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

(Revised April 26, 2024)

## I. INTRODUCTION: HOW THE PROPOSED CONSTITUTIONAL AMENDMENT ACTUALLY WILL BE RESPONSIBLE FOR CREATING VEGAS-STYLE, CLASS III GAMING IN ALABAMA FOR THE FIRST TIME

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

1. The Indian Gaming Regulatory Act ("IGRA"), specifically 25 U.S.C. 2719 (see Addendum A), generally prohibits gambling on Indian lands taken into trust by the Secretary of the Interior after August 17, 1988. Of the three existing lands held in trust by the Secretary for the tribe, only Atmore was taken into trust before that date.

The only potential exception for the Poarch tribe's other two in-trust lands (Montgomery and Wetumpka, both taken into trust after 1988), has been and remains a provision of IGRA that would require a concurrence by the governor of Alabama (the "Concurring Power") in a Secretarial determination that gambling activities on such lands should be allowed. Absent a favorable exercise by an Alabama governor of this federally-granted Concurring Power, the Poarch Band

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*Editorial Note: After this paper was initially prepared, the Alabama Senate added language to the proposed constitutional amendment in an attempt to prevent a governor from concurring to allow gambling on Indian lands "outside lands held in trust . . . as of February 6, 2024." The legal efficacy of this new language is now addressed in the introductory portion of Part II and in newly added Part II.C, below. Other, minor, editorial changes also have been made.

of Creek Indians could not seek a compact for Class III gambling for any location other than Atmore,

2. Moreover, the only form of Class III gaming legally permitted in Alabama has been parimutuel dog and horse betting in a few counties. The political jump from this to full-on, Vegas style casinos has been too much for elected officials to ask the public to accept. (Polling indicates that casinos still are not favored by the general public.) Moreover, under some federal appellate 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 simply opening a dog or horse track in Atmore.

3. For well over a century, the language in Section 65 of the Alabama Constitution has stated a strong public policy against gambling in Alabama – broadly prohibiting all games of chance. (Only narrow exceptions for parimutuel betting in a few counties and traditional bingo for charitable purposes in several others have been added by local constitutional amendments.) This public policy arguably has tied the hands of any Alabama governor, at least politically, in exercising the aforesaid Concurring Power and has deterred any exercise of the so-called "Compacting Power" of a State under IGRA (see 25 U.S.C. 2710(d), Addendum B).

The proposed Constitutional Amendment, HB 151 would eliminate section 65 as it now exists. It would thus remove from Alabama law the long-standing public policy against gambling generally. In fact, new section 65 would establish the opposite public policy, i.e., one in favor of gambling, including a lottery, slot-machine casinos at multiple sites throughout the State and at least three full-fledged casinos on Indian lands. In effect, it would eliminate any political or legal restraint on the Governor's exercise of both the Concurring Power and the Compacting Power.

In fact, the proposed Section 65 will expressly require the Governor to exercise the Compacting Power to negotiate a compact for full-fledged, Class III casinos featuring "any and all activities allowable under [the Indian Gaming Regulatory Act]." And while the proposed amendment adds that the Governor "may execute" the compact resulting from such mandatory negotiations, this latter clause is merely permissive, designating the Governor as the "signing authority" on behalf of the State. This in light of two decades of uncertainty as to whether an Alabama governor could act alone to sign a compact in light of existing section 65. [2] Any suggestion that this "may execute" language gives the

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[2] See generally, e.g., *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) (recognizing a legal issue as to "whether the person or entity signing the compact for the state in fact had the authority to do so").

Governor some sort of independent discretion to refuse to execute that which she is otherwise mandated to negotiate would be self-contradictory and violative of established State law rules of statutory construction. And for that matter, such an approach would be prevented by the overlay of federal law onto this new State law obligation to negotiate, specifically 25 U.S.C. 2710's requirement that any such negotiation be conducted in "good faith," with regulatory provisions for the Secretary of Interior to take over the negotiations if they are found not to have been conducted in "good faith." See 25 U.S.C. 2710(d)(7)(B).

## II. NEW SECTION 65 DOES NOT GUARANTEE PROTECTION FOR DOWNTOWN 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 as of February 6, 2024. There is no guarantee this provision will be enforceable.**

**The Poarch Tribe already owns the OWA Park land in Baldwin County and, reportedly, land in downtown Huntsville. Nothing prevents it from acquiring a parcel of land in downtown Birmingham. Federal approval for such lands to be taken into trust would be a virtual certainty. As discussed in Parts A and B, below, the lax criteria used by the Secretary of Interior make the approval of so-called "fee-to-trust" applications a "rubber-stamping" process.**

**Once such land is taken into trust, it could readily become gambling-eligible under federal law that empowers the Secretary of the Interior to authorize gambling on such land, and empowers the Governor to agree or disagree with that determination. See Part C, below. At that point, the obligation to negotiate a compact in "good faith" as to the additional locations would be triggered under federal law.**

### A. THE LAX TRUST CRITERIA APPLIED BY THE SECRETARY OF THE INTERIOR 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[3]

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

[3] 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."

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."
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> B. Empirical Results
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> 1. General Observations
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> 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).

## C. PROPOSED LANGUAGE SEEKING TO PREVENT CASINOS ON INDIAN LAND TAKEN INTO TRUST AFTER FEBRUARY 6, 2024, IS NO ASSURANCE AGAINST VEGAS-STYLE CASINOS IN DOWNTOWN BIRMINGHAM, HUNTSVILLE AND BALDWIN COUNTY

On March 7, the Alabama Senate added to proposed section 65.04 the phrase "as of February 6, 2024" following the language purportedly prohibiting the Governor from "granting authority" for gambling activities "outside lands held in trust . . . ." The addition of this new phrase does not provide the protection against full, Vegas-style casinos in downtown Birmingham, Huntsville or Baldwin County that is assumed. It <u>does</u> provide an argument against such casinos in any future federal court litigation. But the Tribe could well argue successfully to a federal judge – including to current United States Supreme Court Justices who have proven in recent years to be very pro-Indian and pro-Indian-gaming – that federal law governs the matter and that the State's attempted absolute prohibition is ineffective.

Specifically, the determination as to whether land taken into trust after 1988 (including land taken into trust after February 6, 2024) will be treated as gambling-eligible is controlled by the scheme laid out in 25 U.S.C. 2719(b). See Addendum A. That scheme delegates authority to the Secretary of Interior to determine whether such activity would be in the "best interest of the Indian tribe" and not be "detrimental to the

surrounding community." The tribe will argue that a governor is given discretion under federal law to agree or disagree with these determinations, but that a decision of a governor to concur in this determination by the Secretary is not in itself the "granting [of] authority" to conduct gambling. In addition, the federal scheme is focused on "the best interests of the tribe," as well as the effect on the surrounding community. The argument will be made that an absolute bar on the exercise of discretion by the Governor to consider these criteria will thwart the federal scheme.

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) <u>Class III gaming activities; authorization; revocation; Tribal-State compact</u>

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are–
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> . . .
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> (B) located in a State that permits **such gaming** for any purpose by any person, organization, or entity, and
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> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.
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> . . . .
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> (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) (emphasis added).