United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

AUG 27 2014

The Honorable Joshua Madalena
Governor, Pueblo of Jemez
P.O. Box 100
Jemez Pueblo, New Mexico 87024

Dear Governor Madalena:

On July 14, 2014, we received the Tribal-State Class III Gaming Compact between the State of New Mexico (State) and the Pueblo of Jemez (Pueblo), as Amended in First Session of 48th Legislature, 2007 (Compact).

Under the Indian Gaming Regulatory Act (IGRA), the 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 the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). Under IGRA, the Department of the Interior (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.

DECISION

We have completed our review of the Compact along with the additional materials submitted by the Pueblo. The Compact before us is the first Class III gaming compact between the Pueblo and the State. Yet, the Compact is titled as an "[a]mended" compact. Because the Pueblo does not have a compact in effect under IGRA that can be amended[1] and the proposed Compact includes a section setting forth obligations relating to a settlement to which the Pueblo was not a party, the Compact is hereby disapproved.

BACKGROUND

The State's letter accompanying the Compact submission says that, under State law, "the Pueblo must first agree to the terms of the 2001 Compact and then execute the 2007 Compact," within a certain period of time. According to the State's letter, ""the State and the Pueblo executed the

[1] In fact, the parties have not submitted the compact on which the amended Compact is based for our review.

2001 Compact on June 6, 2014."[2] We have not received the 2001 Compact for review, and it is not in effect under IGRA.[3] In sum, the Compact before us purports to amend an agreement that has not been reviewed, approved, or published in the Federal Register as required by IGRA..

ANALYSIS

The Compact before us appears to be identical to the compact entered into by the tribes involved in litigation with the State over revenue sharing.[4] However, the Pueblo was not a party to the litigation. Section 9 of the Compact refers to settlement of this litigation between other tribes or pueblos and the State involving a dispute over revenue sharing. The Compact states that unless the Pueblo has either paid the disputed amount or has entered into an agreement for repayment, the Compact may not be executed by the Governor of the State.[5] Section 9 also states that, "[u]pon the publication of notice of the Secretary's affirmative approval of this Compact in the Federal Register, the Predecessor Agreements shall be and become null and void, and of no further effect[.]" *See* Section 9.D.

We are unsure what to make of this language in the context of the Jemez Pueblo. The Pueblo was not a named defendant in that suit, has not engaged in Class III gaming, and therefore has never owed revenue sharing to the State. To our knowledge, the Pueblo also has never had a "Predecessor Agreement" that could become null and void upon approval of this Compact. Thus, it would appear that the entirety of Section 9 is inapplicable to the Pueblo. Yet, the

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[2] The "2001 Compact" refers to a model agreement between the State and a number of tribes and pueblos that became effective as to those tribes and pueblos in late 2001. *See* 66 Fed. Reg. 64856 (November 30, 2001). The provenance of the "2007 Compact" is discussed below at Footnote 3, *infra.*

[3] A compact becomes effective under IGRA only upon publication of the Secretary's notice of approval in the Federal Register. 25 U.S.C. § 2710 (d)(3)(B).

[4] When compacts were entered into between other tribes and pueblos in New Mexico and the State that were approved by the Secretary, those tribes and pueblos were already engaged in gaming and many were making revenue sharing payments to the State. Disagreements over revenue sharing led to litigation initiated by the State that included the threat of an injunction to halt tribal gaming. Named defendants in the case included the Mescalero Apache Tribe, Pueblo of Acoma, Pueblo of Isleta, Pueblo of Laguna, Pueblo of Pojoaque, Pueblo of Sandia, Pueblo of San Felipe, Pueblo of San Juan, Pueblo of Santa Ana, Pueblo of Taos, and Pueblo of Tesuque. *State of New Mexico v. Jicarilla Apache Tribe, et al.,* No. 00-0851 (D. N. M.). The tribes and pueblos eventually agreed to a settlement that required payment to the State of specific amounts of revenue sharing. The agreement was memorialized in the 2007 compacts and submitted for review as required by IGRA. Although the Department had concerns about several provisions of the compacts at the time, the compacts were nevertheless approved in order to facilitate the settlement of the litigation and to avoid a scenario where tribes could be forced to close their existing gaming establishments.

[5] The compact specifically states:

> [t]his Compact may not be executed by the Governor of the State unless and until it has been executed by the appropriate representative of the Tribe, and until the State Attorney General has certified to the Governor in writing that the tribe and the State have negotiated a complete settlement of the issues in dispute in the Lawsuit (except that such settlement shall be contingent upon this Compact going into effect under the provisions of IGRA), and that the Tribe has either paid in full the amount agreed to by the terms of the settlement, into the registry of the federal court, or has entered into a binding and fully enforceable agreement for the payment of such amount that is acceptable to the Attorney General.

Compact at Section 9.B.

Compact's terms make it an essential, non-severable term of the Compact.[6] In sum, the State appears to have demanded that the Pueblo take action to settle litigation as to which it was not a party. Such terms make no sense in the context of the Jemez Pueblo.[7]

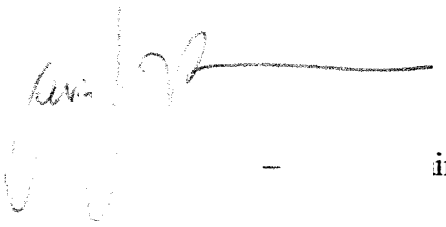
The Pueblo is a separate and independent sovereign with its own identity and salient issues. Its issues are distinct from other tribes who used a similar form of compact as a means of settling litigation (as to which the Pueblo was not a party). We believe that good faith negotiations require the State to negotiate with the Pueblo to address the issues that are actually relevant to the Pueblo.

CONCLUSION

We are grateful for the efforts of the State and Pueblo to negotiate a gaming compact. Yet, the Pueblo acknowledges that it was not part of the litigation that formed the basis for the terms of this compact and thus has no settlement agreement with the State. Because the terms of the Compact prevent us from severing the troublesome provision that is wholly inapplicable to the Pueblo, we hereby disapprove the Compact.

We regret that this decision is necessary and strongly encourage the State to negotiate a new Class III Gaming Compact with the Pueblo in good faith and in accordance with IGRA, so that the Pueblo may proceed with its efforts to develop its economy for the benefit of its citizens. A similar letter has been sent to the Honorable Susana Martinez, Governor of the State of New Mexico.

Sincerely,



– irs

[6] The savings clause in Section 17 renders Section 9 "nonseverable."

[7] While these problems alone constitute a sufficient basis for disapproval of the Compact, we are concerned with other aspects of the Compact, including provisions requiring compliance with certain State laws or regulations involving matters that are not the proper subject of compact negotiations; payments for the State's regulatory costs; and the revenue sharing provisions. Our decision today should not be construed as condoning other terms of the Compact in any way.