



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

FEB 25 2011

Honorable Leona Williams
Chairwoman, Pinoleville Pomo Nation
500 B. Pinoleville Drive
Ukiah, California 95482

Dear Chairwoman Williams:

I am writing to you regarding the proposed Class III Gaming Compact (Compact) between the State of California (State) and the Pinoleville Pomo Nation (Tribe) the Department of the Interior (Department) received on January 13, 2011. The Compact was approved by the California Legislature on January 25, 2010. (Compact). The Compact would authorize Class III gaming on the Tribe's reservation lands.

Under the Indian Gaming Regulatory Act (IGRA), the Secretary may approve or disapprove the Compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8)(A-B). If the Secretary does not approve or disapprove the Compact within 45 days, IGRA states that the Compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). Under IGRA the Department must determine whether the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

DECISION

We have completed our review of the Compact, along with the additional material submitted by the Tribe and the State. For the following reasons, the Compact is hereby disapproved under Section 2710(d)(8) of IGRA.

BACKGROUND

The parties originally submitted the Compact to the Department on February 11, 2010. They later withdrew their request for Secretarial approval on April 8, 2010, after the Department had expressed concerns regarding several provisions.

The Compact authorizes the Tribe to operate Class III gaming on its lands in northern California, including up to 900 gaming devices (slot machines), any banking or percentage card games and any devices or games that are authorized under State law to the California State Lottery until December 31, 2030. Sections 3.0, 4.1 and 14.2 (a).

The Compact contains two provisions requiring the Tribe to share gaming revenues with the State. Section 4.3.1 requires the Tribe to pay 15 percent of its net win to the State's general fund

(revenue sharing) and Section 5.2 (a) requires annual contributions to the Revenue Sharing Trust Fund (RSTF) of \$900 for each gaming device the Tribe operates in excess of 349 devices.

In exchange for the Tribe's revenue sharing payments, Section 4.4 (a) of the Compact purports to grant the Tribe exclusive gaming rights within the Tribe's "core geographic market" – a zone within a "75-mile radius of the Tribe's Gaming Facility," (Core Geographic Area or CGA). If the State authorizes any person or entity, other than a federally recognized tribe or the State Lottery, to engage in gaming activity authorized by the Compact, and the person or entity engages in those gaming activities within the CGA, the Tribe would be relieved of its obligation to make the 15-percent revenue sharing payments to the State.

The parties' primary justification for the 15 percent revenue sharing provision is that, under California's Proposition 1A, the Tribe enjoys the exclusive right to operate Class III gaming to the exclusion of non-tribal competitors throughout the State; and, in the event Proposition 1A is overturned, such exclusivity would be further protected within the CGA. Other revenue-sharing justifications provided by the State and the Tribe included a "low payment" into the California Revenue Sharing Trust Fund (RSTF), and the ability of the Tribe to deduct participation fees from the calculation of its net win.

ANALYSIS

Pursuant to IGRA, the Secretary may only disapprove a proposed Compact where the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B).

The Department is committed to upholding IGRA, which expressly provides that it does not authorize states to levy a tax, fee, charge, or other assessment on Indian gaming except to defray the state's costs of regulating Class III gaming activities. 25 U.S.C. § 2710(d)(4). IGRA also prohibits states from refusing to negotiate tribal-state gaming compacts based upon the lack of authority to impose such a tax, fee, or other assessment on Indian gaming. *Id.*

We review revenue sharing requirements in gaming compacts with great scrutiny. Our analysis first looks to whether the State has offered a meaningful concession(s). We view this concept as one where the State concedes something it was not otherwise required to negotiate, such as granting exclusive rights to operate Class III gaming or other benefits sharing a gaming-related nexus. We then examine whether the value of the concession(s) provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required.

An important part of our analysis is the decision of the United States Court of Appeals for the Ninth Circuit in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), providing guidance on the extent to which revenue sharing and variations on tribal gaming exclusivity constitute "meaningful concessions" under IGRA. In reaching its decision the Court reiterated that in order to be lawful under IGRA, a state may request revenue sharing if the revenue sharing provision is (a) for uses "directly related to the operation of gaming activities," (b) consistent with the purposes of IGRA, and (c)

not "imposed" because it is bargained for in exchange for a "meaningful concession." *Rincon*, 602 F.3d at 1033 (discussing *In re Indian Gaming Cases (Coyote II)*, 331 F.3d 1094, 1103 (9th Cir. 2003)).

Last year, the Department disapproved the compact between the Habematolel Pomo of Upper Lake and the State of California. That agreement contained provisions virtually identical to those contained in the Class III Gaming Compact between the State of California and the Pinoleville Pomo Nation, requiring us to make a similar analysis to that we have applied here.

In that instance, I acknowledged that exclusive gaming rights within a "core geographic area," layered on top of pre-existing statewide exclusivity, was a concession by the State to the Tribe. However, I determined that this concession was not meaningful under our analysis, because the Tribe was already entitled to exclusive gaming rights under California's Proposition 1A. I also determined that the existing statewide exclusive gaming rights enjoyed by all gaming tribes in California, including the Habematolel Pomo of Upper Lake, did not confer a substantial economic benefit upon the Habematolel Pomo of Upper Lake justifying a revenue-sharing rate of 15-percent on all electronic gaming devices. Letter from Larry Echo Hawk, Assistant Secretary – Indian Affairs to Honorable Sherry Treppa, Chairperson of the Habematolel Pomo of Upper Lake (August 17, 2010).

A. The State's Concessions.

As noted above, a "meaningful concession" exists where the State concedes something it was not otherwise required to negotiate and to which the Tribe is not already entitled. Moreover, the parties must show that the purported "meaningful concession" was not merely a necessary and ordinary result of good faith compact negotiations.

The Tribe asserts that each of the following Compact provisions constitute meaningful concessions by the State: tribal authority to operate up to 900 gaming devices; a Compact term of 20 years; "low payments" from the Tribe to the RSTF; the lack of a requirement for the Tribe to enter into an intergovernmental agreement with the City of Ukiah; "State supported constitutional exclusivity" pursuant to Proposition 1A; "enhanced exclusivity" within a defined CGA; the "vast" scope of the CGA; the conditional nature of the Tribe's revenue contribution; and, the deduction of participation fees from the calculation of the Tribe's net win. Each of these elements is analyzed below.

1. Exclusivity for Indian gaming operated by the Tribe.

The Tribe asserts that the State has made meaningful concessions because it will enjoy "State supported constitutional exclusivity" pursuant to Proposition 1A as well as "enhanced exclusivity" within a defined CGA. We find that the exclusivity provided by Proposition 1A constitutes a meaningful concession but, as discussed below, it does not confer a substantial economic benefit on the Tribe sufficient to justify 15-percent revenue sharing. In contrast, we find that the CGA does not constitute a meaningful concession by the State.

In 2000, the State's voters approved Proposition 1A, a constitutional amendment, which exempts tribal gaming from the prohibition on Nevada-style casinos set forth at Section 19 of Article IV of the California Constitution. This amendment effectively granted all California tribes a constitutionally protected monopoly on most types of Class III games in California. We recognize that the State's support for Proposition 1A's grant of Class III gaming exclusivity to all California tribes, including the Pinoleville Pomo Nation, is a meaningful concession by the State to all tribes seeking to participate in gaming under IGRA. Nevertheless, as discussed below, this meaningful concession does not confer a substantial economic benefit on the Tribe justifying a revenue sharing rate of 15-percent.

In addition, the Tribe claims that the Compact provides the Tribe with "enhanced exclusivity" within the CGA.¹ As discussed above, we find that Proposition 1A constitutes a meaningful concession by the State to the Pinoleville Pomo Nation. However, we do not believe the CGA constitutes an additional independent or separate "meaningful concession" in light of Proposition 1A, which is now the law of the State of California, notwithstanding the CGA.

2. Ordinary and routine subjects of compact negotiations.

In addition to exclusivity, the Tribe claims numerous other Compact provisions also constitute meaningful concessions by the State. More specifically, the Tribe claims that tribal authority to operate up to 900 gaming devices; a Compact term of twenty (20) years; "low payments" from the Tribe to the RSTF; the lack of a requirement for the Tribe to enter into an intergovernmental agreement with the City of Ukiah; the conditional nature of the Tribe's revenue contribution; and, the deduction of participation fees from the calculation of the Tribe's net win, taken together, constitute meaningful concessions.

We have carefully considered the Tribe's submissions and claims and have concluded that the additional Compact provisions identified by the Tribe are ordinary and routine subjects of compact negotiations. As we have stated previously, "[w]e have not, nor are we disposed to, authorize revenue sharing payments in exchange for compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities, such as duration, number of gaming devices, hours of operation, and wager limits." See Letter from Aurene Martin, Acting Assistant Secretary of the Interior – Indian Affairs, to Hon. Gus Frank, Chairman of the Forest County Potawatomi Community, April 25, 2003 (explaining the Department's reasoning for not taking action upon the Tribe's proposed tribal-state Class III gaming compact).

The State and the Tribe negotiated and agreed upon each of these provisions as an ordinary subject of negotiations pursuant to IGRA. As such, the State has not conceded anything it was not otherwise required to negotiate pursuant to IGRA. Moreover, the Tribe has not gained anything to which it is not otherwise entitled pursuant to the good-faith negotiation provision of

¹ The Tribe also asserts that the "vast" scope of the CGA constitutes a meaningful concession by the State. The Compact-defined CGA is irrelevant in this instance, because the CGA itself does not constitute an additional independent or separate meaningful concession by the State to the Tribe. Consequently, the scope of the CGA is not a meaningful concession by the State.

IGRA. We therefore conclude that these Compact provisions do not constitute a meaningful concession in this instance.

B. Substantial Economic Benefit.

We now examine whether the value of the State's meaningful concession of statewide exclusivity provide substantial economic benefits to the Tribe in a manner that justifies the 15-percent revenue sharing required by the Compact.

The Tribe has asserted that protection of its exclusive gaming rights, both generally pursuant to Proposition 1A and specifically within the Tribe's CGA, confers a substantial economic benefit upon the Tribe justifying a 15-percent revenue-sharing rate.

We have determined that *only* the tribal exclusivity under Proposition 1A constitutes a meaningful concession on the part of the State. However, even if we had concluded that the exclusivity granted under Proposition 1A and the CGA both constitute meaningful concessions, these provisions do not (individually or collectively) confer a substantial economic benefit upon the Tribe in a manner that justifies the value received by the State through the 15-percent revenue sharing rate in this case.

The parties contend that the State's agreement to forego repeal of Proposition 1A, which grants tribes in California exclusive authority to operate Las Vegas-style gaming, confers a substantial economic benefit upon the Tribe here. In support of that position, the Tribe cites efforts by groups within the State that have attempted – albeit unsuccessfully – to gather enough signatures to authorize ballot initiatives aimed at legalizing non-Indian commercial gaming. Whether such initiatives ultimately prove successful in altering the status quo remains unknown and the potential impact of repeal is a difficult question. However, the Ninth Circuit recently addressed the issue, at least in part, in *Rincon*.

The Court wrote that since “passage of a constitutional amendment eliminating tribal gaming exclusivity is highly unlikely, freedom from non-tribal competition in (Rincon's) core geographic market provides no significant additional economic advantages over whatever value the Tribe receives from the statewide exclusivity it already enjoys.” *Rincon*, 602 F.3d at 1038.² While we recognize that some of the facts underlying the *Rincon* decision may be distinguishable from the Tribe's circumstances, we cannot ignore the Ninth Circuit's views on this point.

The Tribe's current primary market competitors are existing tribal gaming facilities, none of which are covered by the Compact's CGA exclusivity provisions.³ There are at least 11 tribal

² *Rincon* found that “[s]ince the passage of a constitutional amendment eliminating tribal gaming exclusivity is extremely unlikely,” the monetary remedies in the proposed Compact contingent upon that event did not “have anything more than speculative value” 602 F.3d at 1038.

³ While not determinative in this instance, the revenue-sharing provisions contained in the Class III gaming compacts for each of these tribes are illustrative of the value of tribal gaming exclusivity within the proposed CGA. Nearly all of the tribes operating Class III gaming facilities in the Pinoleville Pomo Nation's CGA are party to compacts that provide for tribal payments of 10% to the Special Distribution Fund (SDF) for between 501 and 1,000

gaming facilities within the Tribe's CGA operating as few as 92 gaming devices (Cahto Laytonville Rancheria) to as many as 3,130 devices (Yocha Dehe Wintun Nation). As many as six tribes operating gaming facilities within the CGA have received an RSTF payment, which indicates that those facilities operate 349 gaming devices or less. Most of those tribes within the CGA have continued to receive RSTF payments since the first distributions in 2004 through June 30, 2010 (the most recent date for which data is available).

We find that the exclusivity offered by Proposition 1A, while providing some economic benefit to the Tribe, is not substantial enough to justify a 15-percent revenue sharing provision for a 900 machine facility. The repeal of Proposition 1A is purely speculative, and, as such, any value that is arguably added by the CGA is of limited economic benefit to the Tribe and does not justify a 15-percent revenue sharing rate.

CONCLUSION

Based on this analysis, I find that the Compact violates IGRA, which expressly provides that it does not authorize states to levy a tax, fee, or other assessment on Indian gaming except to defray the state's costs of regulating class III gaming activities. 25 U.S.C. § 2710(d)(8). The IGRA also prohibits states from refusing to negotiate tribal-state gaming compacts based upon the lack of authority to impose such a tax, fee, or other assessment on Indian gaming. *Id.* The Department is committed to upholding IGRA, and I cannot approve any compact that violates its terms. Therefore, I hereby disapprove the Compact.

I regret that our decision could not be more favorable at this time, and I strongly encourage the State to negotiate a new Class III gaming compact with the Tribe in good faith and in accordance with IGRA so that the Tribe may proceed with its efforts to develop its economy for the benefit of its members.

A similar letter has been sent to the Honorable Jerry Brown, Governor of the State of California.

Sincerely,



Larry Echo Hawk
Assistant Secretary – Indian Affairs

electronic gaming devices. *See, e.g.* Class III Gaming Compact of the Middletown Rancheria Band of Pomo Indians (Oct. 12, 1999). Moreover, those same compacts provide for a tribal revenue sharing rate of 7% to the SDF for between 201 and 500 electronic gaming devices, and for no tribal revenue sharing where the facility contains fewer than 201 electronic gaming devices. In this instance, the Compact would require the Tribe to pay 15% of Net Win to the State's general fund beginning with the first electronic gaming device for a similarly-sized facility.