

BACK TO THE NEGOTIATING TABLE: DESIGNING A TRIBAL-STATE COMPACT FOR ALABAMA

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INTRODUCTION

Traditional Indian gaming can trace its roots to centuries preceding the foundation of the United States. Despite the long history of wagering by Native peoples, the modern conception of Indian gaming did not emerge until after a series of Supreme Court decisions rejecting state taxation and civil regulatory authority over activities conducted by Indian tribes on reservation lands.² In the wake of these decisions, tribes began to open gaming facilities on their tribal lands.³

Indian gaming continued to develop largely independent of state regulation until Congress enacted the Indian Gaming Regulatory Act (IGRA) in an attempt to address the issue of unregulated gaming on tribal lands.⁴ IGRA was a response to the United State Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, which established the proposition that tribes could conduct gaming on Indian lands without state interference if the State permitted gaming in any form.⁵

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² See, e.g., *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 181 (1973) (holding that a state individual income tax was unlawful as applied to reservation Indians with respect to income derived wholly to reservation sources); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (holding that the Indian Reorganization Act barred a state use tax imposed on personalty that the Tribe purchased out of state and subsequently installed on tribal lands); *Bryan v. Itasca Cty.*, 426 U.S. 373, 379–81 (1976) (holding that states generally lack regulatory authority over Indian people on Indian reservations).

³ *Seminole Today*, SEMINOLE TRIBE OF FLORIDA, <http://www.semtribe.com/History/SeminoleToday.aspx> (last visited Mar. 30, 2017) (stating that the first Indian bingo hall was opened in 1979 by the Seminole Tribe of Florida on its reservation lands, Seminole Tribe of Fla.).

⁴ See 25 U.S.C. §§ 2701–2702 (2012).

⁵ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214, 221–22 (1987).

The Poarch Band of Creek Indians presently operates three casinos within Alabama's external borders: Wind Creek Casino in Escambia County, Creek Casino in Elmore County, and Creek Casino in Montgomery County.⁶ All three casinos are located on lands held in trust by the United States for the benefit of the Poarch Band—Alabama's only federally recognized tribe.⁷ The gaming activities that take place at these casinos are conducted pursuant to a tribal ordinance that has been approved by the Chairman of the National Indian Gaming Commission (NIGC).⁸ PCI Gaming Authority—a commercial enterprise wholly owned by the Poarch Band—is tasked with operating the tribe's gaming facilities.

Although the Alabama Constitution generally prohibits bingo gaming, nonprofit entities and private clubs are permitted to operate bingo games for prizes or money in some towns and counties for charitable, educational, or other lawful purposes.⁹ Because some bingo gaming is allowed under Alabama law and the Chairman of the National Indian Gaming Commission approved

⁶ *Alabama v. PCI Gaming Auth. (PCI I)*, 15 F. Supp.3d 1161, 1168 (M.D. Ala. 2014) (stating that the lands on which the three casinos are located were taken into trust in 1984 (Elmore County land), 1992 (Escambia County land), and 1995 (Montgomery County land) respectively).

⁷ Final Determination for Federal Acknowledgement of the Poarch Band of Creeks, 49 Fed. Reg. 24083 (June 4, 1984) (to be codified at 25 C.F.R. pt. 83) (granting federal recognition to the Poarch Band in 1984).

⁸ See Letter from Tracie L. Stevens, Chairwoman of the Nat'l Indian Gaming Comm'n, to Buford L. Rolin, Tribal Chairman, Poarch Band of Creek Indians (July 30, 2010), <http://www.nigc.gov/images/uploads/gamingordinances/poarchband-Amdappr07302010.pdf>.

⁹ ALA. CONST. art. IV, § 65 (prohibiting the legislature from authorizing "lotteries or gift enterprises for any purpose.");

see also ALA. CODE § 13A-12-27 (1975) (criminalizing the possession of slot machines or "[a]ny other gambling device, with the intention that it be used in the advancement of unlawful gambling activity.");

ALA. CONST. amend. 386 (authorizing "[t]he operation of bingo games for prizes or money by nonprofit organizations for charitable or educational purposes" in Jefferson county); Ala. CONST. amend. 387 (Madison County); Ala. CONST. amend. 413 (authorizing "[t]he operation of bingo games for prizes or money by . . . nonprofit organizations for charitable, educational, or other lawful purposes" in Montgomery county); Ala. CONST. amend. 440 (Mobile County); Ala. CONST. amend. 508 (Calhoun County); Ala. CONST. amend. 542 (St. Clair County); Ala. CONST. amend. 549 (Walker County); Ala. CONST. amend. 599 (Morgan County); Ala. CONST. amend. 674 (Lowndes County); Ala. CONST. amend. 692 (Limestone County); Ala. CONST. amend. 744 (Macon County); Ala. CONST. amend. 506 (authorizing "[t]he operation of bingo games for prizes or money by certain nonprofit organizations for charitable or educational purposes" in Etowah county); Ala. CONST. amend. 565 (authorizing "[t]he operation of bingo games for prizes or money by certain nonprofit organizations and certain private clubs for charitable, educational, or other lawful purposes" in Covington county); Ala. CONST. amend. 569 (Houston County); Ala. CONST. amend. 612 (Russell County); Ala. CONST. amend. 743 (authorizing "[b]ingo games for prizes or money. . . operated by a nonprofit organization in Greene county.").

the the Poarch Band's ordinance to participate in bingo gaming, the Poarch Band may operate bingo games at its casinos. Under IGRA, the State is not required to negotiate a tribal-state compact that would permit the Poarch Band to offer bingo gaming on its tribal lands.¹⁰ However, the Poarch Band may not operate slot machines at its casinos because Alabama prohibits the operation of slot machines within its external borders.¹¹

Part I will provide an overview of the classes of tribal gaming governed by IGRA while also examining IGRA's provision allowing states to regulate tribal gaming by agreeing to a tribal-state compact. Part II will turn to jurisprudence from the Eleventh Circuit barring tribes from utilizing IGRA's provision forcing states to enter into tribal-state compacts and foreclosing State regulation of tribal gaming in the absence of a tribal-state compact. Part III will examine IGRA's guidelines for compact provisions, provide examples of provisions included in successfully negotiated compacts from Florida and Mississippi, and propose provisions that should be considered when compact negotiations resume between Alabama and the Poarch Band of Creek Indians.

I. THE INDIAN GAMING REGULATORY ACT

IGRA was enacted "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."¹² Through IGRA, Congress "develop[ed] a comprehensive approach to the controversial subject of regulating tribal gaming [and] struck a careful balance among federal, state, and tribal interests."¹³ IGRA regulates gaming that occurs on "Indian lands," which include "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe. . . and over which an Indian tribe exercises governmental power."¹⁴

¹⁰ IGRA includes a provision allowing tribes to sue a state for failing to enter into negotiations for a tribal-state compact. 25 U.S.C. § 2710(d)(7)(A)(i) (2012). However, the Supreme Court has held that this provision does not provide a cause of action for a tribe to breach a state's Eleventh Amendment immunity from suit. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity).

¹¹ ALA. CODE § 13A-12-27(a)(1) (2015) (criminalizing the possession of slot machines).

¹² 25 U.S.C. § 2702(1) (2012).

¹³ *Florida v. Seminole Tribe of Fla. (Seminole Tribe II)*, 181 F.3d 1237, 1247 (11th Cir. 1999).

¹⁴ 25 U.S.C. § 2703(4)(B) (2012); IGRA defines "Indian lands" to mean (1) "all lands within the limits of any Indian reservation"; and (2) "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power. 25 U.S.C. § 2703(4) (2012).

A. Gaming Classifications Under IGRA

IGRA “divides gaming on Indian lands into three classes. . . and provides a different regulatory scheme for each class.”¹⁵ Class I gaming includes “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”¹⁶ “Class I gaming on Indian lands is within the exclusive jurisdiction of the” tribes.¹⁷

Class II gaming includes “the game of chance commonly known as bingo” and permits the use of “electronic, computer, or other technological aids” in connection with the game.¹⁸ Class II gaming is within the jurisdiction of the tribes, but is subject to IGRA.¹⁹ A tribe may engage in, license, or regulate Class II gaming if the state “permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)” and “the governing body of the . . . tribe adopts an ordinance or resolution which is approved by the Chairman [of the National Indian Gaming Commission (NIGC)].”²⁰

Class III gaming includes “all forms of gaming that are not [C]lass I gaming or [C]lass II gaming,” including slot machines and other casino games.²¹ Like Class II gaming, Class III gaming activities are lawful only if they are authorized by a tribal resolution approved by the Chairman of the NIGC and “located in a State that permits such gaming for any purpose by any person, organization or entity.”²²

B. Tribal-State Compacts

IGRA places an additional requirement that Class III gaming may only be “conducted in conformance with a tribal-state compact entered into by the

¹⁵ *Seminole Tribe of Fla. v. Florida (Seminole Tribe I)*, 517 U.S. 44, 48 (1996).

¹⁶ 25 U.S.C. § 2703(6) (2012).

¹⁷ 25 U.S.C. § 2710(a)(1) (2012).

¹⁸ 25 U.S.C. § 2703(7)(A)(i) (2012); Class II gaming also includes card games that either (1) “are expressly authorized by the laws of the State, or” (2) “are not explicitly prohibited by the laws of the State and are played at any location in the State.” 25 U.S.C. § 2703(7)(A)(ii) (2012).

¹⁹ 25 U.S.C. § 2710(a)(2) (2012). The NIGC is charged with monitoring Class II gaming conducted on Indian lands to ensure that those operations are conducted in compliance with IGRA. 25 U.S.C. § 2706(b)(1). However, the NIGC is not authorized to extend its minimum internal control standards to Class III gaming, *see Colo. River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 140 (D.C. Cir. 2006).

²⁰ 25 U.S.C. § 2710(b)(1)(A)–(B) (2012).

²¹ 25 U.S.C. § 2703(8) (2012); *Seminole Tribe I*, 517 U.S. at 48 (1996).

²² 25 U.S.C. § 2710(d)(1)(A)–(B) (2012). The NIGC has defined key terms in IGRA to delineate between Class II and Class III gaming, *see infra* note 60 and accompanying text.

Indian tribe and the State.”²³ It provides that “[a]ny State and any Indian Tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe,” and that upon receiving a request from a Tribe “the State shall negotiate . . . in good faith to enter into such a compact.”²⁴ The United States district courts have jurisdiction over causes of action initiated by a tribe arising from the failure of a state to enter into compact negotiations with the tribe or conduct such negotiations in good faith.²⁵

II. TRIBAL GAMING JURISPRUDENCE FROM THE ELEVENTH CIRCUIT

Tribes within the Eleventh Circuit have been repeatedly barred from conducting Class III gaming on tribal lands by state efforts to impede IGRA’s tribal-state compacting process. Shortly after the passage of IGRA, tribes in both Alabama and Florida attempted to invoke the IGRA provision allowing a tribe to sue a state in federal court for failing to enter into negotiations or failing to negotiate in good faith. However, the United States Supreme Court invalidated this provision and held that states retained sovereign immunity from such suits under the Eleventh Amendment.

With the knowledge that tribes could no longer enjoin states into entering into a tribal-state compact, Alabama and Florida made efforts to regulate tribal gaming on Indian lands within their respective external borders in the absence of a tribal-state compact.²⁶ Both states invoked IGRA’s provision allowing a state to enjoin the operation of Class III gaming activities on tribal lands in the absence of a tribal state-compact—alleging that the tribes were illegally offering Class III gaming in violation of state law. However, the Eleventh Circuit has barred such suits, holding that IGRA does not authorize a state to bring suit against tribal gaming officials for allegedly conducting Class III gaming on Indian lands without a compact.

A. Attempts by Tribes to Force States to Enter Into a Tribal-State Compact

IGRA allows a tribe to sue a state after 180 days from the tribe’s request for the state to enter into negotiations.²⁷ If the district “court finds that the State

²³ 25 U.S.C. § 2710(d)(1)(C) (2012).

²⁴ 25 U.S.C. § 2710(d)(3)(A)–(B) (2012).

²⁵ 25 U.S.C. § 2710(d)(7)(A)(i) (2012). (“The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or conduct such negotiations in good faith.”).

²⁶ See *infra* part II(A)–(B).

²⁷ 25 U.S.C. § 2710(d)(7)(B)(i) (2012) (“An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).”).

has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities,” IGRA authorizes the court to “order the State and the Indian tribe to conclude such a compact within a 60-day period.”²⁸ “If a State and an Indian tribe fail to conclude a compact . . . within the 60-day period,” both the state and the tribe “submit to a mediator appointed by the court a proposed compact that represents their last best offer.”²⁹ The mediator’s selection becomes the tribal-state compact if the state consents to it within 60 days.³⁰ If the state refuses to consent to the mediator’s selection, the Secretary “prescribe[s], in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.”³¹

When the Poarch Band invoked IGRA’s compact negotiation procedure in 1990, Alabama entered into negotiations with the tribe. However, the tribe soon filed suit in the United States District Court for the Southern District of Alabama, claiming that the state had not negotiated in good faith. The district court dismissed the suit, holding that (1) Congress had not constitutionally abrogated the state’s sovereign immunity under IGRA and (2) that the state had been sued without its consent in violation of the Eleventh Amendment.³² A year after *Poarch I*, the district court held that its previous ruling was “equally applicable” to the state’s official agents when the Poarch Band attempted to sue the Governor under the doctrine of *ex parte Young*.³³

1. The Supreme Court Strikes Down IGRA’s Provision Allowing Tribes to Sue States

The issue of “whether Congress successfully abrogated the states’ Eleventh Amendment sovereign immunity from suit by enacting [IGRA]” was taken up on appeal by the United States Court of Appeals for the Eleventh Circuit.³⁴ The Poarch Band’s appeal of the district court’s prior decisions were consolidated with a similar case arising out of Florida.³⁵ The Eleventh Circuit affirmed the decision of the Southern District of Alabama, holding “states retain their sovereign immunity and the federal courts do not have subject-matter jurisdiction over suits brought under IGRA,” concluding that Congress did not possess the power to abrogate states’ Eleventh Amendment sovereign

²⁸ 25 U.S.C. § 2710(d)(7)(B)(iii) (2012).

²⁹ 25 U.S.C. § 2710(d)(7)(B)(iv) (2012).

³⁰ 25 U.S.C. § 2710(d)(7)(B)(vi) (2012).

³¹ 25 U.S.C. § 2710(d)(7)(B)(vii) (2012).

³² *Poarch Band of Creek Indians v. Alabama (Poarch II)*, 784 F.Supp. 1549, 1550 (S.D. Ala. 1992) (referencing *Poarch Band of Creek Indians v. Alabama (Poarch I)*, 776 F. Supp. 550 (S.D. Ala. 1991)).

³³ *Id.*

³⁴ *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1018 (11th Cir. 1994).

³⁵ *Id.* at 1018.

immunity when enacting IGRA under the Indian Commerce Clause.³⁶

Despite striking down IGRA's cause-of-action for tribes to sue states that failed to negotiate in good faith, the Eleventh Circuit authorized the Secretary of the Interior to enact regulations that would produce a legally-binding compact when negotiations between a tribe and a state broke down.³⁷ When the Supreme Court affirmed the judgment of the Eleventh Circuit in 1996, it left intact the substitute remedy created by the lower court.³⁸

In the wake of the Supreme Court's decision in *Seminole Tribe*, the Secretary of the Interior promulgated new regulations establishing procedures that would allow tribes to conduct Class III gaming on tribal lands should a state invoke its Eleventh Amendment suit.³⁹ When the Poarch Band invoked the new regulations in March 2006, the Secretary "forwarded the Tribe's proposal to the governor and attorney general," who responded but did not submit a counterproposal.⁴⁰

In November 2006, the tribe and the state attended an informal conference with the Secretary to discuss the scope of gaming allowed under Alabama law.⁴¹ However, before the Secretary could make a final determination regarding the scope of gaming allowed by the state, the state requested that the

³⁶ *Id.* at 1019; U.S. CONST. art. 1, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce. . . with the Indian Tribes.").

³⁷ *See Seminole Tribe*, 11 F.3d at 1018; *see also* 25 U.S.C. § 2710(d)(3), (7) (2012) (authorizing the Secretary to "prescribe, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction" in the event that a state invokes its Eleventh Amendment immunity from suit).

³⁸ *See Seminole Tribe I*, 517 U.S. at 76. The Supreme Court "[did] not here consider, and [expressed] no opinion upon, that portion of [the Eleventh Circuit's decision] that provides a substitute remedy for a tribe bringing suit." *Id.* at 76 n. 18.

³⁹ *See* 25 C.F.R. § 291 (2016). These regulations provide for a tribe to ask the Secretary to issue Class III gaming procedures if the state successfully invokes its Eleventh Amendment immunity during IGRA's compacting process. 25 C.F.R. § 291.3. The regulations also provide information that a tribe's proposal must contain. 25 C.F.R. § 291.4. Under the regulations, the Secretary is required to perform several tasks, including: (1) notifying the tribe whether it meets the eligibility criteria for invoking the regulations; (2) submitting the proposal to the state's governor or attorney general for comment; (3) reviewing the tribe's proposal; (4) identifying unresolved issues and areas of disagreement; (5) inviting the tribe, governor and attorney general to attend an informal conference to resolve such issues and areas of disagreement.; (6) issuing a final decision. 25 C.F.R. §§ 291.6–8. Should the state submit a counterproposal, the Secretary must appoint a mediator. 25 C.F.R. § 291.9. The mediator selects between the parties' last, best offers. 25 C.F.R. § 291.10. The Secretary may accept or reject for specified reasons. 25 C.F.R. § 291.11. If the mediator's selection is rejected, the Secretary is to prescribe procedures for gaming that comport with the mediator's selected version as much as possible, as well as with IGRA and state law. 25 C.F.R. § 291.11.

⁴⁰ *Alabama v. United States*, 630 F. Supp. 2d 1320, 1324 (S.D. Ala. 2008).

⁴¹ *Id.*

Secretary dismiss the Poarch Band's application in light of a decision by the United States Court of Appeals for the Fifth Circuit holding that the new regulations exceeded the Secretary's statutory authority under IGRA.⁴²

In 2008, "the Secretary issued his preliminary determination on the scope of gaming in" Alabama, finding that state law permitted "electronic bingo and parimutuel wagering but [did] not allow non-banked card games."⁴³ "The Secretary proposed to resume the informal conference, but the State" filed suit challenging the new regulations in a United States District Court the next month.⁴⁴ Later that year, the Poarch Band intervened in the suit, with both the tribe and the Secretary moving to dismiss the case.⁴⁵ The district court agreed with the reasoning of both the Poarch Band and the Secretary, dismissing the case as the state's challenge was not yet ripe.⁴⁶

B. State Efforts to Regulate Tribal Gaming in the Absence of a Tribal-State Compact

IGRA expressly provides states with a cause of action "to enjoin a class III gaming activity located on Indian lands [that is] conducted in violation of any Tribal-State compact."⁴⁷ However, states may not bring such an action under state law, as the United States has "exclusive jurisdiction over criminal prosecutions of violations of state gambling laws that are made applicable. . . to Indian country" under Section 1166 of the Criminal Code.⁴⁸ Under Section 1166, states do not have "a private, federal right of action to enjoin uncompact Class III gaming activity that would violate state laws if conducted on state lands."⁴⁹ Section 1166 merely "creates a body of federal law for the United States to enforce if it determines that a tribe is engaged in unlawful Class III gaming on Indian lands that are beyond the reach of state enforcement authority."⁵⁰

In 1996, the State of Florida filed suit in the United States District Court for the Southern District of Florida to enjoin what it alleged to be Class III gaming operations by the Seminole Tribe of Florida on its reservation lands on

⁴² *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007); *cert denied sub nom. Kickapoo Traditional Tribe v. Texas*, 129 S. Ct. 32 (2008); *Alabama*, 630 F. Supp. 2d at 1324.

⁴³ *Alabama*, 630 F. Supp. 2d at 1324.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1331.

⁴⁷ 25 U.S.C. § 2710(d)(7)(A)(ii) (2012).

⁴⁸ 18 U.S.C. § 1166(d) (2012).

⁴⁹ Reeves, Mark H., *A Rejection of State Efforts to Enforce Gaming Laws on Indian Lands in the Absence of a Tribal-State Compact*, 9 FIU L. REV. 331, 343 (2014).

⁵⁰ *Id.* at 343–44.

the grounds that such gaming violated both state and federal law.⁵¹ At that time, Florida had not entered into a tribal-state compact with the tribe. Because the tribe was not bound under a compact, the district court reasoned that the tribe had not availed itself of IGRA's limited abrogation of tribal sovereign immunity.⁵² The Eleventh Circuit affirmed, preserving "the settled law that tribes possess sovereign immunity from suit unless they waive such immunity or it is expressly abrogated by Congress."⁵³

1. The Eleventh Circuit Affirms Tribal Sovereign Immunity in the Absence of a Tribal-State Compact

"[T]he Eleventh Circuit's 1999 *Seminole Tribe* decision constituted a resounding rejection of state efforts to control on-reservation tribal gaming activity in the absence of a tribal-state compact."⁵⁴ Florida eventually entered into a tribal-state compact with the Seminole Tribe in 2010.⁵⁵ However, Alabama has sought to avoid entering into a compact with the Poarch Band, "choosing instead to file suit in an effort to apply state laws to gaming activity on the Tribe's trust lands without agreeing to a compact."⁵⁶

In 2014, the State of Alabama brought an equity action in state court under both state nuisance law and IGRA to enjoin gaming at the three casinos owned by the Poarch Band.⁵⁷ The action commenced in the Circuit Court of Elmore County, Alabama, where the state filed a one-count complaint for injunctive and declaratory relief on the grounds that PCI's operation of allegedly illegal slot machines at the three Poarch Band casinos constituted a public nuisance under Alabama law.⁵⁸ Because the absence of a tribal-state compact preserved the tribe's sovereign immunity and the tribe did not consent to suit, the state instead named in its complaint PCI Gaming Authority ("the commercial entity through which the [Poarch Band]" controls its gaming operations), its members, and the "members . . . of the Poarch Band Tribal Council in their official capacities."⁵⁹

The state alleged in the lawsuit "that the Poarch Band[']s casinos offered illegal class III gaming . . . under the guise of class II gaming," allowing the state to sue under Section 1166 of IGRA.⁶⁰ While the hundreds of machines at

⁵¹ See *Seminole Tribe II*, 181 F.3d at 1239.

⁵² *Id.* at 1242.

⁵³ Reeves, *supra* note 49, at 340.

⁵⁴ Reeves, *supra* note 49, at 341.

⁵⁵ See *infra* note 98 and accompanying text.

⁵⁶ Reeves, *supra* note 49, at 331–32; see also Complaint, Alabama v. PCI Gaming Auth., No. 29–CV–2013–900057.00 (Cir. Ct. Elmore Cnty., Ala., Feb. 19, 2013).

⁵⁷ *PCI I*, 15 F. Supp. 3d at 1169–70.

⁵⁸ See ALA. CODE § 6–5–121 (1975) (authorizing Alabama to bring a lawsuit to abate a public nuisance).

⁵⁹ *PCI I*, 15 F. Supp. 3d at 1164.

⁶⁰ *Id.* at 1167.

the tribe's casinos were billed as electronic bingo games, the state contended that the devices "play like, look like, sound like, and attract the same class of customers as acknowledged slot machines."⁶¹ The state also alleged that machines nearly identical to those operating in the tribe's casinos were also being marketed as slot machines.⁶²

PCI removed the action to the United States District Court for the Middle District of Alabama to settle the question of whether the state could enjoin allegedly illegal gaming at the tribe's casinos.⁶³ The state made two arguments as to why state law should apply to the tribe's casinos.⁶⁴ Under its first theory, the state asserted that the "Secretary of the Interior lacked authority to take land into trust for the Tribe."⁶⁵ Under its second theory, the state asserted that "by incorporating state laws governing gambling into federal law," Section 1166 created "a right of action for a state to sue in federal court to enforce its laws on Indian lands."⁶⁶

"The district court rejected [the state's] arguments and dismissed the action on the grounds that the [tribe was] entitled to [sovereign] immunity on nearly all of Alabama's claims."⁶⁷ The state appealed the decision to the Eleventh Circuit.⁶⁸ The Eleventh Circuit affirmed the district court's decision to dismiss the state's claims, concluding that (1) both PCI and its members were entitled

⁶¹ Alabama v. PCI Gaming Authority (*PCI II*), 801 F.3d 1278, 1285 (11th Cir. 2015). The NIGC has adopted regulations that define key terms in order to delineate between Class II electronic bingo and Class III gaming. 67 Fed. Reg. 41166 (June 17, 2002). The regulations define "electronic, computer or other technological aid" as any device that (1) "[a]ssists a player or the playing of a game;" (2) "[i]s not an electronic or electromechanical facsimile;" and (3) "[i]s operated in accordance with applicable Federal communications law." 25 C.F.R. § 502.7(a).

Under the regulations, these include, but are not limited to devices that (1) "[b]roaden the participation levels in a common game;" (2) "[f]acilitate communication between and among gaming sites;" or (3) "[a]llow a player to play a game with or against other players rather than with or against a machine." 25 C.F.R. § 502.7(b). In the context of bingo, the regulations define "electronic or electromechanical facsimile" as "a game played in an electronic or electromechanical format that . . . broadens participation by allowing multiple players to play with or against each other rather than with or against a machine." 25 C.F.R. § 502.8. "Other games similar to bingo" are defined under the regulations as "any game played in the same location as bingo (as defined in [IGRA]) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes." 25 C.F.R. § 502.9.

⁶² *PCI II*, 801 F.3d at 1285.

⁶³ *PCII*, 15 F. Supp. 3d at 1164–65.

⁶⁴ *PCI II*, 801 F.3d at 1282.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (referencing *PCII*, 15 F. Supp. 3d at 1191).

⁶⁸ *Id.*

to sovereign immunity and (2) section 1166 gave no right of action for the state to sue.⁶⁹

III. DESIGNING A TRIBAL-STATE COMPACT FOR ALABAMA

The Eleventh Circuit's decision in *PCI Gaming* "should mark the last gasp of state efforts to control tribal gaming on Indian lands in the absence of a tribal-state compact, at least in the states encompassed within the Eleventh Circuit."⁷⁰ *PCI Gaming* "unequivocally establishes that, outside the context of a mutually agreed-upon compact, Congress intended" to leave the regulation of tribal gaming and enforcement of IGRA on tribal lands within the exclusive purview of gaming tribes and the federal government.⁷¹ The Eleventh Circuit's ruling in *PCI Gaming* effectively forecloses any future efforts by the state of Alabama to regulate tribal gaming on tribal lands within its borders in the absence of a tribal-state compact. Thus, for the state to gain any oversight of the Poarch Band's gaming operations, it must resume compact negotiations with the tribe.

A. IGRA's Guidelines for Compact Provisions

IGRA contains a list of provisions that may be included in a tribal-state compact. Under IGRA, a tribal-state compact may include provisions affecting: (1) the application of tribal and state criminal and civil laws and regulations "directly related to, and necessary for, the licensing and regulation" of gaming; (2) "the allocation of criminal and civil jurisdiction between the state and the Indian tribe necessary for the enforcement of such laws and regulations;" (3) payments assessed by the state "in such amounts as are necessary to defray the costs of regulat[ion];" (4) "taxation by the Indian tribe of [gaming] in amounts comparable to amounts assessed by the State for comparable activities"; (5) "remedies for breach of contract;" (6) "standards for the operation of [gaming] and maintenance of the gaming facility, including licensing; and" (7) "any other subjects that are directly related to the operation of gaming activities."⁷²

The content of provisions following these guidelines among successfully negotiated tribal-state compacts vary widely.⁷³ Terms in tribal-state compacts

⁶⁹ *Id.* at 1300.

⁷⁰ Reeves, *supra* note 49, at 342.

⁷¹ *Id.*

⁷² 25 U.S.C. § 2710(d)(3)(C) (2012).

⁷³ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.05[2], at 890 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK].

"[M]any compacts currently in effect have provisions that deal with tribal and state licensing and certification for employees; tribal and state enforcement of compact provisions; allocation of civil, regulatory, and criminal jurisdiction and law enforcement; the tribe's sovereign immunity and whether or to what extent it is waived for gaming activities; size of gaming operations; which games are authorized; technical requirements of electronic gaming devices; state inspection, testing, and approval of gaming devices and facilities; tribal

often set the duration of the compact.⁷⁴ When no duration is set, “the compact is presumed to run indefinitely and neither party may unilaterally terminate a compact.”⁷⁵

IGRA provides that states may not insist upon any terms that “impose any tax, fee, charge, or other assessment upon an Indian tribe.”⁷⁶ This section also provides that “[n]o [s]tate may refuse to enter into [compact] negotiations . . . based upon the [state’s] lack of authority . . . to impose such a tax, fee, charge, or other assessment.”⁷⁷ However, IGRA’s express prohibition on terms that impose a tax or fee on tribal gaming does not forbid provisions that allow the reimbursement of the costs incurred by the state in regulating tribal gaming.⁷⁸ Thus, states may insist upon “compact provisions calling for assessments by the State to defray its additional regulatory costs.”⁷⁹

IGRA also places restrictions prohibiting tribes from using net revenues from gaming operations for any “purposes other than . . . funding tribal government operations or programs; promot[ing] tribal economic development; [donating] to charitable organizations;” or helping fund local government agencies’ operations.⁸⁰ Despite these limitations, IGRA permits tribes to “distribute per capita payments . . . from net gaming revenues in accordance with tribal revenue allocations plans approved by the Secretary of the Interior if certain conditions are met.”⁸¹

payment of state regulatory costs; casino security and monitoring; tribal and state reciprocal access to records and reports; alcohol regulation; day-to-day rules of operation; conditions for amendments; and intrastate parity of gaming operations among tribes.”

Id.

⁷⁴ *Id.* at 890–91. For example, Florida’s tribal state with the Seminole Tribe of Florida is designed to remain in effect for a term of 20 years. *See infra* note 98 and accompanying text.

⁷⁵ COHEN’S HANDBOOK, *supra* note 73, at 891. For example, Mississippi’s tribal-state compact with the Mississippi Band of Choctaw Indians contains no such terms, meaning that the compact will remain in effect for indefinitely “until terminated by mutual consent of the parties.” TRIBAL-STATE COMPACT FOR REGULATION OF CLASS III GAMING ON THE MISSISSIPPI BAND OF CHOCTAW INDIANS RESERVATION IN MISSISSIPPI, § 15.2, 39 (Dec. 4, 1992), <http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038317.pdf> [hereinafter CHOCTAW COMPACT].

⁷⁶ 25 U.S.C. § 2710(d)(4) (2012).

⁷⁷ *Id.*

⁷⁸ *See generally, id.*

⁷⁹ COHEN’S HANDBOOK, *supra* note 73, at 891.

⁸⁰ 25 U.S.C. § 2710(b)(2)(B) (2012).

⁸¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO–15–355, INDIAN GAMING: REGULATION AND OVERSIGHT BY THE FED. GOV’T, STATES, & TRIBES (June 2015) at 6 n.17. IGRA allows tribal gaming revenues to “be used to make per capita payments” to tribal members only if: (1) “the Indian tribe has prepared a plan to allocate revenues to uses authorized by [IGRA];” (2) “the plan is approved by the Secretary as adequate;” (3) “the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian

I. Revenue-Sharing Agreements Under IGRA

Revenue-sharing agreements requiring payments by tribes directly to the state have been approved by the Secretary of the Interior “on the ground that those payments are not taxes, but exchanges of cash for significant economic value conferred by the exclusive or substantially exclusive right to conduct gaming in the state.”⁸² Under many revenue-sharing agreements, “a tribe commits to paying a portion of its gaming revenues to the state in exchange for the [exclusive] right to conduct [Class III] gaming in the state.”⁸³ Revenue-sharing provisions that include promises of exclusivity have become prevalent in successfully negotiated tribal-state compacts.⁸⁴

Revenue-sharing provisions fall into two general categories. The vast majority of revenue-sharing provisions require the tribe to pay the state an increasing percentage as gaming revenues increase.⁸⁵ However, the percentage of revenues shared are often capped at the maximum payment agreed upon in the revenue-sharing agreement.⁸⁶ Far fewer tribal-state compacts require a tribe to pay the state a fixed amount or a flat percentage of all gaming revenues.⁸⁷

B. Examples of Tribal-State Compacts From Adjacent States

Both Mississippi and Florida have successfully negotiated tribal-state compacts regulating Class III gaming operations within their respective borders. Like Alabama, Mississippi is home to only one federally recognized tribe (the Mississippi Band of Choctaw Indians).⁸⁸ Florida is home to two federally recognized tribes (the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida) but has only agreed to a tribal-state compact with

of such [persons] in such amounts as may be necessary for the health, education, or welfare, of [that person] under a plan approved by the Secretary and the governing body of the Indian tribe; and” (4) “the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.” 25 U.S.C. § 2710(b)(3) (2012).

⁸² COHEN’S HANDBOOK, *supra* note 73, at 891.

⁸³ STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 70 (2005).

⁸⁴ *Id.* 169 of 276 (61 percent) “of all compacts in effect as of [2014] contained revenue sharing provisions between the tribes and states.” U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 81, at 18.

⁸⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 81, at 18 (noting that 164 tribal-state compacts in effect as of October 2014 involved tribal “payments [to the state] tied to gaming revenues and include[d] a maximum payment.”)

⁸⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 81, at 18.

⁸⁷ *Id.* (Only five compacts in effect as of 2014 required a tribe pay a fixed amount or a flat percentage of all gaming revenues to the state).

⁸⁸ *Federal and State Recognized Tribes*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#ms> (last updated Oct. 2016).

one.⁸⁹

Mississippi has elected to take a limited regulatory role over tribal gaming, leaving the primary responsibility of monitoring gaming on tribal lands to the tribe itself.⁹⁰ Florida has taken a more active role in regulating tribal gaming, with the state maintaining a regular presence at gaming facilities.⁹¹ Florida has a revenue-sharing agreement with the Seminole Tribe of Florida, while Mississippi generally does not receive payments tied to tribal gaming revenue.⁹² An analysis of both tribal-state compacts demonstrates two very different approaches to negotiating a successful tribal-state compact.

1. The 'Hands-Off' Approach: Mississippi's Tribal-State Compact with the Mississippi Band of Choctaw Indians

Mississippi's tribal-state compact with the Mississippi Band of Choctaw Indians received Secretarial approval in 1993.⁹³ Mississippi's compact remains in effect for an indefinite term "until terminated by mutual consent of the parties."⁹⁴ The scope of gaming allowed under Mississippi's compact extends to virtually all Class III gaming permitted under IGRA.⁹⁵

For the purposes of regulating Class III gaming on tribal lands, Mississippi's tribal-state compact confers: (1) "exclusive criminal and civil jurisdiction over Tribal members. . .to the extent allowed by federal law" to the Mississippi Band of Choctaw Indians; (2) concurrent civil jurisdiction to both the state and the tribe over the Class III gaming activities occurring on tribal lands; and (3) "exclusive criminal jurisdiction over non-Indians" to the state.⁹⁶ The compact also provides that the Mississippi Band of Choctaw Indians "shall maintain its own security force which will have primary law enforcement

⁸⁹ See *id.*; see also *Gaming Compacts*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, <https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#Florida> (last updated Apr. 3, 2017).

⁹⁰ See *infra* Section (III)(B)(1).

⁹¹ See *infra* Section (III)(B)(2).

⁹² See *infra* Sections (III)(B)(1)–(2).

⁹³ Indian Gaming; Mississippi Band of Choctaw Indians, 58 Fed. Reg. 6600 (Jan. 29, 1993).

⁹⁴ CHOCTAW COMPACT, *supra* note 75, at 39.

⁹⁵ Mississippi's tribal-state compact authorizes the Tribe to operate "any game played with cards, dice, equipment or any mechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, and any other banking or percentage game." CHOCTAW COMPACT, *supra* note 75, at 6–7. Mississippi's tribal-state compact also authorizes the Tribe to conduct "parimutuel wagering, race book and sport pools. . .only if such games are allowed under the laws of the State." CHOCTAW COMPACT, *supra* note 75, at 7.

⁹⁶ CHOCTAW COMPACT, *supra* note 75, at 12.

responsibilities on the premise[s]” of the tribe’s Class III gaming facility.⁹⁷

Mississippi’s tribal-state compact delegates “[t]he primary responsibility for the on-site regulation, control and security” of the tribe’s Class III gaming operations to the Choctaw Gaming Commission—the tribe’s independent regulatory entity.⁹⁸ However, the terms of the compact delegate the Mississippi Gaming Commission some authority to oversee tribal gaming. For example,

[a]gents of the Mississippi Gaming Commission . . . upon the presentation of appropriate identification to the on-site Choctaw Gaming Commission official . . . have the right to gain access, without notice during normal business hours, to all premises used for the operation of Class III Gaming or the storage of Class III Gaming equipment . . . and may inspect the Casino premises, equipment, or equipment maintenance records in order to verify compliance with the provisions of [the] compact.⁹⁹

The Choctaw Gaming Commission must also “forward copies of all completed investigation reports and final dispositions to the Mississippi Gaming Commission on a continuing basis.”¹⁰⁰

Although Mississippi’s tribal-state compact does not include a revenue-sharing provision, the tribe and the state may “mutually agree upon a budget for necessary and actual expenses that may be reasonably incurred by the State during the calendar year in connection with Class III gaming activities.”¹⁰¹ Under the compact, additional payments to the state are required if the state designates tribal lands as a ‘State Tourism Council Area,’ in which case “the Tribe and the State shall separately provide \$250,000 each year in matching funds to be used for advertising and promotion of tourism.”¹⁰²

Mississippi’s tribal-state compact is extraordinarily deferential to the tribe in terms of the regulatory oversight of the tribe’s gaming operations. The Compact’s indefinite term leaves the state with few options to negotiate with the tribe in light of developments regarding the Interior Department’s rules governing revenue-sharing agreements. However, despite its shortcomings in terms of the state’s ability to demand payments derived from tribal gaming revenues, Mississippi’s compact places a light burden on the state in regulating tribal gaming.

⁹⁷ *Id.*

⁹⁸ CHOCTAW COMPACT, *supra* note 75, at 13–14.

⁹⁹ CHOCTAW COMPACT, *supra* note 75, at 17–18.

¹⁰⁰ CHOCTAW COMPACT, *supra* note 75, at 15.

¹⁰¹ CHOCTAW COMPACT, *supra* note 75, at 33–34. These expenses include, but are not limited to:

(i) oversight and enforcement actions as provided for under this Compact, (ii) additional manpower and equipment required by the Department of Public Safety due to increased traffic control on State highways leading to a Casino, and (iii) costs in making any necessary improvement to an intersection of a State highway with a Bureau of Indian Affairs or Tribal road leading to a Tribal Casino as a result of increased traffic due to Class III gaming activities and utilizing government grants and road funds.

CHOCTAW COMPACT, *supra* note 75, at 33–34.

¹⁰² CHOCTAW COMPACT, *supra* note 75, at 34.

2. *The 'Hands-On Approach': Florida's Tribal-State Compact With the Seminole Tribe of Florida*

Florida's tribal-state gaming compact with the Seminole Tribe of Florida received secretarial approval in 2010.¹⁰³ It authorizes the tribe to offer gaming at seven of the tribe's gaming facilities and is effective for a term of 20 years.¹⁰⁴ The compact does not purport to "alter tribal, federal or state adjudicatory or criminal jurisdiction in any way" because "[t]he obligations and rights of the state and the tribe under [the] Compact are contractual in nature."¹⁰⁵

Florida's tribal-state compact restricts the tribe's ability to conduct Class III gaming to only those games covered under the compact.¹⁰⁶ The Class III games covered under the compact include: (1) slot machines (excluding slot machines that accept payment by credit or debit card); (2) "[b]anking or banked card games, including baccarat, chemin de fer, and blackjack;" (3) "[r]affles and drawings;" and (4) "[a]ny new game authorized by Florida law for any person for any purpose . . . [excluding] banked card games authorized for any other federally recognized tribe pursuant to [IGRA]."¹⁰⁷

¹⁰³ Indian Gaming, 75 Fed. Reg. 38833 (July 6, 2010). Florida's current tribal-state gaming compact with the Seminole Tribe replaces an unsuccessfully negotiated compact that was deemed approved by the Secretary of the Interior in 2008. *See* Indian Gaming, 73 Fed. Reg. 1229 (Jan. 7, 2008); *see also* COMPACT BETWEEN THE SEMINOLE TRIBE OF FLORIDA AND THE STATE OF FLORIDA (Nov. 14, 2007), <http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026001.pdf> [hereinafter SEMINOLE COMPACT].

¹⁰⁴ SEMINOLE COMPACT, *supra* note 103, at 13, 49 (Apr. 7, 2010). The seven tribally-owned casinos authorized under the compact include: Seminole Indian Casino–Brighton, Seminole Indian Casino–Coconut Creek, Seminole Indian Casino–Hollywood, Seminole Indian Casino–Immokalee, Seminole Indian Casino–Big Cypress, Seminole Hard Rock Hotel & Casino–Hollywood, and Seminole Hard Rock Hotel & Casino–Tampa.

¹⁰⁵ SEMINOLE COMPACT, *supra* note 103, at 31.

¹⁰⁶ SEMINOLE COMPACT, *supra* note 103, at 3. Florida's tribal state compact expressly prohibits the Tribe from offering "roulette, craps, roulette-styled games, or craps styled games" but does not "prohibit the Tribe from operating slot machines that employ video and/or mechanical displays of roulette, wheels or other table game themes." SEMINOLE COMPACT, *supra* note 102, at 12.

¹⁰⁷ SEMINOLE COMPACT, *supra* note 103, at 3–4. (Defining "Slot machines," as "any mechanical or electrical contrivance, terminal that may or may not be capable of downloading slot games from a central server system, machine, or other device that, upon insertion of a coin, bill, ticket, token, or similar object or upon payment of any consideration whatsoever, including the use of any electronic payment system, except a credit card or debit card, is available to play or operate . . . whether by reason of skill or application of the element of chance . . . may deliver or entitle the person . . . playing or operating the . . . machine . . . to receive cash,

Under Florida's tribal-state compact, the state and the tribe concurrently share the responsibility to regulate gaming on tribal lands.¹⁰⁸ The tribe's regulatory responsibilities under the compact are fulfilled by the Seminole Tribal Gaming Commission—the tribe's independent regulatory agency.¹⁰⁹ The state's regulatory responsibilities are delegated to the State Compliance Agency (SCA).¹¹⁰ Officers of the Commission are required under the compact to "be available to the [tribe's facilities] during all hours of operation upon reasonable notice" and are authorized to "have immediate access to any and all areas of the [tribe's facilities] for the purpose of ensuring compliance with the provisions of [this] compact."¹¹¹ However, officers of the Commission are required to answer to the SCA regarding any potential violations of the terms of the Compact.¹¹²

Despite granting the tribe the authority to regulate its own gaming activities, the state reserves the right under the compact "to conduct random inspections as provided for in this Part to assure that the tribe is operating in accordance with the terms of the Compact."¹¹³ In order to fulfill the state's oversight responsibility, agents of the SCA are required to "have reasonable

billets, tickets, tokens, or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually.").

Despite its prohibition on the use of slot machines that accept payment by credit or debit card, Florida's tribal-state compact authorizes the Tribe to use such machines if Florida state law allows. SEMINOLE COMPACT, *supra* note 103, at 4. Although Florida's tribal-state compact permits the Tribe to offer banked card games, the compact forbids it from doing so "at [the Tribe's] Brighton or Big Cypress Facilities unless . . . [the State] permits any other person, organization or entity to offer such games." SEMINOLE COMPACT, *supra* note 103, at 4.

¹⁰⁸ SEMINOLE COMPACT, *supra* note 103, at 23.

¹⁰⁹ SEMINOLE COMPACT, *supra* note 103, at 3, 24 (requiring that officers of the Seminole Tribal Gaming Commission "be independent of the Tribal gaming operations, and shall be supervised by and accountable only to the Commission.").

¹¹⁰ SEMINOLE COMPACT, *supra* note 103, at 12.

¹¹¹ SEMINOLE COMPACT, *supra* note 103, at 24.

¹¹² See SEMINOLE COMPACT, *supra* note 103, at 24. (requiring the Seminole Tribal Gaming Commission to "investigate any suspected or reported violation of [the compact] and shall officially enter into its files timely written reports of investigations and any action taken thereon." The compact requires the Commission to forward copies of their investigative reports to the SCA within 30 days).

¹¹³ SEMINOLE COMPACT, *supra* note 103, at 25. (This includes the authority of the State to demand "an annual independent audit of the conduct of Covered Games subject to [the] Compact."). Random inspections of tribal gaming facilities by the SCA are limited to "one . . . inspection per Facility per calendar month . . . and . . . not more than ten . . . hours spread over two . . . consecutive days." SEMINOLE COMPACT, *supra* note 103, at 27. The compact sets an annual limit of 1,200 hours for all random inspections and audit reviews of tribal gaming facilities by the SCA. SEMINOLE COMPACT, *supra* note 103, at 27. The compact also limits the SCA to one review per year of the Tribe's slot machine compliance audit. SEMINOLE COMPACT, *supra* note 103, at 28.

access to all public areas of the [tribe's] [f]acilities related to the conduct of [games covered under the compact].”¹¹⁴ However,

[a]t the completion of any SCA inspection or investigation, the SCA [must] forward any written report . . . to the Commission, containing all pertinent, non-confidential, non-proprietary information regarding any violation of applicable laws or [the] Compact . . . unless disclosure . . . would adversely impact an investigation of suspected criminal activity.¹¹⁵

The Compact requires the tribe to reimburse the state annually “for the actual and reasonable costs of the [SCA] to perform its monitoring functions.”¹¹⁶

In exchange for “partial but substantial exclusivity,” Florida’s tribal-state compact requires the tribe to pay the state a share of its net winnings derived from the tribe’s Class III gaming operations.¹¹⁷ To facilitate this, the compact’s revenue-sharing agreement requires the tribe to convert all of its Class II video bingo terminals to Class III slot machines within 60 months from January 1, 2008.¹¹⁸ The revenue-share that the tribe pays to the state is calculated according to a ‘Revenue Sharing Cycle.’¹¹⁹ For the first 24 calendar months from the effective date of the compact, the tribe is required to pay \$12,500,000 per month.¹²⁰ The first revenue sharing cycle commences after 24 months have passed from the effective date and terminates after one year.¹²¹ Each successive revenue-sharing cycle lasts a term of 12 months.¹²² For the first three Revenue Sharing Cycles, the tribe is required to pay the state the greater of the ‘Guaranteed Minimum Revenue Sharing Cycle Payment’ or an amount equal to the ‘Percentage Revenue Share Amount’ calculated under the compact.¹²³ After

¹¹⁴ SEMINOLE COMPACT, *supra* note 103, at 26. The compact only allows SCA agents to access the Tribe’s gaming facilities during operating hours. *Id.* at 29. When SCA inspection of the facility is limited only to public areas, “representatives of the SCA [must] provide notice and photographic identification to the Commission of their presence before beginning any such inspections.” *Id.* When SCA inspection of the facility includes nonpublic areas, SCA agents must “provide one . . . hour notice . . . to the Commission and . . . [must] be accompanied in nonpublic areas of the Facility by a Commission officer.” *Id.*

¹¹⁵ *Id.* at 30.

¹¹⁶ *Id.* at 2. Under Florida’s tribal-state compact, the State’s ‘Annual Oversight Assessment’ is not to exceed \$250,000 per year. *Id.* at 38.

¹¹⁷ *Id.* at 31–32.

¹¹⁸ *Id.* at 32.

¹¹⁹ *Id.* at 12, 24.

¹²⁰ *See generally Id.* at 9, 32–33.

¹²¹ *Id.* at 12.

¹²² *See id.*

¹²³ *Id.* at 7, 33 (the ‘Guaranteed Minimum Revenue Sharing Cycle Payment’ as calculated under Florida’s tribal-state compact requires the tribe to pay \$150,000,000 in each of the two years of the Initial Period; a minimum payment of \$233,000,000 for each of the first and second revenue-sharing cycles; and \$234,000,000 for the third revenue-sharing cycle).

the third revenue-sharing cycle, the tribe must pay the state the ‘Percentage Revenue Share Amount.’¹²⁴ The total revenue-share payments for the first five years of the compact must total at least \$1,000,000,000.¹²⁵

Florida’s tribal-state compact places significant restrictions on the conduct of tribal gaming in the state. This particular compact exemplifies the extent to which a state can regulate tribal gaming, (including Class II gaming) under a valid compact. In exchange for a promise of exclusivity, the state was able to secure an enormous share of the tribe’s gaming revenue. The state has also required the tribe to reimburse the costs of state regulation, greatly reducing the state’s financial burden.

C. Drafting a Tribal-State Compact for Alabama

As recently as 2015, the Poarch Band offered to pay \$250,000,000 to the state in return for the exclusive right to conduct Class III gaming in the state.¹²⁶ This offer prompted legislative leaders in the state to “recommend an agreement with the [tribe] as a key part of [their] plan to close a budget shortfall estimated at \$200 million” for fiscal year 2016.¹²⁷ Discussions held between the Poarch Band’s tribal council and state legislators indicated that a proposed compact between the tribe and the state would require the tribe “to pay the state a percentage of earnings each year.”¹²⁸

A cursory analysis of the tribe’s gaming revenues and other holdings

¹²⁴ *Id.* at 33–34 (the ‘Percentage Revenue Share Amount’ as calculated under Florida’s tribal-state compact requires the Tribe to pay 12% of all amounts up to \$2,000,000,000 of net winnings; 15% of all amounts between \$2,000,000,000 and \$3,000,000,000; 17.5% of all amounts between \$3,000,000,000 and \$3,500,000,000; 20% of all amounts between \$3,500,000,000 and \$4,000,000,000; 22.5% of all amounts between \$4,000,000,000 and \$4,500,000,000; and 25% of all amounts greater than \$4,500,000,000).

¹²⁵ *Id.* at 7, 38 (the Tribe is also required to “make an annual donation to the Florida Council on Compulsive Gaming as an assignee of the State in an amount not less than. . . \$250,000.00 per Facility.”).

¹²⁶ Josh Moon & Brian Lyman, *Poarch Creeks Offer Alabama \$250M Budget Bailout*, MONTGOMERY ADVERTISER (Apr. 29, 2015, 7:05 AM), <http://www.montgomeryadvertiser.com/story/news/2015/04/28/poarch-creeks-offer-bail-state/26548581/> (stating Alabama Senate President Pro Tem Del Marsh (R-Anniston) “confirmed that he met with tribal leaders in Montgomery and that the \$250 million number was ‘mentioned.’”); see also Mike Cason, *State Leaders Look to Poarch Creeks for Bailout as AG Tries to Shut Casinos*, AL.COM (May 10, 2015, 7:41AM), http://www.al.com/news/index.ssf/2015/05/state_leaders_seek_bailout_fro.html (the Poarch Band’s treasurer and governmental relations adviser, Robert McGhee, said that although “[t]he \$250 million is an amount that’s been discussed. . . [n]o arrangement has been made on what that would entail.”).

¹²⁷ Cason, *supra* note 126 (this recommendation was made in 2015 by Alabama’s Republican Caucus in the State’s House of Representatives and was later endorsed by the State’s Senate President Pro Tem Del Marsh).

¹²⁸ Moon & Lyman, *supra* note 126.

indicate that it could easily afford to pay the state the \$250 million that was brought up in discussions with state leaders.¹²⁹ From 2008 to 2010, the Poarch Band's gaming revenues experienced the fastest growth rate among gaming tribes in the United States.¹³⁰ PCI Gaming—the tribally-owned entity tasked with operating the tribe's gaming facilities—reported in 2012 that it “reaped \$322 million in net earnings [that year alone], continuing a five-year upswing.”¹³¹ The tribe itself reported that its gaming and hospitality operations “generated as much as \$600 million in revenues in 2012.”¹³² A vast majority of these profits are derived from the tribe's three casinos, while the tribe's two pari-mutuel gaming operations accounted for a less significant portion of the tribe's net earnings.¹³³

The Poarch Band's holdings are not restricted to its gaming operations, nor are they restricted to investments within Alabama's borders. “The Tribe has acquired stakes in a string of Florida hotels. . . in Pensacola, Fort Walton Beach and near Orlando,” and is presently developing a hotel in Huntsville, Alabama (“with rights to build another”).¹³⁴ On its tribal lands, the tribe has “opened a manufacturing and fabrication company named Muskogee Technology; runs a cattle farm, two gas stations and a truck stop; and owns Magnolia Branch Wildlife Reserve that makes up about 9,000 acres and includes a tree farm, an RV park and campground.”¹³⁵ In 2015, the tribe gained full control over the \$200 million Blue Collar Country development—a 500 acre complex in Foley,

¹²⁹ *Id.* (the Poarch Band's treasurer and governmental relations adviser said in a 2015 interview with the Montgomery Advertiser that the Tribe had the means to pay the state the \$250,000,000 in exchange for exclusive gaming rights).

¹³⁰ George Altman, *Study: Alabama Indian Casino Revenue Growth Fastest in Nation*, AL.COM (Mar. 11, 2012, 7:20 AM), http://blog.al.com/live/2012/03/study_alabama_indian_casino_re.html. PCI's gaming revenues increased no less than 34 percent every year between 2008 and 2010, while total Indian gaming revenues in the United States as a whole “grew 1.2 percent in 2008, fell 1 percent in 2009 and grew 1.3 percent in 2010.” *Id.*

¹³¹ Michael Finch II, *Flush With Cash, Poarch Creek Tribe's Growing Interests Stretch from Huntsville to Florida*, AL.COM (Sept. 6, 2014, 8:00 AM), http://www.al.com/business/index.ssf/2014/09/poarch_creek_tribes_growing_in.html. In 2008, PCI's gaming revenues grew 45 percent, 34 percent in 2009, and 61 percent in 2010. Altman, *supra* note 130.

¹³² Finch, *supra* note 131.

¹³³ See generally *Alabama v. PCI Gaming Auth.*, 15 F. Supp. 3d 1161, 1168 (M.D. Ala. 2014). See also Marc D. Anderson, *Poarch Creeks Take Control of \$200 Million Blue Collar Country Project in Foley*, AL.COM (May 22, 2015, 6:10 PM), http://www.al.com/news/mobile/index.ssf/2015/05/poarch_creeks_take_control_of.html; The Poarch Band acquired the Mobile Greyhound Park and the Pensacola Greyhound Track and Poker Room in 2009. See also Finch, *supra* note 131 (noting financial audits submitted to the Florida Department of Business and Professional Regulation suggested that “[i]n 2013, the Pensacola track and its 25 poker tables earned about \$125,000 in net income.”).

¹³⁴ Finch, *supra* note 131.

¹³⁵ Anderson, *supra* note 133.

Alabama that will feature retail space, entertainment venues, restaurants, amusement rides, a water park, an RV park, a 200 bedroom hotel, and a convention space.¹³⁶

1. Recommending Provisions to be Included in a Compact Between Alabama and the Poarch Band

As demonstrated in an analysis of Florida's tribal-state compact, states have the authority to demand an enormous share of tribal gaming revenues in exchange for promises of exclusivity. For Alabama, this means that the state may be able to access a significant source of new revenue by entering into a revenue-sharing agreement with the Poarch Band. If the state is to stake its claim to a share of the Poarch Band's gaming revenues, it must promise the Poarch Band the exclusive right to conduct Class II or Class III gaming operations in the state. In exchange for exclusive gaming rights, the state might follow Florida's regime of structured payments made to the state in accordance with a revenue-sharing schedule. Of course, such an agreement may have an adverse impact on other non-tribal gaming operations in the state.¹³⁷

A tribal-state compact between Alabama and the Poarch Band must also create a regime where the Poarch Band's independent regulatory entity must answer to the state to ensure that tribal gaming is conducted in accordance with tribal law, IGRA, and the proposed tribal-state compact. This may require the state to create its own gaming commission or compliance agency that will work in concert with the tribe's already existing Tribal Gaming Commission.¹³⁸ The tribal-state compacts of Florida and Mississippi both establish a hierarchy where a tribal independent regulatory agency provides the state with copies of the tribal gaming commission's investigations. However, both compacts differ as to the extent to which the state may exercise direct oversight of tribal gaming operations.

Alabama and the Poarch Band must also negotiate a method to reimburse

¹³⁶ *Id.*

¹³⁷ See ALA. CONST. amend. 508, 565, 506, 743, 569, 386, 692, 674, 744, 387, 440, 413, 599, 612, 542, 549.. (Alabama's state constitution authorizes certain bingo operations in Calhoun, Covington, Etowah, Greene, Houston, Jefferson, Limestone, Lowndes, Macon, Madison, Mobile, Montgomery, Morgan, Russell, St. Clair, and Walker counties).

¹³⁸ POARCH BAND OF CREEK INDIANS, TRIBES & TRIBAL NATIONS CODE OF ORDINANCES, Title 20, ch. 1, § 20-2-1 (2015), https://www.municode.com/library/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_or_dinances?nodeId=TIT20GA (establishing the Poarch Band of Creek Indians Tribal Gaming Commission "in order to regulate the operation, conduct, and playing of Gaming Activities on the Tribe's Indian Lands."). See also *id.* at § 20-2-2. (The Poarch Band's Tribal Gaming Commission "[acts] independently and autonomously from the Tribal council in all matters within its purview."). See generally *id.* at § 20-2-6 (delegating powers and duties to the Tribal Gaming Commission).

the state costs incurred in regulating and enforcing the terms of the tribal-state compact. Such a provision will inevitably depend on the scope of the state's regulatory authority. If the state intends to utilize Mississippi's 'hands-off' approach to regulation by delegating the primary authority to regulate tribal gaming to the tribe, the state and the tribe may choose to agree to a budget that splits regulation and enforcement costs between the tribe and the state. Conversely, if the state intends to utilize Florida's 'hands-on' approach and adopt an active regulatory role, it might choose to require the tribe to reimburse the state for its regulation and enforcement costs.

IV. CONCLUSION

The Eleventh Circuit's decision in *PCI Gaming* effectively forecloses the possibility that Alabama might be able to regulate gaming operations on the Poarch Band's tribal lands in the absence of a tribal-state compact. Therefore, the state must resume compact negotiations with the tribe if it is to have any say in the conduct of tribal gaming in the state. Consistent with IGRA and following the examples of compacts negotiated by Florida and Mississippi, a tribal-state compact between Alabama and the Poarch Band should include: (1) a definite term during which the compact will remain effective; (2) a provision creating an Alabama State Gaming Commission or an Alabama State Compliance Agency to ensure that gaming on tribal lands is conducted in compliance with IGRA, Alabama state law, tribal law, and the tribal-state compact; (3) definitions of what games the tribe can operate at its facilities; (4) a provision allowing the parties to agree upon a budget to cover the state's regulation and enforcement costs; (5) a promise that the tribe can conduct certain games exclusively; and (6) a revenue-sharing agreement in consideration for the promise of exclusivity.

A tribal-state compact between the Alabama and the Poarch Band, if negotiated in good faith, can ensure that the state can stake its claim to a share of the tribe's lucrative gaming operations. In a state plagued by budget crises, tribal gaming revenues (if properly distributed) can provide the 'stop-gap' needed to restore much needed funding to state programs. While a tribal-state compact does not grant the state the absolute authority it desires to regulate tribal gaming, it does provide the state with limited regulatory authority as well as an opportunity to benefit from the tribe's immensely successful gaming operations. In the absence of a tribal-state compact, the state will not be able to regulate the conduct of tribal gaming occurring within its borders and will not reap the benefits of the Poarch Band's wildly successful gaming operations.