THE SECRETARY OF THE INTERIOR

WASHINGTON

OCT 30 1997

Honorable Lela Kaskalla
Governor, Pueblo of Nambe
Route 1, P.O. Box 117BB
Nambe Pueblo, New Mexico 87501

Dear Governor Kaskalla:

On September 9, 1997, the Department received the two interrelated documents (the Gaming Compact and the Revenue Sharing Agreement) which together comprise the Tribal-State Compact between the Pueblo of Nambe and the State of New Mexico. Under Section 11(d)(8)(C) of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within 45 days of its submission. If the Secretary does not approve or disapprove a compact within 45 days, IGRA states that the compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." The compact takes effect when notice is published in the *Federal Register* pursuant to Section 11 (d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

I have declined to approve or disapprove the Pueblo of Nambe's Compact within the 45-day period. As a result, the Compact is considered to have been approved, but only to the extent it is consistent with the provisions of IGRA. The Pueblo and the State should be aware that the Department is particularly concerned about two provisions in the Compact that appear inconsistent with IGRA, *i.e.*, the revenue sharing provisions and the regulatory fee structure.

The Revenue Sharing Provisions

As a preliminary matter it should be noted that the Department has reviewed the Revenue-Sharing Agreement between the Pueblo and the State in concert with the Compact because the New Mexico Gaming Control Act specifically prohibits execution of either document without execution of the other.

The Agreement requires the Pueblo to pay the State 16% of "net win" (defined as the amount wagered on gaming machines less prizes, regulatory fees paid to the State, and $250,000 representing tribal regulatory fees) as long as the State does not take any action directly or indirectly to attempt to restrict the scope of Indian gaming permitted under the Compact, and does not permit any further expansion of non-tribal class III gaming in the State.

The Department of the Interior has approved 161 tribal-state compacts to date. Only a few have called for tribal payments to states other than for direct expenses that the states incur in regulating gaming authorized by the compacts. To date, the Department has approved payments to a state only when the state has agreed to provide substantial exclusivity, *i.e.*, to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the state permits competition to take place. The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a state. Otherwise, states effectively would be able to leverage very large payments from the tribes, in derogation of Congress' intent in 25 U.S.C. § 2710(d)(4) of IGRA not to permit states "to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in Class III gaming activities." In addition, because of the Department's trust responsibility, we seek to ensure that the cost to the Pueblo -- in this case up to 16% of "net win" -- is appropriate in light of the benefit conferred on the Pueblo.

In light of the large payments required under the Compact, the Department questions whether the limited exclusivity provided the Pueblo meets the standards discussed in the previous paragraph. The Compact does not provide substantial exclusivity. Indeed, the Compact seems to expand non-Indian gaming by allowing for a State lottery, the operation of a large number of electronic gaming devices by fraternal, veterans, or other nonprofit membership organizations, gaming by nonprofit tax exempt organizations for fundraising purposes, and the operation of electronic gaming devices at horse tracks every day that live or simulcast horse racing occurs.

Furthermore, Section 11(d)(3)(A) of IGRA, 25 U.S.C. § 2710(d)(3)(A), calls for Indian tribes and states to conduct give-and-take negotiations regarding the potential terms of a tribal-state compact. Our concern is highlighted by our understanding that neither the Compact nor the Revenue-Sharing Agreement were the result of a true bi-lateral tribal-state negotiation process. This fact reinforces the Department's view that the payment required pursuant to the Revenue-Sharing Agreement resembles more a fee or assessment imposed by the State on the Pueblo as a condition to engage in class III gaming activities rather than a bargained-for payment for a valuable privilege, and thus appears to violate Section 11(d)(4) of IGRA, 25 U.S.C. § 2710(d)(4).

The Regulatory Fee Structure

Section 4.E.5 of the Compact imposes a facility regulatory fee of $6,250 per quarter ($25,000 yearly), a slot machine regulatory fee of $300 per quarter per machine ($1,200 yearly), and a table regulatory fee of $750 per quarter per table ($3,000 yearly). These amounts increase by five percent (5%) each year for the term of the Compact. In addition, the Revenue-Sharing Agreement mandates that regulatory fees under the Compact automatically increase by 20% if the State takes any action that results in the cessation of the Pueblo's obligation to pay 16% of net win under the Revenue-Sharing Agreement.

Section 11(d)(3)(C) of IGRA, 25 U.S.C. § 2710(d)(3)(C), provides that state regulatory fees must be no more than the "amounts as are necessary to defray the costs of regulating such [gaming] activity." Unlike other tribal-state compacts, this Compact does not require the State to provide an accounting of the regulatory fees in order to ensure that the payments actually match the cost of regulation, nor does it provide for the Pueblo to be reimbursed if the Tribal regulatory fees

exceed the actual cost of regulation by the State. As a result, the Department has serious questions about the permissibility of this regulatory fee structure under IGRA.

The Department believes that the decision to let the 45-day statutory deadline for approval or disapproval of the Compact expire without taking action is the most appropriate course of action given the unique history of State and Federal court cases and legislative actions that have shaped the course of Indian gaming in New Mexico. The Department hopes that the foregoing explanation will encourage the State and the Pueblo to enter into genuine negotiations to resolve these concerns.

Sincerely,

Identical Letter Sent to: Honorable Gary E. Johnson
Governor of New Mexico
State Capitol
Santa Fe, New Mexico 87503

cc: Albuquerque Area Office w/copy of compact
Superintendent, Northern Pueblos Agency w/copy of compact
National Indian Gaming Commission w/copy of compact
SW Regional Solicitor's Office w/copy of compact
NM U.S. Attorney w/copy of compact