THE TRIBAL TRUMP CARD

IGRA's Good Faith Compact Negotiation Requirement

BY PATRICK SULLIVAN

As of March 2016, three California Indian tribes have won decisions from federal judges holding that their State had broken the law by failing to negotiate Class III gaming compacts in good faith and ordering the Governor's office to either resume negotiations or risk having a compact imposed by the United States Secretary of the Interior.

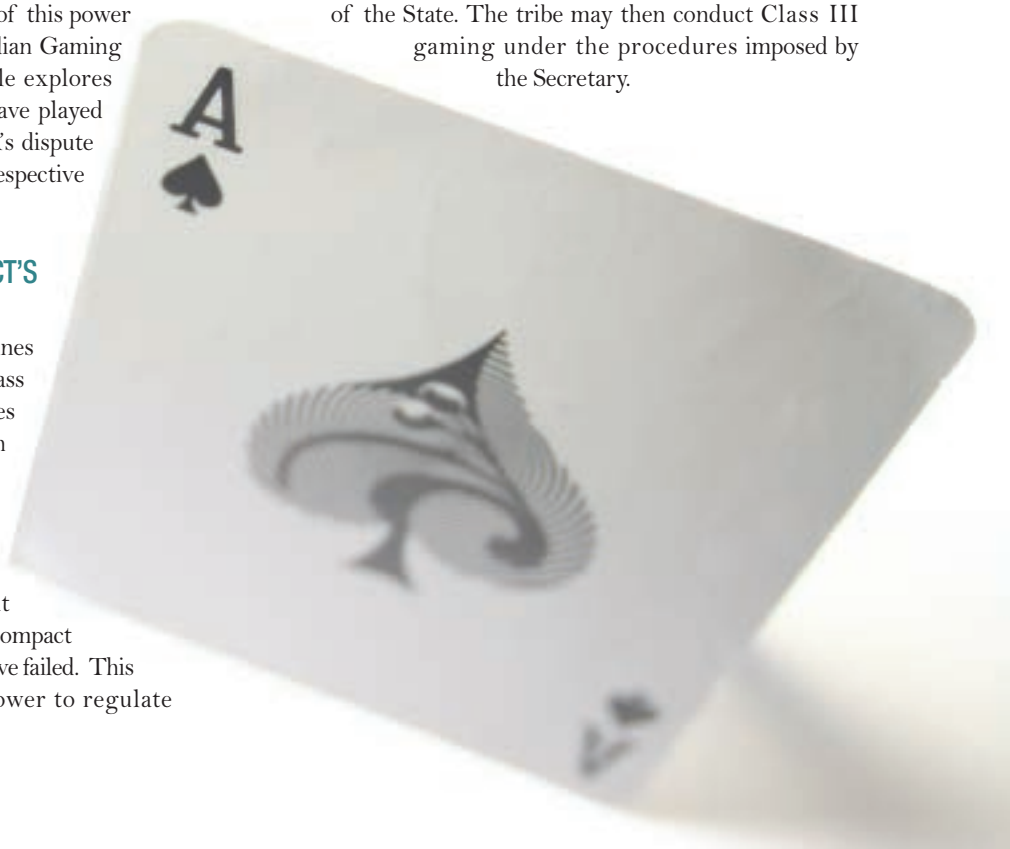
North Fork Rancheria and Enterprise Rancheria both negotiated Class III gaming compacts with Governor Brown in 2012. The North Fork compact was ratified in the state legislature, but an anti-gaming ballot initiative reversed the ratification in November 2015. The Enterprise compact ratification bill stalled in the California legislature. The Governor's office refused to even execute a compact with the Big Lagoon Rancheria, located on the Pacific Coast just south of the Oregon border.

If the Secretary imposes a compact for any of these tribes, it will be the first exercise of this power since the enactment in 1988 of the Indian Gaming Regulatory Act ("IGRA"). This article explores several cases in which Indian tribes have played their "trump card" consisting of IGRA's dispute resolution procedures, and how their respective states have fought back.

THE INDIAN GAMING REGULATORY ACT'S GOOD FAITH REQUIREMENT

IGRA classifies full-fledged slot machines and table games such as Blackjack as "Class III" gaming. IGRA requires that tribes request the negotiation of compacts with states in which they intend to conduct Class III gaming. States, in turn, must negotiate with tribes in good faith to develop such compacts and, if a state refuses to do so, the federal government may intervene and potentially impose a compact if all other efforts to secure a compact have failed. This scheme was intended to balance the power to regulate Indian gaming between the tribes, states and the federal government.

Congress' balancing scheme included a grant of federal court jurisdiction for "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact… or to conduct such negotiations in good faith." This theoretically allowed tribes to sue recalcitrant states in federal district court and obtain a determination that the State had failed to negotiate in good faith. If a tribe and state fail to reach a compact within 60 days of such a determination, each party must submit a proposed compact to a mediator to select the compact which "best comports with" IGRA and the findings of the Court. If the State fails to consent to that compact within a further 60 days, the Secretary of the Interior prescribes procedures consistent with the mediator's proposed compact, IGRA, and relevant provisions of the laws of the State. The tribe may then conduct Class III gaming under the procedures imposed by the Secretary.



Patrick Sullivan

THE SUPREME COURT PULLS THE RUG OUT FROM IGRA - *SEMINOLE V. FLORIDA*

In a harsh blow to Indian tribes seeking to negotiate compacts, a 1996 Supreme Court opinion severely limited their ability to obtain the prerequisite judicial determination that a stated failed to negotiate in good faith. In *Seminole Tribe of Florida v. Florida*, when the Tribe sued the State of Florida for failure to negotiate, the State challenged the Tribe's lawsuit as unconstitutional. In support of its argument, Florida asserted that the 11th Amendment to the United States Constitution shielded it from such lawsuits without its consent, and, consequently, the Tribe could not obtain the court's statutorily-mandated judicial determination of bad faith. The Supreme Court agreed that Congress could not breach Florida's 11th Amendment immunity through IGRA. The impact of *Seminole* is that a state may waive immunity from a tribal suit, or the United States may sue the state to obtain the determination as the Tribe's trustee, but a state cannot be forced to submit to the Tribe's suit. This result drastically limited tribal bargaining power under IGRA.

INTERIOR'S ATTEMPT TO FIX *SEMINOLE*

In an attempt to "fix" the *Seminole* decision, the Department of the Interior in 1999 rewrote its 25 C.F.R. Part 291 regulations to eliminate the statutory requirement of a federal court determination of failure to negotiate in good faith. Subsequent to a district court dismissal of a tribe's IGRA suit due to 11th Amendment immunity, these Secretarial Procedures ostensibly permitted the tribe to apply directly to the Secretary to initiate dispute resolution. The Secretary then would invite a competing proposal from the state and select a compact in the absence of any judicial bad-faith determination. One judge characterized the Secretary's plan in poker room language: these procedures "make IGRA's river card, regulations allowing gaming without a compact, available to a Tribe on the flop, before a federal court has ruled on the Tribe's allegations of bad faith," avoiding the State's "trump card" of 11th Amendment immunity.[1] Legal observers doubted that the new regulations would survive judicial scrutiny precisely because they circumvented IGRA's threshold requirement of a federal court determination that the state had failed to negotiate in good faith before implementing administrative procedures.

In 1995, the Kickapoo Traditional Tribe of Texas petitioned the State of Texas to enter into a compact, and the State refused. The Tribe's subsequent suit was dismissed under *Seminole* and the Tribe in 2004 invoked the Secretarial Procedures under the 1999 regulations. When the Secretary invited Texas to comment or submit an alternative proposal, the State sued the Secretary, arguing that the 1999 regulations were unconstitutional and unauthorized by IGRA. On appeal, the United States Court of Appeals for the Fifth Circuit agreed with the State and, avoiding the constitutional issue, held that the 1999 regulations were not authorized by IGRA.

Similarly, when compact renegotiations between the Pueblo of Pojoaque and New Mexico broke down in 2013, the Tribe sued the State and the federal district court in New Mexico dismissed that lawsuit under *Seminole*. The Tribe invoked the Secretarial Procedures and, like Texas, New Mexico sued the United States to prevent application of the 1999 regulations. The New Mexico court is within the 10th Circuit and not bound by the Fifth Circuit decision in *Kickapoo v. Texas*, so it considered the issue anew and reached the same conclusion, stating "Congress's failure to anticipate States' ability to sabotage IGRA's remedial process does not make Congress's delegation of authority to adopt procedures any broader: IGRA remains clear that this authority only arises after a federal court finds bad faith and the State passes up its remaining chances to negotiate a compact after such a finding." The Court noted that, while the State was immune from the Tribe's suit, the United States, acting as the Tribe's trustee, could sue for a determination of failure to negotiate in good faith because the 11th Amendment does not apply against the federal government. The matter is now pending before the 10th Circuit Court of Appeals.

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CALIFORNIA VOTERS AUTHORIZE GOOD FAITH NEGOTIATION SUITS

In November 1998, the voters of California approved Class III Indian gaming by passing Proposition 5 with 62.4 percent of the voters in favor. Indian gaming proponents spent $68 million on the campaign to pass the ballot initiative, which (1) required the California Governor to enter into a standard Class III compact with any tribe that was willing to accept the agreement, (2) required the California Governor to negotiate a different tribal-state compact with any tribe that wanted one, and (3) contained a waiver of 11th Amendment immunity that effectively reinstated IGRA's good-faith cause of action in California federal courts.

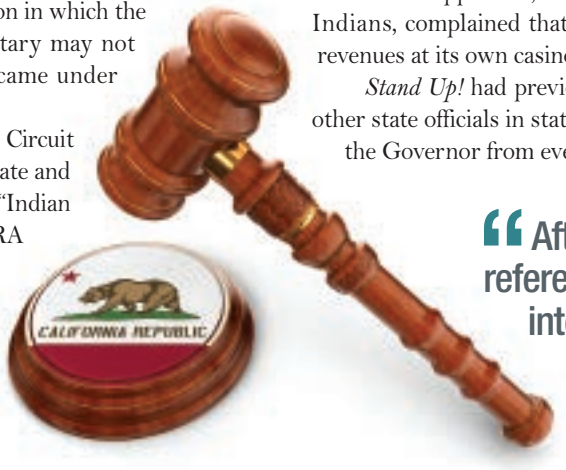
The California Supreme Court struck down certain provisions of Proposition 5 in 1999 on the basis that the law violated California's constitutional ban on casino-style gaming, but the immunity waiver survived. In March 2000, California voters passed Proposition 1A, which amended the Constitution to legalize casinos, authorized the Governor to negotiate Class III compacts and required legislative ratification of those negotiated compacts. (Proposition 1A subsequently survived legal challenges that it illegally discriminated against non-Indian gaming operations.)

California's waiver of sovereign immunity paved the way for application of IGRA's original compact dispute resolution process, but the experiences of the Big Lagoon Rancheria, North Fork Rancheria and Enterprise Rancheria Tribes demonstrate that the opponents of controversial gaming projects would not be so easily convinced to return the "trump card" of good-faith lawsuits to the tribes.

BIG LAGOON RANCHERIA V. CALIFORNIA

Big Lagoon Rancheria is a federally recognized Indian tribe located on California's northern coast in Humboldt County. After negotiations with the State to enter a compact for to build a hotel and casino broke down, the State's waiver of 11th Amendment immunity allowed the Tribe to win a district court holding that California had failed to negotiate in good faith in 2009. The State appealed, boldly arguing that the Tribe was not entitled to a compact under IGRA because the BIA lacked the authority to take the 11-acre parcel into trust for Big Lagoon. The State relied on the 2009 *Carcieri v. Salazar* decision in which the Supreme Court held that the Secretary may not place land in trust for tribes that came under federal jurisdiction after 1934.

In January 2014, a split Ninth Circuit three-judge panel agreed with the State and held that the lands at issue were not "Indian lands" under *Carcieri*. Because IGRA only requires good-faith negotiations for gaming on *Indian lands*, the Ninth Circuit dismissed the Tribe's suit. The panel decision threatened to open a Pandora's Box of litigation by allowing collateral attacks on any agency fee-to-trust decision.



However, in June 2015, the Ninth Circuit, sitting *en banc*, reversed the panel decision with an 11-0 opinion holding that the State's argument was an improper collateral attack on the BIA's decisions to take the parcel of land into trust and to designate the Tribe as federally recognized, emphasizing that the suit was brought well after the six-year statute of limitations to challenge those actions.

NORTH FORK RANCHERIA V. CALIFORNIA

The North Fork Rancheria, situated in the Sierra foothills north of Fresno in Madera County, has pursued its casino project for more than 12 years. The Tribe negotiated and executed an intergovernmental services agreement with the County in 2004, and in 2011 won a "two-part" gaming eligibility determination for its newly acquired off-reservation casino site under IGRA. The determination was based on conclusions by both the Secretary of the Interior and California Governor that a gaming facility was in the best interests of the Tribe and not detrimental to the surrounding area.

The Tribe and Governor then negotiated and executed a Class III Gaming Compact in August 2012, and successfully placed a 305-acre parcel in trust status six months later. In October 2013, the Secretary of the Interior published notice that the compact was federally approved, and in June 2014, the legislature ratified the Tribe's compact. Governor Brown signed the compact ratification bill on July 3, 2014. North Fork had strong support within Madera County and the City of Madera for the gaming project due to expectations that the project would create 1,400 local jobs and millions of dollars in mitigation payments to local governments.

The Tribe received a devastating blow when, immediately after it won legislative ratification, *Stand Up for California!*, a gaming watchdog group opposed to what it calls "reservation shopping" by Indian tribes, began the process of gathering signatures to refer the North Fork compact ratification to the voters. The group successfully placed the referendum on the November 2014 general election ballot and commenced an $18.5 million campaign to reverse the compact ratification, reportedly outspending supporters of the project by 45 to 1. Much of the opposition funding came from nearby Indian gaming tribes and their investors. One active opponent, the Picayune Rancheria of Chukchansi Indians, complained that the North Fork project would reduce revenues at its own casino by as much as a third.[2]

Stand Up! had previously sued the State, the governor and other state officials in state court proceedings seeking to prohibit the Governor from even executing the North Fork compact.

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After *Stand Up!* began the referendum process, the Tribe intervened in that litigation and filed a counterclaim challenging the validity of the referendum. The Tribe claimed that (1) the ratification could not be undone by referendum under California law, and (2) IGRA's requirement that states negotiate compacts "in good faith" preempted such a referendum to the electorate. On June 26, the state court allowed the referendum to proceed, ruling that the compact ratification was subject to referendum under California law because it was a "legislative act" and not an "administrative act" exempt from legal challenge. The Court further held that California's referendum process could be read in harmony with IGRA and was not preempted by the federal law.

The heavily-financed referendum proceeded and, despite the project's local support, California voters approved it and reversed the legislative ratification, leaving the Tribe without a compact.

In January 2015, North Fork requested that the State reopen compact negotiations. That request was summarily rejected by Joginder Dhillon, Senior Advisor for Tribal Negotiations to Governor Brown, who responded in a letter to the Tribe: "Given that the people have spoken, entering into negotiations for a new compact for gaming on the Madera parcel would be futile."

In response, the Tribe filed federal litigation against the State alleging that the referendum overturning the compact ratification and the renewed refusal to enter new negotiations violated IGRA. The Tribe asked the court for a declaration that the State had failed to negotiate a Class III gaming compact "in good faith" in violation of IGRA because the good faith negotiation requirement of IGRA applies to the State as a whole – including the people of California voting in a referendum.

The Court considered "which person(s) or entity(s) owe a duty to negotiate in good faith on behalf of the State with the Tribe," and ruled that states are free to implement their own procedure for compact negotiation, including legislative ratification, but agreed with the Tribe that "the duty to negotiate is imposed generally upon the State." The Court then applied IGRA to California's process:

> The system structured by state law for negotiation – regardless of the name given to each part of the process, whether it be negotiation, ratification, execution, or some other term – all falls within the IGRA requirement that the state negotiate in good faith.... [W]hether the state-authorized entity did all within its authority to negotiate in good faith is not the dispositive inquiry.

The Court held that California's refusal to conduct negotiations with the North Fork Tribe violated its duty under IGRA and ordered the parties to conclude a compact within 60 days of its order.

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ENTERPRISE RANCHERIA OF CALIFORNIA

California's Estom Yumeka Maidu Tribe, also known as Enterprise Rancheria, is based in Oroville in Butte County. In pursuing a casino project, the Tribe selected a Yuba County site some 30 miles south of its existing land base due to Butte County's saturated casino market and the Tribe's historical occupation of an area including both counties. The Tribe gained the support of Yuba County as well as the City of Marysville for its application with promises of revenue sharing.

Enterprise passed a major milestone on September 1, 2011, when the Interior Secretary determined that, like North Fork, the Enterprise land was eligible for gaming as an "off-reservation" gaming facility. California Governor Jerry Brown concurred in the Secretary's determination, and the land was placed in trust status for gaming on November 21, 2012.

At that point, the Tribe was legally entitled to conduct Class II gaming on the Yuba County site, but could not operate Class III gaming until it secured a compact. Following negotiations, Governor Brown executed a compact with the Tribe in August 2012 and transmitted it to the California legislature for approval. The Enterprise compact ratification was caught up in the *Stand Up!* referendum attacking the North Fork and Wiyot and, consequently, never came to a vote in the legislature. The compact expired by its own terms in 2014. The legislature had never even held a hearing on the compact in its 2013 or 2014 sessions.

> "The outcome of the described activity in California and New Mexico, as well as the Seminole Tribe of Florida's recent invocation of IGRA's dispute resolution provisions, will determine whether the tribes are able to play the "trump card" of an imposed compact that Congress dealt them 28 years ago when it passed IGRA."

Like North Fork, the Enterprise compact faced opposition from anti-casino groups and neighboring Indian tribes already offering Class III gaming in nearby casinos. The United Auburn Indian Community operates the Thunder Valley casino, and the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa") operates the Colusa Casino Resort 39 miles from the Enterprise site. Along with a group calling itself "Citizens for a Better Way," those Tribes brought a National Environmental Policy Act challenge to the Department of the Interior's 2012 decision to accept the casino site into trust for gaming purposes.

In response to the California legislature's failure to ratify its compact, in August 2014, Enterprise filed a federal lawsuit against the State for failure to negotiate in good faith as required by IGRA. The question before the court was whether the legislature's inactivity was covered by the IGRA's good faith negotiation mandate. The State argued that the legislature's action or inaction could not form the basis for a suit under the IGRA, because only the Governor had negotiated the Enterprise Compact. And, as it had in *North Fork*, the State argued that California's waiver of 11th Amendment immunity did not extend to actions of the legislature.

In late February 2016, the federal Court ruled that the State had failed to meet its burden of showing that it had negotiated in good faith to conclude a compact with Enterprise. The Court rejected the State's arguments that IGRA's mandate and the Proposition 5 immunity waiver were limited to the actions of the Governor, noting that IGRA provided jurisdiction for actions "arising from the failure of a State to enter into negotiations," which included both the Governor and the legislature.

Echoing the North Fork decision, the Court wrote that it was "bound to evaluate negotiation as described in the broad sense under the IGRA, which refers only to the state [including the Governor and the legislature]." The Court ordered the parties to conclude a gaming compact within 60 days.

In the meantime, the Tribe has indicated that it will begin construction of a scaled-down Class II gaming facility in Yuba County, apparently deferring its Class III plans until the legal dispute is resolved. The 105,750-square-foot facility will be roughly one-third the size of the formerly planned 318,000-square-foot Class III casino.

CONCLUSION

The past year appears to have revived the good-faith provisions that many thought were killed by the 1996 *Seminole v. Florida* decision. The outcome of the above-described activity in California and New Mexico, as well as the Seminole Tribe of Florida's recent invocation of IGRA's dispute resolution provisions, will determine whether the tribes are able to play the "trump card" of an imposed compact that Congress dealt them 28 years ago when it passed IGRA. ❄

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[1] *New Mexico v. Dept. of the Interior*, No. 1:14-cv-00695 (D. N.M. Oct. 17, 2014)

[2] The Chukchansi casino was subsequently closed by federal and state officials for some 15 months due to a tribal leadership dispute. It reopened late last year.