



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

AUG 06 2021

The Honorable Ron DeSantis
Governor of Florida
Tallahassee, Florida 32399

Dear Governor DeSantis:

On June 21, 2021, the Department of the Interior (Department) received the class III gaming compact (Compact) between the Seminole Tribe of Florida (Tribe) and the State of Florida (State).¹ Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.*, the Secretary of the Interior (Secretary) may approve or disapprove a compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8). Should the Secretary take no action within the 45-day timeframe, the compact is “considered to have been approved” but only “to the extent that the compact is consistent with the provisions of [IGRA].” *Id.* at 2710(d)(8)(C).

After thorough review under IGRA, we have taken no action to approve or disapprove the Compact before August 5, 2021, the 45th day. As a result, the Compact is considered to have been approved by operation of law to the extent that it complies with IGRA and existing Federal law. The Compact will become effective upon the publication of notice in the Federal Register.

SUMMARY

When Congress enacted IGRA in 1988, it authorized state governments to play a limited role in the regulation of class III Indian gaming. Congress also recognized that this limited expansion of state influence over matters historically left to tribal self-government could be used to undermine tribal sovereignty. Congress, therefore, required states to negotiate class III gaming compacts in good faith, provided a remedy in the event that states refused to negotiate in good faith, limited the scope of bargaining for class III gaming compacts, and prohibited states from using the process to impose taxes on tribal gaming operations.

Congress also required tribes and states to submit class III gaming compacts to the Department for a final review before a compact may take effect. In undertaking this review, the Department works to ensure that the compact is not used to diminish tribal sovereignty at the expense of accreting state power; and, to preserve symmetry in the bargaining power of tribes and states.

In 1995, the United States Supreme Court effectively rendered certain aspects of IGRA’s tribal-sovereignty protection provisions inoperable for many tribes in *Seminole Tribe v. Florida*, 517 U.S. 44 (1995) – a case that arose out of the Seminole Tribe’s first efforts to negotiate a class III gaming

¹ The parties submitted the required documents to comply with 25 C.F.R. § 293.8, including a signed original Compact, Tribal Council Resolution No. C-297-21, and certification in Part XIX of the Compact that the Governor affirms his authority to act for the State. The parties also included a copy of the legislation enacted by the State that certifies the gaming Compact is ratified and approved.

compact with the State of Florida. One of the biggest consequences of the Court's decision in the *Seminole* case was an expansion of state bargaining power when negotiating class III gaming compacts with tribes. Consequently, the Department's review of class III gaming compacts became even more important to preserving tribal sovereignty under IGRA and maintaining the limited expansion of state authority that Congress granted.

Each class III gaming compact is unique and responds to the particular interests and relative bargaining power of the parties to the agreement. As part of the trust obligation to tribes, the Department must consider these unique factors as it undertakes its review pursuant to 25 U.S.C. § 2710.

In this instance, the Department is aware of the exceptional bargaining position of the Tribe. Notwithstanding the Supreme Court's 1995 opinion, the Tribe's gaming operations have resulted in an incredible success story. Through a mix of business savvy and shrewdness, the Tribe has grown its gaming operations from limited class II facilities to globally-recognized class III gaming operations – and has been able to successfully negotiate class III gaming compacts with the State to facilitate that expansion.

We considered these circumstances when conducting our review, and it informed our assessment of whether certain Compact provisions were the outcome of bilateral good-faith negotiations.

As explained below, the Department has concerns regarding the inclusion of provisions relating to jurisdiction over tort claims and mandatory vendor contracts. We also believe it is important that the Department address the provisions relating to internet gaming activities and revenue sharing.

BACKGROUND

1. “Hub and Spoke” Model for Mobile Sports Betting

The Compact authorizes the Tribe to continue to conduct class III gaming on its lands and expands the allowable scope of gaming to include mobile sports betting, amongst other games. The Tribe may conduct and operate sports books to offer sports betting on professional and collegiate sport events through mobile or electronic devices by patrons physically located within the State. Compact, Part III.CC.1-2. Pursuant to the Compact and State law, such wagering is deemed to be exclusively conducted by the Tribe at the location of the servers that process such wagering activity on the Tribe's Indian lands. *Id.*; Part IV.A; Part III.CC.2. “Sports Betting” is defined as wagering on past or future professional sports or athletic event or contest, Olympic sport or international event, any collegiate sport or motor vehicle race, but not proposition bets on collegiate sports. *Id.* Part III.CC.

The Tribe and State refer to this arrangement as a “hub and spoke” model, where the Tribe's servers are the hub, and the spokes are the mobile devices and contracted Qualified Pari-mutuel Permitholders facilities where the wagers originate. The State legislature authorized mobile sports betting exclusively for the Tribe through legislation enacted at the same time it ratified the Compact. The Tribe will have statewide exclusivity for sports betting, and in the event of a breach due to a citizen's initiative the Tribe's sports betting revenue share will be reduced to zero. Compact, Part XII.A.3.(a). If another tribe is permitted to offer state-wide sports betting in partnership with a commercial entity, the

Tribe will reduce its sports betting revenue share by 25 percent.² Compact, Part XII.B.1. If the Tribe loses the ability to offer sports betting, the guaranteed minimum payment will be reduced by 10 percent. Compact, Part XI.C.4(e).

2. Revenue Sharing and Exclusivity

The Compact and accompanying State legislation authorize the Tribe to continue to conduct the following types of games that were previously authorized: slot machines; raffles and drawings; and banked card games, including baccarat, chemin de fer, and blackjack. *See* Compact, Part III.F, FF. The Tribe is also authorized to conduct the following new games: craps, including dice games such as sic-bo and any similar variations; roulette, including big six and any similar variations; sports betting (at casinos and on mobile devices); and fantasy sports contests (if authorized by future legislation). *Id.* Part III.F.3-5, L, FF, CC. The Tribe can also offer any new games authorized by the State, including online gaming. *Id.* Part III.F.6; Part XVIII.B.

The Compact provides that the Tribe will receive substantial exclusivity for Covered Games³ with a list of exceptions to such exclusivity. The Tribe will obtain exclusivity for offering craps, roulette and similar games (with a limited exception) and state-wide exclusivity for sports betting including mobile sports betting. *See* Compact Part XII. The Compact includes eleven noted exceptions to the Tribe's exclusivity, which are paraphrased below:

- i) Any Class III Gaming⁴ or other Casino-Style Gaming⁵ authorized by a compact between the State and any other federally recognized tribe under IGRA, provided that the Tribe has land in trust as of January 2, 2021;
- ii) The operation of Slot Machines at each of the four currently operating licensed pari-mutuel facilities in Broward County or at the four currently operating licensed pari-mutuel facilities in Miami-Dade County, provided that the licenses are not transferred to a location in a county other than Broward County or Miami-Dade County where the new location is within 100 miles on a straight line from any Tribal Facility or in Broward or Miami-Dade County where the new location is within 15 miles on a straight line from any Tribal Facility in Broward County;
- iii) The operation of a total of not more than 350 historic racing machines and electronic bingo card minders at each pari-mutuel facility licensed as of January 2, 2021, and not located in either Broward or Miami-Dade County;

² Letter from Marcellus Osceola, Jr., Chairman of the Tribal Council, Seminole Tribe of Florida, to Paula Hart, Director Office of Indian Gaming, Response to Questions on Seminole Compact, dated July 13, 2021.

³ "Covered Game" is defined as slot machines, raffles and drawings, table games, fantasy sports contests, sports betting, and any new game authorized by Florida law for any person for any purpose. Compact, Part III.F.

⁴ Under the Compact, "Class III Gaming" means the forms of class III gaming defined in 25 U.S.C. § 2703(8), and by the regulations of the National Indian Gaming Commission or any successor commission. Compact, Part III.C.

⁵ Under the Compact, "Other Casino-Style Gaming" is given the same definition as "casino gambling" in Article X, s. 30 of the Florida Constitution, but not excluding any games authorized by Article X, s. 15 of the Florida Constitution if such games involve any slot-like or casino-style game. Compact, Part III.U.

- iv) The operation of Pari-Mutuel Wagering Activities at pari-mutuel facilities licensed by the State;
- v) The operation of poker at card rooms licensed by the State, but not including any game banked by the house, a player or any other person or entity;
- vi) The operation of Class III Gaming or other Casino-Style Gaming, excluding Sports Betting or any other form of online or remote gaming, at any location not less than one hundred (100) miles on a straight line from any Tribal Facility;
- vii) The operation by the Florida Department of Lottery of certain types of lottery games;
- viii) The operation of games authorized by chapters 546 and 849, Florida Statutes, on January 21, 2021;
- ix) The operation of Fantasy Sports Contests;
- x) The provision of marketing services by a Qualified Pari-mutuel Permitholder⁶ pursuant to a written agreement with the Tribe associated with the Tribe's operation of Sports Betting;
- xi) Expanded gaming conducted pursuant to an amendment to the Florida Constitution approved by an initiative pursuant to Article XI, s.3 that is funded in whole or in part by the Tribe.

See Compact, Part XII.B.

The Compact provides that the Tribe can conduct Covered Games at any of its identified seven facilities existing on Indian lands and such facilities may be relocated, expanded or replaced by another facility on the same Indian land with advance notice to the State of 60 calendar days. Compact, Part IV.B. The Compact limits the Tribe from building Las Vegas-style casino resorts on its Brighton Reservation (Okeechobee, FL) or Big Cypress Reservation (Clewiston, FL), but authorizes the Tribe to build up to three additional facilities on its Hollywood Reservation. *Id.* Part IV.C-D.

The Compact also provides that the Tribe will pay the State a guaranteed minimum of \$2.5 billion in revenue sharing over the first five years of the Compact ("Guaranteed Minimum Compact Term Payment"). Compact, Part XI.C. Revenue sharing is separated into tiers categorized by the type of game: the tiers start at 12 percent for slot machines, raffles and drawings, and new games and increase through several tiers to 25 percent based on Net Win⁷, and start at 15 percent for table games up to 25 percent based on Net Win. *Id.* Part XI.C.1(a)-(i). The Tribe will pay a revenue share of 13.75 percent of sports betting Net Win if the Tribe enters into marketing agreement contracts with at least three Qualified Pari-mutuel Permitholders. Part XI.C.1(j)-(k). The Tribe will pay a reduced revenue share of 10 percent on the Net Win generated through the contracted Qualified Pari-mutual Permitholders.

⁶ A Qualified Pari-mutuel Permitholder must hold a pari-mutuel operating permit or license under the appropriate Florida Statute and a slot machine or cardroom license under the appropriate Florida Statute. Compact, Part III.X.

⁷ "Net Win" is defined as the total receipts from the play of all Covered Games less all prize payouts and free play or promotional credits issued by the Tribe.

Id. If the Tribe does not contract with at least 3 Qualified Pari-mutuel Permitholders, it will pay 15.75 percent sports betting Net Win. *Id.* Part III.CC.4, and Part XI.C.1(j)-(k).

Finally, the Compact authorizes the Tribe to stop or reduce the Guaranteed Minimum Compact Term Payment if the State authorizes specified gaming in violation of the Tribe's exclusivity rights or if a force majeure event occurs. Compact, Part XI.C.4(d)-(e). If at any time the Tribe is not legally permitted to offer sports betting as described in the Compact, including to patrons physically located in the State but not on Indian lands, or the Tribe loses the exclusive right to offer sports betting by citizen initiative or by allowing other tribes to conduct sports betting in the State but not on Indian lands, then the Tribe's obligation to pay the full Guaranteed Minimum Compact Term Payment and the other minimum payments is reduced by ten percent. *Id.* Part XI.C.4(e).

3. Notable Regulatory Provisions

The Compact addresses tort remedies for patrons of the Tribe's gaming facilities and provides that upon a written notice process, the Tribe and patron will have one year to resolve the dispute. Compact, Part VI.D(1)-(4). Should the dispute not be resolved within one year, the patron may bring a tort claim against the Tribe "in any court of competent jurisdiction in the county in which the incident alleged to have caused injury occurred..." *Id.* Part VI.D(4). The Tribe waives its immunity from suit "to the same extent as the State of Florida waives its sovereign immunity" pursuant to specified State laws. *Id.* Part VI.D(5).

The Compact also provides an arrangement in which the Tribe must negotiate agreements with Qualified Pari-mutuel Permitholders to provide marketing services or similar agreements for the Tribe's sports betting operation. Compact, Part III.CC.4.

If for any reason the Tribe does not have valid written contracts with at least three (3) or more Qualified Pari-mutuel Permitholders upon or following the commencement of the Tribe's Sports Betting operation, the Payments due to the State...based on the Net Win received by the Tribe from the operation and play of Sports Betting shall increase by two (2) percent until the Tribe has valid written contracts with at least three (3) Qualified Pari-mutuel Permitholders to perform marketing or similar services for the Tribe's Sports Betting.

Id.

ANALYSIS

Pursuant to IGRA, the Secretary is vested with the discretionary authority to disapprove a proposed class III compact when it violates IGRA, any other provision of Federal law that does not relate to Indian lands, or the trust obligations of the United States to Indians. *See* IGRA limits the subjects over which states and tribes may negotiate a

⁸ At the outset, it is important to note the public concern surrounding the State constitutionality of the legislative authorization of sports betting within the State of Florida. IGRA provides the Secretary with discretionary authority to disapprove a compact only in limited circumstances. Those circumstances do not permit the Department to consider questions of State law in its review. 25 U.S.C. § 2710(d)(8)(B). *See also Pueblo of Santa Ana v. Kelly* 104 F.3d 1546, 1556 (10th Cir. 1997).

tribal-state gaming compact, and prohibits the imposition of a tax, fee, charge, or other assessment on Indian gaming except to defray the state's cost of regulating class III gaming activities. *Id.* §2710(d)(3)(C); §2710(d)(4). In fulfilling the United States' trust obligations to tribes, the Department reviews compacts to ensure that they comply with Federal law, were the product of bilateral good-faith negotiations, and that they respect the boundaries of tribal sovereignty that Congress altered when it enacted IGRA.

The Department adheres to the statutory limitations imposed by the IGRA, but must avoid a paternalistic approach by balancing its review through acknowledgment of the inherent sovereign authority of tribes to engage in economic development and make business decisions that respond to their unique circumstances and are in the best interests of their citizens. While gaming has been the most successful means of economic development for tribes in the modern era, the industry is continually changing with the emergence of new technology. The Department must apply the law in a manner that ensures tribes are not hindered from utilizing new technology in an evolving industry.

1. Hub and Spoke Model Internet Gaming

This Compact requires the Department to examine the "hub and spoke" model of internet gaming under IGRA as a matter of first impression. While Congress did not contemplate the new era of internet gaming when it adopted IGRA, it crafted IGRA as a flexible statute that acknowledged tribal sovereignty, was enacted for the benefit of tribal economic development, and for promoting tribal-state cooperation.⁹ IGRA provides that class III gaming is lawful on Indian lands if: authorized by a tribal ordinance or resolution, located in a state that permits such gaming, and conducted in conformance with a tribal-state compact. *See* 25 U.S.C. §2710(d)(1).

In examining the permissibility of mobile sports betting under IGRA as a novel matter, the Department seeks to uphold the intent of IGRA and notes that: 1) evolving technology should not be an impediment to tribes participating in the gaming industry; 2) the pursuit of mobile gaming is in-line with the public policy considerations of IGRA to promote tribal economic development, self-sufficiency, and strong tribal governments; and 3) the purposes of IGRA would be served through the improvement of tribal-state cooperation in the regulation of mobile wagering.

Until recently, compact review under IGRA was limited to "brick and mortar" gaming facilities located on Indian lands, with both the player and the bet taking place in one physical location. By virtue of internet gaming, however, the player can be in one physical location and the server—which facilitates the wager—can be in a separate location, creating ambiguity as to the physical location where the wager occurs.

Courts and agencies have previously examined tribal use of the internet for gaming, finding that such an offering was impermissible under IGRA. However, those cases presented scenarios where tribal

Consequently, any concern surrounding the State's authorization of sports betting is outside the scope of the Department's review, and the Department has relied on the representations of the Governor of Florida that the gaming was properly authorized.

⁹ Even in 1988, Congress provided context for evolving technological gaming changes, specifically noting in the context of class II gaming that "tribes should be given the opportunity to take advantage of modern methods" of conducting the gaming and that linking players across reservations or states by means of "telephone, cable, television or satellite" is acceptable. S. Rept. 100-446 at 9.

internet wagering was not done with the consent of a State pursuant to a tribal-state compact; and, in some instance, where state law prohibited the contemplated form of online gaming.¹⁰

Here, both the Compact and the State law authorize the Tribe to engage in mobile sports betting and provide that the gaming takes place on Indian lands where: (1) the Tribe owns and operates the gaming, (2) the server is located on Indian lands; and (3) the player is located within the geographic bounds of the State.

The IGRA provides that a tribe and state may negotiate for “the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity” and “the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations.” 25 U.S.C. § 2710(d)(3)(c)(i)-(ii). When developing IGRA’s framework for tribal-state compacts, Congress stressed the importance of tribes and states engaging in dialogue over how best to achieve tribal gaming’s “mutual benefits.” As the Senate Committee report stated, “[s]tates and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribes [sic] and States. This is a strong and serious presumption that must provide the framework for negotiations.”¹¹

Congress also specifically addressed the issues that may be the subject of negotiations between a tribe and a state in reaching a compact. In describing the scope of negotiations in Section 11(d)(3)(C), the Senate Committee “recognize[d] that subparts of each of the broad areas may be more inclusive” and that “[a] compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between.”¹² The Committee noted that states are not required to forgo any state governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact.¹³ This understanding was ultimately reflected in the final text of IGRA at 25 U.S.C. § 2710.

We acknowledge that IGRA did not confer authority on tribes to engage in gaming—tribes retain the inherent sovereign authority to engage in gaming and IGRA codified this right while limiting the extent of such authority. Thus, while Congress did limit the subjects to be negotiated in a compact, it specifically contemplated the authority to tribes and states to *negotiate the allocation of criminal and civil jurisdiction and laws directly related to the regulation of Indian gaming*. See 25 U.S.C. § 2710(d)(3)(c)(i)-(ii) (emphasis added). The IGRA should not be an impediment to tribes that seek to modernize their gaming offerings, and this jurisdictional agreement aligns with the policy goals of

¹⁰ See *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018); Letter from Kevin K. Washburn, General Counsel, NIGC, to Robert A. Rosette (Oct. 26, 2000) (2000 NIGC Letter); Letter from Kevin K. Washburn, General Counsel, NIGC, to Joseph Speck, Nic-A-Bob Productions (March 13, 2001) (2001 NIGC Letter); *but see* Stipulation to Consent Judgment at 8, *Michigan v. Hannahville*, No. 2:17-cv-00045 (W.D. Mich. March 14, 2016) (approved March 15, 2017) (“If a change in state law is enacted which is intended to permit or permits the sale of Class III-style gaming or Electronic Games of Chance through the internet or through a similar digital, online, or virtual format, online operations of said games shall be considered Class III games for purposes of...the Compact, but only to the extent that the games are authorized under state law.”).

¹¹ Sen. Rep. No. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083 (1988).

¹² *Id.* at 14.

¹³ *Id.* at 14.

IGRA to promote tribal economic development while ensuring regulatory control of Indian gaming. The Department will not read restrictions into IGRA that do not exist.

Accordingly, provided that a player is not physically located on another Tribe's Indian lands, a Tribe should have the opportunity to engage in this type of gaming pursuant to a tribal-state gaming compact.¹⁴

As technology and internet gaming evolve, other jurisdictions are deeming wagers to occur at a specified location. Multiple states have enacted laws that deem a bet to have occurred at the location of the servers, regardless of where the player is physically located in the state.¹⁵ The Compact reflects this modern understanding of how to regulate online gaming.

The Department also recognizes the ability of tribes to engage in other models of online gaming involving state commercial licenses to accept bets off Indian lands. A tribal government may exercise its sovereignty and determine which model works best for its situation. In this scenario, however, the Tribe and the State were able to resolve jurisdictional issues and negotiate for the inclusion of mobile sports betting in the Compact.

2. *Revenue Share and Exclusivity*

The Department reviews revenue sharing provisions with great scrutiny. Because the IGRA sharply limits the circumstances under which an Indian tribe can make direct payments to a state, we begin with the premise that a Tribe's payments to a state or local government for anything beyond the costs of regulating class III gaming activities are a prohibited "tax, fee, charge, or other assessment." 25 U.S.C. § 2710(d)(4).

Thus, in order to be permissible, we analyze the revenue sharing by first determining whether the State has offered meaningful concessions to the Tribe that it was otherwise not required to negotiate. We then examine whether the value of the concessions provide substantial economic benefits to the Tribe in a manner justifying the revenue sharing required by the Compact. *See Rincon Band of Luiseno Mission of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), cert. denied, 113 S. Ct. 3055 (2011) (an increase in revenue sharing from current levels must be accompanied by additional meaningful concessions that provide substantial economic benefit to the tribe).

a. *Meaningful Concessions*

The State is offering the Tribe state-wide exclusivity for sports betting, exclusivity for new table game, and fantasy sports contests (if authorized by future legislation). *See* Compact, Part III.F.3-6, L, CC, FF; Part XVIII.B. The Compact also permits the Tribe to open three additional facilities on its Hollywood Reservation and removes all limitations on the Tribe's right to install class II player terminals. Compact, Part IV.A, C-D.

¹⁴ Class III gaming is "lawful on Indian lands" only if such gaming is authorized by the "Indian tribe having jurisdiction over such lands." 25 U.S.C. § 2710(d)(1)(A)(i). Thus, to be permissible under the IGRA, a tribe must geofence its gaming to ensure players are not located on other Indian lands.

¹⁵ *See* Mich. Comp. Laws Ann. § 432.304(2); N.J. Stat. Ann. § 5:12-95.20; R.I. Gen. Laws Ann. § 42-61.2-1(16); W. Va. Code Ann. § 29-22E-15(f).

Additionally, the Compact imposes limitations on designated player card games allowed pursuant to a State license, settling a disagreement between the Tribe and State. Compact, XII.B.5. It further places new restrictions on the number of slot machines permitted at the eight pari-mutuel facilities in Broward and Miami-Dade Counties; restricts bingo card minders to be offered in connection with charitable organizations' bingo games under State law; and places restrictions on the relocation of pari-mutuel permits to ensure that a permit is not located within 15 miles of the Tribe's gaming facilities in Broward County and at least 100 miles from the Tribe's other gaming facilities. Compact, Part XII.B.2, B.9. Thus, the Tribe enjoys an increase in exclusivity under the Compact when compared with its 2010 Tribal-State Compact.

While ordinary and routine subjects of negotiation about the regulation of gaming—such as the number of permissible gaming devices—are not meaningful concessions for purposes of the revenue sharing analysis, the State's concession of class III gaming exclusivity to the Tribe is considered a meaningful concession in this instance. As discussed below, the State's concessions provide a substantial economic benefit to the Tribe that justifies the revenue sharing under the Compact.

b. Substantial Economic Benefit

In examining whether a compact confers a substantial economic benefit on a tribe that justifies the proposed revenue sharing, the Department first scrutinizes whether the tribe is the primary beneficiary of the gaming operation. 25 U.S.C. § 2702 (2). Here, the concessions on behalf of the State—such as the exclusivity for sports betting and increased exclusivity for other games—create a substantial projected increase in revenue for the Tribe, ensuring it is the primary beneficiary.

The Supplemental Economic Justification supplied by the Tribe notes the anticipated increase in revenue and provides justification to show that the exceptions have “little or no impact on the value of exclusivity.”¹⁶ The Tribe's primary gaming market is located within a 100 mile radius of its facilities where 82 percent of all Florida residents reside.¹⁷ This area is an established gaming market: there are no other tribal gaming facilities and no new class III commercial gaming facilities within 100 miles. If State permits for slot machines (or pari-mutuels) are relocated within the State, the Tribe has negotiated and preserved its exclusivity for the area and taken into consideration the financial implications. *See* Compact Part XII.B.2(a); Supplemental Economic Justification at 4-7.

The Compact also provides that the Tribe will pay the State a Guaranteed Minimum Compact Term Payment of \$2.5 billion over the first five years of the Compact. If exclusivity is breached, the Tribe receives a reduction in revenue sharing without ceasing all payments to the State. In other circumstances, we might consider a guaranteed minimum payment from the Tribe to the State as an impermissible tax, fee, or assessment on the Tribe's gaming operations. But in this instance, we must consider the Tribe's unique circumstances that led to this agreement.

¹⁶ Cover Letter to 2021 Compact- Supplemental Economic Justification from Jim Shore, Seminole Tribe General Counsel to Ms. Paula Hart (July 13, 2021). The Tribe submitted its confidential economic and financial information which is marked confidential and was submitted to the Department with an expectation of confidentiality. This information is protected from release to third parties without the consent of the Tribe (5 U.S.C § 552(b)(4)).

¹⁷ *See* Supplemental Economic Justification at 12.

The Tribe has a proven record of success with its gaming operations and has justified the revenue sharing provisions with economic and geographic data. The Guaranteed Minimum Compact Term Payment is also couched with a force majeure clause to provide protection for the Tribe. The Tribe's 2010 Tribal-State Compact also contained a flat fee of revenue sharing to the State, requiring the Tribe to pay \$1 billion over 5 years. The Tribe successfully fulfilled its revenue sharing obligations under that compact and based on the projected revenue under the 2021 Compact with the addition of state-wide exclusivity for sports betting, including mobile sports betting, the Tribe is confident that it can satisfy the Guaranteed Minimum Compact Term Payment.

The Department is concerned with the revenue sharing provisions in this Compact and these provisions should not be considered a model for other states to generally impose on tribes. However, we are confident that the State's concessions confer a substantial economic benefit on the Tribe that justifies the proposed revenue sharing in this instance, and that these terms are the outcome of good-faith bilateral negotiations.

3. *Permissible Subjects of Compact Negotiations*

Through IGRA, Congress ensured a regulatory scheme that sought to balance state, federal, and tribal interests in regulating gaming activities on Indian lands. In doing so, Congress limited the subjects of negotiation in a gaming compact to the following enumerated provisions:

- i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- v) remedies for breach of contract;
- vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
- vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(c).

It is against this backdrop in which we review the Compact's provisions. Importantly, we must construe the State's regulatory authority over tribal gaming activities narrowly—as intended by IGRA—and recognize the Tribal government's inherent right to self-regulate its gaming when conducted on Indian lands and under allowable law.

In reviewing the Tribe's Compact, we have significant concerns with the provisions relating to the allocation of jurisdiction to the State over patron disputes and tort claims. Compact, Part VI.D(6).

Unlike allocating gaming jurisdiction referenced above in relation to the "hub and spoke" model of gaming, tort claim jurisdiction is not directly related to the licensing and regulation of gaming, and we believe that this provision may violate the limited reach of state civil jurisdiction allowed under IGRA. In limiting the negotiable subjects of a compact, the intent of IGRA is to ensure that states cannot leverage compact negotiations to impose jurisdiction over tribal lands. *See* Committee Report for IGRA, S. Rep. 100-446 at 14. Although the Department approved a similar provision in the 2010 Tribal-State Compact, we note that judicial interpretation of these types of provisions has evolved and courts have held that changing the venue for tort claims to state jurisdiction is an impermissible subject for negotiation under the IGRA. *See Chicken Ranch Rancheria of Me-Wuk Indians v. Newsom*, No. 1:19-CV-0024 AWI SKO, 2021 WL 1212712 at *7 (E.D. Cal. March 31, 2021) (citing *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013)) ("First, the ability to resolve disputes within the tribal court system is the legal default position. Indeed, as discussed above, changing the venue of patron personal injury and employee claims from tribal court to state court is not a permitted topic of IGRA negotiation.").

Compacts are not the appropriate vehicle to shift patron dispute and tort claim jurisdiction to the states. The Department must uphold its trust responsibility to tribes and ensure that states do not inappropriately attempt to leverage compact negotiations to have tribes submit to state jurisdiction in areas that are not directly related to the operation of gaming. Accordingly, we believe that this provision is an impermissible compact provision under IGRA and is likely unenforceable.

4. *Other Concerns*

In addition to the issues discussed above, the Department has concerns with the Compact's provisions that require the Tribe to contract with Qualified Pari-mutuel Permitholders to provide marketing services for the Tribe's sports book.

The Compact contains a provision that incentivizes the Tribe to enter into marketing agreements with State-licensed Qualified Pari-mutuel Permitholders related to the Tribe's operation of mobile sports betting. The Compact requires that the Tribe, within three months of the Compact effective date, negotiate contracts with a minimum of three or more Qualified Pari-mutuel Permitholders or pay the State an additional two percent of the net win from its sports betting operation. Compact Part III.CC.4. When the Tribe does enter into these marketing contracts, it is required to compensate the contracted Qualified Pari-mutuel Permitholders 60 percent of the difference between the net win that an operator generates and a "reasonable and proportionate share of all expenses incurred by the Tribe". *Id.* Part III.CC.3.(c).

The Department is concerned with the sole proprietary interest of the gaming operation in relation to these agreements. The IGRA requires that a tribe have the sole proprietary interest in, and responsibility for, the tribal gaming operation to ensure that it receives the primary benefit of its gaming revenue, consistent with IGRA's statutory goals. 25 U.S.C. §§ 2702, 2710(b)(2)(A). When examining whether a tribe has the sole proprietary interest in the gaming operation, three factors are

relevant: “1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) the right of control provided to the third party over the gaming activity.” *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011) (cleaned up), *aff’d in pertinent part*, 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of proprietary interest provision)).

The term of these marketing contracts is “no less than 5 years” and raises a question as to whether such marketing contracts will constitute management contracts requiring further review by the National Indian Gaming Commission. Compact Part III.CC.3.(g); 25 U.S.C. § 2711. The Tribe has represented that it is the sole operator for its sports books and will not share any management responsibilities with the pari-mutuels, however it must also pay 60 percent of the difference between net win from any business that the contracted Qualified Pari-mutuel generates and the Tribe’s expenses. This arrangement further raises a question as to whether the contracted Qualified Pari-mutuel’s interests in the Tribe’s sports betting operation become proprietary.

Accordingly, the Department does not endorse the marketing agreement arrangement provided in the Compact.

CONCLUSION

We undertook a thorough review of the Compact and additional materials submitted by the Tribe but took no action within the prescribed 45-day timeframe. As a result, the Compact is “considered to have been approved by the Secretary, but only to the extent [it] is consistent with the provisions of [IGRA].” 25 U.S.C. § 2710(d)(8)(C).

The Compact will become effective upon the publication of notice in the Federal Register, as required by 25 U.S.C. § 2710(d)(3)(8)(D).

The Department commends the Tribe’s extraordinary accomplishments in its gaming endeavors and wishes the Tribe continued success. A similar letter is being sent to the Honorable Marcellus W. Osceola, Jr., Chairman, Seminole Tribe of Florida.

Sincerely,



Bryan Newland
Principal Deputy Assistant Secretary – Indian Affairs