



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

AUG 17 2010

Honorable Sherry Treppa
Chairperson, Habematolel Pomo of Upper Lake
375 E. Hwy. 20, Suite 1
P.O. Box 516
Upper Lake, California 95485

Dear Chairperson Treppa:

I am writing to you regarding the proposed Class III Gaming Compact (Compact) between the State of California (State) and the Habematolel Pomo of Upper Lake (Tribe) the Department of the Interior received on July 6, 2010.

The Tribe executed the Compact on August 28, 2009. California Governor Arnold Schwarzenegger signed the Compact on January 7, 2010, following ratification by the State Legislature. The Tribe originally submitted the Compact to the Department for review on January 12, 2010. Following a brief period of communication with the Department, during which the Department posed questions regarding the Compact's revenue sharing provisions, the Tribe and the State agreed to withdraw the Compact and submit information justifying the Compact's revenue sharing provisions.

The Tribe resubmitted the Compact to the Department on February 25, 2010. Prior to the expiration of IGRA's 45-day review period, on April 8, 2010, the Tribe and the State again agreed to withdraw the Compact to provide the Department with more information in support of the Compact's approval.

In the intervening period between the original January 12, 2010 submission and today, my staff and I met with representatives of the Tribe on several occasions to discuss a number of issues related to the Compact. My office has also reviewed numerous documents submitted by the Tribe and the State in support of the Compact. Since the Compact currently under review is the same agreement that was initially submitted on January 12, 2010, we have included all documentation the Tribe and State have sent us since that time in the administrative record for this decision.

Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within 45 days of its submission. 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 Compact authorizes the Tribe to operate Class III gaming on its lands in northern California, including up to 750 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 grants the Tribe exclusivity within the Tribe's "core geographic market" – a zone within a "100-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 primary justification provided to the Department for the 15 percent revenue sharing provision in the Compact is the State's assertion that under Proposition 1A the Tribe has 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 the Tribe's eligibility to continue to receive RSTF payments, and the ability of the Tribe to deduct participation fees from the calculation of its net win.

ANALYSIS

The Secretary may only disapprove a proposed Compact under IGRA 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, 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). 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 meaningful concessions. 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 provides substantial economic benefits to the tribe proportional to the revenue sharing required.

An important part of our analysis is that the United States Court of Appeals for the Ninth Circuit issued an opinion 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)).

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.

The State asserts that the Compact provisions allowing for the deduction of participation fees – those fees paid to suppliers for the right to lease gaming devices – from the calculation of net win constitutes a meaningful concession. The State also asserts that permitting the Tribe to continue to participate in the Revenue Sharing Trust Fund (RSTF) constitutes a significant and meaningful concession. Next, the State asserts that permitting the Tribe to operate up to 750 gaming devices is a meaningful concession. Lastly, the State asserts that protection of exclusive Indian gaming rights under Proposition 1A, and the additional protection of the Tribe’s exclusive gaming rights within the Tribe’s CGA constitute separate and independent meaningful concessions on the part of the State justifying the 15 percent revenue sharing provision. Each of these elements is analyzed below.

1. Deduction of Participation Fees

The National Indian Gaming Commission’s definition of operating expenses already allows participation fees to be classified as an operating expense, outside the calculation of net revenue. Therefore, because the State has not provided anything new to which the Tribe is not already entitled, this does not constitute a meaningful concession.

2. Continued Participation in the RSTF

The State does not grant or deny tribal participation in the RSTF. Tribal eligibility is defined in other tribal-state compacts in California and under State law. The State cannot confer a substantial economic benefit upon the tribe by claiming to allow the Tribe to enjoy benefits to which it is already entitled.

Additionally, the Tribe suggested in a July 1, 2010, letter to the Office of Indian Gaming that continued participation in the RSTF will offset a portion of its revenue sharing payments.¹ Permitting the Tribe to draw from the RSTF only to transfer that amount and more back to the State through revenue sharing allows the State to use the Tribe as a conduit to appropriate Indian gaming funds contributed to the RSTF by other gaming tribes to which the State is not entitled.

3. Authority to Operate up to 750 Gaming Devices

In 1999, the State and 61 tribes entered into what became known as the “1999 Compacts,” which were ratified by the State Legislature after passage of Proposition 1A, and later approved by the Department. Under the 1999 Compacts, each tribe was permitted to operate a minimum of 350 slot machines, or the number of slot machines a tribe was operating on September 1, 1999, whichever was greater. The 1999 Compacts also contained a complex system to seek additional slot machines, but this process has proved cumbersome, difficult to administer, and has resulted in multiple lawsuits against the State. We view this concession as meaningful.

4. Protection of Exclusive Gaming Rights

In 2000, the State’s voters approved Proposition 1A, an amendment exempting tribal gaming from the prohibition Section 19 of Article IV of the California Constitution that exempted tribal gaming from the prohibition on Nevada-style casinos. 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 grant of Class III gaming exclusivity to all California tribes, including the Habematolel Pomo of Upper Lake, is a concession.

However, we do not believe the CGA can also count as an independent or separate “meaningful concession” in light of Proposition 1A’s tribal exclusivity that now constitutes the law of the State of California, notwithstanding the CGA.

B. Substantial Economic Benefit

We now examine whether the value of the concessions provide substantial economic benefits to the tribe proportional to the revenue sharing required.

The State has asserted that protection of the Tribe’s exclusive gaming rights, both generally and specifically within the Tribe’s CGA, confer a substantial economic benefit upon the Tribe justifying a revenue-sharing rate of 15 percent.

We have determined that only the tribal exclusivity under Proposition 1A constitutes a meaningful concession on the part of the State. Assuming *arguendo* that the CGA also constitutes a meaningful concession, these provisions do not by themselves or together, confer a substantial economic benefit

¹ “Moreover, because of the Tribe’s continuing eligibility for disbursements from the Revenue Sharing Trust Fund, the Tribe will in fact receive more money from the State each year than it pays pursuant to the terms of the Compact.” Letter from Sherry Treppa, Chairperson of Habematolel Pomo of Upper Lake, to Paula Hart, Director of the Office of Indian Gaming. July 1, 2010.

upon the Tribe proportional to the value received by the State through the 15 percent revenue sharing provision.

Today there is one non-Indian gaming facility within the Tribe's CGA, the 101 Club in Petaluma, California, offering 15 poker tables. The 101 Club is the only commercial gaming facility to have operated continuously within the CGA prior to any exclusive tribal gaming rights in California. We believe this demonstrates that the market within the CGA is not conducive to new competition from commercial gaming facilities. Construction of the Tribe's new gaming facility is unlikely to alter this dynamic.

The Tribe and State contend that State foregoing repeal of its constitutional amendment granting tribes in California exclusive authority to operate Las Vegas-style gaming confers a substantial economic benefit upon the Tribe. As support for its position, the Tribe cites efforts by groups within the State that have attempted, albeit unsuccessfully, to gather enough signatures for ballot initiatives aimed at authorizing commercial gaming. Whether such initiatives will ultimately prove successful in repealing the status quo is a difficult question, but the Ninth Circuit has 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 1019, 1038 (9th Cir. 2010).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.

Moreover, even if commercial gaming was approved by the State, the Tribe would have to continue sharing 15 percent of its net win if extensive commercial gaming started operating in California beyond the CGA. This is true regardless of any negative impact statewide commercial gaming had on the Tribe's net revenues.

In addition, 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 gaming facilities within the CGA operating as few as 92 gaming devices (Cahto Laytonville Rancheria) to as many as 1,300 devices (Dry Creek Rancheria). As many as six of the tribes operating

² *Rincon* also noted that "[s]ince passage of a constitutional amendment eliminating tribal gaming exclusivity it is extremely unlikely . . . [that] the monetary remedies [in the Compact] contingent upon that event 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 in the CGA. Nearly all of the tribes operating Class III gaming facilities in the Habematolel Pomo of Upper Lake's CGA are party to compacts that provide for tribal payments of 10 percent to the Special Distribution Fund (SDF) for between 501 and 1,000 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 7percent 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 percent of Net Win to the State's general fund beginning with the first electronic gaming device for a similarly-sized facility.

these gaming facilities have received RSTF payments, indicating that they operate 349 gaming devices or less. Most of these tribes have received payments from the RSTF since the first distributions were made 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 so substantial as to justify a 15 percent revenue sharing provision for the size of the facility agreed upon. And, as discussed above, any value that is arguably added by the CGA is limited in economic benefit to the Tribe in comparison to a 15 percent revenue sharing provision, because the Tribe must compete with other Indian gaming enterprises within the CGA and repeal of Proposition 1A is purely speculative.

CONCLUSION

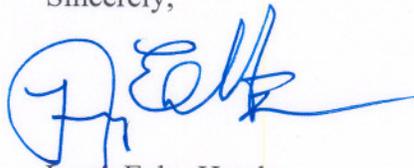
Based on this analysis I find that the Compact is in violation of IGRA. Therefore, I hereby disapprove the Compact.

I deeply regret that this decision is necessary, and understand that it constitutes a significant economic setback for the Tribe. Nevertheless, the Department is committed to upholding IGRA and cannot approve a compact where the State imposes a tax, fee, charge, or other assessment on a tribally-owned gaming facility in violation of IGRA, as set forth above. *See* § 25 U.S.C. 2710(d)(8).

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 Arnold Schwarzenegger, Governor of the State of California.

Sincerely,



Larry Echo Hawk
Assistant Secretary – Indian Affairs