

**NLWJC - Kagan**

**Counsel - Box 020- Folder 009**

**Indian Gaming-Mass Issue [1]**

# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Memorandum for Jack Quinn from Elena Kagan. Subject: Massachusetts Indian Gaming Compact. (2 pages)	01/31/1996	P5
002. note	Handwritten notes. (4 pages)	n.d.	P5

**COLLECTION:**

Clinton Presidential Records  
 Counsel's Office  
 Elena Kagan  
 OA/Box Number: 8287

**FOLDER TITLE:**

Indian Gaming - Mass. Issue [1]

2009-1006-F  
vz129

### RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

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**CHRONOLOGY OF EVENTS RELATING TO DISAPPROVAL OF THE WAMPANOAG  
TRIBE OF GAY HEAD (AQUINNAH) AND THE COMMONWEALTH OF  
MASSACHUSETTS**

- August 22, 1994      BIA received written request from Thomas H. Green, First Assistant Attorney General, Department of the Attorney General of Massachusetts, to be notified of any land acquisition application from the Wampanoag Tribe of Gay Head (Aquinnah) and the Commonwealth of Massachusetts.
- August 25, 1994      Paula Hart, Ned Slagle, and Tom Hartman of BIA's Indian Gaming Management Staff (IGMS) and Phil Thompson from the Solicitor's Office (SOL) met with Jeffrey Madison, Economic Development Director, Attorney Thomas J. Wynn, Attorney Robert Mills and Lon Povich, Deputy Chief Legal Counsel to the Governor, to discuss IGRA and the process required to begin Class III gaming.
- October 4, 1994      Introductory letter from Barney Frank to Secretary Babbitt expressing support for the proposed casino in New Bedford. Response to Congressman Frank sent November 4, 1995, signed by Hilda Manuel, Deputy Commissioner for Indian Affairs (ATTACHMENT 1).
- November 17, 1994    Letter from Barney Frank to Secretary Babbitt concerning environmental issues relating to a proposed Wampanoag casino in New Bedford. Response letter from John Duffy (SIO) sent to Barney Frank on March 8, 1995. Telephone call from Heather Sibbison (SIO) to Maria Giesta (Frank's staff) preceded letter, apologizing for delay with written response, discussing substantive environmental issue, and offering to be contact point for future inquiries. (Frank letter and DOI response at ATTACHMENT 2.)
- March 3, 1995        IGMS received a telephone call from Congressman Barney Frank concerning environmental issues relating to the Wampanoag proposed land acquisition. The IGMS Environmentalist (Ned Slagle) was not in to take the call that day.
- March 7, 1995        Ned Slagle of IGMS returned a telephone call from Congressman Barney Frank regarding the Wampanoag Gay Head proposed casino project.

Congressman Frank presented arguments in favor of a recommendation by the IGMS of an environmental assessment rather than an environmental impact statement for the proposed project.

- April 16, 1995 The Tribe submitted its land acquisition application to the BIA Eastern Area Office.
- April 18, 1995 Telephone conversations began with Patti Marks, an attorney associated with the law firm of Pirtle, Morrisett, Schlosser, and Ayer, and representing the Wampanoag Tribe, Paula Hart of IGMS, and Troy Woodward of Solicitor's Office regarding the approval process for the Tribal-State Compact. Patti Marks discussed the proposed payments to the State and that the horse tracks would be allowed 400 Video Lottery Terminals (VLTs). She was told that this arrangement amounts to partial exclusivity, and that DOI has not approved anything less than full exclusivity to date. She informed us that she would go back to the State and inform them of our position. We have been told by the Governor's Office that she did fully inform them of DOI's concerns.
- May 5, 1995 George Skibine, IGMS Director, prepared briefing paper for Assistant Secretary Ada Deer on the Tribe's land acquisition proposal for gaming in the City of New Bedford (ATTACHMENT 3).
- May 8, 1995 Barney Frank met with Ada Deer to discuss the land acquisition application. IGMS, SOL, SIO did not participate in this meeting.
- May 10, 1995 BIA received a letter addressed to Governor Weld from Patti Marks' firm, Pirtle, Morrisett, Schlosser & Ayer, representing the Wampanoag Tribe, discussing the negotiating process and the scope of negotiable Class III gaming under IGRA.
- June 5, 1995 Hilda Manuel, BIA Deputy Commissioner responded to correspondence from Barney Frank, notifying him that we believed that federal condemnation was not a viable way to proceed to obtain the parcel land desired by the Tribe for its off-reservation casino (ATTACHMENT 4).

unknown date in  
July, 1995?

John Duffy (SIO) spoke on phone with Barney Frank on condemnation issue.

July 7, 1995

Assistant Secretary - Indian Affairs Ada Deer responded to additional correspondence from Barney Frank, assuring him that although DOI felt that condemnation was an inappropriate approach, DOI was opposed in principle to the concept of a casino in New Bedford, and that there were other ways to approach the land acquisition issue. Ms. Deer offered to have a meeting of DOI/Frank staff to discuss the problem more fully (ATTACHMENT 5). That meeting occurred on July 21, 1995.

July 17, 1995

John Duffy (SIO), Heather Sibbison (SIO), Paula Hart (IGMS), and Scott Keep (SOL) met with Chairperson Beverly Wright, Jeff Madison, a tribal official, attorney Patti Marks and lobbyist Dick Friedman, to discuss the Department's position on exclusivity. The Tribe was told that DOI did not believe it could approve the draft compact in its present form. Duffy encouraged the Tribe to submit alternative compacting options for DOI review. The Tribe did so on July 26, 1995.

July 21, 1995

Maria Giesta of Barney Frank's staff met with Heather Sibbison, George Skibine (IGMS) and Troy Woodward (SOL) to explain more comprehensively the reasons why DOI believed federal condemnation for the particular site proposed in New Bedford would be inappropriate. DOI personnel also explained in detail other options for obtaining land in New Bedford, and explained generally the procedures for taking off-reservation land into trust and for reviewing tribal-state compacts.

July 26, 1995

IGMS received list of options for resolving the Wampanoag compacting exclusivity problem from Patti Marks.

August 9, 1995

Assistant Secretary - Indian Affairs responded to new correspondence from Barney Frank reassuring him of our commitment to working with his staff regarding the land acquisition process (ATTACHMENT 6).

August 15, 1995

Paula Hart (IGMS), and Troy Woodward (SOL) met with Patti Marks to discuss the terms of the compact.

August 16, 1995

Paula Hart (IGMS), Bob Anderson and Troy Woodward (SOL), and Heather Sibbison (Secretary's Office) met with Lon Povich (Gov. Weld's staff), tribal leaders (including Chairwoman Wright and Jeff Madison), and Patti Marks. The State and the Tribe inquired about the possibility of submitting a "clean" compact that did not include the financial arrangement between the State and the Tribe. Marks' concept was that by setting out in a separate agreement -- i.e., not in the compact -- the financial arrangements between the State and the Tribe, they could avoid DOI review of the tribal payments to the State. The State and the Tribe were informed that this approach would not be acceptable to the Department.

September 1, 1995

Paula Hart (IGMS) and Troy Woodward (SOL) met with Patti Marks. She presented us with a draft compact between the State and the Tribe. The draft compact was very general, and did not appear to contain any objectionable provisions. It significantly differed from the final compact that would be officially submitted.

September 21, 1995

IGMS received draft copy of the Tribal-State Compact from Patti Marks who stated that this version would be the one submitted. However, additional changes were made before submission of final version.

September 22, 1995

BIA received a memorandum from Fran Ayer, a partner in Pirtle, Morissett, Schlosser & Ayer, the firm representing the Tribe, discussing the payments to the State.

September 29, 1995

Patti Marks handcarried the Tribal-State Compact to the Secretary's Office. Heather Sibbison speaks with Mike Romano of Senator Kennedy's Office re: status of compact submittal; Heather Sibbison speaks with Lon Povich (Gov. Weld's Office) re status of compact submittal and exclusivity problems.

October 3, 1995

Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: progress of DOI review.

October 10, 1995

Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: progress of DOI review of compact.

October 11, 1995 Heather Sibbison (SIO) speaks with Lon Povich (Gov. Weld's Office) re: problems with compact, status of review.

October 17, 1995 BIA received a Memorandum from Patti Marks discussing the payments to the State. This memorandum was in response to DOI's indication that there were significant concerns about the lack of exclusivity provided in the compact.

October 18, 1995 Heather Sibbison (SIO) talks to Lon Povich (Gov. Weld's staff) re: DOI concerns about the compact, including exclusivity issue; Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: progress of DOI review of compact.

October 19, 1995 Boston Globe article quoting Barney Frank as stating that he received personal assurance from Secretary Babbitt that there was no problem with the Compact (ATTACHMENT 7). Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: progress of DOI review of compact; Heather Sibbison (SIO) discusses same with Lon Povich (Gov. Weld's Office).

October 23, 1995 Two telephone calls between Heather Sibbison (SIO) and Lon Povich (Weld's Office).

October 24, 1995 IGMS memorandum to SOL requesting legal review of Wampanoag Compact (ATTACHMENT 8). Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: progress of DOI review of compact.

October 25, 1995 Heather Sibbison (SIO) talks to Lon Povich (Gov. Weld's staff) re: DOI concerns about the compact, including exclusivity issue.

October 26, 1995 IGMS Prepared briefing paper on the status of the Tribal-State Compact (ATTACHMENT 9).

October 27, 1995 Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: status of DOI review of compact.

October 28, 1995 Heather Sibbison (SIO) speaks with Maria Giesta (Frank's staff) re: problems with the submitted compact.

October 30, 1995 Heather Sibbison (SIO) contacts with Maria Giesta (Barney Frank's Office) re: status of DOI review of compact; Sibbison speaks with

Mike Romano (Kennedy's Office) re same.

October 31, 1995 Heather Sibbison (SIO) speaks with Maria Giesta (Barney Frank's Office); and Lon Povich (Weld's Office) speak on the phone.

November 1, 1995 Heather Sibbison (SIO) and Lon Povich (Weld's Office) speak on the phone.

November 7, 1995 Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: status of DOI review of compact.

November 8, 1995 DRAFT letter to the Tribe (Beverly Wright) outlining the problems DOI discovered in its review of the compact. This draft does not include (but would have if it had been finalized) the Department's view on whether the compact provided sufficient exclusivity to the Tribe. It is attached here to provide a sense of other problems in the compact (ATTACHMENT 10). ALSO Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: status of DOI review of compact.

November 9, 1995 Assistant Secretary - Indian Affairs disapproved Wampanoag Compact (ATTACHMENT 10).

November 13, 1995 Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: status of compact issue.

November 28, 1995 Heather Sibbison (SIO) talks to Lon Povich (Gov. Weld's staff) re: status of compact negotiations.

November 29, 1995 Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: status of compact issue.

November 30, 1995 Heather Sibbison (SIO) speaks with Lon Povich re: status of compact issue.

December 5, 1995 Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: status of compact issue.

December 6, 1995 Heather Sibbison (SIO) speaks with Mike Romano (Kennedy's Office) re: status of compact issue.

ALSO NOTE:

ATTACHMENT 11: Local newspaper articles (probably not a comprehensive collection) provided by Senator Kennedy's Office, the Tribe's attorneys, and the Governor's Office.

- Chronology does not reflect the many telephone calls IGMS and SOL have had with the Tribal attorneys, including Patti Marks, Fran Ayer, and Tom Fredericks.
- Chronology does not reflect a variety of other telephone calls, including conversations between Heather Sibbison (SIO) and staff at Massachusetts State Legislature.

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E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

31-Jan-1996 08:23am

TO:            Elena Kagan

FROM:          Jennifer M. O'Connor  
                Office of The Chief of Staff

SUBJECT:      Indian Gaming

You wouldn't believe it...but I have another Indian Gaming issue.  
Are you the official gaming counsel? If so...let's chat. I'm at  
6-6350.



# United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

January 25, 1996

*Elena Kagan*

## Memorandum

To: John M. Quinn, White House Counsel

From: John Leshy, Solicitor, Interior

Subject: State of Massachusetts/Wampanoag Tribe Gaming Compact

*John Leshy*

This follows up my telephone conversation with Elena Kagan yesterday, in which I described the three problems - one policy, one mixed legal/policy, and one legal - we had identified with the proposed compact. These are discussed in order.

The issues arise because the Indian Gaming Regulatory Act (IGRA) authorizes State-tribal gaming compacts to contain provisions addressing the costs incurred by the State in regulating Indian gaming activities. 25 U.S.C. § 2710(d)(3)(C)(iii). IGRA goes on to say that, with that single exception, nothing in the Act shall be construed "as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity." 25 U.S.C. § 2710(d)(4).

### I. Department policy precludes approval of compacts that do not provide total exclusivity for Indian gaming.

The compact contemplates annual payments of approximately \$90 million to the State for six years in exchange for limited restrictions on non-Indian gaming in certain areas of the State. The Department has approved more than one hundred State/tribal gaming compacts to date. Only a few have called for tribal payments to States (over and above whatever expenses the States incur in regulating gaming authorized by the compacts). The Department has approved compacts containing such payments only if the State agreed to completely prohibit non-Indian gaming from competing with Indian gaming.

The \$90 million payment by the tribe is designated for various purposes, some of which are authorized under IGRA,<sup>1</sup> but most of the money (more than \$77 million), is to be paid directly to the State in consideration for limited tribal gaming exclusivity. This purpose does not fall within the allowable uses of net gaming revenue under IGRA.

<sup>1</sup> A small portion of the money will be paid to surrounding cities and towns and to non-profit organizations providing services for compulsive gamblers. IGRA specifically authorizes such payments to local governments and non-profits. See 25 U.S.C. § 2710(b)(2)(B)(iv) and (v).

My Office has previously determined that a payment by the Mohegan Tribe to the State of Connecticut in exchange for the State's agreement to maintain a tribal monopoly on commercial slot machine gaming within the borders of Connecticut could be considered a cost of operation. As such, it was authorized by IGRA to be paid from gross revenue and not net revenues.

While IGRA restricts Indian tribes' use of net revenues from tribal gaming, it does not restrict Indian tribes' use of gross revenues from gaming if those revenues are used for operating expenses. IGRA defines net revenues as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9).

We believe the Tribe's payment to the State is an operating expense. The payment buys an exclusive right, not required or contemplated by IGRA, to operate commercial slot machines in Connecticut. Under the agreement, the State agrees to prohibit commercial slot machines by all other entities. If any other entity is allowed to conduct commercial slot machines in the State, the tribes are no longer obligated to make payments. Since the agreement provides something of great value above and beyond the requirements of IGRA, the payment constitutes "the cost of doing business" and as such qualifies as an operating expense. Since IGRA does not prohibit or restrict use of gross revenues for operating expenses, we believe that the slot agreement does not violate IGRA.

Memorandum of Associate Solicitor for Indian Affairs (July 13, 1994) (footnotes omitted).

The proposed Wampanoag compact provides for tribal exclusivity only in the "Boston Consolidated Metropolitan Statistical Area" and the "New Bedford Consolidated Metropolitan Statistical Area" -- not throughout the State as in the Mohegan compact. Expressly excepted from this grant of exclusivity is the right of the State to authorize 700 slot machines at each of four racetracks in the Boston area (2800 total) and a non-Indian casino gaming facility in Hampden County.<sup>2</sup>

As a matter of policy, the Department has determined that it will not approve compacts that call for tribal payments in exchange for less than state-wide exclusivity for Indian gaming. Our rationale has been that anything less than total exclusivity gives States an effective opportunity to leverage very large payments from the tribes. Moreover, anything less would require difficult line-drawing judgments to assess the value of particular arrangement to determine whether they are in a tribe's best interest.

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<sup>2</sup> As explained in part II, below, the State also appears free to authorize non-Indian gaming outside of the statistical areas set out above, as well as to authorize additional non-Indian slot machines outside a 20-mile radius of the Tribe's casino.

- II. Assuming that we will depart from our previous policy and consider approving this proposed compact with its less-than-statewide exclusivity, we still have a legal obligation not to approve a compact that violates our trust responsibility for Indians. The exclusivity provisions of this compact will require further scrutiny to determine whether they are so limited as to foreclose our approval.

Section 11 of IGRA, 25 U.S.C. § 2710(d)(8)(B)(iii), authorizes the Secretary to reject proposed compacts that "violate[] the trust obligations of the United States to Indians." At minimum, this requires us to determine that the tribe's proposed gaming operation has a reasonable chance of financial success.

The Wampanoag compact's exclusivity provisions are quite limited. The Department has been led to understand that the State would allow only one casino in western Massachusetts and a total of 2800 slot machines at four race tracks in the Boston area. Indeed, the text of the proposed compact expressly authorizes these non-Indian gaming facilities. But it does not expressly prohibit others. Thus, it is possible that the State could, consistent with the compact, allow many other opportunities for additional non-Indian gaming in the State.

Before the current discussions between this Department and the White House ensued, we had anticipated undertaking further discussions with the Tribe and its attorneys on this point. Our concern is that the exclusivity afforded to the Tribe by this compact may be so insignificant as to make unjustified the large payment the compact obliges the tribe to make to the State. If there is substantial non-Indian competition, the tribe's large payment obligation could cripple its ability to make a profit on its casino operation. The Secretary could not approve the compact without further evaluating, in light of his trust responsibility, the value of the exclusivity protection the Tribe obtains.

- III. Here the proposed compact expressly requires tribal payments even after the State is relieved of any obligation to maintain exclusivity. Therefore, the Secretary cannot approve this compact in its current form.

Section 27(h) of the proposed compact provides (emphasis added):

If the Tribe loses the exclusivity described [elsewhere in the compact] after completion of the six (6) year period described in this sentence, the Tribe agrees to make a contribution equal to the greater of: 1) the State's actual costs for regulation, licensing and Compact oversight of the Tribes's Gaming Facility, plus fifteen (15%) of the amount the Tribe would have paid under this Compact if the exclusivity had been maintained, or 2) an amount calculated at the lowest rate which is paid to the State by any other casino in the Commonwealth.

As noted earlier, IGRA disclaims any intent to confer on a State the "authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity." 25 U.S.C. § 2710(d)(4). As we have always construed it, IGRA prohibits a compact from obliging a Tribe to pay a State out of its net gaming revenues more than the State's actual costs

of regulating the gaming activity authorized by the compact. Accordingly, once the State is relieved of any obligation to limit a tribe's competition, tribal payments to it beyond those necessary to defray the State's regulatory costs are forbidden by IGRA. The tribal payment requirement quoted above thus falls before IGRA.

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25-Jan-1996 12:08pm

TO:            Jack M. Quinn  
TO:            Kathleen M. Wallman  
  
FROM:         Elena Kagan  
               Office of the Counsel

SUBJECT:     Indians

*E -  
for now  
JP*

1. Do you have any views on whether to get a written, or only an oral, opinion from OLC?
2. By the by, the more I think about Interior's position, the more ~~legally~~ vulnerable it seems to me.

## MEMORANDUM

HAROLD  
Kitty wanted  
you to see this  
KIC

TO: Pat Griffin

FR: Barney Frank

RE: Wampanoags

November 22, 1995

I was obviously very pleased when the President was gracious enough to volunteer to me that he thought I should get some relief from the problem the Interior Department is now causing me. This is one where I am very much on the side of the Wampanoags and they tell me that they believe other tribes will be agreeing with them as well. I do know that Pat Williams who has been a strong advocate of the tribal position here tells me that he agrees with me on this one.

The issue is this. The Indian Gaming Act says Indians may not make payments for the right to gamble. In Connecticut, the Pequot tribe was allowed to make a payment not for the right to gamble, but for the right to have no competition in the state. The Wampanoag tribe is seeking to get approval for a very similar approach, and the Interior Department concedes that there is no legal reason why it can't be done. The Wampanoags have a deal with Massachusetts whereby they will pay extra not for the right to gamble but for the right to have very severe restrictions on competition: under their deal there will be only one other casino in the whole state, and frankly, with the referenda going on, it's not even clear that the state will be able to find a second location. Thus the question is whether or not Interior having agreed that it is legal for a tribe to pay for a total restriction on competition should rule that in this case it is a bad deal because they are holding competition down to only one other casino in the state. Of course Massachusetts is about twice as big as Connecticut so having only two casinos in Massachusetts is about equivalent to having one in Connecticut in terms of per capita factors. And John Duffy at Interior explicitly acknowledged to me that this is not a legal ruling but rather a case where Interior thinks what we are trying to do in Massachusetts is "bad public policy". That is I'm not asking you to overrule a legal interpretation but rather to have the policy decision made at the White House in this case, on an issue where the President has spoken of very strongly.

But it is not just the substance that is involved. I am outraged at the way in which Interior has treated me in a procedural way. They have known for a long time that this is a very high priority issue for me. I'm enclosing correspondence from the Summer where I made some requests and was angry that they would not get back to me. Note that in both cases they turned me down in the request and I fully accepted that because it seemed to me they had reasonable positions. But what is relevant is that during all these conversations they never gave me the slightest indication that there was this central problem that they now find and which they want to use to kill the whole deal. In fact, the letter from Ada Deer indicating that she wanted to work with this and looked forward to it being approved clearly gave everybody in Massachusetts the opposite opinion.

Then, to compound things, in September an article appeared in the paper suggesting that there would be a rejection because of the payment. I was very surprised at this, given the fact that I had been discussing this project with Interior officials for some time and had never received any indication of it. So I called Secretary Babbitt to ask him about it, and my staff assistant for this matter, Maria Giesta, checked with the Bureau of Indian Affairs. Both of us were told that this was not a problem, that the legal precedent set for the Connecticut tribe in buying a total restriction on competition covered us as well. And I am submitting an article from the Boston Globe which in fact indicates that the Interior Department said this.

The next thing that happened is that I called Anne Shields -- who I was dealing with at your suggestion -- on Friday, November 10. The Governor had submitted the compact for approval even though it could not be finally approved because the legislature hadn't acted yet. But he and I and the tribe felt it would be helpful if Interior could say it was approved subject to the legislature acting. And because he had submitted it, as he had to to get the legislature moving, there was a time period running by which Interior had to make some statement.

I thus called Anne on a Friday, with the understanding that the decision would have to come out on the Monday, which was it turns out a legal holiday -- Veterans Day -- to urge that the statement be that it would be approved if it were not for the fact that the legislature hadn't acted.

The next thing I heard was the following Wednesday when I got a call from Anne Shields asking if she and Mr. Duffy could come in and see me on Thursday. I of course said yes. But before that meeting, I got a call later on the same day from the Wampanoag tribe in a panic because they had learned that they were going to be told that the compact would be disapproved, not simply because the legislature hadn't acted, but because they were making a payment to the state. This would have simply killed the project. And I am disappointed that Anne did not tell me at the time that's what she wanted to discuss with me. In other words, I had asked her to couch the decision in a most favorable way, and I asked her to do that on Friday. It was not until Wednesday, the day before they planned to announce the decision, that she got back to me to tell me that she wanted to meet and even then she didn't tell me that they were planning to kill the deal.

Because I had been alerted by the Wampanoags, on Thursday morning I called Anne and told her that I simply could not accept this kind of a refusal and that I was terribly disappointed to have the Department now raising this with me on the very day in which they were about to announce the decision after never having mentioned it to me before. In fact, I should have added that the tribe had been told by people in the Bureau of Indian Affairs that their way of dealing with it was acceptable. That is, they had first been told that they couldn't simply make a payment for the right to gamble, or that they could make a payment for a substantial restriction on competition. Thus all of us had been going on for months based on the assurance from the Interior Department that this was a reasonable way to proceed.

After a very strenuous conversation, Anne did help get Duffy to agree that the disapproval would be simply on the basis of the legislature having acted and not on the substantive issue which would have killed things. But even with that the result in the Massachusetts press was a terribly negative one, probably because some of the reporters had gotten a sense from some people at

Interior that the substantive objection was lurking in the background. Indeed, one draft of the letter I was sent of disapproval included allusion to unnamed "other objections". After another panic phone call from me that was removed.

When I spoke with Anne Shields and John Duffy I pointed out to them that we had been told both by Secretary Babbitt and by officials of the Bureau of Indian Affairs that it was not a problem for the tribe to make a payment for the substantial restriction. Duffy and Shields kept ignoring the fact that we had been told this by someone in the Bureau of Indian Affairs, and acted as if I had simply tried to inappropriately get the Secretary to commit to something he hadn't thought about. In fact, we had exchanged phone calls of this it was not a case of me surprising him. And I was particularly appalled to have Anne volunteer to me that if it would help, they would get the Secretary "to recant" what he had told me. In case there is any doubt, having Clinton administration cabinet officials make policy statements to Members of Congress on which the Members of Congress then act, only to be told later that the Secretary is willing to recant, is not helpful.

So the situation is this. Interior is not arguing that what the Wampanoags want to do is illegal, only that it is bad policy. I told them that would absolutely kill the deal and they suggested that may be this is just bargaining. It is not. Everyone who knows anything about the situation understands that this is a tenuous proposition at best in the legislature and if we tell the state that they get no money out of it altogether even for this severe restriction on competition, the deal goes under. I and the Wampanoags were acting on this in good faith based on what we had been told by the Interior Department. And at no point did anyone in the Interior Department ever even hint to me -- including Duffy with whom I briefly discussed this matter -- that there was such a problem. For the administration now to pull the plug on this after everything that has gone forward would be appalling politically and substantively. Substantively, it would be outrageous because they will have killed this deal, poisoned the atmosphere for Indian gambling in Massachusetts, after having misled the tribe about what it could do. Politically, I must tell you that having the administration set me up and then repudiate me this way would be one of the most obnoxious things that has happened to me and I would be more upset than you have ever seen me.

Thus, what is needed is for the President to let the Interior Department know that they must standby their initial decisions; that having the Secretary recant is not a good idea, that killing this deal for the Wampanoags would go contrary to his policy of supporting Indian gaming. If the Department wants to announce that in all future cases they will be very restrictive about payments for less than exclusivity, I can't stop that although I think that should not be done without first negotiating with the Indians. To claim that you are doing this on behalf of the tribes as Interior does when in fact you will probably be making it very hard for many tribes to get any further agreements seems to me a terrible way to help them.

THE BOSTON GLOBE NOVEMBER 10, 1995

# US delays Indian casino approval

## Legislative OK is called a priority

By David M. Halperger and Chris Black  
GLOBE STAFF

WASHINGTON — The Interior Department dealt a heavy blow yesterday to the Wampanoag Tribe's gambling plans, refusing to approve a casino deal reached by the tribe and Gov. Weld until it first clears the

also gambling to Massachusetts. Legislative action has already been delayed at least until next year.

The lack of federal approval on a specific deal may encourage some legislators to write a compact that looks like the Wampanoag's but the state's four race tracks more than a year to negotiate. The tribe plans to build a casino in New Bedford.

Wampanoag chairwoman Beverly Wright said she understood the Interior Department's decision and "we agree with

that position." She said she hoped the legislature would approve the compact quickly so that "Interior can give its final approval."

The compact grants the Wampanoag exclusive casino rights in eastern Massachusetts for six years in exchange for an annual payment of \$90 million to the state. It also allows for future legislation permitting a casino in Hampden County as well as up to 700 slot machines at each of the tracks.

The Interior Department's decision did not address the merits of the compact. Spokesman leader of the Gay Head-based tribe, Justice said to point it as a form of land

# Legislature must OK casino first, Washington says

■ CASINO  
Continued from page 28

### endorsement

"I take the letter that is given here as a green light to go ahead, finish your business, and we'll approve the compact," said Jeffrey Markson, the Wampanoag's economic development director.

Ade E. Deer, assistant interior secretary for Indian affairs, "disapproved" the compact in identical letters to Weld and to Wright.

"The compact before us may yet

be amended during the consideration by the state legislature," Deer wrote. "Nevertheless, it is inappropriate for us to approve the compact at this time because it is not yet binding on the parties, and therefore, we must defer approval of the compact until legislative approval has been obtained."

Rep. Barney Frank, Democrat of New Jersey, the tribe's strongest ally in Washington, said he believed Interior Secretary Bruce Babbitt would approve a compact since it is ready to be sent to the department after it re-

ceives legislative approval.

"I'm 99 percent sure they will approve it," Frank said.

Deer concluded by saying "We regret that our decision could not be more favorable at this time."

Interior Department spokesman Stephen Hanna said that the Wampanoag compact posed "a very complex legal matter. Our solicitors reviewed it at length."

Once a tribal-state compact is approved, Hanna said, it becomes legally binding.

Under the Indian Gaming Regu-

latory Act, approval from the Interior Department could have allowed the Wampanoag to build and open a casino even if the compact became stalled in the legislature.

A spokesman for Attorney General Scott Harshbarger, an opponent of gambling in Massachusetts, said the department had acted wrongly.

William F. Lee, executive assistant attorney general, praised the decision for avoiding the "uncertain" line here resulted when federal officials approved tribal compacts before state legislators.

In New Mexico, for example, the governor signed a tribal gambling compact which was later struck down by the state's high court.

"The tribe started gambling anyway, because they had an Interior-approved compact in hand," Lee said. "And the attorney general felt his hands were tied" because the tribe's gambling law is only enforceable by the federal government.

The decision by the Interior Department comes at a awkward time for Wright, who has planned her forays to the casino project. She is

"It would have been nice if the department could have approved the compact before we understood that it would change in the legislature and that they want to wait for a final product before they give their final approval," said Jesse Hoffer, Wright's spokeswoman.

► Staff writer Mitchell Zuckoff contributed to this report.

REP. BARNEY FRANK TEL: 202-225-0182

Nov 22 95 12:53 No. 004 P.06

# BOSTON HERALD



★★★

Friday November 10, 1995

WEATHER: Partly sunny, cool, high 48, Page 54/TV: Page 57/LOTTERIES: Page 70

# Casino backers dealt a setback

By ANDREW WIGA

WASHINGTON — The U.S. Interior Department has turned down a New Bedford casino deal, delivering at least a temporary setback to backers of the \$175 million gaming project.

Interior officials said in a letter made public yesterday that

## Feds place gambling project into hands of state Legislature

they would reconsider the casino pact only after it wins final state legislative approval.

The ruling was viewed as a blow to casino advocates who

had hoped to have federal approval in hand before state lawmakers tackle the issue early next year.

The federal action gives the

state Legislature an open hand to amend the casino pact, an action House Speaker Charles F. Flaherty, said was highly likely.

"It (the casino compact) could be changed and changed substantially," said Flaherty.

The compact between the

Turn to Page 16

# Feds won't OK casino without state approval

From Page 1

state and the Wampanoag Indian tribe provides for a gambling casino in New Bedford. It also would allow four race track owners to operate up to 700 slot machines apiece.

One senior adviser to the project acknowledged yesterday that the federal action, while done on technical grounds, marked a setback.

"A green light from the feds would have speeded up the process and given us more muscle on Beacon Hill," he said.

## MORE ON CASINO

Page 30

Just last month Gov. William F. Weld predicted federal approval would have a "positive" impact on state legislators. Yesterday the governor said he did not believe the compact agreement was in any jeopardy.

U.S. Rep. Barney Frank (D-Newton), one of the casino's most ardent backers, said yesterday he was "confident" the project would ultimately be approved. He said it was "a good sign" Interior did not single out any other problems with the compact.

Casino opponents, meanwhile, hailed the ruling as a victory.

"They would have loved to have cleared a hurdle with Interior and then gone to the Leg-

islature saying everything's hunky-dory in Washington," said William P. Lee, executive assistant state attorney general.

"We're delighted they can't (do that)," he added.

The Wampanoag tribe took the ruling in stride, looking ahead to a tough fight on Beacon Hill.

"We ask the Legislature to approve the compact quickly so that the Department of Interior can give its final sign-off," said tribal leader Beverly Wright.

The deal between Weld and the Wampanoag, known as a compact, was hammered out Sept. 29 and immediately submitted to the federal government.

Federal officials informed Weld and the Wampanoag of their decision about the compact via a two-page letter.

"The compact before us may yet be amended during its consideration by the state Legislature," Ada Deer, assistant secretary of Indian Affairs wrote. "Therefore, we must defer approval of the compact until legislative approval has been obtained."

"For the foregoing reasons," the letter concluded, "the compact is hereby disapproved."

Final votes on the casino bills are not expected on Beacon Hill until January.

Connie Paige contributed to this report.

100 P. TELU

THE BOSTON GLOBE • THURSDAY, SEPTEMBER 14, 1995

# US officials signal support for casino

By Mitchell Zuckoff  
GLOBE STAFF

Federal officials have signaled their eagerness to approve the Wampanoag tribe's proposal to turn the New Bedford Municipal Golf Course into tribal land, a key step toward the tribe's dream of building a casino at the site.

In a letter to US Rep. Barney Frank (D-Newton), whose district includes New Bedford, the government's top Indian affairs official expressed "hope that the Wampanoag tribe will be successful in their bid to conduct off-reservation gaming and we stand ready to provide assistance where appropriate."

The letter from Ada Deer, assistant secretary for Indian affairs in the Interior Department, was written last month in response to an inquiry from Frank. It was released yesterday to reporters.

The letter's message was interpreted by Frank, an aide to Deer and others close to the casino negotiations as a clear statement to Gov. Weld and state legislators that federal officials would not create roadblocks to the Wampanoag's plan.

"This reaffirms that this administration is very supportive of the law on Indian gaming and is going to do whatever it can within the law to advance it," Frank said in a telephone interview. "This should relieve any

CASINO, Page 39

## CASINO

Continued from page 36  
body's concern that there is going to be a federal problem here."

Paula Hart, an attorney and management analyst in Deer's office, agreed with Frank's assessment and added, "We would be very happy if this proposal happened."

Federal approval for turning the golf course into tribal land, though a key requirement, is just one step in the process. First, two-thirds of the Legislature must approve the transfer of the land from public to private property.

That vote by the Legislature would have to precede any action by

the Interior Department because federal authorities cannot approve the creation of tribal land until a tribe has clear title to the property, Hart said.

Also, before the issue goes to the Legislature, the Wampanoags need to reach a final agreement with Weld on details of the casino's operations.

Among the issues under discussion are how it would be regulated and how much money the state would receive in exchange for preventing nontribal casinos from opening anywhere else in eastern Massachusetts.

Completion of that agreement, known as a compact, has been stalled for months during negotiations among the tribe, the Weld administration and the state's four race tracks.

The two sides have been fighting over its many slot machines the tracks not be allowed to install, and when they could begin operation, without jeopardizing the tribe's payments to the state. Sources we said an agreement is imminent and would set the slot machine number at 700 for each track, with strict limits on when they could begin operation.

Once his deal is worked out, Weld is expected to sign the compact and ask the Legislature to approve both the compact and the land transfer.

If the tribe clears those hurdles and wins approvals from state and federal officials, the 270-acre golf course also would become the legal equivalent of an Indian reservation. That, in turn, would make it eligible for use as a gambling site under a 1988 federal law that has resulted in Indian casinos being built in 23 states.

Jeff Nelson, the Wampanoags' economic development director, acknowledged that the tribe still has a long haul ahead. But added, "We're extremely pleased at the report that Interior is committed to our project and sees no problem with our following through to completion."

P. 001/001

BF D.C.

TO

FROM

10:18

SEP-14-1995



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
Washington, D.C. 20240



*Rile*

IN REPLY REFER TO:

BCCO 5922

JUN 05 1995

Honorable Barney Frank  
House of Representatives  
Washington, D.C. 20515-22104

RECEIVED

JUN 12 1995

Congressman Barney Frank

*Handwritten signature/initials*

Dear Mr. Frank:

Thank you for your letter of April 14, 1995, to Assistant Secretary Ada E. Deer, enclosing a March 8, 1995 letter to you from Mr. Joseph W. Haley, regarding the legal basis for using condemnation proceedings to acquire the New Bedford golf course site to be held in trust for the Wampanoag Tribe of Gay Head.

As you know, the Wampanoag Tribe has submitted an application to the Bureau of Indian Affairs (BIA) to take a parcel of land of approximately 168 acres, located in New Bedford, Massachusetts, in trust for the Tribe to operate a gaming establishment. The New Bedford site is located off-reservation. We do not believe that condemnation proceedings are a reasonable way of proceeding in this case, notwithstanding the merits of Mr. Haley's legal analysis.

Rather, it is our position that the acquisition of this parcel of land in trust for the Wampanoag Tribe should be subject to the requirements of Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. Section 2719, and the BIA's land acquisition regulations in 25 CFR Part 151.

We thank you for your interest in this acquisition, and hope that we can be of assistance to you in the future regarding this matter.

Sincerely,

*Hilda G. Manuel*

Deputy Commissioner of Indian Affairs

June 16, 1995

The Honorable Ada Deer  
Assistant Secretary  
Indian Affairs  
MS 4140-MIB  
1849 C Street N.W.  
Washington, DC 20240

Dear Ada,

I am writing to you with a deep sense of disappointment. A few weeks ago, I and my staff assistant in charge of our work on the proposed Wampanoag gambling casino came to the Department to talk to you and some of your officials. We made two requests -- one for some favorable comment by the Secretary about the project, another for a response on whether a particular approach to the taking of the land was doable.

Despite a very pleasant reception, I have spent a very frustrating few weeks after this, first being given the bureaucratic line on it, and finally being rejected on one request and simply ignored on the other -- neither with any explanation. I do not regard this as reasonable given the department's professed support for casinos run by Native Americans, and given my own record of support for and cooperation with the department.

On the question of the takings, I gave your staff a letter which outlined a proposed way to avoid a requirement that there be a 2/3rds vote in the Massachusetts Legislature. They accepted the letter and then I heard nothing about it. I called, and was told that Mr. Duffy was supposed to be getting back to me. Mr. Duffy then did get back to me and said he did not know what I was talking about in that specific case. I then faxed another copy of the letter to Mr. Duffy, hoping that I would be able to at least talk to someone about it. Finally, sometime after faxing that letter, I received a brush off letter from your department saying that while this might be legally interesting, it wasn't something you were interested in. I received no explanation of why you weren't interested, nor any chance to talk about it.

As to the request for the Secretary to say something favorable, that has simply disappeared. No one in your department has even given me the courtesy of a response. I write this to you because I cannot let it simply rest here. I intend to pursue this, but I wanted to discuss it with you first to try to get some understanding of why my requests have simply been dismissed this way. I hope you will be able to get back to me.

BARNEY FRANK



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240



JUL 07 1995

Honorable Barney Frank  
House of Representatives  
Washington, D.C. 20515-2104

Dear *Barney* ~~Mr. Frank~~:

Thank you for your letter of June 16, 1995, expressing your disappointment with the Department of the Interior's position that obtaining land through Federal condemnation proceedings for Indian gaming purposes is unwise. You also expressed your disappointment that the Secretary has not come forward with some "favorable comment" about the project.

Regarding the first matter, I want to emphasize that my staff in the Indian Gaming Management Staff Office and attorneys in the Department's Solicitor's Office studied the condemnation proposal very carefully before presenting their recommendations to me. Their recommendations only confirmed the strong sense of concern with which I viewed the proposal. We believe that using the Federal condemnation power in instances such as this would have significant political, policy and legal ramifications adverse to Indian gaming as a whole.

That being said, I wish to assure you by rejecting the condemnation proposal, the Department has not rejected the notion of Wampanoag gaming in New Bedford. We believe that there are other ways to address the difficulties inherent to this issue and we are working with the Wampanoag Tribe's attorney to explore these other possibilities.

I am, as always, happy to meet with you on this issue. I suggest, however, that more productive at this time would be a meeting between our staffs. I would be happy to make our people available to you for a detailed discussion both on the problems with the condemnation proposal and on other possible ways to approach the Wampanoag's present difficulties.

Regarding your disappointment that the Secretary has not announced "some favorable comment" about the project, we are simply not in a position to make a favorable public comment at this time. In any event, in the meeting I have suggested above, your staff could give us a better sense of what steps, if any, we should undertake next.

I look forward to your response.

Sincerely,

*Ada*

Ada E. Deer  
Assistant Secretary - Indian Affairs

RECEIVED

JUL 13 1995

Congressman Barney Frank

BARNEY FRANK  
4TH DISTRICT, MASSACHUSETTS

2404 RAYBURN BUILDING  
WASHINGTON, DC 20515-2104  
(202) 225-6931

78 CRAFFS STREET  
NEWTON, MA 02458  
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Congress of the United States  
House of Representatives  
Washington, DC

568 PLEASANT STREET  
ROOM 309  
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(508) 999-6462

222 MILLIKIN PLACE  
THIRD FLOOR  
FALL RIVER, MA 02721  
(508) 674-3551

89 MAIN STREET  
BRIDGEWATER, MA 02324  
(508) 697-9403

July 14, 1995

The Honorable Ada Deer  
Assistant Secretary  
Indian Affairs  
MS 4140-MIB  
1849 C Street N.W.  
Washington, DC 20240

SM/38

Dear Ada,

Your letter I must tell you furthers my sense of disappointment, not so much for the substantive points it makes as for the brusque way in which you and your colleagues continue to deal with me. I asked for a meeting and made a couple of requests. At the meeting I was given no indication that I was asking for anything improper or inappropriate. What disturbs me is that a long time after the meeting, when I had heard nothing at all, I get simple flat refusals with no explanation of why, and no offer to give me an explanation. In fact, it is not until I received your letter, in response to my complaint, that I learned that you don't have any plans for the Secretary to say anything positive about the project. Since I was told by representatives of the Wampanoags that the Secretary had made some favorable comments about projects in similar states of application, I am very disappointed simply to get a flat no with no explanation. May be the examples I was given were incorrect. May be there are some reasons why this shouldn't be done in this case. But for you simply to tell me no -- a very long time after I asked, and only after I complained about no answer at all -- does not comport with the treatment I expect to get from an administration with which I assumed I was cooperating.

As to the taking proposal, I was aware that that was a difficult one, but I am also disturbed first to receive no answer for a while, then to have gotten a phone call from Mr. Duffy in which it seemed clear to me that there was a misunderstanding of what I had requested, and then once again simply to get a brusque no with no explanation.

You say in your letter that "there are other ways to address the difficulties inherent to this issue", and you suggest "that more productive at this time would be a meeting between our staffs... for a detailed discussion both on the problems with the condemnation proposal and on other possible ways to approach the Wampanoags present difficulties." I am asking my staff to follow up on the suggestion and set up such a meeting. But I must express my dismay that when I met with you and your staff before, no such suggestions were forthcoming. I do not think I can be accused of having been resistant to suggestions you would make -- this is the first time I've gotten any indication that you or your staff are prepared to do so, and once again this comes only after I had to write a letter of complaint and repeat the complaint to you personally.

My staff will be in touch with you about how to follow up on this but I want to repeat that the way in which you have been dealing with me leaves me unconvinced that this administration considers me someone with whom cooperation is appropriate.



BARNEY FRANK

BF/mg



## United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

AUG 09 1995

Honorable Barney Frank  
House of Representatives  
Washington, D.C. 20515

Dear Barney:

I am pleased to report that our staffs met last Friday and I believe the meeting was productive. It is my understanding that misunderstandings on both sides have been addressed and that our staffs are committed to working closely together on issues affecting the proposed Wampanoag Casino in New Bedford.

I trust that Ms. Maria Giesta has briefed you by now, and that the concerns you raised in your July 14, 1995 letter to me have been addressed. However, if you have any further questions, please do not hesitate to contact the Director of the Indian Gaming Management Staff Office, Mr. George T. Skibine, at (202) 219-4066, or Ms. Heather Sibbison, Special Assistant to the Secretary at (202) 208-7351, who is working on this matter on behalf of Mr. John Duffy, Counselor to the Secretary.

Again, it is my hope that the Wampanoag Tribe will be successful in their bid to conduct off-reservation gaming and we stand ready to provide assistance where appropriate.

Sincerely,

Ada E. Deer  
Assistant Secretary - Indian Affairs

THE WHITE HOUSE

Harold -

Re Exclusivity:  
see p. 2 & 3 of memo  
& p. 60 of compact.

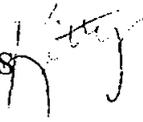
at the end of 6 years  
total pay 15%, even  
if no exclusivity.

Kitty

THE WHITE HOUSE  
WASHINGTON

December 20, 1995

NOTE TO: HAROLD ICKES  
PAT GRIFFIN

FROM: KITTY HIGGINS 

Attached is the information you requested on the  
New Mexico and Connecticut compacts and the provisions  
that define exclusivity.

Attachment

MEMORANDUM

To: Kitty Higgins, Secretary to the Cabinet  
 From: Anne Shields, Chief of Staff  
 Department of the Interior  
 Re: State/Tribal Compacts

*To: Shields  
 Oct 9.  
 From: KH.  
 Attached is  
 the inform  
 from you  
 requests  
 re the  
 new mem  
 + compact  
 cost co  
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 that off  
 the memo*

Of the 144 state/tribal compacts approved by the Department of the Interior, only New Mexico and Connecticut have included provisions for tribal payments in exchange for exclusivity. Additionally, the State of Michigan's compacts include payments for exclusivity provisions, but these provisions have not been reviewed or approved by the Department.

In New Mexico, the State has entered into identical gaming compacts with fourteen of its Pueblos. Attached is the portion of the San Juan Pueblo compact which terminates payments to the State should the Pueblo lose the benefit of the exclusivity contemplated in the compact. (Note: the Secretary's Office provided a New Mexico compact to Governor Weld's Office as a possible model before Governor Weld signed the Wampanoag compact.)

In Connecticut, the State has entered into compacts with the Mohegan and Pequot Tribes. Attached is the portion of the Mohegan compact which terminates payments to the State in the event that exclusivity is compromised. We do not have a copy of the Pequot compact on file, as it was entered into between the State and the Tribe pursuant to a court order. However, personnel in the Indian Gaming Management Staff understand that the relevant provision of the Mohegan compact closely mirrors the exclusivity provision of the Pequot compact.

The only other state in which there are state/tribal compacts relevant to this question is Michigan. However in Michigan, the Tribes submitted to the Department "clean" compacts which did not incorporate the details of their financial agreements with the State. The Tribes' financial agreement with the State was embodied in a court-ordered consent decree which was never reviewed by the Department. However, the consent decree contains the same sort of language used in the New Mexico and Connecticut compacts to void the requirement of tribal payments in the event that the State compromises the Tribes' exclusivity. More specifically, the consent decree states that the Tribes' obligation to make payments to the state "shall apply and continue only so long as there is a binding Class III compact in effect, and then only so long as the Tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan."

*N.B. This agreement was provided to Gov. Weld's office as a possible model for Massachusetts*

*ADDENDUM TO NEW MEXICO COMPACT GOVERNING PAYMENTS TO STATE/LOCALITIES See in particular, ¶ 5 (p. 4)*

**TRIBAL-STATE  
REVENUE SHARING AGREEMENT**

This Agreement made between the State of New Mexico (hereinafter referred to as "State") and the San Juan Pueblo (hereinafter referred to as "Tribe"), parties to a Compact between the Tribe and the State, executed more or less contemporaneously with this Agreement.

**WITNESSETH**

WHEREAS, Article V, § 4 of the Constitution of the State provides that "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed"; and

WHEREAS, the Joint Powers Agreements Act, §§ 11-1-1 to -7, NMSA 1978 (1994 Repl. Pamp.), authorizes any two or more public agencies by agreement to jointly exercise any power common to the contracting parties (§ 11-1-3), and defines "public agency" to include both Indian tribes and pueblos and the State of New Mexico or any department or agency thereof (§ 11-1-2(A)); and

WHEREAS, the Mutual Aid Act, §§ 29-8-1 to -3, NMSA 1978 (1994 Repl. Pamp.), authorizes the State and any Indian tribe or pueblo to enter into mutual aid agreements.

NOW, THEREFORE, the parties agree as follows:

1. Summary. The Tribe agrees to contribute certain of its Class III Gaming revenues, as described below, to the State and Local Government(s), as defined below, on the terms and conditions contained in this Agreement.

2. Purpose. The purpose of this Agreement is to compensate the State and Local Government(s) for maintaining market exclusivity of tribal gaming. Tribal revenue sharing will, therefore, be limited to the extent that competing games are conducted outside Indian Lands. This Agreement is intended to recognize the existing lawful levels of gaming permitted under State law and public policy. A central purpose of this Agreement is that if such existing lawful levels of gaming are increased, except as referred to under Paragraph 5(B), below, the Tribe's revenue sharing obligation hereunder shall terminate.

3. Revenue to State and Local Governments. The parties agree that, after the effective date hereof, the Tribe shall make semi-annual payments to the General Fund of the State ("State General Fund") and to any one or more Local Governments. "Local Government" shall mean any political subdivision of the State or any other local governmental entity or part thereof exercising authority on or near such Tribe's Indian Lands (but shall not mean another Indian Tribe or pueblo).

The Tribe's governing body or its designee shall determine which Local Government(s) shall receive payments and the amounts thereof; provided, however, the Tribe, or its designee, may make this determination based in part upon compensating the Local Governments for governmental services provided to the Tribe. However, no monies that the Tribe is already required or contracted to pay to the State or its subdivision(s) under any other agreement may be included in the forty percent (40%) share to Local Governments.

The State General Fund shall receive sixty percent (60%) of the amount calculated pursuant to Paragraph 4, below, and the Local Government(s) shall receive an aggregate amount equal to forty percent (40%) of that amount.

4. Calculation of Revenue to State and Local Governments.

A. The parties agree that, as used herein, "net win" is defined as the total amount wagered at each Gaming Facility on Class III games of chance which are protected by the limitations in Paragraph 5, below, and elsewhere herein, minus the total amount paid as prizes (including non-cash prizes) and winning wagers at said games, and minus all tribal regulatory fees and expenses, supported by reasonable, adequate documentation, not to exceed \$250,000 per year and minus federal and State regulatory fees and expenses, and taxes.

B. The total revenue the Tribe will pay to the State and Local Government(s) in the aggregate pursuant to Paragraph 3, above, shall be determined as follows:

(1) Three Percent (3%) of the first Four Million Dollars (\$4,000,000) of net win at each Gaming Facility derived from Class III games of chance which are protected by the limitations in Paragraph 5, below, and elsewhere herein; and

(2) Five Percent (5%) of the net win over the first Four Million Dollars (\$4,000,000) at each Gaming Facility derived from Class III games of chance which are protected by the limitations in Paragraph 5, below, and elsewhere herein.

C. For purposes of these payments, all calculations of amounts due shall be based upon a calendar year beginning January 1 and ending December 31,

unless the parties agree on a different fiscal year. The semi-annual payments due to the State and Local Government(s) pursuant to these terms shall be paid no later than twenty five (25) days after December 31 and June 30 of each year (or commensurate dates if the fiscal year agreed upon is different from the calendar year). Any payments due and owing from the Tribe in the year the Compact is approved, or the final year the Compact is in force, shall reflect the net win, but only for the portion of the year the Compact is in effect.

★ 5. Limitations. The Tribe's obligation to make the payments provided for in Paragraphs 3 and 4, above, shall apply and continue only so long as there is a binding Class III Compact in effect between the Tribe and the State which Compact provides for the play of Class III games of chance, but shall terminate in the event of any of the following conditions:

A. If the State passes, amends, or repeals any law, or takes any other action, which would directly or indirectly attempt to restrict, or has the effect of restricting, the scope of Indian gaming.

B. If the State permits any expansion of non-tribal Class III Gaming in the State. Notwithstanding this general prohibition against permitted expansion of gaming activities, the State may permit (1) the enactment of a State lottery, (2) any fraternal, veterans or other non-profit membership organization that, as of the date on which this Agreement is signed by the Governor of the State, was operating one or more electronic gaming devices on such organization's premises for the benefit of its members, whether lawfully or not, to operate such devices lawfully, but only for the

benefit of such organization's members, and only if such devices are required to meet the standards applicable to such devices in the State of Nevada by no later than one year after the date of enactment of legislation making such devices lawful, and only if such organization is permitted to operate no more than the number of such devices in place and operating on such organization's premises as of 5:00 p.m., February 10, 1995, based on a certified state inventory that is subject to audit and review by the Tribe; and (3) any horseracing tracks to operate electronic gaming devices on days on which live horseracing or simulcast of horse races occurring at horseracing tracks elsewhere within New Mexico are conducted at such tracks, provided, however, that for any day on which electronic gaming devices are permitted to be operated under this provision at any horseracing track located within 150 miles of a Gaming Facility owned by the Tribe, one-half of the net win derived from electronic gaming devices at such Gaming Facility for such day would be exempt from any revenue sharing obligation under the provisions of this Agreement (except that if electronic gaming devices are operated at such horseracing track for more than 12 hours on any such day, all of the Tribe's revenues from electronic gaming devices on such day shall be exempt from any revenue sharing obligation under the provisions of this Agreement); and provided further that there will be no exemption from State taxes imposed on gross receipts of such electronic gaming devices at horseracing tracks. Notwithstanding the reference to permitted live horseracing dates, any increase in the number of permitted live horseracing dates on which electronic gaming devices are permitted to be operated shall constitute an unpermitted expansion of gaming.

6. Effect of Variance.

A. In the event the acts or omissions of the State cause the Tribe's obligation to make payments under Paragraph 4 of this Agreement to terminate under the provisions of Paragraph 5, such cessation of obligation to pay will not adversely affect the validity of the Compact, but the maximum amount that the Tribe agrees to reimburse the State for actual documented regulatory costs under Section 4(E)(5) of the Compact shall automatically increase to One Hundred Thousand Dollars (\$100,000) per year.

B. In the event a Tribe's revenue sharing payment to the State is less than \$100,000 per year, the maximum amount that the Tribe agrees to reimburse the State for actual documented regulatory costs under Section (4)(E)(5) of the Compact shall automatically increase to \$100,000 per year less the amount of the revenue sharing payment.

7. Interpretation. This Agreement shall be broadly construed to accomplish its purpose.

8. Dispute Resolution. In the event either party fails to comply with or otherwise breaches any provision of this Agreement, the aggrieved party may invoke the dispute resolution procedure set out in the Compact.

9. Effective Date. This Agreement shall become effective on the date that the Compact between the State and the Tribe becomes effective.

10. Amendments. Any amendment to this Agreement shall be in writing and signed by both parties. The terms and conditions of this Agreement shall remain in effect until amended, modified or terminated, by agreement of the parties.

11. Third Party Beneficiaries. This Agreement is not intended to create any third-party beneficiaries and is entered into solely for the benefit of the Tribe and the State.

12. Definitions. Unless otherwise provided herein, terms in this Agreement shall have the same meanings as such terms are given in Section 2 of the Compact.

13. Equal Treatment. If during the term of this Agreement, any tribe or pueblo in the State of New Mexico enters into a comparable agreement pertaining to sharing of Class III Gaming revenues with the State, containing any terms or conditions more favorable to that tribe or pueblo than those contained in this Agreement, without the written consent of the Tribe, then the Tribe shall be entitled to operate under the more favorable terms without amending this Agreement or the Compact.

IN WITNESS WHEREOF, the parties have executed this Agreement on this 12 day of February, 1995.

SAN JUAN PUEBLO

STATE OF NEW MEXICO

By: *Joe A. Garcia*  
Joe A. Garcia  
Governor

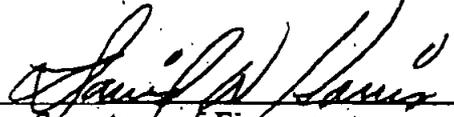
By: *Gary Johnson*  
Gary Johnson  
Governor

Dated: 13 Feb 95

Dated: 2/13/95

**APPROVAL BY THE SECRETARY OF FINANCE AND ADMINISTRATION**

The foregoing Agreement between the SAN JUAN PUEBLO and the STATE OF NEW MEXICO is hereby approved this 12 day of February, 1995, pursuant to authority conferred on me by the New Mexico Joint Powers Agreements Act, §§ 11-1-1 to -7, NMSA 1978 (1994 Repl. Pam.).

BY:   
Secretary of Finance  
and Administration

ADDENDUM TO MOHEGAN/CONNECTICUT  
COMPACT GOVERNING PAYMENTS TO  
STATE/LOCALITIES

See in particular, p. 2

MEMORANDUM OF UNDERSTANDING

This joint memorandum of understanding is entered into by and between the State of Connecticut (the "State") and the Mohegan Tribe of Indians of Connecticut (the "Tribe"), this 17th day of May, 1994, to set forth certain matters regarding implementation of the Mohegan Gaming Compact (the "Compact"), and the Agreement (the "Agreement") resolving the Tribe's land claim against the State. All terms used herein which are defined in the Compact shall have the meanings assigned thereto in the Compact.

(1) In full settlement and satisfaction of certain controversies which have arisen between the parties hereto concerning the effect of the Compact on the operation of the electronic lottery devices and other video facsimiles (as defined in the Compact), the State and the Tribe agree that, subject to all of the terms and conditions herein, the moratorium imposed by section 15(a) of the Compact on the operation by the Tribe of video facsimile games shall be suspended and, so long as the Tribe complies with the terms and conditions of the Memorandum of Understanding, the Tribe may operate video facsimiles ("video facsimiles") as defined in section 2(cc) of the Compact, subject to the requirements of section 7(c) of the Compact and the Technical Standards for Video Facsimile Games as set forth in

section 31 of Appendix A of the Compact. The Tribe agrees that, so long as no change in State law is enacted to permit the operating of video facsimiles or other commercial casino games by any other person, the Tribe will contribute to the State a sum (the "Contribution") equal to twenty five percent (25%) of gross operating revenues of video facsimile games operated by the Tribe less those reductions set forth in paragraphs (2) and (3) hereof. For purposes of this paragraph, gross operating revenues shall be defined to mean the total sum wagered less amounts paid out as prizes. The Contribution shall be payable on or before the fifteenth day of each month in an amount equal to: (i) twenty five percent (25%) of the gross operating revenues of the Tribe from the operation of video facsimiles during the portion of the fiscal year of the State concluding on the last day of the preceding calendar month, or, on July 15th of each year, twenty five percent (25%) of the gross operating revenues of the Tribe from the operation of video facsimiles during the preceding fiscal year of the State, less (ii) the cumulative Contribution paid by the Tribe prior to such date with respect to the operation of video facsimiles during the applicable fiscal year of the State. The Tribe shall provide the State with detailed reporting of the gross operating revenues of video facsimiles and the determination of the Contribution hereunder which shall be subject to audit by the State in accordance with the provisions of the Compact. Upon any failure by the Tribe to satisfy its obligations to the State hereunder, this Agreement shall cease to be of any force or effect and the moratorium established pursuant to section 15(a) of the

Compact shall without any requirement for further action by either party be in full force and effect in accordance with its terms.

(2) The cumulative Contribution required to be paid by the Tribe pursuant to paragraph (1) shall be reduced by \$5,000,000 (five million dollars) in the second year the Mohegan Tribal Gaming Operation is open for business, by \$2,500,000 (two million five hundred thousand dollars) in the third year of such operation and by \$2,500,000 (two million five hundred thousand dollars) in the fourth year of such operation.

(3) The parties agree that the Tribe's cumulative Contribution pursuant to paragraph (1) and paragraph (2) shall be increased by three million dollars (\$3,000,000) in the first year following the completed transfer of Fort Shantok Park to the United States to be held in trust for the Mohegan Tribe as part of its Initial Indian Reservation.

(4) Notwithstanding the provisions contained paragraph (1), solely for the fiscal year of the State commencing July 1, 1994 and concluding on June 30, 1995, the minimum Contribution with respect to the operation of video facsimiles during said fiscal year shall be the lesser of 80% of gross operating revenues or \$40,000,000 (forty million dollars). The minimum Contribution shall be payable on or before the fifteenth of each month during said fiscal year in an amount equal to: (i) eighty percent (80%) of the gross operating revenues of the Tribe from the operation of video facsimiles during the portion of the fiscal year of the State concluding on the last day of the preceding calendar month, or, on June 30, 1995 of such year, eighty percent (80%) of the

gross operating revenues of the Tribe from the operation of video facsimiles during the preceding fiscal year of the State, or \$40,000,000 (forty million dollars), whichever is the lesser, less (ii) the cumulative Contribution paid by the Tribe prior to such date with respect to the operation of video facsimiles during the applicable fiscal year of the State. The Tribe shall provide the State with detailed reporting of the gross operating revenues of video facsimiles and the determination of the Contribution hereunder which shall be subject to audit by the State in accordance with the provisions of the Compact. Upon any failure by the Tribe to satisfy its obligations to the State hereunder, this Agreement shall cease to be of any force or effect and the moratorium established pursuant to section 15(a) of the Compact shall without any requirement for further action by either party be in full force and effect in accordance with its terms.

(5) For each fiscal year of the State commencing on or after July 1, 1995 or in any year after that that the Mohegan Gaming Operation is open for business for any portion of the year, the Minimum Contribution with respect to the operation of video facsimiles during said fiscal year shall be the lesser of: (i) thirty percent (30%) of gross operating revenues from video facsimiles during such fiscal year, or (ii) the greater of twenty five percent (25%) of gross operating revenues with respect to the operation of video facsimiles during such fiscal year or Eighty Million Dollars (\$80,000,000.00) (the "Minimum Contribution"). The Minimum Contribution shall be payable as follows: the cumulative Contribution of the Tribe to the State hereunder with

respect to the operation of video facsimiles during each such fiscal year of the State shall be Eight Million Dollars (\$8,000,000.00) as of September 15th of each such fiscal year, but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through August 31 of such fiscal year; Sixteen Million Dollars (\$16,000,000.00) as of October 15th of each such fiscal year, but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through September 30th of such fiscal year; Twenty Four Million Dollars (\$24,000,000.00) as of November 15th of such fiscal year but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through October 31st of such fiscal year; Thirty Two Million Dollars (\$32,000,000.00) as of December 15th of such fiscal year but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through November 30th of such fiscal year; Forty Million Dollars (\$40,000,000.00) as of January 15th of such fiscal year but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through December 31st of such fiscal year; Forty Eight Million Dollars (\$48,000,000.00) as of February 15th of such fiscal year, but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through January 31st of such fiscal year; Fifty Six Million Dollars (\$56,000,000.00) as of March 15th of such fiscal year, but not

more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through February 28th of such fiscal year; Sixty Four Million Dollars (\$64,000,000.00) as of April 15th of such fiscal year, but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through March 31st of such fiscal year; Seventy Two Million Dollars (\$72,000,000.00) as of May 15th of such fiscal year, but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through April 30th of such fiscal year; and at least Eighty Million Dollars (\$80,000,000.00) as of July 15th following the close of each such fiscal year, but not more than 30% (thirty percent) of gross operating revenues from video facsimiles from July 1st of such fiscal year through June 30th of such fiscal year; provided that, if in any year commencing on or after July 1, 1995, the Mohegan Gaming Operation is open for business for less than a full year, the Minimum Contribution shall be prorated to reflect that portion of the year.

(6) The Tribe's obligation to make any Contribution required by this Memorandum shall be conditioned upon satisfaction of all of the following requirements:

a) Federal Recognition of the Mohegan Tribe is final and effective;

b) The United States has accepted into trust on behalf of the Tribe the lands on which the Tribe will conduct its Gaming

Operation;

c) The tribal-state gaming Compact between the State of Connecticut and the Mohegan Tribe has been approved by the Secretary of Interior, and no part of that Compact or implementing agreement thereto has been invalidated; and

d) The National Indian Gaming Commission has not disapproved the management contract governing the relationship between the Tribe and its gaming management contractor.

e) The Mohegan Tribal Gaming Operation is open for business.

The parties agree to pursue with due diligence all the above conditions expeditiously and in good faith.

(7) It is understood and agreed by the parties that this agreement constitutes an accommodation by both the State and the Tribe in order to satisfy their respective interests and to resolve the matters addressed by section 15(a) of the Compact in an orderly and non-adversarial manner, and does not constitute an admission or concession by either the State or the Tribe as to any legal or factual question which may otherwise arise pursuant to section 15(a) of the Compact. The Tribe agrees that so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimile games or other commercial casino games, the Tribe shall not assert the right to operate video facsimile games except in accordance with this Memorandum of Understanding. In the event that any change in State law is enacted to permit the operation of

video facsimiles or other commercial casino games by any other person or any other person within the State lawfully operates video facsimile games or other commercial casino games, the Tribe shall not be bound by the provisions of this Memorandum of Understanding so long as it does not claim any right to operate video facsimiles by virtue of this Memorandum of Understanding, but the Tribe may thereupon assert any rights which it may otherwise have under the Compact; provided, however, that in such event neither party shall be bound by any of the provisions hereof nor shall either party be barred from taking any position inconsistent with this Memorandum of Understanding; and further provided, that in the event that the Mashantucket Pequot Tribe lawfully operates video facsimile games or other commercial casino games under the provisions of the Indian Gaming Regulatory Act, the Tribe shall not thereby be relieved of its obligations hereunder but shall continue to be bound by the provisions of paragraphs (1) through (5) of this Memorandum of Understanding so long as the Mashantucket Pequot Tribe makes a contribution to the State with respect to its operation of video facsimile games which is at least equivalent to that required pursuant to this Memorandum of Understanding. Nothing contained in this Memorandum of Understanding shall be utilized under any circumstances as evidence by either the State or the Tribe as to the intent of the Compact or the effect of any provision of the Compact or of any State or Federal law or regulation.

BARNEY FRANK  
4TH DISTRICT, MASSACHUSETTS

2404 RAYBURN BUILDING  
WASHINGTON, DC 20515-2104  
(202) 225-5931

29 CRAFTS STREET  
NEWTON, MA 02158  
(617) 332-3920

**Congress of the United States**  
**House of Representatives**  
**Washington, DC**

558 PLEASANT STREET  
ROOM 309  
NEW BEDFORD, MA 02740  
(508) 999-6482

222 MILLIKEN PLACE  
THIRD FLOOR  
FALL RIVER, MA 02721  
(508) 674-3551

89 MAIN STREET  
BRIDGEWATER, MA 02324  
(608) 697-9403

**MEMORANDUM**

TO: Harold Ickes

FR: Barney Frank

December 13, 1995

**ENCLOSURES**

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I wish I didn't have to keep imposing on your time regarding this casino issue -- admittedly not as much as you wish I would stop imposing on your time, but I do sympathize.

To make sure that I had been absolutely accurate in what I told you, I got a copy of the compact. It reinforces my conviction that people at Interior are grossly misrepresenting this, whether intentionally or not I do not know.

For example, the compact specifically says there shall be only one other casino in Massachusetts, with no reference to a 25 mile limitation. There is a provision dealing with milcage -- it says there shall not be any other slot machines within a 20 mile radius. Obviously, this is very different than what the Interior Department told you. The compact specifically allows for only one other casino in the state, and in fact mentions that it should be in Hampden County, which is about 100 miles away.

The compact also specifically says that the payments stop when the exclusivity stops. I'm enclosing along with this a couple of relevant pages.

The first is from the transmission letter dated September 29 from the Governor and Lieutenant Governor to the Legislature which explicitly says that the payments are only during the period of exclusivity -- "these payments shall continue for as long as the tribe has exclusivity." And also refers to the fact that the casino defines exclusivity to allow "a casino, if so authorized by the Legislature, in Hampden County."

I've also enclosed the relevant provisions on exclusivity. I do not understand how Interior Department officials acting on good faith could have given you such a distorted and inaccurate version of this.

**HOUSE . . . . . No. 5518**

**The Commonwealth of Massachusetts**



WILLIAM F. WELD  
GOVERNOR

MARGO PAUL CELLUCCI  
LEUTENANT-GOVERNOR

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133

(617) 727-3600

September 29, 1995

The Honorable Senate and House of Representatives:

We are filing for your consideration the attached "Act Enacting the Tribal-State Compact between the Wampanoag Tribe of Gay Head (Aquinnah) and the Commonwealth of Massachusetts." This Compact has today been executed by the Governor and the Tribe and has also been submitted to the Secretary of the Department of the Interior of the United States for his approval, as required under the Indian Gaming Regulatory Act ("IGRA").

The Compact establishes, as required under the IGRA, the relationship between the Wampanoag Tribe and the Commonwealth as to the operation of a tribal casino in New Bedford and also sets out, in detail, a structure for the operation and regulation of such a casino.

The Compact specifies that the casino will be subject to strict regulation by the State. The regulations require that any party who works at the facility, any entity which provides gaming services to the gaming operation (and principals of such entities) and all management contracts are to be approved first by the State and then by the Tribal Gaming Commission. This regulatory plan compliments the structure contained in the "Massachusetts Gaming Control Act" which we are filing separately today.

Although not required by federal law, in the Compact, the Tribe agrees to pay and withhold all applicable taxes; including, hotel taxes, sales taxes, excise taxes, taxes on liquor and cigarettes and employment taxes, as if it was a non-Indian run business. Finally, the Tribe agrees that the provisions of the National Labor Relations Act will apply to the casino and related businesses.

The Compact provides that during a six year period of exclusivity, the Tribe will pay to the Commonwealth, annually \$90 million, less thirty-three and one-third percent of the amount by which the net gaming revenues of the Tribe (the amount wagered less the amount paid out in prizes) are less than \$375 million, or plus thirty-three and one-third

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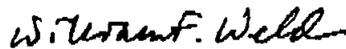
percent of the amount by which such annual net gaming revenue exceeds \$375 million. This amount is subject to a credit of one-half of one percent of the amount of all gross non-tribal revenue from slot machines generated in the Commonwealth and by an offset for certain State regulatory costs paid by the Tribe. (These payments shall continue for as long as the Tribe has exclusivity.) Of the money due from the Tribe, 12% will be distributed to the cities and towns of Bristol County under the lottery formula, an additional \$400,000 will go to the Town of Dartmouth, 2% will be used to address problems associated with compulsive gambling behavior, with the remainder paid to the Commonwealth.

The Compact defines exclusivity to allow charitable gaming; all games operated, now or in the future, by the Massachusetts State Lottery <sup>a</sup>casino, if so authorized by the Legislature, in Hampden County; and, up to 700 slot machines, if so authorized by the Legislature, at each of the four racetracks now licensed in Massachusetts.

We have worked hard to negotiate an agreement with the Wampanoag Tribe which respects their rights under the federal Indian Gaming Regulatory Act, brings much needed jobs to Bristol County, and fairly shares the gaming revenues between the Tribe, the cities and towns of Bristol County, and the Commonwealth. We believe that we have reached an agreement which strikes the proper balance between the Tribe, the Commonwealth, the existing pari-mutual facilities in Massachusetts, and the potential interest in Hampden County in opening a casino in the Western portion of our State.

We urge you to enact the Compact promptly and without amendment.

Respectfully submitted,



William F. Weld  
Governor



Argeo Paul Cellucci  
Lieutenant Governor

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1     **27. GRANT OF EXCLUSIVITY.**

2     a. **Recognition of Unique Circumstances.** In July, 1993, the  
3 Tribe requested that the State allow the Tribe to locate the Tribal  
4 Gaming Facility in New Bedford.

5     This request was made in recognition of the unique circum-  
6 stances of the Tribal reservation's location on the Island of  
7 Martha's Vineyard, an ecologically and environmentally sensitive  
8 area within the State which would be adversely effected by the  
9 operation of a gaming facility on said Tribal reservation, and  
10 which would also limit the success of a gaming facility on said  
11 reservation, and by reason of the location of a significant number  
12 of Tribal members residing in New Bedford, a City with strong  
13 historical ties to the Tribe. The Tribe has substantially improved  
14 the economic benefits it will receive from a gaming facility by  
15 locating the facility in New Bedford rather than on its reservation  
16 on Martha's Vineyard. Further, the City of New Bedford has in  
17 recent years experienced high unemployment and economic dis-  
18 tress, which conditions will be ameliorated by locating the  
19 Gaming Facility within the City of New Bedford.

20     b. **Settlement of Controversies and Grant of Exclusivity.** In  
21 full settlement and satisfaction of outstanding controversies between  
22 the parties hereto and in consideration of the mutual agreements  
23 set forth herein, the parties have agreed on exclusivity set forth in  
24 this Section in return for voluntary contributions to the State  
25 described in subsection (c). The Tribe agrees that so long as no  
26 other Gaming Facility offering Casino Gaming or Electronic  
27 Gaming Devices is authorized by State law except as provided in  
28 this Compact, and no other person operates such a Facility, the  
29 Tribe will make the contributions set forth in subsection (c) of  
30 this Section.

31     c. **Absolute Exclusivity.** The Tribe and the State agree that the  
32 Tribe has absolute exclusivity as follows:

33     i. In Massachusetts, the Tribe has the only unlimited right to  
34 operate Electronic Gaming Devices and the sole and exclusive  
35 right to operate Class III games other than Slot Machines ("Table  
36 Games") without regard to numerical restrictions within what is  
37 known as and designated by the Office of Management and  
38 Budget of the federal government ("OMB") as the Boston Con-  
39 solidated Metropolitan Statistical Area, which Consolidated  
40 Metropolitan Statistical Area consists of approximately 5,400,000  
41 people;

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42 ii. The Tribe has the sole and exclusive right to operate Slot  
43 Machines within a twenty (20) mile radius of the Tribal Gaming  
44 Facility;

45 iii. The Tribe has the sole and exclusive right to operate Class  
46 III Gaming within the New Bedford Metropolitan Statistical Area  
47 as designated by OMB; and

48 iv. The Tribe has an economic interest, as set forth in sub-  
49 section (e) of this Section, in the proceeds of every Slot Machine  
50 operating in the Commonwealth of Massachusetts.

51 d. Terms of Exclusivity. It is expressly understood that the  
52 following fall outside the grant of exclusivity described in the  
53 preceding subsection: a) the State may authorize a single facility  
54 offering Casino Gaming in Hampden County; and b) the State  
55 may authorize not more than a total of seven hundred slot  
56 machines located at each of the four racetracks licensed in the  
57 Commonwealth (at Foxboro, Raynham, Revere, and East Boston).  
58 Further, notwithstanding anything in this Section to the contrary,  
59 the exclusivity described in subsection (b) of this Section shall not  
60 be deemed to cover, and shall be deemed to exclude: a) games  
61 currently offered by the Massachusetts State Lottery, and any  
62 future games developed by the Massachusetts State Lottery in  
63 accordance with General Laws Chapter 10, section 24; and b) any  
64 gaming carried out pursuant to the provisions of General Laws  
65 Chapter 271, §7A.

66 e. Amount of Contribution. The Tribe has determined, after con-  
67 sultation with duly qualified and informed consultants, profes-  
68 sionals, and gaming and business experts, that this Compact confers  
69 upon the Tribe substantial and significant economic advantage and  
70 benefit consistent with the goals of IGRA, and therefore, the Tribe  
71 voluntarily agrees that the Tribal contribution shall be annually the  
72 sum of ninety million dollars (\$90,000,000), less thirty-three and  
73 one-third percent (33 1/3%) of the amount by which the Annual Net  
74 Gaming Revenues of the Tribe are less than three hundred seventy-  
75 five million dollars (\$375,000,000); or plus 33 1/3% of the amount by  
76 which such Annual Net Gaming Revenues exceed \$375,000,000.  
77 provided however, that this contribution will be reduced by a  
78 credit of one-half of one percent (1/2%) of all gross non-Tribal slot  
79 machine Net Gaming Revenues generated in the Commonwealth,  
80 and by an offset for any state regulatory costs paid by the Tribe  
81 during that period. (Any license or application fee charged by the

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82 Commonwealth shall not be deemed to be a "state regulatory  
83 cost."). In the event the Tribe's Annual Net Gaming Revenues are  
84 less than three hundred fifty million (\$350,000,000), the Tribe will  
85 also receive an additional credit of eight percent (8%) of the  
86 amount by which the aggregate gross slot machine Net Gaming  
87 Revenues of any single race track in the Commonwealth exceeds  
88 fifty million dollars (\$50,000,000) annually. Notwithstanding the  
89 foregoing and subject to the terms and conditions hereof, the  
90 Tribe shall make a contribution equal to twenty-five percent  
91 (25%) of its Annual Net Gaming Revenues during the operation  
92 of any Temporary Facility.

93 f. **Revenue Sharing.** The use of the contributions of the Tribe  
94 shall include the following purposes:

95 i. to help fund operations of local governmental agencies of the  
96 State and its political subdivisions;

97 ii. to provide revenue to the State to cover the costs of  
98 licensing and regulation of gaming within the Commonwealth  
99 of Massachusetts;

100 iii. to provide revenue to the State to cover the costs of impacts  
101 resulting from gaming; and

102 iv. for any other use not specifically set forth above which is in  
103 compliance with law.

104 Pursuant to the foregoing and subject to the terms and condi-  
105 tions of this Compact, during the Tribe's occupancy of the  
106 Temporary and Permanent Facilities, twelve percent (12%) of the  
107 contribution referred to in subsection (e) of this Section shall be  
108 paid by the Tribe directly to cities and towns in Bristol County  
109 pursuant to the lottery formula, so-called, and an additional  
110 eighty-eight percent (88%) shall be paid by the Tribe as follows:

111 (1) Four hundred thousand dollars (\$400,000) to the Town of  
112 Dartmouth by reason of special impacts on services caused by  
113 that Town's proximity to the Gaming Facility;

114 (2) A maximum of two percent (2%) to non-profit organiza-  
115 tions serving the needs of compulsive gamblers. Said funds shall  
116 be distributed to such organizations and in such amount as the  
117 Tribe and the Board, after consultation with one another, agree;  
118 and

119 (3) The remainder shall be paid to the Commonwealth.

120 g. **Payment Date.** Payments of the contribution described in  
121 subsection (f) of this Section shall be made on or before the

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122 fifteenth (15th) day of each month, and such monthly contribu-  
123 tions shall be determined by calculating the cumulative Annual  
124 Net Gaming Revenues for the number of months of the fiscal year  
125 which have elapsed concluding with the month preceding the  
126 month in which the payment is due, projecting such cumulative  
127 Net Gaming Revenues over the full fiscal year on a pro forma  
128 basis, and dividing the pro forma result by twelve. The final  
129 monthly payment shall be due July 15 of each year for the year  
130 ending the preceding June 30. Credit shall be given for any  
131 monthly contributions made previously for that fiscal year.

132 h. **Length of Exclusivity.** The exclusivity described in sub-  
133 section (b) of this Section shall have a duration of six (6) years  
134 from the earlier of the date the Tribe opens the Temporary or the  
135 Permanent Gaming Facility to the public; provided, however, that  
136 such six (6) year period shall commence to run no later than  
137 six (6) months after a Management Contractor has been approved  
138 by the Bureau of Indian Affairs and the National Indian Gaming  
139 Commission. In the event the Tribe loses such exclusivity within  
140 such six (6) year period, the Tribe agrees to pay for the actual  
141 costs of regulation, licensing, and Compact oversight of the  
142 Tribe's Gaming Facility. If the Tribe loses the exclusivity  
143 described in subsection (b) of this Section after completion of the  
144 six (6) year period described in this sentence, the Tribe agrees to  
145 make a contribution equal to the greater of: 1) the State's actual  
146 costs for regulation, licensing and Compact oversight of the  
147 Tribe's Gaming Facility, plus fifteen percent (15%) of the amount  
148 the Tribe would have paid under this Compact if the exclusivity  
149 had been maintained, (or) 2) an amount calculated at the lowest rate  
150 which is paid to the State by any other casino gaming facility  
151 operating in the Commonwealth.

#### 1 28. AMENDMENT AND MODIFICATION.

2 a. **Compact.** The terms and conditions of this Compact may be  
3 modified or amended by written agreement of both parties, and  
4 any such amendment or modification shall be subject to the  
5 approval of the Secretary of the Interior of the United States and  
6 the Massachusetts General Court, to the extent required by law.  
7 A request to amend or modify this Compact by either party shall  
8 be in writing, specifying the manner in which a party requests this  
9 Compact to be changed, the reason(s) for the modification and the

## OUTLINE OF SECTION 27 OF THE WAMPANOAG GAMING COMPACT

Following is an analysis of Section 27 of the Compact between the State of Massachusetts and the Wampanoag Tribe Of Gay Head. This section sets forth the terms of payment to the State in consideration for the grant of exclusive rights to certain gaming.

### Grant of Exclusivity

Subsection (b) states that "the Tribe agrees that so long as no other Gaming Facility offering Casino Gaming or Electronic Gaming Devices is authorized by State law except as provided in the Compact, and no other Person or Entity operates such a facility except as provided in this Compact, the Tribe will make the contributions set forth in subsection (e) of this Section."

### Scope of Exclusivity

Subsection (c) states the terms of the exclusivity as follows:

1. Unlimited right to operate electronic gaming devices and exclusive right to operate class III games other than slot machines within the Boston Consolidated Metropolitan Statistical Area (CMSA);
2. Exclusive right to operate slot machines within a 20 mile radius of the tribal gaming facility;
3. Exclusive right to operate class III gaming within New Bedford Metropolitan Statistical Area (MSA);
4. Economic interest in proceeds of every slot machine operating in the State, as set forth in subsection (e) below.

### Understanding of what is not Covered under Subsection (b)

Subsection (d) states that it is understood that the following fall outside of the grant of exclusivity described in subsection (b):

1. Casino gaming facility in Hampden County;
2. 700 slot machines at each of the four racetracks licensed in the State (Foxborough, Raynham, Revere, and East Boston);
3. Current and future games offered by the Massachusetts State Lottery;
4. Gaming carried out under Chapter 271, Section 7A (raffles and bazaars).

### Amount of Contribution

Subsection (e) requires the Tribe to make a voluntary annual

payment \$90,000,000 less 33 1/3% of the amount by which annual net gaming revenues of the Tribe are less than \$375,000,000. This amount will be reduced by a credit of 1/2% of all "gross non-tribal slot machine Net Gaming Revenues generated in the State, and by an offset for any State regulatory costs paid by the Tribe during that period. In the event the Tribe's annual Net Gaming Revenues are less than \$350,000,000, the Tribe will also receive an additional credit of 8% of the amount by which the aggregate gross slot machines Net Gaming revenues of any single race track in the State exceeds \$50,000,000 annually.<sup>1</sup>

Notwithstanding the foregoing, the Tribe is required to pay to the State 25% of its annual Net Gaming Revenues during the operation of the Temporary Facility.

#### What the Contribution Comes Down To

In simple terms, it means that the Tribe does not pay the State anything if its annual Net Gaming Revenues are \$105,000,000 or under. The Tribe pays 33 1/3% of the amount of Net Gaming Revenues in excess of \$105,000,000, up to a maximum payment of \$90,000,000. EXAMPLE I: If the Tribe's Net Gaming Revenues are \$205,000,000, it will pay 33 1/3% of \$100,000,000, or approximately \$3,330,000. EXAMPLE II: If the Tribe's Net Gaming Revenues are \$375,000,000, it will pay 33 1/3% of \$270,000,000, or approximately \$90,000,000. If the Tribe's Net Gaming Revenues exceed \$375,000,000, its payment stays at \$90,000,000.

In addition, the annual tribal payment is reduced by .5% of non-tribal slot machines Net Gaming Revenues, i.e., if other slots in the State have Net Gaming Revenues of \$100,000,000, the tribal payment will be reduced by \$500,000. Additionally, if tribal Net Gaming Revenues are less than \$350,000,000, the Tribe will receive an additional credit of 8% of slot machine Net Gaming Revenues in excess of \$50,000,000 at each race track. EXAMPLE: If each of the four race track has slot Net Gaming Revenues of \$100,000,000, the credit to the Tribe is \$16,000,000, or \$4,000,000 per track.

#### Length of Exclusivity

Subsection (h) states that the grant of exclusivity described in subsection (b) is for six years from opening of either the temporary or permanent facility, whichever occurs first, although it requires the six-year period to start running no later than six months after the NIGC approves a management contract.

If the Tribe loses the exclusivity within the six-year period, it

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<sup>1</sup> The term "Net Gaming Revenues" is defined in the Compact as "the total sum wagered on all Gaming conducted within the Gaming Facility less amounts paid out as winnings and prizes." The common term used in the gaming industry for these revenues is "Net Win" rather than "Net Gaming Revenues."

agrees to pay for the actual costs of regulation. If it loses the exclusivity after the end of the six-year period, it agrees to continue to pay the greater of 1) the actual costs of regulation plus 15% of the amount the Tribe would have paid if the exclusivity had been maintained, or 2) an amount calculated at the lowest rate which is paid to the State by any other casino gaming facility operating in the State. ||

- f. **Arbitration Decision.** Failure to comply with the judgment and award of the arbitration within the time specified therein for compliance shall be deemed a breach of this Compact, and the prevailing party may bring an action in the United States District Court to enforce the judgment and award.
- g. **Preservation of Remedies.** The option to pursue arbitration pursuant to this section is in addition to any other remedies that may be available to the parties under applicable law.

27. **GRANT OF EXCLUSIVITY.**

- a. **Recognition of Unique Circumstances.** In July, 1993, the Tribe requested that the State allow the Tribe to locate the Tribal Gaming Facility in New Bedford. This request was made in recognition of the unique circumstances of the Tribal reservation's location on the Island of Martha's Vineyard, an ecologically and environmentally sensitive area within the State which would be adversely effected by the operation of a Gaming facility on said Tribal reservation, and which would also limit the success of a Gaming facility on said reservation, and by reason of the location of a significant number of Tribal members residing in New Bedford, a City with strong historical ties to the Tribe. The Tribe has substantially improved the economic benefits it will receive from a Gaming facility by locating the facility in New Bedford rather than on its reservation on Martha's Vineyard. Further, the City of New Bedford has in recent years experienced high unemployment and economic distress, which conditions will be ameliorated by locating the Gaming Facility within the City of New Bedford.

b. **Settlement of Controversies and Grant of Exclusivity.** In full settlement and satisfaction of outstanding controversies between the parties hereto and in consideration of the mutual agreements set forth herein, the parties have agreed on exclusivity set forth in this Section in return for voluntary contributions to the State described in subsection (e). The Tribe agrees that so long as no other Gaming Facility offering Casino Gaming or Electronic Gaming Devices is authorized by State law except as provided in this Compact, and no other Person or Entity operates such a Facility except as provided in this Compact, the Tribe will make the contributions set forth in subsection (e) of this Section.

c. **Absolute Exclusivity.** The Tribe and the State agree that the Tribe has absolute exclusivity as follows:

- i. In Massachusetts, the Tribe has the only unlimited right to operate Electronic Gaming Devices and the sole and exclusive right to operate Class III games other than Slot Machines ("Table Games") without regard to numerical restrictions within what is known as and designated by the Office of Management and Budget of the federal government ("OMB") as the Boston Consolidated Metropolitan Statistical Area, which Consolidated Metropolitan Statistical Area consists of approximately 5,400,000 people;
- ii. The Tribe has the sole and exclusive right to operate Slot Machines within a twenty (20) mile radius of the Tribal Gaming Facility;
- iii. The Tribe has the sole and exclusive right to operate Class III Gaming within the New Bedford Metropolitan Statistical Area as designated by

OMB; and

iv. The Tribe has an economic interest, as set forth in subsection (e) of this Section, in the proceeds of every Slot Machine operating in the Commonwealth of Massachusetts.

d. **Terms of Exclusivity.** It is expressly understood that the following fall outside the grant of exclusivity described in subsection (b): a) the State may authorize a single facility offering Casino Gaming in Hampden County; and b) the State may authorize not more than a total of seven hundred (700) Slot Machines to be located at each of the four racetracks licensed in the Commonwealth (at Foxborough, Raynham, Revere, and East Boston). Further, notwithstanding anything in this Section to the contrary, the exclusivity described in subsection (b) of this Section shall not be deemed to cover, and shall be deemed to exclude: a) games currently offered by the Massachusetts State Lottery, and any future games developed by the Massachusetts State Lottery in accordance with General Laws Chapter 10, § 24; and b) any Gaming carried out pursuant to the provisions of General Laws Chapter 271, § 7A.

e. **Amount of Contribution.** The Tribe has determined, after consultation with duly qualified and informed consultants, professionals, and Gaming and business experts, that this Compact confers upon the Tribe substantial and significant economic advantage and benefit consistent with the goals of IGRA, and therefore, the Tribe voluntarily agrees that the Tribal contribution shall be annually the sum of ninety million dollars (\$90,000,000), less thirty-three and one-third percent (33

1/3%) of the amount by which the Annual Net Gaming Revenues of the Tribe are less than three hundred seventy-five million dollars (\$375,000,000); provided, however, that this contribution will be reduced by a credit of one-half of one percent (1/2%) of all gross non-Tribal Slot Machine Net Gaming Revenues generated in the Commonwealth, and by an offset for any state regulatory costs paid by the Tribe during that period. (Any license or application fee charged by the Commonwealth shall not be deemed to be a "state regulatory cost.") In the event the Tribe's Annual Net Gaming Revenues are less than three hundred fifty million (\$350,000,000), the Tribe will also receive an additional credit of eight percent (8%) of the amount by which the aggregate gross slot machine Net Gaming Revenues of any single race track in the Commonwealth exceeds fifty million dollars (\$50,000,000) annually. Notwithstanding the foregoing and subject to the terms and conditions hereof, the Tribe shall make a contribution equal to twenty-five percent (25%) of its Annual Net Gaming Revenues during the operation of any Temporary Facility.

f. **Revenue Sharing.** The use of the contribution of the Tribe shall include the following purposes:

- i. to help fund operations of local governmental agencies of the State and its political subdivisions;
- ii. to provide revenue to the State to cover the costs of licensing and regulation of Gaming within the Commonwealth of Massachusetts;
- iii. to provide revenue to the State to cover the costs of impacts resulting

from Gaming; and

- iv. for any other use not specifically set forth above which is in compliance with law.

Pursuant to the foregoing and subject to the terms and conditions of this Compact, during the Tribe's occupancy of the Temporary and Permanent Facilities, twelve percent (12%) of the contribution referred to in subsection (e) of this Section shall be paid by the Tribe directly to cities and towns in Bristol County pursuant to the lottery formula, so-called, and an additional eighty-eight percent (88%) shall be paid by the Tribe as follows:

- (1) Four hundred thousand dollars (\$400,000) to the Town of Dartmouth by reason of special impacts on services caused by that Town's proximity to the Gaming Facility;
- (2) A maximum of two percent (2%) to non-profit organizations serving the needs of compulsive gamblers. Said funds shall be distributed to such organizations and in such amount as the Tribe and the Board, after consultation with one another, agree; and
- (3) The remainder shall be paid to the Commonwealth.

g. **Payment Date.** Payments of the contribution described in subsection (f) of this Section shall be made on or before the fifteenth (15th) day of each month, and such monthly contributions shall be determined by calculating the cumulative Annual Net Gaming Revenues for the number of months of the fiscal year which have elapsed concluding with the month preceding the month in which the

payment is due, projecting such cumulative Net Gaming Revenues over the full fiscal year on a pro forma basis, and dividing the pro forma result by twelve. The final monthly payment shall be due July 15 of each year for the year ending the preceding June 30. Credit shall be given for any monthly contributions made previously for that fiscal year.

- h. **Length of Exclusivity.** The exclusivity described in subsection (b) of this Section shall have a duration of six (6) years from the earlier of the date the Tribe opens the Temporary or the Permanent Gaming Facility to the public; provided, however, that such six (6) year period shall commence to run no later than six (6) months after a Management Contractor has been approved by the Bureau of Indian Affairs and the National Indian Gaming Commission. In the event the Tribe loses such exclusivity within such six (6) year period, the Tribe agrees to pay for the actual costs of regulation, licensing, and Compact oversight of the Tribe's Gaming Facility. If the Tribe loses the exclusivity described in subsection (b) of this Section after completion of the six (6) year period described in this sentence, the Tribe agrees to make a contribution equal to the greater of:
- 1) the State's actual costs for regulation, licensing and Compact oversight of the Tribe's Gaming Facility, plus fifteen (15%) of the amount the Tribe would have paid under this Compact if the exclusivity had been maintained, or 2) an amount calculated at the lowest rate which is paid to the State by any other casino Gaming facility operating in the Commonwealth.

**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF LEGAL COUNSEL  
WASHINGTON, D.C. 20530**

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**FACSIMILE TRANSMISSION SHEET**

**DATE:** 1/26/96

**FROM:** Teresa Roseborough

**OFFICE PHONE:** ( ) 314-3694

**TO:** Elena Kagan

**OFFICE PHONE:** ( ) \_\_\_\_\_

**NUMBER OF PAGES:** 8 (NOT INCLUDING COVER SHEET)

**FACSIMILE NUMBER:** ( ) 456-1647

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**REMARKS:**

**ANY QUESTIONS, PLEASE CONTACT OUR ADMINISTRATIVE OFFICE ON 514-2067  
OFFICE OF LEGAL COUNSEL FACSIMILE MACHINE NUMBERS ARE - 514-0563 (ROOM 5242)  
AND 514-0539 (ROOM 5224)**

Citation  
56 FR 63572-01  
1991 WL 254043 (F.R.)  
(Cite as: 56 FR 63572)

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## NOTICES

## DEPARTMENT OF THE INTERIOR

## Bureau of Indian Affairs

Indian Gaming; Sisseton-Wahpeton Sioux Tribe, South Dakota; **Approved**  
Tribal-State Compact

Wednesday, December 4, 1991

\*63572 AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of **Approved** Tribal-State Compact.

SUMMARY: Pursuant to 25 U.S.C. 2710, of the Indian Gaming Regulatory Act of 1988 (Pub. L. 100-497), the Secretary of the Interior shall publish, in the Federal Register, notice of **approved** Tribal-State **Compacts** or considered **approved** for the purpose of engaging in Class III (casino) gambling on Indian reservations. The Assistant Secretary--Indian Affairs, Department of the Interior, through his delegated authority is publishing a Tribal-State **Compact** between the Sisseton-Wahpeton Sioux Tribe and the State of South Dakota which is considered **approved**, but only to the extent the **compact** is consistent with the provisions of the Indian Gaming Regulatory Act.

SUPPLEMENTAL INFORMATION: Because the expiration of the 45 days specified in 25 U.S.C. 2710(d)(8)(B) in which the Secretary could **approve** or disapprove this **compact**, the Lower Brule Sioux Tribe video lottery **compact** is considered **approved** as specified in 25 U.S.C. 2710(d)(8)(B) to the extent that it is consistent with the Indian Gaming Regulatory Act.

\*However, it is our opinion that section 11.1 of part A of the **compact** is not consistent with the Act.

DATES: This action is effective December 4, 1991.

ADDRESSES: Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, MS/MIB 4603, 1849 "C" Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Joyce Grisham, Bureau of Indian Affairs, Washington, DC 20240, (202) 208-7445.

Dated: November 26, 1991.

Eddie F. Brown,

Assistant Secretary--Indian Affairs.

Copr. (C) West 1996 No claim to orig. U.S. govt. works



*Taxation by State  
no citations*

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**CABAZON BAND OF MISSION  
INDIANS, a federally recognized Indian  
Tribe; Sycuan**

**Band of Mission Indians, Plaintiffs-  
Appellants,**

v.

**Pete WILSON, Governor, et al.,  
Defendants-Appellees.**

No. 92-15751.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Oct. 5, 1993.

Opinion Filed May 9, 1994.

Opinion Withdrawn Oct. 6, 1994.

Decided Oct. 6, 1994.

Indian bands challenged state's authority to collect license fees from racing associations conducting simulcast wagering on tribal lands. The United States District Court for the Eastern District of California, David E. Levi, J., 788 F.Supp. 1513, entered judgment for state, and the bands appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that the Indian Gaming Regulatory Act (IGRA) preempted state of California from taxing offtrack betting activities on tribal lands.

Reversed and remanded with instructions.

Opinion, 23 F.3d 1535, superseded.

**[1] INDIANS ⇔ 32(12)**

209k32(12)

Section of the IGRA providing that nothing therein shall be interpreted as conferring on state authority to impose tax on tribe or other entity authorized by tribe to engage in class III gaming activity does not in itself constitute a prohibition of tax. Indian Gaming Regulatory Act, § 11(d)(4), 25 U.S.C.A. § 2710(d)(4).

**[2] INDIANS ⇔ 32(3)**

209k32(3)

In determining whether federal law preempts state's authority to regulate activities on tribal lands, different standards apply than in

other areas of federal preemption; state jurisdiction is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless state interests are sufficient to justify assertion of state authority, and in balancing federal, tribal and state interests, no specific congressional intent to preempt state activity is required.

**[3] INDIANS ⇔ 32(3)**

209k32(3)

Ambiguities in federal law are, as a rule, resolved in favor of tribal independence.

**[4] INDIANS ⇔ 32(12)**

209k32(12)

IGRA preempted state of California from taxing offtrack betting activities on tribal lands, though state had interest in extensive regulatory scheme for offtrack betting and expended funds to regulate the activity, and though legal incidence of the tax was not on the Indian bands, where state's tax, in form of licensing fee, threatened federal objective of making tribes primary beneficiary of gaming operation, in that fees exceeded amounts received by the bands, the actual burden of the tax was on the bands in that, under compacts with the state, bands were entitled to the fees if the gaming was not subject to tax, bands had invested significant funds and effort to construct and operate the wagering facilities and attract patrons, compacts established mechanism to reimburse state for regulatory costs outside state tax structure, and fees went into general fund and not to service as related to regulation of offtrack betting. Indian Gaming Regulatory Act, §§ 2-22, 2(1, 2), 25 U.S.C.A. §§ 2701-2721, 2701(1, 2).

**[4] STATES ⇔ 18.75**

360k18.75

IGRA preempted state of California from taxing offtrack betting activities on tribal lands, though state had interest in extensive regulatory scheme for offtrack betting and expended funds to regulate the activity, and though legal incidence of the tax was not on the Indian bands, where state's tax, in form of licensing fee, threatened federal objective of making tribes primary beneficiary of gaming operation, in that fees exceeded amounts



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(Cite as: 37 F.3d 430)

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received by the bands, the actual burden of the tax was on the bands in that, under compacts with the state, bands were entitled to the fees if the gaming was not subject to tax, bands had invested significant funds and effort to construct and operate the wagering facilities and attract patrons, compacts established mechanism to reimburse state for regulatory costs outside state tax structure, and fees went into general fund and not to service as related to regulation of offtrack betting. Indian Gaming Regulatory Act, §§ 2-22, 2(1, 2), 25 U.S.C.A. §§ 2701-2721, 2701(1, 2).

[5] INDIANS ⇌ 32(12)  
209k32(12)

For purposes of determining whether state tax of offtrack betting activities on tribal lands was preempted, tax, collected from non-Indian racing associations, could not be considered as imposed directly on Indian bands on ground that the state law imposed different percentage license fees for wagers made at satellite wagering facilities. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721; West's Ann.Cal.Bus. & Prof.Code §§ 19605.3, 19605.71, 19610.

[5] STATES ⇌ 18.75  
360k18.75

For purposes of determining whether state tax of offtrack betting activities on tribal lands was preempted, tax, collected from non-Indian racing associations, could not be considered as imposed directly on Indian bands on ground that the state law imposed different percentage license fees for wagers made at satellite wagering facilities. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721; West's Ann.Cal.Bus. & Prof.Code §§ 19605.3, 19605.71, 19610.

[6] INDIANS ⇌ 32(12)  
209k32(12)

For purposes of determining whether state taxation of offtrack betting activities on tribal lands was preempted, state law, under which tribes did not have responsibility of paying the taxes, which were collected from non-Indian racing associations, did not apply in determining whether state license fees imposed economic burden on the Indian bands,

where compacts between the state and the bands required that, if the bands prevailed in the litigation, state was required to pay them the amount of the license fee that it received from the racing associations based on wagers at Indian facilities. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721; West's Ann.Cal.Bus. & Prof.Code §§ 19605.8, 19606.

[6] STATES ⇌ 18.75  
360k18.75

For purposes of determining whether state taxation of offtrack betting activities on tribal lands was preempted, state law, under which tribes did not have responsibility of paying the taxes, which were collected from non-Indian racing associations, did not apply in determining whether state license fees imposed economic burden on the Indian bands, where compacts between the state and the bands required that, if the bands prevailed in the litigation, state was required to pay them the amount of the license fee that it received from the racing associations based on wagers at Indian facilities. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721; West's Ann.Cal.Bus. & Prof.Code §§ 19605.8, 19606.

[7] INDIANS ⇌ 32(12)  
209k32(12)

In determining, as part of weighing process as to whether state was preempted from taxing offtrack betting activities on tribal lands, value of transaction was generated on reservation by activities in which tribes had significant interest, it was not determinative that gaming activity was simulcast wagering on live horse racing occurring outside the reservation and operated by non-Indian racing associations, where Indian bands had made a substantial investment in the gaming operations in connection with construction and operation of facilities and attracting patrons, and were not merely serving as conduit for the products of others. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721.

[7] STATES ⇌ 18.75  
360k18.75

In determining, as part of weighing process as



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to whether state was preempted from taxing offtrack betting activities on tribal lands, value of transaction was generated on reservation by activities in which tribes had significant interest, it was not determinative that gaming activity was simulcast wagering on live horse racing occurring outside the reservation and operated by non-Indian racing associations, where Indian bands had made a substantial investment in the gaming operations in connection with construction and operation of facilities and attracting patrons, and were not merely serving as conduit for the products of others. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721.

\*431 George Forman, Alexander & Karshmer, Berkeley, CA, and Glenn M. Feldman, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Phoenix, AZ, for plaintiffs-appellants.

Cathy Christian, Supervising Deputy Atty. Gen., Sacramento, CA, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

\*432 Before: BOOCHEVER, THOMPSON, and O'SCANLAIN, Circuit Judges.

#### ORDER

The petition for rehearing is GRANTED.

The opinion filed on May 9, 1994 is hereby WITHDRAWN and the attached opinion shall be filed in lieu thereof.

#### OPINION

O'SCANLAIN, Circuit Judge:

We consider the power of the State of California to tax offtrack betting activities on Indian reservations.

#### I

Plaintiffs Cabazon Band of Mission Indians and Sycuan Band of Mission Indians ("the

Bands") conduct simulcast wagering (offtrack betting) on their reservations to raise tribal revenue. Such activities are regulated by the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, which categorizes Indian gaming into three classes; simulcast wagering is Class III gaming. Under IGRA, states and Indian tribes must negotiate compacts to regulate the terms under which Class III gaming may be conducted. Here, California and the Bands entered into compacts for the Bands to operate their simulcast wagering facilities.

Southern California Off Track Wagering, Inc. ("SCOTWINC") is a quasi-governmental organization of racing associations formed under California law. Cal.Bus. & Prof.Code § 19608.2. Both Bands entered written agreements with SCOTWINC and the racing associations which conduct the live horse races. SCOTWINC arranges for the racing associations' broadcast signals to be transmitted to the Bands' on-reservation simulcast wagering facilities. SCOTWINC also accepts the wagers and handles the cash at the Bands' facilities.

Under the terms of the compacts between California and the Bands, SCOTWINC distributes to the Bands 2.33% of the money wagered at their simulcast wagering facilities. Two percent is the typical commission offered by racing associations for operating a satellite wagering facility; the remaining 0.33% is paid to the Bands in their deemed "local government" capacity. The Bands contend that an additional amount should be distributed to them rather than remitted to the State of California measured by the proportion of license fees payable on wagers placed at their facilities.

SCOTWINC remits to the State the license fee imposed under Cal.Bus. & Prof.Code sections 19605.71(a) and (b), 19606.5 and 19606.6, which is a percentage of all wagers placed. Different percentages are paid based on the location of the wager (ontrack or offtrack), the type of wager (conventional or exotic), and the type of race (breed of horse and distance). Part of this license fee is based



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on wagers placed at Indian wagering facilities. California concedes that the license fee is a tax. The Bands assert that part of the license fee based on wagers placed at Indian facilities is a tax prohibited under both IGRA and traditional grounds of federal preemption, and should be payable instead to the Bands.

Because the State of California and the Bands could not agree whether the State had the power to collect the license fee based on wagers at Indian facilities, the negotiated compacts specifically state that the Bands will sue the State for declaratory relief. After the Bands brought suit, both sides moved for summary judgment, which the district court granted for the State. See *Cabazon Band of Mission Indians v. California*, 788 F.Supp. 1513 (E.D.Cal.1992). The Bands timely appealed.

## II

[1] The Bands first contend that the State's license fee is impermissible under IGRA. The Bands argue that IGRA expressly prohibits the taxation of both Indian Bands and those entities authorized by such Bands to engage in Class III gaming activities. In support of their contention, the Bands point to section 2710(d)(4) of IGRA, which provides that "nothing in this section shall be interpreted as conferring upon a State ... authority to impose any tax, fee, charge, or other assessment upon an Indian \*433 tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4).

The Band's reasoning is flawed because it equates the failure to confer authority to tax with a prohibition to tax. We objected to this kind of statutory construction in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914, 923 (9th Cir.1992), vacated on other grounds, --- U.S. ---, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). In that case, the plaintiffs sought an injunction requiring the admission of aliens into the United States. Opposing the injunction, the government cited 8 U.S.C. § 1255(a)(3)(C), which states "[n]othing in this section shall be construed as authorizing"

petitioners' admission into the country. Although we affirmed the district court's denial of the injunction, we explicitly stated that the statute did not provide a basis for our affirmance because, "although the statute does not authorize admission to the United States, it does not prohibit admission either." *Catholic Social Servs., Inc.*, 956 F.2d at 923.

Similarly, section 2710(d)(4) is not on its face a prohibition of state taxation. The absence of an express prohibition on the State's power to tax does not end our inquiry, however. ✓

## III

The Supreme Court has, as a matter of federal Indian law, explicitly "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980). Thus, we must analyze whether Congress has, by implication, acted to preempt the extension of state authority onto Indian reservations in this instance. ✓

[2][3] In determining whether federal law preempts a state's authority to regulate activities on tribal lands, courts must apply standards different from those applied in other areas of federal preemption. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 2386, 76 L.Ed.2d 611 (1983). In balancing these federal, tribal, and state interests, no specific congressional intent to preempt state activity is required; "it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy." *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir.1987), aff'd, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988) (quotation omitted). Furthermore, "ambiguities in federal law are, as a rule, resolved in favor of



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tribal independence." *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 177, 109 S.Ct. 1698, 1708, 104 L.Ed.2d 209 (1989).

We analyze the federal, tribal, and state interests in turn.

#### A

[4] The federal interests before us are clearly set forth in the language of IGRA itself. Intended to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," IGRA seeks to "ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. §§ 2701(1) and (2) (emphasis added).

The State's current licensing fee threatens this federal objective. Between March 1, 1990 and February 28, 1991, the State collected \$292,075 in license fees from wagers handled at the Cabazon Band's simulcast wagering facility. During that same period, the Cabazon Band earned \$217,386. Similarly, between November 1, 1990 and March 3, 1991, \$440,175 in license fees were deducted and distributed by SCOTWINC to the State from wagers placed at the Sycuan Band's facility. The Sycuan Band received only \$318,743. In both cases, the State benefited from the tribal gaming operation to a considerably greater extent than the Bands. Neither Band would be described as a "primary beneficiary." Such an outcome contravenes the purposes of IGRA. See *White Mountain Apache Tribe*, 448 U.S. at 149, 100 S.Ct. at 2586-87 (concluding that state was preempted \*434 from imposing fuel tax on a non-Indian logging company harvesting timber on tribal land because "the taxes would threaten the overriding federal objective of guaranteeing Indians that they 'will receive ... the benefit of whatever profit [the forest] is capable of yielding.'").

#### B

[5] The State's licensing scheme also undermines tribal interests. We agree with the district court that the license fee imposed falls directly upon the racing association, and

not the Bands. [FN1] To say that the fee is a direct tax only upon the racing associations is not to say that the Bands are not economically burdened by such fee, however. Discussing federal Indian preemption, the Supreme Court in *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 844 n. 8, 102 S.Ct. 3394, 3401 n. 8, 73 L.Ed.2d 1174 (1982), declined to adopt a "legal incidence test," under which "the legal incidence and not the actual burden of the tax would control preemption inquiry." The Court instead focused on the fact "that the economic burden of the asserted taxes would ultimately fall on the Tribe," even though the legal incidence of the tax was on the non-Indian logging company. *Id.*

FN1. Despite the Bands' assertions to the contrary, we conclude that the Bands are not directly burdened by the tax before us. The Bands do not pay any of their commission to the State, do not write a check to the State, and do not have any direct contact with the State with respect to the license fee. The Bands' argument that the tax is imposed directly on the Bands because California law imposes different percentage license fees for wagers made at satellite wagering facilities is not persuasive. See Cal.Bus. & Prof.Code §§ 19605.3, 19605.71, 19610. The statutes the Bands cite also establish different tax rates for different breeds of horses and distances. Cal.Bus. & Prof.Code § 19605.71. This, of course, does not mean that the breed of horse pays a direct tax. Place of wager and breed of horse are simply variables in the tax formula.

Here, as in *Ramah Navajo*, the Bands bear the actual burden of the license fee. The district court reached a conclusion opposite from our own, reasoning that under California law, surplus revenue is to be divided equally between the racing association and the horsemen. Cal.Bus. & Prof.Code §§ 19605.8 & 19606. Thus, the district court concluded, if the racing association did not pay that part of the license fee based on wagers at Indian satellite facilities, the Bands would not be entitled to the money saved. As the court explained, "[b]ecause the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were



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to go unpaid, the license fees do not impose an economic burden on the Tribes." Cabazon Band, 788 F.Supp. at 1518.

[6] State law does not govern this case, however. Rather, the terms of the compact control. S.Rep. No. 446, 100th Cong.2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76 ("[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."). Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid fees. The licensing scheme currently imposed thus constitutes an economic burden.

[7] In assessing the Bands' interests, we also must consider the nature of the taxed activity. Cf. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20, 107 S.Ct. 1083, 1093-94, 94 L.Ed.2d 244 (1987) (state regulation of on-reservation bingo games preempted because tribe was generating value on reservation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155, 100 S.Ct. 2069, 2082, 65 L.Ed.2d 10 (1980) (upholding state tax on on-reservation sales of cigarettes to non-Indians because value of transaction was "not generated on the reservations by activities in which the Tribes have a significant interest"). "That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining \*435 those activities free from state interference." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1410 (9th Cir.1992).

Although recognizing the Bands' "commitment to operation of their gaming operations," the district court found that the

value of the Bands' activity was derived from live horse racing, an activity "occurring outside the reservation and operated by non-Indian racing associations." Cabazon Band, 788 F.Supp. at 1521. Consequently, the court concluded, "[b]ecause the betting occurs on Indian land, but is dependent on events occurring elsewhere, this factor is neutral in balancing tribal, state, and federal interests." *Id.*

The district court has mischaracterized the Bands' interest, in our view. In this instance, the Bands have invested significant funds and effort to construct and to operate wagering facilities and to attract patrons. It is not necessary, as the district court appears to posit, that the entire value of the on-reservation activity come from within the reservation's borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others. Cabazon, 480 U.S. at 219, 107 S.Ct. at 1093 ("Here ... the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians.").

C

In contrast to the federal and tribal interests articulated above, the State's interests are weaker, although certainly not trivial. As the district court recognized, the State of California has an extensive regulatory scheme for offtrack betting and expends funds to regulate this activity. Thus, "[t]his is not a case in which the State has nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186, 109 S.Ct. at 1713.

The State's asserted interest is weakened in this case, however, because IGRA specifically recognizes such state regulation and establishes a mechanism--the compacts--by which Bands can reimburse the State for regulatory costs, outside of the State tax structure. Indeed, the Cabazon and Sycuan Compacts expressly provide for the modification of the compacts to allow for such reimbursement in the event that the Bands



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prevail in this action. Thus, the State's interest can be satisfied without imposition of the license fee.

Furthermore, this court has required that the State demonstrate a close relationship between the tax imposed on the on-reservation activity and the state interest asserted to justify such tax. See *Crow Tribe*, 819 F.2d at 901 (concluding that a state tax was not narrowly tailored to serve state interest of paying for government services associated with production of coal because 19 to 30% of the tax went to the state general fund). Here, there is no narrow tailoring since California does not use the license fee revenues to fund services related to the regulation of offtrack betting. Rather, 100% of the license fee earned from Indian wagering goes into the State General Fund. This suggests a "distant, rather than a carefully tailored, relationship" between the license fee revenue and the regulatory services provided thereunder. [FN2] Id.

FN2. Congress specifically recognized the raising of revenue as a legitimate state interest with respect to Class III gaming. See S.Rep. No. 446, 100th Cong.2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3083. This interest must be informed by the congressional intent that the Bands be the primary beneficiaries of such gaming, however.

The express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee.

#### IV

We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands.

REVERSED and REMANDED with instructions.

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