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FISCAL IMPACT REPORT

ORIGINAL 1/22/15
DATE LAST

SPONSOR Roybal Caballero UPDATED _____ HB 85

SHORT TITLE Cap Gaming Compact Revenue Sharing SB _____

ANALYST Graeser

REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18	FY19	FY20		
	(\$0) to (\$15,700)	(\$0) to (\$18,000)	(\$0) to (\$18,000)	(\$0) to (\$18,000)	Recurring	General Fund

(Parenthesis () indicate revenue decreases

Note: the revenue estimates are based on CGB’s data and interpretation of the meaning of the bill. All of the tribes, except for Pojoaque, have signed the 2015 compacts.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Gaming Control Board (GCB)

Department of Finance and Administration (2014 on the same bill – HB307) (DFA)

SUMMARY

House Bill 85 would cap the percentage of tribal gaming revenue shared with the state under any new tribal gaming compacts at the corporate income tax rate. This clearly would not apply to the existing compacts, but only to newly negotiated compacts. Nothing in the bill would prohibit the gaming tribes with existing compacts from requesting new negotiations with the (presumably) lower sharing percentages. The cap is expressed in terms of, “The governor shall not submit to the committee and the legislature shall not approve ...” The effective date of this bill is July 1, 2016.

FISCAL IMPLICATIONS

The top corporate tax rates scheduled in current law are:

TY2014	7.3%
TY2015	6.9%
TY2016	6.6%
TY2017	6.2%
TY2018 and thereafter	5.9%

Under the 2001 compact, the revenue sharing percentages are as follows:

- Tribes with annual net win over \$12 million pay 8% of net win.
- Tribes with annual net win below \$12 million pay 3% on the first \$4 million net win and 8% thereafter.

This compact only applies to Acoma, Jicarilla, Mescalero, Navajo and Pojoaque, which did not agree to the 2007 compact amendment.

The 2007 compact increases the revenue sharing rate for the remaining tribes:

- From FY08 to FY15, tribes with net win under \$15 million will pay 3 percent on the first \$5 million and 9.25 percent on the remainder.
- Tribes with annual net win between \$15 and \$50 million will pay 9.25 percent.
- Tribes with annual net win over \$50 million will pay 9.75 percent.

All of the tribes and pueblos, except for Pojoaque, have signed the 2015 compacts. Thus, this bill nominally has no real impact.

The GCB has also estimated the fiscal impact of this bill, again assuming that the all of the current gaming tribes renegotiated their current compacts. The GCB estimates are:

Estimated Revenue			Recurring or Nonrecurring	Fund Affected	
	FY16	FY17			FY18
Scenario #1		(9,376)	(9,376)	Recurring	General Fund
Scenario #2		(13,702)	(13,702)	Recurring	General Fund

Scenario #1 includes all of the tribes and pueblos that renegotiated their 2007 compacts.

As of the 2016 session, however, Pojoaque shows no signs of agreeing to the 2015 compacts.

The GCB also speculates that the bill may want the compacts to be expressed in terms of net income, not win.

SIGNIFICANT ISSUES

There are two or three corporate income tax rates in 7-2A-5 NMSA 1978. By CY17, there is one rate for net income less than \$500 thousand and a second for net income greater than \$500 thousand. Although the bill intends that the cap is at the top marginal rate, this is not clear and could be an element of contention in future compact negotiations. The updated revenue estimating spreadsheet used for this analysis uses the progressive rates from 7-2A-5 NMSA 1978.

As an element of policy, this bill attempts to bind the hands of future legislatures. The limitation on the Governor's submission of a proposed contract to the legislature would be binding, but the legislature would view the law passed by this legislature as advisory, at best.

DFA notes that, "...it is not clear why the revenue sharing agreements would be linked to corporate income tax rates in this manner. The "net win" of casinos is equal to the revenue received from a specific type of slot machine (class III) and does not include revenue received from card games, class II machines, entertainment and other revenue-generating activities that occur at tribal casinos."

This bill may be counter to the LFC tax policy principle of adequacy, efficiency and equity. Due to the increasing cost of tax expenditures revenues may be insufficient to cover growing recurring appropriations. On the other hand, this bill may not create a tax expenditure, since the Tribal Revenue Sharing is not a tax, but a contracted revenue sharing agreement.

Both the 2001 and the 2007 compacts were negotiated in recognition that Indian Gaming net win was not subject to either the Corporate Income Tax on net profits or the Gross Receipts Tax on gross receipts. Thus, were the compacts to be renegotiated after laws 2013, Chapter 160 reduced the State's Corporate Income Tax rate the revenue-sharing percentages might have been somewhat less than the current rates. This bill recognizes that possibility.

However, the compacts are contracts binding on the state and the tribes. The state benefits from the compacts through the revenue sharing percentage. The tribes benefit from the compacts with State approval of Indian gaming. The federal Indian Gaming Regulatory Act (IGRA) requires gaming tribes to negotiate compacts with the states. The state may be prohibited by Article 2, Section 19 of the New Mexico Constitution from impairing a contract. That may be the reason that the bill clearly does not attempt to alter existing compacts.

Additionally, the Tribes that earn more in net win on an annual basis would likely disproportionately benefit by paying a lower revenue share rate, while those Tribes that earn less in net win on an annual basis might be subjected to an increase in their revenue share rates under Section 7-2A-5 NMSA 1978. This is by no means automatic.

There is a small possibility that this bill might change the reality of the negotiated compact rates as a contract to a view that the payments are a tax. This would create issues with the Department of the Interior in light of the Indian Gaming Regulatory Act's ("IGRA") prohibition on imposition of taxes.

GCB adds:

“Section 2710(d)(4) of the Indian Gaming Regulatory Act (“IGRA”) reads, in pertinent part, “(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax..” Connecting the revenue share rate under the Tribal-State Class III Gaming Compact to corporate income tax rates may directly violate provisions of IGRA which specifically prohibit a State from taxing an Indian Tribe. By doing so, there is a significant danger that the Department of the Interior would disapprove all such Tribal-State Compacts.”

“Additionally, the Indian Tribes have negotiated and agreed to compact terms that establish a system of tribal-gaming exclusivity in exchange for revenue sharing. The 2007 and 2015 Compacts offer the Indian Tribes a right to conduct gaming with limited competition (i.e., exclusivity). By way of example, both the 2007 and 2015 Compacts set forth meaningful limitations on non-tribal gaming. If the State of New Mexico were to breach those limitations, the Indian Tribes’ obligations to make revenue share payments could terminate altogether. In comparison, businesses that pay corporate income taxes may pay a lower rate than those described in the Tribal-State Compacts, but such businesses must compete in a free market economy. To allow the Indian Tribes to pay the corporate income tax rates would undo negotiated terms of the Tribal-State Compacts.

PERFORMANCE IMPLICATIONS

Although this bill does create a potential revenue loss, it is by no means clear that the revenue loss can be considered a tax expenditure. The compacts are contracts that are mutually beneficial to the state and to the gaming tribes, nations and pueblos. Thus, the LFC tax policy of accountability may not be applicable.

LG/je/al

Tribes Listed By Compact

2015 Compact - Expires 2037

[Compact Effective Dates](#)

Jicarilla Apache Tribe

Mescalero Apache Tribe

Nambe Pueblo

Navajo Nation

Ohkay Owingeh Pueblo

Pueblo of Acoma

Pueblo of Isleta

Pueblo of Jemez

Pueblo of Taos

Pueblo of Zuni

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2007 Compact - Expires 2037

[Compact Effective Dates Amended](#)

Laguna Pueblo

Sandia Pueblo

San Felipe Pueblo

Santa Ana Pueblo

Santa Clara Pueblo

Pueblo of Tesuque

2001 Compact - Expired June 30, 2015

[Compact Effective Dates](#)

Pojoaque Pueblo