United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

AUG - 1 2013

Honorable Janice Prairie Chief-Boswell
Governor, Cheyenne-Arapaho Tribes
Office of Tribal Council
P.O. Box 38
Concho, Oklahoma 73022

Dear Governor Prairie Chief-Boswell:

On June 18, 2013, the Department of the Interior (Department) received the proposed Class III Settlement Agreement (Agreement) between the Cheyenne Arapaho Tribes (Tribes) and the State of Oklahoma (State), providing for the conduct of Class III gaming activities by the Tribes.

Under the Indian Gaming Regulatory Act (IGRA), the Secretary may approve or disapprove a proposed compact within 45 days of its submission. *See* 25 U.S.C. § 2710 (d)(8). Section 293.4(b) of 25 C.F.R Part 292 provides that "[a]ll amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary." If the Secretary does not approve or disapprove the proposed 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).

We have completed our review of the Agreement, along with the additional material submitted by the Tribes and the State. As discussed in more detail below, we find that the Agreement constitutes an amendment to the Tribes' existing Class III compact (Compact) and pursuant to IGRA, it is subject to the Department's review. We note at the outset that the Agreement provides for the conduct of internet gaming. Because we find that other provisions of the Agreement violate IGRA, we do not reach the issue of whether the Tribes' proposed method of offering internet gaming is lawful.[1] For the reasons discussed below, the Agreement is hereby disapproved.

BACKGROUND

The Tribes currently operate Class III gaming under the terms of the Compact, which was approved by the Department on March 16, 2005. *See* Notice of Approved Tribal-State Compacts, 70 Fed. Reg. 18041 (April 8, 2005). Last year, the Tribes began operating a "free play" internet gaming site, *www.pokertribes.com*. The State challenged the Tribes' activities, contending that the Tribes were materially violating the Compact. As required by the Compact, the Tribes and the State entered into a dispute resolution process in an attempt to resolve their differences. Their efforts resulted in execution of the Agreement that is before us today.

[1] As this is an unsettled area of law that does not require clarification from the Department at this time, we take no position as to the legality of internet gaming under the circumstances presented.

The Agreement includes a number of stipulations between the Tribes and the State, including that all gaming in physical or electronic form is "covered gaming" under the Compact,[2] that all gaming, regardless of location of the gaming transaction is "covered conduct" under the Compact, and that "all forms of internet and/or electronic gaming by individual players . . . is permissible if the individual player is located or resides outside the boundary of the United States and its territories during the entirety of a gaming transaction pursuant to the attached technical standards of play."

Paragraph 8 of the Agreement provides that the Tribes "will pay to the State 20% of all gaming revenues generated by all forms of internet and/or electronic gaming by individual players, who are not physically present at all times in a facility located entirely on Indian lands as defined by IGRA, but are located or reside outside the boundary of the United States and its territories during the entirety of a gaming transaction." Paragraph 10 states that "twenty percent of all gaming revenues with respect to online activities that require no traditional brick and mortar operating expenses roughly equates to the ten percent maximum allowable under the State-Tribal Gaming Compact," and that "twenty percent is equitable." In other words, revenue sharing increases from between 4% to 6% of the Compact-defined "adjusted gross revenues" from specified games and 10% for non house-banked games, to 20% of all "gaming revenues" generated by all forms of internet and/or electronic gaming.[3]

On July 8, 2013, we sent the Tribes a letter seeking clarification on several issues arising from the Agreement. In part, we sought an analysis from the Tribes regarding the Agreement's revenue sharing requirements, an explanation of the meaningful concessions by the State, and how those concessions may provide substantial economic benefits to the Tribes such that the revenue sharing requirements do not constitute a tax, fee, charge or other assessment in violation of IGRA. *See* 25 U.S.C. § 2710(d)(4).

On July 17, 2013, counsel for the Tribes responded to the Department's letter. With regard to the Agreement's revenue sharing requirements, the Tribes provided a single paragraph that, stated in relevant part that the revenue sharing requirements were:

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[2] Section 3 of the Compact defines a "covered game" as:

> "Covered game" means the following games conducted in accordance with the standards, as applicable, set forth in Sections 11 through 18 of the State-Tribal Gaming Act: an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; any other game, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act; and upon election by the tribe by written supplement to this Compact, any Class II game in use by the tribe, provided that no exclusivity payments shall be required for the operation of such Class II game.

[3] The Agreement does not define "gaming revenues." The Compact defines "adjusted gross revenues" in a manner that is similar to what is generally referred to as "net win" in other tribal-state compacts. For purposes of this decision, we interpret "gaming revenues" as having the same meaning as "adjusted gross revenues" as defined in the existing Compact.

> ...justified because a) the decrease in capital costs associated with 'brick and mortar' Facilities under the Compact, and/or b) the corresponding tax consequence of operating an online operation outside of the United States and having to repatriate funds to the Tribe at the repatriation rates of 15% for the State and 36% for the Federal Government, respectively. This consideration results in a 31% savings on the entirety of the transactions for the Tribes when compared to an offshore site.

The Tribes also provided a letter from Eclipse Compliance Testing dated July 18, 2013, discussing the games included in the Appendix to the Technical Standards.

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 IGRA expressly 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). The IGRA further prohibits using this restriction as a basis for refusing to negotiate tribal-state gaming compacts. *Id.*

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. The Department's long-standing analysis on this issue examines whether 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 evaluate whether the value of the concessions provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required. We note that the Ninth Circuit's recent decision in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation* v. *Schwarzenegger*[4] cited with approval the Department's long-standing revenue sharing analysis.

a. Meaningful Concessions

Under the first step of our analysis, we find that the State has not offered a meaningful concession. We do not reach the issue of whether internet gaming as contemplated in the Agreement is lawful. The Tribes concede that, even if lawful, such games "fall into one of the four categories of permissible games under the Oklahoma State-Tribal Gaming Compact." *See* Letter to Richard J. Grellner, Esq., regarding *Synopsis of Permissible Games Included in Appendix of the [Technical Standards]for Compliance with IGRA and Oklahoma Tribal-State Gaming Compact,* from Nick Farley, President, Eclipse Compliance Testing (July 18, 2013). In other words, even if such gaming is lawful, the Agreement does not expand the scope of gaming authorized under the existing Compact. Rather, it provides a different method of delivering

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

types of games already permitted under the Compact. We recently determined that authority to operate wireless gaming was not a concession because it was simply an extension of the Class III gaming authorized by the proposed compact. *See* Letter to Chairman Cedric Cromwell, Mashpee Wampanoag Tribe, from Kevin K. Washburn, Assistant Secretary – Indian Affairs (October 12, 2012). In the absence of any meaningful analysis by the Tribes on this issue, we are not persuaded that offering the same scope of gaming already operated by the Tribes amounts to a meaningful concession.

b. Substantial Economic Benefits

Even if a different method of delivering types of games permitted under an existing Compact were a meaningful concession, the Tribes have not demonstrated that this concession would provide substantial economic benefits to the Tribes in a manner justifying the revenue sharing required. The single paragraph response provided in the Tribes' July 17, 2013, letter does not provide the basic information to analyze whether the concession provides substantial economic benefits to the Tribes. In the absence of a reasonable financial analysis from the Tribes, we cannot conclude that unquantified, unknown economic benefits the Tribes may realize, if any, would justify the 20% rate of revenue sharing required under the Agreement.

Bald assertions such as those contained in Paragraph 10 of the Agreement that "twenty percent of all gaming revenues with respect to online activities that require no traditional brick and mortar operating expenses roughly equates to the ten percent maximum allowable" under the Tribes' Compact cannot be relied upon to determine whether the Tribes are receiving a substantial economic benefit.[5] While internet gaming could have lower operational costs than traditional gaming, paying the State 20% of all internet gaming revenues could result in the State earning more revenue than the Tribes receive from such gaming after they pay its operational expenses. This would render the State, rather than the Tribes, the primary beneficiary of Indian gaming in violation of IGRA. We simply have not been provided adequate analysis to insure that these terms are lawful. Even if we were convinced that the State had made a meaningful concession, in the absence of any meaningful analysis of the economic benefits we hereby disapprove the Agreement.

The Agreement Amends the Tribes' Existing Compact

On April 8, 2013, the Tribes submitted the Agreement for review without a tribal resolution or certification from the State that Governor Fallin was authorized to bind the State to the Agreement. In order to insure that all compacts or amendments we receive have been "entered into" by the responsible parties, our regulations require that all submissions include both a tribal approval resolution and a certification from the state that its representative was authorized to enter into the agreement. 25 C.F.R. §§ 293.8 (b) and (c). In a May 1, 2013, letter, the Director of

[5] On rare occasions, compacts have taken effect by operation of law in situations where tribes have not provided sufficient justification for revenue sharing. Those instances have typically involved compacts with nominal revenue sharing requirements or a model tribal-state compact that contemplated brick-and-mortar gaming facilities. *See, e.g.*, Tribal-State Compacts between the Iowa Tribe, the Modoc Tribe, the Ottawa Tribe, the Delaware Nation, and the Sac & Fox Nation and the State of Oklahoma, 70 Fed. Reg. 31499 (June 1, 2005). Those compacts are approved by operation of law only to the extent they are consistent with IGRA.

the Office of Indian Gaming (Director) returned the Agreement to the Tribes, explaining that a compact submitted without the required documentation is "not properly before us and the 45-day review period was not triggered." The Director invited the Tribes to re-submit the Agreement in compliance with the regulations and the record was closed.

The Tribes assert that the review period under IGRA expired 45 days after the Agreement was originally submitted on April 8, 2013. However, the Department's regulations make plain that the Agreement was not lawfully submitted to the Department until the current submission was received on June 18, 2013. The Tribes' own resolution underscores this basic fact in that the resolution did not become effective until thirty days after it was signed on May 13, 2013, by the Tribes' Governor. Accordingly, no documents sent by the Tribes prior to the submission that was received by the Department on June 18, 2013, constitute a submission of the Agreement that complied with our regulations and triggered IGRA's 45-day review period.

In the letter accompanying the submission of the Agreement, the Tribes assert that they "believe that [the Agreement] is not a matter that merits your offices [sic] consideration or approval. However, we wanted you to be aware of it as a courtesy." As indicated in the Director's May 1 letter to the Tribes, it is clear that the Agreement's express terms amend the Tribes' existing Compact and incorporate many of the terms contained therein. Accordingly, we find that it constitutes an amendment of the Tribes' existing compact and is subject to our review and approval.

CONCLUSION

Based on the above analysis, we find that the Agreement violates IGRA. The Agreement is disapproved. The Department appreciates the efforts of the Tribes and the State to work together to attempt to reach an agreement on important matters affecting their relationship. We deeply regret that this decision is necessary, and understand that it may constitute a significant setback for the Tribes. Nevertheless, the Department is committed to upholding IGRA and we cannot approve a compact that violates IGRA in the manner described above.

A similar letter has been sent to the Honorable Mary Fallin, Governor of the State of Oklahoma.

Sincerely,

Kevin K. Washburn
Assistant Secretary-Indian Affairs