

## The Rincon Decision and Why it Matters

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The Supreme Court has refused to consider the decision of the Ninth Circuit rejecting a Class III Tribal-State Gaming Compact negotiated by former California Governor Schwarzenegger with the Rincon Band of Luiseno Mission Indians. The issue of this case's impact on Indian gaming and state governments is already a topic of international debate.

The Rincon Band challenged the legality of California's "second generation" Compacts pursuant to which the signatory tribes would be entitled to increase their slot machine count in return for paying percentages of the new machine revenue to the state's General Fund. The Ninth Circuit had affirmed a lower court decision that the new financial concessions were nothing more than a state tax on tribal casino revenues which is prohibited by the federal Indian Gaming Regulatory Act ("IGRA"). Rincon had refused to sign the new Compact which already had been executed by several other tribes, electing to demand that it be given the expanded gaming opportunity without making the new financial concessions.

While Rincon Band has stated that it intends to demand the additional slot machines, there are rumors that some tribes intend to seek recovery of the "illegal" payments they made pursuant to their "new" Compacts. Should that occur, the total due bill could total tens of millions of dollars, and it is well known that California is virtually broke – the condition that led to Schwarzenegger's effort in the first place.

Since Class III gaming can only be offered pursuant to a Compact, tribes such as Rincon proposing to exceed the gaming levels permitted by a valid Compact could run afoul of the federal enforcement actions. For this reason, a number of California tribes with the same Compact could elect to stay with the expanded slot machine inventory permitted thereby and continue making the payments as a cost for the greater total revenue numbers they have been realizing.

The outcome of this litigation almost certainly will impact the efforts of all cash-strapped states to generate new revenues through tribal casinos.

It should be noted that the federal Indian gaming law does authorize the states to receive compensation for costs related to tribal gaming such as regulation and gaming addiction, and to offset the effects of casinos on surrounding communities. However, as noted above, states are prohibited from assessing taxes on tribal casino revenues, so unjustified payments to a state's General Fund are no longer permissible unless the tribes are getting something in return for the required payments, such as those

authorized by IGRA. Another vehicle for state receipt of casino payments above those payments must be in exchange for some benefit deemed "exclusive" to the tribe. To this end, it is fact that a number of other Governors have attempted to create "exclusive grants" in favor of Compact signatory tribes in return for payments to the state treasuries.

The new concern is that the *Rincon* decision brings into question the legality of all tribal financial concessions above and beyond the reimbursement of actual costs incurred by the states. But perhaps more far-reaching is that it almost certainly jeopardizes any future efforts by any Governor to negotiate significant financial payments through Compacts.

In short, the decision appears to be a "game changer" in the states' attempts to generate new revenue through tribal casinos.