

Op-Ed/Editorials: Gambling and the Law®: Compacts, Elections and Bureaucrats - Oh My!

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On February 5, 2008, Californians voted on whether four tribes could triple the number of slot machines in their casinos, from 8,000 to 25,000.

The tribes won. If they hadn't, there would have been years of ugly lawsuits.

Opponents, primarily unions and competing tribal casinos and racetracks, believe the legal mess was created by underhanded attempts to guarantee that these four tribes would get their slots, even if the voters disapproved.

I believe the problems were the result of federal and state bureaucrats following what they thought was the letter of the law, without using common sense.

This particular fight started a couple of years ago, when Gov. Schwarzenegger signed compacts giving these tribes more slots in exchange for the state receiving up to 25% of the net gaming revenue. The compacts had to be approved by the State Legislature. The Senate approved immediately. But opponents stalled the approvals in the Assembly, until the tribes agreed to a few additional terms in side agreements. This creates the first legal question: are side agreements between the state and tribes enforceable, when they are not part of the compact?

The opponents did not give up. They launched referenda campaigns and got enough signatures to have the compacts on the February 5th ballot.

But, meanwhile, Gov. Schwarzenegger, with approvals in hand from the State Legislature, signed the compacts and gave them to state Secretary of State Debra Bowen to forward to the federal Department of the Interior. This she did, because she read state law as requiring her to do so.

This would have created the second set of lawsuits. California law does require her to forward approved compacts. But were the compacts approved? Technically, the State Legislature's approval has to be in the form of a statute. Statutes normally don't take effect until January 1st of the following year. So,

maybe Bowen sent the compacts too soon.

Plus, under California law, normal statutes do not take effect at all, once they have been challenged by a referendum.

The Secretary of Interior is not supposed to rubber-stamp tribal-state compacts. Rather, the Indian Gaming Regulatory Act requires that he review them to see that they meet all legal requirements. But, government bureaucrats being bureaucrats, his office apparently misplaced the compacts.

No big deal ... except the Act also says that the compacts are “deemed approved” if the Secretary fails to take any action on them for 45 days.

These compacts were big news. Anyone in the Dept. of Interior with common sense would have treated them with special care. The Dept. has apparently never before misplaced a compact.

In any case, the Secretary should have returned them to California, or at least asked questions whether the approvals by the State Legislature were still valid.

Even after screwing up for 45 days, the Secretary should have done something, such as ask for guidance from the courts. Instead, he announced that the compacts had been deemed approved, because he couldn't find the paperwork.

In the uproar that followed, someone noted that federal law requires more than an announcement by the Secretary. To be official, the Secretary's approval must be published in the Federal Register.

So, all the Secretary had to do was not publish his approval until after the February election.

On December 19th, this Bush appointee published his approval in the Federal Register.

When asked why he did such a bonehead thing, his reply was pure bureaucratese: once deemed approved, the law required him to publish the approval.

So, a bureaucrat in California sent compacts to Washington, that she should have held. Then the bureaucrats in Washington lost the compacts for a few months. Then, instead of asking for copies, they said that since the compacts had not been rejected, since they had been misplaced, they were deemed approved. Finally,

instead of holding off a couple of months until the voters of California decided the issue, the federal bureaucrats published the compacts, making them official.

Imagine the mess if the voters had rejected these compacts after they had already been approved. The only winners would have been the lawyers.

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