United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

OCT 12 2012

Honorable Deval Patrick
Governor of the Commonwealth of Massachusetts
Boston, MA 02133

Dear Governor Patrick:

On August 31, 2012, the Department of the Interior (Department) received the tribal-state class III gaming compact (Compact) between the Mashpee Wampanoag Tribe (Tribe) and the Commonwealth of Massachusetts (Commonwealth).

Under the Indian Gaming Regulatory Act (IGRA), the Secretary may approve or disapprove a compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8). If the Secretary does not act to approve or disapprove a compact within the prescribed 45-day period, IGRA provides that it is considered to have been approved by the Secretary, "but only to the extent that the Compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). Under IGRA, the Department must determine whether the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians.

DECISION

We have completed our review of the Compact, along with the additional material submitted by the Tribe and the Commonwealth. For the following reasons discussed, the Compact is hereby disapproved under Section 2710(d)(8)(B) of IGRA.

First, the Compact provides a significant share of the Tribe's gaming revenue to the Commonwealth, undermining the central premise of IGRA that Indian gaming should primarily benefit tribes. While we have approved varying revenue sharing schemes in exchange for tangible benefits to tribes for over 20 years, the revenue sharing provisions in this Compact go beyond those permitted by the Department and IGRA.

Second, the parties have attempted to use the compact negotiation process to address a host of other issues, such as the Tribe's hunting and fishing rights and land claims, in clear contravention of IGRA's express limitation that gaming compacts may only address matters directly related to gaming. This is not only a legal violation; it poses significant practical problems. If tribal hunting and fishing rights, and land and water rights, are subject to negotiation in gaming compacts, then other rights central to tribal sovereignty will be at stake in gaming compacts.

Third, in the Compact, the Commonwealth has sought authority over several other activities not related to gaming, such as regulation of non-gaming suppliers, ancillary entertainment services,

and ancillary non-gaming amenities. Congress expressly sought to prevent states from using gaming compacts to leverage power over sovereign tribes about matters unrelated to gaming. This is especially important because a tribe may be strongly tempted to agree to such terms for political expediency to obtain the state's agreement. The Department must preserve the important balance between tribal and state interests, and the singular focus on gaming, that Congress envisioned when it enacted IGRA.

Finally, there are numerous additional issues mentioned below that create further problems and concerns. We must apply IGRA in Massachusetts in the same manner we apply it to all other states, and to all other tribes.

BACKGROUND

The Compact was entered into on July 12, 2012 between the Tribe and the Commonwealth to govern the Tribe's conduct of gaming on a proposed site within the Commonwealth (within or near the City of Taunton, Massachusetts). It authorizes the Tribe to operate certain games within a single facility on eligible lands, pursuant to IGRA. Compact at § 4.1.

1. **Problematic regulatory provisions**

The Compact contains a number of significant regulatory provisions that give us concern. Part 3 of the Compact sets forth the definitions of key terms used throughout the agreement. Section 3.15 defines "Enterprise" as, "any legal entity wholly-owned and controlled by the Tribe…which lawfully owns or operates the Gaming Operation on behalf of the Tribe."

The Compact's definitions note important distinctions between terms used to describe the physical locations in which gaming will and will not occur. For example, "Approved Gaming Site" means "a single site on Indian Lands, as defined in IGRA, that is legally eligible under IGRA for the conduct of Compact Games thereon, located within Region C[.]" Compact § 3.3.

The term "Facility" is defined as "a single building complex (including buildings not more than one hundred (100) yards apart and connected by an enclosed walkway), located on the Approved Gaming Site in which any Compact Game or other gambling games of any kind are offered, played, supported, served or operated." Compact § 3.17.

Meanwhile, the term "Gaming Enclosure" is defined as:

> [T]he Facility and any other buildings or enclosures located on the Approved Gaming Site in which the Records of the Gaming Operation are maintained or stored or from which any service related to the Gaming Operation is directed, supervised, observed, monitored, or located, and any parking lots or structures, including hotels and other ancillary buildings, walkways, sidewalks, roadways, improvements, and common areas on or in proximity to the Approved Gaming Site which serve the Gaming Operation.

Compact § 3.22.

Section 3.20 of the Compact defines "Gaming Area" as "any area in the Facility where any Gaming, other than the operation of an authorized Wireless Gaming System, is played or offered for play."

One other notable defined term in the Compact is "Non-Gaming Supplier," which means "any Person, other than a Management Contractor or employee of the Enterprise, who sells, leases or provides goods or services to the Enterprise for the operation of the Facility, which are not used by the Enterprise in the operation of Compact Games." Compact § 3.42.

Part 4 of the Compact is titled "Authorized Gaming," and purports to regulate the Tribe's conduct of class II gaming under IGRA.

Part 5 of the Compact includes provisions that regulate the "Construction, Maintenance and Operation of [the] Facility." Under Part 5, the Tribe is required to adopt an ordinance establishing standards "for building, fire, health and safety which are consistent with and no less stringent than the provisions of any and all such codes that would be otherwise applicable if the Facility were constructed on land subject to the civil jurisdiction of the Commonwealth in the same location." Compact § 5.4.1. Section 5.4.7 requires the Tribe to comply with the National Environmental Policy Act and applicable Commonwealth law for any expansion or modification of the Facility. Section 5.4.11 of the Compact provides:

> Not less than fifteen (15) days before the Facility is open for business, the Tribe shall certify to the MGC, and provide such documentation to support the certification as the MGC requests, that: (a) the Gaming Area and other ancillary entertainment services and such non-gaming ancillary amenities the Tribe and the MGC shall agree upon have been built in accordance with the plans and specifications previously submitted to the MGC pursuant to subpart 5.4.5; and (b) the infrastructure improvements and traffic mitigation projects onsite and in the vicinity of the Facility are complete in accordance with the plans previously submitted to the MGC pursuant to subpart 5.4.5. Under no circumstances shall the Tribe permit the Facility to open for business unless the requirements of this subpart have been met.

Part 7 of the Compact is titled, "Licensing and Registration," and requires employees and vendors to become licensed by the Tribe's regulatory authority. This Part provides:

> The Enterprise shall not conduct business with any Non-Gaming supplier unless the Non-Gaming Supplier is registered with the TGC and has provided such information as the TGC shall require to become registered. Non-Gaming Suppliers include, but are not limited to: construction companies, vending machine providers, linen suppliers, garbage handlers, facility maintenance companies…and such other persons or entities as may be identified by the TGC as Non-Gaming Suppliers."

Compact § 7.7.2.

Part 13 of the Compact is titled "Use of Net Revenues," and limits the manner in which the Tribe may use its Net Revenue for a prescribed list of activities.

Part 17 of the Compact allocates the exercise of criminal jurisdiction within the Gaming Enclosure, as that term is defined in Section 3.22. This Part provides:

> 17.3. The Tribe and the Commonwealth agree that, in the event of the violation of any Gaming law of the Commonwealth, or the commission of any criminal offense against the Enterprise or the Gaming Operation or against any Person or property at the Gaming Enclosure, whether by or against an Indian or non-Indian, the Commonwealth shall have and may exercise criminal jurisdiction to prosecute such Person under its laws and in its courts.
>
> 17.4. If the Tribe adopts a Law and Order Code no less stringent than that provided in 25 C.F.R. Part 11 and authorizes its Tribal Court to hear criminal cases arising from offenses committed by its members and occurring at the Gaming Enclosure, the Tribe shall have and may exercise criminal jurisdiction concurrent with the Commonwealth over offenses committed at the Gaming Enclosure by members of the Tribe. Notwithstanding the foregoing and subject to any applicable federal jurisdiction, the Commonwealth shall have the first right of prosecution as to any crime which, if committed in the Commonwealth outside of Indian country, would be classified under the Commonwealth's laws as a felony.

Compact §§ 17.3-4.

Finally, Part 18 of the Compact addresses "Miscellaneous Provisions." Section 18.5.1 of the Compact provides that the Tribe and the Commonwealth agree to negotiate an agreement in good faith that "addresses measures the Tribe will use for the [collection] of state taxes that, pursuant to federal law, are applicable to activities taking place upon, and to goods and services provided, received or consumed upon, the Approved Gaming Site."

2. Revenue sharing provisions

The Compact includes provisions requiring the Tribe to share a portion of its gaming revenues in exchange for several asserted concessions. See Compact at Part 9. Under the Compact, the Tribe is required a pay the Commonwealth 21.5 percent of its Gross Gaming Revenue. In the event that the Commonwealth violates the Tribe's exclusive right to operate a gaming facility in Region C, the Tribe's revenue sharing obligation is reduced to 15 percent of Gross Gaming Revenues. Compact at § 9.2. The Compact does not provide for any circumstances in which the Tribe's revenue sharing obligations are extinguished.

In exchange for the Tribe's revenue sharing obligations, both the Tribe and the Commonwealth have asserted that the Commonwealth has made several meaningful concessions. These include:

- The Tribe's exclusive right to conduct gaming in a defined geographic area (Region C) within the Commonwealth. Compact § 9.2;

- The Commonwealth's agreement to ensure that the Tribe is the operator of the first gaming facility "in a constrained finite gaming market," – what the Tribe has termed the "First Casino Advantage." Supplemental Response of Mashpee Wampanoag Tribe to the United States Department of the Interior at 2 (September 27, 2012) (First Compact Supplement);

- The Commonwealth's political support and cooperation in the Tribe's efforts to have land acquired in trust on its behalf. Compact § 9.1.6;

- The Commonwealth's agreement "to consider resolution of various important issues between the Tribe and the Commonwealth, such as those involving hunting, fishing, and land use matters." Compact § 9.2;

- The Commonwealth's agreement to "use its best efforts to negotiate an agreement in 2013 with the Tribe to resolve certain title claims asserted by the Tribe involving land and water in and around Mashpee, giving consideration to the conveyance to the Tribe of some such land and water now publicly held." Compact § 2.12.

- The ability of the Tribe to conduct gaming over the internet pursuant to Commonwealth law, as well as its ability to offer patrons wireless gaming throughout its facility. See Compact § 4.3.2; and § 4.7.

ANALYSIS

The Secretary may disapprove a proposed Compact under IGRA only where the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B).

The Department is committed to adhering to IGRA's statutory limitations on tribal-state gaming compacts. The IGRA prohibits the imposition of a tax, fee, charge, or other assessment on Indian gaming except to defray the state's cost of regulating class III gaming activities. 25 U.S.C. § 2710(d)(4). The IGRA further prohibits using this restriction as a basis for states refusing to negotiate with tribes to conclude a compact. *Id.*

Moreover, IGRA also limits the subjects over which states and tribes may negotiate a tribal-state gaming compact. *See* 25 U.S.C. § 2710(d)(3)(C).

1. Permissible Subjects of Compact Negotiations

The IGRA established a statutory scheme that limited tribal gaming and sought to balance tribal, state, and Federal interests in regulating gaming activities on Indian lands.

To ensure an appropriate balance between tribal and state interests, Congress limited the subjects over which tribes and states could negotiate a class III gaming compact. Pursuant to IGRA, a tribal-state compact may include provisions relating to:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
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> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
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> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
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> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
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> (v) remedies for breach of contract;
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> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
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> (vii) any other subjects that are ***directly related to the operation of gaming activities***.

25 U.S.C. § 2710(d)(3)(C) (emphasis added).

Congress included the tribal-state compact provisions to account for states' interests in the regulation and conduct of class III gaming activities, as defined by IGRA.[1] Those provisions limited the subjects over which states and tribes could negotiate a tribal-state compact. 25 U.S.C. § 2710(d)(3)(C). In doing so, Congress also sought to establish "boundaries to restrain aggression by powerful states." *Rincon Band of Luiseno Indians of the Rincon Reservation, 602 F.3d 1019, 1027 (9th Cir. 2010), cert denied, 131 S. Ct. 3055 (2011)* (statement of Sen. John McCain)). The legislative history of IGRA indicates that "compacts [should not] be used as subterfuge for imposing state jurisdiction on tribal lands." *See* Committee Report for IGRA, S. Rep. 100-446 at 14.

In the Senate debate regarding S.555, which was enacted as the Indian Gaming Regulatory Act, Senator Evans submitted:

> It is my understanding that S.555 acknowledges that inherent rights are expressly reserved to the tribes. This bill allows tribes to relinquish some of those rights by way of compacts with the States, in accordance with the Federal Government's trust obligation to the tribes. *This bill should not be construed, however, to require*

[1] 25 U.S.C. § 2708.

> *tribes to unilaterally relinquish any other rights, powers, or authority.*

S.Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071 (emphasis added).

Congress clearly did not intend for class III gaming compacts to be used as leverage by states to resolve "various important issues between [tribes and states], such as those involving hunting, fishing and land use matters[.]" Compact § 9.2.

As with revenue sharing provisions, we will review tribal-state gaming compacts with great scrutiny to ensure that they regulate only those activities that are directly related to the operation of gaming activities. We cannot approve a tribal-state compact that purports to interfere with tribal regulation of community planning and land use, for example, or that regulates certain activities in a manner that only indirectly relates to tribal gaming operations.

Nothing in IGRA or its legislative history indicates that Congress intended to allow gaming compacts to be used to expand state regulatory authority over tribal activities that are not directly related to the conduct of class III gaming.

When we review a tribal-state compact or amendment submitted under IGRA, we look to whether the provisions fall within the scope of categories prescribed at 25 U.S.C. § 2710(d)(3)(C). One of the most challenging aspects of this review is determining whether a particular provision adheres to the "catch-all" category at § 2710(d)(3)(C)(vii): "...subjects that are directly related to the operation of gaming activities."

In the context of applying the "catch-all" category, we do not simply ask, "but for the existence of the Tribe's class III gaming operation, would the particular subject regulated under a compact provision exist?" Instead, we must look to whether the regulated activity has a direct connection to the Tribe's conduct of class III gaming activities.

A. Consideration of resolution of hunting, fishing, and land use disputes

The exercise of aboriginal and reserved hunting and fishing rights has been described as "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371 (1905). Federal law has ensured the protection of these rights:

> Aboriginal title, along with its component hunting, fishing, and gathering rights, remains in the tribe that possessed it unless it has been granted to the United States by treaty, abandoned, or extinguished by statute. See *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *Sac & Fox Tribe v. Licklider*, 576 F.2d 145 (8th Cir. 1978). A claim based on aboriginal title is good against all but the United States. The power to extinguish aboriginal title or aboriginal use rests exclusively with the federal government. See, e.g., *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 667 (1974); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941). . . Aboriginal rights will not be extinguished, however, absent 'plain and

> unambiguous' congressional intent. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985)(quoting *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 354 (1941)(congressional intent to extinguish original title must be "plain and unambiguous," and "will not be lightly implied").

Cohen's Handbook of Federal Indian Law § 18.01 [2012 Ed.] (2012 Cohen's Handbook).

The Tribe has asserted to the Department that it requested this provision in an effort to resolve a longstanding point of contention between it and the Commonwealth. We appreciate the efforts of the Tribe and the Commonwealth to address these issues in a collaborative manner. However, the Tribe's hunting and fishing rights may not be placed upon the bargaining table when it negotiates a class III gaming compact with the Commonwealth.

We must review the Compact according to the statutory limitations placed upon the compact negotiation process. It is immaterial whether the Tribe or the Commonwealth requested that this provision be included in the Compact. Section 9.2 of the Compact is clearly unrelated to the operation of gaming activities, and is not permissible under IGRA. Moreover, Secretarial approval of such a provision may violate the United States' trust obligations to Indians, given that such aboriginal rights can be extinguished only by Congress.[2]

While the resolution of these issues is certainly important to both the Tribe and the Commonwealth, the Compact is neither the lawful nor the appropriate vehicle to do so. That such an important issue has been included in the Compact here implicates the efforts of Congress to limit the subjects of bargaining in IGRA.

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[2] We also note that the Commonwealth's Supreme Judicial Court, the highest appellate court in Massachusetts, has already recognized the hunting and fishing rights of Wampanoag Indians, including the Mashpee:

> Whether aboriginal rights exist is a factual matter. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345 (1941). We note parenthetically that the Attorney General's amicus brief contends that the "District Court did not make a factual finding that the Defendants were descendants of the original Mashpee Wampanoag Native Americans or that the Wampanoag Native Americans had exercised exclusively and continuously their aboriginal fishing rights at the places in question since time immemorial." But the judge did expressly find that the defendants had tribal status and that "the Mashpee Indians have never given up their usufruct rights to fish and have continued to exercise those rights as did their forefathers, since time immemorial." Furthermore, he ruled that Indians are not subject to shellfishing license requirements, and that the Commonwealth has traditionally acknowledged and continues to acknowledge the usufruct rights of the American Indian.
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> The Commonwealth conceded at trial that aboriginal rights have long been recognized in the Commonwealth, and at least until 1941, such rights were explicitly acknowledged by statute.

Commonwealth v. Maxim, 429 Mass. 287, 708 N.E.2nd 636 (Mass. 1999).

B. Negotiation of Ancillary Agreements

In Section 2.12, the Commonwealth agreed to "use its best efforts to negotiate an agreement in 2013 with the Tribe to resolve certain title claims asserted by the Tribe involving land and water in and around Mashpee[.]" Section 18.5.1 of the Compact provides that the Tribe and the Commonwealth agree to negotiate an agreement in good faith that "addresses measures the Tribe will use for the [collection] of state taxes that, pursuant to federal law, are applicable to activities taking place upon, and to goods and services provided, received or consumed upon, the Approved Gaming Site."

For the same reasons described above, these provisions (Section 2.12 and Section 18.5.1) are clearly unrelated to the Tribe's conduct of gaming, and exceed the scope of permissible subjects of negotiating under IGRA. While Section 18.5.1 expressly addresses the taxation of activities, goods, and services on the Approved Gaming Site, its broad reach extends to activities that are not directly related to the Tribe's operation of gaming activities.

Therefore, we conclude that these provisions of the Compact extend beyond the prescribed subjects of bargaining contained in 25 U.S.C. § 2710(d)(3)(C) in violation of IGRA.

C. Regulation of Non-Gaming Suppliers

One other notable defined term in the Compact is "Non-Gaming Supplier," which means "any Person, other than a Management Contractor or employee of the Enterprise, who sells, leases or provides goods or services to the Enterprise for the operation of the Facility, which are not used by the Enterprise in the operation of Compact Games." Compact § 3.42.

Part 7 of the Compact is titled, "Licensing and Registration," and requires employees and vendors to become licensed by the Tribe's regulatory authority. This Part provides:

> The Enterprise shall not conduct business with any Non-Gaming supplier unless the Non-Gaming Supplier is registered with the TGC and has provided such information as the TGC shall require to become registered. Non-Gaming Suppliers include, but are not limited to: construction companies, vending machine providers, linen suppliers, garbage handlers, facility maintenance companies…and such other persons or entities as may be identified by the TGC as Non-Gaming Suppliers."

Compact § 7.7.2.

Again, we must scrutinize this provision to ensure that it fits within the prescribed subjects of bargaining contained within IGRA. The most relevant provisions of IGRA, for purposes of this analysis, are found at 25 U.S.C. § 2710(d)(3)(C)(vi) (pertaining to operation, maintenance, and licensing of the facility) and § 2710(d)(3)(C)(vii) (pertaining to other subjects that are "directly related" to the operation of gaming).

It is clear that the types of activities contemplated by Part 7 of the Compact are at least tangentially related to the Tribe's operation of gaming. The question is whether they are

"directly related," or otherwise pertain to the operation, maintenance, and licensing of the facility.

As explained above, we must view the scope of prescribed state regulatory authority over tribal gaming activities narrowly. This includes our understanding of the term "facility," as used in 25 U.S.C. § 2710(d)(3)(C)(vi).

We cannot conclude that vending machine providers and linen suppliers, for example, implicate the integrity of the Tribe's gaming activities. Nor can we conclude that Part 7 of the Compact implicates the state interests Congress sought to protect through IGRA's compacting provisions.

If we were to approve this particular provision, it would extend the Commonwealth's regulatory authority beyond what Congress has allowed, potentially subjecting tribal citizens and businesses to state regulation. This would inhibit the Tribe's ability to promote economic development and employment within its own community by entering into vendor contracts.

The Compact's definition of a "Non-Gaming Supplier" expressly acknowledges that goods and services provided by such persons are not used in the operation of gaming. See Compact § 3.42. We conclude that these provisions of the Compact extend beyond the prescribed subjects of negotiating contained in 25 U.S.C. § 2710(d)(3)(C) and therefore violates IGRA.

D. Construction, Maintenance and Operation Standards

As noted above, Part 5 of the Compact includes provisions that regulate the "Construction, Maintenance and Operation of [the] Facility." Section 5.4.7 requires the Tribe to comply with the National Environmental Policy Act and applicable Commonwealth law for any expansion or modification of the Facility. Section 5.4.11 of the Compact provides:

> Not less than fifteen (15) days before the Facility is open for business, the Tribe shall certify to the MGC, and provide such documentation to support the certification as the MGC requests, that: (a) the Gaming Area and other ancillary entertainment services and such non-gaming ancillary amenities the Tribe and the MGC shall agree upon have been built in accordance with the plans and specifications previously submitted to the MGC pursuant to subpart 5.4.5; and (b) the infrastructure improvements and traffic mitigation projects onsite and ***in the vicinity of the Facility*** are complete in accordance with the plans previously submitted to the MGC pursuant to subpart 5.4.5. ***Under no circumstances shall the Tribe permit the Facility to open for business unless the requirements of the subpart have been met*** (emphasis added).

As tribal gaming has matured, many tribes have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spas, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities. It does not necessarily follow, however, that such ancillary businesses are "directly related to the operation of gaming activities" and therefore subject to regulation through a tribal-state compact.

While each compact is reviewed according to its unique facts and circumstances, the Department often views such businesses and amenities as not "directly related to gaming activities" unless class III gaming is conducted within those businesses or the parties to the compact can demonstrate particular circumstances establishing a direct connection between the business and the class III gaming activities. Those particular circumstances must also implicate the state interests Congress sought to protect through IGRA's compacting provisions.

In this instance, the Compact purports to regulate "infrastructure improvements and traffic mitigation projects onsite and in the vicinity of the Facility." Compact § 5.4.11.

It is possible to read certain provisions of Part 5, such as Section 5.4.7, narrowly to avoid reaching a determination that it violates the prescribed subjects of negotiating contained in IGRA. See, e.g., Letter from Donald E. Laverdure, Acting Assistant Secretary – Indian Affairs to Greg Sarris, Chairman of the Federated Indians of the Graton Rancheria (July 13, 2012) (narrowly construing certain regulatory provisions in the compact to avoid a conflict with IGRA). The Tribe has asserted that Section 5.4.11 is "non-regulatory and simply requires the Tribe to provide information to the [Commonwealth]." First Compact Supplement at 6.

The language of Section 5.4.11 indicates otherwise, making it clear that "under no circumstances" can the Tribe open the Facility if it has not satisfied this requirement. In other words, the Compact precludes the Tribe from conducting class III gaming activities unless it satisfies regulatory requirements related to infrastructure improvements "in the vicinity" of the Facility – without regard as to whether those improvements are "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C).

We have determined that Section 5.4.11, by its terms, extends beyond the prescribed subjects of bargaining contained in 25 U.S.C. § 2710(d)(3)(C) and therefore violates IGRA. We cannot give a narrow construction to this requirement to avoid reaching this conclusion.

2. Revenue Sharing Provisions

We review revenue sharing provisions in gaming compacts with great scrutiny, in accordance with the principle that Indian tribes, not states or other parties, should be the primary beneficiaries of Indian gaming revenues.

Our analysis as to whether such provisions comply with IGRA first requires us to determine whether the Commonwealth has offered meaningful concessions to the Tribe. We view this concept as one where the Commonwealth concedes something it was not otherwise required to negotiate, such as granting the exclusive right to operate Class III gaming or other benefits sharing a gaming-related nexus, to which the Tribe was not already entitled.[3] We then examine whether the value of the concessions provides substantial economic benefits to the Tribe in a manner justifying the revenue sharing required by the Compact.

We note that the Ninth Circuit's recent decision in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation* v. *Schwarzenegger*[4] favorably cited the Department's long-standing

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[3] See 25 U.S.C. § 2710(d)(3)(c). This particular section of IGRA is discussed further below.

[4] 602 F.3d 1019 (9th Cir. 2010), *cert denied,* 131 S. Ct. 3055 (2011).

policy regarding revenue sharing. While *Rincon* is not binding here because it arose under IGRA's remedial provisions and involved facts and circumstances unique to the litigants, aspects of the decision provide useful guidance.

A. Meaningful Concessions

The Tribe and the Commonwealth have asserted that the Commonwealth has made a number of meaningful concessions to the Tribe to justify the receipt of 21.5 percent of the Tribe's gaming revenues. We believe that the Commonwealth has offered the Tribe a single meaningful concession – the Tribe's exclusive right to conduct gaming in Region C – to support revenue sharing. We have addressed each purported concession below.

i. Geographic Exclusivity

First among the asserted meaningful concessions is the protection of the Tribe's exclusive right to operate a gaming facility in a defined geographic area within the Commonwealth. Compact § 9.2. The Department has previously determined that compact provisions securing a tribe's exclusive right to conduct gaming in a defined geographic area constitutes a "meaningful concession." See Amendment to the Tribal-State Compact Between the St. Regis Mohawk Tribe and the State of New York (2005).

In this instance, the Compact secures only the Tribe's right to exclusivity vis-à-vis a facility granted "a Category 1 License to operate a casino in Region C under the laws of the Commonwealth." Compact § 9.2.4. It does not secure the Tribe the ability to operate its facility exclusive of a competing facility operating under a Category 2 License issued by the Commonwealth. A Category 2 License "means a license issued by the [Commonwealth] that permits the licensee to operate a gaming establishment with no table games and not more than 1,250 slot machines."[5]

Thus, the Tribe could still be faced with the prospect of competing against another facility operating up to 1,250 slot machines in Region C, notwithstanding Section 9.2.4 of the Compact.

Under our test, we recognize that the Commonwealth was not required to concede any form of gaming exclusivity to the Tribe nor was the Tribe entitled to such exclusivity. Therefore, we have determined that the Commonwealth's concession of geographic exclusivity is "meaningful."

While we have determined that the Commonwealth's concession is meaningful, we note that the value to the Tribe of having the exclusive right to operate a full-scale gaming facility including table games within Region C (which is addressed below) may be substantially impaired by the Commonwealth's ability, not limited by the Compact, to issue a Category 2 License to a facility within Region C to operate up to 1,250 slot machines. [6]

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[5] Section 3.5 reflects the Commonwealth's definition of a Category 2 licensee. *See* Chapter 23K § 2 of the Massachusetts General Laws.

[6] We note that the Tribe's Gaming Market Study, submitted as part of its supplemental information, does not address the competitive impact on the Tribe's proposed casino if the Commonwealth awarded the Category 2 license to Plainridge Racecourse. Plainridge Racecourse, located in Plainville, MA, within the "Local Play" market identified

ii. First Casino Advantage

In the First Compact Supplement, the Tribe has asserted that the Commonwealth has conceded to the Tribe the right to:

> ...operate the first casino in a constrained finite gaming market..., and [has foregone], at great economic cost to the Commonwealth, its alternative right under [Commonwealth law] to award the First Casino Advantage to a commercial gaming company through issuance in the Tribe's region ("Region C" as defined in the Compact) of a Category 1 license described in [Commonwealth law].

First Compact Supplement at 2.

The Tribe has also asserted that the Commonwealth's agreement to negotiate the Compact prior to the Tribe possessing gaming-eligible land under IGRA secures the First Casino Advantage. See *Id.*

We believe that this asserted concession is illusory, and that it does not constitute a meaningful concession for purposes of this analysis.

The Compact does not contain any provisions that expressly secure the Tribe's asserted right to operate the first gaming facility in Region C Section 9.2 of the Compact secures the Tribe's exclusive right to operate a gaming facility in Region C, which we have explained does constitute a meaningful concession. By definition, this exclusive right ensures that the Tribe will enjoy the First Casino Advantage within Region C.

In an August 17, 2010 letter to the Governor of California, the Department disapproved a tribal-state gaming compact between the State of California and the Habemetolel Pomo of Upper Lake. Letter from Larry Echo Hawk, Assistant Secretary – Indian Affairs to Sherry Treppa, Chairwoman of the Habemetolel Pomo of Upper Lake (2010 Upper Lake Letter). In that letter, we explained that an additional concession of exclusivity in a limited geographic area, where the Tribe already enjoyed the right to conduct gaming activities exclusive of non-tribal operators throughout the entire State, was not meaningful.

In this instance, the Tribe's right to operate the first full-scale gaming facility in Region C is secured by Section 9.2 of the Compact, which we have already determined constitutes a distinct, meaningful concession. We cannot consider the First Casino Advantage to be a separate and distinct concession by the Commonwealth.

iii. Support for the Tribe's Trust Acquisition Application

Section 9.1.6 of the Compact provides that the Governor of the Commonwealth will "cooperate with and support" the Tribe's efforts to acquire land in trust for gaming purposes within Region

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by the Tribe's Gaming Market Study supplement, began the application process for the sole Category 2 license in August of 2012; *see* http://www.thesunchronicle.com/plainville/plainridge-racecourse-submits-check-to-apply-for-slots-license/article_29285302-cf9f-575b-8457-f3569a19adf5.html (last accessed October 11, 2012).

C. It further adds that this support is a concession in exchange for the Tribe's sharing of its gaming revenues with the Commonwealth.

In a letter dated March 7, 2002, to the Governor of Louisiana, then-Assistant Secretary Neal McCaleb explained that the State of Louisiana's political support for the Jena Band of Choctaw Indians' trust acquisition application could not be used to justify revenue sharing payments under the tribal-state compact between the State of Louisiana and the Jena Band of Choctaw Indians. Letter from Neal McCaleb, Assistant Secretary – Indian Affairs to Mike Foster, Governor of the State of Louisiana, March 7, 2002 (Jena Band Letter). In that letter, the Assistant Secretary noted, "the State does not have the authority to either have the land taken into trust, or to have the land declared part of the Band's initial reservation. Both decisions are vested with the Secretary of the Interior." Jena Band Letter at 2.

In both the Jena Band Letter and the 2010 Upper Lake Letter, we explained that the purported concessions were illusory – meaning that the State was not conceding anything at all to the Tribe. Here, the Commonwealth's offer of support to the Tribe's application to have the Department of the Interior acquire land in trust on its behalf is symbolic, and likely signals improved relations between the Tribe and the Commonwealth. Nevertheless, it is not a concession at all. The Commonwealth does not have the authority or ability to approve the Tribe's application, and is not giving anything tangible to the Tribe. Thus, this offer constitutes an illusory concession to the Tribe and is not meaningful for purposes of this analysis.

iv. Consideration of resolution of hunting, fishing, and land use disputes

In this instance, the Tribe has asserted that the Commonwealth has made a meaningful concession to justify revenue sharing under Section 9.2 of the Compact by agreeing to "use its best efforts to negotiate an agreement with the Tribe to facilitate the exercise by the Tribe and its members of aboriginal hunting and fishing rights on certain lands in the Commonwealth." First Compact Supplement at 3.

As discussed above, this provision is an impermissible subject of compact negotiations under IGRA. Therefore, it cannot constitute a meaningful concession by the Commonwealth to the Tribe to support revenue sharing.

v. Resolution of the Tribe's Land Claims

Section 2.12 of the Compact states that, as a concession by the Commonwealth to the Tribe, it will "use its best efforts to negotiate an agreement in 2013 with the Tribe to resolve certain title claims asserted by the Tribe involving land and water in and around Mashpee, giving consideration to the conveyance to the Tribe of some such land and water now publicly held."

Congress explicitly sought to protect land and water rights from being the subject of compact negotiations. States cannot use gaming as a lever to negotiate about rights such as these that are arguably more fundamental than gaming.

For the same reasons as those relating to the purported concession of "consideration of resolution of hunting, fishing, and land use disputes," we have determined that this does not constitute a meaningful concession by the Commonwealth, for purposes of revenue sharing.

vi. Internet gaming and gaming over wireless, handheld devices

Section 4.3.2 of the Compact prohibits the Tribe from offering any form of internet gaming, as defined in the Compact, unless it is authorized under both Federal and Commonwealth law. In the event that such types of gaming activities are permitted by the Commonwealth, the Compact authorizes the Tribe to conduct those activities on par with other entities under the laws of the Commonwealth. *Id.*

Section 4.7 of the Compact authorizes the Tribe to utilize a "Wireless Gaming System," as that term is defined in the Compact.

As of today, the legality of internet gaming is uncertain throughout the United States. Congress has been contemplating legislation to address internet gaming since at least 2008, but it is difficult to predict whether Congress will ever enact such legislation. It is equally difficult to predict whether such legislation may grant states regulatory authority over tribal internet gaming, or permit tribes to operate internet gaming free of state regulation altogether. For purposes of this analysis, the Commonwealth's asserted concession of internet gaming cannot be considered a meaningful concession.

The Tribe also asserts that the Commonwealth's agreement to allow the Tribe to operate wireless gaming is a meaningful concession. While wireless gaming technology is relatively new, insofar as implementation, standards governing wireless gaming were published in 2007 by Gaming Laboratory International.[7] On October 9, 2012, the New Jersey Attorney General's Division of Gaming Enforcement published temporary regulations to permit gaming on mobile devices. [8] Moreover, we are aware of at least three tribal gaming facilities offering wireless gaming today without specific authority to do so in their respective class III gaming compacts.

Therefore, we do not view authority to operate wireless gaming as a concession at all because it is simply an extension of the class III gaming already authorized by the Compact using a different interface.

B. Substantial Economic Benefit

We must now examine whether the Commonwealth's sole meaningful concession – the exclusive right of the Tribe to conduct gaming in Region C – justifies the revenue sharing provisions in the Compact. We determine that it does not.

The language of Section 9.2 of the Compact makes it clear that the Tribe and the Commonwealth believe that the Tribe's exclusive right to conduct gaming in Region C is worth 6.5 percent of the Tribe's Gross Gaming Revenue. The Compact does not contain any other concessions by the Commonwealth to the Tribe that would justify revenue sharing beyond that rate.

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[7] *See* http://www.gaminglabs.com/downloads/GLI%20Standards/updated%20Standards/GLI-26%20v1.1.pdf (last accessed on October 10, 2012). Gaming Laboratories International (GLI) is a gaming software and equipment test laboratory. GLI or other, similar, certification is required by Part 4.8 of the Compact before a particular gaming device model can be offered for play.

[8] *See* http://www.nj.gov/oag/newsreleases12/pr20121009a.html (last accessed on October 10, 2012).

Section 9.2.1 requires the Tribe to pay 21.5 percent of its Gross Gaming Revenue to the Commonwealth, in exchange for this meaningful concession. In the event that the Tribe's exclusive right to conduct gaming within Region C is abrogated, Section 9.2.4 provides the Tribe with the option of either ceasing operation of class III gaming within 60 days[9], or reducing its revenue sharing obligation to a rate of 15 percent of Gross Gaming Revenues.

If the Tribe loses this exclusive right, its obligation to share revenues with the Commonwealth is reduced by 6.5 percent.

Therefore, we must determine that the Commonwealth has made additional meaningful concessions, beyond securing the Tribe's exclusive right to conduct gaming in Region C, to justify revenue sharing above a rate of 6.5 percent.

As we have explained above, the other purported concessions made by the Commonwealth to the Tribe under the Compact do not constitute "meaningful concessions" that would justify revenue sharing. Without additional meaningful concessions, revenue sharing at a rate of 15 percent as required by the Compact would be unlawful.

In 1996, then-Assistant Secretary Ada Deer issued a letter to the Wampanoag Tribe of Gay Head (Aquinnah) regarding a tribal-state compact it had entered into with the Commonwealth. Letter from Ada Deer, Assistant Secretary – Indian Affairs to Beverly M. Wright, Chairperson of the Wampanoag of Gay Head (July 23, 1996) (Aquinnah Letter). In the Aquinnah Letter, the Assistant Secretary noted that the Aquinnah Wampanoag Tribe's tribal-state compact with the Commonwealth would have required that tribe to share revenues with the Commonwealth even if the tribe were to lose its exclusive right to conduct gaming:

> If the Tribe loses exclusivity after six years, it agrees to make a cash contribution equal to the greater amount of a) the State's actual costs of regulation, licensing, and Compact oversight of its gaming facility, plus 15 percent of the amount the Tribe would have paid to the State under this compact if the exclusivity had been maintained....This provision contemplates that if the Tribe loses exclusivity rights after the first six years, it will be required to continue to pay the State an amount in excess of actual costs to regulate gaming.

Aquinnah Letter at 2.

The Assistant Secretary then expressed the Department's concerns with this provision, which is similar to Section 9.2 of the Compact at issue here:

> We strongly advise that the provision be rewritten because we believe that a requirement that the Tribe make indefinite payments to the State beyond the cost of regulation even if the State removes all restriction on competitive gambling renders the Compact legally vulnerable. We believe that it is very likely that, if

[9] We are reserving analysis as to whether the "option" of ceasing gaming operations in event of the abrogation of the Tribe's exclusive gaming rights in Region C is permissible.

> litigated, a court would find that such payments are beyond the scope of the statute.

Id. at 3.

The 1996 Aquinnah Letter demonstrates that the Department has had longstanding concerns with the type of revenue sharing structure embodied in Section 9.2 of the Compact.

We have determined that the Commonwealth has not made meaningful concessions that would confer a substantial economic benefit to the Tribe in a manner that would justify a revenue sharing rate above and beyond 6.5 percent. Therefore, the revenue sharing provisions set forth in Section 9.2 of the Compact constitute an impermissible tax, fee, charge, or other assessment in violation of IGRA. See 25 U.S.C. § 2710(d)(4).

3. Other Concerns

The preceding discussion is sufficient for us to conclude that the Compact violates IGRA and cannot be approved. Nevertheless, it is important to note that there are additional provisions within the Compact that cause significant concern for the Department.

For example, Part 4 of the Compact purports to regulate the Tribe's conduct of class II gaming activities. We question whether the Commonwealth, through the negotiation of a class III gaming compact, can exercise regulatory authority reserved exclusively to tribes and the National Indian Gaming Commission under IGRA.

Likewise, Part 13 of the Compact appears to constrain the manner in which the Tribe can use net revenues generated by its gaming facility. Given the fact that the Commonwealth would have the ability to enforce the terms of the Compact, we question whether this would create an impermissible conflict with the Federal Government's and tribes' regulatory authority under IGRA.

Part 17 of the Compact addresses the allocation of criminal jurisdiction over the Tribe's Gaming Enclosure, which is permissible under IGRA to a limited extent. See 25 U.S.C. § 2710(d)(3)(C) (permitting the inclusion of provisions in a compact that allocate criminal and civil jurisdiction "directly related to and necessary for" the licensing and regulation of gaming). In this instance, the Compact purports to extend the Commonwealth's criminal jurisdiction to cover all criminal offenses, under the laws of the Commonwealth, to all persons within the Gaming Enclosure. Compact Part 17. We question whether this would violate the limited reach of criminal jurisdiction allowed under IGRA or other Federal laws pertaining to criminal jurisdiction in Indian Country.

It was not necessary for us to analyze these provisions to make the determination to disapprove the Compact. But, it is possible that these provisions – as written, or as potentially applied – could also violate IGRA and provide us with separate bases to disapprove the Compact. We would scrutinize these provisions carefully in any future submissions by the Tribe and the Commonwealth.

CONCLUSION

Based on this analysis I find that the Compact is in violation of IGRA. Therefore, we hereby disapprove the Compact.

We appreciate the efforts of the Commonwealth and the Tribe to attempt to reach an agreement on important matters affecting their relationship. We deeply regret that this decision is necessary, and understand that it constitutes a significant setback for the Tribe. Nevertheless, the Department is committed to upholding IGRA and cannot approve a compact that violates IGRA in the manner described above.

We strongly encourage the Commonwealth to negotiate a new class III gaming compact with the Tribe in good faith and in accordance with IGRA so that the Tribe may proceed with its efforts to develop its economy for the benefit of its citizens.

A similar letter has been sent to the Honorable Cedric Cromwell, Chairperson, Mashpee Wampanoag Tribe.

Sincerely,

Kevin K. Washburn
Assistant Secretary – Indian Affairs