



The Level Playing Field – Still a Dream

by Penny J. Coleman

Over the years, talk about the need for a level playing field has waxed and waned. On occasion, commercial enterprises tried to commandeer the phrase, claiming the need for a chance to compete on the same level with the same rights as Indian Nation government gaming. Generally, however, the phrase is understood to signify the inequities between state-sanctioned gaming and Indian gaming. While some relationships have improved, other states continue to dominate through compact negotiations. California and New Mexico are prime, but disparate, examples.

Compact negotiations were derailed early in the history of the Indian Gaming Regulatory Act (IGRA) in the 1994 *Seminole v. Florida* Supreme Court decision. IGRA authorizes tribes to bring suit against states that do not conduct good faith compact negotiations. The Supreme Court declared this IGRA provision unconstitutional and ruled that Congress could not authorize a tribe to sue a state and thereby waive the state's immunity from suit. Congress' efforts to legislate a Seminole fix were few and eventually abandoned. Without this potential remedy against bad faith negotiations, the states quickly gained the upper hand.

Fortunately for the California Indian Nations, the State of California eventually waived its immunity from suit. Therefore, when the former governor of California decided that the Indian Nations should pay their "fair share" into the state coffers, the result was ultimately in the Nations' favor.

The Nations were expected to pay an ever increasing share of their gaming revenues to the state. And many were doing so. Thankfully, the Rincon Band of Luiseno Indians' decided to fight back. The Nation refused to pay more revenues without receiving additional benefits under the compact. The 9th Circuit ruled in 2011 that the state was negotiating in bad faith when it insisted the Nation pay 15% directly into the state's general fund. As a result, the parties were ordered to mediation. Ultimately unable to reach agreement, the mediator chose the Nation's proposed compact and transferred the compact to the Department of the Interior for Secretarial procedures. Using procedures rather than a compact to establish the regulatory structure diminished the State's leverage and allowed for more reasonable regulatory and revenue sharing terms.

The 9th Circuit's decision and the Rincon Band's subsequent Secretarial procedures also cleared the path for the other Indian Nations in California. Present Governor Brown rolled back the previous administration's demand for a fair share. Recent compacts in California are longer (26 years), authorize

more slots, and steer more money directly to non-gaming Indian Nations. While hardly leveling the playing field, the court decision and procedures reflected a much improved negotiating position for the California Nations.

This same scenario is playing out in New Mexico; so far with a different result. The State of New Mexico refused to waive its immunity from suit. Over the course of the last year, nine Indian Nations, Mescalero Apache Tribe of the Mescalero Reservation, Jicarilla Apache Nation, Navajo Nation, Pueblo of Acoma, and Pueblo of Jemez, as one group and Pueblo of Taos, Pueblo of Isleta, Pueblo of Zuni, and Ohkay Owingeh, individually, signed compacts. The Nations' unified stand to the Department of Interior was that they were receiving substantial economic benefit from the compact terms even though some Nations were paying increased tribal revenues. They had to argue that the compact terms were beneficial or risk having the Department of the Interior disapprove the compacts. Disapproval was a real possibility as the Assistant Secretary – Indian Affairs was clearly skeptical that the Nations were receiving valuable concessions under the compacts. In almost identical letters to the nine Nations, the Assistant Secretary questioned whether the compacts' absence of limitations on the number of slot machines and the additional duration of the compacts were meaningful concessions, especially in those instances where the Nations' revenue sharing rates increased.

The Pueblo of Pojoaque, like the Rincon Band, decided to take the road less traveled. Refusing to agree to the State of New Mexico's take it or leave it compact that would have raised its revenue share from 8% to 10%, the Pueblo allowed its compact to expire on June 30 of this year. To protect the Pueblo, it requested that the United States Attorney forgo enforcement action against the Pueblo's casino until ongoing litigation was resolved. To assure that the casino was properly regulated, it offered to continue to meet the regulatory and gaming level requirements of the expired compacts and to establish a Trust Fund in which it pays 8% of its net win as if the 2001 compact was still in effect. The United States Attorney agreed to exercise his discretion to forgo any enforcement actions at least until the 10th Circuit decided the case presently on appeal.

The Pueblo had sued the State of New Mexico alleging bad faith negotiations. The state prevailed, however, based on its sovereign immunity from suit. This loss in court allowed the Pueblo to go directly to the Department of Interior to request Secretarial procedures in lieu of the compact.

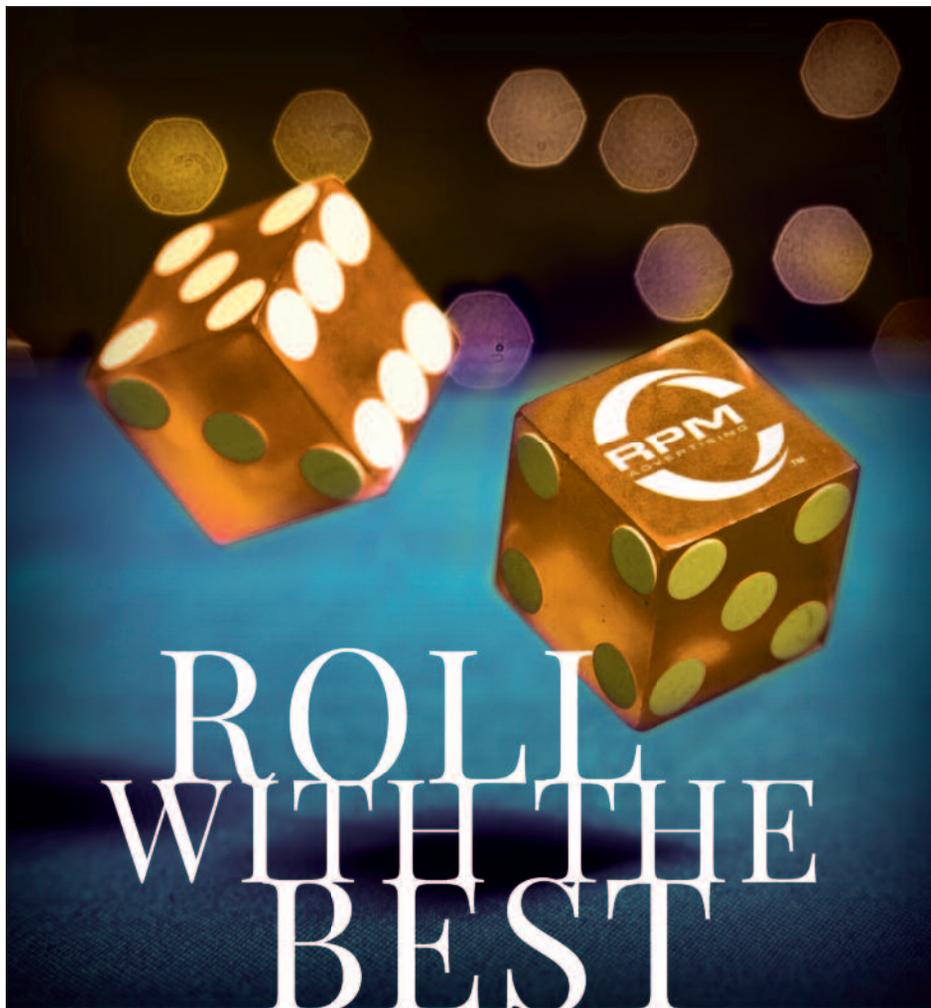
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The state then brought suit against the Department. It sought to prevent the Department from proceeding with Secretarial procedures. The court agreed with the state, finding that the Department's authority to issue Secretarial procedures is valid only after a finding of bad faith negotiations and court ordered mediation that does not result in a compact. With this decision now on appeal, the Pueblo is still operating its casino.

If the Department is not successful in this litigation, the Pueblo's options become very limited. The two main options are simple. The Pueblo can agree to the cookie cutter compact forced upon the other Pueblos, that is, assuming the state even agrees to that option. Or, the United States can bring suit on behalf of the Pueblo as its trustee. This latter option, which resolves the sovereign immunity defense, has never been implemented. The United States has never brought a bad faith suit.

Consequently, the level playing field remains a dream. States continue to dominate the compact negotiations and extract more revenue from the Indian Nations. Congress is not resolving the problem it caused by writing an unconstitutional provision. The United States remains reluctant to take action on behalf of beleaguered Indian Nations. And, only when a state waives its sovereign immunity from suit, can an Indian Nation absolutely refuse to agree to unfair compact demands. ♣

Penny J. Coleman is Principal of Coleman Indian Law. She can be reached by calling (240) 330-3697 or email colemanindianlaw@gmail.com.



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