



1 ¶ 1. The Defendants include state authorities responsible for  
2 negotiating gaming compacts with Indian tribes and enforcing  
3 state laws prohibiting certain forms of gaming. Id. ¶¶ 3-5.  
4 At issue is the kind and breadth of gaming that the Arizona  
5 Governor may include in compacts with Indian tribes. The  
6 Plaintiffs and the Intervenor seek to enjoin the Governor from  
7 entering new, renewed or modified gaming compacts that would  
8 allow Indian tribes in Arizona to conduct slot machine, keno  
9 or blackjack gaming. Of the nineteen gaming compacts  
10 currently obtaining between the State and tribes, the first  
11 will begin to expire in 2003.

12 BACKGROUND

13 I. Procedural Background

14 This action began in the Superior Court in Maricopa  
15 County in November, 2000. The Plaintiffs seek injunctive  
16 relief by means of special action against the Governor, Jane  
17 Dee Hull, and the Attorney General, Janet Napolitano. The  
18 Plaintiffs name the State of Arizona as a defendant to  
19 preserve their right to attorneys' fees in the event they  
20 prevail. Richard Romley, the County Attorney for Maricopa  
21 County, is named so that in the event the court grants the  
22 Plaintiffs' alternative form of relief--an injunction against  
23 criminal prosecution--such relief may be effective. Romley  
24 has not actively participated in this litigation. It should  
25 be understood that where the court refers to "the Defendants,"  
26 the State and its officers (and not Romley) are intended,  
27 unless otherwise noted.

28 The Plaintiffs requested that the case proceed on an

1 accelerated basis. The Plaintiffs alleged that the Defendants  
2 were in the course of negotiating new or modified gaming  
3 compacts with Indian tribes, and that if compacts were  
4 concluded, the case would not be able to go forward.  
5 Accordingly, they believed expeditious treatment of their  
6 claims was necessary. The judge in the Superior Court granted  
7 the request.

8 All Defendants removed the matter on December 15, 2000.  
9 Notice of Removal (doc. #1). The case was assigned to United  
10 States District Judge James A. Teilborg. On January 14, 2001,  
11 Judge Teilborg permitted Tucson Greyhound Park, Inc., to  
12 intervene as a plaintiff pursuant to a stipulation by the  
13 parties (doc. #12). Judge Teilborg recused himself on January  
14 16, 2001, and the case was reassigned to United States  
15 District Judge John W. Sedwick. On January 26, 2001, Judge  
16 Sedwick recused himself. At that time, the matter came before  
17 this court.

18 On February 1, 2001, the court held a preliminary  
19 scheduling conference, at which time the Plaintiffs reiterated  
20 their desire for a ruling on the merits on an expedited basis.  
21 The Defendants asserted that potentially dispositive motions  
22 should be heard first. Shortly thereafter the court announced  
23 a briefing schedule. The parties were required to file  
24 dispositive motions and/or trial briefs, responses and replies  
25 prior to the trial. It was understood that a hearing on the  
26 motions and the trial would be held on same day.<sup>1</sup>

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27  
28 <sup>1</sup> Two additional motions to intervene as plaintiffs were  
filed, the first by George A. Rice and the Arizona Greyhound

1           Since then, the court has approved a consent preliminary  
2 injunction submitted by the parties pursuant to a written  
3 stipulation. Order of February 16, 2001 (doc. #53). The  
4 injunction prohibits the Defendants from entering any new,  
5 modified, or renewed gaming compacts until disposition of this  
6 case.

7           Several dispositive motions are now before the court.  
8 They are: Defendants' Motion to Dismiss (Justiciability)  
9 (doc. #49), Defendants' Motion to Dismiss for Failure to Join  
10 Indispensable Parties (doc. #28), Defendants' Motion to  
11 Dismiss Amended Complaint for Failure to Join Indispensable  
12 Parties (doc. #50), and Plaintiffs' Motion for Summary  
13 Judgment (doc. #46). The court heard oral argument on the  
14 motions on April 12, 2001, at which time it took the matter  
15 under advisement. Also on April 12, 2001, the court took  
16 evidence and held a trial on the merits. The Joint Statement  
17 of Facts (JSOF) submitted by the parties includes a  
18 stipulation that all the exhibits are admissible, although the  
19 parties do not stipulate to their relevance and reserve the  
20 right to challenge the relevance or materiality of any fact or

21 \_\_\_\_\_  
22 Association (doc. #7), and the second by the Pima County  
23 Horsemen's Association, Inc., Arizona Quarter Racing  
24 Association, Arizona Thoroughbred Breeders Association,  
25 Cochise County Fair Association and Arizona Horsemen's  
26 Benevolent and Protective Association, Inc. (doc. #11). Many  
27 of the associations represent suppliers or trainers of racing  
28 animals; two horse racing permittees are also included. The  
court denied the motions to intervene on February 9, 2001,  
because the alleged injuries are derivative of the injuries to  
the racetrack Plaintiffs, and their interests are adequately  
defended by the Plaintiffs. The court granted these would-be  
interveners the opportunity to participate as amici.

1 document at any point in these proceedings. For purposes of  
2 this order, all the exhibits are part of the record.

3 II. Factual Background

4 Beginning in 1993, Arizona governors have entered into  
5 gaming compacts with tribes. Am. Compl. ¶ 10. Tribal gaming  
6 in Arizona is governed by the Indian Gaming Regulatory Act  
7 (IGRA), 25 U.S.C. §§ 2701 et seq., and by state law, which  
8 IGRA incorporates by reference. IGRA establishes three  
9 classes of gaming. Class I includes social games for prizes  
10 of minimal value and traditional forms of Indian gaming. 25  
11 U.S.C. § 2703(6). Class II includes bingo and certain card  
12 games. Id. § 2703(7)(A). Class III is the default category,  
13 capturing any games not falling into classes I or II. Id. §  
14 2703(8). Slot machines and blackjack are types of class III  
15 gaming, see id. § 2703(7)(B) (excluding such games from Class  
16 II), and so is keno, a house banking game, see 25 C.F.R. §  
17 502.4(2). Tribes must reach a compact with the state where  
18 tribal lands are located in order to operate class III gaming  
19 on those lands. 25 U.S.C. § 2710(d).

20 Under Arizona law, the Governor has authority to  
21 negotiate the terms of compacts on behalf of the State. See  
22 A.R.S. § 5-601. In the event negotiations fail, the Governor  
23 must enter into a standard form compact with any tribe wanting  
24 to sign on to its terms. A.R.S. § 5-601.01. Seventeen of the  
25 twenty-one recognized tribes in Arizona have entered into  
26 compacts, all on substantially similar terms. See Motion to  
27 Dismiss (doc. #28), Hart Aff. ¶ 4.

28 The compacts authorize specific types of class III

1 gaming, including slot machines, keno, lotteries, off-track  
2 pari-mutuel wagering, and pari-mutuel wagering on horse and  
3 dog racing. Ex. A to Hart Aff. (Salt River Pima-Maricopa  
4 Indian Community/State of Arizona gaming compact) § 3(a).

5 Each compact provides for automatic renewal after the initial  
6 term. Hart. Aff. ¶ 5. Specifically, the typical duration  
7 clause reads:

- 8 (1) This Compact shall be in effect for a term of ten  
(10) years after the effective date.
- 9 (2) The duration of this Compact shall thereafter be  
10 automatically extended for terms of five (5) years,  
11 unless either party serves written notice of  
12 nonrenewal on the other party not less than one  
hundred eighty (180) days prior to the expiration of  
the original term of this Compact or any extension  
thereof.

13 Salt River Pima-Maricopa compact § 23(b). The termination  
14 clause provides:

15 This Compact may be voluntarily terminated by mutual  
16 agreement of the parties, or by a duly adopted  
17 ordinance or resolution of the Tribe revoking the  
18 authority to conduct Class III gaming upon its  
lands, as provided for in 25 U.S.C. § 2710(d)(2)(D).

19 Id. § 23(c). The enforceability clause provides in relevant  
20 part:

- 21 (2) In the event that federal law changes to  
22 prohibit the gaming authorized by this Compact,  
23 the State may seek, in a court of competent  
24 jurisdiction, a declaration that this Compact is  
25 invalid.
- 26 (3) This Compact shall remain valid and enforceable  
27 against the State and the Tribe unless or until  
28 it is held to be invalid in a final non-  
appealable judgment or order of a court of  
competent jurisdiction.

27 Id. § 23(d).

28 These compact terms form the basis of the relationship

1 between the State and tribes engaged in gaming. The  
2 Defendants admit that "the Governor is considering the  
3 possibility of executing renewed, amended compacts" to take  
4 effect when current compacts expire in 2003. Answer ¶ 5 (doc.  
5 #72). The Defendants maintain that renewal negotiations  
6 between the State and the Indian tribes were initiated in  
7 December 1999 by the tribes, id., and are presently underway.  
8 They have included discussions about slot machines and  
9 blackjack. Id. Apparently longer compact terms have also  
10 been contemplated, for the Governor disputes the Plaintiffs'  
11 suggestion that her authority is limited to compacts for terms  
12 not exceeding ten years. Id. ¶ 12.

13 The Plaintiffs and Intervenor claim they do not intend to  
14 disturb the existing compacts. Rather, they express alarm at  
15 the prospect of renewal of the existing compacts or execution  
16 of new compacts. They contend that they have been injured by  
17 the advent of slot machine, keno and poker gaming on Indian  
18 reservations. Am. Compl. ¶ 15. The Plaintiffs are concerned  
19 by the possibility that the State could increase the  
20 concentration of gaming on the reservations. Id. ¶¶ 13, 15.  
21 They foresee a "massive expansion and extension in quantity  
22 and types" of tribal gaming. Id. ¶ 44. The Plaintiffs  
23 predict that heightened competition from tribal gaming will  
24 lead to their demise. Id. ¶ 15. Accordingly, they seek to  
25 enjoin the State from pursuing these negotiations and from  
26 concluding new compacts. Id. ¶ 6.

27 To this end, the Plaintiffs argue that renewed or new  
28 compacts along the lines contemplated by the State would be

1 illegal under federal and state statutory law and in violation  
2 of state and federal constitutional norms. Specifically, they  
3 contend that the Governor lacks authority to execute compacts  
4 authorizing slot machine, keno and blackjack gaming. Id. ¶¶  
5 18-19. They allege that the Governor would invade the  
6 province of the legislature if she were to enter into compacts  
7 that allow tribes to conduct gaming activities that are  
8 otherwise prohibited by state statutes. Id. ¶ 21. They  
9 assert that such compacts would also violate the federal  
10 Indian Gaming Regulatory Act (IGRA), 18 U.S.C. § 1166, 25  
11 U.S.C. § 2710(d), and 25 U.S.C. § 2710(d)(6). Plaintiffs also  
12 believe that the compacts unlawfully treat Indian tribes  
13 differently than non-Indians. Id. ¶¶ 25-29. For these  
14 reasons, they ask the court to prohibit the Governor from  
15 entering renewed compacts. Id. at 12. They recognize that  
16 effective relief would require the Governor to give  
17 affirmative notice that the State will not renew the compacts,  
18 which, under the terms of the compacts, must be tendered at  
19 least 180 days before the date of expiration. See Response  
20 (doc. #65) at 1.

21 In the event the court rejects their arguments that the  
22 proposed compacts are illegal, the Plaintiffs wish to be  
23 afforded the same gaming privileges as the tribes. Id. ¶ 6.  
24 They envision this remedy taking the form of an injunction  
25 against criminal prosecution, for if the Plaintiffs were to  
26 engage in the kinds of gaming that the State is allegedly  
27 about to condone for the tribes, the Plaintiffs would be  
28 subject to prosecution. Id. ¶¶ 32-33. Defendant Romley's

1 duty to enforce state gambling prohibitions is the reason for  
2 his inclusion in this lawsuit.

3 The Defendants contend that this matter is not  
4 justiciable for a number of reasons. As questions going to  
5 the court's jurisdiction and justiciability are logically  
6 resolved prior to the merits, the court shall address the  
7 Defendants' Motions to Dismiss first. The court shall address  
8 the Plaintiffs' Motion for Summary Judgment in the context of  
9 its findings of fact and conclusions of law at trial.

10 SYNOPSIS

11 Due to the complexity of this order, and thus its length,  
12 the court believes it is appropriate to provide a synopsis.  
13 Engrossing legal issues have been presented; in particular,  
14 the interplay of federal and state law is very unusual. On  
15 issues of both federal and state law, the case breaks fresh  
16 ground. The Plaintiffs and Intervenor advance several  
17 theories why they should prevail, while the Defendants assert  
18 that not only should the Plaintiffs and Intervenor not  
19 prevail, but also that the court does not have the authority  
20 to decide the dispute.

21 The Defendants argue that the court lacks the power to  
22 decide this case because the Plaintiffs do not have the  
23 attributes necessary for them to be parties; in other words,  
24 that they lack standing. To the contrary, the Plaintiffs have  
25 demonstrated that they have a real and immediate problem, and  
26 that their position could be materially improved by a  
27 favorable ruling here. Thus, the court determines that it has  
28 authority to decide the core issues of the Plaintiffs' case,

1 and that no jurisdictional defect precludes it from reaching  
2 the merits.

3       The Defendants also contend that representatives for the  
4 tribes in Arizona must participate in this case. In rejecting  
5 this argument, the court emphasizes that the issues before it  
6 concern the limits of the powers of the State and its  
7 officers. The court must decide what these limits are, and  
8 whether the Defendants' planned actions go beyond them.  
9 Accordingly, the court finds the tribes are not indispensable  
10 parties to this litigation in its present form, not because  
11 the issues are not important to them, but because adjudication  
12 of the issues does not require their presence.

13       One of the limits on the State and its officers arises  
14 from the division of Arizona government into three branches;  
15 simply put, each branch has unique duties that cannot be taken  
16 over by the two other branches. Under the separation of  
17 powers doctrine, no other branch can usurp the power of the  
18 legislative branch. Under the non-delegation doctrine, which  
19 complements the separation of powers doctrine, the legislative  
20 branch cannot delegate its power to make law to another  
21 branch. The legislature may, however, delegate to other  
22 branches the duty to make rules to carry out a purpose fixed  
23 by the legislature. The legislature must supply the  
24 "intelligible principle" behind every law. If the legislature  
25 purports to enact a law like a blank check, leaving some other  
26 branch to create a rationale and then carry it out, such an  
27 arrangement violates the non-delegation doctrine.

28       The Plaintiffs and Intervenor argue that the Arizona

1 statute authorizing the Governor to negotiate and enter  
2 compacts violates the non-delegation doctrine. They complain  
3 that the Governor is enabled to unilaterally create gaming  
4 policy within the State. She could take the position that  
5 very little gaming should take place on tribal land, or she  
6 could take the position that a great deal of gaming is  
7 desirable. Either position could be based on nothing more  
8 than the Governor's whim. Whatever position the Governor  
9 takes, however, the citizens of Arizona are committed once  
10 compacts are executed. After due consideration, the court  
11 holds that decisions about what kinds of gaming should be  
12 legal in Arizona and what kinds of gaming the State should  
13 agree to permit within its boundaries pursuant to tribal-State  
14 compacts are legislative decisions. Ariz. Rev. Stat. § 5-601  
15 delegates this lawmaking power to the Governor without  
16 conveying even a germ of policy to guide the Governor's  
17 discretion. Since A.R.S. § 5-601 violates article III of the  
18 Arizona Constitution and is void, the Governor is not enabled  
19 to enter compacts. The Governor's inability to enter compacts  
20 may readily be cured by the Arizona Legislature with the  
21 enactment of an appropriate delegation of compact authority.

22       Assuming that the Governor could enter compacts, the  
23 Plaintiffs argue those compacts cannot include terms for slot  
24 machine, keno or blackjack gaming. The parties have disputed  
25 whether such gaming is permitted under state law, and whether  
26 games have to be legal in Arizona before being included in a  
27 compact. The court finds that Arizona law does not permit  
28 slot machine, keno or blackjack gaming at charity casino

1 nights or under other circumstances. Outside the social and  
2 amusement gambling contexts, the only gambling permitted under  
3 Arizona law must be conducted as a raffle. Federal law does  
4 not permit the State to enter compacts authorizing tribes to  
5 engage in gaming otherwise prohibited by state law.  
6 Therefore, even if A.R.S. § 5-601 were valid, the Governor  
7 could not properly enter compacts for games of chance other  
8 than raffles.

9 Finding A.R.S. § 5-601 unconstitutional is sufficient to  
10 convey to the Plaintiffs and Intervenor the principal relief  
11 they seek. The Plaintiffs do not prevail on their attempt to  
12 sue under the federal Indian Gaming Regulatory Act (IGRA), 25  
13 U.S.C. §§ 2701 et seq., their "local or special law" argument,  
14 their equal privileges claim, or their federal Equal  
15 Protection theory. The Intervenor prevails only on its non-  
16 delegation theory; its arguments that compacts are unlawful  
17 because they are treaties, legislation subject to tribal  
18 approval, or contracts impinging on the State's reserved  
19 powers are all rejected.

## 20 DISCUSSION

### 21 I. Justiciability

22 The Defendants move for dismissal of the first three of  
23 the Plaintiffs' claims.<sup>2</sup> They maintain that the Plaintiffs

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25 <sup>2</sup> Plaintiffs' first three claims are: (1) the statute  
26 delegating to the Governor authority to enter into compacts,  
27 A.R.S. § 5-601, does not authorize compacts that include forms  
28 of gaming prohibited by state law--to the extent the Governor  
plans to make compacts with such terms, she exceeds her  
statutory authority, Am. Compl. ¶¶ 18-19; (2) if the  
legislature did delegate authority to the Governor to enter  
compacts permitting games of chance otherwise prohibited by

1 lack standing to challenge future compacts currently under  
2 negotiation. They further submit that IGRA does not authorize  
3 private causes of action. Resort may not be had to state law  
4 remedies, the Defendants argue, because IGRA occupies the  
5 field of regulation of tribal gaming, thereby preempting state  
6 claims. Finally, the Defendants argue that the State of  
7 Arizona must be dismissed because claims against it are barred  
8 by the Eleventh Amendment. The Defendants state that their  
9 motion is made pursuant to Fed. R. Civ. P. 12(b)(6).<sup>3</sup>

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11 state law, such an act would violate the separation of powers  
12 doctrine established by Ariz. Const. Art. III, *id.* ¶ 21; and  
13 (3) if the Governor entered compacts authorizing slot machine  
14 and related gaming, the compacts "would violate Arizona law  
because they would be ineffectual under and prohibited by  
[IGRA]," *id.* ¶ 23.

15 The court has had difficulty ascertaining whether the  
16 third claim asserts a claim for relief under IGRA or state  
17 law. From Plaintiffs' Response to the Motions to Dismiss  
18 (doc. #65), the court assumed that the Plaintiffs intended to  
19 cast the third claim as a violation of state law, presumably  
20 A.R.S. § 5-601, which refers to IGRA, which in turn  
21 incorporates state law. At oral argument, however,  
22 Plaintiffs' counsel indicated that the third claim should be  
understood as an "IGRA cause of action." The court shall  
address both readings of Plaintiffs' third claim, for the  
Defendants briefed the IGRA cause of action theory in their  
Motion to Dismiss and had the opportunity to brief the state  
law theory in their Reply.

23 <sup>3</sup> While the Defendants' motion to dismiss for lack of  
24 Article III standing is brought pursuant to Rule 12(b)(6), the  
25 court notes that such a motion may be properly brought under  
26 Rule 12(b)(1) as well. See Medina v. Clinton, 86 F.3d 155,  
157 (9<sup>th</sup> Cir. 1996). There is some authority for the  
27 proposition that a challenge to standing may be brought under  
28 either 12(b)(1) or 12(b)(6). See Simon v. Value Behavioral  
Health, Inc., 208 F.3d 1073, 1082 (9<sup>th</sup> Cir.), as amended 238  
F.3d 428 (9<sup>th</sup> Cir. 2000), cert. denied 121 S.Ct. 843 (2001)  
(affirming Rule 12(b)(6) dismissal for lack of standing);  
accord Cohen v. Stratosphere Corp., 115 F.3d 695, 703 (9<sup>th</sup> Cir.  
1997); but see Bland v. Kessler, 88 F.3d 729, 732 n.4 (9<sup>th</sup> Cir.

1           A. Standing

2           Article III standing requires a plaintiff to demonstrate  
3 three elements. The plaintiff must show (1) injury in fact,  
4 or an injury that is concrete and particularized and actual or  
5 imminent; (2) causation, or that the injury is "fairly  
6 traceable" to the challenged action; and (3) redressability.  
7 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112  
8 S.Ct. 2130, 2136 (1992). For purposes of ruling on a motion  
9 to dismiss for want of standing, the court must accept as true  
10 all material allegations of the complaint, and must construe  
11 the complaint in favor of the complaining party. Desert  
12 Citizens Against Pollution v. Bisson, 231 F.2d 1172, 1178 (9<sup>th</sup>  
13 Cir. 2000).

14           The Defendants challenge the Plaintiffs' assertion of the  
15 first and third elements, and also recommend dismissal  
16 pursuant to the prudential "zone of interests" doctrine. In  
17 response, the Plaintiffs contend that standing is not  
18 necessary to maintain this action, but they also assure the  
19 court they have it. Sua sponte, the court also questions the

20 \_\_\_\_\_  
21 1996) (stating that standing challenges must be brought under  
22 12(b)(1) in the Ninth Circuit).

23           The consequences of a Rule 12(b)(6) determination are  
24 different from a Rule 12(b)(1) determination. See Morgan v.  
25 United States, 958 F.2d 950, 954 n.1 (9<sup>th</sup> Cir.  
26 1992)(B.Fletcher, J. dissenting) (noting that a Rule 12(b)(6)  
27 adjudication operates as a decision on the merits). The  
28 Supreme Court has strongly indicated that a decision about  
Article III standing is a jurisdictional decision and not a  
decision on the merits. See Citizens for a Better Environment  
v. Steel Co., 523 U.S. 83, 109, 118 S.Ct. 1003, 1020 (1998).  
Because the court would approach the motion in the same way  
regardless which subsection of Rule 12 the Defendants cited,  
see Graham v. FEMA, 149 F.3d 997, 1001 (9<sup>th</sup> Cir. 2000), it is  
unnecessary at this juncture to do more than note the issue.

1 Intervenor's standing to assert a constitutional contract  
2 theory.<sup>4</sup>

3 1. Imminent Injury/Ripeness

4 The Defendants contend that the Plaintiffs do not have an  
5 imminent injury. The actual injury requirement of Article III  
6 standing, by excluding hypothetical and indefinite injuries,  
7 overlaps with the justiciability doctrine of ripeness, which  
8 requires a live and immediate controversy. Thomas v.  
9 Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138-39 (9<sup>th</sup> Cir.  
10 2000) (en banc). Whereas the "imminent injury" requirement of  
11 Article III standing deals with the proximity of harm  
12 generally, the ripeness doctrine looks exclusively at the  
13 vector of time. See id. at 1138. Standing thus bears "close  
14 affinity" to the ripeness issue of whether the harm asserted  
15 has "matured sufficiently to warrant judicial intervention."  
16 Warth v. Seldin, 422 U.S. 490, 499 n.10, 95 S.Ct. 2197, 2205  
17 n.10 (1975). The Ninth Circuit analyzes the constitutional  
18 and prudential concepts of ripeness separately. See Thomas,  
19 220 F.3d at 1138-41.

20 a. *Constitutional element*

21 For Article III purposes, a plaintiff must have suffered  
22 an "injury in fact" to a legally protected interest that is  
23 both "concrete and particularized" and "actual or imminent,"  
24

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25 <sup>4</sup> Specifically, the Intervenor contends that compacts  
26 purport to bind the police power of the State, such that the  
27 State could not effect more restrictive regulation of gaming,  
28 should it choose in the future to do so. Opening Brief (doc.  
#43) at 5. The Intervenor argues that the State cannot  
lawfully commit itself by contract to an abdication of its  
sovereign power.

1 as opposed to "conjectural" or "hypothetical." Lujan, 504  
2 U.S. at 560, 112 S.Ct. at 2136. The point of this inquiry is  
3 to find truly adversarial parties with a genuine stake in the  
4 outcome of the litigation, and to ensure that the case does  
5 not extend the court beyond the role constitutionally allotted  
6 to the federal judiciary. Spencer v. Kemna, 523 U.S. 1, 11,  
7 118 S.Ct. 978, 985 (1998).

8 The mere existence of an allegedly unconstitutional  
9 statute does not satisfy the injury-in-fact requirement.  
10 Thomas, 220 F.3d at 1139. Application of the statute must be  
11 threatened so as to put a plaintiff's rights in genuine peril.  
12 Id. When the "asserted threat is wholly contingent upon the  
13 occurrence of unforeseeable events," id. at 1141, the  
14 complaint must be dismissed.

15 Once events have transpired on which immediate legal  
16 consequences rest, however, such as the passage of a rule  
17 requiring immediate compliance, "[o]ne does not have to await  
18 the consummation of threatened injury to obtain preventive  
19 relief. If the injury is certainly impending, that is  
20 enough." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S.  
21 568, 581, 105 S.Ct. 3325, 3333 (1985). It follows that legal  
22 questions that may be decided without significant factual  
23 development are more likely to be ripe. Freedom to Travel  
24 Campaign v. Newcomb, 82 F.3d 1431, 1434 (9<sup>th</sup> Cir. 1996).

25 Ripeness is necessarily a fact-intensive inquiry. For  
26 example, a breach of contract lawsuit is not ripe until it  
27 becomes certain that the contractual obligation will not be  
28 honored. Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9<sup>th</sup> Cir.

1 1996). A civil rights suit to enjoin enforcement of a law is  
2 not ripe until there is a "genuine threat of imminent  
3 prosecution." Thomas, 220 F.3d at 1139. The certainty that  
4 the statute or rule will be applied is important, for "[t]he  
5 degree of contingency is an important barometer of ripeness."  
6 Riva v. Commonwealth of Massachusetts, 61 F.3d 1003, 1011 (1<sup>st</sup>  
7 Cir. 1995); see also Neal v. Shimoda, 131 F.3d 818, 825 (9<sup>th</sup>  
8 Cir. 1997) (if parole is conditioned on a statutory  
9 requirement, among other things, inmates may challenge the  
10 statute even if they have not yet satisfied other conditions).

11  
12 i. Plaintiffs' challenged claims

13 In this case, the Defendants characterize the  
14 Plaintiffs' asserted injury as speculative because it would  
15 result, if at all, from future compact-renewal actions by  
16 state and federal officials. They argue that "[u]nless, and  
17 until, new compacts are executed, the Plaintiffs cannot know  
18 the harm they may, or may not incur." Motion (doc. #49) at 4.  
19 They also suggest that economic harm from future competition  
20 is speculative, because competition is inherently risky and  
21 success in business necessarily unpredictable. At oral  
22 argument, the Defendants submitted that a judgment here would  
23 be merely advisory because no one knows what state law will be  
24 at the time of compact execution.

25 In response, the Plaintiffs argue that they are already  
26 competing with the tribes and already suffering, so the  
27 economic effects of tribal competition are certain. Response  
28 (doc. #65) at 11. Their expert calculates that they lose

1 about \$20 million annually to "illegal" competition from the  
2 tribes. The expert predicts that if Indian gaming is expanded  
3 as proposed, such losses will rise more than 30 percent to  
4 about \$26 million per year. The Plaintiffs expect that if the  
5 Governor enters ten-year compacts on expanded terms, their  
6 total loss will reach \$250 million. If the Plaintiffs  
7 prevail, and the Governor notifies the tribes that the State  
8 will not renew the compacts, the Plaintiffs anticipate their  
9 ten-year revenues to increase by \$200 million.

10 At oral argument, the parties agreed that the Plaintiffs  
11 suffer some quantifiable injury from tribal gaming. Although  
12 the parties do not agree about the extent of the Plaintiffs'  
13 damage, they correctly observe that this detail is irrelevant.  
14 The dispute centers on whether the Plaintiffs' injury is  
15 sufficiently immediate before the precise terms of future  
16 compacts--if any--are known.

17 The Governor has three options before her: she can renew  
18 the compacts on the existing terms, modify those terms and  
19 renew, or give notice of intent not to renew. The Plaintiffs  
20 assert injury to them is likely if the Governor does anything  
21 other than cancel the compacts. The Governor has participated  
22 in compact renewal negotiations, and she has agreed not to  
23 enter renewed compacts only for the period until the court  
24 rules. Once the Governor signs new compacts, it is undisputed  
25 (for the purposes of this motion, at least) that Plaintiffs'  
26 claims become nonjusticiable.

27 It is true that the existence of new compacts is  
28 contingent upon execution, and their terms cannot be known

1 with certainty until consummation. Conceivably, the court  
2 could require the Plaintiffs to interpose their claims between  
3 the time negotiators reach an agreement on compact terms and  
4 the time the Governor signs the compacts. Such a requirement  
5 could be facilitated by an injunction preventing the Governor  
6 from executing proposed compacts. At that instant, the terms  
7 of the future compacts and prevailing state law would be  
8 known.

9       The court does not believe that delaying adjudication  
10 until that instant would materially ripen the issues, however.  
11 The Plaintiffs' claims address the power of the Governor to  
12 agree to slot machine, keno and blackjack gaming. The  
13 challenged terms are known with specificity, and it is  
14 undisputed that the Governor has considered them. The  
15 Governor has not disclaimed the possibility of executing  
16 compacts on the terms negotiated. A decision whether to  
17 execute negotiated compacts is imminent. Indeed, the parties  
18 have stipulated that "[u]nless barred by Court order, the  
19 Governor intends to negotiate in an effort to reach an  
20 agreement on modified or new compacts to be executed before  
21 the end of her term." JSOF (doc. #75) ¶ 58. The questions  
22 before the court are overwhelmingly legal in nature and any  
23 needed factual development occurred at the trial phase of the  
24 hearing. If, under existing law, the Governor cannot enter  
25 compacts including certain terms, nobody profits by spending  
26 more time negotiating over them.

27       To the extent that the Defendants suggest that the  
28 Governor could refuse to enter compacts regardless how far

1 negotiations progress, this possibility does not destroy  
2 jurisdiction. Under the Arizona statutes, it always remains  
3 possible that the Governor will decide not to sign a  
4 negotiated agreement. Her discretion over compact negotiation  
5 and execution is unrestricted. What is guaranteed is that  
6 whether the Governor enters a compact or not, her decision on  
7 the compacts will be taken pursuant to an allegedly unlawful  
8 grant of authority.

9 Furthermore, adopting the Defendants' distinction between  
10 negotiating and entering compacts would create an artificial  
11 fissure contrary to IGRA. Federal law provides that "the  
12 State shall negotiate with the Indian tribe in good faith to  
13 enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). IGRA  
14 anticipates that compacts will be negotiated in consideration  
15 of state law and then become effective. The court finds the  
16 Plaintiffs' challenges pointed and immediate, and holds that  
17 they satisfy the Article III component of standing.

18 ii. Intervenor's reserved powers claim

19 The Intervenor's claim that compacts would contract  
20 away the State's police power is not ripe for Article III  
21 purposes. The Intervenor suggests that compacts bind the  
22 State to a particular exercise of the legislative power, or  
23 limit its power to legislate. Am. Compl. ¶ 18; Opening Brief  
24 (doc. #43) at 5. For the reasons that follow, the court lacks  
25 jurisdiction to entertain such a claim.

26 States may act either in a sovereign capacity or as  
27 contractors. See United States v. Winstar Corp., 518 U.S.  
28 839, 896, 116 S.Ct. 2432, 2465 (1996) (plurality opinion).

1 When a state enters into a contract, it is ordinarily governed  
2 by the same law generally applicable to contracts between  
3 private individuals. Id. at 895, 116 S.Ct. at 2464-65  
4 (quoting Lynch v. United States, 292 U.S. 571, 579, 54 S.Ct.  
5 840, 843 (1934)). The contracting parties remain subject to  
6 subsequent legislation by the sovereign, including legislation  
7 that might obstruct or alter the contractual bargain, for  
8 which the government as contractor may not be held liable.  
9 Horowitz v. United States, 267 U.S. 458, 461, 45 S.Ct. 344  
10 (1925) (describing the sovereign acts doctrine). The  
11 government creates an exception to this presumption when, in  
12 the contract, sovereign power is "surrendered in unmistakable  
13 terms." Winstar, 518 U.S. at 872, 116 S.Ct. at 2453 (quoting  
14 Bowen v. Public Agencies Opposed to Social Security  
15 Entrapment, 477 U.S. 41, 52, 106 S.Ct. 2390, 2397 (1986)).

16 Pursuant to the reserved powers doctrine, some sovereign  
17 powers cannot be ceded even if the contractual intent to do so  
18 is patently clear. See Atlantic Coast Line R. Co. v.  
19 Goldsboro, 232 U.S. 548, 558, 34 S.Ct. 364, 368 (1914). For  
20 example, states cannot contract away their police powers.  
21 Id.; Stone v. Mississippi, 101 U.S. 814 (1880) (holding that a  
22 company granted a state charter to conduct a lottery was not  
23 immune from subsequent legislation prohibiting lotteries).

24 The reserved powers doctrine comes into play when state  
25 liability is asserted for governmental actions that interfere  
26 with performance of a contract with the state. When a state  
27 takes on contractual duties, and the regulatory landscape  
28 later changes, the state may consider itself barred from

1 honoring its prior agreement. If the party on the other side  
2 of the breach sues, the state can defend its actions by  
3 asserting that it could not guarantee performance of the  
4 contract in the face of changing law, due to the essential  
5 nature of the governmental powers that would be constrained.  
6 Courts decide whether the earlier government had the capacity  
7 to bind future legislatures and executives, and/or whether the  
8 later legislation extricated the state from its contract.  
9 Resolution turns on whether holding the state to its  
10 commitment would "strip" the government of its "core"  
11 legislative powers. Winstar, 518 U.S. at 889 & n.34, 116  
12 S.Ct. at 2462 & n.34.

13 Here, the Intervenor encounters three problems. First,  
14 it is unclear that the proposed compacts would include a  
15 conveyance or abrogation of state police power. The court  
16 anticipates that any compact terms making inroads on the  
17 State's police power will be subtle. In the absence of  
18 certain compact terms, the court cannot render an opinion  
19 about their forecast effect.<sup>5</sup>

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20  
21 <sup>5</sup> Without taking a position as to whether there is a true  
22 conflict or not, the court notes that the compacting parties  
23 may have to reconcile the State's inability to unilaterally  
24 amend compacts with the Arizona statute forbidding compacts  
25 to circumscribe state sovereignty.

26 Assuming that tribal-state compacts are analogous to  
27 interstate compacts, a state's ability to exercise its police  
28 power after entering a compact may be constrained. Later  
changes in state law cannot be grounds for reneging on a  
compact between states. See West Virginia ex rel. Dyer v. Sims,  
341 U.S. 22, 30-31, 71 S.Ct. 557, 562 (1951). As a  
consequence, interstate compacts limit the ability of state  
legislatures to respond to changing preferences and  
circumstances. See Jill Elaine Hasday, Interstate Compacts in  
a Democratic Society: The Problem of Permanency, 49 Fla. L.

1           Second, even if the compact terms were known and could  
2 only be construed to cede the State's police power, no  
3 conflict arises unless and until the Arizona legislature  
4 amends state gambling laws. As long as the compacts adhere to  
5 existing law, whether they obstruct future law-making poses a  
6 merely hypothetical problem.

7           Third, assuming that a reserved-powers problem were ripe,  
8 the Intervenor has no standing to enjoin the State. A  
9 citizen's interest in conforming a state's actions to law is  
10 not enough, by itself, to confer standing. See Allen v.  
11 Wright, 468 U.S. 737, 754, 104 S.Ct. 3315, 3326 (1980). The  
12 Intervenor does not have a direct or particularized injury  
13 resulting from the alleged surrender of state police power.  
14 Accordingly, the court dismisses the Intervenor's sovereign  
15 acts claim for lack of constitutional standing.

16           b. *Prudential element*

17           To evaluate the prudential concept of ripeness, the court  
18 considers (1) whether the issues are fit for judicial  
19 decision, and (2) whether the parties will suffer hardship if  
20 the court declines to consider the matter. San Diego County  
21 Gun Rights v. Reno, 98 F.3d 1121, 1132 (9<sup>th</sup> Cir. 1996). The  
22 various factors that enter into a court's assessment of  
23 fitness include: whether the claim involves uncertain and  
24 contingent events that may not occur as anticipated or at all;

25 \_\_\_\_\_  
26 Rev. 1, 8-9 (1997). However, A.R.S. § 5-601(A) explicitly  
27 instructs the Governor not to "waive, abrogate or diminish"  
28 the state's sovereignty, of which police power can be viewed  
as a critical attribute.

1 the extent to which a claim is bound up in the facts; and  
2 whether the parties to the action are sufficiently adverse.  
3 Philadelphia Fed'n of Teachers v. Ridge, 150 F.3d 319, 323 (3<sup>rd</sup>  
4 Cir. 1998). Issues that defy the fashioning of a narrow,  
5 case-specific holding are also unfit for judicial decision.  
6 See Texas v. United States, 523 U.S. 296, 301, 118 S.Ct. 1257,  
7 1260 (1998) (refusing to offer an opinion that a state statute  
8 could never be applied in violation of federal law); see also  
9 Thomas, 220 F.3d at 1141 (requiring a "concrete factual  
10 scenario" demonstrating how a challenged law violates the  
11 plaintiffs' rights).

12 The challenges brought here by the greyhound and horse  
13 racing industries take place in the context of a genuine  
14 dispute about the forms of gambling allowed under state law.  
15 The adversary stance of the parties is well established. The  
16 Defendants have not persuaded the court that any pertinent  
17 factual issues remain for development, nor has the court  
18 identified any. As noted above, the issues are principally  
19 legal: whether Arizona statutes authorize the Governor to  
20 enter compacts with terms for operating slot machines, whether  
21 state statutes cede legislative power to the Governor, and  
22 whether state law requires the Governor to conclude compacts  
23 within the strictures of IGRA. "Whether [a] statute delegates  
24 legislative power is a question for the courts," Whitman v.  
25 American Trucking Ass'n, 531 U.S. 457, 121 S.Ct. 903, 912  
26 (February 27, 2001), and that issue and others are properly  
27 presented here.

28 Deferring adjudication would cause the Plaintiffs

1 hardship: If a dispute over compact terms is premature before  
2 the Secretary's approval, afterwards litigation cannot  
3 proceed, for then the tribes would be absent, indispensable  
4 parties. Indeed, the Defendants are already arguing that the  
5 tribes are indispensable on the theory that the Plaintiffs'  
6 claims affect the tribes' rights under the existing compacts.  
7 While the Plaintiffs could perhaps still bring claims against  
8 the State for relying on unconstitutional state laws, the  
9 problem of redressability at that juncture would likely be  
10 insuperable. The court finds declining jurisdiction on  
11 prudential grounds unwarranted.

## 12 2. Redressability

13 The Defendants argue that even if the Governor were  
14 enjoined from entering gaming compacts with tribes, it is  
15 "highly likely" that tribal gaming will continue. In arguing  
16 the futility of relief, the Defendants rely on an analogy to  
17 Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130  
18 (1992). Lujan's observation that the intervening actions of  
19 non-parties may prevent effective redress does not control  
20 here.

21 In Lujan, the plaintiffs challenged environmental  
22 regulations proposed by the Secretary of the Interior. 504  
23 U.S. at 558, 112 S.Ct. at 2135. The regulations would have  
24 limited the applicability of the Endangered Species Act (ESA)  
25 to domestic activities of federal agencies. Id. at 559, 112  
26 S.Ct. at 2135. The plaintiffs wanted federal agencies funding  
27 development in foreign countries to observe the ESA. Id. at  
28 562, 112 S.Ct. at 2137.

1           As an alternate ground for denying standing, the  
2 plurality wrote that even if the proposed rule were changed,  
3 it was an "open question" whether the agencies would be bound  
4 by it. Id. at 568, 112 S.Ct. at 2140.<sup>6</sup> Because the agencies  
5 were not parties to the plaintiffs' lawsuit, they would not be  
6 obliged "to honor an incidental legal determination." Id. at  
7 569, 112 S.Ct. at 2141. The plurality further assumed that if  
8 required to comply with the ESA, federal agencies would  
9 withdraw funding for projects. It found no indication that  
10 projects would not go forward despite the withdrawal of  
11 federal funds, so it assumed that the environmental harm  
12 feared by Plaintiffs would nevertheless be inevitable. Id. at  
13 571, 112 S.Ct. at 2142. Plaintiffs lacked standing because it  
14 was "conjectural" whether winning relief against the Secretary  
15 of the Interior would alter or affect the activities of the  
16 non-party federal agencies or prevent environmental damage.  
17 Id.

18           The Defendants here argue that "[l]ike the agencies who  
19 were not parties to the Lujan litigation, the Indian tribes  
20 who conduct Indian gaming are not parties here and would not  
21 be bound by any district court determination concerning their  
22

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23  
24           <sup>6</sup> Under the Endangered Species Act, federal agencies are  
25 required to involve the Secretary of the Interior in their  
26 development plans. 16 U.S.C. § 1536(a)(2). The plurality  
27 suggested that the agencies "arguably" had "initial  
28 responsibility" to determine whether they were required under  
the statute to involve the Secretary in their plans. Id. at  
568-69, 112 S.Ct. at 2141. From this grant of interpretive  
discretion, it followed that the agencies could decide their  
projects never required them to consult the Secretary and thus  
could avoid committing to the regulations.

1 activities on sovereign tribal ground." Motion at 5. The  
2 Defendants foresee ongoing tribal gaming for three reasons:  
3 (1) the current compacts provide for automatic renewal for a  
4 5-year term; (2) in the absence of compacts, federal law  
5 permits the tribes to conduct class III gaming with the  
6 approval of the Secretary of the Interior, see 25 U.S.C. §  
7 2710(d)(7)(B)(vii); and (3) the tribes could engage in  
8 "uncompacted gaming," which only the federal government can  
9 contain, and then, allegedly, only with difficulty.

10 In response, the Plaintiffs point out that: (1) one vein  
11 of relief sought is an order requiring the Governor to send  
12 notice of non-renewal, defusing the automatic renewal clause;  
13 (2) uncompacted class III gaming is a federal felony offense,  
14 18 U.S.C. § 1166; and (3) the federal government has effective  
15 means to prevent it. They also argue that the Secretary of  
16 the Interior cannot approve class III gaming in violation of a  
17 judgment here that such gaming is prohibited to all persons in  
18 Arizona. The Plaintiffs contend that the prospect that the  
19 tribes might continue class III gaming without a compact does  
20 not undercut their interest in ensuring the Governor follows  
21 proper procedures. Response at 20 n.12.

22 The Defendants do not raise the automatic renewal clause  
23 again in reply. Instead, they write that it cannot be assumed  
24 that the Plaintiffs will obtain redress from an order here if  
25 uncompacted tribal gaming is the ultimate result. Reply (doc.  
26 #67) at 4. They argue that the relevant enforcement authority  
27 (presumably the U.S. Attorney or some other agent of the  
28 federal government) "is not a party here and is not bound by

1 this Court's interpretation of IGRA or Arizona law." Id. In  
2 a footnote, the Defendants question the Plaintiffs' reliance  
3 on precedents involving claims to enforce procedural rights,  
4 which, the Defendants argue, have a lower redressability  
5 threshold. They characterize the Plaintiffs' claims as a  
6 challenge to the State's "substantive ability through its  
7 Governor to compact for certain types of games under IGRA."  
8 Reply (doc. #67) at 4 n.3.

9 A plaintiff must demonstrate redressability for each form  
10 of relief sought. Friends of the Earth v. Laidlaw  
11 Environmental Serv., 528 U.S. 167, 185, 120 S.Ct. 693, 706  
12 (2000). It is not necessary for judicial relief to inevitably  
13 cure the asserted injury; rather, redress need only be likely,  
14 or more than "merely speculative." Lujan, 504 U.S. at 561,  
15 112 S.Ct. 2130. The procedural-opportunity theory of standing  
16 posits injury when an executive or administrative agency has  
17 failed to comply with its governing procedures. 13 Charles R.  
18 Wright, et al., Federal Practice and Procedure § 3531.4 at 433  
19 (2d ed. 1984 & Supp. 2000). It is not necessary to show that  
20 the final agency decision would have been different; it is  
21 enough to raise the possibility that had the agency observed  
22 required procedures, it would have considered its decision  
23 differently. Id. A substantive injury, on the other hand,  
24 arises when someone is ordered to do or refrain from doing  
25 something; a formal legal license, power, or authority is  
26 granted, modified or withheld; someone is subjected to civil  
27 or criminal liability; or legal rights or obligations are  
28 created. See Ohio Forestry Ass'n, Inc. v. Sierra Club, 523

1 U.S. 726, 733, 118 S.Ct. 1665, 1670 (1998).

2 The court finds that for the purposes of surviving a  
3 motion to dismiss, the Plaintiffs have sufficiently alleged  
4 redressability. The first and third claims are substantive  
5 and must be held to substantive standards, but the second is a  
6 procedural injury and the procedural notions of redress apply.

7 On the first claim, set out supra at 12 n.2, it is likely  
8 that if the court held that the Governor lacks authority under  
9 A.R.S. § 5-601 to offer slot machine, keno and blackjack  
10 gaming in the new compacts, she would not conclude new  
11 compacts on such terms. Executive actions taken in excess of  
12 law are ultra vires. Besides, the Plaintiffs want the court  
13 to enjoin the Governor from entering the compacts, a remedy  
14 that would further decrease the likelihood that the Governor  
15 would proceed.

16 On the second claim, if the court held that the Governor  
17 lacks authority to enter any compacts because of a problem  
18 with the enabling statute A.R.S. § 5-601, it is likely that  
19 new compacts will not be entered pursuant to those statutes.  
20 This inability would not be the end of the story, of course.  
21 The Arizona Legislature might attempt to cure any defects with  
22 the statute, or it might do nothing and compel tribes to  
23 obtain class III gaming permits through the federal  
24 administrative process. Either way, invalidating the statute  
25 would force a reexamination of state compacting processes by  
26 Arizona's political bodies. The Plaintiffs might not carry  
27 the debate, but they would prevail by obtaining a public  
28 airing of their views.

1           On the third claim, the Plaintiffs seek to improve their  
2 competitiveness by limiting the tribes to the varieties of  
3 gaming that the Plaintiffs are allowed. Preventing the tribes  
4 from engaging in blackjack, keno and slot machine gaming could  
5 very well end the alleged competitive imbalance. Cf.  
6 Washington v. Daley, 173 F.3d 1158, 1165 (9<sup>th</sup> Cir. 1999)  
7 (holding that the redressability requirement is met when a  
8 judicial determination would effectively transfer the tribal  
9 allocation of a resource to competing nontribal claimants).  
10 At this early stage, it is not "mere speculation" to believe  
11 that if the court rejects the Defendants' argument about the  
12 breadth of gaming lawful in Arizona, and about what IGRA  
13 permits states to do, the gaming extended to the tribes by  
14 state compacts will be restricted.

15           The possibility that redress will be derailed by actions  
16 of the Secretary of the Interior or the tribes is  
17 unpersuasive. Lujan cautions against making assumptions about  
18 the independent actions of non-parties. The Ninth Circuit has  
19 held it error to pre-judge the outcome of an administrative  
20 proceeding and summarily conclude that no redress is  
21 obtainable. See Tyler v. Cuomo, 236 F.3d 1124, 1133 (9<sup>th</sup> Cir.  
22 2000). The court may not pre-judge the outcome of a  
23 consultation by the Secretary of the Interior with the tribes  
24 pursuant to 25 U.S.C. § 2710(d)(7).

25           In fact, there is good reason to believe that the  
26 Defendants are incorrect in predicting that the Secretary  
27 would annul any relief the Plaintiffs might win here.  
28 Assuming that the State revises its view of its gambling laws

1 following a decision here and tribal-State negotiations fail,  
2 it is unclear that the Secretary would entirely override the  
3 State's position. See 25 U.S.C. § 2710(d)(7)(B)(vii)(I) (the  
4 Secretary must prescribe regulations for gaming consistent  
5 with relevant state law). Regulations binding on the  
6 Secretary expressly provide that proposals are to be  
7 consistent with state law, and contemplate extensive  
8 involvement by state officials. See Class III Gaming  
9 Procedures, 25 C.F.R. Part 291 (2000).<sup>7</sup> If a gaming proposal  
10 is not consistent with state law, and if the gaming proposed  
11 is not permitted in the State for any purposes by any person,  
12 organization, or entity, the proposal may be rejected. 29  
13 C.F.R. §§ 291.8(b), 291.11(b). Thus, in the event that the

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15 <sup>7</sup> If a tribe attempts to sue a state for failure to enter  
16 a compact and is rebuffed by the state's assertion of Eleventh  
17 Amendment immunity, the tribe may submit a proposal to the  
18 Secretary of the Interior. 25 C.F.R. § 291.3. Upon receiving  
19 the proposal, the Secretary forwards copies to the state's  
20 Governor and Attorney General for comments on whether the  
21 proposed gaming activities are permitted to any person for any  
22 purpose in the State, and whether the proposal is otherwise  
23 consistent with relevant state law. Id. § 291.7.

24 If the state elects to submit an alternate proposal, the  
25 two competing proposals are presented to a "mediator," who  
26 must choose one. Id. § 291.10. The Secretary may disapprove  
27 the proposal selected by the mediator for a number of reasons,  
28 including that the chosen provision contemplates gaming  
activities not permitted in the state or is not consistent  
with state law. Id. § 291.11.

If the State does not propose an alternative, the  
Secretary reviews the tribe's proposal for compliance with  
state law. Id. § 291.8(a). Then the Secretary either  
approves the proposal or convenes tribe and state officials to  
discuss any unresolved issues. Id. § 291.8(b). Following the  
conference, the Secretary may either set forth a proposal as a  
final decision, or reject the proposal due to unresolved  
issues, including nonconformity with state law. Id. §  
291.8(c).

1 Plaintiffs obtain a favorable ruling on what Arizona law  
2 permits, it is likely that this relief will be preserved in  
3 subsequent administrative proceedings.<sup>8</sup>

4 Just as the court will not speculate about the future  
5 decisions of the Secretary of the Interior, in the event that  
6 the tribes are faced with a choice of no gaming or uncompact  
7 gaming, the court may not assume that the tribes will hazard  
8 uncompact gaming. After all, the compacts will not begin to  
9 expire for another two years, during which time it is  
10 conceivable that some resolution can be reached. Likewise,  
11 whether a settlement can be reached or not, the court may not  
12 assume that federal authorities will decline to enforce  
13 federal law if it is violated by the tribes.

14 In sum, it is likely that if the court adopts the  
15 interpretation of state law that the Plaintiffs propose, the  
16 choices of independent parties will be circumscribed by that  
17 interpretation, even if those parties are not legally bound by  
18 this adjudication. Unlike Lujan, where the plaintiffs'  
19 standing argument fell apart because non-parties had no  
20 obligation to take actions necessary for relief, here, the  
21 Secretary of the Interior, the tribes and federal law  
22 enforcement officers have obligations preexistent to and  
23 distinct from this lawsuit that would serve--not thwart--a  
24 remedy.

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25  
26 <sup>8</sup> Moreover, because the validity of a state compact is a  
27 distinct issue that is not mooted by Secretarial approval, see  
28 Santa Ana v. Kelly, 104 F.3d 1546, 1555 (10<sup>th</sup> Cir. 1997),  
compact validity under state law is justiciable regardless of  
the possibility of later Secretarial action pursuant to  
federal law.

1           The court finds the Defendants' reliance on two district  
2 court cases from the Fifth Circuit unpersuasive. In holding  
3 that plaintiffs had not established redressability, these  
4 courts found that the requested relief would only delay and  
5 not prevent Indian gaming. See Willis v. Fordice, 850 F.Supp.  
6 523, 539 (S.D. Miss. 1994), aff'd 55 F.3d 633 (5<sup>th</sup> Cir. 1995);  
7 Langley v. Edwards, 872 F.Supp. 1531, 1534 (W.D. La. 1995),  
8 aff'd 77 F.3d 479 (5<sup>th</sup> Cir. 1996). The Willis court relied on  
9 a pre-IGRA Supreme Court case to suggest that tribes have an  
10 absolute right to engage in class III gaming. It specifically  
11 did not consider whether class III Indian gaming would be  
12 inevitable under IGRA. See 850 F.Supp. at 529 n.7.<sup>9</sup> It is  
13 now abundantly clear that tribes may lawfully conduct class  
14 III gaming only pursuant to a valid compact, 25 U.S.C. §  
15 2710(d)(1)(C), whether negotiated directly with the State or  
16 through the intervention of the Secretary. It is entirely  
17 possible that state law may block tribal plans to engage in  
18 certain kinds of class III gaming, depending on how IGRA is  
19 construed. The court rejects the approach taken in these  
20 opinions as inconsistent with Ninth Circuit law.

21           B. Zone of interests

22           The Defendants argue that the Plaintiffs do not fall  
23 within the "zone of interests" regulated by IGRA. The  
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25           <sup>9</sup> Since Willis also found that the plaintiffs alleged no  
26 injury in fact, 850 F.Supp. at 528, and would lose on the  
27 merits besides, id. at 534, it is impossible to surmise that  
28 the Fifth Circuit approved the redressability analysis when it  
affirmed. Langley follows Willis closely and offers no  
analysis to support its conclusion that class III Indian  
gaming is inevitable under IGRA. See 872 F.Supp. at 1534.

1 Plaintiffs respond that as competitors of entities regulated  
2 by IGRA, their claims are within the zone of interests. They  
3 also contend that the Defendants misapprehend the nature of  
4 their claims. They maintain they raise state law claims that  
5 implicate IGRA but do not depend on IGRA for a cause of  
6 action. The Plaintiffs thus imply but do not state directly  
7 that delimiting IGRA's zone of interests is unnecessary here.  
8 In light of the varying characterizations of the Plaintiffs'  
9 third claim and their response to the merits of this argument,  
10 the court shall discuss the "zone of interests" theory, to the  
11 extent that the third claim rests on an implied cause of  
12 action under IGRA.

13 Even when a plaintiff satisfies Article III's standing  
14 requirements, a prudential rule requires that the plaintiff's  
15 complaint fall within "the zone of interests to be protected  
16 or regulated by the statute or constitutional guarantee in  
17 question." Valley Forge Christian College v. Americans United  
18 for Separation of Church and State, 454 U.S. 464, 475, 102  
19 S.Ct. 742, 760 (1982). The prudential zone of interests  
20 doctrine is used to establish whether a plaintiff has a  
21 federal cause of action; that is, whether a particular  
22 plaintiff has a right to judicial enforcement of a legal duty  
23 of the defendant. See William A. Fletcher, The Structure of  
24 Standing, 98 Yale L.J. 221, 237, 252 (1988).

25 In order for the zone of interests doctrine to bar a  
26 plaintiff with an actual injury and with Article III standing:  
27 (1) the plaintiff must not be the subject of the challenged  
28 statute, and (2) the plaintiff's interests must be "so

1 marginally related to or inconsistent with the purposes  
2 implicit in the statute that it cannot reasonably be assumed  
3 that Congress intended to permit the suit." Clarke v.  
4 Securities Industries Ass'n, 479 U.S. 388, 399, 107 S.Ct. 750,  
5 757 (1987). The test is permissive and allows standing so  
6 long as it is "arguable" that the plaintiff's interests are  
7 within the zone covered by the statute. Id. "[T]here need be  
8 no indication of congressional purpose to benefit the would-be  
9 plaintiff." Id. at 399-400, 107 S.Ct. at 757.

10 When a would-be plaintiff competes with entities directly  
11 regulated by the statute in question, it has repeatedly been  
12 held that the zone of interests test is satisfied. See  
13 National Credit Union Administration v. First National Bank  
14 ("NCUA"), 522 U.S. 479, 118 S.Ct. 927 (1998); Clarke, 479  
15 U.S. at 403, 107 S.Ct. 750; TAP Pharmaceuticals v. U.S. Dep't  
16 of Health and Human Serv., 163 F.3d 199, 208 (4<sup>th</sup> Cir. 1998);  
17 Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1074  
18 (D.C. Cir. 1998); American Fed'n of Gov't Employees, Local  
19 2119 v. Cohen, 171 F.3d 460, 469 n.4 (7<sup>th</sup> Cir. 1999). For  
20 example, competitors of financial institutions have standing  
21 to challenge an agency action relaxing restrictions on the  
22 activities of those institutions. NCUA, 422 U.S. at 488, 118  
23 S.Ct. at 933. In NCUA, commercial banks were permitted to  
24 challenge a rule that allowed federal credit unions to expand  
25 membership eligibility. Commercial banks had an interest in  
26 minimizing the market share of credit unions, and that  
27 interest "arguably" fell within the statute. Id. at 494-95,  
28 118 S.Ct. at 936. That the statute limiting credit union

1 membership was apparently intended to promote the cooperative  
2 nature and financial soundness of credit unions--not to  
3 shelter commercial banks--was deemed irrelevant. Id. at 498,  
4 118 S.Ct. at 938.

5 While the competitor standing rule is reasonably clear,  
6 the zone of interests doctrine has been generally described as  
7 "malleable." See 13 Charles Alan Wright, et al., Federal  
8 Practice and Procedure § 3531.7 at 726 (Supp. 2000). It  
9 originated as a way to interpret the broad grant of standing  
10 in the Administrative Procedure Act (APA), at 5 U.S.C. § 702.  
11 See Clarke, 479 U.S. at 399, 107 S.Ct. at 757 (1987)  
12 (construing Ass'n of Data Processing Serv. Org., Inc. v. Camp,  
13 397 U.S. 150, 90 S.Ct. 827 (1970)). The zone of interests is  
14 not a test of universal application. See id. at 400 n.16, 107  
15 S.Ct. at 757 n.16. Indeed, the Supreme Court's most recent  
16 discussions of the zone of interests test could be read to  
17 limit its relevance to cases arising under the APA or similar  
18 statutes with broad provisions for the public to challenge the  
19 actions of federal agencies. See NCUA, 522 U.S. at 488-93,  
20 118 S.Ct. at 933-35 (1998); Federal Election Commission v.  
21 Akins, 524 U.S. 11, 19, 118 S.Ct. 1777, 1783 (1998)  
22 (construing zone of interests protected by Federal Elections  
23 Campaign Act). The possibility that the zone of interests  
24 test is not particularly useful to analyze causes of action  
25 outside the administrative or citizen suit context has been  
26 expressly recognized by the Third Circuit. See Conte Bros.  
27 Automotive v. Quaker State-Slick 50, Inc., 165 F.3d 221, 226  
28 (3d Cir. 1998); see also 13 Charles A. Wright, et al., Federal

1 Practice & Procedure § 3531.7 at 823 (Supp. 2001).

2 On the other hand, the zone of interests doctrine may  
3 bear on all cases arising under federal law. See Bennett v.  
4 Spear, 117 S.Ct. 1154, 1162 (1997) ("Congress legislates  
5 against the background of our prudential standing doctrine,  
6 which applies unless it is expressly negated."). The Ninth  
7 Circuit has recently engaged in a "zone of interests" analysis  
8 regarding a claim without administrative or citizen-suit  
9 characteristics. See San Xavier Development Authority v.  
10 Charles, 237 F.3d 1149 (9<sup>th</sup> Cir. 2001). In San Xavier, the  
11 lessee of an Indian tribe attempted to assert statutory rights  
12 only a tribe can assert. See id. at 1152. Specifically, in  
13 attempting to disentangle itself from obligations to a  
14 sublessee, the plaintiff (a tribe's lessee) argued that the  
15 sublease was void because it violated the requirement that  
16 leases be approved by the Secretary of the Interior, and it  
17 ignored a statutory constraint on alienation of tribal trust  
18 lands. See id. at 1152-53. The Ninth Circuit held that a  
19 non-Indian lessor does not have the right to invoke statutory  
20 remedies enacted to protect Indian tribes and their members.  
21 Id. at 1153. Thus, it used "zone of interests" language to  
22 determine that the plaintiffs had no federal cause of action  
23 under the statute they sought to invoke.

24 Informed by San Xavier, it is apparent that the  
25 Defendants assert a zone of interests argument because they  
26 conceive the Plaintiffs' claims as arising under IGRA. The  
27 Defendants argue that IGRA recognizes only three legal  
28 interests--those of compacting States, tribes, and the

1 Secretary of the Interior--and that the balancing act IGRA  
2 represents should not be upset by allowing a suit by interests  
3 unprotected by the scheme.

4 The court acknowledges the dangers of meddling with  
5 IGRA's integrated statutory scheme. See United States v.  
6 Spokane, 139 F.3d 1297, 1299 (9<sup>th</sup> Cir. 1998) (deciding whether  
7 invalidation of one part of IGRA requires limiting the  
8 applicability of a counteracting provision). It is not  
9 apparent, however, how IGRA will be distorted by the  
10 Plaintiffs' efforts to enforce IGRA's regulations on tribal  
11 gaming. The status of the Plaintiffs as competitors of the  
12 tribes regulated by IGRA gives them an interest in enforcing  
13 IGRA's terms. Considering that plaintiffs "need only show  
14 that their interests fall within the 'general policy' of the  
15 underlying statute, such that interpretations of the statute's  
16 provisions or scope could directly affect them," Graham v.  
17 FEMA, 149 F.3d 997, 1004 (9<sup>th</sup> Cir. 1998), the court finds that  
18 the Plaintiffs' interest "arguably" satisfies the zone of  
19 interest requirement of prudential standing.

20 Moreover, it is preferable to determine whether IGRA  
21 contemplates suits by private-party competitors in the context  
22 of a motion to dismiss for failure to state a claim, and not  
23 in the process of making an initial determination of standing.  
24 Whether the Plaintiffs have a claim under IGRA depends on how  
25 IGRA is construed; that is, whether it is construed to contain  
26 an implied right of action. At this juncture, the court is  
27 unable to find that the assertion of an implied cause of  
28 action is so totally meritless as to deprive the court of

1 subject matter jurisdiction to even consider the matter. See  
2 Steel Co. v. Citizens for a Better Environment, 523 U.S. 83,  
3 89, 118 S.Ct. 1003, 1010 (1998). Therefore, the Defendants'  
4 motion to dismiss for lack of standing is denied. Finding  
5 that the Plaintiffs have standing, it is unnecessary to reach  
6 the Plaintiffs' claim, see Response (doc. #65) at 4, that they  
7 may sue state officials without having a special or  
8 particularized interest in the result.

9 C. Eleventh Amendment

10 The Defendants argue that the State of Arizona should be  
11 dismissed as a defendant because there are no claims against  
12 the State as a separate entity, and if there were, such claims  
13 are barred by the Eleventh Amendment. In response, the  
14 Plaintiffs explain that they seek relief against state  
15 officers and have joined the State to assure execution of a  
16 fees judgment. The Plaintiffs anticipate an award of  
17 attorneys' fees under the common fund/common benefit doctrine,  
18 the private attorney general doctrine,<sup>10</sup> and 42 U.S.C. § 1988.  
19 Am. Compl. ¶¶ 39-45. The Plaintiffs argue that the Eleventh  
20 Amendment does not bar an award of attorneys' fees, but if it  
21 did, the State has waived its sovereign immunity by removing  
22 this action to federal court.

23 At oral argument, the parties agreed to table this issue  
24 until after the court rules on the other motions. The court

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25  
26 <sup>10</sup> The private attorney general doctrine is an equitable  
27 rule that permits courts to award attorneys' fees to a party  
28 who has vindicated a right that: (1) benefits a large number  
of people; (2) requires private enforcement; and (3) is of  
societal importance. Arnold v. Dep't of Health Serv., 775  
P.2d 521, 538 (Ariz. 1989).

1 shall reserve the matter for another day.

2 II. Failure to Join Indispensable Parties

3 The Defendants argue that the action must be dismissed  
4 because the Plaintiffs have failed to join the Indian tribes,  
5 who are alleged to be indispensable parties. On a motion to  
6 dismiss pursuant to Rule 12(b)(7), the court must first decide  
7 whether an absent person should be joined. Fed. R. Civ. P.  
8 19(a); see 5A Charles A. Wright & Arthur Miller, Federal  
9 Practice & Procedure § 1359 (2d ed. 1990 & Supp. 2001). If  
10 the absent party is necessary, the court then considers  
11 whether it can be joined. Quileute Indian Tribe v. Babbitt,  
12 18 F.3d 1456, 1458 (9<sup>th</sup> Cir. 1994). If the absent person  
13 should be joined but is unavailable, the court must then  
14 determine, by balancing the guiding factors set forth in Rule  
15 19(b), whether the absent party is "indispensable" so that in  
16 "equity and good conscience" the action should be dismissed.  
17 Id. The moving party bears the burden of showing the nature  
18 of the unprotected interests of the absent persons. Makah  
19 Indian Tribe v. Verity, 910 F.2d 555, 558 (9<sup>th</sup> Cir. 1990).  
20 Adjudicating a Rule 12(b)(7) motion is a fact-intensive and  
21 flexible inquiry. Id. Facts may be presented in the form of  
22 affidavits and other relevant extra-pleading evidence. McShan  
23 v. Sherrill, 283 F.2d 462, 464 (9<sup>th</sup> Cir. 1960).

24 A. Necessary Parties

25 Under Rule 19(a)(1), the court begins by considering  
26 whether complete relief can be afforded to those already party  
27 to the action in the absence of the unjoined parties.  
28 Quileute, 18 F.3d at 1458. If not, then the tribes are

1 considered necessary parties. Id. at 1459; Clinton v.  
2 Babbitt, 180 F.3d 1081, 1088-89 (9<sup>th</sup> Cir. 1999). If the answer  
3 is yes, however, the court must then determine under Rule  
4 19(a)(2) whether the absent party has a legally protected  
5 interest in the subject of the action that might be  
6 compromised by a disposition. Makah, 910 F.2d at 559.

7 1. Availability of complete relief

8 The Defendants characterize the Plaintiffs' suit as a  
9 challenge to the terms of existing compacts, particularly to  
10 the automatic renewal provision. Motion (doc. #28) at 5;  
11 Motion (doc. #50) at 3. The Defendants argue that as a matter  
12 of law, all parties to an agreement are necessary to  
13 adjudicate an attack on its terms, citing Clinton, 180 F.3d at  
14 1088, and Kescoli v. Babbitt, 101 F.3d 1034 (1996). According  
15 to the Defendants, the tribes have a legally protected  
16 interest in the compacts to which they are parties, and should  
17 be joined if litigation on the terms of the existing compacts  
18 is to go forward.

19 The Plaintiffs dispute the Defendants' description of  
20 their claims. The Plaintiffs contend that they seek "only to  
21 confine the Governor within the law in renewing,  
22 administering, or modifying the compacts or in making new  
23 compacts." Response at 22. The Plaintiffs expressly  
24 challenge only prospective compacts that would go into effect  
25 no earlier than 2003. The Plaintiffs maintain that since the  
26 Governor has unilateral power to not renew the compacts, and  
27 the tribes have no protectable interest in the State's renewal  
28 determination, the tribes are not necessary parties.

1           The court begins with the legal proposition that compacts  
2 are treated like contracts. Confederated Tribes of Siletz  
3 Indians v. Oregon, 143 F.3d 481, 484-85 (9<sup>th</sup> Cir. 1998); Santa  
4 Ana v. Kelly, 104 F.3d 1546, 1556 (10<sup>th</sup> Cir. 1997). When  
5 rights under a contract are litigated, all parties to the  
6 contract are necessary parties in order to afford complete  
7 relief. See Clinton, 180 F.3d at 1088 (citing Lomayaktewa v.  
8 Hathaway, 520 F.2d 1324, 1326 (9<sup>th</sup> Cir. 1975)). The Defendants  
9 compare this case to Clinton and argue that the Ninth Circuit  
10 has already answered the questions before the court. Whether  
11 Defendants are correct depends on the similarity of the  
12 material facts.

13           In Clinton, the terms on which Navajo Nation members  
14 would reside on Hopi Partitioned Lands (HPL) were at stake.  
15 180 F.3d at 1083. Congress attempted to resolve the  
16 differences between Navajos wanting to live on Hopi land (HPL  
17 Navajos) and the Hopi Tribe by enacting the Navajo-Hopi Land  
18 Dispute Settlement Dispute Act of 1996. The 1996 Act ratified  
19 a settlement between the United States and the Hopi Tribe,  
20 whereby the Hopi Tribe agreed to allow HPL Navajos to remain  
21 on their land under the terms of 75-year leases. Id. at 1085.  
22 A standard lease was negotiated by the Hopi Tribe, the Navajo  
23 Nation, and representatives of the HPL Navajos. Id. at 1085.  
24 The standard lease terms were embodied in an Accommodation  
25 Agreement among these parties. Id. at 1085. The Secretary of  
26 the Interior was required to approve each lease written  
27 according to the standard terms. Id. at 1086. Plaintiffs,  
28 HPL Navajos who disagreed with the terms of the standard

1 lease, sued the Secretary to block his approval of any leases.  
2 Id. They also sought a declaratory judgment that the 1996 Act  
3 was unconstitutional. Id.

4 On the Rule 19(a)(1) prong, the Ninth Circuit summarily  
5 held that no complete relief could be granted without the Hopi  
6 Tribe. The panel held that jurisdiction over the parties to  
7 the agreement was necessary to adjudicate its terms, but it  
8 did not specify which agreement was to be adjudicated by the  
9 plaintiffs' lawsuit. 180 F.3d at 1088. Because the lease  
10 terms were part of the Accommodation Agreement concluded among  
11 the Hopi Tribe, the Navajo Nation, and the representatives of  
12 the HPL Navajos, it appears that on the Ninth Circuit's logic,  
13 both the Hopi Tribe and the Navajo Nation were necessary  
14 parties. The other agreement in play was that between the  
15 Secretary and the Hopi Tribe. If, as a result of the  
16 litigation, the Secretary were prevented from approving the  
17 leases, but was obliged to make payments to the Hopi Tribe  
18 after the approval of a number of leases, the Secretary would  
19 face inconsistent obligations. The Secretary would be obliged  
20 to pay valuable incentives to the Hopi Tribe for entering  
21 leases, but it could not approve any leases. Either of these  
22 possibilities would support the Ninth Circuit's holding that  
23 no complete relief could be granted without the Hopi Tribe.  
24 See Manybeads v. United States, 209 F.3d 1164, 1165 (9<sup>th</sup> Cir.  
25 2000), cert. denied 69 U.S.L.W. 3399 (April 2, 2001) (in a  
26 related case, explaining that the Hopi Tribe is necessary  
27 because it is party to the agreement with the Secretary and  
28 the Accommodation Agreement).

1 Not every case where an agreement figures is controlled  
2 by the rule described in Clinton, however. If a litigation  
3 does not concern the obligations under an existing contract,  
4 either because the litigation is about something other than  
5 the contract or because the relief sought would have effect  
6 only after the contract ends, complete relief may be available  
7 with the absent contracting party. As an example of the first  
8 exception, if a non-party raises a procedural challenge to an  
9 agency determination that a certain tract constitutes "tribal  
10 land," the tribe claiming an interest in the land is not  
11 necessary to render complete relief vis-à-vis the agency. See  
12 Kansas v. United States, 249 F.3d 1213, 1226-27 (10<sup>th</sup> Cir.  
13 2001); see also Sac and Fox Nation of Missouri v. Norton, 240  
14 F.3d 1250, 1258 (10<sup>th</sup> Cir. 2001) (propriety of actions by the  
15 Secretary of the Interior can be ascertained without tribe);  
16 Yellowstone County v. Pease, 96 F.3d 1169, 1173 (9<sup>th</sup> Cir. 1996)  
17 (whether tribal court had jurisdiction to interpret a state  
18 statute did not require presence of tribe).

19 Prospective relief, the second exception noted here,  
20 effects changes only going forward and does not undermine  
21 existing obligations.<sup>11</sup> For example, procedural claims raised  
22 by the Makah Tribe against the Secretary of Commerce in Makah  
23 Indian Tribe v. Verity, 910 F.2d 555, 559 (9<sup>th</sup> Cir. 1990)  
24 sought prospective relief. There, the Secretary was  
25 responsible for adopting salmon harvest quotas. Id. at 557.

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26  
27 <sup>11</sup> Assertions that only prospective relief is sought must  
28 be viewed critically. Some so-called prospective relief  
would, if granted, disturb the rights of absent parties under  
existing contracts. See Kescoli, 101 F.3d at 1310.

1 The Makah Tribe challenged its low allocation by alleging that  
2 the Secretary had violated the APA and the Fishery  
3 Conservation and Management Act when he adopted the quotas.  
4 Id. The Ninth Circuit held that these claims could go forward  
5 without the other tribes that had received allocations,  
6 because the Makah sought relief that would "affect only the  
7 future conduct of the administrative process," and "all of the  
8 tribes have an equal interest in an administrative process  
9 that is lawful." Id. at 559. In this case, the relief  
10 sought is prospective and raises largely procedural concerns,  
11 thereby making Clinton distinguishable. The narrow issue  
12 before the court concerns the Governor's authority to enter  
13 future compacts and on what terms. An authoritative  
14 interpretation of state law is the relief that the Plaintiffs  
15 seek. The Plaintiffs do not seek to change the State's duties  
16 or rights under the existing compacts, but rather challenge  
17 how the State decides what duties or rights are appropriate  
18 for prospective compacts.

19 If, in this case, the court were to enter judgment in  
20 favor of the Plaintiffs on the separation of powers claim, the  
21 procedure by which the Governor could renew or negotiate new  
22 compacts would be altered. Conversely, if the court were to  
23 enter a judgment in favor of the Defendants, the State could  
24 proceed to renew or modify the class III gaming compacts as  
25 the Governor sees fit. On the Plaintiffs' substantive claims,  
26 concerning the terms that the Governor may agree to, the  
27 Governor's negotiating hand is established by state law.  
28 Complete relief would involve only a change in the position of

1 the State apart from its obligations under existing compacts.  
2 The court concludes that the tribes need not be joined under  
3 Rule 19(a)(1) because complete relief can be accorded among  
4 the Plaintiffs and Defendants in their absence.

5 2. Legally protected interest

6 Under Rule 19(a)(2), the question is whether the tribes  
7 have a legally protected interest in the process by which  
8 compacts are renewed or the terms of renewal. Makah, 910 F.2d  
9 at 558; Stock West Corp. v. Lujan, 982 F.2d 1389, 1398 (9<sup>th</sup>  
10 Cir. 1993).

11 The Defendants again stress similarities to Clinton.  
12 There, in discussing Rule 19(a)(2), the Ninth Circuit held  
13 that the absent Hopi Tribe's interests were likely to be  
14 impaired for three reasons. 180 F.3d at 1088. First, if the  
15 Secretary could not approve the standard form lease, the Hopi  
16 Tribe would not be able to fulfill its commitment to the  
17 United States to enter leases with the HPL Navajos. Id. at  
18 1089. Second, the 1996 Act offered valuable incentives to the  
19 Hopi Tribe if it entered large numbers of such leases. If the  
20 Hopi Tribe could not enter standard leases, it could not  
21 qualify for these statutory benefits. Id. Third, under the  
22 standard leases, the Hopi Tribe obtained jurisdiction over the  
23 leased land in exchange for allowing the HPL Navajo to live on  
24 it. Hopi jurisdiction over HPL territory was viewed as  
25 essential for Hopi Tribe members and HPL Navajo to coexist  
26 peacefully. Id. Without the leases, the Hopi Tribe would  
27 have no mechanism to secure jurisdiction over its territory.

28 Whether Clinton controls here hinges on how the tribes'

1 interest in the compacts--both current and future--is  
2 conceived. The first question is whether rights under  
3 existing compacts are to be adjudicated. The court must  
4 determine whether the actions of the State that are being  
5 challenged here overlap with the actions that the State takes  
6 pursuant to the compacts. The next question is whether the  
7 tribes have an interest in the terms of future compacts that  
8 could be implicated by adjudicating this case.

9 In light of the Ninth Circuit's position analogizing  
10 compacts to contracts, see Confederated Tribes of Siletz  
11 Indians, 143 F.3d at 484-85, principles of contract law apply.  
12 "[I]n the absence of a statutory or contractual right to  
13 renewal, a person . . . can claim no property interest in the  
14 indefinite renewal of his or her contract." Federal Legal  
15 Lands Consortium ex rel. Robart Estate v. United States, 195  
16 F.3d 1190, 1199 (10<sup>th</sup> Cir. 1999) (on due process claim,  
17 discussing alleged property interest in grazing permits).  
18 When a right to terminate is exercised according to the  
19 conditions set out in the contract, the party losing profits  
20 expected under a renewed term does not suffer prejudice to a  
21 legally protected interest. See Otis Elevator Co. v. George  
22 Washington Hotel Corp., 27 F.3d 903, 908-09 (3d Cir. 1994).  
23 If the right to terminate is unconstrained, the ongoing  
24 existence of an agreement is merely speculative. It is well  
25 established that a legally protected interest cannot be wholly  
26 contingent. "Speculation about the occurrence of a future  
27 event ordinarily does not render all parties potentially  
28 affected by that future event necessary or indispensable

1 parties under Rule 19." Northrop Corp. v. McDonnell Douglas  
2 Corp., 705 F.2d 1030, 1046 (9<sup>th</sup> Cir. 1983).

3 As set out on pages 5-6, supra, the existing compacts  
4 provide for automatic five-year extensions unless either party  
5 serves written notice of non-renewal on the other. The only  
6 condition for an effective notice of non-renewal is that it be  
7 served at least 180 days prior to the expiration of the  
8 existing term. The Governor's right to serve notice of non-  
9 renewal is otherwise absolute. She can exercise for cause, or  
10 for no reason at all. It is probative that one point of  
11 negotiation has been whether, in future compacts, the State's  
12 right to prevent automatic renewal should arise only under  
13 certain conditions. See JSOF, Ex. 58 (letter from a tribe's  
14 counsel proposing an automatic term of renewal that State may  
15 cancel only for a specified reason). Given the present  
16 unconstrained right of the Governor to terminate the existing  
17 compacts at the end of their initial term and to begin  
18 negotiations afresh, renewal on current or more favorable  
19 terms is only speculative.

20 When the Defendants argue that a judgment against the  
21 Governor would be a judicial rewriting of the automatic  
22 renewal clause of the compact, they ignore how that clause  
23 does not specify acceptable grounds for termination. Unlike  
24 Clinton, where the absent parties had vested rights under  
25 existing contracts, here, the tribes' interest in renewal is  
26 contingent on the Governor's exercise of limitless discretion.  
27 Because the compact does not limit the State's discretion to  
28 invoke the termination option, a federal injunction would

1 appear to be as good a reason as any. Requiring the Governor  
2 to invoke the termination clause on the grounds that she lacks  
3 the authority to enter compacts would not disturb the tribes'  
4 contractual rights.

5 Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir.  
6 1992), does not control here, because the dispute before the  
7 court there implicated vested rights of absent parties. The  
8 Shermoen opinion arose in a suit brought by several individual  
9 members of the Yurok Tribe for a declaration that a statute  
10 partitioning tribal land among the Yurok and Hoopa Valley  
11 Tribes was unconstitutional. The plaintiffs argued that the  
12 tribes were not necessary parties, because the partitioning  
13 statute was either constitutional or unconstitutional:

14 [I]f the latter, then the absent tribes have no  
15 "legally protected interest in the outcome of the  
16 action"; if the former, then the appellants will not  
prevail and thus the disposition of the action will  
not impair the absent tribes' interests.

17 Id. at 1317. The Ninth Circuit rejected this logic, holding  
18 that the absent tribes were entitled to raise their legal  
19 theories and claims about the act allotting them partitioned  
20 land. To put it another way, the problem with the Shermoen  
21 plaintiffs' argument is that it prejudges the merits. If the  
22 act were unconstitutional, the absent tribes lacked a legally  
23 protected interest. If the act were constitutional, then the  
24 Tribes would have had a legally protected interest but no harm  
25 would be done by their absence because the statute would have  
26 been upheld. This kind of reasoning is contrary to Rule 19,  
27 which requires a determination whether there is a legally  
28 protected interest before the adjudication on the merits

1 begins.<sup>12</sup>

2 Here, when the Plaintiffs challenge the Governor's  
3 ability to enter renewed compacts on certain terms, the  
4 Plaintiffs challenge the Governor's interpretation of state  
5 law. Before negotiations with the tribes may begin, the  
6 Governor must develop a negotiating position consonant with  
7 state law. This dispute over the limits of state law strikes  
8 at what the Governor will present to the tribes and what she  
9 can agree to, which are issues that must be resolved prior to  
10 the existence of compacts in which tribes have a legally  
11 protected interest. Simply put, the tribes have no legally  
12 protectable interest in the Governor's negotiating agenda.

13 While the court accepts as plausible the Defendants'  
14 assertion that granting the requested relief would "directly  
15 impact the tribes' ability to conduct gaming," the Defendants  
16 have not attempted to persuade the court that the tribes have  
17 a nonfrivolous claim to conduct more gaming than is allowed by  
18 state law. See Rumsey Indian Rancheria of Wintun Indians v.  
19 Wilson, 41 F.3d 421, 425 (9<sup>th</sup> Cir.) as amended, 99 F.3d 321 (9<sup>th</sup>  
20 Cir. 1996) ("where a state does not 'permit' gaming activities  
21 sought by a tribe, the tribe has no right to engage in these  
22 activities. . . ."). A verdict here in the Plaintiffs' favor  
23 would not implicate the rights IGRA guarantees the tribes.

24 To the extent that the tribes believe they have rights to  
25

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26 <sup>12</sup> At this stage, Plaintiffs have only alleged that the  
27 existing compacts are illegal and that renewal would also be  
28 illegal. To the extent that those allegations prove correct,  
the court notes that no legally protectable interest can arise  
in an unlawful creation. See United States v. San Juan Bay  
Marina, 239 F.3d 400, 406 (1<sup>st</sup> Cir. 2001).

1 conduct blackjack, keno and slot machine gaming that are not  
2 dependent on the limits of state law, the tribes' absence is  
3 unlikely to be prejudicial. The tribes may advance these non-  
4 state law rights in negotiations with the Secretary of the  
5 Interior to conduct class III tribal gaming. See 25 U.S.C. §  
6 2710(d)(7)(B)(vii) (providing that Secretary shall prescribe  
7 terms for class III gaming where state has refused to consent  
8 to compact selected by court-appointed mediator); 25 C.F.R.  
9 Part 291 (providing for secretarial approval of class III  
10 gaming where state and tribe have been unable to agree on  
11 compact and state asserts sovereign immunity).

12 The Defendants raise the possibility that the State  
13 Defendants will be subject to inconsistent duties if relief is  
14 entered without the tribes. The Defendants note that the  
15 State is obliged to enter into the standard form compact with  
16 any tribe that requests it, pursuant to A.R.S. § 5-601.01(A).<sup>13</sup>

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17  
18 <sup>13</sup> A.R.S. § 5-601.01, which originated as a voter  
initiative, provides:

19 A. Notwithstanding any other law or the provisions of §  
20 5-601, the state, through the governor, shall enter into  
21 the state's standard form of gaming compact with any  
eligible Indian tribe that requests it.

22 B. For purposes of the this section:

23 1. The state's standard form of gaming compact is the  
24 form of compact that contains provisions limiting types  
25 of gaming, the number of gaming devices, the number of  
26 gaming locations, and other provisions, that are common  
to the compacts entered into by this state with Indian  
tribes in this state on June 24, 1993, and approved by  
the United States secretary of the interior on July 30,  
1993.

27 2. An eligible Indian tribe is an Indian tribe in this  
28 state that has not entered into a gaming compact with  
the state.

C. The state, through the governor, shall execute the  
compact required by this section within thirty days after

1 They argue that an eligible tribe not currently party to an  
2 existing compact could sue the Governor to compel her to enter  
3 into the standard form compact, the lawful renewal of which is  
4 challenged here.

5 This argument fails to persuade. First, the possibility  
6 that a tribe not yet party to a standard form compact might  
7 demand to enter one is hypothetical at this point. The  
8 theoretical possibility of another lawsuit cannot be the basis  
9 for dismissal under Rule 19(a)(2). Northrop Corp., 705 F.2d  
10 at 1045; 7 Charles A. Wright, et al., Federal Practice and  
11 Procedure § 1604 at 48 (3d ed. 2001).

12 Second, the risk of inconsistent obligations arises not  
13 from the tribes' absence from this lawsuit but from ambiguity  
14 in the Arizona statute requiring the Governor to enter  
15 standard form compacts. When ambiguity is inevitable whether  
16 a suit proceeds or not, joinder of an absent party is not  
17 required. See Southwest Center for Biological Diversity v.  
18 Babbitt, 150 F.3d 1152, 1155 (9<sup>th</sup> Cir. 1998). Tribes  
19 negotiating renewal are not entitled to the standard form  
20 compacts, for A.R.S. § 5-601.01 covers only tribes entering a  
21 compact for the first time and does not offer the standard  
22 compact terms as an alternative to a negotiated renewal, if  
23 the State opts against automatic renewal. In making their  
24 inconsistent obligations argument, the Defendants apparently  
25 assume that the Governor will be caught between a statutory  
26 obligation to offer the four tribes not yet parties to a

27 \_\_\_\_\_  
28 written request by the governing body of an eligible  
tribe.

1 compact the terms of the compacts entered in 1993, and a  
2 finding that those terms are somehow illegal.

3 The court finds the alleged conflict does not defeat this  
4 lawsuit. The problem is that § 5-601.01 does not explain the  
5 obligation of the Governor in the event that the standard form  
6 compacts are found to violate state law. The Arizona Supreme  
7 Court expressly avoided taking a position about how the  
8 statute should operate in the event that the standard compact  
9 terms were declared unlawful. See Salt River Pima-Maricopa  
10 Indian Community v. Hull, 945 P.2d 818, 823 n.3 (Ariz. 1997).  
11 The Arizona Supreme Court held only that the State is required  
12 to offer the 1993 compact terms as a default. The issue the  
13 Defendants raise has been percolating since it was recognized  
14 by Vice Chief Justice Jones in 1997. See Salt River Pima-  
15 Maricopa, 945 P.2d at 826-27 (Jones, V.C.J., concurring).  
16 While § 5-601.01 may pose a dilemma for the Defendants,  
17 adjudicating the terms of renewal here does not create  
18 inconsistent burdens, but only exposes a flaw inherent in the  
19 statute.

20 Finally, it remains uncertain whether the Governor would  
21 in fact be subject to inconsistent obligations. To begin  
22 with, the standard form compact is intended as a default  
23 agreement should negotiations fail. It is mere speculation  
24 that negotiations with the tribes could not produce an  
25 agreement consistent with the Governor's obligations under  
26 state law or that the State will ever be bound to inconsistent  
27 judgments.

28 To illustrate, suppose that negotiations fail, the four

1 tribes demand the standard form terms, and the State refuses,  
2 citing a ruling here. The tribes must sue an entity with  
3 sovereign immunity to enforce a different interpretation of  
4 A.R.S. § 5-601.01. Here, the Defendants minimize this  
5 obstacle, arguing that if they assert sovereign immunity, the  
6 Secretary of the Interior is likely to allow the tribes to  
7 continue conducting the same kinds of gaming presently allowed  
8 under the current contracts. Reply at 6-7. Their rationale  
9 is that the Secretary would want the tribes who entered  
10 compacts in 1993 to compete equally with the Salt River Pima-  
11 Maricopa Tribe, which entered a compact that will not expire  
12 until 2008. Yet even if the Secretary takes this course of  
13 action (a very speculative assumption), the compact would  
14 exist pursuant to federal and not state law, and thus not  
15 confront the State with inconsistency. Therefore, the risk  
16 that the Defendants will be confronted with irreconcilable  
17 obligations is remote.

18 Having concluded that the tribes are not necessary  
19 parties under Rule 19(a), further analysis is unnecessary.  
20 Makah, 910 F.2d at 559. In an abundance of caution, the court  
21 proceeds regardless. Assuming that the absent tribes are  
22 necessary, the next step is to determine whether the party can  
23 be joined. Quileute, 18 F.3d at 1458 (9<sup>th</sup> Cir. 1994). The  
24 tribes are entitled to sovereign immunity and cannot be joined  
25 without their express consent. Id. at 1459; Clinton, 180 F.3d  
26 at 1090. The parties accept that the tribes will not consent,  
27 and there is no basis for second-guessing this assumption.  
28 The court next considers whether the action must be dismissed.

1           B. Indispensable Parties

2           The court weighs the following factors to determine  
3 whether absent parties are indispensable:

- 4           (1)           to what extent a judgment rendered in the  
5                        person's absence might be prejudicial to  
6           (2)           the extent to which, by protective  
7                        provisions in the judgment, by the shaping  
8                        of relief, or other measures, the prejudice  
9           (3)           can be lessened or avoided;  
10           (4)           whether a judgment rendered in the person's  
11                        absence will be adequate;  
12                        whether the plaintiff will have an adequate  
13                        remedy if the action is dismissed for  
14                        nonjoinder.

15 Fed. R. Civ. P. 19(b); Clinton, 180 F.3d at 1090.

16           The Defendants argue that the tribes' immunity to suit  
17 should operate conclusively in favor of a finding of  
18 indispensability. The Ninth Circuit has noted that when the  
19 necessary party is immune from suit, there may be "very little  
20 need for balancing Rule 19(b) factors because immunity itself  
21 may be viewed as the compelling factor." Quileute, 18 F.3d at  
22 1460 (quoting Confederated Tribes of the Chehalis Indian  
23 Reservation v. Lujan, 928 F.2d 1496, 1499 (9<sup>th</sup> Cir. 1991)).

24 Nevertheless, district courts must apply the four-part test to  
25 determine whether Indian tribes are indispensable parties.

26 See id.

27           The first factor mirrors the impaired interest analysis  
28 of Rule 19(a)(2). Kescoli, 101 F.3d at 1311. Having found  
that the tribes are not affirmatively required to participate  
in this litigation under Rule 19(a)(1), the court finds that  
it is possible to go forward without them. With regard to the  
second factor, the parties have not suggested any specific  
ameliorative measures. The third factor concerning the

1 adequacy of judgment is closely related to the analysis under  
2 Rule 19(a)(1). 7 Wright, et al., supra § 1604 at 50. For the  
3 reasons discussed above, this factor does not support finding  
4 the tribes indispensable parties.

5 On the fourth factor, the fact that a plaintiff is left  
6 without a remedy is not particularly compelling one way or the  
7 other. See, e.g., Imperial Granite v. Pala Band of Mission  
8 Indians, 940 F.2d 1269, 1272 (9<sup>th</sup> Cir. 1991); Clinton, 180 F.3d  
9 at 1090 (holding that other three factors may heavily outweigh  
10 this factor).<sup>14</sup> The Plaintiffs contend that they will have no  
11 other remedy if this action is dismissed. The Defendants note  
12 that any compact entered by the State and the tribes must be  
13 approved by the Secretary of the Interior, but it is agreed  
14 that the Secretary does not review compacts for compliance  
15 with state law. This factor, although regarded as little more  
16 than a makeweight in cases involving sovereign tribes, favors  
17 allowing this litigation to go forward.

18 Having weighed the four factors carefully, the court  
19 denies the Defendants' Motion to Dismiss for Failure to Join  
20 Indispensable Parties. It is unnecessary to reach the  
21 Plaintiffs' claim that their suit should proceed under the  
22 "public rights exception" to the indispensable party rule.  
23 Were the tribes indispensable parties, however, the court does  
24

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25 <sup>14</sup> The result in Comstock Oil & Gas, Inc. v. Alabama and  
26 Coushatta Indian Tribes, 78 F. Supp. 2d 589 (E.D. Tex. 1999),  
27 is expressly predicated on a Fifth Circuit rule allowing  
28 joinder of tribal officials on the grounds they are not  
entitled to sovereign immunity. The Fifth Circuit and Ninth  
Circuit diverge on this point. Id. at 593. The court rejects  
Comstock as inapplicable.

1 not believe that the Defendants' interests are sufficiently  
2 aligned to allow the State Defendants to represent the tribes.  
3 Cf. Shermoen, 982 F.2d at 1318. As the Defendants point out,  
4 the State and the tribes have been adversaries in a number of  
5 suits over gaming, and the State owes no trust obligation to  
6 the tribes. Although the Defendants acknowledge they have  
7 been in communication with counsel for certain tribes, their  
8 unwillingness to commit themselves to representing the  
9 interests of the absent tribes is significant.<sup>15</sup>

10 Finally, the Defendants assert and the Plaintiffs do not  
11 appear to dispute that the State's gaming policy has in the  
12 past shifted with each new governor. Ultimate resolution of  
13 this case may extend into the gubernatorial campaign season of  
14 2002. Casting the Defendants as proxies for the tribes in  
15 this litigation is rife with potential for conflicts in  
16 representation. To best preserve all parties' interests and

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17  
18 <sup>15</sup> At the trial, the court heard witness testimony which  
19 tended to rebut an inference the Plaintiffs sought to  
20 establish; namely, that the State and tribes are in league  
21 together to secure tribal gaming. The testimony related to  
22 efforts to amend Arizona gambling prohibitions, sponsored by  
23 the Arizona Department of Gaming (DOG). The Plaintiffs  
24 suspect that the changes were intended to cement the  
25 Defendants' view that tribal gaming is legal. The court finds  
26 that the evidence does not support such an inference.

27 Paul Walker, formerly the legislative liaison and public  
28 information officer at DOG, first drafted the agency's  
proposed gaming amendments. He stated that the bill was meant  
to create a mechanism to regulate off-reservation charitable  
gaming. He denied that the bill was meant to have an impact  
on this litigation or on the Governor's power to enter tribal  
compacts. Rick Pyper, who assumed the legislative liaison job  
on January 1, 2001, confirmed that DOG had included tribal  
representatives in its efforts to promote the bill. He stated  
that DOG had not acquiesced to all of the tribes' suggestions,  
however.

1 minimize the possibility of conflicts, the court rejects the  
2 Plaintiffs' suggestion that the Defendants would be adequate  
3 representatives for the absent tribes. No one has suggested  
4 that Rick Romley, the Maricopa County Attorney, should stand  
5 in for the tribes. Accordingly, none of the Defendants may be  
6 viewed as an adequate substitute for the tribes.

7 III. Failure to State a Claim

8 Under Rule 12(b)(6), "dismissal for failure to state a  
9 claim is improper unless 'it appears beyond doubt that the  
10 plaintiff can prove no set of facts in support which would  
11 entitle him to relief.'" Schowngardt v. General Dynamics  
12 Corp., 823 F.2d 1328, 1332 (9th Cir. 1987) (quoting Conley v.  
13 Gibson, 355 U.S. 41, 45-46 (1957)). Thus, in undertaking its  
14 analysis, the court must limit its "review to the contents of  
15 the complaint, accepting the material factual allegations as  
16 true and construing them in the light most favorable to the  
17 [non-movant]." Id.

18 The Defendants maintain that to the extent the first  
19 three claims in the Plaintiffs' amended complaint and the  
20 first claim in Intervenor's amended complaint turn on alleged  
21 violations of IGRA, those claims must be dismissed because  
22 IGRA preempts state law claims based on alleged violations of  
23 federal law and it does not provide a private cause of  
24 action.<sup>16</sup>

25 A. Preemption of State Law Claims

26 The Plaintiffs' state law causes of action are based on  
27

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28 <sup>16</sup> The Plaintiffs' first three claims are set out at note  
2, supra.

1 common law writs of injunction and prohibition guaranteed by  
2 the Arizona Constitution:

3 The superior court or any judge thereof may issue  
4 writs of mandamus, quo warranto, review, certiorari,  
5 prohibition, and writs of habeas corpus on petition  
6 by or on behalf of a person held in actual custody  
7 within the county. Injunctions, attachments and  
8 writs of prohibition and habeas corpus may be issued  
9 and served on legal holidays and non-judicial days.

7 Ariz. Const. art. VI, § 18. The Plaintiffs argue that because  
8 they have "injury and standing," they are entitled to invoke  
9 the writs to restrain the State Defendants. The Defendants do  
10 not dispute the Plaintiffs' ability to state a claim by way of  
11 the writs. They also admit that claims brought under state  
12 law to compel compliance with state law would not be  
13 preempted. Reply at 10. However, they dispute the accuracy  
14 of the Plaintiffs' characterization of their claims.  
15 According to the Defendants, the Plaintiffs' claims are based  
16 on alleged violations of IGRA, and IGRA occupies the field  
17 regulating casino gaming within reservations.

18 IGRA entirely preempts state regulation which "interferes  
19 or is incompatible with federal or tribal interests as  
20 reflected in federal law." Confederated Tribes of Siletz  
21 Indians v. Oregon, 143 F.3d 481, 486 (9<sup>th</sup> Cir. 1998). For  
22 claims involving non-tribal members, the court must determine  
23 "whether, in the specific context, the exercise of state  
24 authority would violate federal law." Id. (quoting White  
25 Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, 100 S.Ct.  
26 2578, 2584 (1980)).

27 For present purposes, the court asks "whether a  
28 particular claim will interfere with tribal governance of

1 gaming." Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d  
2 536, 549 (8<sup>th</sup> Cir. 1996). In Gaming Corp., the Eighth Circuit  
3 held that state law claims "to challenge the outcome of an  
4 internal governmental decision by the nation" are preempted.  
5 Id. By contrast, "[p]otentially valid claims under state law  
6 are those which would not interfere with the nation's  
7 governance of gaming." Id. at 550. Thus, claims arising from  
8 duties independent of gaming, such as an attorney-client  
9 relationship between non-tribal parties, may not be preempted,  
10 depending on their specific facts. Id. State law claims that  
11 attack the process by which tribal decisions are made, by  
12 contrast, are extinguished. Id.

13 The Eighth Circuit recently elaborated on the distinction  
14 between preempted and unrelated claims. A contract that is  
15 "merely peripherally associated with tribal gaming" is not  
16 controlled by IGRA. Casino Resource Corp. v. Harrah's  
17 Entertainment, Inc., 243 F.3d 435, 439 (8<sup>th</sup> Cir. 2001). No  
18 tribal interest is implicated in a breach of contract suit  
19 between two non-tribal would-be casino management companies.  
20 Id. Such a claim is not preempted because it arises from  
21 duties independent of tribal gaming regulation. Id.

22 The Ninth Circuit also construes the scope of IGRA  
23 preemption to permit state law claims if they are sufficiently  
24 tangential to gaming regulation. See Confederated Tribes of  
25 Siletz Indians, 143 F.3d at 484. There, the State of Oregon  
26 created a report of a police investigation of a tribal casino  
27 which, under the terms of the compact in effect, it was  
28 entitled to do. When media groups sought to obtain a copy of

1 the report under Oregon's Public Record Laws, the tribe  
2 objected to disclosure. The terms of the compact expressly  
3 provided that information gathered by the State would be kept  
4 confidential to the extent provided under the Public Records  
5 Laws. Id. at 483. Under the compact, Oregon had to produce  
6 the report if the Record Laws so required. IGRA did not  
7 preempt the Public Records Laws because the Oregon statutes  
8 "do not seek to usurp tribal control over gaming nor do they  
9 threaten to undercut federal authority over Indian gaming."  
10 Id. at 487. The Court of Appeals found that any adverse  
11 consequence accruing to the tribe as a result of disclosure of  
12 the report was incidental and not inconsistent with IGRA. Id.

13 Here, the Plaintiffs seek "judicial supervision of the  
14 legality of State participation in the trilateral compacting  
15 process, not review of federal or tribal action." Response at  
16 9. The Defendants' conclusory assertion that such claims  
17 interfere with "IGRA-apportioned responsibilities" and  
18 threaten tribal interests, Reply at 11, is inadequate. Under  
19 Gaming Corp., the court must assess each claim separately to  
20 identify points of interference.

21 The court finds that the Plaintiffs do not seek relief  
22 that would interfere with tribal control over reservation  
23 gaming. As discussed above, see Part II.A supra, the  
24 Plaintiffs seek to ensure the legality of the terms to which  
25 the Governor proposes to commit the State and its citizens.  
26 The Governor's duty to negotiate compacts and the terms to  
27 which she may agree are set out in state law. State law  
28 questions about whether a state has validly bound itself to a

1 gaming compact are not preempted. Oneida Indian Nation of New  
2 York State v. County of Oneida, 132 F. Supp. 2d 71, 76  
3 (N.D.N.Y. 2000). IGRA preemption blocks the operation of  
4 state policy once a valid compact is executed, see Cabazon  
5 Band of Mission Indians v. Wilson, 124 F.3d 1050 (9<sup>th</sup> Cir.  
6 1997), but it gives effect to state policy through the compact  
7 negotiation process. 25 U.S.C. § 2710(d)(1)(B). The  
8 Plaintiffs' allegations that state officials' acts are illegal  
9 strikes at issues logically prior to the issues preempted by  
10 IGRA.

11 Moreover, to the extent congressional intent is the  
12 touchstone of field preemption, the court finds nothing to  
13 support an inference that the Plaintiffs' first three claims  
14 should be preempted. IGRA does not purport to govern the  
15 political processes whereby states' gaming policy is  
16 established. See Coeur d'Alene Tribe v. Idaho, 842 F. Supp.  
17 1268, 1275 (D.Idaho 1994), aff'd 51 F.3d 876 (9<sup>th</sup> Cir. 1995).  
18 To the contrary, IGRA creates a federal regulatory scheme that  
19 is sensitive to state preferences and idiosyncracies. Where a  
20 form of class III gaming is prohibited by a state, IGRA allows  
21 that prohibition to be extended to tribal gaming in the state.  
22 25 U.S.C. § 2710(d)(1)(B). Therefore, to the extent that the  
23 Plaintiffs' first three claims rely on state writs to require  
24 the Governor to negotiate compacts within the confines of  
25 state law, the Defendants' motion to dismiss is denied. To  
26 the extent that the Plaintiffs' third claim purports to allege  
27 a cause of action under IGRA, such a claim must be rejected  
28 for the reason set described below.

1           B. Implied right under IGRA

2           Only three kinds of entities are expressly given causes  
3 of action under IGRA--Indian tribes, States, and the United  
4 States. 25 U.S.C. § 2710(d)(7)(A). The Intervenor has  
5 claimed that while A.R.S. § 5-601 allows the Governor to enter  
6 compacts for forms of gaming permitted by IGRA, IGRA  
7 authorizes compacts to include only forms of gaming permitted  
8 by state law. It claims that under IGRA, the Governor cannot  
9 enter compacts authorizing slot machines and other games. Am.  
10 Compl. (doc. #52) ¶¶ 15-16.<sup>17</sup> The court has alternatively  
11 construed the Plaintiffs' third claim to assert a similar IGRA  
12 claim. The question arises whether a private cause of action  
13 may be implied under IGRA.

14           A four-factored analysis is used to divine whether a  
15 private right of action is implicit in a statute:

- 16           (1) Is the plaintiff one of the class for whose benefit  
17 the statute was enacted--that is, does the statute create  
18 a federal right in favor of the plaintiff?  
19           (2) Is there any indication of legislative intent,  
20 explicit or implicit, either to create such a remedy or  
21 to deny one?  
22           (3) Is it consistent with the underlying purposes of the  
23 legislative scheme to imply such a remedy for the  
24 plaintiff?  
25           (4) Is the cause of action one traditionally relegated to  
26 state law, so that it would be inappropriate to infer a  
27 cause of action based solely on federal law?

28           See Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d  
661, 664 (9<sup>th</sup> Cir. 2000) (quoting Cort v. Ash, 422 U.S. 66, 78,  
95 S.Ct. 2080, 2088 (1975)). The crux is whether Congress

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27           <sup>17</sup> The court has accepted the Plaintiffs' characterization  
28 of their first two claims as arising under state law. To the  
extent that they seek relief directly under IGRA, however, the  
following analysis is equally applicable.

1 intended private enforcement of the statute. Touche Ross &  
2 Co. v. Redington, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485  
3 (1979). Such an inference is often drawn from statutory  
4 structure: a well-integrated remedial scheme deflects  
5 judicial implication of a private right of action. See id. at  
6 571-72, 99 S.Ct. at 2487; see also Seminole Tribe of Florida  
7 v. Florida, 517 U.S. 44, 73-74, 116 S.Ct. 1114, 1132 (1996)  
8 (holding that the "carefully crafted and intricate remedial  
9 scheme" of IGRA may not be supplemented with the judicially  
10 created remedy of the ex parte Young doctrine). The text of  
11 the statute and legislative history are also important.  
12 Burgert, 200 F.3d at 664.

13 Stepping through the four-part analysis in this case  
14 would be superfluous, for the Ninth Circuit has already ruled  
15 that the only private causes of action under IGRA are those  
16 explicitly provided. See Hein v. Capitan Grande Band of  
17 Diegueno Mission Indians, 201 F.3d 1256, 1260 (9<sup>th</sup> Cir. 2000).  
18 In Hein, the Court of Appeals rejected an attempt by a tribal  
19 splinter group to obtain an allocation of gaming proceeds as  
20 inconsistent with the "comprehensive regulatory scheme." Id.  
21 The Eleventh Circuit has interpreted IGRA similarly. See  
22 Tamiami Partners v. Miccosukee Tribe of Indians, 63 F.3d 1030,  
23 1049 (11<sup>th</sup> Cir. 1995) (gaming management company fails to state  
24 a claim against tribe for failing to issue license in  
25 violation of IGRA, because no implied right of action);  
26 Florida v. Seminole Tribe of Florida, 181 F.3d 1237, 1246 (11<sup>th</sup>  
27 Cir. 1999) (State may bring against tribe only those claims  
28 expressly recognized in IGRA).

1           Furthermore, the Ninth Circuit has refused to recognize a  
2 general cause of action to enforce IGRA. Cabazon Band of  
3 Mission Indians v. Wilson, 124 F.3d 1050, 1059 (9<sup>th</sup> Cir.  
4 1997) (“Cabazon III”). When the State of California sought to  
5 enjoin certain class III tribal gaming alleged to have been  
6 conducted outside a compact, the Ninth Circuit rejected the  
7 attempt, because neither the terms of the compact nor IGRA  
8 allowed it. Id. at 1060.

9           The Plaintiffs cite a few cases that, they argue,  
10 recognize implied rights of action under IGRA. Response (doc.  
11 #65) at 7 n.2. To the contrary, these cases discuss whether  
12 federal subject matter jurisdiction is established when  
13 compacts or contracts made pursuant to IGRA are alleged to be  
14 breached. In Cabazon III, 124 F.3d at 1056, the defendants  
15 disputed the existence of federal question jurisdiction over  
16 an action to enforce compact terms. The Court of Appeals held  
17 that because the contract was a tribal-state compact, the  
18 breach of contract claim arose under IGRA for jurisdictional  
19 purposes. Id.; accord Tamiami Partners, 63 F.3d at 1047; cf.  
20 Iowa Management & Consultants, Inc. v. Sac & Fox Tribe, 207  
21 F.3d 488, 489 (8<sup>th</sup> Cir. 2000) (holding that a management  
22 company’s contract claim against tribe to enforce arbitration  
23 clause did not present a federal question).

24           Because no private right of action can be implied under  
25 IGRA, the Intervenor’s first claim for relief must be  
26 dismissed. The Plaintiffs’ third claim, when construed as a  
27 claim alleging a violation of IGRA, is also dismissed. The  
28 Defendants’ motion is granted on this point.

1 C. Conclusion

2 To summarize, the court has eliminated causes of action  
3 purportedly brought under IGRA. It has also dismissed a claim  
4 by the Intervenor that compacts unlawfully contract away the  
5 State's police power. The claims grounded in state law shall  
6 be decided on their merits.

7 IV. Summary Judgment and Trial Findings of Fact and  
8 Conclusions of Law

9 A. Background

10 The court begins with a brief recitation of the recent  
11 history of tribal gaming in Arizona. This approach reflects  
12 the parties' briefing.

13 Congress enacted IGRA in October 1988, following the U.S.  
14 Supreme Court's decision in California v. Cabazon Band of  
15 Mission Indians, 480 U.S. 202, 107 S.Ct. 1083 (1987).<sup>18</sup> IGRA  
16 balances the interests of three kinds of sovereigns: the  
17 federal government, tribes, and states. The backdrop to IGRA  
18 is recognition that tribes are entitled to conduct gaming on  
19 tribal lands free of state regulation in states that permit  
20 gaming. Sen. Rep. 100-466 (reprinted in U.S.C.C.A.N. 3071,  
21 3072)(describing Cabazon, 480 U.S. 202 (1987)).<sup>19</sup> While states

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22  
23 <sup>18</sup> In California v. Cabazon Band of Mission Indians, the  
24 Supreme Court held that tribes acting on tribal land are not  
25 subject to state civil regulations unless Congress expressly  
26 provides. 480 U.S. 202 (1987). As long as a state regulates  
and does not prohibit a particular gaming activity, tribes may  
freely operate such games.

27 <sup>19</sup> The parties have offered several items of IGRA's  
28 legislative history. They are the Senate Report,  
Congressional Record excerpts concerning the introduction of  
the Senate bills 555 and 1303, Senate approval of S.555 and

1 lack authority to regulate tribal gaming, the federal  
2 government has plenary power to do so. Id. at 3073.

3 Congress made a number of findings, e.g., recognizing  
4 that numerous tribes had become engaged in gaming; that  
5 existing federal law did not provide clear standards or  
6 regulations for the conduct of such gaming; that federal  
7 policy aims to promote tribal economic development, tribal  
8 self-sufficiency and strong tribal government; and that Indian  
9 tribes have an exclusive right to regulate gaming activity  
10 that is neither specifically prohibited by federal law nor the  
11 law of the surrounding state. 25 U.S.C. § 2701.

12 At the time IGRA was passed, no federal gaming regulator  
13 existed and Congress found it appropriate to rely mostly on  
14 state agencies. Sen. Rep. 100-466, supra at 3075. State  
15 agencies regulate tribal gaming only at the "affirmative  
16 election" of the tribes, however. Id. Tribes must invite  
17 state regulation if they wish to conduct class III gaming, for  
18 class III gaming may be conducted only pursuant to a compact.  
19 Id. at 3076.

20 IGRA controls state gaming regulation to prevent states  
21 from (1) sheltering nontribal gambling, see id. at 3083, and  
22 (2) regulating class II gaming by tribes when class II gaming  
23

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24 House approval of S.555, plus excerpts from a hearing before  
25 the Senate Select Committee on Indian Affairs. The statements  
26 of individual legislators printed in the Congressional Record  
27 as hearing testimony is not particularly illuminating. The  
28 Senate Report has been used by other courts and the  
legislative statements of intent there have largely been  
incorporated into judicial opinions. The court will refer to  
the Senate Report when appropriate but shall not consider the  
other materials further.

1 is otherwise permitted, id. at 3081-82. Apart from these  
2 conditions, Congress appears to have meant to depend on and  
3 defer to state mechanisms to achieve regulatory goals:

4 States and tribes are encouraged to conduct  
5 negotiations within the context of the mutual  
6 benefits that can flow to and from tribe and States.  
7 This is a strong and serious presumption that must  
8 provide the framework for negotiations. A tribe's  
9 governmental interests include raising revenues to  
10 provide governmental services for the benefit of the  
11 tribal community and reservation residents,  
12 promoting public safety as well as law and order on  
13 tribal lands, realizing the objectives of economic  
14 self-sufficiency and Indian self-determination, and  
15 regulating activities of persons within its  
16 jurisdictional borders. A State's governmental  
17 interests with respect to class III gaming on Indian  
18 lands include the interplay of such gaming with the  
19 State's public policy, safety, law and other  
20 interests, as well as impacts on the State's  
21 regulatory system, including its economic interest  
22 in raising revenue for its citizens. It is the  
23 Committee's intent that the compact requirement for  
24 class III not be used as a justification by a State  
25 for excluding Indian tribes from such gaming or for  
26 the protection of other State-licensed gaming  
27 enterprises from free market competition with Indian  
28 tribes.

17 Id. at 3083.

18 Pursuant to IGRA, in November 1988, the Yavapai-Prescott  
19 Indian Tribe asked the State of Arizona to enter a tribal  
20 gaming compact. Yavapai-Prescott Indian Tribe v. State of  
21 Arizona, 796 F. Supp. 1292, 1294 (D. Ariz. 1992) (Rosenblatt,  
22 J.). When negotiations stalled over the kinds and quantity of  
23 gaming the State would agree to, the Yavapai-Prescott Tribe  
24 brought suit, with several other tribes participating as  
25 intervenors. Id. While a motion to dismiss the federal  
26 lawsuit was pending, the then-United States Attorney for the  
27 District of Arizona authorized the seizure of several hundred  
28 gaming machines from tribal casinos. A fracas ensued. See

1 JSOF Ex. 6 (Ben Winton, "Symington offers gambling pact,"  
2 Phoenix Gazette A-1, 12 (May 29, 1992).

3 On July 1, 1992, the Arizona legislature enacted what  
4 became codified as A.R.S. § 5-601, authorizing the Governor,  
5 on behalf of the State, to negotiate and execute compacts  
6 pursuant to IGRA. A statement of intent was enacted as well  
7 as the operative statutory text. See JSOF Ex. 7 (H.B. 2352,  
8 1992 Ariz. Sess. Laws ch. 286).<sup>20</sup> On July 3, 1992, the  
9 Governor entered a compact with the Yavapai-Prescott tribe  
10 authorizing the tribe to operate 250 slot machines. Three  
11 other tribes agreed to similar terms, and all four compacts  
12 were approved by the Secretary of the Interior.

13 Three tribes intervening in the lawsuit before Judge  
14 Rosenblatt did not conclude compacts after July 1992 and  
15 continued with the lawsuit. In October 1992, Judge Rosenblatt  
16 denied the State's motion to dismiss. The court ordered  
17 negotiations to resume, and when no result was produced,  
18 appointed a mediator pursuant to 25 U.S.C. §  
19 2710(d)(7)(B)(iv). Yavapai-Prescott, 796 F. Supp. at 1298.

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21 <sup>20</sup> The statement reads:  
22 The Congress of the United States having enacted  
23 [IGRA], compelling this state and various Indian  
24 tribes within this state, upon tribal request, to  
25 negotiate compacts to permit certain gaming  
26 operations on Indian lands within this state, it is  
27 the intention of this legislation to authorize the  
28 negotiation of such compacts, with due regard for  
the public health, safety and welfare in furtherance  
of fairness and honesty in the operation of gaming  
and with due regard for the interests of the Indian  
tribes and other and lawful existing gaming  
operations beyond Indian lands.  
1992 Ariz. Sess. Laws. ch. 286 § 1 (emphasis added).

1 Former Arizona Supreme Court Chief Justice Frank X. Gordon,  
2 Jr., was chosen as the mediator.

3 In the IGRA mediation process, both the tribe and the  
4 State submit proposed compacts representing their respective  
5 last best offers, and the mediator selects that which best  
6 comported with IGRA. 25 U.S.C. § 2710(d)(7)(B)(iv). As  
7 Judge Gordon observed, "under the Act, true mediation is not  
8 contemplated: the Mediator is forced to choose one of two  
9 competing compacts in its entirety." JSOF Ex. 17 (Mediator's  
10 Selection of Proposed Gaming Compacts, dated February 15,  
11 1993) at 2. In the Yavapai-Prescott case, Justice Gordon  
12 selected the compacts presented by the three tribes. He found  
13 that Arizona allowed class III gaming of the kind sought by  
14 the tribes, particularly in its design of state lottery games,  
15 but also in charity casino nights and regulated pari-mutuel  
16 gaming. He added:

17 In conclusion, I would state that my selection of  
18 compacts in this case is based on the state and  
19 federal law as it exists today. Things might be  
different if Arizona would hereafter legislatively  
abolish all Class III gaming . . . .

20 Id. at 8.

21 After Justice Gordon announced his decision, then-  
22 Governor Symington was advised by Senator John McCain that in  
23 order to avoid casino gaming on reservations within Arizona,  
24 the State would have to prohibit all casino gaming for all  
25 purposes. See JSOF Ex. 18 (letter dated February 17, 1993  
26 from Sen. McCain to Gov. Symington). The Governor convened a  
27 special session of the Legislature and championed S.B. 1001,  
28 which would have criminalized any type of casino gaming

1 activities conducted by any person, organization or entity for  
2 any purpose. The new law removed the exception for "regulated  
3 gambling" from the State's criminal law prohibiting promotion  
4 of gambling. JSOF Ex. 20 (S.B. 1001, 1993 Ariz. Sess. Laws 1<sup>st</sup>  
5 Spec. Sess. ch.1). The Governor approved S.B. 1001 on March  
6 5, 1993. JSOF ¶ 20.

7 The Governor thereafter refused to sign the compacts  
8 selected by the mediator. Pursuant to 25 U.S.C. §  
9 2710(d)(7)(B)(vii), the Secretary of the Interior undertook  
10 negotiations with the tribes and the State to reach a  
11 compromise compact. On June 24, 1993, the Governor and the  
12 three tribes broke the stalemate and entered into compromise  
13 compacts. Five additional tribes also entered compacts that  
14 day. See JSOF Ex. 24 (News Release from the Executive Office  
15 of the Governor, June 24, 1993).<sup>21</sup> Between June 24, 1993 and  
16 April 25, 1994, the Governor entered compacts with sixteen  
17 tribes.

18 The greyhound racing interests promptly threatened legal  
19 action. On June 29, 1993, counsel for companies including  
20 some of the parties here (American Greyhound Racing, Inc., and  
21 Tucson Greyhound Park, Inc.) advised the Tohono O'Odham Nation  
22 of his intent to file suit to enjoin the compact as void.  
23 JSOF Ex. 27 (letter from Paul Bardacke). The record here does  
24 not reflect a lawsuit being filed at that time, however.

25 Not long after the compacts were entered, the Ninth  
26 Circuit catalyzed a change in the Governor's position. It

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27  
28 <sup>21</sup> The legislature subsequently repealed S.B. 1001. 1994  
Ariz. Sess. Laws ch. 285, § 1.

1 held that states are not obliged by IGRA to enter compacts on  
2 terms that authorize gambling illegal under state law. Rumsey  
3 Indian Rancheria of Wintun Indians v. Wilson, 41 F.3d 421, 423  
4 (9<sup>th</sup> Cir. 1994), as amended 99 F.3d 321 (9<sup>th</sup> Cir. 1996).

5 In Rumsey, the plaintiffs sought a compact allowing them  
6 to operate electronic gaming devices, such as video bingo  
7 machines, and banked and percentage card games.<sup>22</sup> 41 F.3d at  
8 424. The tribes had previously operated nonelectronic or  
9 nonbanked, nonpercentage versions of the games, and that was  
10 legal in California. Id. n.1. The State balked at the  
11 tribes' new proposal, however, on the grounds that state law  
12 prohibited the games they sought. The tribes brought a  
13 declaratory judgment action.

14 The tribes pointed out that California allowed video  
15 lottery and nonbanked, nonpercentage card games. They viewed  
16 these activities as "functionally similar" to the electronic  
17 devices and banked/percentage card games. They believed IGRA  
18 required the State to enter compacts providing for all games  
19 that did not violate California public policy, independent of  
20 their legality under state law. Id. at 426.

21 The Ninth Circuit disagreed. "IGRA does not require a  
22 state to negotiate over one form of a gaming activity simply  
23 because it has legalized another, albeit similar form of  
24 gaming." 41 F.3d at 427. "[A] state need only allow Indian

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25  
26 <sup>22</sup> In a nutshell, the card games California permitted did  
27 not allow the house to make money. In a "banked game," a  
28 gaming operator participates in the game and acts as a house  
bank, paying the winners and keeping all other players'  
losses. In a percentage game, the gaming operator takes a cut  
of all amounts wagered or won. Rumsey, 41 F.3d at 424 n.2.

1 tribes to operate games that others can operate, but need not  
2 give tribes what others cannot have." Id.

3       Following Rumsey, in May 1995, the Salt River Pima-  
4 Maricopa Indian Community ("Salt River Community") asked  
5 Arizona to enter a gaming compact along the lines of those  
6 concluded with the sixteen other tribes. Then-Governor  
7 Symington refused to enter a compact allowing slot machine or  
8 keno gaming because, he maintained, those forms of gaming were  
9 not permitted under state law. The Salt River Community  
10 responded by sponsoring an initiative to enact A.R.S. § 5-  
11 601.01, which passed handily. JSOF ¶ 44.

12       When the Salt River Community tendered a standard form  
13 compact to the Governor, he demanded the inclusion of a clause  
14 that would give the State the right to approve any proposed  
15 casino location. See Salt River Pima-Maricopa Indian  
16 Community v. Hull, 945 P.2d 818 (Ariz. 1997). The Salt River  
17 Community filed a special action in the Arizona Supreme Court,  
18 arguing that § 5-601.01 did not allow the Governor to demand  
19 additional terms.

20       The Salt River Community won. The Governor argued that §  
21 5-601.01 preempted IGRA's provision requiring tribes and  
22 states to negotiate. The Court read § 5-601.01 to leave the  
23 Governor's power to negotiate under § 5-601 intact, but to  
24 provide the standard form compact as a default should  
25 negotiations fail. 945 P.2d at 822. No conflict with IGRA  
26 was found. Id. at 823-24. The Governor also argued that § 5-  
27 601.01 violated the state doctrine of separation of powers by  
28 limiting his discretion under § 5-601. The Court agreed that

1 § 5-601.01 restricted the broad negotiating authority given by  
2 § 5-601, but that the governor was entitled to no more  
3 discretion than the legislature (or voters) decided to give.  
4 Id. at 825. Finally, the Court rejected the Governor's  
5 suggestion that § 5-601.01 was an unconstitutional "local or  
6 special law." Id.

7 Vice Chief Justice Jones concurred, pointing out that  
8 allowing the Salt River Community a standard form compact did  
9 not answer "the more dispositive federal question, neither  
10 raised nor argued before us--whether, in Arizona, a tribe is  
11 authorized under IGRA to engage in class III gaming. Clearly,  
12 the state has no power to grant such authority." 945 P.2d at  
13 826. "[T]he question must ultimately be posed whether the  
14 State of Arizona, which prohibits class III gaming generally,  
15 has a federally imposed duty to negotiate, and, more  
16 importantly, whether any tribe in Arizona . . . has the right  
17 to engage in such gaming." Id. at 827.

18 After the Salt River Community prevailed in the Arizona  
19 Supreme Court, a family named Sears brought a special action  
20 in the Superior Court in Maricopa County seeking a writ of  
21 mandamus to prevent the Governor from entering a standard form  
22 gaming compact with the tribe. On August 22, 1997, Judge B.  
23 Michael Dann granted the relief requested, finding that  
24 Arizona does not permit keno or slot machine gaming and that a  
25 compact could not include such games under IGRA. JSOF Ex. 38  
26 (Minute Entry).<sup>23</sup> He discounted the evidence of charity casino  
27

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28 <sup>23</sup> The court may not rely on this opinion for precedential  
purposes, but sets forth a description of it for historical

1 nights--crucial to Justice Gordon's mediation decision--on the  
2 grounds that (1) there was no evidence that law enforcement  
3 authorities were aware of or condoned such events; and (2)  
4 such uses are "not normally thought of as 'gaming' or  
5 'gambling activities.'" Id. at 2. He held that equal  
6 treatment was an object of IGRA and that the State could not  
7 permit tribes to conduct games prohibited to other Arizonans.  
8 Id. at 3. Judge Dann held that slot machines, by their  
9 "inherent nature" could not fit under the "social gambling"  
10 exception to Arizona criminal law. Id. at 4. He did not  
11 discuss the Attorney General's opinion that a charity could  
12 carefully design a casino night party to use slot machines  
13 pursuant to a statutory exception.

14 The Arizona Supreme Court vacated Judge Dann's decision  
15 and dismissed the matter because the plaintiffs lacked  
16 standing. Sears v. Hull, 961 P.2d 1013 (Ariz. 1998). The  
17 Supreme Court refused to exercise its discretion to waive the  
18 requirement of standing. Id. at 1019. The Court explained  
19 that it could dispense with standing rules "in cases involving  
20 issues of great public importance that are likely to recur."  
21 Id. However, the Court determined that the Searses' case did  
22 not present sufficiently significant issues: "Essentially the  
23 Sears allege that the proposed gaming activities will result  
24 in the deterioration of their quality of life." Id. at 1020.  
25 "The remaining issues, which essentially reflect the Sears'  
26 opposition to gaming and their interpretation of the statutes  
27 involved, are not of such great moment or public importance as  
28 \_\_\_\_\_  
purposes and because it has been raised by the parties.

1 to convince us to consider this challenge to executive  
2 conduct." Id.

3 Governor Hull expressed interest in negotiating renewals  
4 of the compacts as early as November 1999. See Motion in  
5 Limine (doc. #73) Ex. 1 (letter from Gov. Hull to Dep't of  
6 Gaming Director Stephen Hart dated 11/9/99). She asked the  
7 Department of Gaming to hold public hearings on the subject of  
8 casino gaming in Arizona. The Governor has not, however,  
9 expressed her position on casino gaming generally or tribal  
10 gaming in particular.

11 Having surveyed the landscape, the court turns to the  
12 Plaintiffs' and Intervenor's claims.

13 B. Analysis

14 In moving for summary judgment, the Plaintiffs identify  
15 three issues, one with four subparts. Motion (doc. #46) at 2.  
16 They elaborated on these issues at trial. Discussion of the  
17 first issue--whether a compact proposal contemplating slot  
18 machines, keno and blackjack, is contrary to IGRA--is  
19 foreclosed by the court's implied-right-of-action analysis and  
20 will not be further discussed. See Part III.B, supra. The  
21 second issue designated is whether A.R.S. § 5-601 et seq.  
22 authorizes the Governor to enter into compacts permitting  
23 forms of gaming, which are prohibited by IGRA and by state  
24 law. Subsumed in this issue is an assumption that IGRA and  
25 state law prohibit certain games, a premise that the court  
26 must examine. The third issue is whether, assuming that  
27 A.R.S. § 5-601 et seq. authorizes the Governor to enter  
28 compacts for games alleged banned by state criminal law, those

1 Arizona statutes are constitutional. The Plaintiffs argue  
2 that the statutes would be unconstitutional under: (1) Ariz.  
3 Const. art. III and the doctrine of unconstitutional  
4 delegation of legislative powers; (2) Ariz. Const. art. II, §  
5 13, as a grant of privileges or immunities not equally  
6 available to other citizens or corporations; (3) Ariz. Const.  
7 art. IV, pt. 2, § 19, as a "local or special law"; and (4) the  
8 Equal Protection Clause of the United States Constitution.

9 The Intervenor raises the following unique claims: (1)  
10 compacts are treaties and states are prohibited by the United  
11 States Constitution, Art. I § 10, from entering treaties,  
12 Merits Brief (doc. #43) at 5; and (2) A.R.S. § 5-601 is  
13 unconstitutional because compacts are legislation and the  
14 legislature cannot make the validity of a law contingent upon  
15 tribal assent, id. at 4.

16 1. Extent of gubernatorial negotiating power

17 A.R.S. § 5-601 authorizes the Governor to negotiate and  
18 enter compacts:

19 Notwithstanding any other law, this state, through  
20 the governor, may enter into negotiations and  
21 execute tribal-state compacts with Indian tribes in  
22 this state pursuant to the Indian gaming regulatory  
23 act of 1988. Notwithstanding the authority granted  
24 to the governor by this subsection, this state  
25 specifically reserves all of its rights, as  
attributes of its inherent sovereignty, recognized  
26 by the tenth and eleventh amendments to the United  
27 States Constitution. The governor shall not execute  
28 a tribal-state compact which waives, abrogates or  
diminishes these rights.

A.R.S. § 5-601(A) (emphasis added). In addition, the statute

1 places certain conditions on future compacts and/or renewal.<sup>24</sup>

2  
3 Three disputes have arisen as the parties interpret this  
4 statute. First, what kinds of gaming are allowed under  
5 Arizona law? Because the compacts are to be entered pursuant  
6 to IGRA, and IGRA contemplates tribal participation in gaming  
7 otherwise condoned by state law, the parties indicate that the  
8 limits of state gambling laws must be understood in order to  
9 assess the validity of slot machine, blackjack and keno terms.  
10 Second, does A.R.S. § 5-601 allow the Governor to enter  
11 compacts permitting tribes to engage in gambling otherwise  
12 prohibited by state law? Third, what are the State's  
13 obligations under IGRA? Specifically, when IGRA requires  
14 states to enter compacts for gaming allowed to "any person for  
15 any purpose," does it prohibit states from entering compacts  
16 that allow tribes to engage in gaming uniformly prohibited by  
17 state law?

18 a. *Games legal under Arizona law*

19 Arizona generally prohibits gambling. Conducting,  
20 organizing or financing gambling is a felony, A.R.S. § 13-  
21 3303, and so is possessing gambling equipment for the purpose  
22 of gambling, subject to certain exceptions, *id.* § 13-3306.

---

23  
24 <sup>24</sup> Beginning on June 1, 2003, tribal-state gaming compacts  
25 must include clauses: prohibiting wagering by persons under  
26 21 years of age; establishing guidelines on automated teller  
27 machine use and on the use of credit cards or other forms of  
28 credit in gaming facilities, requiring the tribes to post  
signs advertising a gambling crisis hotline; prohibiting  
advertising geared specifically toward minors; establishing  
guidelines for treatment and prevention of problem and  
pathological gambling; etc. A.R.S. §§ 5-601(B), (I).

1 Knowingly obtaining a benefit from gambling is a misdemeanor.

2 A.R.S. § 13-3304. Nevertheless, Arizona permits gambling  
3 under certain exceptions. The statute reads as follows:

4 A. The following conduct is not unlawful under this  
5 chapter:

- 6 1. Amusement gambling.<sup>25</sup>
- 7 2. Social gambling.<sup>26</sup>

8 <sup>25</sup> A.R.S. § 13-3302(1) defines "amusement gambling" as  
9 "gambling involving a device, game or contest which is played  
10 for entertainment if all of the following apply:

- 11 (a) The player or players actively participate . . . .
- 12 (b) The outcome is not in the control to any material  
13 degree of any person other than the player or players.
- 14 (c) The prizes are not offered as a lure to separate the  
15 player or players from their money.
- 16 (d) Any of the following:
  - 17 (i) No benefit is given to the player or players other  
18 than an immediate and unrecorded right to replay which  
19 is not exchangeable for value.
  - 20 (ii) The gambling is an athletic event and no person  
21 other than the player or players derives a profit or  
22 chance of a profit from the money paid to gamble by the  
23 player or players.
  - 24 (iii) The gambling is an intellectual contest or event,  
25 the money paid to gamble is part of an established  
26 purchase price for a product, no increment has been  
27 added to the price in connection with the gambling  
28 event and no drawing or lottery is held to determine  
the winner or winners.
  - (iv) Skill and not chance is clearly the predominant  
factor in the game and . . . regardless of the number  
of wins, no . . . merchandise prize with a wholesale  
fair market value of greater than thirty-five dollars.

<sup>26</sup> A.R.S. § 3301(7) defines "social gambling" as "gambling  
that is not conducted as a business and that involves players  
who compete on equal terms with each other in a gamble if all  
of the following apply:

- (a) No player receives, or becomes entitled to receive,  
any benefit, directly or indirectly, other than the  
player's winnings from the gamble.
- (b) No other person receives or becomes entitled to  
receive any benefit, directly or indirectly, from the  
gambling activity, including benefits of proprietorship,  
management or unequal advantage or odds in a series of

1           3. Regulated gambling if the gambling is conducted  
2           in accordance with the statutes, rules or orders  
3           governing the gambling.

4           4. Gambling conducted at state, county or district  
5           fairs, which complies with the provisions of §  
6           13-3301, paragraph 1, subdivision (d).

7           B. An organization which has qualified for an exemption  
8           from taxation of income under § 43-1201, paragraph 1, 2,  
9           4, 5, 6, 7, 10 or 11 may conduct a raffle that is subject  
10          to [certain] restrictions: . . . .

11          C. A state, county or local historical society designated  
12          by this state or a county, city or town to conduct a  
13          raffle may conduct the raffle subject to [certain]  
14          conditions. . . .

15          A.R.S. § 13-3302.

16                 The Arizona Attorney General has suggested how a charity  
17                 might lawfully operate a casino night under these limitations.  
18                 See Ariz. Op. Att. Gen. No. I-87-101 (1987). On the Attorney  
19                 General's hypothesis, a charity might divorce the fundraising  
20                 part from the gaming part of a "casino night" by giving any  
21                 attendee who requests them chips or scrip without accepting a  
22                 donation in return. Such games would not fall within the  
23                 definition of "gambling" in § 13-3301(4). Alternatively, the  
24                 charity could bring gambling under the raffle exception by  
25                 asking attendees to buy raffle tickets to use as chips in the  
26                 games. At the end of the evening, prizes would be raffled off  
27                 to ticket holders. In this case, "the games merely serve to  
28                 distribute and redistribute the chances of winning the raffle

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29                 gambles.  
30                 (c) Until June 1, 2003, none of the players is below the  
31                 age of majority. Beginning on June 1, 2003, none of the  
32                 players is under twenty-one years of age.  
33                 (d) Players "compete on equal terms with each other in a  
34                 gamble" when no player enjoys an advantage over any other  
35                 player in the gamble under the conditions or rules of the  
36                 game or contest.

1 among the players." Id. Using the raffle exception set out  
2 at A.R.S. § 13-3302(B), a charity may engage in permissible  
3 "regulated gambling." See A.R.S. § 13-3302(A)(3).

4 Pursuant to one exception or the other, casino nights are  
5 apparently not uncommon in Arizona. According to one  
6 estimate, several hundred such events are held annually. JSOF  
7 Ex. 55 (Barton Aff.) ¶ 8. Gary W. Barton, intelligence  
8 manager for the Arizona Department of Gaming, submits that the  
9 custom in renting casino-night equipment is sufficient to  
10 support at least twelve businesses. Id. ¶ 9. One such casino  
11 night event is described by David Van Boxtaele, a special  
12 investigator for the Arizona Department of Gaming. JSOF Ex.  
13 56 (Van Boxtaele Aff.). He attended an event sponsored by the  
14 School of Hotel and Restaurant Management at Northern Arizona  
15 University. Id. ¶ 2. Van Boxtaele describes giving a  
16 donation in exchange for receiving a corresponding amount of  
17 scrip, playing games such as live blackjack and computerized  
18 slots, and using his scrip winnings to purchase raffle  
19 tickets. Id. ¶¶ 3-4. Stephen M. Weiss, whose pertinent  
20 experience is having managed a charity casino night event for  
21 several years, describes other casino nights in similar terms.  
22 JSOF Ex. 39 (Weiss Aff.).

23 Notwithstanding the open practices of charities, the  
24 Plaintiffs maintain that slot machine, keno and blackjack  
25 gaming are prohibited in Arizona. The Plaintiffs make two  
26 arguments. The first attempts to distinguish "charitable"  
27 gaming--embraced by the State--and "commercial" gaming--banned  
28 by the State. Second, the Plaintiffs argue that slot machine,

1 keno and blackjack gaming cannot be squeezed into the raffle  
2 exception on which charities depend.

3 i. Charitable v. commercial

4 The Plaintiffs suggest that charity casino gaming  
5 should be distinguished from "commercial" gaming. The  
6 Plaintiffs appear to use the term "commercial gaming"  
7 interchangeably with gaming "as a business," Motion (doc. #46)  
8 at 7, gaming "played against the house," id., and "real  
9 gambling" id. at 9. The rationale for the Plaintiffs'  
10 proposed distinction is clear: if the Plaintiffs cannot  
11 convince the court that certain kinds of games are prohibited,  
12 then the only way to keep tribes from engaging in the games  
13 offered at charity casino nights is to distinguish the nature  
14 of the gaming. If the court were to hold that the  
15 "commercial" gaming is a different species from "charitable"  
16 gaming, and only "charitable" gaming is permitted in Arizona,  
17 then the Plaintiffs would have a basis for confining tribes to  
18 "charitable" gaming only.

19 Based on the affidavit of A. Melvin McDonald, the  
20 Plaintiffs seek a factual finding that no commercial slot  
21 machine gaming is allowed in Arizona, except what the tribes  
22 do. McDonald, Chairman of the Arizona Racing Commission,  
23 states that no slot machine or keno gaming for money stakes  
24 has been allowed in Arizona since 1970, and that no  
25 "commercial blackjack" gaming for money stakes has been  
26 allowed during that time either. JSOF Ex. 66 (McDonald Aff.)  
27 ¶ 7.

28 The Defendants respond that a charitable/commercial

1 distinction is irrelevant, because once a game is permitted  
2 for some purpose, IGRA requires that the State enter compacts  
3 including that game, even if the purpose of the tribes is  
4 different from the purpose permitted by state law. They  
5 observe that since charitable gaming involves exchanging cash  
6 for the opportunity to win a valuable prize, it is "real"  
7 gambling; indeed, "real" enough to require a statutory  
8 exception. The Defendants also contend that the purpose of  
9 tribal gaming better approximates the purpose of charitable  
10 gaming than private commercial gaming.

11 In the court's view, the Plaintiffs' proposed  
12 charity/commercial gaming distinction is so porous that it  
13 cannot not be maintained. For one thing, the Plaintiffs never  
14 offer a definition of "commercial gaming." "Commercial" means  
15 many things, but generally suggests mercantile activity.  
16 Webster's Third International Dictionary 456 (1981). The  
17 court must infer that the proposed distinction has something  
18 to do with where net revenue goes, not with the scale of the  
19 enterprise. But not all gaming can readily be classified in  
20 Plaintiffs' two proposed categories. One obvious illustration  
21 of the shortcoming of the Plaintiffs' distinction is the  
22 state lottery. Plaintiffs do not indicate whether funding  
23 governmental functions with gaming revenue in lieu of taxation  
24 should be considered "commercial" or "charitable" gaming.  
25 "Commercial" is a term too imprecise to bear legal weight  
26 without further definition.

27 Furthermore, it is far from obvious that if a  
28 charitable/commercial line were drawn, tribes would fall on

1 the commercial side. By law, tribes use casino net revenues  
2 to fund tribal government operations, provide for the general  
3 welfare of the tribe and its members, promote tribal economic  
4 development, donate to charitable organizations, or help fund  
5 operations of local government agencies. 25 U.S.C. §  
6 2710(b)(2)(B). Cash distributions are made per capita to  
7 individual tribal members only if an "adequate" portion of net  
8 gaming revenues is allocated to the purposes described in  
9 section 2710(b)(2)(B) and the Bureau for Indian Affairs  
10 approves the revenue allocation plan. 25 C.F.R. Part 290.

11 Dr. Clinton M. Pattea, the President of the Tribal  
12 Council of the Fort McDowell Yavapai Nation, described how  
13 Fort McDowell has funded a number of governmental projects  
14 with gaming revenues. JSOF Ex. 67 (Pattea Aff.) ¶¶ 11-26.  
15 Infrastructure projects include building a wastewater  
16 treatment plant, improving the water system, closing a  
17 potentially hazardous landfill, building roads, buying out HUD  
18 housing, and building homes to alleviate a housing shortage.  
19 Id. The Nation has also begun providing a number of social  
20 services.

21 Merna Lewis, Vice President of the Salt River Pima-  
22 Maricopa Indian Community, describes how gaming revenue has  
23 enabled the Salt River government to expand social services.  
24 JSOF Ex. 68 (Lewis Aff.) ¶ 11. Infrastructure projects  
25 include a \$100 million water system, a sewer system, flood  
26 control, roads, and a state-of-the-art wireless telephone  
27 system. Id. ¶¶ 16-20.

28 Under the circumstances, the proposed

1 commercial/charitable gaming distinction is unsound and the  
2 court declines to make any findings to support it.

3 ii. Raffle

4 The Plaintiffs begin by assuming that charities can  
5 use slot machines, keno and other games to distribute and  
6 redistribute raffle tickets pursuant to A.R.S. § 3302. They  
7 argue that the only kind of slot machine gaming Arizona allows  
8 is "raffle cum slot machine" gaming. Motion for Summary  
9 Judgment (doc. #46) at 7. Alternatively, the Plaintiffs argue  
10 that slot machines may not be used by charities in any way.

11 In response, the Defendants argue that Arizona permits  
12 slot machine, keno and blackjack gaming to charities under the  
13 regulated gambling exception. They rely on circumstantial  
14 evidence. First, they point out that in his mediator opinion,  
15 Justice Gordon found that Arizona permits casino-style gaming  
16 to charities. Next, the Defendants rely on the Arizona  
17 Attorney General Opinions, Nos. I87-101 and I90-035. Third,  
18 they raise an inference from legislative behavior over the  
19 last several years. Finally, the Defendants contend that  
20 Arizona law allows casino-style gaming on Indian reservations.  
21 For the reasons that follow, the court finds these points,  
22 which tend to suggest that casino gaming was legalized by  
23 fiat, to be unpersuasive.

24 The court begins with the language of the criminal  
25 statutes.<sup>27</sup> Penal statutes are not strictly construed but  
26

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27 <sup>27</sup> The prohibition on the promotion of gambling reads:  
28 A. Except for amusement, regulated or social  
gambling, a person commits promotion of gambling if  
he knowingly does either of the following for a

1 rather are construed according to the fair import of their  
2 terms, with a view to effect their object and to promote  
3 justice. A.R.S. §§ 1-211(C); 13-104. The court's goal is "to  
4 fulfill the intent of the legislature that wrote it." Zamora  
5 v. Reinstein, 915 P.2d 1227, 1230 (Ariz. 1996) (quoting State  
6 v. Williams, 854 P.2d 131, 133 (Ariz. 1993)); accord State v.  
7 Clifton Lodge No. 1174, 514 P.2d 265, 266 (Ariz. Ct. App.  
8 1973) (construing forfeiture statute to serve legislative  
9 purpose of discouraging gambling). When the statute's  
10 language is plain and unambiguous, it is not necessary to go  
11 beyond the text as written. Canon School Dist. No. 50 v.  
12 W.E.S. Constr. Co., 869 P.2d 500, 503 (Ariz. 1994). When the  
13 statute's language is not clear, legislative intent is  
14 determined by reading the statute as a whole, giving  
15 meaningful operation to all of its provisions, and considering  
16 factors such as the statute's context, subject matter,  
17 historical background, effects and consequences, and spirit  
18 and purpose. Wyatt v. WehmueLLer, 806 P.2d 870, 873 (Ariz.  
19 1991).

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21 benefit:

- 22 1. Conducts, organizes, manages, directs,  
supervises or finances gambling.
- 23 2. Furnishes advice or assistance for the conduct,  
24 organization, management, direction, supervision  
or financing of gambling.

25 A.R.S. § 13-3303. The prohibition on benefiting from gambling  
provides:

- 26 A. Except for amusement or regulated gambling, a  
27 person commits benefiting from gambling if he  
knowingly obtains any benefit from gambling.
- 28 B. Benefiting from social gambling as a player is  
not unlawful under this section.

A.R.S. § 13-3304.

1           The criminal statutes are crafted as broad prohibitions  
2 against promoting and benefitting from gambling, subject to  
3 express exceptions. A.R.S. §§ 13-3303, 13-3304. When gaming  
4 is not structured as social or amusement gambling, the only  
5 game of chance that is permitted under Arizona law is the  
6 raffle, subject to regulation. A.R.S. § 13-3302(B). While  
7 "raffle" is not defined, there is nothing in the text of the  
8 Arizona statutes to suggest that "raffle" means slot machine,  
9 blackjack and keno gaming. Interpreting "raffle" to legalize  
10 these games indirectly would allow the exception for  
11 "regulated gambling" to defeat the broad prohibition. Such a  
12 result would vitiate Arizona's anti-gambling policy and must  
13 be rejected. The court holds that other games may not be  
14 bootstrapped into legitimacy by the raffle exception.

15           The existence of the Attorney General Opinions Nos. I87-  
16 101 and I90-035 in no way stretches or expands the limited  
17 exception for charity raffles. These opinions have no legal  
18 force and cannot be considered regulations prescribing how  
19 raffles should be run or how casino nights should be operated.  
20 See State v. Deddens, 542 P.2d 1124, 1127 (Ariz. 1975)  
21 (Attorney General opinions are merely advisory). That prior  
22 Attorneys General have countenanced distribution and  
23 redistribution of raffle tickets through games of chance does  
24 not make casino gambling lawful, for the opinions simply  
25 elaborate on the possibilities within the raffle rule.

26           The evidence before the court tends to establish that the  
27 raffle rule is being respected by charities. In his opinion  
28 as mediator, Justice Gordon found that charity casino nights

1 were not subject to regulation, suggesting that the raffle  
2 rule was widely ignored. See JSOF Ex. 17 (Mediator's opinion)  
3 at 6. There is nothing in the record here to support a  
4 factual finding that Arizona ignores the raffle requirement  
5 and allows non-raffle gambling by charities to flourish  
6 unchecked.<sup>28</sup> The testimony of the gaming inspectors is that  
7 charity gambling is conducted pursuant to the raffle  
8 exception. Neither party has argued that the mediator's  
9 findings should be accorded collateral estoppel effect.

10 Turning to the Defendants' third argument, the court is  
11 aware that last year, the prohibition on possession of  
12 gambling devices was amended by S.B. 1090. Ariz. Rev. Stat. §  
13 13-3306(E) now carves out an express exception for "the use of  
14 gambling devices by nonprofit or charitable organizations  
15 pursuant to § 13-3302, subsection B." However, the term  
16 "gambling device" refers to "any implement, machine,  
17 paraphernalia, equipment or other thing" "used or intended to  
18 be used" in violation of the gambling prohibitions. A.R.S. §  
19 13-3306(A). The exception legalizes gambling devices for use  
20 with raffles, but sheds no new light on what a raffle is.  
21 Therefore, it does not support an inference that the  
22 legislature intended to legalize gaming by charities other  
23 than raffles.

24 Defendants suggest that "[b]y enacting A.R.S. § 5-601,

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25  
26 <sup>28</sup> Plaintiffs argue that slot machines and keno lack the  
27 capacity to distribute raffle tickets neutrally among players  
28 because these devices invariably generate a cut for the house  
and that these games cannot be used pursuant to the raffle  
exception. There is no evidence in the record to support any  
such findings.

1 the Legislature recognized it was authorizing gaming compacts  
2 that allowed tribal casino gaming, including slot machines."  
3 See Response (doc. #60) at 13. They point to the historical  
4 context in which § 5-601 was enacted. Defendants' position is  
5 that tribal casino gaming is "regulated" under § 5-601, which  
6 makes it lawful "regulated gambling" under A.R.S. § 13-  
7 3301(6).<sup>29</sup>

8       There are multiple problems with this logic. To find  
9 that tribal gaming generally is lawful does not answer the  
10 substantive question about what kind of class III gaming is  
11 lawful in Arizona. Section 5-601 has no substantive  
12 component, but instead authorizes the Governor to negotiate  
13 compacts "notwithstanding any other law." What "any other  
14 law" requires is a separate issue. Thus, § 5-601 et seq. and  
15 consequent tribal gaming does not validate slot machine or any  
16 other particular kind of gaming.

17       Defendants argue that because A.R.S. § 5-601 was passed  
18 as an emergency measure at the Governor's request after he had  
19 proposed compacts allowing slot machines, the legislature  
20 intended to endorse slot machine gaming. While the context in  
21 which a law is enacted may be illuminating, the court  
22 hesitates to draw inferences about the Arizona Legislature's  
23 understanding of the substantive gambling law based on events  
24 surrounding enactment of an enabling law without substantive  
25 content.

26       In any event, the evidence does not support Defendants'  
27 position. It shall be recalled that the Governor first

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28       <sup>29</sup> A.R.S. § 5-601(A) is set out at page 76, supra.

1 proposed slot machines in late May, right around the time  
2 Judge Rosenblatt issued his opinion, Yavapai-Prescott Indian  
3 Tribe v. State, 796 F.Supp. 1292 (D. Ariz. 1992).<sup>30</sup> The issue  
4 before the court was "whether the State must include casino  
5 and video gaming in a tribal-state compact." Id. at 1294  
6 n.7. The nature of the dispute confirms that the State  
7 believed such gambling was not legal under state law. Judge  
8 Rosenblatt stated that class III gaming appeared "inevitable"  
9 but required the parties to negotiate further and did not rule  
10 on what kinds of class III gaming had to be offered to tribes.

11  
12 Governor Symington then concluded compacts with certain  
13 tribes allowing some slot machine gaming, pursuant to A.R.S. §  
14 5-601, which begins "Notwithstanding any other law. . . ." On  
15 December 18, 1992, several months after A.R.S. § 5-601 had  
16 passed, the State continued to take the position that slot  
17 machine gambling is not legal in Arizona. See JSOF Ex. 11  
18 (State Defendants' Brief to Mediator in Support of Last Best  
19 Offer) at 4, 5 (proposing 250 slot machines as a concession).

20  
21 <sup>30</sup> The only evidence of the Governor's proposal in the  
22 record is a newspaper article. See JSOF Ex. 6 (Ben Winton,  
23 "Symington offers gambling pact," Phoenix Gazette A-1 (May 29,  
24 1992)). The newspaper writer indicates that Governor  
25 Symington released a draft proposal to tribes prior to Judge  
26 Rosenblatt's ruling, but it is not clear whether earlier draft  
27 proposals included slot machines. Id. The proposal released  
28 May 28, 1992, the day of Judge Rosenblatt's ruling, would have  
allowed slot machines on the condition that their numbers be  
limited, that no wagers of more than five dollars would be  
allowed, and that payoffs not exceed \$250. Id. at A-12. The  
extensive conditions may be understood as a protest about the  
legality of any slot machines, far from the concession that  
the Defendants perceive.

1 The court finds Defendants' position that the Arizona  
2 Legislature intended to legalize slot machine gambling with  
3 the passage of A.R.S. § 5-601 to require a substantial leap of  
4 faith and rejects it as implausible.

5 Fourth, the Defendants argue that because Arizona has  
6 entered compacts that allowed tribes to engage in slot machine  
7 gaming, slot machines are permitted under state law. This  
8 argument proves nothing about the lawfulness of the initial  
9 permit that might justify its extension. Unlike Forest County  
10 Potawatomi Comm. of Wisconsin v. Norquist, 45 F.3d 1079 (7<sup>th</sup>  
11 Cir. 1995), where the legality of class III gaming had been  
12 previously determined in a separate case, here, no binding  
13 authority has determined that slot machine and related casino  
14 gaming is legal in Arizona. To the extent that Norquist can  
15 be read to justify class III gaming in one compact simply  
16 because similar compacts exist, this suggestion rests on  
17 circular reasoning and is otherwise dicta.<sup>31</sup>

18 Thus, the court concludes that only charity raffles are  
19

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20 <sup>31</sup> In Norquist, the tribe sought declaratory relief to  
21 enjoin city officials from interfering with class III gaming  
22 activities in Milwaukee. 45 F.3d at 1082. An agreement  
23 between the parties provided that as a condition for class III  
24 gaming in the city, class III gaming had to be allowed in  
25 Wisconsin for any purpose by any person. Id. at 1083. In  
26 finding this condition had been met, the Seventh Circuit  
27 relied on a previous adjudication that had found class III  
28 gaming permitted in Wisconsin. In an accompanying footnote,  
the Norquist court added that class III gaming was legal in  
Wisconsin because Wisconsin "presently permits other Indian  
tribes within the state to carry on the exact gaming  
activities being alleged here." Id. at 1083 n.1. In fact,  
the other compacts were created in reliance on the holding of  
the earlier case, id. at 1081, and could not be taken for  
independent evidence of the legality of class III gaming.

1 permitted under Arizona law. This does not, however, mean  
2 that the legislature did not attempt to authorize compacts  
3 with terms that would otherwise be in excess of state law.  
4 The court now construes the enabling statute, A.R.S. § 5-601.

5 b. *"Notwithstanding any other law"*

6 According to the Plaintiffs, A.R.S. § 5-601(A)  
7 authorizes the Governor to negotiate only for such gaming that  
8 IGRA requires the State to provide. Motion (doc. #46) at 15.  
9 They argue that IGRA requires states to enter compacts  
10 allowing gaming otherwise tolerated under state law, but does  
11 not obligate states to agree to terms beyond the limits of  
12 state law. The Defendants, on the other hand, argue that  
13 A.R.S. § 5-601 expressly authorizes the Governor to enter  
14 compacts that allow class III gaming otherwise prohibited in  
15 Arizona. Response at 12. In reply, the Plaintiffs attach to  
16 a different bit of the statute, the phrase "pursuant to" IGRA.  
17 They argue that this phrase confines the Governor's power to  
18 enter compacts to the State's obligations to comply with IGRA.

19  
20 The court believes that the Defendants have the better  
21 view of A.R.S. § 5-601. "Notwithstanding any other law" is a  
22 phrase of unlimited exception. There is reason to believe  
23 that the legislature understood the phrase in this way. The  
24 drafting manual used by state legislators advises that to  
25 create an exception, a bill should begin with a clause  
26 identifying the otherwise applicable statute, reading  
27 "notwithstanding section 35-174, [the exception goes as  
28 follows . . .]." See Ariz. Legislative Council, Arizona Bill

1 Drafting Manual 48 (1985). Use of this construction in § 5-  
2 601 suggests that the legislature meant to create an expansive  
3 exception.

4 Section 5-601 begins by identifying itself as an  
5 exception to all other law, then endorses negotiations and  
6 entry into compacts. No substantive limits about kinds of  
7 gaming are imposed on the governor's compacting authority.  
8 There is no provision for legislative ratification or public  
9 referendum. The legislature demanded only that the State's  
10 sovereign immunity and similar prerogatives be respected. The  
11 exception from other existing state law and the detachment  
12 from lawmaking bodies is complete.

13 The Plaintiffs would have the court read in a requirement  
14 that the Governor not negotiate for any games banned by state  
15 law. The Plaintiffs' attempt to reimport state substantive  
16 prohibitions through IGRA renders the statute convoluted and  
17 creates an unnecessary tension. If state law were  
18 reintroduced "pursuant to" IGRA, the meaning of the  
19 "notwithstanding" phrase conflicts with the reintroduced laws.  
20 The court finds the Plaintiffs' construction unpersuasive.  
21 Therefore, the court holds that A.R.S. § 5-601 authorizes the  
22 Governor to negotiate and enter compacts for kinds of tribal  
23 gaming that Arizona otherwise prohibits.

24 *c. State obligations under IGRA*

25 The court reads the Defendants' brief to assert that IGRA  
26 should be understood to require, at a minimum, a compact  
27 permitting tribes to engage in any class III gaming the State  
28 permits "for any person for any purpose." Response (doc. #60)

1 at 9.<sup>32</sup> The minimum idea is crucial. The Plaintiffs, on the  
2 other hand, maintain that IGRA prohibits gaming under tribal-  
3 state compacts if such gaming is not permitted under state  
4 law. Motion (doc. #46) at 3, 13-14. The Plaintiffs argue  
5 that Congress did not intend to create "jurisdictional  
6 islands" where community norms--as expressed in state law--are  
7 not enforced.

8 The court conceives this question as whether IGRA  
9 establishes a ceiling for compact terms, or a floor. That is,  
10 whether IGRA permits states to offer only such games that are  
11 legal for any person for any purpose (a ceiling), or whether  
12 IGRA requires states to offer tribes terms equal to those  
13 granted their own citizens, plus allows states to agree to any  
14 additional gaming (a floor). For the reasons that follow, the  
15 court believes a ceiling view is mandated.

16 IGRA imposes three prerequisites to lawful class III  
17 gaming: (A) an authorizing tribal ordinance, (B) location "in  
18 a State that permits such gaming for any purpose by any  
19 person, organization, or entity," and (C) a Tribal-State  
20 compact that "is in effect." 25 U.S.C. § 2710(d)(1). Section  
21 2710(d)(1) allows class III gaming "only if" these three  
22 conditions are satisfied. A lawfully made state compact  
23 satisfies subsection (C), but it cannot satisfy the  
24 independent requirement of subsection (B), which demands that  
25

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26 <sup>32</sup> Specifically, the Defendants write: "The provision  
27 obligating states to negotiate with tribes regarding types of  
28 gaming allowed to others for any purpose was not designed to  
restrict the states' ability to allow certain class III gaming  
within Indian reservations." Id. (emphasis omitted).

1 gaming be permitted under state law. According to the  
2 structure of § 2710(d)(1) and its plain terms, a compact  
3 cannot make legal class III gaming not otherwise permitted by  
4 state law. The State must first legalize a game, even if only  
5 for tribes, before it can become a compact term.

6 Federal courts have adopted what the court shall call a  
7 "ceiling" perspective, holding that 25 U.S.C. § 2710(d)(1)  
8 requires compact games to be lawful under state law. See  
9 Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179,  
10 181 (10<sup>th</sup> Cir. 1993); United States v. Santee Sioux Tribe of  
11 Nebraska, 135 F.3d 558, 564 (8<sup>th</sup> Cir. 1998). The Tenth Circuit  
12 rejected as "patent bootstrapping" a suggestion that a compact  
13 could legalize devices prohibited by state law. Green, 995  
14 F.2d at 181; see also U.S. v. Santa Ynez Band of Chumash  
15 Mission Indians of the Santa Ynez Reservation, 33 F. Supp. 2d  
16 862 (C.D.Cal. 1998) (describing games illegal under state law  
17 as "uncompactable").

18 The Ninth Circuit has held only that a state does not  
19 have to negotiate for any more class III games than are  
20 allowed under state law. Rumsey Indian Rancheria of Wintun  
21 Indians v. Wilson, 64 F.3d 1250 (9<sup>th</sup> Cir. 1994). Thus, if a  
22 state permits one kind of class III gaming, such as pari-  
23 mutuel wagering, Rumsey holds that the state has no obligation  
24 to negotiate over other games, such as slot machines. Accord,  
25 Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 279  
26 (8<sup>th</sup> Cir. 1993), abrogated on other grounds by Seminole Tribe  
27 of Florida v. Florida, 517 U.S. 44, 72, 116 S.Ct. 1114, 1131  
28 (1996). Rumsey dealt with the obligations of a reluctant

1 state; it does not establish whether a state with enthusiasm  
2 for tribal gaming may afford tribes greater gaming privileges  
3 than state law otherwise provides. In the absence of Ninth  
4 Circuit precedent, the court follows the authority of the  
5 Tenth and Eighth Circuits, which profess the ceiling view.  
6 Accordingly, Arizona may enter compacts only for games that  
7 are legal under state law.

8 The Defendants' attempt to distinguish the Tenth  
9 Circuit's opinion in Green, 995 F.2d at 181, is unpersuasive.  
10 Green involved the Potawatomi tribe's plan to import video  
11 lottery terminals (VLTs) for use on tribal land. A  
12 tribal/state compact in force allowed VLTs only if the U.S.  
13 Attorney or a federal court first declared that importation of  
14 VLTs was legal under the Johnson Act. The U.S. Attorney and  
15 then the district court both declared that importing the VLTs  
16 would violate the Johnson Act's prohibition on possession or  
17 use of gambling devices. The tribe appealed.

18 The Tenth Circuit affirmed. While IGRA creates an  
19 exception to Johnson Act liability, it did not apply. Under  
20 IGRA, otherwise banned gambling devices may be used pursuant  
21 to a compact made "by a State in which gambling devices are  
22 legal." 25 U.S.C. § 2710(d)(6)(A). Oklahoma prohibited  
23 possessing or dealing in gambling devices, however, making it  
24 impossible for the tribe to bring the VLTs under the IGRA-  
25 created exception to the Johnson Act. Green, 995 F.2d at 181.  
26 Although video games in general were legal under state law,  
27 video games that operated as gambling devices were not. Id.  
28 The compact, which would have permitted the VLTs if they did

1 not violate the Johnson Act, did not establish the legality of  
2 the gambling devices for purposes of the IGRA exception to the  
3 Johnson Act. Id.

4 The Defendants argue that the first question under Green  
5 should be whether Arizona prohibits possession of gambling  
6 devices. They have produced ample evidence to demonstrate  
7 that gambling devices are freely bought, sold and imported in  
8 Arizona. Green cannot be applicable, they argue. The court  
9 disagrees for two reasons.

10 First, to be legal in Arizona, slot machines must be  
11 operated in a fashion that does not constitute "gambling."  
12 State law does not tolerate using the machines to gamble. For  
13 the purpose of determining what IGRA permits, whether a device  
14 is "illegal" in the compacting state because it meets the  
15 definition of "gambling device" and its possession is  
16 prohibited, or because it is used for prohibited "gambling,"  
17 amounts to a distinction without real consequence. The  
18 Johnson Act prohibits both possession and use of "any gambling  
19 device." 15 U.S.C. § 1175. As long as the proposed gaming  
20 activity would violate the State's prohibitions on gambling  
21 devices, the exception under IGRA is not available.

22 Second, Green is not used here for its explanation of how  
23 state law interfaces with the IGRA exception to the Johnson  
24 Act. Rather, the pertinent insight is that IGRA makes a class  
25 III game's legality under state law a separate requirement  
26 from its inclusion in a tribal-state compact. 995 F.2d at  
27 181. The Defendants' emphasis on the "possession" prohibition  
28 in Oklahoma law is misplaced.

1           The Defendants' "floor" interpretation of § 2710(d)(1)  
2 relies on legislative history and the application of IGRA by  
3 the Secretary of the Interior.<sup>33</sup> In the past, the Secretary of  
4 the Interior has taken the position that states should give  
5 tribes exclusive rights to operate certain gaming if tribes  
6 are to make payments to states, other than payments to cover  
7 direct expenses that the states incur in regulating compact  
8 gaming. See JSOF Ex. 64 (letter from Ass't Secretary of  
9 Indian Affairs to Chairman Robert Guenthardt, dated February  
10 9, 1999). The Secretary maintained that the privilege of  
11 exclusive gaming rights would be a legitimate "operating cost"  
12 for which tribes could pay. If, however, a state extracted  
13 extra fees without the benefit of exclusivity, the state would  
14 violate 25 U.S.C. § 2710(d)(4), which forbids states from  
15 imposing any taxes or fees on tribal class III gaming. Id.;  
16 accord JSOF Ex. 62 (letter from Ass't Secretary of Indian  
17 Affairs to Chief Ralph Sturges, dated December 5, 1994).

18           In these letters, the Secretary's concern is not section  
19 2710(d)(1), but rather the possibility of a state extracting  
20 revenues dedicated by Congress to tribes. The Secretary did  
21 not refer to section 2710(d)(1) when setting out this  
22 position. The position taken in these letters cannot be  
23 considered an agency interpretation of § 2710(d)(1). It is  
24 perfectly conceivable that states could satisfy the  
25 Secretary's exclusivity demand and § 2710(d)(1)(B) together by  
26

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27           <sup>33</sup> To the extent that the Defendants also rely on Yavapai-  
28 Prescott Indian Tribe, 796 F. Supp. 1292, 1297 (D. Ariz.  
1992), the quoted portion is dicta.

1 enacting a state law authorizing only tribes to engage in a  
2 particular kind of gaming, or by legalizing that kind of  
3 gaming but granting only tribes permits. The state may not  
4 both legalize and grant exclusivity through a compact,  
5 however, for legality is a separate requirement under  
6 subsection 2710(d)(1)(C).

7 2. Constitutionality of A.R.S. § 5-601 et seq.

8 a. *Unconstitutional delegation of legislative powers*

9 The Plaintiffs argue that A.R.S. § 5-601  
10 unconstitutionally delegates legislative authority by allowing  
11 the Governor unfettered discretion to annul state criminal  
12 gaming laws. In response, the Defendants argue that the  
13 delegation stops short of an executive "usurpation" of  
14 legislative power. Response at 19.

15 The Intervenor makes an argument similar to the  
16 Plaintiffs', contending that decisions about whether and to  
17 what extent gaming should be allowed are legislative. Opening  
18 Brief (doc. #43) at 3-4. It argues that with A.R.S. § 5-601,  
19 the Legislature failed to define a tribal gaming policy or  
20 establish standards to guide the Governor. In response, the  
21 Defendants argue that the delegation of negotiating authority  
22 to the Governor is appropriately channeled. Response (doc.  
23 #61) at 6. They also suggest that gaming compacts are sui  
24 generis, because Arizona "would normally not have any  
25 political say whatsoever" over gaming on tribal land. Id. at  
26 7.

27 The separation of powers doctrine enshrined in the  
28 Arizona Constitution protects one branch against the

1 overreaching of any other branch. State v. Prentiss, 786 P.2d  
2 932, 935-36 (Ariz. 1989). "Nowhere in the United States is  
3 this system of structured liberty [of separation of powers]  
4 more explicitly and firmly expressed than in Arizona." State  
5 ex rel. Woods v. Block, 942 P.2d 428, 434 (Ariz. 1997)  
6 (quoting Mecham v. Gordon, 751 P.2d 957, 960 (1988)).<sup>34</sup> Under  
7 Arizona's tripartite system, the legislature formulates the  
8 law and the executive carries out the policies and purposes  
9 declared by the legislature. Id.

10 In order to delegate legislative power to an executive  
11 agent, the enabling statute need go no further than "giving  
12 the power to adopt rules and regulations to provide for the  
13 execution and enforcement of legislation." Hernandez v.  
14 Frohmler, 204 P.2d 854, 863 (Ariz. 1949). The legislature  
15 may not, however, convey its essential responsibility for  
16 making political choices. See 3613 Ltd. v. Dep't of Liquor  
17 Licenses and Control, 978 P.2d 1282, 1287 (Ariz. Ct. App.  
18 1999)(citing Lake Havasu City v. Mohave County, 675 P.2d 1371,  
19 1378 (Ariz. Ct. App. 1983)). Delegated powers "must, by the

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21 <sup>34</sup> In Block, the Arizona Supreme Court adopted a four-  
22 factor analysis to evaluate separation of powers issues; that  
23 is, whether one branch has purported to usurp the powers of  
24 another. 942 P.2d at 276 (adopting the test of J.W. Hancock  
25 Enterprises v. Arizona State Registrar of Contractors, 690  
26 P.2d 119, 124-25 (Ariz. Ct. App. 1984)). Here, however, the  
27 court confronts allegations not of legislative usurpation but  
28 of excessive legislative delegation. The parties do not  
suggest that Block should extend to non-delegation cases.  
Nothing in Block or subsequent separation-of-powers cases  
alters the older non-delegation case law. Indeed, the court  
perceives the Block Court's statements about the robustness of  
Arizona's separation of powers doctrine to tend to strengthen  
the non-delegation principle.

1 provisions of the act, be surrounded by standards,  
2 limitations, and policies." Hernandez, 204 P.2d at 863.  
3 Standards need not necessarily be set forth in express terms  
4 if they can reasonably be inferred from the statutory scheme  
5 as a whole. State v. Ariz. Mines Supply Co., 484 P.2d 619,  
6 625 (Ariz. 1971). Arizona courts require only an  
7 "intelligible principle" behind a delegation for it to be  
8 lawful. Ethridge v. Ariz. State Bd. of Nursing, 796 P.2d 899,  
9 906 (Ariz. Ct. App. 1989) (quoting Industrial Union Dept. v.  
10 American Petroleum Inst., 448 U.S. 607, 685-86, 100 S.Ct.  
11 2844, 2886 (1980)(Rehnquist, J., concurring)). While  
12 admitting once that the boundary between lawful delegation and  
13 unconstitutional surrender of legislative power is fuzzy, the  
14 Arizona Supreme Court pronounced:

15       It may safely be said that a statute which gives  
16       unlimited regulatory power to a commission, board or  
17       agency with no prescribed restraints nor criterion  
18       nor guide to its action offends the Constitution as  
19       a delegation of legislative power. The board must  
20       be corralled in some reasonable degree and must not  
21       be permitted to range at large and determine for  
22       itself the conditions under which a law should exist  
23       and pass the law it thinks appropriate.

24 State v. Marana Plantations, 252 P.2d 87, 89 (Ariz. 1953)  
25 (emphasis added).

26       With § 5-601, there are few express conditions imposed by  
27 the legislature. The Arizona Supreme Court recognized that §  
28 5-601 confers "almost unlimited power" on the Governor. Salt  
River Pima-Maricopa Indian Community v. Hull, 945 P.2d 818,  
824 (1997).<sup>35</sup> Those directions that do exist fail to

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<sup>35</sup> It shall be recalled that the question before the Arizona Supreme Court was whether A.R.S. § 5-601.01, which

1 articulate a policy toward gaming or impose standards for the  
2 Governor to determine which kinds of gaming are acceptable or  
3 under what conditions. Rather, by expressly waiving every  
4 other law, the legislature permitted the Governor to negotiate  
5 for any game. There are no wager limits, payoff caps, or  
6 other significant legislated precautions. No standards can be  
7 inferred from the statute as a whole, either. The statute  
8 consistently abdicates responsibility for figuring out how the  
9 State's obligations under IGRA may be fulfilled, even waiving  
10 "any other law" to accommodate a broader range of possible  
11 options, yet expressing an opinion on none.

12         The statute's direction to comply with IGRA imports no  
13 substantive constraints, for IGRA is designed to allow states  
14 to express their substantive concerns about class III gaming,  
15 not to impose federal rules. Especially if IGRA is read to  
16 endorse a "floor" view, as the Defendants submit, IGRA does  
17 not channel the Governor's discretion. Just as the health  
18 board must have a mandate more explicit than to "regulate  
19 sanitation and sanitary practices in the interests of public  
20 health" and to prevent "disability and mortality," Marana, 252  
21 P.2d at 90, the Governor must be given to understand the  
22 legislative policy about gaming on tribal lands within the  
23 State in order to negotiate compacts.

24         In the court's view, the qualifications that the  
25 legislature has imposed to date--raising the legal gambling

26 \_\_\_\_\_  
27 requires the Governor to enter standard form compacts in the  
28 event that negotiations fail, unconstitutionally modifies that  
broad grant of negotiating power in section 5-601. Salt River  
does not establish the legality of section 5-601.

1 age, establishing guidelines for the placement of ATMs,  
2 implementing programs to control compulsive gambling, etc.--  
3 are little more than parsley garnishing the policy roast.  
4 These "sparse and peripheral" instructions do not provide an  
5 "intelligible principle" for the bulk of gaming issues.  
6 Section 5-601 enables the Governor to decide basic gaming  
7 policy and standards for the State solely in the course of  
8 negotiation with the tribes.

9       It is important to recognize that the legislature did not  
10 defer to the Governor's particular expertise in gaming issues  
11 when it created § 5-601. In Arizona Mines Supply Co., 484  
12 P.2d at 625, the Arizona Supreme Court recognized that  
13 environmental and economic regulation often depends on  
14 evidence best understood by experts. Another rationale for a  
15 loose statutory description of an agency's duties is that the  
16 legislature cannot anticipate the variety of possible need.  
17 See State v. Wacker, 344 P.2d 1004, 1007 (Ariz. 1959)(agency  
18 charged with preventing introduction of pests to Arizona and  
19 suppressing propagation of present pests from one locality to  
20 another could not be give explicit directions in advance).

21       The expertise rationale for broad delegation is absent  
22 here, for the legislature has the capacity to strike the  
23 policy balances gambling regulation entails. For example,  
24 pari-mutuel gaming is highly regulated by statute, see A.R.S.  
25 § 5-101 et seq., and against a broad prohibition of gambling,  
26 there is a limited statutory exception for raffles, A.R.S. §§  
27 13-3301(6); 13-3302. It is therefore incongruous that the  
28 legislature should abdicate responsibility for determining the

1 kinds of compact games the State should negotiate. Any  
2 delicacy in the details about gambling is political, not  
3 technical or scientific. Nor have the Defendants offered any  
4 reason to believe that determining gambling regulatory policy  
5 requires flexibility in order to accommodate variable factual  
6 situations.

7 Some states grant their governors broad negotiating  
8 authority, reined in by a legislative ratification process.  
9 Accountability to the legislature might save compacts  
10 negotiated pursuant to § 5-601. See Tillotson v. Frohmiller,  
11 271 P. 867, 870 (Ariz. 1928) (holding delegation invalid  
12 because agent could choose to act on "independent uncontrolled  
13 judgment"). Defendants attempt to distinguish Tillotson, but  
14 if the Governor is accountable to anyone under the current  
15 scheme, the Defendants have failed to identify to whom.

16 Other cases where compacts were invalidated on separation  
17 of powers grounds are instructive, although no compacts are  
18 subject to invalidation here. See State ex rel. Clark v.  
19 Johnson, 904 P.2d 11 (N.M. 1995); State ex rel. Stephan v.  
20 Finney, 836 P.2d 1169, 1185 (Kan. 1992). In Clark, the New  
21 Mexico Supreme Court held that a compact broadly permitting  
22 all sorts of games usurped the power of the legislative  
23 branch, because the compact gave the tribe "a virtually  
24 irrevocable and seemingly perpetual right" to conduct class  
25 III gaming. 904 P.2d at 23. The court believed that  
26 establishing a state's position on class III gaming involves  
27 striking a balance and is thus a legislative task. Id.

28 In Finney, the Governor of Kansas purported to rely on a

1 statute generally allowing her to transact the business of the  
2 State in order to negotiate and bind the State of Kansas to a  
3 compact. The Kansas Supreme Court rejected her position  
4 because compacts are not regular state business:

5 [T]he transaction of business connotes the  
6 day-to-day operation of government under previously  
7 established law or public policy. The  
8 implementation of law and policy rather than the  
9 enactment of law and the determination of public  
10 policy constitutes the transaction of business  
11 between Kansas and the federal government. The carte  
12 blanche interpretation asserted by the Governor  
13 herein is massive in its implication and,  
14 additionally, would have serious problems if  
15 challenged on grounds that it constitutes an  
16 impermissible delegation of the legislature's  
17 law-making powers.

18 Id. at 1178. The court went on to hold that the compact terms  
19 executed by the Governor created a state agency and delegated  
20 rule making authority to it, which were both legislative acts  
21 beyond the Governor's power. Id. at 1184. While the holding  
22 of Finney concerns a different issue, its passing observation  
23 about the unlawfulness of a carte blanche authorization is no  
24 less true for being ancillary. The court finds unpersuasive  
25 the Defendants' attempts to distinguish Finney by limiting  
26 that case to voiding the Kansas Governor's creation of a  
27 gaming agency. That the Arizona Legislature properly created  
28 a gaming agency does not mean that an Arizona governor does  
not engage in another kind of legislative act by establishing  
state gaming policy in the absence of legislative guidance.

The court agrees with the Intervenor and Plaintiffs in  
concluding that A.R.S. § 5-601 violates art. III of the  
Arizona Constitution and so is void. It is therefore  
unnecessary, strictly speaking, for the court to reach the

1 Plaintiffs' other arguments to invalidate § 5-601, such as  
2 whether the statute is unconstitutional as a local or special  
3 law, and whether it or compacts created pursuant to it violate  
4 equal protection principles. Discussion of the Intervenor's  
5 theories about compacts being legislation contingent on tribal  
6 approval, or treaties in violation of the federal  
7 constitution, would similarly be redundant holdings. Given  
8 the time pressures bearing on the ultimate resolution of this  
9 litigation, however, the court finds it appropriate to  
10 consider alternate grounds in order to leave no issue  
11 unresolved.

12 b. *"Local or special law"*

13 The Plaintiffs contend that compacts authorizing tribes  
14 to conduct slot machine, keno and blackjack gaming run afoul  
15 of the Arizona constitutional prohibition against "local or  
16 special laws." Motion at 18. In response, the Defendants  
17 argue that the local or special law prohibition does not apply  
18 to tribal-state compacts because tribes are separate  
19 sovereigns and not corporations, associations or individuals,  
20 but if it does, its requirements are satisfied. Response  
21 (doc. #60) at 28. In reply, the Plaintiffs maintain that  
22 tribes' sovereign status is irrelevant, because as long as a  
23 sovereign is engaged in commerce, the same analytical  
24 framework applies. Reply at 17.

25 The Arizona Constitution prohibits local or special laws,  
26 including legislative grants to any corporation, association  
27 or individual of special or exclusive privileges, immunities  
28 or franchises. Ariz. Const. art. IV, part 2 § 19(13). Local

1 laws reflect legislative favoritism for a particular area of  
2 the state. State v. Loughran, 693 P.2d 1000, 1003 (Ariz. Ct.  
3 App. 1985). A law is special if it "applies only to certain  
4 members of a class or to an arbitrarily defined class which is  
5 not rationally related to a legitimate legislative purpose."  
6 State Compensation Fund v. Symington, 848 P.2d 273, 277 (Ariz.  
7 1993) (citations omitted). Conversely, a law of limited  
8 application is general so long as it applies to all cases and  
9 to all members of the specified class. Arizona Downs v.  
10 Arizona Horsemen's Foundation, 637 P.2d 1053, 1061 (1981).

11 The Arizona Supreme Court has explained that the  
12 prohibition against local and special laws is designed, among  
13 other things, "to secure uniformity of law throughout the  
14 state as far as possible." State Compensation Fund, 848 P.2d  
15 at 277. The State must treat similarly situated persons  
16 consistently, Prescott Courier Inc. v. Moore, 274 P. 163, 165  
17 (Ariz. 1929), or without arbitrarily favoring some, see  
18 Arizona Downs, 637 P.2d at 1060.

19 Here, the tribes are not within the State's jurisdiction.  
20 "[A]lthough a tribe may be within the geographical boundaries  
21 of a state, the tribe is jurisdictionally distinct from the  
22 state, and the state has no authority to impose its laws on  
23 the reservation." Tracy v. Superior Court, 810 P.2d 1030,  
24 1043 (Ariz. 1991). The court finds that the local or special  
25 law principle cannot be wielded against laws describing  
26 relationships with entities outside the State's jurisdiction.

27 Even if local/special law analysis were appropriate, the  
28 Plaintiffs would not prevail. A three-part test is used to

1 determine whether a law constitutes special or local  
2 legislation. See Republic Inv. Fund v. Surprise, 800 P.2d  
3 1251, 1257 (Ariz. 1990). A law does not violate Ariz. Const.  
4 art. IV part 2, § 19 if: (1) there is a rational basis for  
5 the classification; (2) the classification is legitimate,  
6 encompassing all members of the relevant class; and (3) the  
7 class is flexible, allowing members to move into and out of  
8 the class. Id.

9 i. Rational basis

10 For local/special law purposes, a statutory  
11 classification should be upheld as reasonable unless it is  
12 "palpably arbitrary." Chevron Chemical Co. v. Superior Court,  
13 641 P.2d 1275, 1285 (Ariz. 1982). The Plaintiffs do not  
14 persuade the court that the State's decision to confine class  
15 III gaming to tribal lands is irrational. In their motion,  
16 the Plaintiffs write: "Gaming monopolies for Indian tribes  
17 would fail the rational basis test in light of the  
18 Congressional extinguishment of tribal sovereignty over Class  
19 III gaming prohibited by state law." Motion (doc. #46) at 20.

20 The court does not understand what is meant by this  
21 conclusory assertion, and the reply fails to clarify. In  
22 light of the federal government's unique relationship with  
23 Indian tribes, see Morton v. Mancari, 417 U.S. 535, 94 S.Ct.  
24 2474 (1974), and the purpose of IGRA to "promote tribal  
25 economic development, tribal self-sufficiency, and strong  
26 tribal government," 25 U.S.C. § 2701(4), the court concludes  
27 that the distinction in state law following IGRA is rational.

28 ii. Legitimate class

1           The Plaintiffs argue that classifying tribes as the  
2 only entities permitted to operate class III gaming excludes  
3 members of the relevant class. They define the relevant class  
4 as "all persons interested in conducting class III gaming."  
5 This is inaccurate. The relevant class is defined by federal  
6 law as Indian tribes, see 25 U.S.C. § 2703(5), for it is only  
7 with such entities that states are obliged to negotiate  
8 compacts. Id. § 2710(d)(3). Restricting class III gaming to  
9 tribes does not create a special or local law.

10           iii. Elasticity of class

11           Elasticity is another measure of the nonspecific  
12 character of a law. "A statute worded so as to admit entry  
13 and exit from the class implies that the class formation was  
14 separate from consideration of particular persons, places, or  
15 things and, thus, not intended as special or local in  
16 operation." Republic Investment Fund, 800 P.2d at 1258-59.  
17 The Plaintiffs argue that tribal membership is "inelastic or  
18 closed." The Plaintiffs misconceive the elasticity analysis.  
19 Within the class of entities eligible to engage in class III  
20 gaming, the statute specifies no particular tribe, and tribes  
21 are free to seek compact negotiations or let compacts expire  
22 unrenewed as they choose. The class is sufficiently elastic.

23           c. *Federal equal protection*

24           The Plaintiffs contend that if the Governor, pursuant to  
25 section 5-601, gives tribes exclusive rights to conduct  
26 commercial slot machine, keno and blackjack gaming in Arizona,  
27 such exclusivity rests entirely on a racial distinction, in  
28 violation of federal equal protection principles. They

1 contend that Congress's authority under the Indian Commerce  
2 Clause is not so great that Congress can compromise the  
3 Fourteenth Amendment.

4 In response, the Defendants argue that the status of  
5 tribes justifies targeted measures and does not violate the  
6 Equal Protection Clause, so long as the treatment is  
7 rationally related to Congress's unique obligations toward  
8 Indians. They argue that strict scrutiny is inapplicable,  
9 because preferential treatment for tribes is a political  
10 classification, not a racial one. They point out that only  
11 tribes, and not individual tribe members, may operate casinos.

12  
13 In reply, the Plaintiffs argue that a tribe has power to  
14 engage in class III gaming only pursuant to a grant by the  
15 State, and if a state makes such a grant, it must observe  
16 Equal Protection principles. The Plaintiffs further submit  
17 that tribal gaming is not a matter of "uniquely Indian  
18 interest" that might justify an overt preference under the  
19 federal government's "unique obligation toward the Indians."  
20 Reply at 15.<sup>36</sup>

21 \_\_\_\_\_  
22 <sup>36</sup> In reply, the Plaintiffs make two other arguments that  
23 the court will not entertain. First, they argue that "a state  
24 grant of tribal monopolies beyond the terms, procedures, and  
25 policies of IGRA" is barred. Reply at 14. To the extent  
26 that this assertion is meant as a claim that the proposed  
27 compacts violate IGRA, it is precluded by the court's analysis  
28 on the implied right of action question. See Part III.B,  
supra. To the extent it recapitulates the ceiling argument,  
it has previously been addressed. See Part IV.B.1.b.

27 Second, the Plaintiffs contend that Congress lacks the  
28 power to "prohibit off-reservation gaming by persons of other  
races to increase the value of a tribal franchise" because  
that would violate the equal protection component of the Fifth

1           The key to the equal protection question, the parties  
2 agree, is whether tribal gaming compacts reflect Congress's  
3 obligation to legislate on behalf of federally recognized  
4 Indian tribes. Although a tribe's right to engage in class  
5 III gaming depends on the legality of such gaming under state  
6 law, the Defendants acknowledge that tribes' entitlement may  
7 be broader than that of persons permitted to conduct games  
8 under state law. Therefore, the Defendants attempt to justify  
9 the preference IGRA creates for tribes. Response at 22-23.

10           In Morton v. Mancari, 417 U.S. 535, 554, 94 S.Ct. 2474  
11 (1974), the Supreme Court held that federal laws "reasonably  
12 designed to further the cause of Indian self-government" are  
13 scrutinized under the rational basis test. Preferences for  
14 members of federally recognized tribes are not racial  
15 preferences but rather political ones, for federal recognition  
16 of a tribe is a political and not a racial matter. Id. at 553  
17 n.24; 94 S.Ct. at 2484 n.24; cf. Rice v. Cayetano, 120 S.Ct.  
18 1044, 1062 (Breyer, J., concurring) (classifications based on  
19 ancestry are not permissible if ancestral group does not have  
20 a political structure to determine who its members are).  
21 Federal regulation of Indian affairs is "rooted in the unique  
22 status of Indians as a 'separate people' with their own  
23 political institutions." United States v. Antelope, 430 U.S.

24 \_\_\_\_\_  
25 Amendment Due Process Clause. Id. at 15. This statement  
26 emphasizes the State's lack of power to create such  
27 franchises. However, the Plaintiffs further maintain that no  
28 source of federal power over Indian tribes authorizes such a  
statute. The Plaintiffs have not asserted in their amended  
complaint or their summary judgment brief that IGRA is  
unconstitutional. The court shall not consider such a claim  
at this point.

1 641, 646, 97 S.Ct. 1395, 1399 (1977). The federal government  
2 also regulates Indians as persons subject to federal  
3 jurisdiction. See id.; 18 U.S.C. § 1153.

4 When the federal government creates a law applicable to  
5 all persons subject to federal jurisdiction, it does not  
6 violate equal protection as long as "its own body of law is  
7 evenhanded, regardless of the laws of States with respect to  
8 the same subject matter." Antelope, 430 U.S. at 649, 97 S.Ct.  
9 at 1400 (holding that application of federal law to Indians'  
10 crimes did not violate equal protection as an unfair race-  
11 based classification, where Indians were convicted of first  
12 degree murder under federal law, when elements for first  
13 degree murder under state law had not been proved). The  
14 Antelope Court recognized the possibility that regulations  
15 made for Indians pursuant to Indians' special status could  
16 result in a situation where federal law no longer applied  
17 consistently to all persons subject to federal jurisdiction,  
18 id. at 649 n.11, 97 S.Ct. at 1400 n.11, but declined to  
19 intimate a view on how this should be sorted out.

20 The Plaintiffs read footnote 11 for the proposition that  
21 "a federal statute which treats Indians differently without  
22 nexus to the separate governmental powers of tribes could fail  
23 the federal Due Process test." Motion (doc. #46) at 25. The  
24 court agrees that a regulation treating Indians differently  
25 that cannot be justified under Mancari could violate equal  
26 protection. See Dawavendewa v. Salt River Project Agr. Imp.  
27 and Power Dist., 154 F.3d 1117, 1124 (9<sup>th</sup> Cir. 1998)  
28 (employer's preference for members of only one tribe violated

1 Title VII). The question is whether A.R.S. § 5-601, if read  
2 to grant tribes casino gaming rights not allowed to others, is  
3 "reasonably designed to further the cause of Indian self-  
4 government." Motion at 27.

5 The Plaintiffs rely on Williams v. Babbitt, 115 F.3d 657  
6 (9<sup>th</sup> Cir. 1997) to argue that it is not. There, the Ninth  
7 Circuit considered the validity of a BIA regulation that  
8 limited reindeer ownership in Alaska to members of Indian  
9 tribes. The BIA regulation was adopted pursuant to the  
10 Reindeer Act, designed to preserve what Congress considered  
11 the "native character" of the Alaska reindeer industry. Id.  
12 at 659-60. A non-Indian sought to import reindeer from Canada  
13 and was blocked by the BIA. The majority of the Ninth Circuit  
14 panel held that the BIA interpretation of the Reindeer Act was  
15 not entitled to deference because of the "seriousness of the  
16 constitutional doubts it raises." Id. at 663. Freed to  
17 interpret the Act de novo, the court determined that the Act  
18 does not prohibit non-native ownership of reindeer in Alaska.  
19 Id. at 666. The majority's approach allowed exploration of  
20 equal protection issues without ultimately resolving them.  
21 Id. On this portion of the opinion where constitutional  
22 doubts are merely raised, the Plaintiffs stake their equal  
23 protection claim.

24 The majority recognized that Congress may grant  
25 preferences to Indians. It insists, however, that only if a  
26 classification is entwined with traditional or "unique" Indian  
27 interests should the preference be considered politically  
28 based and analyzed for rationality under Mancari. Williams,

1 115 F.3d at 665. Classifications bearing on matters not  
2 affecting uniquely Indian interests are subject to strict  
3 scrutiny. Id. The majority went on to pointedly suggest that  
4 certain preferences do not relate to uniquely Indian  
5 interests:

6 For example, we seriously doubt that Congress could  
7 give Indians a complete monopoly on the casino  
8 industry or on Space Shuttle contracts. At oral  
9 argument, counsel for the government conceded that  
10 granting natives a monopoly on all Space Shuttle  
11 contracts would not pass Mancari's rational-relation  
12 test. Counsel could only distinguish the Space  
13 Shuttle preference from a reindeer preference by  
14 noting that, in 1937, natives were heavily involved  
15 in the reindeer business whereas they aren't  
16 involved in the Space Program. The casino example  
17 defies this distinction, but is equally unrelated to  
18 "Congress' unique obligation toward the Indians."  
19 Mancari, 417 U.S. at 555, 94 S.Ct. at 2485.

20 Id. at 665.

21 As further grounds for "serious constitutional doubt"  
22 about the regulation, the Williams majority mentioned the  
23 impact of Adarand Constructors, Inc. v. Pena, 515 U.S. 200,  
24 115 S.Ct. 2097 (1995), where the Supreme Court held that  
25 racial preferences must be narrowly tailored to remedy past  
26 discrimination. Id. at 665. Justice Stevens, dissenting in  
27 Adarand, wrote that the logical implications of the Adarand  
28 majority opinion jeopardized federal preferences for Native  
Americans. Drawing on this dissent, the Williams court  
predicted that "Mancari's days are numbered." 115 F.3d at  
665.

29 The Plaintiffs use Williams as follows. They begin by  
30 stating that IGRA does not require special treatment of  
31 Indians, but rather requires only that Indians be treated as  
32 well as other persons in Arizona. Since Congress has not set

1 out to justify special treatment, the Plaintiffs argue that  
2 the State has no basis for granting tribes exclusive class III  
3 gaming permits. They then take their cue from the dicta of  
4 Williams to argue that because gaming does not uniquely affect  
5 tribal interests, the proposed compacts must be held to strict  
6 scrutiny and invalidated.

7 The court finds that equal protection is not violated.  
8 Congress did call for special treatment for tribes in IGRA,  
9 because by requiring states to enter compacts on terms  
10 permitted to "any person for any purpose" under state law,  
11 IGRA provides for gaming on tribal lands to benefit tribes,  
12 even where such for-profit gaming is not allowed to entities  
13 outside tribal lands. To prevail on their claim, the  
14 Plaintiffs must demonstrate that Congress's grant of  
15 potentially exclusive gaming opportunities to tribes bears no  
16 rational relationship to any legitimate purpose. See City of  
17 Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 105  
18 S.Ct. 3249, 3254 (1985). Congress need only articulate "some  
19 reasoned explanation" for creating an Indian classification.  
20 Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n, 158  
21 F.3d 1335, 1340-41 (D.C. Cir. 1998).

22 In enacting IGRA, Congress found that tribes had been  
23 operating gambling to raise revenue on tribal lands. 25  
24 U.S.C. § 2701(1). Congress also found that tribes benefitted  
25 from earning money through gaming in a manner that promoted  
26 tribal self-sufficiency and economic development. Id. §  
27 2701(4). The limitation of such gaming to tribes on tribal  
28 lands is sufficiently related to Indian sovereignty over

1 tribal lands to satisfy Mancari's test.

2 The Plaintiffs do not argue here directly that Adarand,  
3 tightening the use of racial classifications of individuals  
4 for remedial purposes, overrules Mancari's holding that  
5 preferences for Indian tribes are political and not racial.  
6 The court is aware that an implicit overruling has been  
7 suggested by Justice Stevens and acknowledged by the Ninth  
8 Circuit. However, Mancari is directly on point, is  
9 acknowledged as authoritative in cases involving tribes, see  
10 Rice, 598 U.S. at 519, and is overruled by Adarand only  
11 depending on how broadly that opinion is construed. In these  
12 circumstances, the court must follow Mancari as the directly  
13 controlling case, for the Supreme Court reserves to itself the  
14 prerogative to find its opinions implicitly overruled by  
15 changing doctrine. Agostini v. Felton, 521 U.S. 203, 237, 117  
16 S.Ct. 1997, 2017 (1997).

17 To the extent that A.R.S. § 5-601 may be read to  
18 authorize exclusive gaming privileges by tribes on tribal  
19 land, the Governor's decision to do so is also consistent with  
20 equal protection. Where a state law is enacted "in response  
21 to a federal measure" intended to achieve the result  
22 accomplished by the challenged state law, the state law itself  
23 need only "rationally further the purpose identified by the  
24 State" to be sustained against an equal protection challenge.  
25 Washington v. Confederated Band & Tribes of Yakima Indian  
26 Nation, 439 U.S. 500-501, 99 S.Ct. 740, 761 (1979).  
27 Legislative classifications are valid unless they bear no  
28 rational relationship to the State's objective to carry out

1 federal law. Id. at 501, 99 S.Ct. at 762. Because the  
2 Arizona legislature has made no findings about tribal gaming,  
3 the Defendants rely on materials created for the Governor to  
4 support the rationality of her gaming decisions. These  
5 materials are subject to a motion in limine.

6 The Defendants move for the admission of a report called  
7 "Public Hearings on Indian Gaming," created by the Arizona  
8 Department of Gaming. The report, created at Governor Hull's  
9 behest by the Department's Director, Stephen Hart, describes  
10 sentiments expressed by persons who attended four public  
11 hearings in December 1999. The report consists of eleven  
12 pages summarizing testimony given at the hearings (Report  
13 Summary) and the rest consists of transcripts, written  
14 comments submitted at the meetings, etc. (Report Attachments).  
15 The Defendants argue that the eleven-page summary is  
16 admissible under Fed. R. Evid. 803(8) as a public report, and  
17 that the Attachments may be considered for the non-hearsay  
18 purpose of establishing a basis for the Governor's decisions.  
19 The Plaintiffs object, contending that none of the materials  
20 are relevant and all are hearsay, and that the Attachments are  
21 more prejudicial than probative.

22 The Report was generated after four public hearings, held  
23 in Payson, Yuma, Phoenix and Tucson between November 30 and  
24 December 9, 1999. Over 1200 persons attended; how they came  
25 to participate is unknown, for sample selection methods are  
26 not described. The report "summarizes" the "themes" discussed  
27 at the hearings by announcing conclusions on every issue,  
28 presumably a summary representing the majority view. The

1 report also suggests that the views expressed in the summary  
2 are the views of the public, but no statistical analysis is  
3 included to support such extrapolation.

4 The court finds that the report is admissible, but its  
5 utility is limited to reflect its flaws. Courts take a broad  
6 approach to admissibility under Fed. R. Evid. 803(8)(C).  
7 Public reports are not inadmissible merely because they state  
8 conclusions or opinions, as long as the conclusions are  
9 trustworthy. Beech Aircraft Corp. v. Rainey, 488 U.S. 153,  
10 170, 109 S.Ct. 439, 450 (1988).

11 The court may presume that public records are  
12 trustworthy, and it is the challengers burden to show  
13 otherwise. Johnson v. City of Pleasanton, 982 F.2d 350, 352  
14 (9<sup>th</sup> Cir. 1992). In determining whether the "sources of  
15 information or other circumstances" indicate lack of  
16 trustworthiness, the Advisory Committee Notes list four  
17 suggested factors for consideration: (1) the timeliness of the  
18 investigation; (2) the special skill or experience of the  
19 official; (3) whether a hearing was held on the level at which  
20 conducted, and (4) possible motivational problems. See  
21 Advisory Committee Notes, Reprinted following Fed.Rules of  
22 Evid. 803, 28 U.S.C.A.

23 The Plaintiffs' objections to the Report Summary are well  
24 taken, for the conclusions the Report draws are not shown to  
25 have been derived from generally accepted or trustworthy  
26 methods. The Report Summary shall be considered to represent  
27 only the conclusions of the Department of Gaming about the  
28 prevailing opinions expressed at the hearings. As the

1 Plaintiffs recognize, "this information may have been useful  
2 for determining political priorities." The conclusions in the  
3 Summary will not be considered to represent the views of the  
4 general public, however, for no appropriate statistical  
5 analysis has been done. In an age of polling, the failure to  
6 ensure a representative sample and an acceptable margin of  
7 error cannot be overlooked. The Summary also will not be  
8 considered for the truth of the opinions expressed, e.g., that  
9 "gaming has not increased the volume of criminal activity,  
10 number of calls for service, or the volume of cases processed  
11 through the non-Indian criminal justice system," for there is  
12 no reason to believe that any of the speakers were qualified  
13 to speak to such matters.

14 The court shall admit the statements in the Attachments  
15 for the purpose of showing that members of the public  
16 attending the hearings felt that they had benefitted from  
17 Indian gaming. The court sees no risk of unfair prejudice if  
18 the statements are properly understood as anecdotal. The  
19 motion in limine is granted in part and denied in part.

20 Based on the Report and other evidence, the Governor  
21 could rationally conclude that casino gaming on tribal lands  
22 should be continued. While the Plaintiffs argue that the  
23 Governor could better pursue a poverty-reduction policy by  
24 allowing all local governments, including municipalities, to  
25 conduct casino gaming, the pertinent question is whether the  
26 Governor's policy is rational. The Plaintiffs have not shown  
27 that tribal gaming pursuant to IGRA is so contrary to state  
28 interests or so arbitrary as to be irrational. The fact that

1 the Governor resorted to an anecdotal sampling of public  
2 opinion to guide her strategy only confirms, however, that §  
3 5-601 gives her unbridled discretion to formulate gaming  
4 policy.

5 d. *Equal privileges*

6 The Plaintiffs believe that compacts authorizing tribal  
7 monopolies in slot machine, keno and blackjack gaming violate  
8 the equal privileges clause in the Arizona Constitution. The  
9 Plaintiffs argue that Ariz. Const. art. II, § 13 enshrines the  
10 principle of equal opportunity for businesses, and is more  
11 rigorous than federal equal protection analysis. Motion at  
12 22.

13 Article II, section 13 of the Arizona Constitution  
14 prohibits the State from granting any person or corporation,  
15 other than a municipality, "privileges or immunities which,  
16 upon the same terms, shall not equally belong to all citizens  
17 or corporations." The Arizona Supreme Court interprets the  
18 equal privileges clause "to secure equality of opportunity and  
19 right to all persons similarly situated." Prescott Courier,  
20 Inc. v. Moore, 274 P. 163, 165 (1929). The effects of the  
21 state equal privileges clause and the federal equal protection  
22 clause are essentially the same, State v. Bonneville, 2 P.3d  
23 682, 686 (Ariz. Ct. App. 1999), although the Arizona law has  
24 unique roots in a fear of overreaching by business entities.  
25 See Martin v. Reinstein, 987 P.2d 779, 799 n.18 (Ariz. Ct.  
26 App. 1999); see generally John D. Leshy, The Arizona State  
27 Constitution 54 (1993).

28 There is no equal privileges issue here because there is

1 no discrimination among similarly situated persons. Tribes,  
2 unlike Plaintiffs, are sovereign political entities and not  
3 subject to state regulation. Nevertheless, even if the  
4 Plaintiffs were similarly situated, there is no violation of  
5 equal privileges rights. The privilege in question--to engage  
6 in class III gaming--implicates only economic rights and no  
7 fundamental right. The State's rule limiting class III gaming  
8 to tribes on tribal land must be only rationally related to  
9 furthering some legitimate governmental interest. See Big D  
10 Const. Corp. v. Court of Appeals, 789 P.2d 1061, 1067 (Ariz.  
11 1990). The State may rationally draw a regulatory distinction  
12 based on land ownership. See Bonneville, 2 P.2d at 685  
13 (upholding a law banning leghold traps on public land but not  
14 on private land). Analogously, the State may legitimately  
15 decide to limit class III gaming to tribal lands. The  
16 Defendants theorize that Arizona would choose to endorse class  
17 III gaming only for tribes to promote strong tribal  
18 government, economic development, and self-sufficiency of  
19 tribal lands. Response at 27. The Plaintiffs do not show  
20 that these motives cannot reasonably be achieved by the  
21 State's tribal gaming policy. For the reasons discussed above  
22 in the equal protection analysis, tribes are not similarly  
23 situated to the Plaintiffs because they are political  
24 sovereigns not otherwise subject to state regulation.

25 Notably, class III gaming is not "presumptively a  
26 legitimate business," an element that the Arizona Supreme  
27 Court has mentioned as a factor in determining whether a  
28 regulation unfairly limits economic activity. See State v.

1 Childs, 257 P. 366, 367 (Ariz. 1927); Elliott v. State, 242 P.  
2 340, 341-42 (Ariz. 1926)(If a law prohibits the exercise of  
3 occupations, "legitimate and laudable in themselves," while  
4 allowing other businesses not reasonably distinguishable to be  
5 carried on freely, it violates the equal privileges clause).  
6 Rather, gambling is broadly banned in Arizona, and Arizona  
7 citizens and corporations have no reasonable baseline  
8 expectation to conduct such enterprises. The equal privileges  
9 clause is not violated by Arizona's actions to convey an  
10 exclusive class III gaming franchise on tribes.

11 3. Compacts are ultra vires

12 The Intervenor believes that compacts are treaties and  
13 states cannot make treaties. It also describes compacts as  
14 legislation, the effectiveness of which is contingent on  
15 tribal approval. While the court questions whether the  
16 Intervenor has standing to assert these claims, Defendants  
17 have not asserted a jurisdictional defect. Assuming that the  
18 Intervenor has standing, the court rejects these theories on  
19 their merits.

20 a. *Compacts as treaties*

21 The United States Constitution allocates treaty-making  
22 authority exclusively to the President, with the advice and  
23 consent of the Senate, Art. II § 2, and prohibits states from  
24 concluding treaties, Art. I § 10. The Intervenor contends  
25 that Congress cannot enable Arizona to enter treaties with  
26 Indian tribes. Opening Brief (doc. #43) at 5.

27 The court rejects the Intervenor's superficial  
28 characterization of tribal-state compacts as "treaties."

1 United States v. Reid, 73 F.2d 153, 155 (9<sup>th</sup> Cir. 1953),  
2 defines treaties as contracts between nations. Although  
3 states are sovereigns, they are not nations.

4 No one today, including the President of the United  
5 States, makes treaties with Indian tribes. 25 U.S.C. § 71;  
6 see Antoine v. Washington, 420 U.S. 194, 201-02, 95 S.Ct. 944,  
7 949 (1975). Congress exercises its plenary power to mediate  
8 relations between the United States and tribes through  
9 legislation. Antoine, 420 U.S. at 203, 95 S.Ct. at 950. By  
10 virtue of the Supremacy Clause, Congressional acts are  
11 "superior and paramount to the authority of any State within  
12 whose limits are Indian tribes." Id. at 294, 95 S.Ct. at 950  
13 (quoting Dick v. United States, 208 U.S. 340, 353, 28 S.Ct.  
14 399, 403 (1908)). Congress may, however, cause state  
15 regulation to extend to tribal land if it specifically directs  
16 such an incursion. Washington v. Confederated Bands and  
17 Tribes of Yakima Indian Nation, 439 U.S. 463, 501, 99 S.Ct.  
18 740, 761 (1979).

19 With IGRA, Congress imposed federal regulation on tribal  
20 gaming capacities. Santa Ana v. Kelly, 104 F.3d 1546, 1549  
21 (10th Cir. 1997); see generally Rebecca Tsosie, Negotiating  
22 Economic Survival: The Consent Principle and Tribal-State  
23 Compacts under the Indian Gaming Regulatory Act, 29 Ariz. St.  
24 L.J. 25, 56-57 (1997). IGRA improves on the method of  
25 adopting state laws by creating a mechanism whereby tribes and  
26 states negotiate to determine which state gaming regulation  
27 should apply on tribal lands. The approval of the Secretary  
28 of the Interior enfoldes the negotiated compact terms into



1 the court shall enter judgment to that effect shortly. Before  
2 doing so, the court desires guidance from the parties as to  
3 the appropriate phrasing of such relief. The parties are  
4 directed to attempt to collaborate on a proposed form of  
5 judgment, to be lodged within 15 days of the filing of this  
6 order. If negotiations between the parties fail, within 5  
7 days after the date for submitting a stipulated form of  
8 judgment, each shall separately submit a proposed form of  
9 judgment. Until the court enters judgment, the preliminary  
10 injunction that has preserved the status quo in this matter  
11 shall be extended.

12       THEREFORE IT IS ORDERED, denying Defendants' Motion to  
13 Dismiss for Failure to Join Indispensable Parties (docs. #28,  
14 50).

15       IT IS FURTHER ORDERED, denying in part and granting in  
16 part Defendants' Motion to Dismiss (Justiciability) (doc.  
17 #49).

18       IT IS FURTHER ORDERED, granting in part and denying in  
19 part Defendants' Motion in Limine (doc. #73).

20       IT IS FURTHER ORDERED, denying in part and granting in  
21 part Plaintiffs' Motion for Summary Judgment (doc. #46).  
22 Plaintiffs and Intervenor prevail on their claims that A.R.S.  
23 § 5-601 violates the Arizona Constitution.

24       IT IS FURTHER ORDERED directing the parties to submit a  
25 proposed form of judgment within 15 days. Failing agreement,  
26 . . .

27  
28

