IGRA and Tribal "Non-Gaming Spaces"

Fighting Back Against State Government Overreach In Compacts and Intergovernmental Agreements

BY LITTLE FAWN BOLAND

The Indian Gaming Regulatory Act (IGRA) prohibits states, including their political subdivisions such as counties, from imposing "any tax, fee, charge or other assessment upon an Indian Tribe" via tribal-state compacts, except for assessments in such amounts as are necessary to defray the costs of regulating gaming activities.[1] As legal rulings have made it increasingly clear that blatant taxes are illegal, state and local governments have been creatively expanding the purview of gaming regulation to justify higher regulatory assessments. Part and parcel of this "extraction" campaign against tribes is the added demand for mitigation payments to be paid to surrounding local governments for purported "off-reservation impacts." Expansive views of what constitutes the gaming footprint necessarily leads to greater impact, which in turn justifies extorting more money from tribes.

Since the mid 2000's, tribes compacting with the State of California have had to negotiate essentially a "second compact"—intergovernmental agreements with local government units that are never seen by the Department of the Interior ("DOI"), let alone approved or rejected by DOI. And a survey of such intergovernmental agreements reveals the same broad overreach in violation of IGRA that is often seen in tribal-state compacts with respect to so-called "regulatory assessments."

A. THIS IS NOT THE WAY IT WAS SUPPOSED TO BE

The "regulatory assessment" attack on tribal sovereignty and tribal coffers is achieved by purposefully *conflating regulation of "gaming-related" with "casino-related" activities.* Congress did "not intend that the compacting methodology would be used in such areas as taxation, water rights, environmental regulation, and land use."[2] The phrase "directly related to the operations of gaming" should ordinarily exclude non-gaming amenities (each a "Non-Gaming Space"), irrespective of their proximity to the tribe's gaming spaces within a gaming facility. In order for a Non-Gaming Space to "directly relate" to gaming, the relationship between the gaming facility and the Non-Gaming Space must be something out of the ordinary.[3]

Yet, tribes continue to agree that states and their political subdivisions may impose regulatory authority over hotels, wastewater facilities, water quality, the reservation environment, food standards, concert venues, conference centers, restaurants (to force them to be non-smoking), land into trust, design aesthetics (the list goes on and on) because of some tangential connection to their tribal casinos. For example, many counties have illegally demanded receipt of a tribe's hotel occupancy taxes as a form of mitigation for operation of tribal hotels if they are co-located with tribal casinos.

B. STATE REGULATION OF NON-GAMING SPACES IS ILLEGAL

When DOI approves a compact only to the extent it is lawful under IGRA, it is illegal for a state (or its political subdivision) to assert regulatory authority over the Non-Gaming Spaces, regardless of the language agreed to suggesting certain Non-Gaming Spaces may be included. Tribes would be within their rights to push back on this score.

States may negotiate for regulatory authority on the operations of tribal gaming establishments only when the regulation has a significant potential to impact a patron's participation in gaming activities and implicates the integrity of the conduct of Class III gaming activities.[4] The plain language of IGRA, in conjunction with DOI's interpretations of IGRA, make clear that compacting, and the corollary intergovernmental negotiation process, were not meant to include subjects that do not pose risks associated with gaming. IGRA limits state co-regulation of Class III gaming via compacting to those activities and issues that "directly relate to the operation of gaming activities." To illustrate, DOI has explained "we must look to whether the regulated activity has a *direct connection* to the Tribe's conduct of class III gaming activities."

Acting Assistant Secretary Laverdure provided instructive guidance on this matter in his notice to the Federated Indians of the Graton Rancheria of DOI's decision to take no action regarding its tribal-state compact. Therein, he distinguished the compact's unlawful regulations governing food and water against its lawful regulations regarding alcohol. "While the Tribe's provision of food, beverages and drinking water to its patrons may occur on the same parcel on which it conducts class III gaming," he said, "it does not necessarily follow that such activities are directly related to the operation of gaming activities under IGRA." Alcohol on the other hand has been proven to be directly related to player performance and engagement.

By virtually outlawing potential co-regulation of any interest not related to gaming, IGRA established "boundaries to restrain aggression by powerful states" (and their political subdivisions) who might seek to use the compacting process as a means of securing far-reaching jurisdictional control over Indian reservations to justify impermissible regulatory assessments (i.e. the tribes' money).

Over the last 5 years DOI decisions and opinion letters have demonstrated a renewed focus on limiting the topics that may be co-regulated via tribal-state compacting. In 2012 and 2015, respectively, DOI rejected tribal-state compacts submitted by the Mashpee Wampanoag Tribe and the Forest County Potawatomi Community because the compacts contemplated matters not related to gaming. Since 2012, Interior has issued many "deemed approved" letters for California compacts including to the Federated Indians of the Graton Rancheria, the Karuk Tribe,[5] Pinoleville Pomo Nation, Viejas Group of Capitan Grande Band of Mission Indians of the Viejas Reservation rather than outright approve such compacts due in large part to its "significant concerns" regarding the definitions of "Gaming Facility" and "Project" that "could be misconstrued to allow the State to regulate matters that are not directly related to gaming activities."

In the words of Assistant Secretary Washburn:

> Because IGRA is very specific about the reach of a lawful compact, we interpret these provisions as applying only to spaces in which gaming actually takes place, to spaces in which gaming-related funds or devices are kept, to spaces in which other activities directly related to gaming occur and to spaces occupied or frequented by employees who work within the confines of the gaming operation. *So, for example,* ***the definition cannot lawfully apply to hotel rooms and hotel-related spaces, such as hotel laundries and linen storage rooms, or other areas occupied and used exclusively by hotel guests, housekeeping and other non-gaming-related hotel employees.*** Similarly, the definition should not apply to businesses or amenities that are ancillary to gaming activities.

Despite this, we see tribe after tribe including hotels in their compacts, intergovernmental agreements and environmental analyses.

Recent compacts modified the definition of Gaming Facility to include places where activities occur with the "principal purpose" of serving the Gaming Facility. This new language is still in violation of "IGRA's requirement that compacts may regulate only those activities that are 'directly related to the operation of gaming activities.'"

C. FIGHTING BACK AGAINST STATE GOVERNMENT OVERREACH WORKS

States may not blindly regulate Non-Gaming Spaces, regardless of whether those physical spaces are housed within the gaming operation. Any such regulation must instead be narrowly tailored to address the effects of a specific gaming-related activity. State government overreach can and should be thwarted because the law is on Indian Country's side.

This basic fact of IGRA was affirmed when the Pascua Yaqui Tribe fought back against the State of Arizona when it attempted to co-regulate a hotel that is physically connected to the Pascua Yaqui Tribe's casino. Rather than accept this overreach, the Pascua Yaqui went to arbitration in 2012 and won an award in their favor. Other tribes should be emboldened to do likewise when faced with any overreach efforts by states or local government units even if the tribe in question has a compact that broadly defines "Gaming Facility."

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[1] 25 U.S.C. § 2710(d)(4).

[2] Sen. Daniel Inouye of Hawaii discussing the compact negotiation process, S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071).

[3] Letter from Kevin K. Washburn to Shingle Springs Band of Miwok Indians (July 15, 2013), at 10 (hereafter, "Shingle Springs Deemed Approved Letter").

[4] Letter from Donald E. Laverdure to Federated Indians of the Graton Rancheria (July 13, 2012), at fn 13 (hereafter, "Graton Deemed Approved Letter").

[5] Graton Deemed Approved Letter, at 10-12; Shingle Springs Deemed Approved Letter, at 9-10; Letter from Kevin K. Washburn to Governor of the Commonwealth of Massachusetts (Oct. 12, 2012), 79 *Fed. Reg.* 6,213 (Feb. 13, 2014), at 1.

[6] Graton Deemed Approved Letter. "[C]ompacts [should not] be used as subterfuge for imposing state jurisdiction on tribal lands"; *See also* Committee Report for IGRA, S. Rep. 100-446 at 14.

[7] S. Rep. No. 100-446, at 33 (1988) (statement of Sen. John McCain).

[8] Letter to Karuk Tribe, 79 Fed. Reg. 68,910 (Nov. 19, 2014) (cautioning the parties against using the compact to regulate construction of roadways, water supplies and utilities because they are not related to gaming and cautioning against regulating non-gaming amenities) (hereinafter "Karuk Deemed Approved Letter").

[9] Letter from Larry Echo Hawk to Pinoleville Pomo Nation (Feb. 25, 2011) (cautioning the parties from using the environmental review process to regulate beyond the actual areas in which gaming occurs).

[10] Letter from Lawrence S. Roberts to Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation (Oct. 21, 2016) (hereafter "Viejas Deemed Approved Letter").

[11] Karuk Deemed Approved Letter, at 4; Viejas Deemed Approved Letter, at 4 (emphasis added).

[12] Shingle Springs Deemed Approved Letter, at 10.

[13] Letter from Kevin K. Washburn to Jackson Band of Miwok Indians (Oct. 16, 2015), at 4; Viejas Deemed Approved Letter, at 4.