United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUL 2 2 2022

The Honorable Gavin Newsom
Governor of California
Sacramento, California 95814

Dear Governor Newsom:

On June 9, 2022, the Department of the Interior (Department) received the class III gaming compact (2022 Compact) between the Santa Rosa Indian Community of the Santa Rosa Rancheria (Tribe) and the State of California (State). The Tribe also submitted a redline comparison between the 2022 Compact and the class III gaming compact between the Tribe and the State which the Department disapproved on November 23, 2021 (2021 Compact).

For the reasons set forth below, I have disapproved the 2022 Compact in accordance with my authority under the Indian Gaming Regulatory Act (IGRA).

Background

Congress enacted IGRA in 1988 in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 489 U.S. 202 (1987). In doing so, Congress preempted State laws attempting to regulate Tribes' gaming activities on Indian lands; and Congress granted States a limited ability to participate in the regulation of certain types of tribal gaming activities on Indian lands.

As a precondition to conducting class III gaming on Indian lands, Congress required Tribes to negotiate a government-to-government agreement with States regarding the regulation of those gaming activities – a class III gaming compact. Congress recognized the enormous leverage this conferred on States vis-à-vis Tribes, and included provisions in IGRA requiring States to negotiate those agreements in "good faith."[1] This "good faith" mandate was not the only provision Congress included in IGRA to protect Tribes' sovereign interests in conducting and regulating gaming on their own lands.

Congress also included language explicitly prohibiting States from attempting to impose taxes on tribally-operated gaming; and, Congress limited the subjects that could be included within a class III gaming compact.[2]

Congress also required the Secretary of the Interior to review tribal-state gaming compacts to ensure they complied with these requirements, and to protect tribal authority to govern their own affairs. Congress sought to safeguard against States leveraging compact negotiations to impose

[1] 25 U.S.C. § 2710(d)(3).
[2] *Id.*

jurisdiction or influence over matters unrelated to gaming and solely flowing from Tribes' inherent sovereignty.[3] In doing so, Congress also sought to establish "boundaries to restrain aggression by powerful states."[4]

The legislative history of IGRA indicates that "compacts [should not] be used as subterfuge for imposing state jurisdiction on tribal lands."[5] The above referenced provisions limit the subjects over which States and Tribes can negotiate in a tribal-state compact.

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

> 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.

In the same colloquy, Senator Inouye discussed the compact negotiation process, stating, "[t]here 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."

These limitations have not prevented States from attempting to use their powerful negotiating leverage over the years to extract concessions from Tribes that would allow for State and local governments to regulate non-gaming activities on tribal lands. The Department has disapproved a number of gaming compacts for violating IGRA's limitation on subjects that can be included within class III gaming compacts. For example, we disapproved a proposed tribal-state gaming compact in 2011 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.[6] That proposed compact restricted the Stockbridge-Munsee Community of

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[3] *Id.* at § 2702.

[4] *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)).

[5] *See* Committee Report for IGRA, S. Rep. 100-446 at 14.

[6] *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).

Mohican Indians from using the proposed gaming site for any purpose other than class III gaming.

On many other occasions, the Department has not approved or disapproved class III gaming compacts, and thus those compacts took effect by operation of law to the extent they are consistent with IGRA.[7] The Department has sometimes issued guidance letters with the objective of highlighting provisions that may be inconsistent with IGRA.

The Department has issued at least four such guidance letters to the State of California in the past decade highlighting concern over the State's practice of asserting greater control over tribal land use decisions through class III gaming compacts.[8] In 2015, the Department issued a guidance letter in conjunction with allowing the class III gaming compact between the State and the Sycuan Band of the Kumeyaay Nation to take effect by operation of law. In that letter, the Assistant Secretary – Indian Affairs expressed concern with the expansion of State and local control over tribal land use, stating: "[w]e have repeatedly warned the State and other California Tribes that the Compact's definitions of 'Gaming Facility' and 'Project' cause us significant concern because the Compact could be misconstrued to allow the State to regulate matters that are not directly related to gaming."[9]

Despite this consistent guidance and warning, the State has continued to insist that class III gaming compacts include more stringent and detailed land use regulations that are attenuated from the actual conduct of class III gaming on the casino floor. As part of this trend, these compact provisions have grown from two pages in the 1999 Compact's "Off-Reservation Environmental Impacts" section to more than 28 pages (plus appendices) in the 2022 Compact. In addition, these provisions have conferred greater authority on municipal governments to consent to the scope of tribal gaming and land-use development *before* the Tribe may continue to operate class III gaming activities on its lands.

That trend continued through our disapproval of the 2021 Compact last year to the 2022 Compact.

Analysis

We conduct our review of tribal-state gaming compacts against this backdrop. Tribal governments are vested with the inherent authority to regulate gaming activities on their own lands. Congress through IGRA, prescribed a limited scope of a state's regulatory interests in class III gaming activities on Indian lands which are located within the state, provided the state

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[7] 25 U.S.C. § 2710(d)(8)(C).

[8] *See e.g.* Letter from Larry Echo Hawk, Assistant Secretary – Indian Affairs to Sherry Treppa Bridges, Chairperson, Habematolel Pomo of Upper Lake (August 31, 2021); Letter from Donald E. Laverdure, Acting Assistant Secretary – Indian Affairs to Greg Sarris, Chairman Federated Indians of Graton Rancheria (July 13, 2012); Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs to Nick Fonseca, Chairman Shingle Springs Band of Miwok Indians (July 15, 2013).

[9] Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs to Cody J. Martinez, Chairman Sycuan Band of the Kumeyaay Nation (December 17, 2015) at 4.

permits the conduct of class III gaming. Therefore, we must view the scope of prescribed state regulatory authority over tribal gaming activities narrowly.[10]

When we review 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?'[11] 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.

Instead, we must look to whether the regulated activity has a direct connection to the Tribe's conduct of class III gaming activities – "what goes on in a casino – each roll of the dice and spin of the wheel."[12]

As 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, those facts alone do not mean that these activities are "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.[13]

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[10] *See* Testimony of Kevin K. Washburn, Assistant Secretary – Indian Affairs, before the Senate Committee on Indian Affairs, July 23, 2014 (emphasis added):

> "With regard to compacts, IGRA carefully describes the topics to address in a compact. Congress specifically named six subjects related to the operation and regulation of Class III gaming activity that may be addressed in a compact, and also included a limited catchall provision authorizing the inclusion of provisions for "any other subjects that are directly related to the operation of [Class III] gaming activities." *The Department closely scrutinizes tribal-state gaming compacts and disapproves compacts that do not squarely fall within the topics delineated in IGRA.* For example, Class II gaming is not an authorized subject of negotiation for class III compacts. The regulation of Class II gaming is reserved for tribal and federal regulation."

[11] 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.

[12] *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 792 (2014).

[13] *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 III Gaming Compact*, dated Jan. 9, 2015, at 5-7, and fn.

Because IGRA is very specific about the lawful reach of a compact to protect the sphere of tribal sovereignty, we must construe its provisions narrowly and avoid inferences that diminish tribal sovereignty. We interpret § 2710 (d)(3)(c)(vii) as applying only to the spaces in which the operation of class III gaming actually takes place such as the casino floor, vault, surveillance, count room, casino management, casino information technology, storage areas for gaming devices and supplies, that are "directly related to the *operation* of [class III] gaming activities" (together, "Gaming Spaces").[14]

Like many tribes, the Tribe has developed a casino resort complex: the Tachi Palace Casino Resort. Beyond the Gaming Spaces regulated by the Tribe's Gaming Commission, the Tribe offers a spa, multiple restaurant options, a hotel, a bar and lounge, and an entertainment and conference venue. Absent the existence of class III gaming under IGRA, no State civil regulatory laws or local government zoning ordinances, for example, would apply to the Tribe's hotel, its restaurants, conference center, or anywhere else on its tribal lands.

1. Comparison of the 2022 Compact and the 2021 Compact

I provided direction in my 2021 Disapproval on the provisions in the 2021 Compact which were violations of IGRA, and this 2022 Compact should have addressed those concerns. We will compare the difference here.

In both the 2022 Compact and the 2021 Compact, the key provisions all are considered under IGRA's "catch-all" category at § 2710(d)(3)(c)(vii): "… subjects that are directly related to the operation of [class III] gaming activities." The 2021 Disapproval letter explained the Department has long rejected a 'but for gaming' test and stated these provisions must be "directly related to the operation of gaming activities."[15] Further, the Department has consistently pushed back against state regulation of tribal businesses and resort amenities through compacts. The 2021 Disapproval letter reiterated this standard and stated:

> Because IGRA is very specific about the lawful reach of a compact, we interpret these provisions as applying only to the spaces in which the operation of gaming actually takes place such as the casino floor … that are "directly related to the operation of class III gaming activities" and therefore subject to regulation under IGRA …. In performing this analysis, we keep in mind the Indian canons of construction and interpret this phrase to the benefit of the tribe. As such, we must construe this provision narrowly and not imply any diminishment of tribal sovereignty that does not exist.

2021 Disapproval at 9.

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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.

[14] 25 U.S.C. § 2710 (d)(3)(C).

[15] 2021 Disapproval at 8.

Here again I emphasize this standard and apply it below.

2. Analysis of Revised Definitions

The 2021 Disapproval found that some of the 1999 Compact definitions, that were carried forward—particularly the definitions for "Gaming Facility," "Gaming Operation," "Project," and "Interested Persons"—when coupled with the greatly expanded off-reservation environmental section's language went far beyond the impact that they had in the 1999 Compacts (which the Department affirmatively approved) and had the effect of interfering with the Tribe's authority to govern itself, start a project, or otherwise use its lands.[16]

In response, the State and the Tribe revised some of the definitions. These revisions are minor and generally fail to address the concerns articulated in the 2021 Disapprovals. Further, key phrases identified as particularly problematic in the 2021 Disapproval remain in the 2022 Compact.

Gaming Facility is defined in the 2022 Compact at Section 2.13 as:

> "Gaming Facility" or "Facility" means any building in which Gaming Activities or ~~any Gaming Operations~~ gaming operations occur, or in which the business records, receipts, or funds of the Gaming Operation are maintained (but excluding off-site facilities primarily dedicated to storage of those records, and financial institutions), ~~which may include parking lots, walkways,~~ and all rooms, buildings, and areas ~~that provide amenities to Gaming Activity patrons~~, including parking lots and walkways, if and only if, the principal purpose of which is to serve the activities of the Gaming Operation, provided that nothing herein prevents the conduct of class II gaming (as defined under IGRA) therein.

The redlines above reflect changes between the 2021 Compact and the 2022 Compact.

The revised definition for *Gaming Facility* in the 2022 Compact is broader than the definition in the 2021 Compact. Although the first reference to the *Gaming Operation* that we found in the 2021 could encompass activities beyond the gaming spaces was deleted, in its place remains a reference to "gaming operation" that is no longer a defined term. The definition of *Gaming Facility* creates a broad interpretation of directly related to the *operation* of [class III] gaming activities and therefore subject to regulation under IGRA.

In the 2021 Disapproval we explained that tribes often develop businesses which are located near or adjacent to the gaming facility, co-branded and marketed with the gaming facility, and often co-managed by the tribe's business arm. We further explained that "[m]utually beneficial proximity, or even co-management alone is insufficient to establish a "direct connection" between the businesses and the class III gaming activity."

[16] 2021 Disapproval at 11.

As applied to the Tribe's casino-resort Tachi Palace Casino Resort the State's definition of *Gaming Facility* reaches from the very edge of the parking lots to all areas within the buildings including all hotel rooms. Further, this definition – standing alone – likely includes the tribally owned and operated gas station. The Tribe's gas station, Yokut Gas shares a parking lot with the casino and is listed on the casino's website.[17] In addition, the ambiguity in these definitions increases the potential that the State and municipal governments could impose certain land use requirements on the Tribe in the future.

Project is defined in the 2022 Compact at Section 2.25 as:

> "Project" means (i) the construction of a new Gaming Facility, (ii) a renovation, expansion or modification of an existing Gaming Facility, or (iii) ~~other~~ a development activity involving a physical change to the reservation environment, provided the principal purpose of which is directly related to the activities of the Gaming Operation, and any one (1) of which may cause a Significant Effect on the Off-Reservation Environment. For purposes of this definition, section 11.0, and Appendix B, "reservation" refers to the Tribe's Indian lands within the meaning of IGRA, or lands otherwise held in trust for the Tribe by the United States. "Project" does not include an activity that has been both described and the impacts of which have been previously addressed in a tribal environmental impact report or document described in section 11.0, or in an environmental impact report, statement, or assessment under the Tribe's 1999 Compact; nor does it include any activity otherwise meeting the definition of "Project" for which a notice of preparation has issued pursuant to the Tribe's 1999 Compact prior to the effective date of this Compact, which activity the parties agree shall be governed by section 10.8 of the Tribe's 1999 Compact.

I stated in the 2021 Disapproval that the definition of *Project* could subject the Tribe to State oversight and regulation of construction projects not directly related to the Tribe's gaming spaces. My disapproval reiterated the Department's long-held position rejecting the State's argument that the inclusion of the "principal purpose" test in the definition of *Project* and *Gaming Facility* is an effective limiting phrase, and yet it still remains in the 2022 Compact.[18]

Although the 2022 Compact restricts the third clause of *Project* to "development" activities and not just "other" activities, the remaining language is unchanged. The 2022 Compact does not include a definition for "development activity" without which the Department cannot confirm that this is a substantive change. The definition of *Project* when considered in tandem with the environmental regulation provisions in Section 11, interferes with the Tribe's use of its lands in a

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[17] Tachi Palace website last visited July 18, 2022. https://www.tachipalace.com/about-us/yokut-gas-station/ *See also* Google maps satellite view of Tachi Palace and Yokut Gas, last visited July 18, 2022. https://www.google.com/maps/place/Yokut+Gas/@36.2378069,-119.7653829.638m/data=!3m1!1e3!4m15!1m9!3m8!1s0x8094c798118152f9:0x42b26c08a34f7fea!2sTachi+Palace+Casino+Resort!5m2!4m1!1i2!8m2!3d36.2381393!4d-119.7670637!3m4!1s0x0:0x6c8e5808f3bd6e59!8m2!3d36.2395697!4d-119.7634311

[18] 2021 Disapproval note 41.

manner that is not directly related to gaming and beyond the proper scope of negotiations for a compact under IGRA.

We construe the expansive definition of *Gaming Facility* to capture the Tribe's gas station for clauses 1 and 2. Even if the definition of *Gaming Facility* is somehow narrowly construed to exclude the gas station, the proximity, co-branding, and likely co-management of the gas station would trigger clause 3. Any planned expansion or renovation of the gas station would be considered a *Project* as defined in the 2022 Compact and subject to the extensive environmental review provisions in Section 11, in addition to all relevant Federal law.

Interested Persons is defined in the 2022 Compact at Section 2.20 as:

> "Interested Persons" means (i) all local, ~~state,~~ and federal agencies, which, *if a Project were not taking place on Indian lands, would have responsibility for approving the Project or would exercise authority over the natural resources that may be affected by the Project,* ~~(ii) any incorporated city within ten (10) miles of the Project, and (iii) persons, groups, or agencies that request in writing a notice of preparation of a draft tribal environmental impact report or document described in section 11.0, or have commented on the Project in writing to the Tribe or the County where those comments were provided to the Tribe~~ and (ii) the City of Lemoore, California. (*emphasis added*)

This definition partially addresses the Department's concerns that individuals and entities had the ability to comment and interfere with the Tribe's ability to use its lands in a manner contrary to IGRA. The definition removes the 10-mile radius and deletes reference to parties, groups, and agencies that have requested notification in writing. However, the environmental review provisions in Section 11 contain a process for notification and participation by these outside groups. Therefore, the revisions to this definition reflect removal of superfluous language with minimal – if any – impacts on the Tribe's obligations under Section 11 when contemplating a *Project*.

3. Analysis of Revised Environmental Regulations:

The 2021 Disapproval addressed several specific provisions in Section 11 *Off-Reservation Environmental Impacts* as well as the overall scope of those provisions coupled with the expansive definitions. The 2021 Disapproval stated that:

> [t]riggered by the definitions discussed above, the Compact at Section 11 requires the Tribe to implement State environmental law and regulations for on-reservation projects. These provisions apply to any construction or renovation at the Gaming Facility beyond the Gaming Spaces to 'other activity involving a physical change to the reservation environment, provided the principal purpose of which is directly related to the activities of the Gaming Operation.'[19] Further, section 11.10(c) requires the Tribe to enter into

[19] We note that activity is now limited to development activity, but as discussed above this revision was one of language and not substance.

> intergovernmental agreements with the County, and Caltrans prior to commencement of a project. Section 11.10(a)(1)-(2) requires that these intergovernmental agreements include compensation (payment) from the Tribe to the local governments for mitigation of effects on public safety and for public services provided to the Tribe. In effect, any project funded by, organized by, or related to, the Tribe's gaming business enterprise will trigger these provisions.

2021 Disapproval at 11, internal citations omitted.

My 2021 Disapproval reiterated the Department's long-held stance that these provisions fell outside the narrow range of topics IGRA permits in a compact. Yet they remain in the 2022 Compact. In response to the 2021 Disapproval, the Tribe and the State revised some technical provisions which do not change the scope or effect of Section 11. The 2022 Compact continues to prohibit the Tribe from commencing construction (breaking ground) on any *Project* until the requirements of Section 11 are completed, including binding arbitration.

Section 11 reflects a delegation from the State to the County and the City for immediate oversite of the Tribe's compliance with Section 11. The definition of *Interested Persons* further reflects this delegation and overreach by requiring the Tribe to involve all local agencies, who would have had responsibility for approving the *Project* or would otherwise exercise authority over the natural resources that may be affected, if it was not taking place on the Tribe's Indian lands. Further, Section 11.10, requires the Tribe to waive its sovereign immunity and to enter into an intergovernmental agreement with the County, which must be in place prior to the commencement of a *Project*. Section 11.10 contains specific topics that must be addressed in the intergovernmental agreement, including mitigation for off-reservation effects and compensation for services provided to the Tribe, but does not prohibit the County from demanding the inclusion of other topics. Further, if the Tribe alleges any improper negotiations from the County, it must appeal first to the State then resort to binding arbitration under Section 11.12. These provisions coupled with the expansive definitions of *Gaming Facility*, *Gaming Operation*, and *Project* provide expansive approval authority to local governments over tribal gaming, and tribal land use including but not limited to tribal infrastructure projects. If the intergovernmental agreement required by Section 11.10, does regulate the Tribe's class III gaming or otherwise limit the Tribe's use of its lands, then the provisions requiring the intergovernmental agreement with local governments is beyond the narrow range of topics IGRA permits in a compact.

Section 11.10(a)(1)-(2) requires that these intergovernmental agreements include compensation (payment) from the Tribe to the local governments for mitigation of effects on public safety and for public services provided to the Tribe. Section 4.4(d) includes in the Special Distribution Fund similar payments to local governments, and Section 4.7(a)(2) requires the Tribe to continue such payments if the State breaches the Tribe's exclusivity. The Department previously expressed concerns regarding the financial burdens these types of agreements can place on tribes.[20] The Department has also questioned if these payments are an impermissible tax or – as

[20] Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs to Nick Fonseca, Chairman Shingle Springs Band of Miwok Indians (July 15, 2013) at 2.

the State argues – "necessary to defray the [state's] costs of regulating" class III gaming.[21] These provisions are contrary to IGRA which prohibits the State or any of its political subdivisions from imposing a tax, fee, charge or other assessment as a condition of the compact.[22] I am unpersuaded by the State's assertion that these unspecified payments are permissible under IGRA as the State's assessment of such amounts which are necessary to defray the State's cost of regulating the Tribe's class III gaming.[23]

In addition to the extensive local governmental oversite, the State may challenge the Tribe's determinations at numerous stages in the process, with the State's costs covered under Section 11.12(b) by all gaming tribes through payments made into the Special Distribution Fund. As a result, a recalcitrant state could bring meritless claims – including whether a proposed action is a *Project* – against the Tribe resulting in significant delays and costs for the Tribe but at no cost to the State.

Section 11.2 contains stylistic edits and continues to require the Tribe to adopt Tribal Environmental Laws incorporating the National Environmental Policy Act of 1969 (NEPA) and the California Environmental Quality Act (CEQA). A provision in Section 11.2 providing the State with explicit authority to review and object to the Tribe's Environmental Laws has been removed, but the dispute resolution provisions in Section 11.12 and Section 13 remain, allowing for implicit State oversite and objection.

The remaining revisions to Section 11 are technical or stylistic in nature and act to offset any potential narrowing in the definition of *Interested Persons*. The redline revisions to Section 11 reflects wordsmithing and the removal of superfluous provisions in response to the 2021 Disapproval. Further, key provisions I identified in the 2021 Disapproval as problematic remain unchanged.

4. Analysis of Revised Provisions Regarding Child and Spousal Support Orders:

The 2021 Compact at Section 12.6(d) required the Tribe's *Gaming Operation* to "recognize and enforce lawfully issued state child or spousal support orders or judgements entered against any person employed at the Gaming Operation or Gaming Facility." The 2021 Disapproval noted this provision appeared to require automatic enforcement by obligating the Tribe to enforce State law and State court orders that are unrelated to gaming.

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[21] *See e.g.,* Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs to Cody J. Martinez, Chairman Sycuan Band of the Kumeyaay Nation (December 17, 2015) at 4; and Letter from Paula L. Hart, Director, Office of Indian Gaming to Cody J. Martinez, Chairman Sycuan Band of the Kumeyaay Nation (November 2, 2015) requesting additional information.
[22] 25 U.S.C. § 2710 (d)(4).
[23] 25 U.S.C. § 2710(d)(3)(C)(iii).

The 2022 Compact now provides in Section 12.6(d):

> In furtherance of the licensing provisions in section 6.4.7, and as a matter of comity with the State's recent change to state law, which now provides that a child or spousal support order entered by a tribal court may be recognized and enforced in a state court proceeding pursuant to sections 1730 through 1741 of the California Code of Civil Procedure, the Tribe shall require the Gaming Operation to keep in place and continue to enforce the Gaming Operation's current policy of recognizing and enforcing lawfully issued state child or spousal support orders or judgments entered against any person, other than tribal members, employed at the Gaming Operation or Gaming Facility.

Although the Tribe and the State revised Section 12.6(d) to clarify that the provision was included in furtherance of the licensing provisions and as a matter of comity with the State's laws, the 2021 Disapproval addressed the issue of comity. The 2021 Disapproval noted that the Tribe, in its justification of that provision, argued that the provision reflects comity and mutual exercises of sovereignty as well as recognition of the Tribe's existing practice.[24]

The 2021 Disapproval found that neither the 2021 Compact nor the Tribe's supplemental information reflected a similar Tribal court petition process for recognition and entry of a judgment based on a state court order. Tribes should not be enforcing state court orders without a process for that order to be domesticated in tribal court, similar to the State court process described in section 12.6(d). The court in *Chicken Ranch Rancheria of Me-Wuk Indians v. Newsom* (*Chicken Ranch*), found this type of mechanism improper.[25] In *Chicken Ranch*, as here, the State sought to include a compact provision that required Tribes to directly recognize and provide automatic execution of state court orders without having the issue resolved by tribal courts, finding it akin to prohibited jurisdiction shifting under IGRA because the relevant court making decisions was the state court.[26] Likewise, even with the proposed additional language, the concern remains that the State is imposing a mechanism on the Tribe for the automatic enforcement of a state court decision, shifting jurisdiction away from the Tribe. The revisions to this section highlight the very disparity identified in the 2021 Disapproval between the State court process and apparent absence of an equivalent tribal court process.[27]

Further, it is unclear how this provision directly relates to the tribal licensing provisions in Section 6.4.7, which require that the person: is of good character, honesty, and integrity; does not pose a threat to the public interest or effective regulation and control of gaming; and is in all other respects qualified to be licensed.

Provided, failure to pay state court ordered child or spousal support payments are grounds for denying, suspending, or revoking a tribal gaming license; or for the State Gaming Agency to

[24] 2021 Disapproval at 13-14.
[25] 530 F. Supp. 970, 981 (E.D. Cal. 2021).
[26] *Id.* (citing *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1256-57 (D.N.M. 2013) (court held that IGRA did not permit shifting the jurisdiction from tribal court to state court for personal injury tort claims, finding no justification for concluding that the IGRA intends the extension of state court jurisdiction for any other purpose than resolution of issues involving the licensing and regulation of class III gaming).
[27] 2021 Disapproval note 50.

issue a determination of unsuitability pursuant to section 6.5.1; automatic enforcement of a State court order to ensure employees remain in good standing is too attenuated from the regulation of the conduct of gaming. The 2021 Disapproval noted that the court in *Chicken Ranch*[28] found substantially similar requirements to be too attenuated from the conduct of gaming to fall within the permissible subjects of compact negotiations under IGRA. The *Chicken Ranch* court found this was per se evidence of bad faith negotiation.[29]

5. Other Concerning Provisions in the 2022 Compact

In the 2021 Disapproval, I addressed the provisions in the 2021 Compact that were clear violations of IGRA and noted concerns about provisions related to tort claims. My decision here, and the 2021 Disapproval should not be viewed as addressing all problematic provisions in the 2021 Compact as resubmitted in 2022. Rather, the provisions identified in this decision and in the 2021 Disapproval build on the numerous letters the Department has provided expressing concerns with substantially similar provisions that appear in the 2022 Compact. This includes the requirement to use binding arbitration to resolve some compact disputes which may change the parties' obligations under the 2022 Compact – effectively amending the compact in a manner that evades Departmental review.[30]

Conclusion

Tribal gaming has proven to be the most successful form of economic development in Indian country in the past century. Many Tribes have used gaming to lift entire communities out of crushing poverty and to develop sophisticated and dynamic governments that rival their state and local counterparts.

In creating the class III gaming compact, Congress effectively provided States with the keys to the gates of Indian gaming. Congress recognized this fact, which is why it also put numerous guardrails in place: the mandate to negotiate in good faith; remedial provisions that apply when a State refuses to negotiate a gaming compact in good faith; a prohibition on State taxation of tribal gaming; and strict limitations on the issues that can be addressed in a gaming compact. Congress also delegated responsibility to the Secretary of the Interior to ensure that each compact stays within these guardrails and complies with the law.

I recognize that the disapproval of a class III compact is a harsh remedy in circumstances like this, and that it is ultimately the Tribe that suffers the greatest consequences of a disapproval. Secretarial disapproval is a blunt instrument, but it is the only tool the Department has at its disposal to protect the balance Congress developed in IGRA. Secretarial disapproval helps to fulfill Congress' goal that Tribes should not have to sacrifice their inherent sovereignty in exchange for the proven benefits of Indian gaming.

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[28] 2021 Disapproval at 13-14, 530 F. Supp. 3d at 982.
[29] 530 F. Supp. 3d at 982.
[30] *See e.g.*, Sections 11.10, and 11.12.

In this case, the 2022 Compact confers expansive powers on the State and local governments to regulate the Tribe's activities and lands that are not directly related to the actual conduct of gaming. There is nothing preventing the Tribe, the State, and local governments from negotiating different types of cooperative agreements that promote good governance amongst neighbors. But those agreements must be negotiated on a level playing field outside IGRA's class III compacting process.

For the reasons stated above I disapprove this Compact. I regret my decision could not be more favorable at this time. A similar letter is being sent to the Honorable Leo Sisco, Chairman, Santa Rosa Indian Community of the Santa Rosa Rancheria.

Sincerely,

Bryan Newland
Assistant Secretary – Indian Affairs