Indian Country, Interior Weigh Rincon Ruling Impact

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A high court ruling hindering California's ability to use Indian casino revenue to help alleviate a budget deficit will likely influence U.S. Department of Interior policy regarding tribal-state agreements in other states, according to legal experts.

The nationwide impact of the 9th Circuit Court of Appeals ruling, which the U.S. Supreme Court let stand last week, will be limited by several factors unique to California, which has the nation's largest tribal gambling industry with some 60 casinos generating nearly $7bn a year. The 9th Circuit said former Gov. Arnold Schwarzenegger acted in "bad faith" in demanding the Rincon Band of Luiseño Indians pay 15 percent of its casino revenue into the state's general fund in exchange for more slot machines for the tribe's Harrah's Rincon Casino and Resort near Escondido. Schwarzenegger, who took office in 2003, had been renegotiating 1999 tribal-state compacts and signing off on new agreements that, in exchange for more slot machines, demanded that tribes pay money into the general fund to offset a rising budget deficit.

Some 15 tribes are paying $360m a year into the fund under Schwarzenegger compacts.

The 9th Circuit ruled in 2010 that payments demanded from Rincon constituted an illegal tax in violation of the Indian Gaming Regulatory Act of 1988, which generally limits use of tribal funds to defray regulatory and infrastructure costs and to mitigate local impact of casinos.

Some tribal advocates have long argued states have been circumventing tax prohibition provisions of IGRA — and violating Indian sovereignty — by demanding shares of tribal casino revenues in exchange for the right to operate Class III, casino-style gambling.

"Governments do not tax other governments," Rincon attorney Scott Crowell said. "The federal law is clear in that the compacting process cannot be used to impose state taxes on tribes."

It remains uncertain, however, to what degree Interior will consider the 9th Circuit decision in regard to tribal-state compacts in many of the other 27 states with tribal casinos. Several require that tribes pay into the state general fund in apparent violation of IGRA.

Under IGRA, tribes can only operate Class III casinos if they enter into tribal-state agreements, or compacts.

Yet in a 1996 ruling involving the Seminole Tribe of Florida, the U.S. Supreme Court said 11th Amendment provisions in the Constitution prohibit tribes from filing lawsuits to compel recalcitrant states to enter into compact negotiations.

The ruling is blamed for forcing tribes to concede to "voluntarily" sharing gambling revenue with states in exchange for the ability to operate Class III casinos.

The Department of Interior, which has trust responsibility for tribes, has approved compacts with general fund payments as long as tribes received something of benefit, most often the exclusive, statewide ability to operate Las Vegas-style casinos.

California is unique because the exclusive right of tribes to operate casinos is not conferred by state compacts but guaranteed by Proposition 1A, an amendment to the state's constitution agreed in 2000. The amendment limits the state's ability to use exclusivity as leverage in compact negotiations.

In addition, the state by the same amendment waived 11th Amendment protection against a lawsuit, which Rincon used in contesting Schwarzenegger's demand.

Ninth Circuit Judge Jay S. Bybee, in a dissenting opinion, said the Rincon ruling could cause "chaos" with other Schwarzenegger compacts and in other states where tribal revenues are paid into the state general fund, notably Connecticut, Florida, Michigan, New York, New Mexico, Oklahoma and Wisconsin.

"Those tribes now have a powerful argument that their compacts must be renegotiated (again) in light of the majority's decision," Bybee said of the Schwarzenegger agreements.

"The damage, moreover, is not confined to our circuit [but] … every state that has negotiated a similar revenue sharing provision, one that was also approved by [Interior]. The result is going to be chaos as tribe after tribe seeks to reopen negotiations concluded and duly approved."

Many legal experts dispute that contention, noting that other federal court districts have not addressed revenue payments under IGRA.

Department of Interior and Bureau of Indian Affairs officials did not respond to requests for interviews.

Interior Assistant Secretary for Indian Affairs Larry Echo Hawk, who approved the 15 Schwarzenegger compacts, cited the 9th Circuit's Rincon ruling in August 2010 in rejecting a compact for the Habematolel Pomo Indians of Upper Lake Rancheria.

But that same month the Interior Department approved a compact for the Seminole Tribe of Florida which called for annual revenue sharing payments of $100m. "This case is going to continue to be a factor as Interior reviews compacts going forward across the country," Crowell said.

"But it would be an overstatement to say compacts with revenue sharing provisions are not going to be approved.

"I think you're still going to see Interior approve some compacts and disapprove others and the Rincon decision provides some clarify as to where they should draw that line."

While the Rincon ruling technically only applies to the 9th Circuit, tribal attorney George Forman said, "Interior could use it as the standard to evaluate compacts in other jurisdictions."

Attorney Howard Dickstein, who represents two California tribes seeking relief from Schwarzenegger compacts, said there will have to be additional case law in other judicial districts before the "full national impact" of Rincon is determined. "But right now the fact this decision was left alone by the Supreme Court is an indication it is good law and will certainly have a national impact," he said.