LEGAL FRONT

Who Will Defend the 1999 Compacts After the Decision of the Ninth Circuit in Rincon?

by Sam Cohen

The Rincon Band sued the State of California that a requirement of then Governor Schwarzenegger for state general fund revenue sharing of 15% of net win and higher was an illegal tax under the Indian Gaming Regulatory Act (25 U.S.C. Sec. 2701, et seq.). Rincon prevailed at the District Court, the Ninth Circuit Court of Appeals affirmed, the Solicitor General told the Supreme Court that it was only a California problem, and the Supreme Court denied certiorari review in June, 2011. A victory for Rincon and extreme doubt about every general fund revenue sharing compact negotiated by Governor Schwarzenegger; but what about the over 50 remaining California compacts negotiated in 1999 by then Governor Davis (the so-called "1999 Compacts")?

The 1999 Compacts have a tumultuous history. Due to a refusal to negotiate by then Governor Pete Wilson, the

California tribes got Proposition 5 qualified to establish a tribal-state compact. Proposition 5 was invalidated on constitutional grounds for violating the then California Constitutional prohibition against Las Vegas-style casinos (Hotel Employees & Restaurant Employees Int'l Union v. Davis, 981 P.2d 990, Cal. 1999). With the help of then Governor Davis and the California Legislature, the tribes qualified Proposition 1A as a constitutional amendment which passed by majority vote.

The 1999 Compacts established two funds, the Revenue Sharing Trust Fund (RSTF) to allow non-gaming tribes to share in the benefits of gaming by a payment of $1.1 million per year, and the Special Distribution Fund (SDF), which backfills any shortfalls in the RSTF, funds the costs of gambling regulation by the California Gambling Control Commission (CGCC) and the California Department of Justice (DOJ), problem gambling programs, and funds local government payments to mitigate the off reservation impacts of tribal gaming.

In 2004, the Viejas Band, the United Auburn Indian Community, the Buena Vista Rancheria, the Yocha DeHe Wintun Nation and the Pala Band of Luiseno Mission Indians negotiated an amended 1999 Compact for an unlim- ited amount of gaming devices based on a graduated per device payment schedule to a general fund account for a transporta- tion bond. In the past years, executive orders have placed these funds in the general fund.

In 2006, the San Manuel Band of Mission Indians, the Morongo Band of Mission Indians, the Pechanga Band of Luiseno Indians and the Agua Caliente Band have renegoti- ated increases from 2,000 gaming devices under the 1999 Compact to 5,000 to 7,500 devices for payments to the general fund of 15% to 25% of net win per device. Complete copies of the 1999 Compacts and all amendments are available at www.cgcc.ca.gov.

The Rincon case does much more than merely state that general fund revenue sharing violates IGRA. It reaffirms the prior 2003 decision of the Ninth Circuit in Coyote Valley II that the RSTF and SDF revenue sharing in the 1999 Compacts were negotiated in exchange for the statewide exclusivity provided in Proposition 1A (In re Indian Gaming Related Cases, 331 F.3d 1094, 9th Cir. 2003, also referred to as "Coyote Valley II"). Proposition 1A may have been supported by Governor Davis and the Legislature but it was completely funded and implemented by California tribes. In exchange for such exclusivity, California tribes bargained for and expected a solvent RSTF for non-gaming

tribes and a solvent SDF for gaming tribes. It is another year for 1999 Compact tribes to lobby the

California Legislature to appropriate their own tribal money to fund local government payments to mitigate the off reser- vation impacts of tribal gaming. This year the vehicle is AB 1417 (Hall). The California Department of Finance argues that such mitigation grants cannot be fully financed because the RSTF for non-gaming tribes is running a deficit and the fund balance for the SDF is being depleted. The reason the SDF is allegedly depleted is then Governor Schwarzenegger forced the 2004 and 2006 amended compact tribes to no longer make SDF payments and instead contribute to the general fund. Such 2004 and

2006 amended compacts also do not contribute to the budgets of the CGCC and the California DOJ or prob- lem gambling programs through the SDF.

In contrast, the SDF implementing legislation in 2003, SB 621 (Battin), recognizes in its preamble that the revenue paid to the state from renegotiated 1999 Compacts should at least contribute to the costs of self regulation by the CGCC and the California DOJ as well as prob- lem gambling programs:

(b) It is the intent of the Legislature that in the event that any compact between any tribe and the state takes effect on or after the effective date of this chapter, or that any compact between any tribe and the state that took effect on or before May 16, 2000, is renegotiated and reexecuted at any time after its initial effective date, money provided to the state by a tribe pursuant to the terms of these compacts shall be applied on a pro rata basis to the state costs for the regulation of gaming and for problem gambling prevention programs in the Office of Problem and Pathological Gambling within the State Department of Alcohol and Drug Programs (Govt. Code Sec. 12711b).

It is another year and the RSTF and the SDF are again allegedly on the brink of insolvency due to the 2004 and 2006 compact amendments, so we are forced to ask, “Who will defend the 1999 Compacts after the decision of the Ninth Circuit in Rincon?” It seems clear that the State of California has completely undermined the RSTF and SDF systems approved in Coyote Valley II in exchange for general fund payments. Perhaps it is not only Rincon, but also the 1999 Compact tribes that have a claim that the State of California is in violation of the 1999 Compacts and IGRA? ❐

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