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Rincon Ruling Stirs New Mexico Compact Talks

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Dave Palermo, GamblingCompliance

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Two American Indian tribes renegotiating casino regulatory agreements with New Mexico officials that are due to expire in 2015 have entirely different strategies for coping with an apparently saturated \$800m gambling market.

Pojoaque Pueblo, owners of the debt-ridden Buffalo Thunder Resort near Santa Fe, wants to halt what it calls excessive revenue sharing, citing a 2009 landmark federal court ruling that it is illegal for states to demand Indian casino profits without providing a substantial benefit.

"They can't offer the tribe anything ... the market is saturated," Pojoaque governor George Rivera said of the state's demand that tribes share up to 10.75 percent of their net casino revenue.

But an optimistic Navajo Nation wants permission to operate up to five casinos, three more than nine other New Mexico tribes are allowed to operate under compacts that do not expire until 2037.

"We have a large reservation land base in New Mexico" with 100,000 Navajos scattered over 6,500 square miles, said Derrick Watchman, CEO of the tribe's gambling enterprises. "We need the ability to expand to five facilities.

"Whether that happens depends on the market and demographics over the next 25 years."

With 14 tribes operating 27 casinos in a state with 2m citizens, competition is intense, hindering Governor Susana Martinez's efforts to negotiate lucrative tribal-state compacts with Pojoaque, Navajo and three other tribes, the Mescalero and Jicarilla Apaches and Acoma Pueblo.

The state also has four racetracks with a fifth in the planning stages, each legally able to offer up to 750 slot machines.

The state in 2007 convinced nine tribes to pay up to 10.75 percent of their gambling revenue in exchange for the right to operate casinos in what has become a crowded market.

But Pojoaque attorney Scott Crowell said New Mexico revenue sharing violates tax prohibitions in the Indian Gaming Regulatory Act (IGRA).

He also contends New Mexico is acting contrary to a [9th Circuit Court ruling that California negotiated in bad faith in demanding the Rincon Band of Luiseño Indians pay the state](#) for the ability to exceed a cap on slot machines.

"It's an excellent factual context in which to advance the momentum created by Rincon and prevent overreaching by states in extracting revenues out of tribes," Crowell, lead attorney in the Rincon case, said of the Pojoaque litigation.

"You're likely to see significant pushback by tribes against states demanding revenue sharing."

Martinez spokesman Enrique Knell did not respond to GamblingCompliance requests for comment.

"It's incredibly unfortunate that Pojoaque has chosen to litigate, not negotiate," Knell told the New Mexican newspaper.

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The Pojoaque lawsuit may not get much traction.

California waived its 11th Amendment immunity against litigation by tribes, paving the way for the Rincon litigation. New Mexico maintains its constitutional protection against tribal lawsuits.

But Crowell said the state may prefer to argue the case in federal court.

If the lawsuit is dismissed on 11th Amendment grounds, he said, the tribe will ask the federal Department of Interior to use **secretarial procedures** to impose a tribal-state compact, a process that historically has not included revenue sharing.

Crowell is confident the National Indian Gaming Commission and Interior Department under the tribal-friendly Obama administration will not close the casino in the event it is operating without a valid compact when the current agreement expires June 30, 2015.

"No tribe has ever been ordered to shut down because it has been unable to resolve a meritorious dispute with a state," Crowell said.

"We will not now and not ever walk away from the negotiating table if the state is willing to discuss the issues."

Tribal consultant Jeremiah Murphy said the only benefit the Interior Department has used to justify revenue sharing has been state-wide or regional market exclusivity.

In states such as New Mexico, with extensive tribal and commercial gambling, Murphy said more tribes may consider Rincon as legal justification for rejecting revenue sharing demands.

"It's certainly fair to say Rincon opens another avenue for the tribes," Murphy said. "Rincon goes into every tribe's negotiating tool kit."

Rivera said Pojoaque has been frustrated in the 20 months of negotiations trying to convince the state of its economic dilemma.

"We've tried to get the state to understand the tribe needs the revenue," he said. "We've gotten nowhere."

Risks associated with Pojoaque's legal action and a potential shutdown pale in comparison to the tribe's nearly \$300m bond debt. Industry analysts do not believe the resort can operate profitably under the state's revenue sharing demands.

"Pojoaque has some serious challenges," said a tribal gaming attorney who requested anonymity.

Navajo is not opposed to sharing revenue with the state. But the tribe hopes to convince state negotiators to include "free play" slot credits in determining net revenue subject to revenue sharing.

Free play is used almost to excess by many casinos in the highly competitive New Mexico market. Navajo's \$64m net win in fiscal 2012 would have lessened by 10 percent or more if free play was factored in, sources said.

But the tribe's biggest obstacle will be convincing the state to allow it to operate five casinos, a demand opposed by several tribes and legislators.

"I'm just concerned we're overdoing it," Senator Steve Neville said. "If we have more [casinos] and they start to feed off each other, it could be a real issue for folks."

Navajo currently operates four casinos on its sprawling, three-state reservation, one in Flagstaff, Arizona, and three others near Gallup, Farmington and Ship Rock, New Mexico, the latter a bingo machine facility not subject to state regulation.

The New Mexico legislature will consider the Navajo compact during a 30-day session beginning January 15.

Meanwhile, Pojoaque Governor Rivera waits by the phone.

"If the state calls and says, 'Let's try to remedy this,' we'll try," Rivera said.

"I don't think we'll be getting that call."

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