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15 *Director Daniel Bergin, Arizona Department of Gaming*

16 UNITED STATES DISTRICT COURT
17 DISTRICT OF ARIZONA

18 The Tohono O’odham Nation,
Plaintiff,
19 v.
20 Douglas Ducey, Governor of Arizona;
Mark Brnovich, Arizona Attorney
21 General; and Daniel Bergin, Director,
Arizona Department of Gaming, in their
22 official capacities,
23 Defendants.

No. CV-15-01135-PHX-DGC

**DEFENDANT DANIEL BERGIN’S
ANSWER AND COUNTERCLAIM**

24 Daniel Bergin, Director, Arizona
Department of Gaming, in his official
25 capacity,
26 Counterclaimant,
27 v.
28 The Tohono O’odham Nation,
Counterdefendant.

1 Defendant Daniel Bergin, Director, Arizona Department of Gaming (“Director
2 Bergin”), answers Plaintiff’s Complaint as follows.

3 **INTRODUCTION AND NATURE OF ACTION**

4 1. Director Bergin admits that the Nation seeks equitable and declaratory relief
5 against him but denies the remaining allegations in paragraph 1.

6 2. Answering paragraph 2, Director Bergin affirmatively alleges that 25 U.S.C.
7 § 2710(d)(1) is the best evidence of its contents and speaks for itself. Director Bergin
8 denies that Indian Gaming Regulatory Act (“IGRA”) authorizes gaming conducted
9 pursuant to a compact obtained by fraud, misrepresentation, or in violation of a promise
10 supporting promissory estoppel. With those qualifications, the allegations in paragraph 2
11 are admitted.

12 3. Director Bergin admits that the Nation and the State entered into a compact
13 in 2002 to govern Class III gaming (the “Compact”) and the Compact was approved by
14 the U.S. Secretary of the Interior in 2003. Based on the Nation’s fraud and
15 misrepresentations associated with procuring the Compact, Director Bergin affirmatively
16 denies any implication from those facts that the Nation may conduct Class III gaming in
17 the Phoenix metropolitan area simply by virtue of having entered into the Compact.
18 Director Bergin admits that the land upon which the Nation intends to build a resort and
19 gaming facility was accepted by the Secretary of the Interior into trust for the Nation.
20 Director Bergin denies any remaining allegations in paragraph 3.

21 4. Director Bergin admits that the State and two other tribes sued the Nation as
22 described and that the ruling is currently on appeal. Director Bergin affirmatively alleges
23 that the Court did not address several arguments raised by the Plaintiffs in that case
24 regarding fraud, misrepresentation and promissory estoppel due to the Nation’s assertion
25 of sovereign immunity and that those claims support the State’s denial of any right by the
26 Nation to conduct Class III gaming in the Phoenix metropolitan area. The remainder of
27 the allegations in paragraph 4 are denied.

28 5. Director Bergin admits the final sentence of paragraph 5, except for the final

1 clause that asserts that IGRA and the Compact expressly authorize the project, which is
2 denied. Director Bergin also admits that the Arizona Department of Gaming (“ADG”) has
3 taken the position that it is not required to approve the facility due to the Nation’s fraud
4 and misrepresentations during the negotiation process, and that state law, as incorporated
5 within the terms of the Compact, allows the fraud and misrepresentations to be considered
6 by the ADG. The remaining allegations in paragraph 5 are denied.

7 6. Director Bergin denies the allegations in paragraph 6.

8 7. Director Bergin denies the allegations in paragraph 7.

9 8. Director Bergin admits that the ADG sent out the referenced notices, the
10 content of which speak for themselves. Director Bergin denies the remaining allegations
11 in paragraph 8.

12 9. Director Bergin denies that Count II remains in this case following the
13 dismissal of Count II by the Court. As a result, no answer is required to these allegations.

14 10. Director Bergin admits the Nation has brought this suit, but denies the
15 remaining allegations in paragraph 10.

16 **PARTIES**

17 11. Director Bergin admits the allegations in paragraph 11.

18 12. Director Bergin admits the allegations in paragraph 12.

19 13. Director Bergin admits the allegations in paragraph 13.

20 14. Director Bergin admits the allegations in paragraph 14.

21 15. Director Bergin admits the allegations in paragraph 15.

22 **JURISDICTION AND VENUE**

23 16. Director Bergin denies the allegations in paragraph 16.

24 17. Director Bergin admits the allegations in paragraph 17.

25 **GENERAL ALLEGATIONS**

26 18. Director Bergin admits the allegations in paragraph 18 but affirmatively
27 alleges that the cited case is the best evidence of its holding and speaks for itself.

28 19. Director Bergin admits that Congress enacted IGRA, 25 U.S.C. §§ 2701-

1 2721, in 1988, but denies the remaining allegations in paragraph 19 to the extent that they
2 imply that IGRA does not recognize the important role states play in regulating Class III
3 gaming or that tribes can conduct Class III gaming without state approval.

4 20. Director Bergin admits that the cited statutes have been accurately quoted.
5 Director Bergin affirmatively alleges that 25 U.S.C. § 2702 and 25 U.S.C. § 2710 are the
6 best evidence of their contents and speak for themselves. Director Bergin denies the
7 allegations in paragraph 20 to the extent that they imply that IGRA does not recognize the
8 important role states play in regulating Class III gaming or that tribes can conduct Class
9 III gaming without state approval. Director Bergin further affirmatively alleges federal
10 law does not require the State to certify any tribal gaming facility.

11 21. Answering paragraph 21, Director Bergin affirmatively alleges that 25
12 U.S.C. § 2703 is the best evidence of its contents and speaks for itself.

13 22. Answering paragraph 22, Director Bergin admits that 25 U.S.C.
14 § 2710(a)(1) states “Class I gaming on Indian lands is within the exclusive jurisdiction of
15 the Indian tribes and shall not be subject to the provisions of this chapter.” Director
16 Bergin admits that 25 U.S.C. § 2710(a)(2) states that tribes may regulate Class II gaming
17 but affirmatively asserts that Class II gaming must first be permitted by a state. Director
18 Bergin admits that the Nation has accurately quoted *Oneida Tribe of Indians of Wis. v.*
19 *Wisconsin*, 951 F.2d 757 (7th Cir. 1991) but omitted the fact that whether Class II gaming
20 is allowed at all is dependent on state law. Director Bergin admits that the Nation has
21 accurately quoted *Seneca-Cayuga Tribe of Okla. v. NIGC*, 327 F.3d 1019 (10th Cir. 2003)
22 but affirmatively asserts that in order for a tribe to engage in Class II gaming, three
23 conditions, which are not listed in paragraph 22, must be met. Director Bergin denies the
24 parenthetical in relation to the Nation’s citation of *Wisconsin v. Ho-Chunk Nation*, 784
25 F.3d 1076, 1077 (7th Cir. 2015) because it is a quotation focused on the facts of that
26 particular compact.

27 23. Answering paragraph 23, Director Bergin affirmatively alleges that 25
28 U.S.C. § 2710 is the best evidence of its contents and speak for itself. Director Bergin

1 denies the allegations in paragraph 23 to the extent that they are inconsistent with the
2 language of 25 U.S.C. § 2710. Director Bergin specifically denies that IGRA authorizes
3 gaming conducted pursuant to a compact obtained by fraud, misrepresentation, or in
4 violation of a promise supporting promissory estoppel.

5 24. Answering paragraph 24, Director Bergin affirmatively alleges that 25
6 U.S.C. § 2710 and court opinions are the best evidence of their contents and speak for
7 themselves. This paragraph is a legal argument about the meaning of those authorities to
8 which no answer is required, but if an answer is required, it is denied.

9 25. Answering paragraph 25, Director Bergin affirmatively alleges that 25
10 U.S.C. § 2703 and 25 U.S.C. § 2719 are the best evidence of their contents and speak for
11 themselves. This paragraph is a legal argument about the meaning of those authorities to
12 which no answer is required, but if an answer is required, it is denied.

13 26. Director Bergin admits that the ADG was established in 1995 but denies that
14 it was created solely to carry out the State's duties under IGRA. Director Bergin admits
15 the remaining allegations in paragraph 26.

16 27. Answering paragraph 27, Director Bergin affirmatively alleges that A.R.S.
17 § 5-602 is the best evidence of its contents and speaks for itself. Director Bergin denies
18 the allegations in paragraph 27 to the extent that they are inconsistent with the language of
19 A.R.S. § 5-602.

20 28. Answering paragraph 28, Director Bergin affirmatively alleges that A.R.S.
21 § 5-602 is the best evidence of its contents and speaks for itself. With that qualification,
22 the allegations of paragraph 28 are admitted.

23 29. Director Bergin admits the allegations in paragraph 29.

24 30. Director Bergin admits the allegations in paragraph 30.

25 31. Director Bergin admits that the Gila Bend Act is a public statute, but denies
26 any implication that the Nation's right to acquire replacement land allowed it to engage in
27 fraud and misrepresentations regarding its intentions to conduct Class III gaming in the
28 Phoenix metropolitan area.

1 32. Director Bergin lacks knowledge or information sufficient to form a belief
2 as to the truth of the allegations in paragraph 32, and therefore denies them.

3 33. Director Bergin lacks knowledge or information sufficient to form a belief
4 as to the truth of the allegations in paragraph 33, and therefore denies them.

5 34. Paragraph 34 is a legal argument about the interpretation or meaning of the
6 Compact, to which no response is required. To the extent any response is required,
7 Director Bergin denies paragraph 34.

8 35. Answering paragraph 35, Director Bergin affirmatively alleges that the 1993
9 compact is the best evidence of its contents and speaks for itself. With that qualification,
10 the allegations of paragraph 35 are admitted.

11 36. The allegations in paragraph 36 are admitted.

12 37. Director Bergin lacks knowledge or information sufficient to form a belief
13 as to the truth of the allegations in paragraph 37, and therefore denies them. Director
14 Bergin affirmatively alleges that AIGA presented itself to the State and to the public as
15 being authorized to speak for the negotiating member tribes with respect to their common
16 positions, and that no tribe publicly or to the State disputed that AIGA had such authority,
17 and that no tribe ever argued that anything AIGA or its officers stated was an inaccurate
18 representation of member tribes' positions.

19 38. Director Bergin lacks knowledge or information sufficient to form a belief
20 as to the truth of the allegations in paragraph 38, and therefore denies them. Director
21 Bergin affirmatively alleges that the intent of the voters of Arizona in passing Proposition
22 202 at the 2002 general election was to prohibit any additional casinos in the Phoenix
23 metropolitan area and the Nation was fully aware that the voters understood this to be the
24 effect of passing Proposition 202 to approve the standard form compacts system.

25 39. Director Bergin is without knowledge or information sufficient to form a
26 belief as to whether tribes negotiated among themselves at arm's length, and therefore
27 denies this allegation. Director Bergin admits the other allegations of paragraph 39, but
28 denies any implication that representation by counsel excuses the Nation's fraud and

1 misrepresentations.

2 40. Director Bergin admits the allegations of paragraph 40.

3 41. Director Bergin admits the allegations of paragraph 41, but denies any
4 implication that the allegations excuse the Nation's fraud and misrepresentations.

5 42. Paragraph 42 is a legal argument about the interpretation or meaning of the
6 Compacts, to which no response is required. To the extent any response is required,
7 Director Bergin denies paragraph 42. Director Bergin denies any implication that the
8 allegations excuse the Nation's fraud and misrepresentations. Director Bergin further
9 denies any implication that this paragraph is a complete statement of the parties'
10 negotiations, understandings, and agreements regarding the location of gaming facilities,
11 and affirmatively alleges that the Nation specifically represented to State negotiators that
12 it would locate its facilities in either the Tucson metropolitan area or in rural areas of its
13 existing reservation lands.

14 43. Director Bergin lacks knowledge or information sufficient to form a belief
15 as to the truth of the allegations in paragraph 43, and therefore denies them. Director
16 Bergin specifically denies any allegation or implication that the parties believed that the
17 Compact as negotiated would allow any possibility of additional facilities in the Phoenix
18 metropolitan area.

19 44. Director Bergin lacks knowledge or information sufficient to form a belief
20 as to the truth of the allegations in paragraph 44, and therefore denies them. Director
21 Bergin specifically denies any allegation or implication that the parties believed that the
22 Compact as negotiated would allow any possibility of additional facilities in the Phoenix
23 metropolitan area.

24 45. Director Bergin lacks knowledge or information sufficient to form a belief
25 as to the truth of the allegations in paragraph 45, and therefore denies them. Director
26 Bergin specifically denies any allegation or implication that the parties believed that the
27 Compact as negotiated would allow any possibility of additional facilities in the Phoenix
28 metropolitan area.

1 46. Director Bergin lacks knowledge or information sufficient to form a belief
2 as to the truth of the allegations in paragraph 46, and therefore denies them.

3 47. Director Bergin lacks knowledge or information sufficient to form a belief
4 as to the truth of the allegations in paragraph 47, and therefore denies them.

5 48. Director Bergin admits that the Arizona voters approved Proposition 202 in
6 November 2002 and that the State and the Nation signed the Compact on December 4,
7 2002.

8 49. Director Bergin admits the allegations in paragraph 49.

9 50. Paragraph 50 is a legal argument about the interpretation or meaning of the
10 Compact, to which no response is required. To the extent any response is required,
11 Director Bergin denies paragraph 50. Director Bergin further specifically denies any
12 implication that the State is required to act on or implement the Compact to allow the
13 Nation to conduct Class III gaming in the Phoenix metropolitan area, due to the fraud and
14 misrepresentations by the Nation.

15 51. Answering paragraph 51, Director Bergin denies any allegations about the
16 interpretation or meaning of the 2002 Compact. Director Bergin denies the allegations in
17 paragraph 51 to the extent that they are inconsistent with the 2002 Compact.

18 52. Paragraph 52 is a legal argument about the interpretation or meaning of the
19 Compact, to which no response is required. To the extent any response is required,
20 Director Bergin denies paragraph 52.

21 53. Paragraph 53 is a legal argument about the interpretation or meaning of the
22 Compact, to which no response is required. To the extent any response is required,
23 Director Bergin denies paragraph 53.

24 54. Paragraph 54 is a legal argument about the interpretation or meaning of the
25 Compact, to which no response is required. To the extent any response is required,
26 Director Bergin denies paragraph 54.

27 55. Paragraph 55 is a legal argument about the interpretation or meaning of the
28 Compact, to which no response is required. To the extent any response is required,

1 Director Bergin denies paragraph 55. Due to the Nation's fraud and misrepresentations,
2 Director Bergin further specifically denies that the ADG must certify a facility in the
3 Phoenix metropolitan area.

4 56. Paragraph 56 is a legal argument about the interpretation or meaning of the
5 Compact, to which no response is required. To the extent any response is required,
6 Director Bergin denies paragraph 56. Due to the Nation's fraud and misrepresentations,
7 Director Bergin further specifically denies that the ADG must certify a facility in the
8 Phoenix metropolitan area.

9 57. Paragraph 57 is a legal argument about the interpretation or meaning of the
10 Act, to which no response is required. To the extent any response is required, Director
11 Bergin denies paragraph 57.

12 58. Director Bergin lacks knowledge or information sufficient to form a belief
13 as to the truth of the allegations in paragraph 58, and therefore denies them.

14 59. Paragraph 59 is a legal argument about the interpretation or meaning of the
15 Act, to which no response is required. To the extent any response is required, Director
16 Bergin denies paragraph 59.

17 60. Paragraph 60 is a legal argument about the interpretation or meaning of the
18 Act, to which no response is required. To the extent any response is required, Director
19 Bergin denies paragraph 60.

20 61. Director Bergin lacks knowledge or information sufficient to form a belief
21 as to the source of the funds used, and denies that allegation. Director Bergin denies that
22 the Nation directly purchased the land. Other allegations in paragraph 61 are admitted.

23 62. Director Bergin admits the allegations in paragraph 62.

24 63. Director Bergin admits the first sentence in paragraph 63. Answering the
25 remaining allegations in paragraph 63, Director Bergin affirmatively alleges that the
26 Lands Replacement Act is the best evidence of its contents and speaks for itself. Director
27 Bergin denies the allegations in paragraph 63 to the extent that they are inconsistent with
28 the language of the Lands Replacement Act.

1 64. Director Bergin admits the first sentence of paragraph 64, but denies the
2 remaining allegations in paragraph 64.

3 65. Director Bergin admits that the State of Arizona previously sued the Nation
4 in this Court seeking to enjoin the West Valley Resort project. Director Bergin denies the
5 remaining allegations of paragraph 65 as misstating the scope of the lawsuit.

6 66. Director Bergin admits the allegations in paragraph 66 but affirmatively
7 alleges that they do not fully describe the basis for the prior complaint.

8 67. Addressing paragraph 67, the Court's rulings speak for themselves.
9 Director Bergin denies any implication that the Court's ruling requires the ADG to certify
10 the Nation's conduct of Class III gaming in the Phoenix metropolitan area. Any
11 remaining allegations in paragraph 67 are denied.

12 68. Addressing paragraph 68, the Court's rulings speak for themselves.
13 Director Bergin denies any implication that the Court's ruling requires the ADG to certify
14 the Nation's conduct of Class III gaming in the Phoenix metropolitan area, and all other
15 remaining allegations.

16 69. Director Bergin admits the allegations in paragraph 69 that this Court did
17 not decide the claims for promissory estoppel, fraud in the inducement, and material
18 misrepresentation, and affirmatively alleges that no court has ever addressed or decided
19 those claims. Director Bergin denies any implication that the Court's ruling requires the
20 ADG to certify the Nation's conduct of Class III gaming in the Phoenix metropolitan area.

21 70. Director Bergin denies the allegations in paragraph 70.

22 71. Addressing paragraph 71, the Court's rulings speak for themselves. This
23 paragraph is otherwise denied, and Director Bergin specifically denies any implication by
24 the Nation that the Court's prior rulings require the ADG to certify the Nation's conduct
25 of Class III gaming in the Phoenix metropolitan area.

26 72. Addressing paragraph 72, the Court's rulings speak for themselves.
27 Director Bergin denies any implication by the Nation that the Court's prior rulings require
28 the ADG to certify the Nation's conduct of Class III gaming in the Phoenix metropolitan

1 area. Director Bergin denies the allegation that the “principal” evidence of fraud was as
2 described, and affirmatively alleges that there was significant evidence of fraud and
3 misrepresentation by the Nation from many sources.

4 73. Addressing paragraph 73, the Court’s rulings speak for themselves.
5 Director Bergin denies any remaining allegations in paragraph 73.

6 74. Addressing paragraph 74, the Court’s rulings speak for themselves.
7 Director Bergin denies any remaining allegations in paragraph 74.

8 75. Answering paragraph 75, Director Bergin affirmatively alleges that the cited
9 letters are the best evidence of their contents and speak for themselves. Director Bergin
10 denies the allegations in paragraph 75 to the extent that they are inconsistent with the
11 language of the cited letters.

12 76. Answering paragraph 76, Director Bergin affirmatively alleges that the cited
13 letter is the best evidence of its contents and speaks for itself. Director Bergin denies the
14 allegations in paragraph 76 to the extent that they are inconsistent with the language of the
15 cited letter.

16 77. Answering paragraph 77, Director Bergin affirmatively alleges that the cited
17 letter is the best evidence of its contents and speaks for itself. Director Bergin denies the
18 allegations in paragraph 77 to the extent that they are inconsistent with the language of the
19 cited letter.

20 78. Director Bergin denies the allegations in paragraph 78. Further answering
21 paragraph 78, Director Bergin affirmatively alleges that the cited letter is the best
22 evidence of its contents and speaks for itself. Director Bergin denies the allegations in
23 paragraph 78 to the extent that they are inconsistent with the language of the cited letter.
24 In any event, Governor Ducey and Attorney General Brnovich have been dismissed from
25 this action on the Court’s grant of their motion.

26 79. Answering paragraph 79, Director Bergin affirmatively alleges that the cited
27 letter is the best evidence of its contents and speaks for itself. Director Bergin denies the
28 allegations in paragraph 79 to the extent that they are inconsistent with the language of the

1 cited letter. In any event, Governor Ducey and Attorney General Brnovich have been
2 dismissed from this action on the Court's grant of their motion.

3 80. Answering paragraph 80, Director Bergin affirmatively alleges that the cited
4 letter is the best evidence of its contents and speaks for itself. Director Bergin denies the
5 allegations in paragraph 80 to the extent that they are inconsistent with the language of the
6 cited letter.

7 81. Answering paragraph 81, Director Bergin affirmatively alleges that the cited
8 letters are the best evidence of its contents and speak for themselves. Director Bergin
9 denies the allegations in paragraph 81 to the extent that they are inconsistent with the
10 language of the cited letters.

11 82. Director Bergin denies the allegations in paragraph 82.

12 83. Answering paragraph 83, Director Bergin affirmatively alleges that the cited
13 letter is the best evidence of its contents and speaks for itself. Director Bergin denies the
14 allegations in paragraph 83 to the extent that they are inconsistent with the language of the
15 cited letter.

16 84. Director Bergin denies the allegations in paragraph 84.

17 85. Answering paragraph 85, Director Bergin affirmatively alleges that the cited
18 letter is the best evidence of its contents and speaks for itself. With that qualification, the
19 allegations are admitted.

20 86. Director Bergin admits the allegations in paragraph 86.

21 87. Director Bergin admits the allegations in paragraph 87.

22 88. Answering paragraph 88, Director Bergin affirmatively alleges that the cited
23 notices are the best evidence of their contents and speaks for themselves. Director Bergin
24 denies the allegations in paragraph 88 to the extent that they are inconsistent with the
25 language of the cited notices.

26 89. Director Bergin denies the allegations in paragraph 89.

27 90. Director Bergin admits the allegations in paragraph 90.

28 91. Director Bergin admits the allegations in paragraph 91.

1 92. Director Bergin denies the allegations in paragraph 92.

2 93. Director Bergin denies the allegations in paragraph 93.

3 **COUNT ONE:**

4 **FEDERAL PREEMPTION OF DEFENDANTS' OBSTRUCTION OF**
5 **LAWFUL CLASS III GAMING**

6 94. Director Bergin incorporates by reference his answers to the preceding
7 paragraphs.

8 95. Director Bergin admits the quotation from the United States Constitution,
9 but denies the remaining allegations in paragraph 95.

10 96. Director Bergin admits the legal references in paragraph 96, but denies any
11 interpretation of those authorities and any implication that the ADG has violated any of
12 the referenced authorities.

13 97. Director Bergin denies the allegations in paragraph 97.

14 98. Director Bergin admits the legal references in paragraph 98, but denies any
15 interpretation of those authorities and any implication that the ADG must certify a gaming
16 facility when the gaming facility operator has previously engaged in fraud and
17 misrepresentation.

18 99. Director Bergin denies the allegations in paragraph 99.

19 100. Director Bergin denies the allegations in paragraph 100.

20 101. Answering paragraph 101, Director Bergin admits that the ADG takes the
21 position that it may not be required to issue certifications and approvals to the Nation's
22 gaming facility located in the Phoenix metropolitan area because the gaming facility
23 operator has previously engaged in fraud and misrepresentation. Director Bergin denies
24 the remaining allegations in paragraph 101.

25 102. Director Bergin denies the allegations in paragraph 102.

26 103. Director Bergin admits the legal references in paragraph 103, but denies any
27 implication that the ADG must certify a gaming facility when the gaming facility operator
28 has previously engaged in fraud and misrepresentation. Director Bergin denies the

1 remaining allegations in paragraph 103.

2 104. Director Bergin denies the allegations in paragraph 104.

3 105. Director Bergin denies the allegations in paragraph 105.

4 106. Director Bergin denies the allegations in paragraph 106.

5 107. Director Bergin denies paragraph 107, and specifically denies any
6 implication that the ADG must certify a gaming facility when the gaming facility operator
7 has previously engaged in fraud and misrepresentation.

8 108. Director Bergin denies the allegations in paragraph 108.

9 109. Director Bergin denies the allegations in paragraph 109.

10 110. Director Bergin denies the allegations in paragraph 110.

11 111. Director Bergin denies the allegations in paragraph 111.

12 112. Director Bergin denies the allegations in paragraph 112.

13 113. Director Bergin denies the allegations in paragraph 113.

14 **COUNT TWO:**

15 **FEDERAL PREEMPTION OF STATE REGULATION OF**
16 **CLASS II GAMING**

17 114. Director Bergin incorporates by reference his answers to the preceding
18 paragraphs.

19 115. Director Bergin denies that Count II remains in this case following the
20 dismissal of Count II by the Court and, as a result, no response is required to this count.

21 116. Director Bergin denies that Count II remains in this case following the
22 dismissal of Count II by the Court and, as a result, no response is required to this count.

23 117. Director Bergin denies that Count II remains in this case following the
24 dismissal of Count II by the Court and, as a result, no response is required to this count.

25 118. Director Bergin denies that Count II remains in this case following the
26 dismissal of Count II by the Court and, as a result, no response is required to this count.

27 119. Director Bergin denies that Count II remains in this case following the
28 dismissal of Count II by the Court and, as a result, no response is required to this count.

1 120. Director Bergin denies that Count II remains in this case following the
2 dismissal of Count II by the Court and, as a result, no response is required to this count.

3 121. Director Bergin denies that Count II remains in this case following the
4 dismissal of Count II by the Court and, as a result, no response is required to this count.

5 122. Director Bergin denies that Count II remains in this case following the
6 dismissal of Count II by the Court and, as a result, no response is required to this count.

7 123. Director Bergin denies that Count II remains in this case following the
8 dismissal of Count II by the Court and, as a result, no response is required to this count.

9 124. Director Bergin denies that Count II remains in this case following the
10 dismissal of Count II by the Court and, as a result, no response is required to this count.

11 125. Director Bergin denies each and every allegation of Plaintiff's Complaint
12 not specifically admitted herein.

13 **SEPARATE AND AFFIRMATIVE ADDITIONAL DEFENSES**

14 By alleging the defenses set forth below, Director Bergin is not in any way
15 agreeing or conceding that he has the burden of proof or the burden of persuasion on any
16 of these issues.

17 1. Failure to state a claim: The Nation's Complaint and each purported cause
18 of action contained therein fail to state a claim or cause of action against Director Bergin
19 upon which relief can be granted.

20 2. Lack of standing: The Nation's claims are barred, in whole or in part,
21 because the Nation lacks standing to assert any or all of the causes of action alleged in the
22 Complaint.

23 3. Lack of jurisdiction: The court lacks jurisdiction over some or all of the
24 claims asserted by the Nation.

25 4. Promissory estoppel: Promissory estoppel precludes the Nation from
26 asserting each purported cause of action in the Complaint.

27 5. Fraud: The Nation's fraud in connection with the negotiation of the 2002
28 Compact renders it voidable, subject to rescission, and unenforceable.

1 6. Material misrepresentation: The Nation’s material misrepresentations in
2 connection with the negotiation of the 2002 Compact render it voidable, subject to
3 rescission, and unenforceable.

4 7. Unclean hands: The Nation’s unclean hands precludes the relief it seeks
5 herein.

6 8. Laches: By reason of its own conduct, acts, and omissions, the Nation is
7 barred from any relief by the doctrine of laches.

8 9. Bad faith: The Nation’s bad faith in connection with the negotiation of the
9 2002 Compact precludes the relief it seeks herein.

10 10. Compliance with obligations and legal duties: Director Bergin has
11 appropriately, completely, and fully performed and discharged any and all obligations and
12 legal duties arising out of the matters alleged in the Complaint.

13 11. Failure to mitigate damages: The Nation has failed to mitigate its damages,
14 if any, and any recovery should be reduced or denied accordingly.

15 12. Sovereign immunity: Sovereign immunity bars the Nation’s Complaint and
16 each purported cause of action contained therein.

17 13. Violation of the Tenth Amendment: The tenth amendment’s anti-
18 commandeering doctrine prohibits the federal government from requiring state officials to
19 issue regulatory approvals to tribal casinos.

20 14. Adequate remedy at law: The Nation’s claims for equitable relief are barred
21 to the extent there is an adequate remedy at law.

22 15. Speculative equitable relief: The Nation’s claims for equitable relief are
23 barred to the extent they seek “future” or “speculative” damages.

24 16. Affirmative or mandatory injunction: The Nation’s claims for equitable
25 relief are barred to the extent they seek an affirmative or mandatory injunction.

26 17. No causation or injury in fact: The Nation has not sustained any injury or
27 damage as a result of any actions taken by Director Bergin, and thus is barred from
28 asserting any claim against Director Bergin.

1 18. No attorneys' fees: The Nation's request for attorneys' fees in this matter is
2 barred because it lacks any basis in law or contract.

3 19. Director Bergin reserves the right to assert all additional affirmative
4 defenses, including those set forth in Federal Rule of Civil Procedure 8(c), as more
5 information becomes known through discovery.

6 **PRAYER**

7 WHEREFORE, Director Bergin prays for the following relief:

- 8 a. That the Nation takes nothing by its Complaint;
- 9 b. That judgment on the Complaint, and on each cause of action against
10 Director Bergin, be entered in Director Bergin's favor and against the Nation;
- 11 c. That Director Bergin be awarded his costs incurred herein, including
12 reasonable attorneys' fees and costs; and
- 13 d. For such other relief as the Court deems appropriate.

14 **COUNTERCLAIMS**

15 Pursuant to Rule 13, Federal Rules of Civil Procedure, Director Bergin asserts the
16 following counterclaims against the Nation.

17 1. Director Bergin, on behalf of the Arizona Department of Gaming ("ADG"),
18 brings this action under the Indian Gaming Regulatory Act ("IGRA") and the 2002
19 Tohono O'odham Nation—State of Arizona Gaming Compact ("Compact"), which is
20 attached as Exhibit B to Plaintiff's complaint, to enjoin the Tohono O'odham Nation
21 ("Nation") from engaging in Class III gaming activity, the alleged right to which was
22 procured by the Nation's fraudulent conduct in connection with the Compact.

23 2. Federal law requires that casino-style gaming on Indian lands be governed
24 by Tribal-State compacts. Specifically, the IGRA provides that casino-style gaming
25 ("Class III gaming" as defined in IGRA) "shall be lawful on Indian lands only if such
26 activities are (A) authorized by [a Tribal] ordinance or resolution . . . , (B) located in a
27 State that permits such gaming for any purpose by any person, organization, or entity, and
28 (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe

1 and the State . . . that is in effect.” 25 U.S.C. § 2710(d)(1).

2 3. IGRA also provides, “[t]he United States district courts shall have
3 jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a
4 class III gaming activity located on Indian lands and conducted in violation of any Tribal-
5 State compact . . . that is in effect.” 25 U.S.C. § 2710(d)(7)(A)(ii).

6 4. In Arizona, all gaming tribes have identical forms of Tribal-State compacts
7 negotiated between the State of Arizona and seventeen Indian tribes in Arizona, including
8 the Nation. All seventeen tribes negotiated jointly and entered into identical compacts
9 with the intent that all seventeen tribes would benefit from the uniform language of the
10 compacts. By their terms, none of the compacts became effective until each tribe with
11 gaming facilities in Maricopa, Pima, or Pinal Counties entered into its respective compact
12 with the State and the U.S. Department of the Interior (“Interior”) approved each compact.

13 5. The identical gaming compacts that the seventeen tribes and the State of
14 Arizona negotiated were incorporated into an initiative called the “Indian Gaming
15 Preservation and Self-Reliance Act” (“Proposition 202”) that Arizona voters approved at
16 the 2002 general election.

17 6. In negotiations for the seventeen Tribal-State compacts and during the
18 public debate on Proposition 202, the Nation both expressly and impliedly represented to
19 the State, to other tribes, and to the voters of Arizona that the compacts would preclude
20 any tribe, including the Nation, from opening a new gaming facility in the Phoenix
21 metropolitan area.

22 7. By representing that the Compact would prevent additional gaming facilities
23 from being opened in the Phoenix metropolitan area, the Nation was necessarily
24 representing that it would not conduct Class III gaming on any lands in the Phoenix
25 metropolitan area it might have taken into trust under the Gila Bend Reservation
26 Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) (“Gila Bend Act”). The Gila
27 Bend Act authorizes the Nation to acquire by purchase and have taken into trust land in
28 Maricopa, Pinal, or Pima counties that meets specified requirements.

1 **JURISDICTION AND VENUE**

2 15. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question
3 jurisdiction), 25 U.S.C. § 2710(d)(7)(A)(ii) (jurisdiction over actions brought by States or
4 Indian tribes to enjoin gaming activity that would violate a Tribal-State compact), 28
5 U.S.C. § 1367 (Supplemental jurisdiction over state law claims), and 28 U.S.C. §§ 2201-
6 2202 (the Declaratory Judgment Act).

7 16. Venue in this Court is proper under 28 U.S.C. §§ 1391(b)(2), because the
8 negotiation and signing of the Compact occurred in this federal district and the real
9 property that is the subject of the action is located in this federal district.

10 **GENERAL ALLEGATIONS**

11 17. IGRA provides that an Indian tribe may conduct Class III gaming on its
12 Indian lands only if authorized pursuant to a Tribal-State compact. On June 24, 1993, the
13 State of Arizona and the Nation entered into a compact authorizing gaming on the “Indian
14 Lands of the Tribe” at up to four locations. 1993 Compact § 3(j)(1).

15 18. The 1993 Compact provides that “[g]aming Activity on lands acquired after
16 the enactment of the Act of [sic] October 17, 1988 [IGRA] shall be authorized only in
17 accordance with 25 U.S.C. § 2719.” 1993 Compact 3(j)(1). The Nation represented to a
18 federal court and to state negotiators and state legislative staff that this language would be
19 sufficient to prevent any off-reservation casinos in the Phoenix area without the
20 governor’s consent, because no tribe could assert that new lands were the settlement of a
21 land claim.

22 19. On August 18, 1993, Interior published in the Federal Register its approval
23 of the compact, as required by IGRA.

24 20. In 1999, four years before the scheduled expiration of the existing Arizona
25 Class III Tribal State Gaming compacts with various Arizona tribes, negotiations for new
26 gaming compacts began.

27 21. Seventeen Arizona Indian tribes, including the Nation, negotiated with then-
28 Governor Jane Hull and the ADG regarding material issues that would be a part of each of

1 their respective compacts with the State.

2 22. While those parties involved in the negotiations anticipated that each Indian
3 tribe would sign its own compact with the State of Arizona, they collectively negotiated
4 the material terms and conditions as if they were negotiating one standard form of
5 compact. The compacts would not become effective until each tribe with gaming
6 facilities in Maricopa, Pima, or Pinal Counties approved its respective compact and
7 obtained Interior's approval as well.

8 23. After years of negotiations, the State of Arizona and the seventeen tribes
9 reached agreement on the number of gaming devices (*i.e.*, slot machines) and the number
10 and location of gaming facilities (*i.e.*, tribal casinos) that the new compacts would
11 authorize. The seventeen tribes negotiated among themselves to determine how many
12 gaming facilities and machines each would be allocated from the total.

13 24. The new compacts would increase the total number of permitted gaming
14 devices for each tribe but reduce the total number of authorized gaming facilities in the
15 State from 38 to 29.

16 25. During negotiations, the State asked the Nation to accept a reduction in the
17 number of casinos authorized for it under the compact from four to three, because all other
18 urban tribes had accepted a reduction in the number of facilities. The Nation argued that
19 it should be allowed a fourth casino because it was both a rural and urban tribe, and it
20 needed four facilities to have a casino in a rural areas while also having the ability to have
21 three Tucson casinos to use its machine allocations fully. The Nation represented that if it
22 was allowed to retain the authorization for four facilities, it would locate its facilities in
23 either the Tucson metropolitan area or in rural areas of its reservation, at the location of its
24 existing facility in Why and perhaps an additional facility in Gila Bend or Florence if its
25 plans for a third Tucson-area facility (in addition to its two existing Tucson-area casinos)
26 were not realized. The State relied on these specific, affirmative representations by the
27 Nation in eventually agreeing to allow the Nation alone to retain the right to operate four
28 casinos while all other urban tribes had agreed to each give up one casino authorization

1 under the compact.

2 26. As in the 1993 compacts, gaming would not be allowed on any lands
3 acquired after October 17, 1988 except “in accordance with 25 U.S.C. 2719,” which in
4 turn prohibits gaming on lands taken into trust after 1988, subject to certain limited
5 exceptions. Compact 3(j)(1); *see also* A.R.S. § 5-601.02(I)(6)(j)(1). Further, Compact
6 § 3(p) prohibits the Nation from engaging in “any Class III gaming not specifically
7 authorized in this Section 3.”

8 27. These limits on the number and location of gaming facilities were a key part
9 of the consideration bargained for by the State and the other tribes.

10 28. Moreover, these compact provisions are highly interdependent. If the State
11 and any tribe agree to increase the number of gaming devices, increase the number or size
12 of gaming facilities, increase the wager limits, allow additional types of games, or reduce
13 the payments a tribe must make to the State, then corresponding changes to terms of the
14 compacts for all other tribes must be changed. Compact § 3(g).

15 29. This carefully constructed balance was embodied in Proposition 202, which
16 Arizona voters approved in November 2002 after considerable public debate.

17 30. Then-Governor Jane Hull announced this historic agreement in a press
18 release dated February 20, 2002, which included a bullet point emphasizing that under the
19 agreement, there would be “[n]o additional casinos allowed in the Phoenix metropolitan
20 area and one additional casino in the Tucson area.” The Tucson-area casino language
21 referred to a fourth but unused casino site available to the Nation under the Compact. All
22 parties intended this site to be limited to the Tucson area or a rural portion of the Nation’s
23 reservation or a rural portion of the Nation’s reservation, consistent with the Nation’s
24 express representations.

25 31. The Nation misrepresented and failed to disclose its plans for and claimed
26 authority to seek and obtain a gaming facility in the Phoenix metropolitan area.

27 32. The Nation knew that it was a basic assumption of the State and the other
28 sixteen tribes that, under the new compacts, no new class III casinos would be permitted

1 in the Phoenix metropolitan area.

2 33. Further, the Nation's failure to disclose its plans or to assert the right to
3 obtain additional reservation lands in the Phoenix metropolitan area that would be eligible
4 for gaming under 25 U.S.C. § 2719 was, under the circumstances, equivalent to an
5 assertion that it had no such plans or right, because the Nation: (1) joined in, endorsed, or
6 authorized statements that the compacts would not allow it to open such a facility; and (2)
7 never contradicted or corrected any of those statements.

8 34. Proposition 202 addressed legal issues that had been raised in litigation with
9 the horse-and-dog-racetrack industry, resolving "any technical deficiencies in current state
10 law and authoriz[ing] the governor to execute new tribal-state compacts, in accordance
11 with specified parameters, so that Indian casinos can continue to operate." Prop. 202, § 2
12 (declaration of purpose). It also provided voters with an alternative to other ballot
13 measures that affected Indian gaming, including Proposition 201, which would have
14 authorized racetrack-based gaming (or "racinos"), and Proposition 200, which was
15 supported by a single tribe and was not the product of joint Tribal-State negotiations.

16 35. In 2002, the 17 tribes (including the Nation) and civic leaders formed a
17 coalition called "Arizonans for Fair Gaming and Indian Self Reliance" ("the Coalition") to
18 urge Arizona voters to approve Proposition 202 and reject Propositions 200 and 201. The
19 Nation provided \$1.8 million in funding to the Coalition.

20 36. The Coalition provided voters with a document called "Answers to
21 Common Questions" that made plain that no additional gaming facilities would be in
22 Phoenix. A notation on the face of this document stated that it was paid for with "[m]ajor
23 funding provided by . . . Tohono O'odham Nation and other Indian tribes in Arizona."
24 The text of this document also was included on the Coalition's website. The Nation
25 intended for voters to rely on the Answers to Common Questions.

26 37. The Nation played a very significant leadership role in the development of
27 the Answers to Common Questions document, and Nation representatives Matt Smith and
28 Alexander Ritchie helped draft the document. It was approved by tribal leaders, including

1 the Nation's leaders. The Nation distributed the Answers to Common Questions
2 document during the campaign in support of Proposition 202. Nation officials specifically
3 agreed with the statement in the Answers to Common Questions document that "there will
4 be no additional facilities authorized in Phoenix, and only one additional facility permitted
5 in Tucson."

6 38. The language "one additional facility permitted in Tucson" refers explicitly
7 to the fact that the Nation, which is based in and has aboriginal lands in the Tucson area,
8 had only three gaming facilities in operation but would be allowed a fourth facility in the
9 Tucson area. The Nation also understood it had the option of operating this fourth casino
10 in a rural part of its reservation.

11 39. This statement that "there will be no additional facilities authorized in
12 Phoenix, and only one additional facility permitted in Tucson" was repeated widely by
13 various proponents of Proposition 202, including State officials testifying before the
14 Arizona Legislature. The reference to no additional facilities in Phoenix or in the Phoenix
15 metropolitan area was also reported widely in the media. The Nation never suggested that
16 this statement was inaccurate in any respect.

17 40. While the Nation was looking for a west Phoenix casino location, Nation
18 lobbyists Alexander Ritchie and Joe Abate stated to State legislators that under the
19 compacts there would be no additional casinos in the Phoenix metropolitan area and only
20 one in the Tucson area. In addition, Nation Chairman Manuel (along with other tribal
21 leaders) approved statements by David LaSarte-Meeks, the Executive Director of AIGA,
22 to the State Legislature saying this same thing.

23 41. Ned Norris, who was later elected Chairman of the Nation and extensively
24 promoted its efforts to put a casino in Glendale, served as a public relations spokesman for
25 the Nation during the Prop 202 campaign. In that role, he publicly supported Proposition
26 202 and urged Arizona voters at a Town Hall Meeting in Tucson to cast their vote for
27 approval. On September 25, 2002, he argued that voters should choose Proposition 202
28 because it would not "open gaming into cities." He argued that opening gaming into cities

1 would be unacceptable, because “the citizens of Arizona have, repeatedly over the years,
2 expressed their desire to keep gaming on the reservation.”

3 42. Then-Governor Jane Hull campaigned in favor of Proposition 202 and
4 against Propositions 200 and 201. In the Publicity Pamphlet published by the Arizona
5 Secretary of State to inform voters about the ballot measures they will be asked to
6 consider at the general election, the Governor urged Arizona voters to rely on the balance
7 that had been struck by the State and the tribes. Governor Hull stated:

8 I strongly urge you to vote ‘YES’ on Proposition 202, the ‘17
9 Tribe’ Initiative. Proposition 202 keeps casinos limited to
10 Indian reservations and limits the number of casinos on
11 reservations Proposition 202 ensures that no new casinos
12 will be built in the Phoenix metropolitan area and only one in
13 the Tucson area for at least 23 years. Proposition 202 keeps
14 gaming on Indian Reservations and does not allow it to move
15 into our neighborhoods Plain and simple, this is the best
16 gaming proposal for all Arizona citizens.

17 43. In its support for Proposition 202, the Nation both expressly and impliedly
18 represented to the State, to other tribes, and to the voters of Arizona that the compacts
19 would not authorize any tribe, including the Nation, to open a casino in the Phoenix
20 metropolitan area.

21 44. David LaSarte-Meeks previously testified that “everybody also understood
22 that the concept of no increase in the number of facilities in the Phoenix area market was
23 also very critical to getting the initiative past the electorate. It was a major talking point,
24 because it was a major concern for the public. So the very concept of no increase in the
25 Phoenix market was a critical piece getting it passed, especially considering we barely
26 passed.” *Arizona v. Tohono O’odham Nation*, 944 F. Supp. 2d 748, 762 (D. Ariz. 2013).

27 45. Chairman Manuel and his assistant Alexander Ritchie met with the editorial
28 boards of Tucson-area newspapers and told them that under the compact there would be
no increase in the number of facilities in the Phoenix market, and there would be up to one
more facility potentially in the Tucson market.

46. “Albert Manuel, Jr., a member of the Nation who served for a time as
chairman of Vi-ikam Doag Industries (“VDI”), an economic development corporation

1 chartered by the Nation allegedly for the purpose of the Phoenix-area casino project, also
2 testified that Proposition 202 included the understanding that no additional casinos would
3 be built in the Phoenix area.” *Arizona v. Tohono O’odham Nation*, 944 F. Supp. 2d 748,
4 762-63 (D. Ariz. 2013).

5 47. At the 2002 general election, Arizona voters approved Proposition 202 and
6 defeated the two other ballot measures that affected Indian gaming.

7 48. The State and other tribes relied on the Nation’s express and implied
8 representations that the compacts would not allow another casino in the Phoenix area in
9 supporting and advocating for the passage of Proposition 202 and in entering into the
10 compacts.

11 49. None of the compacts became effective until all tribes with gaming facilities
12 in Maricopa, Pima, or Pinal Counties had their new compacts approved by Interior.
13 Compact § 2(vv)(4).

14 50. The State would not have entered into the compact with the Nation but for
15 the representations by the Nation that the compact did not allow new gaming facilities in
16 the Phoenix metropolitan area.

17 51. The Nation had a secret plan to build a casino in the Phoenix metropolitan
18 area notwithstanding its participation in the negotiations that led to Proposition 202, its
19 vocal support for Proposition 202, and its entering into the 2002 Compact after voters
20 approved Proposition 202.

21 52. “Mary Ann Antone, a former member of the Nation’s Legislative Council,
22 testified that the Nation was looking for land to purchase in the Phoenix area as early as
23 1988 or 1989, and that while that land was not specifically for casino purposes, casinos
24 were an option.” *Arizona v. Tohono O’odham Nation*, 944 F. Supp. 2d 748, 763 (D. Ariz.
25 2013).

26 53. In approximately 1992, the Nation requested an opinion from Interior on
27 whether lands acquired under the Gila Bend Act would qualify as part of a “settlement of
28 a land claim” under IGRA and therefore be eligible for gaming. The Nation was given a

1 preliminary assessment that Interior would consider Gila Bend Act lands part of a
2 settlement of a land claim on May 6, 1993. The Nation withheld this material information
3 from the State and all other Arizona tribes from 1993 to 2009, including during the 2002
4 compact negotiations, and failed to disclose that the Nation claimed the right to conduct
5 gaming on Gila Bend Act lands under § 2719.

6 54. The Nation was actively looking for land in West Phoenix to purchase as
7 potential reservation lands and gaming locations during the negotiations over the 2002
8 compacts, well before the compacts were executed.

9 55. On January 25, 2000, the Nation requested a waiver from the Secretary of
10 the Interior of requirements in Section 6(d) of the Gila Bend Act—that one area of land be
11 contiguous to San Lucy Village near Gila Bend, Arizona—and that the Nation be
12 permitted to take more than three areas of contiguous tracts of land in trust. In sum, the
13 Nation requested that it be allowed to place up to five separate areas of land in trust. On
14 May 31, 2000, the Secretary of the Interior granted the waiver of the requirement that at
15 least one parcel of land must be contiguous to San Lucy Village and Interior also granted
16 a waiver of the requirement that no more than three separate areas of land may be
17 acquired under the Gila Bend Act. The Nation did not disclose these facts to the State or
18 to the 17-tribe coalition during the negotiation of the compacts.

19 56. “Handwritten notes from a meeting that allegedly occurred in May 2001,
20 attended by . . . members of the Nation’s Legislative Council, . . . contemplate the
21 building of a casino west of Phoenix while noting that the participants were ‘unsure what
22 will happen’ with the gaming compact. . . . The notes say: ‘Buy Land West Phx, put in
23 trust and build a casino,’ and ‘Put it in a shell company—need to keep it quiet especially
24 [sic] when negotiations [sic] of compact [with] State.’ . . . When asked about the notes in
25 his deposition, Mr. Manuel stated that he had no reason to dispute the notes and that the
26 notes refreshed his memory to some extent, particularly with regard to what appears to be
27 a proposed location for a casino represented by a hand-drawn map on the fourth page, but
28 Manuel did not know who took the meeting notes.” *Arizona v. Tohono O’odham Nation*,

1 944 F. Supp. 2d 748, 763 (D. Ariz. 2013).

2 57. A “transcript of a June 26, 2001, meeting of the San Lucy District Council
3 in which Richard Ramirez refers to plans to build a casino ‘on the west end of Phoenix’
4 and the need to keep the plans confidential ‘to minimize the impact of public hearings’
5 due to ‘resentment from the public about ... Indian tribes building casinos.’ . . . Transcripts
6 from meetings of VDI also reflect a VDI employee stating that the new casino would be
7 ‘way out there, but ... still [in] the Phoenix area.’ . . . Another employee states that ‘if
8 that’s going to be the position of the State, they don’t want any more casinos around the
9 Phoenix area, then they’re going to fight it, whoever the new governor is.’ . . . The first
10 employee responds: ‘Which is why we really want to wait until the initiative passes before
11 it gets out.’” *Arizona v. Tohono O’odham Nation*, 944 F. Supp. 2d 748, 763 (D. Ariz.
12 2013).

13 58. During negotiations and the Proposition 202 campaign, Nation Chairman
14 Manuel and members of the Nation’s legislative council—its entire Commerce
15 Committee—were actively involved in compact negotiations while simultaneously
16 participating in the search for land in the Phoenix metropolitan area for a casino.

17 59. On August 1, 2002, the VDI board held a joint meeting with the Nation’s
18 Commerce Committee. Five members of the Nation’s Commerce Committee attended:
19 Albert Manuel, Jr., Frances Miguel, Dennis Ramon, Kenneth Williams, and Barbara
20 Salvicio. The minutes indicate that the purpose of the meeting is “the land purchase for
21 the West Buckeye Property . . . for a casino to be built on that property.” Commerce
22 Committee member Frances Miguel stated that she felt the project was long overdue.
23 Commerce Committee member Kenneth Williams encouraged the VDI board to move
24 forward with the property. The minutes state that “[t]he Commerce Committee is in full
25 support of the land purchase for gaming purposes.”

26 60. On August 21, 2002, just two months before Proposition 202 passed,
27 Chairman Edward Manuel and the Commerce Committee attended a formal presentation
28 regarding the secret land search where a West Phoenix Land Presentation document was

1 distributed to the attendees.

2 61. Within months of the passage of Proposition 202, in August 2003 the Nation
3 purchased the Glendale Property, which consists of approximately 135 acres at 91st and
4 Northern Avenues, in Glendale, Arizona.

5 62. The Nation purchased the Glendale Property through its wholly owned
6 Delaware corporation called "Rainier Resources, Inc." Rainier Resources, Inc. acquired
7 title in fee simple. The Nation structured the transaction in this manner to conceal its
8 ownership of the property.

9 63. The Nation kept its ownership of the Glendale Property secret for more than
10 five years. During that time, a public high school was opened across the street from the
11 site. Restaurants, hotels, and retail establishments were developed adjacent to and in close
12 proximity to the Glendale Property, all without the knowledge that the Nation planned to
13 build a casino in the neighborhood.

14 64. On January 20, 2009, Rainier Resources, Inc. conveyed the fee title to the
15 Nation.

16 65. On January 27, 2009, the Nation's Legislative Council passed Resolution
17 No. 09-049, which states in part:

18 BE IT . . . RESOLVED that the Tohono O'odham Legislative
19 Council hereby requests that the Office of Indian Gaming of
20 the Department of the Interior issue an opinion that the
21 Settlement Property was acquired under the settlement of a
22 land claim, and thus is excepted from IGRA's general
23 prohibition on gaming on lands acquired after the date of
24 enactment of IGRA.

25 66. On January 28, 2009, the Nation filed an application asking Interior to take
26 the Glendale Property in trust for the benefit of the Nation pursuant to the Gila Bend Act.

27 67. The letter to Interior conveying the Nation's fee-to-trust application stated:
28 "The Nation intends to use portions of the property for gaming purposes pursuant to
IGRA." The application asserted that gaming would be authorized under an IGRA
exception for land taken into trust as part of "a settlement of a land claim." 25 U.S.C.
§ 2719(b)(1)(B)(i).

1 68. At present, the Nation intends to use portions of the Glendale Property,
2 including Parcel 2, for gaming activities beginning in December 2015.

3 69. Notwithstanding its prior representations and non-disclosures, the Nation
4 now claims the right to operate a new casino in the Phoenix metropolitan area. Its present
5 position regarding gaming on land acquired under the Gila Bend Act could open the door
6 to as many four new casinos in the Phoenix metropolitan area, because the Nation could
7 choose to close its less profitable operations in Southern Arizona in favor of locations in
8 the Phoenix metropolitan area.

9 70. The Nation has stated that it will commence gaming activities in the
10 Phoenix metropolitan area in December 2015, notwithstanding its prior representations
11 that the Compact would not allow such activities.

12 **FIRST CAUSE OF ACTION**

13 **PROMISSORY ESTOPPEL**

14 71. Director Bergin realleges and incorporates the preceding paragraphs.

15 72. In negotiating and entering into the 2002 Tribal-State compacts and in
16 advocating for voter approval of Proposition 202, the State relied on the Nation's
17 commitment that its compliance with the compacts would ensure that no new gaming
18 facilities would be opened in the Phoenix metropolitan area, and its promises that it would
19 locate any additional facilities in the Tucson metropolitan area or in rural areas of its
20 reservation.

21 73. The Nation expected its promises to induce support for the Compact by the
22 State, the public and the Arizona voters; knew it was reasonable their promises would
23 induce such acceptance; intended its promises to induce such acceptance; and said
24 promises did in fact induce such acceptance.

25 74. The State has detrimentally relied on the Nation's promises in making
26 significant regulatory and policy decisions.

27 75. The State detrimentally relied on the Nation's promises in deciding to
28 advocate acceptance of Proposition 202.

1 76. The Arizona voters detrimentally relied upon the Nation's promises and
2 upon the State's advocacy of the compact in approving Proposition 202.

3 77. The Nation should be estopped and enjoined from upsetting those
4 substantial reliance interests by opening a Class III gaming facility in the Phoenix
5 metropolitan area.

6 78. The Nation should be estopped and enjoined from opening a Class III
7 gaming facility in the Phoenix metropolitan area based upon an invalidly entered into
8 compact induced by its promises.

9 79. This Court held in the prior lawsuit initiated by the State that a promissory
10 estoppel claim was barred by tribal sovereign immunity. *Arizona v. Tohono O'odham*
11 *Nation*, 944 F. Supp. 2d 748, 769-770 (D. Ariz. 2013). By initiating this action to force
12 the ADG to certify its Phoenix metropolitan area Class III facility, as allegedly required
13 by the Compact, the Nation has waived its sovereign immunity.

14 **SECOND CAUSE OF ACTION**

15 **FRAUD IN THE INDUCEMENT**

16 80. Director Bergin realleges and incorporates the preceding paragraphs.

17 81. On information and belief, the Nation had a secret plan at the time it was
18 negotiating the Compact to build a gaming facility in the Phoenix metropolitan area and to
19 assert the right to do so under IGRA and the Gila Bend Act, notwithstanding its contrary,
20 false, representations to the State, the public and the Arizona voters.

21 82. The Nation made these material misrepresentations knowing they were
22 likely to induce the State and the public to approve the Compact and intended that they do
23 so.

24 83. The Nation's representations induced the State accept the negotiated
25 compact language, advocate acceptance of Proposition 202 and to enter into the Compact.
26 The State would not have signed the Compact had it known of the Nation's plans to build
27 a new Class III casino in the Phoenix metropolitan area and to assert the right to do so
28 under IGRA and the Gila Bend Act.

1 they were likely to induce the State and the public to approve the Compact and intended
2 that they do so.

3 92. The State's assent to the Compact was induced by the Nation's
4 misrepresentations and intentional failures to disclose material facts.

5 93. The State's reliance on the Nation's representations was justified in the
6 circumstances.

7 94. The State is entitled to a declaration that because its assent to the Compact
8 was induced by the Nation's misrepresentations, the Compact is voidable, subject to
9 rescission, and unenforceable.

10 85. This Court held in the prior lawsuit initiated by the State that a material
11 misrepresentation claim was barred by tribal sovereign immunity. *Arizona v. Tohono*
12 *O'odham Nation*, No. CV11-0296-PHX-DGC, 2011 WL 2357833, *12-13 (D. Ariz. June
13 15, 2011). By initiating this action to force the ADG to certify its Phoenix metropolitan
14 area Class III facility, as allegedly required by the Compact, the Nation has waived its
15 sovereign immunity.

16 **RELIEF REQUESTED**

17 WHEREFORE, in accordance the Compact and the Indian Gaming Regulatory
18 Act, 25 U.S.C. § 2710(d)(1) and § 2710 (d)(7)(A)(ii), the Counterclaimant seeks:

19 a. A judgment that the Nation is estopped from opening any class III gaming
20 facilities in the Phoenix metropolitan area;

21 b. A judgment and injunction prohibiting the Nation from conducting class III
22 gaming activities on the Glendale Property or in the Phoenix metropolitan area;

23 c. Reformation of the Compact to prohibit the Nation from opening any new
24 class III gaming facilities in the Phoenix metropolitan area;

25 d. An award to the Counterclaimant of his reasonable attorneys' fees;

26 e. All other costs and fees as allowed by law; and

27 f. Such other and additional relief as the Court deems just and equitable.
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DATED this 8th day of October, 2015.

FENNEMORE CRAIG, P.C.

By *s/ Patrick Irvine*

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 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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