United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 0 6 2014

The Honorable Cedric Cromwell
Chairperson, Mashpee Wampanoag Tribe
483 Great Neck Road South
Mashpee, Massachusetts 02649

Dear Chairman Cromwell:

On November 18, 2013, the Department of the Interior (Department) received the tribal-state class III gaming compact (Compact) between the Mashpee Wampanoag Tribe (Tribe) and the Commonwealth of Massachusetts (Commonwealth).

Under the Indian Gaming Regulatory Act (IGRA), the Secretary may approve or disapprove a compact within 45 days of its submission. See 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]." See 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. See 25 U.S.C. § 2710 (d)(8)(B).

DECISION

We appreciate the diligence and hard work of the Tribe and the Commonwealth in addressing the concerns we raised in our letter of October 12, 2012, wherein we disapproved the first compact that was submitted to the Department. The Compact now addresses the concerns we relied upon as a basis for disapproval. We do have a remaining concern with the Compact regarding potential state regulation of class II gaming, but it does not rise to the level requiring the Department to disapprove it. The Compact includes terms that provide a theoretical possibility based on a number of future contingent events whereby the Commonwealth could someday claim the authority to attempt to exercise regulatory authority over discrete types of class II games at the Approved Gaming Site. It is speculative whether these contingencies may ever occur, and even more speculative as to how the Commonwealth and Tribe would actually proceed should such a scenario arise. The IGRA draws a bright line providing that only tribes and the National Indian Gaming Commission may regulate class II gaming.

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. To the extent that the parties implement this compact at some undefined point in the future in a manner to grant the state authority over class II gaming, such action would not be lawful. We caution the parties that, in implementing the Compact, they should avoid applying its provisions in a manner that does not directly relate to

the operation of class III gaming activities, and thus avoid any potential violation of IGRA regarding the limited scope of tribal-state gaming compacts. Accordingly, pursuant to Section 11 of IGRA, the Compact will take effect by operation of law. *See* 25 U.S.C. §2170 (d)(8)(C).

BACKGROUND

The Compact was entered into on March 19, 2013, on behalf of the Tribe by its Chairperson and Vice Chairperson and on behalf of the Commonwealth by its Governor. The Compact was subsequently approved by the Commonwealth's legislature and signed into law by the Governor on November 15, 2013. The Compact governs the Tribe's conduct of gaming on a proposed site within the Commonwealth (within or near the City of Taunton, Massachusetts). It authorizes the Tribe to operate certain games within a single facility on eligible lands pursuant to IGRA. (See Compact at § 4.1.)

ANALYSIS

Unlike class III gaming, the actual exercise of regulatory authority over class II gaming is reserved exclusively to tribes and the National Indian Gaming Commission under IGRA. *See* 25 U.S.C. § 2710 (b). Additionally, our regulations specifically define a compact as an agreement between a tribe and a state that "establishes between the parties the terms and conditions for the operation and regulation of the tribe's class III gaming activities." 25 C.F.R. § 293.2 (b)(2). We noted in our October 12, 2013 disapproval letter a general concern with the apparent regulation of the Tribe's conduct of class II gaming activities. *See* 2012 Compact at 17. While we did not rely upon this concern as a basis for disapproval, the parties nonetheless attempted to address the concern. The Compact as it exists today, addresses most of our concern by expressly providing that it does not limit the Tribe's right to operate any gaming within IGRA's definition of class II gaming. (See Compact at § 4.1.)

However, the Compact may leave open a theoretical possibility whereby the Commonwealth may attempt to regulate discrete aspects of class II gaming at the Approved Gaming site. This provision applies only to the Approved Gaming Site as defined in the Compact and does not apply to the operation of class II gaming on other gaming-eligible lands. If, at some future date, the Commonwealth violates the exclusivity provisions in the Compact, the Tribe is no longer required to share class III revenues. The Tribe would continue to be able to offer all class III gaming, including slot machines which are generally acknowledged as being more lucrative than class II machines. Sections 9.2.1.4(c) and 9.2.5(c) provide that if the Tribe chooses to offer certain class II gaming in addition to full class III gaming, then the Commonwealth could collect revenue sharing and could consider bids and issue a Category 1 or other commercial gaming license. Under this hypothetical, it is unclear why the Commonwealth would choose to violate the existing exclusivity provision thereby eliminating any obligation on the Tribe to share revenue. It is equally unclear whether the Tribe would choose to offer certain electronic class II gaming given its right to continue to operate more lucrative class III machines without any obligation to share any revenues with the Commonwealth. Nevertheless, if the State violates the exclusivity provision and the Tribe exercises its ability to offer certain class II machines, the Compact then provides for payments to be made to the State and for the State to consider issuing a license.

We acknowledge that the Department has not always spoken with a clear voice on this use. In prior determinations, the Department approved compacts that included provisions regarding the operation of class II gaming. We understand that in such situations, approval was based in part on the fact that the provisions may have had no practical effect. Similarly, it appears that this Compact will have no concrete practical effect, absent potential future actions by both of the parties.

I want to take this opportunity to emphasize that IGRA does not permit the regulation of class II gaming in tribal-state compacts. In the future, states and tribes should avoid including any language in a compact that could be construed as providing for the potential state regulation of class II gaming.

CONCLUSION

We congratulate the Tribe and Commonwealth on working together to achieve this important agreement. The Compact will take effect upon publication of notice in the *Federal Register* pursuant to section 11 of IGRA. 25 U.S.C. § 2710 (d)(3)(B).

A similar letter has been sent to the Honorable Deval Patrick, Governor of the Commonwealth of Massachusetts.

Sincerely,

Kevin K. Washburn
Assistant Secretary – Indian Affairs