State-Tribal Gaming Compacts: *A Deal is a Deal, Right?*

by Hilary C. Tompkins

States and tribes may not agree on many things, but in the area of Indian gaming, they must have a "meeting of the minds" in a gaming compact. Congress struck a balance between tribal and state sovereign authorities in the Indian Gaming Regulatory Act (IGRA) whereby tribes and states must enter into a gaming compact for Class III gaming on Indian lands. The U.S. Department of the Interior also must approve the compact. Having observed firsthand this multi-governmental process, arguably the hardest step is reaching agreement on compact terms, particularly given that states and tribes do not have unlimited cards to play in the negotiation process.

Congress imposed limits on what can be negotiated in a compact. For instance, a state cannot impose a tax on a tribe as a condition to game and a gaming compact can only cover those games that are permitted under state law. Interior also has views on issues that can be negotiated in a compact, with non-gaming terms being a bridge too far, such as topics regarding hotel amenities or entertainment. Given all these hurdles, it is a true feat when a state and tribe reach an agreement on compact terms and Interior approves the compact. It is a testament to tribes' resilience that there are over 230 gaming tribes with compacts in effect in 29 states. Many of these compacts have been in effect for years and are now coming up for renewal. As a result, disputes over what was agreed upon in the first place are coming to light. Both states and tribes are finding themselves saying "That was not part of the deal!" Meanwhile, Interior has been standing on the sidelines as a spectator. An examination of recent disputes helps to shed light on where states and tribes can find themselves at odds and whether Interior could play a more active role.

One dispute involves the Seneca Nation and the State of New York over an automatic compact renewal provision and whether the Nation must continue to pay revenue sharing to the state under the renewed compact. The Nation recently received an adverse arbitration ruling, which concluded that while the existing compact was silent about revenue sharing upon renewal, that silence did not mean the Nation could stop paying revenue sharing. The Seneca Nation has asked a federal court to undo the $255 million arbitration award, arguing that Interior must approve this payment. New York asserts there is no need for Interior approval because the arbitration award addressed a contract interpretation issue and not an amendment of a compact (which would require Interior approval). The Seneca Nation's strategy of mandatory Interior participation could provide the basis for new federal action on the matter that could restart the clock in this fight and also give room for settlement.

Another example of where renewal of a compact can open the door to disputes is in Oklahoma, where the state is resisting the tribes' position that the existing compacts will automatically renew in January, 2020, with no change in the level of revenue sharing payments to the state. The tribes annually pay more than $140 million to the state. Governor Stitt is seeking higher revenue sharing in a renegotiated compact, arguing that the existing compacts expire and do not renew in 2020. The state's strategy poses some risk as a tribe's obligation to pay revenue sharing to a state must be based on the tribe receiving something of value in return. This requirement is to avoid the prohibition under IGRA that forbids a state from taxing a tribe. The quid pro quo typically consists of tribes holding an exclusive gaming market in return for making payments to the state. Another risk for the state is that Interior will not approve a compact that increases already sizeable revenue sharing payments. Interior does not readily approve increased payments to states, particularly given IGRA's purpose of supporting tribal self-governance and programs through gaming revenue.

A third revenue sharing dispute recently arose in New Mexico where certain Pueblos sued the state for its adverse position that the Pueblos should include the face value of free play in the calculation of net win, which determines the amount of revenue sharing owed to the state. The federal district court judge ruled in *Pueblo of Isleta v. Grisham* that the state's interpretation was wrong because free play did not result in revenue to the Pueblos' gaming operations (i.e., net win), and therefore, the state's demand was contrary to the terms of the contract. The court also concluded that the state's demand to share in the value of free play constituted an impermissible tax under IGRA. The court noted that Interior had identified this problem in its compact approval letter. The Pueblos' legal victory still stands as the state did not appeal the court's ruling.

A final example where the "meeting of the minds" fell apart is in California, where gaming tribes unsuccessfully sued the state for violation of market exclusivity under their 2016 gaming compact for permitting banking and percentage card games at non-Indian gaming operations. The federal district court judge in *Yocha Dehe Winton Nation v. Brown* ruled that while the state's constitution recognized a right of exclusivity,

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the newly-negotiated compacts did not provide an express term requiring the state to preserve that right and provided only a limited recourse of dispute resolution if exclusivity ever lapsed. The court also reasoned that the fifteen years of debate between the tribes and state about what activity was covered by the term "banking and percentage card games," also showed that the tribes' view of the state's exclusivity obligation was not shared by the state. An appeal is anticipated in this case.

Common themes in all of these examples is that while a gaming compact may be signed, sealed, and blessed by Interior, the states and tribes may interpret the deal differently. In fact, at times the parties will shelve debates for a later day and relent to ambiguous compact provisions on tough topics. To avoid future legal battles, it is critical that for the big ticket items, like revenue sharing and exclusivity, the parties should have those tough talks and reach agreement to avoid ambiguous compact language. This clarity is also important with regard to Interior's approval of the compact. In these debates between state and tribes, Interior often stands on the sidelines and will be reluctant to take a formal position, particularly for deemed approved compacts. However, where there is greater clarity, Interior will be better situated to advance the right interpretation that is commensurate with the goals of IGRA and in support of tribal self-governance and economic prosperity. ♣

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