



Compacts or Clout

By [Dave Palermo](#)

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Sports betting debate presents tribes with difficult decisions



American Indian political clout amassed over the last 30 years with development of a \$32 billion tribal government gambling industry is proving effective in deliberations over legalized sports betting in the 29 states with Indian casinos.

In addition, the Indian Gaming Regulatory Act (IGRA) of 1988 and tribal-state casino regulatory agreements, or compacts, are proving effective tools in protecting the rights of 242 indigenous communities operating casinos for the purpose of generating government revenue.

States seeking legalized sports wagering are largely ceding to tribal demands, particularly exclusivity provisions in many tribal-state compacts. State officials are cognizant that to do otherwise could jeopardize jobs and revenue generated by Indian gambling.

“States have found great value in the revenue these compacts generate through tribal gaming,” says Navajo Hilary Tompkins, an attorney with the Washington, D.C. firm Hogan Lovells LLP.

“The states have been facing a lot of budget constraints and are very dependent on tribal revenue sharing,” says Tompkins, former solicitor for the U.S. Department of the Interior under President Barack Obama.

Nine of 29 states with tribal casinos have revenue sharing provisions in their compacts, according to statistics compiled by tribal consultant Jeremiah M. Murphy. States also benefit from taxes, jobs and the economic impact of Indian casinos on surrounding communities.

“My general sense is that the states are in a position where they really are dependent on the tribes and have an interest in continuing that relationship,” Tompkins says.

Economic Clout

Tribal casinos in 2014 were responsible for 635,000 direct and indirect jobs nationwide, according to a study by economist Alan Meister for the American Gaming Association. The industry generated \$96.6 billion in economic output, \$33.2 billion in wages and \$16 billion in taxes and payments to federal, state and local governments, Meister says.

The economic impact of gambling has provided tribes with political clout.

“Political power follows economic power, and Indians are a dominant player in the U.S. gambling industry,” says attorney Stephen Hart of Lewis Roca Rothgerber Christie LLP, whose clients include several Indian tribes.

“It’s fair to say tribes have good relations with the states, but it’s based on money, not anything else,” says Rosebud Sioux Joe Valandra, a consultant and onetime chief of staff for the National Indian Gaming Commission (NIGC), the federal regulatory agency for Indian casinos. “That may sound a little cynical. But tribes have, by and large, done a great job leveraging that financial benefit to the states.”

About a dozen states have moved to legalize sports betting. But sports wagering legislation in California, Connecticut, Washington, Minnesota, Michigan, Florida, Oklahoma and other states with significant Indian gambling industries has been delayed or deep-sixed by powerful tribal lobbies not pleased with wording in the bills.

While commercial casino operators and some Indian governments have expressed enthusiasm about sports wagering, many tribes are cautious about the low profit margins and risks associated with the endeavor.

They are also insisting on protecting gambling exclusivity provisions in their compacts.

“Tribes are not beating down the door to get into sports betting,” says attorney Glenn Feldman, whose clients include California and Arizona tribes.

“A year ago, when the Supreme Court decision came down, everyone thought tribes would be ready and rearing to go,” Feldman says of the high court ruling that gutted the Professional and Amateur Sports Protection Act (PASPA), allowing states to pursue sports wagering. “But I don’t think that’s turned out to be the case. I don’t think we’ve seen a tremendous groundswell of enthusiasm for it.”

Interest from states once excited about potential taxes from sports wagering has also waned.

Six states that legalized sports betting have been disappointed with tax revenue from the fledgling businesses. West Virginia has collected only a quarter of projected revenue from sports betting while Pennsylvania and Mississippi have generated roughly half of what was anticipated.

In addition, many tribes remain fearful sports betting will prompt mobile and internet wagering, a crucial component to the profitability of sports books but an industry evolution tribes fear will diminish visitation to nearly 500 casinos and other gambling outlets on Indian lands. (See “Tribes Slipping Away from IGRA,” page 28.)

“Sports betting takes us one step closer to what we don’t want to see, which is wide-open internet gambling in Minnesota,” John McCarthy, executive director of the Minnesota Indian Gaming Association, says of sports wagering bills tribes managed to delay until next year.

Minnesota tribes have compacts with no expiration and no revenue sharing, agreements envied by tribes in other states. The state’s 11 politically powerful tribes signed a resolution against expanded gambling, including sports betting.

“We believe it (online gambling) will hurt the brick-and-mortar operations,” McCarthy says. “That’s been an issue with us forever.”

California tribes which top the nation’s gambling industry, generating some \$9 billion a year in casino revenue, oppose proposed legislation to amend the constitution to legalize sports wagering not only for tribes, but card rooms and racetracks.

Thanks But No Thanks

The measure will not succeed without support of 61 tribes who enjoy constitutionally guaranteed casino exclusivity and compact provisions allowing them to operate slot machines and banked and percentage card games.

“I don’t see any appetite for sports betting among the tribes in California,” says Steve Stallings, chairman of the California Nations Indian Gaming Association, a group of 38 tribes. Washington state tribes also used their political influence to delay recent legislative efforts to legalize sports betting, particularly a bill that would have allowed the Muckleshoot Tribe to operate sports betting at an off-reservation racetrack.

“Tribes are very much in favor of sports betting,” says Ron Allen, chairman of the Jamestown S’Klallam Tribe and Washington Indian Gaming Association. “It could be legislatively authorized and easily amended into our compact.

“But the legislature just hasn’t vetted the issue enough to understand how it would work. We are insisting if it is allowed in Washington state that it only be allowed on tribal property.”

Michigan tribes also pushed back on legislation to legalize online wagering, including sports betting. A current bill would allow tribes to offer internet gambling as a commercial venture taxed at 8 percent and regulated by the state, rather than gambling under IGRA.

Tribes in Wisconsin, home to the NFL’s Green Bay Packers, with the possible exception of the Oneida Nation, are not enthused about renegotiating compacts to permit sports betting.

About half of the nine Oregon tribes are likely to pursue sports wagering if the state lottery goes through with plans to offer the option.

“The key is equity or parity with what the state offers,” Justin Martin of Perseverance Strategies says of the Oregon Tribal Gaming Alliance. “State-tribal relations in Oregon are really good.

Regardless of who the governor is, we've always been able to sit down and request amendments."

Compact renegotiations have again proven problematic in Florida, where the Seminole Tribe has a virtual monopoly on a nearly \$3 billion casino gambling industry. A tentative pack under consideration is expected to include sports wagering.

The Mashantucket Pequot and Mohegan tribes—which share a monopoly on gambling in Connecticut—have been working out an agreement on sports betting with state officials that would give tribes exclusivity. Talks had stalemated when Global Gaming Business went to press.

Connecticut tribes, which generate about \$1.6 billion a year based on 2016 estimates, share a whopping 25 percent of their slot machine win with the state, far more than other jurisdictions.

"If there is no agreement between the tribes and the state, I don't see any gaming bill coming out, including sports betting," state Rep. Joe Verrengia told the Hartford Courant. "Revenues of sports betting in other states are under-performing, and I don't see Connecticut being any different."

Compacts Playing Crucial Role

IGRA is a congressional response to a 1987 U.S. Supreme Court ruling upholding the inherent right of Indian communities to operate gambling on tribal lands. It requires that tribes seeking to operate what is known as Class III, Nevada-style casinos enter into regulatory agreements with the states.

Some tribes pay states a share of their gambling revenues in exchange for exclusivity to operate casinos. Revenue sharing remains controversial, in that IGRA prohibits taxation of tribal gambling. But nine of the 29 states with tribal compacts have revenue sharing provisions.

IGRA also limits tribes to the types of gambling otherwise legal in the state. Some states have constitutional prohibitions against casino gambling. Others restrict it through legislation.

Some compacts—such as those in New York, New Mexico, Mississippi, North Dakota and Oregon—refer to "casino-style games," which in legal terms may include sports betting. Other agreements specifically define permissible games. Most exclude sports betting.

Tribes in states with significant Indian gambling markets—California, Arizona, Oklahoma, Washington, Connecticut and Florida, in particular—are not able to operate sports betting unless the states amend their constitutions or enact legislation to legalize the activity. The Eastern Carolina Band of Cherokee Indians is pursuing sports betting legislation.

"IGRA imposed a lot of restrictions on tribal gaming. The Seminole decision was an additional restriction on tribal rights," Murphy says of the 1996 U.S. Supreme Court decision preventing tribes from suing states that refuse to negotiate compacts.

"That said, in the instance of sports betting—a new Class III product—certain tribes have the upper hand.

“States that have traded gaming exclusivity for a share of tribal gaming revenue have a significant interest in the success of those tribal gaming operations,” says Murphy, who has extensively researched compacts.

“Connecticut has a 25 percent stake in revenues from two substantial gaming enterprises,” Murphy says. “But the state earns that 25 percent only so long as it prevents any gaming competition to those tribal gaming operations.

“That’s powerful leverage for those Connecticut tribes.”

“It’s all a very interesting balance between sovereign powers,” Tompkins says of the tribal-state compacts.

“The very delicate balance that is achieved in these compacts is a hard-fought, negotiated agreement. That is why I think there is reticence by the state to do anything that would jeopardize that balance.”

Impact On Compact Talks

Nationwide, roughly 20 of the 29 compacts do not have expirations or include automatic renewal provisions, Murphy says.

Seventy-seven California tribes have compacts, although only 61 operate 63 licensed casinos, according to the California Gambling Control Commission.

Although most of California’s more lucrative tribes reached agreement on new deals before Governor Jerry Brown left office in January, about 33 tribes are still seeking deals with newly elected Governor Gavin Newsom.

The legislative session would need to ratify compacts by August to meet a deadline for expirations, but they can be extended if talks are ongoing.

Arizona tribes are in compact talks to extend agreements that expire in 2023, deals expected to include sports betting provisions.

The Navajo Nation is endorsing legislation by state Senator Sonny Borrelli to allow tribes to operate sports betting kiosks in off-reservation bars. The proposition is opposed by most other tribes, which fear it would void existing compacts.

Compacts for 32 Oklahoma tribes are due to expire in January, but the agreements have automatic 15-year renewals. Tribes are generally pleased with the current statewide agreement, which calls for machine revenue sharing of roughly 4 percent to 6 percent.

“There have been some informal talks,” says attorney Mike McBride of Crowe & Dunlevy in Tulsa. “Suffice to say, the tribal party line is, ‘We’ve got a good thing going; let’s let the compact renew on its own.’”

Legislators recently approved “ball and dice” games, which were amended into the existing compacts. The same could be done should lawmakers approve sports betting. But no bill is pending and only a few of the larger tribes have indicated interest in the low-margin endeavor.

“The tribes’ collective position—as best there can be one—is that sports betting is a complicated and unique situation with a lot of moving parts, and nobody has or can get their arms around it yet, at least in this market,” says attorney William Norman of Hobs Straus Dean & Walker. “That needs to be separate and apart from this 15-year agreement we have that automatically renews in six months.

“We’ve got a compact that has been wildly successful, more than anybody imagined it would be,” Norman says. “There is no reason to fix something that’s not broken.” Sources say newly elected Oklahoma Governor Kevin Stitt hopes to get additional exclusivity fees from the tribes to help with a potential tax shortfall from the state’s energy industry. But tribes can revert to a thriving Class II machine market not subject to state taxes, negating any increase in fees.

Stitt and his communications director, Baylee Lakey, would not respond to requests for comment.

David Qualls, chairman of the Oklahoma Indian Gaming Association, said in an emailed statement that tribes are not aware if Stitt will seek compact talks.

“We don’t know. It’s possible, but the market has shown the current exclusivity fee to be well calibrated, and we would not anticipate tribal leadership being willing to discuss at this point something that is not in their economic interest,” Qualls says.

“Any addition to the existing compacts to allow sports betting will require state legislation to legalize sports betting and a supplement to the compacts to make sports betting a covered game,” he says. It also would be subject to approval by the U.S. Department of the Interior.

California Conflicts

A public ballot initiative to amend the constitution to legalize sports wagering in California failed this spring to amass the required signatures. Assemblyman Adam Grey is sponsoring legislation to put sports betting on the ballot in 2020, extending the opportunity to tribes, racetracks and card rooms.

The issue is not likely to succeed without support of the politically powerful tribes. And they are not anxious to support any initiative that would extend sports wagering to tracks and card rooms.

Tribes are particularly adamant about the card rooms. The tribes are suing card rooms and state regulators, claiming the clubs are offering banked games in violation of state law and constitutional prohibitions.

“I don’t think any tribes will support sports betting while the card rooms are expanding the games,” says a tribal lobbyist who requested anonymity. “Until that’s resolved I don’t see any progress on sports betting.”

Tribes seeking new compacts operate smaller casinos and are largely concerned with provisions dealing with contributions to a tribal grant fund, local government mitigation, organized labor and state intrusion into the ability of tribes to regulate their casinos. Tribes contend these and other matters are largely outside the scope of what IGRA intended, and so are permissible issues in compact negotiations. Previous agreements entered into under

the Brown administration were only “deemed” approved by Interior officials not pleased with the compacts.

“These are all various peripheral things that may be good social policy that nobody can disagree with but are not within the scope” of IGRA’s seven issues permissible in compact negotiations, attorney George Forman says. “Not a single Brown compact was affirmatively approved,” he adds.

Meanwhile, a biannual “all-tribes” meeting scheduled later this summer will likely take on sports betting. A tribal-supported ballot initiative to amend the constitution may be on the table.

“Tribes are starting to have conversations on how to approach (sports betting), legislatively and politically,” says a source requesting anonymity. “It won’t be the only issue up for discussion. But I’m sure it will be a topic.”

Tribes Slipping Away from IGRA

Sports betting and mobile gaming demand flexibility



Navajo attorney Steve Hart

Sports betting deliberations in Arizona, Michigan and elsewhere are prompting debate over whether American Indians should begin moving away from federal Indian law and instead operate expanded gambling as commercial ventures, taxed and regulated by the states.

The Indian Gaming Regulatory Act (IGRA) of 1988 allows tribes to operate Nevada-style casinos on Indian land held in trust status by the federal government. IGRA permits indigenous communities to regulate casinos exempt from state taxes.

But IGRA is creating legal uncertainty over the ability of tribes to accept wagers from off Indian reservations, creating a potential obstacle to indigenous communities as gambling evolves from casino slot machines to internet and mobile wagering.

“There are very diverse opinions on mobile gaming,” says Navajo attorney Hilary Tompkins of Hogan Lovells LLP, former solicitor of the U.S. Department of the Interior in the Obama administration.

“If you go off Indian lands, you operate outside the Indian Gaming Regulatory Act. It would not be part of a compact under IGRA. It would be tribes acting as commercial entities,” she says, taxed and regulated by the state.

The issue is particularly sensitive in Indian Country, because land-based casino revenue is crucial in sustaining tribal governments and providing services to indigenous citizens.

Tribes fear sports and online wagering will erode revenue from some 500 casinos and other gambling venues on Indian lands. But the evolution appears unavoidable.

The sports betting business is regarded by experts as an expensive and risky endeavor, likely to generate only a slim profit margin. But it is regarded as a valuable marketing tool in luring younger customers to casinos.

Sports betting profits can be dramatically improved with account and internet wagering from the convenience of a smartphone. Roughly 70 percent of sports wagers in the European and New Jersey markets come from online bets.

“Commercial operators and tribes realize the only way that sports betting has a chance to be successful—both as a stand-alone profit center and as a promotional tool—is if it is tied to mobile gaming,” says consultant and Rosebud Sioux Joe Valandra, former chief of staff for the National Indian Gaming Commission, the regulatory agency for tribal government casinos.

States and tribes have largely pushed back against online wagering as legislation to legalize sports betting spreads throughout the country. Most bills prohibit online wagers or limit it to bets made in or near tribal casinos.

Exceptions include New Jersey, which has no federally recognized tribes, and Michigan, which is proposing sports betting legislation that would allow tribes to provide the business as a commercial venture outside IGRA, taxed at 8 percent and regulated by the state.

Meanwhile, the Navajo Nation and Arizona Senator Sonny Borrelli are proposing legislation that would allow tribes to offer sports betting on the reservation under IGRA while owning and operating wagering kiosks at off-reservation bars, state-regulated and taxed at 6.75 percent.

“Our primary goal is to develop and diversify the Navajo economy,” Dwight Witherspoon, speaker of the Navajo Nation Council, told a Senate committee.

“This is about business, jobs and revenue, both for tribes and for the state of Arizona.”

Most Arizona tribes are opposed to the legislation, which has come in the midst of renegotiating tribal-state compacts due to expire in 2023.

Navajo attorney Stephen Hart of Lewis Roca Rothgerber Christie says tribes need to begin moving away from IGRA to embrace an industry evolving from middle-aged slot players to millennials with smartphones.

He says the trend will obscure the legal dispute over whether a wager occurs with the smartphone or at an internet server on an Indian reservation.

“Tribes are soon going to be moving beyond the IGRA compacts and into a world where they operate not only under IGRA, but as a commercial entity under state law,” Hart says. “That’s the natural progression of things and a good progression for the tribes.”

Meanwhile, casino opportunities in Indian Country have diminished—tribes operate some 500 casinos in 29 states—and indigenous governments are increasingly seeking commercial gambling ventures.

“We see (online and sports betting), strategically, as an incredibly important part of the industry,” Charles Cohen, vice president of sports betting for IGT, told Frank Fantini, publisher of Fantini

Research. "It's going to be a major element of every part of the gaming industry in the U.S. in the next 50 years."

Minnesota tribes enacted a resolution to oppose expanded gambling in the state, including sports wagering. Minnesota Indian Gaming Association Executive Director John McCarthy says tribes fear online wagering brought about by sports betting will diminish casino revenues.

McCarthy acknowledges, however, that online and mobile gambling will eventually become a reality. Tribal casino operators, he says, can only hope to forestall the inevitable.

"If it is 20 degrees and snowing, are you going to get in your car and drive 20 miles to a casino," McCarthy asks, "or are you going to go online?"

Dave Palermo is an award-winning metropolitan newspaper reporter. He has written about American Indian governments for more than 20 years, working as an advocate for several tribes and tribal associations. He also has co-authored books on gambling and gambling law. He can be reached at dgpalermo1@gmail.com.