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April 3, 2003

Via Facsimile and Mail

David Rosenberg
Director of Intergovernmental Relations/Community Relations
Office of Governor Gray Davis
State Capitol
Sacramento, CA 95814

**CONFIDENTIAL AND PRIVILEGED
ATTORNEY-CLIENT COMMUNICATION**

RE: Indian Gaming Special Distribution Fund

Dear Mr. Rosenberg:

You asked for information regarding whether Executive Order D-66-03 is a valid exercise of the Governor's authority under the California Constitution and the Government Code. We have concluded that the Executive Order is a valid exercise of the Governor's authority and that in the future the Tribes should send all checks and quarterly reports to the Gambling Control Commission as required by the Executive Order.

BACKGROUND

1. **Executive Order D-66-03**

On January 28, 2003, Governor Davis issued Executive Order D-66-03. The purpose of the Executive Order is to designate the California Gambling Control Commission (Commission) as the State entity responsible for collecting and accounting for all monies deposited into the Indian Gaming Special Distribution Fund (Distribution Fund) and for collecting and analyzing the quarterly reports issued by the Tribes as required under the Tribal-State Gaming Compacts (Compacts) and Government Code section 12012.85. To that end, the Executive Order explains that the Commission currently performs other administrative and enforcement duties under the Compacts and has been trained by experts in the review, collection and administration of the Distribution Fund and the quarterly reports. The Executive Order provides in pertinent part:

IT IS ORDERED that the California Gambling Control

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Commission is authorized to and shall collect and account for all contributions under Section 5.1 of the Tribal-State Gaming Compacts for deposit in the Indian Gaming Special Distribution Fund;

IT IS FURTHER ORDERED that the California Gambling Control Commission is authorized to and shall collect and analyze the certified quarterly reports submitted by the Tribes;

IT IS FURTHER ORDERED that the State of California's rights to enforce the provisions of Sections 5.1 (a) and (b) and 5.3 (b), (c), (d), and (e) of the Tribal-State Gaming Compacts are hereby delegated to the California Gambling Control Commission.

2. Relevant Provisions of the Compacts

The Compacts are entered into by federally-recognized sovereign Indian Tribes and the State of California, pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"). (P.L. 100-497, codified at 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) The Compacts define the "State" to mean the State of California or an authorized official or agency thereof. (Compacts, § 2.17.) The purpose behind IGRA and the Compacts is to provide a statutory basis for the operation of Class III gaming by Indian Tribes as a means of promoting Tribal economic development, self-sufficiency and strong Tribal governments.

In order to further the intent of IGRA and the Compacts, the Compacts provide for the creation of two funds, the Revenue Sharing Trust Fund and the Distribution Fund. The Revenue Sharing Trust Fund provides that "each Non-Compact Tribe in the State shall receive the sum of \$1.1 million per year. In the event there are insufficient monies in the Revenue Sharing Trust Fund to pay \$1.1 million per year to each Non-Compact Tribe, any additional monies in the Fund shall be distributed to Non-Compact Tribes in equal shares." (Compact, § 4.3.2.1, subdivision (a).) Section 4.3.2.1, subdivision (b) of the Compact states that the Commission shall serve as the trustee of the Revenue Sharing Trust Fund and shall have no discretion with respect to the use or disbursement of the trust funds.

The Distribution Fund was created by the Legislature for the receipt, deposit and distribution of monies collected under section 5.0 of the Compacts. In order to determine the amount of collectable monies from the Tribes, the Compacts calculate revenues based on the percent of average gaming. The gaming revenue must be deposited into the Distribution Fund at the conclusion of the first calendar quarter following the second anniversary date of the effective

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date of the Compacts. (Compact, § 5.1, subdivision (a).) The monies are due no later than the thirtieth day following the end of each calendar quarter. If the contributions are not made in the time periods indicated, interest on the amount due accrues from the date the quarterly contribution was due until the date the quarterly contribution is deposited into the Distribution Fund. (Compact, § 5.3, subdivisions (a) & (b).) At the time the contributions are deposited into the Distribution Fund, each contributing Tribe must submit to the State a Quarterly Contribution Report. (Compact, § 5.3, subdivision (c).)

3. Relevant Statutory Provisions

The Revenue Sharing Trust Fund and the Distribution Fund were legislatively created by Government Code sections 12012.75 and 12012.85, respectively. Section 12012.75 provides:

There is hereby created in the State Treasury a special fund called the "Indian Gaming Revenue Sharing Trust Fund" for the receipt and deposit of moneys derived from gaming device license fees that are paid into the fund pursuant to the terms of tribal-state gaming compacts for the purpose of making distributions to noncompact tribes. Moneys in the Indian Gaming Revenue Sharing Trust Fund shall be available to the California Gambling Control Commission, upon appropriation by the Legislature, for the purpose of making distributions to noncompact tribes, in accordance with distribution plans specified in tribal-state gaming compacts.

Government Code section 12012.85 provides:

There is hereby created in the State Treasury a fund called the "Indian Gaming Special Distribution Fund" for the receipt and deposit of moneys received by the state from Indian tribes pursuant to the terms of tribal-state gaming compacts. These moneys shall be available for appropriation by the Legislature for the following purposes:

- (a) Grants, including any administrative costs, for programs designed to address gambling addiction.
- (b) Grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government

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gaming.

(c) Compensation for regulatory costs incurred by the State Gaming Agency and the Department of Justice in connection with the implementation and administration of tribal-state gaming compacts.

(d) Disbursements for the purpose of implementing the terms of tribal labor relations ordinances promulgated in accordance with the terms of tribal-state gaming compacts ratified pursuant to Chapter 874 of the Statutes of 1999. No more than 10 percent of the funds appropriated in the Budget Act of 2000 for implementation of tribal labor relations ordinances promulgated in accordance with those compacts shall be expended in the selection of the Tribal Labor Panel. The Department of Personnel Administration shall consult with and seek input from the parties prior to any expenditure for purposes of selecting the Tribal Labor Panel. Other than the cost of selecting the Tribal Labor Panel, there shall be no further disbursements until the Tribal Labor Panel, which is selected by mutual agreement of the parties, is in place.

(e) Any other purpose specified by law.

ANALYSIS

1. The Executive Order Is A Valid Exercise Of The Governor's Authority.

The executive power of this State is vested in the Governor, and the Governor is responsible for ensuring that federal and state laws are faithfully executed. (Cal. Const. art. V, § 1.) The Governor also supervises the official conduct of all executive and ministerial officers. (Gov. Code §12010.) An executive order, therefore, is a formal written directive of the Governor that by interpretation, or by specification of detail, directs and guides subordinate officers in the enforcement of a particular law. (63 Ops.Cal.Atty.Gen. 583 (1980).)

Despite these broad powers, the Governor may not invade the province of the Legislature. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const. Art. III, § 3.) This separation of powers doctrine prohibits one branch of government from assuming for itself the core functions of another branch. (*Carmel*

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Valley Fire Protection District v. The State of California (2001) 25 Cal.4th 287, 297; see also *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 596; *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53; *Loving v. United States* (1996) 517 U.S. 748, 757.)

Government Code section 12012.85¹ creates the Distribution Fund, which is where the moneys collected from the Tribes pursuant to the Compacts are received and deposited. Section 12012.85 does not expressly exclude or include the Commission in this process. It merely designates the fund to accept these moneys. Similarly, section 5 of the Compacts also does not designate the specific State agency that will administer the Distribution Fund. In contrast, the Revenue Sharing Trust Fund that was created by section 12012.75 and sections 4.3.2 and 4.3.2.1 of the Compacts both designate the Commission as the trustee of the Revenue Sharing Trust Fund.

In the present case, the Executive Order does not appear to encroach upon the authority of the Legislature, because the Executive Order does not appear to change or modify existing legislation. This view is based on the rules of statutory interpretation that address conflicting but reasonable interpretations of a statutory scheme. In these situations, "the court looks to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part" in order to "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Wilcox v. Birnwhistle* (1999) 21 Cal.4th 973, 977-978.)

Application of these rules suggests that the Executive Order does not amend the effect of, or qualify the operation of, existing legislation regarding the Compacts. These rules also suggest that the Executive Order does not change or modify the Compacts themselves. The Executive Order simply appoints the Commission as the State agency in charge of receiving and depositing the checks. The Commission has no substantive authority to appropriate the funds.

Moreover, section 12012.75 (the legislation creating the Revenue Sharing Trust Fund) and section 12012.85 (the legislation creating the Distribution Fund) appear to be too disparate to warrant drawing an inference that the Legislature intended to exclude the Commission from administering the Distribution Funds. The Revenue Sharing Trust Fund is a trust fund. Trust funds must identify a trustee to be valid. Thus, in order for the Revenue Sharing Trust Fund to be valid, a trustee had to be appointed. This is not the case for the Distribution Fund. Indeed, to

¹ While section 12012.85 does not mention the quarterly reports, it does state that the Distribution Fund shall be administered pursuant to the Compacts. The Compacts require quarterly reports.

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designate a trustee for the Distribution Fund would be inappropriate as there is no trust to administer.

The purposes of the two funds are also entirely different. The Revenue Sharing Trust Fund was created so that "each Non-Compact Tribe in the State shall receive the sum of \$1.1 million per year. In the event there are insufficient monies in the Revenue Sharing Trust Fund to pay \$1.1 million per year to each Non-Compact Tribe, any additional monies in the Fund shall be distributed to Non-Compact Tribes in equal shares." (Compact, § 4.3.2.1, subdivision (a).) In contrast, the Distribution Fund was created to absorb some of the administrative costs of gaming from the gaming revenues.

Based on the foregoing, it appears that the Executive Order does not amend or change existing legislation and thereby does not encroach upon the authority of the Legislature to create and amend statutory law. Therefore, it appears that Executive Order D-66-03 is a valid exercise of the Governor's authority and that in the future, the Tribes should send all checks and quarterly reports to the Commission as required by the Executive Order.

Sincerely,



LOUIS R. MAURO,
Senior Assistant Attorney General

For BILL LOCKYER
Attorney General