Opinion No. 99-02

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OPINION OF: Patricia A. Madrid, Attorney General

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TO: Honorable Manny M. Aragon & Honorable Raymond G. Sanchez, Co-chairs, Legislative Councel, New Mexico State Legislature, State Capitol, Santa Fe, New Mexico 87501

QUESTIONS

QUESTION:[1] 1. What effect would arbitration under Section 7 of the Tribal-State Class III Gaming Compact, NMSA 1978, Section 11-13-1 (1997) ("Section 7") have on the law as it exists, **i.e.**, could the arbitrator change or invalidate the regulatory fees set out in the Compact and the statute?

2. Does the arbitration provided for in Section 7 extend to the revenue-sharing agreement entered into between the state and a tribe? If so, is an arbitration panel authorized to rule on whether an issue such as the specified revenue-sharing amount violates federal law; would such a ruling be binding on the state; and what review might the state seek of such a ruling?

CONCLUSIONS

1. An arbitration panel selected under the Compact could not change or invalidate the regulatory fees specified in Section 4(E)(5) of the Compact.

2. It is not clear that the revenue sharing agreement (codified at NMSA 1978, § 11-13-2 (1997)) is covered by Section 7 of the Compact, but if it is, the arbitration panel would not have authority to determine the legal validity of the revenue-sharing amount. Judicial review of any attempt by an arbitration panel to rule on the legal validity of either the regulatory fees or the revenue-sharing amount may be possible in federal court.

FACTS

Some tribes that have entered into Compacts with the state have questioned the amount and validity of certain fees required to be paid to the state under the Compact and related revenue-sharing agreement. Tribes have sought to raise this question with an arbitration panel selected in accordance with Section 7 of the Compact. This, in turn, has raised an issue regarding the scope of the arbitrators' authority.

ANALYSIS

1. **Effect of Arbitration Panel's Decision on the Compact and Statute.**

In pertinent part, Section 7(A) of the Compact provides:

In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:

1. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision believed to have been violated and shall specify the factual and legal basis for the alleged noncompliance. The notice shall specifically identify the date, time and nature of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

2. In the event an allegation by the complaining party is not resolved to the satisfaction of such party within ninety (90) days after service of the notice set forth in Paragraph A.1 of this section, the complaining party may serve upon the other party a notice to cease conduct of the particular game(s) or activities alleged by the complaining party to be in noncompliance. Upon receipt of such notice, the responding party may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The responding party shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the complaining party.

The Compact provides for the selection of an arbitration panel of three attorneys licensed by the State Bar of New Mexico or another state. § 7(A)(3). Once the panel has reached a decision:

The results of arbitration shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction. For purposes of any such action, the State and the Tribe acknowledge that any action or failure to act on the part of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not protected by the sovereign immunity of the State or the Tribe.

Section 7(A)(5)[2]. Except for action or failure to act by the state or a tribe contrary to the arbitrators' decision, the Compact does not waive the state's or tribe's sovereign immunity. § 7(B).

Arbitration is a contractual remedy for the settlement of disputes. **See Christmas v. Cimarron Realty Co.**, 98 N.M. 330, 332, 648 P.2d 788 (1982). "As in any contract case, the parties' intent is controlling with regard to whether they agree to arbitrate a particular dispute." **Alcaraz v. Avnet, Inc.**, 933 F. Supp. 1025, 1027 (D.N.M. 1996). **See also Armijo v. Prudential Ins. Co.**, 72 F.3d 793, 797 (10th Cir. 1995) ("the parties'

intent controls regarding whether they agreed to arbitrate a particular dispute"). The terms of the parties' agreement "define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated." **Christmas**, 98 N.M. at 332.

In general, unless limited by the parties' agreement, the law as well as the facts may be submitted to the judgment of an arbitrator. **See Board of Educ. of Carlsbad v. Harrell**, 118 N.M. 470, 476, 882 P.2d 511 (1994) (when arbitration is voluntary, a court has no authority to review arbitration awards for errors as to the law or the facts); **Greenwood Internat'l, Inc. v. Greenwood Forest Products, Inc.**, 814 P.2d 528, 529 (Or. Ct. App.) (an arbitrator acts within the bounds of his authority when he decides a question of law either correctly or in a manner a court would find erroneous), **review denied**, 817 P.2d 757 (Or. 1991). **See generally** 4 Am.Jur. 2d **Alternative Dispute Resolution** § 64.

However, an arbitrator "lacks the authority to revise the agreement in a manner the parties did not contemplate and to which they did not assent." School Bd. of Seminole County v. Cornelison, 406 So.2d 484, 487 (Fla. Dist. Ct. App. 1981), review denied, 421 So.2d 67 (Fla. 1992). See also Cosmos Broadcasting of Louisiana, Inc. v. New Orleans Local American Fed'n of Television & Radio Artists, 455 F. Supp. 426, 428 (E.D. La. 1978) (an arbitrator has no authority to rewrite the contract). See generally 4 Am.Jur.2d Alternative Dispute Resolution, § 164 (1995).

For several reasons, we believe the arbitration contemplated under the Compact is limited to factual issues relating to compliance with and enforcement of the specific games and activities under the Compact's provisions. First, the language of Section 7(A), quoted above, indicates that the parties' intent was to allow arbitration in the event one of the parties believed the other party failed to comply with or otherwise breached a provision of the Compact. The allegedly noncomplying party is given the option of stopping the games or activities in question or continuing them pending the results of arbitration, and judicial enforcement of the results of arbitration is limited to injunctive relief. These provisions are not, on their face, consistent with any intent by the parties to allow arbitration of the legality or validity of the Compact's provisions.

Second, other provisions of the Compact support the limited scope of arbitration. Section 13 provides that the Compact is the entire agreement between the parties, and that neither it nor any of its provisions "may be changed, waived, discharged or terminated orally, but only by an instrument, in writing, signed by the Tribe and the State and approved by the Secretary of the Interior." If a party is dissatisfied with a provision of the Compact or believes that issues not addressed in the Compact should be raised, Section 11 permits the party to request that negotiations be reopened with respect to the questioned provision or issues. The request may not be "unreasonably refused," but neither party is required to agree to any change in the Compact "and no agreement to supplement or amend this Compact in any respect shall have any validity until the same shall have been approved in writing by the Tribe, the State and the Secretary of the Interior and notice of such approval published in the Federal Register." § 11(D). These provisions clearly require the reopening of negotiations and the agreement of the parties before any provision of the Compact may be amended or terminated. They appear to

negate any authority an arbitration panel might otherwise have to make a binding determination that a particular provision should be amended or invalidated.[3]

Finally, the extent of an arbitration panel's authority to interpret the provisions of the Compact is arguably limited because the Compact has been codified as part of state statutory law. Under constitutional separation of powers principles, the legislature may not delegate its powers to make laws. See N.M. Const. art. III, § 1[4], **State v. Spears**, 57 N.M. 400, 405, 259 P.2d 356 (1953). Thus, any attempt by an arbitration panel to change or invalidate a provision of the Compact might be viewed as an unconstitutional attempt to usurp the legislature's authority.

In addition, the New Mexico Supreme Court has held that in cases where arbitration is mandated by statute, rather than by a voluntary contract, due process considerations and separation of powers principles subject the arbitrator's decision to the same judicial review applicable to decisions made by administrative bodies. **Board of Educ. of Carlsbad v. Harrell**, 118 N.M. 470, 882 P.2d 511 (1994) (addressing a statute requiring that local school board decisions be appealed to an arbitrator). Such review includes "whether the arbitrator's award is arbitrary, unlawful, unreasonable, capricious or not based on substantial evidence on the whole record," and de novo review of conclusions of law. 118 N.M. at 486. Any attempt to further limit judicial review, according to the Court, would amount to an unconstitutional delegation of judicial power. **Id.** at 485. The **Harrell** decision suggests that, if the arbitration authorized under Section 7 is viewed as compulsory[5], an interpretation of the arbitrators' authority to include binding decisions of law would be vulnerable to a separation of powers challenge.

In light of the provisions of the Compact and applicable law, we conclude that arbitration under Section 7 is limited to determining what the Compact requires and whether the parties have complied with the Compact. For the regulatory fees required by the Compact in particular, an arbitration panel would be authorized only to determine whether payment of the fees was required by the Compact and, if so, to order that the fees be paid. The panel would have no authority to change the amount of the fees or to invalidate them.

2. **Arbitration of Revenue-Sharing Agreements.**

The availability of the arbitration procedures in Section 7 to resolve disputes arising under a revenue-sharing agreement between the state and a tribe is questionable. On its face, Section 7 does not extend to a revenue-sharing agreement. Section 7 expressly refers to disputes stemming from a breach of, or noncompliance with, a provision of the "Compact." The Compact is set forth in NMSA 1978, Section 11-13-1, which is titled "Indian gaming compact entered into," and provides that the "compact is enacted and entered into in a form substantially as follows]." For purposes of Section 11-13-1, "Compact" is defined as "this compact between the State and the Tribe." § 2(B). Section 13 of the Compact states that the "Compact is the entire agreement between the parties]." Nothing in the Compact expressly includes or incorporates the revenue-sharing agreement.

The revenue-sharing agreement is separately codified at NMSA 1978, Section 11-13-2, which is titled "Revenue sharing of tribal gaming revenue." Section 11-13-2 states, in pertinent part: "The governor is authorized to execute a revenue-sharing agreement in the form substantially set forth in this section with any New Mexico Indian nation, tribe or pueblo that has also entered into an Indian gaming compact as provided by law." This provision supports the position that the Compact and revenue-sharing agreement are separate and distinct from one another.

The apparent omission of the revenue-sharing agreement from coverage under the arbitration provisions of Section 7 of the Compact raises questions regarding available remedies should a party breach or fail to comply with the provisions of the revenue-sharing agreement. Not only would arbitration be unavailable, but judicial review of any alleged breach or judicial enforcement of the agreement might also be foreclosed because neither the state nor the tribe has waived its sovereign immunity for purposes of the revenue-sharing agreement.

It seems unlikely that the parties intended to enter into an agreement that was incapable of enforcement, and despite its separate execution and codification, a reasonable argument might be made that the revenue-sharing agreement should be considered part of the Compact. Except under certain conditions specified in the revenue-sharing agreement, neither agreement can exist without the other. Specifically, Section 9 of the Compact authorizes the governor "to execute compacts with an individual Tribe that has also entered into revenue-sharing agreements." The revenue-sharing agreement also expressly provides that "[e]xecution of an Indian gaming compact is conditioned upon execution of a revenue-sharing agreement." NMSA 1978, § 11-13-2. Significantly, based on these interrelationships, the Secretary of the Interior found that the Compact and revenue-sharing agreement "together comprise[d] the tribal-state gaming compact" subject to the Secretary's approval under the Indian Gaming Regulatory Act ("IGRA"). Letter from Bruce Babbitt, Secretary of the Interior to the Honorable Gary E. Johnson, Governor (Aug. 23, 1997).

Even if the arbitration procedures specified in Section 7 applied to the revenue-sharing agreement[6], the same limitations on the arbitration panel discussed above would apply. With respect to the amount of revenues required to be paid to the state, the arbitrators would be limited to determining whether there was an obligation to pay and ordering compliance. The legality of the revenue-sharing agreement under IGRA or otherwise would be outside the scope of arbitration.

The availability of judicial review if the arbitration panel, contrary to our conclusion, determined that the revenue-sharing agreement was invalid under IGRA is unclear. Section 7 does not provide for judicial review or appeal of the arbitrator's decision. It limits judicial enforcement of the results of arbitration to injunctive relief. § 7(A)(5). While Section 7 expressly states that it shall not be construed to limit or waive "any remedy that is otherwise available to either party to enforce or resolve disputes" concerning the Compact, it also provides that, except for judicial actions to enforce the arbitrators' decisions, nothing in the Compact is deemed to waive either the state's or the tribe's

sovereign immunity. § 7(B). These provisions may effectively prevent any judicial review of an arbitration panel's decision.

Notwithstanding the absence of any express provision for judicial review, if a decision by an arbitration panel under Section 7 raised a question about the validity of the Compact under IGRA, or if any other question is raised regarding violation of the Compact or revenue-sharing agreement, it may be possible for the state to bring that issue before the federal courts. IGRA confers jurisdiction on the United States district courts over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact] that is in effect]." 25 U.S.C.A. § 2710(d)(7)(A)(ii). The Tenth Circuit Court of Appeals recently examined this provision and confirmed that it abrogated tribal sovereign immunity "where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." **Mescalero Apache Tribe v. New Mexico**, 131 F.3d 1379, 1385 (10th Cir. 1997). The Court concluded that this provision gave the federal district court jurisdiction to consider the state's counterclaim in that case asserting that the Compact at issue was invalid under IGRA. **Id.** at 1386.

GENERAL FOOTNOTES

n1 This Attorney General Opinion was initially issued as an informal advisory letter dated January 13, 1999. The opinion is re-issued here as a formal Attorney General Opinion in accordance with NMSA 1978, § 8-5-2(D) (as amended through 1975). While the procedural format has changed, the substance of the opinion remains the same.

n2 The Compact does not specify what courts are "of competent jurisdiction" for purposes of enforcing the results of arbitration under Section 7. Usually, written agreements providing for arbitration in this state are subject to review by New Mexico state courts under the Uniform Arbitration Act (NMSA 1978, §§ 44-7-1 to -22). However, arbitration under the Compact is not expressly made subject to the Uniform Arbitration Act, and the limited waiver of the parties' sovereign immunity under Section 7 does not appear to include actions brought under the Act.

n3 Further evidence of the arbitrators' lack of authority to change Compact provisions is found in the Compact Negotiation Act, which was passed during the regular 1999 legislative session and was effective immediately when the Governor signed it. 1999 N.M. Laws, Ch. 252 (Senate Bill 737). The Act establishes a process for the negotiation of compacts and amendments to existing compacts, and defines "compact" to mean "a tribal-state class III gaming compact] and including any separate agreement ancillary to that compact." § 2(B). Under the Act, the Governor or the Governor's designated representative is authorized to negotiate the terms of a compact or an amendment, but is not authorized to execute a compact or an amendment on behalf of the state without legislative approval. § 3(C). Thus, the Compact and the Compact Negotiation Act provide the legal process for amending or terminating compact terms while the arbitration process is limited to resolving factual disputes about the games and activities conducted pursuant to the compact terms.

n4 Separation of powers is enunciated in Article III, Section 1 of the New Mexico Constitution, which provides, in pertinent part: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others]."

n5 The Compact states that it was entered into after good faith negotiations between tribal and state representatives. NMSA 1978, § 11-13-1, Introduction. While the parties may disagree about how to characterize the negotiations, the Compact nevertheless indicates on its face that the arbitration process is discretionary, not mandatory. **See** § 7 (providing that a party "may" invoke the specified arbitration procedures and that the availability of arbitration does not waive any other available remedy to enforce or resolve disputes). This suggests that the arbitration required under the Compact has more voluntary characteristics than the statutorily mandated arbitration at issue in **Harrell**. **See** 118 N.M. at 476-77 (describing statute requiring submission of local school board decision to arbitration as "a nonconsensual submission to a statutorily imposed requirement of mandatory arbitration," non-negotiable, and a governmentally compelled restriction of a party's choice of judicial forum). Thus, it is not certain that a New Mexico court would find that Section 7 amounted to compulsory arbitration for purposes of the appropriate judicial review.

n6 The revenue-sharing agreement provides that if the state attempts to restrict the scope of Indian gaming or expands nontribal Class III gaming in the state beyond that permitted in the agreement, the tribe will no longer be required to pay the amounts specified in the agreement. NMSA 1978, 11-13-2, § 4. In the event of such an occurrence, the Compact's validity is not affected, but the amount of the regulatory fees required under Section 4 (E)(5) of the Compact will automatically increase by 20%. Id. § 5.