

**Senate Committee on Governmental Organization
Informational Hearing
Tribal-State Gaming Compact Between the State of California and the Elk Valley
Rancheria, California
March 13, 2018 – 9:30 a.m.
Room 4203 State Capitol**

Compact Overview

SUMMARY

The Tribal-State Gaming Compact (hereafter “Compact”) between the State of California and the Elk Valley Rancheria, California (hereafter “Tribe”) was executed on August 31, 2017.

The Compact authorizes the Tribe to operate a maximum of 1,200 slot machines at no more than two gaming facilities located on eligible Indian lands held in trust for the Tribe, and located within the boundaries of the Tribe’s reservation.

The Tribe has agreed to pay the State its pro rata share of costs the State incurs for the performance of its duties under the Compact. The Compact does not require the Tribe to pay into the Revenue Sharing Trust Fund (RSTF) or the Tribal Nation Grant Fund (TNGF). However, if the Tribe intends to operate more than 1,200 slot machines during the term of this Compact, the Compact requires the Tribe to enter into negotiations with the State for an amendment regarding payments to the RSTF or the TNGF.

In 2002, the Tribe entered into a Memorandum of Understanding (MOU) with Del Norte County (County). The Compact requires the Tribe to maintain a binding enforceable agreement for such undertakings and services that mitigate the impacts of the Tribe’s casino. According to the Tribe, the current MOU covers a full range of municipal services, including law enforcement, emergency response services, fire protection, and sewer and water services. The MOU provides for escalating annual payments estimated to be approximately \$430,000 in the first year after the new casino is built.

According to the Governor’s Office, certain terms of the Compact related to licensing, regulatory, environmental mitigation, patron protection, labor, public health and safety provisions are substantially the same as recent compacts.

The Compact’s preamble notes that this Compact protects the interests of the Tribe and its members, the surrounding community, and the California public, and will promote and secure long-term stability, mutual respect, and mutual benefits.

The Compact's preamble also notes that the Tribe and the State entered into a Tribal-State Compact in 1999 which enabled the Tribe, through revenues generated by its casino, to improve the governance, environment, education, health, safety, and general welfare of its citizens.

Once effective (legislative ratification and federal approval required), this Compact will be in full force and effect for 25 years following the effective date.

EXISTING LAW

Existing law provides, under IGRA, for the negotiation and conclusion of compacts between federally recognized Indian tribes and the state for the purpose of conducting Class III gaming activities on Indian lands within a state as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. Existing law expressly authorizes a number of tribal-state gaming compacts between the State of California and specified Indian tribes.

Existing law authorizes the conduct of Class III gaming activities to the extent such activities are permitted by state law, a gaming compact has been concluded by a federally recognized tribe and the state, and the compact has been approved by the Secretary of the Interior.

Existing law limits the operation of Class III gaming activities to Indian lands acquired on or before October 17, 1988. Existing law also provides for certain exceptions to conduct gaming activities on Indian lands acquired after October 17, 1988.

Existing law defines Indian lands to mean all lands within the limits of any Indian reservation, and any land which is either held in trust by the United States for the benefit of any Indian tribe or individual, or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

Existing law requires the state to negotiate and to conclude a compact in good faith with an Indian tribe having jurisdiction over the Indian lands upon which the Class III gaming activity is to be conducted. Existing law also provides the United States district courts with jurisdiction over any cause of action initiated by a tribal government alleging that the state failed to negotiate in good faith to conclude a compact. Furthermore, existing law prescribes the remedy, mediation supervised by the courts, if it is found that the state failed to negotiate in good faith to conclude a compact.

Existing law authorizes the Governor, under the California Constitution, to negotiate and conclude compacts, subject to ratification by the Legislature.

Brief History and Background – Elk Valley Rancheria, California

Established in 1909, the Elk Valley Rancheria, California is located in modern-day Del Norte County, California, one mile south of the City of Crescent City. According to the Tribe, the Tribe's current enrollment is 88 members, comprised of descendants of Tolowa and Yurok people.

In 1954, the Tribe, along with approximately 40 other Rancherias throughout California, was terminated from federal recognition due to the passage of the California Rancheria Act. In 1987, the Tribe gained federal recognition, but unfortunately the Tribe no longer owned any land within the Rancheria.

In order to obtain land, the Tribe, in 1995, entered into a lease agreement for a small parcel of property within the Rancheria boundaries that the United States government had accepted into trust. Since that initial agreement, the Tribe has continued to acquire land within or near the Rancheria. Specifically, the Tribe obtained the Martin Ranch Property in 1998 – approximately 204 acres located approximately one mile south of the exterior boundaries of the Rancheria. This land was accepted into trust in March 2008, making it eligible for gaming.

The Tribe currently operates the Elk Valley Casino which consists of approximately 300 slot machines, two blackjack tables, six poker tables, an 85-seat restaurant, and bingo hall/events center. The Tribe plans on opening a new casino, the Elk Valley Resort and Casino, at which point the current casino would close.

The Elk Valley Resort and Casino is planned to include a 156 room hotel, 20,000 square foot conference center, and parking facilities. The new casino will have space for 400 slot machines, approximately six blackjack tables, a poker room, a 135-seat restaurant, and bingo hall/events center.

According to the Tribe, the Tribe currently employs approximately 220 employees. Approximately 120 of them are employed at the Elk Valley Casino. When the Elk Valley's Resort and Casino is fully built, the Tribe anticipates an increase to approximately 200-250 employees. At full build, the Tribe expects that the proposed Elk Valley Resort and Casino will attract 640,000 visitors in the first year of operation. The project is expected to generate additional local and state taxes of \$2 million due to construction activities and between \$400,000 and \$520,000 from increased economic activity.

The Tribe states that their efforts, including the current Elk Valley Casino and future Elk Valley Resort and Casino, increases regional tourism, creates new business opportunities, and increases commercial recreational facilities and opportunities for all members of the community, not just the Tribe.

Key Provisions of the Compact

Scope of Class III Gaming Authorized: The Tribe is authorized to operate up to 1,200 slot machines, banking or percentage card games, and any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through use of the Internet unless others in the state not affiliated with or licensed by the California State Lottery are permitted to do so under state and federal law. The Tribe shall not engage in Class III Gaming that is not expressly authorized in the Compact.

Authorized Gaming Facility: The Tribe may establish and operate no more than two gaming facilities and engage in Class III gaming only on eligible Indian lands held in trust for the Tribe, located within the boundaries of the Tribe's reservation.

Payments to the Special Distribution Fund (SDF): The Tribe shall pay to the State, on a pro rata basis, the costs the State incurs for the performance of all its duties under this Compact, as established by the monies appropriated in the annual Budget Act for the performance of their duties under the Class III Gaming Compacts.

Exclusivity: Provides that in the event the exclusive right of Indian tribes to operate Class III gaming in California pursuant to the California Constitution is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision or the conclusive and dispositive judicial construction of a statute or the State Constitution by a California appellate court after the effective date of this Compact, that gaming devices may lawfully be operated by non-Indian entities, the Tribe shall have the right to terminate this Compact, as specified.

Payments to the RSTF or the TNGF: The Compact does not require the Tribe to pay into either the RSTF or the TNGF. However, the Compact does include a provision that would require the Tribe to enter into negotiation shall the Tribe have intentions of operating more than 1,200 slot machines for payments into the RSTF or the TNGF.

Additional Compact Components

Gaming Ordinance and Regulations – all gaming activities conducted under this Compact shall, at a minimum, comply with a gaming ordinance duly adopted by the Tribe and approved in accordance with IGRA and all applicable rules, regulations, procedures, specifications, and standards duly adopted by the National Indian Gaming Commission (NIGC), the Tribal Gaming Agency, and the State Gaming Agency, and with the provisions of this Compact, as specified.

Prohibitions Regarding Minors – the Tribe shall prohibit persons under the age 18 years from being present in any room or area in which gaming activities are being conducted unless the person is en route to a non-gaming area of the gaming facility, or is employed at the gaming facility in a capacity other than as a gaming employee. If the Tribe permits the consumption of alcoholic beverages in the Gaming Facility, the Tribe shall prohibit persons under the age of 21

from purchasing, consuming, or possessing alcoholic beverages. The Tribe shall also prohibit persons under the age of 21 from being present in any room or area, in which alcoholic beverages may be consumed.

Licensing Requirements and Procedures – all persons in any way connected with the gaming operation or gaming facility who are required to be licensed or to submit to a background investigation under IGRA, and any others required to be licensed under this Compact, including, without limitation, all gaming employees, gaming resource suppliers, financial sources, and any other person having a significant influence over the gaming operation, must be licensed by the Tribal Gaming Agency. Also, every gaming employee must obtain, and thereafter maintain current, a valid tribal gaming license, as specified.

Inspection and Testing of Gaming Devices – gaming devices will have to be tested, approved and certified by an independent gaming test laboratory or state governmental gaming test laboratory to ensure they are being operated according to specified technical standards. Also, requires the Tribal Gaming Agency to maintain adequate records that demonstrate compliance with software and hardware specifications. The State Gaming Agency would be authorized to annually conduct up to four random inspections of gaming devices in operation to confirm that the devices are operating in conformance with these standards.

Minimum Internal Control Standards (MICS) – the Tribe must conduct its gaming activities pursuant to an internal control system that implements MICS that are no less stringent than those contained in the MICS of the federal NIGC standards, as specified. It requires gaming to operate pursuant to a written internal control system that reasonably assures that assets are safeguarded and accountability over assets is maintained; liabilities are properly recorded and contingent liabilities are properly disclosed; financial records are accurate and reliable; transactions are performed in accordance with the Tribal Gaming Agency’s authorization; access to assets is permitted only in accordance with the Tribal Gaming Agency’s approved procedures; recorded accountability for assets is compared with actual assets; and, functions, duties and responsibilities are appropriately segregated and performed by qualified personnel. The Tribe is required to provide the CGCC, upon written request, a copy of the independent certified public accountant agreed-upon procedures report conducted annually for submission to the NIGC pursuant to federal law. This report verifies that the gaming operation is in compliance with the NIGC’s MICS.

Problem Gambling – the gaming operation must establish a program, approved by the Tribal Gaming Agency, to mitigate pathological and problem gaming by implementing specified measures.

Patron Disputes – the Tribal Gaming Agency must promulgate regulations governing patron disputes over the play or operation of any game, including any refusal to pay to a patron any alleged winnings from any gaming activities that includes specified minimum standards.

Environmental Protections – the Tribe currently has an MOU with the County of Del Norte which covers the environmental impact of the casino project discussed above. So long as the County and the Tribe agree, within 90 days after the effective date of this compact, to extend the MOU’s effective date, and for so long as the extended MOU exists, the Tribe is not required to complete a new environmental impact report. However, if the Tribe intends to commence a project that will result in the operation of more than 400 slot machines, the Compact requires the Tribe and the State to commence good faith negotiations to address the environmental review of that new project. According to the Governor’s office, the new modified environmental mitigation process in this Compact involves a more collaborative process and is likely to cost less which benefits both the Tribe and the County.

Public and Workplace Liability – the Tribe is required to obtain and maintain a commercial general liability insurance policy which provides coverage of no less than \$10 million and adopt a Tort Liability Ordinance stipulating that California tort law governs claims.

Compliance Enforcement – it is the responsibility of the Tribal Gaming Agency to conduct on-site gaming regulation and control in order to enforce the terms of this Compact, IGRA, NIGC gaming regulations, state gaming agency regulations, and the gaming ordinance, to protect the integrity of gaming activities and the gaming operation for honesty and fairness, and to maintain the confidence of patrons that tribal governmental gaming in California meets the highest standards of fairness and internal controls. To meet those responsibilities, the tribal gaming agency shall promulgate rules and regulations for these purposes.

Tobacco Provisions – the Tribe agrees to provide a non-smoking area in the gaming facility and to utilize a ventilation system throughout the gaming facility that exhausts tobacco smoke to the extent reasonably feasible under state-of-the-art technology existing as of the date of the construction or significant renovation of the gaming facility, and further agrees not to offer or sell tobacco products, including but not limited to smokeless tobacco products or e-cigarettes, to anyone under 18 years of age in the gaming facility.

Alcohol Provisions – makes it explicit that the purchase, sale, and service of alcoholic beverages shall be subject to state law – the Alcoholic Beverage Control Act.

Labor Provisions – provides that the gaming activities authorized by this Compact may only commence after the Tribe has adopted an ordinance identical to the Tribal Labor Relations Ordinance (TRLO), referenced as Appendix B of the Compact, and the gaming activities may only continue as long as the Tribe maintains the ordinance. If the Tribe employs 250 or more persons in a tribal casino facility, then the provisions of the TLRO become effective. The TLRO provides for a secret ballot election and union neutrality. After the certification that 30% of the eligible employees in a bargaining unit have expressed an interest in the union, a notice of election shall be issued and the election shall be concluded within 30 calendar days thereafter.

Employees may mail in ballots provided they are received by election day. Union representation requires an affirmative vote of 50% plus one of all votes cast.

Workers' Compensation – the Tribe agrees to participate in the State's workers' compensation program with respect to employees at the casino. All disputes arising from the workers' compensation laws shall be heard by the State Workers' Compensation Appeals Board pursuant to the California Labor Code. The Tribe acknowledges the jurisdiction of the Board in such manners. In lieu of participation in the State's system, the Tribe may create and maintain a system through self-insurance, which includes specified provisions, including hearings before an independent tribunal. Furthermore, the Tribe agrees that it will participate in the State's unemployment compensation program for providing benefits and unemployment compensation disability benefits to employees at the casino. The Tribe shall withhold all taxes due to the State, except for Tribal members living on the Tribe's reservation, and forward such amounts to the State.

Health and Safety Standards – the Tribe has agreed to adopt and comply with tribal health standards for food and beverage handling that consistent with the State's public health standards. Also, the Tribe has agreed to comply with federal water quality and safe drinking water standards applicable in California. The Tribe must also adopt and comply with federal and state laws forbidding harassment, including sexual harassment, discrimination and retaliation. Furthermore, the Tribe must maintain a \$3 million insurance policy for these purposes and adopt an ordinance that includes a dispute resolution process.

Building Codes and Fire Safety – in order to assure the protection of the health and safety of all gaming facility patrons, guests, and employees, the Tribe shall adopt and shall maintain throughout the term of this Compact, an ordinance that requires any covered gaming facility construction to meet or exceed the applicable codes. Gaming facility construction, expansion, improvement, modification or renovation must also comply with the federal Americans with Disabilities Act.

Emergency Services Accessibility and Possession of Firearms – the Tribe must make reasonable provisions for adequate emergency fire, medical, and related relief and disaster services for patrons and employees. Also, the Compact prohibits the possession of firearms by any person in the gaming facility at all times except for federal, state, or local law enforcement personnel, or tribal law enforcement or security personnel, as authorized.

Effective Date – this Compact shall not be effective unless and until all of the following have occurred: the Compact is ratified by statute in accordance with state law and notice of approval or constructive approval is published in the Federal Register. Once effective, this Compact shall be in full force and effect for 25 years following the effective date.

Amendment by Agreement – the terms and conditions of this Compact may be amended at any time by the mutual and written agreement of both parties, provided that each party voluntarily consents to such negotiations in writing. Any amendments to this Compact shall be deemed to supersede, supplant and extinguish all previous understandings and agreements on the subject.

ADDITIONAL BACKGROUND INFORMATION

Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA to provide a statutory basis for the operation and regulation of gaming on Indian lands. IGRA provides that an Indian tribe may conduct gaming activity on Indian lands if the activity “is not specifically prohibited by federal law and is conducted within a State which does not prohibit such gaming activity.”

IGRA distinguishes between three classes of gaming (Class I, Class II, and Class III) and provides for different forms of regulation for each class. Class I gaming includes “social games” for minor prizes or “traditional forms of Indian gaming.” Class II gaming is defined to include bingo and card games that are explicitly authorized by the laws of the state, or that are not explicitly prohibited by the laws of the state and are played at any location in the State, so long as the card games are played in conformity with those laws and regulations. Class III gaming includes such things as slot machines, casino games, and banked card games such as black jack and baccarat. Class III gaming may only be conducted under terms of a compact negotiated between an Indian tribe and a State.

IGRA was enacted against a legal background in which Indian tribes and individuals generally are exempt from state taxation within their own territory. IGRA provides that with the exception of assessments permitted under the statute, to defray the State’s costs of regulating gaming activity, IGRA shall not be interpreted as conferring upon a State authority to impose any tax, fee, charge, or other assessment upon an Indian tribe to engage in Class III activity. Nor may a State refuse to enter into negotiations based on the lack of authority to impose such a tax, fee, charge, or other assessment.

When a tribe requests negotiations for a Class III compact, IGRA requires the State to negotiate with the Indian tribe in good faith. IGRA provides a comprehensive process to prevent an impasse in compact negotiations, which is triggered when a tribe files suit alleging that the State has refused to negotiate or has failed to negotiate in good faith.

Before 2000, the California Constitution prohibited Class III gaming. In 2000, California voters approved Proposition 1A, which had been proposed by the Governor and passed by the Legislature. Proposition 1A amended the California Constitution to permit the State to negotiate compacts with federally recognized Indian tribes for certain Class III gaming activities. Because non-Indian parties were still forbidden from operating gaming facilities, Proposition 1A granted

Indian tribes a “constitutionally protected monopoly on most types of Class III games in California.”

Rincon Decision

The U.S. Supreme Court in July 2011 refused to consider the decision of the Ninth Circuit Court of Appeals rejecting a Class III Tribal-State Gaming Compact negotiated by then Governor Schwarzenegger with the Rincon Band of Luiseno Mission Indians. The issue of this case's impact on Indian gaming throughout the country has been a topic of great debate.

As noted, IGRA authorizes states to receive compensation for costs related to tribal gaming such as regulation and gaming addiction, and to offset the effects of casinos on surrounding communities. However, states are prohibited from assessing taxes on tribal casino revenues, so unjustified payments to a state's General Fund are no longer permissible unless the tribes are getting something in return for the required payments, such as those authorized by IGRA.

Any payments to the State, above those needed to mitigate impacts of gaming must be in exchange for a benefit deemed "exclusive" to the tribe.

The Rincon Band challenged the legality of California's "second generation" compacts pursuant to which the signatory tribes would be entitled to increase their slot machine count in return for paying percentages of the new slot machine revenue to the state's General Fund. The Ninth Circuit had affirmed a lower court decision that the new financial concessions were nothing more than a state tax on tribal casino revenues which is prohibited by IGRA.

The Rincon Band refused to sign the amended compact which had already been executed by several other tribes choosing instead to demand that it be given the expanded gaming opportunity without making the new financial concessions. The Ninth Circuit Court of Appeals concluded that a “non-negotiable, mandatory payment of 10% of net win into the State treasury for unrestricted use yields public revenue, and is [therefore] a tax, and that the court was therefore required to consider the State’s demand as evidence of bad faith under IGRA’s statutes.”

The court noted that “the State could rebut the presumption of bad faith by demonstrating that the revenue demanded was to be used for the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing activities, but the State’s need for general tax revenue was insufficient to demonstrate good faith.”

Special Distribution Fund

Existing law creates the SDF in the State Treasury for the receipt of revenue contributions made by tribal governments pursuant to the terms of the 1999 model Tribal-State Gaming Compacts and authorizes the Legislature to appropriate money from the SDF for the following purposes: grants for programs designed to address gambling addiction; grants for the support of state and

local government agencies impacted by tribal government gaming; compensation for regulatory costs incurred by the CGCC and DOJ in connection with the implementation and administration of compacts; payment of shortfalls that may occur in the RSTF; disbursements for the purpose of implementing the terms of tribal labor relations ordinances promulgated in accordance with the terms of the 1999 compacts; and any other purpose specified by law. (Pursuant to compact renegotiations that took place with several of the larger gaming tribes during the Schwarzenegger administration, revenue from those tribes is directed into the state General Fund, instead of the SDF.)

Current law establishes a method of calculating the distribution of appropriations from the SDF for grants to local government agencies impacted by tribal gaming. This method includes a requirement that the State Controller, in consultation with the CGCC, deposit funds into County Tribal Casino Accounts and Individual Tribal Casino Accounts based upon a process that takes into consideration whether the county has tribes that pay, or do not pay, into the SDF.

Revenue Sharing Trust Fund

Existing law creates in the State Treasury the RSTF for the receipt and deposit of moneys derived from gaming device license fees that are paid into the RSTF pursuant to the terms of specified tribal-state gaming compacts for the purpose of making distributions to non-compacted California tribes (e.g., federally-recognized non-gaming tribes and tribes that operate casinos with fewer than 350 slot machines). Revenue in the RSTF is available to CGCC, upon appropriation by the Legislature, for making distributions of \$1.1 million annually to non-compact tribes. The RSTF was created as part of the 1999 compacts, which, in conjunction with the passage of Proposition 1A, created gaming compacts with approximately 60 California tribes. Non-compact tribes are considered third-party beneficiaries of the 1999 compacts.

Tribal Nation Grant Fund

This particular fund (referenced in recent compacts) was created to complement the RSTF and provides for the distribution of funds to non-gaming tribes, upon application of such tribes for purposes related to effective self-governance, self-determined community, and economic development. Payments from this fund are intended to be made to non-gaming tribes on a “need” basis, upon application. Payments from the TNGF are expected to begin in 2018.

SUPPORT

None received

OPPOSITION

None received

PRIOR AND CURRENT LEGISLATION

SB 6 (Hueso, Chapter 455, Statutes of 2017) ratified the tribal-state gaming compact entered into between the State of California and the Quechan Tribe of the Fort Yuma Indian Reservation, executed on August 31, 2017.

SB 585 (McGuire and Mendoza, Chapter 464, Statutes of 2017) ratified the tribal-state gaming compact entered into between the State of California and the Dry Creek Rancheria Band of Pomo Indians, executed on August 18, 2017.

SB 626 (Dodd, Chapter 465, Statutes of 2017) ratified the amendment to the tribal-state gaming compact entered into between the State of California and the Federated Indians of Graton Rancheria, executed on August 18, 2017.

AB 174 (Bigelow, Chapter 435, Statutes of 2017) ratified the tribal-state gaming compact entered into between the State of California and the United Auburn Indian Community, executed on August 18, 2017.

AB 253 (Bigelow, Chapter 437, Statutes of 2017) ratified the tribal-state gaming compact entered into between the State of California and the Tuolumne Band of Me-Wuk Indians, executed on August 18, 2017.

AB 394 (Mathis, Chapter 440, Statutes of 2017) ratified the tribal-state gaming compact entered into between the State of California and the Tule River Indian Tribe of California, executed on August 31, 2017.

AB 891 (Mayes, Chapter 447, Statutes 2017) ratified the tribal-state gaming compact entered into between the State of California and the Morongo Band of Mission Indians executed on September 6, 2017.

AB 1378 (Gray, Chapter 450, Statutes of 2017) ratified the amendment to the tribal-state gaming compact entered into between the State of California and the San Manuel Band of Mission Indians executed on August 18, 2017.

AB 1606 (Cooper, Chapter 453, Statutes of 2017) ratified the tribal-state gaming compact entered into between the State of California and the Wilton Rancheria, executed on July 19, 2017.