AMENDING THE OKLAHOMA MODEL TRIBAL GAMING COMPACT

by Graydon Dean Luthey, Jr. of the Oklahoma Bar*

The recent "settlement agreement" between the Cheyenne-Arapaho Tribes and the Governor of Oklahoma (Exhibit A hereto) has revived interest in amendment of the terms of the Model Tribal Gaming Compact (the "Compact") (Exhibit B hereto). Those terms will have particular importance as Tribes focus on the expiration of the primary term of the Compact on January 1, 2020 and formulate their strategies, either collectively or individually, toward potential renegotiation. Accordingly, a review of certain terms of the Compact germane to amendment is timely.

I. What is the Compact?

A review of the origin of the Compact is informative. When Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), in the wake of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, (1987), Indian governmental gaming was statutorily divided into three classes - Class I for traditional and social games, Class II for statutorily defined bingo and other identified games, and Class III for other forms of gaming, including slot machines, roulette, house-banked card games, craps, roulette and horseracing. 25 U.S.C. § 2703(6), (7)&(8). Class II gaming was allowed on Indian land, subject to certain federal and tribal regulatory requirements, located in a state where such a game was otherwise lawful. The states had no authority over such Class II gaming. Class III gaming was authorized in states where the particular game was allowed for any purpose by a person, organization, or entity but only pursuant to a compact between the Tribe and the state. 25 U.S.C. § 2710(d).

* Graydon Dean Luthey, Jr. is a partner at GableGotwals and General Counsel of the Oklahoma Indian Gaming Association. The views expressed in this article are his alone and do not necessarily reflect the views of his firm, the Oklahoma Indian Gaming Association or its members.

The compact is an intergovernmental agreement entered into to handle a particular problem or task. *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51 ¶ 9, 230 P.3d 485. IGRA is silent as to who has the authority to compact on behalf of the state. *Id.* at ¶ 12, n. 10. In the absence of federal statutory identification of such authority, the issue is determined under state law. *Id*. (*citing Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 493 n. 39).

In Oklahoma the people, on behalf of the state, expressly authorized tribal gaming compacting. 3A O.S. §280. Rather than identifying a person or entity to negotiate terms of a compact with a particular gaming tribe individually or all gaming tribes collectively, the legislature drafted the terms of the Model Tribal Gaming Compact (the "Compact"). After approval by the governor, the Compact was sent to the people as part of a statutory referendum. The people, pursuant to their constitutional legislative authority[1], adopted the Compact on November 2, 2004. 3 A O.S. § 281. The Compact provides that it, "as an enactment of the people of Oklahoma, is deemed approved by the State of Oklahoma" and that upon execution by an authorized tribal official, "[n]o further action by the state or any state official is necessary" for it to take effect upon approval by the Secretary of the Interior and publication in the Federal Register. 3A O.S. § 281, Part 16.

II. Is the Compact Subject to Amendment?

The terms of the Compact suggest that it is not subject to amendment except as to one particular provision and then only in a very limited circumstance. Initially, the Compact contains

---

[1] Const. Art. 5 § 1 reserves to the people the power to approve or reject any act of the Legislature. Const. Art. 5 § 2 expressly provides for referendum ordered by the Legislature.

no provision expressly authorizing amendment.[2] If viewed merely as a contract, the absence of such an amendment or modification authorizing provision, should not, without more, preclude amendment. Contracts are subject to modification upon the consent of the parties and when supported by consideration. *National Interstate Life Ins. Co. v. Thomas*, 1981 OK 71, 630 P.2d 779. However, this Compact is not merely a contract. Rather, according to the Oklahoma Supreme Court, the Compact is a statute enacted pursuant to legislative authority and therefore is a public law. *Griffith* at ¶ 7.[3]

Likewise, the compact language concerning its term is consistent with no amendment. The Compact identifies the end of its primary term - January 1, 2020. However, as long as organizational licensees for horseracing[4] are authorized to conduct electronic gaming by statute or court order on that ending date, the Compact automatically renews for successive 15-year terms. In such a case, the Compact does recognize one, and only one, topic that can be amended - the exclusivity fee and penalty. Even then, the Compact, through remarkably weak language, acknowledges that neither party is required to negotiate the issue if requested, much less agree to an amendment.

> "[W]ithin one hundred eighty [180] days of the expiration of this Compact or any renewal thereof, either the tribe of the state, acting through its Governor may request to renegotiate the terms of subsections A & E of Part 11 of this Compact."

---

[2] The Court has implicitly acknowledged the non-negotiability, and implicitly the non-amendability, of the Compact by describing it as an "all or none" offer to the Tribes. *Griffith* at ¶ 14.

[3] One federal judge for the Western District of Oklahoma has indicated that the Compact is "a form of contract". *Muhammad v. Comanche Nation Casino*, 742 F.Supp 1268, 1276, n.7.

[4] An organization licensee is a person licensed by the Oklahoma Horseracing Commission to conduct a race meeting. 3A O.S. § 200.1A(9) and 205.1A.

Surprisingly, the Compact is silent as to who shall represent the state in such a re-negotiation, much less as to what organ of government is empowered to ultimately bind the state to any such negotiated amendment. The susceptibility of other compact terms to amendment seems inconsistent with a "renegotiation" provision limited not only to specific terms but also to a particular time period. If other terms were susceptible to amendment, the renegotiation of the exclusivity provisions would not need to be identified particularly and made subject to a specific time limitation.

Further, as the Compact expressly recognizes, it may be terminated by the mutual consent of the parties. 3 A O.S. § 281, Part 15 C. Such a termination provision could be viewed as consistent with the inability to amend. If the parties have the ability to amend the Compact, then termination and adoption of a new Compact would not be needed to resolve a problem arising from judicial application of Compact language. However, such termination and subsequent making a new compact, rather than an amendment of the existing compact, was exactly what was suggested to resolve such a problem in *Griffith, supra* (*Kauger, J., concurring in part & dissenting in part* ¶ 13.) ("However, the compact also provides that it may be terminated by mutual consent. If the Tribe and the State are truly in accord with what was their intent at the time of compacting they may terminate and renegotiate the compact . . .").[5] That separate opinion did not identify who, on behalf of the State, would conduct such a new negotiation.

[5] The legislature has, by statute, actually amended the terms of the Compact, to make non-substantive changes in numbering sections and to redesignate the State Compliance Agency from the Office of the State Finance to the Office of Management and Enterprise Services. No substantive change was made. No indication is contained in the Session Laws that the amendments were intended to have retroactive effect in existing compacts. Okl. Session Laws

III. Who Can Amend the Compact on Behalf of the State?

If the Compact is subject to amendment, the question immediately arises as to what governmental agent possesses the authority to amend the statutory language on behalf of the state. The history of compacting with Indian Tribes in Oklahoma suggests that the legislature believes that it alone possesses the inherent authority to make and delegate the making of such compacts.[6] Although in certain instances the Governor negotiates and, in some instances makes compacts with Indian tribes, that gubernatorial power is granted by the legislature and even then in most cases, the Compact must be approved by another state entity. In discussing the history of compacting with Tribes, the Court has stressed that it is the Legislature that authorized the compacting by citing the statute that first authorized the Governor to make cooperative agreements with Tribes and then identifying subsequent legislation:

> 1988 Okla. Sess. Laws, ch. 160 (codified at 74 O.S. Supp. 1988, §§ 1221-1222). In 1989, the Oklahoma Legislature amended § 1221 to also authorize political subdivisions to enter into agreements with the tribes on subjects of mutual interest such as law enforcement. 1989 Okla. Sess. Laws, ch. 296, § 1. In 1991, the Legislature required cooperative agreements, upon approval by the Joint Committee on State-Tribal Relations, to be filed with the Secretary of State. 1991 Okla. Sess. Laws, ch. 202 § 2 (codified at 74 O.S. 1991, § 1221(E)). In 1993, the Legislature provided for the Oklahoma State Bureau of Investigation to monitor any Indian gaming compacts approved under §§ 1221-1222. 1993 Okla. Sess. Laws, ch 305, § 1 (codified at 74 O.S. Supp. 1993, § 1223). Further, in 1992, the Oklahoma Legislature authorized the Governor to enter into cigarette and tobacco products tax compacts with the tribes. 1992 Okla. Sess. Laws, ch. 339 (codified at 68 O.S. Supp. 1991, § 34).

2012, c. 304, § 24. Other than signing the Act, the Governor does not appear to have been involved.

[6] Art. 6, Sec. 8 of the Constitution defines the powers of the Governor. While the Governor has the power to conduct the business of the State with other states and the United States, the Constitution gives the Governor no authority as to representing the State with Indian tribes.

Griffith at ¶ 12, n. 9.

In 74 O.S. § 1221, the legislature conferred on the governor, or the governor's designee, the authority to enter into cooperative agreements on behalf of the state with federally recognized Indian tribal governments within Oklahoma to address issues of mutual interest. That grant makes clear that the governor's authority is conferred by the legislature and is not inherent. Likewise, the legislature made clear that it, through a joint legislative committee, not the governor, had the ultimate authority to enter into cooperative agreements:

> "Except as otherwise provided in this subsection, such agreements shall be effective upon approval by the joint Committee on State Tribal Relations."[7]

From the various statutes identified in *Griffith*, including 74 O.S. 1221, the clear impression arises that the governor's ability to compact with Indian tribes is a creature of statute and if created at all, is subject to express legislative limitation. In the absence of the expression to the contrary, the governor has no power to amend a compact without the final approval of the State-Tribal Relations Committee.[8]

---

[7] 74 O.S. § 1222 establishes the Joint Committee on State-Tribal Relations consisting of five Senators appointed by the President ProTempore of the Senate and five Members of the House of Representatives appointed by the Speaker. "The Committee shall be responsible for overseeing and approving agreements between tribal governments and the State of Oklahoma." *Id.*

[8] The Attorney General, in Opinion 2004 OK AG 27, noted that the legislation vested the Governor with the authority to compact pursuant to 74 O.S. § 1221(C)(1). In so doing, the Attorney general concluded that the Governor's exercise of such authority was not subject to legislative approval of the compact. The Attorney General, although discussing *In re Oklahoma Dep't of Transportation*, 2002 OK 74, 64 P.2d 546 and its holding on the constitutional separation of powers, did not address 74 O.S. § 1221(C)(1)'s requirement of approval of a gubernatorial negotiated compact by the State-Tribal Relations Committee, other than to note the requirement's existence.

No language of the Compact or the other sections of the State-Tribal Gaming Act accompanying it adopted by the people, indicates that the Governor has been given any authority by the people to amend the Compact in any circumstance, and particularly without final approval of the State-Tribal Relations Committee. Most significantly, the Compact makes clear in Part 16, Authority to Execute, in unambiguous language that it is not a gubernatorial act but is "an enactment of the people of Oklahoma", "is deemed approved by the State of Oklahoma" and that "[n]o further action by the state or any state official is necessary for this Compact to take effect upon approval by the Secretary of the Interior and publication in the Federal Register." If not a gubernatorial act but instead a legislative act, by what authority is the governor able to modify a statute?[9]

IV. Can the Governor Amend the Compact by Contract?

The "settlement agreement" raises the specific issue of the governor's ability to modify the terms of the statutory compact by a non-statutory contract not approved by the Joint Committee on State-Tribal Relations. The clear result of the "settlement agreement" is to authorize off-shore betting on "compacted games" operated by a particular tribe in exchange for enhanced revenue to the state. Arguably, the Compact implicitly limits compacted games to

[9] 3 A O.S. § 280 does contain vague language referencing "the executive prerogatives" of the Office of the Governor and "the power to negotiate the terms of a compact between the state and a tribe." The statute does not state that the Governor has inherent power to negotiate a tribal compact or that the Legislature has granted the Governor by power to bind the State to a gaming compact in the absence of the approval of the Committee on Tribal-State Relations required by 74 O.S. § 1221. The fact that the Compact was a legislative act by the State is consistent with the absence of gubernatorial power to make a Tribal gaming compact on behalf of the State.

those in which the patron who places a bet is located on Indian land as defined in IGRA.[10] By effectively changing the statutory definition of "patron" by executive action, the settlement agreement amends that Compact term. Not only does the "settlement agreement" seem to cause such an amendment, it apparently does so without the approval of the amendment by the Committee on State-Tribal Relations as required by 74 O.S. § 221.[11]

Even if the settlement agreement either lawfully constituted an amendment of "patron" or did not amend the definition because amendment was somehow not required to implement the purpose of the settlement agreement, an issue arises as to whether a "settlement agreement" can render lawful previously unlawful activity. An argument exists that internet gaming is unlawful in Oklahoma unless all acts, including the location of the players making the bet, are on Indian land as defined by IGRA.[12] For a game to be legally compacted, the game must (i) be approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislature for use by any person or entity or (iii) approved by amendment of the State-Tribal Gaming Act, or a Class II game in use by the Tribe. Compact Part 3, § 5.

---

[10] Part 3, § 20 defines "patron" as "any person who is on the premises of a gaming facility, for the purpose of playing covered games authorized by this Compact." The purpose of the Compact, in part, is to define the relationship between players and the gaming tribal operator, including the rights of the player as to prize claims. Part 6, § of the Compact suggests that the Compact implicitly requires compacted games to be played by patrons physically present in the facility on Indian land since the Prize Claim due process provisions apply to "patrons" as defined in Part 3, § 20. If the player is not so present as a "patron" then the player has no protection for a prize claim and is substantially at risk.

[11] The Compact itself did not receive such Committee approval. However, the Compact was an Act of the people, and accordingly could be regarded as a specific statute, which controls over the general language of 74 O.S. § 1221. Additionally, the contractual amendment failed to obtain the statutory status held by the initial Compact.

[12] 25 U.S.C § 2703(4) defines Indian land and § 2710(c) and (d) require that Class II and Class III gaming must be on Indian land to be lawful under IGRA.

If the off-shore internet gaming is Class III and fails to meet one of the three compacting qualifiers as to legality, then merely including the off-shore internet gaming within the Compact definition of "compacted games" neither satisfies the express statutory definition of "compacted games", nor, more significantly, transforms the statutorily unlawful into new-founded legality. Of course, if the off-shore internet gaming was otherwise lawful as either within one of the three qualifications for Class III games or was a Class II game, no legal reason exists for the settlement agreement. In such instance, the "settlement agreement" merely recognizes the legality of the previously lawful activity and seems to have no legal purpose other than increasing state revenue.[13]

V. Conclusion

The years ahead present ample time for reflection on the parameters and legal limitations of tribal-state gaming compacting. The potential for automatic extension of existing compacts, along with who lawfully may bind the state to amendments and new contracts are merely some of the issues confronting those interested in this activity and its significant sovereignty and economic impacts.

[13] Since the "settlement agreement" does not disclose the nature of the dispute settled, it is impossible to determine from the face of the "settlement agreement" whether the agreed-to terms actually resolve a real dispute or whether some other reason motivated the execution of the settlement agreement.