IMPACT OF THE PROPOSED CONSTITUTIONAL AMENDMENT ON THE OPENING OF NEW INDIAN CASINOS including in BIRMINGHAM, HUNTSVILLE AND BALDWIN COUNTY[1]

I. INTRODUCTION: HOW THE PROPOSED CONSTITUTIONAL AMENDMENT ACTUALLY DOES MAKE POSSIBLE VEGAS-STYLE, CLASS III GAMING

Until now, no compact has been negotiated for Class III gaming – despite the long-standing legality of Class III pari-mutuel dog/horse track betting in some counties in Alabama. There have been three reasons for this:

1. Historically, the only form of Class III gaming in Alabama has been pari-mutuel dog and horse betting in a few counties. The political jump from that to full-on, Vegas style casinos was too much for elected officials to ask the public to accept. (Plus, under some federal court decisions, any negotiation would have been limited to the specific type of Class III gambling permitted by the State. The Indians were not interested in opening dog/horse tracks.)

2. & 3. Section 65 of the Alabama Constitution arguably has tied any Alabama Governor's hands in exercising both what is know as the "Concurring Power" of State Governors under federal Indian law (see Addendum A, below) and, in turn, the "Compacting Power" of a State under Federal law (see Addendum B, below).

The proposed constitutional amendment partially closes the gap between what is legal in Alabama and full, Vegas-style, Class III casinos, making the jump to a compact for full-on Vegas-style gambling more defensible to the public.

Moreover, the proposed CA effectively eliminates any restraint on the Governor's exercise of both the Concurring Power and the Compacting Power. In fact, the new Section 65 affirmatively – expressly – obligates the Governor of Alabama to exercise the Compacting Power to negotiate to allow Indians to have full, Class III casinos (including "any and all activities allowable under [the Indian Gaming Regulatory Act]"). And by necessary implication, the Governor will be obligated to "concur" in that which he or she has been obligated to negotiate.

---

[1]Prepared by Glenn Murdock, retired Alabama Supreme Court Justice, for the Alabama Policy Institute.

II. THE ILLUSORY PROTECTION FOR BIRMINGHAM, HUNTSVILLE AND BALDWIN COUNTY

The proposed CA suggests protection for Birmingham, Huntsville and Baldwin County because it limits the compact to lands held in trust by the Secretary of the Interior for an Indian tribe. This is an illusory protection.

Approval of any application for new lands to be taken into trust in these areas, especially land like the OWA Park in Baldwin County already owned (but not only that land), is a virtual certainty. Because of the lax criteria used by the Secretary of Interior, approval of a fee-to-trust application has been described as a "rubber-stamping" process.

A. THE LAX CRITERIA UNDER FEDERAL REGULATIONS

25 C.F.R. § 151.3
What is the Secretary's land acquisition policy?

(a) It is the Secretary's policy to acquire land in trust status through direct acquisition or transfer for individual Indians and Tribes to strengthen self-determination and sovereignty, ensure that every Tribe has protected homelands where its citizens can maintain their Tribal existence and way of life, and consolidate land ownership to strengthen Tribal governance over reservation lands and reduce checkerboarding. The Secretary retains discretion whether to acquire land in trust status where discretion is granted under Federal law. Land not held in trust or restricted status may only be acquired for an individual Indian or a Tribe in trust status when the acquisition is authorized by Federal law. No acquisition of land in trust status under these regulations, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(b) Subject to the provisions of Federal law authorizing trust land acquisitions, **the Secretary may acquire land for a Tribe in trust status**:
(1) When the land is located within the exterior boundaries of the Tribe's reservation or contiguous thereto;
(2) **When the Tribe already owns an interest in the land**; or
(3) When **the Secretary determines** that the acquisition of the land will **further Tribal interests** by establishing a Tribal land base or protecting Tribal homelands, protecting sacred sites or cultural resources and practices, establishing or maintaining conservation or environmental mitigation areas, consolidating land

ownership, reducing checkerboarding, acquiring land lost through allotment, protecting treaty or subsistence rights, or **facilitating Tribal self-determination, economic development**, Indian housing, **or for other reasons the Secretary determines will support Tribal welfare**.

25 C.F.R. § 151.3 (emphasis added).

B. DENIALS OF LAND-INTO-TRUST APPLICATIONS ARE EXCEEDINGLY RARE[2]

EXTREME RUBBER-STAMPING: THE FEE-TO-TRUST PROCESS OF THE INDIAN REORGANIZATION ACT OF 1934, 40 PEPPERDINE LAW REVIEW 251 (2012) (emphasis added):

> Under Section 151, land can be taken into trust for a tribe if the land is within the exterior boundaries of the reservation or adjacent to it, if the tribe already owns an interest in the land, or if the acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing."
> . . . .
>
> B. Empirical Results
>
> 1. General Observations
>
> Based on review of the entire data set, several initial observations are apparent. Most significantly, **100% of the proposed fee-to-trust acquisitions submitted to the Pacific Region B[ureau of] I[ndian] A[ffairs] from 2001 through 2011 were granted**. Additionally, across **all 111 decisions**, the Pacific Region BIA did not conclude that a single factor weighed against acceptance of the land into trust. This resulted in a total of **10,538.03 acres being accepted into trust** for individual Indians and tribes in California over that period. Overall, the average request was for 94.94 acres and the median request was approximately 13.39 acres. The smallest request was for 0.19 acres and the largest for 1,160.00 acres.

Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepperdine Law Review. 251, 265, 278 (2012).

---

[2]One long-time legal observer notes that the only rejection by the Secretary of the Interior of a fee-to-trust application of which he is aware in recent years occurred because the targeted land was found to be "environmentally sensitive" "wetlands."

ADDENDUM A

The "Concurring Power"

25 U.S.C.A. § 2719: Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary
Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--
(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
(2) the Indian tribe has no reservation on October 17, 1988, and--
(A) such lands are located in Oklahoma and--
(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or
(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions
(1) **Subsection (a) [restricting gambling on newly-acquired lands] will not apply when--**
(A) **the Secretary**, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, **determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe** and its members, and would not be detrimental to the surrounding community, **but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination;**

25 U.S.C.A. § 2719 (emphasis added).

ADDENDUM B

The "Compacting Power"

The Indian Gaming Regulatory Act, section 2710:

> (d)(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

25 U.S.C.A. § 2710(d)(3)(A).