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## Feds May Throw Regulatory Wrench In Cuomo Casino Plans

14 Nov, 2013

**Dave Palermo, GamblingCompliance**

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*Federal regulators may stymie New York Governor Andrew Cuomo's ambitious plan to launch a commercial casino industry, while promising American Indians regional zones of exclusivity to operate their own casinos, legal experts say.*

Seven casinos could be built in New York under a **plan by Cuomo to mesh commercial gambling with nine casinos** operated by three tribes that, combined, generate nearly \$1bn a year, most of which goes to fund their tribal governments.

Cuomo's plan, approved by legislators and voters in a November 5 referendum, is viewed as a model for cash-strapped governors seeking to break the promised exclusivity enjoyed by most tribal casinos, which are exempt from state taxes.

Tribal and commercial casinos currently share markets in Mississippi, Iowa, Michigan, New Mexico and elsewhere. Florida lawmakers are **contemplating introducing casino-resorts** in a state-wide market dominated by the Seminole Tribe and, to a lesser degree, the Miccosukee.

"Governor Cuomo figured out a way to satisfy tribes and yet get his own piece of the pie," said Jeremiah Murphy, a consultant on tribal-state compacts.

"The next place to look for something similar is Florida, where it seems everything is on the table."

But the U.S. Department of Interior and Bureau of Indian affairs is not expected to look favorably on Cuomo's effort to amend a tribal-state regulatory compact with the Oneida Indian Nation.

Indian law experts believe Interior will reject the amended compact because it includes such non-gambling issues as taxes and land claims. The Indian Gaming Regulatory Act (IGRA) generally limits compact negotiations to the scope and regulation of gambling.

Seven tribal attorneys, some of whom spoke on the condition of anonymity, told GamblingCompliance that Interior will reject the Oneida agreement or demand that it be restructured.

"If this agreement is presented to Interior as a gaming compact [amendment] it will be rejected," said George Skibine, a former Interior official and attorney with Dentons law firm.

"I don't think there is any way Interior is going to approve it because it would create a precedent that would tell other states they are free to include treaty negotiations, fishing rights and other issues in a gaming compact."

Attorneys also questioned whether U.S. Assistant Secretary for Indian Affairs Kevin Washburn would approve an amended Oneida compact calling for a ten-county exclusivity zone and 25 percent revenue share, terms similar to those rejected by federal officials in a proposed compact with the Mashpee Wampanoag Tribe of Massachusetts.

"If [Interior] wants to stay consistent with Massachusetts they have to turn it down," one attorney said.

Meanwhile, the United South and Eastern Tribes, an alliance of 26 Indian

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### U.S. Regulators Urge Cautious Approach To Interstate Compacts

30 Oct, 2013

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governments, last week approved a resolution asking that Interior reject the compact because it prohibits the Cayuga Nation from gambling on its tribal lands, located within Oneida's zone of exclusivity.

Some tribal attorneys also believe Cuomo agreements settling revenue sharing disputes with the Seneca Nation and St. Regis Mohawk may constitute amended tribal-state compacts subject to Interior approval.

State regulators disagree.

"The Seneca, St. Regis Mohawk and Oneida agreements do not require Department of Interior approval," said Lee Park, spokesman for the New York State Gaming Commission.

"However, the stipulation to end the litigation regarding the Oneida compact does require [Interior] approval, which is pending."

Seneca and St. Regis Mohawk did not respond to requests for comment.

The Mohawk and Seneca nations have had regional exclusivity and revenue sharing since they signed tribal-state compacts in 1999 and 2001, respectively. However, in recent years they began withholding payments, claiming their exclusivity was being violated by racetrack slots.

Oneida, which has had a compact with New York since 1993, never agreed to a revenue share until its agreement with Cuomo.

A former Department of Interior attorney said he does not believe Seneca and St. Regis settlements constitute amended compacts subject to the agency's scrutiny.

"Tribes and states often get into disputes over compact issues," said the attorney, who requested anonymity.

"We rarely get involved. Once Interior approves initial compacts, disputes become an issue between states and the tribes."

But several attorneys said the settlement agreements, if not the compacts, could be scrutinized by the National Indian Gaming Commission (NIGC), particularly the Oneida and St. Regis pacts that condition extension of the compacts to settlement of land claims.

NIGC spokesman Mike Odle said the agency has no jurisdiction in the matter.

Some lawyers disagree.

"Indeed it does," attorney Scott Crowell said of NIGC's authority.

"Remember NIGC ordered that Fond du Lac [Band of Lake Superior Chippewa] **cease and desist** in making payments to the city of Duluth," in Minnesota, he said of a ruling this year that voided a compact NIGC said threatened the tribe's proprietary interest in a downtown casino.

Skibine said if the Oneida agreement is not submitted to Interior as an amendment to the gambling compact it would be left to NIGC to determine whether the agreement violates IGRA.

Washburn, in an email, declined comment on the Oneida settlement because the Department of Interior is a party to ongoing litigation.

"I just cannot discuss anything about that," Washburn said.

Washburn said he has not seen the Seneca and St. Regis agreements and did not know if they constituted amended compacts subject to Interior review.

"If they are indeed gaming compact amendments ... then our approval is required by law, and they will come our way eventually, or they won't be valid," he said.

Washburn in a prior interview with GamblingCompliance said: "States should not be able to use a gaming compact as a stalking horse to deal with tribal water rights or land claims."

“A gaming compact is supposed to be very much about gaming, primarily about gaming.”

The Oneida agreement would end decades of litigation and allow the tribe to place 25,000 acres of land in Oneida and Madison counties into federal trust, exempting it from state and local taxes and regulations.

It also lets the tribe retain sales, use and occupancy taxes.

The taxation and land claims components fly in the face of IGRA prohibitions and Interior policy against incorporating non-gambling issues in casino compacts.

But Democratic politics and a desire by Interior and the Department of Justice to settle the long-standing Oneida lands claim may generate high-level creativity in getting the deal done.

“The politics are there for it to happen,” said tribal consultant John Tahsuda, principal in Navigator’s Global, a Capitol Hill government relations firm.

Crowell, lead attorney in the landmark 2010 ruling in *Rincon v Schwarzenegger* that limited the ability of states to extract shares of tribal casino revenues, said Cuomo deals run contrary to the court’s ruling.

The 9th Circuit Court of Appeals in Rincon — later **upheld on appeal by the U.S. Supreme Court** — said revenue sharing without a substantial benefit to a tribe constitutes an illegal tax.

“Seven commercial casinos competing head-to-head with tribal operations brings into question whether the price of the exclusivity is justified,” Crowell said.

“If states are going to expand casino gambling they have to abandon this notion they can still impose some exclusivity tax on tribes.

“I think Cuomo has over-reached. If other states go the same direction you’re going to see more litigation.”

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