United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

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INDIAN GAMING COMMISSION
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Honorable Janet Napolitano
Governor of Arizona
1700 West Washington
Phoenix, Arizona 85007

Dear Governor Napolitano:

On December 12, 2002, we received the Tribal-State Compacts between the State of Arizona (State) and the White Mountain Apache, Havasupai, San Carlos Apache, Quechan, Fort Mojave, Salt River Pima-Maricopa, Ak-Chin, Fort McDowell, Gila River, Hualapai, Tohono O'odham, and Cocopah Indian tribes. On January 7, 2003, we received the Tribal-State Compacts between the State and the Tonto Apache and Kaibab Band of Paiutes Indian tribes. On January 13, 2003, we received the Tribal-State Compacts between the State and the Yavapai-Apache and Pascua Yacqui Indian tribes; and on January 17, 2003, we received the Tribal-State Compact between the State and the Navajo Nation.

We have completed our review of these compacts and conclude that they do not violate the Indian Gaming Regulatory Act of 1988 (IGRA), federal law, or our trust obligation to Indians. Therefore, pursuant to delegated authority and Section 11 of IGRA, based on a full review of the record and the law, we approve the compacts. The compacts will take effect when notice of our approval, pursuant to 25 U.S.C. § 2710(d)(3)(B), is published in the *Federal Register*.

Revenue Sharing

Section 12(b) of the compacts requires the tribes to contribute a percentage of their Class III Net Win for each fiscal year as follows: One percent of the first $25 million, 3% of the next $50 million, 6% of the next $25 million, and 8% of Class III Net Win in excess of $100 million. Class III Net Win is defined in Section 2(qq) to mean "gross gaming revenue, which is the difference between gaming wins and losses, before deducting costs and expenses." The tribal contribution is made "in consideration for the substantial exclusivity covenants by the State in Section 3(h)" of the compacts. Section 3(a) of the compacts authorizes the tribes to operate (1) Class III Gaming Devices, (2) blackjack, (3) jackpot poker, (4) keno, (5) lottery, (6) off-track pari-mutuel wagering, (7) pari-mutuel wagering on horse racing, and (8) pari-mutuel wagering on dog racing. Section 3(h) provides that if State law changes to permit a person or entity other than an Indian tribe to operate Gaming Devices, any form of Class III gaming , including Video Lottery Terminals, that is not authorized under the compact (other than gambling that is lawful on May 1, 2002, pursuant to A.R.S. § 13-3302), the tribes' obligation to make contributions to the State under Section 12 is immediately reduced to quarterly contributions to the State equal to .75% of its Class III Net Win for the prior quarter. Specifically exempted from the provisions of Section 3(h) are casino nights operated by non-profit

charitable organizations, social gambling, paper product lottery games used by the Arizona lottery prior to May 1, 2002, and low-wager, non-banked recreational pools.

The Department of the Interior (Department) has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide the tribe with substantial exclusivity for Indian gaming, *i.e.*, where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State. The payment to the State must be appropriate in light of the exclusivity right conferred on the tribe. It is our determination that the revenue-sharing provisions described above are lawful under IGRA because the value of the exclusive gaming rights conferred on the tribes is significant, and thus cannot be characterized as a prohibited tax pursuant to 25 U.S.C. § 2710(d)(4). In addition, the percentage rate of Net Win that tribes are required to pay the State under Section 12(d) in exchange for exclusive gaming rights is overstated because it factors in payments of regulatory costs that are usually assessed separately and authorized under 25 U.S.C. § 2710(d)(3)(C)(iii). Finally, Section 12(d) of the compacts provides that 12% of the tribes' annual contribution shall be made in the form of either distribution to cities, towns or counties for government services or deposits to the Commerce and Economic Development Commission Local Communities Fund. We believe that this portion of the tribes' contribution is likewise independently authorized pursuant to 25 U.S.C. § 2710(b)(2)(B)(v) which authorizes the use of net revenues from any tribal gaming to be used to help fund operations of local government agencies, and would not be characterized as a tax even in the absence of exclusive gaming rights.

Section 16(b) of the compacts provides that "[n]othing in this Compact shall be deemed to authorize or permit the State or any political subdivision thereof to impose any tax, fee, charge or assessment upon the Tribe or any Gaming Operation of the Tribe, except for the payment of expenses as provided in Section 12 of this Compact." In a letter received by the Department on January 15, 2003, the Executive Director of the Arizona Indian Gaming Association and the Acting Director of the Arizona Department of Gaming clarify that it was not the intent of the tribes or the State to authorize the imposition of a tax with the adoption of this provision. This provision was intended to reflect the authorization to assess regulatory fees in 25 U.S.C. § 2710(d)(4). We view this interpretation as reasonable. Accordingly, we do not construe the clause "except for the payment of expenses as provided in Section 12 of this Compact" to authorize the imposition of any tax, fee, charge, or assessment forbidden under IGRA.

Effective Date of the Compacts

Section 2(vv) provides that the compact goes into effect after all of the following events have occurred: (1) Execution on behalf of the State and the Tribe; (2) approval by the Secretary of the Interior; (3) publication of approval notice in the *Federal Register*; and (4) approval of a new compact for each tribe with a gaming facility in Maricopa, Pima, or Pinal Counties, unless the Governor waives this specific requirement. It is the position of the Department that a compact becomes effective when notice of its approval is published in the *Federal Register* as required by 25 U.S.C. § 2710(d)(3)(B). There can be no subsequent event to the *Federal Register* notice that triggers the effective date of the compact. We have determined that approval in this case is appropriate

because Section 2(vv)(4) is now moot since all Indian tribes with a gaming facility in the listed three counties have entered into a new compact with the State.

Secretarial Review of Amendments

Section 17 of the compacts (Amendments) does not specifically provide that amendments are subject to review and approval by the Secretary of the Interior (Secretary) pursuant to IGRA. It is the position of the Department that compact amendments must be submitted to the Secretary for review and approval to become effective under IGRA. We believe that this is a common sense interpretation of the compact approval requirements of IGRA. Any other construction of IGRA would render the Secretary's approval authority meaningless because it would permit substantive and controversial provisions to escape Secretarial review through the amendment process. Failure of Section 17 of the compacts to specifically address the Secretary's role in the approval of amendments to the compact does not require us to reject the compacts as long as the parties understand that compliance with IGRA requires submission of compact amendments to the Department for review and approval.

Similarly, Section 3(b)(3)(C) provides that amending appendices, or the addition of additional appendices may be agreed upon by the Tribal Gaming Office and the State Gaming Agency, and are not considered amendments to the compacts under Section 17 of the compacts. Although the parties to the compacts can delegate the modification of appendices or addition of appendices to subordinate agencies, we consider that if these modifications are substantive, they are subject to the review and approval authority of the Secretary under IGRA. In our view, it is appropriate for a compact to provide that technical, non-substantive modifications can be agreed upon by the parties without requiring Secretarial approval under IGRA. However, substantive modifications of the terms of a compact must be approved by the Secretary. It is our view that a substantive modification is one that potentially implicates any of the three statutory reasons available to the Secretary to disapprove a compact in the first instance, *i.e.*, whether the provision violates IGRA, any other provision of Federal law, or the trust obligation of the United States to Indians, *See* 25 U.S.C. § 2710(d)(8)(B). For example, a proposed modification that requires the parties to operate under other Federal law, such as the Interstate Horseracing Act, would trigger Secretarial review and approval under IGRA.

We wish the tribes and the State success in their economic venture.

Sincerely,

/sgd/ Aurene M. Martin

Assistant Secretary - Indian Affairs

Enclosure

Similar Letter Sent to:

Honorable Terry Enos
Chairperson, Ak-Chin Community
42507 W. Peters & Nall Road
Maricopa, Arizona 85239

Honorable Sherry Cordova
Chairperson, Cocopah Indian Tribe
County 15th & Avenue G
Somerton, Arizona 85350

Honorable Clinton M. Pattea
President, Fort McDowell Yavapai Nation
P.O. Box 17779
Fountain Hills, Arizona 85268

Honorable Nora Helton
Chairperson, Fort Mojave Indian Tribe
500 West Merriman
Needles, California 92363

Honorable Donald Antone, Sr.
Governor, Gila River Indian Community
P.O. Box 97
Sacaton, Arizona 85247

Honorable Louise Benson
Chairwoman, Hualapai Indian Tribe
P.O. Box 179
Peach Springs, Arizona 86434

Honorable Anges Chamberlaine
Chairperson, Havasupai Indian Tribe
P.O. Box 10
Supai, Arizona 86435

Honorable Carmen M. Bradley
Chairperson, Kaibab Band of Paiute Indians
HC65 Box 2
Pipe Spring, Arizona 86022

Honorable Kelsey Begay
President, Navajo Nation
P.O. Box 9000
Window Rock, Arizona 86515

Honorable Robert Valencia
Chairman, Pascua Yacqui Tribe
7474 S. Camino De Oeste
Tucson, Arizona 85746

Honorable Mike Jackson, Sr.
President, Quechan Indian Tribe
P.O. Box 1899
Yuma, Arizona 85633

Honorable Ivan Makil
President, Salt River Pima-Maricopa
Indian Community
10005 East Osborn Road
Phoenix, Arizona 85256

Honorable Kathleen Wesley Kitcheyan
Chairperson, San Carlos Apache Tribe
P.O. Box 0
San Carlos, Arizona 85550

Honorable Edward D. Manuel
Chairperson, Tohono O'odham Nation
P.O. Box 837
Sells, Arizona 85634

Honorable Vivian L. Burdette
Chairperson, Tonto Apache Tribe
Tonto Apache Reservation #30
Payson, Arizona 85541

Honorable Dallas Massey, Sr.
Chairman, White Mountain Apache Tribe
P.O. Box 1150
Whiteriver, Arizona 85941

Honorable Aaron Russell
Chairman, Yavapai-Apache Nation
2400 West Datsi Street
Camp Verde, Arizona 86322

cc: Western Regional Director w/ copy of approved Compact
National Indian Gaming Commission w/ copy of approved Compact
Arizona United States Attorney w. copy of approved Compact