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No. 13-16517, 13-16519, 13-16520

In the United States Court of Appeals
for the Ninth Circuit

STATE OF ARIZONA, et al.,

Plaintiffs - Appellants

v.

TOHONO O'ODHAM NATION,

Defendant - Appellee

On Appeal from the United States District Court
for the District of Arizona, Case No. 2:11-cv-00296-DGC

APPELLANT STATE OF ARIZONA'S OPENING BRIEF

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INTRODUCTION*

This case concerns whether the gaming compact between the State of Arizona and the Tohono O'odham Nation (the "Nation") permits the Nation to open a casino on land it purchased in the Phoenix metropolitan area. During the compact negotiations, the Nation secured the right to conduct gaming in the Tucson metropolitan area and outlying rural areas of its Southern Arizona reservation. It neither negotiated for nor received any gaming rights in the Phoenix metropolitan area. In fact, a key issue during the compact negotiations was that there would be no additional casinos in the Phoenix metropolitan area. The Nation made and joined in numerous promises to the State of Arizona and to the public that the compacts authorized no new casinos in the Phoenix metropolitan area and that any gaming in Arizona on newly acquired reservation land would be subject to the governor's concurrence. *See* 25 U.S.C. § 2719(b)(1)(A).

The Nation's promises were duplicitous. At the same time the Nation negotiated with the State and participated with other tribes in trying to earn voter approval for the new compact, the Nation was looking for land near Phoenix for a new casino. The Indian Gaming Regulatory Act ("IGRA"), 102 Stat. 2467, Pub. L. No. 100–497 (1988) (codified at 25 U.S.C. § 2701 *et seq.*), prohibits gaming on such newly acquired land subject only to a few narrow exceptions. Contrary to

* Cases and statutes cited in this brief are hyperlinked to WestlawNext for the Court's convenience.

representations it previously made to the State, the Nation secretly intended to assert that the Gila Bend Indian Reservation Lands Replacement Act of 1986, Pub. L. No. 99-503, 100 Stat. 1798, (1986) (the "Gila Bend Act" or "Act") (ER616-619) would satisfy an exception and permit it to open a casino on unincorporated land anywhere in Maricopa County (which includes Phoenix). During the negotiations over the compact, the Nation deliberately hid its "west Phoenix" plan from the State and the other tribes who were working with the Nation to negotiate the new compacts with the State, and from the voters of Arizona in 2002 when they were considering whether to vote for the new compact language. It deliberately timed its purchase of a west Phoenix casino site (through a shell company) to occur a few months after its compact had been finalized and approved. Then, in 2009, the Nation announced plans for a new casino on an unincorporated county island within the City of Glendale ("the Glendale Property").

The Nation now contends that it may use the Glendale Property for gaming in violation of its prior promises and profit from its fraud with impunity because of its sovereign immunity.

Appellants State of Arizona, Gila River Indian Community ("Gila River") and Salt River Pima-Maricopa Indian Community ("Salt River") filed this lawsuit to enforce the promises made by the Nation and to enjoin gaming on the Glendale Property.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action alleging violations of IGRA based on 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This appeal is from a final judgment entered on June 25, 2013 that disposed of all of the claims in this case. (ER68.) Plaintiffs State of Arizona, Gila River, and Salt River filed timely notices of appeal on July 23 and 25, 2013. (ER61-67.)

STATEMENT OF THE ISSUES

The State joins in the issues raised in the Opening Brief of Appellants Salt River and Gila River and also specifically addresses the following issues on appeal:

1. IGRA generally prohibits gaming on land acquired in trust after IGRA's enactment, unless that land is contiguous to or within the boundaries of the tribe's existing reservation, or unless both the Secretary of the Interior and the governor of the state where the land is located agree that the tribe may operate a casino. 25 U.S.C. § 2719. The district court concluded that this prohibition does not apply to the Glendale Property because of IGRA's exception for land taken into trust as part of a "settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i). This raises the following issues:

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A. Did the district court err in concluding that the "settlement of a land claim" exception applies to land that the Nation acquired with funds it received through the Gila Bend Act even though the Act's language and history indicate that Congress did not intend the Act to settle any dispute regarding possession, title or other real property interest?

B. Even if the settlement of a land claim exception applies to the Glendale Property, is the Nation judicially estopped from asserting that it has the right to open a casino in Glendale in light of its representations to the district court's mediator during IGRA-mandated arbitration that there could be no gaming on lands acquired after IGRA's enactment unless Arizona's governor concurred?

C. Did the Nation waive its right to game on the Glendale Property as a result of representations to the State in the 1990s that gaming would be permitted on after-acquired land in Arizona only if the governor concurred?

2. Did the district court err in concluding that sovereign immunity bars claims of promissory estoppel, fraud in the inducement, and material misrepresentation that arise out of the negotiations between the State of Arizona and tribes for gaming compacts under IGRA?

STATEMENT OF THE CASE

This case arises out of the Nation's secret effort to acquire land far from its existing reservation to use for a casino. The land that the Nation selected—the Glendale Property—is in a suburb of Phoenix, Arizona's largest metropolitan area. The Nation conducted its search for land in west Phoenix on which to build a casino while it was ostensibly working with sixteen other Arizona tribes to negotiate new gaming compacts with the State of Arizona. Those complex negotiations began in 1999, when the tribes agreed to work together to reach agreement on new compact language, and ended in 2002 with new compacts approved by the State's governor and subsequently the Secretary of the Interior.

This agreement did not authorize the Nation to operate any casinos in the Phoenix metropolitan area, and the State of Arizona, Gila River, and Salt River filed this lawsuit to enforce the Nation's promise not to operate a casino in the Phoenix metropolitan area and enjoin the Nation's proposed casino on the Glendale Property.

A. The Indian Gaming Regulatory Act Generally Prohibits Gaming on After-Acquired Lands

Congress enacted IGRA to "provide a statutory basis for the operation of gaming by Indian tribes" and to ensure that gaming is conducted "fairly and honestly." 25 U.S.C. § 2702. IGRA generally prohibits a tribe from conducting Class III gaming on land taken into trust after IGRA's 1988 enactment ("after-

acquired lands"), unless that new land is within or contiguous to the boundaries of the tribe's existing reservation. 25 U.S.C. § 2719(a). This prohibition on gaming on after-acquired lands is an important part of the balance of state and tribal interests that Congress struck after years of negotiations concerning the regulation of gaming on reservations. *Cf. Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1123-26 (E.D. Cal. 2002), *aff'd* 353 F.3d 712 (9th Cir. 2003) (describing IGRA's legislative history).

IGRA includes limited exceptions to its prohibition against gaming on land that is taken into trust after IGRA's enactment, requiring either the concurrence of the governor of the state where the land is located or the existence of unique tribal interests that justify bypassing that approval process. Generally, the governor must concur with a determination of the Secretary of the Interior that gaming on the after-acquired land is in the best interest of the tribe and would not "be detrimental to the surrounding community," commonly referred to as the "two-part determination." 25 U.S.C. § 2719(b)(1). The Secretary's determination follows mandatory consultations with the tribe, state and local officials, and neighboring tribes. *Id.* Gaming on non-contiguous after-acquired reservation land is permitted without this consultation process and the governor's consent only if the after-acquired land is taken into trust as (1) a settlement of a land claim; (2) the initial

reservation of an Indian tribe; or (3) the restoration of lands for an Indian tribe restored to federal recognition. 25 U.S.C. § 2719(b).

B. In the Early 1990s, When the First Gaming Compacts Were Negotiated in Arizona, State Policy Makers Took Steps to Ensure that Gaming Was Limited to Arizona's Existing Reservation Lands

The negotiations that led to the Nation's current compact with the State have their roots in hotly contested negotiations between the State and the Nation and other tribes that began in the early 1990s. (ER85-92.) The period leading up to the first IGRA gaming compacts in Arizona was marked by extensive litigation, fervent political opposition, and even an FBI raid that led to a highly publicized and acrimonious standoff between tribes and state and federal officials. (*Id.*) In the litigation and the negotiations with the governor and legislature, the tribes seeking compacts, including the Nation, made representations to convince State officials that tribes would not be able to operate casinos on newly acquired non-contiguous land. (ER715; ER423-424; ER449-450; ER167-168 (140:25-142:10); ER154 (69:17-70:11).) The Nation's present effort to build a casino on the Glendale Property contradicts those representations that were essential to securing gaming compacts in Arizona in the 1990s—and key language from the 1993 Compact was carried forward into the current compact. (ER652; ER729.)

The earliest compact-related litigation began in 1991, when several Arizona tribes, including the Nation, sued the State and then-Governor J. Fife Symington

III to force the State to negotiate gaming compacts in good faith as required by IGRA. (ER598.) Pursuant to IGRA, the district court appointed a mediator—former Arizona Supreme Court Justice Frank Gordon—to select a compact from the last best offers that the State and the tribes submitted ("baseball arbitration"). *See* 25 U.S.C. § 2710(d)(7)(B)(iv); (ER598.)[1] In the last best offers submitted to the federal mediator, one of the differences concerned the definition of "Indian Lands."

The State's proposed compact included a definition of "Indian Lands" that would have prohibited the Nation from gaming on non-contiguous after-acquired lands. (ER715.) The Nation, however, argued that entirely eliminating gaming on after-acquired lands was an unnecessary protection because IGRA already required the consent of the State for any gaming on after-acquired land: ***"The existing federal law requires the Governor's concurrence. This is adequate protection to the State and local interests."*** (*Id*. (emphasis added).)

The mediator selected the Nation's compact, including its definition of "Indian Lands." (ER599; ER163 (63:12-18); ER69.) The State, however, refused to sign the compact. (ER170-171 (199:13-201:10).) After the Secretary of the Interior (former Arizona Governor Bruce Babbitt) expressed reluctance to

[1] Although the IGRA "baseball arbitration" process is referred to as mediation in the statute, it does not permit negotiation as in traditional mediation but instead results in an all-or-nothing decision. *See* 25 U.S.C. § 2710(c)(7)(B)(vii).

promulgate procedures under IGRA in lieu of a compact, the tribes and the State continued to negotiate toward a resolution. (*Id.*)

Throughout those proceedings, the State's political leaders debated whether to permit casino-style gaming in Arizona. In the spring of 1993, the Arizona legislature considered legislation to restrict the Governor's power to execute gaming compacts with the tribes. (ER440-445; ER165 (117:3-118:2); ER145 (63:4-64:2).) The Legislature convened a "Joint Select Committee on Indian Gaming," which held public hearings in May 1993 at which legislators questioned tribal leaders about gaming on after-acquired lands. (ER425-427.) All of the tribes involved in the negotiations, including the Nation, were informed that gaming on after-acquired lands was one of the Legislature's top concerns about Indian gaming. (ER438; ER144 (56:22-25).)

In June 1993, the Nation alongside other tribes met with legislative staff and provided them with a memorandum stating that there could be no gaming on after-acquired land in Arizona under IGRA's settlement of a land claim exception. (ER449-450; ER154 (69:7-70:11), ER167-168 (140:25-142:10).) Governor Symington repeated these assurances and expressed his own view that gaming would not be permitted in Arizona on non-contiguous land "without the permission of the governor." (ER453.)

Governor Symington signed the Nation's first compact on June 24, 1993 (the "1993 Compact"). (ER713.) In light of the Nation's consistent representations that there could be no gaming on after-acquired land without the governor's approval, the 1993 Compact incorporated the definition of "Indian Lands" that the federal mediator selected. (ER652.) That definition was carried forward unchanged into the Nation's current gaming compact. (ER729.) The Arizona legislature subsequently passed legislation to bar the governor from concurring in any such determination, eliminating the possibility of any gaming on non-contiguous after-acquired land in Arizona. A.R.S. § 5-601(C).

C. From 1999 to 2002, During Negotiations for New Gaming Compacts, the Nation Misled the State and Concealed Its Intention to Operate a Casino in the Phoenix Metropolitan Area

From late 1999 to 2002, with many of the existing compacts set to expire in 2003, a number of Arizona Indian tribes began negotiations with the staff of then-Governor Jane Dee Hull and representatives of the Arizona Department of Gaming ("ADOG") regarding potential terms for new gaming compacts.[2] (ER851 ¶ 23.) Over the course of three years, there were twenty or thirty negotiating sessions between the tribes and the State. (ER199 (58:23-24).)

Throughout these negotiations, Arizona's governor made clear that she would not approve a compact that would permit additional casinos in the Phoenix

[2] The Salt River compact, which was not executed until 1998, was set to expire in 2008. (ER92 ¶31.)

metropolitan area. (ER244 (29:7-30:10); ER197 (46:7-15).) The State wanted to reduce the number of casinos overall and ensure that there would be no additional casinos in the metropolitan areas. (ER98-99 ¶¶ 74-77; ER281 (49:2-11); ER204 (78:11-13).) Under the then-existing compacts, each of the Phoenix-market and Tucson-market tribes had the right to build one additional facility, and the State wanted to eliminate those rights. This was a key point for the State. (ER281 (49:2-11); ER292 (47:1-20).)

Because the State made clear that it would only agree to a standard form compact (ER149-150 (36:5-38:9)), the tribes worked together in the negotiations under the auspices of the Arizona Indian Gaming Association ("AIGA"). (ER240-241 (12:22-15:10).) Approximately 17 tribes, including the Nation, Salt River and Gila River, negotiated collectively through the AIGA, which was composed of the tribal leaders from member tribes and acted through its executive director, David LaSarte, who served as the organization's spokesperson. (*Id.*)

At the State's insistence, the AIGA tribes negotiated among themselves regarding facility (casino) locations and device (e.g., slot machine) allocations. (ER245-246 (44:7-45:4).) The AIGA tribes formed self-selected subgroups to resolve among themselves the number of gaming facilities and the number of machines per facility in the metropolitan markets. (ER250 (61:10-22).) The Nation participated in separate negotiations for Tucson-area tribes. (ER507-511;

ER354-355 (60:15-64:25).) In these negotiations, the Nation never asserted or bargained for the right to locate any casinos or slot machines in the Phoenix metropolitan area. (ER249-251 (59:12-65:24).)

In response to the State's efforts to prevent additional casinos in the urban markets, the tribes in the Phoenix metropolitan area each agreed to give up a casino that they were entitled to operate under their previous compacts with the State. (ER282 (55:11-21); ER739-740 (2002 Compact, Sec. 3(c)(5)).) In the Tucson market, the Pascua Yaqui Tribe agreed to a similar reduction. (ER739-740.) The Nation, however, retained its four facility authorizations. (*Id.*) The Nation insisted upon its right to build and operate another facility in addition to its three already in operation. (ER208-209 (93:25-97:6).) When State negotiators asked where the Nation would put another casino, the Nation identified only Tucson, Gila Bend, and rural areas of its reservation such as Casa Grande and Florence as potential locations; the Nation never identified the Phoenix metropolitan area as a potential location. (*Id.*; ER256-257 (101:10-105:3).)

While agreeing to let the Nation preserve its four facility authorizations, the State sought to ensure that at least one of the Nation's casinos would remain a rural casino, calling it a reduction "from four facilities to three and a half." (ER218 (154:13-155:11).) The State and Nation agreed to Section 3(c)(3) of the Compact which provided that at least one of the Nation's four facilities would remain fifty

(50) miles from the Nation's existing gaming facilities in the Tucson metropolitan area. (ER739 (2002 Compact, Sec. 3(c)(3)).)

The negotiations led to an agreed-upon Framework in February 2002 and an initiative (Proposition 202) that Arizona voters approved at the ballot. In the campaign leading up to the vote, the State's representatives and the tribes told legislators and the people of Arizona that this new compact would not authorize additional casinos in the Phoenix metropolitan area. Both the State and AIGA promised voters in unequivocal terms that the Compact would prevent the addition of any more casinos in the Phoenix market and would permit no more than one additional casino in the Tucson market. (ER477; ER479-481; ER566; ER564; ER548; ER544; ER 533.) In the Publicity Pamphlet published by the Arizona Secretary of State and mailed to every voting household in the state, Governor Hull stated that "voting yes on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area and only one in the Tucson area for at least 23 years." (ER830.) The Nation never expressed its disagreement with the statements being made to Arizona voters. (ER853-854 (¶ 40).)

Meanwhile, the Nation actively concealed its plan to open a casino in west Phoenix. The Nation had been considering specific sites since at least May 2001 and had hidden its intentions from the State during the Compact negotiations and from Arizona voters during the Proposition 202 campaign. (ER494-495.)

During meetings of the Nation's tribally chartered enterprise which was searching for casino land in west Phoenix, the members discussed the need to keep the plan secret because "there's going to be a lot of resistance from . . . the general public." (ER583 (29:14-15).) The attendees reiterated the need to "wait until the initiative passes before [the west Phoenix plan] gets out" because "if that's going to be the position of the State, [that] they don't want any more casinos around the Phoenix area, then they're going to fight it." (ER589 (14:6-13).) At one meeting, after noting that the 2002 Compact "limited the number of [Phoenix] metro casinos to what it sits now," the group started exploring loopholes in the language, including the fact that "[t]hey didn't say within a certain radius." (ER591-592 (17:22-23; 18:7-8).)

The Nation purchased the Glendale Property through a shell corporation in 2003 and sought to have it acquired in trust in 2009. (ER855 ¶¶ 54-55.) This Court reversed and remanded the Secretary's decision to have the land taken into trust. *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1151 (9th Cir. 2013), as amended (July 9, 2013).

D. This Lawsuit's Procedural History

The State of Arizona, Gila River, and Salt River brought this lawsuit to enjoin the Nation from opening a casino on the Glendale Property. (ER867-891 (First Amended Complaint).) The Amended Complaint alleged, *inter alia*, that a

casino on the Glendale Property (1) violates the Nation's tribal state compact that did not authorize the Nation to open a casino within the Phoenix Metropolitan area; (2) violates the Nation's obligation of good faith and fair dealing; (3) violates IGRA's prohibition on gaming on land taken into trust after IGRA's enactment; and (4) is prohibited based on fraud in the inducement, material misrepresentation, and promissory estoppel. (*Id.*)

The district court entered judgment for the Nation. Citing sovereign immunity, the court dismissed the fraud and misrepresentation claims in its ruling on the Nation's motion to dismiss. (ER55-56.) Although the court noted that the evidence "would appear to support a claim for promissory estoppel," it rejected the claim on sovereign immunity grounds as well in its ruling on summary judgment. (ER35 (26:25-26).)

In its first ruling on the motions and cross-motions for summary judgment issued May 7, 2013, the district court granted the Nation's motion for summary judgment for all claims except for a breach of compact argument based on the Restatement (Second) of Contracts § 201 (1981)(2) and denied Plaintiffs' Cross Motion for Summary Judgment. (ER36 (27:20-23).) The court then ordered additional briefing on the arguments based on Restatement § 201(2). (ER34-37 at 25:12-26:1; 27:24-28:1.) In addition to the supplemental briefing that the court ordered, Plaintiffs moved to reconsider the portion of the court's summary

judgment ruling that addressed Restatement (Second) of Contracts § 201(1) and the evidence concerning the Nation's public statements about the compact's limitation on additional casinos in the Phoenix area. (ER916.) On June 15, 2013, the district court granted the Nation's motion for summary judgment on the remaining issues and denied Plaintiffs' motion for partial reconsideration. (ER1-9.) The clerk entered judgment in the case on June 25, 2013 (ER68), and Plaintiffs timely appealed. (ER61-67.)

SUMMARY OF ARGUMENT

The State of Arizona joins in the opening brief filed by Salt River and Gila River, including its argument that the district court erred in refusing to interpret the compact to give effect to the intent of the parties, and focuses on two issues in this brief: the settlement of a land claim and sovereign immunity.

First, the Nation's Glendale Property is ineligible for gaming because the Gila Bend Act does not qualify as a "settlement of a land claim" under IGRA, and the trial court erred in concluding otherwise. Congress unmistakably intended to treat the Gila Bend Act as an economic development bill, not a settlement of a land claim. Because the Act was not the "settlement of a land claim," the Glendale Property is subject to IGRA's general prohibition against gaming on after-acquired land. During the 1990s, when Indian gaming under IGRA was just underway in Arizona, the Nation made statements in litigation and compact negotiations that

indicated it could not conduct gaming on after-acquired land without the governor's concurrence. As a result of the Nation's earlier statements, the doctrines of judicial estoppel and waiver bar the Nation from relying on the settlement of a land claim exception.

Second, the claims for fraud, misrepresentation and promissory estoppel based on the Nation's conduct and statements during compact negotiations were incorrectly dismissed based on sovereign immunity. IGRA's abrogation of sovereign immunity for claims concerning gaming compacts applies to these claims that arise directly out of the compact negotiations. Any other conclusion undermines IGRA's regulatory system, which is based on the good faith negotiation of tribal-state compacts. Moreover, United States Supreme Court precedent does not establish that sovereign immunity even applies to torts such as fraud and misrepresentation that arise out of IGRA's mandated compact negotiations. The district court's decision dismissing these claims should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The district court's decisions dismissing claims of promissory estoppel, material misrepresentation and fraudulent inducement based on sovereign immunity are subject to *de novo* review. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013) (grant of a motion to dismiss pursuant to Rule 12(b)(6) is reviewed *de novo*); *In re Ellett*, 243 B.R. 741, 743 (B.A.P. 9th Cir. 1999), *aff'd*, 254 F.3d 1135 (9th Cir. 2001) (decision regarding sovereign immunity defense is a question of law subject to *de novo* review).

This Court also reviews the district court's grant of summary judgment *de novo* and applies the same standard as the trial court under Federal Rule of Civil Procedure 56(c). *Crowley v. Nevada ex rel. Nevada Sec'y of State*, 678 F.3d 730, 733 (9th Cir. 2012). This Court views the evidence in the light most favorable to the non-moving party, inquires whether there are any genuine issues of material fact, and determines whether the district court correctly applied the relevant substantive law. *Id.*

II. THE GLENDALE PROPERTY WAS NOT ACQUIRED AS A "SETTLEMENT OF A LAND CLAIM" AS DEFINED IN IGRA AND THE NATION IS PRECLUDED FROM ASSERTING OTHERWISE

Class III gaming is not authorized on the Glendale Property because IGRA generally prohibits gaming on land acquired after enactment of IGRA. 25 U.S.C.

§ 2719 (a). To bypass IGRA's prohibition, the Nation seeks to take advantage of the statutory exception for land acquired as "a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i). The district court erroneously concluded that land acquired pursuant to the Gila Bend Act, which Congress approved two years before IGRA in 1986, qualifies for the exception.

But the "settlement of a land claim" exception does not apply to lands acquired through the Gila Bend Act. The Act's language establishes that it settled only "claims of water rights or injuries to land or water rights (including rights to both surface and ground water)." Gila Bend Act, § 9(a). The Nation had threatened to sue the federal government under numerous legal theories in its effort to persuade Congress to enact the Gila Bend Act, but Congress responded in the Act itself only to the narrow category of claims described above, which do not include "land claims." Indeed, Congress deleted references to the Nation's other potential legal claims and made clear that the Act's purpose was to "promote the economic self-sufficiency of the O'odham Indian people," as opposed to settling potential land claims. Gila Bend Act, § 2(4). Because land acquired under the Gila Bend Act is not the "settlement of a land claim" under IGRA, the Nation cannot conduct Class III gaming on the Glendale Property, and the district court erred in entering summary judgment for the Nation.

A. The Settlement of a Land Claim Exception Does Not Apply to Lands Purchased with Funds Provided through the Gila Bend Act

The Gila Bend Act settled water rights claims and claims concerning "injuries to land or water rights," but that is not a "settlement of a land claim" under IGRA. The phrase applies to claims to title or possession of land, not to injuries to land. This conclusion is supported by IGRA's regulations and Congress's ordinary use of the term "land claim" as well as the language and history of the Gila Bend Act.

1. A Land Claim Involves a Claim to Title or Possession of Land, Not an Injury to Land

The Department of the Interior's regulations adopted in 2008 define a "land claim" to include "any claim by a tribe *concerning the impairment of title or other real property interest or loss of possession*" that: (1) arises under federal law; (2) conflicts with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and (3) either accrued before IGRA's enactment or involves lands held in trust or restricted fee before IGRA's enactment. 25 C.F.R. § 292.2 (emphasis added).

This regulation is consistent with Congress's traditional usage of the term "land claim." Congress has typically used the term "land claim" to describe a tribe's claim that seeks to remedy the dispossession of aboriginal homelands or treaty reservations. *See* 25 U.S.C. § 1300k(6) (describing a "successful land claim with the Indian Claims Commission"); 25 U.S.C. § 1758(b) (referring to "the

Settlement of the Mashantucket Pequot Indian Land Claim"). For example, Congress described one tribe's "land claim" as "litigation to regain possession of its treaty lands," and as "the Tribe's claim that it was dispossessed of its lands in violation of Federal law" when it "ceded its [federal] treaty reservation to the State." 25 U.S.C. § 941(a)(4)(B), (D), (E) (settlement with the Catawba Indian Tribe of South Carolina). Congress's major stated purpose in enacting that statute (and settlement) was "to remove the cloud on titles . . . resulting from the Tribe's land claim." *Id.* at § 941(b)(4). Likewise, Congress settled a lawsuit involving land claims in Massachusetts to "remove all clouds on titles resulting from such Indian land claim." 25 U.S.C. § 1771.

Congress has distinguished "land claims" from other property disputes. For example, in settling claims of the Pueblo of Santo Domingo, which involved both "land claims" and "trespass claims," Congress explicitly distinguished between the two types of claims. 25 U.S.C. § 1777(a). The settlement resolved "all claims to land, whether based on aboriginal or recognized title, and all claims for damages or other judicial relief or for administrative remedies pertaining in any way to the Pueblo's land, such as boundary, trespass, and mismanagement claims." 25 U.S.C. § 1777c(a)(1)(B)(i). Similarly, the regulations implementing IGRA's "settlement of a land claim" exception focus on claims regarding title and possession but do not extend to tort claims concerning injuries to land.

2. The Gila Bend Act Did Not Settle a Land Claim

The Gila Bend Act authorized the United States to pay the Nation $30 million in exchange for 9,880 acres of land within the Gila Bend Indian Reservation. Gila Bend Act, § 4(a). Congress authorized the Nation to use these funds "for land and water rights acquisition, economic and community development, and relocation costs" as well as for related planning and administration. *Id*. at § 6(a). Under the legislation, the Nation could, in its discretion, purchase up to 9,880 acres of land that it could hold in trust, if the land met other statutory requirements. *Id*. at § 6(c), (d). The Nation had the option of using the funds for new land or other economic development projects. *Id*. The Secretary of the Interior was required to implement the Act only if the Nation executed a waiver and release of "any and all claims of water rights or injuries to land or water rights (including rights to both surface and ground water) with respect to the lands of the Gila Bend Indian Reservation from time immemorial to the date of the execution by the Tribe of the waiver." *Id*. at § 9(a).

The best indicator of congressional intent is the language that Congress enacted. *United States v. LaFleur*, 971 F.2d 200, 208 (9th Cir. 1991). Here, the Act's plain language did not settle any claim concerning title or possession of land. Thus, lands that the Nation purchased in its discretion with Gila Bend Act funds

are not acquired as "settlement of a land claim" for the purposes of IGRA's prohibition on gaming on after-acquired land.

The waiver language in the Act establishes that it settled claims relating to water rights and "injuries to land and water rights." Gila Bend Act, § 9(a). It did not, however, by its terms settle any "land claim" as defined in the regulations, *i.e.*, a claim "concerning the impairment of title or other real property interest or loss of possession." 25 C.F.R. § 292.2. Claims for "injuries" are typically tort claims for damages, not claims for title or possession. *See Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 551-52 (9th Cir. 1984) (claim for damage caused when U.S. Forest Service lost control of nearby slash burn sounds in tort). If Congress had intended to settle a claim of title or possession of land, different language would have been used. The contrast between the Gila Bend Act's broad language governing waivers for water rights and narrower language governing "injuries to land" illustrates this point. While it settled any "claims relating to water rights" and "injuries to . . . water rights," with respect to land the legislation referred only to claims for "injuries." Gila Bend Act, § 9(a).

The regulations' reference to claims concerning some "other real property interest" also does not extend to claims concerning "injuries" to land. In context, the "other real property interest" must relate to title of the property or a related ownership interest. *See Gustafson v. Alloyd Co. Inc.*, 513 U.S. 561, 575 (1995)

(courts interpret words in light of the company they keep in order to avoid giving "unintended breadth to the Acts of Congress") (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). A claim for injuries is not an impairment of a "real property interest." Otherwise, the resolution of *any* tort claim concerning land could fall within the settlement of a land claim exception—a breathtaking expansion of that limited exception. This broad interpretation is not justified by IGRA's statutory language, the common usage of the term "land claim" or the text of the regulation read as a whole.

3. The Gila Bend Act's Legislative History Confirms that the Act Did Not Settle Any Land Claim

This reading of Section 9(a) of the Gila Bend Act—as carefully specifying a narrow subset of claims that does not encompass "land claims"—is buttressed by the Act's legislative history. Although the Nation used broad threats of litigation to urge Congress to approve the Gila Bend Act, Congress rejected legislation based on those threats and, instead, enacted legislation to address the Nation's economic problems. Other than Section 9(a)'s waiver of claims relating to water rights and injuries to land, Congress amended the bill specifically to eliminate the references to the Nation's threatened claims that were part of the bill as introduced. *Compare* H.R. 4216, §§ 2(1), 2(3), 2(6), and 8(d) (introduced Feb. 24, 1986) (ER600-607), *with* Gila Bend Act, § 2.

For example, the Act's title was changed during the legislative process to eliminate references to "settlement." As originally introduced, the bill's title was "A Bill to provide for the settlement of certain claims for the Papago Tribe arising from the operation of the Painted Rock Dam, and for other purposes," and its short title was "Papago-Gila Bend Settlement Act." (ER600.) By contrast, after enactment the Act's title was "an Act to provide for the replacement of certain lands within the Gila Bend Indian Reservation, and for other purposes," and its short title was changed to "the Gila Bend Indian Reservation Lands Replacement Act." Gila Bend Act, § 1.

The Congressional findings were also modified during the legislative process to eliminate the references to potential claims. The recitation of Congressional findings in the original legislation referred to resolving "Indian land and water claims through negotiation rather than costly and lengthy litigation" and said that the Nation's "land and water rights claims . . . are the subject of prospective lawsuits against the United States." (ER600-601 (Gila Bend Act as introduced).) None of this language made it into the enacted bill. Congress intentionally eliminated these statements and replaced them with language that focused on Congress's desire to provide "an appropriate land base" that would improve the "economic self-sufficiency" of the former residents of the Gila Bend Reservation. Congress itself found that this was the purpose and intent of the Gila

Bend Act. These modifications to the legislation show that the "settlement" language in the introduced version was "inconsistent with ultimate congressional intentions." *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1151 (9th Cir. 1991).

The House Committee on Interior and Insular Affairs described these modifications that eliminated the focus on the Nation's threatened "claims" in the bill as introduced in its Committee Report. As the Committee Report explained:

> These findings [in the committee substitute bill] **replace those in the original bill which stressed the need to settle prospective O'odham legal claims against the United States** as well as to provide alternative lands for the tribe. As such, **they did not adequately reflect the principal purpose of the legislation**—to provide suitable alternative lands and economic opportunity for the tribe. **These findings apparently and regrettably prompted the Administration to focus its attention almost entirely on the legitimacy of these potential claims and the extent of the United States' liability if they were brought**, rather than on the broader responsibility of the United States, as trustee, to take action to resolve the tribe's immediate problem of an utterly uneconomic land base.

(ER628 (emphasis added).)

Congress made it very clear that it did not enact the Gila Bend Act to settle a land claim, if there was any colorable claim to settle. Based on the plain language of the Act, confirmed by the legislative history, the Act is not a "settlement of a land claim" and the district court erred in concluding otherwise.

4. The District Court Erred by Ignoring the Gila Bend Act's Plain Language and Congress's Amendments

The district court made two critical errors in its analysis of the settlement of a land claim issue. First, the district court incorrectly viewed the "waiver and release" language in Section 9(a) of the Act as evidence that the Act was a settlement of a land claim. (ER16.) For the reasons explained above, this conclusion ignores the plain language of section 9(a) that fails to waive any "land claim" and disregards the changes to the bill during the legislative process.

Second, the district court incorrectly concluded that the Act was a settlement of a land claim because the Nation asserted it had a potential takings claim due to intermittent flooding on the Gila Bend Reservation. (ER16.) Threatened claims, even if a court thinks they may be viable, do not determine whether legislation is a "settlement of a land claim." It is congressional intent that matters. *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006) ("When reviewing the language of a statute, our purpose is always to discern the intent of Congress.") Here, Congress explicitly rejected efforts to characterize the Gila Bend Act as a "settlement" and Congress enacted no language settling a "land claim."

In the initial deliberations over the Act as introduced, the federal government vigorously disputed the legitimacy of the Nation's asserted legal claims, and, as described above, Congress specifically amended the legislation to

eliminate the references to potential legal claims and settlements beyond the narrow category of claims specified in Section 9(a).[3] Although the Nation communicated its threatened legal claims to Congress in an effort to get this legislation approved, Congress did not see a potential "land claim" that it needed to settle. Rather, it saw an economic problem for the Tohono O'odham that it wanted to address. Consequently, despite the threatened claims, Congress did not enact legislation that settled a land claim. The statutory language and history make this clear.

For the reasons explained above, lands acquired in trust through the Gila Bend Act are not within IGRA's exception for lands acquired as settlement of a land claim. Therefore, gaming is not permitted on the Glendale Property.

B. The Doctrine of Judicial Estoppel Prevents the Nation from Now Asserting that the Gila Bend Act Permits Gaming on the Glendale Property

During the "baseball arbitration" in 1992-1993 that was part of the litigation in federal court, the Nation successfully proposed the definition of "Indian Lands" ultimately incorporated into the 1993 Compact and carried over into the 2002

[3] The federal government had good reason to doubt the legitimacy of the Nation's threatened takings claims. Even though the flooding began in the 1970s, no lawsuit was filed asserting any claims based on the flooding. (ER624; ER626.) A takings claim must be filed within six years of its accrual, so even if there had been a claim at some time, it was barred by the statute of limitations at the time of the Gila Bend Act's 1986 enactment. *See* 28 U.S.C. § 2401; *Navajo Nation v. United States*, 631 F.3d 1268, 1273-75 (Fed. Cir. 2011).

Compact, promising that its definition permitted gaming on after-acquired land only with the concurrence of the governor. (ER715; ER652; ER729.) Appellants argued that judicial estoppel prohibited the Nation from now taking a contrary position in this litigation. "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). In erroneously declining to apply the doctrine, the district court allowed the Nation to gain an unfair advantage and failed to protect "the dignity of judicial proceedings" against the Nation's attempt to "play[] fast and loose with the courts." *Id.* (quotations and citations omitted).

Some of the factors that inform the decision to apply judicial estoppel include (1) whether the party's later position is "clearly inconsistent" with its previous position, (2) whether the party successfully persuaded a court to adopt its previous position, and (3) whether the party would derive an unfair advantage from the inconsistency. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). The clear inconsistency of the Nation's two positions is obvious, as implied by the district court's discussion of the latter two factors only. However, the district court erred in its application of both. (ER16-18.)

First, the district court held that the second element (successful adoption of prior position by the court) does not apply because "the Nation never succeeded in persuading the arbitrator to accept its argument." (ER17.) The district court reached this conclusion because the federal mediator was required to select one of the competing compacts in full and without amendment and therefore his choice expressed no view on the definition of "Indian Lands." (*Id.*)

However, the doctrine of judicial estoppel does not require that a written opinion specify agreement with a particular argument; the only requirement is that the court be persuaded to adopt the litigant's position "in some manner." *Stevens Tech. Servs., Inc. v. S.S. Brooklyn*, 885 F.2d 584, 588-89 (9th Cir. 1989) (purpose of judicial estoppel is to avoid danger that "the first or subsequent court was misled"). The fact that Justice Gordon accepted the entire compact *necessarily* means that he accepted a portion of the compact. Certainly Justice Gordon gave no indication that he had rejected the Nation's argument that the two-part determination protects the State against the Nation's unilateral decision to conduct gaming on after-acquired land.

Under the district court's reasoning, either a state or a tribe could make misrepresentations during IGRA "baseball arbitration" and judicial estoppel would only apply if the federal arbitrator wrote an opinion detailing the selected compact section-by-section and giving reasoning for each segment. Of course, such an

opinion would consume hundreds of pages, an extraordinary amount of effort in light of the fact that both the state and tribe are supposed to be negotiating in good faith, and would be seemingly inconsistent with the entire framework of the "baseball arbitration" called for in IGRA. The more appropriate course is to apply judicial estoppel in the usual way: if the first court adopts a party's position "in some manner" then judicial estoppel should apply to prevent that party from switching course in later litigation on the same subject. *Stevens Tech. Services*, 885 F.2d at 588-89.

The district court also erroneously held that the third factor (unfair advantage to party switching positions) does not apply in this instance because the arbitration did not lead to a binding compact and thus left an "absence of any meaningful benefit gained from the arbitration" to the Nation. (ER17-18.) This reasoning ignores the fact that the language at issue, the definition of "Indian Lands," was carried forward unchanged into the 1993 Compact and again into the 2002 Compact which is in effect today. (ER652; ER729.)

Having the Nation's own definition of "Indian Lands" become a binding compact term for decades, a period in which the Nation pursued a secret plan to open a Phoenix-area casino based on that definition, should count as a "meaningful benefit." Certainly if the State believed the Nation would change its position on the definition, it would not have been included in the 2002 Compact.

Moreover, the district court ignores the fact that once Justice Gordon's decision was filed and the separate district court case number was closed, the Nation had all of the negotiating leverage because it had already won the battle. IGRA requires the Secretary of the Interior to promulgate procedures "which are consistent with the proposed compact selected by the mediator." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Thus, even though the State declined to accept the arbitrator's compact selection, the Secretary's procedures could have implemented that compact anyway. The fact that Secretary Babbitt convinced the parties to return to the negotiating table does not negate the fact that the Nation prevailed during the "baseball" arbitration and thereby gained a significant advantage: ultimately making the Nation's definition of "Indian Lands" the official compact definition for 21 years and beyond. The subsequent negotiation of a slightly different compact than the one selected by Justice Gordon is more akin to a case that settles while pending on appeal, where the decision of the lower court remains valid. *See Ringsby Truck Lines, Inc. v. W. Conf. of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982) (settling after judgment does not automatically vacate the judgment so dissatisfied litigants may not have trial court decisions "wiped from the books").

Having achieved this enormous benefit—the favorable terms of the 1993 Compact and the subsequent carryover into the 2003 Compact—in substantial part from its statements in the course of district court proceedings, the Nation cannot

simply abandon those statements. To protect the integrity of the federal court system, this Court should hold that judicial estoppel bars the Nation's invocation of the "settlement of a land claim" exception here.

C. The Nation Knowingly and Voluntarily Waived the Right to Invoke the Settlement of a Land Claim Exception during the 1993 Negotiations

During the 1992-1993 compact negotiations, the Nation made the strategic political decision to walk away from any right to conduct gaming on non-contiguous lands purchased with Gila Bend Act funds, and therefore the Glendale Property is not eligible for gaming. A waiver is "the voluntary relinquishment—express or implied—of a legal right or advantage" that is "knowing or intelligent" because the waiving party has "sufficient awareness of the relevant circumstances and likely consequences." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1170-71 (9th Cir. 2006) (quotations and citations omitted). Courts presume that a party may waive the benefit of a statutory provision "absent some affirmative indication of Congress' intent to preclude waiver." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Because neither the Gila Bend Act nor IGRA's "settlement of a land claim" exception contain any indication that its benefits may not be waived by the Nation, its behavior in the 1992-1993 negotiations constitutes a waiver of any purported right to game on the Glendale

Property. The district court erroneously held that the Nation's behavior did not meet these elements due to the alleged "silence" of the Nation. (ER19.)

To understand why the district court erred, it is important to understand the context of the Nation's waiver. In June 1993, the negotiations between the tribes and Governor Symington were at the end stage and the Arizona legislature was considering a bill that would prohibit the governor from executing any compact which would permit gaming on after-acquired lands under any circumstances. (ER441.) The stakes were extremely high, as were the tensions between the parties. The tribes and the governor were working together to convince reluctant state legislators that gaming on after-acquired lands would require the concurrence of the governor pursuant to the two-part determination. (ER438; ER449-450; ER165 (119:16-120:23).) At a June 8, 1993 meeting between representatives of numerous tribes and legislative staff, the Nation joined a number of other tribes in passing out a handout saying:

> Another exception to the prohibition of gaming on after acquired lands is when the lands are taken into trust as part of a settlement of a land claim. This will not effect [*sic*] Arizona because aboriginal land claims in Arizona have already been settled pursuant to the Indian Claims Commission Act of 1946.

(ER449-450) The position in the handout was the Nation's official position, and no representative of the Nation expressed disagreement with this position. (ER154 (69:17-70:11).)

The district court erroneously held that where the Nation's representatives did not act as the speakers for the group at the June 8th meeting, there could not be a waiver because waiver ordinarily does not occur by silence. (ER19.) "Silence" does not accurately describe the Nation's role in the meeting and in those negotiations. The Nation's representatives acted collectively with the other tribes in appearing at the meeting and presenting the handout, and allowed those who spoke for the tribes to state the group's position as that in the handout, without objection; moreover, the Nation actively participated in the entire course of negotiations by these tribes with the State and in litigation against the State. (ER438; ER449-450; ER154 (69:17-70:11); ER167-168 (140:23-141:16).)

By the district court's reasoning, at such a meeting between the State's representatives and multiple tribes, the State can never allow one tribal representative to speak for the entire group. While the waiver would be indisputable if the legislature's representatives had asked for each individual to affirm every utterance from the designated spokesperson and every statement in the handout, it would have been impossible to conduct good-faith negotiations that way.

This general principle is embodied in the concept of apparent authority of agents. Under Arizona law, an agent has apparent authority when the principal permits others to assume the agent has authority under circumstances as to estop

the principal from denying that apparent authority exists. *Koven v. Saberdyne Sys., Inc.*, 625 P.2d 907, 911-12 (Ariz. Ct. App. 1980). If the principal represents that another is speaking for him, and a third party reasonably believes that the agent is speaking for the principal, the agent has apparent authority to speak for the principal. *Id.*

This is precisely what happened in this instance: the Nation joined other tribes in presenting a uniform negotiating position, and the State reasonably believed that the persons speaking for the group of tribes were speaking for the individual tribes in that group. The person taking the lead for the group had apparent authority to speak for the entire group. The Nation accepted the benefits of the successful effort to persuade the State that the settlement of a land claim exception does not apply in Arizona, as reflected in the 1993 Compact.

In the context of contract negotiations, silence is equivalent to an affirmative assertion when the silent party "knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." Restatement (Second) of Contracts § 161(b) (1981).

During the 1993 negotiations the Nation and its representatives were well aware that the State was concerned with gaming on after-acquired lands. (ER436-

439.) The Nation was repeatedly informed that the governor and members of the legislature were highly concerned about the possibility that a tribe might build a casino off existing reservations and in a metropolitan area. (ER438; ER164 (102:9-25).) The Nation allowed the State to be reassured that concurrence of the governor would be required, and did nothing to correct that supposed "mistake" before gaining the benefits of the 1993 Compact. The Nation was well aware of both the relevant circumstances and likely consequences of waiving its right to game on non-contiguous, after-acquired lands. Remaining silent while other tribal representatives asserted that all after-acquired lands would require a two-part determination for gaming eligibility, knowing that this was a vital issue to the State, had the same effect as stating it out loud. Restatement § 161(b). The district court erred in finding no waiver on the grounds of silence by the Nation.

At a minimum, the district court erred in holding that the waiver issue is not a triable issue of fact. "[U]nless only one conclusion may be drawn, existence of an agency and the extent of an agent's authority is a question of fact and should not be decided on summary judgment." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). It seems self-evident that at the June 8th meeting the individual who was speaking for the group had apparent authority to speak for everyone in the group. But if the district court thought that another conclusion was possible, it was error to grant summary judgment to the

Nation instead of allowing a trial on the waiver question. The decision below should be reversed, and either summary judgment should be granted to the Appellants or the issue should be remanded for trial.

III. SOVEREIGN IMMUNITY DOES NOT BAR APPELLANTS' CLAIMS FOR PROMISSORY ESTOPPEL, FRAUDULENT INDUCEMENT, AND MATERIAL MISREPRESENTATION

This Court has long recognized that IGRA is meant to facilitate good faith negotiations, stating, "Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose," *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997). For the same reason, IGRA does not permit tribes to make empty promises and repudiate them with immunity. IGRA did not burden the states with a one-sided duty of good faith while allowing tribes to defraud states when negotiating gaming compacts.

IGRA's abrogation of tribal immunity is not nearly as narrow as the decision below held. IGRA abrogates sovereign immunity as to "***any*** cause of action" to enjoin a class III gaming activity conducted in violation of any Tribal-State compact "entered into" pursuant to IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). Claims for promissory estoppel, material misrepresentation and fraud arising out of the negotiations for a compact "entered into" pursuant to IGRA

or relating to its validity fall within this abrogation of sovereign immunity. *See, e.g.*, *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1386 (10th Cir. 1997); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir. 1997).

Moreover, even if IGRA does not abrogate sovereign immunity for such claims, sovereign immunity should not bar claims for misrepresentation, fraud and promissory estoppel arising out of compact negotiations. The United States Supreme Court recently acknowledged that no binding precedent extends sovereign immunity to suits brought by plaintiffs who became victims of a tribe's misconduct without having "chosen to deal with a tribe." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 n.8 (May 27, 2014). Accordingly, this Court should not apply sovereign immunity to bar claims arising out of a tribe's wrongful conduct in negotiations under IGRA.

A. IGRA Does Not Permit a Tribe to Make Promises During Compact Negotiations and Then Repudiate Those Promises With Immunity

The district court's conclusion that IGRA abrogates sovereign immunity only for "breach-of-compact claims" reads IGRA's abrogation of sovereign immunity too narrowly. (ER56.) IGRA abrogates sovereign immunity for "*any* cause of action . . . to enjoin" a class III gaming activity conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added); *see also Cabazon Band*, 124 F.3d at 1056 (IGRA envisions "the enforcement of a

compact and *any* contractual obligations assumed pursuant to a compact" (emphasis added)). Likewise, immunity is abrogated "when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process"—such as the location of the Nation's gaming facilities—by virtue of Section 2710(d)(7)(A)(ii)'s reference to a compact "entered into" under IGRA. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008).

Most significantly, IGRA abrogates sovereign immunity for determinations of the validity of a compact. *Mescalero*, 131 F.3d at 1386. In *Mescalero*, the Tenth Circuit considered a claim by the State of New Mexico that the gaming compact was invalid because the governor did not have authority to execute the compact on behalf of the state. 131 F.3d at 1382-83. Citing its decision in *Pueblo of Santa Ana*, the court of appeals held that § 2710(d) abrogates sovereign immunity for claims regarding the validity of the compact. 131 F.3d at 1386. The Tenth Circuit was correctly "hesitant to conclude that Congress intended to permit a state to be bound by a compact regulating class III gaming which it never validly entered." *Pueblo of Santa Ana*, 104 F.3d at 1554. This Court should not part ways with the Tenth Circuit's correct conclusion.

The Nation induced the State to enter into the 2002 Compact by promising, among other things, that it would locate its gaming facilities in the Tucson market or in outlying rural areas. (ER208 (95:2-96:19).) The Nation allowed Governor

Hull and the State's representatives to promise legislators and voters that no additional casinos would be built in the Phoenix area. (ER830; ER479-481; ER544; ER564; ER566.) The Nation allowed AIGA to repeatedly promise voters that no additional casinos would be built in the Phoenix area. (ER477; ER533; ER548; ER581.) Based on these representations, reporters informed voters that there would be no additional casinos in the Phoenix area. (ER535-536; ER539-540; ER551; ER557; ER560; ER567; ER570; ER571; ER573-74; ER581.) Now the Nation claims that the State's belief that the 2002 Compact would not authorize the Nation to operate a casino in the Phoenix area—a belief induced by the Nation's fraudulent representations—was incorrect. This raises the question of whether the State validly entered into the 2002 Compact at all.

To the extent that the Nation's promise not to construct a Phoenix-area casino is not enforceable under Arizona contract law, the State never assented to the agreement with the Nation because the Nation concealed "essential terms" of the agreement and, due to the Nation's extensive efforts to hide its true intentions, the State had no reasonable opportunity to discover the fraud. Restatement (Second) of Contracts § 163 (1981);[4] *see also Canyon Contracting Co. v. Tohono O'odham Hous. Auth.*, 837 P.2d 750, 754 (Ariz. Ct. App. 1992) ("Assent to the terms of a contract is the central question in determining the existence of a

[4] Arizona courts follow the Restatements in the absence of contrary Arizona law. *Perry v. Ronan*, 234 P.3d 617, 620 (Ariz. Ct. App. 2010).

contract."). The district court erred by holding that IGRA created a Catch-22 for states that are defrauded by tribes, reasoning that if the compact was invalid then there was no compact in effect to fall within the abrogation of sovereign immunity. (ER56.)

Allowing the Nation to defraud the State by invoking sovereign immunity also violates the policies Congress intended to further through the IGRA process. *See* S. Rept. 100-446, 100th Cong. 2nd Sess (1988) at 1-2 (purposes of IGRA include the desire "to protect the tribes and the gaming public from unscrupulous persons" and to "achieve a fair balancing of competitive economic interests"). If this Court's decision permits the Nation to build a Phoenix-area casino, it will set a precedent that enables tribes to deceive their negotiating partners during IGRA negotiations with impunity. Such a decision would work a substantial injustice in this case and severely undermine IGRA as a vehicle for resolving conflicts between states and tribes over gaming.

Gaming compacts will become untenable if states must forgo reliance on good faith in favor of attempting to independently verify *every* statement made by *every* tribe, sentence by sentence, in future compact negotiations. Tribes will likewise eschew IGRA compact negotiations if they must categorically waive all sovereign immunity before negotiations begin—an unfair and unwarranted proviso when applied to tribes that would presumably continue to negotiate gaming

compacts in good faith. The Nation, after all, was the only tribe that negotiated the 2002 Compact in bad faith. Congress did not intend to eliminate mutual trust when it passed IGRA.

Promissory estoppel, fraudulent inducement, and material misrepresentation arise out of compact negotiations or implicate the validity of the compact entered into by the State and the Nation. Nothing in the text or legislative history of IGRA suggests that the State should be bound by a compact that is invalid under controlling contract law. Consequently, it was wrong to presume, as the district court did, that Congress intended to allow a tribe to secure a compact through fraud and then use the fraudulently obtained language of that compact as a shield against accountability for its intentional actions against another sovereign. The claims asserted in this case fall well within the only reasonable interpretation of IGRA's abrogation of tribal immunity.

B. Sovereign Immunity Does Not Extend to the Nation's Wrongdoing

The decision below proceeds from the *assumption* that sovereign immunity applies, restricting the analysis to whether IGRA abrogates sovereign immunity for the claims. But with respect to the claims of fraudulent inducement and material misrepresentation, the Nation does not enjoy sovereign immunity in the first place. As the United States Supreme Court has now clarified, the common law doctrine of tribal sovereign immunity has not yet been deemed to protect tribes from claims

made by unwitting victims, such as the State here. *Bay Mills*, 134 S. Ct. at 2036 n.8. The *Bay Mills* decision alters the way this Court has previously applied precedent relating to sovereign immunity, resolving this Court's dilemma in extending immunity even to those plaintiffs who have not chosen to deal with a tribe.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), the Supreme Court defined tribal sovereign immunity as follows: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." In discussing the doctrine, the Court acknowledged that tribal sovereign immunity can work an injustice against those who come in contact with tribes but "who have no choice in the matter, as in the case of tort victims." *Id.* at 758. Even in reaching its decision, the *Kiowa* Court conceded that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" because immunity can "harm" those who had no choice in becoming victims of wrongdoing by tribes. *Id.*

Although *Kiowa* did not directly address tort claims against tribes, courts widely assumed that the broadly written description of tribal sovereign immunity included immunity from tort claims. For example, this Court subsequently recognized that the "policy arguments [against tribal sovereign immunity for torts] are not without some insight but are foreclosed by our precedent," the main one

being that the Supreme Court "somewhat grudgingly accepted tribal immunity in the commercial context." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (citing *Kiowa*, 523 U.S. at 758). In *Cook*, the plaintiff had been seriously injured by an intoxicated driver who had allegedly been drinking at a casino operated by the Fort Mojave Indian Tribe. *Id.* at 721. In holding that sovereign immunity barred the lawsuit, the author took the unusual step of separately concurring in his own opinion to decry the fact that "the austerity of our jurisprudence concerning tribal sovereign immunity leaves me with the conclusion that an unjust result is reached that our law might better preclude." *Id.* at 727 (Gould, J., concurring).

In *Bay Mills*, the Supreme Court recently noted that it has never "specifically addressed" whether tribal sovereign immunity bars claims brought by victims who "ha[ve] not chosen to deal with a tribe" and who have no alternative remedies available to them, such as tort victims. 134 S. Ct. at 2036 n.8. This clarification supports declining to apply tribal sovereign immunity to bar the State's fraudulent inducement and material misrepresentation claims against the Nation, because in this circumstance the State is precisely the kind of plaintiff *Bay Mills* noted may be outside of tribal sovereign immunity.

Despite the fact that this was a contract negotiation, the State did not choose to deal with the Nation, but was forced to do so by federal and state law. IGRA

mandates that states "shall negotiate with [tribes] in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). Even if the State ignored the federal statutory mandate, the State would have faced a false choice because Arizona law required the governor to execute a "standard form compact" for any tribe requesting one. *Salt River Pima-Maricopa Indian Cmty. v. Hull*, 945 P.2d 818, 821-22 (Ariz. 1997). Indeed, when the 2002 Compact went to the voters for approval as Proposition 202, it was not presented as a complete compact, but merely as amendments to the pre-existing compacts. (ER808.) The only "choice" the State could make was whether to negotiate with the tribes or allow the tribes alone to dictate the terms of the standard form gaming compact.[5] Under those circumstances, the State had no real choice but to move forward in good faith, after which it unwittingly become the victim of the Nation's fraud.[6]

[5] In 1996, prior to the commencement of the negotiations at issue, the Supreme Court held that sovereign immunity barred suits against states for ignoring IGRA's mandate to negotiate compacts in good faith. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996). In that case, Florida was choosing between negotiating and not executing a compact at all. In this case the State did not even have that choice, as the tribes could force the State to execute a compact through a ballot initiative. *See Salt River*, 945 P.2d at 821-22.

[6] Under Arizona law, fraudulent inducement and material misrepresentation are torts. *See Morris v. Achen Constr. Co.*, 747 P.2d 1211, 1213 (Ariz. 1987) (fraudulent inducement); *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 34 n.22 (Ariz. 2002) (citing Restatement (Second) of Torts § 525 (1977)) (material misrepresentation).

The alternative remedies available to the State of Michigan in *Bay Mills* are not readily apparent here—and the Nation has never suggested the availability any such alternative remedies. In *Bay Mills*, the tribe operated a casino on land that was owned in fee by the tribe but not part of the tribe's reservation. 134 S. Ct. at 2026. Because the casino was on land subject to state jurisdiction, the Supreme Court noted that Michigan had alternate remedies, including direct enforcement of state laws. *Id.* at 2041-43. Here, if the Nation goes forward with its plans based on the district court's ruling, it will be conducting gaming in the Phoenix area on reservation land under the protection of a ruling of this Court that the 2002 Compact permits the Nation to do so.

The State is an unwitting and unwilling victim under the description set forth by the Supreme Court. Consequently, the State should be allowed to pursue its claims in court because the Nation's fraud will cause real and significant harms. During the negotiations of the 2002 Compact, the State sought to structure an agreement that was fair to all tribes by ensuring that the casinos in metropolitan areas did not eliminate the customer base for rural casinos. (ER223 (199:5-16).) Governor Jane Dee Hull personally represented to all Arizona voters that the 2002 Compact would not permit what the Nation is trying to do now, and the voters approved the 2002 Compact after she made those representations. (ER830; ER482.) The Nation now seeks to cloak itself in sovereign immunity so it can

exploit the compact language it fraudulently obtained, thereby corrupting the fairness the State was so careful to achieve. This will result in serious harm to other tribes, to the State, and to the voters who approved Proposition 202 under false pretenses. (ER203 (74:7-75:25).)

To the extent this Court has previously assumed that the Supreme Court extended tribal sovereign immunity to claims by parties who did not choose to deal with a tribe, that assumption must be cast aside under *Bay Mills*. *Kiowa* did not "grudgingly accept" tribal sovereign immunity in such cases, and this Court is now free from the discomforting interpretation of *Kiowa* as imposing an obligation to reach unjust results in such cases against Indian tribes. *Bay Mills*, 134 S. Ct. at 2036 n.8. In any event, the State is aware of no prior decision of this Court holding that Indian tribes have sovereign immunity for claims of fraudulent inducement or material misrepresentation in compact negotiations.[7] In light of *Bay Mills*, the common law doctrine of tribal sovereign immunity does not cover the kind of fraud committed in this case.

[7] In a case involving fraudulent inducement and material misrepresentation, this Court vacated a district court decision dismissing the case on sovereign immunity grounds because under the unique facts of the case a sovereign immunity determination required an interpretation of tribal law to be decided by the tribal courts in the first instance; the Court instead upheld the dismissal on comity grounds. *Stock W. Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992).

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IV. THE DISTRICT COURT ERRED IN GRANTING THE NATION SUMMARY JUDGMENT ON THE APPELLANTS' CLAIM THAT ITS PROPOSED CASINO ON THE GLENDALE PROPERTY VIOLATES THE COMPACT WITH THE STATE OF ARIZONA

The district court erred in determining as a matter of law that the Compact was not "reasonably susceptible" to the Plaintiffs' interpretation of the Compact as prohibiting the Nation from building a casino in the Phoenix metropolitan area. When negotiating the Tribal-State Compacts, the State sought to ensure, and did ensure, that there would be no additional gaming facilities in the Phoenix metropolitan area and only one new facility in the Tucson metropolitan area. The Nation neither negotiated for nor received facility or device allocations in the Phoenix metropolitan area. For all of the reasons discussed in the Opening Brief of Gila River and Salt River, the Nation's attempt to now build a casino in Glendale is contrary to the language of the Compact, context, common sense, and all of the documented evidence of the parties' intent.

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CONCLUSION

For the reasons stated above, the Court should reverse the district court's decision and remand with instructions to enter summary judgment for the State, or alternatively, to set the matter for trial.

RESPECTFULLY SUBMITTED this 26th day of June, 2014.

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STATEMENT OF RELATED CASES

This Court has heard two appeals concerning the Nation's intention to operate a casino on the Glendale Property. *See Gila River Indian Community v. United States*, Nos. 11-15631, 11-15633, 11-15639, 11-15641, 11-15642, 697 F.3d 886 (9th Cir. 2012), withdrawn and superseded on denial of rehearing en banc by 729 F.2d 1139 (9th Cir. 2013); *Tohono O'odham Nation v. City of Glendale*, Nos. 11-16811, 16823, 16833 (submission of case vacated June 21, 2013).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule Of Appellate Procedure 32(a)(7)(B) because it contains 11,692 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated this 26th day of June 2014.

s/ Michael Tryon
Attorneys for Plaintiffs-Appellants

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Michael Tryon
Attorneys for Plaintiffs-Appellants

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United States Code

Title 25. Indians

Chapter 29. Indian Gaming Regulation

§ 2710. Tribal gaming ordinances

*****

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)

(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711 (e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)

(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)

(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations

for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the

State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)

(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to

conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)

(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

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United States Code

Title 25. Indians

Chapter 29. Indian Gaming Regulation

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

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(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86–2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

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