

KEEP THE PROMISE ACT OF 2013

SEPTEMBER 17, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HASTINGS of Washington, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1410]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 1410) to prohibit gaming activities on certain Indian lands in Arizona until the expiration of certain gaming compacts, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 1410 is to prohibit gaming activities on certain Indian lands in Arizona until the expiration of certain gaming compacts.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 1410 addresses a “reservation shopping” controversy in the State of Arizona where the Secretary of the Interior is creating a satellite reservation for a tribe to open a casino in the potentially lucrative gambling market near Phoenix, Arizona. Specifically, Interior has agreed—over the objections of the Governor of Arizona, a majority of recognized tribes in Arizona, and the affected city—to create trust lands for a casino in the City of Glendale, for the benefit of the Tohono O’odham Nation (TO Nation). The TO Nation is one of the largest recognized tribes in the United States, with a reservation stretching from the U.S.-Mexico border to the Tucson

area. The tribe currently operates three casinos on its existing lands, including one near Tucson.

H.R. 1410 prohibits the off-reservation casino in Glendale, Arizona. As explained by the Salt River Pima-Maricopa Indian Community (Arizona):

This bill will protect the promises that the tribes of Arizona made to each other and the State and voters of Arizona and protects the current Indian gaming structure in Arizona. Specifically, this bill will prohibit any tribe from conducting gaming on lands acquired into trust after April 9, 2013 for the duration of the existing gaming compacts which begin to expire in 2026. . . . While the need for this bill is necessitated by the current actions of one tribe, it will prevent any other tribes, including my own tribe, from trying to renege on the commitments and promises relied upon by the voters when they authorized tribes in Arizona to conduct Las Vegas-style gaming in 2002.

(Testimony of Diane Enos, President, Salt River Pima-Maricopa Indian Community before the Subcommittee on Indian and Alaska Native Affairs, May 16, 2013).

As noted above, the Glendale casino project violates commitments made to Arizona. The TO Nation cosponsored a tribal advocacy campaign to persuade Arizona voters to authorize exclusive gaming rights to tribes in exchange for certain limitations. One of these limitations was that “there will be no additional facilities authorized in Phoenix.” (See “Yes on 202—The 17-Tribe Indian Self Reliance Initiatives, Answers to Common Questions”, co-sponsored by the Tohono O’odham Nation, on file with the Committee on Natural Resources; also see Appendix I, joint announcement of the Governor of Arizona and Arizona Indian Gaming Association dated February 20, 2002). Arizonans subsequently voted against a competing ballot initiative to liberalize gaming rights for non-Indians, while voting to pass Proposition 202, granting tribes exclusive rights. Around the same time, however, the TO Nation was apparently maneuvering to purchase property in the Glendale area.

H.R. 1410 simply enforces the commitments made to Arizona by the TO Nation and stops the Secretary of the Interior from setting a precedent that may lead to an expansion of off-reservation casinos in other states. As reported by the Committee, H.R. 1410 permits the TO Nation to use the Glendale land for any other purpose besides gaming. Moreover, the reported bill does not stop the tribe from opening a casino on lands acquired for its benefit south of Phoenix (provided such lands meet other criteria set forth in applicable law), nor does it change the tribe’s ability to seek land for gaming under an Act of Congress, such as the Indian Reorganization Act of 1934. Finally, the bill has no effect on the TO Nation’s rights to conduct gaming on its existing reservation—where it currently operates three casinos—including two near the City of Tucson.

While there is an understandable argument that this matter can and should be resolved by the Secretary of the Interior and the courts, Congress reserves the right to adjust its policy respecting Indian tribes, a power the Supreme Court has referred to as “plenary.” And this case so warrants it because the Secretary of the In-

terior's handling of trust land action and gaming policy have lately been opaque and the cause of numerous controversies. This one is no exception.

The controversy stems from a peculiar application of two statutes enacted in the 1980s and a tribal-state compact ratified in 2002. In 1986, Congress passed the Gila Bend Indian Reservation Lands Replacement Act. That Act authorizes the TO Nation to purchase up to 9,880 acres of replacement lands to compensate the Nation for years of consistent flood damage to its farming property caused by the federal Painted Rock Dam on the Gila River (Public Law 81-516). Amendments to that Act directed the Secretary of the Interior to accept replacement lands into trust for "sustained economic use" (Public Law 99-503, Section 2(4)) and such lands are deemed an Indian reservation for all purposes. Furthermore, the replacement lands must be non-incorporated and within three counties (Pima, Pinal, or Maricopa) in Arizona. Though Congress intended to make lands of any character available to the tribe, the intent was to replace primarily agricultural lands with an equal number of acres.

Two years later, on October 17, 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA, 25 U.S.C. 2071 et seq.) to provide a federal framework for tribes to conduct gaming on Indian lands in existence as of the date of enactment of that Act. Section 20 of IGRA (25 U.S.C. 2719) prohibits gaming on lands acquired in trust after October 17, 1988, except in certain (supposedly rare) circumstances. One of these circumstances is when "lands are taken into trust as part of a land claim" (25 U.S.C. 2719(b)(1)(B)(i)). This is sometimes called the "land claim exception." The Act did not define "land claim" for the purpose of the gaming exception. It is generally understood that Indian land claims historically arose when non-Indians acquired Indian lands in violation of the Trade and Intercourse Acts, a series of related laws prohibiting the sale or transfer of Indian lands without authorization from Congress. The Gila Bend Act of 1986 was not a redress of a violation of the Trade and Intercourse Acts.

In 2003, the TO Nation, using a non-tribal entity, began quietly purchasing 134 acres of non-incorporated land near the Phoenix metropolitan area (located between the cities of Glendale, Peoria, and Tolleson). On January 28, 2009, the TO Nation asked the Secretary of the Interior to accept this parcel of land in trust. Though the tribe had by then purchased lands exceeding its 9,880-acre limit, in July 2010, the Secretary determined that the Glendale property met the requirements of the Gila Bend Indian Reservation Land Replacement Act of 1986 and the Secretary allowed the tribe to determine which of the over 16,000 acres of land it had purchased would count against the 9,880-acre limit in the 1986 Gila Bend Act.

On August 26, 2010, the Secretary issued a decision to hold the land in trust (75 Fed. Reg. 52,550). Believing it to violate the law, the Gila River Indian Community, the City of Glendale, and other plaintiffs challenged this decision in U.S. District Court. The Court upheld the Secretary's decision and the plaintiffs have filed an appeal with the Ninth Circuit Court of Appeals. On May 20, 2013, the Ninth Circuit Court asked the Interior Department to justify the interpretation of the meaning "within the city."

If the land is finally placed in trust, the record strongly suggests the TO Nation will conduct gaming in Glendale without the need for further agency action. And the question whether the land claim exception is being correctly applied will not be subject to a legal challenge because under the Department of the Interior's gaming regulations, an "opinion" on a land claim exception requested by a tribe regarding its newly acquired lands "is not, per se, a final agency action under the Administrative Procedures Act (APA)." See Federal Register/Vol. 73, No. 98, May 20, 2008, p. 29358).

This history of the controversy demonstrates the lengths to which the prospect of a lucrative urban casino is turning what Congress in 1988 regarded as a tribal government power—the regulation of gaming on an Indian reservation—into a commercial venture in targeted urban markets, a practice that some say should be subject to state regulation. Indeed, in 2006, a majority of House Members voted to eliminate the Indian land claim exception altogether and to impose additional restrictions on off-reservation gaming (see H.R. 4893, the Restricting Indian Gaming to Homelands of Tribes Act of 2006).

Tribal regulation of gaming has been extraordinarily successful for many tribes that were previously impoverished. In most states where it is conducted, citizens understand and respect a tribe's right to regulate gaming as a core function of government and for funding tribal government services. Reservation shopping, however, is changing the complexion of tribal gaming, causing local political strife (as in Arizona) and leading to expensive litigation benefiting no one.

H.R. 1410 restores the status quo as understood by Arizona voters, the Governor of Arizona, the Legislature of Arizona, and all but one tribe in Arizona when Prop 202 was passed and non-tribal casino gaming prohibited. The bill is sponsored by the Representative for the City of Glendale, and supported by most of the Arizona House Delegation. It does not amend IGRA or effect wide-ranging tribal policy: it addresses one instance where the State, the Members representing the affected area, and most tribes seek to ensure a delicate, negotiated compromise benefiting all sides is maintained.

COMMITTEE ACTION

H.R. 1410 was introduced on April 9, 2013, by Congressman Trent Franks (R-AZ). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Indian and Alaska Native Affairs. On May 16, 2013, the Subcommittee held a hearing on the bill. On July 24, 2013, the full Natural Resources Committee met to consider the bill. The Subcommittee on Indian and Alaska Native Affairs was discharged by unanimous consent. Congressman Raúl Grijalva (D-AZ) offered an amendment designated .052 to the bill; the amendment was not adopted by voice vote. No further amendments were offered, and the bill was then adopted and ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 35 to 5, 1 present, as follows:

Committee on Natural Resources

U.S. House of Representatives

113th Congress

Date: July 24, 2013

Recorded Vote #: 11

Meeting on / Amendment on: H.R.1410 - To adopt and favorably report the bill to the House, agreed to by a vote of 35 yeas, 5 nays and 1 present

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Hastings, WA, Chairman	X			Mr. Duncan of SC	X		
<i>Mr. Defazio, OR, Ranking</i>	X			<i>Mr. Cardenas, CA</i>	X		
Mr. Young, AK	X			Mr. Tipton, CO	X		
<i>Mr. Faleomavaega, AS</i>				<i>Mr. Horsford, NV</i>			
Mr. Gohmert, TX	X			Mr. Gosar, AZ	X		
<i>Mr. Pallone, NJ</i>				<i>Mr. Huffman, CA</i>	X		
Mr. Bishop, UT	X			Mr. Labrador, ID	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Ruiz, CA</i>	X		
Mr. Lamborn, CO	X			Mr. Southerland, FL	X		
<i>Mr. Holt, NJ</i>				<i>Ms. Shea-Porter, NH</i>			X
Mr. Wittman, VA	X			Mr. Flores, TX	X		
<i>Mr. Grijalva, AZ</i>		X		<i>Mr. Lowenthal, CA</i>	X		
Mr. Broun, GA	X			Mr. Runyan, NJ	X		
<i>Ms. Bordallo, GU</i>		X		<i>Mr. Garcia, FL</i>	X		
Mr. Fleming, LA	X			Mr. Amodei, NV	X		
<i>Mr. Costa, CA</i>	X			<i>Mr. Cartwright, PA</i>	X		
Mr. McClintock, CA		X		Mr. Mullin, OK	X		
<i>Mr. Sablan, CNMI</i>				Mr. Stewart, UT	X		
Mr. Thompson, PA	X			Mr. Daines, MT	X		
<i>Ms. Tsongas, MA</i>		X		Mr. Cramer, ND	X		
Ms. Lummis, WY	X			Mr. LaMalfa, CA	X		
<i>Mr. Pierluisi, PR</i>	X			Mr. Smith, MO	X		
Mr. Benishek, MI	X			<i>Vacancy</i>			
<i>Ms. Hanabusa, HI</i>	X						
				TOTALS	35	5	1

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 1410—Keep the Promise Act of 2013

H.R. 1410 would prohibit gaming (defined as gambling other than social games for prizes of minimal value) activities on lands in the Phoenix, Arizona, metropolitan area that have been taken into trust for the benefit of the Tohono O'odham Tribe after April 9, 2013. CBO estimates that implementing the bill would have no significant impact on the federal budget. Enacting H.R. 1410 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

The prohibition on gaming activities would be an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) on the Tribe. Based on information from the Tribe about when, absent enactment of this bill, it expects to begin collecting revenue from the proposed casino and the uncertainty of future legal challenges to the project, CBO estimates that the cost of the mandate in the first five years after enactment would not exceed the annual threshold established in UMRA (\$75 million in 2013, adjusted annually for inflation). H.R. 1410 contains no private-sector mandates as defined in UMRA.

The CBO staff contacts for this estimate are Martin von Gnechten (for federal costs) and Melissa Merrell (for the impact on state, local, and tribal governments). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. CBO estimates that implementing the bill would have no significant impact on the federal budget.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to prohibit gaming activities on certain Indian lands in Arizona until the expiration of certain gaming compacts.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. The Chairman does not believe that this bill directs any executive branch official to conduct any specific rule-making proceedings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

DISSENTING VIEWS

H.R. 1410 will break the United States' solemn promise to the Tohono O'odham Nation in order to placate a few wealthy tribes' gaming monopoly, and will be an ugly mark on Congress' relations with all Indian tribes. This legislation not only upsets settled law, potentially subjecting the United States to new liabilities for breach of trust, breach of contract, and takings claims valued in the hundreds of millions of dollars, but it also creates a dangerous precedent for hundreds of tribal-state compacts and land and water rights settlements nationwide and impugns the federal trust responsibility. The House should reject this irresponsible legislation.

In the 1950s the United States Army Corps of Engineers constructed the Painted Rock Dam, which caused the repeated flooding, devastation, and destruction of nearly 10,000 acres of the Nation's Gila Bend Reservation. In the mid-1980s the Nation and the United States Congress attempted to reach a negotiated settlement to compensate the Nation for the loss of its reservation lands and associated water rights while relieving the United States of its substantial liabilities. The result of these negotiations was the 1986 Gila Bend Indian Reservation Lands Replacement Act.¹ The Gila Bend Act entitles the Tohono O'odham Nation to acquire 9,880 acres of reservation replacement lands in Arizona within Pima, Pinal, or Maricopa Counties, subject to certain enumerated conditions, in order to replace its reservation lands flooded by the Painted Rock Dam.² The Gila Bend Act specifically provides that the Nation's reservation replacement lands can be used for economic development purposes and "shall be deemed to be a Federal Indian Reservation for all purposes."³ The Gila Bend Act also settled 36,000 acre feet of senior reserved water rights underlying the Gila Bend Reservation.

H.R. 1410 catastrophically diminishes the compensation the United States promised Tohono O'odham when it agreed to settle its land and water claims against the United States in 1986 by unilaterally inserting new geographic restrictions on the Nation's use of its reservation replacement lands. This legislation also reintroduces the Nation's 36,000 acre feet of reserved water rights into both long-settled and ongoing water rights litigation. This damaging precedent would mark the first and only time in modern history that the United States has unilaterally reneged on an Indian land or water rights settlement. This bill sends a clear message across Indian Country that negotiated settlements with the United States are not a viable option, which in turn will lead to more litigation and increased expenses borne by the American taxpayer.

¹Public Law 99-503.

²*Id.* at § 6.

³*Id.* at § 6(d).

H.R. 1410 is an obvious attempt to legislatively prevent the Nation from exercising its right to compete in the open market alongside its tribal neighbors for gaming revenue. The legislation draws a legislatively mandated monopoly zone around the lucrative Phoenix metropolitan gaming market to prevent the Nation from gaming on lands that it is attempting to take into trust status as reservation replacement lands pursuant to the Gila Bend Act. The bill's sole objective is to protect the established tribal gaming interests in the Phoenix area, while stifling free market competition and killing thousands of jobs that the Tohono O'odham project would create.

This legislation is premised on false claims that have already been raised in, and dismissed by federal courts.⁴ Wealthy gaming interests opposed to the Nation's plans alleged that the Nation's reservation replacement lands were not eligible for gaming under the Indian Gaming Regulatory Act (IGRA). However, the district court ruled that "the Glendale-area land acquired by the Nation . . . qualifies for gaming," and that "gaming on that land is expressly permitted by the federal statute [IGRA] that authorizes Indian gaming."⁵ These wealthy gaming interests also claimed that Arizona tribal-state gaming compact prohibited the Nation from opening a gaming facility in the Phoenix area. But the district court found that "no reasonable reading of the Compact could lead a person to conclude that it prohibited new casinos in the Phoenix area."⁶ Finally, these parties argued that the Nation promised other tribes and the State of Arizona that the Nation would not game in the Phoenix area, even though the Nation's compact explicitly allows it to do so. The district court rejected this argument, not on sovereign immunity grounds, but by holding that "the parties did not reach such an agreement."⁷ In doing so, the court pointed to the compact's integration clause (Section 25), which states that "[t]his compact contains the entire agreement of the parties . . . and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding."⁸

Accordingly, far from keeping a phantom promise, the real purpose of H.R. 1410 is to re-write the Arizona tribal-state gaming compact, setting a dangerous precedent for all tribal-state gaming compacts. The Arizona tribal-state gaming compact was the result of Proposition 202, the voter-approved measure that governs Class III Indian gaming in Arizona. When the voters approved Proposition 202 they understood that it would dictate how and where Class III gaming could take place in the State. H.R. 1410 would unilaterally amend the Arizona tribal-state gaming compact by inserting a new restriction that the tribes and the State never negotiated, that Arizona voters did not approve, and that the district court has indicated is not reasonable.⁹ Congress should not interfere with purely local, voter-approved agreements that have been

⁴See, e.g., *State of Arizona, et al. v. Tohono O'odham Nation*, No. CV-11-00296-PHX-DGC Slip ops. Doc. No. 216 (D. Ariz. May 7, 2013) & Doc. No. 225 (D. Ariz. June 25, 2013).

⁵*Id.* Doc. No. 216 at 7 & 3.

⁶*Id.* at 25.

⁷*Id.* at 2.

⁸*Id.*

⁹*Id.* at 21.

upheld by federal courts. Such actions undermine Congress' intent in IGRA when it formulated the tribal-state gaming compact process. H.R. 1410 puts all tribal-state compacts at risk of collateral attack by Congress. These compacts are a result of good faith, arms-length negotiations in which tribes and states work together to agree how Class III Indian gaming will be conducted. A crucial aspect of tribal-state gaming compacts, just like any other contract, is the certainty that they create. If Congress unilaterally amends the Arizona tribal-state gaming compact—in this case to protect a couple of wealthy tribes' monopoly on a huge market—then all tribal-state gaming compacts are vulnerable to attack.

As a policy matter, negotiated and legislatively enacted settlements between the United States and Indian tribes are the most efficient and effective means for settling outstanding claims and righting past grievances. They also represent Congressional affirmations of the federal trust responsibility that is the foundation of the government-to-government relationship between Indian tribes and the federal government. This trust responsibility is paramount in Congress' legislative interactions with Indian tribes, which is why most, if not all, modern legislation dealing with Indian tribes contains a statement reaffirming the federal trust responsibility. Congress thus routinely does, and should, recognize the seriousness of its actions and their impact on this sacred duty towards Indian tribes. Unfortunately, H.R. 1410 blatantly undermines Congress' trust responsibility to the Tohono O'odham Nation while unilaterally reneging Congress' promise in the Gila Bend Act to compensate the Nation for the loss of its land and water rights. Congress should focus its attention on abiding by its 1986 promise to the Tohono O'odham instead of accusing the Nation of breaking a phantom promise, claims that the courts have already rejected. Sadly, the only purpose for the "Keep the Promise Act" is to rewrite a tribal-state compact for the sole benefit of tribal competitors who would solidify their gaming monopoly through this legislation. Stripping the Tohono O'odham Nation of its legally-affirmed right to game in certain areas, even if only until 2027, creates new takings, breach of contract and breach of trust claims against the United States, thus exposing taxpayers to significant new liabilities. This is simply bad policy and a poor reflection of our nation's solemn oath to honor its legal commitments and uphold the federal trust responsibility in settlement agreements with the First Americans.

RAÚL M. GRIJALVA.

