

# GAMING LEGALNEWS

## LATEST TRIBAL GAMING REVENUE REPORT: "TRIBAL GAMING IMPROVES DESPITE SLUGGISH ECONOMY"

by Dennis J. Whittlesey

The annual "Casino City's Indian Gaming Industry Report" was released nationally on Wednesday, and the improvement in revenues gave tribal gaming for 2011 its best performance in three years. While there were downturns in several states, the overall picture gleaned from the report is a good one for the Indian gaming industry and suggests that 2012 almost certainly will continue the upward trend experienced in 2011.

The 2011 revenues grew by 3.4 percent over 2010, and that number is a dramatic improvement after the previous three years: the revenue increase for 2010 was only 1 percent, there was a 1 percent decline in 2009, and there was a 1.2 percent increase in 2008. While the current number is encouraging, it is still below the 4.1 percent increase in 2007.

The annual report is developed and written by Dr. Alan Meister, who is in the Southern California office of the national consulting firm Nathan Associates. Dr. Meister writes and speaks extensively on a variety of topics and is universally recognized for his expertise in Indian Gaming finance and the annual report that he develops from public information and personal contacts throughout Indian Country. Of particular interest is his data documenting that the 2011 Indian gaming revenue was \$27.4 billion, but of equal significance is his conclusion that Indian casinos are maintaining their share of the total casino gambling revenue, essentially equaling the non-Indian gaming revenues in the United States.

"Despite a sluggish economy in 2011, Indian gaming sustained a modest growth to bring it above its pre-recession gaming revenue level," Meister wrote. While the two years of increased revenues may be encouraging, he did add a note of caution with the following: "The question is how much further can Indian gaming grow?"

The growth leader was Alabama with a 26 percent increase. This is in contrast to a 3 percent decline in New York, and recent news stories about tribal gaming in Western New York have suggested that there are some local issues and disputes that could continue to tamp down the Indian casino revenue numbers in that area.

The brightest news is found in California where tribal gaming revenues hit \$6.9 billion in 2011; not only did this total lead all states, but it accounted for 25 percent of Indian gaming revenue nationwide. The next four top revenue-producing states were Washington, Florida, Connecticut, and Oklahoma, and these top five states accounted for 61 percent of total gaming revenue. And if one considers the top 10 states by adding the next 5 – Arizona, Michigan, Minnesota, Wisconsin, and



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New York – the combined revenues account for some 86 percent of the national total.

Recent legal developments do raise some red flags in Meister's assessments. He cited potential threats such as a land dispute in Michigan that theoretically could result in the tribal land losing its trust status and a judicially determined increase in the time period for challenging trust land acceptances for gaming, as well as the fact that state regulations restrict Indian casinos and limit expansion – obstacles not facing the commercial gaming industry. All of this, Meister wrote, "in some ways, holds back Indian gaming from what it could potentially be."

Still, expansion continues, and all eyes will be on Santa Rosa, California, later this year when the Federated Indians of Graton Rancheria open their \$800 million Resort & Casino adjacent to U.S. 101 in Sonoma County. That project is being developed and will be operated by Station Casinos of Las Vegas.

## TRIBAL GAMING REVENUE SHARING IN CALIFORNIA

by Patrick Sullivan

The Indian Gaming Regulatory Act ("IGRA") requires Indian tribes to execute Tribal-State Gaming Compacts in order to conduct the full panoply of casino gaming, or "Class III" gaming, which includes slot machines and table games such as blackjack. Currently, 70 Indian tribes in California have executed these compacts.

In September of 1999, the California legislature ratified 61 compacts with Indian tribes, all based on a model compact negotiated by the State and tribes. The 1999 compacts ostensibly limited the number of devices to 2,000 per tribe and specified that non-gaming tribes, and tribes operating fewer than 350 gaming devices, receive \$1.1 million annually from a Revenue Sharing Trust Fund ("RSTF") administered by the California Gambling Control Commission. The RSTF is funded by payments from tribes operating more than 350 machines (or the number of machines in operation on September 1, 1999, whichever is greater). The RSTF gained tribal and popular support in California for the legislation and constitutional amendment enabling Indian gaming in California because it allowed tribes located far from population centers to benefit from Indian gaming. Under the 1999 compacts, Tribes pay into the RSTF according to the following schedule.

- 0-350 Gaming Devices: \$0 per Gaming Device;
- 351-750 Gaming Devices: \$900 per Gaming Device;
- 751-1250 Gaming Devices: \$1,950 per Gaming Device;
- 1251- 2000 Gaming Devices: \$4,350 per Gaming Device;

In addition to the RSTF, the 1999 compacts provide for reimbursement to the State for the costs of regulating Indian gaming by the California Gambling Control Commission and for payments to a Special Distribution Fund ("SDF"). The SDF funds are to be used for (a) programs designed to address gambling addiction, (b) payments to state and local government agencies impacted by tribal government gaming,

(c) regulatory costs related to the compacts, (d) payment of shortfalls in the RSTF, and (e) "any other purposes specified by the Legislature." The SDF has been consistently used to cover shortfalls in the RSTF. Most recently, just over half of the funds for the latest RSTF quarterly payment of \$275,000 per tribe were drawn from machine license fees, and the rest was drawn from the SDF to cover the shortfall.

Between 2003 and 2008, California entered into compacts allowing for more gaming devices and providing for payments into California's general fund. For example, one California compact amendment added a provision allowing the Tribe to operate unlimited devices but specified that the Tribe would pay 15 percent of net win up to \$200 million, and 25 percent of net win over \$200 million, to the State. Last year, California tribes sent \$369 million to California's general fund.

## Compact Negotiation after *Seminole Tribe v. Florida*

Recently, the Rincon Band of Luiseño Indians became the first Indian tribe to enter a compact imposed by a federal court pursuant to IGRA. IGRA provides a regulatory scheme balancing the interests of states and Indian tribes and includes a mechanism ultimately requiring states to negotiate gaming compacts with Indian tribes in good faith. If states refuse, Indian tribes may sue states in federal court, and the court may impose mediation and force a compact.

However, when the Seminole Tribe of Florida sued the State of Florida for failure to enter compact negotiations under IGRA, Florida argued as a defense that it enjoyed sovereign immunity from such suits, and the Supreme Court ultimately agreed. Now, under the Supreme Court's decision in *Seminole Tribe v. Florida*, a tribe cannot sue a state pursuant to IGRA absent an express waiver of sovereign immunity by the state. The *Seminole* decision removed an arrow from the quiver of Indian tribes in compact negotiation as they lack standing to pursue the good faith remedies of IGRA due to the state's sovereign immunity defense. The decision upset the balancing of interests contemplated in the text of IGRA, and as a result, altered the balance of power, sometimes leaving tribes with the stark choice of accepting a state's proposed compact terms or going without a Class III gaming compact at all.

Despite the Supreme Court ruling, California's Proposition 5 ballot initiative to promote Indian gaming, promoted by the State and passed by the voters in 1998, waived the State's sovereign immunity to any cause of action related to the State's failure to negotiate compacts. Similarly, the 1999 compacts, including Rincon Band's compact, contain a limited waiver of both tribal and state sovereign immunity. In 2000, the voters passed Proposition 1A to amend the California constitution to authorize the governor to negotiate compacts with tribes.

## The *Rincon* Decision

California's waiver allowed the Rincon Band of Luiseño Indians to sue the State for refusing to renegotiate a compact in good faith in 2004. The Band had executed a compact in 1999 but hoped to add 900 slot machines to its casino in the 2004 negotiations. Governor Schwarzenegger's administration demanded payments to the State's general fund, which

was burdened with an enormous budget deficit, in exchange for the expansion. A federal district court found that the payments to the California general fund constituted an illegal tax on the Tribe, the Ninth Circuit agreed, and the U.S. Supreme Court refused the State's appeal. When the Tribe and State failed to reach agreement last year, both sides submitted their "last best offer" compact proposals to a court-appointed mediator. In June, the mediator selected the Rincon Band's version as the proposal that "best comports with IGRA" and the Secretary of the Interior approved the Band's proposed compact, after nine years of negotiations and litigation.

The imposed compact process gave the Indian gaming community a glimpse into an alternate universe in which the Supreme Court hadn't struck down the "good faith" compact negotiation remedy of IGRA, and a decision on the merits that extractive revenue-sharing demands by states offering no meaningful concession in compact negotiations violate IGRA. The Ninth Circuit's decision held that, in order to be lawful, under IGRA, the State may receive revenue sharing for uses directly related to gaming activities, as a bargained for consideration for a meaningful concession from the State, but that merely increasing the number of gaming devices was not meaningful.

The Rincon Band had never sought to avoid payments to the Revenue Sharing Trust Fund at the usual rates, cost reimbursement to the State for the portion of the State's actual regulatory costs attributable to the Band, and payments to the Special Distribution Fund. It appears that those terms are safely within the realm of good faith negotiation. The Rincon tribe will not pay into the California general fund.

## The Graton Rancheria Compact

The most recent California compact to be approved by the Secretary of the Interior is the compact enabling the enormous \$800 million Graton Rancheria project in Rohnert Park, an hour's drive north of downtown San Francisco. The compact provides for various payments from the Federated Indians of Graton Rancheria to California. Under the Graton compact, the Tribe will pay \$350,000 per quarter to the SDF, and three percent of net win after 29 quarters. The Tribe pays 15 percent of net win to the "Graton Mitigation Fund," decreasing to 12 percent after 29 quarters, with deductions for the benefit of the Tribe based on the number of tribal citizens and retirement of development costs. The Graton Mitigation Fund may be used only for payments to the City of Rohnert Park, Sonoma County, and non-gaming and limited-gaming tribes. Finally, the Tribe pays into the RSTF on the regular schedule but also pays 25 percent of net win over a certain amount each year, starting at \$350 million at Year One. In approving the compact, the Acting Assistant Secretary-Indian Affairs reasoned that the exclusivity granted to Indian gaming in California is a meaningful concession.

## Conclusion

Under Governor Brown, California's attitude towards negotiating with Indian tribes has returned to a more cooperative spirit. It is clear from the Graton compact that Tribes are still willing to enter substantial

revenue-sharing arrangements with the State after the *Rincon* decision and that the Secretary of the Interior will approve those arrangements. However, the *Rincon* decision will likely affect the renegotiation of the other compacts executed under Governor Schwarzenegger that provide for payments to the California general fund.

## SENECA NATION V. NEW YORK EXCLUSIVITY DISPUTE UPDATE

by Patrick Sullivan

As the arbitration between the Seneca Nation of Indians and the State of New York continues, stakeholders such as the cities of Niagara Falls and Salamanca watch and wait for news of whether and when the withheld payments may be delivered. Meanwhile, the State has not removed the video lottery terminals within the Tribe's exclusivity zone that sparked the debate.

Adding to the existing tensions, New York Governor Cuomo has not denied an off-the-record tip to the *Buffalo News* that he may propose the idea of a second, non-Indian casino in Niagara Falls. The notion of a competing commercial casino is speculative at best, as such an operation would be years away and would do little to solve the city's immediate cash flow crisis.

Niagara Falls Mayor Dyster prefers the more realistic option of reaching an agreement with the Nation, and he has stated that the arbitration is on track and that he expects the withheld tribal payments to the State will be delivered by mid-year. The Governor has agreed to send \$2.5 million to the city of Salamanca, which is home to another Seneca casino and is owed \$20 million in payments. However, as of now, the Governor has not offered a similar deal to Niagara Falls.