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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

**The State of Arizona; The Gila River
Indian Community**, a federally recognized
Indian tribe; and **The Salt River Pima-
Maricopa Indian Community**, a federally
recognized Indian tribe,

Plaintiffs,

v.

The Tohono O'odham Nation, a federally
recognized Indian tribe,

Defendant.

No. CV11-00296-PHX-DGC

**PLAINTIFFS' REPLY IN
SUPPORT OF THEIR CROSS-
MOTION FOR SUMMARY
JUDGMENT**

Oral Argument Set for April 9, 2013, at
2:00 p.m.

(Assigned to the Hon. David G.
Campbell)

INTRODUCTION

From February to November 2002, AIGA Tribes (including the Nation) and Governor Hull and her staff worked together to promote the proposed compacts, explaining to the legislature and the public that the compacts would prevent additional casinos in the Phoenix metropolitan area and would allow only one more casino in the Tucson metropolitan area. The Nation does not dispute that the spokesman for it and the other AIGA Tribes, David LaSarte, made many such statements, that it was aware of these statements, and that it provided funds used to distribute them in written form. Nor does it dispute that the Nation's then-Chairman has agreed on the record with one of these statements by Mr. LaSarte, made to the Arizona Senate in March 2002.

These statements were based on the heavily negotiated scope of gaming chart that appears in Section 3(c)(5) of the Compact and the additional restriction on the Nation that appears in Section 3(c)(3). These contractual provisions show the tribes organized according to the markets in which they were conducting gaming (rural, Phoenix, Tucson); the Phoenix market tribes each losing the right to construct any additional facilities; one Tucson-area tribe (Pascua Yaqui) also giving up its right to build an additional casino; and the other Tucson-area tribe, the Nation, retaining the right to open an additional casino (so long as one of its four casinos remained in a rural location). That this interpretation was expressed so extensively and consistently in the months leading up to the Compact's execution establishes not only that the Compact is reasonably susceptible to this reading, but also that this was the meaning attached to it by all the parties. This is conclusive under Restatement (Second) Contracts § 201, and supports summary judgment for the Plaintiffs.

Moreover, this meaning of the Compact is evident on its face. Section 3(c)(3) restricts one of the Nation's 3(c)(5) facility authorizations to a rural location but expressly excludes it only from the "Tucson metropolitan area." No similar language excluding the Phoenix metropolitan area was necessary to ensure the casino's rural nature, suggesting that the Nation's 3(c)(5) authorizations were only for Tucson, not Phoenix. This fits exactly the AIGA Tribes' representations that the Nation's one unbuilt casino could not be

1 located in the Phoenix area but might be located in the Tucson area.

2 Now, over a decade later, the Nation argues not just that the AIGA Tribes' public
3 statements misconstrued the Compact, but that they have *absolutely no textual basis in*,
4 and in fact *contradict*, the Compact. Neither of these extreme assertions can stand,
5 whether viewed in light of the Compact's language or the extrinsic evidence.

6 In addition, the Nation fails to show not only that the Gila Bend Act qualifies as a
7 settlement of a land claim under IGRA, but even that it should be permitted to advance the
8 argument. Whether by waiver, judicial estoppel, or simply being wrong as a matter of law,
9 the Nation may not conduct gaming on the Glendale parcel without a two-part
10 determination, and therefore the proposed casino violates the Compact.

11 **I. THE NATION'S SECTION 3(c)(5) GAMING FACILITIES ALLOCATION**
12 **INCLUDES NO AUTHORIZATION FOR THE PHOENIX MARKET**

13 **A. Under Section 24 of the Compact and the Restatement (Second) of**
14 **Conflict of Laws, Arizona Law Governs Contract Interpretation**

15 **1. The Court Must Apply Section 24 Rather than Bypass It**

16 In Section 24, the parties chose to have their contract governed by traditional
17 conflict principles for determining the applicable law, specifying three sources for the
18 analysis: "This Compact shall be governed by and construed in accordance with the
19 applicable laws of the United States, and the Nation and the State." Compact § 24. This
20 provision directs the court to determine the "applicable" law for a particular issue using
21 the traditional Restatement principles for resolving conflicts. The law of the state with the
22 most significant relationship to the issue governs its disposition.

23 At this point, this straightforward interpretation of Section 24 is the only one being
24 offered to the Court. In its opening brief, the Nation offered its own interpretation,
25 construing the term "applicable" to refer to the laws that would otherwise apply in the
26 absence of the provision, which, it argued, included a default rule requiring the application
27 of federal law to interpret tribal-state compacts. Thus, it argued, "the 'applicable' law
28 governing [the Compact's] construction is the law of the United States." N. Mot. (Doc.

1 193) 31.¹ But in its reply the Nation abandons any specific interpretation of Section 24
 2 and instead simply dismisses it as being insufficiently clear to *displace* what the Nation
 3 says is the default rule. N. Opp. (Doc. 203) 22. According to the Nation, a blanket default
 4 rule should require that federal law govern the interpretation of all tribal-state compacts,
 5 unless the parties “clearly elect” some other law by making “a clear contrary choice.” N.
 6 Opp. 22, 21.

7 The total lack of authority for this argument is striking. No such “clear statement”
 8 rule exists for tribal-state compacts generally, or IGRA compacts specifically. *Cachil* and
 9 *Muhammad* set forth no such rule.² And IGRA forecloses it. Although IGRA specifically
 10 designates a federal forum and expressly provides jurisdiction in actions such as this one,
 11 *see* 25 U.S.C. § 2710(d)(7)(A), it says nothing about requiring federal law to govern
 12 compact interpretation. That is no accident. IGRA leaves to the states and tribes
 13 themselves the negotiation of the terms of their compacts and the determination of the law
 14 by which they wish their compacts to be interpreted. *See Confederated Tribes of Siletz*
 15 *Indians v. Oregon*, 143 F.3d 481, 485 (9th Cir. 1996). The Nation’s assertion that the
 16 particular “terms of the compacts” (N. Opp. 21) are a matter of federal importance is
 17 completely unsupported. The existence and enforceability generally of tribal-state
 18 compacts are matters of federal concern, but the particular terms of those compacts are
 19 not. The Secretary has no power to negotiate these terms, and is allowed to disapprove a
 20 compact only if it violates federal law or federal trust duties. *See* 25 U.S.C. § 2710(d)(8).
 21 If there were an overriding federal interest in interpreting all IGRA compacts in

22
 23 ¹ Page numbers are those appended by the ECF system at the top of each page.

24 ²Moreover, the Nation admits that it is citing mere dicta from *Cachil*: it speculates
 25 in the conditional tense that *if* California law had differed from federal law, “it seems
 26 clear that the court *would have* applied federal law.” N. Opp. 21-22 n.10 (emphasis
 27 added). Nobody knows what the court might have decided had the issue been presented
 28 and briefed in the context of a consequential controversy over the issue. Also, the
 Nation’s attempt to distinguish the dicta in *Wilson v. Marchington* because it “might not
 have been referring to IGRA compacts at all” (N. Opp. 21-22 n.10) is ineffective because
 the Nation does not limit its own argument or rationales to IGRA compacts (tribes and
 states are just as sovereign when entering tribal-state compacts pursuant to other federal
 statutes). *See* N. Opp. 21.

1 accordance with federal law, Congress would have said so when it provided a federal
2 forum.

3 Nor do tribes or states have any inherent interest in applying federal law to the
4 interpretation of all tribal-state compacts, especially where, as here, the Nation has
5 identified no conflict between the Nation's law and Arizona law. In such circumstances, a
6 default federal rule hardly gives expression to state or tribal sovereignty. And, as in its
7 opening brief, the Nation can cite no authority for its inapt analogy to interstate compacts.
8 N. Opp. 21.

9 In sum, there is no "clear choice" test for enforcing choice-of-law clauses in tribal-
10 state compacts, and there is no authority for this Court to set aside Section 24. The
11 question is "how [Section 24] should be applied by the Court," Order Dated June 15, 2011
12 (Doc. 43) at 13, not whether to apply it at all.

13 The Nation argues that Plaintiffs' definition of Section 24 is a nullity, relying on the
14 premise that "a traditional conflict-of-laws analysis . . . would apply in the absence of any
15 choice-of-law clause." N. Opp. 22. If the Nation concedes that premise, then its argument
16 is unnecessary because the parties agree that there is no default federal rule and the
17 Restatement governs. Even so, Plaintiffs' reading of Section 24 still is not a nullity. The
18 parties locked in place a traditional conflicts analysis and specified three sources,
19 intending to eliminate the risk that any different rule might be applied. By contrast, in its
20 opening brief the Nation interpreted "applicable" as referring generically to any and all
21 default rules that might otherwise be applied at some future point, rather than as fixing on
22 any specific rule *ex ante* to avoid uncertainty. N. Mot. 30-31. Such a clause, by its nature,
23 would always be superfluous.

24 In any event, applying a federal default rule would contradict controlling authority.
25 The Nation cites no authority to distinguish *Empire Healthchoice Assurance v. McVeigh*,
26 547 U.S. 677 (2006), and its predecessors. N. Opp. 22-23 n.11. The Nation argues that
27 these cases apply state law only to "conduct . . . ordinarily regulated by state law," rather
28 than to "activity" that "is inherently federal," which it defines here as "Class III gaming on

Indian lands.” *Id.* This contravenes the reasoning of *Empire* itself, which requires an actual, significant conflict between federal policy and state law rather than mere characterization of an activity as “inherently federal.” *Empire* explained that the dissent’s focus on the “pervasively federal” nature of “FEHBA contracts at large” was incorrect and that the proper analysis turned on the narrow issue of “reimbursement” —in particular, whether state law of reimbursement conflicted significantly with a specific federal policy. 547 U.S. at 692-93. Likewise, here, the Nation improperly frames the issue as “Class III gaming on Indian lands” at large, rather than the contract interpretation rules applicable to an IGRA compact. The Nation does not and cannot identify any specific federal policy that the use of state law to govern contract interpretation would impair. *See Siletz*, 143 F.3d at 485.

2. Under the Restatement, Arizona Law Is the Applicable Law for Contract Interpretation

“Applicable” law is determined on an issue-by-issue basis, applying the contacts listed in Restatement § 188. The state with the most significant relationship to the issue of admitting extrinsic evidence during contract interpretation is Arizona—it is where the negotiations took place and it is a party to the compact. The Nation does not dispute the obvious importance of the law of the state where negotiations occurred in determining whether those negotiations are admissible. And it does not contest that at least two of the five contacts in § 188—the place of negotiation and the domicil/ residence/ nationality of the parties—favor application of Arizona law. The federal government had no role in the negotiations and is not a party to the Compact.

The Nation attempts to transform two other contacts—the place of performance and the location of the subject matter—into abstract jurisdictional contacts, arguing that under the Restatement “these factors are concerned with identifying the forum³” with

³ To be clear, the term “forum” in the field of conflict of laws usually refers to the court in which suit is filed, the court with the task of adjudicating the choice of law. *See* “Forum state,” *Black’s Law Dictionary* 726 (9th ed. 2009). The more appropriate term here would be “state.” *See* Rest. 2d. Conf. § 3. But in any event, the argument is wrong.

1 *jurisdiction* over the performance” rather than the physical location. N. Opp. 24. Such an
 2 approach would merely beg the question because Arizona, the Nation, and the United
 3 States all have some degree of jurisdiction over Indian gaming on the Nation’s lands.
 4 Moreover, rather than speak in abstract jurisdictional terms, the Restatement refers
 5 specifically to “place” and “location,” and discusses interests arising from the physical
 6 location of land. With respect to subject matter, it explains, “When the contract deals with
 7 a specific physical thing, such as land or a chattel, . . . the location of the thing . . . is
 8 significant. The state where the thing is located will have a natural interest in transactions
 9 affecting it.” Rest. 2d Confl. § 188 cmt. e. The Restatement also describes the “place of
 10 performance” as “the state where performance is to occur,” with no reference to
 11 jurisdiction. *Id.* The Nation does not dispute that under an analysis of physical “location”
 12 or “place,” both factors favor Arizona law.

13 The Nation quibbles with being treated with Arizona as a single state in this
 14 analysis, arguing that its courts would have no obligation to follow Arizona law. N. Opp.
 15 23. But the reference to Arizona law in the Nation’s Code § 1-102 is the clearest (and
 16 only) indication of what rule the Nation’s courts would apply. The Nation offers nothing
 17 to the contrary. When there is no conflict between the laws of two states in a multi-state
 18 conflicts analysis, those two states are treated as a single state under § 188. *See* Rest. 2d
 19 Confl. § 186 cmt. c. The ultimate question, when grouping states in this manner, is
 20 whether, “[t]aking the laws of each state as a whole, there is [any] conflict between them
 21 with reference to these facts.” Robert A. Leflar, *True “False Conflicts,”* 48 B.U.L. Rev.
 22 164, 173 (1968) (cited by the Restatement as support for § 186 cmt. c). The Nation
 23 identifies no such conflict here between Arizona and the Nation. In any event, even if
 24 § 1-102’s reference to Arizona law is disregarded, and the Nation is treated as having no
 25 law at all on the issue, then the result is the same because the Nation drops out of the
 26 analysis entirely. Section 24 would still require a binary choice between Arizona law and
 27 federal law. The place of performance and the location of the subject matter would favor
 28 Arizona rather than both Arizona and the Nation, and Arizona law would still govern,

1 under either the two dispositive factors in § 188(3) or the five in § 188(2).

2 The contact that the Nation emphasizes above all others, the place of contracting, is
 3 unimportant and inconsequential here. “Standing alone, the place of contracting is a
 4 relatively insignificant contact,” except with respect to “issues involving the validity of a
 5 contract.” Rest. 2d. Confl. § 188 cmt. e. The choice of law issue here, contract
 6 interpretation, has nothing to do with the validity of the Compact. The Nation’s emphasis
 7 on the Secretary of the Interior’s role might matter if the question were what law to apply
 8 to determine validity. Here, other contacts such as the place of negotiation merit the most
 9 emphasis. In any event, as it relates to contract interpretation, the place of contracting is
 10 at best neutral for the Nation, given that offer, acceptance, and execution occurred in
 11 Arizona and that the Compact gives state law a role in making the Compact effective, *see*
 12 § 2(vv)(1).⁴ Regardless, under §188(2) or § 188(3), Arizona law applies.

13 **B. Under Arizona Law, Sections 3(c)(3) and 3(c)(5), Read Together with the**
 14 **Extrinsic Evidence in Hand, Support Summary Judgment for Plaintiffs**

15 **1. The Nation Fails to Address the Interaction Between Sections**
 16 **3(c)(3) and 3(c)(5)**

17 When the Nation argues that the Plaintiffs’ interpretation is “untethered” to any
 18 language in the Compact, N. Opp. 9, it fails to address the language on which Plaintiffs
 19 rely—namely, Sections 3(c)(3) and 3(c)(5), read together. Section 3(c)(3) expressly refers
 20 to the “Tucson metropolitan area” as a market within which the Nation is operating
 21 casinos and from which one of the four casinos authorized in Section 3(c)(5), its rural
 22 casino, is excluded. When Sections 3(c)(3) and 3(c)(5) are read together, they raise a
 23 question that the Nation fails to address: Why, when 3(c)(3) is intended to restrict one of
 24 the Nation’s casinos in 3(c)(5) to a rural location, does it expressly exclude the casino
 25 from only the *Tucson* metropolitan area? Why is exclusion from the Phoenix metropolitan
 26 area not mentioned? The answer is that in drafting 3(c)(3) an express exclusion from the

27 ⁴ The Nation quotes the Secretary’s objections to Section 2(vv)(1), but the
 28 Secretary does not have the power to excise that provision and did not purport to do so.
 The Secretary has the power only to approve or disapprove the Compact as a whole, and
 that provision is in the Compact.

1 Phoenix market was not necessary because the “allocation” in Section 3(c)(5) authorizes
 2 the Nation to locate casinos within only one urban market—Tucson.

3 This question looms large for the Nation because Sections 3(c)(3) and 3(c)(5) play
 4 a critical role in the Compact’s authorizing structure. Without them, there is no
 5 authorization of Class III gaming. Section 3(a) authorizes certain “Class III Gaming
 6 Activities” as a general matter, “[s]ubject to the terms and conditions of this Compact.”
 7 One of those terms and conditions is that such activities must be in an authorized Gaming
 8 Facility. *See* § 2(n) (“‘Gaming Facility’ means the buildings or structures in which Class
 9 III Gaming, as authorized by this Compact, is conducted.”). Only Sections 3(c)(3) and
 10 3(c)(5) authorize such facilities. Under Section 3(c)(3), every casino and every slot
 11 machine in Arizona must, in order to be authorized, appear within the numbers in the chart
 12 in Section 3(c)(5). “The Tribe *may operate* Gaming Devices *in the number of Gaming*
 13 *Facilities in column (3) or (4)* of the Tribe’s row in the Table [in 3(c)(5)], whichever is
 14 lower, but shall not operate more than its Maximum Devices per Facility in any one
 15 Gaming Facility” (emphasis added). Section 3(c)(3) goes on to limit further the location
 16 and scope of one of the Nation’s four authorizations in Section 3(c)(5), requiring that it
 17 “be at least fifty (50) miles from the existing Gaming Facilities of the tribe in the Tucson
 18 metropolitan area,” and have only 645 machines and 75 tables.

19 From the text of Section 3(c)(3), it is apparent that this restriction is intended to
 20 require a rural, reduced-capacity facility; the Nation admits as much. N. Mot. 16-17; N.
 21 Opp. 28-29 & n.14; Ex. 24 (Nation) 85:8-14. Because the language of 3(c)(3) excludes
 22 the casino from only the Tucson metropolitan area, a person reading that restriction would
 23 expect to see in Section 3(c)(5) a listing of market groupings that gives the Nation rights
 24 to operate Gaming Facilities only in the Tucson market. And that is what one finds,
 25 although the headings for each of the market areas and the spacing between them no
 26 longer appear. It is the missing headings and spacing, as well as the draft footnotes about
 27 parity in each of the urban market groupings (which appeared through most of the
 28 negotiations and were removed only in the final draft), *see, e.g.*, SOF (Doc. 199) ¶ 107;

1 Ex. 47-58, that create ambiguity in what would otherwise unambiguously show that the
 2 Nation's authorizations are in the Tucson market. But in any event the surviving language
 3 in the Compact makes those market groupings inferable—the rural restriction in Section
 4 3(c)(3) that fails to mention Phoenix; the ordering of the tribes in Section 3(c)(5) in rural,
 5 Phoenix, and Tucson groupings; and the labeling of Section 3(c)(5) as an “allocation” of a
 6 limited supply. Thus, Section 3(c)(5) does speak to the geographic market location of the
 7 facilities authorized. Otherwise, the language in 3(c)(3) further limiting the location of
 8 one of the Nation's four casinos to 50 miles outside Tucson would be out of place (under
 9 the Nation's logic, it should appear in Section 3(j)(1)).

10 The proper interpretation of Section 3(c)(5) as a market-based allocation of devices
 11 and machines is inferable on the face of the Compact even under a federal standard for
 12 ambiguity (see section I.C., *infra*), but it is inescapable with the extrinsic evidence in
 13 hand. The prior drafts show that the Phoenix-market tribes negotiated for “parity” in
 14 machine and device numbers within that market to arrive at the numbers in the chart, and
 15 that the Tucson-market tribes did the same for their market. See SOF ¶¶ 96-101. In light
 16 of this evidence, to which the Nation has no answer, the “reasonably susceptible”
 17 threshold is easily met.

18 Instead of addressing the interaction of Sections 3(c)(3) and 3(c)(5), the Nation
 19 atomizes the Compact. It initially focuses on Section 3(c)(5), arguing that it says nothing
 20 about location (ignoring the interaction between the reference to location in 3(c)(3) and
 21 3(c)(5)). N. Opp. 24. It then turns to the location restriction in 3(c)(3), noting that its
 22 existing rural facility at Why complies with 3(c)(3)'s terms. N. Opp. 28. But that is not
 23 responsive to Plaintiffs' point about the significance of Section 3(c)(3)'s wording. The
 24 question in this case has never been *compliance* with the restriction in Section 3(c)(3); the
 25 point rather is what the wording of that restriction reveals about Section 3(c)(5). It shows
 26 that the Gaming Facility authorizations allocated to the Nation in Section 3(c)(5), without
 27 which the Nation cannot conduct gaming, are for facilities in the Tucson market.

28 The Nation simply refuses to address Sections 3(c)(3) and 3(c)(5) *together* in the

1 context of the whole agreement. It appears to argue that when determining whether a
 2 contract is “reasonably susceptible” to an interpretation, it is impermissible to look at the
 3 contract as a whole and to draw inferences based on how various provisions relate to each
 4 other. N. Opp. 30-31. The Nation’s apparent position is that there must be one “specific
 5 term or phrase” upon which all interpretation arguments depend. N. Opp. 31. There is no
 6 authority for such a rule.

7 The two cases on which the Nation relies do not support its atomizing approach. In
 8 both cases courts held that the excluded extrinsic evidence would actually vary or
 9 contradict an agreement.⁵ Here, by contrast, actual language in the Compact—the
 10 restriction in 3(c)(3)—shows that the drafters treated Section 3(c)(5) as a market-based
 11 allocation. The extrinsic evidence only illuminates and confirms this reading.

12 The interaction of Sections 3(c)(3) and 3(c)(5) makes this a relatively easy case for
 13 admitting extrinsic evidence. By contrast, a harder case was *Johnson v. Cavan*, 733 P.2d
 14 649, 651-52 (Ariz. App. 1986), where the court held that in light of extrinsic evidence,
 15 lease language letting “Suites 117 through 120,” but saying nothing about parking spaces,
 16 should be interpreted to include certain parking spaces as well. The court relied on what
 17 the parties knew when the relevant contracts were signed. Because both parties to the
 18 lease “assumed and intended that the parking spaces be a part of the lease,” and the
 19 assignee lessors (appellees) “were on notice of appellant's claim of an exclusive right to
 20 use the parking spaces for his business,” they “were obligated to inquire of appellant by
 21 what right or title he claimed possession. They could not rely solely upon the silent lease
 22 to resolve the uncertainty about parking spaces.” *Id.*

23 Another reason for admitting extrinsic evidence here is the Nation’s failure to
 24

25 ⁵ In *Velarde v. Pace Membership Warehouse*, 105 F.3d 1313, 1317 (9th Cir.
 26 1997), an employer attempted to prove an additional condition precedent to a bonus
 27 payment, which would have directly contradicted the sole and exclusive condition “as
 28 long as you work through the date specifi[ed] above.” In *Long v. City of Glendale*, 93
 P.3d 519, 528 (Ariz. Ct. App. 2004), the court held that a requirement in a deed that
 land be used as a city’s “primary municipal airport” would be “unavoidably change[d]”
 by an additional requirement that a second runway be built.

1 explain why its interpretation even makes sense—why tribes with casinos in the Phoenix
 2 market would agree to reduce their facility authorizations while simultaneously allowing a
 3 Tucson tribe to enter the market to take advantage of the reduction. The Nation does not
 4 dispute that the Court must avoid an interpretation that “no reasonable party would have
 5 assented to,” but offers no answer to the parallels between *Burkons* and this case, *see* N.
 6 Opp. 31 n.16; Pl. Mot. (Doc. 198) 27-28 (discussing *Burkons v. Ticor Title Ins. Co.*, 813
 7 P.2d 710, 715-16 (Ariz. 1991)). The Nation is forced to claim that its reading of the
 8 Compact is “inexorabl[e],” N. Opp. 30, because the extrinsic evidence shows that its
 9 reading makes no sense and was never intended.

10 In the end, the question of interpretation can be reduced to a straightforward
 11 application of Restatement (Second) of Contracts § 201. The Nation fails entirely to
 12 respond to § 201(1): “Where the parties have attached the same meaning to a promise or
 13 agreement or a term thereof, it is interpreted in accordance with that meaning.” It does not
 14 dispute that AIGA was composed of its member tribes (including the Nation), that David
 15 LaSarte acted as spokesperson for the AIGA tribes, and that it was important to the
 16 Nation’s Chairman Manuel that LaSarte speak accurately. N. Con. (Doc. 204) ¶¶ 30, 49.
 17 The Nation also does not dispute that LaSarte publicly stated many times that the
 18 Compacts would not permit additional casinos in Phoenix. *See, e.g.*, N. Con. ¶¶ 148-150;
 19 154; 191. Although the Nation dismisses those public statements as “bullet-point
 20 summar[ies]” that “fail[ed] to take into account the possibility of” the Nation’s concurrent
 21 secret plan to locate a casino in West Phoenix, N. Opp. 34, the Nation was one of those
 22 AIGA Tribes. It is undisputed that Chairman Manuel has agreed on the record with at
 23 least one of these statements made to the Arizona Senate. N. Con. ¶ 154. And neither
 24 Chairman Manuel nor any other representative of the Nation ever expressed disagreement
 25 with any similar statements by LaSarte or others. N. Con. ¶ 196.⁶ In fact, it is undisputed
 26

27 ⁶ It is also undisputed that the Nation’s current Chairman derided other
 28 propositions competing with Proposition 202 because they would “open gaming into
 cities,” rather than “keep gaming on the reservation.” N. Con. ¶ 182.

1 that no one, not even opponents of Proposition 202, ever expressed disagreement with this
 2 interpretation. N. Con. ¶ 194. What the Nation may have believed privately is irrelevant
 3 to this analysis. *See* Rest. 2d Contr. § 212 cmt. a.⁷

4 The Nation argues that such statements are not probative because they “were made
 5 after the Compact negotiations concluded and thus shed little light on the intention of the
 6 parties at the time the contract was made.” N. Opp. at 34. To the contrary, these
 7 consistent and pervasive statements were made in the period immediately preceding the
 8 Compact’s execution in December 2002. They are highly probative of the meaning
 9 attached by all parties to the Compact.

10 Restatement § 201(2) compels a similar conclusion because the Nation knew of
 11 many other statements to the same effect by the State and other tribes. *See, e.g.*, N. Con.
 12 ¶¶ 142-147; 151-153; 156-158; 168-169; 189-193. In an attempt to avoid § 201(2), the
 13 Nation postulates a distinction between the “proper interpretation of the Compact” and
 14 “the consequences of the Compact’s provisions.” N. Opp. 34-35 n.20. This artificial
 15 distinction has no support in the law, and the Nation cites none. It is contradicted by the
 16 language of § 201 itself, which applies to “meanings” that are “attached . . . to a promise
 17 *or agreement* or a term thereof.” There is no distinguishing the “meaning” of an
 18 “agreement” as a whole from its operation in practice.

19 **2. Plaintiffs’ Interpretation Does Not Conflict with any Other** 20 **Provision, Particularly in Light of the Extrinsic Evidence**

21 The Nation attempts to exclude extrinsic evidence under Arizona law by arguing
 22 that the evidence of market-based allocations in Section 3(c)(5), clarifying the ambiguity
 23 in Sections 3(c)(3) and 3(c)(5), would “vary or contradict” the rest of the Compact. N.
 24 Opp. 30. But the Court must make this determination in view of the extrinsic evidence—
 25 evidence that the Nation again ignores in its analysis. *See* Pl. Mot. 28; N. Opp. 30. That
 26 evidence shows, for example, that an authorized spokesman for the Nation and the other

27 _____
 28 ⁷ This undisputed proof of statements by the AIGA tribes’ spokesman makes it unnecessary to resolve disputes over statements by the Nation’s own officers.

1 AIGA tribes made public statements supporting Plaintiffs' interpretation of this same
 2 language. *See, e.g.*, SOF ¶¶ 148, 150, 154, 168-169. It also shows that the headings and
 3 spacing in Section 3(c)(5) were removed for clerical, not substantive, reasons and that the
 4 "parity" footnotes were removed only at the end of negotiations. SOF ¶¶ 101-102, 105,
 5 107. This evidence shows that the Plaintiffs' interpretation is consistent with and does not
 6 vary the rest of the agreement.

7 Nor is there any contradiction on the face of the agreement. The Nation confuses
 8 the issue of whether Section 3 of the Compact as a whole is an authorization of gaming (it
 9 is) with whether Section 3(j)(1) is an authorization of gaming anywhere it is legal under
 10 IGRA (it is not). Section 3(a) authorizes certain gaming *activities*, but only "[s]ubject to
 11 the terms and conditions of this Compact." Those activities must occur within a "Gaming
 12 Facility," § 2(n), and Gaming Facilities are authorized only by Sections 3(c)(3) and
 13 3(c)(5). *If* a Gaming Facility is authorized under those sections, it must also satisfy
 14 additional terms and conditions. One such further requirement is the necessary (but by no
 15 means sufficient) condition in Section 3(j)(1) that "[a]ll Gaming Facilities shall be located
 16 on the Indian Lands of the Tribe." It is entirely consistent with this restriction to read the
 17 prior authorizations in Sections 3(c)(3) and 3(c)(5) as limited to particular markets,
 18 particularly where 3(c)(3) already places a further geographical limitation on one of the
 19 Nation's casino authorizations in 3(c)(5). Under Section 3(j)(1), no Gaming Facility
 20 authorized under Sections 3(c)(3) and 3(c)(5) can be located outside a tribe's Indian
 21 Lands. But it is not true, as a matter of logic or exegesis, that all Gaming Facilities
 22 "located on the Indian Lands of the Tribe" are necessarily authorized under Sections
 23 3(c)(3) and 3(c)(5). Indeed, the Nation admits, as it must, that compliance with IGRA is
 24 not sufficient, and that there are other location requirements, even under its own reading
 25 of the Compact. *See* N. Opp. 20 ("the Compact's plain terms, . . . *with irrelevant*
 26 *exceptions*, expressly permit gaming wherever IGRA allows it.") (emphasis added). Thus,
 27 the Nation cannot identify a single provision of the Compact that would be negated by
 28 Plaintiffs' reading of Sections 3(c)(3) and 3(c)(5).

3. Extrinsic Evidence Not Only Supports but Compels Plaintiffs' Interpretation

The Nation argues that the extrinsic evidence would not even “permit” the Court to read the Compact how Governor Hull and all 17 AIGA tribes read it during 2002. N. Opp. 32. But, as noted above, the Nation does not dispute the facts that support judgment for Plaintiffs under Restatement § 201(1) or § 201(2). Many other facts lead to the same conclusion. The Nation’s attempts to contest a few of them warrant brief mention.

The Nation admits that it never attempted to take part in the negotiations over the number of facilities and machines in the Phoenix market. It argues, however, that it had no reason to do so “because the Compact’s terms expressly authorized” the Nation to operate in the Phoenix area “and did not confine any tribe to a specific ‘market.’” N. Opp. 32. But “the Compact’s terms” had not yet been drafted at the time—that was the whole point of the market-group negotiations. Based on the declaration of one witness, the Nation claims that Phoenix and Tucson market-group negotiations never occurred, but this assertion does not raise a genuine issue of material fact because it is refuted by overwhelming evidence, including the same witness’s contemporaneous memorandum to the file.⁸ The Nation also argues that during negotiations there were not fixed numbers of devices to be allocated to each market, N. Opp. 33, but that is not what Plaintiffs aver. The tribes who negotiated for devices and machines in the Phoenix market arrived at the final allocations in the chart for that market over time. *See* SOF ¶¶ 68-92. During that period, the Nation participated in Tucson-area negotiations and undisputedly was entirely

⁸ With Dan Quigley’s declaration, the Nation claims that the Tucson-area “negotiations did not involve dividing up facility or device rights among the two tribes . . .” N. Opp. 33 n.18. But his Memorandum to File dated September 11, 2000, shows negotiations between the two Tucson tribes over facility size, location, and number of devices. SOF Ex. 80. Also, for example, early versions of the scope of gaming charts state that the facility cap for Pima County was “TBN by TON and PYT,” meaning “to be negotiated” by the Nation and Pascua Yaqui. SOF Ex. 49; SOF Ex. 9 (Dahlstrom Vol. 2) 283:24-284:11. Later versions contain a footnote to “Facilities” and “Max. Devices per Facility,” stating “[f]inal numbers still subject to negotiation between Tucson Area Tribes.” SOF Ex. 51 and 53. And other witnesses, including the Nation’s former chairman, have testified that the Nation and Pascua Yaqui negotiated separately over facility and device rights for the “Tucson market.” *See, e.g.*, SOF Ex. 13 (LaSarte) 42:19-45:4; SOF Ex. 19 (Manuel, Edward) 131:25-132:6.

absent from the Phoenix negotiations. SOF ¶ 83; SOF Ex. 80; SOF Ex. 13 (LaSarte) 42:19-45:4; SOF Ex. 19 (Manuel, Edward) 131:25-132:6; N. Con. ¶¶ 90-91.

The Nation argues that a prohibition on gaming on after-acquired lands was proposed and not included, N. Opp. 32, but ignores why the issue quickly died—AIGA tribes assured the State that such a provision was overbroad and unnecessary to achieving its goals, including specifically keeping additional casinos out of Phoenix. *See, e.g.*, N. Ex. 30 (Hart) 147:4-147:16.

Further, the Nation claims that in negotiations to keep the rights to four casinos, it made representations only about where it might relocate its rural casino, and not about where it might place its unbuilt casino. N. Opp. 33-34 & n.19. That is refuted by overwhelming record evidence. During the negotiations in which the Nation sought to retain the right to build an additional casino while all other urban-market tribes gave up such rights, it made representations, in response to repeated inquiries, about the range of possible locations for such a casino. Contrary to the Nation's argument, N. Opp. 34 n.19, the Nation *did* represent it would not build a facility anywhere outside these locations. *See* SOF ¶¶ 111, 112, 116-122, 124, 127; *see also* Pl. Mot. 27. The Nation's representatives gave false answers that omitted West Phoenix as a potential location even though the Nation had already initiated an active search to acquire a casino site there.⁹

C. Sections 3(c)(3) and 3(c)(5) Are Ambiguous Under Federal Law

As discussed above, the Nation fails to address the ambiguity apparent on the face of the Compact when Sections 3(c)(3) and 3(c)(5) are read together. As a result, the Nation's assertion that the "language of the Compact could not be clearer," N. Opp. at 24, serves only to highlight the need for extrinsic evidence.

Although the Nation tries to bury *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039

⁹ Although it argues that these representations were not authorized, it relies on a declaration that puts at issue the substance of attorney-client communications for which the Nation claimed privilege during discovery. Quigley Decl. (Doc. 206) ¶ 27. The Nation's authority argument concerns disputed facts, but if those facts are to be tried, either these new assertions should be excluded, or additional discovery should be allowed in light of the Nation's waiver of privilege.

(9th Cir. 1996), in a footnote, that decision is dispositive on this point. In *Crow*, the Ninth Circuit agreed that “[t]he *Crow* present a good argument that lotteries generally include slot machines.” *Id.* at 1045-46. But the court found ambiguity based on an inference it drew from a gap in one of the compact appendices: “[t]he lack of security provisions for slot machines implies that the compact was not intended to allow their use.” *Id.* at 1045. *Crow* controls here because a similar inference can be drawn on the face of this Compact—“the lack of [any mention in Section 3(c)(3) of the Phoenix metropolitan area] implies that the compact was not intended to allow [the Nation to locate facilities there].”

In any event, the Nation does not dispute that “objective evidence of the surrounding circumstances” is admissible even under federal law. N. Opp. 29 n.15. This rule allows proof of latent ambiguity through evidence other than the subjective testimony of the parties about their own contract. *See AM Int’l v. Graphic Mgmt.*, 44 F.3d 572, 575-77 (7th Cir. 1995). Objective evidence is not limited to interpretation of “terms of art that may be informed by common usage in a trade or industry,” N. Opp. 29 n.15, but rather includes any “evidence of ambiguity that can be supplied by disinterested third parties,” *AM Int’l*, 44 F.3d at 575. The enormous quantity of press articles reporting that the Nation could locate its unbuilt casino in Tucson but not Phoenix, SOF ¶¶ 143-145, 147, 149-152, 156, 158, 185, 187-190, 192, and the undisputed absence of any public statement to the contrary, SOF ¶ 194, constitute such evidence of ambiguity, showing objectively the circumstances in which the parties signed the Compact. This supports admitting further extrinsic evidence under federal law.

D. The Market-Based Aspects of Section 3(c)(5) Can Alternatively Be Proven as Additional Consistent Terms

As the Court noted at the motion to dismiss stage, the admissibility of parol evidence is normally determined with the evidence in hand. Order dated June 15, 2011 (Doc. 43) at 14. Moreover, the parties agree that the integration clause is not automatically conclusive. N. Opp. 35-36. Rather, as with all contract law, the point of the parol evidence rule, and of enforcing integration clauses, is to vindicate the parties’ intent,

specifically, their intent regarding what is and what is not part of the agreement. Thus, the parties agree that additional terms that are (1) consistent with the other terms of the agreement and (2) might naturally have been omitted can be proven by extrinsic evidence. *Id.* at 35.

The extrinsic evidence shows that the parties negotiated and intended to enforce market-based allocations of machines and devices. The whole structure of the negotiations over Section 3(c)(5) was market-based, as the prior drafts of the scope of gaming charts show. *See* SOF ¶¶ 81-84, 93-107; Ex. 47-58. The headings and spacing were eliminated solely as a clerical matter, an understandable, non-substantive omission. *See* SOF ¶¶ 101-102; 105; 107. The market-area names are consistent additional terms that should not be barred by the integration clause. Restoring them by implication is not inconsistent with the rest of the Compact. Moreover, the Nation's false statements and omissions concealing its ongoing efforts to locate a casino in West Phoenix further explain why the omission of such terms was natural. If the Nation had been honest in the negotiations, this matter could and undoubtedly would have been addressed more directly.

The Nation argues now for the first time that its sovereign immunity protects it from proof of consistent additional terms. N. Opp. 36. It cites no support for this proposition. The admission of extrinsic evidence under the applicable law of contracts is allowed by IGRA and the Compact itself. *See* Compact § 24; *Siletz*, 143 F.3d at 485.

II. THIS COURT SHOULD REJECT THE NATION'S EFFORTS TO AVOID THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiffs invoke the implied covenant not to "rewrite" the parties' bargain, N. Opp. 37, but to enforce it. As discussed above, the parties' expectations of a market-based allocation of facilities and devices are reflected in the Compact's language. The Nation seeks to exploit imprecision in that language—imprecision that would not exist but for the Nation's own fraudulent conduct—to breach obligations embodied in the Compact and publicly agreed to by the Nation. The Nation protests that it is immune to claims of fraud. N. Mot. 41-42; N. Opp. 3, 39 n.23. While it may be immune to certain legal theories, the

1 same facts can support more than one theory, and the Nation is not immune to facts. Nor
 2 is parol evidence inadmissible on or irrelevant to this claim. The Nation misreads
 3 *Traumann v. Southland Corp.*, 842 F. Supp. 386 (N.D. Cal. 1993). *See* N. Opp. at 44 n.
 4 22. In rejecting Southland’s argument that the parol evidence rule barred the Traumanns’
 5 implied covenant claim, the court relied on the entire history of the parties’ dealings,
 6 including allegedly false representations before execution. 842 F. Supp. at 391-92.

7 Breach of the implied covenant includes denying the reasonably expected benefits
 8 of the bargain. *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons*
 9 *local No. 395 Pension Trust Fund*, 38 P.3d 12, 29-30 (Ariz. 2002). The evidence here
 10 shows that the State and the AIGA tribes reasonably expected as a benefit of the Compact,
 11 particularly sections 3(c)(3) and 3(c)(5), that there would be no additional Phoenix
 12 casinos. The Nation does not dispute that such expectations were reasonable, except by
 13 contending that they are legally unprotected by the express language of the Compact. Yet
 14 the Nation concedes, as it must, that “the implied covenant may in certain circumstances
 15 be breached by conduct ‘not expressly excluded’ by the contract’s terms.” N. Opp. 38. Its
 16 only answer to that principle is to argue that “the Compact expressly *authorizes*” a
 17 Glendale casino. *Id.* But as discussed above, Section 3(j)(1) does not specify that the
 18 Nation may build a casino in the Phoenix area, *see* N. Opp. at 39. Only the casinos
 19 authorized in Sections 3(c)(3) and 3(c)(5) are allowed, and compliance with IGRA is only
 20 a necessary, not a sufficient condition.¹⁰ Nothing in the Compact expressly authorizes a
 21 Tucson-area tribe to enter the Phoenix market, particularly where each Phoenix tribe gave
 22 up a facility authorization in Section 3(c)(5).

23 The Nation seeks “to recapture opportunities forgone” at the time of contracting,
 24 which is “bad faith performance.” Burton, “Breach of Contract and the Common Law
 25

26 ¹⁰ Like the preceding sentences of 3(j)(1), the last sentence is worded as a
 27 restriction on location, stating that gaming on after-acquired lands “shall be authorized
 28 *only* in accordance with 25 U.S.C. § 2719.” (Emphasis added.) The Nation splices the
 parts it likes, deleting the word “only” and adding the word “any.” *See* N. Opp. at 37-38.
 The Nation cannot make its argument without revising the contractual language.

1 Duty to Perform in Good Faith,” 94 *Harv. L. Rev.* 369, 387 (1980). The Nation did not
 2 bargain for the right to enter the Phoenix market. And when it bargained for the right to
 3 retain a fourth casino authorization, its expressed rationale was to preserve its ability to
 4 operate a rural facility, not to gain the right to move into a new urban market. Entering
 5 that market now would deprive Plaintiffs of benefits that they justifiably expected to
 6 receive, and that the Nation knew they expected to receive, under the Compact.

7 **III. PROMISES MADE DURING THE COMPACT NEGOTIATIONS ARE** 8 **ENFORCEABLE UNDER PROMISSORY ESTOPPEL**

9 The Nation argues that promissory estoppel is outside the scope of 25 U.S.C.
 10 § 2710. Plaintiffs’ promissory estoppel claim seeks to hold the Nation to the promises it
 11 made during Tribal-State gaming negotiations and as such comes within 25 U.S.C.
 12 § 2710(d)(7)(A)(ii), which abrogates sovereign immunity for “any” cause of action
 13 initiated by a State or Indian tribe to enjoin class III gaming in violation of a compact.

14 The Nation also argues (N. Opp. 40) that it cannot be liable under promissory
 15 estoppel because “an actual contract” exists here. But this is true only if the contract
 16 conflicts with the promise. *See Chanay v. Chittenden*, 563 P.2d 287, 290 (Ariz. 1977).¹¹
 17 No such conflict exists here. *See supra* Section I(B)(2); *see also* Pl. Mot. 29.

18 **IV. THE GILA BEND ACT IS NOT A SETTLEMENT OF A LAND CLAIM AND** 19 **THE NATION IS BLOCKED FROM ASSERTING OTHERWISE**

20 **A. Congress Did Not Intend to Settle any Claim that Qualifies as a “Land** 21 **Claim” Under IGRA**

22 No separate claims relating to clouds on title and possession were included in the
 23 Gila Bend Act settlement. Pursuant to the Gila Bend Act, the federal government
 24 purchased the flooded land from the Nation for \$30 million, which could be used to buy
 25 economically viable lands. In exchange, the Nation’s flood-related tort claims were

26 ¹¹ The cases cited by the Nation are not to the contrary. In *Walker v. KFC Corp.*,
 27 728 F.2d 1215, 1219-20 (9th Cir. 1984), a conflict existed between plaintiff’s promissory
 28 estoppel claim and the express contract insofar as the plaintiff’s detrimental reliance was
 the very consideration that formed the foundation of the express contract. And in *All-
 Tech Telecom v. Amway Corp.*, 174 F.3d 862, 869 (7th Cir. 1999), there was conflict with
 “an express contract governing the relationship out of which the promise emerged.”

1 settled as a prerequisite to the land purchase by the United States. Pub. L. 99-503 §§ 4, 6,
 2 9. After the Nation received the maximum possible remedy for any alleged cloud on the
 3 title—the purchase of the damaged land—claims relating to the title became moot.

4 The Nation does not dispute that neither the Gila Bend Act nor the Settlement
 5 Agreement mentions *any* of the land claims the Nation asserts were settled by the Act and
 6 the Agreement. Pl. Mot. 42. And the Nation continues to ignore the dramatic changes that
 7 Congress made in committee to the Gila Bend Act to avoid the Nation’s potential land
 8 claims, changes made specifically to overcome the Executive Branch’s strong opposition
 9 to any such settlement. Pl. Mot. 43. Congress re-crafted the legislation to focus instead
 10 on the trust responsibilities of the United States, even striking the word “settlement” from
 11 the title of the Act. Pl. Mot. 43-44. Rather than acknowledge those changes, the Nation
 12 relies solely on a selective reading of the legislative history, omitting the portions showing
 13 that Congress did not intend to settle anything but the tort claims explicitly mentioned in
 14 the Settlement Agreement. *See* Pl. Mot. 42-44.

15 The Nation falsely claims that, when the Gila Bend Act was amended in committee,
 16 “Congress left the relevant language regarding the scope of the [claims] waiver
 17 untouched.” N. Opp. 13. In fact, Congress *did* modify the waiver language, and did so in
 18 a manner that shows it intended to exclude land claims. The bill as introduced required a
 19 “waiver and release of any and all claims for injuries to land or water rights.” H.R. 4216
 20 § 8(a) (Doc. 200-1 at 65). The amended version, however, required a “waiver and release
 21 of any and all claims *of water rights or* injuries to land or water rights.” Gila Bend Act
 22 § 9(a) (Doc. 195-1 at 4) (emphasis added). A parallel of this “claims of water rights or
 23 injuries to . . . water rights” construction applying to land claims would be “claims to land
 24 or injuries to land.” Congress chose not to use a parallel construction, but included *only*
 25 “injuries to land.” In clarifying the language of the settlement section, Congress expressly
 26 avoided any hint that “land claims,” as opposed to property torts, were to be settled as a
 27 condition to the federal government’s purchase of the Nation’s damaged land.

28 This carefully worded restriction cannot possibly be, as the Nation claims, “a

1 complete settlement of ‘any and all’ claims relating to the Gila Bend Reservation.” N.
 2 Opp. 12. If that were correct, there would be no need for restrictive language relating to
 3 injuries to land and water rights—every conceivable claim would be included. Yet the
 4 restrictive language was put in both the statute and the Settlement Agreement. This Court
 5 is not free to ignore restrictive language in a statute. *See Ctr. for Biological Diversity v.*
 6 *Salazar*, 695 F.3d 893, 903 (9th Cir. 2012) (statutes must be interpreted so “no clause,
 7 sentence, or word shall be superfluous, void, or insignificant”) (citing *TRW Inc. v.*
 8 *Andrews*, 534 U.S. 19, 31 (2001)).

9 The Nation attempts to conflate the flooding torts with land claims by referring to
 10 the Painted Rock Dam flooding as “flooding pursuant to an unauthorized easement.” N.
 11 Opp. 12. But, of course, there is no such thing as flooding “pursuant to” an invalid
 12 easement, and the Nation cites no authority showing such a legal concept exists. Either
 13 the flood damage is permissible because it remains within a valid easement, or the flood
 14 damage is a tort. The validity of the easement is an analytically separate question from the
 15 alleged tort damages.

16 Similarly, the Nation uses selective quoting to interpret the Code of Federal
 17 Regulations, claiming that “the relevant question is whether the legislation enacted by
 18 Congress ‘resolves or extinguishes with finality the tribe’s land claim in whole or in part,
 19 thereby resulting in the alienation or loss of possession of some or all of the lands claimed
 20 by the tribe.’” N. Opp. 14 (quoting 25 C.F.R. § 292.5(a)). But the Nation omits language
 21 requiring that it first must show that the legislation actually settles a land claim. Where
 22 the Nation says “*the legislation enacted by Congress*,” the regulation says “*a settlement of*
 23 *a land claim*.” 25 C.F.R. § 292.5(a). The portion the Nation quotes merely adds a
 24 restriction that a land claim settlement must result in alienation to qualify for the
 25 § 2719(b)(2)(B) exception. Under the Nation’s reading, a land swap between the federal
 26 government and a tribal government would qualify without any dispute over title or
 27 possession. The correct reading requires a determination that the enabling legislation was,
 28 in fact, a “settlement of a land claim” before reaching the question of alienation. Loss of

1 lands is necessary, not sufficient.

2 Nor has the Nation cited any examples of torts to land treated as a settlement of a
3 land claim under § 2719. None of the examples cited by the Nation (N. Opp. 13 n.2) even
4 come close to showing that a tort counts as a land claim under § 2719.¹² The Nation asks
5 this Court to be the first body of any kind to declare that a tort is a land claim under
6 IGRA, and therefore expand the scope of § 2719. The Court should decline to do so.

7 **B. Under Well-Established Principles of Judicial Estoppel, the Nation**
8 **Should Be Held to Its Prior Representation to this Court that Gaming**
9 **on Its After-Acquired Lands Requires a Two-Part Determination**

10 The Nation struggles to explain away its prior statements to this Court. The
11 language of its mediation brief, particularly in light of the factual circumstances
12 surrounding its 1993 effort to obtain a compact, shows that the Nation promised to satisfy
13 the two-part determination process before gaming on after-acquired lands.

14 Running through the *New Hampshire v. Maine* guidelines, 532 U.S. 742, 749-50
15 (2001), the Nation claims that its current position is not clearly inconsistent with its prior
16 position because the language in its mediation brief applies only to those circumstances in
17 which the Nation would “request” a two-part determination. N. Opp. 15-16. This post
18 hoc justification ignores the context in which the Nation’s 1993 statements were made—it
19 was arguing against a definition of Indian lands that would have barred all gaming on any
20 after-acquired lands. The Nation sought to assure the State that any such gaming could be
21 easily controlled by state and local authorities. The Nation therefore unequivocally stated
22 in its mediation brief that “[t]he existing federal law requires the Governor’s concurrence”
23 and that “[t]his is adequate protection to the State and local interests.” SOF ¶ 8. Now, the

24 ¹² The Seneca Nation settlement explicitly settled claims relating to leases, a clear
25 title-related settlement. 25 U.S.C. § 1774(a). In the Torres-Martinez Desert Cahuilla
26 settlement, Congress included explicit instructions on where gaming could occur on
27 settlement property, mooted the need to determine whether the flooding claims qualified
28 as “land claims” under § 2719. 25 U.S.C. § 1778(d)(b). The Cherokee, Choctaw, and
Chickasaw Nations settlement was not merely to resolve claims of “mismanagement of
tribal trust resources” but also to settle claims of illegal possession of the tribal drybed
lands by private landowners, a clear land claim that resulted in a quiet title action. 25
U.S.C. § 1779(9), (13), (14).

1 Nation asks this Court to interpret this as a circular argument—namely, that the two-part
 2 determination protects the State only when the Nation chooses to seek a two-part
 3 determination. This is an absurd reading of the Nation’s brief. The Nation plainly
 4 promised that the two-part determination would give adequate protection to the State,
 5 which wanted no gaming at all on after-acquired lands. That makes sense only if the
 6 “settlement of a land claim” exception does not apply in Arizona—and the Nation and
 7 other tribes represented exactly that. SOF ¶ 23.

8 The Nation also argues that the Court did not accept the Nation’s earlier position
 9 because the mediator lacked the authority to alter the Nation’s proposal. N. Opp. 17. The
 10 Nation cites no authority requiring that a court specifically highlight and explicitly
 11 endorse a particular argument before a successful outcome justifies application of judicial
 12 estoppel. The only authority offered, *Reed Elsevier Co. v. Muchnick*, 130 S. Ct. 1237,
 13 1249 (2010), imposes no such requirement. There the Court reasoned that not only had
 14 the district court declined to adopt the argument in question, but the party to be estopped
 15 had already abandoned the argument in the Court of Appeals in the very same case,
 16 thereby eliminating any risk of inconsistent positions. *Id.* The Nation’s selective quoting
 17 ignores that abandonment was key to the *Reed Elsevier* decision, because the Nation never
 18 abandoned the representations it made during the 1993 mediation or compact negotiations,
 19 and the mediator accepted its position. Nothing in *Reed Elsevier* allows it to take a
 20 contrary position here. *See also Stevens Tech. Servs., Inc. v. S.S. Brooklyn*, 885 F.2d 584,
 21 588 (9th Cir. 1989) (judicial estoppel requires only that prior court adopted position to be
 22 estopped “in some manner”).

23 Similarly, the Nation cites no authority establishing that a court cannot have been
 24 successfully persuaded unless its decision ultimately became effective. In *Williams v.*
 25 *Boeing*, 517 F.3d 1120, 1135 (9th Cir. 2008) (cited at N. Opp. 17), the court found no risk
 26 of inconsistent positions because the Consent Decree had been affirmatively rejected by
 27 the court of appeals. The Nation faced no such rejection by any court. The miscellaneous
 28 case for the mediation (M-93-0001-PHX) came to a conclusion. The subsequent

1 negotiation of a different compact is more akin to a case that settles while pending on
 2 appeal, where the decision of the lower court remains valid. *See Ringsby Truck Lines, Inc.*
 3 *v. W. Conf. of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982) (settling after judgment does not
 4 automatically vacate the judgment so dissatisfied litigants may not have trial court decisions
 5 “wiped from the books”). Moreover, the Nation admits that the provision at issue—the
 6 definition of Indian lands—actually became effective. The definition advanced by the
 7 Nation in the mediation became the definition in the 1993 Compact and remains the
 8 definition in the 2002 Compact. *See* N. Con. ¶ 14.

9 Next, the Nation claims that the Plaintiffs suffer no unfair detriment because the
 10 mediation compact never became effective and the State “was thereafter free to continue
 11 to pursue a compact that would bar gaming on after-acquired land.” N. Opp. 17. But this
 12 argument fails to recognize that *the State did act to bar gaming on after-acquired land*. In
 13 the next regular legislative session after execution of the 1993 Compact, the legislature
 14 passed a statute making the necessary repeal of SB 1001 and simultaneously prohibiting
 15 the governor from concurring in a two-part determination under § 2719. 1994 Ariz. Sess.
 16 Laws ch. 285 § 2. That prohibition remains in effect today. A.R.S. § 5-601(C). The
 17 Nation promised that the two-part determination would protect against gaming on after-
 18 acquired lands, and the State acted to make that protection permanent and mandatory. To
 19 let the Nation take an inconsistent position now would be unjust.

20 **C. The Nation Clearly and Unequivocally Waived Its Right to Assert a**
 21 **“Settlement of a Land Claim” Exception**

22 The Nation incorrectly argues that it did not waive its alleged statutory right to
 23 assert a “settlement of a land claim” exception because the Plaintiffs rely upon mere
 24 silence rather than affirmative conduct. N. Opp. 18-19. But the Nation did not merely
 25 remain silent; it actively participated with a group of tribes that affirmatively
 26 represented to the State—in writing—that the “settlement of a land claim” exception
 27 would never apply in Arizona. *See* SOF ¶ 23. That the Nation’s attorney was not the
 28 lead speaker at the group meeting where the tribes delivered this assurance is irrelevant.

1 The Nation stood shoulder to shoulder with its fellow tribes when they advanced this
 2 affirmative representation. *See* SOF ¶¶ 22-23. The Nation's tribal council endorsed this
 3 action by approving the 1993 Compact, which the State joined because it believed it
 4 was protected by the two-part determination. *See* SOF ¶¶ 25-26.

5 The Nation argues that Plaintiffs do not identify a single action that constitutes a
 6 waiver. N. Opp. 19. But, in light of all the circumstances associated with the 1993
 7 litigation and compact negotiations, the Nation's decision to stand with the other tribes
 8 must be viewed as an affirmative act of waiver. *See* SOF ¶¶ 22-23. The case cited by
 9 the Nation is not to the contrary. In *adidas-America v. Payless Shoesource*, 546 F. Supp.
 10 2d 1029, 1074-75 (D. Or. 2008), the court merely held that failure to prosecute other
 11 alleged infringements does not constitute a waiver of intellectual property rights as
 12 against the current defendant. *Id.* But the Nation did not fail to act in this case. It took
 13 affirmative steps to secure a compact by making and joining public statements that a
 14 two-part determination would apply.¹³ *See* SOF ¶¶ 8, 23.

15 To overcome stiff opposition to Indian gaming compacts, the Nation knowingly,
 16 voluntarily, intelligently, and understandably communicated that it would not seek to game
 17 on after-acquired land without a two-part determination, thereby waiving its right to assert
 18 that the Gila Bend Act is a settlement of a land claim.

19 CONCLUSION

20 The Court should grant summary judgment to the Plaintiffs and deny summary
 21 judgment to the Nation on Counts One, Two, Three, Four, and Seven of the Complaint.

22 Dated this 29th day of March 2013.

23
 24
 25 _____
 26 ¹³ Plaintiffs emphatically dispute the significance of the Nation's alleged disclosure
 27 in a July 15, 1992 meeting with the State, and the corrected transcript speaks for itself.
 28 (Doc. 195-5 at 11-22.) In any event, all of the Nation's actions constituting a waiver
 occurred *after* that particular meeting. SOF ¶¶ 8, 23. If they had any significance at all,
 statements made before the waiver would merely illuminate and amplify what the Nation
 waived.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and service to counsel of record.

/s/ Amy Hershberger