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, No. 2:11-cv-00296
Before the Honorable David G. Campbell

THE TOHONO O'ODHAM NATION'S MOTION FOR LEAVE TO FILE A BRIEF EXCEEDING THE TYPE-VOLUME LIMITATION OF FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

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August 25, 2014

Pursuant to Ninth Circuit Local Appellate Rule 32-2, Defendant-Appellee the Tohono O'odham Nation (the Nation) respectfully requests leave to file the attached brief, which exceeds the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). Plaintiffs-Appellants take no position on this request.

Rule 32(a)(7)(B) provides that a principal brief may contain no more than 14,000 words. The proposed brief contains 17,481 words, counted in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The Nation thus seeks an extension of 3,481 words.

The Nation recognizes that, under Ninth Circuit Local Appellate Rule 32-2, motions to exceed the type-volume limitation "will be granted only upon a showing of diligence and substantial need." These conditions are satisfied here, for the following reasons:

1. This appeal, which concerns the scope of tribal gaming authorized by the Indian Gaming Regulatory Act (IGRA) and by the Nation's gaming compact with the State of Arizona, has been brought by multiple Appellants: (i) the State of Arizona, and (ii) the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community (collectively, GRIC-Salt River). Appellants did not file a consolidated brief; instead, they divided the issues between them and filed opening briefs of 11,692 and 12,762 words, respectively. GRIC-Salt River focused

on issues of compact interpretation, while Arizona addressed sovereign immunity, judicial estoppel, waiver, and the scope of the Indian Gaming Regulatory Act's "settlement of a land claim" exception. In total, Appellants' opening briefs comprised 24,454 words.

2. The Nation is the sole appellee in this case. Its opposition brief must therefore respond to the arguments presented in both of Appellants' briefs.

3. This appeal presents a broad array of claims, which implicate issues of federal Indian law, statutory construction, choice of law, contract interpretation, and tribal sovereign immunity. Briefing this case also requires explication of a complex factual background, stretching back to the United States' flooding of the Nation's Gila Bend Indian Reservation beginning in the 1970s; Congress's 1986 passage of the Gila Bend Indian Reservation Lands Replacement Act to settle the Nation's claims arising from that flooding; and the negotiation and adoption of two tribal-state gaming compacts between the Nation and the State of Arizona.

4. The Nation has made every effort to respond to Appellants' 24,454 words as concisely as possible. The proposed brief contains 17,481 words, 6,973 fewer words than Appellants' briefs. The Nation does not object to the cumulative length of Appellants' briefs; it merely seeks a modest increase in its own type-volume limitation, sufficient to provide the Court with a thorough, well-supported response to each of the issues Appellants raise.

In the event that this Court does not grant the requested relief or grants it only in part, the Nation respectfully requests an extension of time to file a revised brief, as envisioned by this Court's Circuit Advisory Committee Note to Local Appellate Rule 32-2.

Respectfully submitted.

/s/ Danielle Spinelli
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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Danielle Spinelli
DANIELLE SPINELLI

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DECLARATION OF DANIELLE SPINELLI IN SUPPORT OF THE TOHONO O'ODHAM NATION'S MOTION FOR LEAVE TO FILE A BRIEF EXCEEDING THE TYPE-VOLUME LIMITATION OF FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

1. I am an attorney and a member of the bar of this Court. I serve as appellate counsel for the Tohono O'odham Nation (the Nation) in the above-captioned matter. Pursuant to Ninth Circuit Local Appellate Rule 32-2, I submit this declaration in support of the Nation's Motion for Leave to File a Brief Exceeding the Type-Volume Limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

2. The Nation's proposed brief contains 17,481 words, excluding exempted portions.

3. This appeal has been brought by several Appellants: (i) the State of Arizona, and (ii) the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community (collectively, GRIC-Salt River). Appellants filed separate opening briefs of 11,692 and 12,762 words, respectively, excluding exempted portions. In total, these two briefs comprised 24,454 words.

4. The two briefs address separate issues, with only minimal overlap: GRIC-Salt River focused on issues of compact interpretation, while Arizona addressed sovereign immunity, judicial estoppel, waiver, and the scope of the Indian Gaming Regulatory Act's "settlement of a land claim" exception.

5. The Nation is the sole appellee in this case. Its opposition brief must therefore respond to the arguments presented in both of Appellants' briefs.

6. This appeal presents a broad array of claims, which implicate issues of federal Indian law, statutory construction, choice of law, contract interpretation, and tribal sovereign immunity. Briefing this case also requires explication of a complex factual background, stretching back to the United States' flooding of the Nation's Gila Bend Indian Reservation beginning in the 1970s; Congress's 1986 passage of the Gila Bend Indian Reservation Lands Replacement Act to settle the Nation's claims arising from that flooding; and the negotiation and adoption of two tribal-state gaming compacts between the Nation and the State of Arizona.

7. My colleagues and I have worked diligently to present the Nation's response to Appellants' arguments as concisely as possible. While the Nation does not require the same number of words that Appellants used, the 17,481 words requested are necessary for the Nation to provide a clear and complete response to Appellants' 24,454 words of briefing.

8. On August 23, 2014, I conferred with Michael Tryon, counsel for the State of Arizona in this matter, and Pratik Shah, counsel for the GRIC-Salt River Plaintiffs-Appellants in this matter. Mr. Tryon and Mr. Shah indicated that their clients take no position on the motion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of August, 2014, in Washington, D.C.

/s/ Danielle Spinelli

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BRIEF FOR DEFENDANT-APPELLEE TOHONO O'ODHAM NATION

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August 25, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Tohono O'odham Nation's gaming Compact with the State of Arizona expressly "authorize[s]" the Nation to game on its "Indian Lands," as defined by the Indian Gaming Regulatory Act (IGRA). Compact §§2(s), 3(a), 3(j).[1] Under IGRA, gaming-eligible "Indian Lands" include trust lands acquired "as part of … a settlement of a land claim." 25 U.S.C. §2719(b)(1)(B)(i). The Nation's Settlement Property in Maricopa County—purchased with funds Congress provided to replace the Nation's lost reservation lands—was acquired as part of a settlement of a land claim. In short, the Compact's terms expressly authorize the Nation to game on the Settlement Property.

These are the straightforward conclusions the district court reached as a matter of law based on the clear language of IGRA, its implementing regulations, and the Compact. Appellants' contrary arguments distort basic principles of statutory and contract interpretation to argue that the Compact—which was painstakingly negotiated by sovereign governments, pursuant to a carefully delineated federal regulatory scheme, and with mutual knowledge of all parties' sovereign immunity from suit—does not say what it means or mean what it says. At every turn, however, the Compact's plain and unequivocal language defeats their claims. The district court's judgment should be affirmed.

[1] Relevant portions of the Compact are reproduced in the Addendum to this brief at 1a-4a.

STATEMENT OF JURISDICTION

The Nation agrees with Appellants' statement of jurisdiction.

STATEMENT OF ISSUES

1. Whether the Nation's Settlement Property was acquired as part of "a settlement of a land claim" and is thus gaming-eligible under IGRA.

2. Whether the Nation's Compact with Arizona bars the Nation from gaming on the Settlement Property.

STATEMENT OF FACTS AND OF THE CASE

Viewing the evidence in the light most favorable to Appellants, the district court correctly concluded that there was no genuine dispute as to any fact material to Appellants' claims. ER13.[2] Even on Appellants' account of the facts, the Nation prevails as a matter of law. But Appellants' account is sufficiently distorted that the Nation is compelled to respond. The Nation thus briefly sets out the facts of this case below.

A. The Statutory Scheme

1. The Nation is a federally recognized Indian tribe with over 28,000 members. Its Gila Bend Indian Reservation is home to one of its twelve political subdivisions, the San Lucy District. Created by executive order in 1882, the Gila Bend Reservation originally encompassed 22,400 acres along the Gila River (in

[2] Appellants' Excerpts of Record are cited as "ER__." The Nation's Supplemental Excerpts of Record are cited as "NER__."

what is now Maricopa County, Arizona), where the Nation's forebears lived for centuries. ER623 (H.R. Rep. No. 99-851 (1986) (House Report)).

In the 1970s and 1980s, a federal dam repeatedly flooded the Gila Bend Reservation, rendering the land unusable. The consequences for the Nation's people at Gila Bend were devastating: They were forced to relocate to a tiny 40-acre parcel incapable of supporting any economic development. The loss of land destroyed their way of life, condemning them to unemployment and poverty. NER3 (Nation's Statement of Material Undisputed Facts (SMF) ¶4).

In response, Congress enacted the Gila Bend Indian Reservation Lands Replacement Act (LRA), Pub. L. No. 99-503, 100 Stat. 1798 (1986) (Add. 5a-9a), "to provide for the settlement of [the Nation's] claims arising from the operation" of the dam. ER620 (House Report); NER3-4 (SMF¶5). The LRA's purposes were to "replace[] … [r]eservation land with land suitable for sustained economic use which is not principally farming …, to promote the economic self-sufficiency of the O'odham Indian people at Gila Bend, and to preclude lengthy and costly litigation." ER622-623 (House Report). The LRA accordingly provided that, in exchange for surrendering title to the flooded lands and releasing "any and all claims of water rights or injuries to land or water rights" against the United States, the Nation would receive $30 million that could be used to acquire replacement reservation lands. LRA §§4(a), 6(c), 9(a); *see* ER633-642 (10/13/87 U.S./TON

Agreement); NER4 (SMF¶¶6,8). The LRA requires the Secretary to take such lands into trust for the Nation if they meet certain conditions, including being located in unincorporated Maricopa, Pima, or Pinal Counties. LRA §6(d); NER4 (SMF¶7). The LRA mandates that, once taken into trust, such lands will be "a Federal Indian Reservation for all purposes." *Id*.

2. In 1988, Congress enacted IGRA, 25 U.S.C. §§2701-2721, to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and to "establish[] independent Federal regulatory authority [and] Federal standards for gaming on Indian lands." *Id*. §2702. IGRA authorizes Class III gaming (sometimes referred to as "casino-style gaming") on "Indian lands," including "any lands title to which is … held in trust by the United States for the benefit of any Indian tribe," *id*. §2703(4)(A), (B), if, among other things, gaming is "conducted in conformance with a Tribal-State compact." *Id*. §2710(d)(1); *see* NER5 (SMF¶13). IGRA requires states to "negotiate" such a compact "in good faith" upon a tribe's request. 25 U.S.C. §2710(d)(3)(A). The Secretary of the Interior must approve the compact to make it effective. *Id*. §2710(d)(3)(B).

Although IGRA generally prohibits gaming on lands acquired in trust after October 17, 1988, there are several exceptions, including for lands "taken into trust as part of … a settlement of a land claim" after that date. *Id*. §2719(b)(1)(B)(i); *see*

NER5 (SMF¶13). The purpose of these exceptions is to place tribes that are disadvantaged by IGRA's 1988 cut-off date—such as tribes that had lost land that otherwise would have been eligible for gaming and had yet to obtain replacement land—on an "equal footing" with other tribes. NER38 (DOI Memorandum).

B. The Nation's 1993 Gaming Compact With Arizona

Following IGRA's enactment, the Nation and other tribes sought to enter into a Tribal-State compact with Arizona, sparking years of litigation and contentious bargaining.

When negotiations began, Arizona was on notice that the LRA—a public federal law passed in 1986—permitted the Nation to acquire replacement reservation lands in unincorporated Maricopa County as part of the Nation's settlement of its land claims against the United States. Indeed, at compact negotiation meetings with Arizona in July 1992 and May 1993, the Nation's counsel expressly reminded State negotiators of the Nation's rights under the LRA. In response to an inquiry about "the potential for gaming on noncontiguous land," the Nation's representatives explained that the LRA authorized the Nation to purchase "up to 9,880 acres of additional trust land" and that "[n]ot all of the land has been purchased yet, so there is a possibility of additional trust land to be acquired." NER10-11 (Tr. of 7/15/92 Tohono/Arizona Mtg.); *see* NER82,86,89 (Dahlstrom Dep. 49:4-18; 209:19-210:5, 257:4-260:4).

Arizona also knew that IGRA permitted gaming on after-acquired lands in certain circumstances. Indeed, Arizona's representatives informed tribal representatives multiple times during the negotiations that "[t]hey were concerned that there not be a mechanism by which an Indian tribe could open a casino outside of their contiguous reservation lands." NER83 (Dahlstrom Dep. 86:8-87:14). And Arizona actively sought limitations that would have barred the Nation and other tribes from gaming on after-acquired land, notwithstanding IGRA's equal-footing exceptions.[3] Ultimately, however, Arizona agreed to compacts that had no such restrictions and that, instead, incorporated IGRA's provisions governing gaming on after-acquired lands.

The Nation's compact, which it executed in 1993, accordingly "authorized" it to conduct Class III gaming "on the Indian Lands" of the Nation, ER657,663, and incorporated IGRA's definition of "Indian Lands," ER652. The 1993 Compact

[3] Those concerns were raised, *e.g.*, at a May 1993 legislative hearing that Appellants discuss. Az. Br. 16; GRIC Br. 6-7. At that hearing, Arizona Solicitor General Rebecca Berch explained, in response to questioning about the possibility of gaming on "noncontiguous tribal lands," ER430, that "the definition of authorized gaming locations in the drafts of compacts that are now circulating limits the locations to Indian lands of the tribe, and again, that's subject to a very technical definition in IGRA," ER434. She advised that concerns about such gaming could "be handled simply by contract negotiations limited to lands that were designated Indian lands as of a particular date, such as 1993." *Id*. A bill was subsequently introduced that would have limited Indian gaming to "lands that were part of a reservation as referred to in 25 [U.S.C. §]2703(4)(A) on October 17, 1988," ER440-445 (S.B. 1001), but that bill was not enacted.

further provided that "[g]aming on lands acquired after the enactment of [IGRA] on October 17, 1988, shall be authorized only in accordance with 25 U.S.C. §2719," which includes the settlement-of-a-land-claim exception. ER663.

The 1990s compacts authorized each tribe to operate a certain number of facilities and machines based on its population. The 1993 Compact gave the Nation the right to operate up to four facilities and 1,400 gaming devices. ER659-661,663. During the term of the 1993 Compact, the Nation operated three of the four facilities it was allotted, one of which was a small facility near Why, Arizona, in a rural area of the Nation's reservation. NER293 (Quigley Decl.).

C. Proposition 202 And The 2002 Gaming Compact

1. Because the first of the 1990s compacts were set to expire in 2003, Arizona and the 17 member tribes of the Arizona Indian Gaming Association (AIGA)—including the Nation, the Gila River Indian Community (GRIC), and the Salt River Pima-Maricopa Indian Community (Salt River)—began to discuss new compacts in 1999. NER287-288,293 (Quigley Decl.). At Arizona's request, the tribes agreed to negotiate a single comprehensive form of compact that each tribe would execute separately with Arizona. NER287-288 (Quigley Decl.). The negotiations lasted from fall 1999 to early 2002. *Id.*

Although the tribes met with Arizona under the umbrella of AIGA, AIGA played a purely organizational role. AIGA coordinated and facilitated the

discussions among the tribes and Arizona, but its officers (including its Executive Director, David LaSarte) had no authority to speak for or to bind the tribes on any issue. NER294-295 (Quigley Decl.); ER243 (LaSarte Dep. 26:14-18). That understanding was memorialized in the "Agreement in Principle" signed by leaders of the AIGA tribes. ER716-717; NER299-300 (Quigley Decl.). Although the Agreement encouraged the development of common positions, it nonetheless recognized that each tribe's "first priority is to protect the interests, sovereignty, and right to self-determination of their individual Indian Nations." ER716. The Agreement did not require tribes to disclose the factual predicates for their negotiating positions, and it was common for the tribes not to share such information with each other—even on significant issues such as revenue sharing. NER301 (Quigley Decl.).

The parties also all understood that tribal negotiators, including the Nation's negotiators, had no authority to bind their respective tribes on any compacting issue or provision. Rather—as the tribes informed Arizona many times—the tribal negotiators could only negotiate the best deal they could for their tribes, reduce the agreement to writing, and then present the negotiated compact to their tribal legislatures for approval or disapproval. NER295-298 (Quigley Decl.); ER229 (Landry Dep. 12:11-16); NER126,127 (Makil Dep. 32:5-18, 34:9-20); NER87 (Dahlstrom Dep. 214:2-5). Indeed, the resolution passed by the Nation's

Legislative Council authorizing its negotiators to negotiate the compact required that the compact be "submit[ted] to the Legislative Council … for final approval." NER326. This approach, taken by other tribes as well, was intended to prevent "some kind of casual conversation or … side remark [from being] considered an agreement before the tribe had a chance to review and approve it." NER102 (Landry Dep. 14:1-15:4); NER153 (W.M. Smith Dep. 66:24-67:3).

The need for legislative approval meant that until the negotiators were able to agree on *all* the provisions of a standard form compact, neither Arizona nor the tribes could consider *any* provision to be final. NER297-298 (Quigley Decl.). "The reason for this understanding was that many issues were interrelated; for example, a tribe's perspective about the financial benefits to be obtained from an expanded scope of gaming might affect its willingness to make revenue-sharing payments." *Id.*

2. The tribal negotiators participated in hundreds of meetings from 1999 to 2002 to negotiate the new compact terms—both among themselves and in discussions with Arizona—and they sought a written agreement that would be "comprehensive." ER242 (LaSarte Dep. 19:11-25); NER152 (W.M. Smith Dep. 64:17-25); ER230 (Landry Dep. 18:23-19:21). The tribes and Arizona were represented by sophisticated counsel, on whom they depended to draft compact provisions for all the terms on which they came to agreement, ER231 (Landry Dep.

21:21-25); ER289 (Lunn Dep. 35:3-10), and they negotiated the terms at "arm's length," NER135-136 (Ochoa Dep. 56:8-58:19); NER75 (Clapham Dep. 29:7-21).

One key point in the negotiations was the number of gaming facilities and machines each tribe would be allowed to operate under the new compacts. At first, Arizona asked all the tribes to forgo the right to build any new facilities. ER80 (Arizona Letter to LaSarte). The tribes rejected that offer, and Arizona then insisted that each tribe relinquish one of the facility rights it had been granted in the 1990s compacts. That proposal would have limited the Nation to three facilities, even though its 1993 Compact authorized it to operate four. Nine tribes accepted this proposal, but six others—including the Nation—did not. NER302-303 (Quigley Decl.).

As the parties negotiated over the number of facilities and machines the compacts would authorize, their positions were set forth in numerous versions of a "Gaming Device Allocation Table" that were exchanged among the parties. NER315 (Quigley Decl.); ER199-200,205 (Hart Dep. 60:24-61:12, 81:2-21).[4]

[4] At a certain point, Salt River and other tribes with facilities in the Phoenix area wanted to explore asking Arizona for an even greater expansion of the scope of gaming (*e.g.*, larger facilities and/or more devices). The Nation's representatives did not join those meetings because the prospects for State agreement seemed remote, and even if Arizona did agree to an expanded scope of gaming, the Nation believed that its number of devices and facility size would remain identical to GRIC's, since the Nation was a larger tribe than GRIC. NER309,310 (Quigley Decl.). At another point in the negotiations, the Pascua Yaqui Tribe asked the Nation to agree that Yaqui could put all its devices in a single facility. The Nation

Ultimately, the parties agreed on the version of the table contained in the Compact. Compact §3(c)(5) (Add. 3a). In its final form, the table authorized the Nation to operate four facilities and 2,420 devices (the same allocation as GRIC's). *Id.*

On several occasions during the negotiations, Arizona asked the Nation to reconsider its position on maintaining the four facility rights to which it was entitled under its 1993 Compact. The Nation refused, explaining that if it were allowed to operate only three facilities, it would be forced to close its small facility near Why, which produced little revenue but provided much-needed jobs for members on a remote part of the Nation's reservation. If the Nation were limited to three facilities, it would not have been feasible to keep the Why facility open and still use all of the Nation's allotted gaming devices. NER311-312 (Quigley Decl.).

In the end, Arizona agreed that the Nation and five other tribes would not be required to relinquish the right to one gaming facility. NER302-303 (Quigley Decl.). A concern was raised, however, that the Nation might close the Why facility and relocate it to a heavily populated area. NER312 (Quigley Decl.). Arizona thereafter proposed and the Nation accepted a compact provision limiting the location of one of the Nation's four facilities. NER313 (Quigley Decl.); *see*

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referred that question to the larger group, but that issue and the expanded scope-of-gaming issue resulted in "footnotes" to some drafts of the chart indicating that scope-of-gaming numbers had not been finalized in "Phoenix" or "Tucson." NER309-310,316 (Quigley Decl.). Those footnotes were removed once those issues were resolved.

Compact §3(c)(3) (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") (Add. 2a).

Aside from this restriction, the negotiators agreed that, just as in the 1990s compacts, the location of facilities—including facilities on after-acquired lands—would be controlled by IGRA. NER307 (Quigley Decl.). Indeed, the negotiators considered and rejected proposed compact provisions that would have gone farther than IGRA in restricting gaming on after-acquired lands.

Specifically, Steve Hart, a lead negotiator for Arizona, expressed concern about the potential for tribes to put "casinos downtown" and was "adamant" that tribes relinquish their right to game on after-acquired lands. NER129 (Makil Dep. 86:24-88:25); NER96 (Hart Dep. 146:21-147:3); NER104 (Landry Dep. 39:2-16, 77:14-18). Salt River objected, telling Hart that "[t]hat was just something we couldn't agree to." NER129 (Makil Dep. 88:6). The Navajo Nation also objected to the proposal, stating that the tribe had the right to acquire additional trust lands under its land settlement and was considering acquiring lands near Flagstaff for gaming purposes. NER104,106-107 (Landry Dep. 39:2-5, 77:14-78:14). Accordingly, the tribes refused to agree to Hart's request. NER96 (Hart Dep. 147:4-16). GRIC's counsel Eric Dahlstrom likewise proposed a ban on gaming on after-acquired lands to eliminate the possibility that a tribe might get land taken

into trust in the Phoenix area for gaming purposes; that proposal was also rejected. NER131 (Makil Dep. 100:12-20); NER137 (Ochoa Dep. 88:4-89:19); NER77 (Clapham Dep. 57:19-24); NER141(Ritchie Dep. 15:7-17).[5]

3. In early 2002, after three years of intense negotiations, the parties agreed on a framework for a new standard compact. ER794-805 (Compact Framework). The framework stated that it was "an outline of the issues discussed, and proposed compromises reached, during the past two years." ER794. The framework did not include any restrictions on gaming on after-acquired lands permitted by IGRA. Before the parties could agree on a full compact, however, operators of horse and dog tracks that wanted to offer gaming successfully challenged the Governor's authority under state law to enter into new compacts. A

[5] Consistent with this negotiating history, Appellants' own representatives in the compacting process have affirmed that the Nation never agreed to give up its right to game on any of its Indian lands. One of Arizona's negotiators candidly acknowledged that he could not "point to any member of the Nation or any of their lobbyists or lawyers who have ever specifically stated that there would be no new casinos in the Phoenix area." NER159 (Walker Dep. 43:19–24). Another Arizona participant similarly testified that she had "no recollection of a conversation in which [the Nation] mentioned they would or would not build [a casino in Phoenix]." NER148 (Severns Dep. 54:7-9). Participants from GRIC and Salt River offered substantially identical accounts. *See* NER105 (Landry Dep. 43:10-13) ("Q. During the negotiations, no one from the Tohono O'odham ever specifically stated that the tribe would never game in the Phoenix area, did they? A. That's correct."); NER130 (Makil Dep. 95:7-11) ("Q. [Y]ou don't recall any specific representative of the Nation affirmatively stating that the Tohono O'odham would not build casinos in the Phoenix area. Correct? A. No one ever said anything to me."); NER121 (Lewis Dep. 44:1-17) (does not recall the Nation ever stating it would not game in Phoenix area).

new state law thus became necessary to give the Governor such authority. NER317 (Quigley Decl.). A bill that would have done so failed to pass the Arizona legislature. NER319 (Quigley Decl.); NER71 (Bielecki Dep. 34:5-19).

Accordingly, a coalition of tribes proposed a ballot initiative—Proposition 202—requiring the Governor to enter into a standard form compact with any tribe requesting one, and setting out the complete text of the standard form compact. ER806-841; *see* Ariz. Rev. Stat. Ann. §5-601.02. In drafting Proposition 202, the tribes drew on the terms they had previously negotiated with Arizona, ER221 (Hart Dep. 179:9-17), and no substantive changes were made to the terms governing the location of gaming facilities. Arizona voters passed Proposition 202 in November 2002, and on December 4, 2002, Arizona and the Nation executed the Compact. ER793; *see also* ER718-793 (2002 Compact). On January 24, 2003, the Secretary of the Interior approved the Compact, NER30-33, which became effective on February 5, 2003, *see* 68 Fed. Reg. 5,912.

The Compact incorporates the precise terms set out in Proposition 202 governing the permissible locations for gaming facilities. As in the 1990s compacts, the Compact "authorize[s]" Class III gaming on the "Indian Lands" of the tribe, Compact §3(a), (j), and incorporates IGRA's definition of "Indian lands," subject to the restrictions on gaming on after-acquired lands in §2719 of IGRA, *id.* §2(s). *See* Addendum 1a-4a. The Compact also retained the provision stating that

"Gaming Activity on lands acquired after the enactment of [IGRA] on October 17, 1988 shall be authorized only in accordance with 25 U.S.C. §2719." Compact §3(j)(1) (Add. 4a). In short, the 2002 Compact authorizes gaming wherever IGRA permits it, except for the limitation on the location of one of the Nation's four facilities (if the Nation operates four facilities). The parties also agreed to a comprehensive integration clause stating that the Compact "contains the entire agreement of the parties with respect to the matters covered by this Compact and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding." Compact §25 (Add. 4a).

D. The Settlement Property And This Case

In August 2003—six months after the Secretary of the Interior approved the Compact—the Nation purchased the Settlement Property through its wholly-owned corporation, Rainer Resources, Inc.

On January 28, 2009, the Nation filed an application asking the Secretary to accept trust title to the Settlement Property pursuant to the LRA. In 2010, the Secretary concluded that the LRA mandated the trust acquisition. Arizona, GRIC, and others challenged the Secretary's decision. Following a remand by this Court, *see GRIC v. United States*, 729 F.3d 1139 (9th Cir. 2013), the Secretary again determined that the LRA mandated the trust acquisition, and in July 2014 the United States took a portion of the Settlement Property into trust for the Nation.

DOI Trust Letter, *available at* http://bia.gov/cs/groups/webteam/documents/text/idc1-027180.pdf. That land is now part of the Nation's "Indian Lands."

Arizona, GRIC, and Salt River filed this action in February 2011, invoking §2710 of IGRA. That section abrogates tribal sovereign immunity for a narrow category of claims—namely, suits "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. §2710(d)(7)(A)(ii). Plaintiffs alleged that gaming on the Settlement Property would violate the Compact because the LRA was not a settlement of a land claim under IGRA and because the Compact implicitly bars the Nation from gaming in the Phoenix area. They also raised other non-Compact-based claims, including promissory estoppel, fraud in the inducement, and material misrepresentation. ER867-891.

The Nation moved to dismiss the complaint. The district court dismissed the claims of fraud in the inducement and material misrepresentation as barred by sovereign immunity because they did not allege a violation of "any Tribal-State compact," as IGRA requires. ER55-56. The court allowed the remaining claims to go forward.

Following a year of wide-ranging discovery, the parties cross-moved for summary judgment. The district court dismissed the promissory estoppel claim as barred by sovereign immunity because it was "based on a promise not contained in

the Compact," ER36, and granted summary judgment to the Nation on all other claims, ER9. First, the court held that the LRA is a "classic settlement": It "settled a 'land claim' within the meaning of IGRA .... [Thus] the [Settlement Property] qualifies for gaming under 3(j)(1) of the Compact." ER16. Second, applying Arizona law, and after reviewing the extrinsic evidence offered by Appellants, the court also held that "the words of the Compact cannot reasonably be read to include Plaintiffs' claimed ban on new casinos in Phoenix," and that "any evidence … of a separate oral understanding between the Nation and the State … must be excluded from the task of interpreting the Compact" because the Compact is fully integrated and discharges any unwritten understandings. ER7; *see also* ER34.

SUMMARY OF ARGUMENT

As the district court held, the plain text of IGRA, its implementing regulations, and the Compact foreclose Appellants' claims as a matter of law. IGRA authorizes gaming on the Settlement Property, and the Compact's plain terms authorize the Nation to game where IGRA permits.

I. The Lands Replacement Act plainly "settle[d] … a land claim" within the meaning of IGRA. 25 U.S.C. §2719(b)(1)(B)(i). The Act provided the Nation with $30 million and a mechanism for the acquisition of replacement lands in return for the Nation's waiving its claims arising out of the United States' destruction of its reservation lands. The Department of the Interior's (DOI's)

binding regulations confirm that these claims were "land claims" under IGRA and that the LRA settled them. Appellants' related argument—that even if the Settlement Property was acquired as part of a settlement of a land claim the Nation should be estopped from saying so—is meritless.

II. The Nation's Compact with Arizona expressly "authorize[s]" the Nation to game on its "Indian Lands." Compact §§2(s), 3(a), 3(j). Appellants nowhere identify *any* Compact language remotely susceptible of the interpretations they suggest. Under federal principles of contract interpretation—which should apply to a Tribal-State compact negotiated and approved pursuant to federal law—Appellants' extrinsic evidence is thus flatly inadmissible. Even under Arizona contract law, however, Appellants may not use extrinsic evidence to alter or contradict the unambiguous written terms to which they agreed. The district court therefore properly entered summary judgment on each of Appellants' Compact-related claims.

III. The district court correctly held Appellants' claims of promissory estoppel, material misrepresentation, and fraudulent inducement barred by the Nation's sovereign immunity. IGRA abrogates tribal sovereign immunity only for claims alleging "violation of a[] Tribal-State compact … that is in effect." 25 U.S.C. §2710(d)(7)(A)(ii). None of these claims alleges a violation of any provision of the Compact. The district court thus properly dismissed them.

ARGUMENT

I. IGRA AUTHORIZES GAMING ON THE SETTLEMENT PROPERTY

Appellants wrongly contend (Az. Br. 25-35) that IGRA—and therefore the Compact—does not authorize the Nation to game on the Settlement Property because the Lands Replacement Act is not a "settlement of a land claim" under §2719. That argument is foreclosed by the language of IGRA and DOI's implementing regulations, which make clear that the LRA settled "land claims" within the meaning of IGRA. And Appellants' contention that the LRA settled only a "narrow subset" of the Nation's claims (Az. Br. 26, 31) is not only implausible, it lacks any basis in the LRA's text or legislative history.

A. The Claims Settled By The LRA Are "Land Claims" Under IGRA

Straightforward principles of statutory construction establish that the Lands Replacement Act "settle[d] … a land claim" within the meaning of IGRA. 25 U.S.C. §2719(b)(1)(B)(i). The central purpose of the LRA was to settle the Nation's land claims against the United States by requiring the Nation to waive those claims in exchange for partial monetary compensation and the promise of new reservation lands to replace the destroyed lands of the Gila Bend Indian Reservation. Specifically, the Act provided that if the Nation waived "any and all claims of water rights or injuries to land or water rights … with respect to the lands of the Gila Bend Indian Reservation," LRA §9(a), and ceded "all right, title, and interest" to 9,880 acres of the destroyed reservation land, the Secretary would pay

the Nation $30 million, *id.* §4(a), and those "[s]ettlement [f]unds" could be used to purchase replacement trust lands, *id.* §6.

The legislative history of the LRA confirms what its text makes plain: It settled the Nation's land claims. As the House Report explained, the flooding of the Nation's reservation gave rise to "a variety of potential legal claims against the United States," including the unauthorized and unlawful taking of tribal trust lands. ER626. "[R]esolving [those claims] in the courts would be both lengthy and costly to all parties." *Id*. Accordingly, the Act "provide[d] for the United States to settle the prospective claims of the [Nation] by," among other things, authorizing the Secretary "to hold in trust up to 9,880 acres of replacement lands" in return for the Nation's waiver of its claims. ER627. The LRA thus qualifies as a "settlement of a land claim," 25 U.S.C. §2719(b)(1)(B)(i), under the ordinary meaning of those words.

The plain meaning of §2719 is reinforced by considerations of statutory purpose. IGRA expressly provides that certain trust lands acquired after the law's effective date would be dealt with as though they were part of a tribe's pre-IGRA trust or reservation lands. 25 U.S.C. §2719(a), (b)(1)(B). The purpose of those provisions was to place tribes disadvantaged by the statute's 1988 cut-off date—such as tribes that had been wrongfully dispossessed of gaming-eligible land before

IGRA's enactment—on an "equal footing" with other tribes. NER38 (DOI Memorandum).

This is precisely the kind of case the equal-footing exceptions were designed to address. Before 1988, the United States' wrongful conduct deprived the Nation of its rightful possession of gaming-eligible reservation land. The LRA settled the Nation's claims against the United States by giving the Nation the right to acquire replacement reservation lands that would have the same legal status as the unlawfully taken lands—indeed, the LRA makes clear that land acquired under it is "a Federal Indian Reservation for all purposes," LRA §6(d). Failing to treat the Nation's acquisition of replacement lands as part of the settlement of a land claim would defeat Congress's purpose in enacting the equal-footing exceptions.[6]

For all of these reasons, the Field Solicitor for the Phoenix Field Office of DOI correctly determined in 1992 that "any land" acquired under the LRA satisfies IGRA's settlement-of-a-land-claim exception. NER41.

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[6] If there were any doubt that the Settlement Property satisfies the settlement-of-a-land-claim exception, both IGRA's purpose and the Indian canon of construction resolve the question in the Nation's favor. "Although §2719 creates a presumptive bar against casino-style gaming on Indian lands acquired after the enactment of the IGRA, that bar should be construed narrowly (and the exceptions to the bar broadly) in order to be consistent with the purpose of the IGRA, which is to encourage gaming." *Grand Traverse Band v. Office of U.S. Att'y W.D. Mich.*, 369 F.3d 960, 971 (6th Cir. 2004); *see City of Roseville v. Norton*, 348 F.3d 1020, 1030-1032 (D.C. Cir. 2003) (the exceptions in §2719(b)(1)(B) "embody policies counseling for a broader reading" and the Indian canon "would resolve any doubt" in their interpretation).

B. The LRA Is A "Settlement Of A Land Claim" Under DOI's Regulations

In addition to IGRA's plain text, binding regulations issued by DOI since the Field Solicitor's conclusion in 1992 establish beyond question that (1) the Nation had "land claims" against the United States and (2) the LRA settled those claims.[7]

1. The Nation had "land claims" against the United States

DOI has interpreted the term "land claim" in IGRA to mean:

> [A]ny claim by a tribe concerning the impairment of title or other real property interest or loss of possession that: (1) [a]rises under the United States Constitution, Federal common law, Federal statute or treaty; (2) [i]s in conflict with the right, or title or other real property interest claimed by an individual or entity …; and (3) … accrued on or before October 17, 1988.

25 C.F.R. §292.2. Appellants do not seriously dispute that the Nation had "land claims" against the United States under this definition.[8]

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[7] DOI's regulations are a reasonable construction of IGRA and entitled to *Chevron* deference. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711-712 (2011); *Center for Biological Diversity v. Salazar*, 695 F.3d 899, 902 (9th Cir. 2012).

[8] Appellants seemingly suggest (Az. Br. 27-28) that the regulations limit "land claims" to claims "seek[ing] to remedy dispossession of aboriginal homelands," but the regulations' plain text refutes that contention by defining "land claims" as claims "concerning the impairment of title *or* other real property interest *or* loss of possession." 25 C.F.R. §292.2 (emphasis added). In any event, the flooding *did* dispossess the Nation of its homelands: The Nation was forced to leave its reservation—the land was unusable—thus losing the most essential aspects of its right to possession. Nor, contrary to Appellants' contention (Az. Br. 27-28), is there anything unusual about an Indian "land claim" settlement that addresses claims like the Nation's. *See, e.g.*, 25 U.S.C. §§1774-1774h (Seneca Nation Land Claims Settlement) (claims related to inequitable lease terms); *id.*

a. The Nation had claims "concerning the impairment of title or other real property interest or loss of possession"

In 1950, Congress authorized the construction of the Painted Rock Dam on the Gila River. NER49 (Flood Control Act of 1950); ER623 (House Report); NER3 (SMF¶1). That statute did not authorize the condemnation of the Nation's land. The U.S. Army Corps of Engineers nonetheless built the dam ten miles downstream from the Nation's Gila Bend Reservation and obtained a court-ordered flowage easement giving it the "perpetual right to occasionally overflow, flood, and submerge" about 7,700 acres of the Gila Bend Reservation "and all structures on the land, as well as to prohibit the use of the land for human habitation." ER623-624 (House Report); NER58-63 (Decl. of Taking, *United States v. 7,743.82 Acres of Land* (D. Ariz. Nov. 23, 1960)); NER3 (SMF¶3).[9] As a result, the Nation's reservation sustained almost-continual flooding throughout the late 1970s and early 1980s. ER624 (House Report); NER3 (SMF¶4). The floods destroyed a tribal farm and left almost the entire 10,000-acre reservation unusable for agriculture or

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§§1778-1778h (Torrez-Martinez Desert Cahuilla Indians Claims Settlement) (trespass claims related to flooding). The Santo Domingo Pueblo Claims Settlement, on which Appellants rely (Az. Br. 28), likewise settled both claims for the return of land and claims for "trespass and mismanagement" as part of a unified settlement of "all existing *land claims*, including the [trespass and mismanagement] claims." 25 U.S.C. §1777(a)(6) (emphasis added).

[9] The Corps allegedly paid $130,000 to the Bureau of Indian Affairs (BIA) for the benefit of the Nation ($16.83 per acre), but that amount cannot be found in the BIA's accounts. 132 Cong. Rec. H8106 (daily ed. Sept. 23, 1986).

livestock grazing. ER624-625. "The tribe thus ha[d] a reservation which for all practical purposes [could not] be used to provide any kind of sustaining economy." ER626.

These events gave rise to at least four sets of claims by the Nation against the United States "concerning the impairment of title or other real property interest or loss of possession." 25 C.F.R. §292.2.

First, the Nation had a claim that the flowage easement took its land without congressional authorization.[10] There must be "a clear expression of congressional purpose" to authorize a condemnation of tribal land. *United States v. Winnebago Tribe*, 542 F.2d 1002, 1005 (8th Cir. 1976); *United States v. Imperial Irrigation Dist.*, 799 F. Supp. 1052, 1061 (S.D. Cal. 1992); 25 U.S.C. §177. The Flood Control Act, however, did not authorize the Corps to take the Nation's land by way of a flowage easement. And, as Congress acknowledged, there was "[no] mention of the [Gila Bend] reservation or the dam's potential effects on the reservation and its inhabitants" in the Act's applicable legislative history. ER623 (House Report). The Nation thus had "claims for the taking of tribal trust lands by condemnation without express authority from Congress." ER626.

[10] An easement "is 'an interest in land' in the possession of another," 4 *Powell on Real Property* §34.02[1](1) (2014), and thus impairs the owner's full enjoyment of title and possession. When the government obtains an easement on private property, it effects a taking requiring just compensation. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-832 (1987).

Second, even had the easement been authorized, the Nation would still have had a takings claim because the Corps exceeded the scope of the easement, which permitted only "occasional[]" flooding—not the near-continual flooding (and resulting destruction) that actually occurred. ER624-625 (House Report); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012) ("government-induced flooding" of land is "[n]o … exception to our Takings Clause jurisprudence.").[11] Moreover, the small sum allegedly paid to the Nation was insufficient to compensate it for its loss.[12] As Congress recognized, the Nation thus had a claim "for payment of unjust compensation" for the loss of its property interest. ER626 (House Report).

Third, the Nation had a claim for trespass against the United States. "Federal common law governs an action for trespass on Indian lands," *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009), and under the federal common law, "[a]ny physical entry upon the surface of the land is a trespass, including flooding land with water," *Imperial Irrigation Dist.*, 799 F. Supp. at 1059; *see also* 75 *Am.*

[11] Indeed, in litigation concerning other landowners on the Gila River subject to an identical easement, the courts recognized that the landowners had "stated a claim based upon the Government's taking of property beyond the scope" of that easement. *Narramore v. United States*, 960 F.2d 1048, 1051-1052 (Fed. Cir. 1992); *see Narramore v. United States*, 30 Fed. Cl. 383, 391 (1994) (additional flooding not "within the scope of the existing easement" "clearly qualifies as a 'new claim'… for an additional taking").

[12] *See* 132 Cong. Rec. H8106 (Rep. McCain) (noting that "the amount [paid] was approximately one-half to one-third of that paid non-Indians").

Jur. 2d Trespass §43 (2007); *id.* §1 (defining trespass as "an injury to possession"). Because the Corps caused water to enter the Nation's land and its flowage easement was invalid—and because the flooding exceeded the easement's terms—the flooding was a trespass.

Finally, the Nation had a claim for breach of the federal government's fiduciary duty to preserve the Gila Bend Reservation in trust for the Nation. ER626 (House Report). The United States unlawfully inundated the very lands that, as trustee for the Nation, it was obligated to protect. Moreover, it did so on profoundly inequitable terms. Such claims are "land claims" under DOI's regulations. NER65-67 (DOI Letter) (a "breach of fiduciary duty" claim can be "a land claim" under DOI's regulations).

b. The Nation's claims meet the remaining requirements

The Nation's claims against the United States also meet each of the three remaining requirements in 25 C.F.R. §292.2: First, the Nation's claims for unauthorized taking of its land and for just compensation arose under the Constitution, *see* U.S. Const. art. I, §8, cl. 3; *id.* amend. V, while the trespass and breach of trust claims arose under federal common law. Second, the Nation's claims to full beneficial title and possessory interest in its reservation unquestionably "conflict[ed]" with the Corps' claim that it had a right to flood that

same land. Third, the claims accrued no later than 1984, the last year of the floods, ER624 (House Report)—well before IGRA's enactment on October 17, 1988.

In sum, under DOI's regulations, the Nation indisputably had "land claims" against the United States—claims the United States judged sufficiently meritorious to warrant a $30 million settlement.[13]

2. The LRA was a "settlement" of the Nation's land claims

Under DOI's regulations, a "settlement" of a land claim

> [1] resolves or extinguishes with finality the tribe's land claim in whole or in part, [2] thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, [3] in legislation enacted by Congress.

25 C.F.R. §292.5(a). The LRA meets each of these requirements. Appellants do not dispute that the LRA resulted in the loss of possession of the Gila Bend Reservation (or that it is legislation enacted by Congress). Rather, they wrongly contend that the LRA did not settle the Nation's "land claim[s]." As explained above, it plainly did so: The LRA required the Nation to execute a "waiver and release" of "any and all claims of water rights or injuries to land or water rights …

[13] It is irrelevant whether the claims would have prevailed in court. As DOI has explained, a land claim "does not have to be filed in court in order to fall under the definition." 73 Fed. Reg. 29,354, 29,356 (May 20, 2008). The question is whether the parties sought to avoid the risks of litigation by entering into a legally binding agreement resolving the claims. Appellants' suggestion (Az. Br. 35 n.3) that the Nation's takings claim was time-barred is thus not only wrong, *see United States v. Dickinson*, 331 U.S. 745, 749 (1947), but beside the point.

from time immemorial," LRA §§4(a), 9(a), and the Nation executed such a release, ER633-642.

Appellants contend, however, that the Nation's waiver of its claims "for injuries to land or water rights" does not include a waiver of its "land claims." They argue that the United States paid the Nation $30 million in return for a release of only a "narrow subset" (Az. Br. 31) of the Nation's claims arising out of the flooding. This interpretation is absurd on its face. Appellants nowhere even attempt to explain why Congress would have intended the LRA to be anything other than a mechanism for finally extinguishing all the Nation's claims. The implausibility of Appellants' interpretation is sufficient reason to reject it.

In any event, Appellants' proposed distinction between "land claims" and claims for "injuries to land or water rights" is specious. According to Appellants, claims for "injuries to land or water rights" encompass only tort claims stemming from physical damage to land, and those claims are not claims "concerning the impairment of title or other real property interest or loss of possession" within the meaning of DOI's regulations. That vanishingly narrow reading of the LRA is without merit.[14]

[14] Appellants appear to construe the phrase "injuries to land or water rights" to mean "injuries to land or injuries to water rights." But the phrase is more naturally (and sensibly, in light of the LRA's purpose) read to mean "injuries to land rights or water rights," where "land" and "water" are adjectives modifying "rights." *See, e.g.*, *Lawrence v. Florida*, 549 U.S. 327, 331-332 (2007) (word

The flooding that destroyed the Nation's reservation was, to be sure, an "injury to land." But that injury was not limited to physical damage to the land; it simultaneously worked a trespass, a taking of the Nation's right to possession and enjoyment of its land, and an impairment of the Nation's title, which was clouded by the unlawful easement. The Nation's claims arising out of the injury to its land thus included claims "concerning the impairment of title or … loss of possession." *See Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193, 1208 (D. Kan. 2006) (a "'land claim' means that the operative facts giving rise to a right arise from a dispute over land"). Indeed, the LRA specifically required the Nation to cede "all right, title, and interest" to 9,880 acres of the destroyed reservation land. LRA §4(a).

Moreover, even if Appellants were correct that claims for "injuries to land and water rights" covered only tort claims and not "claims to title or possession of land" (Az. Br. 27), the Nation's claim for trespass would be covered by the LRA. And that claim by itself satisfies the regulatory definition of "land claim," which includes not just claims to title or possession, but also "*any* claim" concerning any

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"State" in phrase "application for State post-conviction or other collateral review" modifies both "post-conviction" and "other collateral review"). Plainly, claims of injuries to land rights encompass claims "concerning the impairment of title or other real property interest or loss of possession." In any event, as explained in text, even if the LRA is read to cover only "injuries to land," it settled the Nation's land claims.

"other real property interest," including the interest in exclusive possession and enjoyment of real property. Appellants argue (Az. Br. 30) that an "'other real property interest' must relate to title of the property or a related ownership interest," but that makes no sense. Because the regulation already covers "any claim … concerning … the impairment of title," Appellants' reading violates one of the most basic canons of interpretation by rendering the phrase "other real property interest" surplusage. *See Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("[I]t is generally presumed that statutes do not contain surplusage."); *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute.").

Finding no support in the text of the LRA or IGRA's implementing regulations, Appellants retreat to snippets of the LRA's drafting history. They point out (Az. Br. 23, 31-33) that Congress modified the "findings" section in the final version of the Act to remove references to the Nation's legal claims. As the House Report explained, however, that was done because the prior version of the findings—which stated that the bill was intended to settle the Nation's "land and water claims," ER600-603 (H.R. 4216 §2(1), (3), (6))—had "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 its responsibility as trustee to ensure the Nation's welfare. ER628.

There is no suggestion in the legislative history that Congress intended these revisions to change either the fact that the Act settled the Nation's claims or the scope of the settlement. On the contrary, the House Report explained that "[t]he substance" of the LRA's waiver provision "is the same as … the original bill," ER631.

C. There Has Been No Estoppel Or Waiver

Appellants separately argue that, even if the Settlement Property was acquired as part of the settlement of a land claim, the Nation is estopped from asserting that it has a right to game on the property. This argument rests on two theories: First, Appellants point to four sentences in a supplemental brief submitted twenty years ago to a mediator in an unsuccessful arbitration. Second, they claim that the Nation waived its rights under IGRA when it allegedly "joined" a 1993 group handout to certain Arizona legislative staff. Both claims are meritless.

1. Judicial estoppel does not apply

"[J]udicial estoppel 'is an equitable doctrine'" designed "'to protect the integrity of the judicial process.'" *New Hampshire v. Maine*, 532 U.S. 742, 749, 750 (2001).[15] In determining whether to apply it, courts typically consider

[15] "Federal law governs the application of judicial estoppel in federal court[s]." *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 992 (9th Cir. 2012).

(1) whether a party's later position is "'clearly inconsistent'" with its earlier position; (2) whether the party has successfully persuaded the court "to accept [its] earlier position [such] that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) whether allowing the inconsistent position would give the party "an unfair advantage or impose an unfair detriment on the opposing party." *Id*. at 750-751. None of these factors supports the application of judicial estoppel here.

First, the Nation has not taken a position that is "clearly inconsistent," or indeed inconsistent at all, with any position it took in the 1992 arbitration. The language on which Appellants rely discusses a provision in Arizona's draft compact that would have barred gaming on trust lands after IGRA's effective date. ER715. The Nation explained that the provision

> 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.

Id.

Appellants maintain (Az. Br. 36) that in those sentences the Nation somehow conceded that, forever after, gaming on any of its after-acquired lands would be "permitted … only with the concurrence of the governor." But the quoted language merely explained that one particularly harsh consequence of Arizona's proposed

compact was that "the Nation [would] forfeit[]" its ability "to request" a two-part determination pursuant to §2719(b)(1)(A), notwithstanding that "federal law requires the Governor's concurrence." ER715. The two-part determination process in §2719(b)(1)(A)—which is generally available to any tribe that wishes to game on after-acquired lands—is separate from the equal-footing exceptions set forth in §2719(b)(1)(B)—which apply only in certain limited circumstances. The passage nowhere suggests that the Nation would not pursue gaming under the equal-footing exceptions unless the governor agreed. At worst, the language is, as the district court determined (ER17), merely "cryptic." That by itself is sufficient to preclude judicial estoppel.

Second, the Nation did not obtain any relief based on its alleged concession. The mediator selected the Nation's proposed compact, but in doing so took no position on whether the Nation could game on its Indian lands under the settlement-of-a-land-claim exception. Moreover, Arizona refused to consent to the mediator's selection, *see* 25 U.S.C. §2710(d)(7)(B)(vii); GRIC Br. 6, so the arbitration concluded without the Nation receiving any relief whatsoever. Under these circumstances, there can be no judicial estoppel because there is "no risk of inconsistent judicial determinations." *Williams v. Boeing*, 517 F.3d 1120, 1135 (9th Cir. 2008); *see also Reed Elsevier Co. v. Muchnick*, 559 U.S. 154, 170 (2010) (declining to apply judicial estoppel where "in approving the [parties'] settlement,

the District Court did not adopt petitioners' interpretation of [the statute]" and thus "[a]ccepting petitioners' arguments here … cannot create 'inconsistent court determinations'").

Finally, the Nation's statements in the arbitration did not create an "unfair advantage or impose an unfair detriment on [Plaintiffs]." *New Hampshire*, 532 U.S. at 751. The arbitration failed, and the Secretary of the Interior returned the parties to the negotiating table. *See Williams*, 517 F.3d at 1135 (no "unfair advantage" where the consent decree obtained never became effective). Arizona was thereafter free to pursue—and did pursue (unsuccessfully)—a compact that would bar gaming on after-acquired lands. *See* ER440-445 (S.B. 1001).

2. The Nation did not waive its statutory rights

Appellants next claim (Az. Br. 40-45) that the Nation permanently waived "any right to conduct gaming on [LRA lands]" based on an alleged group "handout" from a 1993 meeting "between representatives of numerous tribes and legislative staff." This argument fails as a matter of law and fact.

To demonstrate waiver, Appellants must show that a representative of the Nation (1) was empowered to waive the Nation's rights and (2) evinced a "'clear, decisive and unequivocal'" intent to do so. *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 603 (9th Cir. 1995); 28 *Am. Jur. 2d Estoppel and Waiver* §200

(2011).[16] As the district court correctly held (ER19-20), Appellants could not, as a matter of law, make either showing.

First, when the Nation formed its Negotiating Committee, it made clear that any terms and conditions negotiated by the committee were "subject to" the approval of the Nation's Legislative Council. ER491. Accordingly, no representative of the Nation was empowered to waive the Nation's statutory rights under the LRA. That alone is sufficient reason to reject Appellants' claim of waiver.[17]

Second, and in any event, none of the conduct on which Appellants rely amounts to a waiver. To be a waiver, conduct must be "'so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of [the] conduct is possible.'" *Bechtel v. Liberty Nat'l Bank*, 534 F.2d 1335, 1340 (9th Cir. 1976). Here, Appellants allege (Az. Br. 41) only that the Nation "joined a number of other tribes in passing out a handout"

[16] "'The interpretation and validity of a [waiver] of [federal claims] is governed by federal law.'" *Nilsson v. City of Mesa*, 503 F.3d 947, 951 (9th Cir. 2007) (alterations in original).

[17] For the first time in this Court, Appellants argue that the unnamed person who distributed the handout had "apparent authority" to waive the Nation's statutory rights. To support this theory, Appellants rely (Az. Br. 43-44) on Arizona and California state law. Even if that law applied, "to establish 'ostensible' [or apparent] authority, the record must reflect that the alleged principal … represented another as his agent." *Koven v. Saberdyne Sys., Inc.*, 625 P.2d 907, 911-912 (Ariz. Ct. App. 1980). Here, Appellants have made no such record, and the Nation's resolution is directly to the contrary.

stating that the settlement-of-a-land-claim exception "'will not [a]ffect Arizona.'" They point to nothing in the record identifying who wrote the handout or distributed it. That someone from the Nation "appear[ed] at the meeting" (Az. Br. 42), if true, cannot possibly show that the Nation had a "'clear, decisive and unequivocal'" intent to waive its rights under a federal statute. *Amwest*, 54 F.3d at 603. At bottom, all Appellants can point to (Az. Br. 41, 44) is that "[n]o representative of the Nation expressed disagreement" with the handout. But, as the district court held (ER19-20), the Nation's alleged silence is wholly insufficient to constitute waiver. *See, e.g., adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1074 (D. Or. 2008); 28 *Am. Jur. 2d Estoppel and Waiver* §195 ("mere silence is no waiver").

II. THE COMPACT DOES NOT BAR GAMING ON THE SETTLEMENT PROPERTY

Appellants next wrongly contend that, even if IGRA permits gaming on the Settlement Property, the Compact—which expressly "authorize[s]" the Nation to game on its "Indian Lands" (including after-acquired lands that are gaming eligible under IGRA), Compact §§3(a), 3(j), 2(s)—should nonetheless be understood to prohibit such gaming, either impliedly or through application of the covenant of good faith and fair dealing. But the Compact cannot, as a matter of law or common sense, bear Appellants' meaning. Appellants nowhere identify any words in the Compact to which to tether the alleged and varied "promises" they are seeking to

enforce. At every turn, it is clear that they are merely seeking to graft onto the Compact a term that is not there and that would contravene its express language. And although the Nation continues to believe that federal law governs the interpretation of Tribal-State gaming compacts, no rule of contract interpretation—federal or state—justifies Appellants' reading of the Compact.[18]

A. Federal Law Governs Interpretation Of The Compact

As the district court correctly held, the Nation prevails even if Arizona law applies. Because the Nation has an ongoing interest in this question, however, the Nation requests that the Court make clear that federal law, not Arizona law, governs interpretation of the Compact.

This Court has previously stated that "[g]eneral principles of federal contract law govern … Compacts, which were entered pursuant to IGRA." *Cachil Dehe Band v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010). In *Cachil* itself, the Court "rel[ied] on California contract law and Ninth Circuit decisions interpreting California law because we discern, and the parties note, no difference between California and federal contract law." *Id.* (internal quotation marks and brackets

[18] Although this Court need not reach the issue because all of Appellants' claims fail on the merits, the district court's grant of summary judgment against GRIC and Salt River on their Compact claims was warranted for an additional reason: They are not parties to the Compact. And the Compact provides that it "is entered into solely for the benefit of the Nation and the State. It is not intended to create any rights in third-parties which could result in any claim of any type against the Nation and/or the State." Compact §19 (Add. 4a). There is no record evidence that this provision means anything other than precisely what it says.

omitted). As other district courts in this Circuit have recognized, *Cachil* stands for the proposition that courts should apply federal law in interpreting IGRA compacts unless federal contract law and the relevant State's contract law are the same. *Idaho v. Coeur d'Alene Tribe*, 2014 WL 2818682, at *2 (D. Idaho June 23, 2014); *Tulalip Tribes of Wash. v. Washington*, 2013 WL 2253668, at *3 (W.D. Wash. May 22, 2013). Here, because "federal and Arizona law differ significantly" on the role of parol, or extrinsic, evidence, ER20, federal law applies.

The district court broke with other district courts in the Ninth Circuit and deemed *Cachil*'s statement to be "dictum." ER21. In its view, *Cachil*'s conclusion that "[g]eneral principles of federal contract law govern the Compacts" was unnecessary to the holding because California law paralleled federal law. *Id*. That was error.

As the Supreme Court has explained, it is "unexceptional" to perform parts of the analysis that are "logically antecedent," "even when the preliminary steps turn out not to be dispositive." *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (citing cases). *Cachil* relied on California contract-law cases only after stating that "federal contract law govern[s]" and finding that there was "no difference between [California] and federal contract law" on the issue presented. 618 F.3d at 1073. Had California law differed, the court would have applied federal law. *Cachil*'s description of the appropriate inquiry is thus precedential. *McCullen*, 134 S. Ct. at

2530. Indeed, this Court has previously explained that a link in a chain of reasoning is part of the decision's holding, not dicta. *Marshall Naify Revocable Trust v. United States*, 672 F.3d 620, 627 (9th Cir. 2012) (prior panel's "'line of reasoning … cannot be ignored as dictum'").

More importantly, whatever its precedential weight, this Court's statement that federal law governs the interpretation of IGRA compacts was correct. To hold otherwise would contravene basic principles of contract law and allow States to exercise power over Indian gaming that they do not possess.

Contracts are not untethered obligations floating free of any background legal regime. "A contract has no legal force apart from the law that acknowledges its binding character." *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991). For Tribal-State gaming compacts, that background law is federal law. "Compacts quite clearly are a creation of federal law." *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997). IGRA establishes a detailed process for compact negotiations, 25 U.S.C. §2710(d)(3)(A), prescribes a compact's permissible scope, *id*. §2710(d)(3)(C), and provides that a compact is effective "only when … approv[ed] by the Secretary [of the Interior]," *id*. §2710(d)(3)(B). A compact thus depends wholly on federal law "for its effectiveness and enforcement." *Norfolk & Western*, 499 U.S. at 130.

The rules of interpretation that apply to a contract, including a Tribal-State compact, are an inseparable part of "the law that acknowledges its binding character." *Id.* "'Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. *This principle embraces alike those laws which affect its construction* and those which affect its enforcement or discharge.'" *Id.* (emphasis added). A contract thus adopts the principles of interpretation provided by the background law "that acknowledges its binding character"—here, federal law. *Id.*

The district court overlooked this basic principle. *First*, the choice-of-law analysis the district court employed is an inapt framework for resolving this question. In every meaningful sense, "all legally significant aspects of" a Tribal-State compact's creation occur within the federal forum. *Restatement (Second) of Conflict of Laws* §1 cmt. a (1971). There thus was no "conflict of laws" for the district court to resolve. *See id.* §1 cmts. a-b ("Ordinarily all legally significant aspects of a case are grouped within the state of the forum …. Problems arise when legally significant aspects of a case are divided between two or more states."). The *Restatement*'s choice-of-law provisions are not designed to guide a choice between federal and state law in a situation like this one, in which an agreement is made

pursuant to a federal statute and against a backdrop of pervasive federal regulation. *Id.* §3 cmts. c-d.

Second, the district court's weighing (ER22-23) of the federal and state interests at stake was inappropriate. IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (quoting S. Rep. No. 100-446, at 6 (1988)).[19]

That concern applies with full force to rules of interpretation governing Tribal-State compacts. Interpretive rules can diminish or enlarge a party's substantive rights under a contract. Employing state interpretive rules to limit a tribe's ability to game on Indian lands would thus give States a "measure of

[19] In any event, choice-of-law principles would yield the same result. In light of the "federal interest at stake," *Cabazon Band*, 124 F.3d at 1056, the federal government has "the most significant relationship to the transaction and the parties," *Restatement of Conflicts* §188(1). The "place of contracting," which is where the "last act" giving the contract "binding effect" occurred, was Washington, D.C., where the Secretary published approval in the Federal Register. *Restatement of Conflicts* §188 cmt. e; *see* 25 U.S.C. §2710(d)(3)(B); *Muhammad v. Comanche Nation Casino*, 742 F. Supp. 2d 1268, 1275 (W.D. Okla. 2010). The "place of performance" and "the location of the subject matter" of the Compact, *Restatement of Conflicts* §188(2), are on "Indian lands" as defined by federal law, 25 U.S.C. §2703(4)(A), (B). Finally, the "places" listed by the district court (ER23) in its choice-of-law analysis fall within the United States as well as the Nation's territory or that of Arizona.

authority over gaming on Indian lands" that IGRA itself does not countenance. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996).[20]

Accordingly, in the absence of a clear contrary choice by the parties, federal law governs the construction of Tribal-State compacts. Here, the parties did not make that choice: The Compact's choice-of-law clause provides that the Compact shall be "construed in accordance with the applicable laws of the United States, and the Nation and the State." Compact §24 (Add. 4a). That provision, as the district court recognized (ER20), in no way represents a choice to apply Arizona law to portions of the Compact that do not expressly relate to Arizona law.[21]

B. Regardless Of Which Law Applies, The Compact Does Not Impliedly Bar Gaming On The Settlement Property

In any event, the Nation prevails under either federal or Arizona law. The Compact expressly "authorize[s]" the Nation to conduct Class III gaming on its "Indian Lands," as that term is defined by IGRA, "subject to the provisions of 25

[20] The federal government has a particularly acute interest in the federal parol evidence rule and rules barring consideration of extrinsic evidence absent a contractual ambiguity. IGRA's requirement that the Secretary of the Interior must approve the Compact would be undercut if the Secretary is not afforded the opportunity to review and consider all of the terms of the Compact. *See* 25 U.S.C. §2710(d)(3)(B); *cf.* NER33 (DOI Compact Approval Letter) ("[T]he Secretary's approval authority [would be] meaningless … [if] substantive and controversial provisions [could] escape Secretarial review.").

[21] Certain Compact provisions do expressly refer to or incorporate Arizona law, *see, e.g.*, Compact §§3(h), 12, and certain portions refer to or incorporate tribal law, *see, e.g.*, *id.* §6. *See* ER748,765-768,776-778.

U.S.C. §2719," which in turn authorizes gaming on after-acquired lands acquired as part of a settlement of a land claim. Compact §§2(s), 3(a), 3(j) (Add. 1a, 2a, 4a); *see* NER4-5 (SMF¶¶12,13). Appellants nonetheless claim, based on their asserted extrinsic evidence, that the Compact implicitly *bars* the Nation from gaming on such lands, at least in the Phoenix area.[22] That argument fails because a party cannot rely on extrinsic evidence to vary or contradict the written terms of a contract under either federal or Arizona law. As the district court recognized, that is precisely what Appellants are attempting, and the law does not allow it.

1. The Compact's language is unambiguous and cannot be varied by extrinsic evidence under either federal or Arizona law

a. Federal Law. Appellants do not claim that the Compact contains any patent ambiguity. Indeed, they do not identify *any* word or phrase that could reasonably be subject to conflicting interpretations. Nor could they, because the Compact's language is entirely unequivocal. Federal law accordingly prohibits the admission of extrinsic evidence as an interpretive aid. *Klamath Water Users*

[22] Appellants have never identified the precise term they seek to imply into the Compact. Before this Court, Appellants continue to propose a variety of substantively distinct terms, including that the Nation is barred from gaming on after-acquired lands absent gubernatorial consent (GRIC Br. 31), barred from gaming outside "the Tucson metropolitan area or a rural area" (*id.* 34), or barred from opening a facility in the Phoenix metropolitan area because it promised there would be "no new casinos" in that area (*id.* 45-48). Such a hodgepodge itself seriously undermines the credibility of Appellants' claims. But, more importantly, as the district court held (ER34), the Compact cannot reasonably be read to incorporate any of Appellants' implied terms.

Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999) ("[W]hen the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself." (citations omitted)); *Cabazon Band*, 124 F.3d at 1057-1058 ("reject[ing] the State's efforts to introduce extrinsic evidence" to impose a restriction that "the plain language of the [Tribal-State] Compacts does not contain"). Only "if reasonable people could find [a contract's] terms susceptible to more than one interpretation" is resort to extrinsic evidence appropriate. *Klamath*, 204 F.3d at 1210.[23] Whether contract language is ambiguous is a question of law. *Id*.

Here, the district court correctly concluded that the Compact is unambiguous. Section 3(a) "authorize[s]" Class III gaming "[s]ubject to the terms and conditions of this Compact." Section 3(j), in turn, specifies where such gaming may occur:

> **Location.** All Gaming Facilities shall be located on the Indian Lands of the Tribe. All Gaming Facilities of the Tribe shall be located not less than one and one-half (1 1/2) miles apart unless the configuration of the Indian Lands of the Tribe makes this requirement impracticable…. Gaming Activity on lands acquired after the

[23] There are narrow exceptions to this rule, such as for objective evidence interpreting contractual terms of art that may be informed by common usage in a trade or industry. *See AM Int'l, Inc. v. Graphic Mgmt. Assocs.*, 44 F.3d 572, 575 (7th Cir. 1995); *Kerin v. USPS*, 116 F.3d 988, 992 n.2 (2d Cir. 1997); *Baldwin v. University of Pittsburgh Med. Ctr.*, 636 F.3d 69, 77 (3d Cir. 2011). But Appellants have identified no such term here.

> enactment of the Act on October 17, 1988 shall be authorized only in accordance with 25 U.S.C. §2719.

Compact §3(j)(1) (Add. 4a); *see* NER4 (SMF¶11). The Compact defines "Indian Lands" as "lands as defined in 25 U.S.C. §2703(4)(A) and (B), subject to the provisions of 25 U.S.C. §2719," which allows gaming on after-acquired lands acquired as part of a settlement of a land claim. Compact §2(s) (Add. 1a). This language cannot be understood as anything other than an express *authorization* for the Nation to game on its Indian lands, including after-acquired lands that are gaming-eligible under IGRA.

In the face of that straightforward statutory text, Appellants point to two separate provisions of the Compact that they claim somehow support their interpretation. Appellants rely, first, on Section 3(c)(3) of the Compact, which states that if the Nation operates four facilities, "at least one of the four" must be located "at least fifty (50) miles from the existing Gaming Facilities of the Tribe in the Tucson metropolitan area as of the Effective Date." Compact §3(c)(3) (Add. 2a). By its plain language, however, this provision restricts the location of only *one* of the Nation's four facilities, if the Nation operates four. It cannot be read to impose any restriction on the location of any of the Nation's *other* facilities. And it

is undisputed that the Nation's Why facility satisfies the restriction in Section 3(c)(3), and that the Nation is thus in compliance with that provision.[24]

Appellants nonetheless contend (GRIC Br. 36-37) that the reference to Tucson in Section 3(c)(3) somehow indicates that the Compact prohibits the Nation from gaming on its Indian lands in any metropolitan area other than Tucson. The district court correctly rejected that argument. ER29. Not only does Section 3(c)(3) contain no such prohibition, but Section 3(j) of the Compact expressly authorizes the Nation to game anywhere on its Indian lands that IGRA permits. Indeed, Section 3(c)(3) expressly refers to the Nation's "existing Gaming Facilities … as of the Effective Date," an acknowledgment that the location of the Nation's gaming facilities was not fixed. The circumstances surrounding the adoption of Section 3(c)(3)—which Appellants grossly distort—thus do not help them.

Appellants' reliance on the Gaming Device Allocation Table is equally misplaced. That table sets out the "Number of Gaming Device Operating Rights and Number of Gaming Facilities." Compact §3(c)(5) (Add. 3a). It lists each gaming tribe, along with the tribe's "Current Gaming Device Allocation," the

[24] Whether Section 3(c)(3) restricts the Why facility to a rural location, *see* GRIC Br. 37, is wholly irrelevant to this litigation, as the district court recognized, ER29. In any event, the Nation has made no concession on that point. Although Arizona proposed Section 3(c)(3) after concern was expressed about the prospect of the Why facility being moved to a metropolitan area, NER312,313 (Quigley Decl.), the provision does not restrict the Why facility to a rural area—as its plain terms indicate.

number of "Additional Gaming Devices" it is permitted under the Compact, its "Previous Gaming Facility Allocation," and its "Revised Gaming Facility Allocation." It then lists the non-gaming tribes and specifies their "Current Gaming Device Allocation" and "Previous Gaming Facility Allocation." That is all the table does. Appellants identify no ambiguity in the table's language. GRIC Br. 34 (contending only that extrinsic evidence is admissible with respect to Section 3(c)(5) "regardless of ambiguity in the contract"). The table is simply not "susceptible to more than one interpretation," let alone the meaning(s) Appellants attribute to it. *Klamath*, 204 F.3d at 1210.[25]

In short, there is no ambiguity in the Compact. Extrinsic evidence is therefore inadmissible to aid in its interpretation. *See Klamath*, 204 F.3d at 1210; *Cabazon Band*, 124 F.3d at 1058 (rejecting extrinsic evidence and explaining, "[w]e will not entertain strained interpretations of a clear and unambiguous

[25] Appellants contend that "prior drafts of agreements [are] appropriate evidence of the parties' intentions in contracting, even in jurisdictions that apply a more stringent parol evidence rule." But the cases on which they rely either apply a parol evidence rule similar to Arizona's, *see SCC Alameda Point LLC v. City of Alameda*, 897 F. Supp. 2d 886, 897 (N.D. Cal. 2012) (applying California law), or involve contract language that the court has determined is ambiguous, *see Stonebridge Equity v. China Auto Sys., Inc.*, 520 F. App'x 331, 336 (6th Cir. 2013). In any event, Appellants' extrinsic evidence shows—at most—that certain tribes with facilities in the Phoenix area negotiated among themselves over the number of machine and device rights each would request from Arizona. *See supra* note 4. That hardly supports reading the Compact to grant those tribes a monopoly over the Phoenix market.

compact provision").[26] The Compact simply does not contain the gaming prohibition Appellants seek to enforce.

b. Arizona Law. The same result obtains under Arizona law, as the district court correctly held. Arizona allows consideration of extrinsic evidence in some circumstances to determine whether a contractual provision is ambiguous, but "even under Arizona's more permissive approach …, a proponent of parol evidence cannot completely escape the confines of the actual writing." *Long v. City of Glendale*, 93 P.3d 519, 529 (Ariz. Ct. App. 2004). "[B]efore admitting external evidence of the intent of the parties," the court still must determine, as a matter of law, whether the "written language is … 'reasonably susceptible' to the meaning asserted." *Id*. at 528. "[O]ne cannot claim that one is 'interpreting' a written clause with extrinsic evidence if the resulting 'interpretation' unavoidably changes the meaning of the writing." *Id*. at 529.

In sum, Arizona law bars the use of "extrinsic evidence to vary or contradict … the agreement." *Taylor v. State Farm Mut. Auto. Ins.*, 854 P.2d 1134, 1138 (Ariz. 1993); *see Velarde v. PACE Membership Warehouse*, 105 F.3d 1313,1317-

[26] Appellants rely on *Crow Tribe v. Racicot*, 87 F.3d 1039 (9th Cir. 1996), but there the Court considered extrinsic evidence only *after* determining that the compact term in question was ambiguous. *See id*. at 1044-1045 (determining that term "lottery games" in a tribe's gaming compact was ambiguous and only then looking to negotiating history to determine whether mechanical slot machines were "lottery games").

1318 (9th Cir. 1997) (applying *Taylor*). Appellants propose to do precisely that. Their claim thus fails as a matter of law, for at least two reasons.

First, and most simply, Appellants cannot "interpret" the Compact to bar the Nation from gaming on the Settlement Property because doing so contradicts the express language of the Compact, which "authorize[s]" the Nation to game on after-acquired lands as provided by IGRA. Compact §3(a), (j)(1); *see supra* Part II.B.1.a. That unequivocal language answers the question whether such gaming is permitted. *See Taylor*, 854 P.2d at 1141 n.2 ("Some words are clear beyond dispute.").

Second, even if Appellants' interpretation did not contradict the Compact's express authorization of gaming on the Nation's Indian lands, it would still fail because Appellants cannot point to any specific language in the Compact susceptible of the "interpretation" they advocate. Courts applying Arizona law routinely refuse to admit extrinsic evidence to interpret a contractual provision when the proponent cannot identify any language that could reasonably bear the asserted meaning. *See, e.g.*, *Velarde*, 105 F.3d at 1317 (rejecting extrinsic evidence where "[w]e find no language in the contract which is susceptible to competing interpretations"); *Long*, 93 P.3d at 529 ("there must be something in the [contract] that would permit the court to find that the [contract's] language is amenable to [the] interpretation" urged by the proponent of extrinsic evidence). Appellants here

can point to no specific term or phrase in the Compact that is reasonably susceptible of their interpretation. Their attempts to do so verge on the absurd.

Appellants claim (GRIC Br. 29-31), for example, that Section 3(j) of the Compact (Add. 4a), which "authorize[s]" gaming "in accordance with 25 U.S.C. §2719," is "reasonably susceptible" of a "predicate understanding" that *prohibits* gaming under §2719 except pursuant to a two-part determination. Since Arizona law has barred the governor from concurring in two-part determinations since 1994, Ariz. Rev. Stat. Ann. §5-601(C), this reading would preclude gaming under §2719 altogether. Appellants thus contend that, by including a provision in the Compact "authoriz[ing]" gaming on after-acquired lands "only in accordance with §2719," the parties intended to categorically *bar* gaming on after-acquired lands. That claim refutes itself. Arizona law makes clear that a judge need not even entertain extrinsic evidence, like Appellants', that purports to show that "white is black and that a dollar is fifty cents." *Taylor*, 854 P.2d 1141; *see id*. at 1142 (agreement unlikely to be found reasonably susceptible of an interpretation that "'X' in fact does not mean 'X'"). "[T]he court can admit evidence for *interpretation* but must stop short of *contradiction*." *Id.* at 1139.

Nor can Sections 3(c)(3) or (3)(c)(5) of the Compact (Add. 2a, 3a)—however much Appellants torture them—support their interpretation. Appellants cannot wedge their argument into the language of Section 3(c)(3) for all the reasons

discussed above. *See supra* pp.45-46. And the "Gaming Device Allocation Table" says nothing at all about the location of gaming facilities, which is addressed elsewhere in the Compact. Appellants point to the *ordering* of the tribes in the table, which lists four tribes with facilities in the Phoenix area, followed by two tribes with facilities in the Tucson area, and argue that this ordering indicates that the Compact prohibits the so-called "Tucson tribes" from ever opening a facility near Phoenix. Nothing in the table is remotely susceptible of that interpretation, which directly contradicts the *relevant* provision of the Compact, §3(j). Indeed, nothing in the table supports the notion that the order in which the tribes are listed has any significance at all. To the extent that Appellants rely on the significance of "spaces" in prior drafts, "it is noteworthy," as the district court determined (ER29), "that they were deleted from the final version of the Compact."[27]

Accordingly, under Arizona law, and taking into account all of Appellants' extrinsic evidence, Appellants cannot show that the Compact's terms should (or, indeed, *could* be) be interpreted to prohibit the Nation from gaming in Phoenix. Because "the question whether written language is 'reasonably susceptible' to the

[27] Appellants criticize (GRIC Br. 41-44) the district court's mention of the integration clause (ER30), but the court was simply making a commonsense observation about the implausibility that parties would "specifically agree that understandings not written in the Compact have no force," *id.*, but nevertheless embody "critical agreement[s]" in "spacing [that] was changed and footnotes [that] were omitted," GRIC Br. 38.

meaning asserted is a question of law, not of fact," *Long*, 93 P.3d at 528, the district court properly granted summary judgment.

2. *Restatement* Section 201 is inapplicable because the Compact's language is unambiguous

Contrary to Appellants' argument (GRIC Br. 45-51), Section 201 of the *Restatement (Second) of Contracts* (1981) ("*Restatement*") provides no support for their contentions. Section 201 is merely a principle of contract *interpretation*—it "resol[ves] problems that derive from the failure of language, that is to say, with the resolution of ambiguity and vagueness," 2 *Farnsworth on Contracts* §7.12 (3d ed. 2004). As discussed above, however, there is no language in the Compact that can reasonably bear the meaning Appellants seek to impose on it. Section 201 is thus inapplicable.

a. Appellants first contend that the Nation "attached the same meaning" to the Compact as they did, so *Restatement* 201(1) requires that the Compact be understood to bar the Nation from gaming in Phoenix. That is wrong on the law and the facts.

First, although Appellants acknowledge (GRIC Br. 49) that Section 201 cannot "'operate independently of the words in the agreement,'" they fail to identify *any* Compact language they are "interpreting" to arrive at the gaming prohibition they are seeking to enforce. And while Section 201(1) may enforce a mutually assigned meaning that is derived from a contract's words, no aspect of it

contemplates that the "meaning" of a contract can be unhinged from the writing. That is clear from both the *Restatement* itself[28] and the cases applying it.[29] But Appellants here seek to do something different. Their purported meaning—"no new casinos in Phoenix"—is not tethered to *any* language in the Compact. It is thus not interpretive in any respect.

Second, Appellants have "failed to create a genuine issue of fact" that the Nation shared its "interpretation" of the Compact. *See* ER32.[30] The Compact itself

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[28] As the comments to the *Restatement* explain, "language is interpreted in accordance with its generally prevailing meaning," but "most words are commonly used in more than one sense"—"usages change over time, and persons engaged in transactions with each other often develop temporary usages peculiar to themselves." *Restatement* §201 cmt. a. Section 201 accordingly provides a way to resolve "[u]ncertainties in the meaning of words" by putting them into "the context in which they [were] used." *Id*. cmt. b; *see id*. cmt. c ill. 3 (parties' evidence of trade usage can show that their definition of gallons per "barrel" should control).

[29] Appellants rely on *Johnson v. Cavan*, 733 P.2d 649 (Ariz. Ct. App. 1986), in which the court determined through examination of extrinsic evidence that "both [parties] assumed and intended that the parking spaces be a part of the lease" and thus interpreted the contract term "premises" to give effect to the parties' mutual understanding. *Id*. at 652. Other cases referring to Section 201(1) reason along the same lines. *See, e.g.*, *James v. Zurich-American Ins. Co.*, 203 F.3d 250, 255 (3d Cir. 2000) (applying §201(1) only after holding contractual provision "ambiguous"); *Skycam, Inc. v. Bennett*, 2011 WL 3293015, at *7 (N.D. Okla. Aug. 1, 2011) (noting that §201(1) would apply only "[i]n the unlikely event a portion of the [contract] is deemed to be ambiguous"); *Bender v. Highway Truck Drivers & Helpers Local 107*, 598 F. Supp. 178, 187 (E.D. Pa. 1984) ("[S]eeming uncertainties in the words of a contract may frequently be made clear by looking to the intent of the bargaining parties." (citing §201(1))).

[30] The district court's decision to grant the Nation's summary judgment motion was thus entirely proper. The district court referred to the lack of

refutes the claim: The Compact means what it says, and that alone is compelling evidence that the Nation intended it to mean what it says. Moreover, the statements made through AIGA—which remain Appellants' only evidence that the Nation purportedly shared its view (GRIC Br. 45-46)—occurred *after* the parties had agreed on the language of the standard form compact, *cf. Restatement* §201(2) (a contract's meaning is determined "at the time the agreement was made"). In any event, as the district court correctly held (ER32), those statements are insufficient to raise a triable issue of fact in light of the AIGA tribes' agreement that they would not be bound by AIGA's actions.

b. Appellants' arguments under Section 201(2) fail for similar reasons. Like Section 201(1), Section 201(2) is merely a tool for resolving competing reasonable interpretations of an actual contractual *term*. *Restatement* §201 cmt. b. Once again, however, Appellants fail to identify any specific "promise or agreement" in the Compact to which their interpretation might attach. *Restatement* §201(2)(b). Where a contract is not reasonably susceptible of more than one meaning, there is no need to interpret it and no justification for admitting extrinsic evidence of the parties' understanding of the agreement's meaning. *See, e.g.*, *Long*, 93 P.3d at 529 ("[O]ne cannot claim that one is 'interpreting' a written clause with

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"undisputed evidence" only to deny *Appellants'* motion for summary judgment. *See* ER31-32.

extrinsic evidence if the resulting 'interpretation' unavoidably changes the meaning of the writing."); *Woods Masonry v. Monumental Gen. Cas. Ins.*, 198 F. Supp. 2d 1016, 1031 n.9 (N.D. Iowa 2002) (refusing to apply §201(2) in dispute over contract that was "unambiguous"); *Harris Corp. v. Giesting & Assocs.*, 297 F.3d 1270, 1273-1274 (11th Cir. 2002) (same).

c. Appellants claim (GRIC Br. 48, 49) that the district court "misconceived" their *Restatement* §201 arguments and rejected them on the ground that "the Compact is a fully integrated writing." The district court, however, perceived Appellants' arguments perfectly. Far from failing to appreciate that "extrinsic evidence of intentions or promises is permitted 'so long as [the evidence is] used to show the meaning of the writing'"—something the court took pains to point out (ER4)—the court recognized that Appellants were attempting to "read [the Compact] to include an agreement *not reasonably within the meaning of its words*." ER5 (emphasis added). As a matter of law, Section 201 cannot support such an interpretation. And, as the district court held, Appellants cannot enforce "an agreement not reasonably within the meaning of [the Compact's] words," *id.*, because "[t]he fully integrated compact discharges any unwritten understanding," ER9.[31]

[31] Indeed, Appellants concede the latter point. *See* GRIC Br. 49 ("If Appellants had invoked *Restatement* §201 to enforce … a separate agreement, the district court would be correct.").

3. The Compact contains no implied additional terms

Appellants next make the last-ditch assertion (GRIC Br. 49-51) that even if they "lack … an adequate textual anchor in the Compact" for the gaming prohibition they seek to enforce, they should be able to graft it onto the Compact as an "additional" term—notwithstanding the Compact's integration clause—because "nothing … specifically authorizes the Nation to open a casino in the Phoenix metropolitan area" *and* it is something that the parties "might naturally [have] omitted from the writing."[32] The district court was right to reject Appellants' bid to rewrite the parties' Compact.

As an initial matter, any implied term barring the Nation from gaming in Phoenix flatly contradicts the Compact's express written provisions. Any such term—to the extent it ever existed in any form—is thus discharged by the parol evidence rule as a matter of law. *See Restatement* §213(1) (even a partially integrated written agreement "discharges prior agreements to the extent that it is inconsistent with them"); *United States v. Triple A Mach. Shop*, 857 F.2d 579, 585 (9th Cir. 1988) (under federal parol evidence rule, "[e]vidence of a collateral

[32] A written agreement is completely integrated unless "the writing [1] omits a consistent additional agreed term which … [2] in the circumstances might naturally be omitted from the writing." Whether a writing is completely integrated is a question of law. *Sylvania Elec. Prods., Inc. v. United States*, 458 F.2d 994, 1007 n.9 (Ct. Cl. 1972); *Anderson v. Preferred Stock Food Markets*, 854 P.2d 1194, 1197 (Ariz. Ct. App. 1993).

agreement" is inadmissible if it "contradict[s] a clear and unambiguous provision of a written agreement"); *Taylor*, 854 P.2d at 1138-1139 (same under Arizona law).

Moreover, Appellants' assertion that a bar on gaming in Phoenix is the sort of term that naturally would have been omitted from the Compact is wholly incredible. Appellants claim that prohibiting any new casinos in Phoenix was a central goal of the negotiations. If that were true, the parties could not possibly—let alone "naturally"—have omitted the prohibition from the Compact, when the language of the Compact otherwise expressly *authorized* gaming anywhere on tribes' Indian lands and expressly disclaimed any contrary agreement. The integration clause alone should "conclude the issue." *Restatement* §216 cmt. e; *see McAbee Constr. v. United States*, 97 F.3d 1431, 1434 (Fed. Cir. 1996) (under federal law, a party "carries an extremely heavy burden in overcoming" an integration clause).[33] Here, moreover, the location of gaming facilities is a central issue expressly and specifically addressed in the Compact, *see* §3(c)(3), (j). *See Day v. American Seafoods Co.*, 557 F.3d 1056, 1058 (9th Cir. 2009) (specificity of

[33] *See also* 3 *Corbin on Contracts* §578 (1960) ("If a written document … declares in express terms that it contains the entire agreement of the parties, and that there are no antecedent or extrinsic representations, warranties, or collateral provisions …, *this declaration is conclusive* as long as it has itself not been set aside by a court on grounds of fraud or mistake…. [The writing] is just like a general release of all antecedent claims." (emphasis added)); *Anderson*, 854 P.2d at 1198 ("Corbin's rule of integration applies to negotiated contracts" under Arizona law).

written terms in contract defeated attempt to introduce extrinsic evidence to add new term). Appellants thus cannot plausibly contend that a bar on gaming in Phoenix would "naturally" have been omitted from the Compact.

Finally, the unique circumstances of negotiating a Tribal-State compact make it still more unlikely that this kind of gaming prohibition would naturally be omitted from the Compact. Here, both parties were sovereigns; were sophisticated, repeat players in the IGRA compacting process; and were represented by experienced counsel during years of painstaking negotiations. *See supra* pp.9-10; *Pinnacle Peak Developers v. TRW Inv. Corp.*, 631 P.2d 540, 547-548 (Ariz. Ct. App. 1980) (oral agreement inadmissible where "formal contract" resulted from negotiations among experienced parties represented by counsel); *cf. New Jersey v. Delaware*, 552 U.S. 597, 615-616 (2008) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the[ir] purposes.'"). Moreover, the parties were aware that any agreement they reached would not be effective until approved by the Secretary of the Interior, who was not privy to the negotiations. Under these circumstances, the notion that the parties "naturally omitted" a key substantive term is frivolous.

4. Appellants' implied-covenant claim fails as a matter of law

Finally, Appellants cannot resurrect their failed implied-term argument by recasting it as a breach of the implied covenant of good faith and fair dealing. Whether federal or Arizona law applies, the covenant requires only that parties exercise good faith in performing the bargain that was struck. *Restatement* §205.[34] The covenant cannot *rewrite* that bargain or "'block [the] use of terms that actually appear in the contract.'" *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 796 (8th Cir. 2001); *see Rawlings v. Apodaca*, 726 P.2d 565, 570 (Ariz. 1986) ("'[T]he relevant inquiry always will focus on the contract itself, to determine what the parties did agree to.'"). Where, as here, the Compact "authorize[s]" the Nation to game on any "[Indian] lands acquired after the enactment of [IGRA] … in accordance with 25 U.S.C. §2719," Compact §3(j)(1), the only "justified expectation[]" that may result, *Restatement* §205 cmt. a, is that the Nation will do just that. "[T]here can be no breach of the implied promise or covenant of good faith and fair dealing where … the defendant acts in accordance with the express terms of the contract." 23 *Williston on Contracts* §63:22 (4th ed. 2002).[35]

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[34] Both Arizona and federal common law follow the *Restatement*. *See Rawlings v. Apodaca*, 726 P.2d 565, 569 (Ariz. 1986); *Flores v. American Seafoods Co.*, 335 F.3d 904, 913 (9th Cir. 2003).

[35] *See also* 17A C.J.S. *Contracts* §437 (2011) (implied covenant "cannot contradict, modify, negate, or override the express terms of a contract[,] … create rights or duties beyond those agreed to by the parties, … supply terms to the contract the parties were free to negotiate, but did not, or interpose new obligations

Appellants' contention (GRIC Br. 52-53) that the implied covenant "extends beyond the written words of [a] contract" does not help them. Although the implied covenant may in certain circumstances be breached by conduct "not expressly excluded" by the contract's terms, *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002), this is not such a case: The Compact expressly *permits* the Nation's planned facility. Compact §3(j)(1). Appellants' assertion that the issue is the Nation's "discretion over the location of [a] fourth casino" misses the point. If a party uses its "discretion" to exercise a right the agreement expressly confers on it, that cannot violate the covenant of good faith and fair dealing.[36]

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about which the contract is silent, even if the inclusion of the obligation is thought to be logical and wise"); 2 *Farnsworth on Contracts* §7.17 (3d ed. 2004) ("there is no duty of good faith if it would conflict with an express provision of the contract"); Burton & Andersen, *Contractual Good Faith* §3.2.1 (1995) (same).

[36] In any event, the cases on which Appellants rely (GRIC Br. 52) to "extend [the Compact] beyond [its] written words" concern the exercise of a retained contractual power in bad faith, such as where a party to a contract acts "out of spite, ill will, or … other non-business purpose," *Southwest Sav. & Loan Ass'n v. SunAmp Sys., Inc.*, 838 P.2d 1314, 1320-1322 (Ariz. Ct. App. 1992). Here, Appellants do not allege that the Nation is building a facility in Phoenix for any such illegitimate or non-business reason. Rather, Appellants are seeking—contrary to the authorization of §3(j)(1)—to bar the Nation from gaming in Phoenix for *any* reason. That claim falls well outside the scope of the implied covenant.

III. SOVEREIGN IMMUNITY BARS APPELLANTS' REMAINING CLAIMS, WHICH ARE MERITLESS IN ANY EVENT

Appellants' remaining non-compact claims—for promissory estoppel, fraud in the inducement, and material misrepresentation—are all barred by the Nation's sovereign immunity and, in any event, fail as a matter of law. Appellants' contrary arguments are unpersuasive.

A. Appellants' Non-Compact Claims Do Not Fall Within IGRA's Abrogation of Sovereign Immunity

1. "'Indian Nations are exempt from suit'" absent an "'unequivocally expressed'" congressional intent to abrogate their sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *accord Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) ("The baseline position, we have often held, is tribal immunity; and to abrogate such immunity, Congress must unequivocally express that purpose." (internal quotation marks and brackets omitted)). Even an acknowledged statutory abrogation of tribal immunity must be read narrowly because (1) a waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane v. Peña*, 518 U.S. 187, 192 (1996), and (2) because ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor, *Rincon Band v. Schwarzenegger*, 602 F.3d 1019, 1028 n.9 (9th Cir. 2010).

The only statute that could be read to abrogate the Nation's sovereign immunity with respect to these claims is 25 U.S.C. §2710(d)(7)(A)(ii), which covers "a cause of action … to enjoin a class III gaming activity … conducted in violation of a[] Tribal-State compact … that is in effect." By its plain terms, Section 2710(d)(7)(A)(ii) permits suit based only on "conduct violating a compact." *Bay Mills*, 134 S. Ct. at 2028. "When section 2710(d)(7)(A)(ii)" is read in light of the principles governing interpretation of statutes abrogating sovereign immunity, "it becomes clear that Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact." *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999); *see also Cabazon Band*, 124 F.3d at 1059-1060.

The district court properly held that Appellants' claims of promissory estoppel, fraud in the inducement, and material misrepresentation do not fall within IGRA's narrow abrogation of immunity because they are not based on claims that the Nation violated a gaming compact.

Promissory estoppel. Promissory estoppel is a legal fiction that substitutes for a contractual obligation where one party relies on another's promise without having entered into an enforceable contract. *See Restatement* §90; 4 *Williston on Contracts* §8:7 (4th ed. 2008). By definition, a claim for promissory estoppel is not a claim regarding "conduct violating a compact," *Bay Mills*, 134 S. Ct. at 2029.

See Jablon v. United States, 657 F.2d 1064, 1070 (9th Cir. 1981) (claim for promissory estoppel "cannot be characterized … as an 'express or implied-in-fact' contract"); *Double AA Builders, Ltd. v. Grand State Constr. LLC*, 114 P.3d 835, 843 (Ariz. Ct. App. 2005) ("A promissory estoppel claim is not the same as a contract claim"). The district court thus correctly held that this claim is barred by the Nation's sovereign immunity. *See* ER36.

Fraud in the inducement and material misrepresentation. Appellants' fraud-in-the-inducement and material-misrepresentation claims also fail to allege a violation of the Compact, as IGRA's abrogation of sovereign immunity requires. "Fraudulently inducing a state *to enter* such a compact," the district court recognized, "does not constitute a claim for breach of the Compact." ER56. Similarly, the district court held that "[m]aterial misrepresentation is a wrong other than breach of the Compact, and IGRA abrogates sovereign immunity only for beach of the Compact." *Id.* Those holdings were plainly correct. Appellants' dismissed claims attack the validity of the Compact based on alleged conduct that occurred before the Compact was signed. They thus fall beyond IGRA's limited abrogation of the Nation's sovereign immunity.

2. In challenging the district court's conclusion that non-compact claims do not fall within IGRA's abrogation of immunity, Appellants attempt (Az. Br. 45) to stretch the statutory text to encompass any claim "arising out of the negotiations

for a compact," even if the alleged "violation[s]" are not of the Compact but of miscellaneous common-law doctrines. This broad and atextual reading cannot be squared with statutory text, relevant interpretive canons, or judicial precedent.

IGRA's "limited" abrogation, *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998), does not "evince[] a broad congressional intent to abrogate tribal immunity from any state suit that seeks declaratory or injunctive relief," *Seminole Tribe of Fla.*, 181 F.3d at 1242. Rather, as the Supreme Court has recently confirmed, it confers jurisdiction and abrogates sovereign immunity only for suits to enjoin "conduct violating a [Tribal-State] compact." *Bay Mills*, 134 S. Ct. at 2029.

None of the cases Appellants rely on (Az. Br. 46-47)—each predating the Supreme Court's emphatic reminder in *Bay Mills* that the abrogation of tribal immunity in IGRA must be construed according to its plain terms—supports their open-ended construction of §2710(d)(7)(A)(ii). *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997), a suit initiated by various tribes seeking a declaration that a Tribal-State compact was valid, did not involve tribal sovereign immunity at all—the tribes were the plaintiffs. *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1382-1383 (10th Cir. 1997), does not, as Appellants claim (Az. Br. 47), broadly hold that IGRA "abrogates sovereign immunity for determinations of the validity of a compact." Rather, *Mescalero* holds only that

"IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue." 131 F.3d at 1385-1386. Whether that broad statement reflects an accurate interpretation of IGRA is beside the point here, where the claims that the district court dismissed on sovereign-immunity grounds—promissory estoppel, fraud in the inducement, and material misrepresentation—alleged violations not of any "of IGRA's provisions," but of contract- and tort-law principles.

Appellants' reliance (Az. Br. 47) on *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008), is equally misplaced. In *Ho-Chunk*, the State sued to enjoin Class III gaming on the basis of two express requirements in the compact: "the Compact's revenue-sharing agreement" and "the Compact's Dispute Resolution provision." *Id.* at 930, 934. *Ho-Chunk*, which thus concerned only obligations expressly undertaken *in a compact*, plainly cannot support Arizona's claim that IGRA allows suits based on obligations *not* in a compact.[37]

[37] Arizona selectively quotes *Ho-Chunk* for the proposition that "immunity is abrogated 'when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process.'" Az. Br. 47. The full sentence reveals that the Seventh Circuit was not expanding IGRA's abrogation of sovereign immunity, but *narrowing* the class of Compact violations for which IGRA permits suit: "[A] proper interpretation of §2710(d)(7)(A)(ii) is not that federal jurisdiction exists over a suit to enjoin class III gaming whenever *any* clause in a Tribal–State compact is violated, but rather that jurisdiction exists only when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process." 512 F.3d at 933. The next page of the court's opinion makes

All told, Appellants cite not one case holding that IGRA abrogates sovereign immunity with respect to claims other than alleged violations of legal obligations contained in a Tribal-State compact. And the statutory text and *Bay Mills* are unequivocal: Only alleged violations of a Tribal-State compact are actionable under §2710(d)(7)(A)(ii).

B. Arizona's Newly Minted Theory That Sovereign Immunity Does Not Apply To Non-Compact Claims Is Wrong

Until the opening briefs in this appeal, Appellants had litigated this case on the assumption that the Nation was presumptively immune from suit and that any claim could proceed if, and only if, it fell within Congress's abrogation of tribal immunity in IGRA. Based on a single footnote in the Supreme Court's decision in *Bay Mills*, Appellants now advance (Az. Br. 50-51) a new theory: The Nation "does not enjoy sovereign immunity in the first place" with respect to "claims of fraudulent inducement and material misrepresentation" because tribal sovereign immunity "does not protect tribes from claims made by unwitting victims." This argument is deeply flawed for multiple reasons.

To begin with, the Supreme Court was clear in *Bay Mills* that its precedents establish that, barring congressional abrogation or waiver, tribal immunity is unqualified. The Court explained that it has "time and again treated the doctrine of

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clear that there must still be an "alleged *compact* violation," *id.* at 934 (emphasis added), not merely equitable claims somehow related to the Compact.

tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." 134 S. Ct. at 2030-2031 (internal quotation marks and alterations omitted). Indeed, in the footnote Arizona cites, the Court was discussing the principle of *stare decisis*, and it reserved decision on whether a case involving an unwitting "tort victim" "would present a 'special justification' for abandoning precedent." *Id.* at 2036 n.8. Given the Court's recognition that it would take a reversal of its own precedent to recognize an exception for unwitting tort victims, this Court is in no position to do so. *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

In any event, the theoretical exception to tribal immunity alluded to in the *Bay Mills* footnote could not possibly be relevant here.

First, in that footnote, the Court was addressing tort claims based on "off-reservation *commercial* conduct," 134 S. Ct. at 2036 n.8 (emphasis added)—for example, a pedestrian hit by a truck belonging to an off-reservation tribal commercial venture. Here, Arizona's claims against the Nation arise exclusively out of high-level negotiations between a sovereign Indian Nation and a sovereign State—conduct that lies at the heart of "Indian self-government." *Id.* at 2032.

Second, in the *Bay Mills* footnote, the Court assumed that neither Congress nor the Court had "specifically addressed" tribal sovereign immunity. 134 S. Ct. at

2036 n.8. In this case, however, there is no statutory vacuum to fill. In Section 2710(d)(7)(A)(ii), Congress specified when and under what circumstances tribes are not immune from claims relating to on-reservation Class III gaming pursuant to a Tribal-State gaming compact, reflecting Congress's understanding that tribes otherwise are immune.

Third, the State of Arizona is in no way like the "unwitting" tort victim contemplated in the *Bay Mills* footnote. "[T]ort victim[s], or other plaintiff[s] who ha[ve] not chosen to deal with a tribe" are individuals who encounter a tribe through chance encounters or impersonal commercial transactions—for example, the injured casino patron in *Cook v. AVI Casino Enters.*, 548 F.3d 718 (9th Cir. 2008); *cf. Strate v. A-1 Contractors*, 520 U.S. 438 (1997). It defies common sense to suggest Arizona is similarly situated. Aided by skilled and experienced counsel, Arizona negotiated directly with the Nation for years. The result of those intensive discussions was a written document that expressly and comprehensively governs the rights and duties of the parties with respect to Class III Indian gaming in Arizona. There is no inequity in enforcing the plain terms of that agreement or in leaving Arizona with the remedies for which it bargained and that Congress provided in IGRA.

C. Appellants' Non-Compact Claims Fail As A Matter Of Law

Even if they were not barred by sovereign immunity, Appellants' non-compact claims would fail as a matter of law.

Promissory estoppel. It is blackletter law that there can be no claim for promissory estoppel "where there is an express contract between the parties in reference to the same subject matter." *Chanay v. Chittenden*, 563 P.2d 287, 290 (Ariz. 1977); *see Mann v. GTCR Golder Rauner LLC*, 425 F. Supp. 2d 1015, 1036 (D. Ariz. 2006) (granting summary judgment where subject matter of promise was addressed in a contract between the parties); *cf. All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 869 (7th Cir. 1999) ("When there is an express contract … there is no gap in the remedial system for promissory estoppel to fill."). That is the case here. Appellants' (untrue) allegations regarding "promises" about the location of gaming facilities cannot support a claim for promissory estoppel given that the Nation and Arizona subsequently entered into an enforceable, binding Compact that dictates those locations.

Fraud in the Inducement and Material Misrepresentation. It is likewise blackletter law that fraud-in-the-inducement and material-misrepresentation claims require *reasonable* reliance by the plaintiff. *See Restatement* §162 (misrepresentation qualifies as "material" only "if it would be likely to induce a reasonable person to manifest his assent"), §164 (fraudulent inducement renders a

contract voidable only if the assenting party was "justified in relying" on it). A purported promise not to game on certain of the Nation's "Indian Lands" could not have reasonably induced Arizona to enter into a Compact whose express terms *authorize* such gaming.[38] Indeed, as the district court found (ER34), "no reasonable reading of the Compact could lead a person to conclude that it prohibited new casinos in the Phoenix area." The court thus correctly and fairly held Arizona to the unambiguous terms of the agreement it entered.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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[38] Moreover, actionable misrepresentations, except in circumstances not relevant here, can relate only to matters of present fact—not predictions about what the "Compact would … authorize" assuming the status quo remained in place (Az. Br. 48). *Restatement* §159 cmt. c.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Nation state that the docketed cross-appeals in *Tohono O'odham Nation v. City of Glendale*, Nos. 11-16811, 11-16823, and 11-16833, are related to this case within the meaning of Rule 28-2.6(d). Those cross-appeals arise out of the Nation's suit challenging Arizona House Bill 2534, a law that sought to thwart the trust application related to the Settlement Property at issue in this case by allowing Glendale to annex the Nation's land without obtaining the Nation's consent or observing any of the other procedural requirements ordinarily required by Arizona law.

Counsel for the Nation are unaware of any other cases pending in this Court that are related to this case as defined in Ninth Circuit Rule 28-2.6.

ADDENDUM

TABLE OF CONTENTS

Page

Tohono O'odham Nation and State of Arizona Gaming Compact (2002) (excerpts)

* * *

SECTION 2. DEFINITIONS.

For purposes of this Compact and its appendices:

* * *

(s) **"Indian Lands"** means lands as defined in 25 U.S.C. § 2703(4)(A) and (B), subject to the provisions of 25 U.S.C. § 2719.

* * *

SECTION 3. NATURE, SIZE, AND CONDUCT OF CLASS III GAMING.

(a) **Authorized Class III Gaming Activities.** Subject to the terms and conditions of this Compact, the Tribe is authorized to operate the following Gaming Activities: (1) Class III Gaming Devices, (2) blackjack, (3) jackpot poker, (4) Keno, (5) lottery, (6) off-track pari-mutuel wagering, (7) pari-mutuel wagering on horse racing, and (8) pari-mutuel wagering on dog racing.

* * *

(c) **Number of Gaming Device Operating Rights and Number of Gaming Facilities.**

(1) **Number of Gaming Devices.** The Tribe's Gaming Device Operating Rights are equal to the sum of its Current Gaming Device Allocation, plus any rights to operate Additional Gaming Devices acquired by the Tribe in accordance with and subject to the provisions of Section 3(d). The Tribe may operate one Class III Gaming Device for each of the Tribe's Gaming Device Operating Rights.

(2) **Class II Gaming Devices.** The Tribe may operate up to forty (40) Class II Gaming Devices in a Gaming Facility without acquiring Gaming Device Operating Rights under Section 3(d), but such Class II Gaming Devices shall be counted against the Tribe's number of Additional Gaming Devices. Each Class II Gaming Device in excess

of forty (40) that the Tribe operates within its Indian Lands shall be counted against the Tribe's Current Gaming Device Allocation.

(3) **Number of Gaming Facilities and Maximum Devices Per Gaming Facility.** The Tribe may operate Gaming Devices in the number of Gaming Facilities in column (3) or (4) of the Tribe's row in the Table, whoever is lower, but shall not operate more than its Maximum Devices Per Gaming Facility in any one Gaming Facility. The Maximum Devices Per Gaming Facility for the Tribe is the sum of the Tribe's Current Gaming Device Allocation (including automatic periodic increases under Section 3(c)(4)), plus the Tribe's Additional Gaming Devices, except if the Tribe is Salt River Pima-Maricopa Indian Community, Gila River Indian Community, Pascua Yaqui Tribe, Tohono O'odham Nation, or Navajo Nation, then the Maximum Devices Per Gaming Facility is the same number as the Maximum Devices Per Gaming Facility for Ak-Chin Indian Community and Ft. McDowell Yavapai Nation. 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: a) be at least fifty (50) miles from the existing Gaming Facilities of the Tribe in the Tucson metropolitan area as of the Effective Date; b) have no more than six hundred forty-five (645) Gaming Devices; and c) have no more than seventy-five (75) Card Game Tables.

(4) **Periodic Increase.** During the term of this Compact, the Tribe's Current Gaming Device Allocation shall be automatically increased (but not decreased), without the need to amend this Compact on each five-year anniversary of the Effective Date, to the number equal to the Current Gaming Device Allocation specified in the Table multiplied by the Population Adjustment Rate (with any fractions rounded up to the next whole number).

(5) Gaming Device Allocation Table.

Listed Tribe	(1) Current Gaming Device Allocation	(2) Additional Gaming Devices	(3) Previous Gaming Facility Allocation	(4) Revised Gaming Facility Allocation
The Cocopah Indian Tribe	475	170	2	2
Fort Mojave Indian Tribe	475	370	2	2
Quechan Tribe	475	370	2	2
Tonto Apache Tribe	475	170	2	1
Yavapai-Apache Nation	475	370	2	1
Yavapai-Prescott Tribe	475	370	2	2
Colorado River Indian Tribes	475	370	2	2
San Carlos Apache Tribe	900	230	3	2
White Mountain Apache Tribe	900	40	3	2
Ak-Chin Indian Community	475	523	2	1
Fort McDowell Yavapai Nation	475	523	2	1
Salt River Pima-Maricopa Indian Community	700	830	3	2
Gila River Indian Community	1400	1020	4	3
Pascua Yaqui Tribe	900	670	3	2
Tohono O'odham Nation	1400	1020	4	4
Subtotal:	10,475		38	29
Non-gaming Tribes (as of 5/1/02)				
Havasupai Tribe	475		2	
Hualapai Tribe	475		2	
Kaibab-Paiute Tribe	475		2	
Hopi Tribe	900		3	
Navajo Nation	2400		4	
San Juan Southern Paiute Tribe	475		2	
Subtotal:	5,200		15	
State Total:	15,675		53	

(6) If the Tribe is not listed on the Table, the Tribe's Current Gaming Device Allocation shall be four hundred seventy-five (475) Gaming Devices and the Tribe's Revised Gaming Facility Allocation shall be two (2) Gaming Facilities.

(7) **Multi-Station Devices.** No more than two and one-half percent (2.5%) of the Gaming Devices in a Gaming Facility (rounded off to the nearest whole number) may be Multi-Station Devices.

* * *

(j) Location of Gaming Facility.

(1) Location. All Gaming Facilities shall be located on the Indian Lands of the Tribe. All Gaming Facilities of the Tribe shall be located not less than one and one-half (1½) miles apart unless the configuration of the Indian Lands of the Tribe makes this requirement impracticable. The Tribe shall notify the State Gaming Agency of the physical location of any Gaming Facility a minimum of thirty (30) days prior to commencing Gaming Activities at such location. Gaming Activity on lands acquired after the enactment of the Act on October 17, 1988 shall be authorized only in accordance with 25 U.S.C. § 2719.

(2) Notice to Surrounding Communities. The Tribe shall notify surrounding communities regarding new or substantial modifications to Gaming Facilities and shall develop procedures for consultation with surrounding communities regarding new or substantial modifications to Gaming Facilities.

* * *

SECTION 19. THIRD PARTY BENEFICIARIES.

This Compact is entered into solely for the benefit of the Nation and the State. It is not intended to create any rights in third-parties which could result in any claim of any type against the Nation and/or the State. Neither the Nation nor the State waive their immunity from third-party claims and this Compact is not intended to result in any waiver of that immunity, in whole or in part.

* * *

SECTION 24. GOVERNING LAW.

This Compact shall be governed by and construed in accordance with the applicable laws of the United States, and the Nation and the State.

SECTION 25. ENTIRE AGREEMENT.

This Compact contains the entire agreement of the parties with respect to the matters covered by this Compact and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding.

Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1789 (1986)

An Act

To provide for the replacement of certain lands within the Gila Bend Indian Reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Gila Bend Indian Reservation Lands Replacement Act".

CONGRESSIONAL FINDINGS

SEC. 2. The Congress finds that:

(1) Section 308 of Public Law 97-293 authorizes the Secretary of the Interior to exchange certain agricultural lands of the Gila Bend Indian Reservation, Arizona, for public lands suitable for farming.

(2) An examination of public lands within a one-hundred-mile radius of the reservation disclosed that those which might be suitable for agriculture would require substantial Federal outlays for construction of irrigation systems, roads, education and health facilities.

(3) The lack of an appropriate land base severely retards the economic self-sufficiency of the O'odham people of the Gila Bend Indian Reservation, contributes to their high unemployment and acute health problems, and results in chronic high costs for Federal services and transfer payments.

(4) This Act will facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming and do not require Federal outlays for construction, and promote the economic self-sufficiency of the O'odham Indian people.

DEFINITIONS

SEC. 3. For the purposes of this Act, the term:

(1) "Central Arizona Project" means the project authorized under title III of the Colorado River Basin Project Act (82 Stat. 887; 43 U.S.C. 1521, et seq.).

(2) "Tribe" means the Tohono O'odham Nation, formerly known as the Papago Tribe of Arizona, organized under section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476).

(3) "Secretary" means the Secretary of the Interior.

(4) "San Lucy District" means the political subdivision of the Tohono O'odham Nation exercising governmental functions on the Gila Bend Indian Reservation.

[1799]

ASSIGNMENT OF TRIBAL LANDS; RETAINED RIGHTS

SEC. 4. (a) If the tribe assigns to the United States all right, title, and interest of the Tribe in nine thousand eight hundred and eighty acres of land within the Gila Bend Indian Reservation, the Secretary of the Interior shall pay to the authorized governing body of the Tribe the sum of $30,000,000—$10,000,000 in fiscal year 1988, $10,000,000 in fiscal year 1989 and $10,000,000 in fiscal year 1990—together with interest accruing from the date of enactment of this Act at a rate determined by the Secretary of the Treasury taking into consideration the average market yield on outstanding Federal obligations of comparable maturity, to be used for the benefit of the San Lucy District. The Secretary shall accept any assignment under this subsection.

(b) The Tribe shall be permitted to continue to hunt, fish, and gather on any lands assigned to the United States under subsection (a) of this section so long as such lands remain in Federal ownership.

(c) With respect to any lands of the Gila Bend Indian Reservation which the Tribe does not assign to the United States, the Tribe shall have the right to withdraw ground water therefrom from wells having a capacity of less than thirty-five gallons per minute and which are used only for domestic purposes.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. Effective October 1, 1987 there is authorized to be appropriated such sums as may be necessary to carry out the purposes of section 4.

USE OF SETTLEMENT FUNDS; ACQUISITION OF LANDS

SEC. 6. (a) The Tribe shall invest sums received under section 4 in interest bearing deposits and securities until expended. The authorized governing body of the Tribe may spend the principal and the interest and dividends accruing on such sums on behalf of the San Lucy District for land and water rights acquisition, economic and community development, and relocation costs. Such income may be used by the Tribe for planning and administration related to land and water rights acquisition, economic and community development and relocation for the San Lucy District.

(b) The Secretary shall not be responsible for the review, approval or audit of the use and expenditure of the moneys referred to in this section, nor shall the Secretary be subject to liability for any claim or cause of action arising from the Tribe's use and expenditure of such moneys. No portion of such moneys shall be used for per capita payments to any members of the Tribe.

(c) The Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres. The Tribe and the United States shall be forever barred from asserting any and all claims for reserved water rights with respect to any land acquired pursuant to this subsection.

(d) The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the **[1800]** corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

(e) The Secretary shall establish a water management plan for any land which is held in trust under subsection (c) which, except as is necessary to be consistent with the provisions of this Act, will have the same effect as any management plan developed under Arizona law.

REAL PROPERTY TAXES

SEC. 7. (a) With respect to any private land acquired by the Tribe under section 6 and held in trust by the Secretary, the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes.

(b) The Secretary is authorized to enter into agreements with the State of Arizona and its political subdivisions pursuant to which the Secretary may satisfy the obligation under subsection (a), in whole or in part, through the transfer of public land under his jurisdiction or interests therein, including land within the Gila Bend Indian Reservation or interests therein.

WATER DELIVERY

SEC. 8. If the tribe acquires rights to the use of any water by purchase, rental, or exchange within the State of Arizona, the Secretary, at the request of the Tribe, shall deliver such water, at no cost to the United States, through the main project works of the Central Arizona Project to any land acquired under section 5(c), if, in the judgment of the Secretary, sufficient canal capacity exists to convey such water: *Provided*, That deliveries of such water shall not displace deliveries of Central Arizona Project water. The rate charged to the tribe for water delivery shall be the same as that charged by the Central Arizona Water Conservation District pursuant to contracts entered into pursuant to the Colorado River Basin Project Act (43 U.S. C. 1521, et seq.). Nothing in this section shall be deemed to obligate the Secretary to construct any water delivery system.

WAIVER AND RELEASE OF CLAIMS; EFFECTIVE DATE

SEC. 9. (a) The Secretary shall be required to carry out the obligations of this Act only if within one year after the enactment of this Act the Tribe executes a waiver and release in a manner satisfactory to the Secretary 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 such a waiver.

(b) Nothing in this section shall be construed as a waiver or release by the Tribe of any claim where such claim arises under this Act.

(c) The assignment referred to in section 4 and the waiver and release referred to in this section shall not take effect until such time as the full amount authorized to be appropriated in section 4 has been appropriated by the Congress and paid to the Tribe.

[1801]

COMPLIANCE WITH BUDGET ACT

SEC. 10. No authority under this Act to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts. Any provision of this Act which, directly or indirectly, authorizes the enactment of new budget authority shall be effective only for fiscal years beginning after September 30, 1987.

Approved October 20, 1986.

25 U.S.C. §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.

* * *

(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

[2] So in original. Probably should not be capitalized.

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.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

25 U.S.C. §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

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

* * *

25 C.F.R. §292.2—How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

* * *

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

* * *

25 C.F.R. §292.5—When can gaming occur on newly acquired lands under a settlement of a land claim?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(i), known as the "settlement of a land claim" exception. Gaming may occur on newly acquired lands if the land at issue is either:

(a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or

(b) Acquired under a settlement of a land claim that:

(1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or

(2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.

CERTIFICATE OF SERVICE

I hereby certify that 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 on August 25, 2014. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Danielle Spinelli
DANIELLE SPINELLI

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned hereby certifies:

1. The brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and contains 17,481 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. The brief complies with the type size and typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font.

As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Danielle Spinelli
DANIELLE SPINELLI

August 25, 2014