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## Tribes Holding All The Aces In Michigan Compact Talks

02 Dec, 2013

Dave Palermo, GamblingCompliance

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*Negotiations on new casino compacts between Michigan lawmakers and six American Indian tribes will likely continue for months, if not years, beyond last weekend's expiration of the agreements, according to Indian law experts and federal authorities.*

Time appears to be on the tribes' side, sources said, and it is unlikely federal court rulings, Department of Interior (DOI) policy and the tribe's diminished exclusivity to operate gambling will enable Governor Rick Snyder to extract significant casino revenue for state coffers.

"Tribes have a lot of leverage," Michigan attorney and former DOI counsel Bryan Newland said.

"I would be very surprised if they entered into a compact the state wants."

Agreements reached in 1993 with six of Michigan's 12 gambling tribes — Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Lac Vieux Band of Lake Superior Chippewa, Saginaw Chippewa Tribe and Sault Ste. Marie Tribe of Chippewa — required they contribute 8 percent of casino net revenues to the state and 2 percent to local governments.

But commercial casinos in Detroit, tavern slot machines and expanded tribal gambling violated the promised exclusivity and negated the state's share of revenue from the tribes' 15 casinos, money Snyder now wants back.

Snyder is asking tribes to make sliding payments of 8 percent to 12 percent of casino net revenues. But he has not indicated what, if anything, tribes would receive in exchange.

"We have asked repeatedly, 'What are you offering?' They've said nothing," said Aaron Payment, chairman of the Sault Ste Marie Tribe of Chippewa Indians.

Snyder spokesman Dave Murray said: "Everything is on the table." He declined to elaborate.

The governor acknowledged in a Tuesday letter to tribal leaders that compact language states the agreements remain in effect "until exhaustion of the administrative and judicial remedies set forth in IGRA [Indian Gaming Regulatory Act] and/or any other applicable federal law."

"We believe there are many avenues to be explored in negotiations before ... administrative or judicial remedies, if any, would be necessary, and are hopeful that the tribes concur that continued negotiations would be beneficial," Snyder said.

With no clear end date to the compacts, it is questionable whether Snyder has leverage to force tribes into an agreement.

Tribes believe compact language and a federal court consent decree paving the way for the expiring agreements call for five-year automatic rollovers if a new deal is not negotiated.

As a result, sources said talks could continue indefinitely.

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There appears to be no immediate danger state or federal officials will seek closure of the casinos if tribes do not capitulate to Snyder's demands.

The casinos employ thousands of workers and tribes have good relations with local communities that continue to receive a 2 percent share of gambling revenues.

The National Indian Gaming Commission (NIGC), the federal regulatory agency for tribal casinos, has authority to shut down facilities operating Class III, casino-style gambling without a compact.

Former NIGC commissioner Norm DesRosiers and one-time chief of staff Joe Valandra said the NIGC could issue "closure orders" if talks break down and compacts expire.

"If a Class III compact expires, and yet the tribe then continues to offer Class III gaming, it would be a violation of IGRA and subject to an NIGC enforcement action," agreed Jeffrey Nelson, former NIGC general counsel.

"Interior would not get involved unless the tribe went through the process of establishing lack of good faith negotiations and started talking to Interior about secretarial procedures in lieu of a compact."

But it is not clear what action, if any, would be taken by NIGC officials under a tribal-friendly Obama administration.

When asked if the agency would seek enforcement action against Michigan tribes operating casinos without a compact, NIGC associate commissioner Dan Little said in an email, "I believe this may be a better question for [the Department of Interior]."

"It's too early to tell what the final outcome of compact negotiations will be," NIGC spokesman Michael Odle said. "[DOI] would be a better source of information, since compacts are their thing."

In 2011 the NIGC, at the request of the Fond du Lac Band of Lake Superior Chippewa, **voided a compact** with the city of Duluth, Minnesota. The tribe said the agreement demanded too much casino revenue.

But NIGC did not take enforcement action in 2010 when Bay Mills opened a casino on fee lands in Vanderbilt, Michigan, without state or federal approvals. The case is currently before the U.S. Supreme Court.

Payment, the Saulte Ste. Marie chairman, said he was "not fearful" of a federal shutdown while negotiations are ongoing.

"Tribes are confident NIGC will not issue a closure order," he said.

Recent legal precedent also suggests the Michigan tribes hold a strong hand.

The 9th Circuit Court of Appeals, in a 2010 decision involving the Rincon Band of Luiseño Indians in California, upheld IGRA's prohibition on revenue sharing with state governments, with justices calling it an illegal tax.

The ruling, which the Supreme Court **let stand on appeal**, requires states seeking casino revenue to provide tribes a "substantial benefit," generally interpreted as state-wide or regional exclusivity.

The six Michigan tribes compete with commercial and tribal casinos, tavern keno machines and a state lottery that will soon be selling tickets and operating **instant games online**.

"There is no exclusivity," Payment said.

Tribal-state compacts are also subject to approval by Interior and the Bureau of Indian Affairs (BIA). U.S. Assistant Secretary for Indian Affairs Kevin Washburn has not looked kindly on agreements that violate IGRA and stray from the Rincon decision.

"What the state is asking — increased revenue sharing with nothing in return — I think is a non-starter as far as the BIA is concerned," Payment said. "I can't imagine their agreeing to such as exploitative relationship."

"With the extension of the compacts I don't see any reason why the tribes would even entertain an increase in revenue sharing to the state," Rincon attorney Scott Crowell said.

"I don't know how the governor can ask for such a share of revenue with a straight face."

Tribal consultant Jake Miklojcik said Snyder may use the threat of expanded convenience gambling to get tribal cooperation.

Michigan casinos are successful, but not lucrative.

None of the tribes issue per capita payments to their citizens. With the exception of payouts to local communities casino money is earmarked for government services, debt retirement and capital improvements.

"Many of these casinos are in very rural areas, far from major population centers," Newland said. "They're struggling."

"I don't think tribes can absorb the hit," he said of a revenue share with the state.

At stake is \$45m that would be generated by an 8 percent revenue share, but the chips are stacked on the tribal side of the negotiating table.

"Snyder has already overplayed his hand," Crowell said. "The best thing he can do is acknowledge tribes are an economic benefit to the state and extend terms of the compacts."

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