



Disputes Over Tribal Gaming Compacts May Reach Supreme Court

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A growing number of disputes over Indian gaming compacts may increase the likelihood that the U.S. Supreme Court will revisit a landmark 1996 decision which allows states to assert sovereign immunity to avoid bargaining with gaming tribes.

The Pojoaque Pueblo of New Mexico is suing Republican Governor Susana Martinez for allegedly failing to negotiate in good faith to renew the tribe's gaming compact which expired June 30.

In Florida, key provisions of the gaming compact of the Seminole Tribe, which was involved in the historic ruling by the Supreme Court 19 years ago, expired August 1.

Although the Seminoles have not sued Florida Governor Rick Scott, negotiations have come to a grinding halt and a resumption of talks is uncertain.

Tribes in Arizona, Connecticut, South Dakota and Wyoming also have met resistance from governors in negotiating gaming compacts.

"Certainly, states have tried harder to get a greater percentage of tribal gaming revenue. This has been an increasing problem," said Penny Coleman, a former general counsel of the National Indian Gaming Commission.

The Pojoaque Pueblo claims New Mexico is demanding 10.5 percent of the tribe's gross gaming revenue, or more than 20 percent of its net profits, before agreeing to renew its gaming compact.

That same amount was agreed by several New Mexico tribes which inked new compacts with the state earlier this year, but the Pojoaque said it cannot be justified by accompanying exclusivity provisions because New Mexico's commercial and tribal gaming market is so crowded.

Frustrated by its negotiations with New Mexico, the Pojoaque Pueblo Tribe last year reached out to the U.S. Department of the Interior.

The Indian Gaming Regulatory Act of 1988 (IGRA) allows tribes to take compact disputes to the Interior Department if a federal judge decides the state is not negotiating in good faith.

But in October 2014, U.S. District Judge James A. Parker of Albuquerque upheld New Mexico's objection to the tribe's compact proposal to the Interior Department.

The judge's opinion suggested tribes are caught in a Catch-22 situation.

Despite the IGRA provision, the Supreme Court's 5-4 decision in *Seminole Tribe of Florida v Florida* in 1996 does not allow federal courts to conclude a state has negotiated in bad faith if the state asserts its sovereign immunity under the 11th Amendment of the U.S. Constitution.

Scott Crowell, a prominent tribal gaming attorney in Arizona who is representing the Pojoaque Pueblo tribe, said the Supreme Court's decision in the Seminole case has allowed states to negotiate with impunity.

"The distortion of leverage that has come out of Seminole has resulted in dozens of compacts with illegal provisions improperly taxing tribal gaming revenue," Crowell said.

"One of the major motivations for the tribe to pursue this litigation is to restore the leverage at the negotiating table that Congress intended."

Crowell represented the Rincon Band of Luiseno Indians in a historic 2011 case in which the 9th U.S. Circuit Court of Appeals in San Francisco ruled California could not force the tribe to pay 15 percent of its casino revenue into the state's general fund.

Crowell said the similarity of the New Mexico case to Rincon is that the state is violating IGRA by using compact negotiations as a means to tax tribal gaming revenue.

"What's different is that tribes in California have exclusivity (in the gaming market)," Crowell said. "In sharp contrast, New Mexico has a completely saturated gaming market where you have 20 tribes competing against one another and competing against six non-Indian owned racinos in urban areas. The suggestion that New Mexico gaming tribes have exclusivity is absurd."

After losing last year in federal district court, the Pojoaque Pueblo appealed to the 10th U.S. Circuit Court of Appeals in Denver, which is scheduled to hear arguments in the case near the end of September.

In the meantime, U.S. Attorney Damon Martinez of New Mexico (no relation to the governor) has said his office will not close the Pojoaque Pueblo's casino operations while the appeals court mulls the tribe's lawsuit against the governor.

But the Santa Clara Pueblo Tribe of New Mexico has complained the U.S. attorney's decision has given the Pojoaque Pueblo "a huge competitive advantage," and has asked for their casinos to be shuttered.

Joseph Talachy, governor of the Pojoaque Pueblo Tribe, said the complaint by the Santa Clara Pueblo tribe was based on "miscommunication" and he claims other tribes in New Mexico also are unhappy with their gaming compacts.

"We went the federal route because we weren't getting anywhere with the state," Talachy said.

"Over the last two years, Class III gaming in New Mexico has declined and yet the state wants to charge the tribes more."

The Pojoaque Pueblo followed up with a second lawsuit last month, accusing the New Mexico Gaming Control Board of illegally interfering with its vendors by deferring action on their license renewals in the wake of the compact's expiration.

Michael Lonergan, press secretary for Governor Martinez, described the tribe's lawsuit as an attempt to intimidate state regulators.

"The simple truth is that Pojoaque Pueblo is operating in violation of state and federal law, and they want to play by a different set of rules than other New Mexico tribes," Lonergan told GamblingCompliance in an email.

"Neither the state nor the governor are going to be bullied into a position that would harm the state and

punish every single other gaming tribe that has chosen to negotiate in good faith and operate legal gaming establishments in accordance with an adopted compact."

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