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17
18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE DISTRICT OF ARIZONA

20 THE TOHONO O’ODHAM NATION,

21 Plaintiff,

22 v.

23 DOUGLAS DUCEY, Governor of
24 Arizona; MARK BRNOVICH, Arizona
25 Attorney General; and DANIEL BERGIN,
Director, Arizona Department of Gaming,
in their official capacities,

26 Defendants.
27
28

CASE NO. 2:15-cv-01135-DGC

**DEFENDANT DANIEL BERGIN’S
MOTION TO DISMISS PLAINTIFF’S
COMPLAINT PURSUANT TO FED. R.
CIV. P. 12(b)(1) & 12(b)(6)**

ORAL ARGUMENT REQUESTED

1 Defendant Daniel Bergin, in his official capacity as Director of the Arizona
2 Department of Gaming (“ADG”), respectfully moves for an order dismissing Plaintiff
3 Tohono O’odham Nation’s (“the Nation”) complaint pursuant to Federal Rules of Civil
4 Procedure 12(b)(1) and 12(b)(6).

5 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

6 The Nation asks this Court to compel the State of Arizona through its officials
7 (collectively referred to here as “the State”) to issue licenses that would allow the Nation to
8 proceed with its plans to open a Class III gaming facility in Glendale. That request is fatally
9 flawed and should be dismissed with prejudice for several independent reasons:

10 At the threshold, the Court lacks subject matter jurisdiction. The Eleventh
11 Amendment to the United States Constitution bars the entirety of the Nation’s suit. The
12 Nation does not and cannot allege that the State has waived its Eleventh Amendment
13 immunity, and under the Supreme Court’s decision in *Seminole Tribe of Florida v. Florida*,
14 517 U.S. 44 (1996), the detailed remedial scheme of the Indian Gaming Regulatory Act
15 (“IGRA”) renders the *Ex parte Young* doctrine inapplicable.

16 Moreover, there is no live Article III controversy between the State and the Nation
17 over the regulation of Class II gaming that could warrant adjudication of the Nation’s second
18 claim for relief. The State has never asserted authority to regulate the Nation’s Class II
19 gaming activities, nor has it threatened any adverse action against the Nation or its gaming
20 vendors with respect to Class II gaming. The Nation’s unease that the State’s
21 communications to State-regulated gaming vendors do not “clarif[y] that the State has no
22 authority to regulate Class II gaming” (D.E. 1, ¶ 118) falls far short of establishing the “actual
23 controversy” the Declaratory Judgment Act requires.

24 Beyond the jurisdictional defects, the Nation’s complaint fails to state a claim on
25 which relief can be granted. Neither the Supremacy Clause nor IGRA grants the Nation a
26 private right of action to compel state officials to issue regulatory approvals. Even if IGRA
27 conferred such a right of action—and it does not—the Nation’s preemption arguments fail on
28 their own terms. IGRA simply does not preempt the State’s police-power authority to grant

1 or withhold regulatory approvals in connection with Class III gaming. Far from it, IGRA was
2 enacted specifically to ensure that States *retained* regulatory authority over Class III gaming
3 occurring within their borders. It is not the State’s actions that conflict with IGRA’s
4 policies—it is the Nation’s lawsuit.

5 Finally, under no circumstance could IGRA—or any other federal law—permissibly
6 be construed to require a State to issue regulatory approvals for Class III gaming. The anti-
7 commandeering doctrine of the Tenth Amendment forbids legislation requiring States to
8 govern according to Congress’s instructions. If federal law cannot require state officials to
9 perform background checks on handgun purchasers (*see Printz v. United States*, 521 U.S. 898
10 (1997)), it cannot require state officials to issue regulatory approvals to tribal casinos.

11 None of these defects can be cured by amendment, because each of them represents a
12 fundamental failing at the core of the Nation’s attempt to compel the State to grant its
13 regulatory imprimatur to the Nation’s new casino in Glendale. The Nation’s complaint
14 therefore should be dismissed with prejudice. If the Nation believes its rights under its tribal-
15 State compact have been violated, it should file a claim for breach of the compact and face
16 the State’s defenses, including that the Nation procured that compact by fraud.

17 II. SUMMARY OF FACTUAL ALLEGATIONS

18 A. Background

19 In 2002, after years of negotiations between the State and the Arizona Indian Gaming
20 Association (“AIGA”)—which included the Nation and most of the gaming tribes in the
21 State—the parties agreed on the form and substance of a new compact to govern future
22 gaming activities by tribes wishing to engage in them. *See Arizona v. Tohono O’odham*
23 *Nation*, 944 F. Supp. 2d 748, 754 (D. Ariz. 2013) (*TONI*). Because the Governor of Arizona
24 was not authorized to approve the compact under then-existing Arizona law, a coalition of
25 tribes proposed a ballot initiative, Proposition 202, which set forth the terms of the compact
26 and required the Governor of Arizona to execute the compact on behalf of the State upon the
27 voters’ approval of the initiative. *Id.* During the course of the compact negotiations and
28 during the ballot initiative process, the Nation and AIGA, of which the Nation was a part,

1 repeatedly represented—through both affirmative statements and purposeful omissions—that
2 no casino in the greater Phoenix metropolitan area would be built under Proposition 202. *Id.*
3 at 762; *see also TON I*, No. 11-00296, D.E. 119, ¶¶ 41, 49, 89–92, 111, 124, 140, 141, 169,
4 182, 186 (plaintiffs’ statement of undisputed facts outlining representations and omissions
5 relating to the Phoenix geographic restriction). Proposition 202 passed, and, as required by
6 the terms of that Proposition, the Governor signed the compact. *TON I*, 944 F. Supp. 2d at
7 762–63; *see also TON I*, No. 11-00296, D.E. 119, ¶¶ 195–96.

8 Turning its back on its representations to the voters and government of Arizona, in
9 2009, the Nation announced its intention to open the “West Valley Resort” casino in the city
10 of Glendale. The State and other affected tribes sued the Nation for violating the compact, as
11 well as on claims of promissory estoppel, fraud in the inducement, and material
12 misrepresentation. *See TON I*, No. 11-00296, D.E. 1 (filed Feb. 14, 2011). On cross-motions
13 for summary judgment, this Court found no violation of the compact, but did not reach the
14 merits of plaintiffs’ claims for promissory estoppel, fraud in the inducement, and material
15 misrepresentation, holding that those claims were barred by the Nation’s sovereign immunity.
16 It did note, however, that plaintiffs’ evidence “would appear to support a claim for
17 promissory estoppel” based on the representations the Nation made about the compact and
18 the State’s evident reliance on those representations in not insisting on more specific
19 geographic restrictions in the compact itself. *TON I*, 944 F. Supp. 2d at 768–69.

20 The State timely appealed this Court’s ruling to the Ninth Circuit (*see Arizona v.*
21 *Tohono O’odham Nation*, No. 13-16517 (9th Cir.)), but the Nation decided to proceed with
22 construction of the casino project even though its legal status remains subject to challenge.

23 On February 2, 2015, ADG wrote to the Nation to express its concern that, in view of
24 the pending appeal and the fraudulent manner in which the Nation developed the casino
25 project, the casino could not be authorized and therefore would not be able to obtain state
26 approvals for the vendors, employees, and casino facilities. D.E. 1-4 at 1–2. The Nation
27 responded that the casino had been authorized by the Court in *TON I* and that it had no
28 intention of halting construction. *Id.* at 4–6.

1 On April 10, 2015, ADG again wrote to the Nation, notifying it that pursuant to A.R.S.
2 §§ 5-602(A) and (C), ADG could not approve the casino because doing so would be
3 inconsistent with its mandate to ensure that the gaming in question is “permitted” and
4 consistent with “extensive, thorough and fair regulation.” D.E. 1-5 at 3. ADG noted that the
5 Court did not order the State to issue the necessary approvals in *TON I*, and that, based on its
6 review of the relevant evidence, it believed there was “credible and largely unrefuted
7 evidence that TON engaged in deceptive behavior and made significant misrepresentations
8 during the compact negotiation process and the run-up to Proposition 202.” *Id.* at 3–4. As
9 such, ADG concluded it would exceed its statutory authority if it were to proceed with
10 certifying and approving the casino as a Class III gaming facility. Further correspondence
11 followed. D.E. 1-5 at 10–25.

12 **B. The Nation’s Current Lawsuit**

13 The Nation filed this lawsuit on June 22, 2015. Count One of the Nation’s complaint
14 alleges that ADG’s communication that it would “refuse to issue regulatory certifications and
15 approvals relating to Class III gaming at the West Valley Resort” violates IGRA and the
16 Supremacy Clause. D.E. 1, ¶ 101.

17 Count Two of the Nation’s complaint alleges that certain of ADG’s communications to
18 the regulated community “threaten legal and regulatory action against vendors or employees
19 who provide services to the West Valley Resort without clarifying that the State has no
20 authority to regulate Class II gaming,” and that such statements violate IGRA and the
21 Supremacy Clause. D.E. 1, ¶ 118. The Nation requests declaratory and injunctive relief
22 prohibiting the State, *inter alia*, from “refus[ing] to perform regulatory approvals for Class III
23 gaming” or “refusing to certify ... vendors, employees, or others based on the provision of
24 goods or services for Class III or Class II gaming at the West Valley Resort.” D.E. 1 at
25 32–33.

26 **III. LEGAL STANDARD**

27 A complaint must be dismissed pursuant to Rule 12(b)(1) when the Court “lack[s] ...
28 subject-matter jurisdiction” over the claims. Fed. R. Civ. P. 12(b)(1); *Seminole Tribe*, 517

1 U.S. at 76 (granting State’s motion to dismiss in IGRA suit for lack of subject matter
2 jurisdiction). In resolving a motion to dismiss under Rule 12(b)(1), the Court need not
3 “presume the truthfulness of the plaintiff[’s] allegations” and “may look beyond the
4 complaint” to affidavits or other matters of public record without converting the motion into
5 one for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

6 Under Rule 12(b)(6), a complaint must be dismissed where the plaintiff fails to state a
7 cognizable claim under the statutes at issue, or requests relief under a statute that can provide
8 it no remedy. *See, e.g., Cement Masons Health & Welfare Trust Fund for N. Cal. v. Stone*,
9 197 F.3d 1003, 1007–08 (9th Cir. 1999) (dismissing claims that were not cognizable under
10 ERISA or where ERISA provided no remedy); *In re Hanford Nuclear Reservation Litig.*, 534
11 F.3d 986, 1009–10 (9th Cir. 2007) (dismissing claims under statute dealing with injuries
12 caused by nuclear plants where statute was “exclusive means” of redressing certain injuries
13 and requested relief was not cognizable under it).

14 IV. ARGUMENT

15 A. The Court Lacks Subject Matter Jurisdiction Over The Nation’s Claims.

16 1. The State’s Eleventh Amendment Immunity Bars The Nation’s Lawsuit.

17 The State of Arizona may not be sued in federal court, either directly or through its
18 officials, unless it has waived its Eleventh Amendment immunity, or Congress validly has
19 abrogated its immunity. *See Scott v. State*, No. CV-09-1882-PHX-JAT (Lead), 2010 WL
20 2228513, at *1 (D. Ariz. June 1, 2010) (citing *College Sav. Bank v. Fla. Prepaid*
21 *Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999)). The Nation, as the party
22 asserting federal jurisdiction, bears the burden of establishing that the State is not immune.
23 *See Horejs v. United States*, No. 02-35288, 2002 WL 1769274, at *1 (D. Ariz. Sept. 20, 2002)
24 (citing *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987)). The Nation’s complaint
25 does not allege that the State has waived its Eleventh Amendment immunity, and as the
26 Supreme Court has held, IGRA does not abrogate the State’s constitutional immunity from
27 suit in federal court. *See Seminole Tribe*, 517 U.S. at 72; *see also Hein v. Capitan Grande*
28

1 *Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 n.7 (9th Cir. 2000) (IGRA “does not
2 permit a suit against a state unless the state waives its sovereign immunity”).

3 To the extent the Nation seeks to base jurisdiction on the doctrine of *Ex parte Young*,
4 209 U.S. 123 (1908), that also is foreclosed by Supreme Court precedent. As the Court
5 explained, while the *Ex parte Young* doctrine generally permits “jurisdiction over a suit
6 against a state official when that suit seeks only prospective injunctive relief in order to ‘end a
7 continuing violation of federal law,’” the doctrine is “inapplicable” to suits claiming
8 violations of rights conferred by IGRA. *Seminole Tribe*, 517 U.S. at 73, 74 (quoting *Green v.*
9 *Mansour*, 474 U.S. 64, 68 (1985)). IGRA’s “detailed remedial scheme for the enforcement
10 against a State of a statutorily created right” demonstrates that Congress did not permit other
11 means of enforcing IGRA’s mandates. *Id.* at 74. Thus in *Seminole Tribe*, the Court
12 concluded that the tribe’s suit against the governor of Florida was “barred by the Eleventh
13 Amendment and must be dismissed for a lack of jurisdiction.” 517 U.S. at 76. The same is
14 true here.

15 **2. There Is No Live Controversy Over Class II Gaming.**

16 In order to obtain a declaratory judgment or other prospective relief, the Nation must
17 demonstrate that there is a “substantial controversy, between parties having adverse legal
18 interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory
19 judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citing *Md. Cas.*
20 *Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)) (emphasis added). The Nation’s
21 allegations that “ADG’s threat to sanction vendors and employees ... draws no distinction
22 between Class II and Class III gaming” (D.E. 1, ¶ 9) and that ADG’s “threaten[ing] legal and
23 regulatory action against vendor or employees ... without clarifying that the State has no
24 authority to regulate Class II gaming” (*id.*, ¶ 118) do not cross this threshold.

25 There is no genuine dispute between the State and the Nation concerning the Nation’s
26 ability to engage in Class II gaming. The State has never claimed to have the authority to
27 regulate Class II gaming. Indeed, Section 16 of the compact expressly states that it “*shall not*
28 *apply to any Class I or Class II Gaming* whether conducted within or without the Gaming

1 Facilities.” D.E. 1-3 at 33 (emphasis added). Against this background, there is not even a
2 “general threat of enforcement” against the Nation for engaging in Class II gaming activities,
3 much less the threat with “sufficient immediacy and reality” necessary to satisfy the “actual
4 controversy” requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201. *Rincon Band*
5 *of Mission Indians v. San Diego Cnty.*, 495 F.2d 1, 6 (9th Cir. 1974); *see also Cal. Pro-Life*
6 *Council, Inc. v. Getman*, 328 F.3d 1088, 1096 (9th Cir. 2003) (finding no standing where
7 plaintiff did not face a “credible threat of prosecution” because the regulations at issue would
8 not have applied to plaintiff’s conduct).

9 The Nation nevertheless claims harm from certain ADG notices to state-regulated
10 gaming vendors and employees that remind those vendors and employees that their State
11 certifications apply only in gaming facilities authorized by the State, and further notifies them
12 that the West Valley casino is not such a State-authorized facility. *See* D.E. 1-6 at 5–6. The
13 Nation complains that because these notices do not themselves “clarify[] that the State has no
14 authority to regulate Class II gaming,” they “threaten to chill vendors’ and employees’
15 willingness to provide goods and services relating to lawful Class II gaming at the West
16 Valley Resort.” D.E. 1, ¶ 118.

17 But the Nation’s complaint alleges no facts whatsoever to substantiate the alleged
18 “chill” ADG’s notices supposedly have placed on “vendors’ and employees’ willingness to
19 provide goods and services relating to lawful Class II gaming.” A conclusory allegation of a
20 “threat” of a “chill” based on a hypothetical set of facts cannot satisfy Article III’s
21 requirement that there be an “actual controversy.” At most, the Nation is alleging a “general
22 threat of enforcement” from ADG that the Ninth Circuit has found to be insufficient to satisfy
23 Article III’s requirements. *Rincon Band*, 495 F.2d at 6.

24 In reality, the Nation’s second claim for relief seeks an advisory opinion that, if it
25 operated the West Valley casino as a Class II-only facility, then IGRA would require ADG to
26 treat the West Valley casino as an authorized gaming facility *under State law* such that *State-*
27 *regulated* vendors and employees could not be sanctioned *under State law* for providing
28 goods and services to that facility. That contention is flawed on the merits, but this Court

1 should decline that invitation as a matter of federal subject matter jurisdiction—both because
2 the Nation is not alleging a concrete and particularized injury resulting from ADG’s notices
3 and also because it is not clear at this time whether the Nation intends to open the West
4 Valley casino as a Class II-only facility, or something else.¹

5 Count 2 of the Nation’s complaint should be dismissed under Rule 12(b)(1).

6 **B. The Nation’s Complaint Fails To State A Claim On Which Relief Could Be**
7 **Granted.**

8 **1. Neither The Supremacy Clause Nor IGRA Authorizes The Nation’s**
9 **Lawsuit.**

10 The Nation purports to bring this suit against the State “for conduct that violates the
11 Supremacy Clause of the U.S. Constitution and the Indian Gaming Regulatory Act.” D.E. 1,
12 ¶ 1. Even if the State had waived its sovereign immunity (and it has not), neither the
13 Supremacy Clause nor IGRA provides the Nation with a right of action for the relief it seeks
14 here.

15 The Supreme Court recently made clear that the Constitution’s “Supremacy Clause is
16 not the source of any federal rights and certainly does not create a cause of action” for suits
17 seeking injunctive or declaratory relief against state officers. *Armstrong v. Exceptional Child*
18 *Center, Inc.*, 135 S. Ct. 1378, 1383 (2015) (internal quotation marks and citation omitted). “It
19 instructs courts what to do when state and federal law clash, but is silent regarding who may
20 enforce federal laws in court, and in what circumstances they may do so.” *Id.* For its federal
21 causes of action, the Nation cannot look to the Supremacy Clause; its causes of action must
22 be found in IGRA.

23 But IGRA does not grant Indian tribes a right of action to seek relief from alleged
24 “obstruction of lawful class III gaming” by a State, or alleged “state regulation of class II

25 ¹ The complaint does not allege that the Nation intends to open West Valley casino as a
26 Class II-only facility; indeed, the Nation has suggested publicly that it may attempt to
27 operate the West Valley casino as a Class III facility even without the State certification
28 required by the tribal-State compact. Howard Fischer, *Tohono O’odham Vow To Defend*
Glendale Casino Rights, ARIZ. DAILY STAR (Apr. 22, 2015), [http://tucson.com/news/
business/tohono-o-odham-vow-to-defend-glendale-casino-rights/article_a6a6c297-744d-
5552-88bd-fa8580357800.html](http://tucson.com/news/business/tohono-o-odham-vow-to-defend-glendale-casino-rights/article_a6a6c297-744d-5552-88bd-fa8580357800.html).

1 gaming.” D.E. 1, ¶¶ 94–113 (Count One), 114–124 (Count Two). As the Ninth Circuit has
2 explained, IGRA does not create a “general private right of action.” *Hein*, 201 F.3d at 1260.
3 IGRA provides a private right of action *only* if the claim falls into one of three categories:
4 (i) “a[] cause of action initiated by an Indian tribe arising from the failure of a State to enter
5 into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact”;
6 (ii) “a[] cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity
7 located on Indian lands and conducted in violation of any Tribal-State compact ... that is in
8 effect”; or (iii) “a[] cause of action initiated by the Secretary [of the Bureau of Indian Affairs]
9 to enforce the [Act’s post-mediation procedures].” 25 U.S.C. § 2710(d)(7)(A)(i)–(iii). The
10 Nation’s lawsuit does not fit within any of the congressionally-authorized causes of action.
11 Because there is no right of action for the claims or relief pled in the Nation’s complaint, the
12 Nation’s complaint must be dismissed.²

13 **2. IGRA Does Not Preempt The State’s Authority To Withhold Regulatory** 14 **Approvals In Connection With Class III Gaming.**

15 The primary count of the Nation’s complaint fails for the additional reason that IGRA
16 does not displace the State’s authority to withhold regulatory approvals or to decide whether
17 to issue vendor or employee certifications to non-tribal members in connection with Class III
18 gaming. The “purpose of Congress” “is the ultimate touchstone of preemption analysis.”
19 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In IGRA, Congress created a
20 cooperative federalism regime in which the federal government, States, and tribes share
21 regulatory authority. An intention to preempt State authority over Class III gaming cannot be
22 inferred from that design.

23
24 ² Under some circumstances, the Ninth Circuit has permitted tribes to bring breach-of-
25 compact claims in federal court on the theory that the compacts are “a creation of federal
26 law,” and thus present a federal question. *See Cabazon Band of Mission Indians v. Wilson*,
27 124 F.3d 1050, 1056 (9th Cir. 1997); *see also Cachil Dehe Band of Wintun Indians of the*
28 *Colusa Indian Cmty. v. California*, 547 F.3d 962, 968 (9th Cir. 2008). But the Nation
pointedly avoids asserting any breach of the tribal-State compact, doubtless to avoid the
State’s defenses to such an action, which would include the claims of fraud and
promissory estoppel that the Nation, by tactically deploying its sovereign immunity, thus
far has evaded.

1 **a. IGRA Does Not Preempt The Field Of Regulation Of Class III**
 2 **Gaming.**

3 The Nation claims that IGRA “left states with no regulatory role over gaming.” D.E.
 4 1, ¶ 105. But, as the Ninth Circuit has recognized, “IGRA is an example of ‘cooperative
 5 federalism’” that “giv[es] each [sovereign] a role in the regulatory scheme.” *In re Indian*
 6 *Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (citation omitted). Indeed,
 7 IGRA was enacted specifically to *undo* the Supreme Court’s “ouster” of States’ “regulatory
 8 authority over gaming on Indian lands” in *California v. Cabazon Band of Mission Indians*,
 9 480 U.S. 202 (1987), and to ensure that States would continue to have a “measure of
 10 authority over gaming on Indian lands.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct.
 11 2024, 2034 (2014); *see also Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir.
 12 1997) (“While preservation of tribal sovereignty was clearly of great concern to Congress,
 13 respect for state interests relating to class III gaming was also of great concern.”). And that is
 14 why the Ninth Circuit *rejected* the argument—now pressed by the Nation here—that “in
 15 passing IGRA, Congress made it clear that the statute expressly preempts the entire field of
 16 Indian Gaming.” *Confederated Tribes of Siletz Indians of Or. v. Oregon*, 143 F.3d 481, 486
 17 n.7 (9th Cir. 1998). That decision is controlling and dispositive of the Nation’s field
 18 preemption contention.³

19 **b. The State’s Decision, Under The Terms Of A Tribal-State Compact,**
 20 **To Withhold Regulatory Approvals For Class III Gaming Does Not**
 21 **Conflict With IGRA’s Objectives Or Purpose.**

22 The Nation’s conflict preemption theories fare no better. Congress’s purpose in
 23 enacting IGRA was three-fold: First, to “provide a statutory basis for the operation of gaming
 24 by Indian tribes”; second, to “provide a statutory basis for the regulation of gaming by an

25 ³ The Nation’s complaint cites a snippet from the Senate report on IGRA stating that the
 26 legislation was intended to “preempt the field in the governance of gaming activities on
 27 Indian lands.” D.E. 1, ¶ 96 (citing S. Rep. 100-446 at 6). But as the same report explains
 28 (on the same page), under a “tribal-State compact,” there may be “State jurisdiction and the
 application of state laws to activities conducted on Indian land.” S. Rep. 100-446 at 6.
 Thus, Indian gaming may be regulated only pursuant to IGRA, but IGRA permits the
 exercise of State jurisdiction under tribal-State compacts.

1 Indian tribe adequate to shield it from organized crime and other corrupting influences,” as
2 well as to “assure that gaming is conducted fairly and honestly by both the operator and the
3 players”; and third, to establish “independent Federal regulatory authority for gaming on
4 Indian lands,” along with “Federal standards,” to “protect such gaming as a means of
5 generating tribal revenue.” 25 U.S.C. § 2702. To the extent that IGRA is intended to provide
6 a “statutory basis” for Indian tribes to engage in Class III gaming, it does so only when such
7 gaming is conducted in accordance with a valid tribal-State compact. *Id.* § 2710(d).

8 The compact in this case requires that “[p]rior to the initial commencement of the
9 [Class III gaming] operation,” the State must issue a “letter of compliance” to the “Gaming
10 Facility Operator” (D.E. 1-3 at 1–2)—which includes “the Nation, an enterprise owned by the
11 Nation, or such other entity of the Nation ... as the wholly-owned Tribal entity having full
12 authority and responsibility for the operation and management of Class III Gaming
13 Activities” (D.E. 1-2 at 13–14). If the State “determines that the Gaming Facility Operator
14 and Gaming Facility do not comport with the terms of this Compact, a non-compliance letter
15 shall be sent.” D.E. 1-3 at 2. Section 5(b) of the compact likewise grants authority to the
16 State to deny a vendor or employee application provided the State submits a “statement
17 setting forth the grounds for denial” to the Nation “together with all documentation relied
18 upon by the State Gaming Agency to the extent allowed by State law.” D.E. 1-3 at 4.
19 Section 5(f) then sets forth a non-exclusive list of determinations the State “may” make in
20 order to “revoke, suspend or deny” a State Certification. D.E. 1-3 at 5. In this way, the
21 State’s compact with the Nation requires the State, through Director Bergin, to exercise state-
22 law regulatory authority over Class III gaming activities on tribal lands.

23 Here, Director Bergin has advised the Nation of his view that he would exceed the
24 authority granted to him under Arizona law if he were to issue various regulatory approvals to
25 an unauthorized casino born of an elaborate fraud upon Arizona’s government and voters.
26 D.E. 1-5 at 3–4; *see also* A.R.S. § 5-602(C). Exercising the regulatory authority granted to
27 the State under the compact hardly conflicts with IGRA; it is precisely the role for the State
28 that IGRA envisions. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2034.

1 The Nation’s real complaint is that it does not believe Director Bergin’s actions are
2 permitted under the compact. *See* D.E. 1, ¶ 54 (claiming the compact “enumerates specified
3 grounds—the only grounds—on which the State may deny certification to a prospective
4 employee, contractor, or vendor”); *id.*, ¶ 105 (“[t]he Compact nowhere authorize[s] the State
5 to deny the Nation the right to engage in Class III gaming”). But that dispute is about the
6 terms of the compact, not the requirements of IGRA. Although the State and the Nation may
7 have a dispute about their rights and obligations under the compact, there should be no
8 dispute that IGRA allows States to regulate Class III gaming on Indian lands in accordance
9 with a tribal-State compact. Such regulation is precisely what IGRA was enacted to permit
10 and thus does not conflict with that statute’s purposes or objectives.

11 **C. The Nation Cannot Use IGRA To Compel The State To Issue Certifications.**

12 The Nation’s interpretation of IGRA is flawed for yet another reason: Under it, IGRA
13 would commandeer the State’s and its officers’ authority to issue certifications relating to the
14 West Valley casino. Because the U.S. Constitution’s Tenth Amendment prohibits a reading
15 of IGRA that would effectively allow the federal government to force the State to certify
16 Indian casinos, employees, and vendors, it too requires dismissal of the Nation’s claims.

17 Ordinarily, when federal law preempts state law, it “*displace[s]* state law” in that area
18 and replaces it with a federal standard or requirement. *See Olympic Pipe Line Co. v. City of*
19 *Seattle*, 437 F.3d 872, 877 (9th Cir. 2006) (emphasis added). Here, however, a federal order
20 barring the State from “refusing to certify” the Nation, employees, and vendors (D.E. 1 at 32),
21 would not replace Arizona law with any federal directive. Instead, federal law simply would
22 require the *Arizona* officials to use their own powers under *Arizona* law to issue *Arizona*
23 certifications. That type of “preemption” would involve a “prescription for state and local
24 governing bodies to use their ... power in a specified way” (*Petersburg Cellular P’ship v. Bd.*
25 *of Sup’rs of Nottoway Cnty.*, 205 F.3d 688, 702 (4th Cir. 2000)), and would violate the Tenth
26 Amendment’s prohibition on commandeering of the regulatory authority of the States. The
27 Tenth Amendment simply does not permit the federal government to command a State to
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1 “govern according to Congress’ instructions” in such a way. *New York v. United States*, 505
2 U.S. 144, 162 (1992).

3 As the Supreme Court has said, “[i]t is an essential attribute of the States’ retained
4 sovereignty that they remain independent and autonomous within their proper sphere of
5 authority” (*Printz*, 521 U.S. at 928), and the federal government may not “directly ... compel
6 the States to require or prohibit” the licensing of individuals or entities. *New York*, 505 U.S.
7 at 166; *Bd. of Natural Resources of the State of Wash. v. Brown*, 992 F.2d 937, 947 (9th Cir.
8 1993) (concluding that provisions in a federal law directing, among other things, that “the
9 Governor of each State to which [the Act] applies ... shall ... issue regulations to carry out
10 the purposes of this section” violated the Tenth Amendment). Just as the Tenth Amendment
11 precludes the federal government from directing a State to issue regulations (*see Brown*, 992
12 F.2d at 947), so, too, does it preclude the federal government from requiring a State to issue
13 regulatory approvals for Class III gaming activities.

14 The Tenth Amendment prohibits such commandeering of state authority in part
15 because a federal takeover of a State’s regulatory authority necessarily diminishes the
16 accountability of the State government to its citizens. *New York*, 505 U.S. at 168. That
17 concern is palpable here. Arizona citizens understandably will blame State officials, not
18 Congress, if State officials issue regulatory approvals to the Nation’s casino in contravention
19 of State law and policy. Under the Tenth Amendment, if the federal government wants to
20 dictate that outcome, it must take ownership of the regulatory function and do it itself. It
21 cannot command a State to do its bidding. Since that is the sum and substance of the relief
22 the Nation seeks—a federal order commanding the State to issue a state-law regulatory
23 approval—the Nation’s complaint must be dismissed.

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V. CONCLUSION

For the foregoing reasons, each of the Nation's claims for relief should be dismissed with prejudice.

DATED: July 31, 2015

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2015, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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