

# States Face Struggle For Share Of Indian Gaming Revenues

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*A 2010 federal court ruling and U.S. Department of Interior policy under the Obama administration is making it increasingly difficult for states with budgetary problems to extract revenue from Indian gaming, leaving commercial casinos an attractive alternative, according to tribal lawyers and consultants.*

An October decision by the Interior Department's Bureau of Indian Affairs (BIA) to **reject a proposed tribal-state compact** between the state of Massachusetts and the Mashpee Wampanoag Indian Tribe, in part because of a stipulation that the tribe pay the state 21.5 percent of its gross gambling revenue, may be an omen of future rulings by the agency.

"The current policy is to be much more vigilant of what's acceptable in a compact in terms of revenue sharing," said George Skibine, a tribal consultant who recently retired from serving as director of the BIA's Office of Indian Gaming.

"That's why the Mashpee compact was disapproved," Skibine said. "It was to send a signal that 'We're going to be monitoring those things more closely.'"

The Interior Department's crackdown on revenue sharing comes on the heels of a 2010 9th Circuit Court of Appeals ruling that former California Governor Arnold Schwarzenegger acted in bad faith when he demanded the Rincon Band of Luiseño Indians share its gambling revenue with the state in exchange for additional slot machines.

The Rincon ruling was upheld when the U.S. Supreme Court **refused to take it up on appeal**.

"The world has changed between Rincon and the recent denial of the Mashpee compact," said Barry Brandon, executive director of the Native American Financial Services Association (NAFSA). "It's a different day."

The federal Indian Gaming Regulatory Act (IGRA) of 1988 prohibits taxation of tribal casino revenue.

But IGRA requires that tribes seeking to operate Las Vegas-style casinos enter into tribal-state regulatory agreements, or compacts, under which tribes pay regulatory fees and compensate local governments for the environmental and other impacts of their casinos.

Several states have also managed to negotiate revenue sharing with tribes, often by guaranteeing tribes state-wide exclusivity to operate casino gambling.

Tribes in ten of 28 states with Indian casinos pay up to 25 percent of their revenue in exchange for some measure of geographic exclusivity. Tribes in 2009 paid \$2.4bn in state taxes, revenue sharing and regulatory payments, according to the National Indian Gaming Association.

Although IGRA generally prohibits revenue sharing, the Interior Department and the BIA under George W. Bush often approved compacts agreed to by both the tribes and the state.

Many revenue sharing compacts went into effect when officials took no action on proposed compacts in 45 days, after which the agreements are "deemed approved."

"With a number of political appointees during the Bush administration, their view was if the state and tribe both sign on the dotted line, who are we to judge?" Skibine said. "That's their deal."

Many of the "deemed approved" compacts came from California, where Schwarzenegger argued that tribes needed to pay their "fair share" to alleviate a state budget crisis.

Renegotiated compacts during Schwarzenegger's term of office (2003-2011) require that 14 California tribes pay some \$345m a year into the state's general fund.

Interior officials under the Obama administration have taken a stricter view of the congressional intent of IGRA, which is to build strong tribal governments and diversified economies.

Interior and BIA officials declined requests for interviews.

But newly-appointed BIA assistant secretary Kevin Washburn in October said efforts to use the compact process to extract money from Indians to ease budget deficits fly in the face of IGRA's statutory provisions against taxation of gambling revenues.

"The Department of Interior is very thoughtful about these decisions," Washburn said. "Tribes need to be the primary beneficiary of gaming. That is a principle that's been pushed and tested and endured a lot of stresses as states have been so desperate to increase their own coffers."

Ironically, the changing legal and political landscape, combined with the nationwide success and public acceptance of some 460 tribal casinos in 28 states, may be prompting more states to consider commercial casinos as a means to alleviate budget shortfalls, creating competitive problems for the tribes.

"The proliferation of Indian gaming and the fact none of the bad things happened that people said would happen — mafia infiltration, crime and what have you — and the pervasiveness of casinos has brought gambling into the mainstream of society," Brandon said.

"The spread of tribal gambling has made casinos much more palatable," Brandon said. "People have become accustomed to it."

A number of states are considering **expanding their gambling markets**.

New York voters this year could hold a referendum to allow commercial casinos, ending the current **monopoly held by three Indian tribes**.

Meanwhile, Florida lawmakers have begun a review of the state's gaming policy that may lead to future **consideration of casino resorts near Miami**. At present, the Seminole Tribe pays the state

millions of dollars annually in return for exclusivity over table games, guaranteed by a 2010 compact.

State officials also may be increasingly unwilling to deal with the bureaucratic delays involved with tribal governments seeking to acquire and place new lands in trust for gambling outside their existing reservations.

New York Governor Andrew Cuomo earlier this month announced plans to establish casinos in the northern half of the state, including the Catskills. But tribes for more than a decade have been trying without success to establish off-reservation gambling in the region.

Massachusetts officials who approved state-wide legislation legalizing both commercial and tribal casinos were put off by the Interior Department's lengthy process of placing land in trust for the Wampanoags.

A license set aside for the Wampanoags could be opened later this year to commercial bidders.

"An argument could be made that the line in the sand Interior has taken with respect to Indian gaming ... is furthering the desire of the states to go and do it themselves" through commercial casinos, said Brandon.

"They can make more money," Brandon said. "This is about states and how they have stopped fearing and love gaming."