HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 209 Indian Gaming Activities
SPONSOR(S): Waldman
TIED BILLS: **IDEN./SIM. BILLS:** SB 160

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on State Affairs	6 Y, 0 N	Ligas	Williamson
2) Government Efficiency & Accountability Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

Current law does not address tribal-state compacts in Florida; however, this is an issue Florida is facing with regards to slot machine gaming.

This bill provides that the Governor is the designated state officer responsible for negotiating and executing tribal-state compacts relating to Class III gaming under the federal Indian Gaming Regulatory Act of 1988. The Governor must submit a copy of any executed tribal-state compact to the Legislature for ratification by a majority vote of both houses, and must submit a copy to the Secretary of State pending ratification. Once the compact is ratified, the Secretary of State must forward a copy of the compact and the ratification act to the U.S. Secretary of the Interior for review and approval.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill designates the Governor as the state officer responsible for negotiating and executing tribal-state gaming compacts with federally recognized Indian tribes located within the state. It also requires the Legislature to ratify, by a majority vote, the executed tribal-state compact.

B. EFFECT OF PROPOSED CHANGES:

Present Situation: Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act (IGRA)[1] divides gaming into three types of classes. Class I gaming means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations.[2] Class I gaming is within the exclusive jurisdiction of the Indian tribes.[3]

Class II gaming includes bingo and lotto, and if played at the same location as bingo, pull-tabs, punch boards, and other games similar to bingo.[4] Class II gaming also includes non-banking card games (such as poker) which are authorized by state law or not explicitly prohibited by state law.[5] Card games must be played in conformity with state laws or regulations regarding hours of operation and limitations on wagers.[6] A tribe may conduct class II gaming if:

- The state in which the tribe is located permits such gaming for any purpose by any person, organization or entity; and
- The governing body of the tribe adopts a gaming ordinance which is approved by the Chairman of the National Indian Gaming Commission.[7]

Class II gaming is regulated by the tribes with oversight by the commission.

Class III gaming includes all forms of gaming that are not deemed Class I or Class II, such as banking card games, casino games, electronic or electromechanical facsimiles of games of chance, and pari-mutuel wagering.[8]

The Seminole and Miccosukee tribes currently have Class II slots, which are bingo-style devices where players compete against each other.

Present Situation: Slot Machines

Chapter 551, F.S., is the result of the passage of Amendment 4 to the State Constitution[9] (codified at s. 23, Art. X, Florida Constitution), which authorized slot machines at existing pari-mutuel facilities in

[1] 18 U.S.C. 1166-1168 and 25 U.S.C. 2701 et seq.
[2] 25 U.S.C. 2703(6).
[3] 25 U.S.C. 2710(1).
[4] 25 U.S.C. 2703(7)(A)(i).
[5] Poker is authorized at the par-mutuel facilities in Florida by s. 849.086, F.S.
[6] 25 U.S.C. 2703(7)(A)(ii).
[7] 25 U.S.C. 2710(b)(1)
[8] 25 U.S.C. 2703(8).
[9] The amendment was proposed by Initiative Petition filed with the Secretary of State on May 28, 2002 and adopted by the electorate at the General Election in 2004.

Miami-Dade and Broward Counties upon an affirmative vote of the electors in those counties. Both Miami-Dade and Broward Counties held referenda elections on March 8, 2005.

The electors approved slot machines at the pari-mutuel facilities in Broward County, but the measure was defeated in Miami-Dade County. Under the provisions of the amendment, four pari-mutuel facilities are eligible to conduct slot machine gaming in Broward County:

- Gulfstream Park Racing and Casino,[10] a thoroughbred permit holder;
- Pompano Park,[11] a harness racing permit holder;
- Dania Jai Alai,[12] a jai alai permit holder; and
- Mardi Gras Racetrack and Gaming Center,[13] formerly known as Hollywood Greyhound Track, a greyhound permit holder.[14]

Under the Indian Gaming Regulatory Act (IGRA) slot machines are considered Class III gaming and open the possibility for tribes to negotiate a compact with the state allowing slots in the tribal casinos.[15] The law provides that before a tribe may lawfully conduct Class III gaming, the following conditions must be met, the:

- Particular form of Class III gaming that the tribe wants to conduct must be permitted in the state in which the tribe is located;
- Tribe and the state must have negotiated a compact[16] that has been approved by the Secretary of the Interior, or the Secretary must have approved regulatory procedures; and
- Tribe must have adopted a tribal gaming ordinance that has been approved by the Indian Gaming Commission or its chairman.[17]

A state or political subdivision does not have authority to impose taxes, fees, charges, or other assessments upon tribes that seek to operate Class III gaming and a state is prohibited from refusing to negotiate based on the lack of authority in such state, or its political subdivision, to impose such a tax, fee, charge, or other assessment.[18] A tribe may agree to pay assessments to a state or political subdivision to defray the costs of state regulation of its Class III gaming activities and may agree to a payment, in lieu of taxes, to the state in amounts comparable to amounts assessed by the state for comparable activities.[19]

Present Situation: Compacts

The IGRA provides, in relevant part, that an Indian tribe may initiate a cause of action 180 days after the date the tribe requested the state to enter into negotiations if:

- A tribal-state compact has not been entered into;
- The state did not respond to the request of the Indian tribe or did not respond to the request in good faith.[20]

The U.S. Supreme Court held in part in *Seminole Tribe v. State of Florida* that the Eleventh Amendment prohibits an Indian tribe from suing a state in Federal court for an alleged failure of the

[10] Gulfstream Park Racing and Casino was licensed to operate slots by the state on October 13, 2006, and opened on November 15, 2006.
[11] Pompano Park was licensed January 10, 2007, and is expected to open in March 15, 2007.
[12] Dania Jai Alai was licensed January 17, 2007, and is expected to open in the fall of 2008.
[13] Mardi Gras Racetrack and Gaming Center was licensed on September 29, 2006 and opened on December 26, 2006.
[14] Senate Staff Analysis and Economic Impact Statement for SB 160 (January 25, 2007) at 2. (on file with the Senate Regulated Industries Committee).
[15] 25 U.S.C. 2701, et seq.
[16] The compact may contain any subjects directly related to the operation of gaming activities.
[17] 12 U.S.C. 2710(d).
[18] 25 U.S.C. 2710(d)(4)
[19] *Id.* (Sometimes referred to as "revenue sharing.")
[20] 25 U.S.C. 2710(d)(7)(B).

state to negotiate a compact in good faith.[21] The Department of Interior subsequently responded to the *Seminole* decision by publishing a regulation[22] to address this issue. [23] The U.S. Supreme Court also noted in its decision that the duty imposed by the IGRA to negotiate in good faith "is not likely to be performed by an individual state executive officer or even a group of officers."[24]

In 1999, the states of Florida and Alabama challenged the Secretary's authority to promulgate this regulation.[25] The case was administratively closed in 2003 pending administrative action by the Department of Interior to promulgate rules. The Order further stated that the case would be reopened at the request of any party, if at any time further proceedings appear to be appropriate.

According to an affidavit of the General Counsel for the Seminole Indian Tribe,[26] negotiations continued. Compact negotiations began subsequent to the passage of the Constitutional Amendment authorizing slot machines. The affidavit further stated the negotiations continued on and off from June 6, 2005 until December 2006, but did not result in the negotiation of a compact. The affidavit further stated that while the State of Florida agreed that the Seminole tribe was entitled to operate slot machines, the state made unlawful demands for a major share of the tribal gaming revenues without providing substantial exclusivity or other valuable consideration.[27]

In July 2006, the Seminole Tribe requested that the Secretary of Interior issue Class III Secretarial Procedures in order to comply with the governing provisions of 25 C.F.R. 291.8(c). On September 26, 2006, the Department of Interior responded to the Seminole Tribes request for Secretarial Procedures stating the department was encouraged by the willingness of the State of Florida to negotiate a Class III gaming compact with the tribe. It stated further that the department had completed its review of the tribe's application and would in the next 60 days, absent a negotiation of a compact between the tribe and state, issue a final decision setting forth the proposed Class III gaming procedures of the tribe. The department did not issue procedures within the 60 days stated in the September 26, 2006 letter.[28]

In January 2007, the Seminole Tribe moved to reopen the case against the Department of Interior and restore it to active status, amend the Court-approved Scheduling Report to provide for briefing on cross-motions for summary judgment no later than 45 days after the date of the Court's Order and irrespective of when the secretary issues a decision on Secretarial Procedures; and direct the secretary to issue a final decision on procedures no later than 30 days after the court has acted on the motion.[29]

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[21] 517 U.S. 44 (1996).

[22] The regulation provides, in part, that an Indian tribe may ask the Secretary of the Interior to issue Class III gaming procedures when the following steps have taken place: (a) The Indian tribe submitted a written request to the Sate to enter into negotiations to establish a Tribal-State compact governing the conduct of Class III gaming activities; (b) The Sate and the Indian tribe failed to negotiate a compact 180 days after the State received the Indian tribe's request; (c) The Indian tribe initiated a cause of action in Federal district court against the State alleging that the State did not respond, or did not respond in good faith, to the request of the Indian tribe to negotiate such a compact; (d) The State raised an Eleventh Amendment defense to the tribal action; and (e) The Federal district court dismissed the action due to the State's sovereign immunity under the Eleventh Amendment.

[23] 25 CFR 291.3. The states of Florida and Alabama have challenged the Secretary's authority to promulgate this regulation. *State of Florida and State of Alabama v. United States of America, United States Department of the Interior and Dirk Kempthorne in his official capacity as Secretary of the Interior and Seminole Tribe of Florida, Miccosukee Tribe of Florida and Poarch Band of Creek Indians,* Case No. 4:99-CV137-RH (N.D.Fla.).

[24] 517 U.S. 44, at 75 n. 17 [citing *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 251 Kan. 559 (1992) that the Governor of Kansas may negotiate but may not enter into a compact without a grant of power from the Legislature].

[25] 25 CFR 291.3.

[26] Affidavit of Jim Shore, *State of Florida and State of Alabama v. United States of America, United States Department of the Interior and Seminole Tribe of Florida, Miccosukee Tribe of Florida and Poarch Band of Creek Indians*, Case No. 4:99-CV137-RH (N.D. Fla. Filed January 16, 2007).

[27] *Id.*

[28] Senate Staff Analysis and Economic Impact Statement for SB 160 (January 25, 2007) at 4.

[29] In the motion, counsel for the Seminoles stated that the Federal Defendants oppose the motion and were unable to resolve the matter and the Poarch Band of Creek Indians support the motion. The Seminole Tribe attempted to confer with the states of Florida and Alabama and the Miccosukee Tribe and was not able to resolve the issue.

On January 8, 2007, Governor Crist sent a letter to the Interior Secretary asking for the federal government to hold off on any action so his administration could enter into discussions with the tribe.[30]

Several state supreme courts have reviewed whether the Governor of the state has the power to unilaterally negotiate and execute an Indian gaming compact. The Supreme Court in the states of New Mexico, Kansas, Rhode Island, New York, and Wisconsin has held that the Governor does not have the power to bind the state to a tribal-state compact without legislative authority.[31] Two federal district courts have held that the Governor has the unilateral authority to negotiate and execute tribal-state Indian gaming compacts.[32] The state supreme courts that have addressed these two cases have dismissed their decisions as not well reasoned and distinguishable.[33]

Currently, there is no statutory provision related to tribal-state compacts in Florida. Tribal-state compacts are an issue that Florida is facing with the recent passage of ch.2005-362, L.O.F.,[34] regarding slot machine gaming.

Effect of Proposed Changes

The bill provides that the Governor is the designated state officer responsible for negotiating and executing tribal-state compacts relating to Class III gaming under the federal Indian Gaming Regulatory Act of 1988.

The Governor must submit a copy of any executed tribal-state compact to the Legislature for ratification by a majority vote of both houses. The Governor also must submit a copy to the Secretary of State pending receipt of ratification.

Once the compact is ratified, the Secretary of State must forward a copy of the tribal-state compact and the ratifying act to the U.S. Secretary of the Interior for review and approval in accordance with the United States Code.[35]

C. SECTION DIRECTORY:

Section 1 designates the Governor as the official to negotiate tribal-state compacts and provides for ratification by the Legislature.

Section 2 provides that the bill will take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[30] Jon Burstein, "Seminoles ask federal judge for OK on Vegas-style slot machines," *South Florida Sun Sentinel,* 17 Jan. 2007 (http://www.sun-sentinel.com/news/local/broward/sfl-cseminole17jan17,0,5424919.story?coll=sfla-news-broward, last visited February 28, 2007)

[31] *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992); *State v. Johnson*, 120 N.M. 562, 904 P.2d 11 (N.M. 1995); *Narragansett Indian Tribe of R.I. v. Rhode Island*, 667 A.2d 280 (R.I. 1995); *Saratoga Co. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047 (N.Y. 2003); and *Panzer v. Doyle* 271 Wis.2d, 680 N.W. 2d 666 (Wisc. 2004).

[32] *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992); *State v. Johnson*, 120 N.M. 562, 904 P.2d 11 (N.M. 1995); *Narragansett Indian Tribe of R.I. v. Rhode Island*, 667 A.2d 280 (R.I. 1995); *Saratoga Co. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047 (N.Y. 2003); and *Panzer v. Doyle* 271 Wis.2d, 680 N.W. 2d 666 (Wisc. 2004).

[33] *Panzer v. Doyle*, 680 N.W.2d at 687.

[34] Codified at ch. 551, F.S.

[35] 25 U.S.C. 2710(d)(3)(B).

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.