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INTRODUCTION

Indian-sponsored gambling, from bingo parlors to Las Vegas-style casinos, exploded onto tribal lands during the 1980's. Essentially free from state regulation,[1] Indian gaming halls bring millions of dollars a year to scores of once economically depressed Indian communities.[2] Now, with the success of on-reservation gaming, tribes are seeking to acquire new land to open off-reservation gambling establishments in cities as diverse as Detroit, Michigan, and Salem, Oregon. State officials, who in the mid-1980's unsuccessfully fought to extend state gambling laws over reservations, vigorously oppose the spread of off-reservation gaming. They question the ability of tribes, acting with the Federal Government, to remove land in the heart of cities from state jurisdiction, convert it into Indian land, and open Indian-regulated gaming on

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1. State bingo regulations and other civil or regulatory gambling laws do not, absent tribal consent, apply to Indian lands. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 1020 (1982); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981). Additionally, under a provision of the Indian Gambling Regulatory Act of 1988, Congress explicitly provided that tribes who wish to offer activities such as parimutuel dog and horse racing, casino games, and jai alai must in good faith negotiate a tribal-state compact that will govern the operation of such gaming on Indian lands. 25 U.S.C. § 2710(d) (1988).

2. By 1991, Indian tribes operated about 150 gambling halls, generating $1.3 billion in revenue and $400 million in net profit in that year alone. *Indians Want to Block States' Role in Reservation Casinos*, BOSTON GLOBE, July 21, 1992, Nation Section, at 13 (quoting the National Indian Gaming Commission) [hereinafter *Reservation Casinos*]. A March, 1992, study by the New York investment banking firm of Wertheim Schroder found that at least 27 Las Vegas-style casinos were run by tribes in nine states, with more than 50 applications pending before the Federal Government. Janan Hanna, *Suburb's Casino Plan Still Quite a Gamble*, CHI. TRIB. (Lake ed.), Nov. 15, 1992, § 2, at 3.

In constant 1990 dollars, economic development spending by the Bureau of Indian Affairs ("BIA") fell from $144 million in 1977 to $36 million in 1990, a drop of 75%. 138 CONG. REC. S3426 (daily ed. Mar. 12, 1992) (remarks by Arizona Sen. John McCain, quoting statistics from the National Indian Policy Center).

> From 40 to 45 percent of reservation Indians and 22 percent of off-reservation Indians live below the poverty line. In 1985, the Bureau of Indian Affairs reported a 39 percent unemployment rate among its population. Fourteen percent of Indian reservation households, three times the rate for the United States as a whole, had an annual income under $2,500, and 25 percent of Indian reservation households are on food stamps.

Id. at S3425.

Only 40% of the working age population on Indian reservations are employed more than 40 weeks of the year, and most of those who work earn less than $7000 a year. *Id.* (quoting statistics from the National Indian Policy Center).

it—thereby preventing the states from exerting control over what they see as an unsavory activity with a detrimental impact on state residents.

The Indian Gaming Regulatory Act of 1988 ("IGRA"),[3] comprehensive federal legislation that governs the operation of Indian gambling establishments, addresses this concern. Section 2719 of the IGRA prohibits gaming on lands acquired in trust for Indian tribes (and thus exempt from state gambling laws) after October 17, 1988—with several exceptions. The major exception allows the Secretary of the Interior to lift a prohibition on gaming on newly acquired trust lands if:

> [A]fter consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, [the Secretary] 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* . . . .[4]

The practical effects of this language, however, are by no means clear. Some interested parties, such as the Western Governors Association, have criticized this language as vague and sought clarifying amendments to the Act.[5] Others, such as the State of Oregon and the Confederated Tribes of the Siletz, brought lawsuits to determine the meaning of the section.[6] The Department of the Interior, which decides whether to take land into trust for gaming, has vacillated on the legislation's requirements. Until recently, the Interior Department interpreted this section to allow the state governor to voice concerns about off-reservation Indian gaming, which the Department would consider in determining whether to allow gambling on newly acquired trust lands.[7] In December, 1992, however, the Department reversed itself and announced a policy that essentially makes the governor's veto dispositive in these gaming decisions.[8]

This new policy highlights the ongoing battle for power between states and Indian tribes. Since 1831, when the Cherokee Nation challenged Georgia's attempts to abolish the Cherokee government and distribute Indian land over five counties, Indians have fought steadily, but not always successfully, to prevent state governments from exercising jurisdiction over tribes.[9] In fact,

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3. 25 U.S.C. §§ 2701-2721 (1988).

4. *Id.* § 2719(b)(1)(A) (emphasis added).

5. Pat Flannery, *Governors Raise Gambling Ante; New Deal Asked on Tribal Gaming*, PHOENIX GAZETTE (Final ed.), June 23, 1992, at A1 (quoting Ariz. Gov. Fife Symington).

6. *Oregon Files Suit to Stop Siletz Tribes' Casino Plan*, SEATTLE TIMES, Nov. 26, 1992, Northwest Section, at E1, WESTLAW, *available in* DIALOG, file no. 707 [hereinafter *Oregon Files Suit*]; Carmel Finley, *Siletz Tribes File Suit to Save Casino Plan*, OREGONIAN, Dec. 23, 1992, Metro/Northwest Section, at E6.

7. Hanna, *supra* note 2, at 3.

8. *New Policy Gives Engler Veto Power Over Indian-Run Casinos*, UPI Newswire, Dec. 23, 1992, *available in* LEXIS, Nexis Library, Wires File.

9. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). In this highly controversial case, an outgrowth of Georgia's attempts to assert jurisdiction over the Cherokee Nation (and incidentally its gold-rich lands), the Cherokee Nation filed suit to test the state's jurisdiction over crimes occurring on

states have regularly disregarded Indian interests when exercising or attempting to exercise jurisdiction.[10] The Interior Department's new policy of allowing a state governor to unilaterally veto tribal plans for gaming on newly acquired off-reservation lands presents an impermissible encroachment of state regulation onto the lands of a separate sovereign body, and an impermissible intrusion into tribal affairs.

As the issue is just beginning to draw attention, few cases or scholarly articles address § 2719, or otherwise discuss the state's ability, or lack thereof, to exercise control over tribal use of newly acquired lands. This Note discusses two possible attacks on the Interior Department policy granting a state governor absolute veto power over gaming facilities on newly acquired sovereign Indian trust lands.[11] Part I discusses the various interests of the states and tribes involved. Part II details congressional action on this issue. Part III analyzes § 2719 in accordance with the canons of statutory construction of American Indian law, determines that the Interior Department's interpretation of the statute is erroneous because it disregards the longstanding methods used to interpret federal actions concerning Indians, and presents an alternative interpretation. Part IV argues that the Interior Department's interpretation poses a constitutional problem and thus should be invalidated under the commonly recognized principle of statutory interpretation that courts should prefer a meaning which satisfies constitutional scrutiny.

I. GAMBLING INTERESTS: INDIAN TRIBES AND STATES

High-stakes Indian bingo parlors opened in Florida in the late 1970's and quickly spread to one-third of the 330 reservations in the United States.[12] Since then, Indian gaming—the "white man's firewater"[13]—has been a financial windfall to more than 150 tribes across the United States during the 1980's. Exempt from state gambling regulations, Indian bingo halls can offer higher pots and longer hours than state-approved bingo parlors.[14] More than

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tribal lands. Chief Justice John Marshall avoided deciding the touchy question of the extent of the state's jurisdiction by first focusing on whether the Cherokee Nation had standing to sue in federal court. Looking to an aberrational and no longer valid case from the early 1800's, Marshall ruled that the Cherokee Nation had no standing to bring the case. In so holding, however, Marshall created a special legal status for Indian tribes. *See* text accompanying *infra* notes 61-63.

10. *See infra* note 99.

11. Indian trust lands are off-reservation lands acquired by the Federal Government under 25 U.S.C. § 465 (1988) and held in trust for the benefit of Indian tribes. Trust lands are usually considered Indian country and are governed primarily by federal and tribal law. *See infra* note 70.

12. Chuck Haga, *Indians Snare Chunk of Jackpot; Tribes See Casinos as Chance to Reverse Economic Stagnation*, STAR TRIB. (Minneapolis), Sept. 24, 1990, News Section, at 1A, WESTLAW, *availabe in* DIALOG, File no. 724.

13. David Fritze, *Minnesota Tribes Roll Dice, Win With Gambling*, ARIZ. REPUBLIC, May 24, 1992, at A1, WESTLAW, *available in* DIALOG, File No. 492.

14. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 1020 (1982); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

$720 million was bet on Indian lands in 1991;[15] gamblers from nearby states take advantage of package-fare deals and fly or ride chartered buses to the reservations.[16]

This windfall income is helping Indian tribes become self-sufficient through tribal economic development, a goal the Reagan administration announced in 1983.[17] Gambling profits, which reached $400 million in 1991,[18] have made up for cuts in federal funding during the last decade[19] and paid for health, education, and community development programs. For example, tribes in Minnesota have withdrawn from federal assistance programs, using income from casino-related jobs to pave roads, build water and sewer projects, and community centers, and fund chemical dependency programs, college educations, and free medical care. Some tribes distribute gambling profits to their members in per capita installments. The Shakopee Mdewakanton Sioux Community guarantees tribal members a free college education and trust fund payments of up to $140,000, beginning at age eighteen.[20] Contrast this relative prosperity with the situation ten years ago, when seventy percent of the people were on welfare and living in trailers with two or three families to a home.[21]

Indian gaming on reservations is also a boon to nearby economically depressed cities. In Turtle Lake, Wisconsin, when the St. Croix tribes opened a casino on reservation lands in May, 1992, jobs and real estate development boomed while deposits at the Bank of Turtle Lake jumped ten percent.[22] In Redwood Falls, Minnesota, a 4900-person town and the site of an on-reservation casino, unemployment in 1992 was less than two percent, single-family homes sold within days in a once-depressed housing market, and new businesses moved in.[23]

Tribal representatives were thrilled with the benefits that gambling brought their communities. "It represents growth in any area you can imagine," said Leonard Prescott, chairman of the tribal company that runs a new $15 million casino in Mystic Lake, Minnesota.[24] "It represents a strong tribal government; it represents self-determination; it represents pride."[25]

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15. *Wisconsin Tribes Attend War Council on Gaming*, ST. PAUL PIONEER PRESS (Wis. ed.), Oct. 7, 1992, at 3D.

16. Fritze, *supra* note 13.

17. Indian Policy, Statement of the President, 19 WKLY. COMP. PRES. DOC. 98, 99 (Jan. 24, 1983).

18. *Reservation Casinos*, *supra* note 2 at 13.

19. *Id.*; Haga, *supra* note 12.

20. Fritze, *supra* note 13.

21. Haga, *supra* note 12.

22. Steven Morris, *Gambling Drums are Beating in Illinois*, CHI. TRIB., Nov. 16, 1992, § 4, at 1, 3. Patrick Wick, the president of the Bank of Turtle Lake, said the bank received about $3.5 million in deposits from the casino and its employees. *Id.*

23. Richard Meryhew, *Casino Gives Nearby Town a Shot in the Arm, Pain in the Neck*, STAR TRIB. (Minneapolis), July 18, 1992, News Section, at A1, A8.

24. Fritze, *supra* note 13.

25. *Id.*

State officials and their supporters often view the issue differently, raising concerns about immorality[26] and organized crime.[27] Since tribal governments are not required to report large cash transactions, law enforcement authorities worry that Indian halls will be used to launder drug money.[28] "Who [is] making sure the machines [are not] rigged, the payoffs [are] being made and the income [is] being used for community activities?" asked one state official.[29] Others noted the impact that Indian on-reservation gaming could have on revenues from state-sanctioned gambling—one Nevada senator put the figure at $15 billion in 1985.[30] Finally, some officials are reluctant to recognize tribal sovereignty and its accompanying limits on the state's ability to exercise jurisdiction over tribal lands. "I know the tribes don't want State regulation. I know that. They want sovereignty," said Arizona Attorney General Robert Corbin. "But they are part of the State of Arizona. And I think they should comply with our laws." [31]

Whether Indian on-reservation gaming has had a detrimental impact on nearby communities has yet to be proven. In 1992, the Justice Department reported that it found no widespread or successful effort by organized crime to infiltrate Indian gaming operations. In fact, the Department said the Federal Bureau of Investigation reported less than five open investigations of organized crime family activity relating to Indian gaming.[32] On the other hand, calls for police service, traffic accidents, and congestion increased after a casino was built near Redwood Falls, Minnesota.[33] And in the Minneapolis-St. Paul area, where tribes operate several casinos, membership in the area

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26. Oregon Governor Barbara Roberts vetoed plans for an Indian casino in Salem, the state capital, citing concerns that "a casino in Salem would erode the social and moral fabric of the community and that quality of life would decline." *Oregon Files Suit, supra* note 6. Others have stated that the government should steer clear of supporting or conducting such a "destructive and improper activity" as legalized gambling, citing religious and social concerns and referring to gambling as an "economic parasite." *Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 436-38 (1987) [hereinafter *Senate Hearing on Gaming Activities I*]. Finally, some have voiced concerns about opening the reservations to unregulated "cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 222 (1987) (Stevens, J., dissenting).

27. *See Cabazon Band of Mission Indians*, 480 U.S. at 211; *Senate Hearing on Gaming Activities I, supra* note 26, at 82-84, 92, 141-44; *Indian Gambling Control Act: Hearing on H.R. 4566 Before the House Comm. on Interior and Insular Affairs*, 98th Cong., 2d Sess. 15-39, 66-75 (1984).

28. Haga, *supra* note 12.

29. *Id.*

30. For example, Nevada Senator Chic Hecht's study estimated that the 32 states with Indian reservations could lose from $28 million to $123 million in lottery revenues and from $89 million to $199 million in state-approved bingo revenues in 1985. *Senate Hearing on Gaming Activities I, supra* note 26, at 187.

31. *Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the House Comm. on Interior and Insular Affairs, Part I*, 99th Cong., 1st Sess. 56 (1985) [hereinafter *House Indian Gambling Hearings, Part I*].

32. Michael Murphy, *Casinos Mostly Crime-Free, Official Says*, PHOENIX GAZETTE, June 23, 1992, at A1.

33. Meryhew, *supra* note 23, at A8.

Gamblers Anonymous increased nearly sixfold in the past ten years and calls to the group's hotline tripled during 1991.[34]

With the financial success of on-reservation gaming, tribes began to seek to acquire lands and open bingo halls and casinos in urban areas.[35] They did so by seeking to capitalize on provisions of the Indian Reorganization Act of 1934, which allow the Federal Government to acquire off-reservation land and convert it into Indian land for the tribes' benefit.[36] This process, though, generally leaves state and local governments with little or no control over activities that could be harmful to their communities.[37] The states' concerns (and the tribes' potential for income) increase when Indian gaming operations are established off the reservation. In addition to concerns discussed earlier,[38] lands taken into trust for tribes are removed from local governments' tax rolls[39] and from the reach of zoning and other land-use regulations.[40] Urban traffic and crime problems may be increased by the proximity of a casino, but are still the city's responsibility to solve. A city's decision to welcome tribal gaming may be less well-considered if the tribe is also negotiating with the city next door. Rolling Meadows Mayor Carl Couve said

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34. Fritze, *supra* note 13.

35. For years, only two off-reservation gaming halls existed. But recently, tribes began seeking to open off-reservation casinos around the country. For example, in Detroit, two developers have offered to donate a parcel of land in the trendy "Greektown" area to the Sault Ste. Marie Chippewa tribe for use as a casino. Mayor Coleman Young favors the plan; a majority of city residents and Michigan Governor John Engler do not. *See* Tina Lam & Joel Thurtell, *Casino Foes Fight Odds; Detroit Plan's Lawyer Confident*, DETROIT FREE PRESS, Nov. 30, 1992, at 1A. In the northwestern Chicago suburb of Rolling Meadows, the town aldermen decided to lend their support to a casino proposed by the Wisconsin-based St. Croix Chippewa tribe; Illinois Governor Jim Edgar refused to approve the plan. Hanna, *supra* note 2, at 1. In Hudson, Wisconsin, voters endorsed the sale of a greyhound racing track to an Indian tribe that plans to add a casino there. Wisconsin Governor Tommy Thompson has said he does not want to expand gambling operations but would consider the wishes of local communities. Maureen M. Smith, *Hudson Voters Narrowly Endorse Sale of Dog Track*, STAR TRIB. (Minneapolis), Dec. 4, 1992, at 1A.

36. 25 U.S.C. § 465. That section states: "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . for the purpose of providing land for Indians. . . . Such lands . . . shall be exempt from State and local taxation." *Id.*

37. Florida Dep't of Business Reg. v. United State Dep't of the Interior, 768 F.2d 1248 (11th Cir. 1985) (holding that an Interior Department decision to take land into trust for Indians is unreviewable as within the Secretary's discretion), *cert. denied*, 475 U.S. 1011 (1986). *But c.f.* Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States, 921 F.2d 924 (9th Cir. 1990) (holding that the city's tax and regulatory concerns gave it protectable interest in an Indian action to have land restored to trust status); City of Sault Ste. Marie, Mich. v. Andrus, 458 F. Supp. 465 (D.D.C. 1978) (holding that statute waived the Federal Government's sovereign immunity status so the city could challenge the Interior Department trust decision).

38. *See supra* notes 26-34 and accompanying text.

39. 25 U.S.C. § 465. Although not favored by the IGRA, tribes often negotiate agreements to pay local governments money to make up for the loss of tax dollars. The St. Croix Chippewa tribe promised to pay the cities of Rolling Meadows and East St. Louis $10 million a year in lieu of sales and other taxes lost when land was taken into trust for new casinos, and to provide each city with 2000 new jobs. Morris, *supra* note 22, at 3. The potential loss of taxes inherent in land-trust actions, however, has led some local governments to fight federal trust decisions made for other reasons. *See, e.g.*, *Scotts Valley Band*, 921 F.2d 924; *City of Sault Ste. Marie*, 458 F. Supp. 465; City of Tacoma, Wash. v. Andrus, 457 F. Supp. 342 (D.D.C. 1978).

40. 58 Interior Dec. 52, 54 (1942); 25 C.F.R. § 1.4 (1992).

he was concerned that the neighboring suburb would accept the Chippewa casino if Rolling Meadows rejected it, forcing the suburb to live with the detriments of a casino without reaping any of its benefits.[41]

The issue peaked in late 1992, when the Confederated Tribes of the Siletz asked the Federal Government to take twenty acres in northeast Salem, Oregon, into trust so the tribe could open a $8 million casino. The recently recognized tribe, whose land holdings are scattered primarily among tracts of steep timberland on the Oregon coast, sought the land because of its proximity to the Portland-Salem-Eugene metropolitan area and to the Interstate 5 corridor. Interior Secretary Manuel Lujan first announced in November, 1992, that he planned to take the land into trust despite the objections of Oregon Governor Barbara Roberts, following a longstanding Department policy that considered the governor's opinion advisory. He reversed his decision—and the Interior Department's interpretation of the Indian Gaming Regulatory Act of 1988—after the state filed a federal lawsuit to determine how much control § 2719 gives the governor in determining whether gaming should be allowed on new Indian lands.[42]

II. FEDERAL ACTION

Early congresssional action considered the idea of prohibiting gaming on new, off-reservation Indian lands. This idea drew little attention, however, as lawmakers focused more on creating a regulatory scheme that would protect tribal sovereignty and states' interests in fighting crime. The first bill on Indian gambling activities, House Bill 4566 in the 98th Congress, made no mention of gaming on trust lands and eventually died in committee.[43]

In 1985, the 99th Congress considered several bills to regulate Indian gaming. One bill, House Bill 3130, was specifically introduced by Nebraska Representative Douglas Bereuter to prohibit the granting of trust status to non-Indian lands for gambling activities unless the tribe obtained "the concurrence of the governor of the state and the legislative bodies of all local governmental units in which the land is located."[44] In introducing his bill, Representative Bereuter noted that extending trust status to land not contiguous to Indian reservations "would create ill feelings . . . in areas where relationships are already strained."[45] He also stated that although he supported tribal sovereignty and economic development, gambling was not an "appropriate activity" to justify adding new trust lands and that Nebraska charities were fearful of

41. Hanna, *supra* note 2, at 3.

42. Finley, *supra* note 6. After Secretary Lujan decided not to take the land into trust, the Siletz tribes filed a federal lawsuit attacking the Secretary's interpretation of § 2719 as unconstitutional. *Id.*

43. Gary Sokolow, *The Future of Gambling in Indian Country*, 15 AM. INDIAN L. REV. 151, 155 (1990). Sokolow's article presents a detailed history of attempts to regulate Indian gambling prior to the passage of the IGRA.

44. H.R. 3130, 99th Cong., § 1(b), *reprinted in Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the Comm. on Interior and Insular Affairs, Part II*, 99th Cong., 1st Sess. 18 (1985) [hereinafter *House Indian Gambling Hearings, Part II*].

45. *Id.* at 18.

losing income from state-approved bingo games to competing Indian bingo halls.[46] Similarly, the Department of the Interior and the Justice Department presented a plan to restrict gaming to the reservations proper and on trust lands where the tribe resides as a community and exercises governmental authority.[47] Bereuter's bill drew little discussion at the committee level,[48] as House members were preoccupied with considering House Bill 1920, which provided for a comprehensive Indian gambling regulatory scheme.[49] These bills also died in Congress.

In the 100th Congress, senators considered two bills that apparently reflected the intent of Bereuter's earlier bill to grant a state governor the ability to veto gaming on newly acquired lands: Senate Bills 1303 and 555. The first, Senate Bill 1303, allowed the prohibition against gaming on new lands to be waived if the tribe "obtains the concurrence of the Governor of the State, and the governing bodies of the county or municipality in which such lands are located."[50] This section drew occasional criticism from Indian supporters, who saw the section as either an impermissible encroachment on tribal sovereignty[51] or an out-and-out attempt to limit competition for non-Indian gaming interests.[52] The potential constitutional violation in the section's language also concerned the Justice Department. The Justice Department suggested revising the section to comply with the demands of the Appointments Clause,[53] noting that this was essentially the approach taken in the other bill, Senate Bill 555.[54] Senate Bill 555 was adopted and became the Indian Gaming Regulatory Act of 1988.[55]

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46. *Id.* at 22-29.

47. *Id.* at 52.

48. One lawmaker, Ohio Representative John F. Sieberling, a supporter of H.R. 3130, suggested including the requirement that an off-reservation gaming hall on new trust land should be established according to state requirements as well as federal requirements. *House Indian Gambling Hearings, Part II, supra* note 44, at 28-29.

49. *House Indian Gambling Hearings, Part I, supra* note 31, at 5-13 *passim*; *House Indian Gambling Hearings, Part II, supra* note 44 *passim.*

50. S. 1303, 100th Cong., 1st Sess. § 4(b) (1987), *reprinted in Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 46-47 (1987) [hereinafter *Senate Hearing on Gaming Activities II*].

51. *See, e.g., id.* at 433 (statement of Charles W. Blackwell of American Indian Tribal Government and Policy Consultants, Inc.).

52. *See, e.g., id.* at 505 (letter from John M. Peebles, Steier & Kreikemeier, P.C., to Sen. Daniel Inouye).

53. U.S. CONST., art. II, § 2, cl. 2. For further discussion of the Justice Department concerns regarding a potential Appointments Clause violation, see *infra* notes 76-81, 103-10 and accompanying text.

54. S. REP. NO. 446, 100th Cong., 2d Sess. 32 (1988).

55. 25 U.S.C. §§ 2701-2721.

III. THE GOVERNOR'S VETO AND A BACKDROP OF TRIBAL SOVEREIGNTY

Tribal sovereignty, the power of tribes to govern themselves and determine their futures, is a concept cherished by Indians[56] and their supporters.[57] The concept encompasses tribal authority over Indian lands to, for example, enact and enforce tribal laws, tax, grant marriages and divorces, provide for the adoption of children, zone property, develop the tribal economy, and regulate the use of natural resources on tribal land.[58] "Indian people will never surrender their basic desire to control the relationships both among themselves and with non-Indian governments, organizations and persons," said Wade Miller, chairman of the tribal council of the Omaha Tribe of Nebraska.[59]

Although Congress' view of American Indian independence and self-determination has fluctuated during the past 150 years, the Federal

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56. *See, e.g., Establish Federal Standards and Regulations for the Conduct of Gaming Activities Within Indian Country, Hearing on S. 902 Before the Senate Select Comm. on Indian Affairs*, 99th Cong., 2d Sess. 471-72, 481 (1986) [hereinafter *Senate Hearing on Federal Standards*] (statement of Roger A. Jourdain, Chairman of the Red Lake Band of Chippewa Indians). The letter states:

> The threat to the sovereignty of American Indian tribes is one of the most critical issues that we face today. In addition to the ever increasing difficulty of dealing with economic survival, the maintenance of cultural traditions, languages, customs and spiritual existence that all Tribes have faced for centuries, the constant erosion of the sovereign rights of American Indian Tribes poses a threat to our very existence as a separate and distinct people. Indian tribes have survived since the creation because we have always understood and respected our own sovereignty and because we have fought to protect it in war, in court and in the Congress . . . . Sovereignty is a state of mind, supported by actions, and it is our responsibility to take those actions necessary to protect it.

57. Felix S. Cohen, a former solicitor for the Interior Department, an Indian law scholar, and a longtime Indian rights supporter, described the importance of tribal sovereignty this way:

> In the history of Western thought, theologians, missionaries, judges, and legislators for four hundred years and more have consistently recognized the right of Indians to manage their own affairs . . . . For four hundred years, men who have looked at the matter without the distortions of material prejudice or bureaucratic power have seen that the safety and freedom of all of us is inevitably tied up with the safety and freedom of the weakest and tiniest of our minorities . . . .
>
> [M]ay not the world profit, if in a few places in our Western Hemisphere there is still freedom of an aboriginal people to try out ideas of self-government, of economics, of social relations. After all, there are so many places all over the world where we Americans can try out the ideas of economics and government that we know to be right. Is there not a great scientific advantage in allowing alternative ideas to work themselves out to a point where they can demonstrate the evils that we believe are bound to flow from a municipal government that maintains no prisons, or from a government that gives land to all members of the group who need it? . . .
>
> [W]hen those of us who never were Indians and never expect to be Indians fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth; we are fighting for what Las Casas and Vitoria and Pope Paul III called the integrity or salvation of our own souls. We are fighting for what Jefferson called the basic rights of man.

FELIX S. COHEN, THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN (Lucy K. Cohen ed., 1970), *quoted in Senate Hearing on Federal Standards, supra* note 56, at 358-60 (statement of Wade Miller, Chairman of the Omaha Tribe of Nebraska).

58. KIRK KICKINGBIRD ET AL., INDIAN SOVEREIGNTY 8-12, 39 (Inst. for the Dev. of Indian Law 1983).

59. *Senate Hearings on Federal Standards, supra* note 56, at 361.

Government recognizes the tribal sovereignty doctrine first set forth by Chief Justice Marshall in *Worcester v. Georgia*.[60] Although the *Worcester* doctrine has since been modified to accommodate changing circumstances, its basic principles remain:[61] state jurisdiction over Indians is limited, but tribes do not enjoy the full range of sovereignty of foreign nations. They are instead perceived as "domestic dependent nations" with a relationship to the United States that "resembles that of a ward to his guardian."[62] This trust relationship places upon Congress the responsibility to act to protect Indian interests.[63] Since Congress' intent in dealing with the Indians is presumed to be benevolent, the United States Supreme Court has developed canons of construction that dictate that federal action should be read, when possible, to protect Indian rights.[64] For example, courts should broadly construe federal action that establishes or reserves Indian rights, and should narrowly construe action that limits Indian rights.[65] This rule of construction, though, can only go so far: congressional intent,[66] as evinced by the language, legislative history, and surrounding circumstances of an act,[67] will ultimately control.

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60. *Worcester*, 31 U.S. (6 Pet.) 515 (1832).

61. Williams v. Lee, 358 U.S. 217, 219 (1959). Over the years, the tribal sovereignty doctrine evolved to accommodate changing circumstances, allowing (in the absence of a governing act of Congress) limited state jurisdiction "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . ." Examples include allowing state court jurisdiction over crimes committed by a non-Indian against another on Indian land and over lawsuits by Indians against an outsider. *Id.* at 219-20.

62. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

63. For a history and critique of the trust doctrine, see Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

64. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221 (Rennard Strickland et al. eds., 1982).

65. *Id.* at 225. More specifically, the United States Supreme Court has ruled: 1) ambiguous expressions must be resolved in favor of the Indians, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); 2) treaties must be construed to favor Indians, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912); and 3) treaties should be construed as the Indians would have understood them. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). *See also* COHEN, *supra* note 64, at 222 (discussing canons). These canons of construction apply to statutes, executive orders, and administrative regulations as well as to treaties, since their purpose is to carry out the special trust relationship between the United States and tribes. In addition, Congress has not distinguished between treaty tribes and non-treaty tribes when implementing the federal-tribal relationship. *Id.* at 224.

66. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977) (holding that congressional intent controls the court determination of whether reservation boundaries were diminished by subsequent congressional enactments); DeCoteau v. District County Court, 420 U.S. 425, 444 (1975) (reasoning that congressional intent to terminate a reservation must be clear on the face of the act or in the surrounding circumstances and legislative history).

67. *See, e.g.*, *DeCoteau*, 420 U.S. at 444; Mattz v. Arnett, 412 U.S. 481, 505 (1973) (concluding that language surrounding the circumstances and legislative history of the act did not indicate congressional intent to terminate the reservation); Frost v. Wenie, 157 U.S. 46, 59 (1895) (holding that Indian treaty rights will only be abrogated if the express language of the act makes such a construction unavoidable); United States v. White, 508 F.2d 453, 456-59 (8th Cir. 1974) (concluding that the language and legislative history of the Bald Eagle Protection Act do not clearly indicate congressional intent to modify reservation hunting rights).

Recently, the United States Supreme Court determined the surrounding circumstances of an Indian law issue by looking to other statutes as well as the statute before it. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (ruling that explicit language in the prior statute granting states the

Still, Congress must "clearly and specifically express" its intention to delegate jurisdiction over Indian country, since state jurisdiction over Indian country erodes tribal self-government and federal protection, two long-favored aspects of the trust relationship between Indian tribes and the United States.[68]

Reading § 2719 against the traditional "backdrop"[69] of Indian sovereignty that gives meaning to federal laws governing Indian affairs indicates that the Interior Department's new interpretation of the section is improper. The interpretation, which gives a state governor veto power over the Secretary's decision to allow gaming on new Indian lands, conflicts with these long-recognized canons of construction. Because lands taken into trust by the Secretary become Indian country,[70] the Interior Department's interpretation is proper only if it confirms a clear showing of congressional intent to allow the governor to exercise jurisdiction over these lands.[71] No such clear showing is present, as indicated by an examination of the language, legislative history, and surrounding circumstances of § 2719 and of the structure of the IGRA itself.

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ability to tax oil and gas production on Indian land provoked the conclusion that a 1938 mineral leasing statute allowed such taxation even though the statute was silent on the issue). For a discussion of whether courts should look for an express statement of congressional intent in statutory language before abrogating Indian rights, rather than implying legislative intent by looking to extrinsic evidence, see Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth" — How Long a Time is That?*, 63 CAL. L. REV. 601 (1975).

68. COHEN, *supra* note 64, at 361; *see, e.g.*, Montana v. Blackfeet Indian Tribe, 471 U.S. 759 (1985) (disallowing the state to tax royalty payments for mineral leases under a statute that lacked a clear expression of congressional intent to allow taxation); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (holding that subsequent congressional action lacked plain and unambiguous language and thus did not ratify unlawful land treaties); Bryan v. Itasca County, 426 U.S. 373, 381 (1976) (concluding that congressional enactments gave no express grant of authority to county to tax personal property on the reservation); Fisher v. District Court, 424 U.S. 382, 387-89 (1976) (finding jurisdiction over adoptions in the tribal court, and not the Montana state court, where all parties were tribal members living on the reservation).

69. *McClanahan*, 411 U.S. at 172.

70. Off-reservation lands acquired for tribes become Indian country once they are taken into trust. Indian country is governed primarily by federal and tribal law rather than state law. It has three definitions under federal law:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1988). There is little case law discussing the status of land held in trust for Indians; however, the Supreme Court has stated that lands held in trust are set aside for the benefit of the Indians and are thus considered Indian country. United States v. John, 437 U.S. 634 (1978); United States v. Celestine, 215 U.S. 278 (1909).

71. *See* COHEN, *supra* note 64, at 361.

A. Ambiguous Language and an Alternative Interpretation

The language of § 2719 is ambiguous, obscuring the roles which the Interior Secretary and the state governor are to play in determining whether new tribal lands should be used for gaming. The Act prohibits gaming on lands acquired after October 17, 1988, with several exceptions. The exception at issue allows the Interior Secretary to lift a prohibition on such gaming if:

> [T]he 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 . . . .[72]

It is unclear whether the language of § 2719 delegates the ultimate decision-making authority to waive the ban on gaming to the Interior Secretary alone, to the state governor alone, or to both parties jointly. In fact, two federal agencies have given this language different interpretations. The Interior Department's new policy construes the language such that the state governor has the ultimate power to ban or approve off-reservation gambling.[73] The Justice Department has interpreted the language as ultimately assigning this decision to the Interior Secretary.[74]

The ambiguity of this section apparently reflects legislative attempts to avoid a potential constitutional violation. Earlier versions of the IGRA clearly provided a blanket grant of power to the state governor to approve or disapprove gaming on new Indian lands; the Interior Secretary was given no control over these decisions.[75] This grant of power drew criticism from the Justice Department, which noted a potential Appointments Clause[76] violation:

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72. 25 U.S.C. § 2719(b)(1)(A).

73. *See supra* note 8 and accompanying text; *cf.* Hanna, *supra* note 2, at 3 (explaining the Department of Interior's prior interpretation of the policy that the governor's opinion was advisory only).

74. *See infra* notes 78-80 and accompanying text.

75. The first piece of proposed legislation to address gaming on newly acquired lands, H.R. 3130, would have prohibited the Interior Secretary from taking land into trust if the land was to be used for gaming purposes. H.R. 3130(1)(a), *reprinted in House Indian Gambling Hearings, Part II*, *supra* note 44, at 17. This prohibition would not apply if: "the Indian tribe requesting the acquisition of land in trust status obtains the concurrence of the governor of the state and the legislative bodies of all local governmental units in which the land is located." H.R. 3130(1)(b), *reprinted in House Indian Gambling Hearings, Part II*, *supra* note 44, at 18.

Subsequent attempts to create a more comprehensive regulatory system for Indian gambling imposed similar requirements of state approval. For instance, H.R. 1920 provided that the ban on off-reservation gambling on new trust lands: "shall not apply if the Indian tribe requesting the acquisition of such lands in trust obtains the concurrence of the Governor of the State, the State legislature, and the governing bodies of the county and municipality in which such lands are located." H.R. 1920(3)(b), *reprinted in Senate Hearing on Federal Standards*, *supra* note 56, at 17. Additionally, S. 1303 provided that the gaming ban "shall not apply if the Indian tribe requesting the acquisition of such lands in trust obtains the concurrence of the Governor of the State, and the governing bodies of the county or municipality in which such lands are located." S. 1303(4)(b), *reprinted in Senate Hearing on Gaming Activities II*, *supra* note 50, at 47.

76. U.S. CONST. art. II, § 2, cl. 2.

the section would give individuals not appointed in accordance with constitutional provisions the power to waive a federal statute.[77] The Justice Department believed the constitutional requirements could be met if lawmakers reworded the section's language to ensure that the Interior Secretary, an executive officer, would ultimately be responsible for determining whether to lift the ban.[78] The Justice Department also noted that the language of Senate Bill 555, another regulatory proposal, took that approach and met constitutional requirements.[79] Aware of this need to make the Interior Secretary ultimately responsible for lifting the gaming ban, Congress adopted Senate Bill 555 as the Indian Gaming Regulatory Act of 1988.

In light of these events, it is most probable that Congress intended to grant the Interior Secretary ultimate authority to determine whether to lift the ban on off-reservation gaming. It is unlikely that lawmakers intended to grant this authority to the state governor, since they knew of the potential constitutional problems that it would pose. Even if the Secretary and the governor jointly exercised that authority, the constitutional problems would remain because the governor would be responsible for waiving a federal statute. Still, Congress most likely intended for the state governor's opinion to carry weight in the Secretary's decision on lifting the gaming ban. Throughout discussions on the

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77. This criticism was made by Assistant Attorney General John Bolton in a lengthy letter to Senator Daniel K. Inouye, Chairman, Select Committee on Indian Affairs. The pertinent section states:

> Section four of S. 1303 generally prohibits tribes from running a gaming operation anywhere but within the boundaries of their present reservations. It provides that gaming regulated by the Act shall be unlawful on lands acquired in trust for the tribe after the effective date of the Act. However, the section does not apply "if the Indian tribe requesting the acquisition of such lands in trust obtains the concurrence of the governor of the State and the governing bodies of the county or municipality in which such lands are located." This provision would give individuals not appointed in accordance with the Appointments Clause, Article II, section 2, clause 2, the authority to waive a federal statute. In order to avoid the constitutional problems inherent in such a situation, section 4(b) should be revised to begin "Subject to the approval of the Secretary," a change that would ensure that implementation of this part of the statute remains in the hands of a properly appointed executive branch officer. We note that this, in essence, is the approach adopted in the comparable provision in S. 555, section 20 (b)(1).

Letter from Assistant Att'y Gen. John Bolton to Sen. Daniel K. Inouye (Jan. 14, 1988), *reprinted in* S. REP. NO. 446, *supra* note 54, at 22, 32 [hereinafter *Letter to Inouye*].

The existence of a potential Appointments Clause violation is examined *infra* notes 102-09 and accompanying text.

78. *See Letter to Inouye, supra* note 77.

79. The language of S. 555, § 20(b)(1) is identical to the IGRA's language prohibiting gaming on new off-reservation lands. 25 U.S.C. § 2719. The language states that the ban on off-reservation gambling can be lifted when:

> [T]he 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 . . . .

Id. § 2719(b)(1)(A).

The discussion of S. 555 and the IGRA shed little light on the convoluted wording of this section, making little mention of the extent to which a governor could wield power to prohibit gaming on new lands. *See Senate Hearing on Gaming Activities I, supra* note 26 *passim*; S. REP. NO. 446, *supra* note 54 *passim*. The Justice Department, however, believed that this language was sufficient to grant the Interior Secretary the ultimate power to lift the gaming prohibition, thereby fulfilling the requirements of the Appointments Clause. *See Letter to Inouye, supra* note 77.

IGRA, lawmakers emphasized tribal-state cooperation and the need to develop a gaming regulatory scheme that protected state as well as Indian rights.[80] The proper reading of § 2719 would make the Secretary of the Interior responsible for determining whether to allow gaming on newly acquired, off-reservation lands—but would require the Secretary to give great weight to the state governor's *advisory* opinion when making this determination.[81]

The existence of a second plausible interpretation of this ambiguous language indicates that the Interior Department erred when it interpreted § 2719 to grant the state governor absolute veto power over gaming on new Indian lands. Congress did not clearly, specifically, and unambiguously state an intention to give the governor this power. Congress, however, is fully aware of the need to use clear and specific language when granting states jurisdiction over Indian country, and it has done so in the past. For example, when Congress passed Public Law 280 to give five states criminal and civil jurisdiction over reservation Indians, it stated:

> Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .[82]

Similarly, Congress also stated:

> Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .[83]

Without a similarly clear and specific expression of intent to grant state governors unilateral control over gaming on newly acquired land, § 2719 cannot be interpreted as granting such jurisdiction.

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80. *See* S. REP. NO. 446, *supra* note 54 *passim*; *Senate Hearing on Gaming Activities I*, *supra* note 26 *passim*; *House Indian Gambling Hearings, Part I*, *supra* note 31 *passim*; *House Indian Gambling Hearings, Part II*, *supra* note 44, *passim*; *Senate Hearing on Gaming Activities II*, *supra* note 50, *passim*; and *Gambling on Indian Reservations and Lands, Hearing Before the Senate Select Comm. on Indian Affairs*, 99th Cong., 1st Sess. *passim* (1985).

81. It is not unusual for federal officials and courts to give far more mandatory language than that of § 2719 a less than mandatory reading when such language deals with Indian tribes. *See, e.g.*, 57 Interior Dec. 162, 167-68 (1940) (explaining that, although a statute said the Secretary of the Interior "shall" permit state health and education inspection and enforcement on Indian lands, the word "shall" should be construed as "may" in this case, giving the Secretary discretion); Menominee Tribe of Indians v. United States, 391 U.S. 404, 410 (1968) (holding that, although a reservation termination act provided that state laws should apply to the tribe and its members "in the same manner as they apply to other citizens . . . within their jurisdiction," this did not make the Indians subject to state game and fishing laws so as to abolish hunting and fishing rights).

82. 18 U.S.C. § 1162(a) (1988).

83. 28 U.S.C. § 1360(a) (1988).

B. A "Framework" of Sovereignty

In addition to the ambiguous language of § 2719, the structure of the IGRA itself precludes an interpretation that would allow a state to encroach upon tribal sovereignty by vetoing gambling on new Indian lands. As the sponsors of the IGRA addressed the need for enforcement of gaming laws and regulations, they were emphatic about preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. In fact, the Senate Select Committee on Indian Affairs intentionally developed a "framework"[84] for these Indian gaming regulations which: "provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unitaterally [sic] impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."[85]

In just one example of congressional concern for the integrity of tribal sovereignty, Congress repeatedly included safeguards for tribal sovereignty when it drafted § 2710(d) of the Act, which governs the ability of tribes to operate casino gaming, horse and dog racing, jai alai, and certain other gambling (all referred to as Class III gaming) on Indian lands. In drafting this section, Congress sought to balance the law enforcement interests of the states with the economic development and self-government interests of the tribes. This section of the Act states in part that: "(1) Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ."[86] Section 2710(d) was drafted to ensure that tribes wishing to offer Class III gambling could negotiate such regulatory compacts with the state as "equal sovereigns,"[87] and to prevent states from using these regulatory compacts as a subterfuge for imposing state jurisdiction on tribal lands. Congressional protections for tribal sovereignty permeate the section.

For example, states are required to act in good faith when negotiating tribal-state compacts. Tribes have the affirmative right to sue the state if a compact is not negotiated. In such a case, the state must prove it acted in good faith[88] and any demand by the state for direct taxation of the tribe or Indian lands is evidence that the state did not negotiate in good faith.[89] The courts can appoint a mediator to attempt to negotiate another compact.[90] Finally, if that attempt fails, the Secretary of the Interior has the power to prescribe procedures, in consultation with the tribe, under which Class III gaming may

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84. S. REP. NO. 446, *supra* note 54, at 5.

85. *Id.* at 5-6.

86. 25 U.S.C. § 2710(d)(1)(C). The compact could cover licensing issues such as days and hours of operations or wage and pot limits, the application of state and tribal criminal and civil laws necessary for licensing and regulating gaming, and the allocation of criminal and civil jurisdiction between the state and the tribe. *Id.* § 2710(d)(3)(C).

87. S. REP. NO. 446, *supra* note 54, at 13.

88. 25 U.S.C. § 2710(d)(7)(B)(ii).

89. *Id.* § 2710(d)(7)(B)(iii)(II).

90. *Id.* § 2710(d)(7)(B)(iv)-(vi).

be conducted on the tribal lands.[91] Under this scheme, no state consent is ultimately needed for tribal jurisdiction over Class III gaming on Indian lands.

Given the Act's emphasis on the protection of tribal sovereignty, the Interior Secretary's ultimate authority, and limits on state jurisdiction elsewhere in the Act, a policy allowing a governor to prohibit gaming on newly acquired lands would be at odds with the purpose of the Act and Congress's interest in tribal sovereignty. These textual and structural arguments and their reliance on a backdrop of tribal sovereignty should prevail.

C. Legislative History and Surrounding Circumstances

The Interior Department's interpretation of § 2719 is undermined by further examining the IGRA's legislative history: analyzing § 2719 against a backdrop of tribal sovereignty. In light of this examination and the goals of the IGRA and the Indian Reorganization Act of 1934 ("IRA"),[92] § 2719 does not clearly and specifically show congressional intent to allow a governor to unilaterally veto tribal gaming on new lands.

Both the IGRA and the IRA share the goal of attaining tribal self-sufficiency through tribal economic development. Under the IGRA, Congress set up a gaming regulatory scheme to preserve tribal self-sufficiency while minimizing the risk of criminal involvement.[93] Under the IRA,[94] the federal government was allowed to take lands into trust for Indian tribes in order to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[95] At present, tribal use and development of trust property represents "one of the main vehicles for the economic self-development necessary to equal Indian participation in American life."[96] Gaming profits have helped tribes provide more government services than otherwise would have been possible, just as lotteries and other forms of gambling have contributed to state and local government coffers. Often these profits mean the difference between adequate tribal programs and skeletal programs totally dependent on federal funding.[97]

States, however, often resent Indian gaming's success, due to fears of lost lottery revenue, increasing crime, moral concerns, or pressure from non-Indian gambling interests.[98] States also have a lengthy history of ignoring or disparaging tribal interests in economic development and other areas when

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91. *Id.* § 2710(d)(7)(B)(vii).

92. 25 U.S.C. § 465 (providing the method by which Indian lands are taken into trust).

93. S. REP. NO. 446, *supra* note 54 *passim*.

94. 25 U.S.C. § 465.

95. H.R. REP. NO. 1804, 73d Cong., 2d Sess. 6 (1934).

96. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

97. S. REP. NO. 446, *supra* note 54, at 2-3.

98. *See supra* notes 26-34, 38-40 and accompanying text.

enacting legislation,[99] and therefore they are not the proper entities to wield unfettered control over American Indian economic development efforts. As one federal court pointedly explained:

> [S]ubjecting [Indian lands] to local jurisdiction would . . . subject[] Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians . . . . Indians and surrounding communities are often likely to have differing views of the relative priority of economic development, environmental amenity, public morals, and the like . . . .[100]

In light of congressional attempts to foster tribal self-sufficiency and economic development in this and other legislation,[101] it is unlikely that Congress intended to create a policy under which a hostile state governor could unilaterally and arbitrarily prevent a tribe from acquiring land to start what has become a highly lucrative economic development activity for tribes.

IV. A CONFLICT WITH THE APPOINTMENTS CLAUSE

Under a commonly recognized canon of statutory interpretation, if there is a potential problem with a statute's constitutionality, the statute is ordinarily to be interpreted in a manner that avoids constitutional doubt.[102] The Interior

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99. *See, e.g.*, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992) (addressing tribal contentions that state attempts to extend tax laws to reservation activities crippled Indian economic development); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (addressing state attempts to eradicate tribal government and exercise jurisdiction over tribal lands). The U.S. Supreme Court also recognized state-Indian tensions when it upheld federal jurisdiction over certain on-reservation crimes, stating: "[t]hese Indian tribes . . . owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." U.S. v. Kagama, 118 U.S. 375, 384 (1886).

In discussions on the IGRA, Arizona Representative John McCain charged states with taking part in the creation of the IGRA with the "true interest [of] protecti[ng] . . . their own games from a new source of economic competition. [T]he State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe have [sic] is negotiable." S. REP. NO. 446, *supra* note 54, at 33.

100. *Santa Rosa Band*, 532 F.2d at 664 (footnote omitted).

101. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450(a)-(n) (1988) (authorizing tribes to plan and administer federally funded programs themselves); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1453 (1988) (enhancing tribal economies through tribal economic development efforts); Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1988) (authorizing a variety of mineral development arrangements to promote Indian self-determination and tribal economic development); Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871 (1988) (extending to tribes tax advantages enjoyed by states to strengthen tribal governments, provide additional sources of income, and eliminate an unfair tax burden).

102. This rule falls under the justiciability doctrine, which also holds that the Supreme Court refuses to answer unnecessary constitutional questions, formulates constitutional rules only as broadly as necessary for the case before it, and prefers to render decisions on non-constitutional grounds. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) ("[I]f a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); Schneider v. Smith, 390 U.S. 17 (1968) (Act delegating executive officials authority to safeguard merchant ships from sabotage construed narrowly to prevent constitutional violation inherent in attempt to condition employment on ships on

Department's current interpretation of § 2719(b) poses constitutional concerns because it conflicts with the Appointments Clause.[103] Therefore, courts should prefer an interpretation of § 2719(b) that vests ultimate authority in the Secretary of the Department of the Interior.[104]

The Interior Department's interpretation allows a person who is not an executive branch official to waive a federal statute. Under case law interpreting the Appointments Clause, any person who exercises significant authority under the laws of the United States is considered an "Officer of the United States" and must be appointed by the President with the "Advice and Consent of the Senate" in accordance with the procedures prescribed by the Clause.[105] A person exercises such "significant authority" if, for example, she can make decisions that bind not only the parties involved, but also a cabinet member and the President.[106]

In the instant case, a state governor acting under the Interior Department's interpretation of § 2719(b) exercises significant authority under federal law. The statute prohibiting gaming on new Indian lands[107] can be waived only if the state governor permits it to be waived. This permission would only come if the governor agreed that gaming on the new lands would benefit the tribe and would not be detrimental to the surrounding community. If the governor does not agree, the prohibition cannot be lifted. The governor's decision whether to agree, therefore, determines the Secretary's actions and is binding on the Secretary. The responsibility of determining when to waive a federal law must fall under the responsibility to execute the laws, which is entrusted to the Executive Branch.[108] Here, though, this executive responsibility is given to the governor, a person not considered an Officer of the United States and *not* appointed by the President with the advice and consent

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non-membership in the Communist Party); *see also* Scales v. United States, 367 U.S. 203, 211 (1961) ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.").

103. The Appointments Clause states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

104. The Confederated Tribes of the Siletz, the Indian tribe whose plans for gaming on new lands in the city limits of Salem, Oregon, were recently scuttled by the Interior Department's new policy, filed suit in January, 1993, on the grounds that this reading of the statute violated the Appointments Clause. Finley, *supra* note 6, at E6. An earlier version of this section of the IGRA, S. 1303 § (4)(b), was criticized by the Justice Department as potentially posing the same constitutional problem. *See supra* text accompanying note 53.

105. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (holding that the composition of the Federal Election Commission, as to all but its investigative and informative powers, violates the Appointments Clause).

106. United States v. Mississippi Vocational Rehabilitation for the Blind, 794 F. Supp. 1344, 1354 (S.D. Miss. 1992) (no Appointments Clause violation existed in the makeup of an arbitration panel because the Secretary of Education appointed its members pursuant to statute).

107. 25 U.S.C. § 2719(a).

108. "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley*, 424 U.S. at 138.

of the Senate. An interpretation of § 2719(b) that grants a governor this veto power would render the section unconstitutional, as would an interpretation that granted power to waive the gaming prohibition *jointly* to the governor and the Interior Secretary.

Although such an argument is not unassailable,[109] it does present a serious constitutional concern with the Interior Department's current interpretation of § 2719(b). As discussed in Part III, an alternative interpretation of § 2719(b) would make the governor's opinion advisory and would give the Interior Secretary the sole authority to determine whether to lift the ban. Two interpretations of the statute are possible, one constitutional, one unconstitutional. Following the Supreme Court's rules of statutory interpretation, the Interior Department should adopt the constitutional interpretation, which gives the Interior Secretary the ultimate decision on gaming on newly acquired lands. The purpose of the statute—to ensure that off-reservation gaming would benefit the tribe and not harm the surrounding community—would still be met, because the Interior Secretary would have to seriously consider this information and the governor's opinion when making this decision. The Department should reject its current interpretation, which poses constitutional problems.

CONCLUSION

The Department of the Interior should reverse its policy giving states an absolute veto over gaming on new Indian lands. The benefits to tribes from gaming have been well documented; the harm from gaming feared by the states has not been demonstrated. The Secretary of the Interior already considers state interests when determining whether to take land into trust for tribes,[110] so state interests would be accounted for even though state governors would not possess veto power. Given the emphasis of the IGRA

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109. Such an argument may first be attacked on the grounds that a governor acting pursuant to § 2719 would not be considered an "Officer of the United States." A person whose "position is without tenure, duration, continuing emolument, or continuous duties, and [who] acts only occasionally and temporarily" is not an "officer" for purposes of the Appointments Clause. Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); *see also* United States *ex rel.* Newsham v. Lockheed, 722 F. Supp. 607, 613 (N.D. Cal. 1989) (finding that parties authorized to bring qui tam proceedings "do not have a tenure beyond the lifespan of the particular suit"). Arguably, a governor acting under § 2719(b) would only be called on occasionally, whenever a tribe sought to open off-reservation gaming on new trust lands, and would only make limited decisions.

Second, a similar Appointments Clause argument was struck down on the grounds that Congress has the power under the Necessary and Proper clause to appoint such persons. United States v. Ferry County, 511 F. Supp. 546 (E.D. Wash. 1981) (upholding a requirement that the local government concur before land is taken into trust in such a way to make it non-taxable). The court stated that the Appointments Clause "does not put Congress into such a 'rigid box' as to preclude conditioning [the] operation of [a federal law] on the consent of local officials." *Id.* at 552. The court did not explain its reasoning.

110. 25 C.F.R. § 151.10(e)-(f) (1993) requires the Secretary to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls[, and] jurisdictional problems and potential conflicts of land use . . . ." In addition, the further away from the Indian reservation, the more compelling need for the land the tribe must show.

and the recent federal policy of protecting tribal sovereignty, there is no reason to limit it by adopting a potentially unconstitutional interpretation of the ambiguous language of § 2719