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Can Tribal Casino's Reopen During the COVID Shutdown?

Unlike most other California businesses, it is not entirely clear that tribal casinos—which operate on tribal lands and are run by tribal authorities—must follow the California state government's directives on whether and how they operate.

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(Courtesy photos)

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Can California's tribal casinos reopen while California's stay-at-home order remains in effect? In March, California Gov. Gavin Newsom's series of COVID-19-related executive orders indefinitely shut down a wide variety of brick-and-mortar business in the state, including 64 Tribal casinos and their associated restaurants, entertainment venues and hotels. While certain states have begun to, or plan to, reopen parts of businesses, California has announced no concrete plan to do so. Unlike many businesses—like restaurants—that continue to operate at reduced capacity, casinos are effectively shuttered, and many are eager to reopen. And, unlike most other California businesses, it is not entirely clear that tribal casinos—which operate on tribal lands and are run by tribal authorities—must follow the California state government's directives on whether and how they operate.

Thus, while all tribal casinos have thus far "followed" the governor's and other state officials' COVID-19-related directives, over the coming months many California tribal casinos may seek to reopen, even in defiance of state directives. This article looks at whether they lawfully can, and the legal hurdles the parties will face if they try.

Background

Newsom's stay-at-home Executive Order N-33-20 (the order) requires all individuals living in California to "stay home or at their place of residence except as needed to maintain continuity of operations of [critical sectors]." Governor's Exec. Order No. N-33-20 (March 19, 2020). Critical sectors do not include any entertainment or gaming businesses, or restaurants, except to prepare carry-out food options. See, e.g., Calif. State Pub. Health Off., Essential Critical Infrastructure Workers (2020), pp. 1, 6. Similarly, hotels generally are not part of a critical sector. Therefore, under the order, tribal casinos and their associated hotels and restaurants are effectively closed.

Tribal casinos may not be bound to follow the order. The regulatory laws of the state are generally preempted by the tribe's own laws and sovereign governance. *See Williams v. Lee*, 1959, 358 U.S. 217, 223 (1959) (holding that jurisdiction of state courts does not extend to Indian country unless Congress specifically permits); *Warren Trading Post v. Arizona Tax Commission*, 1965,

380 U.S. 685, 691-92 (1965) (holding that Congress occupies field of trading with Indians on reservations so broadly there is no room for states); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 180-81 (1973) (quoting *Worcester v. Georgia*, 31 U.S. 557, 561 (1832) ("[Indian Country] is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of [the state] can have no force"). Tribal sovereignty is inherent, and subject to preemptive federal law, but it is not subject to the laws of the states. See also *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114, 123-24 (1993) (noting that historically under the Indian Sovereignty Doctrine, state law has no role to play within a tribe's territorial boundaries).

Moreover, while federal statutory law—P.L. 280—provides that state penal laws apply in "Indian country," meaning primarily reservations, in certain states, the U.S. Supreme Court has made it clear that P.L. 280 only applies the state's "criminal-prohibitory" penal statutes. See Pub. L. No. 83-280, 67 Stat. 588-590 (1953) (now codified at 18 U.S.C. Section 1162, 28 U.S.C. Section 1360, and 25 U.S.C. Sections 1321–1326). Criminal-prohibitory laws prohibit and punish conduct offensive to a state's public policy. A state's attempt to regulate conduct, even if enforced by criminal penalties, is considered "civil-regulatory," and is not enforceable in Indian country. See, e.g., *Bryan v. Itasca County,* 426 U.S. 373, 390 (1976) (holding that if Congress had intended to confer general civil regulatory powers to the states under P.L. 280, it would have explicitly done so); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 222 (1987) ("State regulation would impermissibly infringe on tribal government"). Here, the order is arguably facially "civil-regulatory" in nature and therefore does not apply on tribal lands. Thus, while tribes have closed their gaming and resort facilities, urging "everyone" to adhere to the stay-at-home orders, they are not so obligated. See, e.g., Morongo Band of Mission Indians, Coronavirus (COVID-19) Update, https://morongonation.org/coronavirus-covid%E2%80%9019-update.

The federal government can shut down tribal casinos operating in violation of state orders. The federal Indian Gaming Regulatory Act (IGRA) established the National Indian Gaming Commission (the commission), which regulates Class III (casino-style) gaming by Indian tribes. See generally 25 U.S.C. Section 2701 et seq. (2018); see also 25 U.S.C. Section 2705(a)(1) (2018) and 25 U.S.C. Section 2713(b)(1) (2018). The commission has broad authority to regulate and shut down casinos. See generally 25 U.S.C. Section 2701 et seq. (2018). However, the federal government has issued no stay-at-home orders and, while the current administration has left reopening after stay-at-home orders largely up to the states, it has been pushing to reopen the economy. See, e.g., United States White House, Guidelines: Opening Up America Again; see also Kristen Holmes, "Trump is frustrated and 'chomping at the bit' to reopen America and the economy," CNN (Apr. 18, 2020). Thus, it appears unlikely the commission will be issuing any casino closure orders to effectuate state laws.

What does this mean?

This does not necessarily mean that, despite the order, California tribal casinos can lawfully reopen immediately. The IGRA includes its own public health mandate. The law requires tribes to enter into "compacts"—contracts—with the state where they operate casinos, and that tribes adopt tribal ordinances ensuring that that "the operation of [a] gaming [facility] is conducted ...[so as to] protect ... public health and safety." In California, such ordinances are part the tribal-state compacts. California tribal-state compacts follow a template containing numerous provisions which might allow the state to enforce the Order or other general public health policies.

While many template compact provisions arguably so empower the state, the most germane provisions are, first, Section 9.6, which provides that "in exigent circumstances (e.g., imminent threat to public health and safety), the State Gaming Agency [which is in California's executive branch] may adopt a regulation that becomes effective immediately." However, that agency must immediately submit the regulation to the California Association of Tribal and State Gaming Regulators (the association) for consideration, and the association can disapprove it. Tribal gaming agency members outnumber the state representatives in the

association. Thus, if tribes desire to reopen despite the order, any emergency regulation issued by the State Gaming Agency might be immediately overturned.

Section 12 of the general compact language requires that tribes "shall not conduct Class III Gaming in a manner that endangers the public health, safety, or welfare" commits the tribes to adopt tribal health standards for food and beverage handling no less stringent than State public health standards, and permits various inspections by state or local inspectors and requires adoption of standards no less stringent federal workplace and occupational health and safety standards (and allow for federal inspections). While these provisions do not explicitly reference pandemics, they may be broad enough to bar operations during such an event, particularly to the extent they adopt federal standards by reference. For example, OSHA requires employers to furnish each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

However, even assuming reopening could arguably violate one or more compact provisions, the California compacts explicitly provide that these provisions do not subject the tribes to state authority. Instead, California's sole remedy to specifically address a breach of compact is a lawsuit. Section 13.1 contains a provision that allows for "either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief."

Such a lawsuit would involve interesting factual disputes—almost certainly involving a battle of the experts—focusing on whether operation of all or any part of a casino and associated venue operations would, in fact, endanger the public health, safety or welfare, when considering any procedures the tribe would put in place to address COVID-19, such as distance requirements and sanitizing of gaming surfaces. The tribes, moreover, may argue that the economic impact of closure may create health and safety issues that a court should consider when deciding the issue.

If such a lawsuit failed, the state may try to use its police power to address the health and safety concerns, by, for example, shutting down traffic in or out of tribal lands. Such an effort would likely be immediately met by a legal challenge from the tribe. The tribe would argue that such state actions infringe on the sovereign status of the tribal lands. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (holding that the exercise of state authority may be barred if it "unlawfully [infringes] on the right of reservation Indians to make their own laws and be ruled by them."). See also *United States v. Washington*, 827 F.3d 836, 852 (9th Cir. 2016) (holding that state could not maintain culverts off reservation land that diminished salmon runs on tribal land to point where tribe could no longer assert guaranteed treaty fishing rights).

Additionally, individual tribal members, as citizens of the United States, would likely have standing to sue the state for infringing on their constitutional right to travel. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 497 (1999) ("the 'constitutional right to travel from one state to another' is firmly embedded in our jurisprudence") (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). It may be possible for the state to arrest those leaving tribal lands for violating the order and quarantine them, but this will be dependent on the local county in which the casino lies having a continuing stay-at-home order. See Cal. Health & Safety Code Section 120210(a) (2018); see also Cal. Health & Safety Code Section 120280 (2018). However, the expense and practical difficulties of setting up such a quarantine system, especially if multiple casinos open around the state, would make this option difficult for the state, and still liable to legal challenge.

Neither side has a decided advantage in these hypothetical legal battles. However, given the high stakes involved—both economic and as a matter of public health—it is entirely possible we may see some or all of them play out.

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