

NLWJC - Kagan

Counsel - Box 021- Folder 003

Gambling-Indian Issues [2]

THE WHITE HOUSE

WASHINGTON

6 March 1996

MEMORANDUM TO KATHY WALLMAN
STEVE NEUWIRTH

FROM JENNIFER O'CONNOR *JOC*

SUBJECT INDIAN GAMING IN NEW MEXICO

Harold sent me a memo inquiring about the status of litigation in New Mexico on Indian gaming. Tom Udall, the Attorney General of New Mexico, recently sent the President a letter on this issue and is following up with Harold.

I need to know if it is OK to ask the Department of Justice for the status of litigation in New Mexico concerning Indian gaming. Please call me at 456-6350 to let me know. Thank you.

[Faint handwritten notes and signatures, including a large signature at the bottom center.]

MEMORANDUM TO LEON PANETTA

FROM:

SUBJECT: Indian Gaming Issues in New Mexico and California

Over the past year, two serious legal conflicts involving Indian Gaming issues have arisen in New Mexico and in California. Because both issues are the subject of pending U.S. Attorney actions, the White House is not legally allowed to take any action on these issues, nor even contact the agencies for updates and information. However, based on newspaper and other reports on these issues, we have put together a brief summary of each issue for your information.

ISSUE #1: LEGALITY OF INDIAN GAMING COMPACTS IN NEW MEXICO

Issue:

Are the Tribal/State Class III gaming compacts that were signed between the Governor and Tribes/Pueblos in New Mexico (and approved by the Secretary of Interior) valid in light of two recent New Mexico Supreme Court Decisions: Citation *Bingo v Otten*, which held that casino gaming is illegal in New Mexico, and; *Clark v Johnson*, which held that the Governor needed legislative authorization to sign the compacts with the Tribes in New Mexico.

Summary:

A number of Indian Tribes and Pueblos in New Mexico negotiated gaming compacts with the Governor of New Mexico in 1994 and 1995. The compacts allow various forms of Class III (casino) gaming on Indian lands. Fourteen signed compacts were submitted to the Secretary of Interior for approval, and the Secretary approved all 14 in early 1995.

The *Clark* Decision was issued by the New Mexico Supreme Court in July of 1995, which held that the Governor of New Mexico lacked the authority to enter into gaming compacts with the Tribes/Pueblos. The court amended its decision in August and went further, stating that the Indian Gaming Regulatory Act (IGRA) does not expand state gubernatorial power and that the compacts executed by the Governor are without legal effect. Because the question of compacting is a matter of Federal law, it is unclear what impact this decision has at this point.

The Citation *Bingo* Decision was issued in late November of 1995. It ruled that, contrary to popular belief, casino gaming (including charitable gaming) was never legal in New Mexico. Since IGRA authorizes gaming compacts only if some form of casino gaming is legal in the state, this ruling removed the legal basis for Indian Gaming in New Mexico.

Current Status: The Department of Justice and the U.S. Attorney are working with the Tribes and the state to try and find a legislative resolution.

VIDEO GAMING INJUNCTION IN SOUTHERN CALIFORNIA

Issue:

Can the Barona, Sycuan, Viejas, Rincon, and other southern California Indian reservations continue to operate video-gaming operations in the absence of a compact with the State of California?

Summary:

Under the Indian Gaming Regulatory Act (IGRA), Tribes must enter into a compact with the state to operate certain types of casino-style games -- called Class III games. However, Tribes have the authority to operate Class II games (mostly bingo and similar games) without state approval. One of the major weaknesses of the IGRA is that it is vague in dealing with video-based versions of games (it is unclear in some cases whether a video version of a game is considered a Class II or Class III game). Several court cases, and DOI regulations, have resolved this grey area (video games are considered Class III -- although these rulings are under appeal), but a number of Tribes in Southern California moved to install video gaming operations in the early 1990s before these rules were clarified.

In the early 1990s, some southern California Tribes began installing video gaming machines in large numbers, taking advantage of the grey area that IGRA had provided. When court cases and regulations provided the necessary clarification, several tribes were left running illegal video gaming operations.

This problem has been compounded by the fact that Governor Wilson has refused to negotiate gaming compacts that cover video games with these tribes, contending that these devices are illegal under state law. The Tribes contend that state-run video lottery terminals are the functional equivalent to their video-gaming operations, and therefore they have the right to operate these games under IGRA.

Current Status:

A Federal Judge is currently ruling on this issue, and the U.S. Attorney is working with the court and the Tribes to try and negotiate a solution to this problem. Negotiations are in their preliminary stages.

Casinos Deal Indians A Winning Hand

Billions in Revenue Ease Tribes' Dependence on Federal Funds

By Dennis McAuliffe Jr.
Washington Post Staff Writer

VERONA, N.Y.

It is 8:30 on a Monday morning at a casino that never closes. Snow is burying the dozen cars parked outside the Turning Stone Casino on the Oneida Indian reservation. Inside, the give-and-take of chips and cards blurs the green-felt surfaces of a half-dozen blackjack tables. A roulette wheel revolves in slow motion for a lone hopeful. A man with a cigar and a woman with a cigarette sit at smoky screens of video gambling games, including one called Indian Gold. A man is snoring in a corner of the casino coffee shop. Whatever he is sleeping off, it is not a night of drinking. The Oneida Indians, out of distaste for liquor, run the only casino in the country that is alcohol-free.

Turning Stone's 15 patrons this morning, and the 7,000 people who visit the central New York casino each day, and the millions who each year visit the 220 Indian gambling businesses now operating around the country, are more than mere gamblers.

They are the pioneers of a new era in U.S.-Indian history, creating more than \$4 billion in new income

annually for Indians and transforming the relationship between government and tribes. Gambling has given many tribes something that a century of federal policy has failed to deliver: a winning hand in creating economic development. Revenue from casinos and high-stakes bingo halls has seeded other tribal ventures, from buffalo-motif

See GAMBLING, A8, Col. 1

GAMBLING, From A1

T-shirts to T-bones of buffalo meat. According to Indian tribal leaders, gambling's success is building something else on reservations that money alone cannot buy: rising pride and can-doism.

How history will judge gambling's new deal for Indians, however, is still a roll of the dice. As in the last century, battle lines have been drawn around Indian land. The "new buffalo," as Indian gambling is often disparagingly called, has attracted a new generation of Buffalo Bills, and they have opened fire from state capitals to Capitol Hill. Indians themselves are united over gambling only in their blanket opposition to non-Indian criticism of the issue. The nation's 557 federally recognized tribes have split between casino haves and have-nots, and the growing wealth of the former group, still a minority, has made the poverty of the larger, latter group appear more acute.

Gamblers are the crutches with which many tribes are lifting themselves out of dependence on the federal government, and out of more than a century of poverty. And for the government, gambling—fraught as it is with questions of immorality and fears of illegality—may become a way to forgo new Indian program spending, or cut it back.

Congress has allowed tribes to venture into gambling only if they spend their profits—gamblers' losses—on the social, welfare and economic-assistance programs historically regarded as Washington's responsibility to Indians under treaties and the ensuing federal trust relationship with the tribes. Only after covering these needs can Indian leaders pay out gambling profits to tribal members, and only 23 tribes now do so.

The social spending is strictly specified by Congress: Gambling dollars feed, house and nurse elderly Indians; provide health care for Indian infants, day care for Indian toddlers and after-school activities for Indian children; send Indian teenagers to college; build clinics, and counseling and cultural centers; repair roads; and erect modern, often modular, houses to replace the mobile homes that Washington sent to tribes.

It was, in fact, the fate of two of these aging government-issue trailers on the Oneida reservation that sparked the Indian gambling phenomenon.

Battling Over Bingo

The way Oneidas tell the story, Indian gambling rose from the ashes of a trailer fire in 1975.

The reservation had no fire company of its own and two Oneidas died in the two-trailer blaze, said Oneida Nation Representative Ray Halbritter, 45, the tribe's Harvard-educated leader and nephew of both victims. To prevent such tragedies in the future, Halbritter said, the Oneidas decided "to raise money for our own fire department"—and to do it the way "all the fire departments" raise money.

Bingo.

Played in a double-wide trailer, the Oneidas' game offered prize money exceeding New York limits. State bingo regulations did not apply to them, the Oneidas insisted, because they are an Indian nation; their recognized right of sovereignty entitled them to run their own game, and to offer a pot enticing enough to draw non-Indians—and their money—to a place they otherwise might never visit.

"The Seminoles got wind of it" and started their own high-stakes bingo game in Hollywood, Fla., Halbritter said. The Madison County, N.Y., district attorney promptly shut down the Oneidas' operation. Local authorities also tried to put the Seminoles' game out of business, but the Seminoles took them to court and won. *Seminole Tribe v. Butterworth*, a landmark 1981 case, was the first of several tribal victories over state governments.

The legal skirmishing culminated in a sweeping 1987 U.S. Supreme Court decision that effectively legalized casino

gambling on reservations and sent state governments reeling.

The court ruled that a state could not ban Indian gambling unless it banned all forms of gambling for all its citizens. Moreover, the court reaffirmed tribes' right of limited sovereignty, which it first recognized in 1832. Federal and state governments, the court said, have no regulatory jurisdiction on Indian reservations, and therefore they cannot tax a tribe's profits or wealth.

The negative reaction from states pursuing their own gambling enterprises, notably Nevada, put pressure on Congress and led to the 1988 Indian Gaming Regulatory Act. The new law gave the states a substantial role in deciding how and where tribes could run gambling operations. Before Indians could offer casino-style games that involve betting against the house, the tribe had to secure the state's permission in the form of a negotiated agreement, or compact.

Some states have resisted tribal efforts to negotiate compacts, resulting in a dozen more court cases, including a Florida case that is now before the Supreme Court. Other states have insisted on a share of tribes' casino profits, in lieu of lost tax revenue. The Mashantucket Pequots, by far the most successful casino tribe in the country, give the state of Connecticut a 25 percent cut of their slot-machine revenue—a large portion of the casino's estimated \$1 million a day in profits.

Since the act, about 200 tribes have set up 220 gambling operations, including about 120 casinos in 24 states. The Oneidas opened Turning Stone Casino in 1993.

"It all came full circle back to the Oneidas," Halbritter said.

Revenue Is Earmarked

In 1975, on their bingo game's first weekend in business, the Oneidas counted a profit of \$150; in 1994, gambling tribes raked in an estimated \$4.2 billion—about 10 percent of the U.S. gambling industry. These profits have underwritten an explosion of entrepreneurial enterprises, according to the three-year-old National Indian Business Association in Albuquerque, which lists more than 24,000 Indian-owned and -operated businesses in more than 100 categories.

According to Indian leaders, gambling revenue effectively allows the federal government to save money on Indian programs. Rick Hill, an Oneida Indian from Wisconsin who chairs the National Indian Gaming Association, told Congress last week, "Indian gaming serves to reduce the federal deficit by lowering welfare dependence and by assisting with many unfunded and underfunded federal obligations."

In enacting the Indian Gaming Regulatory Act, Congress did not intend to substitute gambling for government as the treasury of tribes. According to an inspector general's report, the law's spending requirements stemmed from Congress's desire to head off Mafia

meddling and to ensure that tribes and their members would receive direct benefits from the gambling operations. The act stipulates that tribes must receive at least 60 percent of the profits from their casinos, nearly all of which are managed by non-Indian commercial companies, including big casino operators such as Harrah's.

Nonetheless, congressional appropriators took note of the new-found wealth of many tribes in defending proposed cuts in the budget for the Bureau of Indian Affairs (BIA). Sen. Slade Gorton (R-Wash.), chairman of the Appropriations Committee's subcommittee on the interior, wrote in a Washington Post op-ed article last September: "Indians are not wholly dependent on federal government for their income. Many tribes run revenue-generating activities such as gambling operations."

Noting that the current Interior appropriations bill requires the BIA to report to Congress on the gambling revenue of all tribes, George T. Skibine, director of BIA's Indian Gaming Management office and an Osage Indian of Oklahoma, said: "Clearly the purpose of that report is . . . for Congress to start gauging whether they should take into consideration gaming revenues in making their appropriations."

Not all tribes have anted up to gamble, however. Many are hamstrung by isolated locations. Others have chosen to avoid the lengthy legal fights with state authorities that often accompany the start-up of new gambling operations. Some tribes, such as the Navajos of Arizona and New Mexico who occupy the largest reservation in the United States, and their neighbors, the Hopis, have rejected gambling for moral reasons.

Halbritter, while saying that the Oneidas traditionally gambled as part of some tribal ceremonies, admits to feelings of unease about the tribe's venture into the casino business.

"We'd rather do something besides gaming," he said. "We don't like the idea that people [can become] addicted to it. It's a vice for people that's uncontrollable. [But] there's a lot of things that aren't controllable, like caffeine [and] smoking."

2/2
Before the casino opened, Oneida tribal social workers underwent training to treat gambling addiction. Among Oneidas seeking help for addictions, however, fewer than 1 percent have sought treatment for gambling problems, according to the Oneida Family Services Department.

Most Oneidas, like other Indians, do not spend much time or money at the gaming tables. America's 2 million Indians make up less than 1 percent of the U.S. population, so Indian casinos must draw most of their customers from outside the reservations to make serious money.

"What's happened, I think, is 90 percent of the perception about Indian people is being generated by maybe 1 percent of the population of Indian people," Halbritter said. "A few Indian people, groups, are doing amazingly well, and that perception is being broadcast to an extent that it's warping the true condition of Indian country."

Many Indian leaders say they fear that non-Indians are blind to differences among tribes and lump all Indians into one category: rich, and thus undeserving of federal assistance. The misperception is molded in part by persistent media focus on the phenomenal success of the Mashantucket Pequots in Connecticut. Their Foxwoods Resort, which serves 45,000 meals a day, is said to be the largest casino in the Western world.

Gambling has not improved the overall lot of most Indian people, who remain "at the bottom of the socioeconomic ladder," according to Ada E. Deer, assistant secretary of the interior for Indian affairs and a Menominee Indian from Wisconsin. Almost 32 percent of Indians live in poverty, compared with 13 percent of the general U.S. population; nearly 15 percent are unemployed. Other statistics from the last U.S. census—higher rates of liver disease, diabetes, suicide, homicide and accidental death—also point to a society still in distress.

The small Hydaburg tribe of Alaska, which has no gambling operation on its reservation, offers a contrast to the Pequots and other successful gambling tribes. "We have no income and no resources at this time," said tribal president Charles N. Natkong Sr. "Our unemployment rate is a chronic 50-55 percent . . . and the federal budget picture for contracts and/or grants looks more bleak with each passing month."

Natkong's remarks were contained in a thank-you letter to the Coeur d'Alene tribe of Idaho, which has offered non-gambling tribes a 5 percent share of gross revenues from its proposed National Indian Lottery. The Coeur d'Alenes would operate the lottery from a phone bank on their reservation, and players would bet via toll-free numbers using credit cards. The pro-

posal has run into stiff opposition from officials in states that run lotteries.

Halbritter and other Indian leaders worry that the success of Indian gambling will provoke a backlash and the possibility that history will repeat itself. Their fear is this: As more tribes join the casino wave, the Indians' new buffalo will run a greater risk of going the way of the old one, and this time extermination could come with just a swipe of a pen.

Already senators and congressmen have proposed amendments to toughen the 1988 Indian gaming act; Rep. Robert G. Torricelli (D-N.J.), denouncing reservation gambling as "untaxed, unregulated and out of control," suggested a two-year moratorium on new Indian casinos. Last year, the House Ways and Means Committee unsuccessfully sought to slap the 35 percent corporate tax rate on Indian casinos.

Opposition to Indian gambling generally has centered on the tax-free status of tribes; critics say this has stacked the cards in favor of gambling tribes over their commercial competitors and deprived states of tax revenue from tribal casino profits. But the Oneidas and other gambling tribes say the tax argument ignores the tax-paying jobs that Indian casinos have created.

The Oneida casino, which opened in July 1993, employs 1,500 people. The National Indian Gaming Association says Indian casinos have created 140,000 jobs nationwide, about 85 percent held by non-Indians.

"Indians are held to a double standard," Deer said. "On the one hand, [non-Indians] say, 'Okay, come on, you Indians, pull yourselves up by your bootstraps.' And then when Indians did find a bootstrap—most of the time these bootstraps are missing—and that bootstrap was gaming, and then some succeeded, then people are saying, 'Whoa, we didn't really mean that.'"

New Funds, New Services

Ruby Collett, a 70-year-old Oneida Indian great-grandmother, cannot believe her good fortune. She shows a visitor her new home, a two-bedroom, two-bathroom dream-come-true. It is equipped with a modern kitchen and a washer-dryer nook, a ceiling fan, a garage and cedar siding. "Never in my life did I dream I would have a house like this," Collett exclaimed, adding with a chuckle, "Especially after having six kids!"

Collett's year-old home is one of 10 units that the 1,100-member Oneida tribe has built with casino profits—"enterprise funds," they call it—to house their elderly. The units are tucked into a hillside of rolling pasture on Oneida land about five miles from the casino. Each house is outfitted for the handicapped, including an automatic fire extinguisher system.

Collett's bedroom window overlooks 20 other new houses, the Village of White Pines. Her son and a niece live there in single-family modular houses wired with fiber-optics cable to facilitate computer messaging among the residents and enable house-bound parents to perform office work at home, said Dale Rood, a computer technician and member of the Oneidas' governing tribal council.

The way the Oneidas financed their new houses is a process other gambling tribes have adopted. The Oneidas received a basic grant for reservation housing from the Department of Housing and Urban Development, then matched that amount with casino money to build units more to their liking. "If we went with strictly HUD money, what you'd see is a tin box," Rood said.

Oneida "enterprise funds" paid for 57 upgrades to each modular unit, including basements, porches and sliding doors for the single-family houses, and the cedar siding and garages for all the units, Rood said.

The Oneidas, who do not make per capita payments of casino profits to tribal members, similarly enhanced other forms of government assistance, mainly in family services—a second meal a week for the elderly lunch program, for example. The tribe built a 5,000-square-foot clinic for health care furnished by the federal Indian Health Service. Oneidas once had to trek 40 miles to a clinic on the Onondaga reservation south of Syracuse; now, about 2,300 members of 15 tribes in a six-county radius travel to the modern Oneida facility.

"Enterprise funded" scholarships have sent 38 Oneida youngsters to college—up from two before the casino—and 32 to vocational schools; about 70 tribal members are attending Oneida language classes; and 27 preschoolers receive an introduction to Oneida language and culture at a newly opened day-care center, soon to be replaced by a 32,000-square-foot, futuristic C-shaped, elder/child day-care center in White Pines village.

At the casino, the Oneidas are building a \$50 million, 227-room hotel—to supplement a 175-spot recreational vehicle park—and recently opened a 12-pump gas station that sells gasoline free of federal and state taxes. To placate local gas distributors, the Oneidas keep prices only 7 to 10 cents cheaper than at "regular" gas stations. The Oneida station also sells tax-free cigarettes.

And whenever a local farm goes on the block, the Oneidas buy it. In a reversal of a historical trend, an American Indian tribe is gaining ground: The Oneida Nation has grown from its 32-acre reservation to nearly 4,000 acres.

Many of the old trailers—leftovers from federal flood assistance donated to the Oneidas more than 20 years ago—are still occupied. But they now line a paved road that leads to a new community swimming pool and playground, sports fields, and a \$500,000 youth recreation and study center.

"Our future depends on our ability to take care of ourselves, not on our ability to get anybody else to look out for us by either giving us money or having a law that protects you," Halbritter said. "We've really got to, number one, develop our own empowerment. Gaming gives us one step in that direction."

NEXT: The battle over expansion.

LEGALITY OF INDIAN GAMING COMPACTS
BETWEEN TRIBES AND PUEBLOS AND NEW MEXICO

Issue:

Are the Tribal/State Class III gaming compacts in New Mexico that authorize casino gaming on various Indian reservations in the state valid in light of N.M. Supreme Court's recent holding in Citation Bingo v Otten; that casino gaming is illegal in New Mexico and its holding last summer in Clark v Johnson that the Governor needed legislative authorization to sign the compacts with the Tribes?

Position of the Department of the Interior Re:

Clark v Johnson: Once the Secretary exercises his power of approval, a subsequent state court determination that a Governor lacks authority to enter into the compacts does not preclude gaming pursuant to the compacts, or remove their effectiveness within the meaning of the IGRA. Class III gaming may continue on Indian lands pursuant to the terms set out in the compacts. This is the position Secretary Babbitt espoused during his October 1995 trip to New Mexico.

Citation Bingo: DOI has not taken a position on this decision.

Position of The Department of Justice Re:

Clark v Johnson: The Department of Justice has not yet taken a public position on this issue, although privately they support DOI's position. The U.S. Attorney for New Mexico holds a contrary opinion. This issue has been overshadowed by the broader issue of the legality in New Mexico of casino gaming.

Citation Bingo: The U.S. Attorney has indicated that the Citation Bingo decision means that, under IGRA, casino gaming could not have been authorized on Indian reservations. DOI does not appear to disagree. Tribes have filed two suits in Federal court to enjoin the U.S. Attorney from proceeding to close their casinos. Santa Ana v Kelly and Mescalero v Reno. In the primary suit, Santa Ana, the nine tribal entities and the U.S. Attorney have stipulated to filing dispositive motions by mid-April with briefing to conclude by the end of May. This schedule is likely to slip, however. The U.S. Attorney has agreed to suspend any effort to close the tribal casinos until after the District Court rules on the parties motion. The Tribes have agreed that if they lose at the District Court, and do not obtain a stay from the Court of Appeals, they will voluntarily close their casinos within 15 days of the issuance of the District Court opinion. The Tribes arguments are weak; success on the merits is possible, but unlikely.

Background:

Various Indian tribes and Pueblos in New Mexico negotiated Class III gaming compacts with the Governor of New Mexico. The compacts permit Class III gaming on Indian lands pursuant to the terms of the compacts. Fourteen signed compacts were submitted to the Department of the Interior for approval. The Secretary approved all of the compacts in 1995. Eleven compacts were approved by the Secretary prior to the filing of a petition for a writ of mandamus in the New Mexico Supreme Court on April 20, 1995. The remainder were approved shortly thereafter.

The Clark Decision: On July 13, 1995, the New Mexico Supreme Court held that the Governor of New Mexico lacked the authority to enter into the compacts. The Court stayed all actions by the Governor to "enforce, implement or enable" the gaming compacts. On August 4, 1995, the Court amended its July 13, 1995, writ and expressed its view in *dicta* that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988), does not purport to expand state gubernatorial power and that "the compacts executed by the Governor are without legal effect and that no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico." Since the question of the effect of the Clark decision on the compacts is a matter of Federal law, the views of the New Mexico Supreme Court are interesting but not definitive. Both DOI and DOJ have a contrary opinion.

The Citation Bingo Decision: On November 29, 1995, the New Mexico Supreme Court narrowly construed certain state statutes and concluded that, contrary to the then generally held belief, casino gaming, including charitable casino gaming was never legal in New Mexico. Since, under IGRA, gaming on an Indian reservation could have been validly authorized by the compacts only if charitable casino gaming were legal in the State, Citation may have removed the legal basis for the compacts. The Tribes have spent millions of dollars establishing Indian gaming establishments in reliance on the compacts. Several of the Pueblos are likely to default on large loans if they cannot continue to conduct their gaming. Indian gaming employs approximately 3,000 people. In addition, all of the Tribes rely on gaming monies to support their tribal governments. The Pueblos finance between 50% and 80% of the cost of their governmental programs through gaming. Significantly, tribal police programs rely heavily on gaming funds to expand services formerly provided by BIA. Other tribal programs mentioned in the Pueblos' Complaint which would be effected include health care, meals and other programs for the elderly, day care, housing, scholarships, environmental and other tribal land management programs, and tribal governmental office construction and renovation.

Potential Solution:

The solution is legislation that authorizes casino gaming on Indian reservations in the state and that approves existing compacts or authorizes the Governor to enter into new compacts. The Tribes attempted to resolve the situation when the N.M. Legislature was in session in January 1996 but with no success. A special session could be called, but is unlikely unless a tentative deal has been reached. Unfortunately, we have been informed that at this time the Tribes and the leadership of the legislature are far apart.



The Department of Justice, and the U.S. Attorney, who has the primary enforcement obligation, are working with the Tribes and the state to achieve a legislative resolution. DOT's Associate Solicitor for Indian Affairs has been monitoring the situation closely. DOI personnel are meeting next week with the tribal representatives, at their request, to explore the situation and potential solutions.

long-time children's advocate, is a former chairman of the Fund.

The letter, published Saturday in The Washington Post, called the Senate and House bills "fatally flawed, callous, anti-child assaults." She urged Clinton to show "unwavering moral leadership for children and opposition to Senate and House welfare and Medicaid block grants, which will make more children poor and sick."

Sources said the letter dismayed some Clinton political advisers, who have counted on the president to sign welfare reform legislation. Doing so would enable him to argue during his re-election campaign that he had fulfilled a 1992 campaign pledge to "end welfare as we know it."

(End optional trim)

The president's dilemma on welfare reform has been a topic of heated debate within the administration for some time, especially since Oct. 27 when the Los Angeles Times disclosed that a "draft" report prepared by the Department of Health and Human Services (HHS) estimated that the Senate bill would push an estimated 1.1 million children into poverty and worsen conditions for those already under the poverty line.

The Senate bill would end the federal guarantee of cash assistance to poor mothers with children, give states block grants to create their own programs, freeze federal welfare spending for five years, require recipients to work after two years and limit assistance to five years in a lifetime.

Gambling Initiative Described by Some as Vote-Buying By Kim Murphy= (c) 1995, Los Angeles Times=

TACOMA, Wash. Several of Washington's Native American tribes, drafting an initiative to open up unlimited casino gambling on reservation lands, wondered how they might make the measure more appealing to a wary public.

Tribal leaders backing the measure said they looked at gambling revenues as a resource, not so different from the mountains and fish and timber with which the tribes are blessed. And the resource, they figured, ought to be shared.

Who better to share it with than the voters charged with deciding the initiative's fate? So the measure, set for a statewide vote in Washington Tuesday, proposes to do just that: share 10 percent of the proceeds, in the event the election authorizes full casino gambling, with everybody who cast a ballot.

It is the first gambling ballot measure in the nation to offer voters a direct cut of the take. Opponents call it thinly disguised vote-buying. But initiative backers call it sharing the wealth.

"We're not greedy people. We're a sharing culture, and it's a resource we should all benefit from. It's not like a tree that's on my property. It's a tourism resource, and therefore we should share the proceeds," said R.L. Gutierrez, who owns and operates a gambling casino in eastern Washington for the Spokane tribe.

Russell LaFountaine, campaign manager for the ballot initiative, said the voter rebate idea came after tribal leaders debated a number of options for sharing the money. "Somebody thought that 10 percent ought to go to watershed restoration and fishing. Other people talked about education and parks and housing. Then we thought, why not give government back to the people?"

(Begin optional trim)

Native Americans already operate nine casinos in Washington. But individual compacts between each tribe and the state limit wagers, the number of tables and hours of operation. State officials say wagering from the nine casinos now totals up to \$600 million a year.

The initiative, by authorizing slot machines and

removing most other restrictions, could easily triple earnings. Initiative backers predict they could earn enough to mail each voter a check for \$91 a year. (Alternatively, voters would be offered a check-off box to send their cut to the homeless, Catholic Charities, park programs or fish and wildlife funds).

Secretary of State Ralph Munro has called the measure "absolute craziness" and says the state will likely challenge it if it passes.

(End optional trim)

Frank Miller, executive director of the state gambling commission, said the state has made a decision not to open the floodgates of slot machine gambling, which he predicted could boost gambling in Washington to \$6 billion a year.

The measure has split Washington's Native American tribes, with eight tribes opposing the measure against the six that are backing it three of them financially.

WASHINGTON OUTLOOK: On the Growing Black Prison Population By Ronald Brownstein= (c) 1995, Los Angeles Times=

WASHINGTON One number you're bound to hear more about in the months ahead is the rising rate of young black men under supervision of the criminal justice system.

In a study released last month, the Sentencing Project, a left-leaning criminal justice think tank, reported that at any one time, just over 30 percent of black men aged 20-29 were in prison, on probation or on parole, up from 23 percent only five years earlier. For whites, the comparable figure was 6.7 percent; for Latinos just over 12 percent.

This figure is rapidly insinuating itself into the public dialogue of black leaders. Speakers at the Million Man March in Washington last month repeatedly referred to the increased number of young blacks in jail. And black legislators cited the trend last week as they bitterly criticized Congress and President Clinton for refusing to lighten federal penalties associated with crack cocaine a drug that particularly afflicts the inner-city. A federal judicial panel had recommended such a change.

The Sentencing Project's incarceration numbers for young black men largely track with Justice Department estimates. And almost all analysts agree the trend constitutes a kind of slow-motion catastrophe. But its cause, and meaning, remain very much in dispute.

Black leaders like Jesse Jackson portray the figure as a civil rights issue a sign that the criminal justice system is stacked against minorities. Exhibit A in that case is the treatment of crack cocaine in federal courts.

Federal law imposes a five-year mandatory minimum prison sentence for selling five grams of crack; it takes 500 grams of powder cocaine to trigger the same sentence. Because nearly 90 percent of federal crack defendants are black, Jackson at a news conference last week termed the disparity "racist."

It is difficult to justify such widely disparate treatment although the judicial panel recommending lighter penalties noted that distribution of crack is more associated with "systemic violence" than is the powder cocaine trade. But even so, Jackson and other critics place far too much weight on this differential as an explanation for the high incarceration rate of young black men.

The reason: The 100-1 disparity in treatment between crack and powder cocaine exists in federal law while almost all crime in the United States is prosecuted at the state and local levels. Most states don't differentiate between crack and powder cocaine; even the 14 that do generally don't create as wide a gap as the federal law.

Federal crack convictions account for only a minuscule percentage of all blacks in prison. Bureau of Justice Statistics figures suggest that less than 15,000 blacks are currently in federal prison on all drug-related crimes. Only a fraction of those are people convicted of offenses involving crack.

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Col 1: In her grief, Leah Rabin is bitter, and she lets the mourners who hold a candlelight vigil outside the home she shared with her husband Yitzhak know it. "It's a pity that you all weren't here when there were demonstrators on the other side of the street here calling him a traitor and murderer," she said, her voice choking with emotion. (MIDEAST-ISRAEL, moved.)

Col 2: Local tribute in honor of Prime Minister Yitzhak Rabin.

Cols 3-6: Prime Minister Yitzhak Rabin, born in the Jewish promised land and gunned down for forging peace with hostile Arab neighbors, is buried with kings and princes, presidents and prime ministers, friends and former enemies at his graveside. (with art.) (MIDEAST-TIMES, moved.)

Above fold:

Col 2: First Interstate Bancorp, trying to fend off a hostile takeover by Wells Fargo & Co., agrees to be acquired by Minneapolis-based First Bank System Inc. in a \$10.3-billion deal that may cost Los Angeles its last major banking headquarters but could spare the region some of the wrenching job cuts expected under the Wells deal. (BANKS, moved.)

Below fold:

Cols 3-5: President Clinton, in a tribute to slain Israeli leader Yitzhak Rabin, urges the Israeli people to "stay the righteous course" of peace blazed by Rabin and promises the United States will stand behind them in their hour of sorrow. (MIDEAST-CLINTON-TIMES, moved.)

Bottom of page:

Cols 1-2: Nonvoters contribute to a political silence that has been interpreted as everything from contentment with the status quo that breeds non-participation to simple apathy to profound alienation from all aspects of society; but what do these non-voters say when given a chance to speak for themselves? (NONVOTERS, moving Tuesday.)

Cols 4-6: Facing a judge for the first time after committing the first political assassination in Israel's 47-year history, law student Yigal Amir acknowledges the killing and spews forth a tirade of defiance. (MIDEAST-GUNMAN-TIMES, moved.)

U.S. Moves a Step Closer to a Possible Financial Default By Jonathan Peterson= (c) 1995, Los Angeles Times=

WASHINGTON Maneuvering to avoid a looming debt-limit crisis, the U.S. Treasury Department said Monday it was forced to postpone \$31.5 billion in borrowing it had scheduled for this week.

The decision to delay Treasury auctions planned for Tuesday and Wednesday was the latest salvo in a heightening dispute between Congress and the White House over the \$4.9 trillion debt limit, which has become entangled in politics over the federal budget.

Officials say the government can meet cash obligations until the middle of the month, when huge interest expenses threaten a financial crisis unless Congress grants authority to borrow further.

"These postponements are necessary because Congress has not completed action on legislation to increase the statutory debt limit..." the Treasury Department said in

a brief statement.

Treasury Secretary Robert E. Rubin, who was in Israel on Monday for the funeral of Prime Minister Yitzhak Rabin, approved the decision following several telephone calls with aides, a spokesman said.

Although U.S. investors widely expect a political deal that will avoid a humiliating default by the federal government, foreign observers have been more worried. These concerns were reflected in the currency markets Monday, where the dollar fell against the Japanese yen, German mark and other currencies.

The federal government is now operating within a hair's breadth \$2 billion of the legal debt ceiling, and is projected to remain in that zone all week.

Budget experts said Monday that the real danger of a government default would not occur until Nov. 15, when Treasury will owe \$24.8 billion in interest on previously issued securities.

"It's gamesmanship up until the 15th of the month," said Martha Phillips, executive director of the anti-deficit Concord Coalition, referring to the political rhetoric over the debt limit. "And then it gets pretty serious."

Senate Majority Leader Bob Dole, R-Kan., said Sunday he believes Congress will boost the ceiling. "It will be lifted," he declared on NBC's "Meet the Press."

(Optional add end)

Republicans have talked about including measures to abolish the Commerce Department, overhaul the welfare system and restrict abortion on a proposed bill to increase the debt limit, for example.

White House officials have said repeatedly that the issue of balancing the budget and raising the debt ceiling should be kept separate, and President Clinton has threatened to veto legislation that comes with strings attached.

Republicans and the White House also have sparred over the question of how a U.S. default would affect the financial system. Some Republicans have maintained that it would pose little risk, because financial markets would recognize that the default was the byproduct of a far-reaching effort to balance the budget for the first time in years.

Clinton Backs Away from Support for Senate Welfare Reforms By Jack Nelson= (c) 1995, Los Angeles Times=

WASHINGTON President Clinton, increasingly concerned that Republican welfare reforms would hurt children, is backing away from his earlier indications of support for a Senate version of welfare legislation, a Clinton campaign official confirmed Monday.

Clinton's view now on the Senate bill is "let's take a second look at what it's going to mean to children," according to Ann Lewis, deputy director of "Clinton-Gore '96," the president's re-election campaign.

And a senior White House aide, who declined to be identified, said, "The president is mightily concerned with the cumulative impact of the Senate welfare bill in combination with all of the other cuts the Republicans are pushing Medicaid, earned income tax credits, cuts in education."

A congressional conference committee is trying to devise a compromise between the tough Senate welfare bill and an even more stringent House measure. Clinton has criticized the House bill as being too harsh. But he has said that despite some reservations, he could sign the Senate version, which Democrats supported by 35 to 11.

(Begin optional trim)

Lewis said Clinton's concerns were articulated in an open letter to him from Marian Wright Edelman, a close friend of Clinton and his wife Hillary and, as president of the Children's Defense Fund, a leading advocate for children. The first lady, a

Indian tribes promise Wash. voters \$100 annually if slot machines OK'd

By Deeann Glamser
USA TODAY

SEATTLE — Three Indian tribes have a deal for Washington residents: If voters approve slot machines for tribal casinos, each voter can expect yearly checks for \$100.

The Spokane, Puyallup and Shoalwater Bay tribes made their offer in advance of an initiative vote Tuesday on whether tribal casinos can offer Las Vegas-style slots and electronic gambling machines.

"Everybody becomes a winner," says Puyallup Tribe council member Mike Turnipseed. He wants a full-range casino on tribal land south of Seattle to create jobs for his 2,100-member tribe, which has 65% unemployment.

Turnipseed says voters will get an estimated \$100 a year starting in 1997 and continuing as long as Indians hold a monopoly on slots. Opponents say payments aren't likely to ever be that high.

Turnipseed says money will come from the initiative's requirement that voters get a 10% cut of machine gambling revenues. Currently, the eight tribes with casinos give 2% to 3% of revenue to local governments.

But Washington Secretary of State Ralph Munro is aghast. "The whole idea is absolute craziness. I cannot believe this is on the ballot! I do not think it's legal to pay voters." Under state law, an initiative — a law that's proposed by voters — can't be challenged until it becomes law. If passed, Munro thinks it will be struck down. "I'm sure there will be challenges from a lot of sources."

The most likely challenge will come from Tribes For Responsible Gaming. Nine of the state's 26 federally recognized tribes oppose the initiative. "It's really bad to have Indians perceived as buying votes," says Muckle-

shoot Tribe vice-chairman Sonny Bargala.

He would like to have slots at the Muckleshoot casino near Auburn, Wash., but doesn't like the initiative.

The 1988 National Indian Gaming Regulatory Act says states and tribes must negotiate on Indian gambling. Washington limits tribal casinos to one casino per tribe, \$500 wagers, and 52 gaming tables — more liberal than non-Indian card rooms.

Beyond the talk of vote buying, the initiative is turning tribes against each other.

Tulalip Tribe chairman Stan Jones Sr. is angry at the pro-initiative advertising that says casino jobs will get Indians off welfare. "It sounds like all Indians are on welfare. I find that real insulting," he says.

But Shoalwater Bay Tribe chairman Herbert Whitish says his 151-member tribe near the Washington coast needs slot machines for economic development.

He says the issue is urgent. "We're trying to get out of the mode of depending on the federal government for everything we have," says Whitish.

The eight tribal casinos in Washington have \$75 million in revenues. With slots, they could really cash in. Nationally, slots and electronic gambling bring in 70% to 80% of casino revenues.

Non-Indian gambling operators are pushing the legislature for the same gaming privileges as tribes.

"I don't care if they have slots as long as I have slots," says Steve Downen, owner of Riverside Inn bar in Tukwila. His card room business dropped 55% this year after the Muckleshoot casino opened 17 miles away.

But Sen. Margarita Prentice is worried about deeper ramifications if the initiative passes. "I'm a liberal Democrat, but darn it, I don't want this kind of moral decay," says Prentice. "This could really change our state."



By Dennis House, AP

BIRTHDAY WISH: Mickey Dechenne celebrates her birthday by playing slot machines in Miles, Wash.

Wash. weighs property rights

Vote is Tuesday on law that's assailed as costly, praised as fair

By Deeann Glamser
USA TODAY

SEATTLE — The nation's most sweeping property rights law goes before Washington voters Tuesday.

The vote on Referendum 48 grew out of the state Legislature's passage of a law requiring state and local governments to pay private property owners for restrictions on use of their land, such as designating it a wetland or wildlife sanctuary.

Democratic Gov. Mike Lowry couldn't veto the law because it was sent to lawmakers as a voter-approved initiative. So he donated \$1,000 to opponents.

They gathered enough signatures, days before the law was to take effect, to force the referendum.

The property law stemmed from frustration over environmental and growth-management laws.

The referendum is cast as both a fair deal for small-property owners

and an open wallet to big developers.

"It's a confusing issue for people to understand. Our top message is the cost," says John Lamson of the opposition "No On 48" campaign.

In a just-released study, University of Washington researchers say the law would present staggering new bills to governments.

Using 1994 land-use requests, the study finds:

► Governments would have to spend at least \$305 million to study the economic effects of any land restrictions. "That could be 6% to 7% of a city's general fund," says researcher David Harrison.

► Governments would have to pay owners \$3.8 billion to \$11 billion.

Referendum 48 advocates say the study is misleading. Besides, says Tom McCabe of the Building Industry Association of Washington, the real intent is to "slow government regulations. The cost impact could be nothing" without regulations.

Opponents say the law is vague and its effects uncertain. Lawyer Robert Mack says it could harm historical areas and neighborhoods.

Even some advocates say the law needs to be rewritten.

"It's poorly drafted and ambiguous," says Seattle lawyer T. Ryan Durhan, who represents developers.

A September poll showed the vote could go either way: A third were undecided, the rest evenly split.

For local officials, it's anyone's guess how to implement the law.

"This is pure anxiety and frustration," says Mike Walter, a Seattle lawyer representing 80 small and mid-size cities. He says some cities may triple all development fees.

Eino and Bertha Gronberg of Grays Harbor County say the issue is government control, not money.

The Gronbergs own 150 well-wooded acres. They've waited three decades to log the land. With five grandchildren in college, they

thought it was time to cash in. If the land were fully logged, the Gronbergs could earn \$250,000. But current rules for wetlands and buffer zones would restrict their logging to only 30% of the land. Under Referendum 48, they could log their entire property or be paid for not logging.

"We're mightily upset," says Bertha Gronberg. "We want government to back off."

In the eastern Washington city of Wenatchee, some property owners are ready to use Referendum 48 as a club for zoning changes.

A property owner wants to build a large warehouse store on 20 acres surrounded by homes. The owner is telling the city: Change my zoning or pay me for not developing the land.

"Neighbors are threatening to sue us if we allow it," says Wenatchee building director Bob Hughes. "It's going to be a real scary ride."

High rollers face loss of tax break

By William M. Welch
USA TODAY

Professional sports owners and Hollywood moguls who pay their stars millions of dollars could find themselves with a big tax increase.

And they're raising a big-league protest with Congress about it.

With virtually no debate or notice, the Senate late last week added to its budget bill a provision that, in most cases, eliminates the deduction employers take on salaries they pay that are over \$1 million.

The change could increase the tax liability of sports-team owners, movie producers and other employers by millions of dollars.

Sports owners said that could force them to cut future salaries.

When they learned of the provision, lobbyists for sports teams, players' associations, the movie industry and Wall Street firms descended on Congress and the measure's sponsor, Sen. Hank Brown, R-Colo.

"I haven't seen this many meetings on a bill since lobbying reform," said Tom Korologos, a lobbyist whose clients include Major League Baseball.

"The sports and entertainment industries are rather excited. ... They're on the verge of apoplectic," said Ken Kies,

director of the Joint Committee on Taxation, which analyzes tax issues for Congress.

Brown's amendment was approved 99-0. Why so popular? Because it raises \$800 million over seven years, money that would pay for improved Social Security benefits.

It now must be negotiated with the House, where opponents hope it will be dropped.

The amendment would expand a 1993 law proposed by the Clinton administration that eliminates deductibility over \$1 million for the top five earners of publicly traded corporations. It restores deductibility if the pay is based on performance, with terms approved beforehand by outside directors.



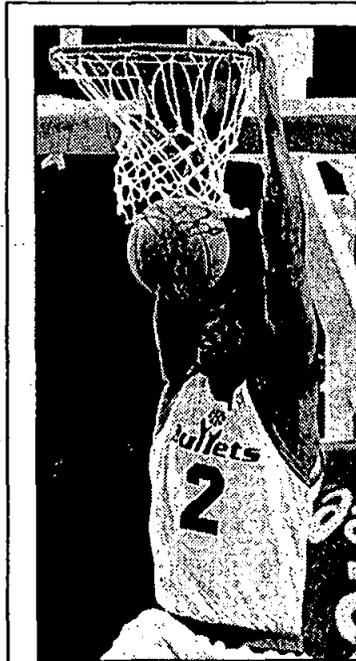
BROWN: Make rules 'apply to everyone'

Brown's amendment expands that to cover most employers and all salaries over \$1 million.

Why would a conservative senator expand a Clinton administration tax?

"The purpose was simply to make the rules apply to everyone," said Brown. "If you have a restriction like this, it ought to apply to everyone."

Tax experts said virtually all corporations have avoided taxes under the 1993 law by tying executive salaries to performance. The White House said that was the law's intent, as well as to stop corporate officers from setting their own pay



By Porter Blinks, USA TODAY
EFFECT ON NBA: Chris Webber's pay not deductible.

Top salaries in pro sports

1995-96
(in millions)

BASKETBALL

Chris Webber	\$9.5
Washington Bullets	
Derrick Coleman	\$7.9
New Jersey Nets	
Penny Hardaway	\$7.6
Orlando Magic	

FOOTBALL

Troy Alkman	\$6.0
Dallas Cowboys	
Drew Bledsoe	\$6.0
New England Patriots	
Steve Young	\$5.1
San Francisco 49ers	

BASEBALL

Cecil Fielder	\$9.2
Detroit Tigers	
Barry Bonds	\$8.0
San Francisco Giants	
David Cone	\$8.0
New York Yankees	

without accountability to shareholders.

Brown's measure earmarks the money to a popular cause: easing the penalty on Social Security recipients who work. People 65 to 69 years old now lose \$1 of benefits for every \$3 of income over \$11,280.

Brown's amendment would take away the deduction only for new contracts. Applied to existing contracts, it would raise taxes \$4.6 billion over seven years.

The implications are huge. Take the NBA, where Chris

Webber of the Washington Bullets will be paid \$9.5 million this year. That is all a deductible expense by his team's owner. Brown's amendment, if applied now, would wipe away an \$8.5 million deduction.

For a typical team payroll of \$50 million, with half going to players in excess of \$1 million, the lost deduction would be \$25 million. Corporations are taxed at a 35% rate, so the team's tax bill would go up \$10 million.

Jeff Mishkin, chief legal officer of the NBA, said the change "would have a devas-

tating and unfair impact." The average salary in the NBA last year was \$1.9 million.

NFL senior vice president Joe Browne said the tax would have "a significant impact on players. ... We're not crying poverty, but profit margin is not that great."

Richard Berthelsen, lawyer for NFL Players Association, said the tax "ignores the fact that athletes make their money in a short period of time."

Team owners and movie producers could get around the tax by basing pay on performance. But shortstops and movie stars may not want their check to depend on how well they or their movie does.

Said baseball lawyer Peter Schmidt: "You can't have every player on an incentive contract. If you pay a guy to win the batting title, and he's up in the last game and he's supposed to bunt, it could cause a problem."

The Clinton administration doesn't support the change, Assistant Treasury Secretary Les Samuels said. The administration said other loopholes could give sports teams an out.

Some tax experts said they think Brown's real aim is to get rid of the original law by expanding it to hit Hollywood millionaires who support Clinton.

"What Hank Brown is doing," says J.D. Foster, head of the Tax Foundation, a research group, "is saying, 'OK, if you think this is such a good provision, we'll apply it to everyone and see if you still think it's a good thing.'"

THE WHITE HOUSE

WASHINGTON

August 31, 1995

Governor Alex Lujan
Pueblo of Sandia
Box 6008
Bernalillo, New Mexico 87004

Dear Governor Lujan:

I am responding, on behalf of the President, to your recent letter concerning gaming compacts with Indian tribes in New Mexico.

As you know, the Department of Justice and the Department of the Interior currently are reviewing whether the New Mexico gaming compacts approved by Secretary Babbitt remain valid after the decision in Clark v. Johnson. I know, from informational discussions between my office and the Department of Justice, that the persons undertaking this review are giving serious and respectful attention to your views on this matter. They expect to conclude their review in the near future. In the meantime, the Department of Justice will decline to bring any enforcement action against tribes that are conducting gaming operations in accordance with the compacts.

The President is well aware of the need for continued economic development and improved governmental services within the New Mexico tribal communities. It is his hope that the tribes and the state can resolve their current conflict consistent with those goals. The Departments of Justice and the Interior stand ready to facilitate such an agreement in any appropriate manner.

If I can be of any further help on this important matter, please do not hesitate to call on me.

Sincerely,



Abner J. Mikva
Counsel to the President

THE WHITE HOUSE

WASHINGTON

September 5, 1995

Herbert A. Becker, Esq.
Director, Office of Tribal Justice
Department of Justice
Washington, D.C. 20530

Dear Herb:

Thanks very much for sending me the legal memo and press release on New Mexico Indian gaming compacts. I am enclosing, for your information, a copy of Governor Lujan's letter to the President and Judge Mikva's reply.

I would greatly appreciate your keeping me informed of any further developments in this matter. Thanks very much again.

Very truly yours,



Elena Kagan
Associate Counsel
to the President

Governor

Alex Lujan
Lt. Governor

Patrick G. Baca
Treasurer

Lucia Benalli



Box 6008
Bernalillo, New Mexico 87004
(505) 867-3317

August 9, 1995

President William J. Clinton
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Gaming Compacts with Indian Tribes in New Mexico

Dear Mr. President:

As Governor of the Pueblo of Sandia, I am writing to ask for your help. Last Spring, Secretary Bruce Babbitt approved compacts between the State of New Mexico and 14 Indian tribes and pueblos for the conduct of Class III gaming. The Secretary approved these compacts pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. I understand the Secretary signed the compacts at the urging of the White House, which the tribes and pueblos have been very grateful.

Many direct benefits have already resulted from these compacts. First, 10 Indian gaming facilities have provided 2,650 jobs to tribal and non-tribal individuals. These employees are paid \$46.6 million annually. These employees will provide food, clothing and housing for their families and gain the self-respect employment brings. Wages paid, along with our purchases of goods and services will generate a total of 13,300 jobs and \$215.5 million in employment income to New Mexico. These figures do not include tribal government spending for economic diversification, community projects and tribal government services. Indian gaming revenues have been earmarked for health clinics, scholarships, water and septic systems, care for the elderly, among other purposes. These revenues are especially vital to tribes at a time of increasing pressures on the federal budget.

On July 13, 1995, the New Mexico Supreme Court issued a ruling in Clark v. Johnson, No. 22,861 (N.M. July 13, 1995), which, if improperly applied, may result in the tribes losing all of the current benefits and those planned for our future generations. The court (comprised entirely of appointees of former anti-gaming governor Bruce King) ruled that the State Governor did not have the authority to enter into the compacts without specific state legislative

President William J. Clinton

August 9, 1995

page 2

authorization. This decision came after our Pueblo, and several other tribes, dealt with this issue for seven years, through the terms of two other state governors, seven state legislative sessions and a host of lawsuits. Initially, the court did not find that the compacts were invalid, but the court revised its opinion to say specifically that the compacts lack legal effect. However, this is a question of federal law over which a state court has no jurisdiction.

The tribes sent a delegation to Washington, D.C. to request the Department of Justice and the Interior to issue a statement upholding the validity of the compacts as federal law. The tribes are particularly concerned about what action the Justice Department might take on this issue, especially since some people in the Department argue that the federal government owes more allegiance to the states than to the tribes. We would remind them that the very reason for the United States' trust responsibility is to protect tribes from hostile political institutions of the states. In 1887, the United States Supreme Court said that "the people of the states where they reside are often [the Indians'] deadliest enemies." That is as true now as it was in 1887.

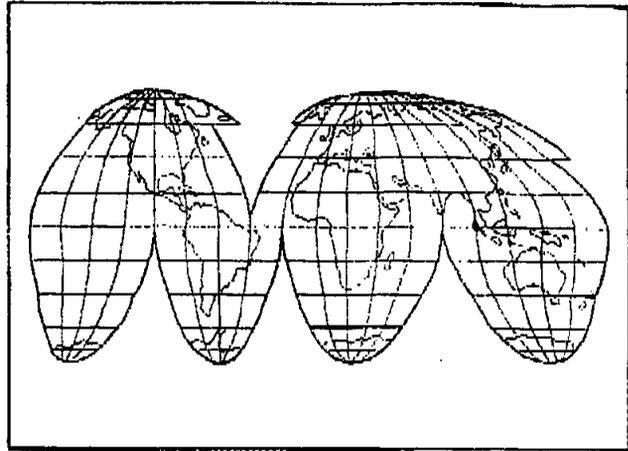
We are caught in the middle of a vicious political war among the Governor, the Legislature, the Supreme Court, and the Attorney General. Our New Mexico tribal communities still lag behind the nation in terms of jobs, income, education, health, and every other statistical indicator of well-being. Our gaming revenues are allowing us for the first time to provide the basic services that non-Indian governments have always provided to their own. This revenue is not a luxury, it is essential to the hopes we have for our people. Indian gaming is a means to realize these hopes, and we urgently and respectfully request your help and support.

Very truly yours,



Alex Lujan
Governor

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.



VIA FAX

DATE: AUGUST 30

TO: ELENA KAGAN
WHITE HOUSE
456-1647

FROM: HERBERT A. BECKER
DIRECTOR
OFFICE OF TRIBAL JUSTICE

SUBJECT: _____

MESSAGE: _____

(TOTAL NUMBER OF PAGES INCLUDING THIS ONE) 3

TRANSMITTED BY: Marjorie L. Jackson
FOR VOICE COMMUNICATIONS WITH THIS OFFICE, PLEASE TELEPHONE (202-514-8812)
TO TRANSMIT TO THIS OFFICE VIA TELEFAX, PLEASE TELEPHONE (202-514-9078)



Department of Justice

FOR IMMEDIATE RELEASE
Monday, August 28, 1995

TJ
(202) 616-2765
TDD (202) 514-1888

STATEMENT ON INDIAN GAMING IN NEW MEXICO

The Department of Justice and the Department of the Interior are reviewing the recent New Mexico State Supreme Court decision in State of New Mexico ex rel. Clark v. Johnson and the question of the continuing validity of the New Mexico gaming compacts. The decision, rendered after the Secretary of the Interior had approved the compacts within the period required by statute, raises complex and important issues under the Indian Gaming Regulatory Act that could have a significant impact on gaming in New Mexico. Accordingly, we are undergoing a careful internal review of the decision and its potential ramifications. We expect to conclude this review in the near future. The Department of Justice will not bring any enforcement action against Indian tribes that are conducting gaming operations in accordance with approved compacts prior to the conclusion of that review.

We sincerely hope that the Indian tribes and the state will reach a mutually agreeable resolution on these issues. The

(MORE)

- 2 -

tribes and the state share common interests in intergovernmental cooperation in law enforcement, economic development, and government services, in accordance with the process prescribed in the Indian Gaming Regulatory Act. A mutually acceptable agreement that facilitates these goals is the best solution for the future of New Mexico and the Indian tribes.

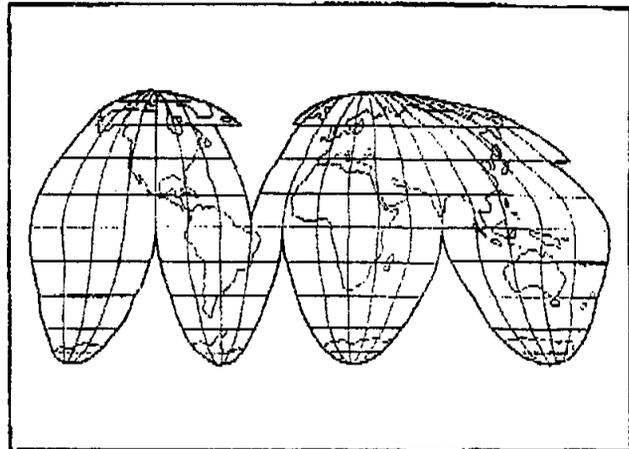
There are 22 Indian tribes in New Mexico. Fourteen have gaming compacts. Eight currently have casinos, slot machines and parimutuel betting in operation on their reservations. They are the Acoma, Isleta, Pojoaque, Sandia, San Juan, Santa Ana and Tesuque Pueblos and the Mescalero Apache Tribe.

The New Mexico gaming compacts were negotiated by the state and signed by the Governor in early 1995. The compacts were subsequently approved by the Secretary of the Interior, pursuant to his authority under the 1988 Indian Gaming Regulatory Act. On July 13, the New Mexico Supreme Court ruled that the Governor lacked the authority under state law to enter into gaming compacts without the approval of the state legislature, and that the compacts were inconsistent with state gaming laws.

####

95-459

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.



VIA FAX

DATE: August 30

TO: ELENA KAGAN
WHITE HOUSE
456-1647

FROM: HERBERT A. BECKER
DIRECTOR
OFFICE OF TRIBAL JUSTICE

SUBJECT: Dear Elena,
Enclosed is the legal
memo on NM Indian gaming
as well as a press release
MESSAGE: issued by the tribes after
the DOJ statement.

(TOTAL NUMBER OF PAGES INCLUDING THIS ONE) 3 21

TRANSMITTED BY: Marjorie L. Jackson See Sent
FOR VOICE COMMUNICATIONS WITH THIS OFFICE, PLEASE TELEPHONE (202-514-8812)
TO TRANSMIT TO THIS OFFICE VIA TELEFAX, PLEASE TELEPHONE (202-514-9078)



U. S. Department of Justice

Office of the Deputy Attorney General

Office of Tribal Justice

Washington, D.C. 20530

MEMORANDUM

TO: Herb Becker, Director
 Office of Tribal Justice
 Office of the Deputy Attorney General

FR: Mark C. Van Norman, Deputy Director
 Craig Alexander, Deputy Director
 Dana Rao, Special Assistant to the Director

RE: Validity of New Mexico Indian Gaming Compacts

DA: July 20, 1995

ISSUE:

Whether gaming compacts, concluded by the Governor of New Mexico and New Mexico Indian tribes and approved by the Secretary of the Interior pursuant to the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, remain "in effect" for federal law purposes after a state court subsequently determines as a matter of state law that the Governor lacked authority to enter into the compacts?

BRIEF ANSWER:

In these circumstances, the gaming compacts have continuing validity (for federal law purposes). The IGRA offers the states an opportunity to participate in developing regulations for Indian gaming in an area of plenary federal power. U.S. CONST., Art. I, § 8, cl. 3. Upon receipt of gaming compacts from state and tribal officials, the Secretary of the Interior approves the compacts and

meaning what?

the compacts are then "in effect" for federal law purposes. State law attacks on the compacts outside the IGRA compacting process are preempted.

BACKGROUND:

Over the course of several years, the Pueblo and Apache Indian tribes of New Mexico requested the State of New Mexico to negotiate class III gaming compacts under the Indian Gaming Regulatory Act. The tribes were frustrated in gaming negotiations because the former Governor alternated between public statements refusing to negotiate and negotiation sessions which led nowhere.

After Governor Johnson's election in November 1994, gaming negotiations between New Mexico and the Pueblo and Apache tribes began in earnest. When draft compacts were available, they were circulated to members of the state legislature and the media. The compacts were signed by the Governor in February and March 1995. The compacts were approved by the Secretary of the Interior under the IGRA and published in the Federal Register in April, May, and June, 1995. See 25 U.S.C. § 2710(d)(3)(B) and (8)(A).

On July 13, 1995, the New Mexico Supreme Court held that the Governor of New Mexico lacked authority to enter into Tribal-State Class III Gaming Compacts with the Pueblo and Apache tribes because the compacting process was a legislative function. State of N.M. ex rel. Clark v. Johnson, ___ S.W.2d ___ (Slip. Op. July 13, 1995 N.M.) ("Clark"). The state court based its holding on federal law determinations under the IGRA, i.e., that Indian gaming could be equated with "for profit" gaming and the Governor's negotiation of compacts which include casino gaming "contravened the legislature's

expressed aversion to commercial gambling." Id. at 11, 16 (emphasis added). The state court stayed all actions by the Governor to "enforce, implement or enable" the gaming compacts.

Neither the state attorney general, the state legislature, the Secretary of the Interior, the Pueblo tribes nor the Apache tribes were party to this action, and accordingly, the state court did not address the validity of the compacts vis-a-vis the Indian tribes or the United States. The state court held that the Indian tribes were not indispensable parties, and addressed only the authority of the Governor.¹

DISCUSSION:

I. The Federal Common Law Background of Indian Gaming:

A. Indian tribes are "domestic dependent nations," subject only to Congress' plenary power over Indian affairs

In the exercise of their powers of self-government, Indian tribes conduct gaming operations to generate revenue for tribal government and to provide capital for economic development on their reservations. Indian gaming has been challenged by some state and local authorities as violative of state law, but Indian treaties,

¹ The Clark court's determination of the state law issue concerning the Governor's authority rests on an erroneous view that Indian gaming can be equated with "for profit" gaming under federal law. Indian Gaming Regulatory Act, 25 U.S.C. § 2702 (Indian gaming is conducted to raise tribal government revenue); see Mashantucket Pequot Tribe v. State of Conn., 913 F.2d 1024 (2d Cir. 1990), cert. denied, 111 S.Ct. 1620 (1991) (any games that are permitted within the state, including charity Las Vegas Nights, may be conducted by Indian tribes). So, even if state law were relevant in determining the effectiveness of federal Indian gaming compacts, the state law ruling rests on an erroneous rulings of federal law and is subject to review by federal courts. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984).

the federal common law, and recognized tribal government rights protect Indian tribes in the exercise of their self-government by preempting state laws that infringe on the right of Indian tribes "to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217 (1959).

In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the State of California challenged the Cabazon and Morongo Bands' rights to operate gaming. The validity of any application of state law in Indian country is a federal question, so California argued that, under Public Law 280, Congress had delegated the state authority to regulate Indian gaming.

The Supreme Court has "consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Id. at 207 (citations omitted). Accordingly, while recognizing that Congress indeed delegated criminal prohibitory authority to the state, the Court held that Congress had not delegated civil regulatory authority to the state under Public Law 280. Finding that California "operates a state lottery, [which] daily encourages its citizens to participate in this state-run gambling [and] permits pari-mutuel horse-race betting [and] card games," the Court ruled that California gaming laws were regulatory, not prohibitory. The Supreme Court held that state regulatory laws were preempted by federal law: "State regulation would impermissibly infringe on tribal government." Id. at 220.

II. The Indian Gaming Regulatory Act and the Compacting Process

In the Indian Gaming Regulatory Act, Congress' expressed purpose was to protect Indian gaming "as a means of generating tribal revenue" to promote "tribal economic development, self-sufficiency, and strong tribal governments," and to provide a statutory framework to protect Indian gaming from corrupting influences. 25 U.S.C. § 2702.

Congress divided gaming into three classes. Class I, social and traditional gaming, is left solely to tribal regulation. Class II, bingo and related games, is subject to both tribal and federal regulation. Class III gaming, which includes all other gaming, such as casino games, pari-mutuel horse and dog racing, and lotteries, is subject to regulation pursuant to a specialized compacting process between states and Indian tribes.

Congress enacted its specialized "system for compacts between tribes and States for regulation of class III gaming" as:

the best mechanism to assure that interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises. . . . The Committee concluded that the compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns. . . .

S. Rep. No. 100-446 (1988); U.S. Code, Cong. & Admin. News (1988) ("USCCAN"), 3071, at 3083. Title 25 U.S.C. § 2710(d)(1) establishes the compact requirement:

Class III gaming activities shall be lawful on Indian lands only if such activities are . . .

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

Upon request by Indian tribes, States are directed to negotiate in

good faith to conclude a Tribal-State Compact governing class III gaming, which sets forth the parameters for such gaming. 25 U.S.C. § 2710(d)(3). The IGRA contemplates that the negotiating process will be completed within 180 days. 25 U.S.C. § 2710(d)(7).

After a compact is concluded, the compact is presented to the Secretary of Interior for review. Congress limited that review by providing that the Secretary may only disapprove a compact if the compact violates: 1) the IGRA; 2) any other provision of Federal law; or 3) the United States' trust obligation to Indians. If the Secretary fails to act upon a gaming compact within 45 days, it is deemed approved. 25 U.S.C. § 2710(d)(8).²

Strict time limits on the compacting process were necessary because tribes which operated electronic games before the passage of the IGRA were granted a one-year grace period to negotiate class III gaming compacts. 25 U.S.C. § 2703(E). The Senate Report explains:

The grace period is . . . intended to give those tribes that are currently operating those games which will

² Alternatively, if negotiations between an Indian tribe and a state do not result in agreement on a compact after 180 days, or a state refuses to negotiate a compact, an Indian tribe may sue the state for failure to negotiate in good faith. Recognizing that the state will have primary access to evidence relating to the state's negotiating positions, Congress placed the burden is upon the state to prove that it negotiated in good faith. If the state fails to meet this burden, then a mediator is appointed to mediate for 60 days. If mediation fails, then the state and the tribe may both submit their final offer to the mediator, and the mediator chooses the compact which "best comports with the terms of the Act." The state may object to that choice within an additional 60 day period. Then following that period, the Secretary of Interior may prescribe procedures for the operation of Indian gaming, if the state objects to the mediators chosen compact. 25 U.S.C. § 2710(d)(7).

become class III games upon enactment of this bill, the full spectrum of time envisioned in the compact process . . . in which to conclude a compact with the State. This timeframe includes a 6-month negotiation period and, if negotiations should fail during that period, time to bring a court action. If the court finds for the tribe, it may order another 60-day negotiation period, and, if that fails, there must be time for the mediator and the Secretary of the Interior to respond in accordance with the directives of the Act. . . .

USCCAN, at 3080-3081. Other Indian tribes are barred from class III gaming while gaming compacts were negotiated, 25 U.S.C. § 2710(d)(1), and Congress found more generally that its compacting system, with its strict time limits, was necessary to "provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place." USCCAN at 3083.

II. The Tribal-State Gaming Compacts are Federal Law Compacts

"There is no doubt that this case is properly analyzed in terms of Congress' exclusive constitutional authority to deal with Indian tribes." United States v. Mazurie, 419 U.S. 544, 554 n. 11 (1975) (congressional delegation of authority to states and Indian tribes to regulate Indian country liquor traffic). Through IGRA, Congress provided states an opportunity to participate with Indian tribes in developing the regulatory framework for Indian gaming in the compact process. States may freely decline the offer, and the Secretary of the Interior will ultimately promulgate procedures to regulate class III gaming by the Indian tribe. See Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523 (D.S.D. 1992), aff'd 3 F.3rd 273 (8th Cir. 1993). Yet without the IGRA process, states have no authority to regulate Indian gaming. California v. Cabazon

Band of Mission Indians, 480 U.S. 202 (1987).

If a state chooses to accept the federal offer to participate in the development of a regulatory framework for Indian gaming, the state participates in a federal compacting process under parameters set forth by Congress. For example, in Coeur D'Alene Indian Tribe v. Idaho, 842 F. Supp. 1268, 1282 (D.Idaho 1993), the court explained:

Congress enacted the IGRA in order to provide a framework to guide states and Indian tribes in their efforts to reach agreement as to the extent of class III gaming to be conducted on tribal lands and how those activities are to be conducted. The purpose of the IGRA, its clear language, and its legislative history make clear that the extent to which state gaming regulations and/or regulatory systems shall apply on Indian reservations is to be carefully negotiated between these sovereign entities through the compact negotiation process.

(Emphasis added). The IGRA prohibits state action to regulate Indian gaming outside the compacting process.

Throughout the compacting process, states are directed to negotiate in "good faith." 25 U.S.C. § 2710(d)(3). States must, of course, act through their agents, and by participating in IGRA compacting process, state officials make implicit representations that they are authorized to negotiate -- to participate otherwise would be "bad faith." Indian tribes and the Secretary of the Interior are entitled to rely on good faith representations by state officials as to their authority, absent contrary evidence. Illinois v. Krull, 480 U.S. 340, 351 (1987) (federal government presumes that state government officials act in a constitutional manner).

After a Tribal-State compact is signed by state and tribal

officials and submitted for approval, the Secretary of the Interior has 45 days to approve or disapprove the compact. If there is an objection to the compact by the state government, that is the time for the state to register the objection. Kickapoo Tribe v. Kansas, 43 F.3d 1491 (D.C. Cir. 1995) (Secretary of the Interior declined to approve compact where notified by state prior to the approval of the compact that state official lacked authority to enter compact on behalf of state). Otherwise, giving deference to responsible state and tribal officials, the Secretary will review the compact.

If the compact is consistent with the IGRA, federal law, and the federal trust obligation, Congress directed the Secretary to approve the compact. 25 U.S.C. § 2710(d)(8). The language of the IGRA provides: a compact "shall take effect . . . when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). Congress understood the import of its plain language, and perhaps the Senate Report bears repeating: "a compact shall take effect when notice of approval by the Secretary has been published in the Federal Register." USCCAN at 3088. Accordingly, it is clear that a compact is "effective" for federal law purposes upon publication of secretarial approval in the Federal Register.

Thus, in Langley v. Edwards, 872 F. Supp. 1531, 1535 (D.La. 1995), addressing a challenge a Tribal-State compact based on the theory that the Governor had "usurped" legislative authority by entering the compact without legislative approval, the court held:

No substantive right exists to challenge the approval on the basis of alleged state law irregularities. The IGRA expresses

a congressional policy of putting compacts into force quickly, by requiring the Secretary to approve or reject them within forty-five days of their submission. 25 U.S.C. § 2710(d)(8). During this time, the Secretary must ensure that the compact complies with the IGRA, other federal laws, and the United States' trust obligation to the tribe.

{ Compact approval by the Secretary cannot be invalidated on the basis of a governor's ultra vires action, because a contrary rule would compel the Secretary to consider state law before approving any compact. See, United States v. Brown, 334 F. Supp. 536, 540 (D.Neb. 1971). "That would lead to endless delay." Id. . . . The compact is valid under IGRA because it was approved by the Secretary of Interior.

(Emphasis added). See also Willis v. Fordice, 850 F. Supp. 523 (S.D. Miss. 1994).

In other words, "[t]he federal government has its own stake in ensuring the uniform and effective administration of the Indian Gaming Regulatory Act," Forest County Potawatomi Community of Wisconsin v. Doyle, 803 F. Supp. 1526, 1534 (W.D. Wis. 1992), and the IGRA does not permit states or Indian tribes to "make an end-run around an existing agreement." Wisconsin Winnebago Nation v. Thompson, 22 F.3rd 719, 724 (7th Cir. 1994) (Indian tribe may not litigate "good faith" issue after conclusion of compact). Thus, given the importance and specificity of Congress' compact system, the IGRA should not be construed to permit collateral state attacks on the federal compacting process, after the process concludes with the Secretary's approval.³

³ The IGRA provides a number of avenues to address objections by states or Indian tribes. First, states may decline to participate in the compacting process, and leave the Secretary of the Interior to develop procedures for the conduct of Indian gaming. Second, states may negotiate in good faith and yet they may never reach a compact. If an Indian tribe objects to state failure to compact, the tribe may initiate a suit for failure to negotiate in good faith, and the state may defend. If the state is

In other cases where states have attempted "self-help" to enforce state law in Indian country, federal courts have held that federal law preempts state action outside of the express statutory provisions of the IGRA. In Sycuan Band of Mission Indians v. Roache, 788 F. Supp. 1498, 1504 (S.D.Cal. 1992), addressing the contention that the state retained criminal prohibitory authority over Indian gaming after the IGRA, the court held:

In the IGRA, Congress addressed the state's authority to criminally prosecute individuals for alleged violations of its gaming laws made applicable to Indian lands under the IGRA. Section 1166(d) provides:

The United States shall have exclusive jurisdiction over criminal prosecutions of violations of state gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact . . . has consented to the transfer to the state of criminal jurisdiction with respect to gambling on the lands of the Indian tribe. . . .

It is a well-established rule of construction that a more specific statutory section governing jurisdiction controls over a more general statutory section. "The rule that a precisely drawn, detailed statute preempts more general remedies flows from the Congressional intent to carve out from the broader scheme a specific exception for this particular type of claim. . . ." *Id.*

Thus, once the Secretary has approved a Tribal-State Class III Gaming Compact, state government has no role to play outside the parameters of its negotiated agreement.

The New Mexico Supreme Court's decision to call into question

unable to demonstrate good faith, it may nevertheless continue to its participation in development of a compact through mediation. Finally, when a compact is concluded, the state or the tribe may enforce the terms of the compact through civil action in federal court. 25 U.S.C. § 2710(d)(7). There is no provision for state court actions, and the express statutory provision of specific remedial avenues negates an implication of more general remedies.

the Governor's authority in Clark as a matter of state law, after approval of the compact, cannot change the Secretary's approval as a final, federal determination that the compact is consistent with the IGRA. In Oneida Nation v. County of Oneida, 414 U.S. 661, 678 (1974), the Supreme Court explained:

There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law . . . must be deemed controlling . . . in dealing with the Indians.

That statement has direct application to the Clark decision. In short, despite the state court's decision, the Secretary's federal law determination is controlling as to the "effectiveness" of the gaming compacts for federal law purposes. ?

III. Analogous Areas of Law, Reinforce the Conclusion that the Secretary's Federal Law Approval of a Tribal-State Gaming Compact is Final

In three contexts other than gaming, courts have held that where a state enters into an agreement or a compact under authority of federal law, federal government approval of the state's action precludes later challenges to the validity of that action based on its alleged non-conformance with state law.

A. The Effectiveness of Public Law 280 Retrocession is a Matter of Federal Law

In Public Law 280, Congress provided states an opportunity to assume criminal jurisdiction over Indian country. P.L. 83-280, 67 Stat. 590 (1953), codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321 et seq. Indian tribes, however, objected to Public Law 280 because they viewed the Act as a derogation of tribal sovereignty and at least some, feared that state courts would be prejudiced against

Indians. Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).

In the Indian Civil Rights Act of 1968, Congress required popular tribal consent prior to any further assumptions of state jurisdiction under Public Law 280, and also provided a process whereby states may "retrocede" that jurisdiction to the federal government. 25 U.S.C. §§ 1323 et seq. The President authorized the Secretary of the Interior to accept such retrocessions for the United States. Exec. Order No. 11435, 33 F.R. 17339. Since Public Law 280 addresses the allocation of criminal jurisdiction, it is not surprising that a number challenges have been raised to the retrocession process.

The Ninth Circuit in Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), rev'd on other grounds, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), decided a question strikingly similar to the question concerning the validity of the Tribal-State gaming compacts after Clark. In Schlie, the defendant challenged a Public Law 280 retrocession of Washington's criminal jurisdiction over the Port Madison Indian Reservation because the state retrocession was achieved by proclamation of the Governor, and the defendant argued that the Governor's proclamation was "invalid under state law."

Prior to the action, however, the Secretary of the Interior had accepted Washington's retrocession of jurisdiction over Port Madison Indian Reservation, and published that acceptance in the Federal Register. The Ninth Circuit held that secretarial approval was determinative of the validity of the retrocession as a matter of federal law. The court explained:

[T]he question is one of federal law not state law. The acceptance of the retrocession by the Secretary, pursuant to the authorization of the President, made the retrocession effective, whether or not the Governor's proclamation was valid under Washington law. . . .

The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been valid state action, are all factors to be considered and lead the court to the conclusion that the federal interpretation of the effectiveness of state action triggering the re-assertion of federal jurisdiction is and was controlling. "Retrocession" does not imply any particular procedure or action on the part of the states involved and the need for finality and importance of the various competing interests here dictate that the state action presented complies with the federal requirements of "retrocession."

544 F.2d at 1012. Accordingly, upon acceptance by the Secretary, the state retrocession was effective as a matter of federal law, without regard to the Governor's supposed lack of authority.

The Ninth Circuit confirmed this ruling in another challenge to Washington retrocession in United States v. Lawrence, 595 F.2d 1149 (9th Cir.), cert. denied 444 U.S. 853 (1979).⁴ In Lawrence, the defendant again complained that the Governor's proclamation of retrocession was invalid under state law because "it was not authorized by appropriate legislation," and the court again explained:

The question is one of federal law, not state law. The acceptance of the retrocession by the Secretary, pursuant to the authorization of the President, made the retrocession effective, whether or not the Governor's proclamation was valid under state law.

⁴ It is noteworthy that the Lawrence court applied the Supreme Court's decision in Washington v. Yakima Indian Nation, and the Supreme Court denied certiorari in Lawrence shortly after Yakima was decided.

595 F.2d at 1151. See also United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971); Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971) aff'd 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973).

The same factors which underlie these Ninth Circuit decisions, i.e., Congress' plenary power over Indian affairs, the difficulty of requiring the Secretary to delve into state law, the Secretary's reliance on good faith representations by state government, and the need for finality, all indicate that the same result is required under the IGRA. Thus, this authority reinforces the conclusion, that the Clark court's state law determinations have no bearing on the validity of IGRA gaming compacts under federal law after the Secretary of the Interior approves the compacts.

B. The Effectiveness of Interstate Compacts is a Matter of Federal Law

The Constitution of the United States provides in the Compact Clause: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State" Art. I, § 10, cl. 3. Congress has, of course, authorized numerous interstate compacts. Interstate compacts give rise to questions, similar to the question in Clark, regarding post hoc determinations of a state's authority to enter into a compact.

In Cuyler v. Adams, 449 U.S. 433, 440 (1981), the Supreme Court ruled that "where Congress has authorized the States to enter into a cooperative agreement, . . . consent of Congress transforms the States' agreement into federal law under the Compact Clause." The Cuyler Court held that Pennsylvania courts had erred in their

construction of the Interstate Agreement on Detainers, a compact to which Pennsylvania was a party. In Cuyler, New Jersey requested transfer of a state prisoner from a Pennsylvania prison for trial in New Jersey. The prisoner challenged Pennsylvania's failure to hold a pre-transfer hearing. Although Pennsylvania courts had held that there was no right to such a hearing, the U.S. Supreme Court ruled that the compact was a matter of federal law. Construing the compact as federal law, the Court held that Pennsylvania must provide pre-transfer hearings. See also West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) (challenge to interstate compact under state law rejected); Washington Metropolitan Area Metro Authority v. One Parcel of Land, 706 F.2d 1312, 1321 (4th Cir. 1983) (challenge to interstate "Metro Authority" condemnation procedure as violative of Maryland Constitution denied under federal law); Acorn v. Wolfe, 827 F. Supp. 47 (D.D.C. 1993) (Virginia constitutional requirement of legislative confirmation of gubernatorial appointments did not apply to interstate airports authority, which was created pursuant to congressionally approved compact).

These compact cases demonstrate that when Congress sets forth the framework for intergovernmental compacts, federal law governs the validity and interpretation of the compact, and after federal approval, state law questions are preempted.

C. The Effectiveness of State Ratification of Amendments to the United States Constitution is a Matter of Federal Law

In the context of amending the U.S. Constitution, the Supreme Court also has held that questions of the validity of ratification

by a state legislature "are exclusively federal questions and are not state questions." Coleman v. Miller, 307 U.S. 433, 438 (1939). In Leser v. Garnett, 258 U.S. 130, 137 (1922), the Court went a step further, holding that an amendment to the U.S. Constitution goes into effect when the requisite number of state legislatures ratify the amendment, precluding subsequent challenges to the validity of state ratification procedures. See also Coleman, 307 U.S. at 440. A challenge to the ratification of the Nineteenth Amendment was brought in Leser. The petitioner argued that the constitutions of several of the ratifying states prohibited ratification by those legislatures and that several of those states did not comply with state ratification procedures. The Court held that the federal acceptance of ratification by the states "is conclusive upon the courts." Leser, 258 U.S. at 137. Once again, the Supreme Court has made clear that state participation in a federal process is a matter of federal law, and state law questions are no longer relevant after federal approval of the process.

CONCLUSION

Given detailed statutory structure, the legislative history, and cases construing the IGRA's systematic Tribal-State compacting process, which Congress established for the regulation of class III gaming by Indian tribes, the Secretary's approval of Tribal-State gaming compacts makes those compacts "effective" for federal law purposes. Subsequent state law challenges to the process for negotiating federal gaming compacts do not disturb the Secretary's prior approval of such compacts.

This conclusion is reinforced by the federal nature of issues arising in the context of Public Law 280 retrocession, interstate compacts, and state ratification of Amendments to the Constitution of the United States. After Federal Government approval of such state action for federal law purposes, later state law challenges are irrelevant. Accordingly, the New Mexico Supreme Court's state law rulings in Clark should have no bearing on the effectiveness of the Pueblo and Apache Tribe's gaming compacts, which were approved by the Secretary of Interior prior to the Clark decision.

1ST CASE of Level 1 printed in FULL format.

STATE OF NEW MEXICO ex rel. GUY CLARK, MAX COLL, and GEORGE
BUFFETT, Petitioners, vs. THE HON. GARY JOHNSON, GOVERNOR OF
THE STATE OF NEW MEXICO, Respondent.

STATE ex rel. CLARK v. JOHNSON

NO. 22,861

SUPREME COURT OF NEW MEXICO

1995 N.M. LEXIS 221; 34 N.M. St. B. Bull. 7

July 13, 1995, FILED

SUBSEQUENT HISTORY: [*1]

Released for Publication July 13, 1995.

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Respondent.

JUDGES: PAMELA B. MINZNER, Justice; JOSEPH F. BACA, Chief Justice, RICHARD E.
RANSOM, Justice, GENE E. FRANCHINI, Justice, THOMAS A. DONNELLY, Judge, Court of
Appeals, Sitting by Designation, concur.

OPINIONBY: PAMELA B. MINZNER

OPINION: ORIGINAL PROCEEDING

OPINION

MINZNER, Justice.

Petitioners filed a verified petition for writ of mandamus or writ of prohibition and declaratory judgment from this Court directed at Respondent, who is the Governor of the State of New Mexico. Attached to the petition was a copy of the "Compact and Revenue Sharing Agreement" entered into by the Governor of New Mexico with the Governor of Pojoaque Pueblo. The petition alleges that the Governor of New Mexico has entered into similar compacts and revenue-sharing agreements with the Presidents of the Jicarilla and Mescalero Apache Tribes, as well as the Governors of Acoma, Isleta, Nambe, Sandia, Santa Ana, Santa Clara, San Felipe, San Ildefonso, San [*2] Juan, Taos, and Tesuque Pueblos pursuant to the Indian Gaming Regulatory Act (the Act or the IGRA). See 25 U.S.C.S. @@ 2701-2721 (Law. Co-op. Supp. 1995).

Petitioners generally contend that the Governor of New Mexico lacked the authority to commit New Mexico to these compacts and agreements, because he attempted to exercise legislative authority contrary to the doctrine of separation of powers expressed in the state Constitution. See N.M. Const. art. III, @ 1; see also State ex rel. Stephan v. Finney, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992) (per curiam) (Finney I). Petitioners sought an order that would

preclude the Governor of New Mexico from implementing the compacts and revenue-sharing agreements he has signed. Cf. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 573 P.2d 213 (1977) (state highway engineer brought mandamus proceeding seeking an order directing the Governor to cease, desist, and refrain from removing or transferring petitioner or interfering with performance of his duties). This Court set the matter for hearing, see SCRA 1986, 12-504(C)(2) (Repl. Pamp. 1992), but on motion of the Governor of New Mexico we vacated the original hearing date in order [*3] to give the Governor an opportunity to obtain counsel and to file a written response. After the Governor filed his response, Petitioners filed a brief, and the matter came before this Court for oral argument. Following oral argument, the matter was taken under advisement. See SCRA 12-504(C)(3)(d). Having determined that Petitioners' pleadings support an order granting a peremptory writ, we now grant that relief and explain our ruling. See SCRA 12-504(C)(3)(c).

BACKGROUND

Congress enacted the IGRA in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987). In *Cabazon Band*, the Supreme Court upheld an Indian tribe's right to conduct bingo games free from interference by the State of California. *Id.* The *Cabazon Band* decision rested on the principle that Indian tribes are sovereign entities and that federal law limits the applicability of state and local law to tribal Indians on reservations. *Id.* at 207. The IGRA also recognized the sovereign right of tribes to regulate gaming activity on Indian lands. However, with the IGRA, Congress attempted to strike [*4] a balance between the rights of tribes as sovereigns and the interests that states may have in regulating sophisticated forms of gambling. See S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988).

The IGRA establishes three classes of gambling: Class I gaming, social or ceremonial games; Class II gaming, bingo and similar games; and Class III gaming, all other gambling, including pari-mutuel horse racing, casino gaming, and electronic versions of Class II games. *Id.* at 3. The IGRA provides for a system of joint regulation of Class II gaming by tribes and the federal government and a system for compacts between tribes and states for regulation of Class III gaming. See *id.* at 13. The IGRA establishes a National Indian Gaming Commission as an independent agency with a regulatory role for Class II gaming and an oversight role with respect to Class III gaming. 25 U.S.C.S. @ 2704, 2706. Under the IGRA, Class III gaming is lawful on Indian lands only if such activities are located in a state that "permits such gaming for any purpose by any person organization or entity, and [is] conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." [*5] 25 U.S.C.S. @ 2710(d)(1).

The IGRA provides that an Indian tribe may request negotiations for a compact, and that upon receipt of such a request, a state must negotiate with the tribe in good faith. See 25 U.S.C.S. @ 2710(d)(3)(A). If a state and a tribe fail after negotiation and then mediation to agree on a compact, the Secretary of the Interior is authorized to prescribe procedures that are consistent with the proposed compact selected by the mediator, the IGRA, and the laws of the state. See 25 U.S.C.S. @ 2710(d)(7)(B)(vii)(I).

Litigation under the IGRA has resulted in a number of published opinions. These cases have arisen most frequently in federal court on suits brought by

Indian tribes to compel negotiation. See. e.g., Ponca Tribe of Oklahoma v. Oklahoma, 37 F.3d 1422 (10th Cir.) (Indian tribes in New Mexico, Oklahoma, and Kansas sought injunctions requiring negotiation), petition for cert. filed, 63 U.S.L.W. 3477 (U.S. Dec. 9, 1994) (Nos. 94-1029 & 94-1030). In these cases, one issue has been the effect of the Tenth and Eleventh Amendments of the United States Constitution.

In Ponca Tribe, the Tenth Circuit affirmed district court decisions dismissing [*6] the tribes' suits against the Governors of Oklahoma and New Mexico. The Court of Appeals concluded that neither the Tenth nor the Eleventh Amendment barred the tribes' actions against the states, but determined that injunctive relief against the governors themselves was barred.

In light of our Tenth Amendment analysis, IGRA does not require the states to regulate Class III gaming by entering into tribal-state compacts. Instead, the only obligation on the state is to negotiate in good faith. The act of negotiating, however, is the epitome of a discretionary act. How the state negotiates: what it perceives to be its interests that must be preserved; where, if anywhere, that it can compromise its interests--these all involve acts of discretion. Thus, injunctive relief against the governors is barred under Ex parte Young[, 209 U.S. 123 (1908)]. . . .

Additionally, the tribes' suits against the Governors are in reality suits against the respective states and thus not authorized under the doctrine of Ex parte Young.

Id. at 1436 (citations omitted).

In November 1994, Respondent was elected Governor of New Mexico and formally assumed office on January 1, 1995. As [*7] part of his transition team, he appointed a negotiator to meet with various Indian tribal representatives to develop compacts and revenue-sharing agreements. The negotiations were successful. An affidavit by the Governor of San Felipe Pueblo, attached to the response of the Governor of New Mexico, indicates that the compact he signed was circulated in draft form to the media and members of the state legislature. The earliest of the compacts is dated February 13; the latest is dated March 1. The Governor of New Mexico's response to the petition also indicates that the Secretary of the interior approved eleven of the compacts on March 22, 1995. The petition was filed on April 20. Two additional compacts were approved effective May 15, 1995.

The compact with Pojoaque Pueblo is titled "A Compact Between the Pojoaque Pueblo and the State of New Mexico Providing for the Conduct of Class III Gaming." The Governor of New Mexico does not dispute that the compact and revenue sharing agreement with Pojoaque Pueblo are representative of the other compacts and agreements he signed. Because they are the only documents in the record, we will discuss them specifically, but also as illustrative of [*8] all the other compacts and agreements the Governor of New Mexico has signed.

The Recitals in the Compact include the following:

WHEREAS, the State permits charitable organizations to conduct all forms of gaming wherein, for consideration, the participants are given an opportunity to win a prize, the award of which is determine by chance, including but not limited to all forms of casino-style games, and others, pursuant to @ 30-19-6,

NMSA 1978 (1994 Repl. Pamp.); and

WHEREAS, the State also permits video pull-tabs and video bingo pursuant to @@ 60-2B-1 to -14, NMSA 1978 (1991 Repl. Pamp.), Infinity Group, Inc. v. Manzagol, No. 14,929 (N.M. Ct. App. Sept. 13, 1994); and

WHEREAS, the State permits pari-mutuel wagering pursuant to @ 60-1-1 to -26, NMSA 1978 (1991 Repl. Pamp.) and @@ 60-2D-1 to -18. NMSA 1978 (1991 Repl. Pamp.); and

WHEREAS, such forms of Class III Gaming are, therefore, permitted in the State within the meaning of the IGRA, 25 U.S.C. @ 2710(d)(1)(B); and

. . . .

WHEREAS, a Compact between the Tribe and the State for the conduct of Class III Gaming on Indian Lands will satisfy the State's obligation to comply with federal law and fulfill the IGRA requirement [*9] for the lawful operation of Class III Gaming on the Indian Lands in New Mexico

The compact further provides as follows:

The Tribe may conduct, only on Indian Lands, subject to all of the terms and conditions of this Compact, any or all Class III Gaming, that, as of the date this Compact is signed by the Governor of the State is permitted within the State for any purpose by any person, organization or entity, such as is set forth in the Recitals to this Compact[.]

Other recitals describe the Governor's power to enter into the compact under the IGRA. They are:

WHEREAS, the Joint Powers Agreements Act. @@ 11-1-1 to -7, NMSA 1978 (1994 Repl. Pamp.), authorizes any two or more public agencies by agreement to jointly exercise any power common to the contracting parties (@ 11-1-3), and defined "public agency" to include Indian tribes and the State of New Mexico or any department or agency thereof (@ 11-1-2(A)); and

WHEREAS, the Mutual Aid Act, @@ 29-8-1 to -3, NMSA 1978 (1994 Repl. Pamp.), authorizes the State and any Indian tribe to enter into mutual aid agreements with respect to law enforcement; and



WHEREAS, Article V @ 4 of the Constitution of the State [*10] of New Mexico provides that "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."

These recitals indicate that in entering the compact, both the State and Tribal Governors believed that the Governor of New Mexico was authorized to bind the State of New Mexico with his signature. In challenging the Governor's actions, Petitioners have relied on the Kansas Supreme Court per curiam decision in Finney I. There the Kansas Supreme Court held that:

Many of the provisions in the compact would operate as the enactment of new laws and the amendment of existing laws. The Kansas Constitution grants such power exclusively to the legislative branch of government . . . we conclude the Governor had the authority to enter into negotiations with the Kickapoo

Nation, but, in the absence of an appropriate delegation of power by the Kansas Legislature or legislative approval of the compact, the Governor has no power to bind the State to the terms thereof.

Id., 836 P.2d at 1185. For the reasons that follow, we conclude that New Mexico law is similar.

MANDAMUS

We initially consider [*11] whether, in light of the procedural posture of this case, a writ of mandamus is an appropriate remedy. Specifically, we examine three subissues: (1) whether Petitioners have standing to bring this action; (2) whether this action is properly before this Court in an original proceeding; and (3) whether a prohibitive writ of mandamus will issue to enjoin a state official from acting or whether it will only issue to compel an official to act.

In the case of State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974), a state senator sought a writ of mandamus to compel the Governor and other officials to treat as void certain partial vetoes. In considering the petitioner's standing to bring that action, we said:

It has been clearly and firmly established that even though a private party may not have standing to invoke the power of this Court to resolve constitutional questions and enforce constitutional compliance, this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.

Id. at 363, 524 P.2d at 979. Accordingly, we did not need to consider whether the petitioner's [*12] status as a legislator, taxpayer, or citizen conferred standing in that case. In the present proceeding, two of the Petitioners are state legislators, and all three are voters and taxpayers. However, as in Sego, we need not consider whether those factors independently confer standing to bring this action because, as in Sego, the issues presented are of "great public interest and importance." Id. Petitioners assert in the present proceeding that the Governor has exercised the state legislature's authority. Their assertion presents issues of constitutional and fundamental importance; in resolving those issues, we will contribute to this State's definition of itself as sovereign. "We simply elect to confer standing on the basis of the importance of the public issues involved." Id. More limited notions of standing are not acceptable. See id.; Hutcheson v. Gonzales, 41 N.M. 474, 491-94, 71 P.2d 140, 151-52 (1937); see generally Charles T. DuMars & Michael B. Browde, Mandamus in New Mexico, 4 N.M. L. Rev. 155, 170-72 (1974). We conclude that Petitioners have standing.

We next consider whether this case should more properly be brought in district court or whether [*13] it is properly before this Court in an original proceeding. Our state Constitution provides that this Court will "have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions." N.M. Const. art. VI, @ 3. In seeming contradiction, NMSA 1978, Section 44-2-3 conveys upon the district court "exclusive original jurisdiction in all cases of mandamus." However, as one scholarly commentary has noted, this apparent conflict:

has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction . . . [and SCRA 12-504(B) (1) (b)] has given force and effect to the policy behind the statute,

by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."

DuMars & Browde, *supra*, at 157 (quoting the predecessor to SCRA 1986, 12-504) (footnotes omitted). Such "circumstances" which justify bringing an original mandamus proceeding in this Court include "the possible inadequacy of other remedies and the necessity of an early decision on this question of great [*14] public importance." *Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 694-95, 448 P.2d 799, 800-01 (1968).

As we have said, this proceeding implicates fundamental constitutional questions of great public importance. Moreover, an early resolution of this dispute is desirable. The Governor asserts, and it has not been disputed, that several of the compacting tribes are in the process of establishing and building gambling resorts and casinos. These projects entail the investment of large sums of tribal money. Capital financing for these projects may well depend upon resolution of the issue presented in this case. Moreover, the relevant facts are virtually undisputed, we perceive no additional factual questions that could be or should be answered in the district court, and the purely legal issues presented would have come eventually to this Court even if proceedings had been initiated in the district court. Accordingly, we conclude that the exercise of our original constitutional jurisdiction is appropriate in this case.

The final procedural issue is whether mandamus, which normally lies to compel a government official to perform a non-discretionary act, is a proper remedy by which [*15] to enjoin the Governor from acting unconstitutionally. This Court has never "insisted upon . . . a technical approach [to the application of mandamus] where there is involved a question of great public import," *Thompson*, 79 N.M. at 694, 448 P.2d at 800, and where other remedies might be inadequate to address that question.

Prohibitory mandamus may well have been a part of New Mexico jurisprudence even before statehood. One nineteenth century New Mexico judge characterized the authority to prohibit unlawful official conduct as implicit in the nature of mandamus. In the case of *In re Sloan*, 5 N.M. 590, 25 P. 930 (1891), the district court enjoined a board of county commissioners from certifying certain candidates as winners of a contested election and ordered the board to instead certify other candidates. The Territorial Supreme Court upheld the district court's granting of both a writ of mandamus and injunctive relief. Justice Freeman wrote: "It is well settled that the two processes, mandamus and injunction, are correlative in their character and operation. As a rule, whenever a court will interpose by mandamus to compel the performance of a duty, it will exercise its restraining [*16] power to prevent a corresponding violation of duty." *Id.* at 628, 25 P. at 942 (Freeman, J. concurring). More recent cases illustrate Justice Freeman's insight. This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action. See *Stanley v. Raton Bd. of Educ.*, 117 N.M. 716, 717, 718, 876 P.2d 232, 233 (1994); *State ex rel. Bird*, 91 N.M. at 282, 573 P.2d at 216; *State ex rel. Sego*, 86 N.M. at 363, 524 P.2d at 979; *State ex rel. State Bd. of Educ. v. Montoya*, 73 N.M. 162, 170, 386 P.2d 252, 258 (1963); cf. *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (Cal. 1948) (en banc) (issuing writ of mandamus to enjoin the secretary of state from submitting to the voters unconstitutional initiative proposal), cert. denied, 336 U.S. 918 (1949); *Leininger v. Alger*, 316 Mich. 644, 26 N.W.2d 348 (Mich. 1947) (same);

Iowa Code @ 661.1 (1995) (defining mandamus as either mandatory or prohibitory). "Mandamus would necessarily lie if the Governor's actions were unconstitutional. State ex rel. Bird, 91 N.M. at 288, 573 P.2d at 222 (Sosa, J., dissenting) (distinguishing Sego as involving [*17] an unconstitutional use of the Governor's veto power).

As the United States Supreme Court has observed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." INS v. Chadha, 462 U.S. 919, 944, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). Although it is not within the province of this Court to evaluate the wisdom of an act of either the legislature or the Governor, it certainly is our role to determine whether that act goes beyond the bounds established by our state Constitution. As we said in State ex rel. Hovey Concrete Products Co. v. Mecham, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), overruled on other grounds by Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986):

Deeply rooted in American Jurisprudence is the doctrine that state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each. No branch of the state may add to, nor detract from its clear mandate. It is a function of the judiciary when its jurisdiction is properly invoked to measure [*18] the acts of the executive and the legislative branch solely by the yardstick of the constitution.

We conclude that Petitioners' arguments raise allegations that support the use of prohibitory mandamus.

INDISPENSABLE PARTIES

The Governor has argued that the Tribes and Pueblos with whom he signed the compacts and agreements are indispensable parties to this proceeding. We disagree. In a mandamus case, a party is indispensable if the "performance of an act to be compelled by the writ of mandamus is dependent on the will of a third party, not before the court." Chavez v. Baca, 47 N.M. 471, 482, 144 P.2d 175, 182 (1943). That is not the case here. Petitioners seek a writ of mandamus against the Governor of New Mexico, not against any of the tribal officials. Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law. This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations [*19] of the respective parties to the compact.

GAMBLING IN NEW MEXICO AND 25 U.S.C.S. @ 2710(d) (1) (B)

As an alternative to their argument that the Governor lacked authority to enter into the compact, Petitioners assert that the disputed compact violates limitations in the IGRA on the permissible scope of any gaming compact. We address this argument first because an analysis of New Mexico's gambling laws, and the public policies expressed therein, is relevant to the question of whether the Governor has infringed legislative authority in signing the compacts.

Under the IGRA, Class III gaming activities are lawful on Indian lands only if such activities are conducted pursuant to a tribal-state compact and are "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C.S. @ 2710(d)(1)(B) (emphasis added). The Eighth and Ninth Circuits have interpreted "such gaming" to mean only those forms of gaming a state presently permits. See Rumsey Indian Rancheria of Wintun Indians v. Wilson, 41 F.3d 421, 426 (9th Cir. 1994); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 279 (8th Cir. 1993). For example, in [*20] Rumsey Indian Rancheria, the Ninth Circuit Court of Appeals held that the IGRA does not require the state to negotiate regarding one form of Class III gaming activity because the state had legalized another, albeit similar form of gaming. A federal district court made a similar determination. See Coeur D'Alene Tribe v. Idaho, 842 F. Supp 1268 (D. Idaho 1994), aff'd, 51 F.3d 876 (9th Cir. 1995).

Petitioners argue that Section 2710(d)(1)(B) is not satisfied because the compact authorizes all forms of "casino-style" gaming. Although not stated in the compact we assume this might include such games as blackjack and poker in all its forms, keno, baccarat, craps, roulette, or any other form of gambling wherein the award of a prize is determined by some combination of chance or skill. The Governor states that New Mexico permits charities to conduct all forms of gaming, including "casino-style" gaming, under the provisions of the permissive lottery exception to New Mexico's gambling laws. See NMSA 1978, @ 30-19-6 (Repl. Pamp. 1994).

The question raised by Petitioners' argument is what forms of Class III gaming New Mexico "permits" within the meaning of 25 U.S.C.S. @ 2710(d)(1)(B). [*21] This is ultimately a federal question. See State of Kansas ex rel. Stephan v. Finney, No. 93-4098-SAC, 1993 WL 192809 at *5 (D. Kan. May 12, 1993) (unpublished opinion). Nevertheless, it depends on an interpretation of New Mexico's gambling laws. See State ex rel. Stephan v. Finney, 254 Kan. 632, 867 P.2d 1034, 1038 (Kan. 1994) (Finney II) (Kansas Supreme Court is proper forum to interpret use of term "lottery" in state constitution).

We do not agree with the Governor's broad assertion that any and all forms of "casino-style" gaming, such as the ones we have described, would be allowed under Section 30-19-6. This provision allows charitable and other non-profit organizations to operate a "lottery" twice a year, and requires that the revenue derived be used for the benefit of the organization or for public purposes. Id. Neither this Court nor the Court of Appeals has construed this provision in order to decide specifically what forms of gaming or gambling the legislature may have intended to allow under this provision, and we will not undertake the task of attempting to catalogue those games now. This question has not been specifically addressed by the parties, and [*22] indeed its resolution is unnecessary to our decision in this case.

It is true, as the Governor has asserted, that the statutory definition of a "lottery" in Article 19, Section 30 of the Criminal Code is extremely broad. "Lottery" is defined in the Criminal Code as "an enterprise wherein, For a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill." NMSA 1978, @ 30-19-1(C) (Repl. Pamp. 1994). However, Section 30-19-6(D) states that "nothing" in Article 19, Chapter 30 of the Criminal Code applies to any "lottery" operated by tax exempt organizations. In addition, the exception to hold a lottery for charitable purposes would in no way exempt the organization involved from other prohibitions against gambling in the Criminal Code. The

general criminal prohibition against gambling in NMSA 1978, Section 30-19-2 (Repl. Pamp. 1994), is applicable to both "making a bet" and participating in or conducting a lottery. Like the term "lottery," the term "bet" is also defined broadly as it relates to gambling. The term "bet" is defined as "a bargain in which the parties agree that, dependent upon [*23] chance, even though accompanied by some skill, one stands to win or lose anything of value specified in the agreement." Section 30-19-1(B).

We think that most of the forms of "casino-style" games we have described could just as easily fall within the definition and prohibition against "betting" as within the broad definition of "lottery." The question, as we see it, would be whether that form of gaming or gambling is more like "making a bet" or conducting or participating in a "lottery." If it was the former, the activity would still be illegal in all circumstances despite the effect of the permissive lottery statute. n1

- - - - -Footnotes- - - - -

n1 The legislature appears to have intended to make these two categories, betting versus lotteries, mutually exclusive; a lottery is specifically excluded from the definition of betting. See @ 30-19-1(B)(3). Thus, a particular form of gaming or gambling would necessarily fall under one or the other of these definitions. In most cases involving the prosecution of illegal gambling whether the activity was considered "making a bet" or participating in a "lottery" would be unimportant; both represent criminal activity, and they are treated equally under the law. See NMSA 1978, @@ 30-19-2 & -3 (Repl. Pamp. 1994). However, in attempting to categorize what form of gaming was allowable under the permissive lottery exception we would be required to decide whether a particular form of gaming fell into one category or the other.

- - - - -End Footnotes- - - - -

[*24]

Moreover, we think the term "lottery" as used in Section 30-19-6 should not receive an expansive definition and should be narrowly construed. New Mexico law has unequivocally declared that all for-profit gambling is illegal and prohibited, except for licensed pari-mutuel horse racing. See NMSA 1978, @ 30-19-3 (Repl. Pamp. 1994); NMSA 1978, @ 60-1-10 (Repl. Pamp. 1991). New Mexico has expressed a strong public policy against for-profit gambling by criminalizing all such gambling with the exception of licensed pari-mutuel horse racing. See @ 30-19-3. The permissive lotteries allowed by Section 30-19-6 include church fair drawings, movie theater prize drawings, and county fair livestock prizes, as well as the twice-a-year provision for nonprofit organizations on which the Governor's argument depends. We think that any expansive construction of the term "lottery" in Section 30-19-6 that would authorize any of these organizations to engage in a full range of "casino-style" gaming would be contrary to the legislature's general public policy against gambling. We note that the Court of Appeals for similar reasons has rejected a broad definition of "raffles" under the Bingo and [*25] Raffle Act, NMSA 1978, @@ 60-2B-1 to -14 (Repl. Pamp. 1991). State ex rel. Rodriguez v. American Legion Post No. 99, 106 N.M. 784, 786-88, 750 P.2d 1110, 1112-14 (Ct. App.), cert. denied, 106 N.M. 588, 746 P.2d 1120 (1987), and cert. denied, 107 N.M. 16, 751 P.2d 700 (1988); see also American Legion Post No. 49 v. Hughes, N.M. P.2d (Ct. App. 1994) (No. 14,831) (rejecting broad construction of "game of chance" under the Bingo and Raffle Act), cert.

granted, N.M. , 890 P.2d 1321 (1995).

We have no doubt that the compact and agreement authorizes more forms of gaming than New Mexico law permits under any set of circumstances. We need not decide which forms New Mexico permits. The legislature of this State has unequivocally expressed a public policy against unrestricted gaming, and the Governor has taken a course contrary to that expressed policy. That fact is relevant in evaluating his authority to enter into the compacts and revenue-sharing agreements. Further, even if our laws allowed under some circumstances what the compact terms "casino-style" gaming, we conclude that the [*26] Governor of New Mexico negotiated and executed a tribal-state compact that exceeded his authority as chief executive officer. To reach this conclusion, we first consider the separation of powers doctrine and then consider the general nature of the Pojoaque compact as representative of all of the compacts the Governor of New Mexico signed.

SEPARATION OF POWERS UNDER THE NEW MEXICO CONSTITUTION

The New Mexico Constitution vests the legislative power in the legislature, N.M. Const. art. IV, @ 1, and the executive power in the governor and six other elected officials, id. art. V, @ 1. The Constitution also explicitly provides for the separation of governmental powers:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, @ 1. This provision reflects a principle that is fundamental in the structure [*27] of the federal government and the governments of all fifty states. The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. See Gregory v. Ashcroft, 501 U.S. 452, 459, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991). James Madison expressed this sentiment more than two hundred years ago when he wrote, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." 1 Alexander Hamilton, James Madison & John Jay, The Federalist, A Commentary on the Constitution of the United States No. XLVII, at 329 (1901 ed.).

Despite the strict language of Article III, Section 1, this Court has previously said that "the constitutional doctrine of separation of powers allows some overlap in the exercise of governmental function." Mowrer v. Rusk, 95 N.M. 48, 53, 618 P.2d 886, 891 (1980). This common sense approach recognizes that the absolute separation of governmental functions is neither desirable nor realistic. As one state court [*28] has said, separation of powers doctrine "does not mean an absolute separation of functions; for, if it did, it would really mean that we are to have no government." Sabre v. Rutland R. Co., 86 Vt. 347, 85 A. 693, 699 (Vt. 1913). Recognizing, as a practical matter, that there cannot be absolute compartmentalization of the legislative, executive, and judicial functions among the respective branches, we must nevertheless give effect to Article III, Section 1. Accordingly, we have not been reluctant to

intervene when one branch of government unduly "interfered with or encroached on the authority or within the province of" a coordinate branch of government. Mowrer, 95 N.M. at 54, 618 P.2d at 892 (quoting Smith v. Miller, 153 Colo. 35, 384 P.2d 738, 741 (Colo. 1963)).

This Court has previously held that Article III, Section 1 mandates that it is the Legislature that creates the law, and the Governor's proper role is the execution of the laws. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932); see also State v. Armstrong, 31 N.M. 220, 255, 243 P. 333, 347 (1924) (recognizing that the Legislature has "the sole power of enacting law"). Our task, [*29] then, is to classify the Governor's actions in entering into the gaming compacts. Although the executive, legislative, and judicial powers are not "'hermetically' sealed," they are nonetheless "functionally identifiable" one from another. Chadha, 462 U.S. at 951. If the entry into the compacts reasonably can be viewed as the execution of law, we would have no difficulty recognizing the attempt as within the Governor's authority as the State's chief executive officer. If, on the other hand, his actions in fact conflict with or infringe upon what is the essence of legislative authority--the making of law--then the Governor has exceeded his authority.

APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS TO THE COMPACT WITH POJOAQUE PUEBLO

The Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature. We have no doubt that the compact with Pojoaque Pueblo does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law. Cf. Texas v. New Mexico, 462 U.S. 554, 564, 77 L. Ed. 2d 1, 103 S. Ct. 2558 (1983) (holding that, upon approval by Congress, [*30] a compact between states becomes federal law that binds the states); West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28, 95 L. Ed. 713, 71 S. Ct. 557 (1951) (characterizing an interstate compact as a "legislative means" by which states resolve interstate dispute). However, that in itself is not dispositive. The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches. See Board of Educ. v. Harrell, 118 N.M. 470, 484, 882 P.2d 511, 525 (1994). In Nixon v. Administrator of General Servs., 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977), the United States Supreme Court said:

In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which the action by one branch prevents another branch from accomplishing its constitutionally assigned functions. United States v. Nixon, 418 U.S. at 711-12. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. Ibid.

Id. (citation [*31] omitted). One mark of undue disruption would be an attempt to foreclose legislative action in areas where legislative authority is undisputed. The Governor's present authority could not preclude future legislative action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement. The compact with Pojoaque Pueblo and those of which it is representative cannot be said to be consistent with these principles. .

The terms of the compact with Pojoaque Pueblo give the Tribe a virtually irrevocable and seemingly perpetual right to conduct any form of Class III gaming permitted in New Mexico on the date the Governor signed the agreement. See Compact Between the Pojoaque Pueblo and the State of New Mexico, at 4. Arguably, even legislative change could not affect the Tribe's ability to conduct Class III gaming authorized under the original compact. The compact is binding on the State of New Mexico for fifteen years, and it is automatically renewed for additional five-year periods unless it has been terminated by mutual agreement. Id. at 27. Any action by the State to amend or repeal its laws that [*32] had the effect of restricting the scope of Indian gaming, or even the attempt to directly or indirectly restrict the scope of such gaming, terminates the Tribe's obligation to make payments to the State of New Mexico under the revenue-sharing agreement separately entered into between the Governor and Pojoaque Pueblo. See Tribal-State Revenue Sharing Agreement, P 5(A). n2

-Footnotes-

n2 Under this agreement, three to five percent of the "net win" derived from Class III gaming on the Pojoaque Pueblo would be paid to the State of New Mexico and divided between state and local government.

-End Footnotes-

We also find the Governor's action to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions of the State and the Tribe necessary for the enforcement of state or tribal laws or [*33] regulations. All of this has occurred in the absence of any action on the part of the legislature. While negotiations between states and Indian tribes to address these matters is expressly contemplated under the IGRA, see 25 U.S.C.S. @ 2710(d)(3)(C), we think the actual balance that is struck represents a legislative function. While the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority.

Moreover, it is undisputed that New Mexico's legislature possesses the authority to prohibit or regulate all aspects of gambling on non-Indian lands. Pursuant to this authority, our legislature has, with narrow exceptions, made for-profit gambling a felony, and thereby expressed a general repugnance to this activity. Section 30-19-3. Whether or not the legislature, if given an opportunity to address the issue of the various gaming compacts, would favor a more restrictive approach consistent with its actions in the past constitutes a legislative policy decision. The compact signed by the Governor, on the other hand, authorizes Pojoaque [*34] Pueblo to conduct "all forms of casino-style games"; that is, virtually any form of commercial gambling. By entering into such a permissive compact with Pojoaque Pueblo and other Indian leaders, we think that the Governor contravened the legislature's expressed aversion to commercial gambling and exceeded his authority as this State's chief executive officer.

Our conclusion that the Governor lacks authority to enter into the disputed compacts gains support from Justice Robert H. Jackson's concurring opinion in

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55, 96 L. Ed. 1153, 72 S. Ct. 863 (1952). In that case, the Supreme Court faced the issue of whether President Truman had exceeded his constitutional authority by issuing an executive order directing the Secretary of Commerce to assume control of a number of steel mills. The President issued this order during the Korean War when the mills became incapacitated by a labor dispute. President Truman justified the seizure on the grounds that (1) he was the commander in chief of the armed forces, and (2) various statutes gave the President special emergency war powers. The Court struck down the President's action, holding [*35] that it was beyond the scope of Presidential authority. Id. at 589. Noting that the seizure was contrary to the will of Congress, Justice Jackson wrote in a famous concurring opinion:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38 (Jackson, J., concurring) (footnote omitted).

Since 1923, the State of New Mexico has entered into at least twenty-two different compacts with other sovereign entities, including the United States and other states. n3 These agreements encompass such widely diverse governmental purposes as interstate water usage and cooperation on higher education. In every case, New Mexico entered into the compact with the enactment of [*36] a statute by the legislature. Apart from non-discretionary ministerial duties, n4 the Governor's role in the compact approval process has heretofore been limited to approving or vetoing n5 the legislation that approves the compact. This is the Governor's role with respect to all legislation passed by the legislature. See N.M. Const. art. IV, @ 22.

- - - - -Footnotes- - - - -

n3 Appendix A includes a listing of these compacts.

n4 For example, the legislation whereby New Mexico entered into an interstate compact regarding parole and probation provided: "The Governor of this state is hereby authorized and directed to execute a compact on behalf of the State of New Mexico . . . in the form substantially as follows. . . ." 1937 N.M. Laws ch. 10, @ 1.

n5 The Governor of New Mexico has vetoed at least one interstate compact. In 1925, the governor vetoed the Pecos River Compact after it had been approved by the legislatures of Texas and New Mexico. See Letter from A.T. Hannett, Governor, to the New Mexico Senate (March 14, 1925) (reprinted in Senate Journal of the Seventh Legislature 423 (1925)).

- - - - -End Footnotes- - - - -

[*37]

Residual governmental authority should rest with the legislative branch rather than the executive branch. The state legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue. See *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923, 926 (Ark. 1991). Cf. *Fair Sch. Fin. Council v. State*, 746 P.2d 1135, 1149 (Okla. 1987) (under state constitution, a legislature may generally do "all but that which it is prohibited from doing"); *State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. 1975) (en banc) (state legislature "has the power to enact any law not prohibited by the constitution"); *House Speaker v. Governor*, 195 Mich. App. 376, 491 N.W.2d 832, 839 (Mich. Ct. App. 1992) ("Any legislative power that the Governor possesses must be expressly granted to him by the constitution."). We conclude that the Governor lacked authority under the state Constitution to bind the State by unilaterally entering into the compacts and revenue-sharing agreements in question.

NEW MEXICO STATUTORY AUTHORITY

In *Willis v. Fordice*, [*38] 850 F. Supp. 523 (S.D. Miss. 1994), aff'd, F.3d (1995) (No. 94-60299), the court upheld the governor's authority to enter into a gaming compact. There, however, the court specifically relied on a Mississippi statute that provides the governor with authority to transact "all the business of the state . . . with any other state or territory." Id. at 532 (quoting Miss. Code Ann. @ 7-1-13 (1972)). New Mexico has no such statute. In fact, in this case the Governor relies primarily on Article V, Section 4 of the New Mexico Constitution, which provides only that the governor shall execute the laws. To the extent that the Governor does rely on statutory authority, his reliance is misplaced.

An analysis of the Joint Powers Agreement Act, NMSA 1978, @@ 11-1-1 to -7 (Repl. Pamp. 1994), indicates that that statute does not enlarge the Governor's authority in the manner that he urges. That statute authorizes "public agencies" to enter into "agreements" with other public agencies. Id. @ 11-1-3. The statute defines a "public agency" as "the federal government or any federal department or agency, this state, an adjoining state or any state department or agency, [*39] an Indian tribe or pueblo, a county, municipality, public corporation or public district of this state or . . . any school district . . ." Id. @ 11-1-2(A). The Governor's claim of authority seems to be premised upon the notion that he is a "state department or agency" within the meaning of this statute. n6 This claim is untenable. To be sure, the Joint Powers Agreement Act does authorize an agreement between the State and a sovereign Indian tribe. However, the statute expressly requires that such an agreement must be "authorized by [the public agency's] legislative or other governing body." Id. @ 11-1-3. This language plainly mandates that the legislature must approve any agreement to which the State is a party. The statute expressly disclaims any enlargement of the authority of public agencies when it provides that agreements executed thereunder are "subject to any constitutional or legislative restriction imposed upon any of the contracting public agencies." Id. @ 11-1-2(B). We conclude that the Joint Powers Agreement Act does not provide authority for the compacts and revenue-sharing agreements at issue.

- - - - -Footnotes- - - - -

n6 The list includes neither the Governor nor executive officers. Application of the principle of *expressio unius est exclusio alterius* supports the

conclusion that the framers of this statute did not intend to include the Governor as a "public agency." See *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971).

- - - - -End Footnotes- - - - -

[*40]

Likewise, the Mutual Aid Act, NMSA 1978, @@ 29-8-1 to -3 (Repl. Pamp. 1994), does not provide authority for the compacts and revenue-sharing agreements. That statute does authorize tribal-state agreements; however, the scope of the statute is confined to "agreements . . . with respect to law enforcement." *Id.* @ 29-8-3. It is true that the compacts have some provisions regarding law enforcement, but this fact does not bring all of the terms within the scope of the Mutual Aid Act. The authority of an executive acting pursuant to a legislative grant of authority is limited to the express or implied terms of that grant. See *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128, 1140 (N.J. 1982). Cf. *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984) (an executive agency cannot promulgate a regulation that is beyond the scope of its statutory authority); *State ex rel. Lee v. Hartman*, 69 N.M. 419, 426, 367 P.2d 918, 923 (1961) (holding that a delegation of authority by the legislature must be express and provide clear statutory standards to guide the delegate). The Mutual Aid Act does not in any way pertain to gaming compacts and provides no statutory [*41] basis for the compact with Pojoaque Pueblo.

APPLICABILITY OF FEDERAL LAW

The Governor argues that even if he lacked the authority under state law to enter into the compact, it is nonetheless binding upon the State of New Mexico as a matter of federal law. Along these same lines, he also argues that he possesses the authority, as a matter of federal law, to bind the State to the terms of the compact, irrespective of whether he has the authority as a matter of state law. We find the Governor's argument on these points to be inconsistent with core principles of federalism. The Governor has only such authority as is given to him by our state Constitution and statutes enacted pursuant to it. Cf. *Rapp v. Carey*, 44 N.Y.2d 157, 375 N.E.2d 745, 750, 404 N.Y.S.2d 565 (N.Y. 1978) (holding that the governor of New York "has only those powers delegated to him by the [state] Constitution and the statutes"). We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress [*42] to enlarge state gubernatorial power. Cf. *Gregory*, 501 U.S. at 460 (recognizing that "through the structure of its government . . . a State defines itself as a sovereign"); *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 2428, 120 L. Ed. 2d 120 (1992) (striking down an act of Congress on the ground that principles of federalism will not permit Congress to "'commandeer[] the legislative processes of the States'" by directly compelling the states to act (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981))); *United States v. Lopez*, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) (striking down federal school gun ban on the ground that it is not substantially related to interstate commerce, and therefore unconstitutionally usurps state sovereignty).

We entertain no doubts that Congress could, if it so desired, enact legislation legalizing all forms of gambling on all Indian lands in whatever state they may occur. See *Morton v. Mancari*, 417 U.S. 535, 551-52, 41 L. Ed.

2d 290, 94 S. Ct. 2474 (1974). That is, however, not the course that Congress chose. Rather, Congress sought to give the states [*43] a role in the process. See S. Rep. No. 446, 100th Cong., 2d Sess. 13. It did so by permitting Class III gaming only on those Indian lands where a negotiated compact is in effect between the state and the tribe, 25 U.S.C.S. @ 2710(d)(1)(C). To this end, the language of the IGRA provides that "Any State . . . may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian Tribe." Id. @ 2710(d)(3)(B). The only reasonable interpretation of this language is that it authorizes state officials, acting pursuant to their authority held under state law, to enter into gaming compacts on behalf of the state. It follows that because the Governor lacked authority under New Mexico law to enter into the compact with Pojoaque Pueblo, the State of New Mexico has not yet entered into any gaming compact that the Governor may implement. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-79, 2 L. Ed. 60 (1803) (holding that an unconstitutional act of Congress has no legal effect).

CONCLUSION

A verified petition for a writ of mandamus and prohibition together with a request for stay, having been filed in this matter by Petitioners and counsel, [*44] and the Supreme Court being sufficiently apprised and informed thereby and good cause appearing for the issuance of a peremptory writ and stay, the Supreme Court now issues the peremptory writ and stay, staying until further order and declaration of this Court all actions to enforce, implement, or enable any and all of the compacts and revenue-sharing agreements between the Tribes and Pueblos of this State and the Governor of New Mexico represented by the compact with Pojoaque Pueblo.

IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:

JOSEPH F. BACA, Chief Justice

RICHARD E. RANSOM, Justice

GENE E. FRANCHINI, Justice

THOMAS A. DONNELLY, Judge, Court of Appeals, Sitting by Designation

APPENDIX A: INTERSTATE COMPACTS

1. 1923 N.M. Laws, ch. 6, @ 1 (now codified at NMSA 1978, @ 72-15-5 (Repl. Pamp. 1985)). Colorado River Compact.
2. 1923 N.M. Laws, ch. 7 @ 1 (now codified at NMSA 1978, @ 72-15-16 (Repl. Pamp. 1985)). La Plata River Compact.
3. 1933 N.M. Laws, ch. 166 (now codified at NMSA 1978, @ 72-15-19 (Repl. Pamp. 1985)). Pecos River Compact. (See *Texas v. New Mexico*, 462 U.S. 554, [*45] 77 L. Ed. 2d 1, 103 S. Ct. 2558 (1983)).

4. 1937 N.M. Laws, ch. 10, @ 1 (now codified at NMSA 1978, @ 31-5-1 (Repl. Pamp. 1984)). Compact Relating to Convicts on Probation or Parole.
5. 1939 N.M. Laws, ch. 33, @ 1 (now codified at NMSA 1978, @ 72-15-23 (Repl. Pamp. 1985)). Rio Grande Compact.
6. 1945 N.M. Laws, ch. 51, @ 1 (now codified at NMSA 1978, @ 72-15-10 (Repl. Pamp. 1985)). Costilla Creek Compact.
7. 1949 N.M. Laws, ch. 5, @ 1 (now codified at NMSA 1978, @ 72-15-26 (Repl. Pamp. 1985)). Upper Colorado River Basin Compact.
8. 1951 N.M. Laws, ch. 4, @ 1 (now codified at NMSA 1978, @ 72-15-2 (Repl. Pamp. 1985)). Canadian River Compact.
9. 1951 N.M. Laws, ch. 138, @ 3 (now codified at NMSA 1978, @ 11-10-1 (Repl. Pamp. 1994)). Compact for Western Regional Cooperation in Higher Education.
10. 1959 N.M. Laws, ch. 112, @ 1 (now codified at NMSA 1978, @ 31-5-4 (Repl. Pamp. 1984)). Western Interstate Corrections Compact.
11. 1967 N.M. Laws, ch. 201, @ 2 (now codified at NMSA 1978, @ 31-5-10 (Repl. Pamp. 1984)). Interstate Compact on Mentally Disordered Offenders.
12. 1969 N.M. Laws, ch. 20, @ 2 (now codified at NMSA 1978, @ 18-2-20 (Repl. Pamp. 1991)). Interstate [*46] Library Compact.
13. 1969 N.M. Laws, ch. 40, @ 1 (now codified at NMSA 1978, @ 11-9-1 (Repl. Pamp. 1994)). Western Interstate Nuclear Compact.
14. 1969 N.M. Laws, ch. 57, @ 1 (now codified at NMSA 1978, @ 72-15-1 (Repl. Pamp. 1985)). Animas-La Plata Project Compact.
15. 1971 N.M. Laws, ch. 270, @ 1 (now codified at NMSA 1978, @ 31-5-12 (Repl. Pamp. 1984)). Agreement on Detainers.
16. 1972 N.M. Laws, ch. 19, @ 1 (now codified at NMSA 1978, @ 16-5-1 (Repl. Pamp. 1987)). Cumbres and Toltec Scenic Railroad Compact.
17. 1973 N.M. Laws, ch. 238, @ 2 (now codified at NMSA 1978, @ 32A-10-1 (Repl. Pamp. 1993)). Interstate Compact on Juveniles.
18. 1977 N.M. Laws, ch. 151, @ 2 (now codified at NMSA 1978, @ 32A-11-1 (Repl. Pamp. 1993)). Interstate Compact on the Placement of Children.
19. 1982 N.M. Laws, ch. 89, @ 1 (now codified at NMSA 1978, @ 11-11-1 (Repl. Pamp. 1994)). Interstate Mining Compact.
20. 1983 N.M. Laws, ch. 20, @ 2 (now codified at NMSA 1978, @ 11-9A-2 (Repl. Pamp. 1994)). Rocky Mountain Low-Level Radioactive Waste Compact.
21. 1985 N.M. Laws, ch. 133, @ 1 (now codified at NMSA 1978, @ 40-7B-1 (Repl. Pamp. 1994)). Interstate Compact on Adoption and [*47] Medical Assistance.

1995 N.M. LEXIS 221, *47; 34 N.M. St. B. Bull. 7

22. 1987 N.M. Laws, ch. 239, @ 1 (now codified at NMSA 1978, @ 11-12-1 (Rep. Pamp. 1994)). Interstate Compact on Agricultural Grain Marketing.

*Elena = urgent =
see me
ajm*

THE WHITE HOUSE
WASHINGTON

AUGUST 25, 1995

MEMORANDUM FOR AB MIKVA

FROM: HAROLD ICKES *(HP)*

SUBJECT: PUEBLO COMPACT

Enclosed please find a letter from Alex Lujan, President of the Pueblo nation regarding gambling compacts in New Mexico.

Lujan states that the New Mexico courts ruled that the Governor does not have the authority to enter into compacts without action by the state legislature. Lujan thinks the state courts have no standing in this matter, but rather that it is a federal issue and he asks for Department of Justice intervention.

I refer this to your office for a response.

Thank you for your assistance.

Herb Becker - Office of Tribal Justice 514-8512

WANT

Interior-client agency
position that ok as mbr of fed'l law.
Once they acts, becomes mbr of fed law

Yesterday - DOJ issued news release saying
we're looking at this.

Now - give time.

It Falls through - 1st part of Oct.

US pos - That Then

THE NEW MEXICO INDIAN GAMING ASSOCIATION

Frank Chavez, Co-Chair
Pueblo of Sandia
Box 6008
Bernalillo, NM 87004
(505)867-3317

Kca Paquin, Co-Chair
Pueblo of Santa Ana
54 Jemez Canyon Dam Rd.
Bernalillo, NM 87004
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FOR IMMEDIATE RELEASE
Tuesday, August 29, 1995

STATEMENT FROM THE NEW MEXICO INDIAN GAMING ASSOCIATION

The New Mexico Indian Gaming Association and its member tribes welcome the announcement from the United States Department of Justice concerning Indian Gaming in New Mexico. We will continue to honor the valid compacts with the State of New Mexico as approved by the United States.

The statement from the Department of Justice was helpful through its reassurance that the Department of Justice will not bring any enforcement action against Indian tribes that are conducting gaming operations in accordance with approved compacts. With the assurance that there will be no move to shut down tribal government gaming, the tribes pledge to continue to abide by their word and abide by all provisions of the valid compacts.

Throughout the negotiation and implementation of the compacts, the tribes carefully followed every step of the process required by the Indian Gaming Regulatory Act. Like Governor Gary Johnson, we believed the compacts required only the signature of the Governor and we relied on that authority through seven years of State negotiations. In all but one of the other nineteen states that have made Class III gaming compacts with the tribes, the approval of the legislature was not required. The tribes have been prudent and respectful of all provisions of the compacts, and they will continue to act in accordance with the compacts.

The Justice Department also expressed its hope for a negotiated resolution of this matter. The tribes are willing to discuss with the state, as always, any provision of the valid compacts, and as neighboring sovereigns, we are always willing to discuss any issues of common concern with the state. As we have said from the outset, the tribes will comply with the compacts, including the provision concerning renegotiation at Section 11, Part D of the compact.

As a matter of policy, and notwithstanding our firm belief that the compacts are valid as a matter of federal law, the tribes would like to have the State Legislature ratify the compacts as we have complied with every requirement of the Federal Indian Gaming Regulatory Act. At this point, however, it is up to the State to define a clear process that would lead to Legislation ratification. Because we are good neighbors and because we promised Governor Johnson we would do so, we will discuss these issues with any properly empowered representatives of the State. The discussions, however, must have as their objective legislative ratification of compacts agreeing to the conduct of Class III gaming within our jurisdiction..

nts" or "equal rights?"

Colorado's Solicitor General Timothy Tymkovich argued it bars gays from having "special rights." Certainly, gays will be protected by the police from assaults, just like any other citizen, he said. Neither libraries or hospitals could single out gays for "arbitrary" and unfair treatment, he added.

This left the justices confused.

"Could an innkeeper say, 'We don't rent to homosexuals?'" asked Stevens. "Is that a special right or being treated like everybody else?"

The state attorney did not answer directly, except to say that innkeepers should not have to face "a special liability" for turning down gay patrons.

"If it doesn't cover that, what does it mean?" asked an agitated Breyer at one point.

(Optional add end)

In other actions, the court:

Dismissed an appeal filed by Shannon Faulkner challenging The Citadel's male-only policy, because she has withdrawn from the South Carolina military college (Faulkner vs. Jones 95-31). But the justices will review a similar policy at the Virginia Military Institute and will almost surely apply its ruling to the Citadel.

Reinstated the murder conviction of a Tacoma, Wash., man for the 1981 murder of a Laundromat attendant. In a 5-4 ruling, the court rebuked the 9th U.S. Circuit Court of Appeals for engaging in "second-guessing" and "mere speculation" about evidence that prompted it to reverse the man's conviction. (Wood vs. Bartholomew, 94-1419)

Supreme Court Attempts to Untangle Reservation Gaming Issue By David G. Savage= (c) 1995, Los Angeles Times=

WASHINGTON Gambling on reservations is big business, although no one knows just how big.

In July, the U.S. Treasury Department estimated that a total of \$27 billion a year is wagered by the patrons of 120 tribal casinos in 16 states.

For its part, the National Indian Gaming Association refers to gambling as "the return of the buffalo," today's primary "survival mechanism" for American Indians.

But no one agrees on who has the legal authority to regulate this fast-growing business. Is it the states, which have general power to prevent crime? The tribes, which say they have sovereign power on the reservations? Or the federal government, which can claim sovereign power over both?

This week, the U.S. Supreme Court will try to straighten out the legal mess, although the justices themselves played a major part in creating the problem in the first place.

In 1987, the high court created a legal void when it ruled that states could not enforce their criminal laws against gambling on tribal lands. The opinion in California vs. Cabazon Band reasoned that because the states allowed some gambling, such as a lottery or horse racing, they had implicitly made all gambling legal.

In response, Congress hurriedly passed the Indian Gaming Regulatory Act of 1988. It allowed tribes to freely conduct social gambling, such as bingo games, but said slot machines and high-stakes casinos were allowed only in a state that "permits such gaming."

In order to regulate gambling, tribes and the state were told to negotiate a "compact" that would set the rules. Federal judges were empowered to enforce these provisions.

But the compromise law has seemingly provoked more disputes than it has settled.

In California, the state agreed to a compact that allowed high-stakes bingo on reservations but balked at slot machines. Those are illegal under state law, officials said. However, the tribes argued that since electronic devices run the lottery and parimutuel, electronically operated slots should be legal on reservations.

Though state officials disagreed, the tribes nonetheless opened a series of casinos offering slot machines. A judge in San Diego has said the state cannot close down these operations.

"It is illegal, unregulated gambling," complains California Assistant Attorney General Thomas F. Gede. This dispute has been appealed to the Supreme Court, which has not decided whether to take the case.

Florida Gov. Lawton Chiles agreed to allow card games and wagering on jai alai on reservations, but he refused to negotiate with the tribes over casinos that would use electronic devices. The state's voters have repeatedly refused to legalize such gambling.

Invoking the 1988 law, the Seminoles took the matter to federal court contending the governor had to negotiate with them. But to the tribe's surprise, a U.S. appeals court threw out their lawsuit and said the Constitution gives the states "sovereign immunity" from being dragged into federal court.

That decision, if upheld, threatens to unravel the entire law. On Wednesday, the Supreme Court will hear arguments in Seminole Tribe vs. Florida, 94-12.

The states say neither Congress nor the courts can force them to accept casino gambling on the reservations.

"This case is more about federalism than about Indian tribes," says California Attorney General Dan Lungren in a brief for 31 states.

The tribes, joined by the Clinton administration, argue that Congress has the ultimate power under the Constitution, and its compromise law should be upheld.

"The states want it both ways. They want to participate in drawing up the regulations, but they also want the unilateral right to block what the tribes want to do," says Jerome L. Levine,

a Los Angeles lawyer who represents the National Indian Gaming Association.

(Optional add end)

Regardless of how the court rules, the decision is not likely to be the final word.

If the justices strike down the 1988 law, Congress or the Interior Department will probably be forced to step in and regulate reservation gambling.

If the law is upheld, it will take further rulings to spell out exactly what type of gambling is permitted on the reservations.

Attorneys on both sides of the issue agree the question of reservation gambling has become a legal quagmire, and, as one noted, no one is betting on the final outcome.

U.S., Mexican Leaders Announce Immigrant Transport Plan

By James Risen= (c) 1995, Los Angeles Times=

WASHINGTON President Clinton and Mexican President Ernesto Zedillo on Tuesday announced a pilot program that will send some illegal immigrants detained in San Diego back into the interior of Mexico rather than just across the border.

The one-year test program will begin in the next couple of weeks, said the two presidents, speaking during Zedillo's first state visit to the United States.

Under the program, detained illegal immigrants will have the option of being returned to major cities in the interior of the nation. This would reduce the burden of illegal immigration on the border region, Clinton administration officials said.

The administration will pay the travel costs for as many as 10,000 people, officials said.

"It is absolutely voluntary on the part of individuals who would decide that they would prefer to return home rather than to be in the difficult situation of being unemployed in the border area far from home," said Richard Feinberg, a Latin American expert at the National Security Council.

The repatriation project comes just as immigration is becoming a hot-button issue in the U.S. presidential campaign. But that is just one piece of a broader conservative Republican attack against Clinton's Mexico policies, which has targeted both the North American Free Trade Agreement and Clinton's bailout of the southern neighbor after the peso collapsed last December.

Zedillo appears to recognize the political pressures facing Clinton in the upcoming campaign and seems unlikely to loudly protest any get-tough immigration measures the White House might take to insulate itself from GOP attacks. U.S. officials indicate that it is left unspoken that Zedillo owes Clinton some support on the issue since Clinton responded so quickly to Mexico's financial crisis.

"I can't imagine a more sensitive issue between us than immigration," one senior administration official said. "We both need each other's help on that."

(Optional add end)

The presidents' meeting was generally upbeat, especially since Zedillo announced just days before his arrival that Mexico was repaying the first \$700 million on \$12.5 billion in loans from the United States.

Clinton said Zedillo's ability to stabilize the Mexican economy quickly vindicates his decision to go ahead with the bailout in the face of fierce Republican opposition.

"The Mexican economy has turned the corner, and the markets have taken notice," Clinton said.

Serbs Continue Expulsions as Cease-Fire Delayed Again By Tracy Wilkinson= (c) 1995, Los Angeles Times=

SARAJEVO, Bosnia-Herzegovina, Oct. 11 Bosnian Serbs continued to round up and expel Muslim women and children and detain draft-age men in northern Bosnia Tuesday while officials in Sarajevo failed for the second day to agree on the start of a U.S.-brokered cease-fire.

In a serious blow to the fledgling peace process, the scheduled truce was again delayed when the Bosnian government said the electricity lighting Sarajevo homes for the first time in months was inadequate.

Following three hours of reportedly hostile meetings, the Muslim-led government said it is willing to enter a truce at 12:01 a.m. Thursday if additional repairs bring in more electrical power. But Bosnian Serbs, who had been prepared to begin the cease-fire both Monday and Tuesday, abruptly said they are not authorized to accept that offer and would have to consult their leaders.

"The danger here is you can't keep putting this off for 24 hours and then another 24 hours," said one foreign official familiar with the negotiations.

There was speculation among U.N. officials that the delay was designed to allow Bosnian government forces and their Croatian allies to consolidate battlefield gains, including the Bosnian Serb-held town of Mrkonjic Grad.

Government forces were reported late Tuesday to have the town, strategic because it cuts road access from Sarajevo to Bihac in the northwest, and Croatian television showed pictures purportedly of Croatian soldiers cruising the town in tanks.

In Bihac, a city under siege by Bosnian Serbs until two months ago, talk of an eventual cease-fire was greeted with cynicism early Wednesday morning.

At a small cafe, several off-duty government soldiers scoffed when asked about the truce, saying neither side really wants one. The mayor of Bihac, Adnan Alagic, joined them. He was also pessimistic.

"It is the West that wants this cease-fire, but the West doesn't understand what it is like to have Serbs living in your country," he said. "We have known it for 600 years, and you can see what it has been like the last four."

The United Nations, meanwhile, announced Tuesday that Yasushi Akashi, the civilian head of the U.N. operation in the former Yugoslav federation, would be replaced at the end of the month. Akashi was widely criticized by U.S. and Bosnian government officials for his reluctance to use force to protect peacekeepers and U.N.-designated "safe areas."

In addition to the continued fighting, U.N. officials reported that a new and brutal round of "ethnic cleansing" is driving people from their homes.

An estimated 10,000 Muslims and Croats have been expelled in the last four days from towns surrounding Banja Luka, the Bosnian Serbs' principal stronghold, in what U.N. officials described as the final push to cleanse northern Bosnia of non-Serbs.

(Optional add end)

Aid officials said the expulsions were being carried out by paramilitary units under the direction of Zeljko Raznjatovic, one of this war's most notorious figures. Known as Arkan, Raznjatovic stands accused of numerous atrocities.

Arkan arrived in the town of Sanski Most on Sept. 21, leading a convoy of buses with license plates from Vukovar, a town in Serb-held Croatia, and began rounding up Muslims and Croats, U.N. officials said, citing reports from the refugees. They were held in what one official called provisional concentration camps until being bused to the front line, where they were forced to cross a river and march through woods to government-held territory.

Men of draft age were separated from their families, and as many as 5,000 have not been heard from since, said Mans Nyberg, spokesman for the Office of the U.N. High Commissioner for Refugees.

U.N. human rights workers also received numerous reports of rape, murder, beatings and robberies in this latest wave of expulsions.

Belgian Panel Begins Kickback Probe of NATO Chief Claes By Tyler Marshall= (c) 1995, Los Angeles Times=

BRUSSELS, Belgium In a development that could distract, even weaken, NATO's leadership, the alliance's senior-most official, Secretary-General Willy Claes, has once again become embroiled in a domestic political scandal in his native Belgium.

With Claes protesting his innocence, a special Belgian parliamentary investigative commission met for the first time Tuesday to weigh more than 700 pages of evidence gathered by state prosecutors that allegedly link him to illegal contributions made to his Flemish Socialist Party party six years ago.

800 + All - need one of them
hospitable ↙ ↘ hostile

1st Bornstein - Paul Bender
514-2035

↓
Herb Becker - Dir. of Office of Tribal
Justice

IR
Indian Gaming Regulatory Comm'n
Regulates Class 2 gaming.
→ Slings etc.
Class 3 like Penn Compacts.

PAUL BENDER
514-2206

THE WHITE HOUSE
WASHINGTON

DATE: _____

TO:

FROM: White House Counsel
Room 125, OEOB, x6-7901

- FYI
- Appropriate Action
- Let's Discuss
- Per Our Conversation
- Per Your Request
- Please Return
- Other

Mark Nichols
Cabazon tribe
invited Sach to WH after
lunch.

Ct case

pending litigation

CALIT -
video jamming
devices -



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

MEMORANDUM

D. Elena Kagan

NOV - 4 1994

To: Leon E. Panetta, Chief of Staff
The White House

From: Tom Collier, Chief of Staff

Subject: Meeting With the Cabazon Band of Mission Indians and the Agua Caliente Tribe

To the best of our knowledge, the only issues which should arise during your meeting with the Cabazon Band of Mission Indians and the Agua Caliente Tribe concern video gaming.

The Issues:

- The Cabazon Band probably wants to talk to you about recent statements by the U. S. Attorney for the Los Angeles District suggesting that she intends to act to remove video gaming devices from their casino.
- The Agua Caliente do not now game, but probably want to complain that Governor Wilson will not enter into a compact enabling the Tribe legally to have video gaming devices.

Background on the Issues:

The Cabazon Band of Mission Indians operates a gaming casino that includes video gaming devices. Such devices are illegal in California. Under the Indian Gaming Regulatory Act (IGRA) such devices could legally be located in the Tribe's casino, but only if they are included in a "compact" entered into by the Tribe and the State. Governor Wilson has refused to negotiate a compact with the Cabazon Band that would legalize such devices.

In the recent case of Rumsey Rancheria vs. Wilson, the U.S. District Court held that video gaming devices were a proper subject for compact negotiations in California. The Governor has appealed this decision. The Tribe argues that the Governor's refusal to negotiate is clearly unlawful and makes it impossible for them to bring their facilities into compliance with the law. Consequently, they believe the U.S. Attorney should not enforce the law against

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61647
1 of 2

[Handwritten signature and date 2/8/2]

Leon E. Panetta

them, or seek to remove the video games from their casino while the Governor continues his unlawful refusal to bargain.

Of the four U.S. Attorneys in California, one has entered into a stand-still agreement with the Tribes in his district in which he agreed not to attempt to remove existing video games from tribal casinos, and the Tribes agreed not to expand operations and to remove existing games if it is finally determined that they are illegal. Two other U.S. Attorneys have taken no public position, but privately have indicated to the Tribes in their districts that they will not take any action against the Tribes until the Rumsey appeal is completed.

However, the U.S. Attorney in the District in which the Cabazon Band is located has made statements that indicate that she intends to take enforcement action against the Cabazon Band. I understand that the Tribe and representatives from the U.S. Attorney's office met recently and that an enforcement action no longer seems imminent. Nevertheless, the U.S. Attorney still has not given the Band the sort of non-enforcement assurance which has been received by other Tribes in California.

No. 94-12

Supreme Court, U.S.

FILED

MAR 31 1995

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE
SPOKANE TRIBE OF INDIANS,
SHAKOPEE MDEWAKANTON DAKOTA COMMUNITY,
COQUILLE INDIAN TRIBE,
SHOALWATER BAY INDIAN TRIBE,
WINNEBAGO TRIBE OF NEBRASKA,
YAKAMA INDIAN NATION,
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, AND
CONFEDERATED TRIBES OF THE COLVILLE
RESERVATION AS AMICI CURIAE
IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I.

Does the legislative history of the Indian Gaming Regulatory Act show the clear intention of Congress to permit tribes to engage in class III gaming for various purposes?

II.

If the Court should decide that the Eleventh Amendment bars tribal suits against states for failure to negotiate in good faith, can the Court fashion an appropriate remedy without striking down Indian Gaming Regulatory Act in its entirety?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-12

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF OF THE
SPOKANE TRIBE OF INDIANS,
SHAKOPEE MDEWAKANTON DAKOTA COMMUNITY,
COQUILLE INDIAN TRIBE,
SHOALWATER BAY INDIAN TRIBE,
WINNEBAGO TRIBE OF NEBRASKA,
YAKAMA INDIAN NATION,
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, AND
CONFEDERATED TRIBES OF THE COLVILLE
RESERVATION AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

INTERESTS OF AMICI CURIAE

Amici are federally recognized Indian tribes that have a compelling and obvious interest in the regulation of gaming on Indian lands. The Eleventh Circuit's decision in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) could prevent amici and all other tribes

from exercising their sovereign gaming rights codified by Congress in the Indian Gaming Regulatory Act. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168) ("IGRA"). Amici support the Seminole Tribe in challenging the *Seminole* decision.

Amici are the Shakopee Mdewakanton Dakota Community, the Spokane Tribe of Indians, the Winnebago Tribe of Nebraska, the Yakama Indian Tribe, the Shoalwater Bay Tribe, the Coquille Tribe of Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Confederated Tribes of the Colville Reservation. All are federally recognized Indian tribes. The amici tribes represent the totality of circumstances that currently exists in Indian country, including tribes with successful class III operations pursuant to tribal-state compacts (the Shakopee Mdewakanton Dakota Community and the Winnebago Tribe of Nebraska), tribes in the initial stages of class III operations (the Coquille Tribe of Indians), tribes with challenged class III operations protected by interim injunctive relief (the Spokane Tribe of Indians) and district court decisions (Confederated Tribes of the Colville Reservation), tribes seeking their remedies under IGRA (Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Yakama Indian Tribe), and tribes that have had to abandon negotiations and class III gaming plans until the legal issue of IGRA's remedy is resolved (the Shoalwater Bay Tribe).

In passing IGRA, Congress fashioned a scheme for regulating class III gaming under which amici and all other federally recognized tribes must refrain from exercising their legal right to operate such gaming on tribal lands unless they enter into negotiated tribal-state compacts or pursue the remedial provisions of IGRA. To insure that inaction by states could not be used to impede tribal gaming rights, Congress provided tribes with a cause of action in federal courts to sue a state that re-

fused to negotiate in good faith. Amici's interest in this case is that the Court requires states to carry out the Congressionally-mandated compromise that gives states the opportunity to have a significant role in the regulation of Indian class III gaming or that the Court fashion an alternative remedy to allow tribes to proceed without state participation.¹

SUMMARY OF ARGUMENT

As the brief of Petitioner, the Seminole Tribe of Florida, and other amici will show, the Indian Commerce Clause provides Congress with the plenary power to abrogate states' Eleventh Amendment immunity. The purpose of this brief is to show by reference to legislative history that Congress, in a political process in which the states participated, adopted the class III tribal-state compacting process approach as a compromise between the competing sovereign interests of tribes and states. The class III compacting process, while perhaps not fully embraced by either side, is binding on each side. Earlier versions of IGRA and reactions to the Court's *Cabazon* decision² show that the debate on Indian gaming focused almost entirely on conflicting regulatory interests of tribes and states. The tribal-state compacting provisions, absent from earlier unsuccessful bills, were included in IGRA in an effort to resolve competing sovereign interests. There is scant evidence in the legislative history of state opposition to the compacting provisions and there is absolutely no evidence of any state opposition based on Eleventh Amendment grounds.

The legislative history also shows that Congress, as part of the compromise, allowed the states a voice they

¹ The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

² *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

would not otherwise have had in the regulation of Indian gaming by incorporating the public policy test set forth in the *Cabazon* decision. Congress understood and expected that states would adhere to the compacting process and work with tribes to complete compacts in accordance with the provisions of IGRA. Initially, this is precisely what happened. However, several states, which had offered no opposition to the compacting provisions during the legislative process, now challenge them on Eleventh Amendment grounds.

The purpose and intent of IGRA is to allow tribes the opportunity to engage in gaming, consistent with *Cabazon*, for the purpose of economic development and tribal self-sufficiency. 25 U.S.C. § 2710. That goal is paramount and overrides any state claim to immunity. Even if the Court accepts the states' position on the Eleventh Amendment immunity, it must still consider the intent of Congress to provide a remedy in the event a state fails to abide by the compacting provisions.

Should the Court determine that the states prevail on the Eleventh Amendment issue, the Court must fashion a remedy for the tribes, either by striking down IGRA in its entirety or by severing those portions of IGRA that preclude tribes from proceeding with class III games without a compact. The amici tribes submit that the enforcement and remedial provisions are fundamental to the scheme established by Congress such that mere severance of the enforcement and remedial provisions would result in a scheme wholly inconsistent with the intent of Congress. The amici tribes submit that if the Court determines that Congress lacks the constitutional authority to abrogate states' immunity from suit, it should grant certiorari of the State of Florida's cross-petition in this matter, (Docket Number 94-219) and the Petition of the State of Alabama in *Poarch Band of Creek Indians v. State of Alabama*, (Docket Number 94-35), and determine the remedy for tribes in the absence of an agreed upon tribal-state compact.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF IGRA SHOWS THAT CONGRESS ADOPTED THE CLASS III TRIBAL-STATE COMPACTING PROVISIONS TO RESOLVE COMPETING SOVEREIGN INTERESTS.

A. The Legislative History of IGRA and Reactions to the *Cabazon* Decision Indicate That the Debate Over Indian Gaming Focused on Tribal and State Regulation of Indian Gaming on Indian Lands.

The Indian Gaming Regulatory Act passed in the 100th Congress and was signed into law as P.L. 100-497 by President Reagan on October 17, 1988. Enactment of this Act was the culmination of several years of Congressional hearings and debates that began in the 98th Congress:

[IGRA] is the outgrowth of several years of discussions and negotiations between gaming tribes, states, the gaming industry, the Administration and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands.

S. Rep. No. 446, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3071, 3071.

In the 98th Congress (1984-85), bills were introduced in both the House and Senate. While Committees in both bodies held hearings, no other official action occurred. S. Rep. No. 446, 100th Cong., 2d Sess. 3 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3071, 3073.

In the 99th Congress (1985-86), the level of Congressional activity increased dramatically. The House Committee on Interior and Insular Affairs held three hearings in 1985 on two Indian gaming bills, H.R. 1920 and H.R. 2404 (three additional bills on Indian gaming were introduced in the House in the 99th Congress). *Id.*

Charman Morris K. Udall of the House Interior and Insular Affairs Committee sponsored H.R. 1920, the bill that emerged as the primary legislative vehicle for Indian gaming in the 99th Congress. *Id.* As reported to the House floor in April 1986, H.R. 1920 would have placed regulation of class III gaming jointly with tribal governments and the proposed new National Indian Gaming Commission. *Id.* Tribes were vocal and adamant in their opposition to any intrusion of state jurisdiction and supported the bill as reported.

On April 29, 1986, just eight days after passage of the House bill, the Court docketed the *Cabazon* case. The Court's decision to review the *Cabazon* case, which had been a solid victory for the tribes at the Appeals Court level, caused concern among tribal government leaders who may have viewed the granting of certiorari to the State of California as a negative signal from the Court. Had the Court denied certiorari and let the Appeals Court decision stand, tribal leaders may have had more confidence in their position against intrusion of state regulatory jurisdiction in Congress. Ultimately, of course, the Court upheld the Ninth Circuit Court of Appeals' decision in the *Cabazon* case, but not until February 1987. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). During that interim period a considerable amount of legislative activity continued in Congress with debate focused on the scope of state jurisdiction of Indian gaming activities.

B. S. 555 Was Amended To Include the Tribal-State Compact Provision To Accommodate Competing Tribal and State Interests and To Provide an Enforcement Mechanism To Insure Tribes' Ability To Engage in Class III Gaming.

As introduced on February 19, 1987, Senate Bill 555, which eventually became IGRA,³ would have made class

³ Other Indian gaming bills introduced in the 100th Congress included S. 1303, introduced on June 2, 1988, by Senators McCain,

III gaming unlawful on Indian lands under section 1166 of title 18 of the United States Code, *unless* such gaming activity was located in a state where the gaming was "otherwise legal" and the Secretary of the Interior consented to the transfer of all civil and criminal jurisdiction "pertaining to the licensing and regulation of gaming . . . to the State within which such gaming enterprise" was to be located. S. 555, 100th Cong., 1st Sess. § 11 (1987). The glaring problem with that scheme was the lack of an enforcement mechanism to insure that states would in fact assume jurisdiction over and allow gaming on Indian lands.⁴

Inouye, and Evans; S. 1841, introduced on November 4, 1987 by Senators Hecht and Reid; H.R. 1079, introduced on February 4, 1987 by Representatives Udall and Bereuter; H.R. 964, introduced on February 4, 1987 by Representatives Coelho, Lujan and Pepper; H.R. 2507, introduced on May 21, 1987 by Representatives Udall, Young, Campbell, Smith and Bereuter; and H.R. 3605, introduced on November 3, 1987 by Representatives Vucanovich and Bilbray. S. 1303 and H.R. 2507 were identical bills when introduced and H.R. 2507 became the House legislative vehicle for Indian gaming. S. Rep. No. 446, 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3074.

⁴ Recognition of this problem by Congress is evidenced by Rep. Vucanovich's statements on S. 555, as amended to include the current tribal-state compact provisions:

Many State law enforcement officials had advocated complete State jurisdiction over gaming on Indian lands. Some tribes, on the other hand, advocated strictly tribal jurisdiction over all forms of gaming by requiring the States and the tribes to negotiate with one another, this bill favors neither State jurisdiction nor exclusive tribal control.

In order to meet tribal concerns that States may refuse to allow them to initiate class III gaming, the bill includes protections for tribes in the process or [sic] achieving a compact. In particular, the bill requires States to negotiate in good faith with the tribes and establishes standards for determining whether this requirement has been met. The bill grants tribes a federal cause of action against States for failure to negotiate in good faith. If a court finds that the State did not negotiate in good faith, the bill prescribes further procedures, including a court-ordered second round of

On February 25, 1987, just six days after the introduction of S.555, the Court issued its decision in the *Cabazon* case. The decision helped to buttress the tribes' position objecting to the imposition of any state regulation on Indian lands.⁵ On May 13, 1988, the class III jurisdictional arrangement was adopted by the Committee when it acted on the bill at a business meeting and ordered an amendment in the nature of a substitute to be reported to the full Senate. The substitute amendment contained the tribal-state compact provisions of IGRA. Chairman Daniel K. Inouye's statement at the business meeting is instructive in tracing the development of the tribal-state compacting provision for class III provided in IGRA. He said:

"[C]ertain principles have been part of established law for over 150 years since the Supreme Court first articulated the principle that Indian tribal governments are sovereign, domestic dependent sovereigns that have all the attributes of any sovereign entity subject to the powers and rights of the federal government. Our Constitution establishes a relationship for tribal governments that is exclusive to the federal government. Unless authorized by federal law, the jurisdiction of state governments does not apply on Indian lands. We have come a long

negotiations, submittal of the matter to a mediator, and the establishment of class III gaming procedures by the Secretary of the Interior.

134 Cong. Rec. H8154 (1988).

⁵ Many tribes opposed the imposition of any state involvement as an unjust intrusion on tribal sovereignty and maintained this position during the development of S. 555 in the 100th Congress. Just after passage of IGRA, the Red Lake Band of Chippewa Indians and other tribes filed an unsuccessful suit in the Federal District Court for the District of Columbia challenging the constitutionality of the Act. *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9 (D.D.C. 1990), *aff'd sub nom, Red Lake Band of Chippewa Indians v. Brown*, 928 F.2d 467 (D.C. Cir. 1991).

way since the period of termination policy of the 1950's, and I believe that it is important that the legislation we consider here today recognize the fundamental principles of Indian law, one of which is the tribal governments will not be subject to state jurisdiction absent their consent.

* * * *

What I propose to the Committee today is a mechanism that will provide for the comprehensive regulation of gaming activities on Indian lands employing existing state licensing and regulatory schemes, *only* if tribal governments in exercising their sovereign prerogatives, choose to submit themselves to state jurisdiction. . . . I believe that the best means of assuring tribal government consent to the jurisdiction of state laws is a mechanism that has been used many times over the course of our history between equal sovereigns—the right to enter into compacts that is recognized in the Constitution. These compacts would be negotiated at arms length between two sovereign entities—state and tribal governments. . . . Failure to reach a compact within a given time period will constitute sufficient cause for a cause of action in federal district court, in which the state will have the burden of proof to demonstrate why a compact was not concluded with the applicant tribal government. Should a court find against a state, the Secretary of the Interior will be empowered to impose a compact under which the two sovereign entities will operate. . . . I believe this approach will accomplish several objectives. One, it will assure that state governments are encouraged to enter into good faith negotiations with tribal governments. Two, it will assure that state laws are not applied on Indian lands without tribal government consent and action to request the application of state laws. Third, it will assure a comprehensive scheme of licensure and regulation of Indian gaming activities consistent with the state law.

Unpublished Statement of Chairman Inouye, May 13, 1988, National Archives, RG 46 Records of the U.S. Senate, Indian Affairs, 100th Cong., Legislative Bill Files (1987) S.555, Box No. 100-22.

The Committee report reflects the importance of the tribal-state compacting process as a compromise and an enforcement mechanism:

After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation. . . . The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a mechanism for setting [sic] various matters between two equal sovereigns.

S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin News 3071, 3083.

C. IGRA Passed on a Voice Vote in the Senate and by an Overwhelmingly Favorable Vote in the House, Indicating the Strong Support of Congress for the Compromise Compacting Provision for Class III Gaming.

The Senate debated and passed S. 555 by voice vote on September 15, 1988. During the debate, only two Senators voiced opposition to the bill: Senator Burdick because of concerns of the State of North Dakota about the scope of games that would be subject to the compacting process, 134 Cong. Rec. S12655-56 (1988), and Senator Daschle of South Dakota opposed the bill

because tribes in South Dakota did not support the class III tribal-state compacting provisions. *Id.*, at S12657. No Senator opposed the compacting procedures or spoke on behalf of any state so opposed.

The House debated the bill, S. 555, on September 26, 1988, and the bill passed on September 27, 1988, by a vote of 323 to 84. *Id.*, at H8153-57, 8426-27. During the House floor debate on September 26, 1988, only three members spoke in opposition to the bill: Representatives Frenzel and Sikorski from Minnesota opposed the bill because of the potential imposition of state jurisdiction on Indian lands through the tribal-state compacting process, *Id.*, at H8155-57; Representative Henry of Michigan opposed the bill because he objected to the "grandfather" clause for certain class II card games played by tribes in the State of Michigan. *Id.*, at H8155. Not a single member of the House of Representatives spoke in opposition to the bill on behalf of any state with respect to the compacting provision.

S. 555 passed with unanimous consent without a recorded vote in the Senate. The vote was nearly four to one in the House. Clearly there was strong Congressional support for the compacting provision. State opposition to the compact provisions in the legislative record is limited to the concerns expressed by Senator Burdick on the matter of scope of games.

II. CONGRESS INCORPORATED THE PUBLIC POLICY TEST SET FORTH IN THE CABAZON DECISION IN IGRA IN RESOLVING COMPETING SOVEREIGN INTERESTS.

In enacting IGRA, Congress made the express finding that:

Indian Tribes have the exclusive right to regulate gaming on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of

criminal law and *public policy*, prohibit such gaming activity.

25 U.S.C. § 2701(5) (emphasis added).

By adopting the Court's balancing of tribal, federal and state interests analysis and *Cabazon's* public policy test into IGRA, Congress decided to allow the states a voice they would not otherwise have had in regulating Indian gaming. Every federal court, except one,⁶ which has addressed the question has held that the public policy test set forth in *Cabazon* determines the scope of class III gaming under IGRA. See *Machantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2nd Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) ("We accordingly conclude that the district court was correct in applying the *Cabazon* criminal/prohibitory—civil/regulatory test to Class III gaming"); *Coeur D'Alene Tribe v. Idaho*, 842 F.Supp. 1268, 1282 (D. Idaho 1994) ("*Cabazon* and IGRA clearly restrict gaming on Indian lands to those types of [class III] games permitted by the state and/or those games which do not violate the law and public policy of the state"); *Ysleta Del Sur Pueblo v. Texas*, 852 F.Supp. 587, 592 (W.D. Texas 1993) ("The civil/regulatory and criminal/prohibitory analysis was intended to be part of the IGRA framework determining the appropriate scope of Class III gaming.") *rev'd on other grounds*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 63 USLW 3685 (1995), *cert. denied*, 63 USLW 3689 (1995); *Lac du Flambeau Band of Lake Superior Chippewa Indians and the Sokaogon Chippewa Community v. Wisconsin*, 770 F. Supp. 480, 486 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (1992), *cert. denied*, 113 U.S. 91 (1992) ("the initial question in determining whether Wisconsin permits the gaming activities [under IGRA] is whether Wisconsin public policy towards Class III gaming is regulatory or prohibitory").

⁶ See *Rumsey Indian Rancheria of Winton Indians v. Watson*, 1994 WL 635178 (9th Cir. 1994), *motion for rehearing and rehearing en banc pending*.

These courts applied the *Cabazon* test as intended by Congress:

[T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.

S. Rep. No. 100-446, 100th Cong., 2d Sess. 6 (1988).

IGRA permits states to be involved in a process that had previously excluded them. IGRA is the political embodiment of Congress' reaction to the Supreme Court's ruling in *Cabazon*, and embodies the fundamental holdings of the *Cabazon* Court. IGRA does accommodate states by allowing them to participate in the process to establish a regulatory framework for class III gaming by requiring that regulation of class III gaming activities be pursuant to the terms of tribal-state compacts negotiated between two sovereign governments. The states that sit down at the negotiation table with tribes, ostensibly pursuant to IGRA, are the same states who, when confronted with IGRA's remedial provisions, assert IGRA is unenforceable against them. In other words, states take the position that not only does IGRA allow states to be involved in the process of establishing a regulatory framework for class III gaming, it also allows states unequivocally to preclude class III gaming on Indian lands simply by refusing to consent to suit pursuant to IGRA. The Ninth Circuit noted the irony and inconsistency of the states' position in *Spokane Tribe of Indians v. Washington State, et al.*, 28 F.3d 991 (9th Cir. 1994) (*cert. pending* DK #94-357), 63 USLW 3161 (1994):

In grappling with the sensitive issues following the state of California's defeat in *Cabazon Band*, Con-

gress tried to fashion a plan that would enable states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws. The states' immunity from suits under the Eleventh Amendment should not frustrate that goal. *Indeed, principles of state sovereignty are singularly out of place in such a scheme*, where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests.

Id. at 997 (emphasis added).

III. AFTER IGRA WAS ENACTED, MANY STATES ADHERED TO THE COMPROMISE STRUCK IN IGRA AND WORKED WITH TRIBES TO COMPLETE COMPACTS WITHOUT RAISING ELEVENTH AMENDMENT CHALLENGES.

Immediately after IGRA was enacted, many states accepted and proceeded with the compact process as Congress envisioned. One of the earliest and best examples of how IGRA's remedial and enforcement provisions can work is found in the experience between the Mashantucket Pequot Tribe and the State of Connecticut. Governor Weicker's administration refused to negotiate with the Pequot Tribe. After 180 days had passed since the Tribe's formal requests to enter into good faith negotiations under IGRA, the Tribe filed suit in federal court pursuant to 25 U.S.C. § 2710(d)(7)(B)(i). *Mashantucket Pequot*, 913 F.2d at 1027. After the court found Connecticut had failed to conclude negotiations in good faith, the court ordered the sixty day negotiation/mediation process set forth in 25 U.S.C. § 2710(d)(7)(B)(iv). Connecticut refused to consent to the compact selected by the Mediator, which resulted in the Secretary prescribing, in consultation with the Pequot Tribe, procedures consistent with the proposed compact selected by the Mediator. 56 Fed. Reg. 24996-98 (1991). Since then, the State and the Tribe have come to full agree-

ment on gaming issues and are no longer in an adversarial relationship. As a result, the Mashantucket Pequot Tribe has achieved the tribal economic development, tribal self-sufficiency, and strong tribal government that Congress intended in enacting IGRA. 25 U.S.C. §§ 2701(4), 2702(1). The Mashantucket Pequot experience stands as a visible example of how Congress intended the remedial and enforcement provisions of IGRA to work.

However, after the initial successes of IGRA's compacting process in Connecticut, Minnesota and elsewhere, several states now raise Eleventh Amendment defenses to good faith lawsuits brought by tribes under IGRA when negotiations break down.⁷ In essence, these states are doing just what Congress and the tribes most feared: that is, they are preventing the compacting process for class III gaming by tribal governments from going forward.

IV. IF THE ELEVENTH AMENDMENT BARS THE TRIBES' CLAIMS AGAINST STATES AND STATE OFFICIALS, IGRA MUST OTHERWISE PROVIDE A REMEDY FOR TRIBES.

The crux of the tribes' argument is that Congress did not intend, and federal courts cannot interpret, IGRA to allow states totally to preclude tribes of their class III gaming rights simply by refusing to negotiate in good faith, and then refusing to consent to the jurisdiction of the federal courts. The amici tribes have consistently maintained that the better-reasoned ruling is that the states' Eleventh Amendment defense fails. However, if Congress lacks the constitutional authority to abrogate Eleventh

⁷ More recently, states have raised yet another defense that IGRA violates the Tenth Amendment. See *Rumsey Indian Rancheria of Winton Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), motion for rehearing and rehearing en banc pending. *Confederated Tribes of the Colville Reservation v. State of Washington*. 20 ILR 3124 (1993).

Amendment immunity, the courts must otherwise interpret IGRA in a manner that provides a remedy for tribes. This section addresses the implications of Congress lacking authority to abrogate the states' Eleventh Amendment immunity, and the application of severance analysis to determine the tribes' remedy in the absence of federal court jurisdiction over states hostile to IGRA and hostile to the tribes with Indian lands in those states.

A. If an Adequate Remedy Is Not Otherwise Available to Tribes, IGRA in Its Entirety Should Be Struck Down as Unconstitutional.

If Congress lacks the authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity, and no remedy for a state's refusal to negotiate in good faith is otherwise available to tribes, the entire IGRA must fall and the applicable law governing Indian gaming will be the *Cabazon* decision, wherein states will have no role, whatsoever, in the regulation of class III gaming on tribal lands. The compacting process is the crux of the entire IGRA; if the Tribe has no recourse against a State that fails to negotiate in good faith, the foundation of IGRA will have collapsed.

An entire legislative act of Congress should be ruled unconstitutional if: (1) it is evident that Congress would not have enacted those provisions which are within its power, independently of that which is not within its power; (2) the legislation cannot function independently of the flawed provision; (3) the legislation, absent the flawed provision, will not operate in a manner consistent with the intent of Congress; or (4) the statute created in the absence of the flawed provision is one which Congress would not have enacted. *Alaska Airlines v. Brock*, 480 U.S. 678, 684-86 (1987); *see also, Sloan v. Lemon*, 413 U.S. 825, 834 (1973). *Carter v. Carter Coal Co.* 298 U.S. 238, 314-16 (1936). All four tests are mere variations of the courts' responsibility to reflect Congressional intent. *The lodestar of Supreme Court case law*

on the issue of severability is legislative intent. Regan v. Time Inc., 468 U.S. 641, 653 (1985).

Without recourse against states, the remaining shell of a statute would be nonsensical. Government-to-government negotiations would be transformed into tribal subservience to arbitrary state control. IGRA's express purpose of "promoting tribal economic development, self sufficiency, and strong tribal government," 25 U.S.C. §§ 2701(4), 2702(1), would be a mockery. Congress would not have enacted any other portion of IGRA without recourse available to tribes with Indian lands in states hostile to IGRA.

If the elimination of an enforcement provision essentially eviscerates a statute and creates a program quite different from the one Congress actually adopted, the entire statute must be found to be unconstitutional, regardless of the presence of a severability clause. *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). If Congress intended to have various components of a statutory scheme either operate together or not at all, failure of one component causes the entire Act to fall. *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988), *stay denied* 857 P.2d 1285, *cert. gr. judg. vacated* 109 S. Ct. 859 *on remand* 871 F.2d 104 (1989) (striking down federal sentencing commission). If a law without the flawed provision would cause an unintended result, the entire law must fall. *Matter of Reyes*, 910 F.2d 611 (9th Cir. 1990) (striking executive order entitling aliens in the armed services to become citizens). The critical question remains; does the removal of a flawed provision (allegedly IGRA's enforcement and remedial provision) cause the remaining provisions of IGRA to work in a manner that constitutes a significant departure from initial Congressional intent?

The tribes' ability to file suit against uncooperative states, which is embodied in IGRA's abrogation of

state sovereign immunity, is so fundamental and essential to the workings of IGRA that the entire statute should be struck down if this Court adopts the states' position on the Eleventh Amendment immunity, unless this Court, through severability analysis is otherwise able to provide a remedy to the tribes. The facts surrounding the adoption of IGRA fit each and every one of the variations of the severability test set forth above. In contrast, the states argue that only the enforcement of remedial provisions of IGRA should be struck. The remaining text of IGRA would then allow the states to preclude a tribe from class III gaming by simply refusing to consent to suit.

One effect of merely severing the enforcement or remedial provision is the deprivation of the tribes' ability to engage in class III gaming if states simply ignore the tribes' request. Congress intended to avoid this effect:

It is the Committee's intent that the compact requirement for class III not be used as justification by a state for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

S. Rep. No. 446, 100th Congress, 2d Sess. 13, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3082. IGRA was intended to provide a means by which tribes may conduct class III gaming; severance of the enforcement or remedial provision produces just the opposite result, one in which there is no class III gaming whatsoever.

A second effect of merely severing the enforcement or remedial provision is the arbitrary and outright transfer of state jurisdiction in those states that are willing to permit class III gaming. The tribes will have no leverage in the negotiation process; they would either have to succumb to states' demands, or forgo any class III gaming

opportunities. Congress had considered and rejected a statutory scheme that granted regulatory authority to states. Senator Inouye, then Chairman of the Senate Select Committee for Indian Affairs, expressed the reason for rejecting such a scheme:

[T]he committee was fully cognizant of the strenuous objections that would be raised by tribes to any outright transfer of State jurisdiction, even for the limited purpose of regulating class III gaming.

134 Cong. Rec. S12650 (Sen. Inouye). Former U.S. Representative Morris Udall, then the Chairman of the House Interior and Insular Affairs Committee, made a similar statement:

Over the years, I have strongly resisted the imposition of State jurisdiction over Indian tribes in this and other areas . . . S 555 is the culmination of nearly six years of congressional consideration of this issue. The basic problem which has prevented earlier action by Congress has been the conflict between the right of tribal self-government and the desire for State jurisdiction.

134 Cong. Rec. H8153 (Rep. Udall). The effect of IGRA without the enforcement or remedial provision is to eliminate the very tribal sovereignty that IGRA was intended to protect.

The inevitable consequences of an IGRA without abrogation of state immunity demonstrate the massive importance the enforcement or remedial provision played in establishing the Congressional scheme for the regulation of class III gaming. The compact process is the key to the delicate balance desired by Congress:

[T]he Committee has attempted to balance the need for sound enforcement of gaming laws and regulations with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. The

Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

S. Rep. No. 446, 100th Congress, 2d Sess. 5, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3076. The negotiations were intended to be among sovereign equals:

This bill establishes a framework in which Indian tribes and States can meet as equals, government-to-government, to negotiate an agreement—a compact—for a mutually acceptable method of regulating high-stakes gambling on Indian reservations.

134 Cong. Rec. H8155 (Rep. Coelho). This equality was to be achieved by the recourse available to tribes to sue uncooperative states in federal court:

[25 U.S.C. § 2710(d)(7)] grants the tribe a right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming interests against the interests of States in regulating such gaming . . . the issue before the Committee was how to best encourage States to deal fairly with tribes as sovereign governments. The Committee elected as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated. . . .

S. Rep. No. 446, 100th Congress, 2d Sess. 14, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3084. Without the enforcement or remedial provision, the delicate balance intended by Congress is impossible to achieve.

B. If IGRA's Remedial Provisions Breach the Eleventh Amendment, the Court Should Grant the States' Cross-Petition for Certiorari and Determine an Adequate Remedy for Tribes.

When faced with fashioning a remedy with a constitutionally defective statute, the Supreme Court has encouraged restructuring the statute to adopt simple and equitable results. *Califano v. Westcott*, 443 U.S. 76, 93 (1979). The federal courts may draw from their broad powers in equity in fashioning the remedy. *Id.* Often in the context of statutes extending benefits to a particular class, the federal courts have upheld extending the coverage of a statute to include those who are aggrieved by a constitutionally defective exclusion. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (pension offset plan extended to apply to nondependent women as well as nondependent men). Specifically, the courts should measure the intensity of commitment to the residual policy and consider the potential disruption of the statutory scheme that would occur by extension as opposed to exclusion. *Id.*; *Welsch v. United States*, 398 U.S. 333, 365 (J. Harlan concurring). IGRA need not be struck down in its entirety if the courts otherwise provide a viable remedy. Many tribes, including several of the amici tribes submitting this brief, are successfully operating class III gaming pursuant to tribal-state compacts and prefer to continue operations pursuant to those compacts. Fashioning a remedy for tribes confronted with hostile state governments is the preferred and least disruptive result.

The most thorough discussion in IGRA cases addressing the ability of a tribe to go forward with class III gaming activities without a compact is Judge Fremming Nielsen's severance analysis in *Confederated Tribes of the Colville Reservation v. Washington*, 20 ILR 3124 (E.D. Wash. 1993). After determining that the Confederated Colville Tribes' lawsuit under IGRA against Washington State must be dismissed because Congress lacks

constitutional authority to subject unconsenting states to the jurisdiction of the federal courts (Eleventh Amendment) and to compel states to negotiate fairly with tribes (Tenth Amendment), Judge Nielsen ruled that IGRA must provide recourse to the tribes:

If this court were to only sever the mandatory language from IGRA, the Tribe would be left without recourse if they are unable to reach an Agreement with the State. Thus subsection (d) regarding class III gaming is not fully operable without the unconstitutional language. Further, even if subsection (d) were fully operable without the unconstitutional portions, the language of the Act and the legislative history indicate State participation and speedy resolution of any impasse were key components of the bill. . . Therefore the entire subsection (d) regarding class III gaming must be severed from the act as unconstitutional.

20 ILR at 3127 (emphasis added). Judge Nielsen lays out a two part test to determine what remains and what must be struck from IGRA: (1) if severed, are the remaining provisions fully operative; and (2) if fully operative, would Congress have enacted IGRA without the deleted provisions. *Id.* Judge Nielsen, in striking all of 25 U.S.C. § 2710(d) may have been overbroad, and instead should have been more meticulous in determining what portions of § 2710(d) should be struck, and what other portions should be saved.

For example, both 18 U.S.C. § 1166 and IGRA's exemption of 15 U.S.C. § 1175 (the Johnson Act), set forth that class III gaming is subject to criminal sanctions and civil forfeiture unless a compact is in place. IGRA's exemption of the Johnson Act is embodied in § 2710(d) and both are operable without the unconstitutional language requiring a tribal-state compact. Congress clearly intended for Tribes to be able to regulate machine gaming in states where machine gaming is "permitted" gaming.

Hence the portion of 18 U.S.C. § 1166 excluding class III gaming from its definition of gambling should be read without reference to a compact (material shown in italics to be struck):

(c) For the purpose of this section, the term 'gambling' does not include—

"(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

"(2) class III gaming conducted under a Tribal State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

18 U.S.C. § 1166 (material shown in italics to be struck). Similarly, IGRA's explicit exemption of class III gaming from the Johnson Act should be read without reference to a compact.

The provisions of section 1175 of Title 15 shall not apply to any gaming conducted [in] under a Tribal State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

25 U.S.C. § 2710(d)(6) (materials shown in italics to be struck). Under the logical extension of Judge Nielsen's analysis, class III gaming must still be played pursuant to tribal law and regulation, must still be played pursuant to an ordinance approved by the National Indian Gaming Commission, and must still be "permitted gaming for any purpose by any person, organization or entity," in the applicable state, must be conducted in

conformance with the provisions of IGRA and any other applicable federal law, but the requirement of a compact should be severed from their application.

The Eleventh Circuit addressed the remedial issue in its determination that tribes may proceed to the Department of interior for procedures in lieu of a compact. *Seminole Tribe*, 11 F.3d at 1029, which ruled in pertinent part:

Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and *the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands.* This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

11 F.3d at 1029 (emphasis added). The amici tribes suggest that the extension of Judge Nielsen's analysis is the better-reasoned approach, but agree with the Eleventh Circuit that IGRA must be interpreted in a manner that provides a viable remedy for the tribes. The states' Petition for Certiorari asks that the cited portion of the Eleventh Circuit opinion be reviewed. If the court concludes that Congress lacks constitutional authority to abrogate Eleventh Amendment immunity, the amici tribes concur that certiorari should be granted in two cases: to the State of Florida's cross-petition in this matter (Docket Number 94-219) and to the Petition of the State of Alabama in *Poarch Band of Creek Indians v. State of*

Alabama (Docket Number 94-35). Both the Eleventh Circuit and the courts in *Colville Tribes* have ruled that IGRA must be interpreted in a manner that provides an adequate remedy to the tribes.

Those two approaches are among others that this Court should consider if the Court determines that Congress lacks the authority to abrogate Eleventh Amendment immunity. A remedy must be available to the tribe, whether it be a compact, a court-appointed mediator, departmental regulations, or exclusive tribal law and regulation. If no remedy exists, then no IGRA exists. The federal District Court in *Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994) also reinforces the amici tribes' position:

Alternatively, even if IGRA is unconstitutional, the Court must adhere to the decisions of the United States Supreme Court. Therefore, under the holding from *Cabazon Band*, the Court finds that *even if Congress lacked the authority to set forth the procedures under IGRA and abrogate the Eleventh Amendment immunity of the states, gaming must still be allowed on Indian lands.*

850 F.Supp. at 530 (emphasis added). The result here is driven by Congressional intent. Congress clearly intended that tribes be able to exercise their sovereign right to offer all forms of gaming that are consistent with the public policy set forth in the landmark case, *Cabazon*. The amici tribes implore this court to further give meaning to the legislative intent underlying passage of IGRA regardless of the constitutionality of IGRA's abrogation of Eleventh Amendment immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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OF THE

United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

VS.

STATE OF FLORIDA, ET AL.,
Respondent.

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To the United States Court of Appeals
For the Eleventh Circuit**

**Brief of *Amici Curiae* San Manuel Band of Mission
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Jackson Rancheria Band of Miwuk Indians, Table
Mountain Rancheria of California, Table Bluff Reserva-
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No. 94-12

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

VS.

STATE OF FLORIDA, ET AL.,
*Respondent.*On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

Brief of *Amici Curiae* San Manuel Band of Mission Indians, Rumsey Indian Rancheria of Wintun Indians, Jackson Rancheria Band of Miwuk Indians, Table Mountain Rancheria of California, Table Bluff Reservation of Wiyot Indians of California, Guidiville Band of Pomo Indians of the Guidiville Rancheria, and Viejas Band of Kumeyaay Indians

I.

Interest of *Amici Curiae*

This brief of amici curiae San Manuel Band of Mission Indians, Rumsey Indian Rancheria of Wintun Indians, Jackson Rancheria Band of Miwuk Indians, Table Mountain Rancheria of California, Table Bluff Reservation of Wiyot Indians of California, Guidiville Band of Pomo Indians of the Guidiville Rancheria, and Viejas Band of Kumeyaay Indians (hereinafter collectively the "Tribes"),

is filed in support of petitioner Seminole Tribe of Florida pursuant to the written consent of all parties. The Tribes are all federally recognized Indian tribes whose reservations are located within the geographical boundaries of the State of California. Many of the amici Tribes depend on gaming on their reservations for tribal governmental revenue and to promote tribal economic development, tribal self-sufficiency, and strong tribal governments. Several other amici Tribes are in the process of developing gaming on their reservations to achieve these benefits. If states are permitted to assert a sovereign immunity defense to actions brought to enforce tribes' rights under the Indian Gaming Regulatory Act, 25 U.S.C. sections 2701-21 (hereinafter "IGRA" or the "Act"), the Tribes believe they will be prevented from realizing the tribal self-sufficiency and economic development Congress intended IGRA to afford.

II.

Summary of Argument

This brief examines Congress' power to abrogate the states' sovereign immunity when legislating under the Indian and interstate commerce clauses, and argues that Congress clearly and successfully exercised such power in IGRA.

In *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793), the Court misconstrued Article III as providing a blanket waiver of the states' immunity. The Eleventh Amendment corrected *Chisholm's* error, instructing federal courts that Article III was not to be construed as waiving the states' immunity. In doing so, the Eleventh Amendment necessarily recognized the existence of that immunity, which is an inherent component of the states' common law sovereignty.

The Amendment did not, however, render the states' immunity inviolable. A state's assertion of immunity in any given instance is still open to challenge, requiring a determi-

nation of whether it can be overcome by a meritorious claim of consent, which may be manifested either directly, by means of a waiver, or, as in the case of Congress' abrogation pursuant to the exercise of its plenary powers, through the plan of the convention. See, e.g., *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581 (1991); *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 310-11, 110 S.Ct. 1868, 1875 (1990) (Brennan, J., concurring); *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 474, 107 S.Ct. 2941, 2946 (1987) (Powell, J.). While the states did not cede their sovereignty — or its corollary immunity — to tribes under the plan of the convention, *Blatchford*, 501 U.S. at 775, 11 S.Ct. at 2578, the states did cede their sovereignty to the federal government to the extent necessary for Congress to effectuate its constitutional powers. See, e.g., *Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 747-48 (1934). The existence and recognition of those powers — here, the Indian and interstate commerce clauses — supports the conclusion that Congress successfully abrogated state immunity in IGRA to either: (1) implement a court-supervised scheme to move IGRA's class III compact process into a meaningful negotiating environment between tribes and states; or (2) to determine that a state has no interest in further participation and direct the tribe to seek class III rules from the Secretary of the Interior.

When Congress clearly states its intent to abrogate state immunity — as it unmistakably did in IGRA — and legislates pursuant to its plenary powers over Indian and interstate commerce, the claim of abrogation overcomes a state's immunity defense. This is particularly true where, as in IGRA, the statute only abrogates the states' immunity to determine the posture of the parties or, at best, to provide equitable relief with respect to prospective federal procedures. Nothing in the text, history, or this Court's interpre-

tation of the Eleventh Amendment suggests that under those circumstances the states' immunity would have inviolable constitutional protection.

Prior to IGRA, states played virtually no role in regulating Indian gaming. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210-11, 107 S.Ct. 1083, 1089 (1987). After forcefully and successfully lobbying Congress, states won the right in IGRA to participate, through good faith negotiations with tribes, in regulating Indian gaming under the mechanism of Tribal-State compacts. Congress recognized, however, the virtual veto power IGRA could give to states over class III gaming if compacts are required without some safeguards against negotiating impasses. Federal court supervision in the event the negotiating process stalled — or worse, was never begun — was the reasonable answer Congress chose. That way, if a state elected not to negotiate, or did so on a basis which was determined to be overreaching or unreasonable, and persisted in maintaining that posture, the tribe could be freed of the compact requirement and could turn to the Secretary of the Interior for compact-equivalent procedures. See 25 U.S.C. § 2710(d)(7)(B).

Under IGRA, states are under no obligation to regulate Indian gaming or appear in federal court to defend against a tribal claim of failure to negotiate, or bad faith negotiation, if the state does not wish to do so. *The availability of a federal forum under IGRA is solely for the state's protection to determine, in a way that assures due process to the state but obviously provides nothing to the Tribe except further delay, whether in fact the state desires to negotiate a compact with the Tribe.* IGRA provides no penalty whatsoever for states that decline the Act's regulatory or judicial invitations. The compact process represents an opportunity for the states to expand the scope of their sovereign powers rather than an intrusion on those powers as the Eleventh

Circuit held. The lack of such an intrusion and the paramount need for Congress to be able to move its chosen process along — and in doing so to fulfill its mandate to regulate Indian gaming — sufficiently supports congressional authority to abrogate state immunity.

Moreover, even if the Court were to balance federal and state interests to determine whether Congress had the power to abrogate the states' sovereign immunity in IGRA, Congress' abrogation power must be upheld. First, the federal government's interest in preserving peace among the sovereigns existing within its borders requires IGRA's abrogation of state immunity. Second, the federal government's interest in promoting Indian self-sufficiency, and the rationale of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634 (1976), also compels abrogation of state immunity. Third, the federal government's trust responsibility to Indian tribes demands that any abrogation of immunity in IGRA apply equally to states and tribes. Fourth, no special justification exists in this case to deviate from this Court's numerous decisions which have both held and assumed that Congress' plenary Article I powers are sufficient to overcome the states' sovereign immunity, given a clear expression of congressional intent. Finally, the states' minimal interest, if any, in regulating activities in Indian country were more than adequately protected in this case by the national political process.

For all of these reasons, amici curiae Tribes submit that the Indian and interstate commerce clauses empower Congress to subject the states to suit in federal court for the limited purpose of determining which forum — negotiations with states or consultations with the Secretary of the Interior — tribes will be directed to in pursuing the gaming activities Congress envisioned under the Act. Amici respectfully request that the Court reverse the Eleventh Circuit's

opinion and judgment, which is reported at 11 F.3d 1016 (11th Cir. 1994).

III. Argument

A. IGRA Unmistakably Subjects States to Suit in Federal Court

Beginning with *Employees of the Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614 (1973), this Court has consistently applied the "clear statement" rule to determine whether or not Congress intended to abrogate state sovereign immunity in a particular statute. The Court has required that Congress express its intention to abrogate state immunity "in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 3148 (1985). See also *Welch v. State Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 474, 107 S.Ct. 2941, 2996 (1987). Without such a clear statement of congressional intent, questions concerning the validity of Congress' exercise of its abrogation power are moot. While Congress' intent must be unmistakably clear, it need not use magic words — that is, the standard "does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects states to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S.Ct. 2397, 2403 (1989) (Scalia, J., concurring).

IGRA unmistakably provides Tribes with a federal claim for equitable relief against states that have either failed to participate in class III negotiations or have done so in bad faith:

The United States district court shall have jurisdiction over — (i) any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.

25 U.S.C. § 2710 (d)(7)(A)(i).¹ The Act also provides evidentiary thresholds relating to (1) failing to reach a compact within 180 days, or (2) failing to respond to a request for compact negotiations, or not responding in good faith. See 25 U.S.C. § 2710(d)(7)(B). Upon showing any of the foregoing, the burden shifts to the state to prove its good faith. *Id.*² Thus, IGRA provides not only federal

¹Section 2710(d)(7)(A) provides for federal jurisdiction over three types of lawsuits:

The United States district court shall have jurisdiction over —

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

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

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

25 U.S.C. § 2710 (d)(7)(A).

²IGRA's Senate Report provides Congress' rationale for subjecting states to suit:

Section 11(d)(7) grants a tribe the right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in

jurisdiction over actions against states, but sets forth the elements of, and evidentiary standards for, such suits. See 25 U.S.C. § 2710(d)(7).

The court below correctly recognized that Congress clearly intended to subject the states to suit in federal court under IGRA. See *Seminole Tribe of Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994). Every other federal court to address the issue has reached the same conclusion. See *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1428 (10th Cir. 1994); *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 994-95 (1994); *Ponca Tribe of Oklahoma v. Oklahoma*, 834 F. Supp. 1341, 1345 (W.D. Okla. 1992); *Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423, 1427 (D. Kan. 1993); *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484, 1488-89 (W.D. Mich. 1992); *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550, 558 (S.D. Ala. 1991). See also *Willis v. Fordice*, 850 F. Supp. 523, 530 (S.D. Miss. 1994) (assuming

gaming against the interests of states in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve state jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, states are not required to forgo any state governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage states to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a state if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the state's dealings with tribes in class III gaming negotiations.

S. Rep. No. 446, 100th Cong., 2d Sess., 1, 14 (1988) reprinted in 1988 U.S. Code Cong. & Admin. News 3071, 3084 (hereinafter "Senate Report").

validity of IGRA's provisions for federal jurisdiction over suits against the states).

The unmistakable clarity with which Congress expressed its intent in IGRA to submit the states to federal court jurisdiction is distinguishable from the statutes which have been at issue in many of the leading Eleventh Amendment cases. Cf. *Blatchford*, 501 U.S. 775, 111 S.Ct. 2578 (interpreting 28 U.S.C. § 1362); *Dellmuth*, 491 U.S. 223, 109 S.Ct. 2397 (interpreting the Education of the Handicapped Act, 20 U.S.C. § 1400, *et seq.*); *Atascadero*, 473 U.S. at 245, 105 S.Ct. at 3149 (interpreting the Rehabilitation Act, 29 U.S.C. § 794a(a)(2)); *Employees*, 411 U.S. 279, 93 S.Ct. 1614 (interpreting the Fair Labor Standards Act, 29 U.S.C. § 216(b)).

In *Spokane Tribe*, the Ninth Circuit explained that:

The tribe's suit and the federal court's jurisdiction are triggered under [section 2710(d)(7)(A)(i)] by the particular state's failure to negotiate in good faith. *The state is the only possible defendant to such a suit, and it is the only other party to the compact negotiations.* Congress fully contemplated and expressed its desire to give the tribes a federal forum by which they could compel the states to negotiate fairly with them. This is not just a permissible inference; it is the only reasonable inference. . . . *Short of mentioning the Eleventh Amendment or sovereign immunity, a clearer statement of the intent to abrogate is difficult to envision.*

Spokane Tribe of Indians, 28 F.3d at 995 (quoting *Kickapoo Tribe*, 818 F. Supp. at 1427) (emphasis added). Given the clarity of Congress' intention to abrogate state sovereign immunity, the question is whether, in enacting IGRA, it was empowered to do so.

B. The Eleventh Amendment Reflects The States' Common Law Sovereign Immunity But Creates No New Substantive Rights

The immunity at issue here is fundamental to the nature of states as political entities: “[A] state’s immunity from suit by a citizen without its consent has been said to be rooted in ‘the inherent nature of sovereignty’” *Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184 191, 84 S.Ct. 1207, 1212 (1964) (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51, 64 S.Ct. 873, 875 (1944)). “[T]he doctrine of sovereign immunity, for states as well as for the Federal Government, was part of the understood background against which the Constitution was adopted . . .” *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31-32, 109 S.Ct. 2273, 2297 (1989) (Scalia, J., concurring in part and dissenting in part).

Article III’s grant of judicial power over suits “between a state and Citizens of another state,” initially raised doubts about the continued existence of state sovereign immunity. See U.S. Const., art. III, § 2.³ In *Chisholm*, the Court read Article III as if it constituted a general waiver of the states’ sovereign immunity. *Chisholm* was reversed with “vehement speed” by the Eleventh Amendment.⁴ *Larson v. Do-*

³Article III, section 2 provides:

The judicial Power shall extend to all Cases, In Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; to Controversies between two or more states; between a state and Citizens of another state; between Citizens of different states; between Citizens of the same state claiming Lands under Grants of different states, and between a state, or the citizens thereof, and foreign states, Citizens or Subjects.

U.S. Const., art. III, § 2.

⁴The Eleventh Amendment provides that: “The Judicial power of the United States shall not be construed to extend to any suit in law or

mestic & Foreign Commerce Corp., 337 U.S. 682, 708, 69 S.Ct. 1457, 1470 (1949). Having been misinterpreted by *Chisholm*, Article III’s original meaning was restored by the Eleventh Amendment: “The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally to restore the original understanding,” namely, that the states retained their sovereignty in those areas not delegated to the federal government. *Employees*, 411 U.S. 279, 291-92, 93 S.Ct. 1614, 1621 (1973) (Marshall, J., concurring). See also *Edelman v. Jordan*, 415 U.S. 651, 662, 94 S.Ct. 1347, 1355 (1974) (“Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams”).

Article III — both before *Chisholm* and after the Eleventh Amendment — merely allows federal courts to hear suits involving a state when such suits are otherwise cognizable. But in determining the scope of what is cognizable, arguments that the classifications of cases enumerated in either Article III or the Eleventh Amendment are limiting factors generally have been rejected. See *Hans v. Louisiana*, 134 U.S. 1, 14, 10 S.Ct. 504, 507 (1890) (Article III, section 2 “can have no operation but this: to give a citizen a right to be heard in the federal courts, and, if a state should condescend to be a party, this court may take cognizance of it”) (quoting Madison in 3 Elliot, Debates, 533). Thus the Court has recognized that:

Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it

equity, commenced or prosecuted against one of the United States by citizens of another state, or by Citizens or subjects of any foreign state.”

confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty (citations) . . . and that a State will therefore not be subject to suit in federal court *unless it has consented to suit, either expressly or in the "plan of the convention.*

Blatchford, 501 U.S. at 799, 111 S.Ct. at 2581 (emphasis added).

Indeed, this Court has consistently held that: (1) the Eleventh Amendment "confirms,"⁵ "exemplifi[es],"⁶ and "affirm[s],"⁷ the fundamental principle that state sovereign immunity survived the states' ratification of the Constitution; (2) Article III's grant of judicial authority is limited by that immunity; and (3) the immunity cannot be overcome unless the state has consented to suit or Congress has abrogated state immunity in unmistakably clear language. *Union Gas*, 491 U.S. at 7, 109 S.Ct. at 2277 (Brennan, J., plurality). Those are the fundamentals "reflected" in, *though not created by*, the Eleventh Amendment. *Id.* Indeed, because the Eleventh Amendment itself may be viewed as simply reflecting the states' common law immunity, rather than giving birth to a new immunity, it therefore may be a misnomer to refer, as is common, to an "Eleventh Amendment immunity" or an "Eleventh Amendment defense." *See, e.g., Quern v. Jordan*, 440 U.S. 332, 343, 99 S.Ct. 423, 425 (1985); *Delmuth*, 491 U.S. at 225, 109 S.Ct. at 2398. All that is really meant by such references is that the state has asserted its common law immunity from suit under its sovereign powers reflected in the Eleventh Amendment; no more, no less. The Eleventh Amendment thus

⁵ *Blatchford*, 501 U.S. at 799, 111 S.Ct. at 2581.

⁶ *Ex Parte New York*, 256 U.S. 490, 497, 41 S.Ct. 588, 589 (1921).

⁷ *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906-07 (1984).

serves as a shorthand reference to the states' traditional defense of sovereign immunity. Put another way, the Eleventh Amendment only addresses a subset of the entire set of cases in which states may have a sovereign immunity defense. For this reason, *Hans* and its progeny do not rely solely on the Eleventh Amendment's narrow terms, but instead rest on the broad concept of common law sovereign immunity of which the Amendment is but a reflection:

[I]n the landmark case of *Hans v. Louisiana*, the Court unanimously rejected this "comprehensive" approach to the [Eleventh] Amendment, finding sovereign immunity where not only a nondiversity basis of jurisdiction was present, *but even where the parties did not fit the description of the Eleventh Amendment*, the plaintiff being a citizen not of another state or country, but of Louisiana itself. What we said in *Hans* was, essentially, that *the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity, for states as well as for the Federal Government, was part of the understood background against which the Constitution was adopted*, and which its jurisdictional provisions did not mean to sweep away.

Union Gas, 491 U.S. at 31-32, 109 S.Ct. at 2297 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

Thus, while the Eleventh Amendment reflects the states' common law sovereign immunity, it does create any new substantive rights.

C. The States Surrendered Their Sovereignty Over Indian and Interstate Commerce to the Federal Government Under the Plan of the Convention

It is well-settled that by ratifying the Constitution the states surrendered their common law sovereignty in areas

where Congress was granted express plenary powers. "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, *save where there has been 'a surrender of this immunity in the plan of the convention.'*" *Monaco v. Mississippi*, 292 U.S. 313, 322-323, 54 S.Ct. 745, 747-48 (1934) (quoting *The Federalist*, No. 81) (emphasis added). See also, *Union Gas*, 491 U.S. at 33, 109 S.Ct. at 2298 (Scalia, J., concurring in part and dissenting in part) (quoting *Monaco*); *Parden*, 377 U.S. at 191, 84 S.Ct. at 1212 (1964) ("the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce").⁸

In his famous dissent in *Chisholm*, Justice Iredell drew the line demarcating the portion of sovereignty the states surrendered from that which they retained:

Every state in the Union in every instance *where its sovereignty has not been delegated to the United States*, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. *The United States are sovereign as to all the powers of Government actually surrendered*. Each state in the Union is sovereign as to all the powers reserved.

Chisholm, 2 U.S. at 435 (Iredell, J., dissenting) (emphasis added). Thus Justice Iredell recognized that the states surrendered their sovereignty as to those powers expressly delegated to the Federal Government. Thirty years after *Chisholm*, the Court confirmed Justice Iredell's view. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court recognized that the states' surrender of sover-

⁸Similarly, IGRA's Senate Report "recognize[d] and affirm[ed] the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished." Senate Report at 5 (Additional Views of Mr. McLain).

eignty specifically encompassed the interstate commerce power:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects is plenary as to those objects, the power over commerce . . . among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

Gibbons, 22 U.S. at 197. Similarly, in *Parden*, the Court recognized that "[b]y empowering Congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192, 84 S.Ct. at 1212. And in *Employees*, Justice Marshall noted that:

The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a state by one of its citizens, absent consent. But that doctrine was modified *pro tanto* in 1788 to the extent that the states relinquished their sovereignty to the Federal Government. At the time our Union was formed, the states, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress.

Employees, 411 U.S. at 288, 93 S.Ct. at 1620 (Marshall, J., concurring).

It is well-settled that Congress has plenary power over both Indian and interstate commerce. See *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1909 (1992) (interstate); *Blatchford*, 501 U.S. at 791, 111 S.Ct.

at 587 (Indian); *Hodel v. Indiana*, 452 U.S. 314, 324, 101 S.Ct. 2376, 2383 (1981) (interstate); *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 2483-84 (1974) (Indian). The totality of the states' surrender of sovereignty over Indian and interstate commerce is apparent in light of the so-called "dormant" commerce clause. Article I, section 8, clause 3 of the Constitution is phrased as an affirmative grant of power to the federal government over commerce: it does not express any limitations whatsoever on the states' power to regulate commerce concurrently with the federal government. *Cf.* U.S. Const., art. I, § 9, cl. 5 (flatly prohibiting states from imposing export duties). Most of Congress' powers do not preclude concurrent state regulation, absent conflicting federal regulation. *See, e.g., Kewanee Oil Co v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879 (1974) (Congress' power to issue patents does not bar states from granting different protection to inventors). In the area of commerce, however, the Court has often stricken state statutes regulating commerce even absent a conflicting federal statute. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629 (1982); *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009 (1980); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434 (1977); *A&P Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923 (1976); *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497 (1935).

In sum, there can be little doubt that by ratifying the Constitution the states surrendered their common law sovereign powers to the Federal Government in the areas of Indian and interstate commerce.

D. Congress Clearly Had the Power to Abrogate State Immunity in IGRA in Order to Effectuate Its Indian and Interstate Commerce Clause Authority

IGRA authorizes federal courts to hear three types of actions: (1) suits by Indian tribes against states for failing to negotiate a Tribal-State compact, or for failing to negotiate in good faith, *see* 25 U.S.C. § 2710(d)(7)(A)(i); (2) suits by states or tribes to enjoin class III gaming activity conducted in violation of a Tribal-State compact, *see id.* at § 2710(d)(7)(A)(ii); and (3) suits by the Secretary of the Interior to enforce procedures for class III gaming where the state has declined to consent to a Tribal-State compact selected through IGRA's mediation process, *see id.* at § 2710(d)(7)(A)(iii). Only the first category of suits is in issue here.

In light of Congress' unmistakable intent to abrogate state immunity in IGRA, and given the states total surrender of sovereignty over Indian and interstate commerce, discussed *supra* at sections III(A) and (C) of this brief, the question of Congress' power to authorize such suits becomes simply one of whether Congress' Article I powers are sufficient to support the statute. Although the Eleventh Circuit held that Congress only enacted IGRA under its Indian Commerce Clause power, and not its Interstate Commerce Clause power, the amici Tribes believe that both powers support the Act. *See* Brief of Amici Curiae National Indian Gaming Association, Minnesota Indian Gaming Association and California-Nevada Indian Gaming Association (interstate). *See also* Brief of Amici Curiae Stockbridge-Munsee Indian Community and the Oneida Nation of Wisconsin (Indian). Given Congress' plenary powers over Indian and interstate commerce, there can be little doubt that Congress had the authority to promulgate IGRA and impose its unique judicial remedies, particularly since those remedies are critical to the successful operation of gaming under the Act. More-

over, those remedies — which are limited to prospective equitable relief, *see* Brief of Amicus Poarch Band of Creek Indians — are designed primarily, if not solely, for the states' protection: that is, IGRA ensures that the states are afforded every opportunity to negotiate for regulatory authority over class III gaming which may impact commerce within their borders.

IGRA demonstrates congressional action in furtherance of its plenary powers over Indian and interstate commerce, which alone is sufficient to support the abrogation invoked under the Act. However, a more moderate approach to determining whether or not the exercise of congressional plenary powers is sufficiently compelling to overcome a state's inherent immunity — by weighing and balancing competing state and federal interests, *see, e.g. Union Gas*, 491 U.S. at 25-29, 109 S.Ct. 2287-89 (Stevens, J., concurring) — also leads to the conclusion that Congress had sufficient authority to abrogate state immunity under the Act. The amici Tribes submit that under IGRA there can be no doubt about Congress' power to abrogate state immunity even if a balancing test is imposed.

E. Any Balancing of Federal and State Interests to Determine Whether Congress Has the Power to Abrogate the States' Sovereign Immunity Must be Concluded in Petitioner's Favor

This Court has acknowledged that sovereign immunity under the Eleventh Amendment is not an absolute bar to federal court jurisdiction over suits against the states: "The Court has recognized certain exceptions to the reach of the Eleventh Amendment." *Welch*, 483 U.S. at 473, 107 S.Ct. at 2946 (Powell, J., plurality). *See also Atascadero State Hospital*, 473 U.S. at 238, 105 S.Ct. at 3145 (noting "well-established exceptions" to the Eleventh Amendment). These exceptions include cases involving: (1) waiver by a

state; *see, e.g., Atascadero State Hospital*, 473 U.S. at 238-39, 105 S.Ct. at 3145-46; *Parden*, 377 U.S. at 186, 84 S.Ct. at 1210; *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 883 (1883); (2) prospective equitable relief; *see Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908); *Edelman*, 415 U.S. at 663-64, 94 S.Ct. at 1356; *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423 (1986); and (3) congressional abrogation in clear, unmistakable language; *see Union Gas*, 491 U.S. at 14-23, 109 S.Ct. at 2281-86 (Brennan, J., plurality); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 459, 96 S.Ct. 2666, 2673 (1976).

Because the Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the states," *Atascadero State Hospital*, 473 U.S. at 238, 105 S.Ct. at 3146, the Court has often weighed and balanced competing federal and state interests. *See Union Gas*, 491 U.S. at 25-29, 109 S.Ct. 2287-89 (Stevens, J., concurring). *See also Hutto v. Finney*, 437 U.S. 678, 691, 98 S.Ct. 2565, 2573-74 (1978). Thus the Court has recognized that the fiction of *Ex parte Young* "rests on the need to promote the vindication of federal rights..." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104-106, 104 S.Ct. 900, 910-11 (1984). Similarly, *Edelman* involved an effort to "accommodate" the need for vindication of federal rights to the competing interest in the "immunity of the states." *Pennhurst*, 465 U.S. at 105, 104 S.Ct. at 910. And in *Green*, the Court explained:

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interests in assuring the supremacy of that law. But compensatory or deterrence

interests are insufficient to overcome the dictates of the Eleventh Amendment.

Green, 474 U.S. at 68, 106 S.Ct. at 426 (citations omitted).

A brief review of the facts in *Edelman* may help illustrate the amici Tribes' point. *Edelman* was a class action against the state officials who administered federally-funded programs of Aid to the Aged, Blind or Disabled ("AABD"). The complaint charged that the state defendants improperly omitted certain eligibility months for which applicants were entitled to aid under federal law, and that the defendants did not timely process applications as required by federal regulations. While the complaint purportedly sought only declaratory and injunctive relief, that relief in effect included retroactive damages, for the prayer sought "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." 415 U.S. at 656, 94 S.Ct. at 1352 (quoting complaint). The district court found for plaintiffs, issued "a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants," and also ordered the defendants to retroactively pay the wrongfully-withheld benefits. 415 U.S. at 656, 94 S.Ct. at 1352. The Seventh Circuit affirmed. 472 F.2d 985 (7th Cir. 1973).

This Court recognized that prospective equitable relief was properly granted under *Ex parte Young*, but reversed the grant of retroactive payment of benefits. *Edelman*, 415 U.S. at 659, 94 S.Ct. at 1354. The Court found that "[t]he funds to satisfy the award in this case must inevitably come from the general revenues of the state of Illinois, and thus the award resembles far more closely the monetary award against the state itself, *Ford Motor Co. v. Department of Treasury*, *supra*, than it does the prospective injunctive relief awarded in *Ex parte Young*." *Id.* at 665, 94 S.Ct. at 1357.

The Court candidly acknowledged that the "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Id.* at 667, 94 S.Ct. at 1357. The relief approved in *Ex parte Young* itself had an "effect on the state's revenues . . . [and] [l]ater cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*." *Id.* at 667, 94 S.Ct. at 1357-58 (citing *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970)). These impacts on the states' treasuries were acceptable because they were ancillary consequences of federal supremacy:

[T]he fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, *supra*.

Edelman, 415 U.S. at 667-68, 94 S.Ct. at 1358.

Finally, the Court also employed this balancing approach in *Employees*, which was a suit by state employees against the Missouri Department of Public Health & Welfare for overtime compensation under the Fair Labor Standards Act of 1938, 29 U.S.C. section 216(b). The Court recognized that Congress intended to "bring under the Act employees of [state] hospitals and related institutions." *Employees*, 411 U.S. at 283, 93 S.Ct. at 1617. Yet the Court also found no evidence that Congress intended "to make it possible for

a citizen of that state or another state to sue the state in the federal courts." *Id.* at 285, 93 S.Ct. at 1618. The Court was thus unwilling "to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the states of an immunity they have long enjoyed under another part of the Constitution." *Id.* at 285, 93 S.Ct. at 1618.

Even absent clear statutory language submitting the states to suit in federal court, the Court nevertheless carefully balanced the competing federal and state interests in reaching its conclusion. Significantly, the Court noted that "[b]y holding that Congress did not waive the sovereign immunity of the states under the FLSA, we do not make the extension of coverage to state employees meaningless." *Id.* The Court explained that the section 16(c) of the FLSA "gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA . . . The policy of the Act so far as the states are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." *Id.* at 285-86, 93 S.Ct. at 1618-19. In other words, since Congress did not clearly state its intent to allow citizen suits against the states in federal court, and because the Secretary of Labor could fully effectuate the federal purposes behind the statute, federalism and federal supremacy did not require abrogation.

When we weigh the competing federal and state interests at stake in the area regulated by IGRA, however, there can be no doubt that the federal interests predominate, requiring abrogation of the states' immunity.

1. The Federal Government's Fundamental Interest in Preserving Peace Among the Sovereigns Existing Within Its Borders Requires the Abrogation of the States' Immunity in IGRA

A central function of our federal system is ensuring peace among the numerous sovereigns existing within the United States' borders. *See* U.S. Const., preamble ("We the People of the United states, in Order to . . . insure domestic tranquility"). *See also* The Federalist No. 6, at 59-60 (A. Hamilton) (Rossiter ed. 1961).⁹ As Justice Scalia observed in *Union Gas*, there is an "inherent necessity of a tribunal for peaceful resolution of disputes between the Union and the individual states, and between the individual states themselves . . ." *Union Gas*, 491 U.S. at 33, 109 S.Ct. at 2298 (Scalia, J., concurring in part and dissenting in part). This federal function applies with equal force to disputes between Indian tribes and the states. *See* The Federalist No. 3 at 44 (J. Jay) ("Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper

⁹Hamilton wrote that:

So far is the general sense of mankind from corresponding with the tenets of those who endeavor to lull asleep our apprehensions of discord and hostility between the states, in the event of disunion, that it has from long observation of the progress of society become a sort of axiom in politics that vicinity, or nearness of situation, constitutes nations natural enemies. An intelligent writer expresses himself on this subject to this effect: "Neighboring nations [says he] are naturally enemies of each other, unless their common weakness forces them to league in a confederate republic, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors." This passage, at the same time, points out the evil and suggests the remedy.

The Federalist No. 6, at 59-60 (A. Hamilton).

conduct of individual states, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants"). Maintaining peace with Indian tribes has long been a goal of the Federal Government. See F. Cohen, Handbook of Federal Indian Law, at 39 (1941) ("Most of the very early treaties were treaties of peace and friendship").

This federal interest is particularly strong given the states' traditional hostility to Indian tribes. See, e.g., *United States v. Wright*, 53 F.2d 300 (4th Cir. 1931) (discussing North Carolina's pernicious anti-Indian discrimination).¹⁰ Indeed, in enacting IGRA, Congress expressly "[r]ecogniz[ed] that the extension of state jurisdiction on Indian lands has traditionally been inimical to Indian interests . . ." Senate Report at 5. The states' hostility to Indian tribes has continued through the present day, and has appeared in the very area at issue in this case. For example, in *Sycuan v. Roache*, 788 F. Supp. 1498 (S.D. Ca 1992), *aff'd* at 38 F.3d 402 (9th Cir. 1994) (petition for rehearing under submission), state law enforcement officers, completely lacking in jurisdiction, conducted illegal raids on Indian lands to disrupt Tribal gaming operations. Amicus Curiae Table Mountain Rancheria suffered a similar illegal raid. See *Table Mountain Band of Indians of the Table Mountain Rancheria v. Magarian*, No. 91-600 (E.D. Cal. Nov. 9, 1991)

¹⁰As the Fourth Circuit noted:

[T]he State of North Carolina has afforded [Indians] few of the privileges of citizenship. It has not furnished them schools, and forbids their attendance upon schools maintained for the white and colored people of the State. It will not receive their unfortunate insane or their deaf, dumb, or blind in State institutions. It makes no provision for their instruction in the arts of agriculture or for the care of their sick or destitute. It supervises their roads; but until comparatively recent years these were maintained by their own labor.

53 F.2d at 304-05.

(order granting temporary restraining order against Fresno County Sheriff and order to show cause re preliminary injunction).

Given the long and unfortunate history of animosity and mistrust between Tribes and states, neither group of sovereigns are likely to submit to the judicial jurisdiction of the other. Hence, if Tribal-State disputes regarding Indian gaming under IGRA are to be resolved peacefully, they must be resolved in the federal courts. Nowhere is the United States' peace-making role more significant. Thus this factor weighs heavily in favor of finding Congressional power to abrogate state immunity in IGRA.

2. The Federal Government's Interest in Promoting Indian Self-Sufficiency, and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, Requires the Abrogation of the States' Immunity In IGRA

It is long-settled that the states are not immune from suit by the United States. See *United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488 (1892). Nor are states immune from suits by the United States brought on behalf of Indian Tribes. See *United States v. Minnesota*, 270 U.S. 181, 195, 46 S.Ct. 298, 301 (1926).

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634 (1976), this Court held that Indian Tribes' access to federal court to obtain equitable relief from state taxation was "as broad as that of the United States suing as the tribe's trustee." *Id.* at 473, 96 S.Ct. at 1641. See also *Blatchford*, 111 S.Ct. at 2583. Indian Tribes' ability to repel states' intrusions on tribal sovereignty by representing themselves furthers the federal policy of promoting tribal self-sufficiency — a goal which Congress expressly stated in IGRA. See 25 U.S.C. § 2701(4). As noted *supra*, IGRA authorizes Indian tribes to bring, and federal courts to

entertain, suits for equitable relief against the states for this very purpose. See 25 U.S.C. § 2710(d)(7). Thus *Moe's* holding appears to authorize the type of suit IGRA authorizes Tribes to bring against the states. This factor also weighs heavily in favor of Congress' abrogation power in IGRA.

3. The Federal Government's Trust Responsibility to Indian Tribes Requires That Any Abrogation of Immunity in IGRA Apply to the States as Well as to the Tribes

The Federal Government "has an overriding duty of fairness when dealing with Indians, one founded upon a relationship of trust for the benefit of" Indians. *Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974). See *Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958, 971 n.1 (1994); *Arizona v. California*, 460 U.S. 605, 650, 103 S.Ct. 1382, 1407 (1983) (Brennan, J., concurring in part and dissenting in part); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 1054 (1942). The Federal Government's actions toward Indian Tribes must meet the highest standards of fiduciary duty. *Nance v. Env'tl Protection Agency*, 645 F.2d 701, 710 (9th Cir. 1981).

The duty to protect Indian property rights inheres in the trust relationship between the Federal Government and Indians. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). In IGRA, Congress recognized that Indian tribes have property rights in Indian gaming: "Indian tribes have the *exclusive right* to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

Given the federal government's trust relationship with Indian tribes, for it to submit the Tribes to suit by the

States, without reciprocally submitting the States to suit by the Tribes, would constitute a breach of the trust relationship.

The Court's sensitivity to the importance of reciprocity in this area is evidenced in *Blatchford*, in which the Court was motivated, in part, by the fact that "[w]e have repeatedly held that Indian tribes enjoy immunity against suits by states, Potawatomi Indian Tribe, *supra*, 498 U.S., at ___, 111 S.Ct., at ___, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the states, we do not believe that it surrendered the states' immunity for the benefit of the tribes." *Id.* 501 U.S. at ___, 111 S.Ct. at 2583.

This factor also weighs heavily in favor of Congress' abrogation power in IGRA.

4. This Court's Precedents, and The Doctrine of Stare Decisis, Weigh in Favor of Congress' Abrogation Power in IGRA

For the Court to affirm the Eleventh Circuit in this case and hold that Congress lacks the power to abrogate the states' sovereign immunity when legislating under the Indian Commerce Clause, would require the Court to make a radical departure from its precedents. Specifically, it would require overruling *Union Gas* and *Parden*, 377 U.S. at 192, 84 S.Ct. at 1212 ("[b]y empowering congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation"). And it would require disapproving of numerous decisions that have recognized, or assumed, that Congress may abrogate the states immunity when legislating under its Article I powers. *Atascadero*, 473 U.S. at 242, 105 S.Ct. at 3147 (affirming that Congress may abrogate by

making its intention unmistakably clear); *Employees*, 411 U.S. at 285, 93 S.Ct. at 1618 (assuming Congress has power under the Commerce Clause to abrogate); *Quern*, 140 U.S. at 343, 19 S.Ct. at 1146; *Edelman*, 415 U.S. at 673, 94 S.Ct. at 1360; *Pennhurst*, 465 U.S. at 99, 104 S.Ct. at 907; *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 305, 110 S.Ct. 1868, 1872-73 (1990); *Welch*, 483 U.S. at 475, 107 S.Ct. at 2947; *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252, 105 S.Ct. 1245, 1261 (1985).

“The rule of law depends in large part on adherence to the doctrine of stare decisis. Indeed, the doctrine is ‘a natural evolution from the very nature of our institutions.’” *Welch*, 483 U.S. at 479, 107 S.Ct. at 2948-49 (quoting Lile, *Some Views on the Rule of Stare Decisis*, 4 Va.L.Rev. 95, 97 (1916)). Thus “any departure from the doctrine of stare decisis demands special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311 (1984). There is no such “special” justification for reversing the cases cited *supra*. Thus, this factor also weighs in favor of Congress’ abrogation power in IGRA.

5. The States’ Minimal Interest in Regulating Activities on Indian Lands Are Adequately Protected by the National Political Process

The theory of protection for states articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), proved more than adequate in the case of IGRA. As noted above, prior to IGRA’s enactment, the states had little or no regulatory jurisdiction over Indian gaming. See *Cabazon*, 480 U.S. at 208-211, 107 S.Ct. at 1087-89. Through the legislative process, the states effectively presented their concerns to Congress. See Senate Report at 1-2, 13, 33, 36. The result of this process, IGRA, provides the states with an unprecedented opportunity to expand their civil regulatory jurisdiction over gaming into

Indian country. See 25 U.S.C. § 2710(d)(3)(C)(I) (Tribal-State compacts governing class III gaming on Indian lands may include provisions applying state criminal and civil laws and regulations).

There is no down side for the states in the process prescribed by IGRA: Under the IGRA, no penalties can be assessed against a state for failing to negotiate. What the state would lose by such a stance would be possible input into a Tribal-State gaming compact. If a state fails to negotiate, the Secretary of the Interior, after consultation with the Tribe, could then prescribe the procedures under which the Tribe could conduct Class III gaming on the Indian lands over which the Tribe has jurisdiction, and the state would lose its input into the process.

Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523, (D. S.D. 1993), *aff’d* 3 F.3d 273 (8th Cir. 1993).

Thus, even this factor also weighs in favor of Congress’ power to abrogate state immunity in IGRA.

IV.

CONCLUSION

For the reasons set forth herein, the amici Tribes respectfully request that the Court reverse the opinion and judgment of the Eleventh Circuit Court of Appeal that respondent State of Florida is entitled to a judgment of dismissal on the basis of sovereign immunity, and remand the case for further proceedings.

Respectfully submitted,

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