



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAR 12 2015

The Honorable Gary Besaw
Chairman, Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, Wisconsin 54135

Dear Chairman Besaw:

On January 28, 2015, my Office received from the Menominee Indian Tribe of Wisconsin (Tribe) a copy of the January 2015 Amendment to the Menominee Indian Tribe of Wisconsin and the State of Wisconsin (State) Class III Gaming Compact (2015 Amendment) between the Tribe and the State providing for the conduct of class III gaming activities by the Tribe.¹

Under the Indian Gaming Regulatory Act (IGRA), the Secretary of the Department of the Interior (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 Secretary 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 have completed our review of the 2015 Amendment and the additional material submitted by the Tribe and the State. For the following reasons, the 2015 Amendment is disapproved pursuant to the Secretary's authority under Section 2710(d)(8)(B) of IGRA.

First, the 2015 Amendment contains the agreement of the parties that the Governor of Wisconsin (Governor) would concur with the Department of the Interior's (Department) August 23, 2013 Secretarial Determination made pursuant to section 2719(b)(1)(A) that a gaming establishment on lands in Kenosha, Wisconsin, is in the best interest of the Tribe and its members and not detrimental to the surrounding community. The 2015 Amendment relies on the Governor's concurrence as a major concession from the State to justify not only increased revenue sharing payments to the State, but assumption of risk for litigation and other payments to the State. However, on January 23, 2015, the Governor notified the Department that he did not concur

¹ The 2015 Amendment was received in our office on January 28, 2015. Under our regulations at 25 C.F.R. Part 293, compacts and amendments to compacts must be submitted to the Office of Indian Gaming, United States Department of the Interior, 1849 C. Street, NW., Washington, DC 20240.

with the Secretarial Determination.² Because the Governor did not concur with the Secretarial Determination, a condition precedent to the Tribe's ability to conduct gaming at the Kenosha site, the Tribe has lost the benefit of its bargain with the State. The Tribe's agreement to pay the State without receiving a commensurate economic return results in an unauthorized tax, fee, charge or other assessment in violation of IGRA. We cannot approve an amendment that does not provide substantial economic benefits to the Tribe in exchange for revenue sharing.

ANALYSIS

The Tribe's original Compact was approved on August 3, 1992, and subsequently amended in February and April of 1999, October 2000, July 2003, January 2011, and May 2013.³ In the October 2000 Compact Amendment, the Tribe and the State included the Kenosha Facility as a class III gaming location operated by the Tribe on land that was to be taken into trust for the benefit of the Tribe.⁴

The 2015 Amendment before us is concerned almost entirely with gaming at the Kenosha Site. The amendment asserts that the Governor's concurrence with the August 23, 2013 Secretarial Determination, along with other purported concessions by the State, is a meaningful concession for the Tribe's agreement to increase its revenue sharing payment to the State.

Revenue Sharing Provisions

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. In other words, the state conceded 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 examine whether the value of the concessions provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required.

a. Meaningful Concessions

An important part of our analysis involving class III gaming compacts involves guidance from *Rincon Band of Luiseño Mission Indians of the Rincon Reservation v. Schwarzenegger*, in which the United States Court of Appeals for the Ninth Circuit opined on the extent to which variations on tribal gaming exclusivity constitute "meaningful concessions" in exchange for revenue sharing under IGRA. While *Rincon* is not binding here because it arose under IGRA's remedial provisions and involved facts and circumstances unique to the litigants, aspects of the decision may provide useful guidance in our inquiry here. In reaching its decision, the court reiterated that to be lawful under IGRA, the State may request revenue sharing if the revenue sharing

² Letter from Governor Scott Walker to Assistant Secretary Kevin Washburn (Jan. 23, 2015) (on file with the Office of Indian Gaming). The Governor did not provide a rationale for his refusal to concur with the Secretarial Determination.

³ See generally Notices of Compact and Amendment Approval, <http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#Wisconsin> (web site last visited Feb. 24, 2015).

⁴ See Amendment to the Gaming Compact of 1992 between the Menominee Indian Tribe of Wisconsin and the State of Wisconsin, 65 Fed. Reg. 62749 (Oct. 19, 2000) <http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038605.pdf> (web site last visited Feb. 24, 2015).

provision is (a) for uses “directly related to the operation of gaming activities,” (b) consistent with the purposes of IGRA, and (c) not “imposed” but rather bargained for in exchange for a “meaningful concession.” We have not directly addressed whether a governor’s concurrence with a Secretarial Determination under Section 20 of IGRA is a meaningful concession supporting revenue sharing. Likewise, we need not resolve that question here. Whether a governor’s concurrence can constitute a meaningful concession, it was pressure by both parties to be a meaningful concession, and it was not forthcoming. The Governor’s failure to concur denied the Tribe the benefit of the bargain it sought. Absent the Governor’s concurrence, the 2015 Amendment fails to meet the first prong of our test and therefore violates IGRA.⁵

b. Substantial Economic Benefits

While we have already determined that the 2015 Amendment violates IGRA, we turn to the second prong of our analysis. Under the second prong of our analysis, there is no concession by the State that can provide a substantial economic benefit to the Tribe in a manner justifying the revenue sharing required under the Compact. Since the Governor did not concur and the Tribe will not be operating class III gaming at Kenosha, there is no prospect of the Tribe receiving any economic benefits under the 2015 Amendment.

Impermissible tax, fee, charge, or other assessment

The 2015 Amendment also violates IGRA by imposing a fee on the Tribe for purposes other than to defray the State’s cost of regulating class III gaming activities. The IGRA does not authorize a State to impose any tax, fee, charge, or other assessment upon an Indian tribe to engage in a class III activity except assessment by the State to defray its costs of regulating class III gaming.⁶

The 2015 Amendment obligates the Tribe to make mitigation payments to the State to reimburse it for any revenue reduction the State experiences from the Tribe opening a gaming facility in Kenosha. The payments would continue for the life of the Tribe’s Compact.⁷ We find that this provision violates IGRA because it imposes an impermissible fee on the Tribe.

The Department is committed to adhering to IGRA’s statutory limitations on tribal-state gaming compacts, and therefore, this Amendment must be disapproved pursuant to 25 U.S.C. § 2710(d)(8)(B)(i).

⁵ The parties indicate that the State makes several additional concessions to the Tribe including exclusivity, compact negotiations for gaming on lands not yet in trust, the extension of the existing gaming compact and the extension of credit to casino patrons. In light of the Governor’s refusal to concur in the Secretarial Determination, these claimed concessions are similarly meaningless.

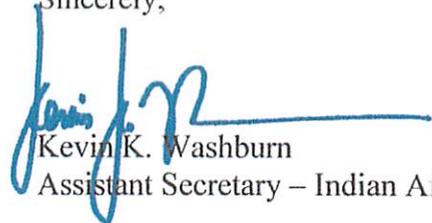
⁶ See 25 U.S.C. § 2710 (d)(4).

⁷ In the course of reviewing several compact amendments from the State of Wisconsin in 2003, the Department raised concerns about the suppression of tribal competition and noted that the anti-competitive provision was contrary to the basic notions of fairness in competition and inconsistent with the goals of IGRA. See Letter to Chairman Harold “Gus” Frank from Acting Assistant Secretary-Indian Affairs Aurene Martin (April 25, 2003) at <http://www.bia.gov/cs/groups/zoig/documents/text/idc1-024612.pdf> (web site last visited Feb. 27, 2015).

CONCLUSION

Based on this analysis we find that the 2015 Amendment violates IGRA. Therefore, we must disapprove the 2015 Amendment. A copy of this letter has been sent to the Honorable Scott Walker, Governor of Wisconsin.

Sincerely,



Kevin K. Washburn
Assistant Secretary – Indian Affairs