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Harrah's Rincon Casino & Resort, nestled in the Palomar mountains of San Diego County (Courtesy Harrah's Rincon)

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Rincon Band Becomes First California Tribe To Renegotiate Tribal-State Gaming Compact With Federal Courts

ICTMN STAFF | FEBRUARY 13, 2013

After seven years of litigation and negotiations, the Rincon Band of Luiseño Indians has renegotiated its

1999 tribal-state gaming compact. The tribe took an unorthodox route to gain approval, setting a legal and political precedent by obtaining the first California agreement negotiated through the federal courts.

Kevin Washburn, assistant secretary of Indian Affairs, approved the secretarial procedures on February 8.

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With the Rincon victory in the courts, the state was forced to end a number of illegal practices related to negotiating tribal state casino compacts and directed by the Southern District Federal Court to meet with the Rincon Band to negotiate a compact that complied with federal law.

The Rincon Band and California Governor Edmund G. Brown began negotiations



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in earnest over a year ago, after the U.S. Supreme Court refused to hear the state's appeal of the 2004 Rincon vs. Schwarzenegger lawsuit. The parties reached agreement on the vast majority of issues within the limited time frame set by law and the court. However, some issues remained unresolved at the expiration of the court-ordered deadlines.

On April 11, 2012, both sides submitted final offers to a mediator for baseball arbitration. On June 13, 2012, the court-appointed mediator, the Hon. Edward Panelli, former State Supreme Court Justice, selected the tribe's version as most consistent with the findings of the court and forwarded it to Interior for review. Gov. Brown had a 60-day window to approve the Rincon offer, or do nothing, leaving the final approval to the federal government in the form of secretarial compact procedures issued by the Interior.

When Rincon sued Gov. Arnold Schwarzenegger for "illegal taxation" and "bad faith" in renegotiations for a gaming compact, seeking to add 900 new machines to the tribe's gaming enterprise, **Harrah's Rincon Casino and Resort**, few expected the band to win—especially since California tribes had been unable to get the federal government to step in and force the state to comply with the rules of tribal state gaming compact negotiations, specifically bad faith remedies, beginning in 1990, when tribes were desperate to make gaming legal by negotiating a compact with a recalcitrant Gov. Pete Wilson. However, after seven years of litigation going from the federal District Court, twice to the 9th Circuit Court of Appeals, and a failed attempt by the state to involve the U.S. Supreme Court, the Rincon Band prevailed. The federal court stepped in, imposing oversight of compact negotiations between the state and the tribe, making it the first time in California legal remedies that an impasse in negotiations between a tribe and the state under the federal Indian Gaming Regulatory Act (IGRA) was triggered.

In the past, states took advantage of the desperation of tribal governments to acquire casino gaming as a means to climb out of poverty by blackmailing them with revenue sharing demands that literally wiped out the economic incentive and cash flow needed to ensure success of the enterprise.

To Rincon Chairman Bo Mazzetti, the frustrations, time and cost of the lawsuit were a price that had to be paid to protect tribal sovereignty and the expectation in federal law that tribes are equals in compact negotiations.

"The federal definition of the goal of Indian gaming is to generate revenues to fund tribal government responsibilities and obligations to provide jobs, health care, social and safety services for tribal members, not to pad or fix a state's budget," said Mazzetti.

"Someone had to make the state own up to the fact its negotiations with tribes were illegal. It was obvious Gov. Schwarzenegger was not interested in recognizing tribal sovereignty, or voluntarily abiding by laws governing tribal



Rincon Chairman Bo Mazzetti (Courtesy Rincon Band)



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state compact negotiations,” he added.

The lawsuit and resulting Rincon compact changed the scope and context of tribal state negotiations in California. Specifically, the state cannot demand revenue sharing as a condition for concluding a compact. Federal law is clear that states cannot use the compact process to impose taxes on tribal gaming revenues.

Also, if a tribe is willing to share gaming revenue with the state, the state must offer the tribe something of meaningful value that the tribe desires, above and beyond the state’s legal obligations under IGRA. In other words, there has to be an exchange of mutual benefits.

In California, this means tribal exclusivity for “Class Three Games” can no longer be used by the state to leverage revenue sharing of 50 to 100 percent of casino profits. The courts held that exclusivity is granted by the voters and institutionalized in the state constitution; therefore, the governor is not in a position to offer it up, or take it away at the negotiation table.

At all times during the negotiations, Rincon was willing to pay for state regulatory costs and mitigate off-reservation impacts, but the Schwarzenegger administration overreached and demanded a severe tax on gross revenue to be paid into the state’s General Fund, the press release states.

“Schwarzenegger’s greed really made the case for us,” noted Mazzetti. “Removing the economic incentives by demanding such a large share of future tribal revenue was not only illegal, it was economically counter intuitive. Tribal gaming is a positive example of California Indians pulling ourselves up by our own bootstraps, and generating benefits that go beyond the tribal community. For example, in 2010, our casino enterprise was responsible for 2,100 good, tax paying jobs; \$20 million in state and local tax revenues; and another \$276 million in purchases of goods and services invested in the regional economy.”

The new Rincon compact eliminates the Schwarzenegger regulatory demands that went beyond gaming, broaching a tribe’s governmental authority. Among them is the practice of obligating a tribe to agree to local contributions in significant revenue sharing dollar amounts to mitigate impacts prior to finalization of the compact and governor’s signature.

Prior to the Rincon case, a governor could hold a tribe’s economic growth ransom against one-sided demands by the state. IGRA remedies are intended to ensure compact negotiations are between equals, and the power of the state is not used to deny gaming to the tribes.

“We didn’t take on this case for Rincon alone; we did it for all the tribes. And our goal to bring compacting back to the legitimacy of its legislative roots was applauded by the Department of Interior.

“The Rincon case and tribal compact offer proof that tribes have the law on our side and we can fight unfair and illegal practices by state governors,” said Mazzetti, explaining that “our main objectives in negotiations with the Brown administration was to produce a prototype of fair negotiations envisioned by federal law. This included removing the illegal and politically inspired regulatory and revenue sharing requirements of the Schwarzenegger administration.”

“Recalcitrant states had turned IGRA on its head, extorting tribes at the negotiation table to divert critically needed tribal governmental revenue, intended to fund tribal services and programs, to the state. These are funds tribes need to diversify their economies and take them out of the dire poverty that preceded Indian gaming. These states did not offer their revenues to assist when the tribes had nothing, but are the first with their hands out when the tribes begin to see some financial opportunity,” said Scott Crowell, lead legal

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counsel throughout the litigation.

“Rincon fought hard, because, we believed winning this case enables other tribes to negotiate compacts that are fair to all parties and restore IGRA, as Congress intended; and also to educate people that the purpose of Indian gaming is first and foremost to promote tribal self-sufficiency and strong tribal government.”

There were disappointments, and, as Chairman Mazzetti acknowledged, “unfinished business” on the way to finalizing the compact. One victim was the shared benefit fund with San Diego County.

In an attempt to establish an alternate, ongoing vehicle to fund community mitigation impacts directly through the county, rather than funneling the money through the state, or the faltering state-controlled Special Distribution Fund, as presently practiced, the band worked with San Diego County in an attempt to establish a shared benefit fund.

“Rincon was seeking a more fiscally responsible way of funding and prioritizing community mitigation projects by partnering with San Diego County to share in funding regional needs like traffic and transportation, police and fire services—all appropriately related to casino impacts. These programs, even though off the reservation, make sense because they benefit the tribal community and its economic ventures, as well as the larger non-Indian community,” said Crowell.

The fund would have resulted in a percentage of revenues from Rincon’s gaming profits to flow annually over the 25-year-life of the compact.

Unfortunately, according to Mazzetti, due to timelines established by IGRA and imposed by the federal court there was not enough time for the state, county and tribal negotiators to overcome the obstacles needed to secure a benefit from the state, warranting a legal exchange of revenues from the tribe.

“Sitting down with the county, we were able to explore many solid and reasonable cooperative approaches to addressing mutual community needs, and the San Diego County Rincon Benefit Sharing plan was a big one,” noted Mazzetti.

“In the process, we started cutting through bureaucratic barriers in the state and the county to meaningful cooperation and benefit sharing. I am hopeful we will continue to work on issues such as formulas for sharing taxes on tobacco and fuel products sold on Indian lands. This is complicated and politically sensitive stuff. However, if we can move forward on agreements we discussed with the Brown administration, Rincon could reciprocate by adopting a local benefit sharing plan.”

Critical new terms of the compact include:

Provides for an increase to 2,250 machines. (Current compact limit is 2,000 machines.)

Extends term of compact through 2037. (Current compact is set to expire in 2020.)

Provides for payment of proportionate share of state’s costs to regulate gaming directly to state. Nearly \$ 1 million per year is anticipated to be paid by Rincon under this provision. (Currently state regulatory costs are appropriated by the legislature out of the special distribution fund.)

Preserves existing obligations to revenue sharing trust fund. (Rincon currently pays in excess of \$ 3million per year into fund, the proceeds of which are distributed to non-gaming tribes.) Under the new compact, RSTF would receive an additional \$1 million, with the total exceeding \$4 million if the band operates at 2,250 machine capacity.

The compact retains the regulatory scheme of 1999 compacts. (Rincon rejected the Schwarzenegger compact model as overly intrusive into tribal self-governance.)

Unresolved issues that the band and state commit to pursue outside of compact litigation:

Rincon/San Diego County Shared Benefits Funds: Rincon and country agreed upon preliminary statement of terms in September 2011 and will continue discussions.

Tribal/state compact(s) resolving issues of taxation: Substantial discussions occurred regarding unresolved issues of state-imposed taxes of gasoline, tobacco products and other on-reservation sales. Those discussions set a foundation for negotiating government-to-government tax compacts.

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Basically, The State Governor failed to "Meet & Confer In Good Faith"; and refused to Honor a "Fair & Equatable Agreement" with NAI Gaming. It was a "One Way State Compelled Contract" that omitted "Fairness of Exchange" and The Federal Court recognized those issues. Kudos to His Honor. The Rincon Band have and do "Meet In Good Faith"; and provide collateral Benefits to neighboring services through response of "First Responders" to adjacent Communities, many times "Free & Clear" during the response. It is the nature & culture of The NAI Communities to be a "Giving Community" when there is an identified need, at their own expense where other State entities would not offer to do so. The Rincon Band has our respect & admiration for pursuing these issue and surfacing the lack of fairness & trust by the former Governor.

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Anonymous

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