FENNEMORE CRAIG, P.C.
Patrick Irvine (No. 006534)
Douglas C. Northup (No. 013987)
Carrie Pixler Ryerson (No. 028072)
2394 E. Camelback Road, Suite 600
Phoenix, AZ 85016-3429
Telephone: (602) 916-5000
Email: pirvine@fclaw.com
Email: dnorthup@fclaw.com
Email: cryerson@fclaw.com

GIBSON, DUNN & CRUTCHER LLP
Matthew D. McGill (admitted pro hac vice)
Matthew A. Hoffman (admitted pro hac vice)
1050 Connecticut Avenue N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Email: mmcgill@gibsondunn.com
Email: mhoffman@gibsondunn.com
Email: tloose@gibsondunn.com

Attorneys for Defendant Director Daniel Bergin, Arizona Department of Gaming

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

The Tohono O'odham Nation, Plaintiff, v. Douglas Ducey, Governor of Arizona; Mark Brnovich, Arizona Attorney General; and Daniel Bergin, Director, Arizona Department of Gaming, in their official capacities, Defendants.	No. 2:15-cv-01135-DGC **DEFENDANT DANIEL BERGIN'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY**

I. INTRODUCTION

Director Bergin moves to compel the production of notes, minutes, and agendas from various "closed sessions" of the San Lucy District, a political subdivision of the Nation, addressing the Glendale property which were withheld in the 2011 litigation between the State of Arizona and the Tohono O'odham Nation, *Arizona v. Tohono O'odham Nation*, No. 11-296 (*TON I*) on the basis of the legislative and deliberative process privileges.[1] In addition, Director Bergin moves to compel the Nation's witnesses who will be deposed in the coming weeks to testify about certain facts that are relevant to Director Bergin's affirmative defenses and counterclaims regardless of whether those facts were disclosed in a closed legislative session, unless the testimony sought pertains directly to a discussion of legislation or policy in such a session. For example, the Nation's witnesses should be compelled to testify on the following topics regardless of whether they were discussed in a closed legislative session:

- The location(s) where the Nation intended to build a fourth casino before Prop. 202;
- The identities of those involved in the decision to purchase the Glendale property;
- The dates on which witnesses first learned of the plan to purchase the Glendale property;
- The Nation's intentions for the Glendale property before and after it was purchased;
- The dates on which witnesses first learned of the plan to conduct Class III gaming on the Glendale property; and
- The reason the Nation kept its search for and purchase of land secret from the State.

The Nation has asserted—in both *TON I* and in this case—that these documents and areas of testimony are protected by the legislative and/or deliberative process privileges because they were created during or discussed during closed legislative sessions. But such sessions do not immunize this information from disclosure, and the Nation has not met its

[1] Director Bergin brings this motion pursuant to the Court's order following the parties' May 20, 2016 telephonic discovery conference, and following the parties' telephonic and written conferences regarding their discovery disputes, consistent with the Federal and Local Rules. *See* Fed. R. Civ. P. 37(a)(1); LRCiv 37.1.

burden of establishing that any of these items are "legislative" or "deliberative" in nature. *See Ariz. Dream Act Coal. v. Brewer*, 2014 WL 171923, at *1 (D. Ariz. Jan. 15, 2014).

Even if the Nation had done so, these documents should be disclosed, and the areas of testimony compelled, under the balancing test articulated by the Ninth Circuit in *F.T.C. v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), which applies to claims of deliberative process privilege and has been applied in substantially similar form to claims of legislative privilege. The documents and testimony at issue (1) are directly relevant to Director Bergin's affirmative defenses and counterclaims of fraud and negligent misrepresentation, (2) may contain evidence of the Nation's intent that is not available from other sources, (3) directly involve conduct by the Nation's government officials, and (4) their disclosure will not substantially chill any legislative or deliberative activity.

The legislative and deliberative process privileges were not designed to cloak facts relating to a party's assertion of fraud and/or misrepresentation, and the Nation should not be permitted to withhold relevant and necessary evidence relating to the search for and purchase of the Glendale property, the decision to engage in Class III gaming on that property, and the Nation's desire to keep the search for and purchase of that land a secret from the State pursuant to those qualified privileges. *See Ariz. Dream Act Coal.*, 2014 WL 171923, at *1. Director Bergin respectfully asks the Court to grant this motion to compel or, at minimum, to review the documents *in camera*.

II. BACKGROUND

In *TON I*, the Nation and its political subdivision, the San Lucy District, withheld several documents on the basis of the legislative and/or deliberative process privileges. Director Bergin, of course, was not a party to *TON I*. But having reviewed the privilege logs produced in that litigation (which are the only applicable privilege logs here, since the Nation responded to Director Bergin's requests for production by pointing him to its *TON I* production and privilege log), Director Bergin has identified the following documents over which he believes the Nation and/or the San Lucy District have improperly claimed

legislative or deliberative process privileges. The Nation's complete privilege log is attached as **Exhibit A** and San Lucy District's complete log is attached as **Exhibit B.**

	Date	Document Type	Author	Description	Privilege
1.	6/18/02	Typed Minutes	Council Secretary	Closed Session on West Valley Property	Legislative Privilege Deliberative Process Privilege
2.	8/29/02		Frances Miguel[2]	Handwritten notes in Ms. Miguel's personal notebook regarding TON legislative council session addressing San Lucy District Land Proposal	Legislative Privilege
3.	10/29/02	Typed Agenda and Handwritten Notes	Council Secretary for Agenda and likely for notes	Closed Council Session on West Valley Project Attorney Mark Curry present	Attorney Client Communications Common Interest Privilege Legislative Privilege Deliberative Process Privilege
4.	2/27/03	Typed Minutes	Council Secretary	Closed Council Session VDI[3] Report	Legislative Privilege Deliberative Process Privilege
5.	2/27/03	Handwritten Notes	Unknown	Closed Council Session on Phoenix Property	Legislative Privilege Deliberative Process Privilege

[2] Ms. Miguel was a member of the Nation's Commerce Committee during the relevant time.

[3] "VDI" refers to Vi-ikam Doag Industries, Inc., an enterprise chartered by the Nation.

6.	3/4/03	Typed Agenda, Minutes and Handwritten Notes	Council Secretary for typed documents and likely for handwritten notes	Closed Council Session – Report from VDI to Council	Legislative Privilege Deliberative Process Privilege
7.	3/13/03	Handwritten Notes	Unknown	Report from VDI to Closed Council Session	Legislative Privilege Deliberative Process Privilege
8.	7/13/03	Handwritten Notes	Unknown	Special Council Meeting re Chairwoman Saunders' Response to District's Position	Legislative Privilege Deliberative Process Privilege Irrelevant, non-responsive to Order

Additionally, several of the Nation's representatives refused to provide deposition testimony on several subjects purportedly on the basis of the legislative and deliberative process privileges. Chairman Norris, for example, refused to answer questions as to why the purchase of the Glendale property was kept a secret (*e.g.*, **Exhibit C**, *TON I* Norris Dep. 78:25-79:16), when the decision was made "to conduct gaming" on the Glendale property, or whether there was "any legitimate reason to keep the Nation's search efforts secret from the state, the public, or other tribes" **Exhibit D**, *TON II* Norris Dep. 54:10-56:8. Mr. Ramon refused even to name the person who first told him, during a closed legislative council session, about the Nation's plans to build a casino in Glendale. *E.g.*, **Exhibit E**, *TON I* Ramon Dep. 66:14-68:3. Chairman Edward Manuel refused to provide testimony about the Nation's "concerns about operating the casino" on the ground that such concerns had been aired in a closed session. **Exhibit F**, *TON I* E. Manuel Dep. 90:9-91:5. Albert Manuel, Jr., too, refused to provide testimony about the Nation's "agenda" during the "1999-2002 compact negotiations" on the grounds that those conversations were held in a closed session.

Exhibit G, *TON I* A. Manuel Dep. 55:18-56:17. And Frances Miguel refused to testify about her "involvement in the effort to pass Proposition 202" and said that, "[a]s much as [she could] remember, "[e]very single discussion that [she] had as a member of the commerce committee regarding the purchase of land using Gila Bend Act funds for gaming occurred in closed session." **Exhibit H**, *TON I* Miguel Dep. 61:19-62:10, 130:12-17.

On April 15, 2016, Director Bergin wrote to the Nation regarding the Nation's assertion of privilege over these documents and included two exhibits setting forth certain disputed documents and testimony. The Nation responded on April 27, 2016, and Director Bergin replied on May 5, 2016. Through that exchange, the parties outlined their legal positions and Director Bergin narrowed the scope of his disclosure request. Copies of those letters are attached as **Exhibits I**, **J**, and **K**, respectively. The parties then held a conference call with the Court on May 20, 2016 to attempt to resolve the outstanding areas of disagreement, and the Court directed Director Bergin to brief the privilege issues in the form of a motion to compel.

III. LEGAL STANDARD

A. Deliberative Process Privilege

The deliberative process privilege recognized at common law "rests on the fact that officials will not communicate candidly among themselves if each remark could be subject to discovery. The privilege seeks to enhance the quality of government by promoting open and frank exchanges among government decision-makers." *Ariz. Dream Act Coal.*, 2014 WL 171923, at *1. "'The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in question.'" *Id*. (quoting *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1998)). For the privilege to apply, a document must meet two threshold requirements. "'First, the document must be predecisional—it must have been generated before the adoption of an agency's policy or decision …. Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. Purely factual material that does not reflect deliberative processes is not protected.'" *Id*. (quoting *Warner Commc'ns Inc.*, 742 F.2d at 1161).

"If the Court determines that the privilege applies, the Court must consider whether portions of the document are still subject to disclosure." *Ariz. Dream Act Coal.*, 2014 WL 171923, at *1 (citing *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 693 F.3d 876 (9th Cir. 2010)). In general, "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Id*. (quoting *Warner Commc'ns*, 742 F.2d at 1161.) To determine whether the privilege should be overridden, courts typically consider: "(1) the relevance of the evidence, (2) the availability of other evidence, (3) the government's role in the litigation, and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id*.

B. **Legislative Privilege**

The legislative privilege, like the deliberative process privilege, is a qualified privilege that "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). Federal and state officials, as well as those serving in a "legislative capacity," may assert the privilege. *See Kilbourn v. Thompson*, 103 U.S. 168, 201-04 (1880) (federal legislators); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (state legislators).

Director Bergin is not aware of any cases permitting tribal legislators to assert the legislative privilege. But assuming *arguendo* that members of a tribal government acting in a legislative capacity may do so, they should only be allowed to assert the narrower privilege applicable to state and local legislators, who have no "absolute right to refuse deposition or discovery requests in connection with their legislative acts." *Harris v. Ariz. Indep. Redist. Comm'n*, 993 F. Supp. 2d 1042, 1069 (D. Ariz. 2014); *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (stating that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance").

Although the legislative privilege "protects the legislative process itself," and covers both the executives' and legislators' actions in the "proposal, formulation, and passage of legislation" (*In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015)), it "does not extend to

cloak all things in any way related to the legislative process." *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 (2003) (quotations omitted). Rather, it extends "to matters beyond pure speech or debate in the legislature *only* when such matters are an integral part of the deliberative and communicative processes relating to proposed legislation, or other matters placed within the jurisdiction of the legislature," and *only* "when necessary to prevent indirect impairment of such deliberations." *Id*. (emphasis added).

The Ninth Circuit has developed a four-part test to determine whether an action is "legislative," which asks: (1) "whether the act involves ad hoc decisionmaking, or the formulation of policy"; (2) "whether the act applies to a few individuals, or to the public at large"; (3) "whether the act is formally legislative in character"; and (4) "whether [the act] bears all the hallmarks of traditional legislation." *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003).

Like the deliberative process privilege, courts have generally agreed that the legislative process privilege may be overcome if factors similar to those laid out in *Warner Communications* are met, such as the factors listed in *United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989).[4] *See*, *e.g.*, *Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710, at *11-15 (C.D. Cal. Oct. 10, 2003) (concluding that while some courts have held that the legislative privilege is absolute, "the better view is that [the legislative privilege] is qualified" and applying the *Irvin* balancing test); *see also Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) (applying balancing test to assertion of legislative privilege); *Favors v. Cuomo*, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012) (same); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011) (same, and

[4] The *Irvin* factors include: (1) "[t]he interest of the litigants, and ultimately of society, in accurate judicial fact finding"; (2) "[t]he relevance of the evidence sought to be protected"; (3) "[t]he availability or unavailability of comparable evidence from other sources"; (4) "[t]he "seriousness of the litigation and the issues involved"; (5) "[t]he presence of issues concerning alleged governmental misconduct"; (6) "[t]he role of the government in the litigation itself"; (7) "[t]he possibility of future timidity by government employees"; and (8) "[t]he federal interest in the enforcement of federal law." 127 F.R.D. at 173 (internal citations and quotations omitted).

explaining that "under the federal common law, legislative privilege is qualified, not absolute, and may be overcome by a showing of need").

IV. ARGUMENT

A. The Nation has not established that the documents and testimony at issue are privileged.

To establish that any privilege applies, the Nation must show that the documents and areas of testimony in question are either (1) legislative in nature (*Kaahumanu*, 315 F.3d at 1220), or (2) pre-decisional and deliberative in nature (*Warner*, 742 F.2d at 1161). The Nation has failed to make either showing.

1. Documents

Each of the documents at issue reflects or was prepared during various legislative council sessions held by the Nation or the San Lucy District. The Nation summarily contends that it is entitled to assert an "absolute" privilege over documents developed during "closed sessions" of its Legislative Council, as well as any documents or records of its meetings with VDI, a corporation chartered by the Nation for the purpose of locating and building a casino in the Phoenix metropolitan area.[5] *See*, *e.g.*, Exhibit J at 7. These assertions are insufficient to establish that any privilege applies.

First, the Nation has not established that the documents pertain to acts that are "legislative" or "deliberative." The Nation has not identified any proposed legislation or policymaking that the notes, minutes, or agendas supposedly preceded or were "integral" to. *Fields*, 206 Ariz. at 137. Nor has the Nation provided a sufficient description of the contents of those documents to determine whether they constitute opinions, recommendations, or advice and are thus "deliberative." In addition, entries 5, 7, and 8 were authored by

[5] The Nation (on behalf of the San Lucy District) also claims that entry 3 is protected by the attorney-client privilege in addition to the legislative and deliberative process privileges (*id.* at 6), apparently because an attorney happened to attend the "closed session," and also claims that entry 8 is not relevant to any issues in the case (*id.* at 7), which is belied by the fact that the document was included on the privilege log. These further assertions of privilege are discussed below.

"unknown" individuals, making it impossible to determine whether they were acting in a legislative or deliberative capacity such that they might be entitled to assert either privilege.

Instead, the Nation cites one case for the proposition that "transcripts or minutes of private legislative meetings," which it equates to "closed sessions," are absolutely protected by the legislative privilege. *See* Exhibit J at 2 (citing *Buonauro v. City of Berwyn*, 2011 WL 2110133, at *4-5 (N.D. Ill. May 25, 2011)). But information disclosed in a closed session may be discoverable if the claims involve questions of intent, and the information is relevant to that intent.[6] And in any event, *Buonauro* is readily distinguishable.

In *Buonauro*, the plaintiffs sought transcripts of meetings in which city legislators debated whether to grant the plaintiffs a license to open a substance abuse clinic and also sought to have the city legislators answer questions at deposition about those license deliberations. Because the court had previously concluded that the legislators could not be forced to answer those questions during deposition, and because the plaintiffs had not objected to that finding, the court saw no reason not to extend the privilege to cover portions of the transcripts of the council meetings. *Buonauro*, 2011 WL 2110133, at *3. The court's reasoning in no way turned on whether the legislative sessions in question were open or closed, and the court ordered a number of portions of the minutes to be disclosed for *in camera* review. *Id*. at *8. Thus, *Buonauro* can hardly be cited for the proposition that closed session meetings are protected by an absolute legislative privilege.

The Nation also cites *Bethune-Hill v. Virginia State Board of Elections*, 114 F. Supp. 3d 323, 332 (E.D. Va. 2015), to argue that the legislative privilege confers absolute protection. But at minimum, that case is distinguishable because the acts in question involved claims of racial gerrymandering in setting the boundaries of state legislative districts—clearly legislative acts. *Bethune-Hill* does not excuse the Nation from having to establish that the acts in question are legislative, rather than administrative, in nature.

---

[6] *E.g.*, *Irvin*, 127 F.R.D. at 173 (permitting discovery of communications between local legislators and their staff members during closed-door, non-public meetings in order to discern the intent with which the legislators adopted a redistricting plan).

The acts at issue here—which predated the Nation's eventual decision to ask the Department of the Interior to take land into trust by some seven years—are not legislative in any ordinary sense of the word. *See Kaahumanu*, 315 F.3d at 1220. Deciding whether to purchase property or what to build on it is not an example of crafting "policy," and the Nation does not attempt to justify it as such. *Id.* Nor does such a decision have any effect on the public at large in the way that, say, a zoning decision or a new criminal statute might have. *Id.* Nor has the Nation cited any formal legislative characteristics of the closed sessions on the West Phoenix property or the VDI reports that might imbue these otherwise administrative acts with legislative attributes. *Id.* To the extent such attributes exist, it is the Nation's burden to come forward with them. The Nation has not done so.

Second, even if the Nation had established that the meetings in question involved legislative or deliberative matters (it has not), the Nation may not categorically assert privilege over all communications with VDI. VDI is not a legislative entity at all—it is an "economic development corporation chartered by the Nation allegedly for the purpose of the Phoenix-area casino project." *TON I*, 944 F. Supp. 2d at 762. While the law on this issue is not well developed, *Harris* suggests that entities like VDI do not enjoy even a qualified legislative privilege because they have "no other public duties from which to be distracted" and "cannot be defeated at the ballot box." 993 F. Supp. 2d at 1069; *see also Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (compelling disclosure of advisory group's deliberations and rejecting notion that disclosure would result in chilling legislative activity).

United States v. Gravel, 408 U.S. 606 (1972) and *Arizona Redistricting Commission v. Fields* are not to the contrary. *Gravel* extended legislative immunity to the acts by a federal lawmaker's aide where such aides "perform or aid in the performance of legislative acts." *Id.* at 618. *Fields* held the same with respect to a staff consultant. 206 Ariz. at 139-40. Absent here (again) is any showing of a "legislative act" in which VDI was participating.

Third, the Nation has not offered any basis to claim attorney-client privilege over the agenda and handwritten notes listed at entry 3. The mere inclusion of a lawyer in a communication does not confer privilege; instead, "counsel must infuse the communication

with legal advice." *In re Chase Bank USA, N.A. Check Loan Contract Litig.*, 2011 WL 3268091, at *1 (N.D. Cal. July 28, 2011) (quotations omitted); *S. Union Co. v. Sw. Gas Corp.*, 205 F.R.D. 542, 546 (D. Ariz. 2002) ("In order for the privilege to apply, the attorney receiving a communication must be acting as an attorney and not simply as a business advisor") (quotations omitted); *see also United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978) (rejecting privilege claim where party could not show that attorney present at a meeting was "acting as an attorney"). The Nation has not represented that any legal advice was given.

Fourth, the Nation has failed to explain why entry 8 is "irrelevant" and "nonresponsive" to the Court's December 2011 discovery order (*TON I*, ECF 80). That order was issued in *TON I*, and thus whether or not a document is responsive to that order is not binding in this case. In addition, the Nation's vague description of the document's contents as reflecting Chairwoman Saunders' "response" to the District's "position" makes it impossible to determine whether the document is relevant or not. If the District's "position" has anything to do with the Glendale property or the West Valley casino, Chairwoman Saunders' opinion of it, given shortly after the Compact was signed, is plainly relevant.

2. Areas of Testimony

The Nation's privilege assertions over various categories of testimony—including when plans were made to purchase the Glendale property, who was involved in those plans, why they purchased the land in the way that they did, when discussions took place regarding plans to build the casino, the Nation's efforts to pass Prop. 202, the Nation's agenda during negotiation, and so on—on the ground that they occurred in "closed sessions" fare no better. As discussed above, the fact that a relevant discussion occurred in a closed session does not automatically confer privileged status without any showing that the act or discussion in question was legislative or deliberative in nature, and courts have required disclosure of testimony from "closed sessions" in similar circumstances. *E.g.*, *Fair & Balanced Map*, 2011 WL 4837503, at *7. Moreover, as with document entry 3, the mere presence of a lawyer at a "closed session" does not immunize a communication under the attorney-client privilege. *In re Chase Bank USA*, 2011 WL 3268091, at *1; *S. Union Co.*, 205 F.R.D. at 547; *Landof*, 591

F.2d at 39. As before, the Nation has not represented that any legal advice was given. The Nation should not be permitted to shield broad swaths of testimony about issues central to Director Bergin's counterclaims merely by claiming that they took place in a closed session.

B. The documents at issue should be disclosed under the balancing test articulated in *Warner Communications* and/or *United States v. Irvin*.

Even if some or all of the documents or areas of testimony described above were entitled to protection under either the legislative or deliberative process privilege, Director Bergin submits that the *Warner Communications* factors—relevance, unavailability elsewhere, government involvement, and lack of a chilling effect—support disclosure of the documents and subjects of testimony discussed here.

Relevance. Each of the documents mentioned above appears to be relevant to Director Bergin's claims that the Nation misrepresented that it "had no plans to open a Class III gaming facility in the Phoenix metropolitan area"; "no plans to have Phoenix-area land taken into trust on which to build a casino"; and that any fourth casino would be located either in Tucson, Florence, Casa Grande, or Gila Bend. Order [ECF 127] at 18, 21; Bergin Answer [ECF 96] ¶ 25. Entry 2 pertains to the "San Lucy District Land proposal" which, based on *TON I*, seems to refer to the Glendale property. Entries 1, 3, 4 and 6 refer directly to the "West Valley Property," the "Phoenix Property," or the "West Valley Project," while entries 5 through 8 refer to "VDI," which was the entity formed by the Nation "for the purpose of the Phoenix-area casino project." *TON I*, 944 F. Supp. 2d at 762. Entry 8 is extremely vague, but appears to refer to the San Lucy District's position on the Phoenix land acquisition and whether to build a casino on that land. And all of the categories of testimony about which the Nation's representatives refused to testify are directly relevant to Director Bergin's affirmative defenses and counterclaims.

Availability. Whether or not the Nation had "plans" to open a casino or take land into trust at some point prior to the signing of the 2003 Compact is something that can be determined by examining the contemporary intentions of the Nation's legislative representatives and their associates such as VDI. *See, e.g.*, *Vill. of Arlington Heights v.*

Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977) (evidence of discriminatory intent could be gleaned from "minutes" and "reports" of municipal meetings and contemporary statements made by members of a legislative body). That is evident for at least three reasons:

First, the Nation has asserted that none of its negotiators actually "had … authority to bind the Nation" during Compact negotiations (*e.g.*, **Exhibit L**, Director Bergin's Responses and Objections to the Nation's First Set of Requests for Admission, No. 1). If that is true, then Director Bergin must look to the Nation's legislators, who formally approved the Compact, to understand what the Nation's "intent" was.[7]

Second, representatives of the Nation, such as Mr. Ramon, have testified that the "the only information that [he] learned about the casino being built in Glendale was … when [he was] in closed session." Exhibit D, *TON I* Ramon Dep. 66:25-68:3. Assuming that is true, then evidence of the Nation's intent with respect to the casino and the land on which it was built can be gleaned only from these sessions.

Third, the Nation argued that the intent-based evidence that the State did gather in *TON I* was inadmissible and the Court did not rule on the issue or consider the evidence. *TON I*, 944 F. Supp. 2d at 763. Thus, the Nation cannot take that position and then fairly say that evidence of its intent is "available" elsewhere. If anything, the sources from which the *TON I* evidence was drawn—minutes of a legislative council meeting in May 2001, a transcript of a San Lucy District Council meeting, and transcripts from meetings with VDI—strongly suggest that the documents that Director Bergin seeks to have disclosed now—legislative council minutes, San Lucy District Council minutes, and meetings with VDI—are precisely the types of documents that may contain further evidence of the Nation's intent.

Government's Role. Director Bergin's counterclaims allege misconduct by some of the Nation's representatives, and the documents and testimony sought through this motion

---

[7] Director Bergin does not know whether the Nation's negotiators had authority to bind the Nation. But the Nation's negotiators did represent that the Nation had no intention of building a casino in the Phoenix metropolitan area and had no plans to have land in that area taken into trust, and the Court has previously stated that those are the types of collateral representations on which the state could reasonably rely. *See* Exhibit L at 3-4.

directly relate to that alleged misconduct. Unlike in *Wilson v. Maricopa County*, 2006 WL 1312934, at *1 (D. Ariz. May 12, 2006), for example, the deliberations "themselves constitute the misconduct" at the heart of Director Bergin's claims. Just as "deliberations leading to the termination of an employee cannot be protected under the privilege when the employee sues for wrongful termination," deliberations leading to the defrauding of the State are of central importance and cannot be protected when the State sues for fraud. *Id*.

Chilling Effect. Any chilling effect that might occur if the Nation is required to disclose the documents at issue or to offer testimony on the subjects identified will be negligible at best. *First*, neither of the privileges at issue here should be used to "shield[] criminal conduct which corrupts the governmental process" (*In re Grand Jury Proceedings*, 563 F.2d 577, 583-84 (3d Cir. 1977)); thus, to the extent any such conduct has taken place here, the chilling effect is irrelevant. *Second*, requiring disclosure will not disturb the legislative or deliberative processes for the simple reason that the documents and testimony at issue are not legislative or deliberative in nature—instead, they are relevant to business and property decisions about whether to buy land, where to buy it, and what to build on it. To the extent the Court is still concerned about a potential chilling effect, it can examine the documents at issue *in camera* and reach a decision after reviewing their contents.[8]

Additional* Irvin *Factors. *United States v. Irvin* sets forth a few additional factors including "the interest of the litigants, and ultimately of society, in accurate judicial fact finding"; the "seriousness of the litigation and the issues involved"; and "the presence of issues concerning alleged governmental misconduct."[9] 127 F.R.D. at 173. Both parties and the public plainly have an interest in accurate fact-finding, which can be accomplished through the disclosure of these documents. The litigation also raises serious issues of

---

[8] In addition, as far as Director Bergin knows, there is no deliberative process or legislative privilege under tribal law. Tribal legislators and officials, therefore "should reasonably expect their deliberations in crafting policy are open to public scrutiny," which weighs in favor of disclosure. *Ariz. Dream Act Coal.*, 2014 WL 171923, at *3.

[9] The eighth factor, "the federal interest in the enforcement of federal law" is not applicable here. *Irvin*, 127 F.R.D. at 173.

government misconduct, insofar as it involves claims that the Nation defrauded the State during years-long, multi-party negotiations that culminated in a state-wide campaign to gain approval of the Compact from Arizona voters. Those voters undoubtedly have the right to know whether its approval of the 2003 Compact was obtained by fraud or misrepresentations.

C. The Nation should be required to produce specified documents listed on the San Lucy District's privilege log.

The Nation will likely argue, as it did in its April 27, 2016 letter, that it cannot be ordered to produce any of the San Lucy District's documents because the District is a "political subdivision of the Nation that governs itself on matters of local concern" and "has its own legal counsel and was not (and is not) under the control of the Nation. Exhibit J at 2. This is a dubious claim. The District's multimillion dollar purchase of property would not seem to be a matter of purely "local concern," particularly given that the District is barred from expending any funds except as approved by the Nation's Council. *See* Tohono O'odham Constitution, Article IX, Section 7. Regardless, if Director Bergin's office may be required to produce or coordinate with other state agencies or superior state officials in order to produce documents responsive to the Nation's Rule 34 requests (*see* ECF 151), surely the Nation—as a superior governmental entity—can be required to request documents from one of its own lesser political subdivisions on the important questions presented here.

V. CONCLUSION

The documents and areas of testimony at issue are not absolutely privileged and the balance of factors articulated in *Warner Communications* and *Irvin* weighs in favor of disclosure here. Should the Court agree, it should also order the Nation to produce those documents which were withheld by the San Lucy District. Alternatively, the Court should examine the documents at issue *in camera* and reach a decision after reviewing their contents.

DATED this 27th day of May, 2016. GIBSON, DUNN & CRUTCHER LLP

By /s/ Matthew A. Hoffman
Matthew D. McGill
Matthew A. Hoffman

-and-

Patrick Irvine
Douglas C. Northup
Carrie Pixler Ryerson

FENNEMORE CRAIG, P.C.

Attorneys for Defendant Director Daniel Bergin, Arizona Department of Gaming

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, I caused the foregoing document to be served upon the following persons via email to the addresses noted below:

Seth P. Waxman
Danielle Spinelli
Kelly P. Dunbar
Sonya L. Lebsack
Wilmer Cutler Pickering Hale & Dorr LLP
1875 Pennsylvania Ave. NW
Washington, DC 2006
Email: seth.waxman@wilmerhale.com
Email: danielle.spinelli@wilmerhale.com
Email: kelly.dunbar@wilmerhale.com
Email: sonya.lebsack@wilmerhale.com
Attorneys for Plaintiff
The Tohono O'odham Nation

Jonathan Landis Jantzen
Laura Lynn Berglan
Tohono O'odham Nation
Office of the Attorney General
P. O. Box 830 Sells, AZ 85634
Email: jonathan.jantzen@tonation-nsn.gov
Email: laura.berglan@tonation-nsn.gov
Attorneys for Plaintiff
The Tohono O'odham Nation

Paul K. Charlton
Karl M. Tilleman
Erin N. Bass
Steptoe & Johnson LLP
201 E. Washington Street Suite 1600
Phoenix, AZ 84004
Email: pcharlton@steptoe.com
Email: ktilleman@steptoe.com
Email: ebass@steptoe.com
Attorneys for Plaintiff
The Tohono O'odham Nation

/s/ Andrew G. Pappas
An employee of Gibson, Dunn & Crutcher LLP

102123206.4