Research Station (ARS). This ARS actually occupies approximately 25 acres on the site, although it occasionally uses part of the balance of the 7,000 acres for its studies. These installations survive on the old Ft. Reno location which originally was intended for military purposes only. The Army closed its last installation at Ft. Reno in 1949.

The Tribes in no way wish to interfere with the operation of the El Reno FCI. They will make any reasonable accommodation with the Bureau of Prisons to facilitate the continued operation of the prison.

Mr. Mack McLarty  
March 18, 1996  
Page Two

Similarly, the Tribes are willing to accommodate the ARS and the Department of Agriculture. However, this situation is more complicated. The Administration has proposed the closure of the Ft. Reno ARS, along with similar units in other states. However, members of the Oklahoma congressional delegation oppose closure of the ARS. This has become something of a local political issue. If the ARS remains open, the Tribes are willing to accommodate it. The Tribes are interested in those areas not actively used by the ARS. Should the ARS be closed, the Tribes would like to succeed to its properties as well pursuant to 40 U.S.C. § 483(a)(2).

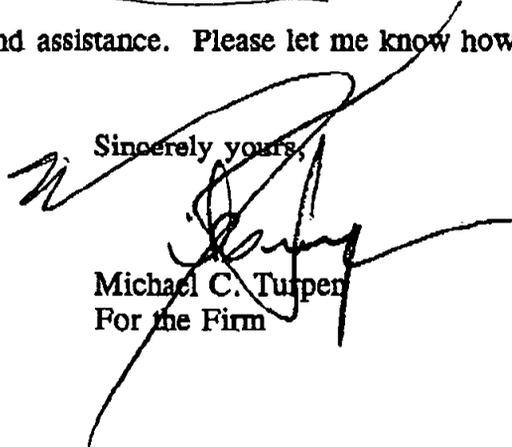
The Department of Veterans Affairs has chosen the Ft. Reno site for a national cemetery. However, the Department is reluctant to go forward with planning such a cemetery because the title to the property is clouded by competing claims of the Tribes and the Government. One of the benefits of a high level negotiated resolution of this dispute would be the creation of a national cemetery at Ft. Reno, a goal which the Tribes wholeheartedly support as a part of an overall agreement.

The claims of the Tribes and their treatment by the government over the years has been the subject of much misunderstanding and the unfortunate renegeing of the government on its treaties with the Tribes. The history is complicated, and could be litigated almost ad infinitum. Similarly, efforts by the Tribes to achieve a consensus of the affected federal agencies have been unavailing. Because the Departments of Justice, Agriculture, Veterans Affairs, and of the Interior are all involved, it has proven impossible to achieve any progress.

Therefore, at the request of the Tribes, we are asking for your assistance to act at the highest level to achieve a resolution which will serve the legitimate interests of all involved, including the Tribes, veterans groups, the Bureau of Prisons and the Department of Agriculture. We are obviously willing to provide you with a detailed summary of the history of the Tribes' relations with the government regarding the Ft. Reno lands. However, we wanted to precede that longer presentation with this relatively brief overview. Our next goal in this process is to secure a meeting with appropriate officials at the White House to try to resolve this matter. \*

Thank you for your consideration and assistance. Please let me know how we can best proceed from here.

Sincerely yours,

  
Michael C. Turpen  
For the Firm

MCT/lsg  
cc: Richard J. Grellner, Esq.  
ran/mclarty.ltr