

Laying Ground Rules for Negotiating Successful Indian Gaming Compacting Beyond 2020 in

Oklahoma

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Abstract

Respect is a non-negotiable given of the negotiating process where each party is required to demonstrate recognizing all other party's sovereignty and worth. Bluntly stated, if you are unwilling to respect another party then good-faith negotiations need to be stayed...perhaps something other than negotiations should occur (usually the Best Alternative to a Negotiated Agreement ("BATNA")). Do the words "the State may readily locate and inspect them at any time" ("Tribal," p. 8) detract from one party's non-negotiable needs? Are stipulations that any single party's unilateral demand, or option that unilateral changes in a compact be allowed really necessary? This paper illustrates a few of the ways to identify bad-faith negotiating elements, so to prevent them from sneaking into a future negotiation; there are also a few of the examples where the State of Oklahoma may not always act in good faith - by appearing to misrepresent, or by failing to notoriously state significant side-effects of the state's advertised intentions.

According to page two of the cited [Oklahoma Gaming Compliance Unit \(OGCU\) Annual Report Fiscal Year 2015](#), since its implementation in 2005, the current compact has grown state annual revenues from \$14.2 mil to 2015's \$128.4 mil. This paper addresses *negotiating* techniques and concepts for some appropriate words and actions capable of sustaining the upward trend that benefits all sovereigns involved in the 2020 Oklahoma Model State-Tribal Gaming Compact.

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What are the most legitimate sources of bargaining power? Should John Boehner's observation that "everything you want in life comes with a price" be a reasonable conclusion, or merely a good 'bad example' of negotiating techniques that this country can improve on? Is that ransoming (economic or otherwise) the well-being of a people and is it a legitimate negotiating tool for a good faith bargain in any context? There are ways to insure that every statement made during the negotiations for the 2020 Oklahoma Model State-Tribal Gaming Compact will be inspected for any duress or coercion so that the parties involved (as well as the parties affected – all of us) have access to only the superior benefits found only by instituting superior changes in the current agreement.

Successful negotiation for one's self involves being happy with how things turn out, but as a fiduciary duty in negotiating on behalf of others, negotiation requires a thorough understanding of details derived from performing close inspections, and then appraising extrinsic and intrinsic values. Statistician W. Edwards Deming points out that we get what we inspect over what we expect every time. Glass beads being traded for Manhattan Island sounds like the deal of a lifetime and a believable story, but closer inspection by [KnowledgeNuts \(2013\)](#) reveals that the Carnarsee Tribe of Brooklyn took payment from the Dutch for the island the tribe knew to be actually owned by the Wappinger Confederacy – thus on deeper inspection it ironically turns out that the undisputed 'capital of deal-making' has a land patent that is initially decorated with a material misrepresentation (fraud).

This year one of the negotiations with voters that the State of Oklahoma allowed on the ballots was a tax increase proposal represented to end a decade old teacher pay freeze;

intrinsically the negotiation offered a \$5,000 teacher pay raise ([KFOR, 2016](#)) coupled to a less advertised new ‘cap of teacher benefits (to help quickly eat-up large portions of the same \$5,000 down the road),’ extrinsically the teachers would be needing part of their new higher salary to pay for their new increased taxes as well...not exactly a win-win. A death penalty question also made it to the ballot in a state that can’t find extra pay for its educators, but a state that has the roughly 0.6% of its all-in annual state budget available that [Goss \(“Retain,” 2016\)](#) estimates is a premium that death penalty states spend not to have non-death penalty state status. This is an example that there are many things that have a value that defy a cursory pencil and paper analysis that become respected mainly as an outcome of the inherited respect for other parties.

It is important to be careful in a negotiation that statements be *related in unthreatening* ways to develop the largest possible pool of forward looking conclusions. Looking at two examples: (1) It is not immoral to ask another for money, nor is it wrong to keep a secret, but it may be improper to ask for money to keep a secret. (2) There is no proof that killing death-row defendants makes the public any smarter or safer than a traditional education would, but there is proof that more than 75% of all incarcerated inmates have less than a high school diploma...there are many different ways to intentionally or unintentionally harm a negotiation when facts are connected incorrectly or insensitively when people have widely varied opinions on how punishments should vindicate the laws that are violated- so all widely varied opinions need to be respectfully considered.

Virtues and Vices

A moral contradiction to consider is that of virtues and vices. The main characteristics that these two words share is that they are both an outcome of deliberate decision, and

recognized attributes of character. Controlling our desires “and of remaining master of ourselves” (I John 2:16) is all that separates otherwise honest people from straying from honest legacies. As time passes, the less-acceptable methods for keeping score in life become more-acceptable in a push to the prize of being recognized as a winner. To the end that winning is important, keep in mind that there was at least one winner- that there was at least one shuffleboard champion travelling on the RMS Titanic.

Positive and Negative Negotiating Leverage in Bargaining

Will all parties negotiating be better for dealing with each another - than if even one party is better off for having nothing to do with the others? Power rooted in consequences is no power at all. The flip-side of the dichotomy of ‘everything coming with a price’ is illustrated with different words credited to another previous Speaker of the House, Sam Rayburn, “A jackass can kick a barn down, but it takes a carpenter to build one.” [Kirgis](#) (2014, p. 74) relies on Richard Shell to draw a distinction between two forms of leverage [used in negotiations] described as “negative leverage” and “positive leverage.”

Positive leverage will satisfy a counterparty’s interests; true also is that positive leverage will usually satisfy every party’s interests. Pick a virtue word and it can probably be illustrated within a positive clause in any negotiation; some examples from just the letter ‘C’ alone, ([according to The Virtue Project Website](#)) include “compassion,” “confidence,” “consideration,” “courage,” and “courtesy.”

Positive leverage encourages an exchange of productive activities: [Choctaw](#) (“Tribal State,” p. 23) shows several positive exchange techniques, perhaps the most jointly beneficial

coming in the phrase: “Should the Tribe request, the OSBI shall conduct the background investigation on the same terms as for gaming employees...”

Negative leverage imposes costs on a counterparty. Pick a vice-word and it can probably be included as being a predictor of a consequence as well as the actual cause of a negative negotiating outcome. Vices are what society decides they are, on any given day and in any given place; ranging from taboo to criminal, these rude, degrading and arbitrarily immoral perceptions have little place in mutually beneficial negotiations.

Retaliation- although threats are never positive, predictions and warnings may well be positive leverage due to realization that any party’s hindrance to specific performance, under negotiated terms, stands to reduce the expected (or exceptional) benefits for all parties.

Warnings are indications of costs to be shared while threats are the symbols of sole burdens that are to be borne by those who may be refusing to succumb to duress.

Involuntary Versus Coercive

The voluntary act of taking advantage of another’s vulnerability does not become a coercive act without a deliberate decision to override that person’s will...the deliberate decision to ignore one’s moral duties not to harm. Although this does raise questions about whether weaker parties can void transactions based on duress or unconscionability, for the purposes of creating the 2020 Oklahoma Model State-Tribal Gaming Compact the point is to be aware that the Tribe’s may suffer from a disparity in bargaining power with the State, so Oklahoma may want to acknowledge their responsibility not to exercise supreme forms power.

Mission, Vision, Goals, and Objectives

Previous compacts have omitted stating the *mission* for compacting, which would be to raise funds for both the Tribes and the State of Oklahoma – Say So...and keep the mission that simple; whenever an impasse arises up or down the negotiating path, there is always a guidance and precedent found by referring to the jointly acknowledged mission. The vision examines how the compact looks, feels, and holds-up as a future successful tool – the vision is an abstractly stated view of what needs to have been done so that the mission will likely get accomplished.

Objectives are required to create the goals that define measurement points- points that are references to see how progress is coming along and where the limited resources of the State and the Tribes might be best (temporarily or permanently) focused to ‘get or stay’ on track. It is important that each developed *goal* is time phased, measurable, relates to a standard, and displays a realistic bounds of behavior: “By 2023 (and for no less than every three years thereafter) the State and the Tribes will have polled more than 20,000 distinct casino visitors about what they find most and least appealing about their casino visits, will have isolated the top five traits that describe both the most and least appeal for visiting Oklahoma Indian casinos, will devise no less than three possible courses to maintain or improve upon these perceptions, and will concur on at least one action to be taken to promote or change each identified trait as jointly agreed, jointly mediated, or as jointly decided by the gamble of a single coin-toss.”

Oklahoma and Tribes must have a value proposition to compete with the future of fantasy football, internet gaming in general, and advances that bordering states make in understanding valuable lost revenue by obstructing class III gambling. What negotiable points will make our state’s Indian casinos more desirable than any alternatives, to as many guests as possible?

What is the Best Management and Marketing Plan?

So far the preferred form of casino ownership has been tribal; is it really that ‘out of the park’ that the State and the Tribes could form a joint corporation in class III gaming to more cement their inter-fiduciary reliance? Creating the organizational chart for an endeavor like that might baffle even the Seven Sages of Greece, but there is plenty to be learned from both the successes and failures in trying. If nothing else, endeavors like that tend to force undeniably positive outcomes in defining the qualifications, experience, skills and roles of the management team in meeting the expectations of the external stakeholders (the rest of us).

The days of tossing a couple of slot machines into a converted warehouse and letting a limitless supply of people exchange a few hours statistically improbable expectations for a few ATM receipts are quickly coming to a close. Credit card based internet gambling allows people to exchange money one may not have (ever) for instantly gratifying dis-gratification needs, and perhaps for lesser and less-rare anonymous home-based patrons, perhaps in unobservable gambling stupors, perhaps too intoxicated to be allowed into a public gaming forum, perhaps comfortably clad in pajamas or less. Competing will require some supreme combined pricing, promotion, public relations, and social media efforts to contend for the diminishing present and future (earned and unearned) dollars of a diminishing middle class, as well as enticements to attract the attention of the necessarily thrifty once-a-month social security, disability, and other retirement based eternally hopeful fixed income check-getters.

Rationally Tying Fees to Purposes

The state of Oklahoma’s gambling compacts allow for collecting fees related to how much people were willing to spend, win, or lose gambling in Indian casinos using a fixed and

long-term formula, yet it is not clear if the state of Oklahoma collects proportional fees related to how much people are willing to spend, win, or lose speculating on energy production and related services. According Reuter's writers Cohen, & Schneyer (2016, para. 1) Oklahoma kept in place "some of the lowest taxes on oil and gas production in the United States – [a break worth \\$470 million in fiscal 2015 alone](#)." Oklahoma's energy tax rates, as low as one percent, pale in comparison to North Dakota's 11.5% average similar tax. Though an energy price bust is blamed for a failure to change energy tax rates now, when oil was booming at the more than doubly priced \$100 a barrel mark, Oklahoma per-student spending rate didn't capitalize in any recognizable ways on the energy producing winner's speculations. As bad as that looks, a [governing \(n.d.\)](#) webpage further contrasts that North Dakota is now spending more than \$12,000 per student with a 3.6% spending increase between 2010 and 2014, while Oklahoma spends less than \$8,000 per student due to an 8.7% per-capita reduction in spending for the same period.

As energy costs and prices have been shown to be no more or no less predictable than the casino's payouts to an arbitrary patron, in an arbitrary casino, on any arbitrary day, it may make sense that the two industry's tax-rates become significantly and similarly connected to Oklahoma's educational future in compacting; in regarding gambling with our children's futures.

The Marijuana Bonus and Recognizing New Value Propositions

The cash-strapped state of Oklahoma has a chance to use compacting to capitalize on the legalization craze of marijuana ("pot") by redefining and expanding the allowed purposes of Indian land 'smoke shops' within the same document. The federal government's Major Crimes Act (1885) includes only the crimes of murder, manslaughter, rape, assault with intent to kill,

arson, burglary and larceny- and therefor implicitly allows these jurisdictions to sell pot (in the same light that gambling is allowed by exclusion) on sovereign tribal lands. By agreeing to and compacting for the legalization of the sale of pot on sovereign tribal lands, Oklahoma will benefit from the *existing infrastructure* needed to oversee a vice, regulate a vice, and capitalize on the sin-taxes involved with the implementation and execution of selling the vice. The new value proposition will encourage and extend the potential gaming audience, the ‘baked’ audience might gamble less frugally, and big winners might be encouraged to celebrate and share in comradery: those things that a pound or two of pot can be productive of.

Conclusion

I have tried to demonstrate that the definitions of positive leverage in negotiations and to introduce that the use of positive leverage in negotiation is all that is required to produce a compact that is capable of teaching all of us to improve on the past practices of elevating the needs of energy companies and lawyers above the needs of educators and school children; state-tribal compacting can be re-examined even in new contexts, as well as suggesting (as OU Law professors elude to in their peacemaking lectures) that the walk-away point in a negotiation can be ‘in the practices we choose to no longer accept’ instead of ‘the parties we choose to no longer associate with.’

Based on Colorado’s demonstrated history in collecting recreational taxes ([9news, 2016](#)) on the sale of Marijuana, Oklahoma could ultimately discover an average increase of 1.3% of *all* general tax collections (versus the proposed and failed 0.5% of merely a sales tax collection increase). Additional work may be required to repeal a free lunch (attractive as it might be after rolling and smoking a ‘fatty’) it is probably time to introduce the energy lobby to their additional

obligations to Oklahoma's future, by tying state gaming revenues in tandem to state energy tax rates.

If Oklahoma comes to realize that anyone worth putting-to-death today will be equally worth putting-to-death 10 years from now, a 10-year moratorium on the death penalty could add another 0.6% overall tax collections bonus to the previous 1.3% pot sales overall tax collections bonus; with energy company's gambles being taxed a rate consistent (or at least proportional) with tribal gambling tax rates, there should be more than enough money to increase education funding by more than 10% over the next four-years, with plenty of money left over to subsidize the lawyers. The lawyer subsidy would be justified in the same way that we pay farmer's for not needing to plant fields, or dairymen for not needing excess milking cows, because a lawyer's income prospects suffer every time the state changes something that makes our laws less repressive and our civil rights more enjoyable without professional legal help. Remember, the mission is raise funds (win-win-win-win-win for all of the rest of us).

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