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S. 2670, KEEP THE PROMISE ACT OF 2014

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 17, 2014

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S. 2670, KEEP THE PROMISE ACT OF 2014

WEDNESDAY, SEPTEMBER 17, 2014

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Jon Tester, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

The CHAIRMAN. The Committee will come to order.

Today we are holding a hearing at the request of Arizona Senators McCain and Senator Flake on S. 2670. The bill would address an issue specific to Arizona, but one that could have broader implications for this Committee. It will affect the role of Congress with regard to gaming compacts between tribes and States.

The Indian Gaming Regulatory Act affirmed the authority of tribes to conduct gaming on the reservations. It specifically required States and tribes to negotiate gaming compacts. The Act further requires the Department of Interior to approve or disapprove these compacts.

The Act provided no further role for Congress in this process. I think most of the members of the Committee would agree that is a good thing.

The State of Arizona and the tribes within the State entered into a compact, which was voted on and passed through a statewide vote in 2002. Now, however, the tribes within the State and some municipalities disagree on what the vote approved. Senator McCain was highly involved in the drafting and the passage of both the Indian Gaming Regulatory Act and the Gila Bend Indian Reservation Lands Replacement Act. These acts formed the basis of the issue that S. 2670 would address.

We heard witness testimony on this issue earlier this year. And now we have called the stakeholders back to discuss the specifics of this legislation. We have also invited the Administration to get their perspective. Welcome, Kevin.

Overall, this Committee wants to ensure that any action taken on this specific issue doesn't have broader impacts for tribes across the Country.

Senator Barrasso, do you have an opening statement?

STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you, Mr. Chairman. In the interest of time, I will keep the statement brief. We will consider S. 2670, the Keep the Promise Act of 2014, introduced by Senators McCain and Flake. The complexity of issues involved in this issue should be fully examined by the Committee.

I appreciate my colleague Senator McCain's leadership on the matter. I want to welcome the witnesses to the hearing today and look forward to the testimony. Thank you, Mr. Chairman.

The CHAIRMAN. Senator McCain.

STATEMENT OF HON. JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA

Senator MCCAIN. First of all, Mr. Chairman, in this busy last week, I want to thank you for allowing time for this hearing. I appreciate it more than I can tell you. This is a really huge issue in my State, particularly in the Phoenix metropolitan area.

I was, with the late Senator Dan Inouye, heavily involved for many months as we put together the Indian Gaming Regulatory Act. We received witness after witness, particularly from various States that had large Native American communities, that said, look, we are all for Indian gaming. But we don't want it on land that is not contiguous to the Indian reservations. They said, we want it to be fair to Native Americans, but we also want it to be fair to the citizens of non-Indian Country that they can be assured that Indian gaming casinos won't show up in the middle of their communities.

I can assure you, and I can assure the witness, it was never the intent of Senator Inouye and I, through weeks and months of hearings, to have air-dropped, no matter what rationale you are using for it, because of some settlement, to have reservations that have non-contiguous Indian gaming air-dropped in the center of a metropolitan city without at least the people of that area being allowed to vote on it, at least.

But the fact is, it was never the intent of the law, and what you are about to do, Mr. Washburn, is to violate the intent of the law. Quite often around here we hear about legislation and people talk about the intent of Congress. I am telling you the intent of Congress, because it was called the Inouye-McCain Act. And it was a great Act. In light of the Cabazon decision, it was mandatory that the United States Congress act.

I am proud of that Act, and I am proud of the benefit that it has accrued to Indian Country. I am proud that there has been revenue sharing between, as there is in our State of Arizona, between the gaming tribes and the State of Arizona and the contribution they have made. I never contemplated air-dropping in the middle of Glendale, no matter what the rationale was for, an Indian gaming operation.

So I want to make it clear, Mr. Chairman, what the intent of the law was. Because I was one of the two authors.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator McCain and Senator Barrasso, for your comments.

Now I want to call up our first witness, Mr. Kevin Washburn, the Assistant Secretary for Indian Affairs at the Department of Interior. Kevin, you have been with us many times, we always look forward to hearing the Administration's thoughts on these issues. The Committee knows you are busy. So we will try to get through with your portion of the testimony as soon as possible. We will have some questions.

We appreciate your time. Thank you for being here today. You may proceed.

STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. WASHBURN. Thank you, Mr. Chairman. And thank you, Mr. Vice Chairman and Senator McCain. Thank you for having me here today.

Maybe I shouldn't be thanking you. This is a difficult issue and I find myself nervous today, and I guess it's because I never like to disappoint my friends. There are no more passionate tribal leaders in the Country that I know of that than Greg Mendoza and Diane Enos. They are probably here in the room. And yet, we find ourselves being asked to, being forced to provide our perspective on this bill.

I have to tell you that I am not really happy to be here, but when pushed, I will tell you what I think about this bill. I believe that the Tohono O'odham Nation has an expectation of land in Maricopa County or in Pinal or Pima County, and they have had that expectation for nearly 30 years now, based on the Gila Bend Act.

And they came by that expectation righteously. We assured them that we wouldn't flood their lands in the San Lucy District back in 1960 when we started working on a dam. And we proceeded to do just that. We flooded those lands. And they came to Congress and looked for a settlement, given the fact that their expectations didn't come out a they should have with regard to the dam.

So Congress enacted the Gila Bend Act and promised them land, up to 10,000 acres in three counties in Arizona, central Arizona, so long as it was not within an incorporated municipality. And that was their expectation and that is the Gila Bend Act. Congress was well aware of gaming at the time the Gila Bend Act was passed. It didn't include any prohibitions on Indian gaming. Indian gaming was a robust industry by that time and the very next year it ended up in the U.S. Supreme Court in the Cabazon case. Cases don't just arrive in the Supreme Court, they go through multiple levels before they reach the Supreme Court.

So this was, again, well known to Congress. There had already been hearings before Congress on Indian gaming and it was well known at the time the Gila Bend Act was passed.

Then shortly thereafter, in 1988, Congress enacted the Indian Gaming Regulatory Act, that Senator McCain spoke eloquently about. This Indian Gaming Regulatory Act did not mention Tohono O'odham and it indeed included a specific provision that allows an exception to the prohibition on gaming after the enactment of IGRA, on lands acquired after that time, included a specific provi-

sion that essentially speaks right to the situation involving the Gila Band parcel.

So Tohono O'odham had an expectation, a reasonable expectation that this land, which was certainly thought to be for economic development, that they would be able to game on this land.

I think a more practical perspective is also in order. I hear over and over that gaming distributes resources unfairly because it creates tribes that are haves and tribes that are have nots. Despite the popular conception, most tribes don't have gaming. Most tribes don't benefit in any way from gaming.

Gaming was being strongly encouraged when the Gila Band Act was passed. Ronald Reagan's Department of the Interior was strongly trying to get tribes to increase gaming, because that would increase self-sufficiency for tribes. And when Ronald Reagan signed the Indian Gaming Regulatory Act in 1988, he said he was supporting the statute because he wanted tribes to be more financially independent, more self-sufficient.

And I come over to this Committee all the time and I get beat up because some members of this Committee think that the Administration is not asking for enough money from the taxpayers for Indian tribes. And maybe we aren't. But this action by Tohono O'odham to try to open up this casino is their effort to provide for their own people. And it is clearly allowed by existing law. Certainly that issue has been litigated over and over. That is what Judge Campbell, a Republican appointee, found when he looked at this issue.

Let me add, too, that when gaming began in the Valley of the Sun, the population of the Phoenix metropolitan area was in a neighborhood of 2 million people. Today the metro area exceeds 4.3 million people. Surely there is enough room in this vast market for another tribe to benefit from gaming, especially an impoverished tribe. Last I checked, despite the recession and everything else that has been going on, Phoenix is still one of the fastest-growing cities in the Country. Again, surely in the fastest-growing cities, there is an opportunity for a growing gaming market, and opportunity for one more tribe to benefit from this vast market.

The promise referenced in the title of S. 2670 is kind of ironic. It is not one that is known to me, and it certainly is not a Federal promise. The Federal promise was to take land into trust for Tohono O'odham anywhere in Pima, Pinal or Maricopa Counties, so long as it was not within an already-incorporated area of a municipality. In my mind, our trust responsibility demands that we keep our Federal promises. We have broken a lot of treaties and we have broken a lot of Federal promises to Indian people in the past. The only promise by the United States that is at issue here today is the one made in the Gila Bend Act. The only way the Federal Government can keep its promise to the Tohono O'odham is for this Committee to reject this bill.

The Tohono O'odham property near Glendale presents an opportunity for another Indian tribe to share the wealth and open a new part of this gaming market. In the tight fiscal environment, that kind of economic development should be an imperative. Opening this facility would help make President Ronald Reagan's dream

come true of using gaming to lift tribes out of poverty and help make them more self-sufficient.

I will stand for your questions. Thank you, Chairman.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Good afternoon, Chairman Tester, Vice-Chairman Barrasso, and Members of the Committee. My name is Kevin Washburn. I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's testimony on S. 2670, the Keep the Promise Act of 2014, which is a bill that if enacted would prohibit Class II and Class III gaming activities on lands, within a defined "Phoenix metropolitan area," acquired in trust by the Secretary of the Interior for the benefit of an Indian tribe after April 9, 2013, and until January 1, 2027.

S. 2670 does not specifically identify a tribe or amend a particular law, but because of the subject matter of the bill, the Department concludes that this bill has a similar effect as a bill introduced in the 112th Congress involving the Tohono O'odham Nation (Nation) and the Nation's 53.54 acre parcel in Maricopa County, Arizona, which the Department has acquired in trust for the Nation pursuant to the Gila Bend Indian Reservation Lands Replacement Act (Public Law 99–503) (Gila Bend Act).

Because S. 2670 would amend the Gila Bend Act in a manner that significantly undermines the promises made by the United States in the Gila Bend settlement, the Department opposes S. 2670.

Gila Bend Indian Reservation Lands Replacement Act

The Nation is a federally recognized tribe located in southern and central Arizona. It has approximately 30,000 enrolled members, and has one of the largest tribal land bases in the country.

The San Lucy District is a political subdivision of the Nation. It was created by Executive Order in 1882 and originally encompassed 22,400 acres of land. In 1960, the U.S. Army Corps of Engineers (Corps) completed construction of the Painted Rock Dam on the Gila River. Prior to construction, the Bureau of Indian Affairs (BIA) and the Corps assured the Nation that flooding would not impair agricultural use of lands within the San Lucy District.

Despite these assurances, construction of the dam resulted in continuous flooding of nearly 9,880 acres of land within the San Lucy District, rendering them unusable for economic development purposes. Included among the destruction was a 750-acre farm that had previously provided tribal revenues. The loss of these lands forced a number of the Nation's citizens to crowd onto a 40-acre parcel of land.

Congress first moved to remedy the plight of the Nation's San Lucy District in 1982, when it directed the Secretary of the Interior to study the flooding and identify replacement lands within a 100-mile radius. After attempts to find replacement lands failed, Senators Barry Goldwater and Dennis DeConcini, along with then-Congressmen John McCain and Morris K. Udall, sponsored legislation to resolve the situation. In 1986, Congress enacted the Gila Bend Act to redress the flooding and loss of the Nation's lands.

The Gila Bend Act authorized the Nation to purchase private lands as replacement reservation lands and directed the Secretary of the Interior to take up to 9,880 acres of unincorporated land in Pima, Pinal, or Maricopa Counties into trust for the Nation, subject to certain other requirements. In addition, Congress mandated that the land *"shall be deemed to be a Federal Indian Reservation for all purposes."* In the accompanying 1987 agreement between the federal government and the Nation, the Nation gave up its right and title to 9,880 acres of land and approximately 36,000 acre-feet of federal reserved water rights.

Eventually, the Nation purchased a 53.54 acre parcel in Maricopa County, Arizona, and requested that the Secretary acquire the land in trust pursuant to the Gila Bend Act. On July 23, 2010, Assistant Secretary Echo Hawk issued a letter to Ned Norris, Jr., Chairman of the Tohono O'odham Nation, stating that the Nation's request for the trust acquisition of this parcel satisfied the legal requirements of the Gila Bend Act and that the Department was obligated to, and therefore would, acquire the land in trust pursuant to Congressional mandate. This decision was remanded to the Department by the United States Court of Appeals for the Ninth Circuit for further consideration of the meaning of section 6(d) of the Act. On July 3, 2014, I made a final agency determination on behalf of the Department to

acquire the parcel in trust for the Nation. The land was acquired in trust—as required by law—on July 7, 2014.

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S. 2670, the "Keep the Promise Act" would prohibit Class II and III gaming on any lands taken into trust for an Indian Tribe by the Secretary of the Interior, if those lands are within the "Phoenix metropolitan area," as defined in Section 3 of S. 2670. The prohibition of Class II and Class III gaming on such lands taken into trust for an Indian Tribe would retroactively begin April 9, 2013, and expire on January 1, 2027. S. 2670 would negatively impact the Nation's "all purposes" use of selected lands under the Gila Bend Act by limiting the Nation's ability to conduct Class II and Class III gaming on such selected lands.

Congress was clear when it originally enacted the Gila Bend Act in 1986, in which it stated that replacement lands *"shall be deemed to be a Federal Indian Reservation for all purposes."* By this language, Congress intended that the Nation be permitted to use replacement lands as any other tribe would use its own reservation trust lands, namely *"for all purposes"* and presumably to include economic development.

The Gila Bend Act was intended to remedy damage to the Nation's lands caused by flooding from the construction of the Painted Rock Dam. The United States and the Nation agreed to the terms of the Gila Bend Act, which included restrictions on where and how the Nation could acquire replacement lands. S. 2670 would specifically impact the Nation's Gila Bend Act by imposing additional restrictions beyond those agreed upon by the United States and the Nation 25 years ago. The Department cannot support legislation that specifically impacts an agreement so long after the fact.

While the purpose of S. 2670 would be to restrict the Nation from conducting gaming on the 53.54 acre parcel in Maricopa County, Arizona, the effect of S. 2670 is even broader. It would seem to reach most or all of the remaining selectable lands under the Gila Bend Act.

S. 2670 would also alter established law that prohibits gaming, authorized under the Indian Gaming Regulatory Act (IGRA), on lands acquired by the Secretary into trust for the benefit of an Indian tribe after October 17, 1988, except in certain circumstances. The effect of this legislation would be to add a tribe-specific and area-specific limitation to IGRA.

Finally, the bill would unilaterally amend Arizona's tribal gaming compacts without the mutual consent of the Tribes and the State. The language of the bill specifically and unilaterally modifies substantive terms such as Section 3(j)(1) (location of gaming facilities on Indian lands), Section 17(c) (Amendments) and Section 25 (entire agreement of the parties) in all of the Tribal-State Compacts in Arizona, which were duly negotiated by the State and the Tribal Nations.

In the compacts, the parties themselves eliminated reliance on any statements or promises made during negotiations, unless they were included within the four corners of the compact. Section 25 of the compacts provides that this is "the entire agreement of the parties with respect to the matters covered by this compact and no other statement, or promise made by any party, officer, or agent of any party shall be valid or binding." In other words, the promise to which the title of S. 2670 refers seems to be illusory.

We are further concerned that the provisions of S. 2670 may result in competitive restrictions favoring one tribe over another. This is a longstanding concern in the area of Indian gaming. In our April 25, 2003, letters to Governor Doyle of Wisconsin and Chairman Frank of the Forest County Potawatomi Community, we refused to affirmatively approve a proposed Class III gaming compact because we found a provision excluding other Indian gaming "anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA." Letter from Acting Assistant Secretary—Indian Affairs, Aurene Martin to Chairman, Forest County Potawatomi Community, Harold "Gus" Frank (Apr. 25, 2003). This legislation would negate and/or amend Section 3(j)(1) of the Nation's Tribal-State compact, without the Tribe or the State participating in the amendment and without regard to the agreement reached between two sovereigns.

Historical Context with the Gila Bend Act and Indian Gaming

It is important to understand the historical context of gaming at the time of passage of the Gila Bend Act. When Congress enacted the Gila Bend Act in 1986, it was well aware of the Indian gaming industry. By that time, Indian gaming was already quite controversial. Indian gaming legislation was introduced in Congress as early as 1984 and 1985. A good deal of litigation over Indian gaming had occurred in the late 1970s and early 1980s. Indeed, cases had been fully litigated through federal appeals courts with reported decisions by 1981. Federal litigation

was proceeding in California, Florida, Minnesota and Wisconsin in the early 1980s. In sum, gaming was spreading like wildfire across the country in the early and mid-1980s.

Fostering Indian gaming was a public policy choice by the Reagan Administration. President Reagan's Department of the Interior strongly encouraged such development in hopes that gaming would help poor tribes become more self-sufficient.

And though it was aware of gaming, Congress said nothing in the Gila Bend Act that would prohibit Tohono O'odham from gaming on lands acquired under the Act. Covered acquisitions, which were mandatory under that Act, included lands in Maricopa County.

After enacting the Gila Bend Act, Congress held hearings that ultimately led to enactment of IGRA in 1988. In IGRA, Congress generally prohibited gaming on lands acquired after its enactment. But Congress specifically included an exception for lands taken in trust as part of a land settlement like those to be acquired under the Gila Bend Act.

Given this course of action by Congress, the Nation would have had reason to believe that the United States had promised it land on which it could engage in gaming in compensation for the lands flooded by the Corps in the San Lucy District. And given that the Gila Bend Act and IGRA are laws enacted through a very public process in Congress, none of these expectations developed in secret.

In the Gila Bend Act, Congress mandated the taking of land into trust for the Nation to make a mandatory acquisition of land in Maricopa, Pima or Pinal County, as long as the land was not "within the corporate limits of any city or town." It is the Department's view that, the promise made in the Gila Bend Act would be broken by S. 2670."

For these reasons, the Department opposes S. 2670. This concludes my prepared statement. I am happy to answer any questions the Committee may have.

The CHAIRMAN. Thank you, Assistant Secretary Washburn. I know that Senator McCain has a conflict with his Foreign Affairs, I believe, so I will let him go ahead of me.

Senator MCCAIN. Well, Mr. Washburn, you talk about impoverished tribes. Does that Tohono O'odham fit into that category, since they already have three casinos?

Mr. WASHBURN. Yes, Senator, despite all that——

Senator MCCAIN. In other words, you just falsely gave the Committee the impression as if the Tohono O'odham was an impoverished tribe without Indian gaming. They have three casinos, right? Isn't that true?

Mr. WASHBURN. I didn't mean to give the impression that they are not a gaming tribe, they indeed already are. But I will tell you that their gaming is in Tucson and Phoenix is a much larger market than Tucson.

Senator MCCAIN. Well, they are certainly not impoverished, Mr. Washburn.

Mr. Washburn, you said that that was the intent that Indian gaming not be located in incorporated areas, right?

Mr. WASHBURN. Yes.

Senator MCCAIN. Isn't that kind of technical, because it is in the middle of the city of Glendale? Isn't it sort of a technical—everything around it is incorporated. It is not out in the desert.

Mr. WASHBURN. Senator, it was your bill. You wrote the language. We are just applying it.

Senator MCCAIN. You know something, Mr. Washburn, that is a pretty smart ass answer. And the fact is, I am telling you what the intent was, okay? Now, we wrote the bill, and we wrote it so that there would not be exactly what has happened now. And if you want to interpret that way, fine. You can interpret how you want to. I interpret it as not ever intending to have a gaming operation in the middle of an incorporated area without the permission of the

people, not only in Glendale, because as you said, this is a large metropolitan area, but the people of the metropolitan area. They should have a say in this.

You are not giving them a say in this. The city of Glendale has been split on this in various ways.

So you are saying that one, that it is for impoverished tribes. Clearly, by any measurement, this tribe is not impoverished. Second of all, you say it was not the intent of the Act to be in incorporated areas. It is surrounded by incorporated areas, Mr. Washburn. And I can tell you what the intent is, and I believe that also it is your interpretation of the law versus my interpretation of the law.

And I really appreciate your concern for impoverished tribes. I have that same concern. The Tohono O'odham tribe isn't one of those. It isn't one of those. They are doing very well with the three casinos that they have already. And there are established casinos within the Phoenix metropolitan area that this is going to impact. That is why the other tribes are against such a move, which would then impact their gaming operations and revenue. Has that been taken into consideration in your decision, the impact on other Native American tribal gaming?

Mr. WASHBURN. As I said, Senator, this is a rapidly-growing market. It continues to be one of the fastest-growing cities in the Country. We certainly have a trust responsibility to all the tribes.

Senator MCCAIN. So it is up to you to decide whether an area is fast-growing or not, as to whether, what guides your decision? Mr. Washburn, that has nothing to do with the law.

Mr. WASHBURN. It is my responsibility to follow the law and follow what Congress said. And what you said was, outside of any municipality, incorporated municipality, anywhere in Maricopa County. And that is what we read. And that is relatively clear. That is what we determined and that is what the courts have upheld. We believe that they are a tribe that has significant burdens. They are one of the largest tribes in the Country, they have roughly 40,000 members and they have a lot of land to try to take care of with a modest revenue source.

Senator MCCAIN. Three casinos is a modest revenue source.

Mr. WASHBURN. Given their burdens, yes, Senator. This is not a tribe with 30 people or 300 people, this is a very, very large tribe with a lot of responsibilities. I can assure you, they can use more revenues.

Senator MCCAIN. I am sure every tribe in America can use more revenue.

So you are basing your decision as to what, are you saying they are impoverished? Are you saying they are impoverished? Because you said, you are referring to impoverished tribes. Are you saying that this tribe is impoverished?

Mr. WASHBURN. I want gaming to benefit all tribes. But yes, I am willing to live with the fact that Tohono O'odham is an impoverished tribe. It has a large number of members and many of them are living in very terrible conditions.

Senator MCCAIN. And are you aware of the gaming revenues from the three casinos?

Mr. WASHBURN. I have heard there are gaming revenues from three casinos. I don't have them in front of me as I sit here.

Senator MCCAIN. Do you know what they are, roughly?

Mr. WASHBURN. No.

Senator MCCAIN. So it doesn't matter to you what, obviously since you don't know, it doesn't matter to you what it is. So you are making a judgment as to the economic condition of the tribe without knowing what their revenues are. That is really, really good, Mr. Washburn. I don't have any more questions for this witness.

The CHAIRMAN. Assistant Secretary Washburn, the Department approves Class III tribal-State gaming compacts. I believe that the Department has approved the latest compacts between the State of Arizona and the Arizona tribes. Do you know if the compacts currently in effect have any type of limitation of facilities in the Phoenix area?

Mr. WASHBURN. They do not have any limitations as to the number of facilities in the Phoenix area.

The CHAIRMAN. You mention in your testimony the Department does not support the bill, as it would undermine promises made by the United States to the Tohono O'odham Nation and the Gila Band Indian Reservation Land Replacement Act. I want you to describe, if this bill were enacted, could you describe the policy implications that it might have on future negotiations and settlements between tribes in the United States?

Mr. WASHBURN. Well, the potential is that we will have tribes feeling this is the same stuff, a different day, that we are just continuing in the mode of breaking treaties and breaking promises to tribes. That is a tough situation to be in, because I had hoped we were past all that and that we were working to live up to our promises to Indian tribes going forward. So this would significantly undermine the promise that we made to Tohono O'odham in the Gila Bend Act and I think that would cause tribes to have great pause in settling with the United States Government if it doesn't live up to its promises.

The CHAIRMAN. So you believe that the Gila Bend Act gave the Tohono O'odham the authority?

Mr. WASHBURN. I believe it gave them the opportunity to take land into trust anywhere in Pima, Pinal and Maricopa Counties and with some caveats, one of the caveats being it couldn't be already incorporated land. So they went out and bought land that was not incorporated, but was in Maricopa County. And if we add requirements to that, we have changed the promise, we have changed the deal that we struck with Tohono O'odham.

Senator MCCAIN. Did that act refer, anywhere in it, any reference to gaming?

Mr. WASHBURN. It had no prohibition on gaming whatsoever.

Senator MCCAIN. Did it have any reference to gaming?

Mr. WASHBURN. It said that lands could be used for all purposes.

Senator MCCAIN. So it made no reference to gaming itself.

Mr. WASHBURN. All purposes encompass gaming.

Senator MCCAIN. I see.

The CHAIRMAN. Assistant Secretary Washburn, some of the witnesses' testimony that we are going to hear today talks about pos-

sible violations in the Arizona tribal compacts, whether by the Tohono O'odham project itself or by possible repercussions if the Tohono O'odham project is allowed to proceed. What role does the Department play in instances where the tribe or a State violates provisions of the compact?

Mr. WASHBURN. Well, first of all, we approve those compacts. So we stamped approval on those compacts. And those compacts would, the provisions would be violated by this statute and would change, again, the terms of those compacts. So there are potential provisions for violations of gaming compacts. I am not sure what the steps would be for the United States to take for those violations.

One of the compact's terms was that this compact, the final agreement for the parties on these issues, and introducing new terms after everybody agreed that they have agreed on all the terms, is definitely a change in the promise.

The CHAIRMAN. Okay. Do you have any more questions, Senator McCain?

Senator MCCAIN. No, thank you, Mr. Chairman.

The CHAIRMAN. Thanks, Secretary Washburn. We appreciate your taking time out of your schedule to be here today.

We will give the staff a moment to reset the witness table. The witnesses can come up at this time.

I want to welcome our second panel up to the witness table. We will first hear from Governor Gregory Mendoza, the Gila River Pima Maricopa Community. Then we will turn it over to Mayor Jerry Weiers, City of Glendale. Welcome back, Mayor.

We will then hear from Gary Sherwood, Glendale city councilman. And finally, we are going to hear from Chairman Ned Norris of the Tohono O'odham Nation, and we welcome you back as well, Mr. Chairman.

Thank you all for being here today. Governor Mendoza, we shall start with you. Go ahead.

STATEMENT OF HON. GREGORY MENDOZA, GOVERNOR, GILA RIVER INDIAN COMMUNITY; ACCOMPANIED BY ALLISON C. BINNEY, PARTNER, AKIN GUMP STRAUSS HAUER & FELD LLP

Mr. MENDOZA. Good afternoon, Chairman Tester, members of the Committee. Thank you for holding this hearing and inviting me to speak in support of the Keep the Promise Act.

I want to start by saying that it pains me to advocate against a sister tribe. But this is not a dispute with the O'odham people, only with the leadership of the Tohono O'odham Nation, whose actions jeopardize every tribe in Arizona. Contrary to what Tohono O'odham claims, this is not a fight about market share. It is about preventing fraud upon tribes, local governments and voters.

Tohono O'odham likes to talk about the promises made between their tribe and the Federal Government in 1986. But this bill is about protecting the promise made to my community and to other tribal governments. Our tribes relied upon the actions of the Tohono O'odham when we gave up our rights in 2002. While we agree that Tohono O'odham should get replacement lands under

the 1986 law, we also strongly believe that Tohono O'odham must abide by the promise and commitments they made to us.

In 2002, Arizona tribes had to get approval of our compact from the voters. In order to get this approval we promised the voters that the number of casinos in the Phoenix metro area would not increase until 2027. At the same time that Tohono O'odham helped us win voter approval, they also were secretly plotting to build a casino in Phoenix. That casino would be located right across the street from a high school, and it is near homes and churches. This is exactly what we promised the voters would not happen. Tribes like mine gave up rights to build additional casinos. We also agreed to limits on the number of gaming machines allocated to us.

We did this in order to get voter approval and to preserve the tribal monopoly on gaming in Arizona. And we ensured that rural tribes benefit from gaming.

Tohono O'odham doesn't deny making promises, nor do they deny knowing that their sister tribes gave up rights in order to limit the number of casinos in Phoenix. They don't deny that the compact negotiations would have been vastly different if everyone knew of their plans. Instead, they say they are winning in the courts. There remains a dispute because they refuse to waive their sovereign immunity for claims of fraud.

We do not want to attack another tribe's immunity. That is why the bill merely provides for a temporary restriction on additional casinos in the Phoenix area until the end of the existing compacts. At that point, all parties can come together at the table and bargain in good faith. Hopefully my community will be able to regain the rights we gave away.

The Gila River Indian Community will weather this storm. But most tribes in Arizona are not as fortunate. Rural tribes will suffer the most from Tohono O'odham's fraud. There are six rural tribes that utilize gaming compacts to lease gaming machines to urban tribes. Leasing these machines allows them to benefit from gaming, even though their markets can't support a casino.

Each year, these tribes receive more than $30 million to provide basic services to their members. And the structure of the gaming compacts create markets for a few rural tribes to operate small casinos. If gaming happens at Glendale, the State legislature will likely eliminate that tribal monopoly. If this happens, urban tribes will have no reason to lease gaming machines from rural tribes. Patrons will stop traveling to reservations for gaming and instead visit non-tribal casinos located in cities.

We have come to Congress because you are the only entity that can provide swift action to preserve the promises made in 2002. Interior indicates it cannot resolve this matter because Congress, through the 1986 law, mandates them to take the land into trust for Tohono O'odham. This bill does not set that precedent. It is common for Congress to pass bills that limit tribal gaming. In this Congress alone, two bills have been enacted placing land into trust for a tribe, but prohibiting gaming on those lands. The bill merely restricts gaming on the lands until 2027, but does not eliminate the uses of the land. There are a number of non-gaming activities that Tohono O'odham could conduct.

For all of these reasons, I ask that you pass this bill. Thank you.

[The prepared statement of Mr. Mendoza follows:]

PREPARED STATEMENT OF HON. GREGORY MENDOZA, GOVERNOR, GILA RIVER INDIAN COMMUNITY

Chairman Tester, Vice Chairman Barrasso and members of the Committee, I want to thank you for inviting me to testify on behalf of the Gila River Indian Community (Community) regarding S. 2670, the Keep the Promise Act of 2014. Swift enactment of this overwhelmingly bipartisan legislation is critical to protecting the existing system of tribal gaming in Arizona. That system is now under threat because the Tohono O'odham Nation (Tohono O'odham or Tribe) has broken ground on a casino project in the Phoenix metropolitan area that would unilaterally destroy the commitment made byArizona tribes that there would be no additional casinos in that area until 2027.

In July, the Committee heard extensive testimony about why the Keep the Promise Act is necessary to protect the future of Indian gaming in Arizona. There was testimony about how Tohono O'odham used negotiations for the current tribal-state compact in Arizona to advance a secret plot to open a casino in Phoenix while telling the State officials and Arizona voters that there would be no more casinos in that very area. The Committee also heard how Arizona's desire to limit gaming in urban areas was exploited by Tohono O'odham, which recognized that tribes like the Community agreed not to open new casinos in Phoenix. Now, we also know that Tohono O'odham kept their plans secret for almost a decade while the State, local cities, and Arizona tribes relied and invested millions of dollars based upon the commitment of no additional casinos in the Phoenix metropolitan area.

By prohibiting gaming on tribal lands acquired in trust status after April 9, 2013 within the Phoenix metropolitan area until January 1, 2027, this bill maintains the commitments and promises that were relied upon during negotiations of the current gaming compacts for the duration of those compacts, which begin to expire in late 2026. It must be clearly understood that the bill does not prohibit Indian gaming on the lands beyond the sunset date of January 1, 2027 and does not prevent lands from being taken into trust status for Indian tribes. At its core, S. 2670 is a bill that would protect the agreed upon system of Indian gaming in Arizona and would prevent fraud from being committed upon tribes, local governments, and voters. Tohono O'odham has been trying to open a casino far outside its aboriginal territory and within the Phoenix metropolitan area since 2002 when it promised the State, voters, and Arizona tribes that there would be no additional casinos in this area. The promise is important because the voters of Arizona authorized a system of gaming in 2002 when the tribes essentially obtained a legal monopoly on gaming in the State, a monopoly that has benefited all Indian tribes in the State, gaming and nongaming. But in return, the voters wanted to set a hard cap of seven casinos that would be in the Phoenix metropolitan and no more. Additionally, the voters wanted certainty about the potential proliferation of gaming, and thought that they had achieved that certainty by limiting gaming to Indian tribes on Indian reservations as they existed at the time of their vote in 2002.

To be clear, no one is trying to prevent Tohono O'odham from acquiring replacement lands pursuant to the 1986 Gila Bend Indian Reservation Lands Replacement Act ("Gila Bend Act"), Pub. L. 99–503. But, we do believe that such replacement lands should be within the aboriginal territory of Tohono O'odham and that the Tribe should not be able to utilize the 1986 law to violate the commitments and promises relied upon during the negotiations of the existing gaming compacts in Arizona.

Contrary to the testimony of Tohono O'odham, S. 2670 would not create liability for the United States or constitute an unlawful taking that would trigger constitutional protection because it is well within Congress' plenary power over Indian affairs to defend and protect the promises that tribes publicly make to obtain gaming. There is no Fifth Amendment right for tribes to violate their own promises on which other tribes and the State have relied. The Fifth Amendment does not curtail Congress's authority to protect the compacting process from broken promises and misrepresentations. To suggest otherwise is disingenuous. S. 2670 was narrowly crafted to preserve promises made during the negotiation of the existing tribal-state compact and to clarify them in a manner that is consistent with federal precedent related to the regulation of gaming on Indian lands.

We have come to Congress because you are the only entity that can provide justice in this situation. Congress allowed tribes to be sued for violations of gaming compacts once they are signed. Unfortunately, Congress did not anticipate situations like this, where a tribe commits fraud during compact negotiations. Further,

the Interior Department indicates that they cannot resolve this matter because Congress, through the 1986 law, mandates them to take the Phoenix area land into trust for Tohono O'odham.

We wish we did not have to come to Congress to address this matter, but we are here because you are our only option.

The Keep The Promise Act Protects All Arizona Tribes

The policy objective of the Keep the Promise Act is simple, to preserve the existing model tribal-state compact that all Arizona tribes agreed to abide by and game under. Arizona's model compact is unique because it struck a delicate balance between the competing interests of the Governor, who wanted to stop the spread of gaming in cities, and Tribes, who wanted tribal exclusivity for gaming. Under the model compact the Governor agreed to tribes' exclusive right to conduct casino gaming provided certain conditions were met. These conditions include: (1) overall limits on the number of gaming devices and casinos; (2) a maximum number of gaming devices per casino; (3) specific limits on the number of casinos located in or near Phoenix and Tucson; (4) revenue-sharing arrangements between rural tribes with no casinos and tribes with casinos in urban markets; and (5) revenue-sharing arrangements between the State and Arizona tribes.

Importantly, in return for rural tribes agreeing to limits on gaming in the Phoenix and Tucson metropolitan areas, and for giving up an opportunity to seek off-reservation gaming near these lucrative markets, they are able to share in gaming revenues generated in these markets through machine transfer agreements (i.e., lease their machine rights to urban tribes). As a result, the rural non-gaming tribes receive revenues from gaming tribes located in the metropolitan markets. There are six tribes in Arizona that currently benefit under machine transfer agreements: Havasupai, Hualapai, Kaibab-Paiute, Navajo, San Juan Southern Paiute, and Zuni. As tribes that struggle with severely limited economic opportunities, these funds are essential to many of the rural tribes. Each year, these tribes receive a combined amount that exceeds $30 million to provide basic services to their tribal members. These tribes rely on stable machine transfer revenue and stand to be hurt the most by Tohono O'odham's proposal.

Although the impact of Tohono O'odham's proposed casino will reverberate throughout Arizona, it will be felt most severely by these rural tribes who depend on revenue from transfer agreements that are only possible because through the model compact. These rural tribes are concerned about the Tohono O'odham's casino because of another feature of the model compact that is commonly referred to as a "poison pill." This provision essentially states that if the tribal gaming monopoly is disrupted in any way—i.e., if Arizona expands gaming to private non-Indians interest—tribes may then operate casinos free of any conditions imposed upon them by the model compact. If non-tribal gaming is authorized, then the existing caps on facilities and machines will disappear and there will be no requirement or reason for urban tribes to lease machines from, and share revenue with, rural tribes.

Rural tribes will not be the only tribes hurt if non-tribal gaming is authorized in Arizona. Small market gaming tribes will also suffer because gaming consumers would stop traveling to reservations for gaming, and would instead visit non-tribal casinos, which will likely be located in cities.

Commercial gaming interests have been clamoring to expand into Arizona since the 1990's and have long targeted tribal exclusivity as an argument in favor of their efforts. As Glendale Mayor Jerry Weirs told this Committee in July, "if gaming happens in Glendale, there will be a strong effort in the Arizona legislature to authorize non-Indian gaming in the State." It isn't just a position held by Mayor Weiers. There have been numerous bills introduced in the Arizona legislature in recent years to authorize non-tribal gaming, as well as a steady stream of editorials and articles calling for an end to tribal gaming exclusivity. The bottom line is that tribes, Arizona citizens, and commercial gaming interests view Tohono O'odham's plan as breaking all Arizona tribes' solemn promise not to open new casinos in the Phoenix metropolitan area under the current model compact. The opening of the Glendale casino will destroy Arizona tribes' credibility among voters and lawmakers, and will be used to justify the end of tribal exclusivity.

The Community will be negatively impacted if the Tohono O'odham opens up one or more casinos in the Phoenix-metro area. If the Tohono O'odham is successful we will have to make budget cuts that will impact our general welfare programs and employment opportunities for our members. These cuts will be especially severe if non-tribal gaming is also authorized. However, the Community will be able to weather the storm far more easily than rural non-gaming tribes who rely most on the current revenue sharing system.

In contrast to all other Arizona tribes, Tohono O'odham has a strong incentive to end the conditions under the model compact. Tohono O'odham maintains that it can operate all of its casinos in Phoenix metropolitan area. If the Tribe successfully establishes one casino in the Phoenix area and subsequently moves the rest of its existing casinos to the area, it would not want market parity. Instead, it would want to create large mega-casinos to dominate the market. Tohono O'odham can accomplish market domination if the limitations in the model compact regarding the number of gaming machines in each casino go away.

Given Tohono O'odham's established gaming presence and its ability to unilaterally cherry-pick strategic locations in the area, it would have an overwhelming head start in any race to establish new gaming facilities in the area should gaming expand to include non-Indian interests. Thus, it would be entirely in Tohono O'odham's interest to have the "poison pill" provision triggered and eliminate restrictions on tribal gaming altogether. Tohono O'odham would then be the only tribe in Arizona able to compete with non-Indian gaming interests on equal footing.

Because Arizona law does not allow two-part determinations,[1] all other tribes would have difficulty competing in this new market and would be forced to attempt to relocate to the urban markets under dubious legal theories or face massive losses in revenue. With Tohono O'odham dominating the Phoenix market, while at the same time facing competition from non-Indian gaming interests, all other Arizona tribes would either suffer drastic cuts to tribal member services, or could be forced to shutter their gaming facilities altogether. The latter is especially true for the outlying small market tribes. Gaming competition among tribes would not increase; rather, Tohono O'odham would become the sole winner among Arizona tribes.

The Keep The Promise Act Would Not Create Negative Precedent

The Keep the Promise Act does not jeopardize tribal sovereignty nor create negative precedent for Indian Country. Congress routinely creates laws that restrict the ability of tribes to conduct gaming through several types of legislation. The Department often supports these bills even though they include the explicit limitations on an affected tribe's right to game. Accordingly, any arguments that S. 2670 constitutes dangerous precedent are inconsistent with common Congressional practice and are without merit.

Congress has enacted these clarifications through statutes intended to shed light on earlier legislation and settlements, prohibitions included in land-into-trust transfers, and restrictions included in federal recognition and restoration legislation. In 2011, Congress enacted the Indian Pueblo Cultural Center Clarification Act, which amended Public Law 95–232. The clarification repealed language in an early statute and provided that lands acquired in trust for certain Indian Pueblos would be treated as Indian Country, except for the purpose of gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq*. Three years earlier, in 2008, Congress clarified the Mashantucket Pequot Settlement Act to provide for the extension of leases of the Tribe's land but provided that "No entity may conduct any gaming activity (within the meaning of section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703)) pursuant to a claim of inherent authority or any Federal law . . . . on any land that is leased with an option to renew the lease in accordance with this section."). In 1978, Congress settled the Narragansett Tribe's land claims through the Rhode Island Indian Claims Settlement Act, which did not include a provision regarding gaming. 25 U.S.C. § 1701 et seq. Congress subsequently amended the Rhode Island Claims Settlement Act in 1996 to unilaterally clarify that lands acquired by the Narragansett pursuant to the Settlement Act "shall not be treated as Indian lands" for the purpose of gaming under IGRA. 25 U.S.C. § 1708(b). The practice of amending existing agreements has persisted until today.

Congress has also passed numerous tribe-specific and area-specific laws to restrict gaming in recent years. In 2012, Congress enacted Public Law 112–97 to provide lands that would ensure flood and tsunami protection for the Quileute Indian Tribe. The law transferred lands to the tribe in trust but stipulated that the tribe may not use the land for any commercial purposes and may not build any commercial or permanent structures on the land. This prohibition has the effect of preventing the tribe from exercising its right to game on the land. Two years earlier, Congress passed the Hoh Indian Tribe Safe Homelands Act, Public Law 111–323, which

[1]1T3ASee Ariz. Rev. Stat. Ann. § 5–601(C) (prohibiting the Governor from concurring in any determination by the Secretary that gaming may be permitted on Indian lands within Arizona under 25 U.S.C. § 2719(b)(1)(A)); *see also* 25 U.S.C. § 2719(b)(1)(A) (permitting gaming on Indian lands acquired in trust after October 17, 1988 where the Secretary consents and the Governor of the state in which the Indian lands are located subsequently concurs that gaming may take places on the lands in question).

transferred federal and non-federal land to the Hoh Indian Tribe. The legislation specifically provided that "[t]he Tribe may not conduct on any land taken into trust pursuant to this Act any gaming activities—(1) as a matter of claimed inherent authority; or (2) under any Federal law . . . . "

This continues to be a consistent practice of Congress and is one that the Department has vocally supported in the past. This Congress alone, there have been two laws enacted to place lands in trust on behalf of Tribes while simultaneously prohibiting the benefitting Tribes from using the lands for gaming. Public Law 113–127, which placed Federal land in trust for the benefit of the Shingle Springs Band of Miwok Indians stipulates that "class II and class III gaming under the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) shall not be permitted at any time on the land taken into trust." The Department testified in support of the bill despite its prohibition on gaming. Separately, Public Law 113–134, the Pascua Yaqui Tribe Trust Land Transfer Act, placed Federal land into trust for the benefit of the Pascua Yaqui Tribe while stipulating that "The Tribe may not conduct gaming activities on the lands held in trust under this Act, as a matter of claimed inherent authority, or under the authority of any federal law . . . . "

These examples demonstrate that it is appropriate and routine for Congress to enact legislation to clarify earlier statutes and limit gaming pursuant to IGRA in appropriate circumstances. Given the near universal opposition to the proposed Glendale casino, the Keep the Promise Act will not create harmful precedent and is in line with Congress's role in legislating in Indian Country to accurately reflect congressional intent. Rather, bad precedent would be created by allowing Tohono O'odham to operate a casino that puts all other Arizona tribes at risk.

The Keep the Promise Act Does Not Create Liability for the United States

Tohono O'odham contends that S. 2670 would subject the United States to a Fifth Amendment Takings Claim. This objection is premised on notion that when Arizona tribes obtained IGRA compacts by promising not to attempt to use those compacts to locate any additional casinos in the Phoenix area, the Fifth Amendment somehow protects their right to violate that very promise. This could not be further from the truth. It should go without saying that Congress does not abrogate gaming compacts or affect a Fifth Amendment taking when it defends and protects the promises tribes made publicly to obtain the compacts. Neither gaming compacts nor the Gila Bend Act include an inherent right to profit from States' and tribes' detrimental reliance on a tribe's promises during the compacting process. Simply put, there is no Fifth Amendment right for tribes to commit fraud while violating their own promises. The Fifth Amendment does not limit Congress' authority to preserve the integrity of IGRA's compact process from illegality.

Nonetheless, Tohono O'odham argues that S. 2670 will give rise to a successful takings claim against the United States, a claim that the Assistant Secretary was not willing to embrace during his response to the Committee's questions during the July 2014 hearing. Such a claim would argue that S. 2670 constituted "regulatory taking" by depriving TON of an economic use of its land and interfering with an investment-backed expectation. As a threshold matter, the Fifth Amendment's Taking Clause generally applies to federal actions that affect Indian property rights formally recognized by Congress. *See generally* 1–5 *Cohen's Handbook of Federal Indian Law* § 5.04[2][c]. However, the Supreme Court's opinion in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), established a multifactor analysis for courts to consider when weighing a regulatory taking claim. The Penn Central test has spawned different categories of regulatory takings but it is highly unlikely that TON could successfully argue that S. 2670 fits into any one of these.

Penn Central requires an *ad hoc* factual inquiry based on three factors: (1) "'the character of the governmental action'"; (2) "[t]he economic impact of the regulation on the claimant"; and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 538–539 (alteration in original (quoting *Penn Central*, 438 U.S. at 124). Mindful of Justice Holmes's oft-cited admonition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[,]" *Mahon*, 260 U.S. at 413, courts historically have applied *Penn Central*'s inquiry stringently.

First, the character of the governmental action that would give rise to TON's taking claim would likely weigh against an unconstitutional taking. S. 2670 was narrowly crafted so TON may still use the Glendale Parcel for commercial gain or otherwise, even if it cannot operate Class II or III gaming activities on the property. The proximity of the Glendale Parcel to the Arizona Cardinals stadium will allow Tohono O'odham to pursue a wide variety of lucrative economic development activities that will bring significant revenue. Viewed from that perspective, the legislation

is more akin to a zoning regulation restricting a particular land use, which tends to withstand a Takings Clause challenge. *See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Moreover, here Congress is effectively regulating gambling in the public interest. The Supreme Court has long recognized the regulation of gambling to be a traditional exercise of police power. *See Lawton v. Steele,* 152 U.S. 133, 136 (1894). And under a much older Takings Clause regime, it has held that "'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the state or its agents, or give him any right of action." *Mugler v. Kansas,* 123 U.S. 623 (1887) (discussing prohibition of alcohol). It is of great consequence for purposes of this analysis that Congress has already placed substantial limits on Indian gaming unless done in accordance with the IGRA. If allowing gaming pursuant only to IGRA's strictures is Congress's baseline approach, then S. 2670 is consistent with that public policy insofar as it closes a loophole in IGRA that is only available to TON through its bad faith negotiations with other parties.

Second, the economic impact of the regulation would clearly be significant but Supreme Court decisions have "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 645 (1993). Indeed, the Supreme Court has noted that a diminution in property value as high as 75 percent or even 92.5 percent may not be a sufficiently serious impact. Id. at 645. Because the Glendale Parcel can be put to a range of other profitable uses, a court may well give less weight to the impact of precluding Class II and III gaming activities. It is also relevant to this analysis that S. 2670 is temporally limited so any economic impact on Tohono O'odham's ability to use the Glendale Parcel for gaming would terminate on January 1, 2027 when all Arizona tribal-state compacts will need to be re-negotiated. Further, S. 2670 would not prevent Tohono O'odham from developing a fourth casino anywhere outside of the Phoenix metropolitan area. These points illustrate how the Keep the Promise Act was drafted to avoid a permanent impairment of any economic development opportunities, including gaming, so any action challenging the Keep the Promises Act would likely fail to demonstrate a credible Takings Claim.

Third, it is unlikely that TON will be able to establish that its investment-backed expectations rise above a "unilateral expectation or an abstract need," which would be critical to establishing a Takings Claim. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984) (citation and quotation marks omitted). Several courts have recognized that gambling is a highly regulated industry and that it is difficult to hold reasonable investment-backed expectations in light of that regulation. *See, e.g., Holliday Amusement Co. of Charleston, Inc. v. South Carolina,* 493 F.3d 404, 411 (4th Cir. 2007) (holding no taking of slot machine property where South Carolina banned video poker after 25 years of allowing it because "Plaintiff's participation in a traditionally regulated industry greatly diminishes the weight of his alleged investment-backed expectations"); *Hawkeye Commodity Promotions, Inc. v. Vilsack,* 486 F.3d 430, 442 (8th Cir. 2007) (holding multi-million "devastating economic impact" of ban on TouchPlay machines to be "discounted" by "heavily regulated nature of gambling in Iowa). Tohono O'odham was well aware of the inherent riskiness of gaming ventures when they purchased the Glendale Parcel. This is likely why the parcel was purchased and kept secret until a more favorable political environment improved the likelihood of success for their scheme. The attenuated timeline of this project epitomizes the highly speculative nature of gaming projects.

Again, it would be difficult for TON to argue that IGRA and the 2002 Compact guarantee a right to game on the Glendale Parcel. The Gila Bend Act and its corresponding settlement agreement did not give Tohono O'odham a right to violate its own subsequent promises in the compacting process. The Gila Bend Act is silent with respect to gaming and it was also enacted two years before IGRA. Further, no one can make the credible argument that by regulating Las Vegas style gaming and making it subject to the Tribal-State compacting process, that IGRA constituted a breach of contract or a taking of federally recognized tribes' inherent right to game on tribal lands. Congress could preclude Indian gaming altogether and has already enacted IGRA to establish that tribal gaming is permissible only "if the gaming activity is not specifically prohibited by Federal law," 25 U.S.C. § 2701(5), and it contains several restrictions as to the location of gaming facilitates. All of that at least arguably puts tribes on notice that Congress may at any time enact additional restrictions on tribal gaming. Moreover, the 2002 Compact—which was negotiated between the Tribes and the State of Arizona—could not estop Congress from altering

IGRA. *Cf. Sioux Nation,* 448 U.S. at 410–411 (affirming Congress's power to abrogate treaties with tribes). Simply put, "[t]he pendulum of politics swings periodically between restriction and permission in such matters [as gambling], and prudent investors understand the risk." *Holliday Amusement,* 493 F.3d at 411. Nothing in the Gila Bend Act bestowed any absolute right to locate a casino on Indian lands in Phoenix—much less did it enshrine a right to violate promises Tohono O'odham and other tribes later made in pursuit of IGRA compacts with Arizona in 1993 and 2002. IGRA, not the Gila Bend Act, defines the boundaries of Indian gaming authority, and just as Congress enacted limitations on such gaming in IGRA, it can legislatively protect the IGRA compacting process from the corrosive and profoundly destabilizing effect of unkept promises made to obtain a compact.

In sum, there are considerable arguments against the viability of a Takings Clause challenge to S. 2670 that stem from the narrow scope of the legislation, arguments that the Assistant Secretary seemed to tacitly acknowledge when he responded to the Committee's inquiries on the issue. The limited nature of the government's restriction, the continued economic viability of the Glendale Parcel, and the highly regulated nature of gaming present significant barriers to a regulatory taking claim.

S. 2670 Would Not Impact Pending Litigation

Tohono O'odham likes to tell Members of Congress to let the ongoing litigation run its course before taking any action on this matter. However, the Tribe fails to tell those very same Members that the courts are unable to adjudicate the essential claims in this matter because Tohono O'odham refuses to waive its sovereign immunity. Thus, S. 2670 would not interfere with ongoing litigation and Congress is the only entity that can resolve this issue.

Two lawsuits were brought after Tohono O'odham announced its intention to acquire lands into trust for an off-reservation casino in 2009. One lawsuit challenges the Tribe's ability to have the lands taken into trust status as an Indian reservation, and that lawsuit is near completion. The other lawsuit alleges that Tohono O'odham wrongfully induced the relevant parties to enter into the compact and is violating the compact. While the courts have been able to review certain claims with respect to the express terms contained within the gaming compact, the courts have been thwarted by Tohono O'odham from addressing the claims of fraud, misrepresentation, or promissory estoppel because the Tribe asserted tribal sovereign immunity with respect to those claims. Tribal sovereign immunity is a legal doctrine providing that Indian tribes are immune from judicial proceedings without their consent or Congressional waiver. Congress waived tribes' sovereign immunity in IGRA with respect to claims for violations of a compact once the compact is signed, but IGRA does not waive a tribe's sovereign immunity for actions that occurred prior to the signing of the compact. Since Tohono O'odham refused to waive its sovereign immunity with respect to the claims of fraud, misrepresentation and promissory estoppel, which occurred prior to the signing of the compact, the court was unable to consider those claims. It would be odd for a gaming compact to waive tribal sovereign immunity in anticipation of acts of fraud and misrepresentation, or wrongful inducement. Sadly, the 2027 Arizona compacts may require that very thing solely as a result of the actions of Tohono O'odham here.

It is these court dismissed claims that S. 2670 seeks to remedy. And, in its May 7, 2013 order the Federal District Court for the District of Arizona found that although evidence appears to support the promissory estoppel claim against Tohono O'odham, the court had to dismiss the claim also because of the Tribe's sovereign immunity.[2] Promissory estoppel is where one party makes a promise and a second party acts in reasonable and detrimental reliance on that promise. In that instance, a court would normally be able to enforce the promise that was relied on regardless of whether it was expressly stated in a contract. That's exactly what happened in this matter. Tohono O'odham made representations that there would be no additional casinos in the Phoenix area and the State and other tribes and voters relied on the Tribe's representations in deciding to give up rights to additional casinos and gaming machines, approve Proposition 202, and sign the compacts approved by the voters. And, because Tohono O'odham's false promises preceded execution of its compact with the State of Arizona, the conduct fell outside of IGRA's waiver of sovereign immunity. Neither IGRA nor any other law concerning governmental conduct would necessarily anticipate fraudulent conduct by responsibly governments, tribal or otherwise. Tohono O'odham has exploited that fundamental assumption and

[2] *State of Ariz. v. Tohono O'odham Nation,,* slip op. at 26–27 (D. Ariz. May 7, 2013).

shielded itself from judicial review of its conduct by refusing to waive sovereign immunity.

Tohono O'odham argues that it is unreasonable to expect it to waive its sovereign immunity for what its Chairman referred to as frivolous claims. The court only found that it could not reach the claims because of sovereign immunity, not that they were without merit. Indeed, the court suggested otherwise when it stated that evidence appeared to support the claims against Tohono O'odham, notwithstanding its immunity from unconsented suit. To the contrary, it is precisely because those claims would expose the wrongful conduct that Tohono O'odham must use sovereign immunity as a shield. And, while it is common for tribes to grant limited waivers of sovereign immunity, particularly for commercial reasons such as casinos, it is hard to imagine waivers that would have expressly envisioned duplicitous conduct grounded in fraud as part of a gaming compact; perhaps the State will require such waivers of all Arizona Indian Tribes in the 2027 compacts in order to safeguard against future conduct of this sort by Tohono O'odham. In the end, waiving sovereign immunity is a political decision, and one that we respect. However, it is disingenuous for Tohono O'odham to refuse to waive its sovereign immunity in court in order to prevent resolution of certain claims and then argue that Congress should not resolve these same claims because they are being addressed in litigation.

S. 2670 comes at a critical time for tribal sovereignty and Indian gaming. In May, the Supreme Court issued its opinion in *Michigan v. Bay Mills,* 134 S.Ct. 2024 (2014). The Court, in a 5 to 4 decision, ruled that the Bay Mills Tribe could assert tribal sovereign immunity and avoid claims filed by the State of Michigan that sought to close what it claimed was an illegal off-reservation in Vanderbilt, Michigan. The Court stated at five different points in its opinion that Congress and not courts are the proper venue to resolve issues where sovereign immunity has frustrated efforts to bring justice to parties that cannot maintain suit against tribes. Perhaps most disturbingly, Justice Scalia, who voted in favor of several Supreme Court decisions which cemented the doctrine of tribal sovereign immunity, explicitly stated in his dissenting opinion in *Bay Mills* that those votes in support of sovereign immunity were wrong and that he "would overrule" tribal sovereign immunity. Although *Bay Mills* was certainly a limited victory for Indian Country, it also put a spotlight on the fragile state of tribal sovereign immunity and the fact that the Supreme Court is one vote from limiting its application or eliminating it altogether. Bay Mills illustrates that off-reservation projects such as those proposed by the Bay Mills Indian Community and Tohono O'odham manipulated the process for obtaining federal approval of tribal gaming projects and have used sovereign immunity as a shield to protect fraudulent activity. From this perspective, S. 2670 is good policy for Indian Country because it will address a narrow set of facts that exploit sovereign immunity and will establish that conniving plots such as that pursued by Tohono O'odham will not be sanctioned.

There remain certain issues that are pending in litigation, but those issues are not related to the claims of fraud, misrepresentation and promissory estoppel. S. 2670 is intended to not impact any pending court case, but rather to address the issues that the court has determined that it is unable to resolve. More, the Department has also indicated that it cannot resolve the claims of fraud, misrepresentation and promissory estoppel, and that it cannot resolve this matter because Congress, through the 1986 law, mandates them to take the Phoenix area land into trust for Tohono O'odham. Thus, Congress is the only entity capable of resolving this issue and addresses issues that courts are unable to review.

For all these reasons, I respectfully ask that you pass this bill.

SUPPLEMENTAL TESTIMONY

This submission is intended to supplement the written and oral testimony submitted on behalf of the Gila River Indian Community ("Community") as part of the record for the Committee's September 17, 2014 Legislative Hearing on S. 2670, the Keep the Promise Act of 2014. The September 17th hearing constituted the second time in three months that the Committee has heard testimony on the Keep the Promise Act. Despite the presentation of testimony by numerous witnesses and questioning from Members of the Committee, this supplemental submission is intended to respond to questions that were not fully addressed.

The Keep the Promise Act would preserve the commitments that the Arizona tribes made to the State of Arizona, when voters approved the existing tribal-state gaming compacts through Proposition 202. To secure the compact, which protects tribal exclusivity for gaming in Arizona, the tribes promised the State of Arizona and the voters that there would be no additional casinos in the Phoenix metropolitan area until the compacts expire. The Tohono O'odham Nation ("Tohono O'odham" or "Tohono") "took a lead role in securing passage of Proposition 202,"[1] and provided "major funding"[2] to the 17-tribe initiative that sought voter approval for the model compact on the basis that it would prevent the construction of additional casinos in the Phoenix area and permit "one additional casino [] in Tucson."[3]

A great deal has already been said about the Keep the Promise Act. Tohono O'odham and the Department of the Interior testified in opposition to the bill for several reasons, most of which were addressed at the hearing. This submission rebuts those objections that were not fully discussed before the Committee.

The Agreement by Phoenix Area Tribes to Reduce Their Authorized Allotment of Casinos was Intended to Prevent the Opening of Additional Casinos in that Area

One topic left unsettled from the September 17th hearing relates to Chairman Tester's inquiry as to why the existing tribal-state compact in Arizona would include a geographic restriction on gaming in the Tucson area but not in Phoenix.[4] Tohono O'odham represented before the Committee that "the Nation's construction of a casino will not violate the Compact,"[5] and that the Keep the Promise Act would "re-write the tribal-state compact" to establish a

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[1] Tohono O'odham Nation, Tohono O'odham Nation Gaming Enterprise and Desert Diamond Casino Issue Brief, http://www.tonation-nsn.gov/pdf/Gaming_Issue_Brief.pdf (Exhibit A).

[2] "Vote Yes on Prop 202", Arizonans for Fair Gaming & Indian Self-Reliance at 6 (Exhibit B).

[3] *Id.* at 5.

[4] Page 78 of the Official Proposition 202 Ballot Materials references the limits on facility numbers agreed upon by each Arizona tribe and provides that, "[i]f the tribe is the Tohono O'odham Nation, and if the tribe operates four(4) gaming facilities, then at least one of the four (4) gaming facilities shall: (i) be at least fifty (50) miles from the existing gaming facilities of the tribe in the Tucson metropolitan area . . . ." (Exhibit C).

[5] *Arizona v. Tohono O'odham Nation*, 944 F.Supp.2d 748, 753 (D.Ariz. 2013).

monopoly for a few "wealthy tribes."[6] These statements constitute a revisionist's history of the 2000-2002 negotiations that culminated in the existing tribal-state compact.

As negotiations began, Governor Jane Hull was patently clear that there would be no deal and no tribal-state compact unless certain policy goals of hers were met.[7] Key among these policy goals was that the State wanted to limit the number of casinos overall and prevent the construction of additional casinos in the metropolitan areas. The governor's desire to tell the people that there would be no additional casinos in the Phoenix metropolitan area was explicitly stated throughout the negotiations.[8] More specifically, the primary points of negotiation included the number of facilities, the location of facilities, and the number of gaming devices.[9] The State was trying to limit the total number of devices per facility to roughly 1,000 machines per facility, and then by limiting the number of facilities within each metropolitan area, to place overall limits on the numbers of machines within each metropolitan area.[10]

The Governor's insistence on limiting the number of machines and facilities in the metropolitan areas was partly driven by a desire to ensure that there was a viable gaming market rural gaming tribes. Because the principal markets in Arizona are the Phoenix and Tucson markets, the State sought to restrict the number of metro casinos to help protect the customer base for rural gaming tribes, ostensibly to reduce rural gaming tribes' temptation to try to locate casinos in the metro areas. The State hired an economist to model the metro markets, the rural markets, and the compact proposals to ensure that the rural gaming tribes were protected.[11] At one point in negotiations, the Governor sought to prevent gaming on all lands not held in trust at the time IGRA was enacted, which would have precluded off-reservation gaming projects like that at issue today. IGRA provides for gaming on these "after-acquired lands" in limited circumstances[12] but certain tribes, including the Navajo Nation, opposed this prohibition because they wanted to retain the option to game on after-acquired lands near the Navajo Reservation. Ultimately, the State did not press for this prohibition, despite the fact that it would have all but guaranteed no additional casinos in Phoenix and Tucson, because Navajo and other rural tribes insisted that their facilities would be located in rural locations away from metropolitan areas. The State ultimately fell back on its initial position of seeking to avoid permitting the expansion of facilities in the Phoenix market, so it actively sought to identify how many casinos would be in the Tucson and Phoenix markets.[13]

By August 2000, the State was willing to increase the number of gaming devices in each facility if the tribes were willing to agree not to increase the number of statewide facilities. The State felt that this concession was necessary to secure an overall reduction on the number of

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[6] *Testimony of Chairman Ned Norris, Tohono O'odham Nation, Legislative Hearing on "The Keep the Promise Act of 2014" before the S. Comm. on Indian Affairs*, 113th Cong. at 9-10 (September 17, 2014).

[7] Exhibit D, (LaSarte depo) at 29:7-30:10.

[8] Exhibit E (Hart depo) 44:13-47:13; (Walker depo) 36:13-37:6; Ex. 9 (Dahlstrom depo) 288:2-12; (LaSarte depo) 81:13-84:3

[9] Exhibit F (Hart depo) 31:9-25.

[10] Exhibit G (Hart depo) 77:9-80:14.

[11] Exhibit H (Hart depo) 84:16-85:18; 169:10-170:6; (Bielecki depo) 76:7-77:22.

[12] 25 U.S.C. § 2719(a)-(b).

[13] Exhibit I (Hart depo) 197:20-199:16; (Landry depo) 54:10-15.

facilities from the numbers authorized in the then-existing compacts because it would help ensure that its demand of no additional facilities in Phoenix and Tucson would be met.[14] Because the State expressed concerns about the two metropolitan markets in particular, the tribes formed self-selected subgroups in each of those markets to negotiate among themselves and develop the Arizona tribal positions with respect to the numbers of facilities and machines in those markets. This was an internal inter-tribal effort to define and develop the tribes' unified position regarding those markets vis-à-vis the governor.[15] Negotiations regarding the Tucson area market were held among Tohono O'odham and the Pascua Yaqui Tribe, while negotiations regarding the Phoenix market only included Salt River, Gila River, Ak-Chin, and Fort McDowell.

Tribal leaders in the Arizona Indian Gaming Association ("AIGA"), which represented the interests of all gaming tribes in Arizona, agreed among themselves and with the State that there would not be any additional casinos in the Phoenix metropolitan area beyond the seven that were already being operated by Salt River, Gila River, Ak-Chin, and Fort McDowell.[16] Because the AIGA tribal leaders agreed the compacts should authorize no additional casinos in the Phoenix metropolitan area, the Phoenix metro tribes each agreed that the new compacts would reduce the maximum number of facilities each tribe could operate by one facility, as compared to their then existing compacts. This reduction is reflected in columns 3 and 4 of Section 3(c)(5) of the 2002 Compact.[17] Column 3 of Section 3(c)(6) denotes how many gaming facilities each tribe was authorized to operate under the previous compacts while column 4 shows how many were to be allowed under the newly agreed upon model compact. Based on the representations of Tohono O'odham (which are discussed further below), the tribal leaders felt that the chart illustrating the reduction in facilities was sufficient to address the State's concern that the compact not authorize additional casinos in the Phoenix metropolitan area. The four Phoenix-market tribes made it clear in discussions with other tribes and the State that they agreed to this reduction specifically for the purpose of ensuring that the only existing casinos in the Phoenix market would be allowed under the compacts.[18] The agreement by Phoenix area tribes to reduce their authorized number of facilities was not just memorialized in the model compact itself but also in materials that promoted the compact in a campaign to garner voter support.[19]

With regard to the Tucson area, the State told Pascua Yaqui and Tohono O'odham that it also wanted no additional casinos in that market but Tohono O'odham was adamant that it be allowed to retain its fourth facility. It was at this point that the State and tribal parties began pressing Tohono O'odham about their insistence on retaining the right to build a fourth casino. State negotiator Steve Hart told Tohono O'odham that, "[t]he Governor wants to see an overall

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[14] Exhibit J (Hart depo.) 44:11-48:8.

[15] Exhibit K (Lunn depo) 84:2-86:12; (LaSarte depo) 42:19-45:4; 59:12-65:24; (Walker depo) 87:22-88:14; (Dahlstrom Vol. 2 depo) 273:3-275:20.

[16] Exhibit L (Makil depo) 47:21-49:3, 219:13-220:12; (Lewis depo) 45:17-47:21; 57:15-61:8; (Lunn depo) 48:13-49:7, 51:25-52:18; 81:20-82:22, 93:4-94:10; (LaSarte depo) 129:7-20; (Hart depo) 92:22-93-13; (Bielecki depo) 143:10-16.

[17] Exhibit C at 79.

[18] Ex. M (Landry) 52:15-53:7; Ex. 14 (Lewis) 55:4-56:2, 57:15-58:17; 98:5-11; Ex. 17 (Makil Vol. 2) 164:21-166:1.

[19] Exhibit B at 5.

reduction in the number of facilities. You guys [Tohono O'odham] are still stuck at four. Everyone else has dropped a facility. We want no added facilities in Phoenix, and you've got this one added facility in Tucson. We'd like to get rid of that."[20] Tohono O'odham argued that it should be allowed to keep its fourth facility because it was a hybrid between a rural and a metro tribe and should be treated differently from other metro tribes. It maintained that it should have the ability to have three large facilities in Tucson and be allowed to maintain one smaller capacity, rural facility.

In an AIGA meeting, Tohono O'odham Chairman Edward Manual stated that Tohono O'odham intended to retain its three existing facilities because of substantial investments made into those casinos, and that retaining the right to a fourth would allow it to put another casino in the Tucson market or in a rural location on its primary reservation to create jobs and provide economic development. These statements were also made by Tohono O'odham's representatives in staff-level meetings.[21] The State repeatedly pressed Tohono O'odham to identify the possible range of locations where its unbuilt facility might be located if it were allowed to keep four authorizations. Tohono O'odham's representatives gave disingenuous answers that omitted West Phoenix as a potential location even though Tohono had already initiated an active search to acquire a casino site there.[22] Tohono O'odham assured the State's negotiators that they would put a "third facility in Tucson" if Pascua Yaqui agreed to allow that in the compact, and that if not, they would still need four casino authorizations because in addition to their two Tucson casinos, they would have "two rural facilities," the existing one in Why and another "in Gila Bend or Florence."[23] State negotiator Steve Hart summed up the promises TON made this way:

> The Tohono O'odham Nation assured everyone, told everyone, agreed with the other tribes, agreed with the governor's office that there would be two or perhaps three facilities in the Tucson area, a facility in Why that was 40 or so miles out, or 50 miles out, and there was a potential for facilities in Gila Bend and Florence. If the locations that they are looking for are not those locations, then they're doing something that's different than they said and promised.[24]

The State was persuaded by Tohono O'odham's rationale and allowed Tohono to retain its fourth facility if it could reach an agreement with Pascua Yaqui. Pascua Yaqui initially objected to the construction of another casino near its facilities in Tucson because of a fear that an additional facility would saturate the market and hurt Pascua Yaqui's business. Pascua Yaqui and Tohono O'odham eventually reached an agreement based on the stipulation that Tohono

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[20] Exhibit N (Hart depo) 119:15-19.

[21] Exhibit O (LaSarte depo) 130:22-134:2.

[22] Evidence uncovered during discovery in *State of Ariz. et al. v. Tohono O'odham Nation*, No. 11-0096 (D. Ariz. filed Feb. 14, 2011), reveals that Tohono O'odham officials discussed Phoenix area casino plans at least as early as May 2001 and that such plans were intentionally kept quiet in consideration of the ongoing negotiations. The July 23, 2014 testimony of Salt River President Diane Enos provides an overview of this evidence. *See Testimony of President Diane Enos Salt River Pima-Maricopa Indian Community, Oversight Hearing on "Indian Gaming: The Next 25 Years," before the S. Comm. on Indian Affairs*, 113th Cong. at 7-12 (July 23, 2014).

[23] Exhibit P (Hart depo) 95:2-97:6.

[24] Exhibit Q (Hart depo) 129:23-130:7.

would be required to place their fourth facility no closer than 50 miles from any existing facility in the Tucson market.[25]

Tohono O'odham never asserted any right or interest in negotiating for machine or facility rights as part of the Phoenix market group, and never negotiated for the right to locate facilities in the Phoenix market.[26] If the Tohono O'odham had intended to game in the Phoenix market, that is something that the other tribes would have reasonably expected Tohono to raise in the negotiations. This is particularly true given Governor Hull's absolute insistence on preventing the expansion of gaming in the Phoenix market, and the existence of the *Agreement in Principle* entered into among the tribal leaders, through which each leader expressly agreed "to make a good faith effort to develop and maintain consistent positions regarding the terms and issues at issue with the State of Arizona in compact negotiations."[27]

However, internal Tohono O'odham memos reveal that Tohono had no doubt about the reliance of Phoenix tribes and deliberately positioned itself to exploit the reduction in the Phoenix market. One memo shows that on August 22, 2002, when TON was secretly looking for a casino site in west Phoenix, those working on the search said that one casino location they were investigating was "way out there, but it's still in the Phoenix area" and noted that under the terms of the negotiated 2002 Compact "everybody in the Phoenix area loses one casino, which drops them to what they currently have" because Governor Hull wanted no additional casinos in the Phoenix area.[28]

Therefore, the existing structure of gaming in Arizona includes and was based upon the agreement by Arizona tribes not to build additional casinos in the Phoenix metropolitan area. This is a message that Tohono O'odham provided "major funding" for to persuade Arizona voters, and one that was negotiated over the course of many years. That Tohono O'odham was aware of this message, heard and paid for its dissemination, and never said anything to rebut it despite active plans to the contrary reveals the depth of Tohono's deceit.

<u>The Keep the Promise Act Does Not Impose Any Greater Restrictions on Tribal Rights Beyond Those Already Agreed Upon by the Tribes</u>

It must be understood that the Keep the Promise Act does not disturb promises between Tohono O'odham and the United States that were made as part of the 1986 Gila Bend Act. That act compensated Tohono O'odham for lands flooded as a result of a federal project and established a mechanism for Tohono to acquire replacement trust lands. The purpose of the Gila Bend Act is not in dispute but it is incorrect to suggest that the Act remains fully intact today, as it was in 1986. When passed in 1986, the Gila Bend Act allowed Tohono O'odham to acquire 9,880 acres of land to be held in trust and used as a reservation. In 1988, congressional enactment of the Indian Gaming Regulatory Act ("IGRA") limited Tohono's inherent right to game and imposed a federal regulatory system to administer gaming on lands taken into trust under the Gila Bend Act. Tohono agreed to operate no more than four casinos when it entered

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[25] Ex. R (Hart depo) 81:22-83:8; 93:25-97; (Ritchie depo) 29:6-21.

[26] Exhibit S (Hart depo) 207:17-208:16; (Dahlstrom depo) 225:12-226:6; (LaSarte depo) 59:12-65:24.

[27] *See Agreement in Principle*, a copy of which is attached as Exhibit T.

[28] Exhibit U, 5:7-21.

into its initial gaming compact with the State of Arizona in the early 1990's. This compact constituted a second limitation on Tohono's ability to use replacement lands acquired under the Gila Bend Act. Although IGRA and the Gila Bend Act did not place a limit on the number of facilities that Tohono O'odham could operate, Tohono agreed to this limitation in the course of good faith negotiations. When the existing tribal-state compacts were negotiated in 2000-2002, Tohono O'odham again restricted its use of Gila Bend Act replacement lands by agreeing to machine limits and geographical restrictions on where its four casinos could be located. The Department approved this compact and its restrictions on Gila Bend Act replacement lands in 2003. That approval has not been revoked.

To say that the Keep the Promise Act's clarification as to the geographic restrictions in these Department-approved compacts somehow breaks a federal promise to allow Tohono to open casinos on any Gila Bend Act lands ignores this history. The Department asserts that the Gila Bend Act's mechanism for Tohono's acquisition of replacement lands is a solemn promise that remains unmodified to this day but that is simply not true. This position ignores the federally sanctioned negotiations between Tohono O'odham and the State of Arizona, which resulted in restrictions on tribal land use in exchange for gaming exclusivity in the State. The Keep the Promise Act does not deprive Tohono O'odham of any rights that it had not already modified over the course of negotiating and acting in furtherance of IGRA-authorized compacts since the early 1990's. Rather, the bill protects the commitments that Arizona tribes made to each other and to so many Arizonans when they approved the current tribal-state compact based on the promise of no additional casinos in the Phoenix metropolitan area until 2027. To justify its opposition to the Keep the Promise Act, the Department decided that a 1986 commitment to place lands into trust for Tohono O'odham that is silent with respect to gaming excuses any dishonest means Tohono O'odham may have used during the course of the tribal-state compact negotiations, even though many other Arizona tribes have expressed concerns that this dishonesty and Tohono's proposed casino, which only is possible because Tohono's bad faith dealings, threatens Arizona tribes' gaming exclusivity and will negatively impact all tribes in the state. The Department maintains its opposition to the Keep the Promise Act even though Tohono O'odham publicly agreed to the gaming limitations it would codify.

Aside from tone, the position of the Department is not surprising. Assistant Secretary Washburn's September 17 hearing testimony made clear that he is not only in the business of picking winners and losers when it comes to the scope of tribal gaming in Arizona, but he is apparently more qualified than the tribes and voters of Arizona who have already made this determination when it comes to making these policy decisions. What was surprising, however, was the Assistant Secretary's willingness to reward the cynicism and dishonesty of one tribe at the expense of the other tribes in Arizona. Nevertheless, Assistant Secretary Washburn has made it crystal clear in his advocacy for the Tohono O'odham that he believes some tribes are more deserving than others, even if it harms rural Arizona tribes.

The Keep the Promise Act will Protect Rural Arizona Tribes to whom the United States has a Trust Responsibility

The Department asserts that its trust responsibility to Tohono O'odham requires it to oppose the Keep the Promise Act but this position is inappropriate and ignores the congruent relationship that the United States maintains with other Arizona tribes who rely heavily on the

current structure of gaming in Arizona. The responsibility that the United States owes to other Arizona tribes who benefit from the existing structure of gaming in Arizona is largely attributable to the fact that this structure was affirmatively approved by the Department in 2003.[29] Ironically, the Department issued its approval of Tohono O'odham's compact with the State of Arizona in the same Federal Register notice that signaled federal approval of nearly identical compacts for the Ak-Chin Community, Cocopah Indian Tribe, Fort McDowell Yavapai Nation, Hualapai Indian Tribe, Havasupai Indian Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Pascua Yaqui Tribe, Quechan Indian Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe, and the Yavapai-Apache Nation.[30]

However, the Department's approval of these compacts does not somehow imbue the Assistant Secretary of Indian Affairs with the expertise or authority to decide that the Phoenix metropolitan area is large enough to sustain an eighth Class III facility, as he contended before the Committee. Despite Assistant Secretary Washburn's unfounded assertion that certain Phoenix area tribes can withstand the competition, this completely disregards the other non-metro tribes that rely upon the stability of the existing structure. Putting aside any questions about Assistant Secretary Washburn's credentials as an economist equipped to measure the capacity of gaming markets to expand, he has simply ignored the social and fiscal benefits that the Keep the Promise Act strives to protect for rural and non-gaming tribes to which he owes a trust responsibility. Other Arizona tribes, such as the Quechan Indian Tribe and the Hualapai Tribe, have voiced their support for measures aimed to protect the promise of no additional casinos in the Phoenix metropolitan area until the existing compacts expire.[31] These tribes fear that a success by Tohono O'odham will disrupt the current system under which all Arizona tribes can benefit, even if they do not operate their own casino. The compacts ensure that non-gaming tribes share in gaming revenue through machine transfer agreements with urban tribes. However, this delicate balance is dependent upon tribal exclusivity, which is under ever increasing pressure from non-tribal gaming interests who view Tohono O'odham's scheme as having destroyed the trust that justified the current monopoly.

The Department's aggressive opposition to the Keep the Promise Act demonstrates its failure to ensure that the existing tribal-state compacts are properly administered and not manipulated in a way that would hurt the majority of Arizona tribes for the benefit of just one. Comments made by Assistant Secretary-Indian Affairs Washburn illustrates an inability to understand the practical reality of his position, which amount to acquiescence to deceptive plans specifically calculated to exploit what were supposed to be "good faith" negotiations and hurt other Arizona tribes for the sake of improved profit margins.

<u>The Keep the Promise Act is Consistent with Legislation that Affects Tribal Gaming</u>

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[29] "Notice of Approved Tribal-State Compacts", 68 Fed. Reg. 5912 (Feb. 5, 2003).

[30] *Id.*

[31] *See Testimony of Chairwoman Sherry Counts, Hualapai Tribe, Oversight Hearing on "Indian Gaming: the Next 25 Years"* before the S. Comm. On Indian Affairs, 113th Cong. (July 23, 2014); *Statement of President Keeny Escalanti Sr., Quechan Indian Tribe, Oversight Hearing on "Indian Gaming: the Next 25 Years"* before the S. Comm. On Indian Affairs, 113th Cong. (July 23, 2014);

One of the Department's other stated reasons for opposing the Keep the Promise Act is that it would create a tribe and area specific limitation in IGRA. The Department relies on this convenient statement but this position declines to acknowledge the universal application of the Keep the Promise Act to all Arizona tribes. The Department also fails to acknowledge that IGRA's original text included carve-outs for tribes in Wisconsin and Florida.[32] In this context, the Department's opposition seems rooted in a distorted view of how Congress has regulated gaming since the day IGRA was enacted.

Moreover, as has been stated in previous submissions to the Committee, Congress routinely enacts and the Department consistently supports legislation that curtails gaming opportunities for certain tribes in specific areas. Opposition to the Keep the Promise Act on the basis of it creating a "tribe-specific and area-specific" limitation in IGRA cannot be squared with the Department's pervasive support of bills that would actually create such limitations but without the temporal limitations considered here.[33] The Department has clearly taken inconsistent positions with regard to legislation that affects tribal gaming rights and therefore, its unartfully stated opposition to the Keep the Promise Act should be disregarded.

The Keep the Promise Act Preserves the Existing Structure of Arizona Gaming and Protects the Capacity of Arizona Tribes to Provide for Their Communities

One of the justifications provided by Assistant Secretary-Indian Affairs Washburn to the Committee for his opposition to the Keep the Promise Act was the fact that Tohono O'odham is "impoverished" and needs the revenue that a fourth casino would generate. This position ignores the reality that Tohono O'odham is already a successful gaming tribe with three existing facilities and is on par with its sister tribe, Gila River, in terms of affluence and capacity to provide services to members. According to Tohono O'odham's own promotional materials, Tohono initiated "modern gaming" on its lands with the opening of its first bingo hall in 1983.[34] The first of Tohono's casino opened in 1993 and two more have opened since that time. In the early 2000s, Tohono O'odham claims that it "took a lead role in securing passage of Proposition 202,"[35] whose official ballot materials included the promise of no additional casinos in the Phoenix metropolitan area for twenty-five years. Tohono O'odham's success has been so consistent and long lived that its council first approved the issuance of per capita payments to tribal members more than fifteen years ago in 1997. Today, Tohono O'odham boasts the Desert Diamond Casino-Hotel, which it claims to be the largest in the State; the Desert Diamond Casino; and the Golden Haṣañi Casino. In total, Tohono O'odham's gaming revenue injects over $25 million into Southern Arizona's local economy on an annual basis and brings in "a respectable percentage of the $1.8 billion generated" by Indian gaming in the State.[36]

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[32] *See* 25 U.S.C. § 2719(b)(2).

[33] *See Testimony of Governor Gregory Mendoza, Gila River Indian Community, Legislative Hearing on the Keep the Promise Act of 2014 Before the S. Comm. on Indian Affairs*, 114th Cong. at 4 (Sept. 17, 2014).

[34] *See* Exhibit A.

[35] *Id.*

[36] *See* "Tohono O'odham Party Time: Celebrating Three Decades o Gaming and Progress", http://indiancountrytodaymedianetwork.com/2014/04/03/tohono-oodham-party-time-celebrating-three-decades-gaming-and-progress-154299 (last visited Sept. 29, 2014).

Notwithstanding the three decade long benefit that Tohono O'odham has received from gaming, there remain many challenges for the community, as Chairman Norris pointed out in his testimony before the Committee. It would be naïve, however, to think that the "impoverished" state of Tohono O'odham, as pointed out by Assistant Secretary Washburn, somehow justifies the construction of a casino that would directly compete with Tohono's similarly situated sister tribes. The 2010 Census Report shows that the Community and Tohono O'odham, both of which operate three casinos, have similar demographics with regard to the percentage of households headed by single mothers, percentage of households with incomes less than $10,000, percentage of households that receive supplemental income, per capita income, and the percentage of persons living in poverty.[37] The strikingly similar census statistics for these sister tribes demonstrates that it is wholly inappropriate for the Department to ground its opposition to the Keep the Promise Act in the fact that the bill would impact the ability of one tribe to boost its revenue. In reality, acquiescence to Tohono O'odham's scheme would cannibalize existing tribal facilities and revenue sharing arrangements to simply shift resources from one sister tribe to another. Moreover, the Department has completely ignored rural tribes in the state which are much more impoverished than either Tohono O'odham or the Community.

Tohono O'odham and the Community have both experienced the type of success that has allowed the tribal governments to slowly improve the quality and breadth of services available to tribal members. However, the size of these communities, in terms of both population and geographic size, and the persisting presence of social ills, ranging from substance abuse and gang activity to poverty and health disparities make it short sighted to oppose the Keep the Promise Act because it would temporarily foreclose just one avenue of economic development to Tohono. Realistically, the opening of the proposed Glendale casino would not bestow any sort of tangible benefit on Tohono O'odham for many years. The mere distance of the facility from Tohono O'odham's reservation would also foreclose any employment opportunities for members living there and would likely force them to relocate to the Phoenix area before securing a job on site. The location of the facility on the rural part of the reservation, as Tohono leadership suggested it would do during the compact negotiations, would at least provide employment opportunities for tribal members and not force them to leave home for work. Instead, this facility would be located in the middle of Glendale and hope for enough profits to one day trickle down to Tohono O'odham membership.

In closing, the Community thanks the Committee for the opportunity to submit this additional information as part of the record for the September 17, 2014 legislative hearing on the Keep the Promise Act. We respectfully urge the Committee to consider the Keep the Promise Act at its next Business Meeting.

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[37] *See* Gila River Indian Community and Tohono O'odham Nation Census 2010 Demographics (Exhibit V).

***The index and exhibits attached to this testimony have been retained in the Committee files.**

The CHAIRMAN. Thank you, Governor.

Mayor Weiers? And I would ask, try to keep it to give minutes, because Senator McCain has another meeting to get to, and I want to get to him for questions.

STATEMENT OF HON. JERRY WEIERS, MAYOR, CITY OF GLENDALE, ARIZONA

Mr. WEIERS. I will do the best I can, sir, thank you very much.

Good afternoon, Chairman Tester, Vice Chairman Barrasso and members of the Committee. My name is Jerry Weiers, and I am the mayor of Glendale, a city of 232,000, and the 72nd largest city in the Country. Before becoming mayor, I served eight years in the Arizona legislature.

I am here today to discuss my personal views on a casino proposed to be built in my city. I am required to state that my views today do not represent the majority of the body of the council. My views are not the official position of the council.

Like Senator McCain, I supported Arizona Proposition 202, the 2002 ballot initiative, which gave tribes the exclusive right to conduct gaming. One key aspect of that campaign was the clear promise repeatedly made to voters by tribes and State officials that there would be no additional casinos in the Phoenix metro area. When Governor Hall concluded compact negotiations in 2002 with the 17 tribes, he publicly announced that under the compact, that there would be "no additional casinos in the metropolitan Phoenix area."

Now, here is a voter pamphlet from the 2002 initiative campaign that was widely distributed by the 17 tribes. The pamphlet told voters that under the compact, "there will be no facilities in Phoenix." If you look at page 6, which I have highlighted here, major funding for this pamphlet was provided by the Tohono O'odham Nation, who I will respectfully refer to as the TO.

Understandably, the public was blindsided when Tohono O'odham announced in January of 2009 it was going to open a Las Vegas style casino on the 54 acre parcel within our city. At that time I was serving in the Arizona legislature, and I met with Tohono O'odham Chairman Norris, and I expressed my grave concerns about gambling within our city. The council immediately passed a resolution opposing the casino, because it would harm our residents and their way of life.

Recently the city council voted four to three to repeal the 2009 resolution opposing that casino. This was done only after the Interior Department had already decided to create a casino reservation on that parcel. We had no real choice; we could continue to fight and hope for action from this body or give up. It is frustrating to be a city of our size and have no voice on gambling pushed by a tribal government that is more than 100 miles away. The public has no right to object to gambling because of the narrow exception in the 1988 Indian Gaming Regulatory Act that Tohono O'odham is using that gives the Interior absolutely no authority to stop gambling, even if it knows adverse impacts to nearby neighborhoods, churches and the public school across the street.

Since the Interior has no authority to stop gambling, it has no reason to ask the public for comments or investigate adverse impacts. This is a polar opposite to the two-part exception in IGRA, which is typically used for off-reservation casinos. It requires that the Interior prepare for an environmental impact statement and investigate in great detail adverse impacts that a casino may cause.

What is more, for gambling to be allowed, the Secretary must determine on the record that the casino "would not be detrimental to the surrounding community." And most importantly, the State's governor has the legal right to veto any casino project, regardless of the Secretary's decision.

But in our case, the public has no say. The State legislature has no say. Our governor has no say, and the Interior has no authority to stop it. For us, this means that the largest tribal casino in the history of the State may operate on a 54-acre island in the middle

of the Phoenix metro area without anyone investigating and addressing the adverse environmental and social impacts it will cause, and without any Federal, State or local official deciding that it can safely operate in the public's interest.

What is more, my city may not be the last. Our sister cities realize that unless Congress acts, they may be next. Under the 1986 Gila Bend Act, Tohono O'odham claims that it can create a new reservation on land on more than 6,000 acres. It also claimed the right to operate a total of four new casinos in the Phoenix metro area. If Congress does not act, the entire Phoenix metropolitan area must be prepared for more off-reservation casinos.

That is why many mayors and city council members have signed a letter asking that Congress enact the Keep the Promise Act. As a former State legislator, I know that if gambling happens in Glendale, there will be a strong effort in the State legislature to authorize non-Indian gaming in all of Arizona. And that will have a devastating effect on all the tribes.

I urge this Committee to move the Keep the Promise Act. The bill is about preserving the promises made to tribes by tribes to voters, protecting Phoenix metro cities from having unwanted gambling within their borders. Thank you, Chairman Tester. I will be happy to answer any questions.

[The prepared statement of Mayor Weiers follows:]

PREPARED STATEMENT OF HON. JERRY WEIERS, MAYOR, CITY OF GLENDALE, ARIZONA

Good afternoon Chairman Tester, Vice Chairman Barrasso and members of the Committee. My name is Jerry Weiers. I am the Mayor of Glendale, a city of 232,000 and the 72nd largest city in the country. Before becoming Mayor, I served eight years in the Arizona Legislature.

I am here today to discuss my personal views on a controversial tribal casino proposed for my City. As Mayor, I am required to state that my views today do not represent the majority of the body of the Council and my views are not the official position of the Council.

Like Senator McCain, I supported Arizona Proposition 202, the 2002 ballot initiative which gave tribes the exclusive right to conduct gaming. One key aspect of the initiative campaign was the clear promise, repeatedly made to voters by Tribes and State officials, that there would be "no additional casinos in the Phoenix-metro area."

When Arizona Governor Hull concluded compact negotiations with the 17 Tribes, she publicly announced that under the compact, there would be—and I quote—"no additional casinos in the Phoenix metropolitan area."

[HOLD UP pamphlet] Here is a voter pamphlet from the 2002 initiative campaign that was widely distributed by the 17 Tribes. The pamphlet told voters that under the compact—and I quote—"there will be no additional facilities in Phoenix." Page 6 of the pamphlet says that major funding for it was provided by the Tohono O'odham Nation, who I will respectfully refer to as TO.

Understandably, the public was blindsided when TO announced in January 2009 that it was going to open a Las Vegas-style casino on a 54-acre parcel within our City. No one gave us any warning. No one asked for our opinion. At that time, I was serving in the Arizona Legislature and I met with TO Chairman Norris and expressed my grave concerns about gambling within our City.

The City Council immediately passed a resolution opposing the casino because it would harm our residents and their way of life. During the following five years, the City was involved in two lawsuits to stop the casino, at enormous financial cost.

Recently the City Council voted 4–3 to repeal our 2009 resolution opposing the casino. But this was done only AFTER the Interior Department had already decided to create a casino reservation on the parcel. We had no real choice—continue to fight and hope for action from this body, or give up. It is frustrating to be a city of our size and have no voice on gambling pushed by a tribal government more than a hundred miles away.

The public has *no right* to object to gambling because the narrow exception in the 1988 Indian Gaming Regulatory Act that TO is using gives Interior absolutely *no authority* to stop gambling, even if it knows of adverse impacts to nearby neighborhoods, churches, and the 2,000-student public high school across the street, and even though Arizona Governor Jan Brewer formally objected. Since Interior has no authority to stop the gambling, there is no reason to ask the public for comments or investigate adverse impacts.

This is polar opposite to the "two-part" exception in IGRA, which is typically used for off-reservation casinos such as this. It requires that Interior prepare an Environmental Impact Statement and investigate in great detail adverse impacts that a casino may cause. What's more, for gambling to be allowed, the Secretary must determine on the record that the casino, and I quote, "would not be detrimental to the surrounding community." And, most importantly, the State's governor has the legal right to veto any casino project regardless of the Secretary's decision.

But in our case, the public has *no say,* the State Legislature has *no say,* the Governor has *no say,* and Interior has *no authority* to stop it, despite adverse impacts. For us, this means that the largest tribal casino in the history of the State may operate on a 54-acre island in the middle of the Phoenix-metro area without anyone investigating and addressing the adverse environmental and social impacts it will cause, and without any federal, state or local official deciding that it can safely operate in the public interest.

What's more my City may not be the last. Our sister cities realize that unless Congress acts, they may be next. Under the 1986 Gila Bend Act, TO claims it can create reservation land on 6,626 more acres. And, T.O. claims a right to operate a total of four new casinos in the Phoenix-metro area. If Congress does not act quickly, the entire Phoenix metropolitan area must be prepared for more off-reservation casinos. And that is why 8 Mayors and many more City Council members have signed a letter asking that Congress enact the Keep the Promise Act.

As a former State legislator, I know that if gambling happens in Glendale, there will be a strong effort in the Arizona Legislature to authorize non-Indian gambling in the State. And that will have a devastating effect on all Tribes.

I urge this Committee to move the Keep the Promise Act. The bill is about *preserving the promises* made by Tribes to voters and *protecting Phoenix-metro cities* from having unwanted gambling within their borders.

Thank you. I am happy to answer any questions.

The CHAIRMAN. Thank you, Mayor Weiers. Councilman Sherwood?

STATEMENT OF HON. GARY SHERWOOD, COUNCILMAN, CITY OF GLENDALE, ARIZONA; ACCOMPANIED BY HON. SAMMY CHAVIRA, COUNCILMAN, CITY OF GLENDALE, ARIZONA

Mr. SHERWOOD. Good afternoon, Chairman Tester and Members of the Senate Indian Affairs Committee. My name is Gary Sherwood, and I am a council member of the City of Glendale, Arizona.

On behalf of Glendale, I am here today with my fellow council member and colleague Sammy Chavira. We are pleased to have been given the opportunity to present Glendale's official position on S. 2670, the so-called Keep the Promise Act.

Let me be absolutely clear: the City of Glendale strongly opposes enactment of this legislation. The city twice has adopted official resolutions clearly expressing its opposition. And these resolutions have been provided to the Committee.

In this opposition to S. 2670 and House Bill 1410, we have joined our sister cities Peoria, Tolleson and Surprise, all of which have long opposed this legislation. It is important to understand that collectively, our cities represent the vast majority of the population of Phoenix's West Valley.

Our communities desperately need this economic development and employment opportunities which the Tohono O'odham Nation's casino and resort project bring to our area. In Glendale alone, al-

most 80,000 of the nearly 90,000 workers who live in Glendale must leave the city for their employment. In other words, 88 percent of the wage earners who live in our community must travel elsewhere to work. Obviously, this job situation is a significant problem in our community.

In the next 20 years, 65 percent of the growth in the Phoenix metropolitan area will occur in the West Valley. The existing casinos in the Phoenix area are overwhelming concentrated in the East Valley, and the West Valley resort will be over 20 miles away from the nearest of these existing casinos. There is no doubt that these successful facilities will continue to prosper.

When I was first elected to the council in 2012, I knew we had to do our homework on a project like this. So I was stunned to learn that the prior Glendale administration had failed to make any effort to learn more about this proposed project before it rushed to oppose it. It was time to make decisions based on the facts. At the direction of my colleagues, Councilman Chavira, whose district actually borders the Nation's reservation, Councilman Ian Hugh, Councilwoman Norma Alvarez and myself, city staff spent months carefully examining every aspect of the Nation's proposed development.

A minority of the Glendale City Council, including Mayor Weiers, continue to maintain their personal opposition to this project. But as President Reagan once said, "Facts are stubborn things." The facts showed that we had been misled, not by the Nation but by the interests seeking to protect their overwhelming casino market share. Based on this misinformation, the city clearly rebuffed the Nation's good faith effort to forge a mutually beneficial relationship. I am proud that the city of Glendale has now opened a new chapter with the Nation and has entered into an agreement that will bring thousands of jobs and millions of dollars in direct benefit to the city.

Today, the city of Glendale and the Tohono O'odham Nation are bound by ties of friendship. I recently had the honor of participating in a historic groundbreaking ceremony with Chairman Norris, a member of the Nation's legislative council, local and business leaders and hundreds of supporters. Construction of the project is now underway. This facility will be located next to our vibrant sports and entertainment district, an area that is represented by Council Member Chavira. We have talked to many business leaders in this area, including leaders of two professional sports teams and major hospitality developments, and they all support this West Valley project.

I am sorry to report to the Committee that despite these benefits and the unequivocal views of Glendale residents who in poll after poll express overwhelming support for this West Valley resort, East Valley casino interests are again trying to interfere. Over the last several days, these casino interests have been using paid signature gatherers to mislead Glendale residents into signing a petition that challenges the city's agreement with the Nation. As has been widely reported to the press, these paid signature gatherers have been caught on tape lying to Glendale voters, suggesting that the petition is in favor of the West Valley resort. Thankfully, even Mayor

Weiers has acknowledged that this dishonest publicity stunt will not in any way affect the city's agreement.

I share the sentiments of a long-time Glendale business owner, who told me that this bill is more properly titled Keeping the Profits Act of 2014. For all these reasons, the city respectfully urges that the Federal Government should not interfere in our efforts to improve the lives of our citizens. Do not destroy this valuable partnership between the Tohono O'odham Nation and our community.

Senator McCain, you did bring up a point about what this would do to other Phoenix area casinos. Again, a good share of the growth in the Valley of the Sun is going to take place in the West Valley over the next 20 years. Currently there are seven casinos that are considered in the metro Phoenix area. Six of them are in the far East Valley with the one being a little over 20 miles away. So I really don't think that is going to be a concern.

Thank you for this opportunity to testify on this matter. I and Councilman Chavira will be pleased to answer any questions that you may have.

[The prepared statement of Mr. Sherwood follows:]

PREPARED STATEMENT OF HON. GARY SHERWOOD, COUNCILMAN, CITY OF GLENDALE, ARIZONA

Good afternoon Chairman Tester and Members of the Senate Indian Affairs Committee. My name is Gary Sherwood, and I am a member of the City Council for the City of Glendale, Arizona. On behalf of the City of Glendale I am here today with my fellow City Councilmember and colleague Sammy Chavira. We are pleased to present the City of Glendale's official position on S. 2670, the companion bill to H.R. 1410. Let me be clear: despite what you have heard from our mayor, the City twice has adopted resolutions which unequivocally state our opposition to H.R. 1410, and now S. 2670.

This dangerous and wrongheaded legislation would prevent the City of Glendale from benefitting from the economic development and desperately needed employment opportunities which already have begun to be generated by the Tohono O'odham Nation's planned development for its West Valley reservation. Make no mistake, enactment of S. 2670 will have a unmistakably negative impact on the people of the West Valley, people who were disproportionally hit by the economic downturn that began with the home mortgage crisis in the late 2000s. For this reason, Glendale joins the other major municipal governments of the West Valley—the cities of Peoria, Tolleson and Surprise—in opposition to this legislation. Together, our cities make up the overwhelming majority of the population of the area west of Phoenix known as the "West Valley".

To put our views in perspective, I want to share with you that the West Valley's ability to provide employment opportunities to our own people lags badly behind the need. At a recent WESTMARC economic development forum it was noted that the West Valley is home to 39 percent of the region's population (and our population is still growing)—but that only 24 percent of the jobs in our region are located West Valley. A recent studyfinds that "51 percent of people who live in the region—Surprise, Peoria, Glendale and other cities—work outside of it. . . . Of the total, only about 35,000 of the 109,000 people surveyed both live and work in the Northwest Valley." *West Valley jobs lag population growth*, Arizona Republic (April 23, 2014). This dynamic is particularly severe in Glendale. We can see from recent census reports that of the 88,699 workers living in Glendale, *78,122 travel outside Glendale for their employment.* "On the Map," 2011 Census. These numbers are staggering, and underscore the West Valley's desperate need for additional economic development opportunities.

The City of Glendale is the proud home of the Arizona Cardinals football franchise, the Phoenix Coyotes hockey team, and the spring training facilities for the Los Angeles Dodgers and Chicago White Sox. The Tohono O'odham Nation's project is located near this area, and in our view will directly compliment the commercial development that will surround it. When the Nation announced its plans for the West Valley Resort in 2009, it immediately reached out to the City, even though its land was outside Glendale's city limits. The Nation also early reached out to

other West Valley municipalities, and began a dialogue aimed at forging mutually beneficial working relationships with all of us in the local community.

Our partnerships with the Tohono O'odham Nation are a shining example of what is possible when an Indian tribe and local communities work together, hand in hand, to bring positive economic development to fruition. The last thing our communities need is federal legislation which would intrude on our local decisionmaking, throw our citizens out of work, and deprive our economies of hundreds of millions of dollars in economic impacts. The specter of such legislation is all the more disheartening to Glendale and our counterparts in other West Valley cities because it is so clear that its main purpose is to legislate a monopoly for two other tribes who operate gaming facilities in the East Valley way over on the other side of Phoenix. As I have heard Peoria Mayor Barrett say over and over again, we are tired of seeing the buses that come every day to the West Valley to pick up gaming patrons and take them back over to the other side of the Valley to spend their entertainment dollars outside of their own local community. In the next twenty years, 65 percent of the growth in the Phoenix metropolitan area will occur in the West Valley. For these reasons, like the City of Glendale, the West Valley cities of Peoria, Surprise, and Tolleson, each have taken formal action to oppose H.R. 1410/S. 2670, and have expressed that opposition in writing to the Congress. *See, Testimony of Hon. Robert Barrett on Behalf of the City of Peoria, Arizona, Before the Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, U.S. House of Representatives* (May 16, 2013); Letter of Bob Barrett, Mayor, on Behalf of the City of Peoria, Arizona, to the Senate Committee on Indian Affairs; July 21, 2014 Letter of Sharon Wolcott, Mayor, on Behalf of the City of Surprise, Arizona to the Senate Committee on Indian Affairs; July 17, 2014 Letter of Adolfo Gamez, Mayor, on Behalf of the City of Tolleson, Arizona, to the Senate Committee on Indian Affairs.

Because the City of Glendale has taken longer than most of its sister cities to recognize the tremendous value of the West Valley Resort, it is important to provide a bit of background on how we got here. I was elected to the Glendale City Council in late 2012. At the time I must admit I was skeptical about the Tohono O'odham Nation's West Valley Resort and Casino proposal. The City had previously entered into several hundred-million-dollar development deals that resulted in the City paying substantial subsidies to private interests. As a direct consequence, Glendale was facing a huge budget crisis, and it seemed as if this project might be a drain on the City's already scarce resources.

Given this history, and my experience serving for decades on numerous boards, commissions, and task forces in my community prior to my election to the City Council, I knew we had to do our homework when considering massive economic development projects like this one. So when I received my first briefings on this project as a member of the City Council, I was stunned to learn that the prior Glendale administration, which opposed the West Valley Resort, had engaged in no fact-finding on the project and had refused to engage in any dialogue with the Nation at all. This despite the fact that the Nation had made significant attempts to meet City officials and despite the fact that over a dozen administrative and court decisions had confirmed the Nation's right to acquire the West Valley Resort land in trust under its land claim settlement act and conduct gaming on the site.

Meanwhile, the other major cities in the West Valley had long ago accepted the Nation's invitation for dialogue, and as noted above these cities have since expressed formal support for the project. So in 2013, the City opened a formal dialogue with the Nation on this project, and engaged on a nearly-six-month fact finding mission to carefully explore the pros and cons of this development. After receiving regular, detailed updates from staff over several months, the City Council formally voted in March 2014 to begin formal negotiations with the Tohono O'odham Nation in order to see whether we could reach agreement on the project. At that time, we also formally voted as a Council to oppose H.R. 1410, a position that a majority of our councilmembers already had expressed individually on numerous occasions.

While a few individual members of the Glendale City council, including Mayor Weiers, have continued their misguided opposition to this project, they are in the distinct minority, both in terms of the City Council and the West Valley. They remain out of step with the more than two-thirds of Glendale residents who have consistently supported this project for the last five years. To put it simply, they are entitled to their views, but these views are their own personal views, and do not represent the official position of the City of Glendale. I fear that these individuals have turned a deaf ear to the facts and instead have fallen prey to the misinformation being peddled by East Valley casino interests seeking to protect their market share. This misinformation was on display this past July, when Mayor Weiers testified before this Committee in an oversight hearing on Indian gaming. Unfortunately, Mayor Weiers used the opportunity to vigorously present his personal views,

which were in direct opposition to the actual and official position of the City of Glendale.

But as former President Ronald Reagan once said, "facts are stubborn things." When the majority of my colleagues on Council and I were presented with the facts about the West Valley resort and casino it became clear that this project was right for our community. Through this process, we learned a great deal, not only about jobs and positive economic impact, but also about the history of the Nation's plans and gaming in Arizona. We examined, with open minds, the claims made by the Nation's opponents—claims that the Nation had hid its intentions from other tribes or that the tribes had promised that there would be "no new casinos in Phoenix." When we looked at the facts, presented in administrative and court proceedings, we found these claims totally lacking. Evidence presented in federal court showed that East Valley casino interests and State legislators knew about the Nation's rights under its settlement act and in fact sought prohibitions on gaming similar to H.R. 1410/S. 2670 during negotiations over the gaming compacts. However, these market protection prohibitions were rejected and were never incorporated into the compact that the State of Arizona and all the tribes (including the East Valley tribes) signed.

In other words, East Valley interests are now seeking to obtain from Congress through H.R. 1410/S. 2670 the prohibitions that they were unsuccessful in negotiating back in 2002—at the expense of my community in the West Valley and in violation of the promises made to the Tohono O'odham Nation. These opponents have spent lots of money and thrown every conceivable form of mud against the wall, but none of it has stuck. H.R. 1410/S. 2670 is just the latest attempt to protect East Valley casino market share. As a longtime Glendale business owner recently said to me, this legislation is more properly titled the "Keeping the Profits Act of 2014."

After careful examination of these facts, the City formally voted in July and August to support the use of the Nation's West Valley Resort property for gaming and to enter into a formal agreement that provides significant mutual benefits to the City for years to come. Under the uniform Arizona tribal-state gaming compacts, Indian tribes are required to share a portion of their gaming revenues with the State of Arizona. However, unlike some gaming compacts in other states, there is no requirement that this revenue go to particular communities. Instead, in Arizona, while tribes must devote a portion of this revenue sharing to local communities, it is up to each to tribe to determine which communities receive these grants. To my knowledge, the agreement that the City has struck with the Tohono O'odham Nation goes well beyond any other tribal gaming revenue grant or casino impact agreement in Arizona in terms of direct benefits to a municipality. Under the agreement:

- The City will receive funding in excess of $26 million during the 20-year term of the agreement;
- The City has already received an initial good faith payment of $500,000;
- Unlike development deals that the City has entered into in prior decades, the City will not pay one dime to the Nation for construction costs, infrastructure costs in and around the site, and municipal services such as water and wastewater. Instead, the Nation will pay for all of these costs;
- The Nation will pay Glendale's monthly standard fees and service charge rates for commercial customers on the site.

More important to the City than these specified benefits, however, are the jobs, economic impacts, and revenue sharing that the project is beginning to generate for the West Valley and the State of Arizona.

I am sorry to report that despite these benefits and the views of Glendale residents (who in poll after poll express overwhelming support for the West Valley Resort), East Valley casino interests are now paying signature gatherers to mislead Glendale residents into signing a petition to challenge the City's agreement with the Nation. As has been widely reported in the press, these paid signature gatherers have been caught on tape lying to Glendale voters, suggesting that the petition is *in favor* of the West Valley Resort. Thankfully, even Mayor Weiers has acknowledged that this dishonest publicity stunt will not in any way affect the City's agreement.

I recently had the honor of participating in an historic groundbreaking ceremony on the project site with Tohono O'odham Nation Chairman Ned Norris, construction and building development representatives, and more than 200 other tribal and municipal leaders. I have not seen such a demonstration of regional cooperation since we collaborated on building the Arizona Cardinals Stadium in Glendale more than a decade ago. Construction on the West Valley Resort site is now underway.

I have met personally with representatives of the other major sports, entertainment and retail industries in Glendale, including the Phoenix Coyotes, Arizona Car-

dinals, Tanger Outlet Mall, the Renaissance Hotel, and many other restaurants and businesses, all of whom have expressed support for the Nation's project and the secondary benefits that it will bring to their franchises. We also have heard from other developers who are excited about the West Valley Resort and who are now interested in investing in our community. In short, this project is already beginning to pay dividends.

For all these reasons I respectfully urge Congress not to reach back from Washington, D.C. to interfere in our efforts to improve the lives of our citizens. Do not crush the dreams of my constituents and those of my sister cities, who have waited patiently for the jobs, investment in our community, and economic development which this project already has begun to bring to the West Valley. We urge the Senate Indian Affairs Committee to see past the misinformation campaign waged by East Valley casino interests which are pushing a false narrative in order to change federal law and break a promise made by President Reagan and the U.S. Congress to the Tohono O'odham Nation more than twenty-five years ago. Congress should be doing everything it can to foster economic development and positive working relationships between tribal and local governments, not moving forward special interest, market-protection legislation. The City of Glendale is asking you not to destroy this valuable partnership between the Tohono O'odham Nation and my community. We are emphatically urging this Committee to prevent H.R. 1410/S. 2670 from moving forward out of this Committee, and urging the Committee to do everything in its power to ensure that it does not become law.

On behalf of the City of Glendale, I want to thank you for this opportunity to testify on this matter, which is of such great importance to the City of Glendale. I and Councilman Chavira would be pleased to answer any questions that the Committee may have.

The CHAIRMAN. Thank you, Councilman Sherwood. Chairman Norris?

STATEMENT OF HON. NED NORRIS, JR., CHAIRMAN, TOHONO O'ODHAM NATION OF ARIZONA

Mr. NORRIS. Chairman Tester, Senator McCain and honorable members of the Committee, good afternoon.

This is now the fourth time that I have come before Congress to testify about this legislation. If enacted, it would commit a profound injustice against the Tohono O'odham Nation and set a terrible precedent for Indian Country. Although I do very much appreciate the opportunity to provide our views on this bill, the Nation is profoundly disappointed that Congress continues to entertain the cynically-named Keep the Promise Act.

This legislation shows no respect for the clear terms of the 1986 settlement agreement between the Nation and the United States, no respect for the contractual agreement between the Nation and the State of Arizona in our 2003 gaming compact, no respect for the Federal courts and administrative agencies which, in 16 decisions, have reviewed the settlement, the compact, the law and found in favor of the Nation, and no respect for the United States' trust responsibility to the Tohono O'odham Nation.

At the heart of this matter, as I have testified previously, is the fact that the Corps of Engineers destroyed nearly 10,000 acres of the Nation's Gila Bend Reservation in Maricopa County. In 1986, Congress enacted the Gila Bend Indian Reservation Lands Replacement Act to compensate the Nation for the loss of its land and valuable water rights. An important part of this settlement is the right to acquire replacement land that has the same legal status as the destroyed land.

Most of our reservation land is located in remote, isolated areas. Our population is one of the poorest in the United States, with av-

erage individual incomes just over $8,000. As Congress clearly provided in 1986, the Nation will develop its replacement reservation land to generate revenue for public services and employment for our people.

In deciding to use our land for gaming, we relied on the plain language of the Gila Bend Act, which promises that we can use our replacement land as a Federal reservation for all purposes, the Indian Gaming Regulatory Act, which explicitly allows settlement lands to be used for gaming, and our tribal-State gaming compact, which the State and all Arizona gaming tribes negotiated and signed and which explicitly allows gaming on new lands consistent with the requirements of IGRA.

The Nation has had it with the constant misinformation and rhetoric about back room deals and secret plots. These arguments have been litigated and rejected by the courts. Here are the facts. Not only is the Gila Band Act a public law that was the subject of extensive hearings in the 1980s, its land acquisition authority was explicitly preserved in the 2004 Arizona Water Settlements Act, by which Gila River Indian Community secured its enormously valuable water rights settlement.

Further, not only does the tribal-State compact clearly allow the Nation to game on this settlement land in Maricopa County, it also explicitly prohibits outside agreements which would change the compact terms.

Our sister tribes have long benefited from the advice of numerous experienced attorneys. The idea that these tribes have no understanding of the Nation's rights under the plain language of the Gila Bend Act, IGRA and the tribal-State compact is, as the United States courts declared, "entirely unreasonable."

The Gila River Indian Community, the Salt River Indian Community and the Tohono O'odham Nation are relatives and friends. Our shared history is vitally important to the Nation. But these tribes' continued assault on the Nation's rights has taken a toll. We ask these tribes to carefully consider the damage their efforts are causing, both in Arizona and in Indian Country generally.

Honorable members of the Committee, the Nation respectfully urges that you put an end to this misguided, cynical legislation. It breaks the promises made by the United States and in Indian land and water rights settlements. It unilaterally amends the negotiated terms of federally-approved tribal-State gaming compacts. Most of all, it is a return to a dishonorable era of Federal Indian policy and will leave a black mark on this Committee and this Congress' legacy.

Thank you. I would be pleased to answer any questions the Committee may have.

[The prepared statement of Mr. Norris follows:]

PREPARED STATEMENT OF HON. NED NORRIS, JR., CHAIRMAN, TOHONO O'ODHAM NATION

My name is Ned Norris, Jr. I am the elected Chairman of the Tohono O'odham Nation. The Nation is a federally recognized tribe with more than 32,000 members. Our people have lived since time immemorial in southern and central Arizona where our non-contiguous reservation lands—including our West Valley Reservation in Maricopa County—are located. I thank Chairman Tester and the Committee for holding a legislative hearing on H.R. 1410/S. 2670, and for giving the Nation an op-

portunity to testify about this bill. If enacted, this legislation will effect a profound injustice upon the Tohono O'odham Nation, one that will besmirch the United States' honor and set a terrible precedent for its relationship with Indian Country. The Nation is deeply disappointed that Congress is even considering this legislation—a bill that shows no respect for the clear terms of agreements negotiated between sovereign governments, that would break the promises the United States has made to my Nation, in a land and water settlement we all agreed to, and that will re-open up water rights claims on the Gila River. I come before Congress, now for the fourth time, to highlight the many problems with this legislation.

On July 23rd, during this Committee's oversight hearing on Indian gaming, I submitted testimony describing the destruction of our Gila Bend Indian Reservation in Maricopa County, the result of perpetual flooding caused by a dam built by the United States Army Corps of Engineers. I also described the federal legislation enacted in 1986 to compensate the Nation for its losses and the Corps' wrongdoing—the Gila Bend Indian Reservation Lands Replacement Act (Pub. L. 99–503). Because I would like to focus my remarks today on the far-reaching, negative precedent that this bill would set, I will only briefly summarize my prior testimony about the destruction and loss of property and water rights suffered by the Nation.

Historical Context: Destruction of Thenation's Gila Bend Reservation and the 1986 Gila Bend Act

In the 1950s, the Corps of Engineers built the Painted Rock Dam to protect large commercial farms downstream from our Gila Bend Reservation, which at that time contained about 10,000 acres of prime agricultural land. The dam caused perpetual flooding of the reservation, destroying our homes and our farms, making the land unusable, and forcing the residents to move to a 40-acre parcel known as San Lucy Village. Our tribal members continue to live there today, well below the poverty line, with multiple families crowded into small substandard housing. The Corps had no Congressional authorization or tribal consent to flood our land, and the resulting destruction constituted a taking of our property rights as well as a significant breach of trust by our federal trustee.

In an effort to avoid litigation, Congress instructed the Department of the Interior to search for agricultural replacement lands within a 100-mile radius of our flooded reservation, but none could be found. As a result, in 1986 Congress enacted legislation that would instead compensate the Nation by providing the Nation the right to locate and acquire replacement lands in Maricopa, Pima or Pinal Counties (where our various reservation areas are located). In exchange the Nation was required to relinquish its title to nearly all of the Gila Bend reservation lands and the water rights appurtenant to it, and its legal claims against the United States. That settlement statute, the Gila Bend Indian Reservation Lands Replacement Act (Pub. L. 99–503) (Gila Bend Act), provided that the Nation's replacement lands were to have the same status as the lands that we lost, i.e., the replacement lands are to be treated as a "Federal Indian Reservation *for all purposes*." Id., § 6(d) (emphasis added). The Gila Bend Act also made clear that Congress' intention was to "facilitate replacement of reservation lands with lands suitable for sustained economic use *which is not principally farming*." Id. § 2(4) (emphasis added). In addition, the United States would pay the Nation $30 million, which was only a small fraction of the value of our lost land and water rights.

As Senator DeConcini (one of the sponsors of the Gila Bend Act) noted on the pending bill, "Over 3 years of work have gone into this settlement.[P]rofessional staff of the House Interior Committee, as well as other staffs, have spent a great deal of time on trying to develop a fair and reasonable settlement." 132 Cong. Rec. S14457–01 (October 1, 1986). Relying on the United States' promises in this settlement legislation, (which Act the Department of the Interior has described as "akin to a treaty," *Tohono O'odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 22 IBIA 220, 233 (1992)) the Nation executed a settlement agreement in 1987, giving up our right to sue the United States and relinquishing our land and water rights claims.

The Gila Bend Act Makes Clear That Our Land is a "Federal Indian Reservation for All Purposes"—Including Gaming

At the same time Congress was considering the Gila Bend Act, it also was holding extensive hearings on predecessor Indian gaming legislation that ultimately would become the Indian Gaming Regulatory Act, Pub. L. 100–497 (IGRA).[1] Two years

[1] *See, e.g.,* Hrg. No. 98–46, on H.R. 4566 (June 19, 1984); H.R. 6390, Indian Country Gambling Regulation Act (98th Congress); H.R. 4566, Indian Gambling Control Act (98th Congress); Hrg.

Continued

prior to passage of the 1986 Gila Bend Act, the Department of the Interior testified before the House Interior and Insular Affairs Committee that 80 Indian tribes were engaged in some form of gaming on their reservations. H. Hrg. No. 98–46, at 62 (June 19, 1984).[2] The Nation (then known as the Papago Tribe) was one of these tribes, having operated Papago Bingo on one of its reservations outside Tucson since 1984. *Id.*, at 117.[3]

Given this history, and given the fact that the Gila Bend Act itself requires that the settlement land acquired under the Gila Bend Act "shall be deemed to be a Federal Indian Reservation for all purposes," there can be no serious argument that Congress could not have foreseen that this land would be used for gaming. To the contrary, Congress ensured that the replacement lands would have the same legal status as the Nation's destroyed Gila Bend reservation. In IGRA, Congress similarly sought to ensure that lands acquired in trust after IGRA's 1988 enactment date as part of the settlement of a land claim would be treated equally to the pre-IGRA claim lands they were intended to replace (i.e., the new lands would be gaming-eligible just as were the claim lands that were lost). As explained by former Interior Secretary Salazar:

> Certain lands that are acquired after IGRA's passage in 1988 are treated under the statute as though they were part of pre-IGRA reservation lands, and, therefore, are eligible for gaming purposes. . .Lands that are taken into trust for *settlement of a land claim*, as part of an initial reservation, or as restoration of lands for a tribe that is restored to federal recognition are also excepted from the IGRA prohibition *in order to place certain tribes on equal footing.*

See Memorandum from the Secretary to the Assistant Secretary for Indian Affairs, "Decisions on Gaming Applications" (June 18, 2010) at 2 (emphasis added), available at *http://www.bia.gov/cs/groups/public/documents/text/idc009878.pdf*. Indeed, lands acquired pursuant to the 1986 Gila Bend Act are the quintessential type of lands that IGRA intended to protect through the equal footing exceptions. Under the Act, the Nation may acquire land to replace the acreage destroyed by the Painted Rock Dam see Pub. L. 99–503 at Section 6(c) so that the replacement land will have the same gaming eligibility status as the land it replaces.

The Nation's West Valley Reservation

In keeping with the requirements of the Gila Bend Act, which limit the location and the amount of replacement land the Nation may acquire, the Nation purchased unincorporated land in Maricopa County located in the "West Valley" (an area west of the City of Phoenix). The land is about 49 miles from the Gila Bend Reservation, between the cities of Glendale and Peoria. Both the federal courts and the Department of the Interior have determined that our West Valley land meets the strict statutory requirements in the Gila Bend Act. In July the Department of the Interior complied with its congressionally-imposed duty to acquire the land in trust, and it is now a part of the Tohono O'odham Reservation. Letter of Kevin Washburn, Assistant Secretary—Indian Affairs, United States Department of the Interior, to Ned Norris Jr., Chairman, Tohono O'odham Nation (July 3, 2014).

Although the Nation's West Valley reservation is a significant distance (more than twenty miles) from other tribal gaming operations in the Phoenix metropolitan area,

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No. 99–55 Part I, on H.R. 1920 & H.R. 2404 (June 25, 1985); Hrg. No. 99–207, on S. 902 (June 26, 1985); Hrg. No. 99–55 Part II, on H.R. 1920 & H.R. 2404 (Nov. 14, 1985); H. Rep. No. 99–488, to accompany H.R. 1920 (Mar. 10, 1986); Hrg. No. 99–887, on S. 902 (June 17, 1986); S. Rep. No. 99–493, To Accompany H.R. 1920 (Sept. 24, 1986); H.R. 3130, An Act to Prohibit Granting of Trust Status to Indian Lands to be used for the Conduct of Gaming Activities (99th Congress); S. 2557, Indian Gaming and Authorization Act of 1986 (99th Congress); Amendment No. 3226, to H.R. 1920, 134 Cong. Rec. S15390 (Oct. 6, 1986); H.R. 1920, Indian Gambling Control Act—(99th Congress); S. 902, Indian Gambling Control Act (99th Congress); *see also*, Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, Arizona State Law Journal, Volume 42, Number 1, Spring 2010, 99.

[2] In contrast, prior to IGRA's enactment, if Congress wanted to restrict or ban gaming on new trust land, Congress explicitly included language to that effect. *See, e.g.,* the Florida Indian Land Claims Act of 1982, Pub. L. 97–399 (Dec. 31, 1982), the Ysleta del Sur Pueblo Restoration Act, Pub. L. 100–89, Tit. I (Aug. 18, 1987) and the Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. 100–89 Tit. II (Aug. 18, 1987). If Congress had intended to impose a similar restriction on the Nation, it would have done so explicitly in the 1986 Gila Bend Act—but it did not. Just as important, the Nation absolutely never agreed to such a condition, and no such condition exists in the 1987 settlement agreement signed by the Nation and the United States.

[3] The Nation's gaming establishment was discussed again in IGRA predecessor legislation hearings before the same Committee in 1985. Hrg. No. 99–55 Part I, on H.R. 1920 & H.R. 2404 at 29.

a few tribes with Phoenix area gaming facilities vigorously urge passage of S. 2670/ H.R. 1410. Early on they urged that the legislation was necessary because the Nation's actions violated the Gila Bend Act, the Nation's tribal-state gaming compact, and IGRA. When the federal courts rejected their claims, these tribes started to shift to new arguments. Most recently, they claim that the legislation is needed to prevent the Nation from violating some unwritten, back-room promise, and they further argue that without the legislation, there will be no way to stop an explosion of new gaming in the East Valley (the area east of the City of Phoenix). In fact, these tribes vigorously oppose the Nation's project because they have long enjoyed a monopoly in one of the biggest gaming markets in the United States, and the simple fact is that they would prefer not to share that market. Based on these market share concerns, they have urged the introduction and enactment of S. 2670 and its companion bill H.R. 1410.

Their arguments having been rejected in every other venue, the proponents of H.R. 1410/S. 2670 come to Congress as a last resort to ask it to enact legislation that unilaterally inserts into the Nation's tribal-state gaming compact a new restriction which was never negotiated and to which the Nation never would have agreed—a prohibition against developing our West Valley reservation the way we have every right to do under the Gila Bend Act, the Indian Gaming Regulatory Act, and our Secretarially-approved tribal-state gaming compact. This use of a unilateral amendment to eviscerate our land and water rights settlement is unprecedented—Congress has never in the modern era unilaterally abrogated either a settlement or a tribal-state gaming compact. And it should not start now.

H.R. 1410/S. 2670 Is Dangerous Precedent

As discussed in more detailed elsewhere, the Gila Bend Act settles the Nation's claims for the unauthorized flooding of nearly 10,000 acres of its Gila Bend Reservation, providing for the purchase of replacement lands that will be treated the same as the Nation's lost reservation lands. In exchange, the Nation gave up it legal claims against the United States, including its water rights claims, and title to its Gila Bend reservation lands. H.R.1410/S. 2670 would fundamentally alter these terms by no longer treating the Nation's replacement land as a "federal reservation for all purposes"—enactment of this legislation would mean that the replacement land henceforth will be treated as "a federal reservation for all purposes except Indian gaming".

In testimony before the House Natural Resources Committee on S. 2670's companion bill H.R. 1410 and its predecessor bill H.R. 2938, the Department of the Interior has twice opposed the proposed legislation in no small part because it unilaterally interferes with a federally-enacted settlement and a federally-approved tribal-state gaming compact. *See Testimony of Paula Hart, Director, Office of Indian Gaming, U.S. Department of the Interior, Before the Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, U.S. House of Representatives* (October 4, 2011); *Testimony of Michael Black, Director, Bureau of Indian Affairs, United States Department of the Interior, Before the Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, U.S. House of Representatives* (May 16, 2013) . The Department's objections have remained consistent, noting that:

> H.R. 1410 would negatively impact the Nation's "all purposes" use of selected lands under the Gila Bend Act by limiting the Nation's ability to conduct Class II and Class III gaming on such selected lands. . .H.R. 1410 would specifically impact the Gila Bend Act *by imposing additional restrictions beyond those agreed upon by the United States and the Tohono O'odham Nation 25 years ago.* The Department cannot support legislation that specifically impacts an agreement so long after the fact. . .The effect of this legislation would be to add a tribespecific and area-specific limitation to the IGRA.
>
> Black Testimony at 2–3(emphasis added).

The Department further underscored its concern "about establishing a precedent for singling out particular tribes through legislation to restrict their access to equal application of the law." *Id.* We understand that the Department of the Interior will again testify at this hearing, and we trust it will raise the same concerns with the Senate Indian Affairs Committee as it did with the House Natural Resources Committee.

In her testimony before the Committee, outgoing Salt River Indian Community President Diane Enos argued that H.R. 1410 would not create a dangerous precedent, and she insisted that that there are other examples of federal legislation similar to H.R. 1410. *Testimony of President Diane Enos, Oversight Hearing on "Indian Gaming: The Next 25 Years*," at 4–5 (July 23, 2014). But this is untrue, and each

of her examples is demonstrably misleading. None of the legislation she identified involved the kind of settlement agreement reached between the United States and the Nation, where in return for giving up its destroyed reservation, the United States agreed to take land into trust for the Nation and treat it as a "Federal Indian Reservation for all purposes." In fact, few of the statutes she cited involved any sort of settlement agreement at all. For example, the Colorado River Indian Reservation Boundary Correction Act, the Siletz and Grand Ronde Tribe acts, and the Indian Pueblo Cultural Center Clarification Act all involved land grants by Congress without the kind of contract and trust promises that are central to the Nation's settlement act and agreement. *See* Pub. L. 10947 (Aug. 2, 2005); Pub. L. 110–78 (Aug. 13, 2007); and Pub. L. 111–354 (Jan 4. 2011). Others, like the amendments to the Rhode Island Indian Claims Settlement Act, concerned the ability of the State of Rhode Island to prohibit gaming by multiple tribes when those tribes had agreed to state jurisdiction as part of the original settlement. *See* Pub. L. 104–208; *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm.*, 158 F.3d 1335 (D.C. Cir. 1998)). In contrast, H.R. 1410 would have Congress unilaterally amend an agreement with a single Indian tribe that would eliminate legal rights that this tribe possesses. Finally, the amendments to the Mashantucket Pequot Settlement Act provided for *additional benefits to the tribe* (in the form of lease extensions) *at that Tribe's request. See* Pub. L. 110–228.

In short, amending settlement legislation over the express objection of the Department of the Interior (which now holds title to the land) and the Nation (for whose beneficial interest the land is held in trust) cannot even remotely be analogized to "routine restrictions" on "legislation involving Indian land" or "revisit[ing] existing statutes to clarify the party's intent" as former President Enos urged. None of the examples cited by the tribal proponents of H.R. 1410/S. 2670 are similar or even relevant to the statutory provisions in S. 2670, which would fundamentally change the terms of an existing land and water rights settlement reached by the Nation and the United States some 25 years ago over the objections of both of the parties to that settlement. H.R. 1410/S. 2670 thus serves as a powerful disincentive to tribes that are considering whether or not to enter into settlement agreements.

Think of it this way. If H.R. 1410/S. 2670 is deemed acceptable for enactment, then there also is no reason why Congress should not, at the behest of competing water users, "impose additional restrictions beyond those agreed upon by the United States and the [Community]" on the Gila River Indian Community pursuant to the Arizona Water Settlements Act, Pub. L. 108–451, and no reason why Congress should not pass legislation that "specifically impacts" the Salt River Pima- Maricopa Indian Community Water Rights Settlement Act, Pub. L. 100–512. Such legislation might, for example, impose additional unilateral restrictions on the manner of each Tribe's use of the water rights allocated under their respective settlement agreements. The Nation has no doubt that if Congress were trying to unilaterally amend either of these tribes' settlements, these tribes would object as strenuously as the Nation does to H.R. 1410/S. 2670.

Given the United States' long, ugly history of unilaterally breaking its treaties with tribal nations, this Congress should think long and hard about reviving that dishonorable legacy with this legislation.

If Enacted, S. 2670 Will Create New Liabilities for the United States and Destabilize Ongoing Water Rights Litigation

Because S. 2670 would deny the benefits that the United States promised to the Nation in return for the Nation waiving its land and water rights claims (by preventing the Nation from using its West Valley Reservation for economic development and as a reservation for all purposes), it would effectively unravel the settlement agreement embodied in the Gila Bend Act, giving rise to new takings and breach of contract claims against the United States and upsetting active water rights litigation.

Fifth Amendment Takings Claim

The U.S. Constitution provides that private property may not be "taken for public use, without just compensation." *See* U.S. Const., amend. V; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). S. 2670 would take away the Nation's right, as confirmed by the court in the litigation brought by the Nation's opponents, to use its West Valley Reservation for gaming-related economic development. *See Forest County Potawatomi Cmty. of Wis. v. Doyle*, 828 F. Supp. 1401, 1408 (W.D. Wis. 1993) (Indian tribe had a property interest in the right to game under its Tribal-State compact). By interfering with the Nation's investment-backed expectations that it can conduct gaming on its West Valley reservation under its tribal-state compact and thereby causing substantial economic harm to the Nation, S.

2670 would effect a taking that requires just compensation, and therefore exposes United States to liability for substantial damages.

Breach of Contract

The Gila Bend Act provided that, in return for waiving its claims against the United States and giving up title to its land and water rights on the Gila Bend Reservation, the Nation could acquire replacement lands in unincorporated Maricopa, Pima, or Pinal Counties that would be treated as a reservation "for all purposes." In 1987, the Nation entered into a settlement agreement—i.e., a contract—with the United States in which it did indeed relinquish its claims and its land and water rights in consideration for the United States' promises in the 1986 Gila Bend Act. S. 2670 breaches that agreement. It is settled law that when the United States enters into a contract, its rights and duties under the contract are governed by the same law applicable to contracts between private individuals. *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996). If S. 2670 is enacted into law, the Nation will sue the United States for breach of this 1987 agreement. Damages will likely be substantial, based on the fact that lost future profits from the Nation's planned gaming facility during the term of the compact would amount to hundreds of millions of dollars, if not more.

Water Rights Claims

The legislative history underpinning the Gila Bend Act makes clear that a "major component in [the tribe's] valuation of the reservation is its as-yet unquantified Winters right to the surface and underground flow of the Gila River, with a priority date of 1882." H.R. Rep. 99–851 at 8 (1986). Thus, when the Nation gave up its right to the Gila Bend Indian Reservation, it also gave up its right to the water rights appurtenant to it. The legislative history explains, "Expressed in terms of practicably irrigable acres times 5.4 acre-feet, this right could amount to as much as 32,000 acre-feet. . . [T]he tribe thus views the value of their land and its water and any damage claims against the United States and third parties to be in *excess of $100,000,000*." *Id.*, at 8–9 (emphasis added). In other words, the lost water right alone was worth in excess of one hundred million dollars in 1986—certainly that water would be worth even more today.

By unilaterally altering the terms of the settlement agreement, H.R. 1410/S. 1670 effectively reopens claims that were settled by the agreement, including the Nation's claims to nearly 36,000[4] acre-feet of water per year and additional water rights-related damage claims against the United States and third parties worth in excess of $100,000,000 (in 1986 dollars). Because the Gila Bend Reservation has an 1882 priority date, the Nation's 36,000 acre-feet per year would have priority over the vast majority of claimants in the ongoing Gila River General Stream Adjudication. Litigation over the quantification and delivery of the Nation's Gila River water rights is ongoing, and this legislation therefore would destabilize the adjudication of the water rights claims of thousands of municipal and private interests throughout Arizona with junior priority dates.

H.R. 1410/S. 2670 Breaks the Court-Confirmed Promises Embodied in the Tribal-State Compacts

Apart from setting dangerous precedent in the context of Indian land and water rights settlements, H.R. 1410/S. 2670 also interferes with the mutually-agreed to contractual promises that are embodied in the tribal-state compacts entered into by the State of Arizona, the Nation, and the Gila River and Salt River tribes. Although the proponents of H.R. 1410/S. 2670 attempt to re-write history by arguing that the Nation made some "promise" not to conduct gaming in the Phoenix area, in fact, as revealed in the litigation, the Gila River and Salt River tribes and the State of Arizona: (1) were well aware of the Nation's right to conduct gaming on its settlement lands long prior to the signing of the 2003 gaming compacts, and (2) *tried but failed* to insert language into the compacts to prevent tribes from gaming on after-acquired lands (such as replacement lands acquired under a land claim settlement).

In the end, the tribes and the State explicitly agreed in the tribal-state compacts they each signed that gaming on lands acquired in accordance with IGRA's equal footing exceptions would be permitted. A federal court has confirmed that "the Nation's construction of a casino on the Glendale-area land will not violate the Compact" and that "gaming on that land is expressly permitted" by IGRA. *Arizona v.*

[4] The United States later determined that the 32,000 acre foot figure cited in the Gila Bend Act's legislative history was in fact too low, and filed a claim for 35,965 acre feet of water in the Gila River Adjudication. *See*, Statement of Claimant, United States ex rel. Gila Bend Indian Reservation Tohono O'odham Nation, No. 39–35090 (Ariz. Super. Ct. Maricopa County Mar. 25, 1987).

Tohono O'odham Nation, 944 F.Supp.2d at 753–54 (D. Ariz. 2013). H.R. 1410/S. 2670 would re-write the tribal-state compact to provide these wealthy tribes a monopoly that they tried and failed to obtain in good faith negotiations—and break the promises made to the Nation.

1992–2001: The Nation informs Arizona, Gila River, and Salt River of its Rights under the Gila Bend Act

Evidence presented in court showed that the Nation's opponents were repeatedly made aware of the Nation's rights under the 1986 Gila Bend Act. During a recorded July 15, 1992 meeting, the Nation explicitly informed gaming negotiators for the State of its position that land acquired under the 1986 Gila Bend Act would be eligible for gaming. *Arizona et al. v. Tohono O'odham Nation,* CV11–0296–PHX–DGC, 7/15/92 Tohono/Arizona Reps. Mtg. Tr. 3. Later, in the mid-1990s, a representative of the Nation informed the former president of the Salt River tribe (and key 2002 compact negotiator) of the Nation's right to conduct gaming on land acquired under the 1986 Gila Bend Act. Id., Antone Dep. at 76 (5/24/12). Finally, in 2001, one of the Gila River tribe's compact negotiators was informed about the Nation's land acquisition rights under the Gila Bend Act. *Id.*, Supp. Resp. to Pl. First Set of Non-Unif. Interrog. (5/14/12).

2001–2002: Arizona and Gila River Try to Introduce Compact Language to Prevent Gaming on After- Acquired Lands During Compact Negotiations; the Tribes Collectively Reject These Attempts

What is more, as the district court noted, the Nation presented evidence that the State and Gila River "proposed during negotiations that gaming on after-acquired lands be prohibited" but that this proposal "was rejected and not included in the Compact." *Arizona v. Tohono O'odham Nation*, 944 F.Supp.2d at 767. During later compact negotiations, "some State legislators attempted to . exclude all gaming on after-acquired lands precisely to avoid gaming on noncontiguous reservation land such as the [Nation's] Glendale-area land." *Id.* These efforts also were rejected. *Id.*

2002: Gila River, Salt River, and Arizona Agree to Language in the Compact that Expressly Permits Gaming on After-Acquired Lands

In the end, the State, Gila River and Salt River explicitly agreed in the final tribal-state compact that gaming would be permitted on any Indian lands that meet the requirements of IGRA, including on "after-acquired lands" acquired under a land claim settlement. *See* Compact at Section 3(j)(1), Proposition 202, A.R.S. § 5–601.02(I)(6)(b)(iii). The federal court found that the tribes "*did not* reach . . . an agreement " that would "prohibit the Nation from building a new casino in the Phoenix area." *Arizona v. Tohono O'odham Nation*, 944 F.Supp.2d at 753 (emphasis added).

2007: Gila River Proposes a Compact Amendment to Prevent Gaming on After-Acquired Lands in Maricopa, Pima, and Pinal Counties

In 2007, following numerous failed attempts to protect its gaming monopoly, Gila River proposed (unsuccessfully) a compact amendment to "preclude gaming on after-acquired lands." Lunn Dep. 72. Gila River's proposal was limited to after-acquired lands in Maricopa, Pima, and Pinal Counties—the same three counties in which the Nation is permitted to acquire settlement lands in trust under the Gila Bend Act.

2009–2012: Gila River and Salt River Build Three New Casinos in the Phoenix Metropolitan Area

Gila River and Salt River now claim that the tribes all promised that there would be "no new casinos in Phoenix." In support of this argument Gila River and Salt River point to statements in 2002 by Arizona's then-governor: "Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area . . . for at least 23 years." But Gila River and Salt River themselves have gone on to build three new casinos in the Phoenix metropolitan area. *See, e.g., GRIC opens New Wild Horse Pass Hotel and Casino*, Gila River Indian News (November 2009, available at *http://www.gilariver.org/index.php/news/849-gric-opens-new-wild-horse-pass-hotel-and-casino)*; ("On Fri, Oct. 30, the Gila River Indian Community opened the doors to its new 100,00 square foot Wild Horse Pass Casino"), *New Vee Quiva Casino & Hotel ground breaking*, Gila River Indian News (July 2012, available at *http://www.gilariver.org/index.php/july-2012-grin/2919-new-vee-quivacasino-a-hotel-ground-breaking)* ("The official ground breaking ceremony for the new Vee Quiva Casino & Hotel commenced on June 7, 2012 in Komatke, District 6 . . . 'Quite frankly I'm very impressed with the contemporary and cultural elements that will be added into this new casino-hotel,' Mendoza said"); Casinos' quarterly revenue fall eases, Arizona Republic (May 5, 2010, available at *http://*

www.azcentral.com/business/news/articles/20100505biz-casinos0505.html)
(" . . . the Gila and the Salt River Pima-Maricopa Indian communities . . . each invested hundreds of millions of dollars to open new casino-hotels amid the recession")

2012: Multiple Witnesses (including those representing Gila River, Salt River, and the State) Contradict the "No New Casinos in Phoenix" Argument

Like its sister tribes Gila River and Salt River, the Nation explicitly stated at the outset of negotiations that it did not wish to be bound by the statements of other tribal leaders. In light of this fact, the court held that it "cannot conclude" that that the Nation shared the views about gaming in Phoenix that other tribal organizations may have had. *Arizona v. Tohono O'odham Nation*, 944 F. Supp.2d at 766. And as explained by witnesses not aligned with either side of the litigation, the concept of "no new casinos in Phoenix" simply was never a theme or a deal point in the negotiations over the gaming compacts and Proposition 202:

- W.M. Smith Dep. 32 (*Cocopah Tribe representative*) "Q. Do you recall the concept of no new casinos in Phoenix ever being broached in the negotiations? A. No."
- Clapham Dep. 35–36 (*Navajo Nation representative*) "Q. There was not a single event, to the best of your recollection, that could constitute a request for a tribe to waive its rights to build a casino in the Phoenix area? A. There were discussions about reducing the number of authorized facilities in exchange for transfer of machine rights. But I don't remember any specific request to deal with not putting another facility in Phoenix.".
- Ochoa Dep. 25 (*Yavapai Prescott Tribe representative*) "Q. So until this lawsuit came about, though, you had never heard anybody talking about how Prop 202 would permit no new casinos in the Phoenix area and only one in Tucson? A. Absolutely not. No. It wasn't discussed at the meetings I attended."

Even Gila River, Salt River, and the State's own witnesses in litigation confirmed that the Nation never promised not to conduct gaming in the Phoenix area. See, e.g.:

- Walker Dep. 43 (*State representative*) "Q. [Y]ou can't point to any member of the Nation or any of their lobbyists or lawyers who have ever specifically stated that there would be no new casinos in the Phoenix area. Correct? A. Correct."
- Severns Dep. 53–54 (*State representative*) "I have no recollection of a conversation in which [the Nation] mentioned they would or would not build [a casino in Phoenix]."
- Lewis Dep. 44 (*Gila River representative*) "Q. [D]uring the negotiations, no one from the Tohono O'odham Nation ever stated that the Nation would never game in the Phoenix area?...A. I don't recall any, right."
- Makil Dep. 95 (*Salt River representative*) "Q. [Y]ou don't recall any specific representative of the Nation affirmatively stating that the Tohono O'odham would not build casinos in the Phoenix area. Correct? A. No one ever said anything to me."
- Landry Dep. 43 (*Salt River representative*) "Q. During the negotiations, no one from the Tohono O'odham ever specifically stated that the tribe would never game in the Phoenix area, did they? A. That's correct."
- LaSarte Dep. 62–63 (*Arizona Indian Gaming Association representative*) "Q. And at no time did the State ever ask the Tohono O'odham to agree never to game in the Phoenix metropolitan area. Correct? . . . [A.] I do not recall any discussions for or against the possibility of Tohono O'odham gaming in the Phoenix metropolitan market[.]"

2012–2013: The Federal Court Rejects Gila River and Salt River's "Promise" Argument on the Merits

The Nation's opponents have incorrectly claimed that the courts did not reach the merits of the "promise" arguments. This is not true. The district court soundly rejected that argument—and not simply on sovereign immunity grounds as the proponents of this legislation claim. In fact, as the oral argument colloquy involving Gila River's lawyer (Mr. Tuite) reveals, the court found this argument totally unconvincing:

> MR. TUITE: The plaintiffs have alleged sufficient facts to show that the parties understood and endorsed the concept that a fundamental premise of the compact was the principle that the agreement would not result in new gaming fa-

cilities being constructed in the Phoenix metropolitan area. The Nation now claims, however, that the compact permits exactly what is alleged it cannot do.

THE COURT: Mr. Tuite, if that was a fundamental premise of this compact, *it would have been a real easy thing to say that in the compact, right?*

MR. TUITE: Well, a lot of things in retrospect could be easy things to say. Yes, Your Honor, that's true. But we think there are, based on the allegations we made, good reasons to think that the parties didn't feel it necessary to spell that out.

THE COURT: *Well, that's a pretty surprising idea,* in my mind, for parties who are represented by lawyers and who are negotiating a contract that will become a compact that has an integration clause that says no other understandings or agreements not in writing will be enforceable.

For somebody with that kind of a clause going into the compact saying this other understanding is so fundamental that we don't to have say it just didn't make any sense to me.

Arizona v. Tohono O'odham Nation, Tr. Mot. to Dismiss at 28:15—29:12 (emphasis added).

Most devastating to Gila River 's and Salt River's arguments was that section 25 of the very Compact that each Arizona tribe signed with the State includes an integration clause which explicitly provides that "This Compact contains the entire agreement of the parties with respect to the matters covered by this Compact and *no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding.*" (emphasis added). In other words, the parties agreed in the compact that the words of the compact would trump any supposed "side-bar" promises and that such promises would have no effect. *Arizona v. Tohono O'odham Nation*, 944 F. Supp.2d . at 770–74. As explained by the court, because "[t]he fully integrated compact discharges any unwritten understandings," *id.* at 774, plaintiffs' claims seeking to enforce a promise that is not in the compact were foreclosed *on their merits.* There is no basis whatsoever for Congress to overturn the district court's carefully considered conclusions at the behest of the losing litigants.

Concerns About Expansion of Gaming

During this Committee's July 23 Oversight Hearing on Indian Gaming, concerns were expressed about the potential of another Tohono O'odham casino being developed in the East Valley. These arguments are based on the worst kind of fear mongering, and reveal that tribes pushing for enactment of H.R. 1410 and S. 2670 have run out of credible legal and policy arguments. In fact, the Nation has no other eligible land in the Phoenix Valley, and it would be a practical impossibility to acquire such land and undertake such an effort before our existing tribal-gaming compact expires. What is more, we have repeatedly stated, again and again, that the Nation has no such plans. Nevertheless, should even stronger confirmation be needed to dispel these arguments, the Nation stands ready to work to address these concerns.

Conclusion

Chairman Tester, Vice Chairman Barrasso, and honorable members of this Committee, thank you for giving the Nation the opportunity to testify at this legislative hearing. It is our great hope that the United States Senate will reject a return to the era of treaty-breaking, and that you will help Congress preserve and protect the commitments the United States made to the Tohono O'odham Nation when it enacted the Gila Bend Indian Reservation Lands Replacement Act. By so doing, the Senate will also ensure that the integrity of the tribal-state gaming compacting process, as it has been set into law under the Indian Gaming Regulatory Act, will not be undermined by private special interest bills such as H.R. 1410 and S. 2670. The Nation respectfully, and urgently, asks that you help ensure these bills do not become law.

Supplemental Testimony

Introduction

The Nation respectfully submits this supplemental testimony to address issues raised during the Committee's September 17, 2014 legislative hearing on S. 2670, the "Keep the Promise Act of 2014", and asks that it be included in the record.

In this submission, the Nation addresses several mischaracterizations of the proceedings and of the outcome of the litigation the Gila River Indian Community and others have brought against the Nation. The Nation also submits information that well establishes the massive liability this bill will create for the United States if it becomes law, contrary to the oral testimony provided by the Community's lawyer. Finally, the Nation was deeply disturbed by the discussion – and the tone of the discussion -- about whether the Nation is an impoverished tribe. The Nation hereby submits more information about the pervasive poverty and unmet needs of its people, and *it urges any member of the Committee that doubts the reality of the third world conditions within which so many of the Nation's members still live to come visit the Nation for a first-hand review.*

Each of these issues are addressed in turn below.

Inaccurate and Misleading Statements concerning the Liability of the United States if This Bill is Enacted and Concerning Litigation over the Fictitious Promise

Over the course of the last two congresses there have been four hearings on this bill, its companion bill, and/or its predecessor bill. The Gila River Indian Community, the primary proponent of the legislation and by far the primary funding source for the effort to have it enacted, only now for the first time actually appeared to testify on the legislation. When it finally publicly participated at this hearing, the Community's witness appeared with legal counsel who answered almost all of the questions directed towards the Community, and used the platform to make multiple legal arguments. No other witness was provided with the same opportunity to bring accompanying legal/litigation counsel.

The Committee asked the Community about the fact that the Arizona tribal-state gaming compacts *do not* in fact prohibit the Nation from gaming on its West Valley reservation or otherwise contain any sort of "promise" not to game in the greater Phoenix area. Rather than answer the question, Governor Mendoza deferred to his lawyer who provided a convoluted response based on disturbing mischaracterizations of the compact negotiations (in which she was never personally involved) and based on mischaracterizations of extensive litigation in which a federal court has already spoken. Further, when the Committee asked about the settled expectation, reliance and taking issues raised by the Department and the Nation in our respective written submissions, the Community's lawyer again provided a view of the law which is demonstrably incorrect and thereby misled the Committee on this important issue.

To address these inaccuracies and mischaracterizations, and to be included in the record with this supplemental testimony, the Nation submits every one of the sixteen court and administrative decisions issued to date on the Nation's proposed development on its West Valley reservation. As these decisions confirm, the Nation's efforts to obtain this replacement land and use it for gaming-related economic development is entirely legal and in keeping with *both the letter and the intent* of the Gila Bend Indian Reservation Lands Replacement Act, the Indian Gaming Regulatory Act, and the Nation's tribal-state gaming compact. The Nation also submits for the record the attached statement from former Solicitor General of the United States Seth Waxman, one of the Nation's attorneys, in which the former Solicitor General addresses the significant legal inaccuracies in the Community's oral and written testimony.

THE NATION'S IMPOVERISHED STATUS IS BEYOND DISPUTE

In the Nation's testimony before this Committee during its oversight hearing on Indian gaming in July, the Nation described its significant physical size and the staggering economic needs faced by our more than 32,000 members. However, during the Committee's September legislative hearing on S. 2670, it was readily apparent that there remains significant confusion over these needs. Accordingly, I will endeavor to provide additional context.

The Nation's non-contiguous reservation lands in southern and central Arizona encompass vast rural desert lands with a combined area of more than 2.8 million acres - approximately the same size as the State of Connecticut. The Nation's main reservation stretches from the Mexican border on the south nearly to Interstate 8 on the north, and lies in Pima, Pinal, and Maricopa Counties (the latter being the county in which Phoenix is located). Many of our members live in remote and isolated areas on our reservation in Arizona.

The Nation's 10,000 acre Gila Bend Reservation was located in Maricopa County near Gila Bend, about ten miles north and forty miles west of the northernmost parts of the Nation's main reservation. Before the Gila Bend Reservation was destroyed by the operation of the Painted Rock Dam it included some of the only fertile and productive lands (and of course very senior water rights) within the Nation's overall reservation land base. The Nation's central and district governments oversee more than 1,800 employees, providing all manner of public services, from education, child welfare, fire, and public safety, to sanitation, corrections services, and cultural protection. The Nation's tribal enterprises employ more than a thousand additional workers.

Nonetheless, because of our location, economic development and self-sufficiency have been, and continue to be, an ongoing struggle. In addition, the Nation's main reservation borders 75 miles of the international boundary with Mexico, which creates significant additional expense for the Nation in dealing with border-related security, illegal immigration and drug trafficking -- expenses that are unique to the Nation, exceed $3 million annually, and are not reimbursed by the federal government. (These issues are complicated by the fact that more than 1,500 of its members live on the other side of the international border -- as you can imagine, no one consulted with the Nation's ancestors when the international border lines were drawn up between the United States and Mexico.)

In 2009, although it was not required, the Nation submitted to Interior with its West Valley land fee-to-trust application a Report on the Nation's significant unmet economic needs entitled "The State of the Tohono O'odham Nation: a Review of Socioeconomic Conditions and Change by the Taylor Policy Group." I have attached this Report for the record. As noted in this Report, hundreds of O'odham members receive direct employment through the Nation's existing gaming facilities, and thousands more benefit indirectly through government employment, services, and programs funded by gaming revenues. However, while these facilities provide and help to fund significant employment and some on-reservation development, given the size of the Nation's membership, the Nation's needs are still significantly underserved.

The Report, as well as more recent census data, shows very clearly that the Nation continues to lag far behind both non-Indian populations and other Arizona tribes in terms of income, life expectancy, education, quality housing, and stable family households. For example, the average income per capita for tribal members on the Nation is well below the average incomes of other Indians in Arizona and across the United States. Close to half of the Nation's families live below the poverty line (defined by the federal government in 2014 as $23,850 in annual income for a family of four), and 31 percent live in overcrowded homes (more than one occupant per room). Rates of violent crime are high and continue to increase. Fewer than half of the Nation's students finish high school; about fourteen percent of the Nation's members have less than a ninth-grade education, and only eight percent have an associate's degree or higher.

It is our tribal government's solemn duty to address these needs. Our duty is made all the more challenging by the fact that, while our reservation comprises vast tracts of land, ***the Nation derives no governmental revenue from income or real property taxes.*** In contrast, nearby Yuma County, which comprises a geographic area only slightly larger (3.5 million acres) than the Nation's reservation but which employs nearly 500 fewer (1,336) governmental workers, has at its disposal nearly ***$152 million*** in annual revenue, more than ***$69 million*** of which comes from taxes.[1] That is far in excess of the revenue available to the Nation from ***all*** sources—and the Nation's infrastructure deficits are vast by comparison.[2] The per capita income for Yuma County's 200,000 residents ($26,928 in 2010)[3] is more than three times that of tribal members living on the Nation, underscoring how futile it would be for the Nation to derive similar tax revenues from its members.

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[1] Yuma County, Arizona Office of Management and Budget.

[2] The 2012 Annual Report for the Gila River Indian Community reflects even greater revenue: nearly $254 million in gaming revenue and $100 million in interest and dividend income alone. See http://www.gilariver.org/pdfs/2013_ANNUAL_REPORT_FINAL_.pdf. Gila River's membership is barely half that of the Nation's.

[3] Yuma County, Arizona Office of Management and Budget.

Gaming has been an absolutely vital source of governmental revenue for the Nation. As the Taylor Policy Group Report shows, throughout the 1990s and 2000s, with the help of revenue from the Nation's gaming facilities, succeeding tribal administrations have made significant efforts to close the extraordinary gaps facing our members through investments in on-reservation programs and services, including the Tohono O'odham Nursing Care Authority and the Tohono O'odham Community College (both tribally-chartered enterprises), five recreation centers, and a forty seat dialysis center. The Nation also has put a priority on public safety and justice by creating its first fire department, tripling the size of its police force, and by constructing and staffing a five-courtroom courthouse, the Tohono O'odham Justice Center. The Nation's gaming revenues also have funded a tribal college and supported scholarships from that allowed more than 2,000 of its citizens to attend college. But as the Taylor Report demonstrates our unmet needs are still profound.

In short, we continue to face great challenges in achieving economic self-sufficiency, and as federal grants and funding available to Tribal nations continue to shrink, the challenges only increase. As the Taylor Policy Group Report shows, the gaming-related facilities the Nation is now developing on its West Valley Reservation will:

> [A]dvance a number of federal policy objectives simultaneously, including general support for Indian self-determination, specific support for economic development and poverty reduction on Indian reservations, and ultimate amelioration of the social, health, and other consequences of poverty at Tohono O'odham.

Report at 6. The Tohono O'odham Nation needs a way to provide for our government and our people, without relying on the federal government. The West Valley Resort is a major component of our strategy for achieving economic independence.

CONCLUSION

I hope this supplemental information is of use to the Committee as it considers this badly misguided legislation. Should the Committee have additional questions, I would be pleased to answer them.

Attachments

STATEMENT FOR THE RECORD BY
SETH P. WAXMAN, COUNSEL FOR THE TOHONO O'ODHAM NATION,
IN RESPONSE TO TESTIMONY BEFORE
THE SENATE INDIAN AFFAIRS COMMITTEE
ON SEPTEMBER 17, 2014
REGARDING S. 2670, THE "KEEP THE PROMISE ACT OF 2014"

October 1, 2014

On September 17, 2014, Allison Binney of Akin Gump Strauss Hauer & Feld LLP addressed this Committee on behalf of the Gila River Indian Community. Her inaccurate factual assertions and her mistaken assessment of the legal consequences of enacting the so-called "Keep the Promise Act" compel a response. I therefore submit this statement on behalf of the Tohono O'odham Nation ("the Nation") in order to ensure the accuracy of the record and to make clear that the effect of enacting S. 2670 would be to expose the United States to monetary liability that, at a minimum, could reach into the many hundreds of millions of dollars.

I. Factual Misstatements About The Tribal-State Gaming Compact And The Nation's Plans

First, Ms. Binney's testimony significantly mischaracterizes the standard-form gaming compact approved by Arizona voters in 2002. The "chart" to which Ms. Binney referred in her testimony does not "limit the number of facilities in the Phoenix area" or otherwise "promise" that there would be no new casinos in Phoenix.[1] That chart, which is attached to this statement, does nothing more than list each gaming tribe's "Current Gaming Device Allocation," the number of "Additional Gaming Devices" each is permitted under the compact, and its "previous" and "revised" "Gaming Facility Allocation[s]." *See* Addendum ("Gaming Device Allocation Table"). As the U.S. District Court for the District of Arizona determined, the chart "says nothing about geographic locations or limitations, and does not mention the cities of Phoenix or Tucson."[2] Indeed, even after considering all the extrinsic evidence related to the compact negotiations put forward by the Gila River Indian Community, the court concluded that *none* of the language in the Nation's compact "contain[s] a ban on new casinos in the Phoenix area, and its terms *cannot reasonably be read to include such a ban*, even in the light of Plaintiffs' extrinsic evidence."[3] As the Assistant Secretary of Indian Affairs, who testified before this Committee, succinctly put it, "the promise to which the title of S. 2670 refers seems to be illusory."[4]

Ms. Binney also asserted that the Nation "kept the same number of casinos" in the 2003 Compact "because they're not a Phoenix area tribe."[5] But the Nation's preservation of its right

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[1] *See* Binney Testimony, Legislative Hearing on S. 2670, Keep the Promise Act of 2014, at 1:09:30-1:1:49, *available at* http://www.indian.senate.gov/hearing/legislative-hearing-s-2670-keep-promise-act-2014.

[2] *Arizona* v. *Tohono O'odham Nation*, 944 F. Supp. 2d 748, 764 (D. Ariz. 2013), *appeal docketed*, No. 13-16517 (9th Cir.).

[3] *Id.* at 774 (emphasis added).

[4] Washburn Prepared Testimony 3.

[5] Binney Testimony, Legislative Hearing on S. 2670, *supra* note 1, at 1:11:03-1:1:10.

to construct a fourth facility had nothing to do with any geographic classification. As the record compiled in Gila River's litigation against the Nation reflects, after Arizona asked the tribes to forgo rights they had under the then-existing compacts to build new facilities, nine tribes—including tribes with facilities outside the Phoenix area—did so, but *six* other tribes, including the Nation, did not. The Nation retained its previous facility allocation because Arizona proposed and the Nation accepted a compact provision limiting the location of one of the Nation's four facilities. That provision was approved by Arizona voters, and the Nation's plans for the West Valley Reservation comply with it.

Second, Ms. Binney claimed that "in the negotiations and during litigation, handwritten notes have come out from Tohono O'odham's representatives basically indicating that they would ... shut down the other three [Tucson-area] casinos and move them up to the Phoenix area."[6] That statement is wholly unsubstantiated. Indeed, no such plan exists or has ever existed. As the Nation's Chairman testified before this Committee, "the Nation has no other eligible land in the Phoenix Valley, and *it would be a practical impossibility to acquire such land* and undertake such an effort before our existing tribal-gaming compact expires. What is more, [the Nation] ha[s] repeatedly stated, again and again, that *the Nation has no such plans*."[7] To claim otherwise is entirely baseless.

II. Takings Claim

Ms. Binney's cursory dismissal of the liability the United States would assume if S. 2670 were enacted was equally misinformed. In response to a question from Chairman Tester, Ms. Binney contended that the Nation would not have a claim for compensation under the Takings Clause because the Nation would still be able to engage in other "economic activities" on its Maricopa County parcel, such as building a "resort" or "sports stadium."[8] The apparent predicate for her conclusion—that the Government need only pay compensation "where regulation denies all economically beneficial or productive use of land"[9]—is fundamentally flawed. While a regulation prohibiting all "economic activities" on a parcel is *sufficient* to establish a taking, it is not the *only* way to do so. The Nation's claim under the Takings Clause would be governed by the ordinary multi-factor "*Penn Central*" test for regulatory takings, which does not require, or even contemplate, a complete diminution in value.[10]

The Nation will have a strong claim under the Takings Clause if S. 2670 is enacted. Courts applying *Penn Central* weigh three factors in deciding whether a regulation "goes too far" in restricting land use and thus amounts to a taking: (1) "the extent to which the regulation has interfered with distinct investment-backed expectations"; (2) "[t]he economic impact of the

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[6] Binney Testimony, Legislative Hearing on S. 2670, *supra* note 1, at 1:04:52-5:11.

[7] Norris Prepared Testimony 13-14 (emphasis added).

[8] Binney Testimony, Legislative Hearing on S. 2670, *supra* note 1, at 1:13:42-52.

[9] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

[10] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) ("Outside these two relatively narrow categories [per se takings], regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).").

regulation on the [property owner]"; and (3) "the character of the governmental action."[11] Each factor is satisfied here.

First, S. 2670 frustrates the Nation's reasonable, investment-backed expectations by barring the Nation from using the West Valley Reservation for class II and class III gaming, which existing law entitles it to do.[12] Not only does the Nation's compact with Arizona expressly authorize such gaming, but as the Assistant Secretary for Indian Affairs acknowledged, "the Nation would have had reason to believe that the United States had promised [the Nation] land on which it could engage in gaming in compensation for the land flooded by the [Army] Corps [of Engineers] ... [a]nd given that the Gila Bend Act and IGRA are laws enacted through a very public process in Congress, none of these expectations developed in secret."[13] In reliance on its vested legal rights, the Nation has invested enormous time, money, and resources to acquire the Maricopa County land, bring the trust acquisition process to conclusion, and design the facility. Barring gaming on this land until 2027—the entire period the Nation's compact remains in effect—would vitiate these reasonable, investment-backed expectations.

Second, S. 2670's economic impact would be severe. The law would deprive the Nation of, at a minimum, many hundreds of millions of dollars of anticipated gaming revenues. The Nation's gaming operations are its central source of employment and funding for education, health care, and housing. Without these revenues, the Nation will lose a crucial opportunity to remedy the poverty, ill health, and unemployment that continue to plague its people.

Finally, the character of S. 2670 is extraordinary. It reneges on the United States' obligation to provide the Nation with reservation lands suitable for non-agricultural economic development (such as gaming), and it does so by arbitrarily singling out the Nation's West Valley Reservation while leaving untouched the gaming operations of every other tribe in the Phoenix area.[14] As the Assistant Secretary for Indian Affairs explained, the law's effect would

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[11] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[12] Class II gaming on "Indian lands," including the Nation's West Valley Reservation, is directly authorized by IGRA. *See* 25 U.S.C. § 2710(b)(1). Class III gaming is authorized by both IGRA and the Nation's gaming compact with Arizona. *See* Nation Compact §§ 3(a), 3(j), 2(s); 27 U.S.C. § 2719(b)(1)(B)(i). There is no question that the Nation's contractual interest is a property right protected by the Takings Clause. As the Supreme Court has explained, "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *accord United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("[c]ontract rights are a form of property" for takings purposes); *Cienega Gardens v. United States*, 331 F.3d 1319, 1329-1330 (Fed. Cir. 2003).

[13] Washburn Prepared Testimony 4.

[14] Gila River Governor Gregory Mendoza's testimony analogized S. 2670 to generally applicable zoning laws, which ordinarily do not require compensation. *See* Mendoza Prepared Testimony 6. That analogy is inapt. Generally applicable land-use restrictions do not ordinarily require compensation because they produce what is called an "average reciprocity of advantage" for all affected landowners: put simply, "the benefit that each burdened owner[,] as in ordinary zoning or historic districting[,] receives *from the similar restriction of his neighbors*." *District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 888 (D.C. Cir. 1999) (Williams, J., concurring in the judgment (emphasis added)); *see Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994) (zoning is "paradigmatic[]" illustration of reciprocity of advantage).

That description is inapplicable to laws, like S. 2670, that single out some members of the community while benefiting others. S. 2670 does not enact a uniform ban on casinos in the Phoenix area. Rather, it affects only

be to "add a tribe-specific and area-specific limitation to IGRA."[15] Equally relevant, S. 2670 has inarguable retroactive effect. "The critical question" in a *Penn Central* analysis "is what a reasonable owner in the [challenger's] position should have anticipated."[16] "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."[17] The Nation's Maricopa County land has already been taken into trust as "a Federal Indian Reservation for all purposes"[18] and ground has been broken for the new facility. By preventing the Nation from gaming on reservation land that would otherwise be gaming-eligible, S. 2670 "takes away or impairs" the Nation's "vested rights[,] acquired under existing laws."[19] It thus works the type of fundamental unfairness that strikes at the heart of retroactivity concerns.

In short, under well-established regulatory takings precedent, enactment of S. 2670 would expose the United States to liability in the form of substantial just compensation. The Nation's contractual and statutory right to use the land for gaming during the period the law is in effect is of enormous monetary value.[20] Gaming is by far the most profitable use of the Nation's land, and gaming-eligible land is considerably more valuable than land that is not gaming-eligible. Because revenues from the planned resort and facility would amount to at least many hundreds of millions of dollars over the life of the Nation's compact, the compensation owed to the Nation would be substantial. Moreover, that judgment would be paid out of the Treasury[21]—a vast expenditure of taxpayer dollars to insulate certain tribal gaming interests in Arizona from competition.

III. Additional Claims Arising From S. 2670

In addition to the Nation's strong takings claim, enactment of S. 2670 would give rise to several additional claims against the United States.

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the Nation's gaming-eligible reservation land, leaving untouched other tribes' many Phoenix-area casinos. *See* VisitPhoenix, Casinos, *available at* http://www.visitphoenix.com/things-to-do/entertainment/casinos/index.aspx.

The Takings Clause exists precisely to address such laws: "It prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

[15] Washburn Prepared Testimony 4; *see also* Washburn Testimony, Legislative Hearing on S. 2670, *supra* note 1, at 22:38-47 (stating that the Nation had "a reasonable expectation that … they would be able to game on this land").

[16] *Chancellor Manor v. United States*, 331 F.3d 891, 904 (Fed. Cir. 2003).

[17] *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

[18] Pub. L. No. 99-503, § 6(d).

[19] *Sturges v. Carter*, 114 U.S. 511, 519 (1885).

[20] *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 237 (2003) ("pecuniary compensation must be measured by [claimant's] net losses").

[21] *See Cohen's Handbook of Federal Indian Law* § 5.06[7], at 450 (2012 ed.).

A. Breach Of Contract

It is settled law that when the United States enters into a contract, its rights and duties under the contract are governed by the same law applicable to contracts between private individuals.[22] If S. 2670 is enacted, it will breach the United States' settlement agreement with the Nation, embodied in the Lands Replacement Act.[23] The Act provides that, in return for the Nation's agreement to release its substantial claims against the United States for the destruction of its reservation lands, any land taken into trust for the Nation will be treated as an Indian reservation "for all purposes."[24] Under the Indian Gaming Regulatory Act, tribes are entitled to engage in class II gaming—and class III gaming if, like the Nation, they have a tribal gaming compact—on their reservation land, including land acquired after 1988 as part of a land-claim settlement. *See* 25 U.S.C. §§ 2710, 2719. By prohibiting gaming on the Nation's West Valley Reservation, the legislation contravenes the Act's express provision—and a key term of the settlement—that such trust land be treated as reservation land "for all purposes." As the Assistant Secretary for Indian Affairs explained to the Committee, there is little question that the enactment of S. 2670 would repudiate the Government's contractual commitment to the Nation: "It is the Department's view that, the promise made in the Gila Bend Act would be broken by S. 2670."[25]

The United States will incur substantial liability for this breach. Under basic contract principles, the Nation would be entitled at a minimum to expectation damages—the benefits it would have expected to receive had the breach not occurred.[26] Here, those damages would include the lost future profits from the Nation's planned gaming facility until the year 2027, when the Nation's gaming compact and S. 2670 expire.[27] Those damages could easily amount to many hundreds of millions of dollars.

B. Breach Of Trust

S. 2670 would also breach the United States' trust obligations to the Nation. In the Lands Replacement Act, Congress unmistakably created a fiduciary obligation with respect to the property at issue here. The statute requires the Secretary of the Interior to "hold in trust for the benefit of the Tribe any land which the Tribe acquires [pursuant to the Act]," and specifies that this trust land "shall be deemed to be a Federal Indian Reservation for all purposes."[28] The statute's context and purpose make clear that the United States undertook this obligation in its capacity as a trustee in order to make amends for its previous breach of its fiduciary obligation to

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[22] *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996).

[23] Gila Bend Indian Reservation Lands Replacement Act (LRA), Pub. L. No. 99-503, 100 Stat. 1798 (1986).

[24] Pub. L. No. 99-503, § 6(d).

[25] Washburn Prepared Testimony 4.

[26] *Restatement (Second) of Contracts* § 344(a) (1981); *see also Stockton E. Water Dist. v. United States*, 761 F.3d 1344, 1353 (Fed. Cir. 2014).

[27] *See, e.g.*, *Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1361 (Fed. Cir. 2010); *Energy Capital Corp. v. United States*, 302 F.3d 1314 (Fed. Cir. 2002).

[28] Pub. L. No. 99-503, § 6(d).

care for the Nation's trust lands. The LRA accordingly constitutes a "substantive source of law that establishes specific fiduciary or other duties."[29]

The LRA and the settlement agreement can also "'fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties'" they impose.[30] This is particularly clear because the LRA is a settlement "'mandating compensation for damages sustained as a result of a breach of'" earlier trust duties.[31] The United States accepted the LRA's obligations in order to settle the Nation's claims "for the taking of tribal trust lands[,] for payment of unjust compensation for the flowage easement[,] and for breach of trust."[32] The LRA therefore not only presupposes, but *embodies*, an obligation to compensate the Nation for such a breach.

Put simply, the United States' duty to act faithfully in the best interests of the Nation cannot be reconciled with a decision to deny the Nation the replacement reservation lands to which the Act expressly entitles it, and which the Nation relinquished its claims against the United States to obtain. As the Assistant Secretary for Indian Affairs explained before the Committee, "the only promise by the United States that's at issue here today is the one made in the Gila Bend Act and the only way the federal government can keep its promise to the Tohono O'odham is for this committee to reject this bill."[33] Enactment of S. 2670 would thus occasion a breach of trust that would not only be profoundly inequitable, but would also threaten the United States' ability to reach settlements in the future with Indian tribes who will justifiably fear that the United States' word cannot be trusted.

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[29] *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

[30] *Navajo Nation*, 537 U.S. at 506.

[31] *Id.*

[32] H.R. Rep. 99-851, at 7; *see also Navajo Nation*, 537 U.S. at 506.

[33] Washburn Testimony, Legislative Hearing on S. 2670, *supra* note 1, at 25:04-15.

(4) PERIODIC INCREASE. DURING THE TERM OF THIS COMPACT, THE TRIBE'S CURRENT GAMING DEVICE ALLOCATION SHALL BE AUTOMATICALLY INCREASED (BUT NOT DECREASED), WITHOUT THE NEED TO AMEND THIS COMPACT ON EACH FIVE-YEAR ANNIVERSARY OF THE EFFECTIVE DATE, TO THE NUMBER EQUAL TO THE CURRENT GAMING DEVICE ALLOCATION SPECIFIED IN THE TABLE MULTIPLIED BY THE POPULATION ADJUSTMENT RATE (WITH ANY FRACTIONS ROUNDED UP TO THE NEXT WHOLE NUMBER).

(5) GAMING DEVICE ALLOCATION TABLE.

GAMING DEVICE ALLOCATION TABLE

LISTED TRIBE	(1) CURRENT GAMING DEVICE ALLOCATION	(2) ADDITIONAL GAMING DEVICES	(3) PREVIOUS GAMING FACILITY ALLOCATION	(4) REVISED GAMING FACILITY ALLOCATION
THE COCOPAH INDIAN TRIBE	475	170	2	2
FORT MOJAVE INDIAN TRIBE	475	370	2	2
QUECHAN TRIBE	475	370	2	2
TONTO APACHE TRIBE	475	170	2	1
YAVAPAI-APACHE NATION	475	370	2	1
YAVAPAI-PRESCOTT TRIBE	475	370	2	2
COLORADO RIVER INDIAN TRIBES	475	370	2	2
SAN CARLOS APACHE TRIBE	900	230	3	2
WHITE MOUNTAIN APACHE TRIBE	900	40	3	2
AK-CHIN INDIAN COMMUNITY	475	523	2	1
FT. MCDOWELL YAVAPAI NATION	475	523	2	1
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY	700	830	3	2
GILA RIVER INDIAN COMMUNITY	1400	1020	4	3
PASCUA YAQUI TRIBE	900	570	3	2
TOHONO O'ODHAM NATION	1400	1020	4	4
SUBTOTAL	10,475		38	29
NON-GAMING TRIBES (AS OF 5/1/02)				
HAVASUPAI TRIBE	475		2	
HUALAPAI TRIBE	475		2	
KAIBAB-PAIUTE TRIBE	475		2	
HOPI TRIBE	900		3	
NAVAJO NATION	2400		4	
SAN JUAN SOUTHERN PAIUTE TRIBE	475		2	
SUBTOTAL	5,200		15	
STATE TOTAL	15,675		53	

(6) IF THE TRIBE IS NOT LISTED ON THE TABLE, THE TRIBE'S CURRENT DEVICE ALLOCATION SHALL BE FOUR

Compiled Administrative and Court Decisions Concerning the Nation's West Valley Reservation		
DOI Trust Decision		
1.	2009-04-30	Quinn Memorandum Opining that the WVR property is eligible under the GBIRLRA
2.	2009-06-17	DOI Solicitor's Preliminary Title Opinion
3.	2010-07-23	Echohawk Trust Decision Letter
4.	2014-07-03	Washburn Trust Decision Letter
GRIC v US (Administrative Review of Trust Decision)		
5.	2011-03-03	District Court Summary Judgment Order
6.	2013-05-20	9th Circuit Decision
TON v. Glendale (Annexation)		
7.	2011-05-03	Court of Appeals Decision
8.	2011-10-26	Supreme Court Denial of Petition for Review
9.	2011-12-08	Supreme Court Fee Award
10.	2012-01-19	Superior Court Judgment
TON v. Arizona (Annexation Statute)		
11.	2011-06-30	District Court Summary Judgment Order
12.	2011-06-30	District Court Judgment
Arizona v. TON		
13.	2011-06-15	District Court Order on Motion to Dismiss (Claims 5 and 6; Claims 1, 2, 3, and 7 in part)
14.	2013-05-07	District Court Summary Judgment Order (All remaining claims *except* breach of contract under Restatement § 201(2))
15.	2013-06-25	District Court Summary Judgment Order (All remaining claims *including* breach of contract under Restatement § 201(2))
16.	2013-06-25	District Court Judgment

The State of the Tohono O'odham Nation: A Review of Socioeconomic Conditions and Change, by the Taylor Policy Group, attachment has been retained in the Committee files.

The CHAIRMAN. Thank you, Chairman Norris, for your testimony. Thank you all for your testimony. Senator McCain?

Senator MCCAIN. Thank you, Mr. Chairman.

Chairman Norris, would you like to, for the record, supply the amount of money or revenue that your casinos have gained for the tribe on an annual basis?

Mr. NORRIS. Mr. Chairman, Senator McCain, I will be happy to give that some consideration, but I will not do that without the express authorization of my legislative counsel.

Senator MCCAIN. So you won't tell us how impoverished you are. I got it.

I will provide for the record, Mr. Chairman, the hearings that Senator Inouye and I had, including that where the attorneys generals, especially, of States that came and testified before our Committee, one of their great concerns was what would happen is exactly happening now. That was one of the reasons why we had great difficulty getting the support of governors and attorneys generals, because they said if we don't look out, we are going to have Indian gaming operations in the middle of our towns and cities. So I would be glad to provide the record of the hearings and the conclusions and the statements that Senator Inouye and I made at the time of the passage of the Indian Gaming Regulatory Act, which clearly was designed to prevent a non-contiguous, middle of a metropolitan area Indian gaming operation, for which the people have, maybe their elected representatives have, maybe some like Mr. Sherwood have changed their mind over time. But they have not been able to make their will known as far as a very significant impact not only in Glendale but in the entire West Side.

So Mr. Sherwood, out of curiosity, I think you used to be very much opposed and even wrote articles in opposition to this. What changed your mind?

Mr. SHERWOOD. Thank you for the question, Mr. Chair and Senator McCain. When I campaigned, I had campaigned against this proposed, based on the information I had. And I had read quite a bit of information on it. The thing that was distressing to me, though, was that in the very beginning there was a half hour conversation, when the city first found out about this in April 2009. That was the only conversation that the previous administration had.

I was always quite upset by the fact that we didn't have the dialogue, we weren't doing very good in the courts. So when the new council got seated in January 2013 and we took care of the hockey arena situation, we turned our attention to the casino issue, which again had been laboring for five years, and started having that informal dialogue, and learned quite a bit more about the project from the fact this could benefit us in many more ways than what the gaming compact even called out for.

So those informal discussions led into formal fact-finding in the November time frame, which led to negotiations in March. And having gone through that and having voted on this a couple of months ago to approve the project and to unequivocally set ourselves against this legislation, and the benefits, certainly after talking to other developers, we have had several developers come to us since this casino project was announced, wanting to develop on land in Glendale city proper.

Senator MCCAIN. Well, thank you. Chairman Norris, I have before me information that, I am not sure where it came from, but it alleges that your annual revenue from gaming is $68,200,000.00. Is that in the ballpark?

Mr. NORRIS. Mr. Chairman, Senator McCain, as I stated before, without the authorization of my legislative counsel, I am not at this point able to disclose, agree or disagree with your information.

Senator MCCAIN. So you refuse to tell this Committee, who is expected to support your effort to establish a casino, that you won't even tell me whether this is a correct or incorrect number, $68,200,000?

Mr. NORRIS. Mr. Chairman, Senator McCain, the courts have already made that determination on whether or not the Nation is within its legal right to be able to establish. And our current compact also authorizes it as well.

Senator MCCAIN. That is not in response to the question I asked, Mr. Chairman. You refuse to give, to authenticate or disagree with roughly $68,200,000.00 in revenue for your Nation? Is that correct, you do not wish to give that information? Agree or disagree?

Mr. NORRIS. Mr. Chairman, Senator McCain, I am not agreeing or disagreeing. What I am saying is——

Senator MCCAIN. Actually what you have done is refuse to answer questions before this Committee. I am not sure why you came.

Mr. Mendoza, is there a concern, Chairman Mendoza, President Mendoza, is there a concern that there may be other loopholes such as this exploited in using this precedent that other casinos would be established in the valley?

Mr. MENDOZA. Mr. Chairman, Senator McCain, thank you for that question. I have been hearing about this particular bill and if it would create that precedent. In my mind, no. The Act has been very consistent with congressional precedents. If you will allow me, I will allow my attorney here to offer some specifics. Ms. Binney?

Ms. BINNEY. Thank you, Senator McCain. The concern that you have is a legitimate concern, in that Tohono O'odham, if they are able to build this Glendale casino, can actually shut down their other three casinos in the Tucson area and move them up to the Phoenix area. Basically using the same legal theory. That is why the East Valley mayors are so concerned, because they thing the same thing that is happening in Glendale can happen in the East Valley.

I think it was Congressman Gosar last time who brought a map that showed 200 county islands in other parts of the Phoenix Valley where the same thing can happen.

But more importantly, in the negotiations and during litigation, handwritten notes have come out from Tohono O'odham's representatives, basically indicating that they would do such a thing. They are aware that they have that legal ability, if they are successful in Glendale, to shut down the other three casinos and move them up to the Phoenix area. That is one of the biggest concerns of the East Valley mayors.

Senator MCCAIN. Well, Mayor Weiers, you find yourself in the minority here. Maybe you can tell us how that happened, going from the majority to the minority on this issue. I am sure it didn't have anything to do with a $26 million commitment over several years.

Mr. WEIERS. Mr. Chairman, Senator McCain, I don't actually know how I found myself in that position. I have been on a one mind and one thought ever since this issue came up, when I was in State legislature. I know in our campaign that people had ran their campaigns stating certain views and certain beliefs. I guess

I never really expected people to change their opinion. But I don't know exactly how we found ourselves, the same facts, the same truths that were there two years ago are the same facts and truths today. Nothing has changed. People's opinions have changed and how they have changed their mind because of those facts and truths, I don't know.

And sir, I don't know if that is really the question that maybe I should be asked, but I'm not exactly sure how we came to that position.

Senator MCCAIN. Thank you.

Mr. Chairman, it bears repeating to all the witnesses in response to some of the statements that the Constitution calls for the Congress to have a special responsibility as far as Native Americans are concerned. It is written in the Constitution. So although some may view this hearing and our action as being unwanted interference, it is a specific Constitutional responsibility of the Congress of the United States.

So Mr. Chairman, this is a very busy week. We will be leaving tomorrow for quite a while. And you were kind enough to hold this hearing for me, and I take that as a very special favor that you granted me. I want to express openly and repeatedly my appreciation for your doing this. I thank you, Mr. Chairman.

The CHAIRMAN. Thank you for those kind words, Senator McCain. We always appreciate your commitment to the Senate and to this Committee. And we thank you for your leadership on a number of issues, including this one.

I have a few questions here, I will start with Governor Mendoza. Governor, when it comes to tribal gaming in Arizona being successful, could you talk about the kind of success that Gila River has enjoyed because of gaming?

Mr. MENDOZA. Thank you for that question, Senator. Gila River does enjoy the benefits from our casinos. We have been able to fully fund for our students to go to college, any college in the world. We have been able to provide funding for our public safety, police, fire, our emergency management program. We are able to provide programs for our elders, our youth, housing, you name it. We have been able to do a lot for our community. Again, we are very thankful and blessed.

The CHAIRMAN. I commend you on your commitment to your people. Education is one of my priorities.

You reference, when it comes to expansion of gaming, you reference a commitment made by the tribes in 2002 that there would be no additional gaming facilities in the Phoenix area. In the current gaming compacts, there is a specific limitation on the Tohono O'odham from building a fourth facility in the Tucson area.

If the parties thought enough to put a Tucson limitation expressly in the compact, why wouldn't the State include such a limitation around Phoenix? Any insight into that?

Mr. MENDOZA. Thank you, Senator Tester. Senator Tester, I am not an attorney. I am going to allow my attorney to answer that for me.

The CHAIRMAN. Well, I think that is a good point that you are not an attorney. I am not one, either. So Allison, since you are, have at it.

Ms. BINNEY. I think there is a little bit of confusion. It depends, so in Arizona, it is different than in most other States. Most of those State, the governors can just go and negotiate a compact directly with the tribes, enter into it. In Arizona, that is not the case. The government had to get authority from the voters to enter into compacts. So the voters voted on a model compact. I actually have the proposition that the voters had there.

So Tohono O'odham does say, like, nowhere in the model compact or the compact does it say, Tohono O'odham can't go into Phoenix. One, there was no need to say that in the compact, because no one ever thought that would happen. But two, in all the negotiations, which are the key part of what this bill is trying to address, Tohono O'odham specifically said, their fourth casino would be in the Tucson area or in a rural area. They never once indicated that they would somehow go 100 miles up to the Phoenix area.

But I will say the proposition that has the model compact that the voters actually saw when they voted to give the governor authority, there is a chart in there. And in the chart it shows the number of casinos that the tribes in Arizona were authorized to build under the old compacts, and the number of casinos that the tribes would be authorized to build under the new compact, the model compact that the voters were voting on.

In the Phoenix area tribes, all are shown as giving up a right to an additional facility that they had under the old compact. Tohono O'odham, because they are not a Phoenix area tribe, kept the same number of casinos, the right to build the same number of casinos. So Gila River is shown as giving up an additional casino, right to an additional casino. Salt River gave up a right to an additional casino. Ak-Chin gave up a right to an additional casino. Fort McDowell gave up the right to an additional casino and so did Pascua Yaqui. Tohono O'odham didn't have to give up the right to an additional casino, because they weren't in the Phoenix area.

So in our view, it is in the compact. Why else would these charts be in here showing that the Phoenix tribes gave up rights to additional casinos and Tohono O'odham didn't, if it wasn't intended that the whole goal of the compact was to limit the number of facilities in the Phoenix area?

The CHAIRMAN. Okay. If you don't mind, Allison, I want to ask you another question, since you are an attorney, since you know the law. And I say this in the most friendly way. When I talked to Chairman Norris, and I think it was referenced in one of your testimonies, maybe it might have been Mr. Washburn's testimony, about breaking ground on a facility already. So ground has been broken.

If we were to pass this bill, would there be a takings issue?

Ms. BINNEY. No. And I thought it was interesting that Assistant Secretary Washburn didn't address this issue at all. Because he was aware of it. And Senator McCain asked him about it last time.

The fundamental reason why is because this bill just provides a temporary restriction on gaming activities on certain lands. That is what IGRA does. The Indian Gaming Regulatory Act was passed to restrict gaming on tribal lands. So if this bill is a takings, then so is the Indian Gaming Regulatory Act. And that has been around 25 years and has been upheld again and again and again.

The CHAIRMAN. So in one point, you are talking about policy that prevents gaming activities that happen with IGRA. This is an actual physical construction, you don't see that there is any difference there. And I ask this because I don't know.

Ms. BINNEY. Yes, and we actually when it came up in the last hearing, Senator McCain asked it. We actually went and did a thorough analysis. Because I will say, last Congress there were some legitimate concerns raised about Tohono O'odham and we addressed them in this new bill. But we looked at it, and the other reason why it is not a takings is because Congress does these types of bills fairly frequently, actually, restricting gaming on lands. And they can build a resort. They can build a new sports stadium. They can do economic activities.

The CHAIRMAN. That is fine, thank you. Thanks, Allison.

Chairman Norris, a similar question to what I just asked Governor Mendoza. You have gaming facilities, can you discuss what benefits you have gotten from these gaming facilities and, while you are in that vein, could you also discuss unmet needs that are still out there by your tribe?

Mr. NORRIS. Mr. Chairman, I too am not an attorney. I am the elected chairman of my nation, and I have an obligation to speak for my people.

The CHAIRMAN. Yes.

Mr. NORRIS. So I will do so. There are still third world conditions that exist in my tribal community, and many tribal communities nationwide. The Nation has had an enormous amount of benefit in comparison to where we were prior to gaming. We have been able to construct different facilities that were only dream facilities that we were needing within our communities, to be able to provide the necessary services. We have been able to create a government of employees that are able to provide the necessary services that many of our Nation's members require. We have been able to provide scholarships to our members.

Prior to gaming, we had probably less than 300 members of our Nation that acquired bachelor's, associate's, master's and doctorate degrees and some law degrees. Today we have graduated more Tohono O'odham with those types of degrees, this many years later. My council continues to allocate some $5 million toward scholarship programs for our Nation.

So we have had an enormous amount of benefit from the results of gaming. But we still have those third world conditions that continue to exist.

As far as unmet needs, Mr. Chairman, we know today that we have 500 families that are homeless on the Nation. We know today that there are many people within our communities that do need housing. We know today that much of the roads that are within our tribal communities that are being used and mis-used by the U.S. Border Patrol because of the influx of border agents on our Nation, really do a wear and tear on our roads. And they are primarily BIA–IRR roads. So there is a need for us to work hand in hand with the Department of Interior, Bureau of Indian Affairs, to try and address the roads conditions that are so needing to be addressed, to be able to deliver the services, to be able to enter and exit our tribal communities nationwide.

We have a reservation that is 2.8 million acres square in size. We have some 80 villages within that geographical area. The reservation is vast. The villages are remote. We have homes that do not have running water. We have homes that do not have electricity. So there is a serious amount of unmet need in my tribal community.

The CHAIRMAN. Thank you, Chairman.

Mayor Weiers, you are a former State legislator, you worked in city government as mayor, and I think you understand the actual text of the laws and contracts and the weight that that carries with those contracts and that text. In this case, there was a specific limitation, correct me if I am wrong, on Tohono O'odham developments around Tucson but not Phoenix. With that said, if this limitation on gaming in the Phoenix area was important, why was it not included in the current contract or Prop 202?

Mr. WEIERS. Chairman Tester, all I can tell you is the knowledge that I have of talking with one of the authors, Senator McCain. He had told me point blank that there was never ever any intention in their mind that this would ever be an issue. And I don't believe, quite honestly, that the average person, the non-attorney people, would ever have thought something like this. I guess that is why we have attorneys, to sit around and think of ways to get around stuff.

But I don't believe anybody ever believed that this was ever going to be an issue. And it is an issue, and quite honestly, all this bill is trying to do is just, let's do what everybody said and thought we were going to do, and then when that compact is over, we will renegotiate. Chances are that we will probably end up with more casinos in the valley, almost certainly.

The CHAIRMAN. Okay, thanks, Mayor.

Councilman Sherwood, your testimony discusses the impacts that the agreement with the Tohono O'odham would have on the city of Glendale, positive impacts. Could you talk about those benefits of this development? And while you are on that, if there is a down side that comes to mind, could you talk about that, too?

Mr. SHERWOOD. Thank you, Chair. Right off the bat, I can't see of any down side in the negotiations and the settlement agreement that we concluded with the Tohono O'odham in August. They are covering existing infrastructure, new infrastructure, water. It is not costing the city a penny. How often do you get a development where you don't have to give in to anything?

In terms of the development, we were hurt pretty hard with the downturn with our sports and entertainment. There were eight funded projects that were to occur south of the University of Phoenix stadium where the Arizona Cardinals play. One of them was Mr. Bidwell's CB101 project, before he started building. Those either went into litigation afterwards or the developers pulled back. Those are slowly coming back, but not near the pace that was expected.

So our sports and entertainment area, which has two professional sports teams, a large entertainment area along with some retail, was hurt vastly by that. So when we have the mega events, like when we have the Super Bowl next February, we don't have

anything to keep people in the area, so they go off into Scottsdale and Phoenix.

A project like this resort will entice other development. In fact, within weeks of us signing that agreement, we had two major developers, one that had done a large scale project in Phoenix, come through and they were only interested in us now because of this project. They were looking at land within the city of Glendale to develop that would be real close to the sports and entertainment area.

So yes, we are looking at a lot of development activity that will directly benefit our city coffers. And then again in the deal that was referenced earlier about the $26 million or so that we get directly into the general fund from the Tohono O'odham. In fact, we have already received a check for $500,000, 10 days after the agreement was signed. That helps a city that has struggled, as has been widely reported, because of our past deals with some of the sporting facilities that we have. It has sorely helped our community.

The CHAIRMAN. Okay. You talked about jobs. How many jobs?

Mr. SHERWOOD. Jobs, in terms of the operations, you are going to see 3,000 jobs, 1,500 of them probably indirect, 1,500 direct in terms of construction jobs. Right now it is scheduled for three phases, the casino and then the attached resort and probably a year later, another resort, based on how things are moving along. So you are talking thousands of construction jobs over this project that is going to take place over the next four years. But in terms of actual jobs at the West Valley, I would say about 3,000.

The CHAIRMAN. Once again, I want to thank all of you for making the trek to Washington, D.C. I know it is not easy and some of you have made it twice. I thank you for that. And I mean that. This is obviously an emotional issue and it is an important issue.

Note that the hearing will remain open for two weeks, and I encourage all stakeholders to submit written statements for the record. I want to say that again, this hearing record will remain open for two weeks. And if you are a stakeholder in this issue, I would encourage you to write written statements for the record.

With that, once again, thank you all. This hearing is adjourned.

[Whereupon, at 3:22 p.m., the hearing was adjourned.]

APPENDIX

PREPARED STATEMENT OF HON. JOHN INSALACO, MAYOR, CITY OF APACHE JUNCTION, ARIZONA

Chairman Tester, Vice Chairman Barrasso, Members of the Committee, thank you for the opportunity to submit my testimony on S. 2670, the Keep the Promise Act. My name is John Insalaco and I am the mayor of the City of Apache Junction, Arizona, which is in the Phoenix metropolitan area.

First and foremost I want to thank our Senators, Senators McCain and Flake, for hearing our concerns and introducing this bill. And I thank you, Mr. Chairman and members of this Committee, for acting promptly to further examine this issue.

While I have my own personal reasons for supporting this legislation, other Phoenix area mayors and I are unified in a singular concern: until Congress affirmatively acts on this legislation, the Tohono O'odham Nation (TON) could open a casino near any of our cities within any of the more than 200 county islands within Pima, Pinal and Maricopa Counties.

Just like in Glendale, this could happen without our consent, without our input, and even without our knowledge. Without Congressional action, a single Washington, DC bureaucrat's decision threatens to change our communities forever and our local governments have lost control in fending off the unwanted proliferation of gaming in our neighborhoods. That outcome is wholly unacceptable to our constituents, which is why we collectively ask that this committee quickly approve this important bill.

We represent communities that support tribal governments and the sovereign rights of our Nation's first peoples. While we may not see eye to eye on all issues, we have a strong track record of collaborative efforts that have fostered successful Government-to-Government relationships. Much of this collaboration is a direct result of the current compacts that promotes tribal governments and local governments to work together to address common issues. We appreciate and value the relationships we have developed with our neighbors, and believe this sentiment is reciprocated by many of the tribal governments throughout Arizona.

That's why we were so surprised to learn of TON's actions. We could not believe that a government would surreptitiously acquire land for a new Phoenix area casino even while promising Arizona voters that there would be no new casinos in the region.

Unfortunately the deception did not stop in Glendale. According to TON's attorneys, the tribe has the right to open even more casinos in the Phoenix metropolitan area.

Like Glendale, many of the 200 county islands in Pima, Pinal and Maricopa counties are unfit for the development of major gambling establishments. These parcels are in and around large residential neighborhoods, near schools, and near religious institutions. In other words, the county islands are in precisely the type of neighborhoods that Phoenix and Arizona voters decided were not suited for further casino development.

The development of new casinos in the Phoenix metropolitan area—whether in Glendale or in any of the other county islands in the metropolitan area—represents a fatal breach of trust between the tribal governments who advocated for Arizona Proposition 202 and the people of our state. When we heard the promise of "no new casinos in the Phoenix area," we trusted our friends and neighbors and took them at their word. And in exchange for that promise, the voters of our state awarded these tribes with the exclusive right to run casinos in Arizona.

Now the actions of one tribe have put this trust, and our longstanding working relationship with Arizona's tribal nations, in jeopardy.

TON's decision to knowingly and willingly deceive voters forces us and many of our constituents to rethink the promises that we have made to tribes as well. While we do not have the authority to nullify the compact, the Proposition 202 compact expires in 2027; and we now have to think long and hard about whether we should

renew that agreement. It would be a shame if the cavalier actions of one tribe upended a successful system that has benefitted all tribes in our state.

Even more troubling was the recent testimony of Assistant-Secretary of Indian Affairs (AS–IA), Kevin Washburn, who clearly advocated on behalf of TON without making any mention of, or demonstrating any consideration for, the impact that the TON's potential casino would have on the Tribal-State compact and our communities.

This Washington, D.C. bureaucrat presumed to know more about the voters' intentions than the voters themselves by claiming that the Phoenix gaming market could afford to have more casinos, even though voters clearly wanted a cap on the number of casinos in the area when they approved Proposition 202. AS–IA Washburn casually dismissed voters expectations by stating that the parties "eliminated reliance on any statements or promises made during negotiations, unless they were included within the four corners of the compact," while ignoring that all urban area tribes except for TON gave up rights to additional casinos to meet State and voter expectations and TON retained one additional casino by assuring State and tribal negotiating parties that it would be located in the Tucson area or in rural parts of its reservation.

AS–IA Washburn did not discuss or consider any of the fraudulent actions and promises that the TON made to State negotiating parties, the general public and other tribes during the compact negotiations and the tribes' campaign to convince voters to approve Proposition 202, when all the while it never intended to live up to these promises. Further, how AS–IA Washburn chose to interpret the Gila Bend Indian Reservation Lands Replacement Act has very direct consequences on our constituents and other Arizona tribes, but his testimony showed no impartiality or concern for non-TON interests, including the interests of other Arizona tribes. AS–IA Washburn refuses to act as an impartial and responsible agency decision-maker, instead leveraging his official position to serve as TON's personal advocate and the lives of our communities are now threatened by this agency action.

Despite years of trying to convince TON to act responsibly and attempting to reason with the Administration, it has become clear that Congressional action is now Arizona citizens' only recourse to preserve our balanced and mutually beneficial system. And the legislation under consideration today does just that.

S. 2670, the Keep the Promises Act, is a narrowly tailored bill that preserves the agreement that was made with voters in 2002 by simply prohibiting new casinos from being constructed in the Phoenix area until 2027, when the current compact expires.

Equally as important is what the bill does not do. The Keep the Promises Act does not prohibit TON from taking land into trust. It does not impact the tribe's right to acquire land under the Gila Bend Act. And it does not prohibit the tribe from conducting gaming on newly acquired land after 2027. AS–IA Washburn falsely and passive aggressively accused the "promise" of S. 2670 as being illusory.

In our eyes, this legislation is far from perfect because we would prefer that Indian reservations not be dropped within or city limits. But we believe the bill makes adequate concessions, while preserving the rights and agreements made by our constituents.

We hope you too will see this as a fair, moderate piece of legislation, and ask that you move to quickly enact the bill.

Thank you for the opportunity to submit our testimony today, and we look forward to working with you to ensure the bill is enacted during the 113th Congress.

PREPARED STATEMENT OF HON. ADOLFO F. GÁMEZ, MAYOR, CITY OF TOLLESON, ARIZONA

As the mayor of the City of Tolleson, Arizona, a community within close proximity to the Tohono O'odham Nation's West Valley Resort, I offer my adamant opposition to the S. 2670. My City was the first to unanimously pass a resolution in favor of the Nation's casino project. We have since been joined by the Cities of Glendale, Peoria, and Surprise.

There is tremendous support for this project among my constituents as well as throughout the West Valley. The Nation's West Valley Resort represents a unique amenity for our region that will attract new visitors, new businesses, and create thousands of jobs—not just at the casino but across the West Valley.

The proposed legislation, S. 2670, seeks to stymie major economic development thereby denying my constituents access to the greater prosperity. I urge you not to allow this harmful bill to go forward.

As more than a dozen legal rulings have found, the Nation's project complies with all of the relevant federal laws and state compact, which is why the special interests opposed to this project have pushed this legislation, to make up for their defeats in court by rewriting the law in their favor. The arguments presented to the Committee by the Nation's opponents during the S. 2670 hearing have all been addressed and rejected throughout judicial proceedings that span over five years.

The opposition continues to repeat these claims, but that doesn't make them any more accurate. The real intent of S. 2670 is to protect a few East Valley special interests at the expense of the West Valley's economic development.

I trust that you and the Indian Affairs Committee will make the right decision, based on all the facts. Thank you for your time and consideration.

PREPARED STATEMENT OF HON. LINDA KAVANAGH, MAYOR, TOWN OF FOUNTAIN HILLS, ARIZONA

Chairman Tester, Vice Chairman Barrasso, Members of the Committee, thank you for the opportunity to submit our testimony on S. 2670, the Keep the Promise Act. My name is Linda Kavanagh and I am the Mayor of the Town of Fountain Hills, Arizona.

Like other elected leaders of the Phoenix metropolitan area, I am very concerned that the Tohono O'odham Nation (TON) could unilaterally open a casino on a county island located within our city limits.

The county islands located near my community are precisely the type of neighborhoods that Phoenix and Arizona voters decided were not suited for further casino development. Without Congressional action, a rich gaming tribe and a single Washington, D.C. bureaucrat threaten to change our communities forever and strip us of our powers as local governments to fend off unwanted proliferation of gaming in our neighborhoods. Because that outcome is wholly unacceptable to our constituents, we collectively ask that this committee quickly approve the Keep the Promise Act.

Further, in approving tribal gaming in and upholding Arizona tribes' right to have casinos in 2002 voters were promised that there were would not be any new casinos in the Phoenix area. All tribes except one have kept that promise. After TON's long kept secret came to light, we could not believe that a tribal government would secretly look for land for a new Phoenix area casino even while promising Arizona voters that there would be no new casinos in the region. Unfortunately this deception may not stop in Glendale. According to TON's attorneys, the tribe has the right to open even more casinos in the Phoenix metropolitan area. Now we must wonder if the tribe will purchase or has already purchased land in our communities. It is because of the actions of one tribe that our longstanding working relationship with Arizona's tribal nations is now in jeopardy.

When we heard the promise of "no new casinos in the Phoenix area," the voters of our state awarded tribes with the exclusive right to run casinos in Arizona. The current gaming compact will expire in 2027 and because of one tribe's broken promise voters will have to think long and hard about whether we should renew tribal gaming, or whether to only allow tribes to operate casinos. In 2027, if not sooner, the central question to voters may be whether tribes should retain their exclusive right when one tribe cannot be trusted.

Our concern for the future of Indian gaming in Arizona grew considerably after hearing the September 17 testimony of Assistant-Secretary of Indian Affairs, Kevin Washburn. Mr. Washburn clearly advocated on behalf of TON without making any mention of how TON's casino threatens Arizona, including other Arizona tribes. Mr. Washburn seems to be in the business of rubber stamping Indian casinos, which will only encourages tribes to adopt a cynical approach to expand gaming in our state.

Additionally, Mr. Washburn ignored discussion of the fraudulent actions and promises that the TON made to State negotiating parties, the general public and other tribes during the compact negotiations. Evidence of their fraudulent conduct was the tribes' campaign to convince voters to approve Proposition 202 on the heavily advertised premise of "no new casinos in Phoenix" when all the while it planned to purchase land in Glendale for the purpose of opening a casino.

It is clear that Mr. Washburn has chosen a way to interpret the Gila Bend Indian Reservation Lands Replacement Act that has very direct consequences on our constituents and other Arizona tribes. His testimony shows that he has no impartiality or concern for non-TON interests, including the interests of Arizona residents and its tribes.

Despite years of trying to convince TON to act responsibly and attempting to reason with the Administration, it has become clear that Congressional action is now Arizona citizens' only recourse to preserve our balanced and mutually beneficial sys-

tem. S. 2670, the Keep the Promises Act, is a narrowly tailored bill that preserves the agreement that was made with voters in 2002 by simply prohibiting new casinos from being constructed in the Phoenix area until 2027, when the current compact expires. Equally as important is what the bill does not do. The Keep the Promises Act does not prohibit TON from taking land into trust. It does not impact the tribe's right to acquire land under the Gila Bend Act. And it does not prohibit the tribe from conducting gaming on newly acquired land after 2027.

Although this legislation does not address the long term problem of off-reservation gaming in Arizona, it does ensure that tribes live up to the commitments and assurances they gave to voters during their campaign to get the exclusive right to have casinos in Arizona. We hope you will see this as a fair, moderate piece of legislation, and ask that you move to quickly enact the bill.

Thank you for taking my testimony.

PREPARED STATEMENT OF HON. THOMAS BEAUTY, CHAIRMAN, YAVAPAI-APACHE NATION

On behalf of the Yavapai-Apache Nation, I appreciate the opportunity to provide written testimony in support of S. 2670, Keep the Promise Act of 2014. The Yavapai-Apache Nation ("Nation") is a rural tribe located off I-17 near Camp Verde, Arizona, approximately sixty miles north of the Phoenix metropolitan area. The Nation has used its ability through gaming revenues from Cliff Castle Casino-Hotel to develop its communities, provide educational, social and economic services to tribal members and improve the quality of life on the reservation. With one of the most diverse economic markets in the Verde Valley, the Nation also provides employment and other economic benefits to the surrounding communities.

In 2002, the Nation was a participant of the 17 Tribes Initiative in support of Proposition 202, which resulted in new tribal-state gaming compacts that have benefitted the tribes as well as the State of Arizona. Participants of the 17 Tribes Initiative made certain promises to gain the support of the Arizona voters, including the promise that no additional casinos would be built in the Phoenix metropolitan area during the term of the compacts. The Tohono O'odham Nation ("Tohono O'odham") was also a participant in the 17 Tribes Initiative and the promise that no additional casinos would be built in the Phoenix metropolitan area during the term of the compacts.

The Nation was obviously shocked when Tohono O'odham announced in 2009 its plan to build a casino in Glendale, far from its reservation near Tucson. More shocking is that Tohono O'odham was secretly planning the Glendale casino *during* the Proposition 202 campaign. Not only is Tohono O'odham violating its promise, it is also threatening the credibility of the other sixteen tribes involved in the 17 Tribes Initiative.

Furthermore, Tohono O'odham is threatening the successful, but fragile, tribal-state gaming relationship in Arizona. The tribes in Arizona currently enjoy exclusivity in the operation of Class III gaming. That exclusivity is jeopardized when controversial off-reservation casinos are proposed far from existing reservations. Such proposals fuel support for non-Indian commercial gaming within the State. This poses a direct and imminent threat to the economic viability of all Indian gaming operations

in the State, especially the Nation's small rural gaming operation which would have to compete with large commercial gaming entities.

In addition, a Tohono O'odham casino in Glendale would significantly impact revenues the Nation receives from its Cliff Castle Casino-Hotel. Cliff Castle Casino-Hotel relies on the Phoenix metropolitan area for approximately twenty-five percent of its business. Earlier this year, the Nation hired a reputable economics firm familiar with the Arizona tribal gaming industry to conduct an economic analysis of the impact of the proposed Tohono O'odham casino in Glendale on the Cliff Castle Casino-Hotel. The analysis confirmed that the proposed Tohono O'odham casino in Glendale would negatively impact the revenues of Cliff Castle Casino-Hotel by seven to twelve percent. Under Tohono O'odham's legal theory, Tohono O'odham could create additional new reservations and casinos in the Phoenix metropolitan area (it has rights under the gaming compact to four casinos), which could include northern areas of the metropolitan area even closer to Cliff Castle Casino-Hotel.

For these reasons, the Nation voiced its opposition to Tohono O'odham's proposed Glendale casino in 2009, along with other Arizona Apache and Yavapai Tribes, in a guest editorial which appeared in the Arizona Republic's March 15, 2009 edition and through a letter to then-Assistant Secretary for Indian Affairs George Skibine dated April 27, 2009 (attached). The Nation's position has not changed. As such, I respectfully ask that you pass S. 2670.

Attachment

George Skibine
Assistant Secretary for Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

April 27, 2009

Re: Tohono O'odham Nation's Fee-to-Trust Application for the Development of Gaming on Land in Glendale, Arizona

Dear Mr. Skibine:

As leaders of five Apache and Yavapai tribes in Arizona, we are writing in opposition to the Tohono O'odham Nation's fee-to-trust application for approximately 135 acres in Glendale, Arizona based on the Tohono O'odham Nation's intended use of the land for the development of a casino. Enclosed are resolutions adopted by each of our councils stating the reasons for our opposition. Also enclosed is our guest editorial which appeared in the Arizona Republic's March 15, 2009 edition.

Each of our gaming enterprises draws significant patronage from the Phoenix metropolitan area. Should the Tohono O'odham Nation, which is headquartered 160 miles south of their proposed Glendale casino site, have its application approved, each of our tribes would sustain economic losses.

It is of further concern to us that the proposed Glendale casino violates promises that seventeen tribes, including the Tohono O'odham Nation, made to Arizona voters in 2002 during our successful campaign to enact Prop. 202, which among other provisions authorized extending the term of our gaming compacts by twenty three years. In an effort to limit the potential negative impacts of casino gaming within Arizona's major urban areas, the sponsoring tribes of Prop. 202 promised that the number of casinos in the Phoenix area would not exceed the seven in existence in 2002 through the duration of the compacts' extended term. Breaking faith with Arizona voters inevitably will damage tribes' public credibility. We have relied on strong public support for tribal gaming in the past, but risk losing that support if voters don't believe we have kept our word.

We would very much appreciate the opportunity to discuss with you in greater detail our objections to this application. We will contact your office in the next few days to follow up on this request.

PREPARED STATEMENT OF SHERRY J. COUNTS, CHAIRWOMAN, HUALAPAI TRIBE

I am Sherry Counts, Chairwoman of the Hualapai Tribe. On behalf of the Hualapai Tribe, I believe it is imperative to present this testimony to the Senate Committee on Indian Affairs following the Committee's September 17, 2014 hearing on S. 2670, "Keep the Promise Act" as introduced by Senators McCain and Flake. This issue is one that has the Hualapai people very concerned. It is often said that there is more than one side to every story. The Committee has only heard part of the story and before acting; the Hualapai would like the Committee to consider other aspects of what S. 2670 means to my people and why we ask Congress to pass this legislation. I thank the Senate Committee on Indian Affairs for the opportunity.

The Hualapai Tribe is a federally recognized tribe located in rural northwestern Arizona. Our land runs along the Grand Canyon and the Colorado River between Kingman and Seligman, Arizona on historic Route 66, very scenic territory. We have about 2,300 members with about 1,300 residing within our reservation. Now we rely on tourism, ranching and arts and crafts to drive our local economy. Our closest "city" is Kingman, Arizona, located about 50 miles to the west of our primary com-

munity of Peach Springs, Arizona. This is where people go to purchase groceries, gas, and clothing. Many of our youth travel the 50 miles to Kingman, one way and each school day, to attend high school.

We do not operate a casino. Many years back, we did make an attempt to open a small gaming facility, but we were not successful. Our facility was forced to closed a very short time after we opened. In retrospect, our remote location as well as our proximity to the large Las Vegas gaming establishments make the operation of a successful gaming operation in our remote community unviable. However, the Hualapai Tribe has a fully executed gaming compact with the state of Arizona. We participate in gaming and receive gaming revenue through our Transfer Agreements. Gaming revenue provides the Hualapai Tribe with additional resources to pay for basic subsistence needs for our members. As a result, this issue is of critical importance to us. Our story presents another facet of the dispute relating to the Tohono O'odham Nation's proposed West Valley Resort. Our story is one that is often overlooked and perhaps misunderstood. Our story presents real facts and considerations of the potential impacts the proposed facility has on one tribe in rural Northwestern Arizona. As a result, we believe it is necessary, as a Tribe that potentially faces perhaps the biggest of repercussions if the West Valley Resort is opened, to provide our position and response on S. 2670 as well as to address some of the issues and arguments raised during the Committee's hearing on September 17, 2014.

Arizona Gaming—Delicately Balanced and Intentionally Limited by Design

Although the Hualapai Tribe does not operate a casino, we have a fully executed Tribal-State Gaming Compact with the state of Arizona. Our former Chairwoman, Louise Benson participated in the negotiations and discussions over the design of gaming in 1999 that ultimately ended up on the Arizona ballots as Proposition 202 in the election of 2002. The compacts included in Proposition 202 were the result of over two years of negotiations and are delicately balanced and intentionally limited gaming that benefits all tribes with at Tribal-State Gaming Compact as well as the citizens of Arizona. The balance has worked for many years and is often cited as the Indian gaming standard.

Gaming in Arizona, by design is limited in size, scope and growth. These carefully engineered limits were discussed multiple times among the tribes, including the Tohono O'odham Nation and with the Governor's Office. Gaming in Arizona is limited as to the number of facilities, number of machines per tribe and per facility, limited as to the types of games, and limited with regard to wager amounts. Plans for responsible growth are also tied to changes in population so that growth would be responsible growth and the markets would not be saturated. To get to this point, every tribe had to be willing to give and make sacrifices for the benefit of all tribes. The Hualapai Tribe sacrificed its facility allocations in order to transfer machines to tribes in the metro areas so that we could benefit from gaming. We did this, not knowing whether there would be a change in circumstances for us that would, at some point, make operation of a facility for us a viable option. We all understood the balance was necessary for all tribes with Tribal-State Gaming Compacts could benefit from gaming. Now, the Tohono O'odham's plans threaten to upset this balance.

In addition to specifically designed limits, there was a plan so that each of the tribes with Tribal-State Gaming Compacts could benefit from gaming, from the tribes located in high density urban locations, such as the Tohono O'odham Nation's land in the Tucson metropolitan area to the most rural of tribes, like the Hualapai Tribe. To this end, Arizona tribes are classified into three categories: The Metro Gaming Tribes, those tribes located near Phoenix and Tucson, the Rural Gaming Tribes, or tribes located near areas with a population to support a gaming facility such as those located in Globe, Yuma, Camp Verde, Payson, and Show Low. Finally, there are the Non-Gaming Tribes also called the Transferring Tribes, which include those tribes with tribal lands in remote areas and without the ability or population to operate a casino. The Hualapai Tribe is a Non-Gaming Tribe. As a Non-Gaming Tribe we lease our machine allocations to other tribes in the metro areas through contractual agreements we refer to as Transfer Agreements. As a result of our Transfer Agreements, we participate in gaming and receive much needed revenue. We are able to use a resource we have by virtue of our Tribal-State Gaming Compacts to benefit financially. The believe the viability of our Transfer Agreements is potentially at risk due to Tohono O'odham Nation's plans. Most Transfer Agreements contain provisions that automatically terminate the Transfer Agreements if the "Poison Pill" provisions of the Tribal-State Gaming Compacts are triggered, thus removing all limits on gaming and thus eliminating the need for the Metro Tribes to lease machines from Non- Gaming Tribes. Some Transfer Agreements also in-

clude early buy-out provisions for the Metro Tribes to exercise if they need to terminate a Transfer Agreement early. Obviously, an additional casino in the Phoenix market will result in changes in market conditions that places the Transfer Agreements at risk because the new facility may lead to the Arizona legislature legalizing commercialized non-Indian gaming, which will definitely trigger the Poison Pill or changes market conditions so that the Metro Tribes exercise the early termination provisions of the Transfer Agreements. Either way, my Tribe, the Hualapai Tribe bears the biggest burden of the outcome of this dispute. We will be eliminated from the gaming industry and will lose much needed revenue. The Tohono O'odham Nation's proposed West Valley Resort has the potential to effectively change the face of gaming in Arizona and tribes like mine, stand to lose the most.

Deception Then or Deception Now—Deception is Deception

In late 1999, before entering the negotiation process an Agreement in Principle was developed for the Tribal Leaders to sign as evidence of the commitment to work together in good faith. This document included language that specified that in the event an individual tribal interest superseded the common goal, there would be full disclosure. On January 7, 2000, Edward Manual, Chairman of the Tohono O'odham Nation. In addition to the Tohono O'odham Nation's pledge through its tribal leader on January 7, 2000, the Tohono O'odham Nation actively participated in negotiations and later in the campaign to get gaming authorized by Arizona's voters. During this process, the clear understanding and expectation and understanding of all participating tribes was expressed multiple times, either in testimony to the state legislature or in campaign materials urging support for Proposition 202, the initiative that authorized Indian gaming in Arizona. The same understanding expectation was also expressed and communicated by the Governor's Office and the Secretary of State through various press releases and in materials circulated to the voters. More specifically, on April 8, 2002, David LaSart, AIGA Executive Director testified before the Arizona Legislative Committee that Proposition 202 compacts, "include the limitation of facilities in the Phoenix-metro area to the current number [7] and allows the possibility for only one additional facility in Tucson." In the voter information pamphlet developed and circulated by the 17-Tribe Indian Self-Reliance Initiative to support Proposition 202, the voters were advised, "[u]nder Prop 202, there will be no additional facilities authorized in Phoenix, and only one additional facility permitted in Tucson." The Tohono O'odham Nation was one of the 17 tribes that provided funding to support Proposition 202 and that was used to pay for this voter information pamphlet. In Governor Hull's February 20, 2002 Press Release, she advised the residents of Arizona, the agreement reduced the number of gaming facilities in Arizona by 25 percent and that there would be "no additional casinos in the Phoenix metropolitan area and one additional casino in the Tucson area." The Secretary of State's Voter Guide for the November 5, 2002 election contains consistent information about Proposition 202 stating, "Voting 'yes' on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area and only one in the Tucson area for at least 23 years." Despite all of Tohono O'odham Nation's active participation in the campaign process, the Tohono O'odham Nation is now saying there was never a promise to limit the number of machines in the Phoenix metro area. Their actions beg a few relevant questions. First, if there was never a clear understanding and agreement that there would be no additional casinos in the Phoenix metro area, why didn't the Tohono O'odham speak up during the campaign to advise all parties that they did not agree to the campaign promise that the negotiated agreement meant that there would be no new casinos in the Phoenix metro area? This statement was not a one-time statement; it was one that was made repeatedly on many different occasions by many different people, both verbally and in writing. How is it that everyone from the Governor to the Secretary of State to the other Tribal Leaders understood that the agreement that would be passed by Proposition 202 meant there would be no new casinos in the Phoenix metro area but Tohono O'odham did not?

Now, to support their new position, in written testimony submitted to the Committee, the Tohono O'odham refer to various 2012 depositions to support their position that there was never a promise of "no new casino in Phoenix". They include excerpts from depositions of W.M. Smith, Clapham, Ochoa, Severns, Lewis and LaSarte. *See* Written Testimony of the Honorable Ned Norris, Jr., Senate Indian Affairs Committee Legislative Hearing on S. 2670, Keep the Promise Act of 2014, September 17, 2014. However each of these individuals state, they do not *recall* any specific promise. (Emphasis added). Basic statement analysis of "I do not recall" suggests the individual had the information at one time but simply does not remember it at the present time. Thus, the deposition excerpts only mean that at the time the deposition was taken, the witnesses merely did not remember. It does not mean

the promise of "No New Casinos in Phoenix" was not made. Multiple written documents, including the campaign materials, the Governor's February 20, 2002 Press Release as well as the Secretary of State's Voter Information Guide from the November 2002 Election written contemporaneously to the event, quite clearly evidence the promise.

Either the Tohono O'odham intentionally chose not to correct the record and allowed misleading information to be provided to the voters in hopes their plans would not be discovered or they subsequently changed their position and now denying that they agreed with the numerous statements made during the Proposition 202 campaign.

City of Glendale

The Tohono O'odham Nation then presents the City of Glendale as supportive of their West Valley Resort. However, it wasn't until the City of Glendale found itself in financial turmoil that Glendale changed its position on the West Valley Resort. Glendale's motivation is purely financial and it can be argued that the Tohono O'odham Nation bought their support. In various news articles, Councilman Gary Sherwood, who testified before the Committee about the benefits of the proposed West Valley Resort and elaborating what a great partnership the parties will enjoy, is quoted as saying "We're hunting for money." *Proposed West Valley Casino is Pitting Valley Indian Tribes Against One Another*, Monica Alonzo, Phoenix New Times, February 6, 2014. Councilwoman Norma Alvarez has stated, "we're so broke." *Glendale City Council Begins Formal Casino Negotiations with Tohono O'odham Nation*, Monica Alonzo, Phoenix New Times, March 20, 2014. Following the decision to begin formal negotiations with the Tohono O'odham Nation, the City of Glendale applied for almost $800,000 in grants from the Tohono O'odham Nation. After years of opposing the Tohono O'odham Nation's proposed West Valley Resort, "Glendale decided to try and reach into the tribe's pocket." *Glendale Applies for Nearly $800k in Grants from Longtime Nemesis Tohono O'odham Nation*, Monica Alonzo, Phoenix New Times, June 16, 2014. Then in August 2014, the City of Glendale and the Tohono O'odham Nation entered an agreement wherein the Tohono O'odham Nation agreed to provide the City of Glendale at least $26 million over a 20-year period. The agreement required the Tohono O'odham Nation to make an initial payment of $500,000 to the City of Glendale within 10 days of the agreement and annual payments of $1.4 million beginning 6 months after gaming begins. *Glendale Council Oks Casino Deal with Tribe*, *www.azcentral.com*, August 13, 2014. According to the written testimony of Councilman Gary Sherwood, the City of Glendale has already received a "good faith payment" of $500,000. See Written Testimony of Gary Sherwood, Councilman, City of Glendale, Arizona to the Senate Committee on Indian Affairs, S. 2670, September 17, 2014. To be direct, it is obvious that the support of the City of Glendale was purchased. However, based upon the Tohono O'odham Nation's history, the City of Glendale should be concerned about what could happen to their partnership with the Tohono O'odham Nation should the "poison pill" provisions of the Tribal-State Gaming compact be triggered or if the Tohono O'odham Nation changes its mind and denies that they ever agreed to a partnership with the City of Glendale as they have with the other tribes.

Bureau of Indian Affairs Opposition to S. 2670 Filled with Misinformation

We listened in shock and despair to the comments provided to the Committee by Assistant Secretary Washburn. Assistant Secretary Washburn works for the Bureau of Indian Affairs, an agency with a mission to "enhance the qualify of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives." *See www.indianaffairs.gov/WhoWeAre*. Yet, Assistant Secretary Washburn was advocating for one Arizona tribe over the other tribes, including the Hualapai Tribe and his testimony was completely inappropriate. As an agent of the Bureau of Indian Affairs, the Assistant Secretary is supposed to support all tribes. During his testimony, he referred to the Tohono O'odham Nation as "impoverished" with significant unmet needs. The Hualapai Tribe, like most Arizona tribes, struggles with the same, if not more significant unmet needs. To be direct, a reference to unmet needs should not justify the Assistant Secretary's position in opposition of S. 2670. In fact, if Assistant Secretary Washburn were considering unmet needs, his consideration would have and should have considered the unmet needs of ALL of Arizona's tribes. In addition, Assistant Secretary Washburn made reference to the Phoenix market being in a position to support an additional casino. However, he failed to identify any source to support his testimony to the Committee that the Phoenix gaming market can support another casino. Assistant Secretary Washburn did not present any evidence that the market can withstand any additional machines. Those of us in the

area who work with gaming at the local level are in the best position to determine whether there will be an impact on the market. The act of opposing an additional casino is evidence enough that the market is not sufficient in the Phoenix metropolitan area to support another casino. Even if, for the sake of argument, the Phoenix market could support another casino, the underlying issue addressed by S. 2670 remains. Because the Assistant Secretary's comments were so biased and presented without support, we urge the Committee to disregard his position.

Possible Consequences—The Rest of the Story

The Hualapai Tribe has used our gaming revenue to build infrastructure in our community and for the benefit of our members. We've constructed buildings such as the Health Building and the Boys and Girls Club, among others. Our gaming revenue assists tribal members in need of emergency food and shelter assistance, to pay medical care when Indian Health Service is insufficient, to provide wood for our elders during the harsh winter months. Several Hualapai members have received scholarships, funded by our gaming revenue and have used the funding to pursue higher education in hopes of creating a better future for our community. While we have other revenue sources, the loss of our gaming revenue would have negative impact that would not go unnoticed.

There is much chatter and finger pointing about this issue being an issue of greed. We've witnessed storied painting the Tohono O'odham Nation as the victim and the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community as the greedy villains wanting to eliminate the competition. Protecting market share is of course part of the issue, however there are bigger issues involved and at stake that a person unversed in the Arizona gaming industry may not understand or be aware. The Tohono O'odham Nation's plans place the Hualapai Tribe at risk for losing our gaming revenue. As mentioned previously, our Metro gaming partners may have motive to terminate our Transfer Agreements as a business decision. Further, our compacts do not continue indefinitely. At some point, the Arizona Tribes will need support to continue being the exclusive providers of gaming in Arizona. In 2002, the tribes made promises to the people of Arizona that no new casinos would be constructed in the Phoenix metropolitan area. Whether the Tohono O'odham Nation acknowledges they were an active participant in making those promises or not, the written evidence is out there. If the West Valley Resort is constructed it potentially endangers our ability to negotiate for additional compact terms both with the state of Arizona as well as with the voters. The Tohono O'odham Nation's plans make it extremely difficult for the Tribes to seek voter approval or even the support of the Governor for an extension of gaming beyond the current compacts.

Each year, we closely monitor the Arizona legislative sessions to protect against the racetracks and commercial gaming interests who have made attempts to expand gaming off the reservation. In 2002, at the same time we were campaigning for the passage of Proposition 202, there was an attempt to expand gaming to Arizona's dog and horse tracks. Each time there is financial strain in Arizona, the concept is brought to the forefront. Part of our success at thwarting these attempts is due to the fact that Indian gaming in Arizona benefits all tribes with a State-Tribal Gaming Compact, including rural Non-Gaming Tribes and the fact that Arizona has enjoyed the positive benefits of well regulated and limited gaming. We've also capitalized on the inability to trust and rely upon promises made by commercial and racetrack gaming as demonstrated in other jurisdictions. If the West Valley Resort is constructed, the trust will be broken. Our ability to make promises people view as trustworthy and reliable is gone; thereby placing limited Indian gaming in Arizona on the path of extinction.

Of further concern are statements made by attorneys for the Tohono O'odham Nation indicating their belief that they can repeat this process again; purchase land under the Gila Bend Reservation Land Settlement Act in the Phoenix metropolitan area, have the land placed into trust and open another facility, this time, perhaps in the East Valley of the Phoenix.

The Hualapai Tribe, as a Non-Gaming Tribe stands to lose the most in this situation. The Metro Tribes will survive and adjust, however, the Hualapai Tribe stands to lose our gaming revenue: that is the bigger but untold story. As Chairwoman of the Hualapai Tribe, I cannot speak on behalf of the other Non-Gaming Tribes; however, I can share my concerns about the Tohono O'odham Nation's plans.

S. 2670 Is Only a Time Out

In painting themselves as a poor impoverished tribe, who happens to be able to pledge $26 million to the City of Glendale for their support, the Tohono O'odham claims S. 2670 takes something from them. That is simply untrue. S. 2670 simply

hits a "pause" button on their plans. It allows those who approved Indian gaming in Arizona, the Arizona voters, to have a say in the process. This action is quite appropriate. If at the end of the compacts, the voters want another casino in the Phoenix metro area, then they can authorize one. However, a new casino shouldn't be forced upon the voters without their consideration of the full impacts, including the impact to other tribes like the Hualapai Tribe.

Conclusion

As the Chairperson of Hualapai Tribe, I urge you to push S. 2670 forward. While I would have preferred the matter to be resolved among the tribes in Arizona, it is evident that we can no longer resolve this issue without Congressional intervention. Thank you.

PREPARED STATEMENT OF ROBERT HART, EXECUTIVE VICE PRESIDENT, HUNT CONSTRUCTION GROUP

On behalf of the construction team for the Tohono O'odham Nation's West Valley Resort and Casino, I would like to offer comments on the project and the potential impacts of S. 2670, the subject of your Committee's recent legislative hearing.

I represent Hunt Construction Group, one of America's top commercial construction management/general contracting firms. We are currently celebrating 70 years of construction excellence and 30 years of success in Arizona. In partnership with PENTA Building Group, we are the construction leads for the West Valley Resort.

We have a long history in the West Valley of Phoenix. Hunt Construction worked on the University of Phoenix Stadium, home of the Arizona Cardinals and site of the 2015 Super Bowl. More recently, we built the new St. Joseph's Westgate Hospital.

The West Valley Resort project has already broken ground and the construction process is underway. More than 3,500 construction jobs will be created during this process. These are high-paying, quality jobs that are being filled primarily by local residents. The Nation will spend an estimated $400 million over the course of the construction process, the vast majority of which will be spent in this community.

The past few years have been incredibly difficult times for the construction industry in Arizona, with the West Valley hit particularly hard. I can honestly say that the West Valley Resort is one of the few major economic development projects currently underway in the region.

Under these conditions, passing a bill to take the shovels out of our hands would be a disaster not just for Hunt, but for the entire construction industry across the Phoenix Valley. It would mean fewer jobs, slower growth, and harder times for thousands of families and businesses. There simply aren't alternatives that can match the scale of the Nation's project.

The Nation has followed the rules every step of the way, and I ask the committee to side with jobs and growth and oppose S. 2670. Thank you for your time and for providing the opportunity to comment.

CITY OF PEORIA, ARIZONA
SEPTEMBER 29, 2014

Hon. Jon Tester, Chairman,
Hon. John Barrasso, Vice Chairman,
Senate Committee on Indian Affairs,
Hart Senate Office Building,
Washington, DC.

Dear Chairman Tester and Vice Chairman Barrasso,

On behalf of the City of Peoria, Arizona I write to express opposition to S. 2670 the job-killing legislation that attempts to break a promise of economic development

for my community and the Tohono O'odham Nation. Our unanimous City Council resolution opposing this legislation is a blatant attempt to preserve market share of Native American Tribes on the other side of the Phoenix Metropolitan region.*

My Councilmembers and I have spent the past 5 plus years working with the Tohono O'odham Nation and were pleased to celebrate the groundbreaking of the West Valley Resort and casino in August. The development shares a border with the City of Peoria and we are thrilled to have the project underway because of the thousands of construction jobs and money that's already being spent in our community today because of the construction as well as the permanent jobs that will ultimately be created.

I have personally taken vacation time from my employer and traveled to Washington D.C. to counter the misinformation and blatant lies being put forth by the East Valley Tribes and their supporters. The fact is that Arizona and, in particular, our West Valley region are growing. The majority of Greater Phoenix's growth will occur in Peoria and the West Valley so there is more than enough market share to go around.

As local government leaders, I respectfully request that you consider our opposition to S. 2670. We are duly elected and have literally spent years talking with our constituents and the Tohono O'odham Nation. Those discussions have now yielded construction of the project and we oppose any effort that would eliminate these important jobs and set back our economic development.

Sincerely,

BOB BARRETT,
Mayor.

RESIDENT OF GLENDALE, ARIZONA
SEPTEMBER 26, 2014

Hon. Jon Tester, Chairman,
Hon. John Barrasso, Vice Chairman,
Senate Committee on Indian Affairs,
Hart Senate Office Building,
Washington, DC.

Dear Chairman Tester and Vice Chairman Barrasso, and all Honorable Senate Committee members of the Indian Affairs Committee

I am asking the following informational research, facts, and opinion become part of the Testimony for S. 2670 which is currently before your Committee.

I am a business partner with my husband in our own business as well as a Facilitator of the Grassroots Tea Party Activists in the Glendale, Phoenix area. I have been involved in the research of the West Valley Resort & Casino project since it's inception meeting with Tea Party members, citizens of Glendale, Phoenix, and surrounding cities, conducting poll research of various businesses here in the valley and have found the reception to be extremely favorable in support of the TO Nation and the West Valley Resort & Casino. I was originally active in attending Glendale city Council meetings in support of the TO Nation and continue to do so when I have the availability of Tuesday night Council Meetings.

This support continues to be favorable in that the economic downturn across the Country, and in particular in the City of Glendale, Arizona is not good. There have been few new startups and a lot of store/restaurant closings in Glendale specifically. There were many homes up for sale in City of Glendale which has slowed down a little. The City of Glendale in a 5–4 decision voted and passed a Resolution in favor of the TO Nation. I'm sure if Council member Ian Hugh, Norma Alveraz, Gary Sherwood, and Sammy Chavira were contacted they would be more than happy to provide a copy to all Senate Members of the Indian Affairs Committee. Be it known that the Mayor was one of the 'No' votes and as you will see down in the text of my email, Mr. Weiers received a good bit of financial support in his 2012 Mayor Candidacy from GRIC (Gila River Indian Community) Independent Expenditures. There has always been a lot of money given to the City of Glendale in the past including a brand new Fire Truck. Westgate City Center has about 4 very large electronic billboards in front of the Arena and in the Restaurant area all constantly flashing/promoting GRIC Casinos. There are even a few of the Restaurants in Westgate City Center that do off-track betting and Poker. The City of Glendale is no stranger to Off-Track Betting establishments as well as Poker establishments in the Bars within Glendale. There are at least 2 Strip Clubs, one to the east, and one

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*The information referred to has been retained in the Committee files.

to the west on Northern of the West Valley Resort & Casino project, one of these exceptionally close to the City of Glendale City Hall. For anyone to complain about a Casino being near a school, of which is not 'close/near' the school, more like an approximate ½–¾ mile away to the south of the property where the Resort/Casino is being built, is an oxymoronic statement. When one can travel just a little further south down 99th Ave to Glendale Ave and go into Westgate City Center and go into any restaurant/bar located there and be in the vicinity of gambling, drinking establishments, etc. The Casino is nothing more than an enlarged entertainment center with restaurants, convention centers, and drinking establishments, nothing different than what is in Westgate City Center or down the road going into Glendale downtown district. Directly across the street from the Casino to the north is the city of Peoria and restaurants, small businesses, etc. and they have no problem with the Casino. In fact the City of Peoria has offered to provide Water to the location. Also in the Resolution passed by Glendale Council, TO Nation has graciously offered to provide quite a bit of money over the next few years and give the water usage to the City of Glendale.

Also, to show just how the integrity of the Mayor is not, he has already, in my and others opinion, violated the City Ordinance/Agreement with the TO Nation by slamming them for a 2nd time at these hearings. He is going against the promise and agreement passed by City of Glendale Council with the TO Nation/West Valley Resort & Casino.

To reiterate a statement made to me face to face by Senator John McCain at a Townhall meeting when I approached him after the meeting asking questions of why is it ok for the State of Arizona to support the building ad financing of a Navajo/Hopi Casino—Twin Arrows in Flagstaff with no problem, promote GRIC Casinos all over the place within Metro Phoenix, billboards, TV ads, and Radio Commercials with no problem, yet condemn another Tribe truing to do the right and legal way to use our American Free Enterprise system and create a beautiful Resort & Casino and Convention Center—Senator McCain's response to me was (he looked me straight in the eye) and responded to me 'My dear, it's all about the money, It's Always about the money!' and laughed.

Please continue to read what I sent on to Mr. Washburn and ensure that all of this becomes part of the Testimony allowed within the allotted timeframe on S. 2670* which is now before your Committee of the 113th Congress (2013–2014): Keep the Promise Act of 2014. Comment: this so-called 'Keep the Promise Act' initiated by GRIC is a sham, and a disgrace to all that is honest and free and all peoples and tribes wanting to participate in the United States Free Market and Free Enterprise System.

Thank you.

Respectfully,

*The information referred to has been retained in the Committee files.

FRANCIE L. ROMESBURG,
Grassroots Tea Party Activist Facilitator/Leader

The Honorable Jon Tester
Chairman
Committee on Indian Affairs
838 Hart Senate Building
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman
Committee on Indian Affairs
838 Hart Senate Building
Washington, D.C. 20510

Re: H.R. 1410/S. 2670 the Keep the Promise Act September 16, 2014

Dear Chairman Tester and Vice-Chairman Barrasso:

As you know, a broad coalition of community and tribal leaders, small business owners and neighbors came together in 2002 to fight for Arizona's neighborhoods by approving new tribal/state gaming compacts that limited gaming to existing reservation lands. As a result, it was never the intent to allow tribal gaming to occur off aboriginal reservation lands and in the middle of large urban areas near neighborhood schools, places of worship and homes. Now, since some have negotiated in bad faith, and misrepresented the facts, the State of Arizona needs Congress to intervene and set the record and intent straight.

H.R. 1410, the Keep the Promise Act of 2013, was approved by a super majority of the U.S. House of Representatives, and is consistent with the promises repeatedly made to Arizona voters when they were asked to approve tribal gaming compacts in 2002. In addition, Senators John McCain and Jeff Flake recently introduced S. 2670 the companion bill to H.R. 1410. Today, both bills are awaiting action in the Committee on Indian Affairs. While these bills would permit new lands to come into trust they would prevent these lands from being used for gaming until the expiration of existing compacts in 2027.

If not addressed in the near future, Arizona will set a dangerous precedent that will make any county island in the Phoenix Metropolitan area vulnerable to purchase and development as a casino reservation where tribal gaming was never intended to occur.

We are requesting the Committee on Indian Affairs to mark-up H.R. 1410/S. 2670 in the coming weeks in order for the full Senate to take action during this Congress.

Thank you for your leadership on this important matter.

Sincerely,

Thomas Schoaf
Mayor, Litchfield Park

John Lewis
Mayor, Town of Gilbert

W. J. "Jim" Lane
Mayor, City of Scottsdale

Mark W. Mitchell
Mayor, Tempe

Alex Finter
Mayor, City of Mesa

Linda Kavanagh
Mayor, Town of Fountain Hills

Eddie Cook
Vice Mayor, Town of Gilbert

Bill Gates
Council District 3, City of Phoenix

Sal DiCiccio
Council District 6, City of Phoenix

Jenn Daniels
Council, Town of Gilbert

Virginia Korte
Council, City of Scottsdale

Yvonne Knaack
Council, City of Glendale

Bob Rivera
Mayor, Town of Thatcher

September 25, 2014

The Honorable Jon Tester
Chairman
Senate Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman
Senate Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

The Honorable John McCain
United States Senate
Washington, D.C. 20510

Dear Senators:

On September 17, 2014, the Senate Committee on Indian Affairs held a Legislative Hearing on S. 2670, Keep the Promise Act of 2014, which addresses the proposal of the Tohono O'odham Nation to create a reservation and construct an Indian gaming facility in the City of Glendale, Arizona.

During that hearing, City of Glendale Councilmember Gary Sherwood testified. The record of the hearing reflects that his testimony included the following statement:

> I [Councilmember Sherwood] have met personally with representatives of the other major sports, entertainment and retail industries in Glendale, including the Phoenix Coyotes, Arizona Cardinals, Tanger Outlet Mall, the Renaissance Hotel, and many other restaurants and businesses, all of whom have expressed support for the Nation's project and the secondary benefits that it will bring to their franchises.

The Arizona Coyotes (formerly the Phoenix Coyotes) desire to repudiate and clarify that portion of Councilmember Sherwood's statement which reflects that this organization has expressed support for the Tohono O'odham's project. Contrary to this statement, the Coyotes have never expressed support for this proposed project. Therefore, we request that a copy of this letter be incorporated into the Committee's Hearing Record for the September 17, 2014 Hearing on S. 2670.

The Coyotes appreciate the Committee and Senator McCain many decades of support for best interests of all Indian communities. The Coyotes have enjoyed a long and successful relationship with Indian communities in Arizona. Specifically, we have been honored to many years to have the Gila River Indian Community as a very important sponsor of our home Arena. That relationship has grown such that the Coyotes and the Gila River Indian Community have entered into a long term for the Arena to bear the Community's name, first Arena hosting a major professional sports franchise that has been named for an Indian community.

Respectfully submitted,

Anthony Leblanc
President & CEO
Arizona Coyotes Hockey Club

RENAISSANCE
GLENDALE HOTEL & SPA

Hon. Jon Tester, Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

September 29, 2014

Hon. John Barrasso, Vice Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Re: Legislative Hearing on S. 2670, the Keep the Promise Act of 2014

Dear Senators Tester and Barrasso:

I would like to offer comments regarding the Glendale City Council's decision to support the Tohono O'odham Nation's West Valley Resort, to be included in the record for the legislative hearing on S. 2670.

I am the General Manager of Renaissance Glendale Hotel & Spa, which is located next to the Westgate Entertainment District in Glendale. I am writing today in support of the City of Glendale and its efforts to bring economic development and jobs to the Entertainment District.

I have studied the issue closely and I support the Council's decision. I believe the Nation's project will be a positive economic development that benefits the West Valley and the Renaissance Glendale Hotel. In fact, I have already developed a positive working relationship with the Nation, as have many others in the community.

As the Nation has begun moving forward, they have already been reaching out to contract with local businesses, creating jobs and adding to the local economy.

I ask the Committee not to override the careful decision made by our City Council. I respectfully request that you oppose S. 2670, which would negatively impact economic development in the West Valley.

Thank you for receiving my comments. Please feel free to contact me if you have any questions.

Very Truly Yours,

Lynnie Green
General Manager
Renaissance Glendale Hotel & Spa

Norma S. Alvarez
Councilmember

Ocotillo District

Office of the City Council

September 30, 2014

The Honorable Jon Tester
Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Tester and Barrasso:

Please accept this letter as my contribution to the legislative hearing on S. 2670, which would halt construction on the Tohono O'odham Nation's West Valley Resort. I ask that you oppose this bill.

I write from the perspective of a Glendale resident, a former employee of the city of Glendale and current Glendale City Councilmember.

Glendale was among the cities hardest hit by the recession and is still far from recovered. We continue to grapple with significant fiscal challenges even as we struggle to expand economic development and job growth.

It was in this context that our Council examined the unique opportunity presented by the Nation's project. It will be the largest construction project in the region and will create thousands permanent jobs, as well as hundreds of millions of dollars in economic impacts each year.

It just doesn't make any sense for Congress to intervene to stop this project, especially with S. 2670. This legislation unilaterally amends the Nation's settlement with the federal government to draw an arbitrary line across the state in a fashion that does more to protect the market share of special interests than serve any public good.

It's also terrible deal for Glendale because S. 2670 would still leave us with the Nation's land in reservation status, while preventing the property from being put to its highest and best use. The only ones who benefit under this law are the outside interests looking to preserve their market share. These interests do not represent the West Valley, which overwhelming supports the casino project. Please, don't let S. 2670 impose a dire burden on Glendale. Stop this bill in its tracks and allow the Nation to move forward with creating jobs in my community.

The promise that needs to be kept here is the one made to the Tohono O'odham Nation nearly 30 years ago. If you have any questions at all, I'd be more than happy to answer them.

Sincerely,

Norma S. Alvarez
Councilmember, Ocotillo District
City of Glendale, Arizona

PIMA COUNTY BOARD OF SUPERVISORS
DISTRICT 3
130 WEST CONGRESS STREET, 11TH FLOOR
TUCSON, ARIZONA 85701-1317
(520) 724-8051
district3@pima.gov

SHARON BRONSON
CHAIR

September 29, 2014

The Honorable Jon Tester
Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Tester and Barrasso:

As an elected official serving on the Pima County Board of Supervisors, I represent a vast region in southern Arizona, including the majority of the Tohono O'odham Nation's reservation. Having served in this position for nearly two decades, I have seen the positive changes gaming has brought to the Tohono O'odham. I also understand the challenges facing this community will take generations, and billions of dollars in funding, to fully address.

I found comments at the September 17, 2014 legislative hearing regarding S. 2670 very concerning. In *particular, I was taken aback at the treatment of Assistant Secretary of Indian Affairs Kevin Washburn and* his entirely accurate characterization of the Tohono O'odham Nation as an impoverished tribe. Dismissing the great needs that exist on the Tohono O'odham Nation is disingenuous and is disrespectful to those tribal members that continue to live in dire conditions.

The Tohono O'odham Nation has approximately 32,000 enrolled members, making them the second largest tribe in Arizona. Many of these individuals live in isolated villages throughout the reservation—a massive land base that covers 2.8 million acres. *Even today, in 2014, there are Tohono O'odham tribal* members that do not have running water, electricity, or reliable roads to travel to receive health care, education, and other basic needs. With little economic opportunity, unemployment rates continue to be four times that of other communities in Arizona.

I would encourage members of the Senate that are considering this bill to travel to southern Arizona to see firsthand the third world living conditions Nation members continue to live in - circumstances that most Arizonans and Americans have never seen, let alone had to endure.

Despite these challenges the Nation continues to be an excellent community partner to Pima County, and the entire region. Their commitment to public safety, education, our delicate ecosystem, and the health and well-being of members is making a difference on the Nation, and in surrounding communities. In other words, Indian gaming is working on the Nation, exactly as it should under the Indian Gaming Regulatory Act.

Please oppose S. 2670 as this bill would set a dangerous precedent by unilaterally denying the Nation rights provided under the Settlement Agreement and IGRA the Nation made with the United States government nearly three decades ago.

I appreciate the opportunity to provide additional information on this issue and ask that it be made part of the official record of the September 17 hearing.

Sincerely,

Sharon Bronson

Sharon Bronson
Chair, Pima County Board of Supervisors
District 3

September 24, 2014

The Honorable Jon Tester, Chairman
Senate Committee on Indian Affairs
706 Hart Senate Office Building
United States Senate
Washington, DC 20510-2604

Re: *Legislative Hearing on S. 2670, Keep the Promise Act of 2014*

Dear Senator Tester:

We are writing regarding the above-referenced legislative hearing, which occurred on September 17, 2014.

During this hearing, City of Glendale Councilman Gary Sherwood testified that the Arizona Cardinals support the casino project under discussion. *See* Testimony of Gary Sherwood, at page 2.

We are writing to clarify the record on this subject: The Arizona Cardinals do not support this casino project. We have made this position clear to the City of Glendale over the past four years and we have never discussed this subject with Mr. Sherwood. Any suggestion to the contrary is misleading.

We request that a copy of this letter be included in the official record of the hearing.

Very truly yours,

David M. Koeninger, General Counsel
Arizona Cardinals Football Club LLC

Office of the Mayor
16000 N. Civic Center Plaza
Surprise, AZ 85374-7470
Ph: 623-222-1300
Fax: 623-222-1301

September 30, 2014

Hon. Jon Tester, Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Hon. John Barrasso, Vice Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Tester and Vice Chairman Barrasso,

As Mayor of Surprise, Arizona I write to express opposition to S. 2670 and its attempt to prevent my community from enjoying the economic and entertainment benefits associated with gaming.

The entire Surprise City Council came out in unanimous opposition to H.R. 1410, the identical legislation to S. 2670 last year , so this is an issue that I am well-versed in. S. 2670 boils down to an economic attack on the West Valley by Tribes and those who benefit from them on the other side of the Phoenix Metro region.

The West Valley Resort and Casino broke ground in August so we are not talking about the theory of job creation and investment. This legislation would have a real, direct negative impact in the form of eliminating construction jobs and the positive economic impacts that occur today. Furthermore, it would prevent thousands of ongoing jobs -- at the casino and resort but also in the form of vendors and service providers to the development.

I have a tremendous amount of respect for the work of Congress and the federal government, but as a local elected leader I have a duty and responsibility to represent my constituents and therefore I ask that you refrain from interfering in the West Valley Resort and casino. Please do not advance S. 2670.

Sincerely,

Sharon R. Wolcott, Mayor

The Honorable Jon Tester, Chairman
Senate Indian Affairs Committee
Judge Jameson Federal Building
2900 4th Ave N., Suite 201
Billings, MT 59101

September 23, 2014

Dear Senator Tester:

Thank you for chairing the hearing last week for S.2670 otherwise known as the Keep the Promise Act. During the hearing you requested input in order to make a decision as to whether the Senate Indian Affairs Committee should pass this bill. I wish to provide you my opinion in favor of this bill. However, before I make my case I must inform you that I am an employee of the Gila River Indian Community, which is a party that is also in favor of this bill. However, I am writing this letter to you as a private citizen and my opinion should not be construed as the opinion of the Gila River Indian Community.

As was established in the hearing the Tohono O' odham indian nation is seeking to build a casino on land that is adjacent to Glendale, Arizona. The hearing revealed the federal government allowed the Tohono O'odham to classify this land as part of their reservation based on a law known as the Gila Bend Indian Lands Replacement Act. The Tohono O'odham nation believes this law allows them to conduct gaming on the land adjacent to Glendale. However, the Tohono O'odham's nation's position does not take into account Congress's position on gaming, which was stated in the Indian Gaming Regulatory Act.

Section 2701 Findings (4) states in part that "The Congress finds that a principal goal of Federal Indian policy is to promote tribal economic development". When the Indian Gaming Regulatory Act was passed Congress was intending to promote tribal economic development by creating a closed system known as gaming that would provide a constant stream of funding to indian nations to allow them to better care for their constituents. It did not intend for one indian nation to use gaming to increase its funding at the expense of other indian nations.

If the Tohono O'odham nation is allowed to conduct gaming next to Glendale, then they will increase their funding stream at the expense of the Gila River Indian Community. The Gila River Indian Community's lands do not extend to Glendale, so it cannot place a casino nearby in order to compete. Its nearest casino, Vee Quiva is confined on its land ten miles south of Glendale and will suffer material losses as the plot of land the Tohono O'odham nation seeks to exploit is considered more favorable.

If the Senate Indian Affairs Committee chooses not to pass S.2670 and allows the Tohono O'odham Nation to build the casino then Congress' goal of promoting tribal economic development for the Gila River Indian Community would be adversely affected. Therefore, I urge the Senate Indian Affairs Committee to pass S.2670 immediately.

Thank you for considering my petition

Sincerely,

Robert Russin
4211 E. Agave Rd.
Phoenix, AZ 85044

September 10, 2014

The Honorable Jon Tester
Chairman
Committee on Indian Affairs
838 Hart Senate Building
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman
Committee on Indian Affairs
838 Hart Senate Building
Washington, D.C. 20510

Re: H.R. 1410/S. 2670 the Keep the Promise Act

Dear Chairman Tester and Vice-Chairman Barrasso:

As you know, a broad coalition of community and tribal leaders, small business owners and neighbors came together in 2002 to fight for Arizona's neighborhoods by approving new tribal/state gaming compacts that limited gaming to existing reservation lands. As a result, it was never the intent to allow tribal gaming to occur off aboriginal reservation lands and in the middle of large urban areas near neighborhood schools, places of worship and homes. Now, since some have negotiated in bad faith, and misrepresented the facts, the State of Arizona needs Congress to intervene and set the record and intent straight.

H.R. 1410, the Keep the Promise Act of 2013, was approved by a super majority of the U.S. House of Representatives, and is consistent with the promises repeatedly made to Arizona voters when they were asked to approve tribal gaming compacts in 2002. In addition, Senators John McCain and Jeff Flake recently introduced S. 2670 the companion bill to H.R. 1410. Today, both bills are awaiting action in the Committee on Indian Affairs. While these bills would permit new lands to come into trust they would prevent these lands from being used for gaming until the expiration of existing compacts in 2027.

If not addressed in the near future, Arizona will set a dangerous precedent that will make any county island in the Phoenix Metropolitan area vulnerable to purchase and development as a casino reservation where tribal gaming was never intended to occur.

We are requesting the Committee on Indian Affairs to mark-up H.R. 1410/S. 2670 in the coming weeks in order for the full Senate to take action during this Congress.

Thank you for your leadership on this important matter.

Sincerely,

SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY

10005 East Osborn Road / Two Waters Building A, Suite 900 / Scottsdale, Arizona 85256-9722
Phone (480) 362-7400 / Fax (480) 362-2593

September 10, 2014

Kevin Washburn
Assistant Secretary—Indian Affairs
Department of the Interior
MS-4141-MIB
1849 C Street, N. W.
Washington, D.C. 20240

Re: Passage of H.R. 1410/S. 2670, the Keep the Promise Act, will not allow for any viable "takings" claim

Dear Assistant Secretary Washburn:

On September 17th, the Senate Committee on Indian Affairs will hold a hearing on S. 2670, the Keep the Promise Act ("KTPA"). This legislation is identical to H.R. 1410, which bears the same name and passed the House of Representatives by voice vote a year ago. We understand that you will be invited to testify at the hearing, and respectfully request that you consider our views regarding an argument that the Tohono O'odham Nation ("Nation") raises in its opposition to the bill, which is that the bill will result in the Nation filing a lawsuit against the United States alleging regulatory takings and damages. Since this question was raised in the last hearing on July 23rd, we wanted to provide you with our analysis of it.

This letter discusses why such a lawsuit would not be successful.

Assumptions

Because this letter addresses a hypothetical question, the analysis would branch out depending on the possible outcome of future events. To keep the analysis focused, I rely on the following assumptions:

1. The compact litigation pending before the Ninth Circuit Court of Appeals will be resolved in the Nation's favor, but the legal claims that were dismissed by Judge Campbell (fraud, misrepresentation, and promissory estoppel) will not be resolved by a court before the takings litigation begins.
2. As the Nation would be the plaintiff, it would have the burden of proving the validity of the compact in light of the fraud, misrepresentation and promissory estoppel claims, which will no longer be blocked by sovereign immunity. These

are much stronger arguments for the federal government to present in defense of a takings lawsuit.

3. Congress will pass KTPA before significant construction begins on the Glendale casino.

Discussion

I. Any takings claim would have to proceed as an inverse condemnation case for a partial regulatory taking, which is the most difficult category of takings claim to prove.

The Fifth Amendment of the U.S. Constitution prohibits the government from taking private property for public use without just compensation. There are four basic types of takings claims: (1) permanent physical invasion of the property; (2) deprivation of all beneficial economic use of the property; (3) exactions such as impact fees; and (4) partial regulatory takings. *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 538–39 (2005).

In this instance, passage of KTPA would only qualify in the fourth category, a partial regulatory taking. Although the Nation might try to claim that the Glendale parcel was purchased with the intent of using it for gaming land, and therefore a gaming ban deprives the Nation of all beneficial economic use, this argument would fail. The Glendale land could be used for all manner of economic development. It will be impossible for the Nation to establish that other economic uses would be unprofitable. Moreover, the prohibition on gaming in the KTPA is temporary and only lasts until 2027, after which the Nation (and other tribes) would not be restricted by the KTPA.

If the Nation were to initiate a case claiming a regulatory taking, the legal analysis would proceed in two steps. First, the court would determine whether the gaming restriction in KTPA constitutes a taking of a property right. If the court found that a partial regulatory taking had occurred (a highly unlikely result), the court would determine the amount of just compensation due by assessing the value of the taking. The Nation would face insurmountable hurdles in both stages.

II. Enactment of a gaming restriction would not be considered a partial regulatory taking under federal takings jurisprudence.

When evaluating partial regulatory takings, courts use a two-part test. First, the court must determine whether the plaintiff has asserted "a cognizable Fifth Amendment property interest" which has been taken. *McGuire v. United States*, 707 F.3d 1351, 1362 (Fed. Cir. 2013). Second, if such a cognizable property right exists, the court determines whether the property was taken using the so-called *Penn Central* test, a set of factors established by the Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The Nation would not meet either one of these requirements.

A. The taking the Nation would allege – a restriction on gaming – is not a cognizable Fifth Amendment property right because the right is unique to the tribe, *not* the land.

When evaluating whether a cognizable property right exists, courts generally look for "crucial indicia of a property right such as the ability to sell, assign, transfer, or exclude." *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012) (quoting *Conti v. United States*, 291 F.3d 1334, 1342 (Fed. Cir. 2002)). Therefore when a plaintiff claims that a regulation has interfered with business operations, the interference must go to the property itself, not to the business. *See, e.g.*, *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990) (takings are damages to the dominion an owner exercises over property, not business losses or consequential losses). There are situations where business losses and a property taking essentially overlap, such as a mining company facing a regulation which takes away the right to extract minerals on its property. In such cases, though, the claim goes to the reduction in the economic value of the real property.

In this situation, however, the right to conduct gaming on the Glendale parcel is not a property right which could even be sold or transferred to others; indeed, the right to conduct gaming on the property could not even be transferred to another Indian tribe. The Glendale land is eligible for gaming (based on the assumptions listed above) only pursuant to the operation of the Gila Bend Act, which applies uniquely to the Nation. The right to conduct gaming is not inherent in or derived from the real property at issue. It is also significant that the KTPA is a restriction against *any* tribe conducting Class II or III gaming on *any* newly-acquired trust land in the Phoenix-metro area as defined in the KTPA; the KTPA is not exclusively focused on the Nation and this 54-acre parcel.

Regardless, the Nation would still face the burden of proving that the land is eligible for gaming at all. Importantly, because the Nation would be the plaintiff in any takings lawsuit against the United States, it would not be able to assert sovereign immunity to avoid the claims of fraudulent inducement, misrepresentation and promissory estoppel that were previously barred by a court because the Nation raised sovereign immunity as a defense. The promissory estoppel issue, in particular, would give the United States a very strong attack on the Nation's assertion that gaming is a cognizable property interest.

Because KTPA does not place any other restrictions on the Nation's use of its Glendale land, the Nation would have no other basis for claiming a lost property right. The takings case could only proceed if the Nation claimed that the right to conduct gaming is a property right and that argument would fail.

B. Even if gaming is a property right, it would be difficult for the Nation to prove that the right was taken under the *Penn Central* test.

Once the Nation attempted to establish a cognizable property right, it will have to show that KTPA constitutes a Fifth Amendment taking of that property right under the *Penn Central* factors: (1) the economic impact on the claimant; (2) the extent of interference with reasonable, investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124. It is highly unlikely, however, that the Nation could establish a taking under these

factors. Mindful of Justice Holmes's oft-cited admonition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[.]" *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), courts historically have applied *Penn Central*'s inquiry stringently.

The first factor, economic impact, is perhaps the strongest factor in the Nation's favor that there is a taking under *Penn Central*. The difference in revenue potential between the Glendale site and an alternative Tucson-area casino site might be meaningful. But Supreme Court decisions have "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993). Indeed, the Supreme Court has noted that a diminution in property value as high as 75% or even 92.5% may not be a sufficiently serious impact. *Id.* at 645. Because the Glendale parcel could be put to a range of other commercial or profitable uses, a court may well give less weight to the impact of precluding Class II and III gaming activities.

The second factor, interference with investment-backed expectations, presents a more difficult determination. On the one hand, there is no doubt that the Nation purchased the land for the purpose of gaming, and the Nation has invested both in the purchase of the land and in its efforts to clear multiple legal hurdles to gaming. The court would still have to determine, however, whether the Nation invested the money with an objectively reasonable expectation that gaming would proceed, as opposed to placing a bet that gaming would proceed. All investments are risks, of course, but the San Lucy District meeting recordings discovered during the compact litigation clearly show that the Nation knew they were purchasing a fight along with the land. The Nation fully expected that the State of Arizona and other Tribes would strenuously oppose its casino plans for this parcel. The fact that the Nation hoped it would prevail is not enough, as the courts would consider the reasonableness of the expectations based on an *objective* evaluation of the regulatory regime in place at the time of the purchase. *McGuire*, 97 Fed. Cl. at 441-42.

Under this standard, the Nation would be unable to argue for investment-backed expectations that rise above a "unilateral expectation or an abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citation and quotation marks omitted). Several courts have recognized that gambling is a highly regulated industry and that it is difficult to hold reasonable investment-backed expectations in light of that regulation. *See, e.g.*, *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 (4th Cir. 2007) (holding no taking of slot machine property where South Carolina banned video poker after 25 years of allowing it because "Plaintiff's participation in a traditionally regulated industry greatly diminishes the weight of his alleged investment-backed expectations"); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (holding multi-million "devastating economic impact" of ban on TouchPlay machines to be "discounted" by "heavily regulated nature of gambling in Iowa"). In the Supreme Court's words on the analogous regulation of alcohol:

> It is true, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its

> legislation upon that subject would remain unchanged. Indeed, the supervision of the public health and the public morals is a governmental power continuing in its nature, and to be dealt with as the special exigencies of the moment may require; *** for this purpose, the largest legislative discretion is allowed, and the discretion cannot be cabined with any more than the power itself.

Mugler v. Kansas, 123 U.S. 623, 669 (1887)(internal citation and quotation marks omitted).

Here, it would be difficult for the Nation to argue that IGRA and the 2002 Compact guarantee a future right to game on the Glendale parcel. Congress could preclude Indian gaming altogether; IGRA provides that tribal gaming is permissible only "if the gaming activity is not specifically prohibited by Federal law," 25 U.S.C. § 2701(1)(5), and contains several restrictions as to the location of gaming facilities. All of that puts tribes on notice that Congress may at any time enact additional restrictions on tribal gaming. Moreover, the 2002 Compact—which was negotiated between the Tribes and the State of Arizona—could not estop Congress from altering IGRA. *Cf. Sioux Nation*, 448 U.S. at 410-411 (affirming Congress's power to abrogate treaties with tribes). Simply put, "[t]he pendulum of politics swings periodically between restriction and permission in such matters [as gambling], and prudent investors understand the risk." *Holliday Amusement*, 493 F.3d at 411. Moreover, the State of Arizona and the 17 Tribes who negotiated the 2002 compact, including the Nation, promised voters that if the compact were approved in the November 5, 2002 initiative, there would be "no additional casinos in the Phoenix metro area." The Nation simply cannot establish it was guaranteed a right to conduct gaming on the Glendale parcel.

The third factor, character of the government action, is the factor which cuts most strongly against the Nation. A partial regulatory taking "may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. The temporary restriction on gaming in KTPA does not come close to a physical invasion. Rather, it would be considered a standard policy adjustment of the burdens of economic life to promote the public good, as with virtually any other law or regulation restricting gaming. *See, e.g., Holliday Amusement Co. of Charleston v. S. Carolina*, 493 F.3d 404, 410 (4th Cir. 2007) (takings claim by slot machine owner over new restrictions on gaming devices "depends upon the false premise that the state's legitimate regulation of gambling constitutes a taking").

The Seventh Circuit Court of Appeals undertook a similar analysis with respect to a lawsuit filed by bar owners who claimed that a new ordinance banning smoking indoors cut into their profits and therefore constituted a taking. *Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013). The court held that the smoking ban was a "prototypical example" of the adjustment of benefits and burdens of economic life to promote the common good, and therefore did not constitute a taking. *Id.* at 1074-75. The smoking ban left the bar owners free to pursue any type of business *except* running establishments that permitted indoor smoking, just as KTPA allows the Nation to pursue any kind of business *except* running establishments that permit gaming.

The primary difference between *Goodpaster* and this situation is that the lost profits for the Nation would be greater than the claims of lost profits by Indianapolis bar owners. The underlying principle, however, remains the same: government regulations frequently have negative effects on

property value, and "only the most extreme regulations can constitute takings." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 329-30 (1987); *see also MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127-28 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 900, 187 L. Ed. 2d 776 (U.S. 2014) (listing cases holding that regulations resulting in property value reductions up to 95% do not constitute takings). The Nation will face tremendous difficulty in showing that the *Penn Central* factors favor a finding that KTPA is a regulatory taking.

Under H.R. 1410, the Nation may still use the Glendale parcel for commercial gain or otherwise, even if it cannot operate Class II or III gaming activities on the property until 2027. In other words, the greater "bundle" of property rights held by the Nation with respect to the land would remain intact after adoption of the KTPA. Viewed from that perspective, the legislation is more akin to a zoning regulation restricting a particular land use, which tends to withstand a Takings Clause challenge. *See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Moreover, here, Congress is regulating gambling in the public interest. It is conforming the Nation's behavior to the "Prop 202" promises made the Nation, the State of Arizona and other Tribes to the voters that there would be "no additional casinos in the Phoenix- metro area." The Supreme Court has long recognized the regulation of gambling to be a traditional exercise of police power. *See Lawton v. Steele*, 152 U.S. 133, 136 (1894). And under a much older Takings Clause regime, it has held that "'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the state or its agents, or give him any right of action." *Mugler v. Kansas*, 123 U.S. 623 (1887) (discussing prohibition of alcohol).

III. Even if KTPA is considered a taking, the just compensation TON could recover would be not be great.

Should the Nation convince a court that a property right existed and that regulatory taking had occurred, the court would still have to determine the amount of just compensation. Lost profits from the casino would not the measure of just compensation.

To begin with, KTPA imposes only a temporary restriction on gaming which expires on January 1, 2027. KTPA § 4(b). When a regulatory taking is known to be temporary, the typical measure of fair compensation is "the fair rental value of the property for the period of the taking." *Tuba Natural Resources*, 904 F.2d 1577, 1580-81 (citing cases).

Moreover, courts do not consider the loss of value caused by the regulatory taking in isolation, but instead consider the other "profitable uses to which the property could still be put." *First English*, 482 U.S. at 331. As noted above, there are many other uses for the Glendale parcel, and those uses argue against considering KTPA to be a taking at all. But even if the court considers this to be a temporary taking, and even if the court inexplicably rejected rental value as the measure of just compensation, the court will surely reduce the amount of just compensation by the amount that the Nation could generate putting the land to other economic use.

In addition, this unique fact situation would require another reduction in just compensation: the fact that the Nation could open its casino elsewhere. Even under the temporary taking analysis, the court would likely find that the Nation could operate a temporary casino on eligible land and then move that casino to the Glendale parcel when KTPA expires. Thus, any damage claim would have to be reduced both by the revenue that the Nation could generate from Glendale parcel put to other uses and the revenue that another casino could generate.

Conclusion

Any takings claim filed against the United States by the Nation as a result of KTPA enactment would face many very serious hurdles at each stage of the analysis. Operation of a casino is not likely to be a cognizable property right. Even if gaming is considered a property right, KTPA does not constitute a taking under the *Penn Central* test. Even if KTPA is a taking, the just compensation would be restricted by the temporary nature of the taking, and by the myriad other ways the Nation could generate revenue during the period of the taking. In short, the most likely outcome is that the court would award nothing.

Sincerely,

Diane Enos

Diane Enos
President

Ian Hugh
Councilmember

Cactus District

Office of the City Council

September 30, 2014

The Honorable Jon Tester
Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman, Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Tester and Barrasso:

Please accept this letter as my contribution to the legislative hearing on S. 2670, which would halt construction on the Tohono O'odham Nation's West Valley Resort. I ask that you oppose this bill.

I write from the perspective of a lifetime Glendale resident; business owner for 35 years, former City Councilmember from 1986-1991; 8 year former Board Member and Past President of the Glendale Union High School District; and current Glendale City Councilmember.

Glendale was among the cities hardest hit by the recession and is still far from recovered. We continue to grapple with significant fiscal challenges even as we struggle to expand economic development and job growth.

It was in this context that our Council examined the unique opportunity presented by the Nation's project. It will be the largest construction project in the region and will create thousands permanent jobs, as well as hundreds of millions of dollars in economic impacts each year.

It just doesn't make any sense for Congress to intervene to stop this project, especially with S. 2670. This legislation unilaterally amends the Nation's settlement with the federal government to draw an arbitrary line across the state in a fashion that does more to protect the market share of special interests than serve any public good.

It's also terrible deal for Glendale because S. 2670 would still leave us with the Nation's land in reservation status, while preventing the property from being put to its highest and best use. The only ones who benefit under this law are the outside interests looking to preserve their market share.

These interests do not represent the West Valley, which overwhelming supports the casino project. Please, don't let S. 2670 impose a dire burden on Glendale. Stop this bill in its tracks and allow the Nation to move forward with creating jobs in my community.

The promise that needs to be kept here is the one made to the Tohono O'odham Nation nearly 30 years ago. If you have any questions at all, I'd be more than happy to answer them.

Sincerely,

Ian Hugh
Councilmember, Cactus District
City of Glendale, Arizona

Samuel U. Chavira
Councilmember

Yucca District

Office of the City Council

October 1, 2014

The Honorable Jon Tester
Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Tester and Barrasso:

You have already heard from my colleagues on the Glendale City Council, Mayor Welers and Councilmember Sherwood, and I would like to add my voice to the record for the legislative hearing on S. 2670. As you know, the City of Glendale fully supports the Tohono O'odham Nation's West Valley Resort & Casino project and our city officially opposes this legislation.

Contrary to comments from others, our support for this project is based on the firm belief that this project—and the agreement we have negotiated with the Nation—will significantly benefit our constituents.

A year of fact-finding and careful negotiations preceded our action, during which time we examined the relevant laws, studied the potential impacts of the Nation's proposal, and the many court rulings in favor of the Nation. In other words, we looked at the facts and concluded that the Nation has consistently acted in good faith and within the confines of the law. We also found that their project will generate significant economic benefits for our community and the entire West Valley, all at no cost to our taxpayers.

During this process we also reviewed the arguments of project opponents, including many that were presented before this Committee. We found that time and again, these arguments did not hold up to scrutiny, and had been repeatedly thrown out of the courts on their merits.

I represent the district adjacent to the casino site and talk to local businesses and residents about this project often. I can say, without hesitation, their support for this project is overwhelming. The public understands S. 2670 is nothing more than special interest legislation designed to protect the market share of two tribes located on the other side of the valley. They also understand that if S. 2670 passes, it will have a massive negative impact on the West Valley.

This is a project that has followed the law at every step. It will bring tremendous economic benefits to the West Valley, has overwhelming public support, and has already begun to create jobs. Now is not the time to unravel all the work that has been done to make this economic development project a benefit to my City and the entire West Valley. Please support jobs for Glendale and oppose S. 2670.

Thank you for this opportunity to offer my perspective. I would be happy to discuss this matter with you in more detail, and can be reached at 623-930-2243 for any questions.

Most Sincerely,

Samuel Chavira
Councilmember, Yucca District
City of Glendale

The Committee received 517 signatories from the City of Glendale, Arizona who oppose the Tohono O'odham Nation's proposed casino in the City of Glendale. The Committee also received 361 individuals letters from the Gila River Indian Community expressing their opposition to the Tohono O'odham Nation's proposed off-res-

ervation casino in Glendale, Arizona and support for H.R. 1410. *The information referred to has been retained in the Committee files.*

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