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Supreme Court Ruling Leaves States With Anti-Casino Ammunition

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[Dave Palermo](#), [GamblingCompliance](#)

Although American Indians scored a rare but major victory for sovereign immunity in this week's U.S. Supreme Court decision for a Michigan tribe, justices left the state a number of tools to prevent off-reservation casinos, according to legal experts.

"We definitely have concerns moving forward," Allison Binney, a tribal lobbyist and partner in Akin Gump, said in a Thursday conference call organized by the Native American Financial Officers Association (NAFOA).

The high court in a 5-4 decision **ruled Tuesday** that the state cannot sue the Bay Mills Indian Community to stop the tribe from opening a casino in Vanderbilt, on property acquired through a federal land claim but not held in federal trust for gambling.

Michigan "lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation," Justice Elena Kagan wrote in her majority opinion.

But Kagan, in an opinion joined by Justices John Roberts, Anthony Kennedy, Stephen Breyer and Sonia Sotomayor, said the state can deny the tribe a casino license and sue individual tribal leaders, casino executives and even patrons for illegal gambling.

"She makes it quite clear states can throw the gauntlet down if tribes open casinos on non-Indian lands," attorney Scott Crowell said.

Michigan Attorney General Bill Schuette has already amended the state's complaint against Bay Mills to include tribal officials.

"Today the U.S. Supreme Court affirmed the state's ability to restrain the illegal expansion of tribal gaming on state lands," he said after the ruling.

Schuette also asked the Supreme Court this month to hear a similar case involving the Sault Ste Marie Tribe of Chippewa Indians, which have plans for a \$245m casino in Lansing, also off reservation property.

Saulte Ste Marie officials remain optimistic.

"The U.S. Supreme Court ruling sends another clear signal Sault Tribe is within our rights and federal law to move forward on our Lansing casino," tribal spokesman Aaron Payment said.

The Bay Mills Indian Community run a casino on their reservation in Michigan's Upper Peninsula. In 2010, they opened another one, 125 miles away in Vanderbilt. The state sued to halt the project and the tribe shuttered the facility, which remains closed.

Justice Kagan said the state's injunction was improper under a 1998 Supreme Court decision, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*. The ruling said tribes had sovereign immunity for off-reservation commercial activities unless Congress says otherwise.

Those on the NAFOA conference call said the Bay Mills ruling was crucial for tribal off-reservation economic development beyond casinos.

"This case was really important because it was basically about whether sovereign

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immunity exists with regard to commercial activity that occurs outside of Indian land," Binney said.

"As tribes become more diverse in their economic development activity more of those activities are occurring off Indian lands."

Bay Mills attorney Bruce Greene said it is wrong to suggest the Supreme Court case was largely about casinos.

"It wasn't so much a gaming case as it was a sovereign immunity case," he said.

The ruling may also provide Indian governments some leverage in renegotiating tribal-state regulatory agreements, or compacts, for casino-style gambling.

The Bay Mills ruling implicitly overturned a previous 10th Circuit Court ruling that allowed New Mexico to sue a tribe for violating federal Indian law.

"[Bay Mills] is going to dramatically alter the leverage between states and tribes in compact negotiations, particularly for New Mexico tribes," attorney Lance Bouldrey said.

"As tribes become proactive in renegotiating expiring tribal compacts or related MOUs [memorandums of understanding] I think explicit limited waivers [of sovereignty] and dispute resolution mechanisms put into these documents avoid the exposure to counter-productive litigation for tribes, both individuals and tribes as a whole."

"This is definitely going to have an impact on future compact negotiations," Binney said. "The thinking is that as compacts come up for renegotiation states will want more waivers of sovereign immunity."

But Kagan's opinion also left states able to file lawsuits against tribal leaders, casino executives and even patrons.

"We have to watch the recipe in the decision for possible increased state litigation, not only for gaming conduct but for off-reservation enterprise development and operations generally," said Jeff Carey of Bank of American/Merrill Lynch.

"She left the door wide open to ex parte lawsuits against tribal officials," Crowell said. "She left the door open to just start throwing people in jail if they open up a casino on non-Indian lands."

The ruling also will create some legal uncertainty for tribal officials and executives for off-reservation business enterprises. Binney suggested they look into indemnity clauses.

The decision is not expected to have an impact on the way financial institutions view tribal business ventures.

"The big banks will continue to lend, the investors will continue to invest," said NAFOA president Bill Lomax.

"We're relieved that the decision didn't add to existing legal uncertainties in doing business in Indian country," Carey said.

The ruling also is not expected to grease the skids for additional off-reservation casinos.

"I don't think you're going to see any tribe take this opinion and say, 'Let's just find a piece of non-Indian land and open up a casino and thumb our nose at the state,'" Crowell said.

"That's just not going to happen."

It was also a rare Supreme Court victory for Indian tribes, who have found the federal courts hostile to tribal self-governance.

Bay Mills was highly criticized for taking the issue to the high court, which has ruled against tribes in all but one of a dozen previous cases.

"Everybody was telling us, 'What are you doing in the damn Supreme Court?'"

Greene said.

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