United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

The Honorable Jerry Brown
Governor of California
Sacramento, California 95814

JUL 13 2012

Dear Governor Brown:

On May 21, 2012, the Department of the Interior (Department) received the tribal-state class III gaming compact (Compact) between the Federated Indians of the Graton Rancheria (Tribe) and the State of California (State).

Under the Indian Gaming Regulatory Act (IGRA), the Secretary may approve or disapprove a compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8). If the Secretary does not act to approve or disapprove a compact within the prescribed 45-day period, IGRA provides that it is considered to have been approved by the Secretary, "but only to the extent that 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 obligation of the United States to Indians.

DECISION

We undertook a thorough review of the Compact and the additional materials submitted by the Tribe. While we have significant concerns with several provisions in the Compact, we took 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 July 12, 2012, as required by 25 U.S.C. § 2710(d)(3)(8).

We have set forth an explanation of our concerns below.

BACKGROUND

1. Revenue Sharing Provisions

The Compact authorizes the Tribe to conduct class III gaming on its lands in Sonoma County, California exclusive of other non-Indian gaming throughout the State of California. See Compact § 4.7. This includes the ability to operate up to a total of 3,000 electronic gaming devices, banking or percentage card games, and any devices or games authorized under state law. Compact §§ 3.1, 4.1.

In exchange for this exclusivity, the Tribe has agreed to share a portion of its revenues with the State for "cost reimbursement, and mitigation." Compact § 4.0. Under these provisions, the Tribe has agreed to share its revenues as follows:

A. To the State Gaming Agency for deposit into the Special Distribution Fund:[1]

   a. $350,000 per quarter for the first 28 quarters in which gaming occurs at the Tribe's gaming facility.

   b. 3 percent of the Net Win from all gaming devices beginning with the 29th quarter after gaming occurs at the Tribe's gaming facility.

B. To the State Gaming Agency for deposit into the Graton Mitigation Fund:[2]

   a. 15 percent of the Net Win from all Gaming Devices for the first 28 quarters in which gaming occurs at the Tribe's gaming facility.

   b. 12 percent of the Net Win from all Gaming Devices beginning with the 29th quarter after gaming occurs at the Tribe's gaming facility.

The Compact provides for a series of "deductions" that the Tribe must take from the Compact's overarching revenue-sharing obligations prior to making payments to the State Gaming Agency for the Graton Mitigation Fund. Under Section 4.5(b), the Tribe must deduct the payments it makes for deposit in the Special Distribution Fund. It must also make a series of deductions, as follows:

A. In the first year in which gaming activities occur, a deduction of $9,000 per tribal citizen, up to a maximum of $11,650,000 for the benefit of the Tribe and its citizens; and, a deduction of $13,000 per tribal citizen up to a maximum of $17,000,000 for payment of debt incurred by the Tribe for predevelopment costs.

B. In the second year in which gaming activities occur, a deduction of $10,000 per tribal citizen, up to a maximum of $12,850,000 for the benefit of the Tribe and its citizens; and, a deduction of $12,750 per tribal citizen up to a maximum of $16,500,000 for payment of debt incurred by the Tribe for predevelopment costs.

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[1] Section 4.3.1 of the Compact prescribes the purposes for which the State may use funds deposited into the Special Distribution Fund by the Tribe. These include grants to address gambling addiction, grants to support local governments impacted by tribal gaming, compensation for costs incurred for regulation of gaming, and any other purpose consistent with IGRA.

[2] The Graton Mitigation Fund is established through the Compact for mitigation payments to the City of Rohnert Park, California and Sonoma County, California. The Compact also provides for payments to the California Revenue Sharing Trust Fund and the Tribal Nation Grant Fund. *See* Compact § 4.5.1. The Tribe has entered into MOUs with the City and the County to make payments for local mitigation of the impact of Class III gaming. Those payments will be disbursed through the Graton Mitigation Fund, rather than separate and apart from the revenue sharing provided for in the Compact. *See* Request for Secretarial Approval of the Tribal-State Compact Between the Federated Indians of the Graton Rancheria and the State of California (Compact Supplement) at 10-13.

C. In the third year in which gaming activities occur, a deduction of $13,000 per tribal citizen, up to a maximum of $16,750,000 for the benefit of the Tribe and its citizens; and, a deduction of $10,900 per tribal citizen up to a maximum of $14,200,000 for payment of debt incurred by the Tribe for predevelopment costs.

D. In the fourth year in which gaming activities occur, a deduction of $13,000 per tribal citizen, up to a maximum of $16,750,000 for the benefit of the Tribe and its citizens; and, a deduction of $9,269 per tribal citizen up to a maximum of $12,000,000 for payment of debt incurred by the Tribe for predevelopment costs.

E. In the fifth year in which gaming activities occur, a deduction of $16,000 per tribal citizen, up to a maximum of $21,000,000 for the benefit of the Tribe and its citizens; and, a deduction of $6,275 per tribal citizen up to a maximum of $8,150,000 for payment of debt incurred by the Tribe for predevelopment costs.

F. In the sixth year in which gaming activities occur, a deduction of $19,600 per tribal citizen, up to a maximum of $25,500,000 for the benefit of the Tribe and its citizens; and, a deduction of $3,250 per tribal citizen up to a maximum of $4,225,000 for payment of debt incurred by the Tribe for predevelopment costs.

G. In the seventh year in which gaming activities occur, a deduction of $21,000 per tribal citizen, up to a maximum of $27,500,000 for the benefit of the Tribe and its citizens; and, a deduction of $2,225 per tribal citizen up to a maximum of $2,900,000 for payment of debt incurred by the Tribe for predevelopment costs.

The Tribe's deductions from revenue sharing payments into the Graton Mitigation Fund for tribal citizen benefits and debt payments cease after the seventh year in which gaming activities occur, meaning that the Tribe must then share 15 percent of its Net Win for the remaining term of the Compact for payment into the Graton Mitigation Fund.

Throughout the entire term of the Compact, however, the Tribe may deduct the payments it makes to the State Gaming Agency for deposit into the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund from the payments it must make into the Graton Mitigation Fund. Compact § 4.5(c).

The Tribe has also agreed to share a portion of its revenues with other tribes located within the State of California that are considered "non-gaming" and "limited-gaming" tribes. These payments must be made to the Revenue Sharing Trust Fund and the Tribal Nation Grant Fund.[3]

[3] The Revenue Sharing Trust Fund (RSTF) was established by the State for annual payments to Non-Gaming Tribes and Limited Gaming Tribes. Compact § 5.1(a). The Tribal Nation Grant Fund (TNGF) was established by the State for discretionary distribution of funds to Non-Gaming Tribes and Limited-Gaming Tribes for "self-governance, self-determined community, and economic development." Compact § 5.1(b). A "Non-Gaming Tribe" is defined in the Compact as a "federally recognized tribe in California with or without a tribal-state Class III Gaming compact, that has not engaged in, or offered, Class II or Class III Gaming in any location whether within or without California" during the preceding year. Compact § 5.1(c). A "Limited Gaming Tribe" is defined as "a federally recognized tribe in California that has a Class III Gaming compact with the State but is operating fewer than a combined total of [350] Gaming Devices in all of its gaming operations wherever located, or does not have a Class III Gaming

Under Section 5.2 of the Compact, the Tribe must make payments to the State for deposit into the RSTF or the TNGF as follows:

Number of Gaming Devices Operated	Annual Payment
0-350	$0 per Gaming Device
351-750	$900 per Gaming Device
751-1,250	$1,950 per Gaming Device
1,251-2,000	$4,350 per Gaming Device
2,001-3000 (in Years One through Seven)	$4,350 per Gaming Device
2,001-3000 (After Year Seven)	$7,500 per Gaming Device

The Compact contains a contingency provision affecting the Tribe's payments to the RSTF and the TNGF. Section 5.2(b) provides:

> In addition to the payments referenced in subdivision (a), in Years One through Seven (as defined in section 4.5, subdivision (b)), if the Net Win from all Gaming Devices in operation in the Gaming Facility for the year exceeds the amount set forth in the following schedule, the Tribe shall pay the State Gaming Agency, for deposit into the [RSTF] or the [TNGF] for distribution to Non-Gaming Tribes and Limited-Gaming Tribes, twenty-five percent (25%) of the difference between the Net Win and the corresponding amount for that year as follows:
>
> | Year of Gaming Activities | Amount of Net Win |
> |---|---|
> | Year One | $350,000,000 |
> | Year Two | $360,000,000 |
> | Year Three | $371,000,000 |
> | Year Four | $382,000,000 |
> | Year Five | $394,000,000 |
> | Year Six | $406,000,000 |
> | Year Seven | $418,000,000 |

Compact §5.2(b).

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compact but is engaged in class II gaming, whether within or without California" during the preceding year. Compact § 5.1(d).

2. Notable Regulatory Provisions

Section 2 of the Compact sets forth the definitions of key terms used throughout the Compact. The term "Gaming Facility" is defined as:

> ...any building in which Gaming Activities or any Gaming Operations occur, or in which the business records receipts, or funds of the Gaming Operation are maintained (excluding offsite facilities dedicated to 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 rather than providing that operation with an incidental benefit.

Compact § 2.12.

"Gaming Activity" is defined as "the Class III Gaming activities authorized" under the Compact. Compact § 2.9. "Gaming Operation" is defined as "the business enterprise that offers and operates Gaming Activities, whether exclusively or otherwise." Compact § 2.13.

The term "Project," is defined under the Compact as "any activity occurring on Indian lands, a principal purpose of which is to serve the 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." Compact § 2.23. That definition further provides that it includes, but is not limited to, "the addition of Gaming Devices within an existing Gaming Facility..., and construction or planned expansion of any Gaming Facility and related improvement thereto, a principal purpose of which is to serve the Gaming Facility rather than provide that facility with an incidental benefit." *Id.*

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[.]" Compact § 11.8.1. It also requires the Tribe to offer to negotiate an enforceable written agreement with the City and the County to mitigate environmental impacts of a Project – as that term is defined in Section 2.23.

Section 12 of the Compact is entitled "Public and Workplace Health, Safety, and Liability," and regulates a variety of aspects and activities within the Gaming Facility. For example, Section 12.2 regulates tobacco smoke and requires the use of technology for mitigation. Section 12.3 imposes standards for food and beverage service, drinking water, workplace safety and occupational health, and equal employment. Under that section, the Tribe has agreed to:

> Adopt and comply with State public health standards for food and beverage handling. The Tribe will allow, during normal hours of operation, inspection of food and beverage services in the Gaming Facility by State, County, or City health inspectors, whichever inspector would have jurisdiction but for the Gaming Facility being on Indian lands, in order to assess compliance with these standards.

Id.

That Section also requires the Tribe to comply with "water quality and safe drinking water standards applicable in California." *Id.* This requirement contains identical jurisdiction, inspection, and enforcement provisions as that for food and beverage handling.

ANALYSIS

The IGRA confers discretionary authority on the Secretary to disapprove a proposed tribal-state compact when it violates IGRA, any other provision of Federal law that does not relate to jurisdiction over Indian lands, or the trust obligations of the United States to Indians. 25 U.S.C. § 2710(d)(8); ("The Secretary *may* disapprove a compact described in [25 U.S.C. § 2710(d)(8)(A).]").

The Department is committed to adhering to IGRA's statutory limitations on tribal-state gaming compacts. The IGRA prohibits the imposition of a tax, fee, charge, or other assessment on Indian gaming except to defray the state's cost of regulating Class III gaming activities. 25 U.S.C. § 2710(d)(4). The IGRA further prohibits using this restriction as a basis for states refusing to negotiate with tribes to conclude a compact. Id.

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

1. Revenue Sharing Provisions

We review revenue sharing provisions in gaming compacts with great scrutiny. Our analysis as to whether such provisions comply with IGRA first requires us to determine 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 the exclusive right 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 by the Compact.

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*,[4] 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."[5]

[4] 602 F.3d 1019 (9th Cir. 2010), *cert denied*, 131 S. Ct. 3055 (2011). .

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

a. Meaningful Concessions

The State's voters approved Proposition 1A in 2000, which effectively grants all California tribes the exclusive right to offer class III gaming within the State. We have consistently recognized that this exclusivity constitutes a meaningful concession to all tribes seeking to participate in gaming under IGRA.[6] We have reached the same conclusion in this instance; the State's concession of the ability to offer class III gaming exclusive of non-Indian operators constitutes a meaningful concession to the Tribe.

In its Compact Supplement, the Tribe has asserted that the State has made additional meaningful concessions – beyond the ability to offer class III gaming exclusive of non-Indian operators – by agreeing to permit the Tribe to operate up to 3,000 gaming devices at its gaming facility, along with not insisting upon some provisions in other compacts between the State and other Indian tribes. See Compact Supplement at 8.

Ordinary and routine subjects of negotiation about the regulation of gaming activities, such as the number of permissible gaming devices, hours of operation, and wager limits, do not constitute meaningful concessions for purposes of our revenue sharing analysis. Congress expressly prescribed that the regulatory regime for each tribe's class III gaming activities was to be negotiated between a single state and a single tribe, in their respective sovereign capacities under IGRA. In this instance, the State and the Tribe have negotiated the number of gaming devices as part of the ordinary and prescribed process under IGRA. As such, the State has not conceded anything it was not required to negotiate pursuant to IGRA.

Nevertheless, the State's concession of class III gaming exclusivity to the Tribe in this instance is meaningful for purposes of our revenue sharing analysis.

Under the second prong of our analysis, we believe that the State's concessions provide a substantial economic benefit to the Tribe that justifies the revenue sharing required under the Compact.

b. Substantial Economic Benefit

The economic analysis provided by the Tribe reasonably concludes that the Tribe will generate substantial revenues over the 20-year life of the Compact, aiding the Tribe in its effort to develop its economy and strengthen its government.

The Tribe also has demonstrated that its primary gaming market has a population of approximately 2.1 million adults, and is largely devoid of tribal gaming competition. See Compact Supplement at 8. This means that the State's concession of the ability to offer class III gaming exclusive of non-tribal operators has substantial economic value to the Tribe.[7]

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[6] See, *e.g.*, Letter from Larry Echo Hawk, Assistant Secretary – Indian Affairs, to Leona Williams, Chairperson of the Pinoleville Pomo Nation (February 25, 2011) (2011 Pinoleville Letter) (disapproving the tribal-state gaming compact for the Pinoleville Pomo Nation).

[7] We do not wish to suggest that provisions concerning exclusivity vis-à-vis other tribal gaming operators are a valuable concession. Rather, the absence of existing tribal gaming facilities in the Tribe's primary gaming market makes that market more attractive to development by potential non-tribal gaming operators. Therefore, the

Moreover, the Compact's revenue sharing provisions accommodate the Tribe's need to service the debt it has incurred in developing its Gaming Facility and to provide services to its citizens as it does so. This accommodation ensures that during the entire term of the Compact the Tribe's class III gaming activities fulfill the purpose of tribal gaming, as acknowledged by Congress in enacting IGRA – to generate revenues for the Tribe's government to provide services to its citizens.

While we have expressed concern over a revenue sharing rate of 15 percent in compacts between the State of California and other Indian tribes, we have consistently indicated that we review each such compact on its own terms. *See* Letter from Larry Echo Hawk, Assistant Secretary – Indian Affairs, to Sherry Treppa Bridges, Chairperson of the Habemetolel Pomo of Upper Lake (August 31, 2011) ("[N]either 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 compact on a case-by-case basis.")

The rate of revenue sharing required under the Compact effectively is limited to no more than 15 percent of the Tribe's net win, after the first 7 years. The effective revenue sharing rate under the Compact will vary in any given year, based upon the deductions the Tribe is entitled to make under the revenue sharing provisions. Over the life of the Compact, the effective revenue sharing rate will be less than 15 percent of the Net Win from the Tribe's class III gaming activities.

In this instance, the Tribe has demonstrated that the unique facts and circumstances surrounding the State's meaningful concession of class III gaming exclusivity vis-à-vis non-tribal operators confer a substantial economic benefit on the Tribe that justifies the amount of revenue sharing required under the Compact.[8] We are confident that the revenue sharing provisions in this Compact, for this Tribe, comply with applicable law.

2. Permissible Subjects of Compact Negotiation

The Compact contains several notable provisions that implicate the limitations on compact negotiations prescribed by Congress in IGRA.

Compact's protection of the Tribe's exclusivity in this market, vis-à-vis non-tribal gaming operators, has substantial economic value.

[8] Arising from IGRA's remedial provisions, the *Rincon* decision provides guidance regarding the permissible uses of tribal revenue sharing payments. *Rincon* also reaffirmed the Ninth Circuit's decision in *Coyote Valley II*, where the court found that revenue sharing requirements in the 2000 model tribal-state compacts (2000 Compact) entered into by over 50 tribes and approved by the Department did not violate IGRA. Under the 2000 Compact, tribes were required to make payments first to the RSTF and, if the tribe's gaming facility met certain parameters, to the SDF. Here, the Compact requires payments to the Graton Mitigation Fund pursuant to existing agreements negotiated and entered into by the Tribe to offset local impacts of the Tribe's gaming operation, and are therefore consistent with the court's guidance in *Rincon* and IGRA. The remainder of the Tribe's revenue sharing payments will be made to the RSTF, SDF, and TNGF. The *Coyote Valley II* court held that revenue sharing payments to the RSTF and SDF were permissible under IGRA. The TNGF is similar to the RSTF because only tribes with either small or no gaming operations are eligible recipients, but the TNGF differs in that tribes will receive discretionary grants for specific purposes that appear to support Federal policies of self-determination and self-governance. We believe that the TNGF is a permissible destination for tribal revenue sharing payments under this Compact.

The IGRA established a statutory scheme that limited tribal gaming and sought to balance tribal, state, and Federal interests in regulating gaming activities on Indian lands.

To ensure an appropriate balance between tribal and state interests, Congress limited the subjects over which tribes and states could negotiate a class III gaming compact. Pursuant to IGRA, a tribal-state 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;
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> (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).

Congress included the tribal-state compact provisions to account for states' interests in the regulation and conduct of class III gaming activities, as defined by IGRA.[9] Those provisions limited the subjects over which states and tribes could negotiate a tribal-state compact. 25 U.S.C. § 2710(d)(3)(c). In doing so, Congress also sought to establish "boundaries to restrain aggression by powerful states." *Rincon Band* (citing S. Rep. No. 100-446, at 33 (1988) (statement of Sen. John McCain)). The legislative history of IGRA indicates that "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.

[9] 25 U.S.C. § 2708.

We conduct our review of tribal-state gaming compacts against this backdrop. Tribal governments are vested with the inherent authority to regulate gaming activities on their own lands, where such lands are located within a state that permits the conduct of gaming, and the scope of a state's regulatory interest in these activities is limited, and was prescribed by Congress through IGRA. Therefore, we must view the scope of prescribed state regulatory authority over tribal gaming activities narrowly.

When we review a tribal-state compact or amendment submitted under IGRA, we look to whether the provisions fall within the scope of categories prescribed at 25 U.S.C. § 2710(d)(3)(c). One of the most challenging aspects of this review is determining whether a particular provision adheres to the "catch-all" category at § 2710(d)(3)(c)(vii): "...subjects that are directly related to the operation of gaming activities."

In the context of applying the "catch-all" category, we do not simply ask, 'but for the existence of the Tribe's class III gaming operation, would the particular subject regulated under a compact provision exist?' Instead, we must look to whether the regulated activity has a direct connection to the Tribe's conduct of class III gaming activities.

With respect to this Compact, we have applied a narrow construction to Section 11, to avoid a determination that it is inconsistent with IGRA's provisions regarding the permissible scope of bargaining.

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, rather than providing that operation with an incidental benefit."[10] Compact, § 2.12. The term "Project," meanwhile, includes other activities, "a principal purpose of which is to serve the Gaming Facility." Compact, § 2.23. Such activities may include "construction of." *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.

The IGRA 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).

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,

[10] A "Gaming Operation" is defined as the "business enterprise that offers and operates Gaming Activities, whether exclusively or otherwise." Compact, § 2.13. "Gaming Activity," is defined as "the Class III Gaming activities authorized under this Compact in section 3.1." Compact § 2.9.

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 wastewater treatment facility.[11]

The Tribe's project descriptions and supplemental information,[12] combined with our narrow construction of the provisions discussed here, prevented us from finding that Section 11 of the Compact was inconsistent IGRA's provisions regarding the permissible scope of compact negotiations. 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 activities, as doing so would violate the provisions of IGRA limiting the scope of tribal-state gaming compacts.

We have also determined that Section 12.3(a),(b) of the Compact attempts to regulate activities outside the scope of those prescribed under 25 U.S.C. § 2710(d)(3)(c), and are inconsistent with IGRA's requirement that class III gaming compacts regulate those activities which are "directly related to the operation of gaming activities."

Those provisions attempt to regulate food and beverage services by the Tribe, as well as drinking water quality. Under Section 12.3(a),(b), the Compact effectively requires the tribe to submit to state jurisdiction for certain health and safety standards notwithstanding the fact that these regulated activities occur on Indian lands and would not otherwise be subject to state regulation.

While the Tribe's provision of food, beverages, and drinking water to its patrons may occur on the same parcel on which it conducts class III gaming, it does not necessarily follow that such activities are "directly related to the operation of gaming activities" under IGRA. 25 U.S.C. § 2710(d)(3)(C)(vii). The State's interest in regulating the Tribe's food, beverage, and drinking water services do not fall within the scope of this "catch all" category, and are not within the range of state interests that Congress sought to protect when it enacted IGRA.[13]

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

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[11] See Compact Supplement at 20.

[12] In its Compact Supplement, the Tribe has asserted that Section 11 of the Compact will be of limited, if any, applicability, because it is unlikely to "engage in a new 'project' not already contemplated or identified under the preferred action in the Record of Decision." Compact Supplement at 16.

[13] "[C]ompacts [should not] be used as subterfuge for imposing state jurisdiction on tribal lands." *See,* Committee Report for IGRA, S. Rep. 100-446 at 14. Please note that this is distinct from Section 12.8 of the Compact, which requires that the purchase, sale, and service of alcoholic beverages be subject to State law. Alcohol sales have a significant potential to impact a patron's participation in gaming activities, and implicate the integrity of the conduct of class III gaming activities itself. Therefore, the regulation of the sale of alcoholic beverages is "directly related to the operation of gaming activities," and is a permissible subject of compact negotiations under IGRA.

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.

Because Sections 12.3(a),(b) are not directly related to the operation of gaming activities, and because they are not central to the Compact's regulation of the Tribe's gaming activities, we did not believe it was necessary to exercise our discretionary authority to disapprove the Compact under 25 U.S.C. § 2710(d)(8)(B). Rather, we have decided to permit the Compact to take effect by operation of law, but only to the extent it is consistent with IGRA, and subject to our understanding of the actual implementation of the Compact described above.

CONCLUSION

We undertook a thorough review of the Compact and additional materials submitted by the Tribe, and took 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 July 12, 2012, as required by 25 U.S.C. § 2710(d)(3)(8).

We wish the Tribe success in its venture. A similar letter is being sent to the Honorable Greg Sarris, Chairman of the Federated Indians of the Graton Rancheria.

Sincerely,

Donald E. Laverdure
Acting Assistant Secretary – Indian Affairs