Tribal-State Class III Gaming Compacts under Indiana and Federal Law

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Introduction

- November 29, 2016 – U.S Dept. of the Interior places 166 acres of land in South Bend into trust for the Pokagon Band
- January 16, 2018 – Pokagon Band opens Four Winds South Bend offering commercial gaming on “Class II” devices, which appear similar to slot machines
- August 13, 2019 – Pokagon Band submits a request to Governor Holcomb to commence negotiations for a Tribal-State compact to authorize Class III gaming at Four Winds South Bend
- September 3, 2019 – Governor Holcomb assembles a negotiating team and commences negotiations with Pokagon Band representatives for a Tribal-State Class III gaming compact

Indian Tribes and Tribal Sovereignty – A Brief Background

- Indian tribes have inherent rights of self-determination that pre-date European contact
- Powers that are lawfully vested in an Indian tribe are not, in general, powers delegated by acts of Congress but, rather, "inherent powers of a limited sovereignty which has never been extinguished." U.S. v. Wheeler, 435 U.S. 313 (1978)
- The Indian Commerce Clause in the US Constitution is understood as giving the federal government exclusive authority of Indian affairs
- Based partly on principles of international law, the federal government is understood as also having a trust responsibility to Indian tribes
- Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication "as a necessary result of their status." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
- The US constitution does not address the relationship between tribes and the states where they reside and occupy tribal lands

Jurisdiction over Tribal Gaming Under Federal Law

- In efforts to address increasing budget shortfalls, some states were led to authorize state lotteries as a new source of revenue
- Indian tribes, who faced severe budget challenges due to limitations on their taxing authority, turned to gaming under tribal regulation as a new source of revenue
- The 1987 US Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U. S. 202, determined that Indian tribes have the right to conduct gaming within their jurisdiction under tribal rather than state regulation, except where state law criminally prohibits such gaming

The Federal Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act (IGRA):

- was the result of a carefully brokered compromise between tribal and state interests
- established a comprehensive federal regulatory framework for tribal gaming within Indian country that preempts state regulation
- is unusual among federal Indian laws in that it seeks to balance the sovereign rights and interests of Indian tribes and states
- provides a specific role for states by requiring a tribal-state compact in order for a tribe to engage in Class III gaming

Class III Gaming Compacts Under IGRA

A Class III gaming compact is:

- an agreement negotiated at arms-length between a tribal government and a state government
- is limited to Class III gaming (generally, slot machines and table games) under IGRA
- is required in order for a tribe to engage in Class III gaming
- authorizes a tribe to conduct the same types of Class III games that are authorized under the laws of the state
- is subject to federal approval for compliance with IGRA and other applicable federal law and

Indiana Code Title 4, Chapter 29 (Tribal Gaming)

Indiana Code § 4-29 provides that:

- the "governor is responsible for negotiating and executing a tribal-state compact on behalf of the state"
- the state "may not enter into…a tribal-state compact without ratification of the general assembly"
- any compact entered into by the Governor without such ratification is void
- Ratification of a compact by the general assembly requires enactment of a bill codifying the compact in the manner required for legislation
- the Governor must submit the ratified compact to the Indiana Secretary of State and to the US Secretary of the Interior for review and approval

Required Compact Terms Under Ind. Code § 4-29

Sec. 4 of IC § 4-29 states that "[a] tribal-state compact negotiated under this chapter must include terms concerning the following:

- The management of the Indian tribe's gaming operation
- Revenue sharing with the state and local units of government
- Infrastructure and site improvements
- The administration and regulation of gaming
- The types of games operated by the Indian tribe

Required and Prohibited Compact Terms Under IGRA

IGRA provides that "[a]ny Tribal-State compact … may include provisions relating to" —

- the application of tribal or state criminal and civil laws that are directly related to such activity
- the allocation of criminal and civil jurisdiction between the State and the Tribe necessary for the enforcement of such laws
- assessment of State regulatory costs
- taxation by the tribe in amounts comparable to amounts assessed by the State
- remedies for breach of contract
- operation and maintenance standards, including licensing
- Any other subjects that are directly related to the operation of gaming activities

Tribal Class III Gaming Revenue-Sharing with the State Under IGRA

- IGRA states that "[e]xcept for any assessments that may be agreed to …, nothing in this section [9] shall be interpreted as conferring upon a State ... authority to impose any tax, fee, charge, or other assessment upon an Indian tribe...."
- The 2010 Ninth Circuit decision in *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, was the seminal court case examining the use of some form of gaming "exclusivity" in exchange for Class III gaming revenue sharing

Tribal Class III Gaming Revenue-Sharing with the State Under IGRA (Cont.)

In order to avoid IGRA's express prohibition against state taxation of tribal gaming, the *Rincon* court explained that a state may request revenue sharing if the revenue sharing provision is:

- for uses "directly related to the operation of gaming activities"
- consistent with the purposes of IGRA
- not "imposed" because it is bargained for in exchange for a "meaningful concession"

Tribal Class III Gaming Revenue-Sharing with the State Under IGRA (Cont.)

The *Rincon* court added, quoting from a letter from the Assistant Secretary – Indian Affairs:

> It is the position of the Department to permit revenue-sharing payments in exchange for quantifiable economic benefits over which the State is not required to negotiate under IGRA, such as substantial exclusive rights to engage in Class III gaming activities. We have not, nor are we disposed to, authorize revenue-sharing payments in exchange for compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities, such as duration, number of gaming devices, hour of operation, and wager limits

Rincon at 1039, quoting from Department of Interior letter dated December 17, 2004 to the Absentee Shawnee Tribe of Oklahoma