

Washington State Compacts with Tribal Businesses

Tribal businesses do not pay a portion of gaming profits to the state general fund

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Key Findings

- The Indian Gaming Regulatory Act (IGRA), of 1988, expressly grants states and Indian tribes the power to jointly regulate Class III Tribal gaming. Class III gaming includes slot machines, blackjack, keno and other casino-style games.
- Since the passage of IGRA, more than 20 states, including Washington, have negotiated compacts allowing for Class III gaming with Indian tribes.
- In Washington there are 29 federally recognized Indian tribes. 28 of the 29 tribes have negotiated and signed Class III gaming compacts with Washington State. These tribes operate 27 casinos, with at least one additional casino under construction.
- Gaming compacts between the tribes and Washington have not included revenue sharing. During the 2005 Spokane Tribe compact negotiations, all parties that were at the table were operating under the understanding that Washington was the only state that did not have general fund revenue sharing with tribes under compact agreements.
- Despite the lack of a revenue sharing agreement Indian gaming expansions continue in Washington. The 2007 Spokane Tribe compact provided them with an increase in allotment of gaming devices beyond that of other previously negotiated compacts. Months later the other 27 compacted tribes agreed to amendments offered in X2, which provided increases in the total allotment of gaming devices equal to or greater than the Spokane agreement. In 2008 the Spokane tribe is back seeking an additional increase in gaming devices.
- The ability to renegotiate compacts varies from state to state, and is often spelled out in the original agreements. Most, if not all, compacts in Washington simply require a letter from either party requesting new negotiations. In some instances, the renegotiation of one compact will automatically set into motion the renegotiation of another tribes compact.
- The current compacts are missing an opportunity to serve the public interest, because there is no policy in place to redress some of the imbalance between the favorable tax and regulatory treatment enjoyed by tribal businesses, and the high-tax environment in which all other business owners in Washington State must operate.

Introduction

Washington, unlike most other states with tribal businesses, does not require Indian tribes to pay part of their gambling profits to the state, in place of the taxes normally paid by most other businesses.

In 2005, state negotiators had settled on a tentative profit-sharing agreement under which the Spokane Tribe would have paid part of its profits on Class III gambling to the state, as is done, for example, in Arizona and California. If finalized, the agreement would likely have become a model for similar profit-sharing agreements with the state's 20 other casino-owning tribes.

That year, however, the governor canceled the tentative agreement and initiated new negotiations, which resulted in a final compact with financial terms far more generous to the Spokane Tribe. Under the final compact, tribal members will retain tens of millions in casino profits each year, which under the canceled agreement would have been used to fund state programs.

Background

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA). The intent of the law was to promote tribal economic development, self sufficiency and strong tribal governments. The Indian Gaming Regulatory Act expressly grants states and Indian tribes the power to jointly regulate Class III Tribal gaming. Class III gaming includes slot machines, blackjack, keno and other casino-style games. IGRA also created the federal National Indian Gaming Commission to oversee reservation bingo games and certain aspects of Class III gaming.¹

The IGRA allows tribal and state governments to negotiate compacts for the joint regulation of Class III gaming. In most states there have been a variety of conditions under which the compacts have been negotiated. Ballot measures and legal challenges have been a prevalent part of this process in most states, including Washington. While the IGRA does in many circumstances provide a prescriptive path for the negotiation of the compacts, there is a great deal of variety from one state to the next.

Since the passage of IGRA, more than 20 states, including Washington, have negotiated compacts allowing for Class III gaming with Indian tribes.² A close examination of the negotiated compacts in Washington, as well as other states, helps policymakers assess whether the IGRA is meeting its policy goals of establishing economic development, self sufficiency and strong tribal governments.

This paper includes a look at:

- Brief History of Early Compact Negotiations in Washington
- California Compact Negotiations: Gov. Davis v. Gov. Schwarzenegger
- Compact Negotiations in Washington State
- Gaming Revenues and Compact length

¹ History of Indian Gaming – Arizona Department of Gaming Website, 2007.

² Wisconsin Legislative Fiscal Bureau, Informational Paper 86 – Tribal Gaming in Wisconsin p28, January 2007.

Washington: Brief History

In Washington there are 29 federally recognized Indian tribes. These tribes operate 27 casinos, with at least one additional casino under construction. The total combined membership of the 29 tribes in the state is just under 55,000 people, or .009% of the population of the state. Some tribes have fewer than 200 members, while the largest have more than 9,000. Tribal membership is defined as the certified number of people who are recognized by tribal leaderships or governments when counting a tribe's population, based on racial identity.

Who is an Indian?

There is no legal definition of who is an American Indian. Each tribe decides on and enforces its own membership rules. The National Indian Gaming Commission describes federal policy this way:

"Indian tribes have the authority to determine membership requirements. Many tribes have a blood quantum requirement (i.e., one-fourth) and may have additional requirements relating to residency, place of birth, or enrollment deadlines. The Federal Government generally requires a person to be a member of a federally recognized tribe to be eligible for federal benefits."³

For example, the Snoqualmie Tribe, in a dispute over control of the tribe's lucrative casino profits, recently expelled 60 members because they "don't have the required one-eighth tribal blood to be members."⁴ At the same meeting of designated "preferred voters," tribal leaders banished eight members, depriving them of all tribal benefits, including the right to be on tribal land, and the right to claim Indian identity.⁵

For purposes of the U.S. census, the definition of who is an Indian is based on self-identification. In 2000, 2.4 million people identified themselves as American Indian or Alaska Native.⁶ Only a small portion of people who self-identify, however, are registered members of a recognized Indian tribe.

For decades tribal members have benefited from a system of special rules and regulations that give them significant competitive advantages not available to other citizens. Tribes do not pay state taxes, and no Washington state tribe has a profit-sharing agreement with the state in lieu of taxes.

Tribal businesses are not subject to the state smoking ban, civil rights laws, gaming taxes, the Business and Occupation Tax, sales taxes or the workers' compensation payroll tax or the unemployment payroll tax.

The following table lists the tribes in Washington, along with the number of tribal members in each, and the number of casinos each tribe operates under a Class III gaming agreement.

³ "Who is considered a tribal member?" National Indian Gaming Commission, Frequently Asked Questions, Tribal Members, at www.nigc.gov/AboutUs/FrequentlyAskedQuestions/tabid/57/Default.aspx?q_01, accessed May 29, 2008.

⁴ "Snoqualmies banish eight, disenroll 60," by Linda V. Mapes, *The Seattle Times*, April 28, 2008.

⁵ Ibid.

⁶ "Table 1: Total Population by Age, Race, Hispanic Origin or Latino Origin for the United States, 2000," Census 2000 Briefs and Special Reports, U.S. Census Bureau, at www.census.gov/population/www/cen2000/phc-t9.html.

| Tribe Name | Number of Members ⁷ | Operate a Casino? ⁸ | Share Profits with the State? |
|-------------------------------------|--------------------------------|--------------------------------|-------------------------------|
| Confed. Tribes & Bands-Yakama | 9,687 | Yes (1) | No |
| Confederated Tribes of the Chehalis | 688 | Yes (1) | No |
| Confederated Tribes of the Colville | 9,023 | Yes (3) | No |
| Cowlitz Indian Tribe | 2,855 | No | No |
| Hoh Indian Tribe | 167 | No | No |
| Jamestown S'Klallam Tribe | 526 | Yes (1) | No |
| Kalispel Indian Community | 364 | Yes (1) | No |
| Lower Elwha S'Klallam Tribe | 800 | No | No |
| Lummi Nation | 4,096 | Yes (1) | No |
| Makah Tribe | 2,492 | No | No |
| Muckleshoot Indian Tribe | 1,712 | Yes (2) | No |
| Nisqually Indian Tribe | 525 | Yes (1) | No |
| Nooksack Indian Tribe | 1,707 | Yes (1) | No |
| Port Gamble S'Klallam | 1,059 | Yes (1) | No |
| Puyallup Tribe | 3,224 | Yes (2) | No |
| Quileute Tribe | 658 | No | No |
| Quinault Indian Nation | 2,454 | Yes (1) | No |
| Samish Indian Tribe | 1,067 | No | No |
| Sauk-Suiattle Indian Tribe | 163 | No | No |
| Shoalwater Bay Indian Tribe | 255 | Yes (1) | No |
| Skokomish Tribe | 750 | Yes (1) | No |
| Snoqualmie Tribe | 595 | No* | No |
| Spokane Tribe of the Spokane Res. | 2,305 | Yes (2) | No |
| Squaxin Island Tribe | 782 | Yes (1) | No |
| Stillaguamish Tribe | 182 | Yes (1) | No |
| Suquamish Tribe | 863 | Yes (1) | No |
| Swinomish Indian Tribal Community | 770 | Yes (1) | No |
| Tulalip Tribes | 3,604 | Yes (2) | No |
| Upper Skagit Indian Tribe | 755 | Yes (1) | No |
| Washington State Totals | 54,128 | 27 | |

*Snoqualmie Tribe is in the process of building a casino

From the outset of gaming compact negotiations, in the early 1990's, between Washington and the tribes, the two sides could not agree on whether slot machines and other machine games were legal in Washington, and therefore subject to negotiation under IGRA. The tribes argued that failure to negotiate for machines was an act of bad faith by the state.

As passed by Congress, IGRA provided for settlement of bad faith claims by filing suit in federal court. However, several states, including Washington, asserted that they were not subject to lawsuits under IGRA because of the state's sovereign immunity. Sovereign immunity limits the right to sue a state government without the consent of the state government. The U.S. Supreme Court accepted the state's

⁷ Department of Interior, Bureau of Indian Affairs 2003 Indian Population and Labor Force Report 2003.

⁸ Washington State Gambling Commission, Tribal and Technical Gambling Division, Tribal Casinos in Washington; updated 2008.

argument, effectively eliminating the IGRA's dispute resolution process whenever states assert immunity defenses.

In 1994, Governor Mike Lowry and then-Attorney General Christine Gregoire waived Washington's sovereign immunity and let the tribes sue the state for the purpose of legalizing slot machines.

On September 26, 1997, the court issued its order and held that the state is not required to negotiate over slot machines, but that other gambling devices are subject to negotiation as long as they do not constitute:

- 1) Mechanical or lottery devices activated by the insertion of a coin or by the insertion of any object purchased by any person taking a chance by gambling in respect to the device;
- 2) Electronic or mechanical devices or video terminals which allow for individual play against such devices or terminals.

For a year, the 12 tribes that had compacts with the state for gaming negotiated a compact amendment with the Gambling Commission and Attorney General Gregoire over what machines fit within the Court's order. An Agreement in Principle was reached in June 1998 on a gaming device modeled after the state lottery. This agreement opened future compact negotiations and provided the legal grounds for introducing a number of types of casino gambling to Washington.⁹

California

In 1998, California voters passed Proposition 5, requiring the governor to approve all tribal casino proposals. In addition, the Proposition lowered the legal gambling age, placed no limit on the number of casinos, allowed Nevada-style gambling, and allowed the tribes self-oversight. Under this initiative tribes were required to set aside money for non-gaming tribes and to establish a fund to reimburse local governments for the cost associated with casino operations. This voter-approved initiative was struck down by the California State Supreme Court in 1999 as a violation of the 1984 state Lottery Act.

The result of the State Supreme Court decision against Proposition 5 led Governor Gray Davis to negotiate new compacts with California tribes to allow Class III gaming in the state. The new compacts required the tribes to make quarterly payments to the state treasury based on the number of slot machines, to pay for problem gambling programs and local government costs, and to give \$1.1 million annually to non-gaming tribes.

The new compacts negotiated by Governor Davis were contingent on the passage of a state constitutional amendment, Proposition 1A. The constitutional amendment passed in March of 2000. Since passage of Proposition 1A, tribes in California have earned more than \$5.1 billion annually in gaming profits.¹⁰

The election of a new governor in California, Arnold Schwarzenegger, led to more changes to the compacts. In 2004, Governor Schwarzenegger announced new compacts with some of the major tribes.

⁹ History of Machine Gaming – Washington State Gaming Commission Website, 2008.

¹⁰ Hot Topic – Indian Gaming in California – Institute of Governmental Studies, University of California, 2005.

The new compacts called for an upfront \$1 billion in payment to the state, followed by regular annual payments to the state treasury of between \$150 and \$275 million.

The annual payment is based on a \$100 million dollar flat amount earmarked to pay for transportation improvements, plus an additional fee based on the number of gaming machine and the amount of tribal profit. Also included in the compacts are the requirement that tribes comply with state environmental, labor and safety law. Normally, Indian tribes claim they are exempt from such laws.

As recently as 2006, Governor Schwarzenegger negotiated new compact agreements that, if confirmed by voters in 2008, will increase the annual minimum payment from the tribes to the state from \$100 million to \$168 million, with additional payments ranging from fifteen to twenty percent of tribal gambling machine profits.¹¹

The ability to renegotiate compacts varies from state to state, and is often spelled out in the original agreements. In California, for example, most compacts have clauses stipulating the terms for requesting renegotiations. The renegotiation requests can be made by either the state or a tribe, which then obligates the other to enter into good faith talks. These renegotiated compacts require the same ratification process as a new compact.

Washington

In Washington, 28 of the 29 federally recognized tribes have negotiated compact agreements. Although the language for each of the compacts is not specifically the same, in general the terms of each are similar. Under compacts signed before 2005, the tribes negotiated the number of machines that a single casino could have, as well as the number of casinos they are allowed to operate.

Additionally, the tribes agreed to pay up to 2% of their net profits to local governments or non-profits to offset the costs associated with the operation and public impacts of a casino. However, the tribes have the discretion to decide where the money is directed. The tribes also agreed to pay an additional 1% of net profits to two specific activities. One-half of one percent was to be used to cover any cost that was not met by the 2% payment to local government. If there was not any additional local cost, than that half percent was given to tribal government leaders.

The other half of one percent was earmarked for charitable contributions; however this portion is not a requirement, but a voluntary element of the compacts. Under these agreements the tribes also make payments to the state to pay for oversight and regulatory costs. None of the agreements include profit sharing payments from a tribe to the state treasury in place of the normal taxes paid by other Washington businesses.

2005 Agreement

In 2005, the Washington State Gaming Commission reached a tentative compact agreement with the Spokane Tribe which included a profit sharing provision. Under the tentative agreement, the Spokane Tribe would have paid a percentage of its yearly gambling profits into the state general fund, in place of the normal business taxes that apply to non-tribal businesses.

¹¹ Question & Answer, California Tribal Casinos, California Legislative Analysts' Office, 2007.

The precise percentage paid to the state would have been based on a sliding percentage scale applied to total annual profits from Class III gaming.¹² For example, if the Spokane Tribe had one-year net profit totaling between \$60 million and \$90 million, then the Tribe would give 10 percent, or \$6 million to \$9 million, to the state general fund. The full graduated scale is presented below.

| Annual Amount of Tribe's Profit from Class III Gaming | | Percentage Paid to the State |
|---|-------------------------------|------------------------------|
| Tier one | \$0 - \$30,000,000 | 3% |
| Tier two | \$30,000,001 - \$60,000,000 | 5% |
| Tier three | \$60,000,001 - \$90,000,000 | 10% |
| Tier four | \$90,000,001 - \$120,000,000 | 15% |
| Tier five | \$120,000,001 - \$150,000,000 | 20% |
| Tier six | \$150,000,001 - \$180,000,000 | 25% |
| Tier seven | \$180,000,001 - \$210,000,000 | 30% |
| Tier eight | Above \$210,000,000 | 35% |

Tribes in Washington do not disclose their annual profits, describing it as proprietary information that will not be made public.¹³ Unlike publically-held companies, they are not required to report gross revenues or profits on their casino, hotels or other business operations.

The lack of public disclosure and the fact that Washington's 27 tribal casinos vary greatly in size and profitability, it is not possible to calculate how much the state general fund would have received if the 2005 compact had become the model for all tribal casinos.

We do know, however, that in 2007 all tribal casinos together cleared \$1.33 billion in net profits. If, for purposes of this discussion, we assume that as a group the tribal casinos would have paid an average rate of 15%, or toward the lower end of the 2005 agreement's sliding scale, the tribes collectively in 2007 would have paid approximately \$200 million to the state general fund. If some casinos had significant higher-than-average profits that year, this payment naturally would have been considerably more.

2005 Agreement Canceled

This agreement never went into effect. On October 27, 2005, Governor Gregoire sent a letter to the Gaming Commission telling its members to withdraw the terms of the compact.¹⁴ It is important to note that at the time of the negotiations, all parties that were at the table were operating under the understanding that Washington was the only state that did not have general fund revenue sharing.¹⁵

¹² Spokane Tribe and the State of Washington Class III Gaming Compact 2005; Appendix 1-C.

¹³ Public requests for annual casino earning typically meet with a polite refusal, for example: "Good morning, Brandon. We received your request for the net receipts of the Nisqually Red Wind Casino and regret to inform you that the information is proprietary and therefore not public information," e-mail communication received by the author and available on request, June 10, 2008.

¹⁴ Governor Letter to Mr. Curt Ludwig, Chair, WA State Gaming Commission; October 27, 2005.

¹⁵ Washington State Gaming Commission, summary of Tribal Revenue Sharing Provisions from Other States.

After canceling the proposed compact agreement, a team led by Governor Gregoire started new negotiations with the Spokane Tribe. In 2007, the governor signed a final agreement with the Tribe, bringing the number of Washington tribes having compacts with the state to 28.¹⁶

The terms of the final compact are considerably more generous to the Spokane Tribe than those of the 2005 tentative agreement. Under the 2007 agreement, the Spokane Tribe is required to pay .13% of its profits to problem gambling programs and a further .13% to smoking cessation programs.¹⁷ This compares with the 2005 tentative agreement that would have required the tribes to pay .26% for problem gambling programs with a minimum of .13% paid to the Department of Social and Health Services' Division of Alcohol and Substance Abuse. The new compact left intact the potential 3% payments to local governments or charities (as noted earlier, the language directing the tribes to pay for impacts is vague, allowing a tribe to make payments to whomever they believe should get the money).

Also, the 2007 agreement allows tribes to avoid payments to the state for public problem gambling and smoking cessation programs. Instead the tribes can keep that money and spend it on their own programs or give it to other organizations and nonprofits that provide similar services.

No Payments to the State General Fund

Missing from final, 2007 compact is any requirement that the Spokane Tribe pay a portion of its annual business profits into the state general fund, thus making all tribal commercial activity tax-free.

No formal reason was given by the governor's negotiating team for dropping the profit sharing provision, so why state negotiators did this is unclear. No compensating provision was included in the agreement that would benefit the state.

It seems to work against the public interest to forgo this available revenue, since a large portion of general fund spending goes to public education, and since most other states require that profit-making tribes make payments to the public treasury. Assuming the tribe paid into the general fund out of its profits at the 10% annual rate, this single concession will deprive the state of between \$6 million and \$9 million in revenue each year of the agreement.

Despite the removal of profit sharing provisions, the Spokane Tribe received an increase in the amount of gaming devices that it would be allowed to operate, compared with gaming device allotments negotiated prior to 2005.

New Compact Negotiations

A few months after the signing of the Spokane Tribal compact, the governor opened negotiations with the other 27 tribes and agreed to a provision called Appendix X2. This provision requires the 27 tribes to make payments to the problem gambling and smoking cessation programs, but not to the state general fund.

Unlike states such as California and Arizona, tribes in Washington do not have a profit sharing agreement that would provide annual payments to the state general fund. All proposed profit sharing

¹⁶ "Governor Signs Spokane Tribal Gaming Compact, Washington State Gambling Commission, February 16, 2007, at www.wsgc.wa.gov/docs/press_releases/spokane_compact_021607.pdf.

¹⁷ Spokane Tribe and the State of Washington 2007 – Washington State Gaming Commission.

provisions in the state have been eliminated since 2005. However, under the Appendix X2 provision, all Washington tribes are allowed to increase the total number of gaming machines, thus greatly increasing their yearly profits.

It is likely that had the governor’s negotiating team retained the 2005 proposed provision to require the Spokane tribe to make yearly profit sharing payments to the general fund, that the other 27 tribes would have been required to do so also. This policy would have opened a new revenue stream for the state, allowing the legislature to direct more funding to key state programs, such as public education and public health services.

In 2007, tribal gaming businesses in Washington made an estimated net profit of \$1.33 billion.¹⁸ If the state had a profit sharing agreement with these tribes, the general fund that year would likely have received several hundred million dollars in additional revenue, depending on the net profits of individual casinos.

National Tribal Gaming Profits

Since the introduction of the Indian Gaming Regulatory Act Tribal, gambling profits across the country have grown substantially. As shown in the following table, several states have profit sharing agreements with tribes that require annual payments to the state treasury.

The table below shows selected states and their 2006 tribal gaming net receipts. In addition, this table shows the period or term of each state compact.

| 2006 Tribal Gaming Revenue ¹ | | | | | |
|---|-------------------|------------------------------|---------------------------------------|----------------------------|----------------------------|
| State | Total Revenue | Term of Compact ³ | Annual State Regulatory Reimbursement | Annual Local Govt. Payment | Annual State Govt. Payment |
| Arizona | 2.1b | 20 yrs/3 yr option | 8m | 12.3m | 81.9m |
| California | 7.7b | Approx 20 yrs | 19.6m ² | 37.8m | 270.7m |
| Connecticut | 1.6b | no limit | 10m ² | | 223m |
| Idaho | 156.2m | compact specific | unavailable | 3m | unavailable |
| New Mexico | 160m | expire 2015 | 100,000/tribe | unavailable | 12.7 m |
| Washington | 1.19b | no limit | 3m | 11.3m | 0 |
| Wisconsin | 1.3b ² | no limit | 350,000 ³ | unavailable | 112.3m ³ |

¹ Meister, Alan, Indian Gaming Industry Report, 2007-2008 Edition, Newton: Casino City Press
² Wisconsin Department of Administration, Division of Gaming, An Evaluation, Sept. 2007
³ Wisconsin Legislative Fiscal Bureau, Informational Paper 86, Tribal Gaming In Wisconsin, 2007

¹⁸ “Net Gambling Receipts for Gambling in Washington State in Fiscal Year 2007,” Tribal Gaming (estimated), Washington State Gambling Commission, Agency Overview, December 2007, at www.wsgc.wa.gov/newsletters/brochure.pdf.

Conclusion

The purpose for the IGRA was to help tribal governments, making them financially strong through the establishment of profit-making businesses based on gambling, and thus lead to economic self sufficiency.

Twenty years later, it is difficult to assess the overall success of the IGRA because tribal leaders, citing sovereignty rights, do not release information on the profits they make from gaming, and how these funds are then subsequently spent. Because of the lack of public disclosure, the best measurement might well be the compacts themselves.

Based on compacts in Washington and California, it appears that the IGRA has been extremely successful at enriching tribal governments. This is evident through tough negotiations in which the tribes have participated during the compact process. However, it remains unclear whether the tribal compacts and ensuing gaming profits have helped establish broad self sufficiency for Native Americans as individuals.

Regarding profit sharing, it appears that most other states, other than Washington, have reached agreements that both sides feel is beneficial. Tribes in other states are able to operate successful businesses that economically benefit the tribe and its members, and states have gained additional revenue that can be spent on public services. In addition, profit sharing agreements work to reduce the unequal tax treatment, and the competitive inequality, that exists between the tribes and their non-Indian neighbors.

In Washington, however, this is not the case. By not following through with the model agreement negotiated with the Spokane Tribe in 2005, state leaders are depriving the state of important additional revenue that could supplement spending on essential public services. They are also missing an opportunity to serve the public interest, because there is no policy in place to redress some of the imbalance between the favorable tax treatment enjoyed by tribal businesses, and the high-tax environment in which all other business owners must operate.

Update – August 8, 2008

At the time this study was published, the Washington State Gaming Commission reported that all other states with gaming compacts have revenue sharing agreements with Indian tribes, and this information was included in our study. Since then the Gaming Commission has revised this information. The Commission now reports that 11 states have revenue sharing agreements with tribes, while 13 states do not. This updated data does not change the substance of our research, which is that, at the time of the 2005 Spokane Compact negotiations, all parties were operating under the understanding that Washington was the only state that did not have general fund revenue sharing.

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