Indian Gaming and Tribal Self-Determination

Reconsidering the 1993 Tribal-State Gaming Compacts

By Zeke Fletcher

In a few short years, the seven Michigan Indian tribes who are signatories to the first wave of gaming compacts with the state of Michigan under the Indian Gaming Regulatory Act (IGRA)[1] in 1993 will begin the process of renewing or even renegotiating those seminal agreements. The 1993 compacts resulted from a consent judgment reached between the tribes (Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Sault Ste. Marie Tribe of Chippewa Indians, and Saginaw Chippewa Indian Tribe) and the state in *Tribes v Engler,* and have a 20-year term.[2] These compacts allow Indian tribes to engage in casino-style gaming, such as slot machines, poker, craps, and other games.

The coming negotiations will allow the seven compacting tribes and the state to re-imagine and restructure Indian gaming in Michigan with regard to the changing economic and political realities of Michigan Indian country.

Indian Gaming in Michigan and Revenue Sharing

The 1993 compacts were among the first Indian gaming compacts nationally to provide for the sharing of gaming revenues with a state government. In 1988, Congress declared the policy behind enacting IGRA as providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[3] Nowhere in IGRA did Congress manifest an intent for state governments or local governments to benefit from Indian gaming or be provided a share of Indian gaming revenue. In fact, IGRA specifically prohibits any state from imposing a tax or refusing to enter into negotiations based on the state's lack of authority to tax Indian gaming revenue.[4]

But IGRA contained a fundamental, almost fatal flaw: the Eleventh Amendment prohibits tribes from bringing suit in federal court to force a state to negotiate in good faith, a circumstance confirmed by the Supreme Court in *Seminole Tribe v Florida* in

1996.[5] The compromise that the Michigan tribes and the state reached in 1993 allowed for "revenue sharing"—8 percent of net win going to the state and 2 percent going to local units of government. Considering IGRA's ban on state taxation of Indian gaming, this revenue-sharing provision probably violated IGRA, but the tribes and the state entered into the agreement as the settlement of a lawsuit, giving the provision the force of a federal court order.

The relevant language provided in the stipulation states, in part:

> [S]emi-annual payments [are to be made] to any local unit of state government in the immediate vicinity of each tribal casino in the aggregate amount equal to 2 percent of the net win at each casino…and…each tribe shall determine which local unit or units of government shall receive payments…for impacts associated with the existence and location of the tribal casino in its vicinity; and provided further, however, that out of said aggregate payment, each local unit of government shall receive no less than an amount equivalent to its share of ad valorem property taxes.

Ironically, the tribes negotiated the 2 percent payments into the consent decree, as then Gov. Engler initially demanded that all 10 percent of the payment be made directly to the state, cutting out the local governments.

A recent article published in the November 2009 issue of the *Michigan Bar Journal,* "Michigan's Tribal Casino Compacts: Rethinking the 2 Percent Solution to Impacts on Local Government," argues that adjacent counties should be eligible for 2 percent payments based on impacts of the casino.[6] The impact language in the consent decree, however, is determined at the minimum by the ad valorem property tax. Including adjacent counties that do not have the right to levy ad valorem property taxes is inconsistent with the consent decree. The parties are not under an obligation to renegotiate the consent decree, so the standards developed in the 1993 consent decree will continue regardless of the compact language.

Even so, the Department of the Interior (DOI), charged with approving each Indian gaming compact, likely would not have allowed the 1993 compacts to go into effect without the tribes receiving something in return: market exclusivity. In essence, the revenue-sharing provisions would have been illegal except that Gov. Engler promised the seven compacting tribes a monopoly on gaming in Michigan. But only a year after signing the 1993 compacts, Gov. Engler created the Governor's Blue Ribbon Commission on Michigan Gaming to assess the issue of expansion of gaming in Michigan.[7] In the coming years, he presided over massive expansions of gaming both in Detroit and in Indian country. The tribes were then relieved of the obligation to continue to share revenue with the state when the governor executed gaming compacts with the Little River Band (LRB) and the Little Traverse Bay Bands (LTBB), although they retained the obligation to share revenue with local units of government, which has been a huge success for both the tribes and the local governments.

The November 2009 *Bar Journal* article includes several assertions to the contrary that are simply wrong.[8] Of note, the author recommended that counties *adjacent* to counties in which there is Indian gaming be part of any revenue sharing. The recommendation appears to be based on a 2007 study (participated in by the author), which found that while Indian gaming has been a resounding success locally,[9] it somehow has damaged non-Indian businesses in counties located within a 50-mile radius from the casinos.[10] Assuming for the moment that this is true (unlikely, given the multitude of other possible causes, including the poor Michigan economy), sharing revenue with non-local units of government goes far afield of the purposes of revenue sharing *and* of Indian gaming in the first instance. Moreover, the author is suggesting that the compact should include language that directly benefits private business owners under the rubric that a decline in non-Indian business revenue is an impact associated with a successful Indian casino and therefore the Indian casino is liable to compensate the non-Indian business. This overlooks that the consent decree does not authorize payments to private individuals and ignores the state's past objections to tribes distributing 2 percent payments to any entity other than a local unit of government.

Re-Thinking the 1993 Compacts

It is inaccurate to assume, as some observers do, that the 1993 compacts "expire" in 2013.[11] It is critical to understand, however, that the 1993 compacts will continue in operation until the exhaustion of any administrative or judicial remedies set forth in IGRA or any other applicable federal law, a process that could take several years.[12]

Before renegotiation can begin, the state should first evaluate what meaningful concession it can offer these tribes in exchange for revenue-sharing payments. According to the DOI, revenue sharing does not constitute illegal state taxation if a state can offer "meaningful concessions" to a tribe in exchange for "a valuable economic benefit."[13] The 1993 compacting tribes agreed to revenue sharing in exchange for the exclusive right, on a collective basis, to operate gaming in Michigan. At that time, exclusivity constituted a meaningful concession exchanged for a valuable economic benefit. There now exists no scenario in which the state can offer the 1993 compacting tribes the right to exclusive

Fast Facts:

- Nowhere in IGRA did Congress manifest an intent for state governments or local governments to benefit from Indian gaming or be provided a share of Indian gaming revenue.
- Given the destruction of the exclusive market, effectively the state has nothing to offer the tribes in exchange for the reinstitution of 8 percent payments or an increase in 2 percent payments.

gaming throughout the state. The entire justification for an 8 percent revenue-sharing payment as applied to the 1993 compacting tribes is non-existent because the state chose to abandon its exclusivity obligation by permitting the expansion of gaming in Detroit and with other Indian tribes. To remain compliant with IGRA, and to avoid illegal taxation, the state must find meaningful concessions that will constitute a valuable economic benefit to these tribes.

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It is possible that, given the destruction of the exclusive market, effectively the state has nothing to offer the tribes in exchange for the reinstitution of 8 percent payments or an increase in 2 percent payments. The tribes that entered into the 1993 agreement may argue that the compacts should simply be renewed under the five-year provision and the current consent decree. In any event, the built-in administrative remedies in the compact will certainly provide for years of litigation on the effective renewal date of the compacts.

Recent Compacts and Compact Amendments

That the other five federally recognized tribes in Michigan signed compacts or amendments containing revenue-sharing provisions does not mean the 1993 compacting tribes are required to include revenue-sharing payments or similar terms in any compact they sign. For example, the 1998 compacts, as well as the compact recently approved with the Match-E-Be-Nash-She-Wish Band in Allegan County, provide that if a commercial gaming facility (meaning any facility with more than 85 electronic gaming devices) operates within the tribes' "competitive market area," then revenue-sharing payments are reduced, although not eliminated.

The key distinction between the 1998 compacts as amended and the 1993 compact is that the competitive market areas for the 1998 compact tribes include populous areas. Arguably, the state is offering a meaningful concession and providing economic benefit to these tribes, as a commercial gaming facility is more likely to operate in a more populated area. The five tribes made the sovereign decision to accept these terms and submit the amended compacts to the secretary of the interior for approval. Under IGRA, if the DOI neither approves nor disapproves a compact or an amendment to a compact within 45 days, then the compact is deemed approved. In the case of the amended compacts of the LRB and LTBB, the DOI allowed the 45-day period to pass, and therefore the amended compacts are simply deemed approved.

The DOI stated its concerns while allowing the 45-day approval period to lapse with the LRB/LTTB compact amendments, but ultimately did not disapprove the amendments. The principal concern was that, due to the reduction in the exclusivity zone, the 85 gaming-device exemption within that zone, and the contingent 4 percent net win continued payment, the DOI was unable to determine with certainly that the amended compacts met the two-prong test of the state offering meaningful concessions resulting in a substantial economic benefit.[14]

Conclusion

Five of the seven 1993 compacting tribes are located in the Upper Peninsula. Providing a competitive market area along similar lines as the more recently executed compacts constitutes neither a meaningful concession from the state of Michigan nor a valuable economic benefit for the tribes. Before the state of Michigan or any local governments decide how to spend revenue-sharing payments or make assumptions regarding negotiating with the 1993 compacting tribes, the state should determine what meaningful concessions it will provide if it seeks to receive revenue-sharing payments from tribes and thereby avoid taxing the tribes for operating gaming within a tribe's own sovereign territory. ■

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FOOTNOTES

1. 25 USC 2701 *et seq.*
2. *Tribes v Engler,* Consent Judgment, No. 90-611 (WD Mich, August 20, 1993).
3. 25 USC 2702(1).
4. 25 USC 2710(d)(4).
5. *Seminole Tribe v Florida,* 517 US 44; 116 S Ct 1114; 134 L Ed 2d 252 (1996).
6. See Hill, *Michigan's tribal casino compacts: Rethinking the 2 percent solution to impacts on local government,* 88 Mich B J 32 (November 2009).
7. See Governor's Blue Ribbon Commission on Michigan Gaming, Blue Ribbon Report (1995), available at <http://www.michigan.gov/mgcb/0,1607,7-120-1382_1452-14473--,00.html>. All websites cited in this article were accessed January 8, 2010.
8. See Hill, n 6 *supra.*
9. Central Michigan University, The New Buffalo: A Comparative Examination of Tribal Casino Gaming in Michigan 1993–2003, pp 5–7 (revised November 2007), available at <http://turtletalk.files.wordpress.com/2008/07/casino-report-final-version-revised-11-5-07.pdf>.
10. See Hill, n 6 *supra* at 34.
11. *Id.* at 32.
12. See A Compact between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan, § 12(C). Each of the individual 1993 compacts contains identical language relating to the term of the compact.
13. See, e.g., U.S. Department of the Interior, *Statement of Secretary of the Interior Bruce Babbitt on the New Mexico Gaming Compacts* (August 23, 1997), available at <http://www.scienceblog.com/community/older/archives/N/int0938.shtml>.
14. Letter from George Skibine to Jennifer Granholm, Governor of Michigan (March 11, 2008), available at <http://www.michigan.gov/documents/mgcb/LTBB_Compact_2nd_Amd_2008-01-24_244325_7.pdf>.