

BEFORE A PANEL OF ARBITRATORS

Frank X. Gordon, Jr.

Charles E. Jones

Paul Bender

In the Matter of the Arbitration Between:

STATE OF ARIZONA

and

PASQUA YAQUI TRIBE

ARBITRATORS' AWARD

This Arbitration concerns a dispute between the State of Arizona and the Pasqua Yaqui Tribe regarding the application of the Tribe's 2003 Gaming Compact ("the Compact") to the Tribe's Casino Del Sol resort complex, located a short distance south of the City of Tucson. The Tribe first opened a gaming facility at the site of the present Casino complex in 2001. At that time the facility was solely a gaming facility; it did not include any resort or conference-center facilities. In November, 2011, however, the Tribe opened an expanded gaming-resort complex on the site. The complex includes a newly-constructed hotel, spa, pool and conference center, in addition to the original gaming facility. The present dispute between the State and the Tribe concerns the

application of the Compact to the expanded facility and its employees.

The Arbitration was initiated by a Notice of Dispute filed by the State on September 9, 2011, shortly before the opening of the expanded facility. That Notice described the dispute as one "regarding whether the regulatory requirements of the Compact [will] apply to the entirety of the Tribe's newly-expanded facility." According to the Notice, the State's position was that the Compact was applicable to the entire resort complex, while the Tribe's view was that, although the Compact would remain fully applicable to the original gaming facility, it would not apply to the new "resort" portions of the complex in which no gaming activity would be conducted. After the Arbitration began, the State moved to amend its Notice of Dispute to include in the Arbitration the additional question "whether employees of An's restaurant (a restaurant located within the original part of the Casino complex) are gaming employees who need to be licensed by the Tribal Gaming Office." On January 27, 2012, we granted the State's motion to amend. On February 24, the first day of hearings, we denied a motion to intervene in the proceeding filed by counsel for the Ans, the proprietors of the restaurant that is the subject of Part 3 of the Discussion section of this Award.

The Arbitration Panel toured the expanded facility on February 24, 2012, held evidentiary hearings at the Casino the same day, and in Phoenix from February 27 through March 2, 2012. The Panel heard live testimony from seven witnesses (Rudy Casillas, Paul Bullis, Mark Brnovich, Keven Washburn, Philip Hogen, Kimberly Van

Amburg and Peter Yucupicio), received numerous exhibits into evidence, and heard opening and closing argument from counsel for the Tribe and the State. The Panel greatly appreciates the excellent presentations of counsel as well as the extraordinary degree of cooperation shown by the parties and their counsel to each other and to the Panel.

DISCUSSION

I. WHAT PORTIONS OF THE COMPLEX ARE "GAMING FACILITIES"?

The first question we must decide is whether the new portions of the Casino Del Sol complex -- the newly-built hotel, conference center, spa and pool -- are "Gaming Facilities" within the meaning of the Compact. Section 2(n) of the Compact defines "Gaming Facility" as "the buildings or structures in which Class III Gaming, authorized by this Compact, is conducted." The hotel (including the spa) and the conference center are physically connected to the original gaming facility in which Class III Gaming continues to be conducted. That gaming activity, however, takes place entirely within what was the original gaming facility. No gaming activity of any kind is conducted in any part of the new construction. One may pass between the hotel and the gaming floor, between the conference center and the gaming floor, and between the hotel and the conference center, through a centrally located and partly newly-constructed "pre-function" room. The pre-function room opens directly onto the gaming floor through a wide doorless opening; it opens onto the hotel lobby through a separate wide

doorless opening, which is set at a ninety-degree angle from the opening to the gaming floor; and it is connected to the conference center by a set of several side-by-side glass doors which are also set at a ninety-degree angle from the opening to the gaming floor. The glass doors to the conference center are to the left of, and approximately 100 feet away from, the opening to the gaming floor, and the opening to the hotel lobby is to the right of, and approximately 50 feet away from, the opening to the gaming floor. We have attached a schematic diagram, admitted into evidence as Tribe's Exhibit #2, that shows this arrangement of spaces.

As we have noted, Class III Gaming is restricted to what was the original gaming facility and is not conducted in either the newly-constructed hotel and spa or newly-constructed conference-center portions of the complex. If the entire complex -- i.e., the original casino and the new construction -- were to be considered a single "building" or "structure" within the meaning of section 2(n) of the Compact, the entire complex would constitute a single "Gaming Facility" within the meaning of the Compact. On the other hand, if the hotel, the original gaming facility and the conference center were each considered to be separate "buildings" or "structures" for Compact purposes, then the hotel component and the conference-center components would not be "Gaming Facilities" within the meaning of the Compact, while the original gaming-facility component would remain a "Gaming Facility."

The language of section 2(n) of the Compact alone does not seem to us to be

determinative of whether the Pasqua Yaqui casino-resort complex should be considered one "building" or "structure" for Compact purposes or more than one "building" or "structure." The fact that each of the elements of the complex -- the casino, the pre-function room, the conference center, and the hotel and spa -- is physically connected to one or more of the other elements of the complex is a relevant factor, but does not itself provide an answer to the question of whether the Pasqua Yaqui complex is composed of one "building" or "structure" or more than one "building" or "structure."

To illustrate this point, suppose that two homes share a common wall, as when two townhouses are built side by side. The two homes might reasonably be considered to constitute one building or structure, but they might just as reasonably be considered to constitute two attached buildings or structures. If the two homes were built at the same time, that would probably increase the likelihood of their being considered to be one structure. If they were built at different times, as is the case with the casino and the other elements of the Pasqua Yaqui complex, that might, on the other hand, suggest that the homes constitute two attached structures, rather than one single "structure." Whether one were able to go from one home to the other without going outside might also be relevant in deciding whether to characterize them as one structure or two structures, but it is doubtful that the existence or non-existence of a connecting door or interior passageway would determine which characterization to use. Insofar as the Compact means to employ a common understanding of what constitutes one "building" or "structure," as opposed to what constitutes more than one

"building" or "structure," the Compact language itself does not answer the question.

Custom or usage also fails to provide a definitive answer to this question. The State and the Arizona Tribes that conduct Class III Gaming operate under a standard "Arizona Tribal Gaming Compact" that is applicable to every Arizona Tribe's gaming operation. Section 2(n) thus applies, not only to the Pasqua Yaqui Casino, but to all Indian gaming facilities in Arizona. Several Arizona Tribes have casino-resort complexes containing hotels and conference centers that in many respects resemble the Pasqua Yaqui complex. Like the Pasqua Yaqui Casino, the elements of these complexes are physically connected with each other, and it is possible to move from one element of the complex to another without going outside. If there were a consistent understanding or practice throughout the State with regard to how to determine whether the non-gaming portions of these complexes are or are not "Gaming Facilities," that practice might well be determinative of the question in this case. It appears, however, that no such consistent understanding or practice exists. For example, with regard to two of these other Arizona complexes that consist of physically connected resort-gaming facilities -- the Tohono O'odham Nation Desert Diamond Resort and Harrah's Ak Chin Resort -- some parts of the complexes have been treated by the State and the Tribe as a "Gaming Facility," while other portions, in which gaming is not conducted, have not been treated as "Gaming Facilities." Conversely, all portions of other physically-connected Arizona tribal resort-gaming complexes -- for example the Gila River Wild Horse Pass Hotel and Casino and the Tonto Apache resort

and hotel -- are treated by the State and the Tribes as constituting "Gaming Facilities." This issue of how to treat the various parts of tribal gaming-resort complexes has been a frequent source of disagreement between the State and Arizona Tribes when Tribes have either expanded existing gaming facilities into gaming-resort complexes or created gaming-resort facilities where gaming had not previously been conducted.

In these circumstances, we have sought guidance by considering the practical consequences of affixing the "Gaming Facility" label to the various portions of the Pasqua Yaqui complex.

(a) *The Hotel.* -- When we consider the hotel portion of the Pasqua Yaqui complex from this perspective, it is reasonably clear to us that the hotel should not be considered a "Gaming Facility" within the meaning of the Compact. One of the consequences of treating something as a "Gaming Facility" under the Compact is that both the State Department of Gaming and the Pasqua Yaqui Tribal Gaming Office have the responsibility and authority to monitor closely all activities that take place in that Facility. For these purposes, the Compact gives employees of each of the two agencies the right to enter and inspect all areas of every "Gaming Facility" whenever they wish to do so, entirely at their own discretion. Section 6(d)(2) of the Compact thus gives inspectors employed by the Tribal Gaming Office "the right to inspect any Gaming Facility at any time" and "immediate access to any and all areas of the Gaming Facility." The inspection rights of the State Department of Gaming under the Compact are only

slightly more limited. With regard to the public areas of a "Gaming Facility," section 7 (a) (1) gives agents of the State "free and unrestricted access to all public areas of a Gaming Facility during operating hours without giving prior notice to the Gaming Facility Operator." With regard to non-public areas of a "Gaming Facility," section 7(a)(3) of the Compact states that "Agents of the State Gaming Agency authority shall be entitled to enter" those areas so long as they have "[g]iven advance notice to the Tribal Gaming Office" and "provide proper identification to the senior supervisory employee of the Gaming Facility on duty and to the Tribal Gaming Office inspector on duty." The Compact recites that the State and Tribal agencies are given this broad and essentially unlimited inspection authority so that the Tribal Gaming Office may carry out its "responsibility for the regulation of all Gaming Activities pursuant to the Tribe's Gaming Ordinance," and so that the State may "monitor the Tribe's Gaming Operation to ensure that the operation is conducted in compliance with the provisions of the Compact."

We find it difficult, if not impossible, to believe that these virtually unlimited right-of-inspection provisions in the Compact were intended to apply to areas of tribal gaming-resort complexes operated as hotels, in which no Class III Gaming, and indeed no gaming of any kind, is conducted. The principal non-public areas of the Casino del Sol hotel are the hotel's guest rooms. If the hotel were to be considered a Compact Gaming Facility, that would mean that Tribal Gaming Office employees would have the right, at any time of the day or night, to have "immediate access" to those rooms, entirely at their own discretion, and that State Department of Gaming employees

-- again, entirely at their own discretion -- would be "entitled to enter" guest rooms at any time by notifying and identifying themselves to tribal officials, with no notice to the occupants of the room and no probable cause, or even suspicion, to believe that any illegal or questionable activity is or has been taking place within those rooms.

Among other problems, searches of that kind would clearly violate both the state and federal constitutions if conducted by State officials, and would violate the Indian Civil Rights Act if conducted by tribal officials. The existence of these powers would, in addition, undoubtedly negatively affect the willingness of people to patronize the hotel, especially when they were doing so in order to use its resort rather than its gaming facilities, or in order to attend or participate in a meeting or conference conducted at the complex's conference center. These unlimited powers of inspection and search make sense as applied to spaces in which gaming actually takes place, to spaces in which gaming-related funds or devices are kept, to spaces in which other activities directly related to gaming occur, and to spaces occupied or frequented by employees who work physically within the gaming operation. They make no sense if applied to hotel rooms and other non-public hotel-related spaces, such as hotel laundries and linen storage rooms, occupied and used exclusively by hotel guests, chambermaids and other non-gaming-related hotel-service employees.

(b) *The Pre-function Room.* -- The application of the Compact to the pre-function room -- the space from which one may enter the hotel, the conference center or the gaming floor -- seems equally clear. The schematic diagram of the gaming-resort

complex introduced into evidence as a Tribe's exhibit labels half of this area as a "gaming" area, and several slot machines were present in this half of the room when we visited the facility. That half of the room is not separated in any way from the other half of the pre-function room and, at one end, the room opens directly onto the gaming floor. We conclude that the entire pre-function room is a "Gaming Facility" within the meaning of the Compact.

(c). *The Conference Center.* -- Whether or not the conference center is a "Gaming Facility" is a more difficult question. Like the hotel, no gaming activity takes place in the conference center. The conference center also resembles the hotel in that some of its spaces -- the small conference rooms, for example -- are areas in which the occupants of the area may have an expectation of privacy. Those areas, however, constitute a very small part of the conference center, which is almost entirely composed of five very large interconnected ballrooms, which are not likely considered to be private areas by conference organizers or attendees. Most significant, in our view, is the fact that, when food is served in the conference center, it is often served from the same kitchen that services the gaming floor's buffet dining facility -- a facility that is directly connected to the gaming floor. That buffet is the place where those who play the Casino's games are most likely to eat. Food is not infrequently served in the conference center ballrooms at dinners and other meals that are part of official conference activities. When that occurs, the food is normally prepared in and served from a kitchen that, at the same time, is preparing food for the Casino's buffet dining

room. At these times wait staff and others may have the opportunity to circulate between the gaming floor and the conference center.

In view of the facts that most of the conference center is not space in which conference participants are likely to have an expectation of privacy, that Tribal and State officials assigned with the job of monitoring the Casino's gaming activities may, at times, have a legitimate and immediate need to inspect areas in the conference center that may in some way be connected with illegal gaming activity, and that the conference center and the gaming floor share both a kitchen and a hallway that runs between the kitchen and the conference center's ballrooms, it seems appropriate, perhaps in an excess of caution, to treat the conference center as a Gaming Facility within the meaning of the Compact.

2. WHICH EMPLOYEES ARE "GAMING EMPLOYEES"?

The second question that we have been asked to decide is whether employees of the Pasqua Yaqui resort complex who do not directly work in gaming activity are "Gaming Employees" within the meaning of the Compact. Section 2(m) of the Compact defines "Gaming Employee" as:

any person employed as a Primary Management Official or Key Employee of a Gaming Operation of the Tribe and any person employed in the operation or management of a Gaming Operation, including, but not limited to, any person whose employment duties require or authorize access to restricted areas of a Gaming Facility not otherwise open to the public.

Whether or not an employee is a "Gaming Employee" within the meaning of this definition is a question of considerable significance. Section 4(b) of the Compact requires that all Gaming Employees must be licensed by the Tribal Gaming Office and, unless they are tribal members, it requires that they must also be certified by the State Department of Gaming, both before beginning their employment and annually thereafter. Section 4(b) exempts Gaming Employees whose jobs are not directly related to gaming operations, such as "waiters," "gift shop clerks" and "hotel personnel," from the State-certification requirement -- but not from the Tribal-licensing requirement -- as long as they do not have "unescorted access to secure areas" of the Casino such as "Gaming Device storage and repair areas, count rooms, vaults, cages, change booths," etc.

If the definition of "Gaming Employee" did not include the language that we have italicized in the "Gaming Employee" definition quoted above, only employees directly involved in gaming activities -- gaming management personnel, those who service the Casino's slot machines, blackjack dealers, cashiers, gaming security personnel, etc. would likely qualify as "Gaming Employees" for Compact purposes. Because the italicized language begins with the word "*including*," rather than the word "*and*," it is not clear from the italicized language itself whether the intended meaning of that language is that employees "whose employment duties require or authorize access to restricted areas of a Gaming Facility not otherwise open to the public" are an *additional* category of "Gaming Employees," -- i.e., whether employees with that access are to be

subject to the licensing and certification requirements of the Compact whether or not they would otherwise be described as being "employed in the operation or management of a Gaming Operation" -- or, whether the italicized language is meant merely to be illustrative of the kind of employee, in addition to "Primary Management Officials" and "Key Employees," who ought to be considered persons "employed in the operation or management of a Gaming Operation" for Compact purposes.

That issue arose in a dispute between the State and the Colorado River Indian Tribes ("CRIT") that was resolved by a Panel of Arbitrators in July, 2000, under the standard Tribal-State of Arizona Compact that was operative at that time. (Frank X. Gordon, one of the members of the CRIT Arbitration Panel, is also a member of the Panel in the present case.) In its Award, the CRIT Arbitration Panel determined that employees "whose employment duties require or authorize access to restricted areas of a Gaming Facility not otherwise open to the public" were always to be considered "Gaming Employees," and it also determined that the phrase "restricted areas of a Gaming Facility not otherwise open to the public" referred to "all areas of a gaming facility that are not open to the public," not only "highly sensitive restricted areas involving Class III gaming or its proceeds, such as hard and soft count rooms," as the Colorado River Indian Tribes argued.

The CRIT Arbitration involved, as does the present Arbitration, a facility that began as a gaming casino, without resort facilities, and that was in the process of being

expanded into a comprehensive gaming-resort facility. The Panel's Award -- treating as "Gaming Employees" all resort employees who have access to any non-public area of the resort complex that qualifies as a "Gaming Facility" under the Compact, whether or not those areas are "highly sensitive restricted areas" -- was a controversial one. The standard Tribal-State Compact in effect in July, 2000, when the CRIT Arbitration Award was rendered, was the original Arizona standard compact initially adopted in 1993. That Compact required all "Gaming Employees" who were not tribal members to be certified by the State, as well as licensed by the Tribe. As a result of the CRIT Arbitration award, all CRIT resort employees, whether or not their duties directly involved gaming activity, were required to obtain State certification if their employment duties required or authorized them to have access to any non-public portion of the resort that was within an area labeled as a "Gaming Facility," even if the non-public area had nothing directly to do with gaming. Since the CRIT complex, like the Pasqua Yaqui complex involved in this case, included restaurants, gift shops and other facilities that were within the gaming area, rather than the resort area portion of the complex, and since those facilities included non-public areas such as kitchens and non-gaming-related storage rooms, the CRIT Arbitration Award required waiters, dishwashers, clerks and other workers to be certified by the State, even though their duties had nothing directly to do with gaming activity.

When a new standard Tribal-State Compact was adopted in 2003, Section 4(b) of the Compact, which governs the licensing and certification of "Gaming Employees," was

amended to take account of the concerns of Arizona Tribes over the breadth of the CRIT Arbitration Award. Language was added to Section 4(b) that provides that nine categories of "Gaming Employees" will no longer be required to be certified by the State if they have no unescorted access to gaming-related secure areas such as "Gaming Device storage and repair areas," "count rooms," "security offices," and "surveillance rooms." The categories of "Gaming Employees" on this list include "[f]ood and beverage personnel such as chefs, cooks, waiters, waitresses," "landscapers" and "janitorial," "warehouse" and "[h]otel personnel" -- the same categories of employees that the Colorado River Indian Tribes sought to exclude from the category of "Gaming Employees" in their 2000 Arbitration with the State. It seems evident that, in revising the standard Tribal-State Compact in 2003, those drafting the revisions intended to accept the CRIT Arbitration ruling that employees of a tribal gaming-resort complex are "Gaming Employees" if they have access to areas of a "Gaming Facility" not open to the public -- whether those non-public areas are gaming-related secure areas or not -- but to modify the effect of that ruling by providing that employees, like waiters and clerks, who have access only to non-gaming-related non-public areas are not required to obtain State certification. We interpret the 2003 Arizona Tribal-State Gaming Compact to accord with that intention.

3. THE AN RESTAURANT

Tribal employees, such as waiters, cooks, dishwashers and other persons who

work in the restaurants, gift shops and similar facilities located in the "Gaming Facility" parts of the Pasqua Yaqui complex, are "Gaming Employees" if their jobs give them access to kitchens or any other non-public area or areas of the Gaming Facility in which they work. Those employees are required to be licensed by the Tribal Gaming Office and, unless they are tribal members, they also need to be certified by the State if they have access to the gaming-related secure areas described in Compact Section 4(b). The employees of An's Restaurant, which is located entirely within the casino portion of the complex, do not, however, work directly for the Tribe. They are employed by An's, which leases the restaurant space from the Tribe.

The fact that the An's Restaurant employees are not Tribal employees is not, in our view, relevant to whether they should be considered to be "Gaming Employees." The Compact definition of "Gaming Employee" applies to any "person" whose employment duties give them access to certain areas of a "Gaming Facility," apparently regardless of whether the employee is employed by the Tribe or by a licensee of the Tribe. It would, we think, make no sense to exempt employees who work in a Gaming Facility from the category of Gaming Employee because they are employed by a Tribal licensee, rather than by the Tribe. The relevant factors should be what the employee does, and where the employee's job is located, rather than who may formally be the "employer." Indeed, there would appear to be more, rather than less, reason to require Tribal licensing and, when appropriate, State certification, of employees who are hired by someone other than the Tribe. We conclude that the

employees of An's Restaurant should be governed by the same licensing and certification requirements that apply to tribal employees who work in the parts of the complex that are "Gaming Facilities."

Section 2(r) of the Compact defines "Gaming Services" as:

the providing of any goods or services, except for legal services to the Tribe in connection with the operation of Class III Gaming in a Gaming Facility, including but not limited to equipment, transportation, food, linens, janitorial supplies, maintenance or security services for the Gaming Facility in an amount in excess of \$10,000 in any single month.

The Ans lease Gaming Facility space from the Tribe. They operate their restaurant in that space, in which they provide food service to Casino patrons. The definition of "Gaming Services" seems to be drafted primarily to apply to services that the Tribe purchases from the service provider. In the case of An's, the food services are not purchased by the Tribe, but by Casino patrons. If the Tribe, rather than Casino patrons, purchased the food from the Ans for service to Casino patrons within the Casino, and if the cost of that food was more than \$10,000 a month, the Ans would be providers of "Gaming Services" under the Compact. We see no reason why the same should not be true when the Casino patrons, rather than the Tribe, pay the Ans directly for the food they consume at the Restaurant, so long as the Restaurant's gross receipts are more than \$10,000 a month. As proprietors of a restaurant that operates within the "Gaming Facility" portion of the complex, the Ans are more closely connected with the Tribe's gaming operation than they would be as vendors of food to a restaurant that the

Tribe operated within the Casino.

As a provider of "Gaming Services," the Ans are required by Section 4(d) of the Compact to be licensed by the Tribal Gaming Office and certified by the State Department of Gaming. The Tribe seems not to take issue with these requirements. In its Answering Brief, the Tribe states that the An del Sol Restaurant, has "applied for State Certification as a vendor," Ans. Br. p. 29, n.5, without suggesting that that application was not necessary.

CONCLUSIONS

Our conclusions with regard to the questions that have been submitted to us are as follows:

1. The only portions of the Pasqua Yaqui Casino Del Sol complex that are "Gaming Facilities" within the meaning of the Arizona Tribal-State Gaming Compact are the original gaming facility, the convention center and the pre-function room. The hotel and spa, the pool, and all other portions of the resort complex are not "Gaming Facilities."
2. Employees of the complex whose jobs are not located in the "Gaming Facility" portions of the complex, and whose duties do not require or authorize access to non-public portions of "Gaming Facility" parts of the complex, are not "Gaming Employees" within the meaning of the Compact.

3. Employees of the complex whose jobs are not located in the "Gaming Facility" portions of the complex are "Gaming Employees" if their duties require or authorize access to non-public areas of the "Gaming Facility" portions of the complex.

4. Employees of the complex whose jobs are located in, or require or authorize access to, the portions of the complex that are "Gaming Facilities" are "Gaming Employees" within the meaning of the Compact if

(a) they are "Primary Management Officials" or "Key Employees," of the complex's "Gaming Operation," or

(b) they are otherwise directly employed in the operation or management of gaming activities, or

(c) they have access to non-public areas of the "Gaming Facility" portions of the complex.

Such employees, however, do not need to be certified by the State if their work is among the nine categories of jobs listed in Section 4(b) of the Compact, and if they do not have unescorted access to the gaming-related secure areas of the Gaming Facility that are described in Section 4(b).


5. With regard to the An Restaurant,


(a) Waiters and other personnel working at the An Restaurant are "Gaming Employees" within the meaning of the Compact.

(b) The Ans are providers of "Gaming Services" within the meaning of the Compact.

DATED THIS 23rd DAY OF APRIL, 2012.


Frank X. Gordon


Charles E. Jones


Paul Bender