Indian Gaming Compacts in Oklahoma: *Respecting Tribal Jurisdiction and Enforcing Understanding - A Continuing Role for Class II Gaming*

by D. Michael McBride III

In Oklahoma, gaming law is almost always an issue of Indian law and gaming, which constitutes about 90% of the field. A recent big development is not about gaming, so much as tribal autonomy and sovereignty. There is a brewing dispute between Oklahoma and tribes over which courts can hear claims brought by casino patrons pursuant to tribal-state gaming compacts. With about 110 Indian casinos and almost $3 billion in business (in 2008), this issue has enormous implications.

The current dispute between certain tribes and the Oklahoma Supreme Court involves the jurisdiction of state courts to hear claims brought by casino patrons. The tribes, and even Oklahoma's state treasurer and the governor's office, have taken the position that, under the present compact, state courts do not have this jurisdiction. The Oklahoma Supreme Court disagrees. This dispute has spawned several state court decisions, federal litigation, and compact-based arbitration.

History of Indian Gaming in Oklahoma

Commercial Indian gaming in Oklahoma dates back to the 1970s and early 1980s. Several lawsuits at that time challenged the tribes' governmental jurisdiction, and the tribes won.

After the decision in *Cabazon Band of Indians v. California*, 480 U.S. 202 (1987), the U.S. Congress stepped in and passed the Indian Gaming Regulatory Act. IGRA represented a massive compromise between tribal, state, and federal interests and it divided gaming into three classes.

By setting up this three-tiered structure, IGRA actually restricted the tribes' pre-existing powers over Indian gaming. Now, for tribes to be able to engage in Las Vegas-style Class III gaming, a tribe and the state must enter into a compact, or agreement, spelling out – the games that will be played; any sort of regulatory oversight; and any revenue sharing arrangements. Once that compact is entered into, it is then sent to the federal government, where it is either approved or disapproved. That compact then governs the relationship between the tribe and the state as a matter of contract and of law.

State-Tribal Compacts Bring Class III Indian Gaming to Oklahoma

For many years there was no Class III Indian gaming in Oklahoma, and most Indian gaming involved paper bingo games and pull-tabs. Around 1992, the first tribal-Oklahoma compacts came about, only allowing horse-race wagers at Indian tribal casinos. The state refused to negotiate further with tribes between 1992 and the early 2000s. Because tribes cannot force the state to negotiate in good faith as required by IGRA, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), Oklahoma's tribes had to work with what they had. Tribes and gaming manufacturers, therefore, toiled in earnest to maximize Class II gaming by adding entertaining video displays and networking bingo games. These games, permitted under IGRA's Class II definition, took advantage of the latest advances in technology. Legal battles followed over the distinction between Class II and Class III, but tribes won most of the cases, and much of the innovation occurred within Oklahoma Indian Country.

In the end, it was technology and tribal success that finally brought Oklahoma to the bargaining table, as Class II technology advanced and tribal casinos within Oklahoma continued to expand.

Negotiations with Oklahoma's governor started again, resulting in a new proposed compact, which was put on the ballot in 2004 as State Question 712. Oklahoma voters overwhelmingly approved this proposal, and the legislature could now offer a new model gaming compact to Oklahoma's federally recognized Indian tribes.

With this model compact, Indian gaming catapulted into the Class III "big leagues." In 2009, the growth rate of Indian gaming in Oklahoma led the nation, and the state has benefited. Under the compacts, tribes pay "exclusivity fees" to the state from their Class III gaming revenues, and those fees are specifically earmarked for state educational purposes. Since 2004, Oklahoma's tribes have paid approximately $250 million dollars to the state.

Challenges of the New Gaming Compacts: Key Litigation

The tribal-state gaming compact of 2004 has been a boon to the Oklahoma economy; by 2008, Oklahoma had 110 casinos, doing nearly $3 billion in business. According to estimates by Alan Meister of Nathan & Associates, publisher of *Casino City's Indian Gaming Industry Report*, in 2008 Indian gaming nationally directly or indirectly provided:

- $84.7 billion in output;
- 712,000 jobs;
- $27 billion in wages;
- $10.8 billion in federal, state, and local tax revenue; and
- $1.6 billion in direct payments to federal, state, and local governments.

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The Current Controversy

In addition to the fees, the compacts also provide that tribes will waive their sovereign immunity to suit for tort and prize claims. Therefore, if someone gets hurt at a tribal casino, a casino patron can seek redress for being hurt; or, if there is a prize claim dispute, patrons can file a claim. The compact says that these patrons can bring claims "in courts of competent jurisdiction," but at the same time, another part of the compact says, "this compact will not alter tribal federal or state civil adjudicatory or criminal jurisdiction." At the time of entering into the compact in 2004, state courts lacked any jurisdiction over tort actions against tribes.

Now, however, casino patrons have sued various tribes in state courts. Three cases have wound their way through the Oklahoma appellate courts - *Cossey v. Cherokee Nation Enterprises LLC*, 2009 OK 6, 212 P.3d 447; *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51; and *Dye v. Choctaw Casino of Pocola*, 2009 OK 52. Each case involved personal injury claims filed in state court. In each of those cases the Oklahoma Supreme Court ruled that state courts are courts of competent jurisdiction that can hear those types of claims against tribes.

These decisions have caused a tremendous amount of friction with Indian tribal communities in Oklahoma; the tribes believe that these matters should only be heard in tribal court or other tribal forums. The exclusive remedy for any dispute between a tribe and the state under the compact is arbitration, and a private arbitrator must decide the dispute. Therefore, the Chickasaw and Choctaw tribes invoked arbitration against the State of Oklahoma in 2009. The arbitrator in that case, a retired U.S. district court judge, ruled in favor of the tribes, finding that Oklahoma courts had no jurisdiction over these tort and prize claims. The Choctaw Nation then filed motions with the Oklahoma Supreme Court to reconsider the decisions in the Dye and Griffith cases in September. Those motions are still pending.

In early 2010, the Chickasaw and Choctaw Nations sued Oklahoma in the federal court to enforce the arbitration award as the sole and explicit remedy under the compact. *See Choctaw Nation, et al. v. Oklahoma*, 5:10-cv-00050-W (W.D. Okla. Jan. 19, 2010).

The Eastern Shawnee Tribe of Oklahoma won arbitration award against Oklahoma on April 5, 2010 from a former federal judge acting as a sole arbitrator. The award granted that tribe relief by making 11 declarations. The awarded relief declared in summary that Oklahoma courts lacked jurisdiction because the compact (i) did not expressly waive the tribe's immunity and Congress did not abrogate the tribe's immunity, (ii) it preserved the existing jurisdiction prior to the compact, namely that the state did not have jurisdiction over matters occurring in Indian Country before and (iii) that federal law preempts the field.

The Future of Oklahoma Tribal-State Gaming Compacts

The current tribal-state compact lasts until January 1, 2020, and would automatically renew unless otherwise renegotiated or terminated; therefore, Oklahoma is at least ten years away from the compact expiring. Perhaps these issues could be addressed through future negotiations. For now, arbitrations and federal enforcement likely will be the final word on these contested jurisdictional issues.

If state budget problems continue, Oklahoma may also attempt to negotiate a larger exclusivity fee for future Indian gaming revenues. However, the U.S. Constitution stipulates that Indians "are not taxed," and IGRA says that states cannot tax gaming. Consequently, the states have extracted fees in order to allow different types of Class III gaming; and so far, the Department of the Interior has approved these arrangements, so long as they provide for some special exclusivity of the tribes. Recent decisions have held that California cannot force Indian tribes to share gaming revenues to repair that state's budget problems. *Rincon Band v. Schwarzenegger*, No. 08-55809 (and No. 08-55914), __F3d__ (9th Cir., April 20, 2010).

Oklahoma has some fairly strict and comprehensive gambling statutes that make it illegal to engage in non-Indian gaming in the state; and that is part of the exclusivity that the tribes enjoy. If the state were to open up gambling to other venues, it would violate the compact and cause a breach.

As the controversy in this area continues, it is possible that certain tribes will end up pulling all Class III devices from their facilities instead of being hauled into state courts. Innovations in Class II gaming have really taken off in the past 20 years and it remains a very viable and powerful class of gaming over which states have no say. Therefore, the use of Class II gaming devices remains a very strong and powerful form of leverage for tribes in their future negotiations with states and as a viable option if government negotiations fail. ♣

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