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RE: **Overview of Compacting Process**

The IGRA is based on the legislative conclusion that class III gaming should only be conducted under a valid tribal-state gaming compact. The IGRA provides a precise and systematic framework for negotiating a gaming compact. Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 275 (8th Cir. 1993). Under the IGRA, an Indian tribe must first request a state to enter into gaming compact negotiations.¹ After a state receives a tribe's request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." Id. If a tribe and a state reach an agreement, the compact takes effect upon the approval of the Secretary of the Interior.²

Although the IGRA mandates a gaming compact, it does not require any specific gaming compact provisions. However, the IGRA provides guidance on provisions that may be included. According to the Act:

Any [t]ribal-[s]tate compact negotiated under subparagraph (A) may include provisions relating to: (i) 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; (ii) the allocation of criminal and civil jurisdiction between the [s]tate and the Indian tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the [s]tate of such activities in such amounts as are necessary to defray the costs of regulating such activity; (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the [s]tate for comparable activities; (v) remedies for breach of contract; (vi) standards for the operation of such

¹25 U.S.C. § 2710(d)(3)(A). The Act explains: Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the [s]tate in which such lands are located to enter into negotiations for the purpose of entering into a [t]ribal-[s]tate compact governing the conduct of gaming activities. Upon receiving such a request, the [s]tate shall negotiate with the Indian tribe in good faith to enter into such a compact.

²§ 2710(d)(3)(B). The Act explains: Any [s]tate and any Indian tribe may enter into a [t]ribal-[s]tate compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

activity and maintenance of the gaming facility, including licensing; and (vii) any other subjects that are directly related to the operation of gaming activities.

Id.

If a tribe and a state cannot reach an agreement within 180 days after a tribe's initial request for negotiations, the tribe may file suit in federal court. 25 U.S.C. § 2710(d)(7)(A)-(B). The burden of proof is then placed on the state to prove that it negotiated with the tribe in good faith. Id. Unfortunately, the IGRA does not provide a definition of good faith. Id. However, the IGRA provides various public policy and economic and social factors for the court to consider in making its good faith determination. A court may take into account “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities” to determine if a state has negotiated in good faith. 25 U.S.C. §2710(d)(7)(B)(iii). Additional guidance for analyzing the IGRA's good faith standard is provided in the Act's legislative history. S. Rep. No. 100-446, at 13 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3083-84. The Senate Committee Report stated:

In the Committee's view, both [s]tate and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from the tribe and [s]tates. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A [s]tate's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the [s]tate's public policy, safety, law and other interests, as well as impacts on the [s]tate's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a [s]tate for excluding Indian tribes from such gaming *503 or for the protection of other [s]tate-licensed gaming enterprises from free market competition with Indian tribes. . . . Finally, the bill allows [s]tates to consider negative impacts on existing gaming activities. That is not to say that the bill would allow [s]tates to reject Indian gaming on the mere showing that Indian gaming will compete with non-Indian games. Rather, [s]tates must show that economic consequences will be severe and that they will clearly outweigh positive economic consequences.

Id.

If the district court concludes that a state failed to negotiate with a tribe in good faith, the court orders the state and the tribe to conclude a gaming compact within sixty days. 25 U.S.C. §2710(d)(7)(B)(iv). If the state and tribe cannot agree on a gaming compact within these sixty days, the parties submit their “best offers” to a court-appointed mediator. Id. The mediator then selects the gaming compact which best comports with federal law, the provisions of the IGRA, and the findings of the court. Id. If the state objects to the mediator's proposed compact within sixty days of its submission, the Secretary of the Interior prescribes the compact's provisions in a manner consistent with the compact proposed by the mediator, the terms of the IGRA, and state

law. 25 U.S.C. §2710(d)(7)(B)(vii). A notice of the approved gaming compact is then published by the Secretary of the Interior in the Federal Register.