United States Department of the Interior
Office of the Assistant Secretary - Indian Affairs
Washington, DC 20240

The Honorable Lloyd Mathieson
Chairperson, Chicken Ranch Rancheria
of Me-Wuk Indians of California
P.O. Box 1159
Jamestown, California 95327

Jan 03 2023

Dear Chairperson, Mathieson:

On August 25, 2022, you issued a Joint Letter with Chemehuevi Indian Tribe, Hopland Band of Pomo Indians, Robinson Rancheria and Blue Lake Rancheria (collectively Chicken Ranch Tribes) through your attorneys to the Assistant Secretary – Indian Affairs requesting guidance on several issues relating to class III tribal-state gaming compact negotiations between Tribes in California and the State of California (State).

In the Joint Letter and a subsequent Technical Assistance Memorandum, the Chicken Ranch Tribes presented the Department of the Interior (Department) with questions, stemming from the Department's disapproval of several California compacts and the holding of the Ninth Circuit Court of Appeals in *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 2022 WL 2978615 (9th Cir. Jul. 28, 2022).

The Joint Letter also requested a technical assistance review of the Last Best Offer (LBO) to determine whether the Department will: (1) affirmatively approve the Chicken Ranch Tribes' LBO if it is selected by the mediator and consented to by the State; or (2) issue Secretarial Procedures consistent with the LBO if it is selected by the mediator and the State does not consent. In response to the Department's Notice of Proposed Rulemaking[1] the Chicken Ranch Tribes revised portions of the LBO and provided the Department with the updated LBO.

Department

The Department's Role under IGRA

The Indian Gaming Regulatory Act (IGRA) prescribes that class III gaming compacts are to be negotiated in good faith between States and Tribes. The Department will not upset the balance struck by Congress. In enacting IGRA, Congress delegated authority to the Secretary to review compacts to ensure that they comply with IGRA, other provisions of federal law that do not relate to jurisdiction over gaming on Indian lands, and the trust obligations of the United States. 25 U.S.C. 2710(d)(8)(B)(i)-(iii). IGRA establishes the parameters for topics that may be the subject

[1] Notice of Proposed Rule Making Class III Tribal State Gaming Compacts, 87 Fed. Reg. 74916 (Dec. 6, 2022).

of compact and amendment negotiations. Thus, in reviewing submitted compacts and amendments, the Secretary is vested the authority to determine whether those submitted documents contain impermissible subjects of negotiation.

Under IGRA, the Department's role involving class III gaming compacts commences when a compact is submitted for review.[2] Periodically, Tribes and States have called upon the Department's Office of Indian Gaming to furnish technical assistance to Tribes and States before or during their compact negotiations. The Office of Indian Gaming's technical assistance is neither a 'pre-determination' nor 'legal guidance,' rather it is often an explanation of past precedent, procedures, and the Department's interpretation of case law.[3] The Office of Indian Gaming has also provided technical assistance by identifying potential concerns with draft compact language and offering best practice suggestions. The Office of Indian Gaming has observed that ensuring Tribes and States have accurate information about the Department's past decisions, regulatory requirements, and current policy positions is critical to assisting them find common ground and successfully negotiate class III gaming compacts.

Once a compact is submitted for secretarial review and approval the Department reviews the compact to ensure that it complies with IGRA, other provisions of federal law that do not relate to jurisdiction over gaming on Indian lands, and the trust obligations of the United States. The Department defers to parties' sovereign decision making when negotiating and has observed that Tribes and States will often reach unique solutions to similar problems based on their own interests and circumstances. Those provisions, however, must be within IGRA's narrow scope of topics that are directly related to the regulation of class III gaming. As a result, the Department may approve or let a compact take effect by operation of law which contains provisions objectionable to other Tribes in that State or across the United States. The Department is committed to maintaining the integrity of this important role as prescribed by Congress in IGRA.

Background

The history of Indian gaming in California which led to the Supreme Court's decision in *California v. Cabazon*, and ultimately the 1999 Compacts is well documented by the Ninth Circuit in the 2003 *Coyote Valley II* decision, the 2010 *Rincon* decision, and the 2022 *Chicken Ranch* decision. Those cases and a number of Departmental letters reflect the State's evolving negotiation demands and attempts to stretch IGRA's limits on permissible compact provisions. As noted in our 2021/2022 Disapproval letters the Department considers the 1999 compacts the baseline against which proposed compact provisions are evaluated.

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[2] *See generally* 25 U.S.C. § 2710(d)(8).

[3] On December 5, 2008, the Department issued regulations codifying long-standing procedures for reviewing proposed gaming compacts at 25 C.F.R Part 293. The Department is considering updating the regulations and has consulted with Tribes to begin the process.

The 1999 Compacts were a negotiated compromise between the State and more than 60 Tribes within the State.[4] The 1999 Compacts, along with Proposition 1A – which amended the State Constitution – guaranteed the Tribes the exclusive right to conduct casino style class III gaming free from non-tribal competition in exchange for percentage based revenue sharing to the State in the Special Distribution Fund (SDF), a per-device fee based revenue sharing with non-gaming Tribes in the State through the Revenue Sharing Trust Fund (RSTF), and certain environmental, health and safety, and labor relations provisions.[5] The 1999 Compacts in Section 5.2 provided the State Legislature could appropriate the money in the Special Distribution Fund for five specified purposes: addressing problem gambling; supporting state and local governmental agencies impacted by Tribal gaming; compensating the State's regulatory costs; covering shortfalls into the Revenue Sharing Trust Fund; and "any other purposes specified by the Legislature." The 1999 Compacts also sought to limit the total number of gaming devices in operation in the State.

As Tribal gaming operations grew, the State offered to expand the total allocation of gaming devices in exchange for increased revenue sharing rates including direct contributions into the State's general fund.[6] In *Rincon* the Ninth Circuit rejected the State's demands for increased revenue sharing into the State's general fund as an impermissible tax under IGRA.[7] The State changed its strategy following the *Rincon* decision and by 2014 was offering a 'pro-rata' calculation for Tribal contributions to the State's Special Distribution Fund in place of the percentage based payments, a percentage based revenue sharing obligation to the Tribal Revenue Sharing Trust Fund, a new Tribal Nations Grant Fund, and requirements that a Tribe enter into Inter Governmental Agreements with payments to local governments as part of an expanded environmental section. These compacts also included changes to certain provisions in the Definitions section as well as expanded environmental, health and safety, and labor relations provisions

In 2021 and 2022, the Department disapproved five separate compacts between the State of California and three Tribes (2021/2022 Disapproval Letters). The Department's disapprovals found certain provisions exceeded IGRA's narrow scope of permissible subjects that are directly related to the regulation of class III gaming. In 2022, the Ninth Circuit also found the State had negotiated in bad faith by insisting on the inclusions of certain provisions that were outside of IGRA's list of permissible subjects. Both the Department's disapproval letters and the Ninth Circuit's decision in *Chicken Ranch* noted there were other provisions of concern but declined to evaluate the other concerning provisions.

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[4] The Department published a notice of approval of Tribal-State Compacts between the State and 60 Tribes in the Federal Register on May 16, 2000. 65 Fed. Reg. 31189. The Ninth Circuit in *Coyote Valley II* noted the Coyote Valley Band participated in the negotiations but ultimately refused to signed the 1999 compact and instead sued the State over the inclusion of several provisions in the 1999 Compact.

[5] For a more detailed history of the 1999 Compact, *see Coyote Valley II*, 331 F.3d 1094 (9th Cir. 2003)

[6] *See e.g. Cachil Dehe Band v. California (Colusa II)*, 618 F.3d 1066 (9th Cir. 2010); *Rincon* 602 F.3d 1019 (9th Cir. 2010); and *Pauma Band v. California*, 813 F.3d 1155 (9th Cir. 2015).

[7] That same year the Department disapproved a compact between the State and the Habematolel Pomo of Upper Lake.

Tribal State Compacts in California

Overly broad definitions

One of the topics the Joint Letter sought technical assistance on is the definition section of the Compacts and expressed concerns over the potentially overbroad definitions of "Gaming Facility" and "Gaming Operation." The Joint Letter noted that in the past, the State has insisted on broad definitions of "Gaming Facility" and "Gaming Operation."

The IGRA uses the phrase "gaming facility" twice but does not define the term. The first use is located in Section 2710(b)(2)(E) which requires a Tribe's gaming ordinance to ensure the construction and maintenance of a gaming facility adequately protects the environment and the public health and safety. The second use is in Section 2710(d)(3)(C)(vi) which permits a compact to include provisions addressing the "maintenance of the gaming facility, including licensing." Both references address the maintenance of the building or structure. The Department continues to construe that narrowly to mean only the building or structure where the gaming activity occurs.[8] The Notice of Proposed Rulemaking explains the definition of *Gaming Facility* is intended to address the building maintenance and licensing of the "building or structure where the gaming activities occurs." The Notice of Proposed Rule Making also references the Department's 2012 technical assistance letter to the Pascua Yaqui Tribe of Arizona which references the Internal Revenue Service's 2009 "safe harbor" analysis as one way of identifying the gaming facility within a larger complex.[9]

The term gaming spaces used by the Department in the 2021/2022 Disapproval Letters identifies the physical spaces within the gaming facility that a compact may regulate. The 2021/2022 Disapproval letters provided a fresh articulation of the Department's long-standing narrow read of Section 2710(d)(3)(C) as applying only to the spaces in which the operation of class III gaming actually takes place, with the exception of the second clause of Section 2710(d)(3)(C)(vi) as discussed above. The Department's Notice of Proposed Rulemaking includes a proposed definition for gaming facility and a definition for gaming spaces within the gaming facility.

The 1999 Compact defined the term "Gaming Operation" as the "the business that offers and operates Class III Gaming Activities, whether exclusively or otherwise." As noted above, the State has evolved this definition along with others and in the disapproved 2021 Compacts, the Gaming Operation was defined as "the business enterprise that offers and operates Gaming Activities,

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[8] Notice of Proposed Rule Making Class III Tribal State Gaming Compacts, Sections 293.2(f) and 293.22, 87 Fed. Reg. 74916 (Dec. 6, 2022).

[9] *See e.g.*, Letter to the Honorable Peter S. Yucupicio, Chairman, Pascua Yaqui Tribe of Arizona, from the Director, Office of Indian Gaming, dated June 15, 2012, at 5, and fn. 9, discussing the American Recovery & Reinvestment Act of 2009 and the IRS's "safe harbor" language. IRS Notice 2009-51 Tribal Economic Development Bonds, Section 10 (b). "As a safe harbor, a structure will be treated as a separate building if it has an independent foundation, independent outer walls and an independent roof. Connections (e.g., doorways, covered walkways or other enclosed common area connections) between two adjacent independent walls of separate buildings may be disregarded as long as such connections do not affect the structural independence of either wall." *https://www.irs.gov/pub/irs-drop/n-09-51.doc*; *see also* IRS Notice 2012-48 Tribal Economic Development Bonds, Section 3(f)(iv), referencing the same safe harbor provision. https://www.irs.gov/pub/irs-drop/n-12-48.pdf

whether exclusively or otherwise, but does not include the Tribe's governmental or other business activities unrelated to the operation of the Gaming Facility."

The Department has consistently observed:

> [a]s tribal gaming has evolved, many Tribes have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spas, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near, or adjacent to, tribal gaming facilities and co-branded and co-marketed with the tribal gaming facility. Many times, they are managed with the tribal gaming facility by the business arm of the tribe. However, they ordinarily are not "directly related to the operation of gaming activities" and therefore not subject to regulation through a tribal-state gaming compact. Mutually beneficial proximity, or even co-management alone is insufficient to establish a "direct connection" between the businesses and the class III gaming activity.[10]

Therefore, the Department advises as a best practice compacting parties to narrowly define terms in a compact including "Gaming Operation." Further, when practicable, the Tribe's business arm should be organized to clearly differentiate the section that manages the Tribe's gaming from the section that manages any business or amenities that are located near, or adjacent to, the Tribe's gaming facility. A clearly defined organizational structure and narrow definition of "Gaming Operation" provides the parties and the Department with clarity on the reach of any provision addressing the gaming operation. Conversely a broad definition may cause the Department to construe the provisions addressing the gaming operation to reach activities and functions that are amenities, such as the operation of restaurants and gift shops, none of which are directly related to the operation of gaming activities and thus exceed the permissible scope of negotiation under 25 U.S.C. § 2710(d)(3)(C)(i)-(vii).

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[10] *See*, *e.g.*, Letter to the Honorable Harold Frank, Chairman, Forest County Potawatomi, from Kevin K. Washburn, Assistant Secretary – Indian Affairs, disapproving the *November 2014 Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Class Ill Gaming Compact*, dated Jan. 9, 2015, at 5-7, and fn. 32. *See also,* Letter to the Honorable Peter S. Yucupicio, Chairman, Pascua Yaqui Tribe of Arizona, from the Director, Office of Indian Gaming, dated June 15, 2012, at 5, and fn. 9, discussing the American Recovery & Reinvestment Act of 2009 and IRS's "safe harbor" language to reassure potential buyers that tribally-issued bonds would be considered tax exempt by the IRS because the bonds did not finance a casino or other gaming establishment.

Intergovernmental Agreements

Another topic the Joint Letter sought technical assistance on is the prevalence of Intergovernmental Agreements or Memorandum of Understanding in compacts between a Tribe and political subdivisions of the State. In particular the Joint Letter asked if the Department would accept a provision requiring entry into an Intergovernmental Agreement as a precondition to entering into a Compact. The Joint Letter also asked whether the Department will adhere to its requirement in the consultation draft of proposed 25 C.F.R. §293.8(d), that any collateral agreements must be included with the Compact submission.

The Department's 2021/ 2022, Disapproval letters and the Ninth Circuit's *Chicken Ranch* decision found that the State's requirements for environmental assessments, mitigation and Intergovernmental Agreements violate IGRA. In particular, the Department's concern with that compact provision, was the requirement that the Tribe enter into an Intergovernmental Agreement thus improperly subjecting the Tribe to a certain degree of local governmental jurisdiction, potential veto over tribal projects, and the requirement that the Tribe to make payments to the local governments which effectively imposes an IGRA prohibited tax, fee, charge, or other assessment.

The IGRA carefully proscribes the appropriate scope of subjects in a compact as well as those that can be negotiated in the negotiation process. The Department agrees with the Ninth Circuit's reasoning in rejecting the requirement for an Intergovernmental Agreement.[11] If a State seeks to require a Tribe enter into an Intergovernmental Agreement as a precondition of negotiating a compact or entering into a compact, such a demand would violate IGRA's good faith negotiation requirement. The Department's November 17, 2022, approval of the Tejon Indian Tribe's compact cautioned against States demanding these types of agreements as a pre-condition the good-faith negotiations mandated by IGRA. Additionally, the Department's Notice of Proposed Rulemaking clarifies that a compact provision requiring a memorandum of understanding or Intergovernmental Agreement with local governments is presumed by the Department to be a violation of IGRA.[12]

The Department recognizes many Tribes have developed strong cooperative relationships with local governments often memorialized in Intergovernmental Agreements or Memorandums of Understanding. A compact may include references to an existing Intergovernmental Agreement. Some Intergovernmental Agreements include reimbursement arrangements for services or utilities provided by one government to the other. If a submitted compact requires the Tribe to comply with the terms of an existing Intergovernmental Agreement the Department will instruct the parties to include that document for review as part of the compact. Department's Notice of Proposed Rulemaking clarifies that a compact submission package must include "[a]ny agreement between a Tribe and a State, its agencies or its political subdivisions required by a compact or amendment if the agreement requires the Tribe to make payments to the State, its agencies, or its political subdivisions, or it restricts or regulates a Tribe's use and enjoyment of its Indian Lands and any other ancillary agreements, documents, ordinances, or laws required by the compact or amendment which the Tribe

[11] *Chicken Ranch* at 27.
[12] *See* Notice of Proposed Rule Making Class III Tribal State Gaming Compacts, Section 293.24, 87 Fed. Reg. 74916 (Dec. 6, 2022).

determines is relevant to the Secretary's review."[13] The Department may disapprove the compact if the Intergovernmental Agreement violates IGRA by improperly regulating the Tribe's gaming activities, or imposes an impermissible, tax, fee, charge, or other assessment.

Potentially Overly Burdensome Topics

Another topic the Joint Letter sought technical assistance on are provisions which may be within IGRA's narrow scope but may be place excessive, unnecessary, or overly burdensome requirements on the Tribes relative to the State or state licensed operations. The Ninth Circuit in *Chicken Ranch* explained that while some topics were clearly beyond IGRA's narrow scope, a State may violate IGRA's requirement for good faith negotiations by including overly burdensome requirements to an otherwise in bound subject.[14] As explained above, when reviewing compacts, the Department defers to parties' sovereign decision making when negotiating provisions addressing directly related to topics. In some instances, Tribes have informed the Department they executed the compact under protest and sought the Department intervein by disapproving or severing a provision. However, unless a party to the compact informs the Department that a provision may violate IGRA as a product of bad faith negotiation, the Department will presume it is the result of the parties' sovereign decision making.

Last Best Offer

As noted above, the Joint Letter requested the Department provide technical assistance review of the Chicken Ranch Tribes Last Best Offer compact. We note the LBO compact contains several provisions which are narrowly tailored to address concerns previously raised by the Department. We also note the Revenue Share Trust Fund provision has been revised to allow increased disbursements when the fund exceeds the target $1.1 million per year for non-gaming and limited gaming Tribes. This change modernizes the Revenue Share Trust Fund and eliminates the need for the Tribal Nations Grant Fund.

We note Section 14.4 anticipates any provisions incorporated from another compact would be effective immediately upon the parties' agreement. The incorporation of such a provision would be considered an amendment by the Department subject to the Secretary's review and approval.[15] Our review did not reveal any significant concerns in the proposed LBO compact. However, this letter should not be construed as a 'pre-determination' or 'legal guidance,' rather it is an explanation of past precedent, procedures, and the Department's interpretation of case law.[16]

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[13] *See* Notice of Proposed Rule Making Class III Tribal State Gaming Compacts, Section 293.8, 87 Fed. Reg. 74916 (Dec. 6, 2022).
[14] *Chicken Ranch* at 34.
[15] *See* 25 CFR §293.2(b)(1).
[16] On December 5, 2008, the Department issued regulations codifying long-standing procedures for reviewing proposed gaming compacts at 25 C.F.R Part 293. The Department is considering updating the regulations and has consulted with Tribes to begin the process.

The Department is committed to maintaining the integrity of its important role in reviewing gaming compacts as prescribed by Congress in IGRA. Our obligations to review tribal-state compacts under IGRA, coupled with the complex and time-intensive nature of compact negotiations, may counsel the inclusion of a severability clause that would permit a tribal-state compact to take effect even if a discrete provision were deemed to violate IGRA.[17]

Thank you for your inquiry on this important issue.

Sincerely,

PAULA HART Digitally signed by PAULA HART
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Paula L. Hart
Director, Office of Indian Gaming

[17] In 2011, we approved a tribal-state gaming compact between the Kialegee Tribal Town and the State of Oklahoma. In doing so, however, we severed a provision of that agreement purporting to address tobacco taxes, stating, "we believe that [the tobacco provisions are] not an appropriate term for inclusion within this Compact. Therefore, I disapprove this provision and it is hereby severed from the Compact." Letter from Larry Echo Hawk, Assistant Secretary- Indian Affairs, to Tiger Hobia, Mekko of the Kialegee Tribal Town (July 8, 2011).