

Proposition 1A

Proposition 1A: Gambling on Tribal Lands

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Executive Summary

By amending the California Constitution, Proposition 1A authorizes the Governor to negotiate compacts with Indian Tribes to allow certain forms of gambling on Indian Lands in California notwithstanding constitutional proscriptions that otherwise would apply barring lotteries and casino-gambling of the type currently operating in Nevada and New Jersey. Any agreements negotiated by the Governor would need to be ratified by the Legislature. (Gambling on Tribal Lands Constitutional Amendment and Initiative, SCA 11, Assembly Committee on Elections, Reapportionment and Constitutional Amendments Analysis, p. 2 (1999) (prepared by Romulo Lopez).)

In September of 1999, Governor Davis authorized Class III gaming activities (which includes slot machines) to be conducted on tribal lands by signing a 38-page agreement known as the Tribal-State Gaming Compact. At about the same time, the Legislature specifically ratified gaming compacts with 57 Indian tribes in Assembly Bill 1385. If Proposition 1A is approved by voters in the March 2000 election, the previously signed

gaming Compact will become effective and Indian tribes will be able to conduct Nevada style gaming on tribal lands for the next 20 years.

Description

A. Current Law

1. California

Under current California law, the State Constitution provides that the Legislature has no power to authorize lotteries, and prohibits the sale of lottery tickets in California. (Cal. Const. art. IV, § 19(a).) In 1984, California voters passed Proposition 37, an exception to the constitutional prohibition against lotteries. Proposition 37 included the California Lottery Act and created the California State Lottery. (Guy Levy, Note: *Western Telcon v. California State Lottery*; Will Native Americans Lose Again?, 19 T. Jefferson L. Rev. 361 (1997).) Two other exceptions to the original prohibition against lotteries have been created as amendments to the California Constitution. These amendments allow the Legislature to regulate horse race wagering and to authorize cities and counties to provide for charitable bingo games. (Cal. Const. art. IV, §§ 19(b), 19(c).) However, the Legislature has no power to authorize casinos of the type operating in Nevada and New Jersey. (Cal. Const. art. IV, § 19(e).) Therefore, legislation allowing gaming activity including slot machines and percentage card games is currently illegal in California.

2. Federal

Native Americans have historically participated in many forms of gambling as part of their traditional culture. (Eric Henderson, Symposium: Indian Gaming, *Indian Gaming: Social Consequences*, 29 Ariz. St. L.J. 205, 206 (1997).) Congress found that Indian Tribes began using gaming as a way to generate revenue. As a result, the United States Congress enacted the Indian Gaming Regulatory Act ("IGRA") of 1998, to further promote tribal economic development, self-sufficiency and strong tribal government. IGRA states that "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.A. § 2701(5) (West 1988).) California is a state that prohibits gaming activity. Therefore, in California, Indian Tribes do not have the exclusive right to regulate gaming activities on Indian land.

In addition, IGRA only authorizes state officials, such as governors, to enter into and negotiate tribal-state gaming compacts under the authority vested to them by the state Constitution and state statutes. IGRA does not vest in the state governors more power to enter into tribal-state gaming compacts than the governors are granted under state law. (See *New Mexico ex rel. Clark v. Johnson*, (1995) 120 N.M. 562, 572-73.) In California, the Legislature generally must ratify such gaming compacts. (See, e.g., *Gambling on Tribal Lands Constitutional Amendment and Initiative*, SCA 11, Assembly Committee on Governmental Organization Analysis, p. 3 (1999) (prepared by George Wiley).)

However, the California Constitution does not grant the Legislature power to authorize the creation of casinos; instead, it actually directs the Legislature to prohibit casinos. (SCA 11, Assembly Committee on Governmental Organization Analysis, at 1.)

IGRA divides gambling activities into three categories. Class I gambling activities include social games solely for prizes of minimal value or traditional/ceremonial games used in connection with tribal celebrations or ceremonies. (25 U.S.C.A. § 2703(6) (West 1992).) Class II gambling activities include bingo and certain card games. (Id. at § 2703(7)(A).) Class II gaming specifically excludes any banking card games, such as baccarat, chemin de fer, or blackjack. (Id. at § 2703(7)(B).) Class III gambling activities include all other forms of gambling such as banked card games, video or electronic game, slot machines, lotteries, craps, and horse wagering. (Id. at § 2703(8).)

IGRA authorizes Class I gaming on Indian lands without any restrictions. (25 U.S.C.A. § 2710(a)(1) (West 1988).) Class II gaming is also within the jurisdiction of the Indian tribes, but requires that such Indian gaming be located within a state that permits such gaming and that such gaming is not specifically prohibited on Indian lands by federal law. (Id. at § 2710 (b)(1)(A).) An Indian tribe can operate Class III games only if the tribe and the state have agreed to a tribal-state compact that allows such games. (Id. at § 2710(d)(1)(C).) Currently, no compact authorizing Class III gaming activities exists. Hence, the federal government could step in at anytime and shut down the operations of Indian casinos offering Class III gaming activities.

B. Proposed Changes

1. Historical Context

a. Wilson-Pala Compact (1998)

In April 1998 Governor Wilson entered into a compact with the Pala Band of Mission Indians. This compact permitted specific types of Class III gambling on tribal lands. Subsequently, ten other tribes signed this agreement and these eleven compacts were approved by the Legislature in August of 1998. Governor Wilson planned to use it as a model for further agreements with other tribes. (Set a new standard. State needs a fair Indian gaming compact, San Diego Union-Tribune, Jan. 18, 1999, at B6.) Although a California superior court ruled that Governor Wilson "did not possess authority to enter into a compact without legislative action," the Legislature approved the Pala Compact as Senate Bill 287 ("SB 287"). (Marcy Lechner, Tribal-State Gaming Compacts. Tribal Casinos Initiative – Proposition 5, 1 Cal. Init. Rev. ¶ 36, (1998) <http://www.mcgeorge.edu/proposition_cover.htm>.)

Senate Bill 287 was signed into law by Governor Wilson in August of 1998. This bill specifically ratified eleven tribal-state gaming compacts in accordance with IGRA. Further, "[a]ny other compact entered into between the State of California and any other federally recognized Indian tribe which is executed after August 24, 1998, is hereby ratified if (1) the compact is identical in all material aspects to any of the compacts

ratified pursuant to this subdivision (a), and (2) the compact is not rejected by each house of the Legislature, two thirds of the membership thereof concurring." (Tribal-State Gaming Compacts Initiative, SB 287, stats. 1998, c. 409, to be codified at Cal. Gov't Code § 12012.5, subject to rejection of Proposition 29 by voters in March 2000.) It further designated Governor Wilson as the state officer, "responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes in the State of California. . . for the purpose of authorizing class III gaming." (Id.)

Even though signed into law, SB 287 has been put on hold pending the vote on Proposition 29 in the March 2000 election, which is a referendum on SB 287. (Indian Gaming, AB 1385, Assembly Committee on Governmental Organization Analysis, p. 4 (1999) (prepared by George Wiley).) In a referendum vote, a "yes" vote approves the law, and a "no" vote rejects the law. However, if Proposition 1A is approved, the eleven gaming compacts will become ineffective irrespective of the referendum vote on Proposition 29 since the compacts negotiated by Governor Davis would supersede the Pala Compacts. If Proposition 1A is not approved, the enforceability of the Pala Compacts will depend upon the outcome of the vote on Proposition 29 and upon a court's ruling of whether the gaming authorized by the Pala Compacts, "video lottery terminals," is a legal lottery or illegal gaming.

b. Proposition 5 (1998)

Even though eleven tribes signed the Pala Compact, "nearly all the tribes found the Pala compact so intrusive into traditional Indian sovereignty that it spurred them into action, resulting in the passage of Proposition 5." (Set a new standard. State needs a fair Indian gaming compact, San Diego Union-Tribune, Jan. 18, 1999, at B6.)

In the November 1998 General Election, voters approved by 63% Proposition 5, the "Tribal Government Gaming and Economic Self-Sufficiency Act of 1998," and gave "Indians a monopoly on high stakes gambling." (Fred Dickey, Inside Story. California's big gamble, L.A. Times Magazine, Jan. 9, 2000, at 14.) Although approved by voters in the November 1998 election, the California Supreme Court, in *Hotel Employees v. Davis*, ultimately decided that Proposition 5 was invalid because it was "inconsistent with the [anti-casino] provision of article IV, section 19, subdivision (e) of the California Constitution." (*Hotel Employees v. Davis*, (1999) 21 Cal. 4th 585, 589, 615.) Since Proposition 5 was a mere statutory measure, it was subject to the restrictions of the California Constitution.

Unlike Proposition 5, Proposition 1A is a constitutional amendment. Proposition 1A proposes to amend Article IV, Section 19 of the California Constitution to allow slot machines, lottery games, banking card games, and other games subject to the negotiation of compacts between the governor and the tribes, and ratified by the legislature. (Gambling on Tribal Lands Constitutional Amendment Initiative, California Voter Pamphlet, p. 4 (2000).) The Proposition also authorizes the operation of slot machines, lottery games, and banking card games on Indian tribal lands, subject to the compacts.

(Id.) As a constitutional amendment, Proposition 1A will eliminate the potential problems Proposition 5 faced, giving Proposition 1A a better chance of surviving future judicial scrutiny.

2. Tribal- State Gaming Compact and Proposition 1A

a. Proposition 1A (Senate Constitutional Amendment 11)

Proposition 1A, if approved by voters, will amend the California Constitution to allow slot machines, lottery games, and banking card games on Indian tribal lands, subject to compacts negotiated between the governor and the tribes and ratified by the legislature. (Id.) Proposition 1A amends Article IV, section 19 of the State Constitution by adding the following subsection:

(f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.

(Id. at 90.)

b. Tribal-State Gaming Compact (1999)

In September 1999, Governor Davis and Indian tribe representatives signed the Tribal-State Gaming Compact ("the Compact"). The Compact outlines reasons why the State of California entered into this agreement:

[O]ut of respect for the sovereignty of the Tribe; in recognition of the historical fact that Indian gaming has become the single largest revenue-producing activity for Indian tribes in the United States; out of a desire to terminate pending 'bad faith' litigation between the Tribe and the State; to initiate a new era of tribal-state cooperation in areas of mutual concern; out of a respect for the sentiment of the voters of California who, in approving Proposition 5, expressed their belief that the forms of gaming authorized herein should be allowed; and in anticipation of voter approval of SCA 11 as passed by the California Legislature.

(Tribal-State Gaming Compact, Preamble ¶ 6 (last modified Dec. 13, 1999) (visited Jan. 28, 2000) <<http://www.governor.ca.gov/briefing/pressrelease/091099alt.html>>.)

The Compact states that it will not become effective until it is ratified by statute in accordance with the law and SCA 11 is approved by voters in the March 2000 general election. (Id. at § 11.1(c).) On the last day of the 1999 session, SCA 11 was overwhelmingly approved by the Legislature. Similarly, Assembly Bill 1385 ("AB 1385") was passed by the Legislature and approved by the Governor to specifically ratify the Tribal-State Gaming Compact between California and 57 tribes. (Indian Tribes:

Tribal-State Gaming Compacts, AB 1385, stats. 1999 c. 874, to be codified at Cal. Gov't Code §§ 12012.5, 12012.75, 12012.85.) With the legislative approval of SCA 11 and the legislative ratification of the Compact through AB 1385, all that remains is the voter approval of SCA 11 (embodied in Proposition 1A) at the March 2000 general election. (James P. Sweeney, Tribes, Governor Sign Compacts, Legislature Ratified Gaming Agreements: Voters to Decide Constitutional Amendment, San Diego Union-Tribune, Sept. 11, 1999, at A1.)

Because the Compact will become effective if Proposition 1A is approved by voters, it is important to outline some of the features of the Compact.

Tribal Gaming Agency: This is the regulatory agency set up primarily to "carry out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance (Tribal-State Gaming Compact, § 2.20 (last modified Dec. 13, 1999) (visited Jan. 28, 2000) <<http://www.governor.ca.gov/t/briefing/pressrelease/091099alt.html>>.) This agency is responsible for investigating gaming license applicants setting fees and issuing licenses, for inspecting safety features of gambling facilities, for enforcing terms of the Compact through fines and sanctions, and all other details involved with the operation of gaming. (Id. at §§ 6.4.2, 6.4.7, 6.5, 7.1.)

Class III gaming: The Compact authorizes tribes to operate class III gaming activities including slot machines and percentage card games. (Id. at § 4.1)

Gaming facilities: The Compact authorizes each tribe to operate no more than two gaming facilities and only on Indian lands. (Id. at § 4.2) Gaming facilities must meet certain building and safety codes and cannot be constructed or maintained in a manner that "endangers the health or safety of occupants." (Id. at § 6.4.2.)

Revenue Sharing Trust Fund: The Compact designates federally recognized tribes operating less than 350 gaming devices as "Non-Compact Tribes" making them eligible to receive \$1.1 million per year from the "Revenue Sharing Trust Fund." Tribes with more than 350 gaming devices, "Compact Tribes," must make contributions to this Fund based on the number of terminals they have and their percentage of slot machine net earnings. If for some reason there is not enough money in the Trust Fund to pay each Non-Compact Tribe \$1.1 million, then all available monies will be divided equally among the Non-Compact Tribes. Any money in excess of the \$1.1 million per Non-Compact Tribe will be disbursed in the following years. (Id. at §§ 4.3.2, 4.3.2.1.)

Limited number of Licensed gaming devices: Compact tribes may license up to 2000 devices by paying certain designated amounts into the Trust Fund. The more licenses obtained the higher per device amount must be paid to the Trust Fund on a quarterly basis. (Id. at § 4.2.2.2.)

Dispute resolution: The Compact requires the State and the Tribe to use their "best efforts" to resolve disputes under the Compact through negotiations whenever possible. (Id. at § 9.1.) In the event that disagreements cannot be resolved through arbitration,

either party may go to federal or state court. (Id. at § 9.1.) Furthermore, if a dispute must be resolved in court, both parties agree to waive any immunity they have and consent to the jurisdiction of the court. (Id. at § 9.4.)

Public and Workplace health, Safety, and Liability: The Compact requires tribes to comply with public and workplace health and safety standards that are no less stringent than federal and state standards. Tribes must also carry public liability insurance for patron claims. (Id. at § 10.2.)

Off-Reservation Environmental Impacts: The Compact requires the Tribe to adopt an ordinance providing for environmental impact reports concerning potential off-Reservation environmental impacts for all projects. Further, the Tribe must make a "good faith effort" to comply with the policies and purposes of the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA"). (Id. at § 10.8.1.)

Duration and Amendments: Finally, the Compact specifies that it will remain effective until December 31, 2020 but its terms and conditions can be amended at any time if both parties mutually agree in writing. (Id. at §§ 11.2.1, 12.1.)

Conclusion

Two obstacles currently prevent Indian tribes from conducting Class III gaming activities on their tribal lands. First, IGRA allows Indian tribes to regulate gambling activity on tribal lands only if the activity is conducted within a State that doesn't prohibit this type of activity. Right now the California Constitution specifically prohibits Class III gaming activities. Second, Indian tribes can only operate Class III gaming if they have entered into a compact agreement with California that authorized this level of gaming.

Proposition 1A not only will amend the Constitution by making Class III gaming legal on tribal lands, but it will make effective the Tribal-State Gaming Compact authorizing Class III gaming. As a result, all Indian tribes that have or will sign the Compact with California will be allowed to conduct Class III gaming on Indian lands, including slot machines and percentage card games.