

Michigan's Tribal Casino Compacts

Rethinking the 2 Percent Solution to Impacts on Local Government

By James P. Hill

Background

In 1988, Congress established a framework for regulating gaming on Indian lands by enacting the Indian Gaming Regulatory Act (IGRA).¹ Five years later, and after three years of litigation, then Governor John Engler reluctantly inked identical tribal casino compacts with the state's seven federally recognized tribes,² ushering in a new era of tribal casino gaming in the state of Michigan. While smaller tribal gaming operations such as bingo had been in operation before 1993, signing the compacts triggered the opening of the more extensive (and profitable) class III³ gaming that over the next 16 years would spread virtually throughout the state and initially create a significant new revenue source for the state and the counties hosting tribal casinos.

The original seven tribal casino compacts approved in 1993 will expire in 2013, although either the state or a tribe can request negotiations in 2012. After more than 16 years of casino operation, a number of issues should be revisited before these original compacts are renegotiated, not the least of which is restoration of the 8 percent state share of tribal casino revenues lost when the nontribal casinos in Detroit opened, violating the tribal exclusivity provisions of the 1993 tribal compacts.⁴ Restoring those casino funds could be a timely and significant boost to declining state revenues.

The 1993 tribal casino compacts were silent as to the process of allocating casino revenues to the state and local units of gov-

ernment in order to compensate them for the effects of these new gaming enterprises. The IGRA does not permit states to tax tribal gaming revenues, so the 2 percent local revenue share (and the 8 percent state share) was addressed in a separate federal court consent decree⁵ in exchange for state promises of tribal casino exclusivity.

However, concerns about the 2 percent local revenue distribution process by the counties hosting casinos and about the overall adequacy of the total revenue sharing persist. In addition, a 2007 Central Michigan University longitudinal study of Michigan tribal casino effects developed under the supervision of this author and released in August 2007⁶ (the CMU study) presented evidence that counties adjacent to host counties also may be legitimate claimants to the 2 percent funding.

Accordingly, after providing an overview of the casino revenue distribution issue, this article will discuss two issues concerning local units of government that need to be addressed when the 1993 compacts are renegotiated:

- (1) Should language revising the local government casino revenue distribution process be formally incorporated into the renegotiated 1993 compacts?
- (2) Should counties other than the host counties be eligible for this 2 percent funding?



Fast Facts:

- The financially strapped state of Michigan forfeited its claim to an 8 percent share of revenues from tribal casinos approved in 1993 when voter-approved Detroit casinos were allowed to open.
- Only communities in host counties of tribal casinos share in the annual 2 percent casino revenue distributions, though data show adjacent counties experience many of the same casino-related effects as the host county.
- Under the terms of the 1993 compacts, the 1993 Michigan tribal casino compacts are scheduled to be renegotiated in approximately three years.



The 2 Percent Decision Makers

Currently, there are three different revenue decision-making models for allocating the 2 percent share of casino revenue to local units of government, depending on the year the compact was approved.

Model One

As noted, the first wave of compacts negotiated with seven federally recognized tribes in Michigan in 1993 provided for neither state nor local government revenue sharing, and they had no revenue allocation process. Instead, a 1993 federal court consent decree produced the 8 percent share to the state and the 2 percent share to local government allocations. While the state could spend its casino allocation revenue for any purpose it deemed appropriate, the 2 percent share was distributed to individual local organizations and governmental units according to priorities set by each Indian tribe.

This allocation process has been criticized because of the lack of transparency as to how the tribes select 2 percent recipients, as well as concerns about the eligibility of some of the recipients of the 2 percent funding. For example, the Antrim County Board of Commissioners adopted a resolution in 2006 that was sent to the governor and the Michigan legislature calling “for more stringent enforcement of the State’s tribal compact agreements for the benefit of state and local community budgets.” The specific reason given was that some tribes dedicate their 2 percent payment to charities of their own choosing, circumventing the obligation to share with local units of government.

Model Two

Compacts approved in 1998⁷ (with four additional tribes who were not recognized by the federal government in 1993) replaced individual Indian tribal decision makers with three-person local revenue sharing boards (LRSBs) to make the 2 percent allocation decisions. The LRSBs consist of a representative of the host county; a representative from the village, city, or township in which the casino is located; and a representative of a third unit of local government determined by the first two representatives to be most affected by the tribal casino. The 1998 compacts provide that certain amounts of the 2 percent share are to be used for public

safety purposes, to compensate for the loss of ad valorem property taxes that otherwise would be subject to local taxation, and “to offset costs to local units of government as a result of the development of a Class III gaming facility in the vicinity.” The remainder of the payments is to be used “for any other lawful local government purpose.”⁸

While more transparent and defined than the individual tribe decision-making process in the 1993 compacts, this LRSB concept also has stirred up political controversy, particularly as it relates to selection of the third member of the board. Local political jealousies have led to battles to exclude otherwise eligible third members. In 2007, a feud between the nearby city of New Buffalo and the two designated representatives for the Four Winds Casino in Berrien County led to the selection of the school district as the third member by the two permanent representatives. The Pokagon Band of Potawatomi Indians rejected this LRSB composition and in December 2007 announced that it would withhold its first 2 percent payment of revenues from the newly opened casino until this board composition was resolved.⁹ (This compact had to be amended to resolve the dispute and is discussed in Model Three below.)

Model Three

More recently, a compact between the state of Michigan and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians signed on March 9, 2007 (the Allegan compact) provided a third decision-making model. Combining aspects of representation from the first and second state compact models, the 2 percent decision-making entity in this compact is an LRSB consisting of six representatives: one representative from the host county governing body; one representative from the village, city, or township where the casino is located; one representative selected by the remaining units of government that are parties to the interlocal agreement; and three representatives selected by the tribe.¹⁰

Although this process creates the possibility of a stalemate with an even number of representatives—for example, a situation could arise in which all the tribe representatives take one position and all the local units of government are united in their opposition to that position—its diverse membership does provide for more transparency to the 2 percent allocation decision-making process than the 1993 compacts approach and removes some of the politics of how to select LRSB representatives found in Model Two.

Most recently, Model Three was further refined in the amended compact between Berrien County and the Pokagon Band of Potawatomi Indians. The amendments provided for a five-person LRSB, which removes stalemate possibilities and specifically identifies LRSB membership as one member from each of the governing bodies of Berrien County, New Buffalo Township, and the city of New Buffalo; a member selected by a remaining unit of government that signed the interlocal agreement; and a member of the tribe.

Implications of the CMU Michigan Tribal Casino Study

The renegotiation of the 1993 compacts to include some formal local government revenue sharing board would address many of the concerns of host counties. However, the presumption that it is sufficient to address only the concerns of the host counties also needs to be reexamined. Data gathered from the CMU study suggests that the geographic impact of tribal casinos may be more far-reaching than the host county borders.

The CMU study not only raises the issue of what additional interests of local units of government should be considered in the 2 percent allocation process, but also the issue of the adequacy of the 2 percent funding. It is to these two related issues that we shall now turn.

The 2 Percent Eligibility and Adequacy Issues

It was assumed in 1993 that the effects of tribal casinos, both positive and negative, would largely be felt in the communities located closest to the casino. The host county was treated as the outer boundary of casino effects, and the 2 percent distributions authorized in the 1993 consent decree for the first wave of tribal casinos were focused on communities within the host county. While some argue that the state's 8 percent share of the casinos' net winnings was intended to handle the casino effects outside the host county, in reality these funds have not been directed at handling specific local governmental issues, but instead have been used for general statewide concerns.

More importantly, the CMU study suggests that some negative casino effects may be felt more intensely in the counties adjacent to the host county than in more distant counties.¹¹ For example, food service and drinking establishments (often associated in the gaming literature as a key business affected by the construction of a casino) located in counties within 50 miles of a casino suffered dramatic economic declines compared to host counties and the county statewide average.¹²

In addition, the rate of personal bankruptcies, another factor often associated with gaming, also showed significant increases in adjacent counties during this 10-year time frame—nearly three times the state average and nearly twice the average rate in host counties.¹³ Adjacent counties also experienced:

- The smallest state equalized value (SEV) increase in property values.¹⁴
- The largest increase in high school student population.¹⁵
- The largest population increase.¹⁶
- A large increase in law enforcement employees—identical to the increase experienced in host counties and significantly greater than the state average.¹⁷

While there are obviously many other reasons for these disproportionate percentages in variables often associated with casino gaming in adjacent counties, the gaming literature suggests that these differences may be influenced by the presence of a casino.

If there is indeed a connection to casinos for these effects on counties adjacent to host counties, the adjacent counties should be eligible for some form of compensatory funding. However, this conclusion raises the funding adequacy issue: how should these additional counties be funded so there is neither a decrease in the 2 percent share currently provided to the host county nor a decrease in the state's 8 percent revenue share¹⁸ so badly needed at this time?

One possibility is to create a separate fund administered by the state and made available only to local units of government within the counties adjacent to the casino. How this process would be funded is a key political consideration. Arguably, the larger the casino, the greater the effect would be on nearby communities. The Allegan compact provides for a graduated increase in the percentage of the casino's net winnings for the state, with the state's 8 percent share rising to as much as 12 percent if the net winnings exceed \$300 million. The funding to pay for impacts experienced by counties near the larger casinos could be drawn from



the increased state percentage provided in the Allegan compact without decreasing either the 2 percent share currently designated for the host counties or the state's base 8 percent allocation.

The specific approach to the 2 percent allocation process will be a point to debate in the next round of tribal compact negotiations. Past experience and lessons from prior compact renegotiations in states such as California and Arizona can be useful guides as well. Regardless of the model eventually selected, it is imperative that this issue be directly addressed in the next round of compact negotiations for the 1993 compacts.

Conclusion

Whether renegotiation begins in 2012 or even earlier¹⁹ will depend on a number of factors. A key timing factor will be the intersection of the state's need for a new revenue stream and the tribes' desire to secure a more favorable, long-term future compact arrangement. The incentive for tribes to negotiate is stronger now while the state is in desperate need to restore state casino revenue funds to balance its budget.

Among the many issues that will need to be addressed during the compact negotiation process, none is more important to local units of government than addressing the inequities in and inadequacies of the current 2 percent solution. Public discussion of these concerns, as well as more intensive data gathering, is necessary before the state commits to another set of 20-year legally binding compacts.

A good first step would be for the state to begin a dialogue with the local units of government in host and adjacent counties to develop a more informed framework for addressing the casino effects on local governments in the next generation of tribal casino compacts. Decisions on revenue sharing boards, the eligibility of non-host counties for 2 percent funding, and a progressive scale for state and local casino revenue sharing should be at the top of the list.

The time for such a *public* discussion of these issues is now, and not 2012. ■

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FOOTNOTES

1. 25 USC 2701 *et seq.*
2. The tribes that signed the 1993 casino compacts were the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Hannahville Indian Community, the Keweenaw Bay Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Saginaw Chippewa Indian Tribe, and the Sault Ste. Marie Tribe of Chippewa Indians.
3. Class III gaming includes any electronic games of chance, such as slot machines and video poker, and essentially all other non-class I or II gaming that would otherwise be heavily regulated by states.
4. When the Detroit nontribal casinos opened, the tribes terminated the 8 percent state revenues, but continued the 2 percent local revenue distributions.
5. *Sault Ste Marie Tribe of Chippewa Indians v Engler*, entered by the United States District Court for the Western District of Michigan, August 20, 1993 (No. 1:90 CV 611).
6. Central Michigan University, *The New Buffalo: A Comparative Examination of Tribal Casino Gaming in Michigan 1993–2003* (revised November 2007), available at <<http://turtletalk.files.wordpress.com/2008/07/casino-report-final-version-revised-11-5-07.pdf>>. All websites cited in this article were accessed October 21, 2009.
7. These compacts were adopted by a process consistent with that approved by the Michigan Supreme Court in *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306; 685 NW2d 221 (2004).
8. Examples of this language can be found in the 1998 compacts with the Little River Band of Ottawa Indians in Manistee County, the Little Traverse Bay Bands of Odawa Indians in Emmet County, and the Pokagon Band of Potawatami Indians in Berrien County. (A fourth casino was approved but not opened in 1998 for the Nottawaseppi Huron Band of Potawatami.)
9. Kehoe, *Pokagon Band Withholds Four Winds Casino's First Revenue Payment*, WSBT News, December 4, 2007, available at <<http://www.wsbt.com/news/local/12125901.html>>.
10. An interlocal agreement is a formal agreement among local units of government for handling casino-related issues.
11. Central Michigan University, pp 7–8. The term "unaffected county" was used in the study to describe counties that are located more than 50 miles from tribal casinos. The term "adjacent county" is used in this article to describe counties that are located in whole or in part within 50 miles of a tribal casino.
12. *Id.* at 30–35.
13. *Id.* at 43–47.
14. *Id.* at 55–56.
15. *Id.* at 84–89.
16. *Id.* at 81–82.
17. *Id.* at 76–78.
18. Eight percent was the share to the state originally established by consent decree for the 1993 compacts. Higher percentages were established in subsequent waves of compacts with other tribes.
19. There is anecdotal evidence that informal meetings between the tribes and the state are already occurring.