United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 31 2011

The Honorable Sherry Treppa Bridges
Chairperson, Habematolel Pomo of
Upper Lake
P.O. Box 516
Upper Lake, California 95485

Dear Chairperson Bridges:

On June 17, 2011, the Department of the Interior (Department) received the tribal-state compact (Compact) between the Habematolel Pomo of Upper Lake (Tribe) and the State of California (State). The Compact was executed between the Tribe and the State on March 17, 2011, and was ratified by the California Legislature on June 13, 2011.

Under the Indian Gaming Regulatory Act (IGRA), the Secretary may approve or disapprove a proposed compact within 45 days of its submission. 25 U.S.C. § 2710 (d) (8). If the Secretary does not approve or disapprove the proposed compact within 45 days, IGRA states that the proposed 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).

APPROVAL BY OPERATION OF LAW

The Tribe submitted additional documentation with the Compact, including a financial analysis and other data. After reviewing the documentation submitted by the Tribe, we did not find it necessary to request additional information from the Tribe or the State.

We undertook a thorough review of the Compact and the additional materials submitted by the Tribe.[1] While we have significant concerns with several provisions in the Compact, we decided to take no action within the prescribed 45-day review period. As a result, the Compact is "considered to have been approved by the Secretary, but only to the extent [it] is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C).

The Compact became effective upon the publication of notice in the Federal Register on August 10, 2011, as required by 25 U.S.C. § 2710(d)(3)(8).

We have set forth an explanation of our concerns below.

[1] We also received comments and submissions by individuals and entities that were not parties to the Compact. While those comments highlighted some of the concerns we will express below, our review of the Compact was necessarily limited to the actual agreement submitted to the Department.

BACKGROUND

1. Revenue Sharing Provisions

The Compact authorizes the Tribe to operate Class III gaming on its trust lands in northern California, including up to 750 gaming devices, 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. Compact, §§ 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 of the Compact, titled "Revenue Contribution," provides, in part:

> (a) The Tribe shall pay quarterly to the Special Distribution Fund created by the Legislature, in accordance with the following schedule:

Number of Gaming Devices in Quarterly Device Base	Percentage of Average Gaming Device Net Win
1-350	0%
351-600	7%
601-750	15%

Section 5.2(a) of the Compact requires the Tribe to make annual contributions to the Revenue Sharing Trust Fund (RSTF) of $900 for each gaming device the Tribe operates in excess of 350 devices.

In exchange for the Tribe's payments to the Special Distribution Fund (SDF), the State grants the Tribe the same statewide exclusivity enjoyed by all other tribes located in California pursuant to State law. *See* Compact, § 4.4. In the event the State authorizes any person or entity other than a federally-recognized tribe or the State Lottery to engage in Class III gaming, Section 4.4 establishes a process under which the Tribe may elect to either continue its gaming operations under reduced SDF payments or cease gaming altogether.

2. Mitigation Provisions

Section 11 of the Compact is entitled "Off-Reservation Environmental and Economic Impacts." Under that section, the Tribe must prepare and submit a Tribal Environmental Impact Report (TEIR) "analyzing the potentially significant off-reservation environmental impacts of the Project pursuant to the process set forth [in Section 11]." Compact, § 11.8.1. Section 11 also requires the Tribe to enter into an Intergovernmental Agreement with "the County and any impacted city in which the Gaming Facility is located or whose boundary is within one-quarter (1/4) mile from the border of any portion of the Gaming Facility," prior to the commencement of a "Project." Compact, § 11.8.7.

The Compact defines the term "Project" as:

> ...any activity occurring on Indian lands, a principal purpose of which is to serve the Tribe's Gaming Activities or Gaming Operation, and which may cause either a direct physical change in the off-reservation environment, or a reasonably foreseeable indirect physical change in the off-reservation environment. This definition shall be understood to include, but not be limited to, the addition of Gaming Devices within an existing Gaming Facility the impacts of which have not previously been addressed in a TEIR, construction or planned expansion of any Gaming Facility, and any other construction or planned expansion, a principal purpose of which is to serve the Gaming Facility, including, but not limited to, access roads, parking lots, a hotel, utility, or waste disposal systems, or water supply, as long as such construction or expansion causes a direct or indirect physical change in the off-reservation environment.

Compact, § 2.20.

The term "Gaming Facility" is defined in Section 2.10 of the Compact as:

> ...any building in which Gaming Activities or any Gaming Operations occur, or in which the business records, receipts, or other funds of the Gaming Operation are maintained (excluding offsite facilities dedicated to the storage of those records and financial institutions), and all rooms, buildings, and areas, including hotels, parking lots, and walkways, a principal purpose of which is to serve the activities of the Gaming Operation.

ANALYSIS

The Secretary may disapprove a proposed tribal-state compact only when it 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. 25 U.S.C. § 2710 (d)(8).

The Department is committed to adhering to IGRA's statutory restrictions on tribal-state gaming compacts. IGRA prohibits the imposition of 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 further prohibits using this restriction as a basis for refusing to negotiate tribal-state gaming compacts. *Id.*

IGRA also limits the subjects over which tribes and states may negotiate a tribal-state gaming compact. *See* 25 U.S.C. § 2710 (d)(3)(C).[2]

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[2] *See also* 134 Cong. Rec. S12643-01, at S12651:

Revenue Sharing

We review revenue sharing requirements in gaming compacts with great scrutiny. Our analysis first looks to whether the State has offered meaningful concessions to the tribe. 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 concessions provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required.

An important part of our analysis of Class III gaming compacts in California involves the decision in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger,*[3] where the Ninth Circuit Court of Appeals provides guidance on the extent to which variations on tribal gaming exclusivity constitute "meaningful concessions" in exchange for revenue sharing under IGRA. In reaching its decision, the Court reiterated that to be lawful under IGRA, the 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."[4]

Under the first prong of our analysis, we believe that the State has made meaningful concessions. Section 4.4 of the Compact secures the Tribe's right to engage in Class III gaming excusive of non-tribal entities throughout the State.

Under the second prong of our analysis, we believe that the State's concessions provide substantial economic benefits to the Tribe in a manner that likely justifies the revenue sharing required under the Compact. First, the Tribe's economic analysis reasonably concludes that the Tribe will generate substantial revenues over the 20-year life of the Compact, which will help the Tribe develop its economy and strengthen its government.

Second, if the Tribe operates fewer than 600 gaming devices, the Compact's effective revenue sharing rate[5] is actually lower than the effective revenue sharing rate required in the compacts of

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> Mr. EVANS: On the question of precedent. am I correct that the use of compacting methods in this bill are meant to be limited to tribal-state gaming compacts and that the use of compacts for this purpose is not to be construed to signal any new congressional policy encouraging the subjugation of tribal governments to state authority.
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> Mr. INOUYE: The vice-chairman is correct. No subjugation is intended. The bill contemplates that the two sovereigns address their respective concerns in the most equitable fashion. There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use.

See also the Committee Report for IGRA, S. Rep. 100-446 at 14:

> "The Committee does not intend that compacts be used as subterfuge for imposing state jurisdiction on tribal lands."

[3] 602 F.3d 1019 (9th Cir. 2010), *cert denied,* 2011 U.S. LEXIS 4917 (2011).

[4] *Id.* at 1033 (discussing *In re Indian Gaming Cases (Coyote Valley II),* 331 F.3d 1094, 1103 (9th Circ. 2003).

[5] For purposes of this discussion, the term "effective revenue sharing rate" refers to the actual percentage of total net-win the Tribe shares with the State.

the Tribe's nearest competitors. In the event the Tribe operates the maximum 750 gaming devices permitted under the Compact, the Compact's effective revenue-sharing rate would be nearly equal to those of the Tribe's nearby competitors.[6]

The Tribe will contribute no revenues to the SDF where it operates fewer than 350 gaming devices. At such time that the Tribe expands its gaming operations to include up to 600 gaming devices, it will contribute 7 percent of its net win to the SDF only on those devices in excess of the 350-device mark. Some of the Tribe's nearest competitors make a contribution of 7 percent of their net win to the SDF for between 200-500 gaming devices, and contribute 10 percent of net win to the SDF for between 500 and 1,000 gaming devices. *See, e.g.* Class III Gaming Compact of the Middletown Rancheria of Pomo Indians (October 12, 1999).

We are, however, very concerned by the Compact's provisions requiring the Tribe to contribute 15 percent of its net win to the SDF for between 601 and 750 gaming devices, especially for a gaming facility located in such a highly competitive, but sparsely populated, gaming market. Based upon our understanding of the Class III gaming market in the Tribe's region, we believe it is unlikely that the Tribe's anticipated market will support an operation with more than 600 gaming devices. Only one of the Tribe's nearby competitors offers more than 600 gaming devices, and the majority of its other competitors have received payments from the RSTF, indicating that they operate fewer than 350 gaming devices. In fact, most tribes in the region have continued to receive RSTF payments through June 30, 2011 since the first distributions were made in 2004, the last date for which data is available.[7]

Last year, we disapproved a separate Class III gaming compact submitted by the Tribe (2010 Compact) because it violated IGRA, which expressly prohibits the state from imposing a tax, fee, charge, or other assessment on Indian gaming, except to defray the state's cost of regulating Class III gaming activities. Letter from Larry Echo Hawk, Assistant Secretary – Indian Affairs, to Sherry Treppa, Chairwoman of the Habematolel Pomo of Upper Lake (August 17, 2010). Our decision to disapprove the Tribe's previous compact was based largely upon the fact that it required the Tribe to contribute 15 percent of its net win for all gaming devices in exchange for the right to operate Class III gaming in a 100-mile Core Geographic Area exclusive of non-tribal entities.

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[6] If the Tribe operates the maximum 750 gaming devices, revenue sharing will be zero pecent on the first 350 gaming devices, 7 percent on the 250 additional gaming devices, and 15% on the 150 additional gaming devices, establishing an effective rate of 6.4 percent. Revenue sharing in the original, model Tribal-State of California Class III gaming compacts approved by the Department in 2000 for operating 750 gaming devices is zero percent on the first 200 gaming devices, 7 percent on the next 300 gaming devices, and 10 percent on the next 250 gaming devices, establishing an effective rate of 6.13 percent. Most of the Tribe's nearby competitors offer Class III gaming under the model compacts described here.

[7] For purposes of this letter, we are referring to the following tribes as "nearby competitors": Robinson Rancheria, Big Valley Rancheria, Hopland Rancheria, Coyote Valley Rancheria, Dry Creek Rancheria, Sherwood Valley Rancheria, Middleton Rancheria, Colusa Rancheria, Rumsey Rancheria, Laytonville Rancheria-Cahto, Round Valley Rancheria, Paskenta Rancheria, Mooretown Rancheria, Berry Creek Rancheria-Tyme Maidu, Lytton Rancheria, and Redding Rancheria.

The Tribe's business projections, combined with our evaluation of certain elements of those projections, prevented us from disapproving the Compact in this instance. It is reasonable for us to conclude that the effective revenue-sharing rate would be much greater if the Compact required the Tribe to contribute 15 percent of the net win to the SDF from more than 150 gaming devices.

Therefore, neither the State of California nor any other state should assume that this Compact's revenue sharing structure may be applied to other tribes in a manner consistent with IGRA. It is also important to note that we review each proposed compact on a case-by-case basis.

Permissible Subjects of Compact Negotiation

Both this Compact and the 2010 Compact contained identical definitions of "Gaming Facility," and similar requirements for TEIRs. Although we did not identify these provisions as a basis for our disapproval of the 2010 Compact, we also were and remain very troubled by the expansive definition of "Gaming Facility" in the Compact. Indeed, when read in conjunction, the definitions of "Gaming Facility" and "Project" may encompass the most expansive range of activities in any compact approved, or considered to have been approved, by the Department since the adoption of IGRA in 1988.

As noted above, IGRA limits the subjects over which tribes and states can negotiate a Class III gaming compact. *See* 25 U.S.C. § 2710 (d)(3)(C) and note 2, *supra.* In particular, a Class III gaming compact may include provisions relating to:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are *directly related to the operation of gaming activities*.

25 U.S.C. § 2710(d)(3)(C)(emphasis added).

Earlier this year, we disapproved a proposed tribal-state gaming compact because we determined that it included provisions restricting tribal land use outside the scope of subjects IGRA permits tribes and states to include in Class III gaming compacts. *See,* Letter from Donald E. Laverdure,

Principal Deputy Assistant Secretary – Indian Affairs, to Kimberly Vele, President of the Stockbridge-Munsee Community of Mohican Indians (February 18, 2011). In that instance, the proposed compact restricted the Stockbridge-Munsee Community of Mohican Indians from using the proposed gaming site for any purpose other than Class III gaming. *Id.*

As noted above, the definition of "Gaming Facility" encompasses, "…all rooms, buildings, and areas, including hotels, parking lots, and walkways, a principal purpose of which is to serve the activities of the Gaming Operation."[8] Compact, § 2.10. The term "Project," meanwhile, includes other activities, "a principal purpose of which is to serve the Gaming Facility." Compact, § 2.20. Such activities may include access roads, water supply systems, and utility systems. *Id.*

The Compact requires the Tribe to prepare a TEIR prior to the commencement of any "Project." Compact, § 11.8.1. It also requires the Tribe to offer to negotiate an intergovernmental agreement "with the County and any impacted city in which the Gaming Facility is located or whose boundary is within one quarter (1/4) mile from the border of any portion of a Gaming Facility…." Compact, § 11.8.7.

IGRA's compact negotiation process permits states to negotiate with tribes to address and mitigate the impact of Class III gaming. Nevertheless, IGRA limits the subjects over which parties may negotiate a gaming compact to those that are "directly related to the operation of gaming activities." 25 U.S.C. §§ 2710(d)(3)(C). As the legislative history of IGRA indicates, "compacts [should not] be used as subterfuge for imposing state jurisdiction on tribal lands." *See,* Committee Report for IGRA, S. Rep. 100-446 at 14.

In this instance, we have significant concerns about whether Section 11 of the Compact, when coupled with its definition of both "Gaming Facility" and "Project," exceeds the scope of provisions tribes and states may include in a Class III gaming compact under IGRA. The term "Project" includes activities intended to serve the "Gaming Facility," which, in turn, encompasses more than just the actual facilities in which gaming activities will be conducted. Arguably, the Compact could even be read to apply to tribal activities far removed from the conduct of gaming, and therefore clearly unrelated to the operation of Class III gaming – such as the development of a tribal power utility or road system. Nothing in IGRA or its legislative history indicates that Congress intended to allow gaming compacts to be used to expand state regulatory authority over tribal activities that are not directly related to the conduct of Class III gaming.

Here again, only the Tribe's project descriptions and supplemental information, combined with our narrow construction of the provisions discussed here, prevented us from finding that the Compact violated IGRA's provisions regarding the permissible scope of compact negotiations and disapproving the Compact. In implementing this Compact, we caution the parties to avoid applying these provisions in a manner that does not directly relate to the operation of gaming

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[8] A "Gaming Operation" is defined as the "business enterprise that offers and operates Gaming Activities, whether exclusively or otherwise." Compact, § 2.11. "Gaming Activity," is defined as "the Class III Gaming activities authorized under this Compact in section 3.1."

activities, as doing so would violate the provisions of IGRA limiting the scope of tribal-state gaming compacts.

As with revenue sharing provisions, we will review tribal-state gaming compacts with great scrutiny to ensure that they regulate only those activities directly related to the operation of gaming activities. We cannot approve a tribal-state gaming compact that purports to interfere with tribal regulation of areas not directly related to the operation of gaming activities, such as community planning and land use, or that regulates amenities in a manner that only indirectly relates to tribal gaming operations.

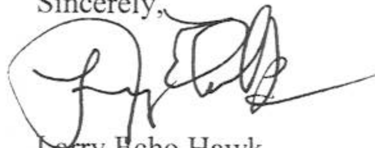
CONCLUSION

We undertook a thorough review of the Compact and the additional materials submitted by the Tribe, and decided to take no action within the prescribed 45-day review period. As a result, the Compact is "considered to have been approved by the Secretary, but only to the extent [it] is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C).

The Compact became effective upon the publication of notice in the Federal Register on August 10, 2011, as required by 25 U.S.C. § 2710(d)(3)(8).

A similar letter is being sent to the Honorable Jerry Brown, Governor of the State of California.

Sincerely,



Larry Echo Hawk
Assistant Secretary – Indian Affairs