

**ARTICLE FOR CASINO LAWYER:
THE BATTLE FOR COMPACTS UNDER THE INDIAN GAMING
REGULATORY ACT**

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Prior to the passage of the Indian Gaming Regulatory Act in 1988 ("IGRA"), the term "compact" had little application outside governmental functions involving agreements between states and similar sovereign entities. These days, "compacts" entered into between Indian Tribes and States for tribal gaming operations have equated to substantial revenues for both Tribes and States.

The IGRA requires that a gaming "compact" be negotiated between the Tribe and the State if the Tribe wants to engage in Class III gaming (essentially anything other than bingo, such as slot machines, table games, or otherwise "Las Vegas style" gaming). A compact is designed to govern the scope of gaming, civil/criminal jurisdiction, regulation, and related issues. The IGRA prohibits a State from "taxing" the tribal casinos through the compact provisions; however, revenue-sharing agreements have been permitted where the Tribe is given something in exchange such as gaming exclusivity, unlimited compact duration, and similar favorable provisions.

Each State has taken a different approach to negotiating compacts with the Tribes. Some States have essentially agreed to unlimited gaming by the Tribes with little or no State involvement in the regulation (i.e., Michigan). In contrast, other States have negotiated specific gaming limitations, with extensive regulatory oversight (i.e., Arizona).

Many States initially refused to negotiate compacts with the Tribes. Slowly, through considerable litigation and other pressures, most of these States ultimately agreed to negotiate compacts. Indeed, much of States' change in attitude has been the result of the huge financial success story of tribal gaming.

Specifically, in 2006, tribal casinos generated \$25.7 Billion in gross revenue from gaming activities and an additional \$3.2 Billion in gross revenue from related hospitality and entertainment services (i.e., resorts, hotels, restaurants, golf, entertainment complexes, travel centers, etc.) Of this amount, \$2.4 Billion has been paid in revenue-sharing and regulatory payments to States as a result of deals struck through the gaming compacts. Local governments also have garnered over \$100 million in payments from the tribal casinos.

Indeed, a number of States have faced budget problems over the last few years, and have tried to utilize revenue-sharing provisions in new, renegotiated or amended compacts with the Tribes in those states to help ease the financial situation.

For example, earlier this year, many of the New Mexico gaming tribes agreed to compact amendments with the State of New Mexico whereby, among other things, the revenue-sharing provisions were altered somewhat to the State's benefit. In exchange, the Tribes now have compacts with a 30-year duration (until 2037), as well as provisions assuring their exclusivity to a certain extent.

Florida has been a battleground for tribal gaming since before the passage of IGRA. The Seminole Tribe was initially involved in litigation which ultimately paved the way for the IGRA. Then, once the IGRA became law, the Seminole immediately pressed the Florida Governor for a compact. For various reasons, the Governor refused to negotiate a compact. The Seminole brought suit against the State of Florida, which went all the way to the United States Supreme Court. The High Court, however, ruled that tribes could no longer sue states in federal court, as the Eleventh Amendment of the Constitution gave states sovereign immunity protection. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

The Seminole then pressed the United States Secretary of Interior to issue "procedures" permitting Class III gaming as permitted under the IGRA as an alternative to a state-negotiated compact. Litigation again ensued over the Secretarial procedures. Then, things stalled when the Seminole Tribe was able to successfully parlay their Class II casino into a multi-million dollar success.

With a new Governor taking the helm in 2006, the Seminole again pursued a compact. This time, the negotiations were much more favorable to the Tribe. At the time of writing this article in mid-September, the long-awaited compact was expected any day. Even if the Tribe is able to secure an executed compact with the Florida Governor, the State Legislature is still likely needed to ratify the compact in order to be effective under state law. A heated battle in the Legislature is anticipated, although the revenue-sharing provisions in the Compact will certainly serve as considerable leverage in a State facing a budget crunch. The proposed deal purportedly would give the State a minimum of \$100 million in annual revenue, and perhaps as much as \$200 million. How and when the Florida battle will finally be resolved is unknown at this point.

On the other Coast, yet another intensive Compact battle is brewing. The California battle is not simply the Tribe vs. the State. Rather, this fight involves Tribes vs. Unions, Racetracks and even other Tribes.

In 1999, in the waning hours of the legislative session, the initial California compacts were approved – but without any revenue-sharing provisions. As the California tribal gaming market quickly developed, the State recognized the lost revenues, while a number of the Tribes located in the more lucrative locations (i.e., near urban centers) determined that they could handle even more slot machines than they were permitted under the 1999 compacts.

Thereafter, several California tribes sought compact amendments permitting additional slot machines, but in exchange agreeing to certain revenue-sharing and other provisions sought by the State. The bulk of the Tribes continued to operate under the 1999 compact

until several of the larger Tribes sought, unsuccessfully, compact amendments in 2006 providing for additional slot machines and in exchange agreeing to certain revenue-sharing. The 2006 amendment proposals, however, were viewed by some to not be as favorable to the State as the earlier amendments. These proposed amendments failed in the last minutes of the 2006 legislative session.

Not willing to give up, the compact amendments were again pursued in 2007, but this time successfully. The Agua Caliente Band, Pechanga Band, Morongo Band, Sycuan Band, and the San Manuel Band secured legislative ratification of new compacts permitting as many as 5,500 additional slot machines to each Tribe and extended terms of 23 years. In return, the State will receive payments of 15% to 25% of the profits from the new machine – possibly equating to hundreds of millions of dollars a year.

No sooner had the ink dried on the Legislative ratification, than did the opposition immediately commence signature-gathering necessary to force a public vote in February seeking to undo the deals. Driving the referendum petition effort are the Unions and Racetracks. Several Tribes who had entered into the earlier compact amendments have provided funding in support of the referendum effort. If sufficient valid signatures are gathered by the October 5th deadline, these new compact amendments will be on the public ballot on February 5th. In the meantime, the compacts are set to become state law as of January 1, 2008. They are not deemed to be effective until approved by the Secretary of the Interior. If the signature-gathering is successful, it is anticipated that the Secretary will not take any action on the compact amendments until after the February vote. Like the Florida situation, the fate of these California compact amendments is unknown as of the writing of this article.

In sharp contrast, the road to the Washington compact amendments was less rocky, with the new deals becoming effective earlier in 2007.

With 2008 a Presidential election year, thereby being a potential political shift, it is possible that further compacting activities (both pro and con) will take place. At least one new tribal gaming jurisdiction is expected to come online with the Mashpee Wampanoag Tribe in Massachusetts finally earning federal recognition in 2007. Hang on for the never-ending tribal gaming roller coaster ride as the IGRA gets ready to celebrate its 20th anniversary next year.

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