

CALIFORNIA GAMBLING CONTROL COMMISSION
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Radisson at LAX
6225 West Century Blvd., Laguna Room
Los Angeles, CA 90015

MINUTES OF JUNE 19, 2002 COMMISSION MEETING

OPEN SESSION

Chairman Hensley called the meeting of June 19, 2002, to order at 10:15 a.m. with Chairman Hensley and Commissioners Smith, Sasaki, and Palmer present. Staff Participating: Gary Qualset, Deputy Director Licensing and Compliance Division; Peter Melnicoe, Chief Counsel, Legal Division.

The Pledge of Allegiance was recited.

Commissioner Palmer moved to approve the June 12, 2002, Commission Meeting Minutes. Commissioner Sasaki seconded the motion, which was unanimously adopted.

DECISION ITEMS

1. Applications for Work Permit:
 - a. Brooks Oceana Card Room:
Forese, Nicholas
 - b. Napa Valley Casino:
Dionisio, Arnel

Deputy Director Qualset indicated that both the Division of Gambling Control and Commission staff recommend approval of the applications for a work permit for Nicholas Forese and Arnel Dionisio. Commissioner Sasaki moved to approve the applications for a work permit for Nicholas Forese and Arnel Dionisio. Commissioner Smith seconded the motion, which was unanimously adopted.

2. Applications for Key Employee License:
 - a. Sonoma Joes:
 - Conti, Mabel
 - Marsden, William

Deputy Director Qualset indicated that both the Division of Gambling Control and Commission staff recommend approval of the applications for a key employee license for Mabel Conti and William Marsden. Commissioner Palmer moved to approve the applications for a key employee license for Mabel Conti and William Marsden. Commissioner Smith seconded the motion, which was unanimously adopted.

3. Application for Key Employee License-Request for Withdrawal:
 - a. Bicycle Club:
 - Robinson, Michael

Deputy Director Qualset indicated that both the Division of Gambling Control and Commission staff recommend that the Commission approve without prejudice the request to withdraw the application for a key employee license for Item 3a, Michael Robinson. Deputy Director Qualset further indicated that the Division of Gambling Control had not begun the background investigation for Michael Robison and upon approval of the request the \$1,500.00 investigation deposit will be refunded. Commissioner Sasaki moved to approve, without prejudice, the request to withdraw the application for a key employee license for Item 3a, Michael Robinson, and to refund the investigation deposit. Commissioner Palmer seconded the motion, which was unanimously adopted.

4. Application for Renewal of State Gambling License:
 - a. Sundowner Cardroom: Charles Gardyn, A California Corporation.

Deputy Director Qualset indicated that because the Sundowner Cardroom's local license was permanently revoked by the City of Benicia, a violation of Business and Professions Code section 19917, staff recommends that the Commission take no action on the application for renewal of a state gambling license for the Sundowner Cardroom at this time, but direct staff to send a written notice to the applicant of an opportunity to request an evidentiary hearing on the renewal application before an administrative law judge. Chairman Hensley moved to approve the recommendation of staff. Commissioner Smith seconded the motion, which was unanimously adopted.

5. Applications for State Gambling License:
 - a. Bay 101: Sutter's Place Inc., A California Corporation.
 - b. Lucky Lady: Stanley Penn, Sole Proprietor.

Deputy Director Qualset indicated that Item 5a, Bay 101, was previously approved as a temporary license pending completion of the background investigation by the Division of Gambling Control. Deputy Director Qualset further indicated that the background investigation was still pending and that staff recommends another 90-day temporary approval of the state gambling license for Item 5a, Bay 101. Commissioner Smith moved to approve a 90-day temporary state gambling license for Item 5a, Bay 101. Commissioner Sasaki seconded the motion, which was unanimously adopted.

Deputy Director Qualset indicated that Item 5b, Lucky Lady, was previously approved a temporary license pending completion of the background investigation by the Division of Gambling Control. Deputy Director Qualset further indicated that the background investigation has been completed and that both the Division of Gambling Control and Commission staff recommend approval of the application for a state gambling license through December 31, 2002, the remaining term of the license, for Item 5b, Lucky Lady.

Rodney Blonien, Lobbyist, requested of the Commission that it consider approval of the state gambling license through May 31, 2003.

Commissioner Palmer moved to approve the application for a state gambling license through December 31, 2002, for Item 5b, Lucky Lady. Commissioner Smith seconded the motion, which was unanimously adopted.

6. Proposed Uniform Tribal Gaming Regulations.

There were no discussions or action taken by the Commission on Item 6.

7. Commission Policy and Interpretation of the Tribal-State Gaming Compacts, Section 4.3.2.2.

Chief Counsel Peter Melnicoe presented to the Commission, for its consideration, staff recommendations on the interpretation of Compact section 4.3.2.2. A copy of the report titled Gaming Device Licensing Under Compact Section 4.3.2.2 has been incorporated into the minutes as Attachment A.

Chief Counsel Melnicoe indicated that staff recommends that the Commission adopt as its policy the following: (1) Each tribe applying to draw gaming device licenses shall submit with its application the fee required by Section 4.3.2.2(e) of the Tribal-State Gaming Compacts for the number of licenses requested; (2) The fees paid by tribes awarded licenses shall be deposited in the Indian Gaming Revenue Sharing Trust Fund upon conclusion of the draw; and (3) Prompt

refunds shall be made of fees deposited for gaming device licenses not awarded in the draw.

Chairman Hensley joined by Commissioner Sasaki expressed concerns regarding the promptness of refunds to tribes of the fees deposited for gaming device licenses not awarded in the draw.

Commissioner Sasaki moved to approve the recommendation. Commissioner Smith seconded the motion, which was unanimously adopted.

Chief Counsel Melnicoe indicated that staff recommends that the Commission adopt as its policy the following: (1) Commission staff shall evaluate applications for gaming device licenses in accordance with the priorities set forth in Section 4.3.2.2(a)(3) of the Tribal-State Gaming Compacts and submit a recommendation for consideration by the Commission for each draw; (2) Commission staff shall establish a process in which a representative of each tribe applying for gaming device licenses in a draw will have access to all relevant information used by the Commission staff in preparing its recommendation relating to that draw and will have an opportunity to provide input; and (3) Each applicant tribe shall have the opportunity to address any issue concerning the draw to the Commission prior to the final decision of the Commission awarding gaming device licenses in the draw.

Mark Nichols, Chief Executive Officer, Cabazon Band of Mission Indians, presented comments in opposition to the recommendation.

James Kawahara, Attorney, Holland & Knight, LLP, presented comments in opposition to the recommendation.

John Currier, Chairman, Rincon San Luiseno Band of Mission Indians, presented comments in support of the recommendation.

Pauline Girbin, Attorney for the Scotts Valley Band of Pomo Indians, presented comments in opposition to the recommendation.

Jessica Taveres, Chairwomen, United Auburn Indian Community, presented comments in support of the recommendation.

Dixie Jackson, Chairwomen, Picayune Rancheria, presented comments in support of the recommendation.

Paula Lorenzo, Rumsey Indian Rancheria, presented comments in support of the recommendation.

Robert Smith, Pala Band of Mission Indians, presented comments in support of the recommendation.

Anna Kimber, Attorney, presented comments in opposition to the recommendation.

Commissioner Smith moved to approve the recommendation. Commissioner Palmer seconded the motion, which was unanimously adopted.

Chief Counsel Melnicoe indicated that staff recommends the Commission adopt as its policy that the form of any certificate issued by the Commission evidencing licensure of a gaming device or devices shall include, if requested by the recipient tribe and in addition to the State seal, space for affixing the seal or other visual authentication of the Tribe.

Commissioner Palmer moved to approve the recommendation. Commissioner Sasaki seconded the motion, which was unanimously adopted.

Chief Counsel Melnicoe indicated that staff recommends the Commission adopt as its policy that the Commission make available 2,753 gaming device licenses for draw pursuant to Section 4.3.2.2 of the Tribal-State Gaming Compacts in addition to any gaming device licenses that are surrendered to the Commission.

Commissioner Smith moved to approve the recommendation. Commissioner Sasaki seconded the motion, which was unanimously adopted.

Chief Counsel Melnicoe indicated that staff recommends that the Commission direct staff to prepare the necessary documentation for noticing and conducting gaming device licensing draws pursuant to Section 4.3.2.2 of the Tribal-State Gaming Compacts, as will provide a fair and unbiased procedure.

Commissioner Sasaki moved to approve the recommendation. Commissioner Smith seconded the motion, which was unanimously adopted.

Chief Counsel Melnicoe indicated that staff recommends that the notice to be sent by the Commission to compacted tribes concerning replacement of Sides putative gaming device licenses also include an offer permitting any tribe to surrender unused putative gaming device licenses within 30 days of receipt of the notice, in exchange for a credit or, if not possible, a refund of fees and quarterly payments remitted for those unused licenses to the Indian Gaming Revenue Sharing Trust Fund, and that the Commission make available for draw, pursuant to Section 4.3.2.2 of the Tribal-State Gaming Compacts, the number of gaming device licenses equal to the number of all unused putative gaming device licenses that were issued by Sides Accountancy Corporation and that are surrendered to the Commission within 30 days of the notice from the Commission.

Bradley Bledsoe Downes, Attorney, Dorsey & Whitney, LLP, presented to the Commission questions concerning the staff recommendation.

James Kawahara, Attorney, Holland & Knight, LLP, presented comments in opposition to the motion.

Harold Monteau, Attorney, Monteau & Peebles, presented comments in support of the recommendation.

Commissioner Smith left the meeting at 11:40 a.m.

Anna Kimber, Attorney, presented comments in opposition to the recommendation.

John Currier, Rincon San Luiseno Band of Mission Indians, presented comments in support of the recommendation.

Commissioner Smith returned to the meeting at 11:45 a.m.

Commissioner Sasaki moved to approve the recommendation. Commissioner Smith seconded the motion, which was unanimously adopted.

Bernard P. Simons, Special Council, Agua Caliente Band of Cahuilla Indians, submitted written comments to the Commission concerning Item 7, that have been incorporated into these minutes as Attachment B.

Wendy I. Schlater, Chairwoman, La Jolla Band of Luiseno Indians, submitted written comments to the Commission concerning Item 7, that have been incorporated into these minutes as Attachment C.

8. Tribal Requests for Adoption of Uniform Gaming Regulations (Compact Section 8.4.1).

Chief Counsel Peter Melnicoe presented to the Commission for its consideration the request of the Cabazon Band of Mission Indian Business Committee to adopt regulation CGCC-1 and CGCC-2 as final regulations applicable to the tribe.

Commissioner Palmer moved to adopt regulations CGCC-1 and CGCC-2 as final regulations applicable to the Cabazon Band of Mission Indians pursuant to Resolution 061702-1 of the Cabazon Band of Mission Indians Business Committee, which request immediate application of these regulations to the Tribe and waives the 30-day comment period of Section 8.4.1(c) of its Tribal-State Gaming Compacts. Commissioner Smith seconded the motion, which was unanimously adopted.

Commissioner Palmer left the meeting at 11:53 a.m.

Mark Nichols, Chief Executive Officer, Cabazon Band of Mission Indians, presented comments concerning the Commission's approval of the Cabazon Band of Mission Indians Business Committee's request.

Commissioner Palmer returned to the meeting at 11:57 a.m.

Commissioner Sasaki moved to authorize Gary Qualset, Deputy Director, Licensing and Compliance Division; to make administrative determinations of eligibility for registration under CGCC-2 of the Tribal-State Gaming Compact upon receipt of all required documents and evidence of qualification, and/or to notify the Tribal Gaming Agency if insufficient evidence is received. Commissioner Smith seconded the motion, which was unanimously adopted.

Chairman Hensley moved to adjourn the morning session. Commissioner Smith seconded the motion, which was adopted unanimously; the morning session was adjourned at 12:05 p.m.

AFTERNOON SESSION

Chairman Hensley called the afternoon session of June 19, 2002, to order at 1:15 p.m., with Chairman Hensley and Commissioners Smith, Sasaki, and Palmer present.

Staff Participating: Peter Melnicoe, Chief Counsel, Legal Division, and Herb Bolz, Senior Legal Counsel, Legal Division; and Gary Qualset, Deputy Director Licensing and Compliance Division.

Chairman Hensley left the meeting at 1:25.

PROPOSITION PLAYER REGULATIONS WORKSHOP

Commissioner Sasaki and Commissioner Smith provided opening remarks. Commissioner Sasaki emphasized that it is the intent of the Commission to have the regulations written in plain english.

Chief Counsel Peter Melnicoe and Senior Legal Counsel Herb Bolz facilitated discussions at the public workshop concerning the draft regulations for Third Party Providers of Proposition Player Services under Division 18 of Title 4 of the California Code of Regulations.

There was no action taken by the Commission during the proposition player regulations workshop.

Rodney J. Blonien, Lobbyist, submitted written comments concerning the regulations to the Commission that have been incorporated into the minutes as Attachment D.

Alan J. Titus, Attorney, Robb & Ross, submitted written comments concerning the regulations to the Commission that have been incorporated into the minutes as Attachment E.

Robert F. Moyer, Owner, San Diego Gaming Consultants, submitted written comments concerning the regulations to the Commission that have been incorporated into the minutes as Attachment F.

Edwin Marzec submitted written comments concerning the regulations to the Commission that have been incorporated into the minutes at Attachment G.

The meeting was adjourned at 3:48 p.m.

**GAMING DEVICE LICENSING UNDER
COMPACT SECTION 4.3.2.2**

**REPORT OF THE STAFF
CALIFORNIA GAMBLING CONTROL COMMISSION
JUNE 19, 2002 HEARING**

INTRODUCTION

At its meeting of June 12, 2002, the California Gambling Control Commission directed Commission staff to present further recommendations concerning Commission action to implement gaming device licensing under Section 4.3.2.2 of the Tribal-State Gaming Compacts. The remaining issues to be discussed by the Commission include procedures for conducting gaming device license draws under Compact section 4.3.2.2(a)(3), the form of the gaming device license, calculation of the statewide limit on gaming device licenses, and the handling of claims for refunds of payments made by compacted tribes for unused putative gaming device licenses issued by the Sides Accountancy Corporation.

The most recent gaming device census conducted in November of 2001 by the Division of Gambling Control in the Department of Justice determined that 45 of the 62 compacted tribes were then operating gaming devices, which in the aggregate numbered 40,883. In addition to the basic entitlement under Compact section 4.3.1 of 350 gaming devices or the number of gaming devices in operation by a tribe on September 1, 1999, the Sides Accountancy Corporation issued 29,398 putative gaming device licenses to 38 compacted tribes in draws conducted between May 15, 2000, and February 28, 2001.¹

PROCEDURE FOR DRAWING LICENSES

Section 4.3.2.2(a)(3) of the Tribal-State Gaming Compacts prescribes priorities for award of gaming device licenses in draws conducted by the California Gambling Control Commission. Compact section 4.3.2.2(e) requires payment of a “non-refundable one-time pre-payment fee” in the amount of \$1,250 per gaming device being licensed.

¹ By letter dated March 16, 2001, the Governor’s Chief Deputy Legal Affairs Secretary Shellyanne Chang and Chief Deputy Attorney General Peter Siggins directed Sides Accountancy Corp. and its principal to cease conducting draws and to remit records of prior draws to the California Gambling Control Commission.

Because priorities must be applied in awarding gaming device licenses, there is a necessity to dispel any possible appearance of unfairness or impropriety. This is best accomplished, in the view of staff, by a process that is “transparent” to all applicants and, therefore, must offer those tribes adequate opportunity to both review and comment to the Commission on the application of the Compacts’ priorities.

The \$1,250 per-device fee required by Compact section 4.3.2.2(e) is payable not for participation in a license draw, but rather for the award of a license. Thus, the Commission could require successful applicants to deposit these fees at the conclusion of the draw or within a short time thereafter. This procedure would be similar to that employed in most auctions. The gaming device draw process is similar to an auction in that, although the per-device fee is fixed, there may be uncertainty as to whether an applicant for gaming device licenses will receive the number requested in the draw.

Under the now-defunct Sides gaming device draw process, no statewide limit was imposed and, consequently, it was axiomatic that all applicants would be awarded as many putative gaming device licenses as were requested. The Sides process required all participants in a draw to deposit the \$1,250 fee for gaming device licenses as a condition of participating in the draw.

The Commission would likewise have the option to require each tribe participating in a draw under Compact section 4.3.2.2(a)(3) to deposit the \$1,250 per-device fee with the Commission as a condition of participating in the draw. The Commission could make refunds of unused fees to unsuccessful and partially successful applicants.

On balance, Commission staff believes that a requirement that the fees be deposited in advance of the draw would best serve the interests of the draw participants by avoiding potential delays and confusion that could be caused by participants that are unable to make timely remittance of the fees.

Recommendations:

- The Commission adopt as its policy *FIRST* that each tribe applying to draw gaming device licenses submit with its application the fee required by Section 4.3.2.2(e) of the Tribal-State Gaming Compacts for the number of licenses requested; *SECOND* that the fees paid by

tribes awarded licenses be deposited in the Indian Gaming Revenue Sharing Trust Fund upon conclusion of the draw; and *THIRD* that prompt refunds be made to unsuccessful and partially successful applicants for fees deposited for which gaming device licenses are not awarded in the draw.

- The Commission adopt as its policy *FIRST* that in each draw the Commission staff shall evaluate applications for gaming device licenses in accordance with the priorities set forth in Section 4.3.2.2(a)(3) of the Tribal-State Gaming Compacts and submit a recommendation for consideration by the Commission; *SECOND* that Commission staff shall establish a process in which a representative of each tribe applying for gaming device licenses in a draw will have access to all relevant information used by the Commission staff in preparing its recommendation relating to that draw and will have an opportunity to provide input; and *THIRD* that each applicant tribe shall have the opportunity to address any issue concerning the draw to the Commission prior to the final decision of the Commission awarding gaming device licenses in the draw.
- The Commission directs staff to proceed to prepare the necessary documentation for noticing and conducting gaming device licensing draws pursuant to Section 4.3.2.2 of the Tribal-State Gaming Compacts, as will provide a fair and unbiased procedure.

THE FORM OF THE GAMING DEVICE LICENSE

Licensing under Section 4.3.2.2 of the Tribal-State Gaming Compacts is for the limited purpose of implementing allocation of gaming devices among the tribes up to the statewide limit of Compact section 4.3.2.2(a)(1). There is nothing in the Compacts which suggests that licensing under these provisions was intended to supplant the regulatory authority of each individual Tribe and its tribal gaming agency over the Tribe's gaming operation and the gaming activities conducted by the Tribe.

Recommendation:

In recognition of the limited nature of the State's role in licensing tribal gaming devices, staff recommends that the form of any certificate issued by the Commission evidencing licensure of a gaming device or devices include, if requested by the recipient tribe and in addition to the State seal, space for affixing the seal or other visual authentication of the Tribe.

STATEWIDE LIMIT ON GAMING DEVICE LICENSES

Compact section 4.3.2.2(a)(1) establishes a limit on the total number of gaming device licenses issued under the Tribal-State Gaming Compacts to compacted tribes. The authorization for gaming device licenses is in addition to a basic entitlement under Section 4.3.1 of the Compacts,² which authorizes each compacted tribe to operate up to 350 gaming devices or such greater number as the Tribe operated on September 1, 1999 (“grandfathered devices”).

Compact section 4.3.2.2(a)(1) reads as follows:

“(1). The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.”

Ambiguity in these provisions has produced a number of differing interpretations. Initially, in late 1999 there arose a public difference of opinion between William Norris, Special Counsel to the Governor for Tribal Affairs, and the Legislative Analyst concerning the limit on the number of total gaming devices authorized for all Tribes by the Compacts.³ Subsequently, various Tribes and tribal organizations have urged their own numbers.

The statewide limit on gaming devices remains one of the most contentious issues of interpretation affecting the Tribal-State Gaming Compacts. The language of Compact section 4.3.2.2(a)(1) is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved in the renegotiation that may be commenced under Compact section 4.3.3 in March of 2003. However, implementation of the draws contemplated by the Compacts in the interim requires the Commission to deal with the language.

² “Sec. 4.3.1 The Tribe may operate no more Gaming Devices than the larger of the following:

- (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or
- (b) Three hundred fifty (350) Gaming Devices.”

³ In his last known writing on this subject, a letter dated May 9, 2000, to Michael Sides, CPA, jointly authored with Chief Deputy Attorney General Peter Siggins, Judge Norris announced a statewide gaming device cap of 45,556, which, he determined, included both the license pool of Compact section 4.3.2.2 and the entitlement under Compact section 4.3.1 to 350 gaming devices or the greater number operated by a Tribe on September 1, 1999.

Calculation: Factual Elements

In order to apply the formula of Compact section 4.3.2.2(a)(1), it is necessary to know the following factual elements concerning the gaming status of tribes as of September 1, 1999:⁴

- 1) 84 of the then 107 federally recognized tribes either had no gaming devices or operated fewer than 350
- 2) 68 of these tribes had no gaming devices
- 3) 16 of these tribes operated gaming devices which totaled 2,849

First Element

The first element of the formula is 350 multiplied by the number of Non-Compact Tribes as of September 1, 1999.⁵ The 84 tribes that either did not have gaming devices or operated fewer than 350 are within the Compact's definition of a "Non-Compact Tribe" (Compact sec. 4.3.2(a)(i)).

350 multiplied by 84 = 29,400.

The TASIN group (Tribal Alliance of Sovereign Indian Nations) arrives at a different number by ignoring the Compact definition of "Non-Compact Tribes." TASIN argues that all 107 tribes that were federally recognized on September 1, 1999, are "Non-Compact Tribes," because no tribe had the current Compact on that date. The TASIN calculation is, therefore, as follows:

350 multiplied 107 = 37,450

There are no other known views of the first element of the formula.

Second Element

The second element is "the difference between 350 and the lesser number authorized under Section 4.3.1." This language is ambiguous.

The words "lesser number" can be construed to refer to the 2,849 gaming devices operated on September 1, 1999, by the 16 compacted tribes that operated fewer than 350 gaming devices. The reference to "350" can be

⁴ These numbers were developed by Commission staff. There are differences in these numbers reflected in early estimates by the Legislative Analyst and others. Commission staff has relied on the disclosures made by each tribe in its Compact.

⁵ Judge Norris appears to have intended to refer to 350 multiplied by the number of non-gaming tribes on September 1, 1999. Because the term "non-compact tribes" was used instead of "non-gaming," that intent is not expressed in the Compact language.

interpreted to refer to the 5,600 gaming devices that would be operated by those 16 tribes if they each operated 350.

Using these assumptions the calculation is $5,600 - 2,849 = 2,751$

The above calculation is consistent with both Judge Norris' apparent approach to this portion of the formula, as well as that taken in a letter of the Legislative Analyst letter to Senator Burton dated December 6, 1999, based upon assumptions requested by Senator Burton (LAO-Burton interpretation). Commission staff believes it is the correct approach to this language.

An alternative interpretation of the second element of the formula of Compact section 4.3.2.2(a)(1) was used by the Legislative Analyst in her November 9, 2000 letter to Bruce Thomson⁶ and is implicit in various of her communications, other than the December 6, 1999 letter to Senator Burton). The TASIN group and tribal attorney Tony Cohen have also posited this interpretation as well. They interpret the second element of the formula to apply not only to the 16 tribes that actually operated gaming devices on September 1, 1999, but also to include the 68 tribes that did not operate any gaming devices on September 1, 1999.

This interpretation yields a far higher number than the LAO-Burton interpretation, because it subtracts the 2,849 gaming devices operated by the 16 tribes on September 1, 1999, from the product of 84 [16 + 68] multiplied by 350.

The full calculation is $84 \times 350 = 29,400 - 2,849 = 26,551$

Commission staff believes this interpretation is erroneous, because the words "the lesser number authorized under Section 4.3.1" cannot be deemed to refer to non-gaming tribes. Simply put, there is no authorization under Compact section 4.3.1 to operate zero gaming devices.

The construction that the license pool is comprised of foregone entitlements under Section 4.3.1

An alternative interpretation the above language of Compact section 4.3.2.2(a)(1) is that the gaming device license pool is comprised of gaming device entitlements under Compact section 4.3.1, which Non-Compact Tribes⁷ have expressly or impliedly foregone.⁸ This interpretation assumes

⁶ The Legislative Analyst did not provide the reasoning behind her numbers in her various letters. Subsequent conversations with the LAO staff have revealed use of several flawed factual and other assumptions that are not pertinent to this analysis.

⁷ The term "Non-Compact Tribe" is defined by Compact section 4.3.2(a)(i) to mean a tribe that operates fewer than 350 gaming devices (including uncompact tribes that do not operate any gaming devices).

that uncompacted tribes have permanently waived their right under Compact section 4.3.1 to deploy up to 350 gaming devices following entry into a Compact with the State. That assumption contradicts the express language of Section 4.3.1. In addition, this interpretation assumes a mechanism for transferring licenses foregone under Section 4.3.1 into the license pool of Section 4.3.2.2(a)(1). There are no provisions in the Compact that either provide for or recognize such a transfer.

Commission staff is, therefore, of the view that the language of Compact section 4.3.2.2(a)(1) does not support the interpretation that the gaming device license pool consists of foregone entitlements under Compact section 4.3.1.

Gaming Device License Pool Size

Combining the two elements of the formula of Compact section 4.3.2.2(a)(1), discussed above, establishes the size of the gaming device license pool.

Using the factual elements set forth above, the LAO-Thomson/Cohen formula yields a license pool of 55,951 and the TASIN formula produces a license pool of 64,283.

For the reasons discussed, the interpretation recommended by Commission staff is that taken in the LAO-Burton letter, which yields a total gaming device license pool of 32,151. This number exceeds the number of putative gaming device licenses previously issued by the Sides Accountancy Corporation by 2,753.

Recommendation:

- The Commission make available 2,753 gaming device licenses for draw pursuant to Section 4.3.2.2 of the Tribal-State Gaming Compacts based upon the above analysis, in addition to any gaming device licenses that are surrendered to the Commission.

REFUND OF FEES PAID FOR UNUSED SIDES “LICENSES”

⁸ The source of this interpretation is Judge William Norris (see e.g., the May 9, 2000 letter from Judge William A. Norris and Chief Deputy Attorney General Peter Siggins to Michael E. Sides, CPA).

Because the draws and, hence, the purported gaming device licenses issued by Sides Accountancy Corporation were inconsistent with the Compacts (see prior staff analysis distributed at the May 29, 2002, Commission meeting), it is the view of staff that tribes that participated in the Sides draws and that acquired Sides licenses which have not been used should have the option of surrendering them and receiving reimbursement for payments made in the form of a credit against future payments under Compact section 4.3.2.2(a)(2) or, if not possible, a refund. Unlike tribes that put gaming devices into operation in reliance on the Sides license draws, any tribe that obtained Sides' purported licenses, but did not place gaming devices in operation under the purported licenses obtained no benefit from them. In the opinion of Commission staff, these tribes with unused Sides licenses cannot be made subject to the payment obligations of Compact section 4.3.2.2(a)(2) if they choose to surrender those licenses rather than accept valid gaming device licenses from the Commission.

Recommendation:

- That the notice to be sent by the Commission to compacted tribes concerning replacement of Sides putative gaming device licenses (with licenses issued by the Commission) also include an offer permitting tribes that desire to do so to surrender unused putative gaming device licenses within 30 days of receipt of the notice, in exchange for a credit or, if not possible, a refund from the Commission of fees and payments remitted therefor.
- That the Commission make available for draw, pursuant to Section 4.3.2.2 of the Tribal-State Gaming Compacts, a number of gaming device licenses equal to the number of all unused putative gaming device licenses that were issued by Sides Accountancy Corporation and that are surrendered to the Commission within 30 days of the notice from the Commission.