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Articles

Scope Creep: What Are the Limits Under IGRA on State Powers to Regulate Ancillary Non-Gaming Business Ventures

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IGRA's legislative history made clear that Congress did not ''intend that compacts be used as a subterfuge for imposing state jurisdiction on tribal lands.''

INTRODUCTION

On November 11, 2011, the Pascua Yaqui Tribe[1] (the "Tribe") opened a new resort and conference center, a 161,000 square foot facility that was adjacent to the Tribe's existing casino. Prior to opening the Tribe's Casino del Sol Resort and Conference Center (the "Resort"), the Arizona Department of Gaming (the "Department") notified the Tribe that the Department was taking the position that the Resort was merely an expansion of the Tribe's existing casino and, therefore, the Resort was a "Gaming Facility" and subject to regulation under the Pascua Yaqui Tribe-State of Arizona Gaming Compact (the "Compact"). The Tribe disagreed, asserting that the Resort was a facility at which no gaming activity was taking place and, therefore, it was not a "Gaming Facility" as defined under the Compact. As such, the Tribe asserted further that the Resort was not subject to regulation under either the Compact or the Indian Gaming Regulatory Act ("IGRA").[2]

The Arizona Tribal-State Gaming Compacts provide for a binding arbitration process when there is a formal dispute between a tribe and the state regarding the interpretation of the Compact.[3] When the Department elected to file a Notice of Dispute under the Compact regarding the status of the Resort, the Department believed it was simply asking a three-person panel to decide whether the Resort was a "Gaming Facility" as that term was defined under the Compact.[4] In reality, the issue before the Panel was more profound than simply resolving a disagreement about the meaning of a defined term in the Compact.

The real issue before the Panel was whether IGRA granted power to the states to regulate tribal enterprises merely because an enterprise was ancillary to a tribal gaming operation. In reaching its decision, the Panel set forth what it believed were the limits on that authority under the Compact. Since the Panel issued its award in the dispute between the Tribe and the Department, the United States Department of Interior has issued two letters that further define the limits of state authority to regulate tribal enterprises that exist to support tribal gaming operations.

This article discusses the Panel's decision in the Pascua Yaqui Tribe-State of Arizona dispute, as well as what the recent Interior letters tell us about the

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[1]The Pascua Yaqui Tribe is located just southwest of the Tucson, Arizona metropolitan area.
[2]*See* COMMITTEE REPORT FOR INDIAN GAMING REGULATORY ACT, S. Rep. No. 100-446, at 14.
[3]Section 15(c) of 2003 of the Arizona Tribal-State Gaming Compacts.
[4]A three-member panel was chosen by the parties in October of 2011.

permissible limits on a state's authority to regulate ancillary non-gaming activities. The article goes on to argue that such power is extremely limited, but that through a process of exponential accretion, states have extended that authority beyond permissible limits. Finally, the article asserts that tribes should object to this improper extension of state regulatory authority, lest such power become accepted as a matter of custom.

FACTUAL BACKGROUND OF THE PASCUA YAQUI/STATE OF ARIZONA DISPUTE

Definition of ''Gaming Facility'' under both the 1993 and 2003 Arizona Compacts

Following the 1988 passage of IGRA, the Pascua Yaqui Tribe and the State of Arizona entered into the Tribe's initial Compact on June 24, 1993. That document defined the phrase "Gaming Facility" to mean "the building or structures in which *Class III Gaming,* as authorized by this Compact, is conducted."[5] The Tribe's 1993 Compact, as well as all other compacts between other Arizona tribes and the State, was scheduled to begin expiring in June 2003, if not renewed by the parties. In early 2002, the State of Arizona and 17 Arizona tribes came to agreement on a model compact that would be offered to all Arizona tribes. Thereafter, the State presented that model compact to the Arizona legislature for approval.[6] When the legislature failed to approve the model compact, the 17 tribes gathered the necessary signatures to put the model compact on the November 5, 2002 ballot as Proposition 202. Arizona voters approved Proposition 202 in November, and on January 9, 2003, the Tribe signed its 2003 Compact with the State. The definition of "Gaming Facility" did not change from the 1993 Compact to the 2003 Compact.[7]

The development of Casino Del Sol Resort and Conference Center

After signing its initial gaming compact in 1993, the Tribe operated a single casino known as the Casino of the Sun. On October 10, 2001, the Tribe expanded its gaming operations when it opened a new casino known as Casino Del Sol. The two casinos are approximately one-and-a-half miles apart, the minimum distance required by the Compact, and there is no lodging adjacent to the Casino of the Sun.

At the present time, there are 308 slot machines located at Casino of the Sun. Casino Del Sol offers a variety of Class III and Class II gaming to its customers. In the Class III area, it offers 956 slot machines, 22 table games, including blackjack and variations of poker, and a poker room. As for Class II gaming,[8] Casino Del Sol's bingo hall seats up to 600 players. All Class III gaming offered in Casino Del Sol is regulated under the 2003 Compact and that regulation was not at issue in the arbitration between the Tribe and the Department.

On November 11, 2011, the Tribe opened its new Resort. The Resort has 215 guest rooms, a spa, and 65,000 square feet of indoor and outdoor meeting and convention space. It also offers additional dining to its guests and visitors—critically, no gaming at all, let alone Class III gaming, takes place in the Resort.

The Tribe was transparent in its communications with the Department regarding the development of the Resort and the Tribe's belief that the Resort was not a gaming facility. The Tribe first notified the Department of its plans to build the Resort in October 2009, and the parties met on four separate occasions to discuss the Resort. At these meetings, the Department consistently stated its belief that the Resort is a gaming facility and that the Department intended to regulate the Resort as if it were a building or structure in which Class III gaming is conducted.

On July 7, 2011, the Tribe provided a copy of the Tribal Enterprise Ordinance and Regulations (the "Enterprise Ordinance") enacted by the Tribe as the regulatory scheme under which the Tribe planned to operate the Resort. The Enterprise Ordinance required employee background checks and contained a number of other provisions designed to ensure the safety and security of resort guests and their

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[5]Section 2(n) of the 1993 Pascua Yaqui Tribe-State of Arizona Gaming Compact (emphasis added).

[6]The 17 Tribes that participated in the negotiations with then Arizona Governor Jane Hull were the following: Gila River Indian Community, Kaibab-Paiute Tribe, Cocopah Tribe, Fort Mojave Indian Tribe, Salt River Pima-Maricopa Indian Community, White Mountain Apache Tribe, Yavapai Apache Nation, Pascua Yaqui Tribe, Hualapai Tribe, Tonto Apache, Ak-Chin Indian Community, Quechan Indian Tribe, Tohono O'odham Nation, Fort McDowell Yavapai Nation, the San Carlos Apache Tribe; the Colorado River Indian Tribes; and the Yavapai-Prescott Indian Tribe.

[7]2(n) of 2003 Pascua Yaqui Tribe-State of Arizona Gaming Compact.

[8]Pursuant to IGRA, states have no regulatory authority over Class II gaming.

property, including providing for tort remedies for patrons of the Resort.[9] After initially informing the Tribe that it had unspecified issues with the Enterprise Ordinance, the Department notified the Tribe on September 9, 2011, that it was instituting the dispute resolution process under Section 15(c) of the Compact to arbitrate the status of the Resort as a gaming facility.

THE PARTIES' LEGAL ARGUMENTS

The Department's position

Before the arbitration panel, the Department took the position that the definition of a gaming facility found in the Compact—"the building or structures in which Class III Gaming, as authorized by this Compact, is conducted"[10]—is clear, unambiguous, and not reasonably susceptible to the Tribe's interpretation. The Department asserted that a gaming facility was the entirety of the buildings and structures where gaming takes place, and not just those portions where patrons are actually gaming. Regarding the Resort, the Department argued that the hotel and conference center were seamlessly linked to the gaming floor, without physical barriers or distance to alert patrons that they were leaving a non-gaming area and entering a gaming facility. The Department did not stop there, however, and it further asserted that the Tribe's amphitheater and soon-to-be-opened golf course were also part of the gaming facility because if it were not for the casino, those tribal enterprises would not exist.

In support of its position, the Department pointed to cases where an expansion to include patron amenities was found to be an expansion of the gaming facility. For example, in *State v. Glusman*,[11] the Nevada Gaming Commission wanted to license the owner of a dress shop operation on the premises of the casino Las Vegas Hilton and Stardust hotels. The shop owner argued that the statute permitting the regulation of casinos did not extend to him. The Supreme Court found otherwise, holding that the fact that his business was located within a casino subjected him to the licensing requirements of the Nevada Gaming Control Act.[12]

The Department also pointed to an unreported, and therefore non-precedential, case involving the Picayune Rancheria of Chukchansi Indians and the County of Madera, California.[13] In that matter, a judge for the Northern District of California found that an expansion of an existing casino to add more hotel rooms and suites, *some of which were designated for private table gaming*, fell within the definition of "Gaming Facility" in the Compact between the Picayune Rancheria and the State of California.[14]

Finally, the Department claimed that its position was supported by the express language of IGRA. In particular, the Department noted that § 2710(d)(3)(c)(vi) provides that "[a]ny Tribal-State compact…may include provisions relating to…standards for the operation of such activity and maintenance of the gaming facility, including licensing." Because subsection (c)(vi) does not require that regulation be "directly related" to gaming, the Department argued it was permissible for the Department to regulate any activity or location, so long as that activity or location exists to support a tribal gaming enterprise in some fashion. In other words, the Department was articulating a "but for the existence of Class III gaming operations" test to determine if any building or activity of a tribe is subject to state regulation under IGRA.[15]

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[9]Pascua Yaqui Tribe's 2011 Tribal Enterprise Ordinance and Regulation.

[10]2(n) of 2003 Compact.

[11]651 P.2d 639, 647–48 (Nev. 1982).

[12]It is important to note that this case is not a case involving the delicate balance between two sovereigns under the statutory provisions of IGRA, but rather, the State of Nevada exercising its exclusive regulatory authority over a commercial casino operation.

[13]2007 WL 397412 (Feb. 1, 2007).

[14]The definition of "Gaming Facility" found in California's Compact with the Picayune Rancheria is broader than the definition contained in the Arizona Compacts. In the California Compact, a "Gaming Facility" is defined as: "any building in which Class III gaming activities or gaming operations occur, or in which the business records, receipts, or other funds of the gaming operation are maintained (but excluding offsite facilities primarily dedicated to storage of those records, and financial institutions), and all rooms, buildings, and areas, including parking lots and walkways, a principal purpose of which is to serve the activities of the Gaming Operation, provided that nothing herein prevents the conduct of Class II gaming (as defined under IGRA) therein. *See* Compact, sec. 2.8.

[15]The Ninth Circuit has given approval to this "But For" test in a matter involving the labor provision of the model tribal-state gaming compact in California. In *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1116 (9th Cir. 2003), the Court of Appeals found that labor organizing provisions in the Compact were directly related to gaming operations and, therefore, enforceable because without the gaming operations, the job in issue would not exist. Again, though, the California Compact's definitions are broader than what we have in the Arizona Compact.

The Tribe's position

The Tribe acknowledges that there was no question that the Department has the authority to regulate Class III gaming that occurs in a Gaming Facility located on the Tribe's land.[16] Because no Class III gaming was taking place within the Resort, it was the Tribe's position that the Resort was not a gaming facility as defined by the Compact and, therefore, not subject to regulation by the Department. The Tribe believed that the Department was trying to expand its regulatory authority over Class III gaming to the Resort, an ancillary non-gaming tribal business, and that such overreaching by the Department was not contemplated or provided for by either IGRA or the Compact.

The Tribe asserted that IGRA was intended to present a careful balancing of state and tribal interests regarding the regulation of gaming.[17] Moreover, the Tribe noted that IGRA's legislative history made clear that Congress did not "intend that compacts be used as a subterfuge for imposing state jurisdiction on tribal lands."[18] Further, Congress stated that compacts should not be "precedent for any other incursions of state law on Indian lands," and that compacts should only include provisions that are "directly related to gaming."[19] In short, when Congress enacted IGRA, it intended to provide a legal framework within which tribes could engage in gaming while setting boundaries to restrain aggression by powerful states.[20]

True to congressional intent, IGRA explicitly limits the extension of state authority onto tribal reservations to those issues "directly related to, and necessary for, the licensing and regulation of gaming activities."[21] To that end, IGRA provides for carefully restricted negotiations between tribes and states, and it stresses that gaming compacts may cover only gaming and "any other subjects that are directly related to the operation of gaming activities."[22] Because IGRA is a congressionally created exception to the general rule that states have no regulatory authority over tribal activities on tribal lands, the Tribe asserted that it must be read narrowly and should not be read to permit the Department to regulate a non-gaming ancillary tribal business, such as the Resort.[23]

The Tribe summed up its position by noting that the Compact permits the Department to regulate the Tribe's casino because the casino is a facility in which Class III gaming is taking place.[24] The Resort, in contrast, is a hotel, spa, and conference center complex in which no gaming of any kind is offered by the Tribe. Nowhere in the Compact did the Tribe consent to regulation by the Department of any non-gaming tribal business, such as the Resort, and IGRA most assuredly does not permit the Department to regulate non-gaming activities, nor should it be read to allow for such an expansion of authority by the Department.[25] According to the Tribe, the absence of both Class III gaming within the Resort and of any expressed consent by the Tribe to permit the Department to regulate the Resort in the Compact, precluded the Department from asserting legal authority over the Resort.[26]

THE PANEL'S AWARD

The panel of arbitrators agreed on by the Tribe and the Department included two former chief

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[16]Section 4(a) of 2003 Compact.

[17]S. Rep. No. 100-446, at 1–2 (1988) ("[T]he issue has been how best to preserve the right of tribes to self-government while, at the same time, protect both the tribes and the gaming public from unscrupulous persons"). ("This legislation is intended to provide a means by which tribal and state governments can realize their unique and individual government objectives").

[18]*Id.* at 14; *see also Salt River Pima-Maricopa Indian Community v. Hull,* 190 Ariz. 97, 102, 945 P.2d 818, 823 (S. Ct. 1997) ("Absent IGRA, tribes were free to use their land for any purpose not prohibited by federal law and permitted by tribal law. IGRA, in fact, requires a tribe to relinquish tribal sovereignty by requiring it to negotiate and compact with respect to gaming activities").

[19]S. Rep. No. 100-446 at 14, 18.

[20]*Rincon Band of Luiseno Mission Indians v. Schwarzenegger,* 602 F.3d 1019, 1027 (9th Cir. 2010).

[21]25 U.S.C. § 2711(d)(3)(c)(i).

[22]25 U.S.C. § 2711(d)(3)(c)(i)–(vii).

[23]*See* Felix S. Cohen, Handbook of Federal Indian Law § 6.04[2] (2005 ed.) ("federal laws delegating jurisdiction to states detract from tribal self-government, and thus should be construed in accordance with cannons of construction designed for laws with those effects"); *see also Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1060 (1997) (implied promises will not be read into compacts and a state's authority over Class III gaming is limited to the express term found within the compact).

[24]Sections 4, 5, and 11 of 2003 Compact.

[25]*See Rincon Band of Luiseno Mission Indians v. Schwarzenegger,* 602 F.3d at 1027 ("In passing IGRA, Congress assured tribes that the statute would always be construed in their best interests").

[26]*See Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 538 (9th Cir. 1995) (a state has no regulatory authority over Class III gaming unless consented to in a tribal-state compact).

justices of the Arizona Supreme Court and the former dean of the Arizona State School of Law.[27] The Panel toured the Resort and adjacent casino, and held five days of evidentiary hearings. The Panel heard testimony from a distinguished group of witnesses, including Kevin Washburn (then the dean of the New Mexico School of Law, before he was nominated to the position of assistant secretary of the Interior) and Philip Hogen, former chairman of the National Indian Gaming Commission.[28]

The Panel, in its Award, began its discussion of the dispute by noting that the Resort (again, which included a hotel, spa, and conference center) was physically connected to Casino Del Sol (the "Casino"), a facility in which Class III gaming was conducted.[29] The Panel then took the time to describe the physical layout of the Resort and Casino:

> One may pass between the hotel and the gaming floor, between the conference center and the gaming floor, and between the hotel and the conference center, through a centrally located and partly newly-constructed "pre-function" room. The pre-function room opens directly onto the gaming floor through a wide doorless opening; it opens onto the hotel lobby through a separate wide doorless opening, which is set at a ninety-degree angle from the opening to the gaming floor; and it is connected to the conference center by a set of several side-by-side glass doors which are also set at a ninety-degree angle from the opening to the gaming floor. The glass doors to the conference center are to the left of, and approximately 100 feet away from, the opening to the gaming floor, and the opening to the hotel lobby is to the right of, and approximately 50 feet away from, the opening to the gaming floor.[30]

In essence, the Panel was agreeing with the Department that there is a seamless ingress and egress between the Resort and the Casino.

In trying to determine whether the Resort, or any portions thereof, should be considered as a gaming facility, the Panel turned first to the definition in the Compact.[31] The Panel found that the definition—"the building or structures in which Class III Gaming, authorized by this Compact, is conducted"—was wholly inadequate in trying to resolve the question of whether the Resort was a gaming facility.[32]

Although the Panel found it a relevant factor that the Resort was physically connected to the Casino, that fact was not determinative regarding the question of whether the Resort and Casino should be considered one "building" or "structure" under the Compact.[33] For example, the Panel noted that townhouses often share common walls, and two adjoining townhouses might reasonably be considered to constitute one building or structure, but they might just as reasonably be considered to constitute two buildings or structures.[34] Further, the Panel stated that although the fact that an interior passageway would be a relevant factor, again stated that this fact would not be determinative.[35]

Having found the definition of "Gaming Facility" in the Compact wanting, the Panel next turned to custom and usage, looking to see how the Department treated other tribes with hotels that were physically connected to their casinos.[36] The Panel noted that "[i]f there were a consistent understanding or practice throughout the State with regard to how to determine whether the non-gaming portions of these complexes are or are not 'Gaming Facilities,' that practice might well be determinative…."[37] However, the Panel found that the Department was inconsistent in how it treated tribal complexes that consist of physically connected resort-gaming facilities.[38] For example, the Panel

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[27]The former chief justices were Frank X. Gordon, Jr. and Charles E. Jones. The former dean of the law school was Paul Bender.

[28]Moreover, the Panel reviewed an affidavit submitted by I. Nelson Rose on behalf of the Tribe. I. Nelson Rose is a full professor with tenure at Whittier Law School and visiting professor at the University of Macau. Professor Rose is an internationally known scholar and public speaker and is recognized as an authority on national and international gaming law, including casinos, lotteries, racetracks, bingo, and Internet gambling. He often acts as a consultant and expert witness, testifying in administrative, civil, and criminal cases.

[29]Arbitrators' award in *Arizona v. Pasqua Yaqui Tribe* (Apr. 23, 2012) (the "Award"), at 3.

[30]*Id.* at 3–4.

[31]*Id.* at 4–5.

[32]*Id.* at 5.

[33]*Id.*

[34]*Id.* at 5–6.

[35]*Id.*

[36]*Id.* at 6.

[37]*Id.*

[38]*Id.*

pointed out that while the Department took the position that some parts of the Tohono O'odham Nation's Desert Diamond Resort and Harrah's Ak Chin Resort were part of the gaming facility, other portions of the complexes, in which no gaming was conducted, were not treated as a gaming facility.[39] Conversely, all portions of the physically connected Gila River Tribe's Wild Horse Pass Hotel and Casino and the Tonto Apache's Resort and Hotel, regardless of the locations where gaming was taking place, were treated by the Department as constituting the gaming facility.[40]

To resolve the issue of whether the Tribe's Resort was a gaming facility, the Panel decided to look at the "practical consequences of affixing the 'Gaming Facility' label to the various portions of the Pascua Yaqui complex."[41] The Panel noted that one consequence of treating the Resort as a gaming facility was that the Department, as well as the Tribe's Tribal Gaming Office ("TGO"),[42] would have the right to enter and inspect all areas of the Resort whenever they wished to do so, entirely at their own discretion.[43] According to the Panel, this broad and essentially unlimited authority was granted to the Department and the TGO so that the TGO can carry out its "responsibility for the regulation of all Gaming Activities pursuant to the Tribe's Gaming Ordinance," and so that the Department may "monitor the Tribe's Gaming Operation to ensure that the operation is conducted in compliance with the provisions of the Compact."[44]

The Panel found it difficult, if not impossible, that such virtually unlimited right-of-inspection provisions in the Compact were intended to apply to areas of tribal gaming-resort complexes operated as hotels, in which no gaming of any kind is conducted.[45] For example, the Panel stated that it made no sense for the Department and the TGO to have immediate access to the Resort's guest rooms, and to be entitled to enter such guest rooms entirely at their own discretion.[46] In other words, the Panel said if the entire Resort was found to be a gaming facility, then the Department could enter a guest's room at any time "with no notice to the occupants of the room and no probable cause, or even suspicion, to believe that any illegal or questionable activity is or has been taking place within" the room.[47]

Although the Panel determined that these unlimited powers of inspection and search made sense when applied to areas where gaming was actually taking place, or to spaces in which gaming-related funds or devices were kept, they made "no sense if applied to hotel rooms and other non-public hotel-related spaces, such as hotel laundries and linen storage rooms, occupied and used exclusively by hotel guests, chambermaids and other non-gaming-related hotel-service employees."[48] As such, the Panel found that the hotel, spa, and pool portions of the Resort were not part of the gaming facility and, therefore, not subject to regulation by the Department.[49]

Applying this same line of reasoning, the Panel found that two sections of the Resort were to be considered part of the gaming facility. The first was the pre-function room. The Panel noted that the Tribe's schematic of the Resort labeled half of the pre-function area as a "gaming" area.[50] Moreover, when the Panel toured the Resort, there were several slot machines present in the pre-function room.[51] Accordingly, the Panel concluded that the entire pre-function room was a "Gaming Facility" within the meaning of the Compact.[52]

Although no gaming activity was taking place in the conference center, the Panel still found that it was part of the gaming facility.[53] The Panel reached this conclusion based on the fact that the food served in the conference center was food prepared

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[39] *Id.*
[40] *Id.* at 7.
[41] *Id.*
[42] The Tribal Gaming Office (TGO) is the tribal regulatory agency tasked with regulating Class II gaming with oversight from the National Indian Gaming Commission; TGO also regulates Class III gaming.
[43] *Id.*, citing sections 6(d)(2) ("the right to inspect any Gaming Facility at any time" and "immediate access to any and all areas of the Gaming Facility"), 7(a)(1) ("free and unrestricted access to all public area[s] of a Gaming Facility during operating hours without giving prior notice to the Gaming Facility Operator"), and 7(a)(3) (regarding non-public areas, "Agents of the [Department] shall be entitled to enter" those areas so long as the Department gave "advance notice to the Tribal Gaming Office" and "provide proper identification to the senior supervisory employee of the Gaming Facility on duty and to the Tribal Gaming Office inspector on duty") of the Compact.
[44] *Id.* at 8.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 9.
[48] *Id.*
[49] *Id.* at 9, 18.
[50] *Id.* at 10.
[51] *Id.*
[52] *Id.*
[53] *Id.*

in the casino's Master Kitchen,[54] and the buffet was considered part of the gaming facility.[55] Moreover, the same wait staff that worked in the buffet also delivered food to the conference center.[56] Because the conference center shared a common kitchen and hallway with the Casino, and because the conference center was not a space in which conference participants were likely to have an expectation of privacy, the Panel determined that it seemed appropriate, perhaps in an excess of caution, to treat the conference center as a Gaming Facility within the meaning of the Compact.[57]

THE DEPARTMENT OF INTERIOR LETTERS

Letter To Pascua Yaqui Chairman Peter Yucupicio

Shortly before it sent notice to the Tribe that it was initiating the dispute resolution process under the Compact, the Department offered to resolve its dispute with the Tribe in a memorandum of understanding ("MOU") that, in essence, amended the Tribe's Compact to permit the Department to regulate activities beyond those which are directly related to the operation of gaming activities. The Department informed the Tribe that it had settled similar disputes regarding casino-resort complexes by convincing other Arizona tribes to sign the MOU.[58] The Tribe refused to sign the MOU.

Under IGRA, the Department of the Interior ("Interior") is tasked with determining whether a Compact violates IGRA. Due to the fact that IGRA vests the Interior with this responsibility, the Tribe decided to seek guidance regarding the MOU from the Department of Interior itself. On January 31, 2012, Pascua Yaqui Tribal Chairman Peter Yucupicio wrote to then Assistant Secretary–Indian Affairs Larry Echo Hawk and asked Interior to answer two questions.[59]

First, the Tribe asked if it was proper for the Department to ask the Tribe to sign an MOU that would substantively amend the Tribe's Compact without seeking approval of the Secretary of the Interior.[60] Second, the Tribe asked whether the terms of the proposed MOU impermissibly included provisions seeking to permit the Department to regulate Tribal activities not directly related to the operation of gaming activities.[61] The Tribe's letter was forwarded to the Department of the Interior's Office of Gaming. The Office of Gaming ("OIG") periodically provides technical assistance to states and tribes regarding compact negotiations. OIG's assistance focuses on sharing the Interior's past compact decisions, directing parties to case law involving compact disputes, and responding to inquiries regarding the Interior's review process.

On June 15, 2012, nearly two months after the Panel issued its award,[62] the Interior responded to Chairman Yucupicio's letter.[63] Regarding the issue of whether it was necessary for the Interior to approve of the proposed MOU between the Department and the Tribe amending the Tribe's Compact, the Director of Interior's Office of Indian Gaming, Paula L. Hart, wrote that the Interior's published regulations governing Class III tribal-state gaming compacts require that "[a]ll [compact] amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary."[64] Accordingly, Ms. Hart stated that the secretary must review and approve all amendments to gaming compacts, and it was of no consequence that such a document was titled "memorandum of understanding" or something else.[65] Ms. Hart concluded by stating that "[a]bsent Secretarial review and approval of an amendment to a compact, and publication of the notice of approval in the Federal Register, it would have no force or effect under IGRA."[66]

Regarding the provisions of the proposed MOU extending the Department's regulatory authority to

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[54]The Casino's Master Kitchen prepares food for the Casino's buffet, the conference center, and other areas of the property.
[55]*Id.*
[56]*Id.* at 11.
[57]*Id.*
[58]When the Department of the Interior issued its approval letter to the Arizona governor and the Arizona tribes, regarding the 2003 Compact, the letter explicitly stated that additional addendums need to be approved by Interior. This guidance effectively put the State on notice that any change to the Compact would need to be reviewed by Interior to ensure that its provisions complied with the IGRA.
[59]Letter from Chairman Yucupicio to Assistant Secretary Echo Hawk (Jan. 31, 2012).
[60]*Id.*
[61]*Id.*
[62]The Tribe moved the Panel to continue the arbitration until the Interior responded to the Tribe's request for guidance. The Department objected and the Panel concluded that the arbitration should continue.
[63]Letter from Paula L. Hart, Director, Office of Indian Gaming, to Chairman Yucupicio (June 15, 2012).
[64]*Id.* at 2, citing to 25 C.F.R. § 293.4(b).
[65]*Id.*
[66]*Id.*

non-gaming activities, Ms. Hart pointed out that in passing IGRA, Congress specifically limited the intrusion on the right of tribal self-governance on the part of aggressive and powerful states.[67] In particular, Congress limited the scope of state regulatory authority to subjects that are directly related to the operation of gaming activities.[68] In reviewing a proposed compact to determine if a particular provision adheres to the requirement that state authority only extends to gaming activities, Ms. Hart reported that the Interior does not simply ask, "but for the existence of the Tribe's Class III gaming operation, would the particular subject regulated under a compact provisions exist?"[69] According to Ms. Hart, if the question were asked in this manner, then "it would permit states to use tribal-state compacts as a means to regulate tribal activities far beyond that which Congress intended when it originally enacted IGRA."[70]

Ms. Hart then noted that as 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."[71] Although these business are often located near or directly adjacent to tribal gaming facilities, Ms. Hart asserted that it does not follow that such ancillary businesses are directly related to the operation of gaming activities and therefore subject to regulation through a tribal-state compact.[72] Ms. Hart concluded by stating that unless Class III gaming is conducted within a business or the parties to a compact can demonstrate particular circumstances establishing a direct connection between the business and Class III, gaming activities, it is impermissible for states to regulate these ancillary activities under a tribal-state gaming compact.[73]

Based on recent proposed compact reviews, the Department of the Interior has provided tribes and states with more direct guidance on its view of what compact provisions it considers outside of the subjects contained in 25 U.S.C. § 2710(d)(3)(c), as well as weighing in on revenue sharing provisions that are more accurately described as an impermissible tax.

LETTER TO MASSACHUSETTS GOVERNOR DEVAL PATRICK

On August 31, 2012, the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts submitted a Tribal-State Class III Gaming Compact to the Department of Interior for approval.[74] Pursuant to the authority granted to the Interior under IGRA, on October 12, 2012, Assistant Secretary–Indian Affairs Kevin Washburn notified Massachusetts Governor Deval Patrick that the Interior was disapproving the proposed compact for several reasons.[75] According to Assistant Secretary Washburn, the principle reason that the Interior was rejecting the proposed Compact was that the revenue-sharing provisions of the Compact provided such a significant share of the Tribe's gaming revenue to the Commonwealth that it undermined the central premise of IGRA that Indian gaming should primarily benefit tribes.[76]

According to Assistant Secretary Washburn, a secondary reason for disapproving the compact was that the Commonwealth had attempted to use the compact negotiation process to resolve issues relating to the Tribe's hunting and fishing rights and land claims, all of which were in clear contravention to IGRA's express limitation that gaming compacts only address matters directly related to gaming.[77] Finally, and germane to this article, Assistant Secretary Washburn stated that the Interior rejected the Compact because the Commonwealth had sought authority over several activities not related to gaming,

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[67] *Id.* at 4, citing *Rincon Band v. Schwarzenegger,* 602 F.3d 1019 (9th Cir. 2010) (citing S. Rep. No. 100-446, at 33 (1988) (statement of Sen. John McCain)).
[68] *Id.* at 5, citing 25 U.S.C. § 2710(d)(3)(c)(vii).
[69] *Id.* at 5.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] In its letter to Chairman Yucupicio, Interior cited to its disapproval of a proposed tribal-state compact that would have allowed Wisconsin to restrict the Stockbridge-Munsee Community of Mohican Indians from using the proposed gaming site for any purpose other than Class III gaming (*see* Letter from Donald Laverdure, Principal Deputy Assistant Secretary—Indian Affairs, to Kimberly Vele, President of the Stockbridge-Munsee Community (Feb. 18, 2011)) and its severance of a provision in the gaming compact between Kialagee Tribe and Oklahoma regarding tobacco taxes as not directly related to gaming activities (*see* Letter from Larry Echo Hawk, Assistant Secretary—Indian Affairs, to Tiger Hobia, Mekko of the Kialagee Tribal Town (July 8, 2011)), as examples of impressible attempts to regulate ancillary businesses.
[74] *See* Letter from Assistant Secretary—Indian Affairs Kevin Washburn to Governor Deval Patrick (Oct. 12, 2012).
[75] *Id.*
[76] *Id.* at 1, 4–5, 11–17.
[77] *Id.* at 1, 7–9.

such as regulation of non-gaming suppliers, ancillary entertainment services, and ancillary non-gaming amenities.[78]

One of the provisions of the proposed Compact addressed the regulation of "Non-Gaming Suppliers," which was defined to mean "any Person other than a management contractor or employee of the enterprise, who sells, leases or provides good or services to the Enterprise for the operation of the facility, which are not used by the Enterprise in the operation of compact games."[79] Moreover, the Compact further provided that the Tribe could not conduct business with any non-gaming supplier unless that supplier was registered with the tribal gaming office.[80] Specifically, the Compact identified construction companies, vending machine providers, linen suppliers, garbage handlers, and facility maintenance companies as non-gaming suppliers.[81]

In analyzing the section of the Compact, Assistant Secretary Washburn acknowledged that the type of activities sought to be regulated by this section of the Compact were at least tangentially related to the Tribe's gaming operation.[82] That said, Assistant Secretary Washburn stated that the Interior could not conclude that vending machine providers and linen suppliers, for example, implicate the integrity of the Tribe's gaming activities, nor could the Interior conclude that regulating such non-gaming suppliers implicates the state interest which Congress sought to protect through IGRA's compacting provisions.[83] Assistant Secretary Washburn further stated that if the Interior were to approve this particular provision of the Compact, it would extend the Commonwealth's regulatory authority beyond what Congress had allowed, potentially subjecting tribal citizens and businesses to impermissible state regulation and inhibiting the Tribe's ability to promote economic development and employment within its own community by entering into vendor contracts.[84] Given that the Compact provisions expressly acknowledged that the goods and services sought to be regulated were not used in the operation of gaming, Assistant Secretary Washburn stated that the Interior had concluded that these provisions of the Compact extended beyond the prescribed subjects of negotiation permissible under IGRA, and therefore, violated IGRA.[85]

Another portion of the proposed Compact that the Interior found in violation of IGRA was the section which required that the construction, maintenance, and operation standards of "ancillary entertainment services" and "non-gaming ancillary amenities" that the Tribe developed in support of its gaming operation comply with the requirements of the National Environmental Policy Act and applicable commonwealth laws.[86] After noting that it does not necessarily follow that ancillary businesses are directly related to the operation of gaming activities, and therefore, are subject to regulation through a tribal-state compact, Assistant Secretary Washburn asserted that the Interior does not view such businesses and amenities as "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.[87]

Assistant Secretary Washburn then pointed out that the Compact precludes the Tribe from conducting any Class III gaming activities unless it satisfies the prescribed regulatory requirements related to infrastructure improvements to ancillary facilities "in the vicinity" of the gaming operation—without regard as to whether those ancillary businesses are "directly related to the operation of gaming activities."[88] As such, the Interior determined that this section of the Compact impermissibly granted state regulatory authority over businesses and amenities that were ancillary to gaming activities, and therefore, violated IGRA.[89]

CONCLUSION

Several insights about the ongoing tug of war between the desire of states to increase their regulatory

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[78] *Id.* at 1–2.
[79] *Id.* at 9; *see also* section 3.42 of Proposed Compact between the Mashpee Wampanoag Tribe and Commonwealth of Massachusetts.
[80] *Id.* at 9; *see also* section 7.7.2 of proposed Compact between Mashpee Wampanoag Tribe and Commonwealth of Massachusetts.
[81] *Id.*
[82] *Id.* at 9.
[83] *Id.* at 10.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 10; *see also* Compact section 5.4.11.
[87] *Id.* at 11.
[88] *Id.*
[89] *Id.*

power and the Tribes' responsibility as a government to provide economic development and services to its members come from the foregoing discussion. As discussed above, the legislative history of IGRA makes it clear that Congress intended to prevent compacts from being used as a subterfuge for imposing state jurisdiction on tribes concerning issues unrelated to gaming.[90]

Unfortunately, while the powers of the states are extremely limited by IGRA,[91] tribes have acquiesced, through the compact negotiation process and other less formal agreements,[92] to state regulatory authority in areas not contemplated by Congress. For the most part, tribes have agreed to this increased intrusion by the states as a trade-off for a gaming compact, mainly due to the widely accepted perception of the power of the states to stand in the way of a tribe offering Class III gaming unless it agrees to the states' demands.[93] In addition, the Interior has allowed compacts to take effect without secretarial approval[94] and did not disapprove of compacts due to the economic motivation of the tribes. For example, tribes have been willing to accept less economic benefits in compact provision negotiations in exchange for the opportunity to offer Class III gaming, because they do not want to suffer a significant competitive disadvantage by only offering Class II gaming while other tribes provide Class III games.[95] These concessions[96] come at the expense of the tribes whose choices are constrained by their need, as a government, to provide for their tribal members.

Despite the Interior's responsibility under IGRA to disapprove compacts that cover topics outside of Congress' intended compact provisions, they have provided tribes with their analysis and simply allowed compacts to become effective through the passage of time.[97] In other words, under prior Administrations, the Interior has unwittingly enabled states to over-reach by not disapproving compacts. This over-reaching on the part of the states is not what Congress intended when it delineated the states' authority and provided an avenue for tribes to agree to a limited waiver of tribal sovereignty in exchange for the right to game on Indian lands.

In the absence of a push back from tribes to the states' increased regulatory scope creep, states will use their regulatory strength to capture more and more jurisdiction over ancillary non-gaming activities. Such a scheme is a tremendous trespass on tribal sovereignty and tribal right to expand economic development and provide jobs and opportunities to tribal members. We must not forget that the over-arching goal of Congress in enacting the IGRA was to promote tribal economic development, tribal self-sufficiency, and strong tribal government.[98]

Thankfully, it appears that this might be changing, as evidenced by the Interior's recent disapproval of the proposed compact with the Mashpee Wampanoag Tribe. In its disapproval letter to Massachusetts Governor Deval Patrick, Assistant Secretary Kevin Washburn explained that the proposed compact provisions related to revenue sharing were so skewed to the benefit of the Commonwealth that they undermined the central premise of IGRA—that Indian gaming should primarily benefit tribes. Assistant Secretary Washburn also rejected the proposed compact because of a similar regulatory scope creep that the Pascua Yaqui had experienced in their recent dispute with the State of Arizona. The Interior's vocalization of the inappropriateness of the Commonwealth's proposed regulatory scope creep will hopefully put both tribes and the states on notice that IGRA did not anticipate providing states with authority over ancillary, non-gaming Tribal economic development ventures.

Furthermore, tribes need to take matters into their own hands and challenge any proposed scope creep by the states. As the State of Arizona witnessed in the Pascua Yaqui matter, a comprehensive review

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[90] *See* S. Rep. No. 100-446, at 14 (1988).

[91] *See* 25 U.S.C. § 2710(d)(3), which restricts the proper topics for compact negotiations.

[92] For example in Arizona, some tribes have engaged in memorandums of understanding ("MOUs") with the Department of Gaming that have provided the State with expanded regulatory authority. These MOUs, although more accurately described as compact amendments, are conducted outside of the compact approval process and thereby effectively evade review by the Interior.

[93] This has occurred in part because Congress has not addressed the issue created by the *Seminole* case. Specifically, *Seminole* held that states were protected by the Eleventh Amendment from being sued without their consent by tribes in federal court. *See Seminole Tribe v. Florida,* 517 U.S. 44 (1996).

[94] Pursuant to Section 11 of the IGRA.

[95] *See* Letter from United States Department of the Interior to the Honorable Emily Bernadette Huber, Chairperson, Iowa Tribe of Oklahoma (Jan. 6, 2006).

[96] It is important to note that tribes agree to these concessions because they cannot afford to postpone the revenue stream of gaming to participate in protracted compact negotiations which could continue for years.

[97] Pursuant to section 11 of IGRA.

[98] *See* 25 U.S.C. § 2710(4).

of IGRA provisions does not allow states regulatory jurisdiction over ancillary non-gaming tribal economic development projects. Fortunately for the Pascua Yaqui Tribe, their compact with the State of Arizona included a provision that allowed either party to notice a dispute and proceed to arbitration if the parties were unable to mediate their disagreement.[99]

The arbitration remedy allowed the Tribe to have an independent tribunal decide whether or not the State of Arizona was attempting to exercise regulatory authority in ancillary non-gaming tribal ventures. As was discussed above, the Panel's Award, which was binding, held that the Tribe's hotel, although connected to the casino, was not a gaming facility, and therefore, was not subject to the State's regulatory jurisdiction. Of note is that other Arizona tribes, in the past, had acquiesced to the State's jurisdiction of their hotels,[100] under facts similar to the Pascua Yaqui Tribe.

This arbitration example is evidence that tribes need to be proactive against the states attempted over-reaching. When Congress provided for a limited waiver of tribal sovereignty in order to offer Class III gaming on tribal lands, Congress did not provide the state with limitless authority. Tribes must be diligent in protecting their sovereignty and challenging state jurisdiction in areas not authorized by IGRA's delineated compact negotiation provisions.[101] The tribes' active sentinel participation,[102] coupled with the Interior's current focus on policing proposed compacts for state over-reaching, should help ensure that the tribes' limited waiver of sovereignty remains just that—limited.

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[99] *See* section 15(c) of the 2003 Pascua Yaqui Tribe-State of Arizona Gaming Compact.

[100] As discussed above, the State of Arizona has entered into MOUs with tribes which provided for state jurisdiction over ancillary non-gaming tribal ventures. In January 2012, the Pascua Yaqui Chairman submitted a letter to the Interior requesting guidance as to the validity of these MOUs. The Interior, in its June 15, 2012 response, stated that the Interior views these MOUs as compact amendments that require secretarial review.

[101] However, this diligence comes at a dear price, because litigation is expensive and it deprives tribes of necessary funds that are needed for tribal services to its members.

[102] While litigation is costly and involves re-directing limited tribal funds away from tribal member services, including healthcare, education, and housing, there are other less costly ways for Tribal Councils to protect tribal sovereignty and prevent states from over-reaching. As discussed above, the Interior is tasked with providing tribes guidance on whether a compact violates IGRA. As indicated in the Interior's response to the Pascua Yaqui Chairman, the Interior's Office of Indian Gaming is available to furnish tribes and states with technical assistance regarding compact negotiations. Even though their guidance is limited to past compact decisions, case law, and the procedural process, their input can help clarify the acceptable discussion points related to compact provision negotiations.