



NEW MEXICO LEGISLATIVE COUNCIL SERVICE INFORMATION BULLETIN NUMBER 26

LEGISLATIVE RESEARCH, POLICY & COMMITTEE SERVICES

JULY 29, 2014

FEDERAL PROCEDURES FOR CASINO GAMING AT THE PUEBLO OF POJOAQUE

SUMMARY

The inability of the Pueblo of Pojoaque and the State of New Mexico to agree on a new gaming compact means that the details of the pueblo's casino operations, including revenue sharing and the number of casinos, will likely be decided by the United States secretary of the interior, with input from the pueblo and New Mexico's governor but not from the legislature.

This information bulletin summarizes that process, discusses a potential challenge by the state to the federal government's authority to decide the issue and highlights some provisions of the Pueblo of Pojoaque's latest gaming proposal.

BACKGROUND

The Pueblo of Pojoaque operates Class III gaming under a tribal-state compact that expires at midnight on June 30, 2015. Although the Pueblo of Pojoaque-New Mexico gaming compact went into effect in 2005, it is often referred to as a "2001 compact" because, other than the name of the tribe, the compact is identical to one approved by the New Mexico Legislature in 2001.

For the past few years, the Pueblo of Pojoaque and other tribes operating under the 2001 compact have been negotiating with the state to come to terms on new compacts. The negotiations between the state and the Pueblo of Pojoaque have not led to a new compact, and on December 13, 2013, the pueblo filed a federal lawsuit claiming that Governor Susana Martinez's administration failed to "negotiate in good faith" regarding a new gaming compact. The state asserted its right to immunity from the suit, and it was dismissed.

The process to establish how gaming may be conducted by the Pueblo of Pojoaque after the expiration of its compact now moves to the federal arena.

The federal Indian Gaming Regulatory Act (IGRA) provides a statutory framework for resolving jurisdictional, regulatory and legal issues about gaming by federally recognized Indian tribes (25 USC §§ 2701 et seq.). IGRA sets out the process for Indian tribes to operate Class III gaming under either tribal-state compacts or federal procedures.

If a state and a tribe are unable to agree on a compact, remedies still exist for the tribe.

A tribe may sue a state in federal court for refusing to negotiate or, as the Pueblo of Pojoaque alleged, for not negotiating in good faith (25 USC § 2710(d)(7)). However, the United States Supreme Court significantly limited this provision of IGRA. It held that based on the Eleventh Amendment of the United States Constitution, Congress lacks the power to subject a state to suit in federal court unless the state waives sovereign immunity (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)).

FEDERAL PROCESS; STATE'S RESPONSE DUE IN AUGUST

If the tribe's suit against the state is dismissed on sovereign immunity grounds, as the Pueblo of Pojoaque's suit was in this case, a tribe may request that the United States secretary of the interior issue gaming procedures for the tribe.

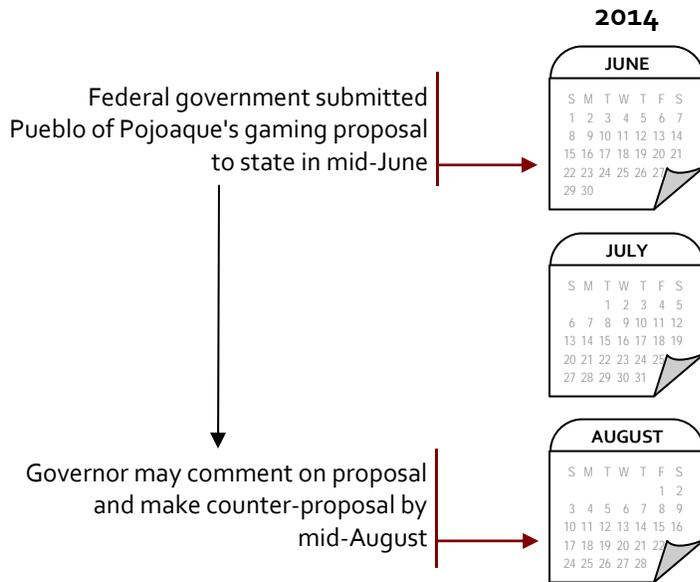
The Code of Federal Regulations (25 C.F.R. pt. 291) sets out the process by which the secretary of the interior, with input from the state governor, will decide how the Pueblo of Pojoaque will operate casinos. (The New Mexico attorney general has also been afforded an opportunity to provide input but is not expected to do so.)

The state may challenge the authority of the secretary of the interior to allow the Pueblo of Pojoaque to continue Class III gaming. Such a challenge could occur at the same time the administration is providing input to the secretary of the interior on the Pueblo of Pojoaque's gaming proposal.

The time line for the secretary of the interior to decide the issue of new gaming procedures for the Pueblo of Pojoaque contains several key mileposts.

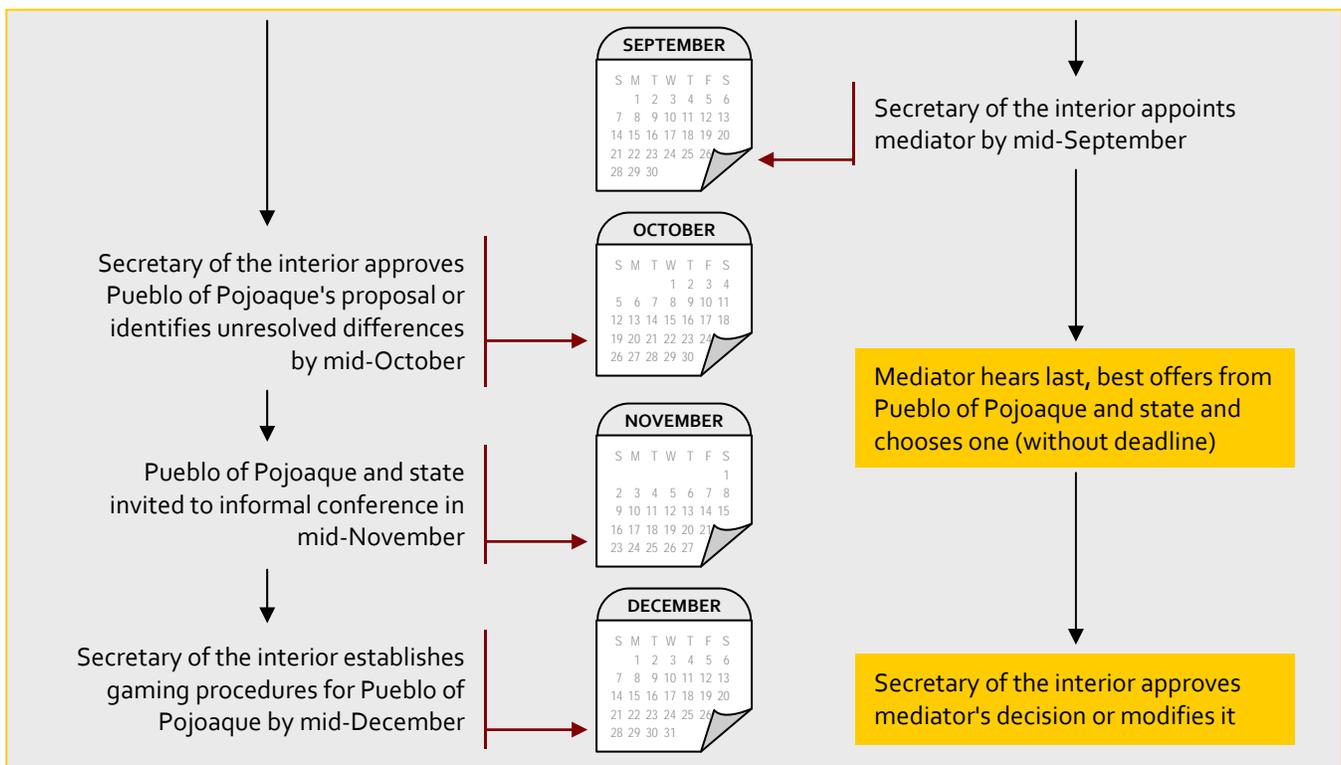
Once the secretary of the interior determines that the Pueblo of Pojoaque's proposal is complete, the secretary submits the proposal to the governor and the attorney general of New Mexico. That occurred in mid-June, and the governor has until mid-August of 2014 to comment on whether the state agrees with the pueblo's proposal; whether the proposal is consistent with state law; and if the proposed gaming activities are permitted in New Mexico. The governor may

FEDERAL TIMELINE FOR GAMING AT THE PUEBLO OF POJOAQUE



IF GOVERNOR DOES NOT MAKE COUNTER-PROPOSAL

IF GOVERNOR MAKES COUNTER-PROPOSAL



also submit an alternative proposal (25 C.F.R. pt. 291.7) (25 C.F.R. pt. 291.8(b)).

INFORMAL CONFERENCE SET IF GOVERNOR DOES NOT MAKE A COUNTER-PROPOSAL

If the mid-August deadline passes without the governor submitting an alternative proposal, the secretary of the interior has 60 days in which to either approve the Pueblo of Pojoaque's proposal or invite the Pueblo of Pojoaque and the state, in the form of the governor and attorney general, to participate in an informal conference within 30 days to resolve their differences.

Within 30 days of the informal conference, the secretary of the interior must prepare a written report that summarizes the results of the informal conference and make a final decision either setting forth proposed Class III gaming procedures for the pueblo or disapproving the proposal for a specific reason (25 C.F.R. pt. 291.8(c)).

MEDIATOR APPOINTED IF STATE MAKES COUNTER-PROPOSAL

If the state offers an alternative proposal for Class III gaming procedures, the secretary of the interior must appoint a mediator within 30 days, and the mediator must convene a process to resolve differences between the two proposals (25 C.F.R. pt. 291.9).

The mediator's role is to ask both the Pueblo of Pojoaque and the state to submit their last best proposal for Class III gaming procedures. After giving the pueblo and the state an opportunity to be heard and to present information supporting their respective positions, the mediator must select from the proposals the one that best comports with the terms of IGRA and any other applicable federal law (25 C.F.R. pt. 291.10).

Within 60 days of receiving the proposal selected by the mediator, the secretary of the interior must either:

- 1) approve the proposal for Class III gaming procedures selected by the mediator (25 C.F.R. pt. 291.11(a)); or
- 2) disapprove the proposal selected by the mediator for a specific reason, including that the proposal is not consistent with relevant provisions of state law (25 C.F.R. pt. 291.11(b)).

If the secretary of the interior disapproves the mediator's

proposal, the secretary must prescribe appropriate procedures within 60 days under which Class III gaming may take place that comport with the mediator's selected proposal as much as possible, with the provisions of IGRA and with the relevant provisions of the laws of the state (25 C.F.R. pt. 291.11(c)).

THE PUEBLO OF POJOAQUE'S GAMING PROPOSAL TO THE FEDERAL GOVERNMENT

The Pueblo of Pojoaque's gaming proposal has some notable differences from its current compact with the state, from the compact agreed to by the state and several tribes in 2007 and from the 2014 proposal from the Navajo Nation. For example, the Pueblo of Pojoaque has proposed that it:

- pay no revenue sharing to the state;
- not be limited in the number of casinos it can open;
- be allowed to serve alcohol in the gaming areas;
- be allowed to keep its casinos open 24 hours a day, seven days a week; and
- be allowed to let 18 year olds gamble.

The pueblo has also proposed significant changes related to combating compulsive gambling and personal injury and property damage. (See chart on back page.)

GAMING BRIEFING IN NOVEMBER

The New Mexico Legislative Council has noted that the looming expiration next year of the 2001 compacts, under which the Pueblo of Pojoaque and four other tribes are currently offering gaming, will likely force the issue during the 2015 legislative session. The New Mexico Legislative Council directed the Legislative Council Service, in conjunction with the chairs of the Indian Affairs Committee and the Legislative Committee on Compacts, to organize a seminar on the issue to which all members of the legislature are invited to attend.

November 21 is the tentative date for the seminar. More information about the meeting will be forthcoming.

COMPARISON OF SELECTED PROVISIONS OF STATE-TRIBAL CLASS III GAMING COMPACTS

Provision	2001 Compact	2007 Compact	Navajo Nation 2014 Proposal	Pueblo of Pojoaque June 2014 Proposal
Expiration date	June 30, 2015	June 30, 2037	Same as 2007	None
Revenue sharing	8% of net win, with 3% on first \$4 million for net wins less than \$12 million	Ranges from 9.25% to 10.75% depending on net win, with 3% on first \$5 million for net win less than \$15 million	Same as 2007	None
"Free play" deductions	Silent	Dispute between state and tribes as to whether prizes paid as a result of "free play" may be deducted to arrive at net win	"Free play" not counted as a wager; prizes paid as a result of free play deducted from net win	Not applicable
Limitations on revenue sharing	Eliminated if state allows any entity other than horse racetracks and fraternal clubs to offer gaming machines or any entity to offer table gaming	Same as 2001; also eliminated if state allows more than six horse racetracks to offer gaming machines or if state expands hours or number of machines at horse racetracks	Same as 2007	Not applicable
Payments to state for regulatory costs	\$100,000 annually, with 3% annual escalator	\$116,000 annually, with 5% escalator every five years	\$121,800 annually, with 5% escalator every five years beginning in 2017 and tribe pays an additional \$25,000 for third and subsequent casinos	None
Number of casinos	No limitation	No more than two, except the Pueblo of Laguna may operate three; provided that its Route 66 Express Casino cannot expand	Up to five, depending on the tribe's population in New Mexico; no more than one new casino may be opened every five years after two casinos are open	Same as 2001
Minimum liability insurance and waiver of immunity	\$50 million per occurrence/\$50 million annual aggregate with escalator tied to inflation	\$10 million per occurrence/\$10 million annual aggregate with escalator tied to inflation	Same as 2007	\$2 million per occurrence for bodily injury; \$1 million per occurrence for property damage; \$10 million annual cap
Hours of operation	Must close for at least four consecutive hours Monday through Thursday	Same as 2001	May be open 24 hours a day, seven days a week	Same as 2014 proposal
Food and lodging as "comps"	Prohibited	Allowed through "players club" programs	Same as 2007	Silent
Compulsive gambling programs	0.25% of net win dedicated to compulsive gambling programs	Same as 2001	Same, with increase to 0.5% if tribe operates three or more casinos; tribe will participate in state's self-exclusion program	Silent
Child support enforcement	Silent	Silent	Tribe will turn over to state payouts of \$1,200 or more won by gamblers who owe child support	Silent
Minimum gaming age	21 years old	Same as 2001	Same as 2001	18 years old
Alcohol in gaming areas	Prohibited	Same as 2001	Same as 2001	Silent

.197265A

This information bulletin does not represent a policy statement of the Legislative Council Service or its staff. This information bulletin was written by Peter Kovnat.