United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

TAKE PRIDE IN AMERICA

JUN 15 2012

Honorable Peter S. Yucupicio
Chairman, Pascua Yaqui Tribe of Arizona
7474 S. Camino de Oeste
Tucson, Arizona 85757

Dear Chairman Yucupicio:

On February 17, 2012, you issued a letter to the Assistant Secretary – Indian Affairs requesting guidance on several issues relating to class III tribal-state gaming compact negotiations between the Pascua Yaqui Tribe (Tribe) and the State of Arizona (State).

In your letter, you presented the Department of the Interior (Department) with two questions:

1. Whether a Memorandum of Understanding that would substantively amend the Tribe's existing class III gaming compact requires review and approval by the Secretary of the Interior; and,

2. Whether the terms of a proposed Memorandum of Understanding (MOU) impermissibly includes provisions seeking to regulate activities beyond those which are directly related to the operation of gaming activities.

The Indian Gaming Regulatory Act (IGRA) prescribes that class III gaming compacts are to be negotiated in good faith between states and tribes, and the Department will not upset the balance struck by Congress in enacting this requirement. Under IGRA, the Department's formal role involving class III gaming compacts commences when a compact is submitted for review by the Secretary.[1] The Department is committed to maintaining the integrity of its important role in reviewing gaming compacts as prescribed by Congress in IGRA.

Periodically, tribes and states have called upon the Department's Office of Indian Gaming (OIG) to furnish technical assistance to tribes and states before or during their compact negotiations. The OIG's assistance has been limited to providing information about the Department's past compact decisions, directing tribal and states to cases involving gaming compacts or related issues, and answering procedural questions about the Department's review process.[2] The OIG

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

[2] On December 5, 2008, the Department issued regulations codifying long-standing procedures for reviewing proposed gaming compacts at 25 C.F.R Part 293.

has observed that ensuring tribes and states have accurate information about the Department's past decisions, regulatory requirements, and current policies is critical to assisting them find common ground and successfully negotiate class III gaming compacts. I have been directed to respond to the questions you have presented to the Department.

A. Amendments to Tribal-State Compacts Must Be Reviewed and Approved by the Department.

IGRA provides that class III gaming on tribal lands is permitted only where such gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." 25 U.S.C. § 2710(d)(1)(C). IGRA further states that "[a]ny State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). The latter provision provides that a compact must be approved by the Secretary (affirmatively or by operation of law) to be valid and enforceable. Together, those two provisions require Department approval of tribal-state class III gaming compacts prior to the operation of gaming activities. This authority also includes approval of amendments to class III tribal-state compacts.

In 2008, the Department published regulations governing the class III tribal-state gaming compact process at 25 C.F.R. Part 293 (December 5, 2008) ("Regulations"). The Regulations state, "[t]he Secretary has the authority to approve compacts or amendments 'entered into' by an Indian tribe and a State, as evidenced by the appropriate signature of both parties." 25 C.F.R. § 293.3. The Regulations further provide that "[a]ll [compact] amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary." 25 C.F.R. § 293.4(b). As explained in the preamble to the Regulations:

> Another comment asked for identification of the Secretary's authority for approving amendments.
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> Response: IGRA requires that the Secretary review all compacts. The Secretary must review amendments to insure that the terms of the compact, as amended and considered as a whole, do not violate any provision of IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

Fed. Reg. Vol. 73, No. 235, 74005 (Dec. 5, 2008).

Accordingly, the Secretary must review and approve all amendments to gaming compacts. It is of no consequence that such a document is titled "memorandum of understanding" or something else. Absent Secretarial review and approval of an amendment to a compact, and publication of the notice of approval in the Federal Register, it would have no force or effect under IGRA. This

requirement ensures that we maintain the balance struck by Congress in enacting IGRA, and that gaming on Indian lands is conducted in a lawful manner.[3]

B. Tribal-State Compacts Regulate A Limited Scope of Activities Involving Class III Gaming on Indian Lands.

In 1987, the United States Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*, which affirmed the right of tribes to conduct gaming activities on their Indian lands in states where those activities were not prohibited under a criminal statute.[4] The following year Congress enacted IGRA largely in response to the *Cabazon* decision, and declared that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701. Thus, Congress established a statutory scheme that limited tribal gaming and sought to balance tribal, state, and federal interests in regulating gaming activities on Indian lands.

As part of this balance of interests, Congress limited the subjects over which tribes and states could negotiate a class III gaming compact. Pursuant to IGRA, a tribal-state compact may include provisions relating to:

(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 [governing gaming activities Indian lands];

(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;

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[3] In 2003, the Assistant Secretary – Indian Affairs noted that "[not requiring Secretarial review of compact amendments] would render the Secretary's approval authority meaningless because it would permit substantive and controversial provisions to escape Secretarial review through the amendment process." Letter from Acting Assistant Secretary – Indian Affairs Aurene Martin to Honorable Janet Napolitano, Governor of Arizona at 3 (January 24, 2003). This letter was issued before the Department promulgated its regulations at 25 C.F.R. Part 293 in 2008.

[4] 408 U.S. 202 (1987).

(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) (emphasis added).

These provisions ensure that the Department will fulfill its trust responsibility to tribes, protect tribal authority to govern their own affairs, and ensure compliance with IGRA by requiring the Secretary to review and approve tribal-state gaming compacts.[5]

IGRA's tribal-state compact provisions allow for the consideration of states' interests in the regulation and conduct of class III gaming activities. The above referenced provisions limit the subjects over which states and tribes can negotiate a tribal-state compact. *Id.* In doing so, Congress also sought to establish "boundaries to restrain aggression by powerful states." *Rincon Band v. Schwarzenegger*, 602 F. 3d 1019 (9th Cir. 2010) (citing S. Rep. No. 100-446, at 33 (1988) (statement of Sen. John McCain)).

In the Senate debate regarding S.555, which was enacted as the Indian Gaming Regulatory Act, Senator Evans submitted:

> As we are all aware, many Indian tribes are opposing S.555 at least in part because of the potential of extending State jurisdiction over Indian lands for certain gaming activities. I wish to make it very clear that the committee has only provided for a mechanism to permit the transfer of limited State jurisdiction over Indian lands where an Indian tribe requests such a transfer as part of a tribal-State gaming compact for class III gaming. We intend that the two sovereigns – the tribes and the States – will sit down together in negotiations on equal terms and come up with a recommended methodology for regulating class III gaming on Indian lands. Permitting the States even in this limited say in matters that are usually in the exclusive domain of tribal government has been permitted only with extreme reluctance. As discussed in the committee report, *gambling is a unique situation and our limited intrusion on the right of tribal self-governance or State-tribal relations.*

S.Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071 (emphasis added).[6]

We conduct our review of tribal-state gaming compacts against this historical and statutory backdrop. Tribal governments have inherent authority to regulate gaming activities on their own lands, where such lands are located within a state that permits the conduct of gaming, and the

[5] 25 U.S.C. § 2710(d)(8)(A).

[6] In the same colloquy, Sen. Inouye discussed the compact negotiation process, stating, "There is no intent on the part of Congress that the compacting methodology be used in such areas as taxation, water rights, environmental regulation, and land use." *Id.*

scope of a state's regulatory interest in these activities is limited as congressionally prescribed in IGRA. Therefore, we must view the scope of prescribed state regulatory authority over tribal gaming activities narrowly.

Furthermore, when the Department reviews a tribal-state compact or amendment submitted under IGRA, we look to whether the provisions fall within the scope of categories prescribed at 25 U.S.C. § 2710(d)(3)(c). One of the most challenging aspects of this review is determining whether a particular provision adheres to the "catch-all" category at § 2710(d)(3)(c)(vii): "...subjects that are directly related to the operation of gaming activities."

In the context of applying the "catch-all" category, we do not simply ask, "but for the existence of the Tribe's class III gaming operation, would the particular subject regulated under a compact provision exist?"[7] If this question were used to provide the standard for determining whether a particular object of regulation was "directly related to the operation of gaming activities," it would permit states to use tribal-state compacts as a means to regulate tribal activities far beyond that which Congress intended when it originally enacted IGRA.[8]

As tribal gaming has matured, 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. It does not necessarily follow, however, that such ancillary businesses are "directly related to the operation of gaming activities" and therefore subject to regulation through a tribal-state compact.

While each compact is reviewed according to its unique facts and circumstances, the Department often views such businesses and amenities as not "directly related to gaming activities" unless class III gaming is conducted within those businesses or the parties to the compact can demonstrate particular circumstances establishing a direct connection between the business and the class III gaming activities.[9] Those particular circumstances must also implicate the state interests Congress sought to protect through IGRA's compacting provisions.

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[7] Under IGRA, it would not be appropriate for tribal-state compacts to provide for state regulation of activities such as tribal housing developments, government programs, or reservation infrastructure Those activities involve intervening factors and otherwise are not "directly related" to class III gaming activities under IGRA.

[8] In 2011, we disapproved a proposed tribal-state gaming compact because we determined that it included provisions restricting tribal land use beyond the scope of specific subjects IGRA permits tribes and states to include in class III gaming compacts. *See,* Letter from Donald Laverdure, Principal Deputy Assistant Secretary – Indian Affairs, to Kimberly Vele, President of the Stockbridge-Munsee Community of Mohican Indians (February 18, 2011) (Stockbridge-Munsee Letter). In that instance, the proposed compact restricted the Stockbridge-Munsee Community of Mohican Indians from using the proposed gaming site for any purpose other than class III gaming. *Id.*

[9] The American Recovery & Reinvestment Act of 2009 (ARRA) is instructive on this point. ARRA created several new types of tax-exempt bonds and tax credit bonds under the Internal Revenue Code. As required by ARRA, the IRS consulted with the Secretary of the Interior to develop guidelines to allocate $2 billion in tax-exempt bonding authority. Published as Notice 2009-51, the IRS provided the following "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: "As a safe harbor, a structure will be treated as a separate building [and

One example of such particular circumstances is Section 10.7 of the 2000 model tribal-state gaming compacts with the State of California, relating to on-site employees and organized labor:

> ...organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

The Coyote Valley Band of Pomo Indians and other tribes located in California sued the State of California under IGRA's remedial provisions, alleging that the organized labor provisions were unrelated to gaming activities, and that by insisting on their inclusion in the compact, the State had refused to negotiate the tribal-state gaming compacts in good faith in violation of IGRA. *In Re Indian Gaming Related Cases*, 331 F. 3d 1094 (9th Cir. 2003). The Court of Appeals for the Ninth Circuit held otherwise, finding "that this provision is 'directly related to the operation of gaming activities' and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii). Without the 'operation of gaming activities,' the jobs this provision covers would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs." 331 F. 3d at 1116.

The Department's review of tribal-state compacts does not strictly adhere to the "but for" analysis implied in *In Re Indian Gaming Related Cases*. Although the Ninth Circuit found a direct relationship between certain employees and tribal gaming operations, no other court has evaluated this issue in other contexts.

Finally, the Department has reviewed a number of tribal-state compacts with provisions concerning vendors and contractors to tribal gaming facilities. Whether such provisions comply with IGRA will depend upon whether vendors and contractors subject to regulation provide products or services that directly relate to class III gaming activities as prescribed in IGRA. The Department will continue to make such determinations on a case-by-case basis and upon review of the particular circumstances of each compact.

Finally, as noted above, 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.[10]

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therefore tax exempt] 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." For more information about IRS Guidance on Tribal Economic Development Bond Provisions, see http://www.irs.gov/taxexemptbond/article/0,,id=206034,00.html (site last accessed on June 5, 2012).

[10] In 2011, we approved a tribal-state gaming compact between the Kialagee 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 Kialagee Tribal Town (July 8, 2011).

Thank you for your inquiry on this important issue.

Sincerely,

Paula L. Hart
Director, Office of Indian Gaming