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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 Cause No. CV 2:11 cv 00296-DGC

APPELLANT STATE OF ARIZONA'S REPLY BRIEF

Thomas C. Horne
Attorney General
Robert Ellman
Solicitor General
Michael Tryon
Office of the Attorney General
STATE OF ARIZONA
1275 West Washington Street
Phoenix, Arizona 85007
Tel: (602) 542-8355
Michael.Tryon@azag.gov

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INTRODUCTION

The Tohono O'odham Nation failed to refute the arguments set forth by the State of Arizona in the State's Opening Brief. The Nation presents no credible argument that Congress intended the Gila Bend Act to be used to drop a casino in the middle of an urban area far from its main reservation. The Nation fails to show why this Court should not apply the doctrines of judicial estoppel and waiver to bar the Nation's inconsistent legal assertions in this case. The Nation also fails to show why this Court should not take the United States Supreme Court at its word and hold that sovereign immunity does not protect the Nation from its premeditated fraud. The district court erred in calling the Gila Bend Act a "settlement of a land claim" under the Indian Gaming Regulatory Act ("IGRA") and the district court erred in holding that sovereign immunity barred claims for fraud, misrepresentation, and promissory estoppel.[1]

I. THE GILA BEND ACT IS NOT A "SETTLEMENT OF A LAND CLAIM" AS DEFINED IN IGRA AND THE NATION IS BARRED FROM ASSERTING OTHERWISE.

The Gila Bend Act settled no "land claim," *i.e.*, a claim relating to clouds on title or possession. Congress made clear that its purpose in enacting the Gila Bend Act was to promote the economic development of the Nation. (ER616 (Gila Bend Act, § 2 (4)).) Indeed, notwithstanding the Nation's various legal theories of

[1] Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the State of Arizona joins the reply brief filed by Appellants Gila River Indian Community and Salt River Pima-Maricopa Indian Community.

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liability against the United States, Congress deliberately removed reference to the settlement of any land claim from the text of the Gila Bend Act because that language did not reflect the purpose of the legislation. (ER628.)

Because land acquired under the Gila Bend Act is not the "settlement of a land claim" under IGRA, and because the Nation should be barred from reversing its prior concessions to that effect, the district court erroneously concluded that the Glendale Property is eligible for gaming.

A. The Glendale property was not acquired pursuant to a settlement of a land claim because Congress did not intend the Gila Bend Act to be such a settlement.

Whether the Gila Bend Act constitutes a "settlement of a land claim" is fundamentally an issue of statutory interpretation. Here, the Gila Bend Act's plain language did not settle any claim concerning title or possession of land. The Act authorized the federal government to purchase 9,880 acres of land within the Gila Bend Indian Reservation for $30 million. (ER617 (Gila Bend Act, § 4(a)).) In exchange, only the Nation's claims for "water rights or injuries to land or water rights" were settled as a prerequisite to the land purchase by the United States. (ER618 (Gila Bend Act, § 9(a)).) After the United States purchased the land at issue, any claims relating to title became moot.

The Nation does not dispute that the Gila Bend Act makes no mention of any settlement of a land claim. Rather, the Nation argues that its lobbying strategy

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of threatening litigation against the United States when urging Congress to enact the Gila Bend Act somehow imbues the Act with a different meaning. But the Nation's arguments regarding its purported claims against the United States miss the point. (Nation Br. at 43-45.)[2]

Other than Section 9(a)'s waiver of claims relating to water rights and injuries to land or water rights, Congress specifically eliminated the references to the Nation's threatened claims that were included in the bill as introduced. *Compare* H.R. 4216, §§ 2) (a), 2(3), 2(6), and 8) (d (introduced Feb. 24, 1986) (ER600-607), with Gila Bend Act, § 2 (ER 616)) The carefully-worded waiver language in the Act unequivocally establishes that it settled only claims relating to water rights and "injuries to land or water rights." (ER618 (Gila Bend Act, § 9(a)); *see* State Br. at 30.)

Congress eliminated statements regarding the Nation's threatened claims from the Gila Bend Act and replaced them with language focused on Congress' desire to provide "an appropriate land base" that would improve the "economic self-sufficiency" of the O'odham people. (ER620.) The enacted legislation emphasized the high unemployment and acute health problems of the Tohono O'odham and stated that the purpose of the Act was to promote the economic self-

[2] All citations to briefs refer to ECF page numbers.

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sufficiency of the people. Gila Bend Act, § 1. The Act's clear language settled no land claim.[3]

The Nation's arguments that claims for *injury to land* constitute a "land claim" are inconsistent with IGRA, the Department of Interior regulations, and other land claim settlements in asserting that it had "land claims" against the United States.

First, to justify its gaming on the Glendale Property, the Nation misconstrues the statutory purpose of IGRA's narrow exceptions for gaming on after-acquired land (Nation Br. at 39-40.) The Nation argues that Congress' purpose in enacting the "settlement of a land claim" exception was to place tribes disadvantaged by IGRA's 1988 cut-off date on an "equal footing" with other tribes. (*Id.*) Congress, however, did not intend for this exception to permit reservation shopping as has happened here: the Nation, which had no obligation to purchase *any* land under the Gila Bend Act, purchased land in the largest

[3] Congress rejected, for good reason, the legislation proposed by the Nation that stressed the need to settle land claims. (ER628.) The Gila Bend Reservation was intermittently flooded pursuant to lawful authority. *See* Pub. L. No. 81-516, 64 Stat. 163. At the time of the enactment of the Gila Bend Act, the Nation did not possess a claim to title or possession in conflict with the right of the government to flood the lands at issue, and arguably did not even have a valid claim for the payment of additional compensation. (ER627.) Moreover, no lawsuit had been filed asserting any claims based on the flooding even though it had begun in the 1970s. Any takings claim was barred by the statute of limitations at the time of the Gila Bend Act's enactment in 1986. (ER624; ER626); *see* 28 U.S.C. § 2401; *Navajo Nation v. United States*, 631 F.3d 1268, 1273-75 (Fed. Cir. 2011).

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metropolitan market in Arizona.[4] The Glendale Property places the Nation in a position *superior* to that of other Arizona gaming tribes. Indeed, the Nation's interpretation of the Gila Bend Act and IGRA would let them cherry-pick the location of their casinos in almost any urban location in the state—and this is neither "equal footing" nor the intent of the Gila Bend Act or IGRA.

Second, the Nation incorrectly argues that the Department of Interior's regulation defines "land claim" to include *injury* to land. (Nation Br. at 41 n.8.) The Department of Interior's regulation, 25 C.F.R. § 292.2, defines "land claim" with reference to any "claim by a tribe concerning the impairment of title or other real property interest or loss of possession[.]" The reference to claims concerning "other real property interest" does not extend, as the Nation suggests, to claims concerning injuries to land. This phrase, read in context of the sentence in which it appears, refers to title-related interests (such as leases) and nothing more. *See Gustafson v. Alloyd Co.*, 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 Act of Congress") (internal quotations and citation omitted); *Deal v. United States*, 508

[4] Section 6(a) of the Gila Bend Act says that the amount paid by the United States, together with interest and dividends accrued, "may" be used for "land and water rights acquisition, economic and community development, and relocation costs." (ER617.) If Congress intended to put the Nation on an "equal footing" as the Nation contends, it would have mandated that the funds be used for land replacement. The fact that the funds could be used for any kind of economic and community development is further evidence that Congress did not intend the Act to be a "settlement of a land claim."

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U.S. 129, 132 (1993) (confirming it is a "fundamental principle of statutory construction (and, indeed of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). Any other reading would be an expansion of the limited exceptions to gaming on after-acquired land under IGRA. (*See* State Br. at 31.)

Third, the Nation's threatened claims are not similar to other recognized settlements of land claims. (Nation Br. at 41 n.8.) The settlement of a land claim for the Seneca and Torres-Martinez both constitute claims that could have been brought under the Nonintercourse Act (which requires a treaty for the transfer of Indian lands) against non-federal entities. *See* 25 U.S.C. § 177. The Nation had no claim under the Nonintercourse Act. That aside, the Seneca Nation settlement explicitly settled claims related to leases, a clear title-related settlement. 25 U.S.C. § 1774(a). In the Torres-Martinez Desert Cahuilla settlement, Congress included explicit instructions on gaming, mooting the need to determine whether the flooding claims qualified as "land claims" under § 2719. 25 U.S.C. § 1778d(b). Neither of these examples supports the Nation's argument that "land claims" encompass other property disputes unrelated to title. Indeed, Congress has traditionally distinguished "land claims" from other disputes involving land. *See* 25 U.S.C. § 1777(a)(5) (distinguishing land claims from trespass claims); State Br. at 27-28.

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Congress never intended the Gila Bend Act to be a "settlement of a land claim" as the term is used in IGRA, and Congress never intended the phrase in IGRA to encompass claims for damage to land. The district court erred in concluding otherwise.

B. The doctrines of judicial estoppel and waiver bar the Nation's assertion that it may conduct gaming under the "settlement of a land claim" exception.

1. The Nation's arguments opposing application of judicial estoppel are unavailing.

The Nation's arguments opposing the application of judicial estoppel are belied by the record and by common sense. Contrary to the Nation's assertion (at 53), the statutory arbitration between the State and the Nation was not a "failed" proceeding, but in fact a success for the Nation. The Nation's proposed compact was accepted in its entirety during the proceeding. (ER599; ER163 (63:12-18); ER69.) After the State refused to execute the proposed compact, the Nation was entitled to have the Secretary of the Interior authorize gaming consistent with the terms of their successfully litigated compact. 25 U.S.C. § 2710(d)(7)(B)(vii). The fact that Secretary Babbitt (a former Arizona governor) had a unique interest in the dispute, and therefore encouraged the State to enter a compact, does not change the fact that the Nation successfully persuaded the district court with a statement that it would not seek to conduct gaming under what it calls the "equal footing" exceptions.

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The Nation's statement in its prior brief was clear:

> Section 2(s) of the Nation's compact uses the term "Indian Lands", as used in IGRA, to describe the lands where gaming may be conducted. The State's compact uses the term "Tohono O'odham Tribal Trust Lands." *See* State's Section 2(cc). The State's provision also adds a compact provision to the existing federal law which specifically governs the acquisition of trust land for a gaming use after the effective date of the Act. 25 U.S.C. §2719. The State's section 2(cc) would result in the Nation forfeiting the rights provided to tribes in IGRA to request that in certain circumstances after-acquired trust land be available for class III gaming activities. ***The existing federal law requires the Governor's concurrence. This is adequate protection to the State and local interests.*** The State simply seeks an ancillary benefit in this provision.

(ER86-87 (emphasis added).) The Nation now offers a post-hoc justification for that statement, contending it was intended only to protect its right to request a two-part determination under IGRA to conduct gaming on noncontiguous, after-acquired land. (Nation Br. at 51-52.)

This "interpretation" of the Nation's own statement defies logic and common sense. The Nation asks this Court to believe that it was merely fighting for the right to request a concurrence that no Arizona governor would ever give, certainly not within the 10-year time frame of the 1993 Compact. Opposition to off-reservation gaming among Arizona leaders and voters has always been intense and widespread. Nobody in the state believed that an Arizona governor would concur in gaming on noncontiguous, after-acquired land. Moreover, the record does not contain any evidence supporting the Nation's new justification of its own

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words, which is why the Nation falls back on the district court's statement that the wording is "cryptic." (Nation Br. at 52.) But the meaning of the statement is crystal clear: the Nation convinced the district court that gaming on non-contiguous, after-acquired land could only occur with the governor's concurrence. The Nation should not be permitted to reverse course in this litigation.

The Nation also incorrectly contends that it "did not obtain any relief based on its alleged concession." (*Id.*) The Nation obtained *all of the relief possible*, which was 100% acceptance of its proposed compact and a federal right to conduct gaming using the terms of its own proposed compact. The fact that the Nation later chose to partially give up the relief it obtained as a political concession does not change the fact that it persuaded the district court to adopt its position "in some manner." *Stevens Tech. Servs., Inc. v. S.S. Brooklyn*, 885 F.2d 584, 588-89 (9th Cir. 1989). The cases the Nation cites (at 52-53) are inapposite, because in those cases the litigant truly did not obtain relief due to *judicial* rejection of the inconsistent statements. *Williams v. Boeing Co.*, 517 F.3d 1120, 1124 (9th Cir. 2008) (noting that "a prior panel of our court . . . rejected the Consent Decree"); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010) (noting that the district court "did not adopt petitioners' interpretation"). In light of the fact that the provision at issue (the definition of "Indian Lands") made it unchanged into the

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1993 Compact and was carried over unchanged into the 2002 Compact, the Nation cannot credibly claim it did not obtain the relief it sought. (ER652; ER729.)

Finally, the Nation is incorrect when it says that its statement did not give the Nation an unfair advantage or create an unfair detriment on the State. (Nation Br. at 53.) The Nation says that the parties "returned . . . to the negotiating table" without mentioning that the table was no longer level. (*Id.*) The Nation had a victory in the arbitration and a statutory right to conduct gaming in accordance with its victorious compact. 25 U.S.C. § 2710(d)(7)(B)(vii)(I) (mandating that "the Secretary ***shall*** prescribe, in consultation with the Indian tribe, procedures which are consistent with the proposed compact selected by the mediator") (emphasis added). In light of that statutory right, the Nation had *all* the power in the negotiation, and it never compromised on the provision it needed to carry out its secret plan to drop a casino in the middle of a metropolitan area far away from its own reservation.

The Nation's claim that it is allowed to take advantage of an "equal footing" exception is inconsistent with its prior litigation statement, it imposes an unquestionable detriment on the State, and it creates a perception that the district court (and this Court) have been misled. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). The doctrine of judicial estoppel is designed to prevent litigants from engaging in the kind of behavior the Nation has demonstrated in this

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case. This Court should not endorse the Nation's effort to diminish the "essential integrity" of the judicial process. *Id.* at 750 (internal quotations and citation omitted).

2. The Nation waived its right to claim that the Gila Bend Act qualifies as a "settlement of a land claim."

The Nation's arguments that it did not send a representative to waive all future claims that after-acquired land qualifies as a "settlement of a land claim" do nothing to refute the unmistakable fact that the Nation (along with other tribes) made that representation to the State in order to defeat legislative opposition to the 1993 Compact.

In June 1993, the Nation's agent participated in a meeting where a handout was distributed stating:

> 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 Nation does not contend that the *content* of the quoted statement is insufficient as a matter of law to waive any future assertion of the "settlement of a land claim" exception. Instead, the Nation focuses solely on its agent's authority and the manner in which the statement was made. But the State has cited ample evidence that the statement was authorized by and made on behalf of the negotiating tribes, including the Nation. (State Br. at 41-43.) At a

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minimum, that is a question of fact that the district court never resolved and, indeed, could not have resolved on summary judgment.

The Nation claims that the State has not shown that the Nation's representatives at the meeting were agents acting with apparent authority. (Nation Br. at 54 n.17.) Notably, the Nation does not deny that its attorney, Eric Dahlstrom, was the Nation's representative at that meeting. In fact, during Mr. Dahlstrom's deposition the Nation asserted a "shared privilege" to stop Mr. Dahlstrom from testifying about legal advice shared among the tribes that participated in those 1993 negotiations. (ER167 (137:22-140:21).) There is no doubt that the Nation was represented at the meeting in which the handout was distributed, and that everyone knew that Mr. Dahlstrom represented the Nation. (*Id.*)

The Nation also argues that its agent had no authority to waive a right to assert the "settlement of a land claim" exception because all terms negotiated were subject to approval of the Nation's Legislative Council. (Nation Br. at 54.) What the Nation leaves out of its brief is the fact that the Legislative Council *did* approve all terms negotiated by its agents when it approved the 1993 Compact. The State entered the 1993 Compact, and agreed to carry over the definition of "Indian Lands" into the 2002 Compact, based in part on the assurance by the Nation and other tribes that all land claims had been settled in Arizona and therefore the

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"settlement of a land claim" exception would never apply. The Nation's representative testified this was the Nation's position, as well as the position of all of the tribes represented at the negotiations. (ER168 (141:1-16).)

Moreover, if *all* statements made during negotiations by a tribe's agents must be separately ratified, the entire IGRA negotiation process will collapse. It is impossible to put every single statement and understanding into a document which can be approved by a legislature, chief executive, or the voting public—but statements made during negotiation *do* have meaning and *can* be relied upon by the negotiating parties and the courts. *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (enforcing statements made by tribal representatives during negotiations with the State of Montana). The Nation empowered its representative to join fellow tribes and inform the State that the "settlement of a land claim" exception would never apply in Arizona. The language in the written document is clear and unequivocal. (ER449-450.) Under either Arizona law or federal law, that is sufficient to constitute a waiver. *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1170-71 (9th Cir. 2006); *Groves v. Prickett*, 420 F.2d 1119, 1125-26 (9th Cir. 1970) (waiver is shown when conduct demonstrates "a purpose to waive the legal rights involved").

The Nation also falls back on its argument that because its agent did not speak the words "the Nation agrees" aloud, its conduct was mere silence that

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cannot constitute a waiver. As discussed at length in the State's Opening Brief, the term "silence" does not accurately describe the Nation's conduct in the negotiations. (State Br. at 42-43.) The Nation's attorney confirmed that the written handout accurately described the Nation's position. (ER168 (141:1-16).) The Nation's action was not "mere silence" but an unequivocal action evincing a purpose to waive any right to assert a "settlement of a land claim" exception. *Groves*, 420 F.2d at 1125-26.

The Nation's argument that the 1993 handout stating its official position was not a waiver is disconcertingly similar to its 2002 Compact interpretation arguments: the Nation "silently" takes affirmative steps to induce the State to believe something, and then uses "silence" as a shield after successfully inducing that belief. That is not the way good-faith negotiations work. The Nation cannot pay others to speak on its behalf and then claim that the Nation itself remained silent. Just as the Nation paid the head of the Arizona Indian Gaming Association to say there would be no new casinos in the Phoenix metropolitan area, and just as the Nation paid for campaign documents in the Proposition 2002 campaign which said there would be no new casinos in the Phoenix metropolitan area, the Nation paid Mr. Dahlstrom to say that there would be no "settlement of a land claim" exceptions in Arizona. The Nation should be held to the statements made by its

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agents. The Nation waived its right to assert the "settlement of a land claim" exception.[5]

II. THE STATE'S CLAIMS FOR PROMISSORY ESTOPPEL, FRAUDULENT INDUCEMENT, AND MATERIAL MISREPRESENTATION ARE NOT BARRED BY SOVEREIGN IMMUNITY.

The Nation's response fails to demonstrate that IGRA's abrogation of sovereign immunity does not apply in this case. The Nation also fails to show why this Court should not accept the pronouncement of the United States Supreme Court that no binding precedent extends sovereign immunity to all tortious conduct. The State of Arizona is a victim of the Nation's fraud and, as even the court below acknowledged, the State has made a viable claim of promissory estoppel in this case. The Nation cannot hide behind the shield of sovereign immunity and escape liability for its fraud.

A. IGRA's abrogation of sovereign immunity permits the State's lawsuit.

The Nation leans heavily on general claims about sovereign immunity but fails to cite authority specifying that sovereign immunity protects the Nation from the fraud it committed or from enforcement of the promises the Nation made.

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[5] Significantly, the Nation ignored the argument in the State's Opening Brief (at 44-45) that, at a minimum, the issue of Mr. Dahlstrom's authority to waive the Nation's right is a question of fact. Any argument not raised by appellees in an answering brief is waived. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009). The Nation has therefore waived the argument that this case should not be remanded for a factual determination of whether a waiver occurred.

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(Nation Br. at 61-66.) To begin with, the Nation incorrectly characterizes the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). The Nation selectively quotes the opinion to claim that IGRA "abrogates sovereign immunity only for suits to enjoin 'conduct violating a [Tribal-State] compact'." (Nation Br. at 83 (quoting *Bay Mills*, 134 S. Ct. at 2029).) Violation of a compact was not the basis for the *Bay Mills* decision. Rather, the Supreme Court based its decision on another requirement for the abrogation in § 2710(d)(7)(A)(ii), namely that a suit must seek to enjoin gaming activity located on Indian lands. *Bay Mills*, 134 S. Ct. at 2032 ("A key phrase in that abrogation is 'on Indian lands' . . . a similar suit to stop gaming activity *off* Indian lands does not [fall within the abrogation]"). There is no dispute that the Nation's proposed Glendale casino will be located on Indian lands, and therefore the central holding of *Bay Mills* does not apply to this case.

The Nation also incorrectly dismisses the applicability of decisions from other Circuits that address the question in this case directly. The Nation contends that the Tenth Circuit opinion cited by the State, *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1386 (10th Cir. 1997), addresses only those cases where "compliance with IGRA's provisions is at issue." (Nation Br. at 84 (quoting *Mescalero*, 131 F.3d at 1385-86).) But the *Mescalero* court was pointing out that IGRA permits suits to enjoin gaming when, as here, the ***validity of the compact***

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itself as negotiated under IGRA is called into question. This was consistent with the view set forth by the Tenth Circuit earlier that same year in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997). Although *Pueblo of Santa Ana* did not involve the use of sovereign immunity as a shield for fraudulent conduct, the Tenth Circuit analyzed IGRA and its legislative history to conclude that states, as fellow sovereigns, are also protected by IGRA:

> While preservation of tribal sovereignty was clearly of great concern to Congress, respect for state interests relating to class III gaming was also of great concern. **We are 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 (emphasis added).

Taken together, *Mescalero* and *Pueblo of Santa Ana* demonstrate the principle that Congress intended IGRA to protect states just as much as Indian tribes from invalidly entered compacts. As the State noted in the Opening Brief (at 45), the provisions of IGRA do not permit states to "make empty promises to Indian tribes during good-faith negotiations" and then "repudiate them with immunity." *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997). This Court should recognize, as the Tenth Circuit did, that the IGRA requirement of good faith runs both ways. It makes no sense that Congress would impose a duty on states to tell the truth while allowing Indian tribes to commit

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fraud with impunity. Indeed, good-faith negotiations would be impossible under such circumstances.

The Nation similarly offered an overly restrictive reading of the Seventh Circuit's decision in *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008). The Nation argues that *Ho-Chunk Nation* affirms that IGRA bars suits "based on obligations *not* in a compact." (Nation Br. at 84.) This misapprehends the nature of the claims brought by the State that were blocked by the district court on sovereign immunity grounds. The issue is whether the State validly entered into a compact that authorizes the Nation to operate a casino on its reservation land in Glendale. This argument related to one of "those items which Congress determined tribes and states may negotiate over under 25 U.S.C. § 2710(d)(3)(C)(i-vii)" and therefore subject to IGRA's abrogation of sovereign immunity. *Ho-Chunk Nation*, 512 F.3d at 934.

The question before this Court is whether IGRA allows an Indian tribe to make explicit promises and propagate falsehoods in order to trick a state into executing a compact, and then repudiate the promises with immunity. This Court has already held that IGRA does not permit states to engage in such conduct.

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Cabazon Band, 124 F.3d at 1056. The Nation cites no authority that would prohibit the Court from applying that same principle to Indian tribes.[6]

B. No precedent binds this Court to applying sovereign immunity to the Nation's tortious conduct.

The Supreme Court's clarification in *Bay Mills* of the scope of its tribal sovereign immunity jurisprudence permits this Court to rule that sovereign immunity does not shield the Nation from accountability for its tortious conduct, and the Nation's arguments to the contrary are unavailing. To begin with, the Nation misstates the Supreme Court's statement in *Bay Mills* when asserting that the Supreme Court is the only court that may overrule one of its own precedents. (Nation Br. at 86.) The entire point of the Supreme Court's statement is that it has never "specifically addressed" the question of sovereign immunity for torts. *Bay Mills*, 134 S. Ct. at 2036 n.8. There is no precedent for this category of cases that must be overruled.

[6] The closest the Nation comes to citing authority that is relevant to the issues here is asserting that "ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor." (Nation Br. at 80.) This statement mutilates the Indian canon of construction and is not supported by the case the Nation cites, or any other case. Far from the automatic victory the Nation asserts, the canon of interpretation the Nation relies upon merely holds that IGRA's ambiguities must be read "most favorably to tribal interests." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1028 n.9 (9th Cir. 2010). Even viewed in the light most favorable to the Nation, IGRA does not permit the Nation to make empty promises and repudiate them with immunity, nor does IGRA permit the Nation to defraud the State during good-faith negotiations.

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It is understandable that, prior to the *Bay Mills* clarification, this Court felt bound to rule in favor of sovereign immunity and against tort victims, even when doing so leads to an "unjust result . . . that our law might better preclude." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (Gould, J., concurring). It is also understandable that the State would have felt bound to present its own arguments in this case consistent with the precedents of this Court. But *Bay Mills* now shows that those assumptions were mistaken, and that this Court is free to avoid unjust results for tort victims.

In this case, the State is a tort victim. The Nation does not dispute the State's authorities concluding that fraudulent inducement and material misrepresentation are torts. (State Br. at 53 n.6.) Rather, the Nation contends that the State is not an "unwitting" tort victim because the State entered negotiations for a gaming compact and was aided by "skilled and experienced counsel." (Nation Br. at 87.) This ignores that the State had no choice but to enter those negotiations due to the strictures of IGRA and the realities of Arizona's ballot initiative process. (State Br. at 52-53.) Even assuming the State was a willing and enthusiastic negotiating partner, the act of entering a negotiation does not equal consent to be defrauded. The fact that the negotiations resulted in a "written document" means nothing, because the State would not have executed that document if not for the

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Nation's fraud.[7] Although the Nation (at 87) cites examples (including *Cook*) where the tort victim had only a chance encounter with the victimizing tribe, it cites no authority for the proposition that a tort victim *must* encounter the tribe by chance. In *Bay Mills*, the Supreme Court emphasized that it is not the random nature of the tortious encounter that matters, but rather whether the case presents a situation where "no alternative remedies were available." *Bay Mills*, 134 S. Ct. at 2036 n.8. The Nation does not argue that the State has alternative remedies for the torts alleged in this case.[8]

Finally, the Nation contends that the *Bay Mills* clarification does not apply because the Supreme Court was referring to commercial conduct. (Nation Br. at 86.) Gaming is commercial conduct, and negotiation of gaming is also commercial conduct. *See Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (rejecting sovereign immunity for farm that was "in virtually every respect a normal commercial farming enterprise"); *see also N. L.R.B. v. Fortune*

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[7] There is no limiting principle to the Nation's argument that negotiating a contract makes the negotiating party a willing tort victim. The Nation's argument applies with equal force if the Nation had surreptitiously altered the language of the compact before the State executed the document. Secretly altering the written instrument is fraud, and the Nation's actions in this case are fraud. A decision allowing tribes to commit any kind of fraud with impunity would destroy the IGRA process.

[8] The Nation contends that the State should be satisfied with the "remedies for which it bargained and that Congress provided in IGRA." (Nation Br. at 87.) The State never bargained for being a victim of fraud, and the Nation's fraud corrupts the bargain itself.

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Bay Resort Casino, 688 F. Supp. 2d 858, 870 (D. Minn. 2010) (holding that tribe's casino is "commercial in nature—not governmental" and therefore "can hardly be described as vital to the tribes' ability to govern themselves or as an essential attribute of their sovereignty") (internal quotations and citation omitted); *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1314-15 (D.C. Cir. 2007) (noting that negotiation of a gaming compact under IGRA is "ancillary" to the "commercial activity" of casino operation); *cf. United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (analyzing advertisements for state-run lottery as "commercial speech"). Just as the fact that a tribe operates a commercial farm does not make farming an act of "Indian self-government," the fact that a tribe conducts gaming does not convert casino operations and related negotiations into "self-government" exercises. While the State does not deny that the 2002 Compact also contains provisions relating to Indian self-government, such as permitting "[m]utual aid and emergency response service agreements" with nearby communities (ER779), there can be no doubt that the entire purpose of the 2002 Compact and the negotiations which led to it is commercial.

For these reasons, this Court is not required to arrive at an unjust result as occurred in *Cook*. The Nation defrauded the State and now holds up the results of that fraud—a compact based on a shared understanding that there would be no additional casinos in the Phoenix area—as a legal shield. The Nation's actions are

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unconscionable, and this Court is not required to let the Nation get away with its fraud. Sovereign immunity does not bar the State's claims for fraudulent inducement and material misrepresentation.

III. THE CLAIMS BARRED BY THE DISTRICT COURT ON SOVEREIGN IMMUNITY ARE VALID LEGAL CLAIMS.

The Nation makes a last-ditch effort to defeat the claims for promissory estoppel and fraud by arguing that the claims would fail as a matter of law. (Nation Br. at 88-89.) The Nation's arguments are incorrect.

Promissory estoppel. The Nation argues that promissory estoppel cannot apply because there is an "express contract" referring to the same subject matter because the 2002 Compact "dictates those [casino] locations." (*Id.* at 88.) But that begs the question. As the district court recognized, the evidence "would appear to support a claim for promissory estoppel" based on the fact that the State relied on the Nation's representations "by not insisting on more specific geographic restrictions in the Compact." (ER35.)

A valid claim for promissory estoppel exists under the allegations in this case because the Nation made a promise (not to conduct gaming in the Phoenix metropolitan area) and successfully induced action by the State (execution of a compact the Nation now uses as a shield) and injustice can be avoided only by enforcing the Nation's promise. *See Johnson Int'l, Inc. v. City of Phoenix*, 967 P.2d 607, 615 (Ariz. Ct. App. 1998) (citing Restatement (Second) of Contracts

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§ 90). If not for sovereign immunity, the State could prove that it is entitled to enforcement of the statements made by the Nation's representatives and disseminated widely during the ballot proposition campaign using funding provided by the Nation.

Fraud in the inducement and material misrepresentation. The Nation argues that these claims cannot prevail because they require the tort victim to have reasonably relied upon the fraudulent statements or material misrepresentations, and the district court held that it was unreasonable to believe the 2002 Compact prohibited the Nation's proposed Glendale casino. (Nation Br. at 88-89.) As a preliminary matter, the State believes that the district court erred in holding that no reasonable person could believe the 2002 Compact prohibited additional casinos in the Phoenix metropolitan area. As noted in the State's Opening Brief (at 47-48), the list of people who believed that the 2002 Compact prohibited the Nation's Glendale casino include then-Governor Jane Dee Hull, the executive director of the Arizona Indian Gaming Association, and numerous reporters who wrote stories saying as much. If these highly engaged and knowledgeable individuals (including one whose salary was partially paid by the Nation) believed the 2002 Compact prohibited the Glendale casino, it is safe to assume that many voters who voted to approve the 2002 Compact also believed the same thing. The district court was wrong to say that all of those people were unreasonable. Had the Nation not

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fraudulently represented that the terms of the 2002 Compact already prohibited the Glendale casino, the State would have insisted on more explicit language and would not have executed the compact in its current form. (ER876, ER887.)

Moreover, parties in a negotiation are justified in relying on representations when a relation of trust and confidence exists between the parties. *Rhoads v. Harvey Publ'ns, Inc.*, 640 P.2d 198, 201-02 (Ariz. Ct. App. 1981). The negotiations for the 2002 Compact were conducted under the auspices of a separate agreement among the tribes due to the Agreement in Principle and Statement of Unity among the tribes. (ER716-717.) Because of this Agreement, the State justifiably believed that even if the Nation would try to defraud the State, it would not defraud its sister tribes. This created a reasonable expectation of good faith negotiations under IGRA, wherein the State relied on representations which were made by the tribes as a unified entity, such as the assurance made repeatedly by the Arizona Indian Gaming Association and the Proposition 202 campaign that no additional casinos would be built in the Phoenix metropolitan area. The State could prevail on its fraud claims if given the opportunity to prove them.

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

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alternatively, to set the matter for trial on all claims, including the claims dismissed by the district court on sovereign immunity grounds.

RESPECTFULLY SUBMITTED this 20th day of October, 2014.

Thomas C. Horne
Attorney General of Arizona

By s/ Michael Tryon
Robert Ellman
Michael Tryon
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for Plaintiff-Appellant State of Arizona

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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 6,418 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated this 20th day of October 2014.

s/ Michael Tryon
Attorneys for Plaintiffs-Appellants

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 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.

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s/ Michael Tryon
Attorneys for Plaintiffs-Appellant