UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND and
JEFFREY B. PINE

v. C.A. No. 94-0619-T

THE NARRAGANSETT INDIAN TRIBE

MEMORANDUM AND ORDER

This is an action challenging the validity of a compact purportedly entered into by the Narragansett Indian Tribe and the State of Rhode Island pursuant to §2710(d)(3)of the Indian Gaming Regulatory Act of 1988 (IGRA). 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168 (1988). It is presently before the Court for consideration of a motion by the Rhode Island Attorney General (the "Attorney General") to certify to the Rhode Island Supreme Court the question of whether former Governor Sundlun had authority to execute the compact on behalf of the State.[1]

Background

The historical facts underlying this dispute are recounted in Town of Charlestown v. United States, 696 F. Supp. 800, 801-05

[1]The Attorney General's motion contains an alternative request to remand the case to the state court. However, at oral argument, he conceded that, since there are federal questions raised in both cases that may have to be addressed if the Governor has authority to bind the state, this Court has jurisdiction.

(D.R.I. 1988) , aff'd, 873 F.2d 1433 (1st Cir. 1989) (table). For present purposes, it is sufficient to note that during the 1970s the Narragansett Indian Tribe (the Tribe) claimed ownership of various lands in southern Rhode Island on the ground that its aboriginal title to those lands had never been divested. The Tribe's claims were settled in accordance with a settlement agreement between the Tribe and the State which provided, among other things, that certain land (the "Settlement Land") would be set aside for the Tribe. The settlement agreement was implemented by an act of Congress (the "Settlement Act") which provided, inter alia, that the Settlement Land would be subject to state jurisdiction. Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716.

The State maintained that, under the Settlement Act, gambling activity on the Settlement Land was subject to state regulation. That contention was rejected by the First Circuit, which held that gambling activity was governed not by state law as provided in the Settlement Act but rather by the provisions of IGRA. State of Rhode Island, et. al. v. Narragansett Indian Tribe, et. al., 19 F.3d 685, 690 (1st Cir. 1994), cert. denied, -- U.S. --, 115 S.Ct. 298 (10/3/94). Among other things, IGRA permits "[a]ny State and any Indian Tribe" to enter into a Tribal-State compact and provides that if the substance of such compact satisfies the requirements of IGRA, the terms of the compact govern regulation of

Class III gaming as defined in the statute. See IGRA, 25 U.S.C. § 2710(d)(3).

Shortly before losing his bid for re-election, Governor Sundlun, purporting to act on behalf of the State, executed what he and the Tribe contend is a Tribal-State compact. That "compact" was approved by the Secretary of the Interior despite the objections of the Rhode Island Attorney General and others who contended that, under state law, Governor Sundlun lacked authority to execute the compact on behalf of the State. See Notice of Approved Tribal-State Compact, 59 Fed.Reg. 65065 (1994) (notice dated December 5, 1994).

Discussion

The ultimate issue in this case is whether the "compact" is valid. The State contends that it is not, citing a variety of reasons, including that the compact does not satisfy the requirements of IGRA. However, the threshold question is whether Governor Sundlun had authority to execute the compact on behalf of the "State". Section 2710(d)(3)(B) provides that:

> Any State and any Indian tribe may enter into a Tribal-State compact governing the conduct of gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary [of the Interior] in the Federal Register.
> 25 U.S.C. § 2710(d)(3)(B) [emphasis added]

If the governor did not have authority to bind the State,

there would be no need to address any other issues because the compact would be a nullity. See Kickapoo Tribe v. Babbitt, 827 F.Supp. 37 (D.D.C. 1993) (holding that a compact signed by the Governor of Kansas, where the Kansas Supreme Court had already determined that the governor lacked the authority to sign such a compact, was invalid because it had not been appropriately "entered into"), rev'd and remanded on other grounds, -- F.3d --, 1995 WL 10370 (D.C. Cir. Jan. 13, 1995).

Effect of Secretary's Approval

The Tribe argues that the Secretary's approval is dispositive of the compact's validity irrespective of what state law provides regarding the governor's authority to sign it. That argument fails for a number of reasons. First, if the "compact" was a nullity because the governor lacked authority to execute it on behalf of the "State," the Secretary's approval also would be a nullity.

Moreover, the Tribe's argument misapprehends the nature and effect of approval by the Secretary. The provisions dealing with approval are set forth in § 2710(d)(8) which states:

> (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.
> (B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates --
> (i) any provision of this Act,
> (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or
> (iii) the trust obligations of the United

> States to Indians.
> (C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.
> (D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

25 U.S.C.§ 2710(d)(8). The manifest purpose of those provisions is to insure that the gambling activity authorized by proposed compacts is consistent with federal law and that the compacts are in the best interests of Indian tribes. Nothing in IGRA even suggests that Congress intended that the Secretary determine who is authorized to execute such compacts on behalf of states. Furthermore, such an intent should not be imputed to Congress, because it is patently unreasonable to expect that potentially complex questions of that nature can be adequately addressed during the 45 day review period mandated by IGRA.

Indeed, the Secretary himself does not consider the approval process to encompass determinations of who has authority to execute a compact on behalf of a state. Thus, in a letter to the Attorney General explaining why the compact was approved, the solicitor for the Department of Interior stated:

> "Given IGRA's time constraints and automatic approval provision, we do not believe that Congress contemplated the Department would address or resolve complex issues of State law raised by an internal challenge to a Governor's authority.

> Further, since IGRA was created to ensure Indian tribes the maximum opportunity to pursue gaming ventures as economic development projects on tribal lands, the Secretary's trust responsibility to the tribes supports approving gaming compacts unless they violate IGRA or other Federal law. In furtherance of this responsibility, this Department defers to the representations of Governors, as the Chief Executive Officers of their states, unless it is clear beyond cavil that a Governor lacks the authority to sign a compact....In this case...we deferred to [Governor Sundlun's] representations that he had the authority to sign the Compact on behalf of the State of Rhode Island. Since we found no other reasons to disapprove the Compact, it was approved....We agree that compacts between Indian tribes and states are valid only if entered into by the appropriate State officials."

The Tribe also relies on the so-called "retrocession cases" which hold that, once approved by the Secretary, agreements by states to cede jurisdiction over Indian territory to the federal government are valid even if they violate state law. See, United States v. Lawrence, 595 F.2d 1149 (9th Cir. 1979), cert. denied, 444 U.S. 893, 100 S.Ct. 108 (1979); Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), rev'd on other grounds, 435 U.S. 191, 98 S.Ct. 1011 (1978); United States v. Brown, 334 F.Supp. 536 (D.Neb. 1971); Omaha Tribe of Nebraska v. Walthill, 334 F. Supp. 823 (D.Neb. 1971), aff'd, 460 F.2d 1327 (8th Cir. 1972), cert denied, 409 U.S. 1107, 93 S.Ct. 898 (1973). However, those cases are readily distinguishable because they involved challenges that were mounted long after the agreements had been approved by the Secretary and implemented. The holdings in those cases were based on the need for finality and the desire to avoid permitting belated

attacks on actions taken in reliance on previously completed transactions. See, Kickapoo, 827 F.Supp at 44-46.

In this case, there has not yet been any such reliance. Execution of a compact is only the first step toward gaming activities on the Settlement Lands. Such activities also must be approved by the Chairman of the National Indian Gaming Commission before any further steps may be taken. 25 U.S.C. §§ 2704, 2705(a)(3), 2710(d)(1)(A)(iii). Moreover, in contrast to the retrocession cases, the Tribe was aware that the validity of the compact was disputed because the Attorney General apprised the Secretary and the Tribe of his objections before the Secretary issued his approval.

Applicability of State Law

In enacting IGRA, Congress did not purport to specify who is authorized to enter into a compact on behalf of a state. The statute is silent with respect to that issue. In fact, it is, at least, questionable whether Congress has the power to make that determination. See Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479 (D. Ore. 1994).

Since Governor Sundlun's authority to act on behalf of the State cannot be determined by reference to IGRA, it must be determined by reference to state law. If state law is clear, this Court can and should decide the question. See, e.g., Willis v. Fordice, 850 F.Supp. 523, 532 (S.D. Miss. 1994) (finding "under

state law and federal law the Governor of the State of Mississippi has and had the power to enter into the Compact with the tribe" where a state statute authorized the Governor to transact business with other sovereigns). On the other hand, if state law is unclear, principles of federalism and comity counsel that the highest court of the state should be given an opportunity to decide what the state's own law provides. That is especially true when the issue deals with a matter of internal self-government. See Elkins v. Moreno, 435 U.S. 647, 662 n.15, 98 S.Ct. 1338, 1347 (1978) (definition of domicile under Maryland law certified to Maryland Supreme Court, because "In a federal system, it is obviously desirable that questions of law which...are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts.")

This case involves just such an issue. It is difficult to imagine a matter more closely related to internal self-government than the question of how a state's powers are allocated among its elected officials. Cf. Gregory v. Ashcroft, 501 U.S. 452, 462, 111 S.Ct. 2395, 2402 (1991) "[T]he authority of the people of the States to determine the qualifications of their most important government officials...is an authority that lies at the heart of representative government....It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of

the Constitution under which the United States guarantee[s] to every State in this Union a Republican Form of Government.") (citations and internal quotations omitted).

The Attorney General contends that the governor lacks authority to enter into Tribal-State compacts because Article VI, § 15 of the Rhode Island Constitution vests authority to regulate state lotteries in the General Assembly.[2] The Tribe, on the other hand, asserts that the governor's authority to enter into such compacts is part of the general executive power vested in him by Article IX of the Rhode Island Constitution.[3]

Neither argument is convincing. Article VI, § 15 deals only with state lotteries and does not specifically address the range of gambling activities contemplated by IGRA. Nor does it deal with whether a governor has general authority to enter into compacts with other sovereigns.

The Tribe's argument is equally unpersuasive. The Tribe correctly asserts that provisions of the Rhode Island Constitution should be interpreted in the same way as similar provisions of the

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[2] Article VI, § 15 provides: "All lotteries shall be prohibited in the state except lotteries operated by the state and except those previously permitted by the general assembly prior to the adoption of this section, and all shall be subject to the prescription and regulation of the general assembly."

[3] Article IX, § 1, provides: "The chief executive power of this state shall be vested in a governor, who, together with a lieutenant governor, shall be elected by the people."
Article IX, § 2 provides: "The governor shall take care that the laws be faithfully executed."

federal Constitution. See Chang v. U.R.I., 118 R.I. 631, 638, 375 A.2d 925 (1977). From that, it reasons that, because the United States Constitution gives the President authority to enter into treaties with foreign governments, the Rhode Island Constitution should be interpreted to vest similar authority in the governor. The fallacy in that argument is that the President's treaty authority derives not from the general executive power conferred by Article II, § 1, but rather from the express treaty making power contained in Article II, § 2, clause 2. There is no comparable provision in the Rhode Island Constitution. In addition, it should be noted that any treaties made by the President must be approved by a two-thirds vote of the Senate.

In short, I find that Rhode Island law is sufficiently unclear with respect to the Governor's authority to execute a Tribal-State compact on behalf of "the State" that the question should be certified to the Rhode Island Supreme Court.

Conclusion

For all of the foregoing reasons, it is hereby ordered that:

(1) Attorney General Pine's motion to remand or in the alternative abstain and certify questions to the Rhode Island Supreme Court is granted to the extent it requests certification of questions regarding the authority of the governor to execute a Tribal-State compact on behalf of the State.

(2) Within 7 days, the parties shall submit a joint statement of agreed-upon facts necessary to decide the questions to be certified. Each party may submit supplemental proposed statements of those facts on which the parties do not agree.

(3) Also within 7 days, the state and any other parties shall submit proposals with respect to the precise questions to be certified to the Rhode Island Supreme Court.

(4) Seven days after such submission of proposed certified questions, the Narragansett Indian Tribe shall submit its proposals with respect to the questions to be certified, in the form of either objections, modifications, or supplemental proposed questions.

By Order,

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Deputy Clerk

ENTER:

_____

Ernest C. Torres
United States District Judge

Date: January 20, 1995