

**MINUTES
for the
SEVENTH MEETING
of the
INDIAN AFFAIRS COMMITTEE**

**December 20, 2012
Room 322, State Capitol
Santa Fe**

The seventh meeting of the Indian Affairs Committee (IAC) was called to order by Senator John Pinto, co-chair, at 9:50 a.m on Thursday, December 20, 2012, in Room 322 of the State Capitol. A moment of silence was observed for the late Speaker of the House Ben Lujan. Then, committee members, staff and the audience introduced themselves.

Present

Rep. James Roger Madalena, Co-Chair
Sen. John Pinto, Co-Chair
Sen. Rod Adair
Rep. Ray Begaye
Rep. Sandra D. Jeff
Rep. Jane E. Powdrell-Culbert
Sen. Nancy Rodriguez
Sen. John C. Ryan

Absent

Sen. Lynda M. Lovejoy
Rep. Patricia A. Lundstrom
Sen. Richard C. Martinez
Sen. George K. Munoz
Rep. James E. Smith

Advisory Members

Rep. Eliseo Lee Alcon
Rep. Ernest H. Chavez
Rep. Debbie A. Rodella
Rep. Nick L. Salazar

Sen. Eric G. Griego
Sen. Stuart Ingle
Sen. Timothy Z. Jennings
Rep. Antonio "Moe" Maestas
Sen. William E. Sharer

Staff

Peter Kovnat, Legislative Council Service (LCS)
Damian Lara, LCS
Theresa Rogers, LCS

Guests

The guest list is in the meeting file.

Handouts

Copies of all handouts and written testimony are in the meeting file.

Thursday, December 20

Tribal-State Gaming Compact Negotiations: State Perspective

There were no representatives from the Office of the Governor present to discuss the gaming compact negotiations from the state's perspective.

Tribal-State Gaming Compact Negotiations: Gaming Control Board (GCB) Perspective

David L. Norvell, board member and acting state gaming representative, GCB, discussed the use of the term "free play" in the 2001 and 2007 compact. Mr. Norvell stated that the term "free play" is not mentioned in either the 2001 or 2007 compacts. The term was made ubiquitous by the gaming industry to describe promotional gaming. Mr. Norvell stated that the GCB has been diligently enforcing the laws created by the legislature and the compacts surrounding free play, and that the interpretations of these laws are at the center of compact negotiations. Of the 14 tribes in New Mexico with gaming compacts, two of the tribes are paying the appropriate costs under the compact, 11 are not paying the appropriate costs and one tribe does not engage in any free play.

Mr. Norvell said that the 2001 compact is slightly different in its language from the 2007 compact where it describes the determination of net win and revenue shares. Both contracts, however, are interpreted by the GCB to reach the same conclusion.

Frank A. Baca, general counsel and acting executive director, GCB, stated that the two tribes paying the appropriate share of their free play revenue to the state independently interpret the law in the same way as the GCB. Mr. Baca emphasized that free play debates and litigation are not unique to New Mexico. The underlying legal issue is the term "wager" and its definition.

The GCB interprets a gambling wager as requiring three parts: 1) consideration for exclusivity to conduct Class III gaming; 2) prizes; and 3) an outcome based on random chance. The GCB hinges its legal position on the term "wager". The 2001 and 2007 compacts use the term to calculate the amounts they owe in revenue shares on Class III gaming machines.

The GCB is fully aware of the tribes' positive impact in New Mexico and, because of this, fostering their success is integral.

A committee member asked for clarification regarding consideration of a wager, which requires something in exchange. The member stated that there is no tangible object in return for consideration, only a chance of winning. Mr. Baca responded that if there is no consideration, there can be no determination for revenue sharing.

A member stated that the generally accepted accounting principles do not recognize free play as revenue, and that in the 2007 compact, tribes were not able to negotiate free play terms.

Committee members expressed concerns that the reopening of the gaming compacts would break good relationships forged between the state and the tribes. They also discussed the Rincon Compact in California, which found the State of California to have negotiated in bad

faith, resulting in severe consequences for the state. Mr. Baca stated that New Mexico stands to gain tens of millions of dollars if the tribes are required to fulfill unpaid free play revenue sharing.

A committee member asked whether the U.S. Department of the Interior has ever rejected compacts sent for final approval. Mr. Baca said he was not aware of any rejected compacts, but that if a compact were rejected, it would be remanded back to the state for negotiation. Mr. Baca went on to say that in 2000, when free play began gaining popularity, it was difficult to write rules surrounding it. Since 2000, free play has experienced significant growth and change, which needs to be considered in the future. A good-faith negotiation, with the support of the legislature and an understanding of the stance of the U.S. Department of the Interior, will be crucial. In response to these steps, the GCB will uphold the approved compacts and curtail illegal activity. Mr. Baca clarified further that if the language in the current compacts were further updated and clarified, the amount the tribes owe the state in revenue would not change very significantly.

A committee member stated that it is well known that the compacts require the tribes to pay a percentage of their net win, including net cash prizes, in revenue sharing. Clarifying definitions that fall under non-cash revenue should be a major initiative. The member stated that it may be best to have all the tribes on the same compact in order to eliminate confusion and maintain equality. The committee member expressed concern that the governor had no representation present, and that there are no signs of progress toward a resolution. The committee asked Secretary of Indian Affairs Arthur P. Allison to coordinate with the GCB to help push toward a resolution and maintain hard-earned relations between the state and the tribes.

Tribal-State Gaming Compact Negotiations: Tribal Perspectives

George Rivera, governor, Pueblo of Pojoaque, expressed that the tribes of New Mexico are very concerned about the progress of the compact negotiations with the state, especially surrounding the issue of free play. Governor Rivera stated that the agreement with the state to pay eight percent of revenue is being breached and should be protected.

Conroy Chino, lobbyist, Pueblo of Acoma, explained that although many of the tribes were invited to the committee meeting to give statements, they were advised not to appear in order to preserve the integrity of the ongoing negotiations, in hope of meeting a negotiation deadline of presenting a new compact before the 2013 legislative body.

Mr. Chino stated that the discussion currently centers around the length of the compacts. The tribes entered into mediation with the state in November 2012 but were unable to reach an agreement after two days of mediation. The tribes stressed in the mediation that they believe they are in compliance with the current compacts and that they have paid their fair share of revenue. The tribes also believe that the state calculates revenue in a way that drains tribal resources, and that "revenue", as defined in the compacts, means net revenue less the amount paid out in prizes. The tribes argue that they are properly deducting these prizes and that

revenue collected on Class III machines is being properly reported. Further, they posit that free play has allowed state revenues to grow.

Governor Rivera and Mr. Chino urged the IAC to continue to support their negotiations toward a new compact and welcomed committee members' insight and feedback on the finished product.

Calculation of Net Win for Revenue Sharing: Tribal Perspective

Wayne Bladh, attorney, Nordhaus Law Firm, LLP, stated that the term "wager" is not defined in the compact to which the parties agreed. Mr. Bladh explained that the definition the GCB is promoting is a definition formed by the National Indian Gaming Commission (NIGC) in the 1980s and 1990s. The NIGC does not define free play as a wager, thereby forbidding deduction of any prizes won. Other states have changed their statutes to reverse this stipulation.

The National Society of Accountants does not consider free play to be revenue, Mr. Bladh said. Mr. Bladh also pointed out that Section 4, Subsection C of the 2007 compact helps define Section 11 of the 2007 compact by stating that a "financial statement shall be prepared in accordance with generally accepted accounting principles and shall specify the total amount wagered . . . for the purposes of calculating 'Net Win' under section 11 of this compact".

Mr. Bladh explained free play by relating it to a sale or discount at a retail store. The store offering a discount on a sweater will not pay taxes on the sweater's full price. It will pay taxes on the discounted amount for which the sweater sold. Similarly, the tribes should not pay revenue sharing on money the tribes never received.

Minutes

The committee adopted the minutes of the November 26-27, 2012 meeting with no objection.

Adjournment

There being no further business before the committee, the seventh meeting of the IAC for the 2012 interim adjourned at 1:35 p.m.