United States Department of the Interior
Office of the Assistant Secretary - Indian Affairs
Washington, DC 20240

The Honorable Garth Sundberg
Chairman, Cher-Ae Heights Indian Community
Of the Trinidad Rancheria, California,
1 Cher-Ae Lane
PO Box 630
Trinidad, CA 95570

March 10th, 2023

Dear Chairman Sundberg:

On February 17, 2023, you requested technical assistance review of certain provisions of a proposed compact between the Cher-Ae Heights Indian Community of the Trinidad Rancheria (Tribe) with the State of California. Particularly, you requested a technical assistance review of proposed changes to the Tribe's revenue sharing obligations with the State to determine whether the Department of the Interior (Department) would affirmatively approve a compact with the proposed provisions.

The Department's Role under IGRA

The Indian Gaming Regulatory Act (IGRA) prescribes that class III gaming compacts are to be negotiated in good faith between states and tribes. The Department will not upset the balance struck by Congress. In enacting IGRA, Congress delegated the authority to review compacts to the Secretary to ensure that they comply with IGRA, other provisions of federal law that do not relate to jurisdiction over gaming on Indian lands, and the trust obligations of the United States. 25 U.S.C. 2710(d)(8)(B)(i)-(iii). IGRA establishes the parameters for topics that may be the subject of compact and amendment negotiations. Thus, in reviewing submitted compacts and amendments, the Secretary is vested the authority to determine whether those submitted documents contain impermissible subjects of negotiation.

Under IGRA, the Department's role in reviewing and approving class III gaming compacts commences when a compact is submitted for review.[1] Periodically, tribes and states have called upon the Department's Office of Indian Gaming to provide technical assistance to tribes and states before or during their compact negotiations. The Office of Indian Gaming's technical assistance is neither a 'pre-determination' nor 'legal guidance,' rather it is often an explanation of past precedent, procedures, and the Department's interpretation of case law.[2] The Office of Indian Gaming has also provided technical assistance by identifying potential concerns with draft compact language and offering best practice suggestions. The Office of Indian Gaming has observed that providing tribes and states with accurate information about the Department's past decisions, regulatory requirements, and current policy positions is critical

[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. The Department is considering updating the regulations and has consulted with Tribes to begin the process.

to assisting tribes in finding common ground and successfully negotiate class III gaming compacts.

The Department defers to parties' sovereign decision making when negotiating and has observed that Tribes and States will often reach unique solutions to similar problems based on their own interests and circumstances. These provisions, however, must be within IGRA's narrow scope of topics that are directly related to the regulation of class III gaming. As a result, the Department may approve or let a compact take effect by operation of law which contains provisions objectionable to other Tribes in that State. The Department is committed to maintaining the integrity of this important role as prescribed by Congress in IGRA.

Review of Proposed Changes to the Tribe's Compact

As explained below the Department considers the 1999 compacts the baseline against which proposed compact provisions are evaluated. As discussed below, the 1999 compacts included a statewide revenue sharing scheme in exchange for statewide tribal exclusivity guaranteed by a State constitutional amendment. Additionally, because of the 1999 compacts tiered structure, some Tribes qualified for no revenue sharing obligations. The information you provided in your request for technical assistance shows the Tribe is one of these Tribes. The Tribe had less than 200 gaming devises in operation on September 1, 1999, therefore the Tribe had no obligation to pay into the SDF. Further, the Tribe has consistently operated fewer than 350 gaming devices and therefore had no obligation to pay into the Revenue Share Trust fund. Therefore, the Tribe's functional baseline revenue sharing agreement with the State is $0.

Your request for technical assistance indicates that the State's most recent proposed compact includes the State's more recent "pro rata" share contribution into the SDF as well as a new "Impact Mitigation Fund" which requires the Tribe to withhold 1% of net win and "distribute those funds to neighboring jurisdictions or charitable fire or emergency service entities to mitigate impacts resulting from the operation of the Gaming Facility."

Absent additional information these new provisions would appear to be a demand for increased revenue sharing from the Tribe in violation of Rincon. The IGRA does permit to the State to assess "amounts as are necessary to defray the costs of regulating." 25 U.S.C. § 2710(d)(3)(C)(iii). The Department has consistently view this as permitting the State to assess its actual and reasonable regulatory costs. Despite the State's arguments that the SDF pro-rata contribution is the State's actual and reasonable regulatory costs, as explained above, the Department disagrees and considers the SDF to be a revenue sharing provision. Similarly, the State's new demand for a 1% Impact Mitigation Fund, appears to be a prohibited demand for a "tax, fee, charge, or other assessment" under 25 U.S.C. § 2710(d)(4).

The information you provided does not indicate that the State has offered any new meaningful concession to offset these demands. Instead, the State has relied upon the grant of exclusivity included in the 1999 Compact. As noted above, the Tribe currently enjoys the full benefit of exclusivity under the 1999 Compact and due to the tiered structure of revenue sharing under the 1999 Compact is not required to make payments to the SDF or the RSTF.

Background

The history of Indian gaming in California, which led to the Supreme Court's decision in *California v. Cabazon*, and ultimately the 1999 Compacts, is well documented by the Ninth Circuit in the 2003 *Coyote Valley II* decision, the 2010 *Rincon* decision, and the 2022 *Chicken Ranch* decision. Those cases, along with numerous Departmental letters, reflect the State's evolving negotiation demands and attempts to stretch IGRA's limits on permissible compact provisions. As noted in our 2021/2022 Disapproval letters, the Department considers the 1999 compacts the baseline against which proposed compact provisions are evaluated.

The 1999 Compacts were a negotiated compromise between the State and more than 60 Tribes within the State.[3] The 1999 Compacts, along with Proposition 1A – which amended the State Constitution – guaranteed the Tribes the exclusive right to conduct casino style class III gaming, free from non-tribal competition, in exchange for percentage based revenue sharing to the State in the Special Distribution Fund (SDF), a per-device fee based revenue sharing with non-gaming Tribes in the State through the Revenue Sharing Trust Fund (RSTF), and certain environmental, health, safety, and labor relations provisions.[4]

It is important to note that the 1999 Compacts revenue sharing provisions included a tiered structure under which the Tribes who operated the largest facilities would carry the largest burden, while Tribes who operated less than 350 machines continued to qualify as a "limited gaming Tribe" and therefore had no obligation to pay into the RSTF. Additionally, a Tribe's obligation to pay into the SDF was tied to the total number of gaming devices the Tribe operated on September 1, 1999. Section 5.1(a) provided, if a Tribe had less than 200 gaming devises in operation on September 1, 1999, the Tribe would have no obligation to pay into the SDF, while Tribes that operated over 1000 machines would be obligated to pay up to 13% of net win.

The 1999 Compacts in Section 5.2 provided the State Legislature could appropriate the money in the Special Distribution Fund for five specified purposes: addressing problem gambling; supporting state and local governmental agencies impacted by Tribal gaming; compensating the State's regulatory costs; covering shortfalls into the Revenue Sharing Trust Fund; and "any other purposes specified by the Legislature." The 1999 Compacts also sought to limit the total number of gaming devices in operation in the State.

As Tribal gaming operations grew, the State offered to expand the total allocation of gaming devices in exchange for increased revenue sharing rates, including direct contributions into the State's general fund.[5] In *Rincon,* the Ninth Circuit rejected the State's demands for increased revenue sharing into the State's general fund as an impermissible tax under IGRA.[6] The State

[3] The Department published a notice of approval of Tribal-State Compacts between the State and 60 Tribes in the Federal Register on May 16, 2000. 65 Fed. Reg. 31189. The Ninth Circuit in *Coyote Valley II* noted the Coyote Valley Band participated in the negotiations but ultimately refused to sign the 1999 compact and instead sued the State over the inclusion of several provisions in the 1999 Compact.

[4] For a more detailed history of the 1999 Compact, *see Coyote Valley II*, 331 F.3d 1094 (9th Cir. 2003)

[5] *See e.g. Cachil Dehe Band v. California (Colusa II)*, 618 F.3d 1066 (9th Cir. 2010); *Rincon* 602 F.3d 1019 (9th Cir. 2010); and *Pauma Band v. California*, 813 F.3d 1155 (9th Cir. 2015).

[6] That same year the Department disapproved a compact between the State and the Habematolel Pomo of Upper Lake.

changed its strategies following the *Rincon* decision, and by 2014 was offering a 'pro-rata' calculation for Tribal contributions to the State's Special Distribution Fund in place of the percentage based payments, a percentage based revenue sharing obligation to the Tribal Revenue Sharing Trust Fund, a new Tribal Nations Grant Fund, and requirements that a Tribe enter into Inter Governmental Agreements with payments to local governments as part of an expanded environmental section. The State, in some instances, offered credits or discounts for certain Tribal expenditures against a Tribe's obligation to pay into the Tribe-to-Tribe revenue sharing funds.[7] These credits vary between compacts, but often include payments to local governments in lieu of sales or occupancy taxes, investments in renewable energy, investments in cultural preservation, and infrastructure investments. These credits act to reduce a Tribe's obligation to non-gaming tribes through revenue sharing obligations.

Revenue Sharing

The IGRA sharply limits the circumstances under which an Indian tribe can make direct payments to a state, pursuant to 25 U.S.C. 2710(d). The Department reviews revenue sharing provisions in compacts with great scrutiny, beginning with the premise that a Tribe's payments to a state or any of its political subdivisions are a prohibited "tax, fee, charge, or other assessment" unless it is to defray the State's costs of regulating class III gaming activities.[8] Our analysis first looks to whether the State has offered meaningful concessions to the Tribe that it was not otherwise required to negotiate, such as granting exclusive rights to operate class III gaming, or other benefits with a gaming-related nexus. We then examine whether the value of the concessions provide substantial economic benefits to the Tribe in a manner justifying the revenue sharing required.

As discussed above, the 1999 compacts included a statewide revenue sharing scheme in exchange for statewide tribal exclusivity guaranteed by a State constitutional amendment. The 1999 revenue sharing scheme in California was scrutinized by the Department and the Ninth Circuit and consistently found to be consistent with IGRA. The Ninth Circuit in *Rincon,* however, found State's demand for increased revenue sharing without any State concession was an impermissible tax. The Department has consistently permitted parties to renegotiate an underlying revenue sharing arrangement, so long as the expected revenue sharing burden on the Tribe either remains the same or is reduced, and the value of the State's concession continues to justify the revenue sharing rate.[9] In some instances, the Department has also approved increases in total revenue sharing when the State has provided new concessions that justify increased revenue sharing.[10]

The Department has also permitted Tribes and States to renegotiate provisions for reimbursing the State's regulatory costs. The 1999 Compacts, along with subsequent compacts in California, have included the States regulatory costs as part of the State's Special Distribution Fund. As the State

[7] *See e.g.* 2015 Tribal-State Compact between the State of California and the Jackson Rancheria Band of Miwuk Indians.
[8] 25 U.S.C. 2710(d)(3)(C)(iii) and 25 U.S.C. 2710(d)(4).
[9] *See e.g.* Letter from Bryan Newland, Principal Deputy Assistant Secretary – Indian Affairs, to Robert Miguel, Chairman Ak-Chin Indian Community, dated May 21, 2021, at 2, discussing the Tribe-to-Tribe revenue sharing and gaming device leasing provisions.
[10] *See e.g.* Letter from Bryan Newland, Principal Deputy Assistant Secretary - Indian Affairs, to Marcellus Osceola, Jr. Chairman, Seminole Tribe of Florida, dated August 6, 2021, at 8-10.

shifted from a percentage to a "pro-rata" contribution calculation for that fund, it also began describing the Special Distribution Fund as its regulatory costs. Initially, the State required a Tribe to "pay [it] on a pro rata basis the actual and reasonable 25 U.S.C. § 2710(d)(3)(C) costs the State incurs for the performance of all its duties under this Amended Compact."[11] This language has evolved to require a Tribe to:

> pay to the State on a pro rata basis the State's 25 U.S.C. § 2710(d)(3)(C) costs incurred for the performance of all its duties under this Compact, including the administration and implementation of tribal-state Class III Gaming compacts and Secretarial procedures prescribed by the Secretary of the Department of the Interior pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii) (Secretarial Procedures), and funding for the Office of Problem Gambling, as determined by the monies appropriated in the annual Budget Act each fiscal year to carry out those purposes (Appropriation) …

Despite this shift, the State has not revised the Special Distribution Fund so that it is strictly limited to just the State's regulatory costs. Instead, the Special Distribution Fund retains the same provisions evaluated by the Ninth Circuit in *Coyote Valley II,* which found the 1999 Compacts revenue sharing scheme was permissible in part because the Special Distribution Fund was earmarked for "gaming-related purposes." This, however, cannot be construed as strictly defraying the State's regulatory costs, which are a subset of the Special Distribution Fund. Rather, the Department has evaluated a Tribe's total revenue sharing obligations against the value of statewide tribal exclusivity for the compacting Tribe.

Further, in 2022, the California State Auditor conducted a comprehensive audit of the State's use of the Special Distribution Fund (Audit Report) and found the State has not effectively managed the fund and has allowed the fund to accumulate an excessive reserve, nearly four times the State's annual budget for Special Distribution Fund related expenditures.[12] The Audit Report describes the Special Distribution Fund as the State's "regulatory costs," which includes regulating tribal gaming operations and funding programs to treat gambling addiction. The Audit Report noted the State no longer relies on the Special Distribution Fund to pay for certain activities, including funding local governments, opting instead to require compacting Tribes to negotiate mitigation payments directly with local governments, although that remains an authorized purpose under state law.[13] The Audit Report provided numerous examples of misuses of the Special Distribution Fund, including charges for nontribal gaming enforcement activity.[14] Further, the State Auditor's report noted differences in the revenue sharing provisions of compacts – pro-rata or a percentage of net win – causes otherwise similarly situated Tribes to carry disproportionate regulatory burdens.[15]

The State Auditor's Report reinforces the Department's treatment of the Special Distribution Fund as a revenue sharing provision, despite the State's argument that it is a permissible

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[11] *See e.g.* Section 4.3 of the 2013 Compact between the Shingle Springs Band of Miwok Indians and the State of California.
[12] California State Auditor Report 2021-102, August 2022.
[13] *Id.* at 12-13. *See also* California Government Code Section 12012.85.
[14] *Id.* at 11
[15] *Id*. at 24

assessment of only the State's regulatory costs under section 2710(d)(3)(C)(iii). In reviewing the 2021/2022 Disapproved compacts, the Department requested the Tribes and the State provide a calculation of the total expected revenue sharing obligations, including any required payments to local governments, relative to the 1999 compact. The Department noted the 2021/2022 Disapproved compacts revenue sharing obligations included the Tribes' pro-rata contributions to the Special Distribution Fund, the Revenue Sharing Trust Fund, the Tribal Nations Grant Fund, any payments to local governments required by the compact, and any discounts or credits offered by the State against the expected revenue sharing obligations. The Department also requested an explanation of how the changes to the revenue sharing provisions, including discounts or credits, complied with IGRA. The Department's Notice of Proposed Rulemaking to revise 25 CFR Part 293 at Section 293.24 reiterated the Department's longstanding rebuttable presumption and test for evaluating revenue sharing obligations under IGRA.

Exclusivity

The 1999 Compacts, along with Proposition 1A, provided the Tribes with a significant concession from the State – the exclusive right to conduct casino style class III gaming free from non-tribal competition – in exchange for tiered revenue sharing. The parties to the 1999 compacts, the Department, and reviewing courts have interpreted this agreement as an ongoing collective right with an ongoing collective payment obligation, similar to a lease or royalty agreement. Additionally, the Ninth Circuit in *Rincon* held the State could not require a Tribe to pay more than what was agreed to in the 1999 Compacts for the same right.

In the 2014 Compact between the Karuk Tribe and the State of California, the Department noted that Section 4.5 of the Compact contains a provision regarding remedies available to the Tribe if exclusivity is abrogated. If exclusivity is abrogated, Section 4.5 states that the Tribe may either cease gaming or continue gaming under the Karuk Compact. The Department noted the Karuk Compact is then silent as to whether the revenue sharing payments would continue or would cease if exclusivity is terminated. The Department noted that Section 4.5 could be misconstrued to require the Tribe to continue revenue sharing payments even after exclusivity is terminated. If that is the case, we determined that the revenue sharing provisions set forth in Section 4.5 would constitute an impermissible tax, fee, charge, or other assessment in violation of IGRA, 25 U.S.C. § 2710(d)(4). In the Department's discussions with the Karuk Tribe and the State regarding this provision, representatives of the State and the Karuk Tribe clarified that their interpretation of this provision in the Karuk Compact is that, if the exclusive right of Indian tribes to operate gaming devices in California terminates, the compact terms allow the Tribe to continue to operate under the Karuk Compact. ln that event, the parties will negotiate amendments to compensate the State for the actual and reasonable costs of regulation and payments to local governments and others to mitigate the impacts of tribal gaming.[16]

The Department has observed other forms of revenue sharing agreements that are more analogous to a purchase rather than a lease. For example, a compact's revenue sharing

[16] *See* Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs, to Jerry Brown, Governor of California (Nov. 12, 2014) at fn. 14 (citing e-mail message from Dennis Whittlesey, counsel for the Tribe, to Paula Hart, Director, Office of Indian Gaming, forwarding and concurring with clarification e-mail message from Joe Dhillon, Senior Adviser for Tribal Negotiations, Office of the Governor (October 16, 2014)).

arrangement may include a different time period or start / end date than the compact itself. The compact may include payments for other concessions of value that are directly related to the Tribes conduct of gaming; for example, use of the State's imminent domain power to facilitate the Tribe's trust acquisition of a proposed gaming facility site. Alternatively, a compact may include triggers for reevaluating the parties' obligations if the offered concession no longer justifies the expected revenue sharing rate. The Department strongly encourages parties, as a best practice, to carefully articulate the full scope of the concession offered; for example, both the right to conduct a specific type or style of games free from state licensed competition, and the right to trigger enforcement or protection of that right. In states with tribe-to-tribe revenue sharing arrangements, those arrangements may include triggers for reevaluating the contribution and disbursement rates over the life of the compact. Further, the Department strongly encourages parties to specify the remedies for breach or loss of the State's concession. The Department relies on carefully articulated exclusivity provisions, along with revenue sharing requirements, to satisfy the longstanding rebuttable presumption and test for evaluating if revenue sharing obligations are lawful under IGRA.

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.[17]

Thank you for your inquiry on this important issue.

Sincerely,

PAULA HART Digitally signed by PAULA HART Date: 2023.03.10 10:48:25 -05'00'

Paula L. Hart
Director, Office of Indian Gaming

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