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MEMORANDUM

VIA FEDERAL EXPRESS

FROM: Joseph Remcho and Janet Sommer

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SUBJECT: Constitutionality of the Tribal Government Gaming and Economic Self-Sufficiency Act of 1998

We have reviewed the Tribal Government Gaming and Economic Self-Sufficiency Act of 1998, and conclude that it is unconstitutional. Specifically, (1) the initiative purports to authorize gaming that is prohibited by the State Constitution, (2) the model compact is not a proper subject of initiative, by directing the governor to execute the compact, (3) the initiative violates the doctrine of separation of powers, and (4) the initiative constitutes an unlawful delegation of authority from the State to the Tribes and the Governor and improperly attempts to bar future Legislatures and the people from changing its terms.

The Tribal Gaming Initiative

The initiative measure, the Tribal Gaming and Economic Self-Sufficiency Act of 1998, is a response to the difficulty Indian tribes have had in negotiating compacts authorized by the Indian Gaming Regulatory Act.

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from a Tribe" to do so. Proposed Gov't Code § 98002(a). If the Governor fails to execute the compact within 30 days, the gaming compact "shall, to the extent permitted by law, be deemed agreed to, approved and executed by the State of California. . . ." Proposed Gov't Code § 98005.

The model compact provides that its terms and conditions "may be amended at any time by the mutual and written agreement" of the Governor and the Tribe, "and such amendment is approved hereby as part of the Act." Model Compact § 12.1. Moreover, the initiative provides that "[i]n the event federal or State law is changed or is interpreted . . . to permit gaming in California which is not now permitted [or offered] . . . this Gaming Compact shall be automatically amended to include such permitted or offered gaming. . . ." *Id.*, § 12.2. The initiative explicitly provides that the amendments do not "require further legislative or voter approval." Proposed Gov't Code § 98011.

The model compact allows the following types of gaming: "Tribal gaming terminals" which pay prizes solely in accordance with a players' pool prize system, any Class III card games operated in any tribal gaming facility in California on or before January 1, 1998 provided that prizes are paid under a players' pool prize system; any lotteries; and off-track betting on horse races. Model Compact § 4.1. The Model Compact authorizes a Tribe to combine and operate any forms of gaming permitted under law at a single facility. Model Compact § 4.2. Finally, the Model Compact establishes regulation and licensing requirements, and requires specified funds received from gaming to be placed in trust for particular uses. Model Compact § 5.0-10.3.

Any Tribe that wishes to negotiate a compact on different terms may request the Governor to do so. Upon receiving such a request, the Governor must enter into good faith negotiations and is authorized to execute any such compact on behalf of the State without approval of the Legislature "so long as the compact does not expand

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such gaming elsewhere. In a concurring opinion in *Salt River Pima-Maricopa Indian Community v. Hull,* 945 P.2d 818, 827 (Ariz. 1997), Vice Chief Justice Jones argued for this strict reading. He stated, "IGRA thus places an absolute prohibition on tribal authority to engage in Class III gaming unless such gaming is otherwise permitted on non-tribal land within the state in which the tribal gaming is proposed."

This strict reading of the law would invalidate the Model Compact because it authorizes gaming that is prohibited elsewhere. For example, California outlaws slot machines (Pen. Code §§ 330a, 330b, 330.1) and black-jack or twenty-one (Pen. Code § 330). The initiative does not directly amend or repeal these prohibitions, but instead includes the general statement that the

> provisions of the Gaming Compact . . . are hereby incorporated into State law and all gaming activities, including but not limited to gaming devices, authorized therein, are expressly declared to be permitted as a matter of State law to any Indian tribe entering into such Gaming Compact . . . ."
>
> Proposed Gov't Code § 98009.

To the extent that the IGRA allows gaming on Indian lands only when such gaming is permitted by other entities in the state, this statement alone cannot authorize such gaming.

Regardless of whether the IGRA itself prohibits gaming under a compact that is otherwise illegal under California law, in negotiating a compact the State is bound by its Constitution. To the extent that the Constitution prohibits a type of gaming, the State cannot authorize such gaming by statute or compact alone, but only by amending the Constitution.

Article IV, section 19 of the California Constitution provides,

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the Compact's authorization for Tribes to combine and operate any of the specified forms of gaming, including "Tribal gaming terminals" and card games such as black-jack, constitutes the operation of a Nevada or New Jersey-type casino.

Despite the fact that the constitutional prohibitions are phrased as limits on the power of "the Legislature," the limitations apply to the legislative power reserved by the people through the initiative. As the State Supreme Court has explained,

> the reserved power to enact statutes by initiative is a legislative power, one that would otherwise reside in the Legislature. It has heretofore been considered to be no greater with respect to the nature and attribute of the statutes that may be enacted than that of the Legislature.
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> *Legislature v. Deukmejian,* 34 Cal. 3d 658, 673 (1983).

In *Legislature v. Deukmejian,* the Court held that Article XXI of the California Constitution, which requires the Legislature to redraw legislative and congressional district lines and limits this authority to being exercised once a decade, also limits the people's initiative power to redraw district lines to once a decade. *Id.* at 663. As the court in *Kennedy Wholesale, Inc. v. State Bd. of Equalization,* 53 Cal. 3d 245, 251 (1991) explained,

> Although the relevant constitutional provision expressly referred only to the Legislature [footnote omitted], we held that the "once-a-decade" rule amounted to a limitation on the state's lawmaking power, regardless of whether that power is exercised by the Legislature or by the voters.

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> gaming facilities under this Chapter and the Gaming Compact, and are limited to using their gaming revenues for various Tribal purposes, including Tribal government services and programs such as those which address reservation housing, elderly care, education, economic development, health care, and other Tribal programs and needs, in conformity with federal law.
>
> Proposed Gov't Code § 98001(c).

These statutory changes cannot override the constitutional prohibition on casinos and serve only to emphasize that the basic gaming terminals authorized by the initiative are in fact casino-style games. Moreover, the California Supreme Court has held that it is not bound by purported legislative findings. *Professional Engineers in California Gov't v. Dept. of Transportation,* 15 Cal. 4th 543, 571-74 (1997); *American Academy of Pediatrics v. Lungren,* 16 Cal. 4th 307, 349 (1997). This is particularly so in the initiative context where the findings represent nothing more than the views of the drafters and are not the result of any legislative hearings.

2. <u>The Model Compact is Not a Proper Subject of Initiative</u>

Article IV, section 1 of the California Constitution makes a distinction between the "Legislative power" and the "powers of initiative and referendum." That section provides,

> The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.

Article II, section 8(a) of the California Constitution makes it clear that the initiative power is a subset of the legislative power; it provides,

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181 Cal. App. 3d 316, 325 (1986) (striking down attempt to change Legislature's internal rules by initiative; "The subjects of statutes are laws" and are "categorically different from the subjects of the rule-making powers").

The resolution at issue in *AFL* and the model compact proposed by the Indian Gaming initiative are similar in that neither constitute the direct enactment of a statute, but instead each attempts to compel another entity to take non-statutory action. In *AFL*, the initiative attempted to require the Legislature to call on Congress to propose a balanced budget amendment, and the Gaming Initiative attempts to require the Governor to agree to a specified compact. Neither of these constitute the creation of law or the enactment of a statute "within the meaning of Article II of the California Constitution." *AFL*, 36 Cal. 3d at 714.[5]

3. By Directing the Governor to Execute the Compact, the Initiative Violates the Doctrine of Separation of Powers

Negotiation of a contract or compact requires the exercise of discretion. The initiative vests that discretion with respect to negotiating Indian gaming compacts

[5] The fact that negotiating and executing compacts is not the enactment of a statute is illustrated by the fact that legislative action is not required. Until it was repealed last year, state law made the California Horseracing Board (the members of which are appointed by the Governor) responsible for negotiating with tribes under the IGRA regarding tribal-state compacts governing horseracing on Indian lands. *See* former Bus. & Prof. Code § 19445, repealed by Stats. 1997, ch. 867. Legislation is currently pending in the California Legislature that would both ratify specified compacts and designate the Governor as the state officer responsible for negotiating and executing all Tribal-State compacts under the IGRA. That legislation specifies that it does not "deny the existence of the Governor's authority to have negotiated and executed tribal-state compacts prior to the effective date of this act." Senate Bill 1502, as amended May 14, 1998.

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Pima-Maricopa Indian Community v. Hull, 945 P.2d 818, 824-25 (Ariz. 1997) (holding similar initiative did not violate separation of powers).

4. The Initiative Constitutes an Unlawful Delegation of Authority From the State to the Tribes and the Governor and Improperly Attempts to Bar Future Legislatures and the People from Changing Its Terms

By limiting the Governor's discretion in negotiating compacts, the initiative improperly attempts to restrict the power of the executive. At the same time, however, the initiative constitutes an improper delegation of authority from the State to the Tribes and the Governor. Once the model compact has been approved, the Governor and the Tribe gain constitutionally impermissible authority to amend the compact in ways that may be inconsistent with state law.

The Compact provides that its terms and conditions "may be amended at any time by the mutual and written agreement of both parties, and such amendment is approved hereby as part of the Act." Compact § 12.1. The Compact further provides that it "shall be subject to renegotiation in the event the Tribe wishes to engage in forms of Class III gaming other than those games authorized or automatically included herein and requests renegotiation for that purpose. . . ." *Id.*, § 12.3. The initiative goes one step further by providing that any amendments to the Compact do not require legislative or voter approval. Proposed Gov't Code § 98011.

Similarly, the Compact purports to bar the Legislature or the people in the future from amending the compact or the statutes governing the compact. Proposed Gov. Code section 98006 provides,

> The gaming authorized pursuant to this Chapter, including . . . the Gaming compact . . ., shall not be subject to any prohibitions in State law now or hereafter enacted.

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This is a clear violation of the principle that one legislature cannot bind future legislatures, and the people, by initiative, cannot bar issues from future consideration by initiative. *See, e.g., City and County of San Francisco v. Cooper,* 13 Cal. 3d 898, 929 (1975); *In re Collie,* 38 Cal. 2d 396, 398 (1952); *People's Advocate, Inc. v. Superior Court,* 181 Cal. App. 3d 316, 328 (1986) ("no legislative board . . . may divest itself or future boards of the power to enact legislation within its competence."); *Mueller v. Brown*, 221 Cal. App. 2d 319, 324 (1963).

Conclusion

Because of the deferential standards governing pre-ballot review, it is unlikely that a court would keep this initiative from the ballot. If it passes, however, it is likely to be successfully challenged.

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