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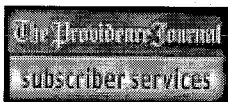
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## State-tribe compact is option in tax fight

**States such as Washington, New York and Oklahoma have made political decisions that have allowed tribes to sell cigarettes.**

07/21/2003

**BY MICHAEL CORKERY**  
Journal Staff Writer

A resolution to the smoke-shop dispute could come in the form of a compact between the state government and the Narragansett Indian tribe that establishes some type of tax on tobacco sales without infringing on tribal sovereignty.

A compact is one option on the negotiating table, as the two sides return to U.S. District Court today in an effort to resolve their differences.

Before the Charlestown melee last Monday, state officials said the Naragansetts' sale of tax-free cigarettes undercut a vital source of state revenue. Governor Carcieri insisted the state had the right to tax those sales.

Governors around the nation have made similar arguments over the years, but after some nasty court and street battles, many states have compromised on the issue.

Washington state has battled over cigarette sales with some of its 29 Indian tribes since 1980. The state finally devised a compact with the tribes in 2001.

Under the Washington compact, the tribes must charge the equivalent of the state's cigarette excise tax and sales tax, but the tribal government can keep that revenue.

"All of that revenue goes to the tribe," said Leslie Cushman, a tribal liaison from Washington's Department of Revenue. "We would have loved the money, but we made some political choices."

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Washington officials decided that the state's priority was to stop the sale of cheap, unregulated cigarettes, Cushman said.

Under the compact, the tribes are required to buy their product from licensed dealers and they are required to affix a tax stamp on the product. The tribal members collect the taxes and keep the money for the tribe.

"We thought [the revenue] belongs to some government; it doesn't matter which government," said Cushman.

After years of sometimes acrimonious clashes between the state and the tribes, "it's been working out well. It took a long time to get here," Cushman said.

The tribes in Washington must tax non-Indian consumers, but they are not required to tax their own tribal members, Cushman said.

In Oklahoma, the issue was settled, in part, by the U.S. Supreme Court case *Oklahoma Tax Commission v. Citizen Band Pottawatomie Indian Tribe of Oklahoma*.

In that 1991 case, the state argued it can tax cigarettes sold by tribal businesses to nontribal members. But it cannot tax cigarettes sold by tribal members to fellow members.

The court case inspired a 1992 compact between the Oklahoma state government and 34 of its 38 federally recognized tribes, including the Cherokee Nation.

Under the Oklahoma compact, the tribes must give 25 percent of the money they generate from tribal taxes on the cigarettes to the state. The tribes keep the rest of the money for themselves.

The compact is based on an assumption that 25 percent of cigarette sales by Indian businesses are to non-tribal members, while 75 percent are made to tribal members, and therefore not subject to state tax.

Barbara Warner, executive director of the Oklahoma Indian Affairs Commission, said this arrangement avoids the sensitive issue of requiring Indian smoke shops to distinguish between tribal and nontribal members when they are buying cigarettes.

"Ideally, you would ask that question," said Warner, but it could also raise issues of discrimination.

Warner said the compact also maintains a fairly level playing field between Indian and non-Indian businesses selling cigarettes. Most tribes have applied their own taxes in place of state taxes.

In Rhode Island, the Narragansetts were selling their tax-free cigarettes at bottom prices, giving them a huge competitive advantage over nontribal businesses.

When the shop was open for two days last weekend, a carton of Merit

cigarettes cost \$22.99. At a nearby convenience store in Charlestown, the carton cost \$54.55.

Rhode Island would lose significant revenue from the Narragansetts' smoke shop, which did not charge the \$1.32 excise tax on a pack of cigarettes.

According to one state estimate, if 10 percent of Rhode Island smokers shop at the store, the state would lose \$10 million of the \$104.8 million it expects to collect in excise taxes next year.

On some levels, it's difficult to compare the situation of the Narragansetts in Rhode Island to that of the Indian tribes in a place such as Oklahoma.

There are about 2,600 Narragansetts living in Rhode Island. By comparison, there are more than 145,000 Cherokees in Oklahoma.

The Oklahoma compact addresses the issues in the dispute between Carcieri and the Narragansetts.

It establishes, in writing, that the state does not have the right to tax the tribal government.

At the same time, it preserves a source of tax revenue and establishes a tribal-run system to regulate the distribution and sale of cigarettes. All cigarettes sold must have a tribal or state stamp, verifying that all tribal taxes, or payments in lieu of state taxes, have been paid to the wholesaler.

The situation in New York stands in stark contrast.

There's never been a cigarette-tax compact between the Seneca Nation, a tribe in the western part of the state, and the state government in Albany. Still, tribal members have been selling tax-free cigarettes for years.

The Senecas sell cigarettes over the Internet, in stores along the interstate and out of the trunks of their cars.

In the 1990s, the Senecas clashed with the state when the government wanted to collect cigarette taxes from the tribe. The tribe shut down a section of Interstate 90 running through their tribal land.

When Gov. George Pataki entered office, he backed away from the issue.

"Given the willingness of Indians to engage in civil disobedience, the state decided it would be better to let it go," said Robert Odawi Porter, a law professor at Syracuse University and member of the Seneca tribe.

But the issue is heating up again. This year, the New York state legislature, facing a fiscal crisis, passed a bill requiring the collection of taxes on Seneca cigarette sales.

"It is driven mainly by, one, they need the money and, secondly, they think we are all rich because they authorized the casino," said Porter.

The bill comes after the Seneca Nation recently opened a casino in Niagara Falls, as part of a compact with the state in which it shares some revenue.




Last Thursday, the New York state tax department revealed plans to go after non-Indian consumers of tax-free cigarettes rather than the Indian business because it fears violent protests by the Senecas.

In a statement, the Seneca Nation's president said his government supports the taxation of non-Indian consumers, but does not endorse the reportedly violent threats made by its members.

"However, we cannot control what each individual Seneca member says and does," said Seneca Nation President Rickey L. Armstrong Sr.

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