

18TH ANNUAL WESTERN INDIAN  
GAMING CONFERENCE  
FEBRUARY 5TH – 7TH  
MORONGO CASINO, RESORT & SPA

Compacts of the Jerry Brown Administration:  
A Comparison to the Schwarzenegger Compacts  
and National Trends

# BROWN COMPACTS TO DATE

- ▶ THE TRANSITION COMPACTS
  - ▶ UPPER LAKE
  - ▶ PINOLEVILLE
- ▶ THE LITIGATION COMPACTS/ LAST BEST OFFERS
  - ▶ RINCON – SECRETARIAL PROCEDURES
  - ▶ BIG LAGOON
- ▶ THE GRATON COMPACT
- ▶ THE AMENDED COMPACTS
  - ▶ COYOTE VALLEY
  - ▶ SHINGLE SPRINGS
- ▶ THE COMPACTS FOR NEWLY ACQUIRED INDIAN LANDS
  - ▶ ENTERPRISE
  - ▶ NORTH FORK

# THE TRANSITION COMPACTS UPPER LAKE PINOLEVILLE

- ▶ INITIAL COMPACTS NEGOTIATED WITH THE SCHWARZENEGGER ADMINISTRATION WERE DISAPPROVED BY DOI ON GROUNDS THAT REVENUE SHARING WAS TOO RICH/ILLEGAL TAX AND COMPACTS OVERREACHED INTO NON-GAMING ISSUES
- ▶ BROWN ADMINISTRATION AGREED TO CHANGES THAT REDUCED AND REDIRECTED REVENUE SHARING FROM GENERAL FUND INTO SDF
- ▶ DOI ALLOWED BROWN REVISIONS TO GO INTO EFFECT AS “DEEMED APPROVED”
- ▶ DOI LETTERS EXPLAINING REASONS FOR DISAPPROVAL and “DEEMED APPROVED” ARE INSTRUCTIVE

# THE LITIGATION COMPACTS

## RINCON – SECRETARIAL PROCEDURES

- ▶ Federal Courts found Schwarzenegger demands to be an illegal tax on tribal gaming revenue and bad –faith negotiation
- ▶ United States waded in during Supreme Court review stage in support of Rincon and the Ninth Circuit opinion – United States’ Amicus brief is instructive
- ▶ Revenue sharing cannot be imposed on a Tribe
- ▶ State and Tribe can agree to revenue sharing if the State offers a “meaningful concession” to the Tribe outside of its good-faith obligations under IGRA if the price is commensurate with the value received

# THE LITIGATION COMPACTS

## RINCON – SECRETARIAL PROCEDURES

- ▶ Court Ordered Remedy: Submission of last-best offers to Mediator
- ▶ Brown Administration and Rincon negotiated and reached agreement on almost all points
- ▶ Minor differences were resolved by Mediator's selection of Rincon's Last Best Offer
- ▶ DOI issuance of Secretarial Procedures is imminent

# THE LITIGATION COMPACTS RINCON – SECRETARIAL PROCEDURES

## KEY PROVISIONS OF RINCON PROCEDURES:

- NO TAX ON GAMING REVENUE
- MAINTAINS RSTF PAYMENTS
- PRO RATA FEE OF ACTUAL & REASONABLE STATE REGULATORY COSTS
- INCREASE TO 2,250 MACHINES – NO LICENSE POOL
- EXTENSION OF TERM TO 2037
- 1999 TEMPLATE REMAINS REGARDING NON-ECONOMIC MATTERS
- NO MANDATORY AGREEMENT WITH COUNTY

# THE LITIGATION COMPACTS BIG LAGOON

- ▶ DISTRICT COURT FOUND BAD FAITH BASED ON ILLEGAL TAX – CITING RINCON
- ▶ STATE STRATEGY WAS TO REMOVE TAXATION ISSUE FROM LAST BEST OFFER AND FOCUS ON IMPOSING STRICT ENVIRONMENTAL PROVISIONS ON BIG LAGOON
- ▶ MEDIATOR REJECTED STATE'S LAST BEST OFFER IN STRONGLY WORDED OPINION
- ▶ STATE APPEALED: NINTH CIRCUIT DECISION IMMINENT
- ▶ CASE MAY BE VERY IMPORTANT REGARDING STATES' ABILITY/ INABILITY TO USE IGRA TO RESTRICT TRIBAL SOVEREIGNTY ON MATTERS NOT DIRECTLY RELATED TO GAMING

# THE LITIGATION COMPACTS

## PAUMA

- ▶ DISTRICT COURT FOUND PAUMA / SCHWARZENEGGER COMPACT TO BE RESULT OF MUTUAL MISTAKE OF FACT AS TO NUMBER OF LICENSES IN STATE-WIDE POOL
- ▶ DISTRICT COURT GRANTED TRIBE AN INJUNCTION PREVENTING STATE FROM COLLECTING GAMING TAX
- ▶ NINTH CIRCUIT REVERSED INITIAL DECISION BUT LEFT INJUNCTION IN PLACE ON REMAND
- ▶ CROSS-MOTIONS FOR SUMMARY JUDGMENT PENDING
- ▶ CASE IS ONE TO WATCH: UNLIKE RINCON, HERE THE TRIBE AGREED TO STATE TAXATION OF GAMING – DECISION COULD IMPACT ENFORCEABILITY OF EXISTING SCHWARZENEGGER COMPACTS
- ▶ BROWN ADMINISTRATION IS FIGHTING HARD TO DEFEND THE PAUMA/SCHWARZENEGGER COMPACT



# THE GRATON COMPACT: KEY PROVISIONS

- ▶ DOI issued “deemed approved” letter expressing concerns -instructive
- ▶ 3,000 MACHINES – NO LICENSE POOL
- ▶ EXPIRES IN 2033
- ▶ REVENUE SHARING INTO RSTF AND SDF
  - ▶ COMPLICATED WORK-OUT TO ACCOMMODATE LARGE NEAR-TERM DEBT – MOST CREDITS GONE AFTER THE EIGHTH YEAR
  - ▶ 15% OF GROSS REVENUE TIED UP IN FORMULAS
  - ▶ WATERFALL INTO DEBT SERVICE, THEN RSTF, THEN SDF
  - ▶ RSTF RATES START AT MACHINE 351
  - ▶ RSTF GRADUATED SCALE UP TO \$ 7K/MACHINE WITH POTENTIAL BIG BACK-END KICKER OF 25% OF NET WIN ABOVE \$418 MILLION
  - ▶ IF PROJECTIONS ARE CORRECT, GRATON COMPACT MAY RESOLVE ISSUE OF RSTF SOLVENCY

# THE GRATON COMPACT: KEY PROVISIONS

- ▶ SCHWARZENEGGER TEMPLATE RE NON-ECONOMIC TERMS
- ▶ MANDATORY AGREEMENTS WITH COUNTY AND CITY
  - ▶ BOTH AGREEMENTS WITH ROHNERT PARK AND WITH SONOMA COUNTY ARE NOW IN PLACE
  - ▶ THEY ARE VERY EXPENSIVE
- ▶ ARBITRATION AND IMMUNITY WAIVER REGARDING PATRON TORTS
- ▶ TROUBLING LANGUAGE ALLOWING STATE TO REPLACE RSTF WITH A 'MEANS TESTING' FUND'
  - ▶ LANGUAGE IN SUBSEQUENT COMPACTS MOSTLY RESOLVES ISSUE SUCH THAT 'MEANS TESTING' CAN ONLY BE USED ON ANY EXCESS ABOVE RSTF SOLVENCY

# THE AMENDED COMPACTS

## SHINGLE SPRINGS

- ▶ 2008 SCHWARZENEGGER COMPACT WAS SUCKING VIRTUALLY ALL REVENUE FROM TRIBAL TREASURY INTO STATE GENERAL FUND
- ▶ 2008 COMPACT WAS MOST EXPENSIVE OF ALL SCHWARZENEGGER COMPACTS: 20% - 25% OF NET WIN INTO STATE GENERAL FUND (MINUS \$ 5.2 MILLION CREDIT TO COUNTY/HOV LANE AGREEMENT)
- ▶ BROWN AMENDMENT (NOT YET RATIFIED) REDUCES RATE TO 15% BUT PROVIDES HUGE CREDITS TO PAY OFF DEBT AND LOCAL AGREEMENTS ON THE FRONT END – FIRST NINE YEARS
- ▶ MONEY PAID INTO SDF AND RSTF RATHER THAN GENERAL FUND
- ▶ NEW TERMS SUBJECT TO RENEGOTIATION OF COUNTY AGREEMENT/ MANAGEMENT AGREEMENT/ DEBT TO TERMS SATISFACTORY TO BROWN ADMINISTRATION

# THE AMENDED COMPACTS

## SHINGLE SPRINGS

- ▶ OTHER KEY CHANGES:
- ▶ REDUCES MACHINE LIMIT FROM 5,000 TO 3,000
- ▶ EXTENDS TERM FROM DECEMBER 2029 TO JUNE 2032
- ▶ CONTINUES SCHWARZENEGGER TEMPLATE ON NON-ECONOMIC TERMS EXCEPT THAT PATRON NOW HAS THE OPTION OF GOING TO TRIBAL COURT WITH DISPUTE
- ▶ FIRST COMPACT TO HAVE LANGUAGE THAT PREVENTS STATE REDIRECTING RSTF INTO A MEANS TESTING FUND UNLESS RSTF IS SOLVENT

# THE AMENDED COMPACTS

## COYOTE VALLEY

- ▶ WENT INTO EFFECT 12/14/2012 AS DEEMED APPROVED – NO EXPLANATORY LETTER
- ▶ COYOTE VALLEY SIGNED WITH SCHWARZENEGGER IN 2004 AFTER ULTIMATE LOSS IN BAD FAITH LITIGATION OVER 1999 COMPACT TERMS
- ▶ SUBSTANTIAL REDUCTION IN TAX RATE TO ACCOMMODATE TRIBE'S FINANCIAL/DEBT SITUATION
  - ▶ 2004 COMPACT TAX RATE 12% TO 25% OF NET WIN
  - ▶ BROWN AMENDMENT: 7% TO 15% OF NET WIN – FRONT END CONCESSIONS FOR SIX YEARS
- ▶ REDIRECTS MONEY FROM GENERAL FUND TO SDF
- ▶ REDUCED RATE SUBJECT TO BROWN ADMINISTRATION APPROVAL OF RENEGOTIATED DEBT
- ▶ MACHINE CAP REDUCED FROM 2,000 TO 1,250
- ▶ INCLUDES TROUBLING LANGUAGE ALLOWING RSTF TO BE REDIRECTED INTO MEANS TESTING FUND
- ▶ OTHERWISE MAINTAINS SCHWARZENEGGER TEMPLATE RE NON-ECONOMIC TERMS

# COMPACTS FOR NEWLY ACQUIRED INDIAN LANDS: ENTERPRISE & NORTH FORK

- ▶ Compacts in context of Gubernatorial Concurrence with Secretary's determination that the project is (1) in the best interest of the Tribe and (2) Not detrimental to the surrounding community
- ▶ Federal Courts just denied efforts to enjoin the projects pending litigation
  - ▶ DOJ briefs signal Patchak patch
  - ▶ Approvals hotly contested including lawsuits brought by opposing tribes and Stand Up for California – makes for strange bedfellows
- ▶ Governor's concurrence is a “meaningful concession” justifying taxation of tribal gaming revenue

# COMPACTS FOR NEWLY ACQUIRED INDIAN LANDS: ENTERPRISE & NORTH FORK

- ▶ KEY PROVISIONS
- ▶ TAX RATE UP TO 25% OF NET WIN IF REVENUE THRESHOLDS ARE REACHED
  - ▶ OTHERWISE 10 – 15% BUT WITH MAJOR CREDITS FOR LOCAL AGREEMENTS
  - ▶ MONEY INTO RSTF – COULD GREATLY CONTRIBUTE TO RESOLUTION OF THE RSTF SOLVENCY ISSUE
- ▶ 2,000 MACHINE LIMIT - NO LICENSE POOL
- ▶ COMPACTS EXPIRE 2033
- ▶ REVENUE CANNOT BE DIVERTED TO MEANS TESTING FUND UNLESS RSTF IS SOLVENT
- ▶ OTHERWISE EMBRACES SCHWARZENEGGER TEMPLATE ON NON-ECONOMIC TERMS

# TAKEAWAYS FROM BROWN COMPACTS

- ▶ BROWN'S PRO-TRIBAL SUBMISSION OF ITS LAST BEST OFFER IN RINCON LITIGATION IS AN ANOMALY
- ▶ BROWN ADMINISTRATION SEEKS 15% AGGREGATE TAX ON TRIBAL GAMING
  - ▶ WILLING TO MAKE MICROECONOMIC DECISIONS TO ACCOMMODATE A SPECIFIC TRIBE'S FINANCIAL POSITION – GREAT FRONT END CONCESSIONS IN GRATON/ SHINGLE SPRINGS/ COYOTE VALLEY, FOR EXAMPLE
  - ▶ COMES WITH GOVERNOR MICRO-MANAGEMENT OF FINANCE DECISIONS
  - ▶ MASSIVE IMPROVEMENT OVER SCHWARZENEGGER, BUT STILL A TAX
- ▶ BROWN ADMINISTRATION IS COMMITTED TO RSTF SOLVENCY
  - ▶ ABANDONS SCHWARZENEGGER AGENDA TO PUMP DOLLARS INTO GENERAL FUND
  - ▶ MORE CONCERNED WITH RSTF SOLVENCY THAN SDF



# TAKEAWAYS FROM BROWN COMPACTS

- ▶ BROWN ADMINISTRATION IS ABANDONING REQUIREMENT FOR STATE-WIDE MACHINE CAP AND USE OF LICENSING POOL
- ▶ BROWN ADMINISTRATION SHOWS FLEXIBILITY ON NEGOTIATING MACHINE CAPS TO REALISTICALLY REFLECT THE SPECIFIC TRIBE'S MARKET SITUATION
- ▶ BROWN ADMINISTRATION SURPRISED MANY WITH BOLD MOVE OF CONCURRENCE WITH NORTH FORK AND ENTERPRISE
  - ▶ IS THIS AN ANOMALY?
  - ▶ WATCH MANZANITA (CALEXICO) and LOS COYOTES (BARSTOW) and CRIT (BLYTHE)

# TAKEAWAYS FROM BROWN COMPACTS

- ▶ BROWN COMMITTED TO DEFEND SCHWARZENEGGER TEMPLATE FOR NON-ECONOMIC TERMS
  - ▶ SOME FLEXIBILITY WITH MANDATORY COUNTY AGREEMENTS BY PROVIDING CREDITS IN STATE TAX PAYMENTS
  - ▶ SOME FLEXIBILITY IN REQUIRING COUNTY CONCESSIONS WHERE FRONT-END CREDITS ARE PART OF COMPACT RENEGOTIATION
  - ▶ NOT MUCH FLEXIBILITY IN PATRON TORT DISPUTES
  - ▶ HARD LINE ON ENVIRONMENTAL ISSUES – BIG LAGOON
  - ▶ SOME FLEXIBILITY IN DEFINING “PROJECT” AND “GAMING FACILITY”
    - ▶ DOI HAS BEEN QUITE CRITICAL OF OLD DEFINITIONS
- ▶ BROWN AGENDA TO CREATE A MEANS TESTING FUND
  - ▶ ADJUSTMENTS TO LANGUAGE FROM EARLY COMPACTS TO RECENT COMPACTS EVIDENCES AGENDA TO SOLVE RSTF SOLVENCY FIRST
  - ▶ LANGUAGE INDICATES THAT IF TRIBES CANNOT RESOLVE THE EQUITY POLICY ISSUES REGARDING THE RSTF, THE STATE WILL IMPOSE ITS OWN POLICY CALLS

# OTHER ISSUES TO WATCH IN 2013

- ▶ WILL OTHER TRIBES WITH SCHWARZENEGGER COMPACTS FILE SUITS SIMILAR TO PAUMA?
- ▶ WILL GOVERNOR BROWN NEGOTIATE WITH THOSE TRIBES WITH 1999 PROPOSITION 1A COMPACTS?
- ▶ WILL DOI TAKE A HARDER LINE ON GAMING TAX ISSUES?
  - ▶ SEE THE MASHPEE REJECTION LETTER
- ▶ WILL DOI TAKE A HARDER LINE ON MATTERS NOT RELATED TO GAMING
  - ▶ SEE THE MASHPEE REJECTION LETTER AND THE PINOLEVILLE “DEEMED APPROVED” LETTER AND THE PASCUA YAQUI CLARIFICATION LETTER