Nos. 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
District Court No. 2:11-cv-00296-DGC

REPLY BRIEF OF APPELLANTS GILA RIVER INDIAN COMMUNITY AND SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

Appellee Tohono O'odham Nation does not deny the existence of statements repeatedly representing that the Nation would not and could not operate a Phoenix-area casino under the Compact. Nor can it deny other record evidence reinforcing that shared understanding among the State of Arizona and the compacting tribes. To recap briefly, that material evidence includes:

- The tribes' joint statement, vetted and distributed by the Nation, to Arizona voters seeking their approval of the Compact: "there will be no additional facilities authorized in Phoenix" under Proposition 202, ER477;

- Testimony of the executive director of the AIGA, approved by the Nation's chairperson, to an Arizona Senate committee that the Compact would "limit[] the number of facilities in [the] Phoenix metro area to the current number," ER526;

- Representations during negotiations, by the Nation's chairperson and attorney, that the Nation agreed that its casinos would be limited to the metro Tucson area or specific rural areas, *e.g.*, ER261-262, at 130-134, ER210, at 101; ER217, at 129-130; *see also* ER472 ("3 within the Tucson area plus the current facility at Why");

- The Nation's meeting minutes that Parcel 2 was acquired through a "shell company" to "keep it qui[e]t[], e[s]pecially when nego[t]iations of [the] compact [with the] state" were ongoing, ER495; and

- The Nation's assertion in federal-court ordered arbitration that "existing federal law requires the Governor's concurrence" to open a new casino on land noncontiguous to its Tucson-area reservation (such as Parcel 2), ER715—a statement consistent with the Nation's jointly developed position that the "settlement of a land claim" exception "will not [a]ffect Arizona because aboriginal land claims in Arizona have already been settled," ER449-450.

The Nation tries to distance itself from some of the starkest representations as not officially approved by or binding on the Nation (Br. 7-9, 35-36, 54), even though made by its authorized representatives in consultation with its chairperson. Not only does such hairsplitting contradict the record (*see* Gila Br. 8-9), but it is insufficient to obviate a dispute of material facts underlying the grant of summary judgment.

The Nation further argues that the evidence of its deception is legally irrelevant. No matter how clear and contrary the extrinsic evidence, the Nation asserts that the absence of an express prohibition in the Compact gives it a right to operate gaming facilities in the Phoenix market. Indeed, under the Nation's interpretation, it would be free to locate *all four* of its casinos in the Phoenix area. That breathtaking proposition flies in the face of the shared understanding memorialized in the Compact generally and in Section 3(c)(3) specifically. Section 3(c)(3) (requiring the location of at least one of the Nation's four casinos to be more than 50 miles outside the Tucson metropolitan area) serves its purpose of imposing a rural-area restriction *only if* read against the well-understood limitation prohibiting the construction of a Phoenix metropolitan-area casino. That same limitation underlies the rest of the Compact, including Section 3(c)(5).

Under Arizona law, which the Nation seeks desperately to avoid even though the contract was negotiated and executed in Arizona and governs activities

to be undertaken in Arizona, the Nation's approach is backward. The district court was required to allow a factfinder to consider the compelling extrinsic evidence of the contracting parties' intent—*i.e.*, that the Nation would operate three Tucson-area casinos and one rural-area casino—rather than limit the inquiry to what in its view the Compact would mean divorced from the parties' negotiations and subsequent conduct. Its misapplication of Arizona's avowedly broad parol evidence rule warrants the reversal of summary judgment.[1]

ARGUMENT

I. ARIZONA LAW GOVERNS INTERPRETATION OF THE COMPACT

The Compact provides that it "shall be governed by and construed in accordance with the applicable laws of the United States, and the Nation and the State." ER792 (§ 24). Federal law "differ[s] significantly" from Arizona law (and the Nation's identical law)[2] with respect to the use of parol evidence. Nation Br. 38. While federal law requires ambiguity in the contract language before extrinsic evidence will be admitted, *see Nehmer v. Department of Veterans Affairs*, 494 F.3d 846, 861 (9th Cir. 2007), Arizona's more inclusive parol evidence rule requires a

[1] Appellants Gila River Indian Community and Salt River Pima-Maricopa Indian Community join the reply brief filed by Appellant State of Arizona, *see* FED. R. APP. P. 28(*i*), on the "settlement of a land claim" and sovereign immunity issues.

[2] The Nation does not dispute that the law of the Nation, which is silent on the consideration of extrinsic evidence, would apply Arizona's parol evidence rule. ER22.

court to consider extrinsic evidence *before* interpreting the text, even in the absence of any apparent ambiguity, *see Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134 (Ariz. 1993) (en banc).

That difference matters here. It is thus no surprise that the Nation tries to escape the application of Arizona law. In view of the Compact's paramount connections to Arizona, however, the district court correctly concluded that Arizona law governs.

A. The Restatement Dictates Application Of Arizona Law

"Federal common law applies to choice-of-law determinations in cases based on federal question jurisdiction," *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997), a category that includes "any claim alleging a violation of IGRA," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2029 n.2 (2014). The governing principles "follow[] the approach of the Restatement (Second) of Conflicts of Laws." *Chan*, 123 F.3d at 1297.

In this case, the Restatement's choice-of-law analysis points unequivocally to the application of Arizona law, rather than federal law. Although the parties elected to name three sources of applicable law, *see* ER792, they did not specify which law governs the consideration of parol evidence. Consequently, the Restatement instructs courts to determine the sovereign that "has the most significant relationship to the transaction and the parties," RESTATEMENT § 188(1),

taking into account "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties," *id.* § 188(2). *Cf. Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1211 (9th Cir. 2001) ("Absent a clear agreement between the parties as to the governing law, Restatement § 188 is the general provision under which choice of law is determined for a contract.").

Although all of those factors indicate that Arizona has the most significant relationship to the dispute, agreement on the second and third factors—which plainly favor Arizona law—is sufficient. *See* RESTATEMENT § 188(3) (stating that if place of negotiation and place of performance are the same, law of that place "will usually be applied"). As the district court found, "[t]he Compact was negotiated in Arizona, the Compact will be performed on the Nation's land within Arizona, gaming that is the subject of the Compact will occur in Arizona, and both parties to the Compact are domiciled in Arizona." ER23.

The Nation disagrees (Br. 41 n.19), but its halfhearted response—raised only in a footnote, *see Estate of Saunders v. Commissioner of Internal Revenue*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes *** are generally deemed waived.")—misses the mark. Contrary to the Nation's suggestion, the Secretary of the Interior's formal approval of the Compact does not

make Washington, D.C. the "place of contracting." The Restatement looks to the physical location of "offer and acceptance." RESTATEMENT § 188 cmt. e. Voter approval and execution of the Compact had already occurred in Arizona. *See* ER793; NER31.

The Nation's remaining contentions are equally unpersuasive. If the Nation's land bears the most significant connection to the Compact, that fact weighs in favor of the application of the Nation's law (identical to Arizona law), not federal law. And the fact that Arizona and Parcel 2 "fall within the United States" is a geographic truism, not a reason to apply federal law.

B. The Nation Cannot Avoid The Restatement's Application

The Nation contends that the Restatement's framework for deciding the "applicable law" for "[i]ssues in contract," RESTATEMENT § 186, is inappropriate for determining which law governs the role of parol evidence. In its view, there is no conflict of laws to resolve because "'all legally significant aspects of' a Tribal-State compact's creation occur within the federal forum," Nation Br. 40 (citation omitted), and IGRA leaves no room for state regulation, *id.* at 41-42. That argument not only renders the Compact's choice-of-law clause superfluous, but also fails on its own terms.

1. Federal law does not categorically trump state law in IGRA compacting.

"IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (citation omitted). IGRA authorizes gaming on Indian lands only to the extent a State, "as a matter of criminal law and public policy, [does not] prohibit such gaming activity." 25 U.S.C. § 2701(5). Arizona has embraced its role, enacting several restrictions that affect both the negotiation and substance of tribal-gaming compacts. *See, e.g.*, ARIZ. REV. STAT. § 5-601(A) (authorizing Governor to negotiate and enter into gaming compacts with Indian tribes); *id.* § 5-601(C) (prohibiting Governor from concurring in federal determination that would permit gaming on after-acquired noncontiguous lands); *id.* § 5-601(*I*) (requiring all compacts to contain certain provisions). Accordingly, the Nation is simply wrong when it asserts (Br. 39) that federal law is the exclusive source of background law for compacts.

The cooperative regulatory scheme also explains why the Compact's choice-of-law clause names three sources of law from which the "applicable law" may be drawn. Far from intending federal law to govern as a default, the parties realized that the myriad of potential governance or interpretive issues called for the Restatement's flexible approach. *See* RESTATEMENT § 188 cmt. d. For instance,

whether the Secretary of the Interior has approved the Compact, *see* ER732 (§ 2(vv)(2)), is a question of federal law subject to review under the Administrative Procedure Act, *see Amador Cnty., Cal. v. Salazar*, 640 F.3d 373, 379-383 (D.C. Cir. 2011); whether the State's signatory had the authority to execute the Compact, *see* ER792 (§ 26), is a question of state law, *see Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997); and whether a gaming employee is an enrolled tribal member, *see* ER756 (§ 4(b)), is a question of tribal law, *see Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005). The Compact's choice-of-law clause thus reinforces the need to conduct the "most significant relationship" test under Restatement § 188.

There is little federal interest in how evidence of negotiations or other parol evidence should bear on compact interpretation. IGRA makes clear that compacts are "entered into by the Indian tribe and the State," 25 U.S.C. § 2710(d)(1)(C), not by the United States. *See* ER726 ("This Compact is entered into by and between the [Nation] and the State of Arizona[.]"). The United States here had no role in initiating compact negotiations, proposing and discussing the Compact's terms over the course of three years, presenting the agreed-upon framework to Arizona voters, executing the agreement in accordance with state law, conducting and regulating gaming activities according to the Compact's terms, or bringing suit to enjoin gaming in violation of the Compact, *see* 25 U.S.C. § 2710(d)(7)(A)(ii)

(providing only "State or Indian tribe" with right of action). The foremost interests at stake if the Nation operates a casino on Parcel 2 therefore belong to Arizona and the Nation.

IGRA's general framework—which contemplates state regulation—does not make those activities inherently, singularly, or even predominantly federal in nature. *See Confederated Tribes of Siletz Indians of Or. v. Oregon*, 143 F.3d 481, 485 (9th Cir. 1998) ("Nor does the generation of the [investigative report] under an IGRA-sponsored Compact necessarily make control of that document a matter of federal law."). Not even the Secretary of the Interior shares the Nation's absolutist view. *See Pueblo of Santa Ana*, 104 F.3d at 1557 (discussing Secretary's view that validity of Governor's signature and thus of entire compact turns on state law). And to the extent the Nation suggests that the Restatement is inapplicable where federal law and state law conflict (Br. 40-41), this Court has held otherwise. *See Flores v. American Seafoods Co.*, 335 F.3d 904, 916-919 (9th Cir. 2003) (applying Restatement to resolve conflict between federal maritime law and Washington law).[3]

[3] The Nation's other footnoted arguments lack merit as well. *First*, even if the application of federal law would enhance the Secretary's understanding of the Compact (Nation Br. 42 n.20), that goal must be balanced against the parties' right to include choice-of-law clauses. *See Confederated Tribes*, 143 F.3d at 485 ("Because the Compact calls for the application of Oregon contract law, we must enforce this unambiguous contract provision according to its terms[.]"); *see also* Nation Br. 42 (arguing that federal law applies "in the absence of a clear contrary

2. The Nation's reliance on the Cachil Dehe Band *case is misplaced.*

The Nation argues (Br. 37-40) that federal law controls the interpretation of gaming compacts by virtue of this Court's passing statement in *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010): "General principles of federal contract law govern the Compacts, which were entered pursuant to IGRA." That is unpersuasive. In that case, "the parties fail[ed] to identify, nor c[ould] the court discern, any provision of the Compact that explicitly provides what law is to be applied." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 629 F. Supp. 2d 1091, 1106 n.12 (E.D. Cal. 2009). In this case, by contrast, the parties specifically included a choice-of-law clause contemplating sources other than federal law. The Nation's reliance on this Court's earlier statement—plucked out of context—is thus inapt here.

Cachil Dehe Band, moreover, does not control even if the Nation's reading were fair. Given the identity between California and federal law in that case, the absence of any dispute by the parties about the governing law, and the Court's own

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choice by the parties"). *Second*, even though certain provisions of the Compact expressly incorporate Arizona law (Nation Br. 42 n.21), other Compact provisions expressly incorporate federal law. *E.g.*, ER787 (adopting "United States Arbitration Act" in § 15(c)(11)). The Compact's choice-of-law clause directly addresses the governing law where, as here, the parties have made no express selection.

recognition that the choice between the two sources of law made no difference, the language relied upon by the Nation is dicta at best. Only "reasoning central to a panel's decision" that constitutes the "*single* line of reasoning to support its result" is "binding on later panels." *Marshall Naify Revocable Trust v. United States*, 672 F.3d 620, 627 (9th Cir. 2012) (emphasis added) (citation omitted). This Court's extensive citation to California law in *Cachil Dehe Band*, 618 F.3d at 1073-1082, makes clear that the application of federal law was anything but central to its analysis. Even the Nation acknowledges that the statement would apply only to a counterfactual and hypothetical scenario—the hallmark of dicta. *See* Nation Br. 38 ("*Had* California law differed, the court *would have* applied federal law.") (emphasis added).

Reliance on *Cachil Dehe Band* is further problematic because the authority cited for the application of federal law concerned an entirely different situation: a contract entered into *by the United States* and a local irrigation district regarding a *federal* water reclamation project. *See Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1020, 1032 (9th Cir. 1989). And the decision does not acknowledge the more established line of precedent requiring the application of the Restatement (as part of federal common law) for "choice-of-law determinations in cases based on federal question jurisdiction," *Chan*, 123 F.3d at 1297; *see* p. 4, *supra*. Had California law differed from federal law, the parties in *Cachil Dehe*

Band would have pointed to, and the Court would have addressed, that body of law.

II. THE COMPACT DOES NOT AUTHORIZE GAMING ON PARCEL 2

As the Nation acknowledges, "federal and Arizona law differ *significantly* on the role of parol, or extrinsic, evidence" in contract interpretation. Nation Br. 38 (emphasis added). In application, however, the Nation essentially treats them interchangeably. Although the Nation purports to argue (in the alternative) that it should also prevail under Arizona law, the Nation's steadfast attempts to exclude evidence of the parties' intent ignores core principles of Arizona's "severely eroded" parol evidence rule. *Wilson Arlington Co. v. Prudential Ins. Co. of Am.*, 912 F.2d 366, 370 (9th Cir. 1990). Considered in the context of the parties' negotiations and its ratification, the Compact as a whole—and Sections 3(c)(3) and 3(c)(5), in particular—are at least reasonably susceptible to an interpretation that authorizes the Nation to operate its casinos in only one metropolitan market: Tucson.[4]

[4] In another waived footnote argument (Br. 37 n.18), the Nation argues that summary judgment should be granted against the tribal appellants because they are neither parties to the Compact nor third-party beneficiaries. That argument is both inconsequential and incorrect. This Court must still adjudicate the merits of the same judgment against the State, and the uniform Compact became effective only upon its execution by Appellants (among other tribes). ER733 (§ 2(vv)(4)); *see also* ER58-59 (denying Nation's motion to dismiss on these grounds).

A. The Nation Misapplies Arizona's Parol Evidence Rule

1. Arizona law emphasizes context and the parties' intent, not the text in isolation.

By placing undue emphasis on what specific words in the Compact would restrict its gaming activities to the Tucson market—as federal law's more familiar plain-meaning rule might require[5]—the Nation commits a cardinal interpretive sin of Arizona contract law: "automatically interpret[ing] contract language as [a judge] would understand the words" in a vacuum. *Taylor*, 854 P.2d at 1139. Under *Taylor*, "'[t]he primary and ultimate purpose of interpretation' is to discover [the parties' underlying] intent and to make it effective," not just to dissect the terms of the agreement divorced from relevant extrinsic evidence. *Id.* at 1138 (quoting 3 CORBIN § 572B, at 421 (1992 Supp.)). Consideration of extrinsic evidence at the outset is paramount under Arizona law because a "judge's decision, *uninformed by context*, may not reflect the intent of the parties." *Id.* (emphasis added); *see also id.* at 1139 ("A contract should be read in light of the parties' intentions as reflected by their language and *in view of all the circumstances*.")

[5] Even federal law recognizes the importance of context where, even if "the agreement itself is a perfectly lucid and apparently complete specimen of English prose, anyone familiar with the real-world context of the agreement would wonder what it meant with reference to the particular question that has arisen." *Bolton v. Constr. Laborers' Pension Trust for S. Cal.*, 56 F.3d 1055, 1059 n.2 (9th Cir. 1995) (internal quotation marks and citation omitted); *see also Richardson v. Pension Plan Bethlehem Steel Corp.*, 112 F.3d 982, 985 (9th Cir. 1997) ("The intended meaning of even the most explicit language can *** only be understood in the light of the context that gave rise to its inclusion.") (citation omitted).

(emphasis added) (citation omitted); *id.* at 1140 n.2 (requiring consideration of the "factual context surrounding the making of the agreement").

To that end, *Taylor* makes clear that the nature and strength of the extrinsic evidence is crucial to the determination of whether a contract is "reasonably susceptible" to a proffered interpretation. 854 P.2d at 1140. Where a "meaning is proved by credible evidence, a court is obligated to enforce the agreement according to the parties' intent," "even if the language ordinarily might mean something different." *Id.* at 1139. Giving effect to the parties' intent—even when it is in apparent tension with the usual meaning of the parties' chosen contract language—does not impermissibly alter the terms of the writing:

> The meaning that appears plain and unambiguous on the first reading of a document may not appear nearly so plain once the judge considers the evidence. In such a case, the parol evidence rule is not violated because the evidence is not being offered to contradict or vary the meaning of the agreement. To the contrary, it is being offered to explain what the parties truly may have intended.

Id. at 1140. Accordingly, Arizona law does not limit the interpretive inquiry to a search for specific words in the agreement that on their face support the proffered interpretation.

The facts of *Taylor* are instructive. Despite the Arizona Supreme Court's understanding that "a release of contractual claims necessarily releases a bad faith claim," 854 P.2d at 1143 n.5, the court ultimately determined that such a claim was not necessarily covered by language releasing "all *contractual* rights, claims, and

causes of action [Taylor] ha[d] or may have against State Farm under the policy of insurance *** in connection with the collision *** *and all subsequent matters*," *id.* at 1141 (alterations except first in original). In the court's view, that result was reasonable because the release was "illuminated by the surrounding circumstances," *id.* at 1145, including the following facts: (i) State Farm directed the use of "general release language" without mentioning "bad faith"; (ii) State Farm internally designated the $15,000 payment in exchange for the release as being for "uninsured motorist (UM) coverage," not a settlement of the bad-faith claim; and (iii) it made little sense for Taylor to settle a bad-faith claim "possibly worth millions of dollars" for only $15,000. *Id.* at 1143-1144. "In light of this [and other evidence], the trial judge correctly concluded that the release could not as a matter of law be interpreted to *** exclude Taylor's bad faith claim." *Id.* at 1144.

Johnson v. Cavan, 733 P.2d 649 (Ariz. Ct. App. 1986), reinforces that the parties' intent, rather than the plain text of the agreement, controls. The Nation is incorrect to suggest that the court's extrinsic-evidence based construction in *Johnson* was "derived from [the] contract's words." Nation Br. 52. The question was not merely whether the term "premises" could include parking lots, but whether the premises "known and described as: Suites 117 through 120 in building located at 1013 North Central Avenue, Phoenix, Arizona, 85004," could

bear that interpretation. 733 P.2d at 650. Pointing to testimony that the parties "assumed and intended that the parking spaces be a part of the lease" and uncontradicted evidence that the appellees "were on notice of appellants' claim of an exclusive right to use the parking spaces for his business," the court expressed no reservation in concluding that the parking spaces located *outside* of the defined premises reasonably could have been conveyed through the "in building" language. *Id*. at 652. "It was incumbent upon the trial court not only to consider the words of the contract which stated that the lease agreement was for 'Suites 117 through 120,' but also evidence as to what the parties meant by that language." *Id.*

The Nation's principal authority on Arizona law—*Long v. City of Glendale*, 93 P.3d 519 (Ariz. Ct. App. 2004)—is not to the contrary. The plaintiff in *Long* conveyed a parcel of land for use as the City's "primary municipal airport." *Id.* at 527. At that time, he alleged, the City showed him an airport layout plan indicating the "possibility of building a second runway" on the parcel, promised to build that runway "when needed," and later represented that it was committed to building the runway. *Id.* at 527-528. The intermediate appellate court rejected plaintiff's argument "that the circumstances bear directly on [the parties'] intention and their meaning of primary municipal airport," because he "offer[ed] no explanation" for interpreting the language of the agreement to require construction of the second runway. *Id*. at 529 (first alteration in original) (internal quotation

marks omitted). That result faithfully applies *Taylor*'s admonition that a contractual intention not facially apparent in the agreement's text must be supported by clear and "credible evidence," 854 P.2d at 1139, not equivocal facts as to whether the term was merely contemplated or actually promised.[6]

2. The uncontroverted evidence of Compact negotiations cannot be ignored.

This case falls well within the heartland of Arizona precedents requiring the admission of extrinsic evidence for consideration at trial. As in *Taylor* and *Johnson*, the context of the 2002 Compact negotiations and ratification makes it especially reasonable to conclude that the parties intended not to authorize the Nation's (or any other tribe's) operation of additional casinos in the Phoenix metropolitan area. *See* Gila Br. 8-20.

In particular, negotiations focused on achieving intra-market parity, *see* ER203-204, at 75-78, and the negotiating tribes—including the Nation—internally separated themselves into market-based groups, ER245-246, at 44-45. One version

[6] To be sure, the intermediate appellate court in *Long* went on to state that "there must be something in the deed that would permit the court to find that the deed's language is amenable to an interpretation" requiring a second runway. 93 P.3d at 529. But that statement must be viewed in light of the fact that the plaintiff there, unlike Appellants here, failed to offer any evidentiary basis to conclude that the parties intended the relied-upon contract language to effectuate the asserted obligation. In any event, to the extent that statement conflicts with the Arizona Supreme Court's guidance in *Taylor* that a court must accept the parties' evidence-based "special meaning" even if seemingly inconsistent with the text (p. 14, *supra*), *Taylor* controls.

of the "scope-of-gaming" chart (later incorporated as Section 3(c)(5)) described the Nation's allotment of four casinos (including one yet to be built) as covering "3 within the Tucson area plus the current facility at Why." ER472. Other draft tables similarly identified the distinct Tucson and Phoenix market groups through headings and footnotes. *E.g.*, ER455, 457, 464, 468-472, 501, 507-511; *see also* Gila Br. 11-12, 35.[7]

As part of the joint multi-million dollar campaign to obtain legislative authorization for and then voter approval of the Compact, the Nation funded, contributed content to, reviewed, and authorized the publication of a document that told voters in no uncertain terms: "there will be no additional facilities authorized in Phoenix[.]" ER477; *see also* ER268, at 157-160 (discussing Nation's involvement with document); ER315-316, at 195-198 (same); ER478 ("major funding"). All the while, the Nation concealed its acquisition of Parcel 2 in the Phoenix area by putting it into a shell company in light of Compact negotiations. *See* ER495.

Once the Compact is viewed in context, the absence of a provision specifying that the Nation is prohibited from opening a casino in Phoenix is

[7] The Nation agrees (Br. 10-11 n.4) that it "did not join" meetings with "Salt River and other tribes with facilities in the Phoenix area"; that it negotiated separately with the other Tucson area tribe (the Pascua Yaqui); and that these negotiations "resulted in [separate] 'footnotes' to some drafts of the chart indicating that scope-of-gaming numbers had not been finalized in 'Phoenix' or 'Tucson.'"

unsurprising (or at least understandable), not a telling omission as the Nation suggests (Nation Br. 57-58). Restricting each tribe's gaming operations to a particular geographic market was the cornerstone of the parties' efforts to achieve market parity, and the parties' agreement on that front—as memorialized in Section 3(c)(5), *see* pp. 24-26, *infra*—obviated the need to draft additional Compact language making that core premise explicit. As one of the State's lead negotiators recounted, "because we thought we had agreement on markets and who was going to be authorized to operate what facilities in what markets, we didn't add the sentence that you're suggesting [on additional geographic restrictions]." ER209, at 100. Instead, the parties relied on the same "scope-of-gaming" chart that had captured the parties' market-driven positions on device and facility allocation over the course of several years. *See* ER210, at 103 ("Why is it we used the chart? *** [E]veryone understood what was in the chart, and it made sense to the group.").

Reliance on the chart was not the product of the State's unsubstantiated belief or misunderstanding of the agreement the chart embodied. The State's understanding—indeed, everyone's public understanding—was "confirm[ed]" by "all of the campaign stuff and all of the discussions in the Senate and all the discussions during the legislature which specifically referenced *** no additional

[casino] in Phoenix, one additional [casino] in Tucson," all of which the Nation joined and supported. ER210, at 103.

The parties' shared understanding that facility and gaming device allocations were market specific was so widespread and publicly reinforced that Appellants did not insist on additional Compact language addressing that point. Representatives from the tribes, the AIGA, and the State all expressed the firm sense that the "possibility of Tohono O'odham gaming in the Phoenix metropolitan market" was "never introduced into discussions by anybody or contemplated by anybody," NER116, at 63 (testimony of AIGA executive director), "because the casinos for the Phoenix areas were set," NER121, at 44 (testimony of Gila River negotiator); *see also* NER 148, 54 (similar testimony of State negotiator).

The Nation attempts to divert attention from these material "surrounding circumstances, including negotiation, prior understandings, and subsequent conduct," *Taylor*, 854 P.2d at 1139, through tunnel vision on the text of the Compact. Nowhere in its discussion of Arizona law (Br. 48-52) does the Nation engage the extrinsic evidence or explain why the evidence is so unpersuasive or incredible that "the judge need not waste much time" on it. *Taylor*, 854 P.2d at 1141. Pointing to what the bare language of the Compact "could" or "should" mean (Br. 51) subverts the evidence-based, contextual inquiry into the parties'

intent that *Taylor* demands and conflates Arizona and federal contract-law principles.

In the end, the Nation fails to explain why the negotiating parties—including the Nation—uniformly represented to each other and Arizona voters that the Compact would not authorize any additional casinos in Phoenix, if that in fact was not their agreement. Likewise, the Nation fails to explain its surreptitious acquisition of land in the Phoenix area for gaming in light of the negotiations, if as the Nation claims such activity was contemplated by the Compact. The only plausible explanation is that the parties had agreed *not* to authorize any additional Phoenix-market casinos.

B. The Compact Is Reasonably Susceptible To Appellants' Interpretation

1. Section (3)(c) provides two anchors.

Far from proffering a construction of the Compact "that is highly improbable" or unsupported by "convincing evidence," *Taylor*, 854 P.2d at 1141, Appellants' interpretation not only reflects a mountain of record evidence but also comports with the Compact's structure and framework. In particular, two provisions—illuminated by context—demonstrate that the Compact is "reasonably susceptible" to the interpretation that the Nation is not authorized to operate a casino on Parcel 2.

a. Section 3(c)(3) provides:

> If the Tribe is the Tohono O'odham Nation, and if the Tribe operates four (4) Gaming Facilities, then at least one of the four (4) Gaming Facilities shall *** be at least fifty (50) miles from the existing Gaming Facilities of the Tribe in the Tucson metropolitan area.

ER739. That provision was drafted and agreed upon—in the words of the Nation's corporate representative and attorney who "took a lead role in drafting much of the [compact] language," NER297—to ensure that the Nation would not move all four of its casinos into metropolitan areas.

> Q: And why was there a concern that the fourth one might be located in a metropolitan area?
>
> ***
>
> THE WITNESS: As I said, the Nation's justification to other tribes for wanting to keep the fourth facility is that it would not be located in a metropolitan area; *it would be in a rural area*.

ER 372, at 85 (emphasis added); *see also* NER312 (summary judgment declaration: "I suggested that the Nation might be willing to discuss a compact provision that would require one of the Nation's four facilities to be located in a rural area" and that "the Nation was unwilling to give up the right to relocate its Why facility to another rural part of its reservation."); *accord* NER76, at 37 (testimony of Navajo representative that "there was [Compact] language that one of the Tohono O'odham facilities would be rural in nature"); NER90, at 294 (testimony of Salt River negotiator that "[the Nation] had said to the other tribes,

'We need to keep a fourth facility in order to put in a casino—a rural casino out in Why'").

Section 3(c)(3) accomplishes the task of ensuring a rural casino not by excluding it expressly from all metropolitan areas, but by mentioning only that it would be at least fifty miles from the "Tucson metropolitan area." In light of those circumstances, it is necessary—not merely reasonable—to read the phrase "Tucson metropolitan area" as describing the Nation's exclusive metropolitan gaming market. A contrary construction would give the Nation the ability to open the referenced casino—indeed, *all four* of its casinos—in either a rural area *or* any metropolitan area (except for Tucson) at its caprice. Such a result is contradicted by the Nation's testimony, record evidence, and common sense.

Ignoring all that, the Nation insists that its Section 3(c)(3) obligation is discharged by its rural Why facility. That is true, but wholly nonresponsive. As is clear from the opening brief (Br. 24), Appellants do *not* contend that the Parcel 2 casino must comply with Section 3(c)(3)'s restriction. Rather, the point is that Section 3(c)(3) makes sense in light of the parties' irrefutable intent of requiring at least one rural-area casino *only if* that provision is read against a non-Phoenix-area limitation. (Otherwise, the Nation could close the Why casino and claim that any additional Phoenix casino, which would also be more than 50 miles outside Tucson, satisfies the terms of Section 3(c)(3).) And if such a non-Phoenix

limitation governs Section 3(c)(3)—as it must—then surely it can govern the Compact more generally, including Section 3(c)(5) (discussed next).[8]

b. The four gaming facilities allocated to the Nation in the Section 3(c)(5) Gaming Device Allocation Table, ER740, likewise can be reasonably read—again, in light of the context supplied by the extrinsic evidence—to reflect the Nation's agreement not to operate a casino in the Phoenix metropolitan area. The draft version of the Table defining the four casinos to be "3 within the Tucson area plus the current facility at Why," ER472, makes that negotiated meaning explicit. If it is reasonable under Arizona law to find based on extrinsic evidence that parking spaces outside a building could be conveyed as part of "Suites 117 through 120 *in building* located at" a specific address, *Johnson*, 733 P.2d at 650 (emphasis added),

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[8] The Nation asserts (Br. 46) that Appellants "grossly distort" the circumstances surrounding the adoption of Section 3(c)(3), but fail to explain how so or to rebut the record evidence establishing the universally understood rural-limitation purpose of that provision (*see* pp. 22-23, *supra*; Gila Br. 12-14). The only "gross[] distort[ion]" is the Nation's attempt (Br. 46 n.24) to backpedal from its concession below that Section 3(c)(3) was designed to ensure that at least one of its casino would be located in a rural area:

> In the end, the State and the other tribes agreed that the Nation could retain the right to operate four facilities, but later "raised a concern that if there was not a provision in the compact that required the Nation to keep the [Why] facility in such a [rural] location that the Nation might put it in a metropolitan area." The State and the other tribes therefore proposed, and the Nation agreed, that if the Nation operates four facilities, "at least one of the four" must be "at least fifty (50) miles from the existing Gaming Facilities of the Tribe in the Tucson metropolitan area."

Mot. for Summ. J. 7 (ECF 193) (alterations in original) (internal citations omitted).

a fortiori the number "4" in Section 3(c)(5) can be interpreted to mean four casinos in the Tucson market.

That is particularly true when Section 3(c)(5) is read in tandem with Section 3(c)(3), the latter of which "link[ed] limits on the *number* of gaming facilities with limits on the *location* of facilities." NER311. The two provisions must be read to embrace the same predicate understanding that the Nation's gaming activities would be restricted to the Tucson market, with the exception of at least one rural casino. *See Hamberlin v. Towsend*, 261 P.2d 1003, 1006 (Ariz. 1953) (contract must be construed as a whole). As the State's negotiator stated, Section 3(c)(3) was a "footnote off of an authorization" in Section 3(c)(5) "to operate up to four facilities in the Tucson area." ER210, at 102.

The Nation disputes (Br. 51) the idea that the ordering of the tribes in Section 3(c)(5) provides further confirmation of the market-specific authorizations embodied in the Compact, arguing that "nothing in the table supports the notion that the order in which the tribes are listed has any significance at all." Once again, that reasoning ignores the extrinsic evidence in contravention of Arizona law. In light of evidence establishing that the tribes negotiated within market groups—particularly under the headings "Maricopa County Market Area" and "Tucson Market Area" in the Table's drafts, ER472—it hardly contradicts or varies the terms of Section 3(c)(5) to draw meaning from the same grouping of the

tribes. And because the primary goal is to discern the parties' intent, that type of record-based explanation of why the tribes appear in this fashion—not contradicted by the Nation—cannot be dismissed as a matter of law.

2. Section 3(j) is not dispositive.

The Nation asserts (Br. 49) that a bar on gaming in Phoenix would contravene the "unequivocal language" of Section 3(j) of the Compact. Contrary to the Nation's characterization, Section 3(j) does not, subject only to 25 U.S.C. § 2719, authorize gaming anywhere on "the Indian Lands of the Tribe." ER749. Look no further than Section 3(c)(3): even the Nation concedes that the provision places additional limitations on the location of its gaming facilities. *See* Nation Br. 57; Nation Mot. for Summ. J. 29 (ECF 193).

The structure of the Compact reinforces that basic understanding. Section 3(a)—not Section 3(j)—authorizes certain "Class III Gaming Activities" as a general matter, "[s]ubject to the terms and conditions of this Compact." ER735. Compliance with Section 3(j), like compliance with Sections 3(c)(3) and 3(c)(5), is one of those "terms and conditions." All are necessary, not sufficient, conditions for authorization.

At bottom, Appellants' point here about Section 3(j) is a modest one: the provisions of the Compact must be read together as a whole, not in isolation. For that reason, the text of Section 3(j) alone does not resolve the issue. To the

contrary, Section 3(c)—interpreted consistent with the extrinsic evidence—does not authorize the Nation to operate a Phoenix area casino.

C. The Restatement And Implied Covenant Claims Raise Factual Disputes

In discussing Appellants' claims under the Restatement (Second) of Contracts and the implied covenant of good faith and fair dealing (Br. 52-60), the Nation repeats the same legal errors. Arizona courts are clear that the Restatement requires consideration of "other meanings [that] appear when the circumstances are disclosed," even when those meanings are in apparent tension with the text of the agreement. *Johnson*, 733 P.2d at 652 (quoting RESTATEMENT § 214 cmt. b and applying § 201(1)). Similarly, with respect to the implied covenant claim, it is not enough under Arizona law for the Nation to state (Br. 59-60) that it acted in accordance with the terms of Section 3(j). A party that "exercise[s] a contractual power"—including an "express provision in the contract" or an "expressly retained *** power"—"for a reason inconsistent with the [other party's] justified expectations" may nonetheless be in breach. *Wells Fargo Bank v. Arizona Laborers Local No. 395 Pension Trust Fund*, 38 P.3d 12, 29-30 (Ariz. 2002) (en banc).

Beyond those misapplications of Arizona law, the Nation asserts (Br. 53) that there are no triable issues of fact on those claims. Not so. A factfinder could more than reasonably conclude that the AIGA, as the official representative of the

joint tribal effort (including the Nation) to negotiate and secure Arizona voter approval of the Compact, represented the Nation's position on the Compact. *See* Gila Br. 16-17. The Nation's contention (Br. 7-8) that the AIGA "played a purely organizational role" and "had no authority to speak for or to bind the tribes on any issue" is belied by the AIGA's letter to the Secretary of the Interior "clarify[ing] *** the intent of the tribes" with respect to a certain Compact provision. NER32. And the evidence goes well beyond the AIGA: the market-specific sub-group negotiations and drafts of the Gaming Device Allocation Table, the Nation's participation in the Proposition 202 campaign, and its surreptitious efforts to acquire and develop land in the Phoenix market for gaming in order to avoid scuttling Compact negotiations all reinforce that the Nation knew or should have known its intentions were in contravention of the Compact, as the State clearly believed. Whether the Nation's actions were inconsistent with the expectations of the other negotiating tribes and of the State, and whether the Nation's actions deprived others of the "primary benefit of the agreement," are at least "genuine questions of material fact *** sufficient for a jury's consideration." *Wells Fargo*, 38 P.3d at 31.[9]

[9] The Nation's suggestion (Br. 54) that some of this evidence post-dates the parties' agreement and therefore should be disregarded is wrong on both the facts, *see* NER322 (Nation's council approved Compact only after Proposition 202 and subsequent regulatory amendments vote), and the law, *see Taylor*, 854 P.2d at 1139, 1143 (accepting evidence of "subsequent conduct").

CONCLUSION

For the foregoing reasons, and those stated in Appellants' opening and reply briefs, the judgment of the district court should be reversed.

Respectfully submitted,

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Pursuant to 9th Cir. R. 25-5(f), I attest that Appellant Salt River Pima-Maricopa Indian Community concurs in the content of this filing.

October 20, 2014

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in 14-point Times New Roman proportional font and contains 6,990 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

s/Z.W. Julius Chen
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October 20, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on October 20, 2014, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

All of the participants are registered CM/ECF users and will be served copies of the foregoing Brief via the CM/ECF system.

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