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BION M. GREGORY

January 28, 2000

Honorable Bruce Thompson
2160 State Capitol

TRIBAL-STATE GAMING COMPACTS - #2457

Dear Mr. Thompson:

You have asked whether the tribal-state gaming compacts submitted to the Legislature on January 1, 2000, are identical in all material respects to the tribal-state gaming compacts ratified pursuant to subdivision (a) of Section 12012.25 of the Government Code,[1] and are therefore eligible for ratification pursuant to subdivision (b) of that section.

Section 12012.25 was added by Chapter 874 of the Statutes of 1999 (Assembly Bill No. 1385). Subdivision (a) of Section 12012.25 expressly ratified 57 identical tribal-state gaming compacts that were negotiated pursuant to the federal Indian Gaming Regulatory Act (18 U.S.C.A. Secs. 1166 to 1168, incl., and 25 U.S.C.A. Secs. 2701 and following; hereafter IGRA) and were executed between the State of California and the specified respective tribes on September 10, 1999. Subdivision (b) of Section 12012.25 provided for the ratification of additional compacts executed after that date. Section 12012.25 reads, in pertinent part, as follows:

> "12012.25. (a) The following tribal-state gaming compacts entered into in accordance with the Indian Gaming Regulatory Act of 1988 (18 U.S.C. Sec. 1166 to 1168, incl., and 25 U.S.C. Sec. 2701 et seq.) are hereby ratified:
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> * * *
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> "(b) Any other tribal-state gaming compact entered into between the State of California and a federally recognized Indian tribe which is executed after September 10, 1999, is hereby ratified if both of the following are true:

[1] All further section references are to the Government Code, unless otherwise indicated.

> "(1) The compact is identical is [sic] all material respects to any of the compacts expressly ratified pursuant to subdivision (a). A compact shall be deemed to be materially identified [sic] to a compact ratified pursuant to subdivision (a) if the Governor certifies it is materially identical at the time he or she submits it to the Legislature.
>
> "(2) The compact is not rejected by each house of the Legislature, two-thirds of the membership thereof concurring, within 30 days of the date of the submission of the compact to the Legislature by the Governor. However, if the 30-day period ends during a joint recess of the Legislature, the period shall be extended until the fifteenth day following the day on which the Legislature reconvenes.
>
> * * *"

Thus, subdivision (b) of Section 12012.25 provides that if a subsequently executed compact is identical in all material respects to any of the ratified compacts that were executed on September 10, 1999, as certified by the Governor, then that compact is also ratified unless it is rejected by a two-thirds vote of each house of the Legislature within 30 days of the date that the compact is submitted to the Governor.[2]

On page 40 of the Assembly Daily File for January 3, 2000, it was announced that, on January 1, 2000, the Governor had submitted copies of 17 additional tribal-state gaming compacts for consideration by the Legislature, together with a letter that reads in pertinent part as follows:

> "Dear Members of the California Legislature:
>
> I hereby certify that the following federally recognized Indian compacts [sic], located in the State of California, have executed tribal-state gaming compacts that are materially identical to those tribal-state gaming compacts executed on September 10, 1999 and ratified in Assembly Bill 1385 (Chap. 874, Stats. 1999). As required by Assembly Bill 1385, I am forwarding copies of these tribal-state gaming compacts for consideration by the Legislature." (List of compacts omitted.)

We have reviewed the text of each of these 17 compacts, and determined that they are identical to each other and, with the exception of two addenda, are identical to the compacts ratified pursuant to subdivision (a) of Section 12012.25.

The question presented, therefore, is whether the inclusion of these addenda indicates a conclusion that the 17 submitted compacts are not identical in all material respects to the earlier compacts, despite the certification by the Governor to that effect.

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[2] Subdivision (b) also provides that, if this period expires during a joint recess of the Legislature, the period shall be extended until the fifteenth day following the day on which the Legislature reconvenes.

The addenda read as follows:[3]

"ADDENDUM 'A' TO TRIBAL-STATE GAMING COMPACT BETWEEN THE ALTURAS RANCHERIA AND THE STATE OF CALIFORNIA

"Modification No. 1

"Section 6.4.4(d) is modified to read as follows:

"Section 6.4.4(d) is modified to read as follows: [sic]

"(d)(1) Notwithstanding subdivision (a), the Tribe may employ or retain in its employ a person whose application for a determination of suitability, or for a renewal of such a determination, has been denied by the State Gaming Agency, if the person is an enrolled member of the Tribe, as defined in this subdivision, and if ~~(i)~~(A) the person holds a valid and current license issued by the Tribal Gaming Agency that must be renewed at least biennially; ~~(ii)~~(B) the denial of the application by the State Gaming Agency is based solely on activities, conduct, or associations that antedate the filing of the person's initial application to the State Gaming Agency for a determination of suitability; and ~~(iii)~~ (C) the person is not an employee or agent of any other gaming operation.

"(2) For purposes of this subdivision, 'enrolled member' means a person who is either: ~~(a)~~ (A) a person certified by the Tribe as having been a member of the Tribe for at least five (5) years; ~~or (b)~~ (B) a holder of confirmation of membership issued by the Bureau of Indian Affairs; or (C), if the Tribe has 100 or more enrolled members as of the date of execution of this Compact, a person certified by the Tribe as being a member pursuant to criteria and standards specified in a tribal Constitution that has been approved by the Secretary of the Interior.

"Modification No. 2

"Section 8.4.1(e) is modified to read as follows:

"(e) The Tribe may object to a State Gaming Agency regulation on the ground that it is unnecessary, unduly burdensome, conflicts with a published final regulation of the NIGC, or is unfairly discriminatory, and may seek repeal or amendment of the regulation through the dispute resolution process of Section 9.0; provided that, if the regulation of the State Gaming Agency

[3] The changes made by Addendum A are shown in strikeout and underline text. Addendum B incorporates the text of a model tribal labor relations ordinance, and is shown in roman.

conflicts with a final published regulation of the NIGC, the NIGC regulation shall govern pending conclusion of the dispute resolution process.

"Modification No. 3

"Section 12.2 is modified to read as follows:

"Sec. 12.2.(a) This Gaming Compact is subject to renegotiation in the event the Tribe wishes to engage in forms of Class III gaming other than those games authorized herein and requests renegotiation for that purpose, provided that no such renegotiation may be sought for 12 months following the effective date of this Gaming Compact.

"(b) Nothing herein shall be construed to constitute a waiver of any rights under IGRA in the event of an expansion of the scope of permissible gaming resulting from a change in state law.

"Modification No. 4

"Section 11.2.1(a) is modified to read:

"Sec. 11.2.1. Effective. (a) Once effective this Compact shall be in full force and effect for state law purposes until December 31, 2020. No sooner than eighteen (18) months prior to the aforementioned termination date, either party may request the other party to enter into negotiations to extend this Compact or to enter into a new compact. If the parties have not agreed to extend the date of this Compact or entered into a new compact by the termination date, this Compact will automatically be extended to June 30, 2022, unless the parties have agreed to an earlier termination date.

"Modification No. 5

"Section 12.4 is modified to read as follows:

"Sec. 12.4. ~~The Tribe shall have the right to terminate this Compact~~ In the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision, or the conclusive and dispositive judicial construction of a statute or the state Constitution by a California appellate court after the effective date of this Compact, that Gaming Devices may lawfully be operated by another person, organization, or entity (other than an Indian tribe pursuant to a compact) within California, the Tribe shall have the right to: (i) termination of this Compact, in which case the Tribe will lose the right to operate Gaming Devices and other Class III gaming, or (ii) continue under the Compact with an entitlement to a reduction of the rates specified in Section 5.1(a) following conclusion of negotiations, to provide for (a)

compensation to the State for actual and reasonable costs of regulation, as determined by the state Department of Finance; (b) reasonable payments to local governments impacted by tribal government gaming; (c) grants for programs designed to address gambling addiction; (d) and such assessments as may be permissible at such time under federal law.

"Modification No. 6

"Section 10.2(d) is modified to read as follows:

"(d) Carry no less than five million dollars ($5,000,000) in public liability insurance for patron claims, and ~~that~~ the Tribe shall request its insurer to ~~provide reasonable assurance that those claims will be~~ promptly and fairly ~~adjudicated, and that legitimate claims will be paid~~ settle all valid claims; provided that nothing herein requires the Tribe to agree to liability for punitive damages, any intentional acts not covered by the insurance policy, or attorneys' fees. On or before the effective date of this Compact or not less than 30 days prior to the commencement of Gaming Activities under this Compact, whichever is later, the Tribe shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which the Tribe waives immunity to suit for money damages resulting from intentional or negligent injuries to person or property at the Gaming Facility or in connection with the Tribe's Gaming Operation, including procedures for processing any claims for such money damages; provided that nothing in this Section shall require the Tribe to waive its immunity to suit except to the extent of the policy limits and insurance coverage set out above.

"Modification No. 7

"Section 10.2(k) is modified to read as follows:

"(k) Comply with provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C. Sec. 5311-5314, as amended, and all reporting requirements of the Internal Revenue Service, insofar as such provisions and reporting requirements are applicable to casinos."

"ADDENDUM 'B' TO TRIBAL-STATE GAMING COMPACT
BETWEEN THE ALTURAS RANCHERIA
AND THE STATE OF CALIFORNIA

"In compliance with Section 10.7 of the Compact, the Tribe agrees to adopt an ordinance identical to the Model Tribal Labor Relations Ordinance attached hereto, and to notify the State of that adoption no later than October 12, 1999. If such notice has not been received by the State by October 13, 1999,

this Compact shall be null and void. Failure of the Tribe to maintain the Ordinance in effect during the term of this Compact shall constitute a material breach entitling the State to terminate this Compact. No amendment of the Ordinance shall be effective unless approved by the State.

"Attachment: Model Tribal Labor Relations Ordinance."

With respect to Addendum A, we have analyzed each modification separately, as follows:

Modification 1 expands the term "enrolled member" to include persons certified as such by a large tribe pursuant to the terms of a tribal constitution approved by the Secretary of Interior. This appears to be intended as a technical change to conform to existing federal law, which provides for the adoption of a constitution under which the tribe defines its membership as an inherent element of its sovereignty (see 25 U.S.C.A. Sec. 476; see also *Masayesva v. Zah* (D. Ariz. 1992) 792 Fed. Supp. 1178, 1188).

Modification 2 provides that a tribe may object to a state gaming agency regulation if it conflicts with a regulation adopted by the National Indian Gaming Commission (hereafter the NIGC). While there may be some debate as to whether the NIGC is in fact a federal agency for purposes of a state law preemption analysis, the tribes are clearly bound by those regulations pursuant to IGRA, so we think that this change is clarifying in nature (see 25 U.S.C.A. 2706). Also, the existing compact terms allow tribes to object to a state gaming regulation that is "unnecessary, unduly burdensome, or is unfairly discriminatory" (Sec. 8.4.1 of the compacts), and a requirement that a tribe follow two sets of conflicting regulations, in our view, would be unduly burdensome.

Modification 3 adds language declaring that nothing in the provision allowing tribes to renegotiate for additional class III games "... shall be construed to constitute a waiver under IGRA in the event of an expansion of the scope of permissible gaming resulting from a change in state law." This appears to be surplusage, in that IGRA provides that the scope of gaming to be negotiated is class III gaming permitted "for any purpose by any person, organization, or entity" in that state, and the compact expressly provides for renegotiation to expand that scope (see 25 U.S.C.A. Sec. 2710 ; Sec. 12.2 of the compacts).

We think that Modification 4 represents the most significant issue. Under the provisions of the compacts ratified in Section 12012.25, the compact shall "be in full force and effect for state law purposes until December 31, 2020." The modification provides that either party may (no sooner than 18 months before this date) request the other to enter into negotiations to extend the compact or enter into a new compact, and, if the parties have not agreed on these terms by the termination date, that the compact will automatically be extended 18 months to June 30, 2022, unless the parties have agreed to an earlier termination date. Assuming that the pending constitutional amendment authorizing these compacts is

approved by the voters[4] (otherwise, the compacts will not take effect, pursuant to subdivision (c) of Sec. 11.1 of the compacts), the right to request negotiations for an extension or renewal is already included in the existing compacts, and thus is not new.

Modification 5 provides that, if state law is amended or interpreted to allow any person, organization, or entity other than an Indian tribe to operate slot machines, the tribe shall have the right to continue under the compact with a right to a (negotiated) reduction in license fee rates. Under the existing terms of the compacts, a tribe has the right to terminate the agreement in this situation (see Sec. 12.4 of the compacts), but is also able to negotiate (in good faith) to amend the compact at any time by mutual written agreement (Sec. 12.1 of the compacts). This modification therefore appears to simply articulate a remedy that would be already available under these circumstances and, because it would be dependent upon further negotiations with the state, it does not appear to make a significant change.

Modification 6 provides for a modest change in provisions surrounding insurance requirements. Under the existing language, a tribe must carry at least $5 million in liability insurance for patron claims and must provide "reasonable assurance" that those claims will be promptly and fairly adjudicated. The modification instead provides that the tribe shall request its insurer to promptly and fairly settle all valid claims and provides that nothing in the compact makes the tribe liable for intentional acts not covered by this insurance policy. This change shifts the burden of providing prompt and fair claims practices to the insurer (which already has this burden (see Sec. 790.03, Ins. C.)) and disclaims any implied liability for intentional acts outside this coverage. These changes appear to be technical in nature and not significant.

Modification 7 inserts the phrase "comply with" to a reference to federal law, and thus merely makes a grammatical correction.

Thus, in our opinion, while several of the above changes may be substantive in nature, given the broad general rights already contained in the original compact and the application of federal law, only the 18-month automatic compact extension contained in modification 4 of Addendum A significantly changes the rights of either party.

With respect to Addendum B, this change constitutes the express incorporation of a side agreement specifically required under the terms of all of the compacts, both those submitted on January 1, 2000, and those ratified in subdivision (a) of Section 12012.25, which provide in Sec. 10.7 that "[n]otwithstanding any other provision of this Compact, this Compact shall be null and void if, on or before October 13, 1999, the tribe has not provided an agreement or other procedure acceptable to the state for addressing organizational and representational rights for class III Gaming Employees and other employees ... ."

Returning to the question of whether the change contained in Modification 4 of Addendum A means that the latter compacts are not "identical in all material respects" to the earlier compacts, we have considered the use of this term under California law and determined that, while it is often used in the context of comparing the facts of one case to

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[4] Proposition 1A of the March 7, 2000, statewide primary election, which amends Section 19 of Article IV of the California Constitution.

cases already decided (see, for example, *Driscoll* v. *City of Los Angeles* (1967) 67 Cal.2d 297, 311; *In re Estate of Troy* (1931) 214 Cal. 53, 61) and in comparing the text of two similar, but not identical, statutes (see, for example, *Lillebo* v. *Davis* (1990) 222 Cal.App.3d 1421, 1437; *Continental Airlines* v. *McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 418), it is used infrequently in the context of contract litigation, at least in reference to the comparison of contractual terms themselves. Courts in this state have used the phrase in comparing similar, but not identical, escrow agreements (see *Conley* v. *Matthes* (1997) 56 Cal.App.4th 1453, 1457), and in comparing provisions of similar insurance policies (see, for example, *Pepperell* v. *Scottsdale Insurance Co.* (1998) 62 Cal.App.4th 1045, 1051; *United States Elevator Corp.* v. *Associated Intl. Ins. Co.* (1989) 215 Cal.App.3d 636, 639).

Generally speaking, a statement is "material" if it would be likely to affect a reasonable person's conduct with reference to the transaction (*Costello* v. *Roer* (1946) 77 Cal.App.2d 174, 178-179). With reference to the effect of modifications to contracts upon third parties, courts have held that additions or supplements that do not conflict with, and therefore do not change, the obligations of the parties to the original agreement, may be made to an agreement without rising to the level of a material modification necessitating approval by (or release of) a third party surety (*National Surety Co.* v. *Russell* (1933) 66 F.2d 104, 110).

In the context of the tribal-state gaming compacts at issue, Modification 4 of Addendum A would have the substantive legal effect of extending the term of a bilateral 20-year agreement by an additional 18 months "[i]f the parties have not agreed to extend the date of this Compact or entered into a new Compact by the termination date ... ." While the parties are free under the terms of all of the compacts to amend the terms and conditions thereof at any time by mutual and written agreement (Sec. 12.1 of the compacts), no provision of the compact expressly provides for the renewal or extension of its term. Thus we think that this change does affect the substantive rights of the parties under the compacts. The Governor, however, by certifying the compacts as being identical in all material respects, has by executive action taken the official position that this extension does not represent a material change, and in accordance with the provisions of subdivision (b) of Section 12012.25 the latter compacts are thereby deemed to be materially identical to the earlier compacts by operation of law.

We have found no case construing the effect of a provision in a statute where a certification by the Governor of certain facts results in those facts being "deemed" to be true. However, it is our view that subdivision (b) of Section 12012.25 does not render the determination of the Governor beyond judicial review.

In *Gutierrez de Martinez* v. *Lamagno* (1995) 132 L.Ed.2d 375, the United States Supreme Court considered a statute that provided that, upon certification by the Attorney General that a federal employee was acting within the scope of employment at the time a claim for damages arose, a civil action against the employee "shall be deemed an action against the United States" and the United States shall be substituted as a party (Id., at p. 382; see 28 U.S.C.A. Sec. 2679). The United States Supreme Court recognized that the phrase was ambiguous (Id., at p. 383) but found that judicial review of executive action should not be cut off unless there is persuasive reason to believe that such was the purpose of Congress

(Id., at p. 384). In that case, the court found no reason to make the determination of the Attorney General conclusive on the courts (Id., at p. 391).

Subdivision (b) of Section 12012.25 does not impose any fixed standard upon the Governor in making this determination, nor does it require the Governor to make any preliminary findings of fact; rather, it relies on the Governor's discretion, as a public officer, to make this determination. This delegation of discretionary authority to the Governor is not unique, in that a number of other statutory provisions similarly function by operation of a finding, decision, or declaration of the Governor. For example, Section 8625 empowers the Governor to declare a state of emergency upon finding that specified conditions exist, that local authority is inadequate to cope with an emergency, or upon request of local officials. Section 6705 authorizes the Governor in his or her discretion to declare a "special or limited holiday" applying only to a special class or classes of businesses or persons. Until its repeal in 1997,[5] Section 77203.5 provided that the Governor, in his or her discretion, could grant an exemption to a county's constructive waiver of certain claims for reimbursement of state-mandated local program costs. In each of these examples the Governor is or was expressly authorized by statute to exercise what would otherwise be legislative[6] powers, in much the same way that an administrative agency exercises quasi-legislative rulemaking and regulatory authority pursuant to statutory authority. While the determination of the Governor in this regard should be entitled to deference, it is our view that it is not binding on the courts.

As chief executive, the civil administration of the laws of the state is vested in the Governor (Sec. 11150), and it is well settled that an administrative agency has only those powers expressly granted or necessarily implied by the California Constitution or by statute (*City and County of San Francisco* v. *Padilla* (1972) 23 Cal.App.3d 388, 400). It is also well established that a statute may confer upon an administrative agency, in this case the Governor, the power to "fill up the details" of a statutory scheme by adopting administrative regulations, findings, and orders as needed to promote the purposes of the statute and carry it into effect (*Knudsen Creamery Co.* v. *Brock* (1951) 37 Cal.2d 485, 492). In this regard the Governor has been given the express authority to determine whether a subsequent compact is "identical in all material respects" to compacts already ratified pursuant to subdivision (a) of Section 12012.25. This determination is in effect an administrative finding. As such, it would be subject to review under the same abuse of discretion standard generally applicable to decisions by public officers, that is, that the exercise of administrative discretion granted to a public officer may be overturned only if the action is arbitrary, capricious, or fraudulent (*Miller Family Home* v. *Department of Social Services* (1997) 57 Cal.App. 4th 488, 491).

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[5] See Section 45 of Chapter 850 of the Statutes of 1997.

[6] This is not to say that all instances of codified gubernatorial discretion are legislative or quasi-legislative in nature; for example, Section 3041.2 of the Penal Code codifies the Governor's express constitutional authority as chief executive to affirm, modify, or reverse parole decisions with respect to persons incarcerated for murder (see subd. (b), Sec. 8, Art. 5, Cal. Const.).

An argument can be made that the extension of the compact term by a period of up to 18 months is material in that it is so significant that the Legislature may not have ratified the compacts on that basis. However, because the terms of the compact authorize the parties to amend its terms at any time (Sec. 12.1), and because subdivision (b) of Section 12012.25 may be interpreted to authorize the Governor to reexecute the compact with the same tribe for an additional 20-year term upon its termination on December 31, 2020, in our opinion the administrative determination by the Governor that the latter compacts are "identical in all material respects" is reasonable given the flexibility delegated to him under Section 12012.25 with respect to the effective term of compacts and amendments thereto.

Accordingly, it is our opinion that, while the 18-month extension contained in Modification 4 of Addendum A represents a significant change in the latter compacts, it was within the Governor's administrative discretion to conclude that this change does not rise to the level of a material modification, and thus the Governor's certification in this regard does not represent an abuse of discretion.

Consequently, we think that a court examining this question would conclude that, pursuant to the certification of the Governor, the tribal-state gaming compacts submitted to the Legislature on January 1, 2000, are identical in all material respects to the tribal-state gaming compacts ratified pursuant to subdivision (a) of Section 12012.25 of the Government Code, and are therefore eligible for ratification pursuant to subdivision (b) of that section.

Very truly yours,

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By
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MK:sjm