

Indian Gaming in the Absence of a Compact.

Background

The Class III gaming compact between the State of New Mexico and the Pueblo of Pojoaque expired at Midnight on June 30, 2015. (2001 Tribal-State Compact Section 12.A) From that point on the Pueblo entered into the rarely trod territory of operating Class III gaming on Indian lands without an agreement with the State allowing them to do so as required under the provisions of IGRA. From the perspective of the Pueblo, everything they could do to negotiate a new compact they had done. As the State made clear in statements made to the newspapers leading up to the expiration, their expectation was that the Pueblo would either capitulate and sign the form compact, or close down their gaming operations at the expiration of the 2001 form compact. As midnight came and went without incident the tension did not subside. At midnight, I was at the Pueblo's flagship resort Buffalo Thunder Resort and Casino with a stack of letters on hand should the State Police or any other State entity attempt to remove games from our gaming floor or otherwise interfere with the operation of the casino.

The Pueblo has been able to continue to engage in gaming as a form of economic development due to the strong stance taken by both Damon Martinez, United States' Attorney for the District of New Mexico and Jonadev Chaudhuri, Chairman, National Indian Gaming Commission, to withhold enforcement against the Pueblo during the pendency of the Pueblo's litigation. If the federal government had not withheld enforcement then it might have been impossible for Pojoaque to continue operating its gaming facilities.

New Mexico State Law provides that if a Tribe requests negotiation of a compact or amendment that is identical to a previously approved compact or amendment, except for the names of the parties then the Governor *shall approve and sign* the compact or amendment. (NMSA 1978, 11-13A-4(J)). Unfortunately, this clause upends the process described in IGRA. IGRA anticipates a negotiation process that takes place between two sovereigns (Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(3)(A) (2000)). The Compact Negotiation Act however, anticipates a form compact in its place. This has been shown clearly in the history of the compacts in New Mexico. There have only been three approved compacts in the history of Indian gaming in New Mexico¹. There is the 2001 Compact which Pojoaque and Mescalero signed onto in 2005, the 2007 compact, and now there is the 2015 Compact which has been signed by all of the gaming tribes in New Mexico with the exception of the Pueblo of Pojoaque. If a Tribe in New Mexico is able to negotiate a good compact which is approved by the legislature, then every other tribe can sign onto the same compact under the above cited provision of the Compact Negotiation Act. The State then is dis-incentivized from negotiating in good faith. Whatever ground it cedes in negotiations with one tribe it has automatically ceded to the next as well for that tribe is automatically assured the same deal. In addition, the Compact Negotiation Act requires a compact to contain revenue sharing provisions.²

¹ Three form compacts.

² NMSA § 11-13-2 (2016).

In no case in which a Tribe has submitted the 2015 compact for approval has it been affirmatively approved. Under IGRA, once a Tribe submits a compact to the Secretary of the Interior for approval, the Secretary has 45 days to either approve or disapprove the compact. If the Secretary takes no action within 45 days then the compact is considered to have been approved to the extent that it complies with IGRA and other federal laws.³ In every instance in which the 2015 form compact has been submitted to the Secretary for approval the Secretary has allowed the 45 day period to lapse and a deemed approved letter has been posted in the Federal Register. The revenue sharing provisions in the 2015 form compact have consistently been cited to as a cause for concern in this compact. In the deemed approval letter to the Jicarilla Apache Nation the Assistant Secretary – Indian Affairs stated that he was troubled by the increase in revenue sharing and also that it was a close question whether the 2015 Compact provides a substantial economic benefit to the Tribes.⁴ These concerns were repeated in each of the sixteen deemed approved letters issued. The illegal revenue sharing provisions unsupported by meaningful concessions are a large part of the reason that the Pueblo has not signed onto the latest form compact.⁵

Governor Martinez believes that Pojoaque has no right to pursue economic development through gaming in the absence of a compact. She believed that if her administration simply refused to negotiate and waited for the compact to expire the Pueblo would be forced to capitulate to the State's demands which included an increased tax, (revenue share), without any meaningful concessions. Instead, the State offered the same exclusivity that the tribes had already paid for in the previous compact but at a higher price. This, despite the fact that the Pueblo was not asking for exclusivity since exclusivity no longer exists in New Mexico. As an example, the Pueblo of Nambé operates the Nambé Falls Casino which is only several hundred feet from the entrance to Buffalo Thunder. There are three other casinos⁶ which compete directly against Buffalo Thunder. In this environment it is unrealistic for the State to say that meaningful exclusivity exists in New Mexico. It is ludicrous for the State to claim that the value of exclusivity has gone up since 2005.⁷ In addition, while Pojoaque came to the table ready to negotiate and it in fact brought a number of proposals forward that it would have considered to be meaningful concessions for which it would have considered paying some amount of revenue share.⁸ On one point the Pueblo stood firm from

³ 25 U.S.C. § 2710 (d)(8)(C).

⁴ Letter from Kevin Washburn, Assistant Secretary – Indian Affairs, to Fred S. Vallo, Sr., Governor, Pueblo of Acoma (Jun. 9, 2015) at 3.

⁵ In the Deemed Approved letter AS-IA Washburn states that exclusivity is a meaningful concession but that it is a close question whether there is a substantial economic benefit to the Tribes. However the unified stance of the tribes the Department chose to take no action on the compact.

⁶ The Pueblos of Tesuque, Ohkay Owingeh, and Santa Clara all have casinos within eleven miles of Buffalo Thunder. One, Camel Rock, operated by the Pueblo of Tesuque lies between the Pueblo of Pojoaque and Santa Fe, which is the largest city in the near the Pueblo.

⁷ The effective date for Pojoaque's compact was Aug. 25, 2005.

⁸ In the spirit of good faith negotiations, the Pueblo asked the State to consider allowing the Pueblo to under the same conditions that the state lottery and the State licensed racinos operate under but the State refused. Since New Mexico is surrounded by jurisdictions that allow patrons to drink alcohol while gambling. New Mexico on the other hand prohibits serving alcoholic beverages on the gaming floor. However, patrons can buy lottery tickets at bars and play games while drinking. In addition, state licensed racinos can allow patrons to drink while they are placing bets. So, the Pueblo suggested allowing drinking on the gaming floor as a concession for which it would be willing to pay an increase in revenue share. The State refused to consider the proposal.

the beginning; it did not want nor would it pay for exclusivity. Pojoaque has also held firmly to the proposition that it would happily pay a reasonable amount for the cost of regulating the gaming activity and to mitigate the local impacts of the gaming operations. A longstanding point of contention has been that the State uses none of the revenue sharing payments to mitigate the effects of the gaming activity on the local infrastructure. Pojoaque has always made it a point not to criticize the choice made by other sovereigns. The State, on the other hand, continues to insist that Pojoaque must accept a compact simply because other tribes have found it to be acceptable.⁹

In the aftermath of *Seminole Tribe of Florida v. Florida*, IGRA is clearly broken. The key component that allowed IGRA to work, which was the balancing of interests with the ability for tribes to sue in the face of bad faith negotiations on the part of the States leaves the states in what appears to be an unassailable position if they do not waive their sovereign immunity. The states are becoming aware of the unassailability of their position but the Congress and the judiciary continue to believe in the one sided compacting scheme which favors the states because that is all that remains after *Seminole*. Take a bad deal or don't game which means the end of housing assistance, educational assistance, the early childhood and elder programs and many other services that serve not only the tribal members but non-Indians living in the surrounding communities. This should not be the only choice open to the Pueblo of Pojoaque.

Gaming without a Class III Tribal-State Gaming Compact

In *Spokane v. United States*, the 9th Circuit Court of Appeals held that after the remedial tribal provisions of IGRA¹⁰ were found unconstitutional in *Seminole Tribe of Florida v. Florida*,¹¹ IGRA's provisions regarding Class III gaming should not be enforced against a tribes when it faithfully followed the procedure outlined in IGRA but is confronted by a state which refuses to negotiate in good faith.¹²

This is the situation that Pojoaque found itself in on June 30, 2015, and it is the position the Pueblo is still in with the loss of the preliminary injunction in the order of February 9, 2017, which denied the Pueblo's Motion to Stay Pending Appeal. The Preliminary Injunction granted by Judge Brack, a Federal District Court Judge for the District of New Mexico on October 7, 2015, had prevented the New Mexico Gaming Control Band ("NMGCB") from taking action against vendors doing business with the Pueblo simply because they were doing business on the Pueblo.

⁹ Of the twenty three tribes in New Mexico, fifteen are currently engaged in gaming and of those fourteen have signed the 2015 form compact. In addition, two tribes which currently do not operate any gaming facilities in New Mexico, the Pueblos of Jemez and Zuni, have also signed the form compact. Fourteen tribes originally signed the 2001 form compact. Ten Tribes signed the 2007 form compact. In 2015, only five tribes were still under the 2001 form compact.

¹⁰ Under §2719(D)(X) of IGRA if a tribe requested the state negotiate a Class III gaming compact and the state negotiated in bad faith, the tribe could sue in federal court and upon a determination of bad faith, the tribe could apply to the Secretary of Interior for procedures under which it could operate Class III gaming.

¹¹ The United States Supreme Court held in *Seminole* that Congress had overstepped its authority by allowing abrogating the states' eleventh Amendment immunity from suit and struck down those provisions of IGRA without performing any severance analysis to determine if the rest of the Statute could survive as intended without those provisions.

¹² *Spokane Tribe v. United States*, 139 F.3d 1297, 1302 (9th Cir. 1998)

The NMGCB repeatedly claimed in court that the NMGCB was simply regulating off reservation activity, something which if it were true, I believe, the Pueblo would concede they have a right to do. However, when the NMGCB takes action against the Pueblo's vendors, solely because they continue to do business with the Pueblo's gaming facilities on the Pueblo's lands then the activity they are trying to regulate takes place entirely upon the Pueblo's Indian lands. The NMGCB is regulating conduct occurring on Indian lands which they have no right to do in the absence of a compact;¹³ a compact the State refused to negotiate in good faith with the Pueblo despite the Pueblo's best efforts. The Pueblo requested the State enter into negotiations for a Class III gaming compact three times, the first time under the Richardson administration and twice under the administration of current Governor Susana Martinez. Each time the Pueblo entered into negotiations with the Martinez Administration they refused to negotiate in good faith on the substantive issues over which the parties disagreed, such as the amount of revenue sharing it was requiring. Instead, the State pursued minor agreements on peripheral and less important issues. Once Pojoaque exhibited an unwillingness to capitulate to the State's demand for an illegal tax on its gaming revenue the State excluded Pojoaque from further negotiations and instead conducted them with the other tribes which were under the 2001 Compact without the Pueblo's involvement. The results of these group negotiations were eventually brought back to the Pueblo as the 2015 form compact. Understandably, the Pueblo does not feel that the 2015 form compact meets its needs as an individual sovereign and so it again requested that the State enter into negotiations for a compact rather than sign a deal it had no hand in negotiating.

On June 30, 2015, the Pueblo received two letters that made it possible for the Pueblo to continue operating its gaming facilities in the absence of a compact. The first was from Damon Martinez, United States' Attorney for the District of New Mexico, and the second was from Jonodev Chaudhuri, the Chairman of the NIGC. In essence, both letters stated that there would be no enforcement actions taken against the Pueblo so long as it continued to maintain the status quo regarding its gaming operations¹⁴ and continued so far as possible to abide by the provisions of the 2001 tribal state compact and IGRA.

Essentially, the operation of the Pueblo's gaming facilities has not changed, (ignoring from the moment the interference in the Pueblo's gaming activities by the NMGCB). All across Indian country, tribal gaming commissions are the primary regulators of Indian gaming. Although IGRA creates a role for states to participate in the regulation of Class III gaming¹⁵ through the compacting

¹³ While the Court conceded that Congress in passing IGRA intended to fully occupy the field so that the exercise of state law was preempted, it still found that there was room for the State to indirectly regulate gaming on Indian lands by misapplying the decision in *Michigan v. Bay Mills Indian Community* a case which involved the off-reservation gaming activity of an Indian tribe. (Case 1:15-cv-00625-JB-GBW Pages 148-150 of 200) The Court did not explain where it developed its theory of indirect versus direct application of state law in the context of field preemption. However, it seems obvious that if Congress intended to fully preempt the application of state law by fully occupying the field, then any application of state law is preempted. The field is fully occupied or it is not.

¹⁴ The Pueblo's casinos have remained below the number of games that were operating on June 30, 2015, as an act of good faith to show that they continue to maintain the status quo until a decision is delivered by the 10th Circuit Court of Appeals regarding the validity of the Part 291 regulations.

¹⁵ Indian Gaming Regulatory Act, 25 U.S.C. 2710 (d)(3)(C)(i)-(vii) (2000).

process.¹⁶ New Mexico has abrogated their right to regulate and instead they have limited their role to ensuring that the State receives the appropriate amount of revenue share and the amount agreed upon in the compact¹⁷ to offset the cost of regulating the gaming activity as allowed under IGRA.¹⁸ It is unfortunate that New Mexico has never taken a more active role in the regulation of Indian gaming until it began to unfairly target Pojoaque's vendors. IGRA clearly anticipated that Tribes and States would share in the regulation of Class III gaming activities¹⁹ to ensure the safe and fair operation of gaming on Indian lands. By imposing a set fee without any justification for the amount, without any substantiation of the time spent regulating the Pueblo's gaming operations, the State is imposing a tax upon the gaming operation under the guise of recouping the costs of its regulatory activities.

On the other hand, the NIGC has been very active in the Pueblo's gaming facilities. While withholding any enforcement action it could have taken with the expiration of the compact, NIGC made it clear from the beginning that they expected the Pueblo to continue to operate at the highest standards and to maintain the status quo in regards to the size of the Pueblo's gaming operations. For its part, the Pueblo has welcomed the heightened scrutiny on the part of the NIGC and it is happy to say that it has continued to regulate its gaming operations stringently which has been evidenced by the continued forbearance by the NIGC.

With the change of Administrations, it may be impossible, for the foreseeable future, for a tribe to continue to operate its gaming facilities in the absence of a compact. It required a special collection of individuals within the Administration for Pojoaque to be able to continue to operate during the pendency of its litigation so that the Tribe could continue to provide essential services to its people and the surrounding communities. Both the current President and his choice for Attorney General have opposed Indian gaming in the past.

In its recent Memorandum Order and Opinion, the Federal District Court for the District of New Mexico reached the opposite opinion from the 9th Circuit Court of Appeals in *Spokane*, finding that even if the State has acted badly, even if Pojoaque has done everything that IGRA requires of it when confronted by a recalcitrant state negotiating in bad faith, and even though it agrees that the *Seminole* decision upset the careful balancing that Congress intended between State and Tribal interests,²⁰ the provisions of IGRA regarding Class III gaming should be enforced against the Pueblo.

¹⁶ 25 U.S.C. § 2710(d)(3)(C) clearly establishes that the application of State civil and criminal regulatory authority is a suitable topic for compact negotiations as well as reimbursement of the State by the Tribe for such activity.

¹⁷ "The Tribe shall reimburse the State for the costs the State incurs in carrying out any functions authorized by the terms of this Compact. The Tribe and the State agree that to require the State to keep track of and account to the Tribe for all such costs would be unreasonably burdensome and that a fair estimate of the State's costs of such activity as of the date on which this Compact takes effect is one hundred thousand dollars (\$100,000) per year, and those costs will increase over time. The Tribe therefore agrees to pay the State the sum of one hundred thousand dollars (\$100,000) per year as reimbursement of the States costs of regulations ..." Tribal-State Class III Gaming Compact between the Pueblo of Pojoaque and the State of New Mexico, Section 4(E)(5), Aug. 25, 2005.

¹⁸ § 2710(d)(3)(C)(iii).

¹⁹ § 2710(d)(5).

²⁰ Case 1:15-cv-00625-JB-GBW Page 174 of 200.

Under the current conditions it is unclear whether the Pueblo can continue to fight for a fair compact which strictly complies with IGRA which is what it has tried to negotiate since the beginning. With the loss of the preliminary injunction, the NMGCB is ready to once again take action against any vendor doing business with the Pueblo. It has called a special meeting for Monday, February 27, 2017, solely for the purpose of taking action against the vendors who continued doing business with the Pueblo²¹ under the preliminary injunction, allowing the Pueblo to continue to operate its gaming facilities while it argued its case in court and during the last sixteen months while it has waited for the Tenth Circuit Court of Appeals to decide if the Secretary of Interior exceeded his authority by promulgating the Part 291 regulations.²² The purpose of this meeting is to ensure that none of the large gaming machine manufacturers will continue to sell machines to the Pueblo of Pojoaque or service machines that the Pueblo already has in place at its gaming facilities. Already, two vendors have indicated to the Pueblo that they will cease to deliver new machines to the Pueblo and have indicated that they are removing their Wide Area Progressive (“WAP”) machines and lease machines. WAPs account for a large part of the revenue that is generated on the gaming floor. In addition, customers want the newest machines that have come out and casinos uniformly market such machines to their players. As the games on the Pueblo’s gaming floor begin to be seen as old and outdated, and they are unable to offer the WAPs with their large payouts, the Pueblo’s gaming revenue will decline. In addition, as machines require servicing and are unable to be repaired they will have to be pulled off of the gaming floor. The actions by the NMGCB are designed to force the Pueblo to sign the 2015 form compact and moot its appeals. This is the latest tactic that states are using to force an unfair and illegal compact on tribes seeking to pursue economic gaming through gaming to improve the lives of its tribal citizens. If New Mexico is successful in forcing the Pueblo of Pojoaque to sign the 2015 form compact tribes across Indian country have reason for concern.

²¹ See New Mexico Gaming Control Board website, Special Board Meeting Agenda at http://nmgcb.sks.com/uploads/CalendarV2/796b34a2933947809efa21989b1d1065/20170227specialagenda_1.pdf#CalendarContent

²² 25 C.F.R. pt. 291.