

# ARIZONA TRIBAL GAMING

## THE GREAT COMPROMISE AND CONTROVERSY

BY HEIDI McNEIL STAUDENMAIER

**T**he Indian Gaming Regulatory Act (“IGRA”), passed by Congress in 1988, requires states to negotiate in good faith with Indian tribes that seek to enter into tribal-state compacts for the conduct of Class III gaming. Although the content of these compacts varies from state to state or from tribe to tribe, these agreements frequently provide for the allocations of criminal and civil jurisdiction between the state and the Indian tribe necessary for the enforcement of laws and regulations.

### INITIAL STRUGGLE TO OBTAIN COMPACTS IN ARIZONA

It was through the complicated IGRA maze that certain Arizona tribes traveled in the early 1990s, leading up to what has been referred to as the “Great Compromise” between the State of Arizona and the tribes involved. State officials at first refused to negotiate any gaming compacts, contending that casino gambling on reservations would attract organized crime. Several tribes sued in Federal Court, arguing that the State *had* to negotiate compacts permitting casino-style gambling since the Arizona Lottery, charitable casino nights and racetrack betting were legal in the State. On this basis, the tribes refused to close down their slot-machine casinos.

Subsequently, the United States Attorney for Arizona raided several tribal casinos in May of 1992. The raids attracted national attention when the Fort McDowell Tribe erected a barricade and

stopped the FBI from leaving with the slot machines.

Soon after, the Arizona Federal Court ordered the State and the tribes to negotiate, with former Arizona Supreme Court Chief Justice Frank X. Gordon as mediator. In February of 1993, Gordon ruled that the tribes were entitled to operate gaming activities like slot machines and poker. He based his decision on the fact that legalized gambling already existed in the State and on tribal needs to generate revenues for governmental purposes.

The State wasted little time in reacting to Gordon’s decision. A special legislative session was called to prohibit slot machines and other “casino gambling.” The tribes’ reaction was equally swift. They gathered enough signatures to put the issue on a statewide ballot.

### COMPROMISE REACHED IN 1993

Eventually, with the assistance of then Secretary of the Interior Bruce Babbitt, a compromise was reached in June of 1993 and compacts with 16 tribes for 10-year terms were executed.

Under the compromise, the bill banning casino gambling was repealed and a “tier” system for slot machines was established. The greater the membership of the tribe, the more slot machines it could operate. For example, a tribe with 16,000 members or more is permitted up to 1,400 devices at as many as four locations. Limitations were also placed on the type of gaming permitted.

In constructing these negotiated compacts, the State sought to create a standard form of compact. As such, any future tribes seek-

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ing a compact would be offered the standard form. The compromise did not include a revenue-sharing arrangement.

### CONTROVERSY CONTINUES IN 1995

Controversy re-emerged in May of 1995 when the Salt River Pima-Maricopa Indian Community (“Salt River Tribe”) formally requested that the State enter into a standard form of compact. In response, then-Governor Fife Symington announced that he would no longer negotiate new compacts or renegotiate existing ones when they expire in 2003. The Governor claimed he had no duty to negotiate with any tribe on casino-style gaming.

Notwithstanding the Governor’s pronouncement, the Salt River Tribe, located on the edge of Scottsdale, forged ahead in pursuing a standard form of compact. When the Governor remained adamant and refused to enter into the standard form compact, the Tribe filed suit in Federal Court. The Tribe contended that the State had violated the 14th Amendment by denying the Tribe equal protection of law through the State’s refusal to give the Tribe exactly what the State had given to the other 16 tribes in a standard form of compact.

Simultaneously with pursuing its claims in court, the Salt River Tribe backed a public referendum in the Fall of 1996 called the “Fairness Initiative.” The Fairness Initiative stood for the basic proposition that all federally recognized tribes in Arizona be permitted to enter into gaming compacts identical to those already in place between other Arizona tribes and the State.

Although there was significant opposition from horse and dog track owners/operators as well as certain members of the hospitality industry concerned about lost revenues to Indian gaming, the Fairness Initiative was overwhelmingly passed by the Arizona voters. Nevertheless, Governor Symington still refused

to enter into a compact identical to the other compacts in place. He wanted to make several substantive changes in the compact, including regulatory authority and site selection of the tribal casinos.

The Tribe thereafter filed a special action in the nature of mandamus in the Arizona Supreme Court (“Mandamus Action”). Specifically, the Tribe sought an Order requiring the Governor to sign a standard-form compact.

In addition to the Mandamus Action, the Tribe became embroiled on another litigation front. The Sears family (private citizens residing in North Phoenix) tried to block the Tribe’s compact efforts by filing a suit with the Arizona Supreme Court and contending the Fairness Initiative was unconstitutional. The Supreme Court declined to accept jurisdiction and also declined to permit the Sears to intervene in the Mandamus Action.

Undaunted by the Supreme Court’s actions, the Sears then filed a lawsuit in Arizona Superior Court, Maricopa County. The Superior Court Judge initially denied the Tribe’s Motion to Dismiss on jurisdictional grounds and proceeded to have the parties address the merits of case. In August of 1997, the Judge ruled that Governor Symington did not have the authority to enter a compact permitting Keno games and slot machines on the reservation.

### NEW GOVERNOR ASSUMES CONTROL

In September of 1997, Symington was convicted of bank fraud and resigned from office. Secretary of State Jane Hull assumed the gubernatorial reins of control.

Symington’s long-time opposition to Indian gaming in the State had been far from a well-kept secret; quite the contrary, Symington had been a vocal opponent of tribal casinos. Governor Hull’s

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Casino Arizona in Scottsdale, AZ, is one of two casinos operated by the Salt River Pima-Maricopa Indian Community. The second property is Talking Stick Resort (inset), also in Scottsdale.



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position on tribal gaming was unknown. Governor Hull, who taught in the Chinle Public School on the Navajo Reservation in the early 1960s, was viewed as being supportive of economic development on the reservation and having a general understanding of tribal issues.

### ARIZONA SUPREME COURT RULES IN FAVOR OF TRIBE

In October of 1997, the Salt River Tribe finally heard from the Arizona Supreme Court on the Mandamus Action. Ruling unanimously, the Supreme Court held that the Fairness Initiative, passed by the Arizona voters in 1996, required the Governor to agree, at a minimum, to a standard form compact with any tribes lacking a compact. In so holding, the Court concluded:

The fundamental issue in this case is not the question of whether the state should or should not negotiate gaming compacts with Indian tribes or whether the state should or should not have veto power over a tribe's selection of location. The issue, rather, is whether this court has the obligation to implement and enforce a law adopted by the people by initiative that in clear, unambiguous text requires the governor to agree to identified terms and enter into compacts with Indian tribes. We answer that question affirmatively.

Proposition 201, codified as A.R.S. § 5-601.01, does not repeal its predecessor, § 5-601, and does not deprive a governor of the ability to negotiate. Read together, the statutes simply and unambiguously permit negotiations and set the minimum terms to which a governor must agree if negotiations prove unsuccessful. In so doing, the statute does not violate the requirements of IGRA or the separation of powers doctrine because the state's initiative process gives the people the ultimate authority to decide on the terms of the state's gaming compacts with the Indian tribes. Nor does the Indian Gaming Regulatory Act give a governor the unfettered discretion to act on behalf of the state. The act only requires that the state negotiate in good faith. Using their initiative power, the people have the authority to act for the state and dictate to the Legislature and the governor a good faith bargaining position, including the minimum terms of any compact.

We therefore conclude that a governor, if unsuccessful in any negotiations and if requested by a tribe, must sign the standard form of compact defined in § 5-601.01. In reaching that conclusion we do not discourage Governor Hull from reopening negotiations. Nothing in IGRA or the initiative measure requires the parties to remain at impasse.

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### PROPOSITION 202 APPROVES NEW COMPACTS

With many of the other compacts set to expire in 2003, the Governor commenced negotiations with the tribes consistent with the State's primary goals of (1) assuring that the gaming was well regulated and (2) limited in place and scope. Before the new compacts could be finalized, the Arizona horse and dog track racing industry sued to prohibit the Governor from entering into new compacts and also pursued legislation to permit the tracks to have slot machines.

The lengthy dispute finally ended in 2002 with the passage of a public referendum (“Proposition 202”), which allowed the tribes and the Governor to execute the new compacts that had been negotiated and to continue tribal gaming in the State. The new compacts had an initial term of 10 years, which could be automatically extended for an additional 10 years and then another three years if certain conditions were agreed upon between the State and the tribes.

From December 2002 to January 2003, Governor Hull signed new compacts with 16 tribes. Later in 2003, Governor Janet Napolitano signed compacts with an additional five tribes. The compact for each of the 21 tribes is substantially identical. The compact is part of state law in Arizona Revised Statutes Section 5-601.02.

The Arizona Department of Gaming is the state agency charged with the regulation of tribal gaming. Each tribe also has its own tribal regulatory authority responsible for oversight of the tribal gaming operations and for coordinating regulatory matters with the State as agreed upon under the compact.



At present, there are 16 tribes operating 23 Class III casinos in Arizona: Ak-Chin, Cocopah, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave, Gila River, Navajo Nation, Pascua Yaqui, Quechan, Salt River Pima-Maricopa, San Carlos, Tohono O'odham Nation, Tonto Apache, White Mountain Apache, Yavapai-Apache, and Yavapai Prescott. Five tribes do not have casinos but have gaming device rights that may be leased to other tribes. The Hopi Tribe does not have a gaming compact. The Tohono O'odham Nation operates a Class II only facility in the Phoenix metropolitan area which is regulated solely by the tribe with oversight from the National Indian Gaming Commission.

The 2003 compacts continue to place certain limits on tribal gaming in the State. The tribes are limited as to the types of games that can be played, the number of gaming devices and other games allowed, and the total number of gaming facilities that can be operated within the State. The following Class III games are permitted: (1) Class III gaming devices, (2) blackjack, (3) jackpot poker, (4) Keno, (5) lottery, (6) off-track pari-mutuel wagering, (7) pari-mutuel wagering on horse racing, and (8) pari-mutuel wagering on dog racing. Internet gaming is prohibited.

The gaming device limits are based on whether the tribe is located in an urban area (*i.e.*, Phoenix or Tucson), and the total membership of the tribe. On this basis, each tribe is given a Current Gaming Device Allocation (which ranges from 475 to 2400). A tribe can acquire Additional Gaming Devices numbering from as low as 40 to 1020. These Additional Gaming Devices can be obtained through negotiating the transfer of Gaming Device Operating Rights from non-gaming tribes in the State.

There also are limits to the number of gaming facilities operated by a tribe. Again, these numbers are based on the location of the tribes and their tribal membership. The number of gaming facilities permitted ranges from one to as many as four. The compacts specify the total number of gaming devices permitted per gaming facility.

With respect to Class II gaming devices, a tribe may operate up to 40 Class II gaming devices without such devices counting against the tribe's overall allocation of Class III gaming devices. The compacts permit multi-station devices; however, no more than 2.5 percent of the gaming devices in a tribal casino may be multi-station devices.

The compacts authorize certain table games, including poker and blackjack. There are specific limits on the total number of tables permitted at the tribal casinos. No more than two Keno games may be operated at each tribal casino.

The compact also generally addresses: (1) problem gambling and excluded persons; (2) financial services in gaming facilities; (3) forms of payment for wagers; (4) hours of operation; (5) operation of gaming devices as part of a network; and (6) age restrictions on employees and patrons.

Based upon the tribes' continued exclusive rights to conduct gaming in Arizona, the 2003 compacts provide for certain revenue sharing to the State. Under the compacts, tribes with Class III

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casinos contribute 1 to 8 percent of their gaming revenue each year to the State, and to cities, towns, and counties. The contribution is determined on a sliding scaled based on the amount of gaming revenue obtained by a casino. The Arizona Department of Gaming is charged with auditing the tribes' gaming revenues and contributions. According to the Arizona Department of Gaming's website, as of April 2016, the Arizona tribes had contributed over \$1 Billion since the compacts went into effect in 2003.

The tribal contributions are distributed as follows:

- 12% distributed by the tribe to the cities, towns and counties of their choosing for community services and public safety programs for local governments
- The remaining 88% of the tribe's total annual contribution goes to the Arizona Benefits Fund on a quarterly basis and provides funding for the Arizona Department of Gaming and the Office of Problem Gambling. The remaining funds are distributed as follows:
  - 56% to instructional improvement for schools
  - 8% to trauma and emergency care
  - 8% to Arizona tourism
  - 8% to wildlife conservation

In sum, tribal gaming has provided numerous benefits to the citizens of the State of Arizona. Nevertheless, with some of the existing compacts expiring in the upcoming years, more negotiations and potential challenges are expected in the near future. ❁

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