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Tribal Panel Warns Of State Regulatory Creep In Compact Talks

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Dave Palermo, GamblingCompliance

States renegotiating casino regulatory agreements with American Indian tribes in California, Michigan, New York and elsewhere are encroaching on the ability of tribes to govern their lands, a panel of Indian law experts warned last week.

Erosion of tribal self-governance may be an even greater threat to gambling tribes than state attempts to get a larger share of casino revenues, according to a panel of tribal lawyers at the National Indian Gaming Association (NIGA) convention in San Diego.

In ten of 23 states where tribes operate casinos under tribal-state gambling agreements, or compacts, states require that tribes share gambling revenues, often in exchange for state-wide or regional exclusivity.

Revenue sharing seems to have plateaued, however, in part because of a **2010 federal court ruling** that demanding revenues in exchange for additional slot machines without additional benefit to tribes violated anti-tax provisions in the Indian Gaming Regulatory Act (IGRA).

But more states are seeking a greater role in the regulation of Indian casinos, despite IGRA's provisions that primacy for regulating casinos rests with tribal gambling commissions.

Meanwhile, efforts by state and local governments to limit casino development on tribal lands can extend to non-gambling projects, including hotels and community infrastructure, NIGA panelists said.

The trend of state intrusion is most evident in California, where 47 tribes are seeking renewal of tribal-state compacts agreed to in 1999, although Michigan and other states are also seeking a larger role in the regulation of tribal casinos.

The panel also questioned a **legal settlement allowing New York to extract a 25 percent share of Oneida Nation casino revenues** in exchange for resolving tax and land disputes.

The U.S. Department of Interior has said the Oneida settlement did not constitute a compact amendment subject to its review. But some legal experts question the use of side agreements to get around federal law and policy preventing states from using non-gambling issues as leverage in compact talks.

"If it's not a compact, what is it?" asked attorney Tim Evans. "Are we just talking about form over substance?"

"I'm not being critical of Interior. I think there needs to be a bit more explanation or rationale."

Assistant secretary for Indian affairs Kevin Washburn, in an email, said the Department of Interior was not a party to the settlement agreement, in which the state and counties dismissed a challenge to Interior's decision to acquire 13,000 acres of trust land for the Oneida Nation.

"The agreement puts to rest centuries of disputes between the Oneida, the state and the counties," Washburn said. "We are very happy to see the other parties reach such a settlement."

In California, Governor Jerry Brown is using a recent compact with the Fort

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The Fort Independence deal essentially gives counties and municipalities the ability to stall casino development on sovereign Indian lands. Local governments have stymied the Yurok Tribe, which has similar language in its compact with Brown, in its efforts to build a casino.

In addition, language in the Fort Independence agreement defining such terms as "project" and "facility" can give local governments authority over non-gambling developments, according to those on the NIGA panel.

"It's really important to pay attention to definitions," tribal attorney Teri Poust said. "As these definitions become broader the state has more authority over the tribe.

"The tribe cannot move forward with a project until they enter into an agreement with local governments. Any time you want to add ten machines you need to go back to the local governments.

"It can be very problematic."

Brown negotiator Joginder Dhillon declined requests for an interview, but spokesman Jim Evans said: "While there are some common themes to the compacts negotiated during this administration, the administration approaches each differently."

In light of the appeals court ruling in *Rincon v Schwarzenegger*, Brown and other state officials are not as active in seeking shares of tribal casino revenues.

"Following *Rincon*, states are on notice that they cannot demand a revenue share without providing something significant — like true exclusivity — in return," attorney Zehava Zevit said.

"Nonetheless, it is hard to imagine that states would completely forego the possibility of benefitting economically from tribal gaming. I think we will continue to see states seeking increased revenue sharing even as they attempt to retain greater regulatory control over tribal gaming."

Brown is insisting that tribes enter into mitigation agreements with local governments along with payments into a trust fund for California's 50 non-casino tribes.

"The state is over-reaching into tribal regulatory issues that go beyond gambling," said Scott Crowell, one of a team of attorneys negotiating the compacts with Brown that are due to expire in 2020.

"The intrusion has gone from bad in the 1999 compacts to worse in the [Governor Arnold] Schwarzenegger compacts to even worse under the Brown compacts.

"State and local governments are extending their reach into regulatory matters that have nothing to do with gambling: environmental issues; health and safety issues; workers compensation.

"Simply because a tribe has gaming doesn't allow states to get into these areas.

"These issues are important to the tribes, as they are important to states, but how to address them on tribal lands is the province of the tribes and not the province of the states."

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