

GAMING LEGAL NEWS

NORTH FORK TRIBE SUES STATE FOR COMPACT IN LATEST CHAPTER OF GAMING SAGA

by Patrick Sullivan

By the summer of 2014, it appeared that the North Fork Rancheria of Mono Indians of California had finally made it over the last hurdle to begin construction of a Class III casino with 2,000 slot machines and 40 gaming tables in Madera County, California. But a successful anti-gaming ballot initiative reversed the Tribe's Class III gaming compact in November, and the Tribe is now suing to regain its lost ground.

The Tribe had pursued its goal for more than 10 years, executing a memorandum of understanding with Madera County in 2004. In 2011, the Tribe won a "two-part" gaming eligibility determination for its newly acquired off-reservation casino site under the Indian Gaming Regulatory Act ("IGRA"). The determination was based on conclusions by the Secretary of the Interior that a gaming facility was in the best interests of the Tribe and not detrimental to the surrounding area, with the concurrence of the governor.

The Tribe negotiated a gaming compact with Governor Jerry Brown, which was signed by the governor in August 2012. In February 2013, the Tribe successfully placed a 305-acre parcel in trust status for the project, 36 miles from its Rancheria. On October 22, 2013, the Secretary of the Interior published notice that the compact was federally approved. California requires that Class III gaming compacts be legislatively ratified, and on June 27, 2014, the legislature ratified the Tribe's compact. Governor Brown signed the compact ratification bill on July 3.

The Tribe received a devastating blow when, immediately after the legislative ratification, *Stand Up for California!*, a gaming watchdog group opposed to what it calls "reservation shopping" by California Indian tribes, began the process of gathering signatures to refer the North Fork compact, along with a second off-reservation gaming compact, to the voters. The group successfully placed the referendum on the November 2014 general election ballot and commenced an \$18.5 million campaign to defeat the compacts, reportedly outspending supporters of the project by 45-1. Almost all of the opposition funding came from other Indian gaming tribes and their investors. The Picayune Rancheria of Chukchansi Indians claimed the North Fork project would reduce revenues at their own casino by as much as a third (the Chukchansi casino is currently closed due to a tribal leadership dispute).

Stand Up! had previously sued the State, the governor and other officials in California state court seeking to prevent the governor from even executing the North Fork compact. After *Stand Up!* began the



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referendum process, the Tribe intervened in that litigation and filed a counterclaim challenging the validity of the referendum. The Tribe claimed that (1) the ratification could not be undone by referendum under California law, and (2) IGRA's requirement that states negotiate compacts "in good faith" preempted such a referendum to the electorate. On June 26, the state court allowed the referendum to proceed, ruling that the compact ratification was subject to referendum under California law as a "legislative act" and not an exempt "administrative act." The Court further held that California's referendum process could be read in harmony with IGRA and was not preempted by the federal law.

The Tribe has strong support within Madera County and the City of Madera for the gaming project due to expectations that the project would create 1,400 local jobs and millions of dollars in mitigation payments to local governments. However, the California voters reversed the legislative ratification in the November 4, 2014, general election, leaving the Tribe without a Class III compact.

IGRA requires states to negotiate gaming compacts and allows tribes to sue for an order that the state conduct negotiations in good faith. If the Tribe and State fail to reach a compact within 60 days of such an order, IGRA states that each party must submit a proposed compact to a mediator to select the compact which "best comports with" IGRA and the findings of the Court. If the State fails to consent to that compact within a further 60 days, the Secretary of the Interior prescribes procedures "consistent with the proposed compact selected by the mediator," IGRA, and "relevant provisions of the laws of the State." The Tribe may then conduct Class III gaming under the imposed "Secretarial procedures."

A 1996 Supreme Court opinion limited the application of Secretarial procedures to states that waive their Eleventh Amendment immunity to tribal suits under IGRA. In *Seminole Tribe v. Florida*, the State of Florida challenged the Tribe's lawsuit against it as unconstitutional. Florida argued that, because the Eleventh Amendment shielded it from such lawsuits without its consent, the Seminole Tribe could not obtain the court's finding of bad faith and order, which IGRA requires before proceeding to the imposition of Secretarial procedures, because the State had not waived its immunity to be sued. The Supreme Court agreed that Congress could not breach states' Eleventh Amendment immunity through legislation. However, California's laws enabling Indian gaming expressly waived the State's sovereign immunity to tribal suits for failure to negotiate compacts pursuant to IGRA, opening the door for North Fork to press its claims.

In January 2015, the Tribe requested that the State reopen compact negotiations. In a January 16, 2015, letter to the Tribe's attorney, Joginder Dhillon, Senior Advisor for Tribal Negotiations to Governor Brown, wrote: "Given that the people have spoken, entering into negotiations for a new compact for gaming on the Madera parcel would be futile."

Dhillon's letter was exactly what the Tribe needed to demonstrate that the State had refused to negotiate. On March 17, the Tribe filed a federal lawsuit against the State of California in federal district court alleging that the referendum overturning the compact ratification and

the renewed refusal to enter new negotiations violated IGRA. The Tribe asked the court for a declaration that the State had failed to negotiate a Class III gaming compact "in good faith" in violation of IGRA and for an order requiring the State to resume negotiations.

The State has yet to file an answer, but California's waiver of its Eleventh Amendment immunity to the Tribe's bad-faith suit means that the Tribe will likely prevail and win the right to conduct Class III gaming at the site. In the meantime, nothing prevents the Tribe from conducting Class II gaming on the site, as Class II gaming does not require a compact.

Dickinson Wright attorneys represented Madera County in negotiations for an intergovernmental agreement with North Fork and currently represent the County in a dispute related to the Picayune Rancheria of Chukchansi Indians.

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