INSIDE THE MINDS™

GAMING LAW LITIGATION STRATEGIES

LEADING LAWYERS ON AVOIDING POTENTIAL LAWSUITS AND NEGOTIATING SETTLEMENTS FOR CASINO OWNERS, RESERVATIONS, AND ONLINE GAMING COMPANIES

ASPATORE

David H. Tennant, Nixon Peabody LLP; Marc W. Dunbar, Jones Walker LLP
Stephen Solomon, Ralph Saltsman, Stephen Jamieson, Bruce Evans, and Ryan Kroll,
Solomon Saltsman & Jamieson; Paul S. West, Baker Donelson
Curt Beason and Ian Russell, Lane & Waterman LLP
John M. Bolton III, Hill Hill Carter Franco Cole & Black PC

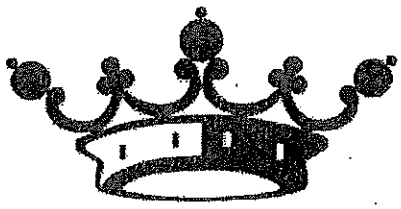
CONTENTS

Indian Gaming Twenty-Five Years After the IGRA: A Litigator's Perspective

David H. Tennant

Partner

Nixon Peabody LLP



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Introduction

Indian tribes seeking to engage in Class III gaming on their Indian lands are at times required to engage in litigation seeking a judicial determination that a state has acted in bad faith during the tribal-state gaming compact process. Because of the importance of Class III gaming to provide funding for vital tribal government operations, tribes may be placed in a situation where only an action challenging state negotiating tactics· will allow that tribe to obtain a fair and reasonable tribal-state compact, to assist in providing for the tribe's members as envisioned by Congress when it passed the Indian Gaming Regulatory Act (IGRA) in 1988, regulating the operation of gaming on tribal lands.[1]

Under the IGRA, the level of regulation on gaming varies depending on which ·of the three classes of gaming a tribe wishes to provide. Class I gaming consists of social games for prizes of nominal value and traditional forms of Indian gaming as part of, or in connection with, tribal ceremonies and celebrations.[2] Class I gaming is within the exclusive jurisdiction of the Indian tribes and not subject to the provisions of the IGRA.[3]

Class II gaming includes certain forms of bingo and card games but does not include any banking card games or slot machines.[4] Class II gaming is within the jurisdiction of the Indian tribes, but is subject to the provisions of the IGRA.s

Class III gaming is all forms of gaming not Class I or Class II, and therefore includes slot machines and banked card games, as well as other forms of gaming.[6] Class III gaming is generally the most lucrative form of gaming and is the most regulated gaming under the IGRA. Prior to operating Class III gaming, the IGRA requires a tribe to enter into a tribal-state compact along with other preconditions.? It is this requirement of a tribal-state compact that has led to disputes between Indian tribes and states because

[1] 25 U.S.C. § 2701 *et seq.* (West **1988).**
[2] 25 U.S.C. *§* 2703(6).
[3] 25 U.S.C. *§* 2710(a)(I).
[4] 25 u.s.c. *§* 2703(7).
[5] 25 U.S.C. § 2710(a)(2).
[6] 25 u.s.c. § 2703(8).
[7] 25 U.S.C. *§* 2710(d)(l)(C).

of the leverage for states created by the mandatory requirement of such a compact for tribes to operate Class III gaming.

Recognizing the potential for abuse by states, Congress sought to ensure that states did not take advantage of this leverage while negotiating tribal- state compacts. The IGRA requires that a state negotiate in good faith and creates a procedure by which tribes can enforce this requirement through federal court action. Once 180 days has passed after a tribe has requested the state to enter into negotiations for a tribal-state compact, a tribe may file suit in federa district court seeking a judicial determination that a state failed to negotiate in good faith.

What a State May Negotiate for in a Gaming Compact

Since the IGRA's inception on in 1988, only a handful of cases discuss what constitutes good-faith negotiations under the IGRA. However, over the last few years, several case decisions provide greater specificity on this subject matter. For instance, a recent case out of the district court of New Mexico, *Pueblo of Santa Ana v. Nash,* concerns Congress's intent in restricting what subject may be included in a tribal-state gaming compact. [9] The states possess unequal bargaining power during the compact negotiations, because there is no requirement that a state enter into a compact, yet tribes may only operate Class III gaming if they have a tribal-state compact. Concerned that states may request a multitude of unfair concessions from tribes in exchange for the Class III gaming the tribes need to generate essential revenue, the IGRA prevents a compact from including more than these seven subject matters:

1. 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;
2. the allocation of criminal and civil jurisdiction between the state and the Indian tribe necessary for the enforcement of such laws and regulations;

[8] 25 U.S.C. § 2710(d)(7)(B)(i).

[9] *Pueblo of Santa Ana v. Nash,* CIV. 11-957 LH/LFG, 2013 WL 5366403 (D. N.M. Sept 25, 2013).

3. the assessment by the state of such activities in such amounts as are necessary to defray the costs of regulating such activity;
4. taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the state for comparable activities;
5. remedies for breach of contract;
6. standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
7. any other subjects that are directly related to the operation of gaming activities.[10]

Pueblo of Santa Ana Decision

In *Pueblo of Santa Ana,* the plaintiff tribe sought an order preventing a New Mexico district court judge from exercising jurisdiction over a pending lawsuit against a tribal gaming enterprise arising from allegations that the tribal gaming enterprise provided alcoholic beverages to two intoxicated patrons, which led to a one-car accident resulting in the death of those individuals and the injury of a third person.[11] The plaintiff tribe also sought a declaration that the IGRA did not permit a compact to shift jurisdiction from tribal court to state court over personal. injury lawsuits against tribes or their gaming enterprises.[12]

The impetus behind the declaratory relief sought was a provision in the plaintiff tribe's compact with New Mexico that allowed claims for bodily injury or property damage proximately caused by the conduct of the plaintiff tribe's gaming enterprise to be filed in state district court, "unless it is finally determined by a state or federal court that the IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court."[13] Utilizing the jurisdiction-shifting provision in the plaintiff tribe's compact, an action was filed in New Mexico state district court alleging the gaming enterprise proximately caused the death of the decedents and injured a third person due to the over-service of alcohol.[14]

[10] 25 U.S.C. § 2710(d)(3)(C).
[11] *Pueblo of Santa Ana,* 2013 WL 5366403, at *3.
[12] *Id.* at *I.
[13] *Id.* at *2.
[14] *Id.* at *3.

In response, the plaintiff tribe filed an action in federal district court and asserted that a jurisdiction-shifting provision on for all claims of bodily injury or property damages against a gaming enterprise is not one of the seven listed topics permitted by the IGRA to be included in a tribal-state gaming compact.[15] Accordingly, the plaintiff tribe argued that Congress does not allow a tribal-state gaming compact to extend state court jurisdiction and the application of state laws over matters that are not directly related to gaming, such as the wrongful death claim and personal injury claim at issue therein.[16]

The district court agreed with the plaintiff tribe and noted that the IGRA is written in a restrictive rather than an expansive manner, and that only matters listed in 25 U.S.C. §2710(d)(3(C) are permitted in a tribal-state gaming compact.[17] The district court then held that since the IGRA does not explicitly permit a jurisdiction-shifting provision in a compact, it therefore prohibits such a provision.[18]

Pueblo of Santa Ana is an important new case that helps define what is and is not permitted within a tribal-state gaming compact. It builds upon comments made in the IGRA Senate Committee Report that Congress did "not intend that compacts be used as a subterfuge for imposing state jurisdiction on tribal lands." [19] While addressing bodily injury and wrongful death claims, its rationale and analysis can and should be allowed with respect to other matters requested by states for inclusion in a tribal-state gaming compact not explicitly included in 25 U.S.C. §2710(d)(3)(C).

Impact of *Pueblo of Santa Ana* Decision on Compact Negotiations

Using the *Pueblo of Santa Ana's* rationale, other matters requested by a state to be included in a tribal-state compact also may not be permitted to be include in a compact pursuant to 25 U.S.C. § 2710(d)(3(C). For instance, recent tribal-state compacts in California include provisions that require tribes to waive their immunity and submit to private arbitration for all

[15] *Id.* at *5.
[16] *Id.* at *5-6.
[17] *Id.* at *10.
[18] *Id.* at*12.
[19] *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1109 (9th Cir. 2003).

claims regarding bodily injury or property damage connected with, or relating to, the operation of the gaming facility; submit to the jurisdiction of the California state agencies that enforce California's workplace and occupational health and safety standards; submit to the governance of California's employment discrimination laws; and submit to the jurisdiction of California's workers' compensation program.

Presumably, the tribes that did enter into compacts with these questionable provisions did so because those tribes perceived that the benefits of obtaining a tribal-state compact and being able to begin operating Class III gaming outweighed the cost of submitting to the state's jurisdiction on these matters. However, this willingness to subvert their own sovereign immunity exemplifies Congress's concern regarding the unequal bargaining power possessed by the states and the exact reason that Congress enacted 25 U.S.C. §2710(d)(3(C) to limit the subject matters in a tribal-state comp ct.

Tribes and their counsel should be aware of the cost and benefits in litigating these matters. Litigation will likely delay the time in which a tribe is able to receive a tribal-state gaming compact even if the tribe ultimately prevails in the litigation. However, depending on the cost of inclusion of the challengeable provisions and the tribe's willingness to preserve its sovereign immunity, a tribe may still deem it necessary to litigate over the challengeable provisions.

Rincon Band **Decision**

Another recent case of interest to tribes and their counsel seeking to negotiate a tribal-state gaming compact with a state and potentially litigate a claim for bad-faith negotiations is the Ninth Circuit decision in *Rincon Band of Luiseno Mission Indians of the "Rincon Reservation.*[20] The *Rincon* decision provided further clarification as to the extent that states may seek revenue sharing from gaming tribes through a tribal-state gaming compact.

Concerned with budgetary shortfalls, California attempted to generate revenue for their general fund by demanding that Rincon, as well as other

[20] *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019 (9th Cir. 2010).

California tribes, pay a percentage of their revenue to the state.[21] Rincon protested, stating that, in 25 U.S.C. § 2710(d)(4), the IGRA expressly_ prohibits a state from imposing "any tax, fee, charge, or other assessment upon an Indian tribe." [22]

The Ninth Circuit began its analysis with the determination that the IGRA required the court to consider a "demand" for a tax is evidence but not conclusive proof of bad faith.[23] The court further noted that any time a state demands taxes to be paid into its general fund, the "state faces a very difficult task to rebut the evidence of bad faith necessarily arising from that demand."[24]

However, bad faith may be disproved if the state demonstrates that the demanded revenue was to be used for the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.[25] Noting that California made no attempt to justify its demand for general fund revenue sharing using any of those listed factors, the Ninth Circuit held that California failed to rebut the presumption of bad faith.[26]

The Ninth Circuit also rejected the state's argument that it had offered meaningful concessions for the tax and therefore did not "impose" the tax but, instead, had merely negotiated for the revenue sharing.[27] Because California tribes already enjoy the exclusive right to operate slot machines within the state of California, California could not offer exclusivity as a meaningful concession since it was something the tribes already possessed and which the Ninth Circuit previously held was already offered in exchange for two other payments required of California tribes, including Rincon in their earlier 1999 compacts.[28]

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[21] *Rincon,* 602 F.3d at 1024-25.
[22] *Id.* at 1025.
[23] *Id.* at 1029-30.
[24] *Id.* at 1032.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 1036.
[28] *Id.* at 1037.

Meaningful Concessions

The *Rincon* decision is also helpful in determining how a "meaningful concession" is defined. California asserted that even if exclusivity by itself was not sufficiently meaningful, the court should consider the bundle of rights being offered within the compact and whether that bundle of rights is more valuable than the status quo.[29] The Ninth Circuit rejected this argument, noting that the "consideration in exchange for the revenue sharing must be independently meaningful in comparison to the status quo"-i.e., not illusory (or illegal) if standing alone.3° *Rincon* stands for the proposition that once a meaningful concession has been exchanged for an obligation upon a tribe, that meaningful concession cannot further be utilized to obtain further obligations from the tribe.3[1] Therefore, tribes and their counsel negotiating compacts should be careful to create a clear record of what meaningful concessions, if any, are offered by a state in exchange for revenue sharing. This will also help determine whether each concession is "independently meaningful," as required by *Rincon.*[32]

Big Lagoon Decision

Tribes and their counsel should also be aware of a recent Ninth Circuit case that could prevent a tribe from prevailing in its bad-faith negotiations claim if it is unable to establish that the tribe was under federal jurisdiction as of 1934. In *Big Lagoon Rancheria v. State of California,* the Ninth Circuit held that pursuant to the IGRA, a tribe's right to request negotiations and thereafter to sue if a state does not negotiate in good faith is dependent upon that tribe having jurisdiction over Indian lands on which it proposed to conduct Class III gaming.3[3]

The question of whether a tribe has jurisdiction over its Indian lands is based upon the 2009 Supreme Court holding that the Bureau of Indian Affairs (BIA) lacks authority to acquire land in trust for tribes that were not under federal jurisdiction in 1934.[34] The determination of being under

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[29] *Id.* at I040.
[30] *Id.* at I 040, fn. 23.
[31] *Id.* at 1037.
[32] *Id.* at I 040.
[33] *Big Lagoon Rancheria v. California,* 741 F.3d 1032, 1040 (9th Cir. 2014).
[34] *Carcieri v. Salazar, 555* U.S. 379, 388 (2009).

federal jurisdiction is specific to the year 1934 because of language in the 1934 Indian .Reorganization Act (IRA) that authorized the secretary of the interior to acquire land and hold it in trust "for purpose of providing lands for Indians."[35] The IRA defined "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under federal jurisdiction."[36] The Supreme Court interpreted the word "now" in the phrase "Now under federal jurisdiction" to mean as of the date the IRA was passed in 1934.[37] Thus, the Supreme Court interpreted the IRA to authorize the BIA to acquire land in trust only for tribes that were under federal jurisdiction as of 1934, and a tribe's current status of recognition or jurisdiction is irrelevant for these purposes.[38]

Building upon the *Carcieri* decision, the Ninth Circuit in *Big Lagoon* determined that if the BIA cannot hold the lands in trust for the tribe, the lands are not "Indian lands" as defined in the IGRA.[39] If the lands are not Indian lands, the IGRA does not permit a tribe to operate Class III gaming on those lands, and there is no requirement that a state negotiate a compact for Class III gaming on those lands.[40]

The issue this case may present to some tribe seeking a compact is whether it can be established that the tribe was under federal jurisdiction in 1934. In *Big Lagoon,* the Ninth Circuit noted that a helpful starting point in this determination is whether the tribe appears on a BIA list compiled shortly after the IRA was enacted.[41] As did the *Carcieri* decision, the *Big Lagoon* decision is quick to point out that this list was not exhaustive and that the BIA did incorrectly leave certain tribes off the list that were in fact under federal jurisdiction at that time.[42] This leaves open the door for tribes not appearing on the list to prove they were under federal jurisdiction in 1934 using other competent evidence such as treaties, legislative acts, and tribal documents.

[35] 25 U.S.C. § 465 (1934).
[36] 25 U.S.C. § 479 (1934) (emphasis added).
[31] *Carcieri, 555* U.S. at 392.
[3s] *Id.*
[39] *Big Lagoon,* 741 F.3d at 1040.
[40] *Id.* at 1045.
[41] *Id.* at 1044.
[42] *Id.* (citing *Carcieri, 555* U.S. at 398).

Big Lagoon's Impact on Bad-Faith Litigation

Counsel for tribes should be aware that a state -could challenge whether the intended lands for the Class III gaming are in fact "Indian lands" even many years after the land was originally taken into trust. In *Big Lagoon,* the BIA took the subject lands into trust in 1994.[43] In the Ninth Circuit, a challenge to an unauthorized agency action, such as taking lands into trust for a tribe pursuant to 25 U.S.C. § 465 if that tribe was not under federal jurisdiction in 1934, must be filed within six years from the date of the "agency's application of the disputed decision to the challenger." [44] In *B Lagoon,* the Ninth Circuit determined that this six-year period did not begin in 1994 when the land was taken into trust, but instead when the plaintiff tribe filed suit to compel negotiations and the state of California challenged the entrustment.45

Obtaining a Compact When a State Negotiates in Bad Faith

If the 180-day negation period has elapsed and a bad-faith negotiation action is filed, the district court will issue its decision on whether the state has negotiated in. bad faith. If the tribe is successful in proving bad-faith negotiations by the state, the district court will order the state and the tribe to conclude a compact within sixty days.[46]

If after the conclusion of this sixty-day period the tribe and state have not agreed upon a compact, the district court shall order each party to submit a proposed compact that represents· that party's last best offer to a mediator appointed by the court.[47] The mediator shall then select from the two proposed compacts the one that best comports with the terms of the IGRA, any other applicable federal law, and with the findings and order of the district court.48

If the state consents to the proposed compact selected by the mediator within sixty days of the mediator's submission to the state of the prevailing

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[43] *Big Lagoon,* 741 F.3d at I 035.
[44] *Id.* at 1043.
[45] *Id.* at 1043.
[46] 25 U.S.C. §27IO(d)(7)(B)(iii).
[47] 25 U.S.C. § 27IO(d)(7)(B)(iv).
[48] 25 U.S.C. §27IO(d)(7)(B)(iv).

compact, the proposed compact is treated as a tribal-state compact.[49] If the state does not consent to the proposed compact selected by the mediator within sixty days, the mediator shall notify the secretary of the interior and the secretary shall proscribe procedures allowing the tribe to operate Class III gaming, which are consistent with the proposed compact selected by the mediator, the IGRA, and the relevant provisions of the laws of the state.[50]

Because 8lass III gaming has become one of the leading means for tribes to provide for their government operations and for their members, tribes may have to resort to filing an action if states do not act in good faith. In such instances, it is important that counsel for the negotiating tribe create a clear record of the underlying negotiations so a district court will have sufficient information to conclude that a state is not negotiating in good faith. To create a clear record, it is important that counsel understand what does and does not constitute good-faith negotiations under the IGRA.

Conclusion

The *Pueblo of Santa Ana* decision confirms that if a negotiated topic is not expressly permitted by e IGRA, it is prohibited. To the extent possible, tribes and their counsel should ensure that no prohibited topic is included in a tribal-state gaming compact to preserve the tribe's sovereignty, obtain the best possible compact, and create a strong record in case of litigation. Tribes and their counsel should also be aware of the *Rincon* decision and its explanation of what constitutes a tax and what constitutes a meaningful concession.

Additionally, tribes and their counsel should recognize that, as in *Big Lagoon,* a state may assert that there is no requirement to engage in negotiations at all if a tribe was not under federal jurisdiction. Tribes and their counsel should be prepared to _address this issue before even filing a bad-faith. negotiation action.

As evidenced by these recent cases, there are many considerations for tribal counsel prior to initiating and litigating an action for a judicial determination of bad-faith negotiations by a state. As with all matters, it is

[49] 25 U.S.C. § 2710(d)(7)(B)(vi).
[50] 25 U.S.C. § 2710(d)(7)(B)(vii).

important that counsel be aware of all precedential decisions to create a clear record in case the negotiations result in litigation.

Key Takeaways

- From the beginning of negotiations for a tribal-state compact for Class III gaming, make it a priority to establish a clear record of all parts of the negotiations. This will be vital evidence if it becomes necessary to go to court with claims that the state is negotiating in bad faith. Make sure that what the tribe believes is not permitted in a compact by the IGRA is clearly stated throughout the negotiations.
- When negotiating_ a tribal-state compact, keep in mind that district court has established that the IGRA is written in a restrictive rather than an expansive manner. Therefore, only matters listed in 25 U.S.C. § 2710(d)(3(C) are permitted in a tribal-state gaming compact. Become familiar with the seven listed topics permitted by the IGRA to be included in a tribal-state gaming compact, and stay within the boundaries of that list, otherwise provisions within the compact will be prohibited. Become conversant with the case of *Pueblo of Santa Ana,* as it helped define what is and is not permitted within a tribal-state gaming compact.
- While the Ninth Circuit noted that a state's demand for taxes to be paid into its general fund makes it difficult to rebut evidence of bad faith, do not depend on that in supporting a claim of bad faith against a state. The state can disprove a bad faith claim if it can demonstrate that the revenue will go toward public interest/safety, criminality, financial integrity, and adverse economic impacts related to gaming activities. The state can also claim that it offers meaningful concessions in return for the tax, but this can be disproved if it can be shown that whatever is being offered is something the tribe already has rights to or already possesses.
- Study the *"Rincon* decision as a guide for defining a "meaningful concession." Also per the Ninth Circuit, "consideration in Exchange for the revenue sharing must be independently meaningful in comparison to the status quo, "meaning that what was being offered, if it was standing alone, would not be illusory or illegal. Once a meaningful concession has been exchanged for an

obligation upon a tribe, it can no longer be used to obtain more obligations from the tribe. Create a clear record of what meaningful concessions are offered by a state in exchange for revenue sharing.

- Prepare to be able to prove that the tribe was under federal jurisdiction as of 1934 before filing a claim of bad faith. Per the *Carcieri* and *Big Lagoon* decisions, the BIA erred and left tribes off of the list that were under federal jurisdiction at that time, which makes it possible for tribes not appearing on the list to prove they were under federal jurisdiction in 1934, using other competent evidence such as treaties, legislative acts, and tribal documents.

The partners of Solomon Saltsman & Jamieson have over 140 years of combined legal experience and practice in several areas of law, including gaming, land use, alcoholic beverage licensing, and litigation. The firm has been at the forefront of gaming law representing both tribal and non-tribal clients. The firm has been involved in tribal-state gaming compact negotiations, litigation to interpret gaming rights under a tribal-state gaming compact, and litigation concerning breaches of tribal-state gaming compact. Additionally, the firm is continuously approached to determine the legality of proposed gaming operations given the constantly improving level of technology.