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TO PROHIBIT GAMING ACTIVITIES ON CERTAIN INDIAN LAND IN ARIZONA UNTIL THE EXPIRATION OF CERTAIN GAMING COMPACTS

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Mr. BARRASSO, from the Committee on Indian Affairs, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 152]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 152) to prohibit gaming activities on certain Indian land in Arizona until the expiration of certain gaming compacts, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to prohibit Class II and Class III gaming activities, as defined by the Indian Gaming Regulatory Act, from being conducted on lands within the Phoenix metropolitan area acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after April 9, 2013. This prohibition would expire on January 1, 2027.

OVERVIEW

The bill involves the interplay of two Federal statutes governing the use of certain lands by the Tohono O'odham Nation in Arizona:

the Gila Bend Indian Reservation Lands Replacement Act[1] (Gila Bend Act) and the Indian Gaming Regulatory Act[2] (IGRA). Enacted in 1986, the Gila Bend Act, among other things, authorized the purchase of certain lands for the use of the Tohono O'odham Nation for economic purposes.

Two years later, the IGRA was enacted and established a regulatory framework for gaming activities on Indian lands. How this framework affects the economic uses under the Gila Bend Act has been the source of considerable controversy in the State of Arizona and underlies the purpose of this legislation.

THE GILA BEND INDIAN RESERVATION LANDS REPLACEMENT ACT

Background. The Gila Bend Act was a legislative settlement to replace the Tohono O'odham Nation's Gila Bend reservation land flooded by the Painted Rock Dam which had been constructed by the U.S. Army Corps of Engineers on the Gila River, approximately ten miles downstream from the tribe's Gila Bend reservation.[3] At the time of the Dam's completion in 1960, the potential flooding of reservation lands from the Dam was estimated to be infrequent and would not impair the tribe's use of the land.[4]

However, a later study by the U.S. Geological Survey in 1963 found that the entire reservation would be inundated "when the reservoir behind the Dam fills to the level of the spillway."[5] Likewise, subsequent flooding in 1978–79, and 1981 proved to be much more damaging than previously estimated.[6]

Facing the loss of its arable lands on the reservation and a Bureau of Indian Affairs unwilling to assist in restoring the land to its prior usefulness, the tribe "petitioned Congress for a new reservation on lands in the public domain which would be suitable for agriculture."[7] Congress passed the Southern Arizona Water Rights Settlement Act of 1982 to authorize the Secretary of the Interior to conduct a study and find suitable replacement lands for the tribe. The study essentially confirmed that the flooding rendered the reservation unusable and unproductive.[8] However, suitable Federal replacement lands within a 100-mile radius could not be found. The ensuing attempts by the tribe and the Department of the Interior to resolve the matter eventually led to the Gila Bend Act.

Purpose. The Gila Bend Act was intended to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming and . . . promote the economic self-sufficiency of the O'odham Indian people."[9] It authorized the Tohono O'odham Nation to purchase up to 9,880 acres of lands within Pima, Pinal, and Maricopa counties in Arizona. These

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[1] Gila Bend Indian Reservation Lands Replacement Act, Public Law 99–503, 100 Stat. 1798.
[2] Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et al. (1988).
[3] An extensive history is also discussed in the Committee Report for the Gila Bend Indian Reservation Lands Replacement Clarification Act, H.R. 2938. H.R. Rep. No. 112–440 (2012). *See also* 132 Cong. Rec. S14457–01 (1986) and 132 Cong. Rec. H8106–02 (1986). This reservation is one of three established for the O'odham people. H.R. Rep. No. 99–851, at 4.
[4] Id., at 5.
[5] Id., at 5 citing the 1963 U.S. Geological Survey (Water-supply paper 1647–A).
[6] Subsequent to the passage of the *Southern Arizona Water Rights Settlement Act of 1982*, the reservation experienced two more major flooding incidents in 1983 and 1984.
[7] H.R. Rep. No. 99–851, at 6.
[8] Id.
[9] Pub. L. No. 99–503, 100 Stat. 1798.

replacement lands had to be outside the corporate limits of any city or town.

On the Tohono O'odham Nation's request, this Act also required the Secretary of the Interior to place those lands purchased into trust for the tribe. The Federal Government would provide $10 million per year over a three-year period for a total of $30 million, plus interest, to purchase those lands. The tribe would then waive all claims against the United States for the past damages to the tribe's land and water rights.

In 2003, the tribe acquired unincorporated land within Maricopa County, just west of the City of Phoenix. This land is located approximately 49 miles from the Gila Bend Reservation and more than 100 miles from the tribal headquarters.

The tribe sought to have this land taken into trust pursuant to the Gila Bend Act with the goal of establishing, pursuant to the IGRA, a gaming facility which would host other related businesses such as an event center, restaurants, and retail and meeting spaces. After legal challenges involving this then-pending trust land acquisition were addressed by the courts, the Assistant Secretary for Indian Affairs for the Department of the Interior issued a final decision to take the land into trust on July 3, 2014.

THE INDIAN GAMING REGULATORY ACT

Purpose. Prior to the enactment of the IGRA, the regulation of gaming on Indian lands was left largely to Indian tribes, without Federal oversight or state involvement.[10] At the time, tribal gaming operations offered primarily bingo and card games.[11] According to testimony before the Committee by the Department of the Interior, "[r]eceipts of some tribes exceed $1 million annually, and the Department estimates that the combined receipts exceed $100 million annually."[12]

The IGRA was enacted to establish a regulatory framework governing gaming on Indian lands. It provides "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[13] This Act also represents a delicate balance of many interests in the conduct of gaming "as a means of generating needed tribal revenues and employment" and the protection against "the intrusion of crime into tribal gaming operations in Indian country."[14]

Classes of Games. The IGRA established three classes of gaming. Class I gaming, within exclusive tribal jurisdiction, consists of social games played solely for prizes of minimal value or traditional gaming played in connection with tribal ceremonies or celebra-

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[10] See *California v. Cabazon*, 480 U.S. 202 (1987) and S. Rep. No. 99–493, at 2 (1986). Early iterations of bills regulating gaming on Indian lands were pending before the Committee. *See e.g.*, H.R. 1920, 99th Cong. (1985); S. 902, 99th Cong. (1985); and S. 2557, 99th Cong. (1986). Several consistent themes were in these bills, most notably the balance of interests of tribal, Federal, and state governments.

[11] S. Rep. No. 99–493, at 2 (1986).

[12] Id. at 3 and see S. Rep. No. 100–446, at 2 (1988).

[13] 25 U.S.C. § 2702 (1988).

[14] S. Rep. No. 99–493 (1986). Both the House Interior and Insular Affairs Committee and the then-Senate Select Committee on Indian Affairs held numerous hearings on the various gaming bills and received testimony from Federal agencies, Indian and non-Indian witnesses as well as numerous statements relating to the subject of the legislation. Id. at 7–8.

tions.[15] Class II gaming includes bingo, games similar to bingo, and certain card games.[16] Class III gaming includes all other types of games, including slot machines, craps, and roulette.[17]

Federal Role. The IGRA also set forth the responsibilities for the Federal government. Class II and Class III gaming activities are subject to Federal regulation or oversight.

The IGRA established the National Indian Gaming Commission (NIGC) to regulate and oversee different aspects of Class II and III gaming, such as reviewing and approving (or disapproving) tribal gaming ordinances and management contracts.[18]

Under the statute, the Secretary of the Interior is responsible for reviewing and approving (or disapproving) compacts between the tribe and state.[19] Under the IGRA, tribal-state compacts establish the terms governing the regulation of the Class III gaming activities.

The Secretary also conducts the "two-part determination,"[20] and reviews and approves (or disapproves) tribal revenue allocation plans.[21] The Secretary is responsible for evaluating whether trust land to be acquired is eligible for gaming. While the trust land acquisition process is an independent process, governed by other separate and distinct Federal laws,[22] the Secretary may need to determine whether an exception to the prohibition on gaming on that trust land applies in the course of evaluating the trust land application.

The IGRA governs gaming activities occurring on Indian lands. In the course of fulfilling their responsibilities under the statute, both the Secretary and the NIGC may make a determination of whether the lands at issue qualify as Indian lands for IGRA purposes.

State Role—Compacts. The IGRA provided a role for states in gaming on Indian lands. The primary involvement is through a tribal-state compact which the IGRA requires to be in place before Class III gaming activities may occur.[23] The compact was intended to reflect the balance of state public safety and law enforcement concerns with tribal concerns regarding the imposition of state jurisdiction in tribal lands. This mechanism appears to be efficacious as there are numerous tribal-state compacts in operation since the

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[15] 25 U.S.C. § 2703(6) (1988).
[16] 25 U.S.C. § 2703(7) (1988).
[17] 25 U.S.C. § 2708 (1988).
[18] 25 U.S.C. §§ 2704, 2706, 2710, 2711, 2712 (1988).
[19] Pursuant to other Federal laws, the Secretary is responsible for processing the trust land acquisitions for gaming purposes. While these processes are separate and distinct, the Secretary may need to determine whether an exception to the prohibition on gaming on that trust land applies in the course of evaluating the trust land application.
[20] *See infra* note 30 and text accompanying.
[21] 25 U.S.C. § 2710(3) (1988).
[22] *See* the *Indian Reorganization Act of June 18, 1934*, 25 U.S.C. § 461 (1934). This process, however, provides the public, state and local governments, and other tribal governments with "many opportunities to participate throughout the trust acquisition process." *Indian Gaming: The Next 25 Years: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014) (statement of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior) at 17.
[23] "After lengthy hearings, negotiations, and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as . . . casino gaming * * * * The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns." S. Rep. No. 100–446, at 13 (1988).

enactment of the IGRA. According to the 2015 Government Accountability Office study on Indian gaming,

> "[f]rom 1998 through fiscal year 2014, Interior reviewed and approved most of the 516 compacts and compact amendments that were submitted * * * 78 percent (405) were approved; 12 percent (60) were deemed approved; 6 percent (32) were withdrawn or returned; and about 4 percent (19) were disapproved. As of October, 2014, a total of 276 compacts, not including amendments, were in effect." [24]

The IGRA sets forth a process governing mediation when compact negotiations between the state and tribe fail. In the event the tribe and state cannot reach an agreement, then the Secretary may issue procedures for the tribe to govern the operation of Class III gaming.[25] "According to [the Department of the] Interior, three tribes conduct [C]lass III gaming under Secretarial procedures (Arapaho Tribe of the Wind River Reservation, Mashantucket Pequot Indian Tribe, and the Rincon Band of Luiseno Mission Indians of the Rincon Reservation)." [26]

These Class III gaming activities may also be subject to state regulation to the extent specified in the tribal-state compacts. The Government Accountability Office, in its 2015 study on Indian gaming, "categorized 7 states as having an active regulatory role, 11 states with a moderate role, and 6 states with a limited role." [27] The monitoring activities of states "ranged from basic informal observation of gaming operations to testing of gaming machine computer functions and reviews of surveillance systems and financial records." [28]

State Role—Two-Part Determination. In addition, the IGRA prohibits gaming on trust land acquired after October 17, 1988, unless certain exceptions exist.[29] "These limited and narrow exceptions operate to provide equal footing for certain tribes that were disadvantaged in relation to land." [30]

One particular exception requires the governor of the state to concur in a Secretarial action commonly referred to as the "two-part determination" before gaming may take place on the particular parcel at issue. The "two-part determination" may be requested by a tribe when the other exceptions to the prohibition against gaming on after-acquired land do not apply.

This process authorizes the Secretary of the Interior to make a determination, after consultation with the Indian tribe seeking the determination, appropriate state and local officials and officials of nearby Indian tribes, that the proposed gaming establishment

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[24] U.S. Gov't Accountability Office, GAO–15–143T, Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes 18 (2015).

[25] U.S.C. § 2710 (1988).

[26] U.S. Gov't Accountability Office, GAO–15–143T (2015).

[27] Id.

[28] Id., at 23. The range indicates the types of specific state involvement in day-to-day regulatory activities. Neither the Committee nor the GAO imply nor conclude that the limited role of states indicates a lack of regulation of Indian gaming. To the contrary, the Indian gaming industry is highly regulated.

[29] The other exceptions include lands taken into trust as part of a land claim settlement, lands restored as part of the restoration of the tribe and an initial reservation for the tribe acknowledge under the Federal acknowledgement process found at 25 C.F.R. pt. 83.

[30] *Indian Gaming: The Next 25 Years: Hearing Before the S. Comm. on Indian Affairs,* 113th Cong. 2 (2014) (Statement of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior) at 17.

> "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination."[31]

According to the Department of the Interior, since IGRA was enacted only sixteen applications for a two-part determination have been submitted and eight of those sixteen applications have been approved.[32]

Indian Land Claim Settlement. Another exception to the prohibition against gaming on after-acquired trust land applies to land "taken into trust as part of a settlement of a land claim. . . ."[33] Neither the IGRA nor the legislative history set forth a specific definition of what constitutes a land claim.

The Department of the Interior and the NIGC have opined to some degree on what might fall within a land claim for IGRA purposes.[34] The Department of the Interior regulations define "land claim" as any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

> (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
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> (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
>
> (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.[35]

These regulations further provide that "gaming may occur on newly acquired lands if the land at issue is either:

> (a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or
>
> (b) Acquired under a settlement of a land claim that:
>
> (1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or
>
> (2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.[36]

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[31] 25 U.S.C. § 2719 (1988).

[32] This process is not widely used by tribes seeking to conduct gaming. Most tribes operate, or seek to operate, gaming on existing tribal trust land. According to the Department of the Interior, the other exceptions to the prohibition have been sought only 26 times. Out of 459 existing operations, 26 operations are indeed a nominal amount. Likewise, gaming is not the most frequently identified purpose for trust land applications. In fact, gaming as a purpose constitutes less than four percent of the total tribal trust land applications submitted to the Department of the Interior.

[33] 25 U.S.C. § 2719(b)(1)(B) (1988).

[34] See Indian lands opinions at *http://www.nigc.gov/images/uploads/indianlands* (last reviewed November 12, 2015).

[35] 25 C.F.R. § 292.2 (2015).

[36] 25 C.F.R. § 292.5 (2015).

INDIAN GAMING

According to the National Indian Gaming Commission, the revenues generated by the Indian gaming industry in 2014 totaled $28.5 billion, an increase of 1.7% over 2013 figure of $28 billion.[37]

There are 240 tribes, in 28 states, that conduct some form of gaming, with a total of over 459 operations. Most of the operations report only modest revenues. In 2014, 56 percent of the gaming operations reported revenue of less than $25 million. Of the 459 total operations, 164 generated revenues of less than $10 million.

Only 26, or 5.6 percent, of the total 459 operations generated revenues of more than $250 million per operation. However, that 5.6 percent accounted for 22.8 percent of the $28.5 billion in total revenue.

The IGRA limits the use of these revenues to funding tribal government operations or programs, providing for the general welfare of the tribe and its members, promoting economic development, donating to charitable organizations, or helping fund local government agencies' operations. According to the GAO, tribal officials reported that the revenues were used "to enhance or develop health and wellness programs for their members, offer educational programs for tribal children and youth, and provide tribal housing, among other uses."[38]

THE KEEP THE PROMISE ACT

Overview. The Keep the Promise Act, S. 152, is intended to prohibit gaming activities on land within the Phoenix metropolitan area acquired by the Secretary of the Interior in trust after April 9, 2013. This prohibition would end on January 1, 2027, when the tribal-state gaming compacts between the State of Arizona and several Indian tribes in Arizona expire.

The effect of this bill would be to prohibit on a temporal basis, until January 1, 2027, the Tohono O'odham Nation from conducting both Class II and Class III gaming, as defined by the IGRA, on its land which is now held in trust in Maricopa County, west of Phoenix, Arizona. It would also prohibit the tribe from gaming on any other land the Secretary may take into trust after April 9, 2013, which is within the Phoenix metropolitan area as defined under the bill.

The bill, however, would not prohibit the tribe from acquiring land into trust within the three counties as authorized by the Gila Bend Act and conducting other non-gaming forms of economic activity in the Phoenix metropolitan area defined by the bill. It also does not affect the current gaming activities conducted by the tribe at its three other existing gaming facilities in southern Arizona.

Local Concerns. This bill was borne out of concerns of neighboring Indian tribes, various local governments, and the State of Arizona regarding the Tohono O'odham Nation's proposed gaming facility on its new trust lands in Maricopa County.[39] Opponents of

[37] The net revenues have been approximately forty percent of the total revenues, or $11.3 billion, in fiscal year 2013. *See* U.S. Gov't Accountability, GAO–15–743T, at 7.

[38] Id.

[39] Not every local government opposes the proposed gaming facility. For example, the cities of Glendale, Peoria, Surprise, and Tolleson support the proposed gaming facility. These cities

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the tribe's plans have sought recourse through numerous legal challenges as well, thus far to no avail.

The Committee recognizes that strong views exist both in favor and against the casino. In fact, the four surrounding towns in closest proximity to the proposed casino support it. On the other hand, the State of Arizona and various other towns located in the three counties hold strong objections to expanding the tribe's gaming operations in the area.

A primary complaint has been that the Tohono O'odham Nation's proposal does not comport with what the opponents argue is the intent of the state referendum, Proposition 202, which essentially authorized the type of gaming activities to be conducted in the tribal-state compacts. Opponents contend that, as part of obtaining voter support for this Proposition, the tribes agreed that there would be limited gaming in the state, including a limited number of gaming facilities in the Phoenix area.

The opponents are also concerned that the tribe may seek to place other lands within the three counties into trust and pursue gaming opportunities on those additional trust lands.[40] Such proliferation would also be contrary to the intent of the referendum and potentially jeopardize future support and compact negotiations when those compacts expire in 2027.

On the other hand, the Tohono O'odham Nation contends that neither the referendum nor the compacts placed such limitations on the tribe.[41] The tribe further argues that it is not prohibited by the IGRA to pursue the gaming operations on the land now held in trust in Maricopa County pursuant to the Gila Bend Act because this acquisition qualifies for the land claim settlement exception to the gaming prohibition on after-acquired land.[42]

The issues involving the intent of the state referendum and effect upon the compact negotiations are typically local matters for the State and tribes.[43] However, the implementation of the IGRA and the balance of interests in the conduct of Indian gaming are matters that this Committee has had to carefully examine over the years.

As stated in the Committee Report for S. 555 which eventually became the IGRA, "Congress ultimately has the responsibility, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands."[44] That action was taken even though the Supreme Court has issued its decision in Cabazon and the Department of Interior had signifi-

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are also in the closest proximity to the proposed site. The Tohono O'odham Nation gaming facility would be located in between Glendale and Peoria.

[40] The Committee has not been informed of other parcels within the Phoenix metropolitan area that are either contemplated or currently being sought to be placed into trust for gaming purposes.

[41] The tribe also points to court cases in support of its position. *See e.g., State of Arizona v. Tohono O'odham Nation,* 944 F.Supp.2d 748 (May 7, 2013) and *Gila River Indian Community, et al. v. U.S.A, et al.,* 729 F.3d 1139 (May 20, 2013).

[42] Neither the Department of Interior nor the NIGC have made this determination. The Assistant Secretary for Indian Affairs testified before the Committee that the court appears to have made the determination suggesting that it is not necessary for the Department to do so. *See Keep the Promise Act of 2014: Hearing on S. 2670 Before the S. Comm. on Indian Affairs,* 113th Cong. 2 (2014).

[43] Notwithstanding the court cases relating to this matter, the continued operation of tribal gaming facilities in Arizona pursuant to the tribal-state compacts is a matter for negotiation between the State and the tribes as the compacts expire in 2027.

[44] S. Rep. No. 100–446, at 3 (1988).

cant authority in facilitating tribal actions underlying the activities at issue. This current issue at hand is no less a responsibility and within the authority of this Committee to examine and make appropriate adjustments to ensure the implementation of a law is consistent with the policies and intent of that law.

Balance of Interests. The complex and controversial nature of gambling has not diminished even though the IGRA was enacted over 27 years ago. In enacting the IGRA, Congress and this Committee, in particular, struggled to find the appropriate level and method of oversight and regulation which would assuage state and local governmental concerns for law enforcement and public policy and safety, yet still uphold tribal sovereignty.

The IGRA was "intended to provide a means by which tribal and state governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied."[45]

The legislative history of the IGRA indicates that the concerns of the states, as well as the Department of Justice, were so strongly held that Congress took the extraordinary step of authorizing the extension of state roles and, to the extent negotiated in compacts, authority in these activities on Indian lands.

This role was such that the more significant gaming activities could not be conducted without the state involvement. Senator Inouye, during the debate on the bill which became the IGRA, stated that "[i]t is also true that S. 555 does not contemplate and does not provide for the conduct of Class III gaming activities on Indian lands in *the absence of a tribal-state compact.*"[46]

However, Congress "intend[ed] that the two sovereigns—the tribes and the States—will sit down together in negotiations on equal terms and come up with a recommended methodology for regulating Class III gaming on Indian lands."[47] These compacts were intended to be the "means by which differing public policies of these respective governmental entities (tribes, states, and Federal) can be accommodated and reconciled."[48]

Today, the Committee is once again called upon to balance dueling concerns against a backdrop and convergence of Federal laws. This bill, S.152, is intended to harmonize the intent of the IGRA with the implementation of the *Gila Bend Act.*

It is limited to narrowly apply in the sole context of gaming and ensure the intent of the IGRA is followed. Indeed, even the IGRA was of limited scope within the jurisprudence of Federal Indian law and policy.[49] Just as the passage of IGRA was not intended to "sig-

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[45] "The process of enacting IGRA was complex, but in the end, I believe that it has achieved a careful balance between the concepts of tribal sovereignty and States' rights." *Indian Gaming: The Next 25 Years: Hearing Before the S. Comm. on Indian Affairs,* 113th Cong. 2 (2014) (Statement of Senator John McCain) at 3.

[46] 134 Cong. Rec. 24023 (Sept. 15, 1988). (Statement of Senator Daniel Inouye). (emphasis added). In the unique situation where a Court has found that the state has acted in bad faith in negotiating for a compact, the tribe may pursue Secretarial procedures which may not include state involvement. See 25 U.S.C. § 2710 (1988).

[47] 134 Cong. Rec. 24024 (Sept. 15, 1988). (Statement of Senator Daniel Evans).

[48] S. Rep. No. 100–446, at 6 (1988).

[49] "Gambling is a unique situation and [Congress'] limited intrusion on the right of tribal self-governance in this area has no implications for any other area of tribal self-governance or State-tribal relations."[49] 134 Cong. Rec. 24024 (Sept. 15, 1988). (Statement of Senator Daniel Evans).

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nal any new Congressional policy. . . .,"[50] this bill is not intended to signal any new policy as well.[51]

The measure has been the subject of at least two hearings before this Committee.[52] Testifying before the Committee on a predecessor bill, the Assistant Secretary for Indian Affairs, Kevin K. Washburn, asserted concerns that the bill would effectively amend the *Gila Bend Act* and would unilaterally amend the Arizona state-tribal gaming compact for the Tohono O'odham Nation.[53]

Land Claim Settlement. In the first determination on the land claim settlement exception under IGRA, the Secretary of the Interior voiced concerns about stretching "the principles underlying the enactment of IGRA . . . in ways Congress never imagined when enacting IGRA."[54] We agree that these provisions should be interpreted consistent with the intent of IGRA.

The Committee anticipated that with the passage of IGRA, some changes to tribal activity might occur. The Committee noted that even rights under then-existing business arrangements could be affected.[55]

In the exercise of its plenary authority, Congress defined in IGRA the contours of tribal land use for gaming purposes.[56] Most notably, any trust land acquired after the enactment of the IGRA could not be used for gaming, unless an exception applied, so the ability to use such trust land for gaming purposes was not an absolute and unlimited right.[57] Since that time, Congress has enacted other laws which restrict gaming even beyond that found in the

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Senator Inouye echoed that view when debating the justification for inserting a state role in gaming. ("The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in Class III gaming warranted the utilization of existing State regulatory capabilities in this one narrow area.") 134 Cong. Rec. 24025 (Sept. 15, 1988).

[50] 134 Cong. Rec. 24024 (Sept. 15, 1988) (Statement of Senator Daniel Evans).

[51] In response to a Committee Member question regarding what the policy implication of this bill might be on future negotiations and settlements between tribes, the Assistant Secretary for Indian Affairs contended that tribes may feel that this is "just continuing in the mode of breaking treaties and breaking promises to tribes." *Keep the Promise Act of 2014: Hearing on S. 2670 Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014) (Statement of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior) at 9. The Committee strongly disagrees.

[52] *See* Id. The Committee on Natural Resources of the House of Representatives has also held hearings on the bill and predecessor bills.

[53] Id. (Statement of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior) at 6.

[54] This determination arose in the course of the review process for the Seneca Nation-State of New York compact. Letter to Cyrus Schindler from Secretary Norton, November 12, 2002, at 3. Available at *http://www.nigc.gov/images/uploads/indianlands/47_senecanationofindns.pdf* (last reviewed November 12, 2015). In the case of the Seneca Nation, the issue of the land claim settlement exception was not a contentious matter (between the tribe and state) when presented to the Secretary of the Interior. By contrast, the State of Arizona adamantly opposes the Tohono O'odham Nation's proposed casino.

[55] "The Committee believes that the plenary power of Congress over Indian affairs, and the extensive government regulation of gambling, provides authority to insist that certain minimum standards be met by non-Indians when dealing with Indians. The Secretary's powers with respect to Indians are always subject to alteration or change by the Congress. In the area of gaming where many factors other than ordinary business risk enter into the equation, the Committee has no reluctance in requiring changes to existing gambling enterprise contracts, whether or not such contracts have been given a stamp of approval by the Secretary." S. Rep. No. 100–446, at 15 (1988).

[56] "It was left to Congress to address several unresolved questions such as the appropriate level of Federal, State and tribal oversight, and what tribal lands are eligible for gaming facilities." *Indian Gaming: The Next 25 Years: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014) (Statement of Senator John McCain) at 3. Congress has acted to limit and even prohibit gaming on trust lands in other statutes.

[57] One Court even went so far as to hold that the IGRA impliedly repealed prior statutes. See *Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994).

IGRA.[58] These restrictions are typically enacted contemporaneously with an underlying action and may be included to assuage concerns regarding gaming. In this case, the restrictions may not have been contemplated in the original *Gila Bend Act*.

The Indian gaming industry is also highly regulated. In fact, the Committee has received testimony regarding how heavily Indian gaming is regulated by three sovereigns in many regards.[59] With a heavily regulated industry, land use changes sometimes may occur, particularly when needed to conform to the principles and intent of the underlying law.

Compact. The disputes between the Tohono O'odham Nation and the State of Arizona over the proposed casino, however, suggests that the balance of interests intended to be negotiated and agreed upon in the compact has been disrupted. At a minimum, the Governor has opined that the proposed casino is contrary to the public interest. The Committee has not since been informed that the State of Arizona has reversed its positions against the legality of the proposed gaming facility or that its concerns have been assuaged—even despite all the court decisions regarding this proposed casino.

Unless there is some other information not provided to the Committee, the existing compact between the Tohono O'odham Nation and the State of Arizona remains in effect. While the bill effectively adds a limitation not expressly included in the compact, the bill does not terminate that compact or amend its terms nor does it require the tribe's three existing casinos located in southern Arizona, to close or alter operations.

The Committee is concerned about what effect this situation may have on future tribal gaming efforts as well as proposed trust land acquisitions for gaming purposes.[60] The other tribes in the state have also expressed concerns about how this situation may affect their ability to negotiation for their compacts which expires in 2027.

The bill would allow the parties the opportunity to work to resolve the various interests at play.[61] While the Committee urges the parties to work to resolve the differences, the Committee also reminds the parties that IGRA prohibits bad faith in negotiations.

The IGRA was intended to "achieve a fair balancing of competitive economic interests"[62] not to provide an economic monopoly to any particular entity. The Committee has previously noted and reiterates once again that the "compact requirement for Class III not be used as a justification . . . for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes."[63]

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[58] *See e.g.*, Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1708(b) (1996), and the Indian Pueblo Cultural Center Clarification Act, Pub.L.No. 111–354 (2011).

[59] *See Indian Gaming: The Next 25 Years: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014).

[60] *See Carcieri: Bringing Certainty to Trust Land Acquisitions: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. 1 (2013).

[61] *See Indian Gaming: The Next 25 Years: Hearing Before the S. Comm. on Indian Affairs.* 113th Cong. 2 (2014) (Statement of Senator John McCain). ("It is my desire that the Committee fully understand the tremendous amount of controversy that this situation has generated in Arizona and how the courts are applying the land claim settlement exception under IGRA. * * * I still hope that we can resolve this issue by sitting down, party to party, individual to individual, tribe to government, and try and resolve this issue which has caused so much controversy and difficulties in our State of Arizona.") at 4.

[62] S. Rep. No. 100–446, at 2 (1988).

[63] S. Rep. No. 100–446, at 13 (1988).

However, the Committee would also stress that once compacts have been negotiated and entered into by the parties and approved by the Secretary, Congress is not the appropriate forum for revisiting these negotiated compacts or for protecting markets, thereby circumventing free and open competition.[64]

LEGISLATIVE HISTORY

Senators McCain and Flake introduced S.152 on January 13, 2015. The Committee did not hold a hearing on this bill, but held a hearing on a predecessor bill during the 113th Congress. The Committee held a business meeting on April 29, 2015, at which the bill was ordered reported, without amendment, by majority voice vote.

The House companion bill, H.R. 308, the *Keep the Promise Act of 2015*, was introduced on January 12, 2015, by Representative Franks and is cosponsored by Representatives Conyers, Gosar, Kildee, Kirkpatrick, and Salmon. On March 25, 2015, the House Natural Resources Committee considered the bill, without a hearing, at a business meeting and, by voice vote, ordered the bill reported to the House of Representatives. On November 16, 2015, the House of Representatives voted not to suspend the rules to consider H.R. 308.

These two bills are substantively identical to each other and, with only minor technical differences, to previous iterations of the legislation introduced in the 113th Congress. These bills are drafted somewhat differently than the prior bill introduced in the 112th Congress. However, the purpose and intent of these bills are essentially the same.

113th Congress. In the 113th Congress, Senators McCain and Flake introduced the *Keep the Promise Act of 2014*, S. 2670, on July 28, 2014. The Committee eld a hearing on the bill on September 17, 2014, at which the Administration, through the Assistant Secretary for Indian Affairs, Kevin Washburn, testified.

In addition to this legislative hearing, the Committee also held an oversight hearing on Indian gaming on July 23, 2014, entitled "*Indian Gaming: The Next 25 Years*" at which one panel of witnesses provided testimony on the issues involved with the bill.

In the 113th Congress, Representative Franks introduced the House bill, H.R. 1410, the *Keep the Promise Act of 2013* on April 9, 2013. On May 16, 2013, the Subcommittee on Indian and Alaska Native Affairs of the Natural Resources Committee held a hearing on the bill. On July 24, 2013, the House Natural Resources Committee ordered the bill to be favorably reported to the full House of Representatives by a roll call vote of 35–5. The House of Representatives passed H.R. 1410 by voice vote on September 17, 2013. The bill was received in the Senate the following day and referred to the Committee on Indian Affairs. No further action was taken on either S. 2670 or H.R. 1410.

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[64] In the first determination on the land claim settlement exception under IGRA, the Secretary of the Interior also noted a reluctance to restrict competition. (" * * * I still find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and, if pushed to its extreme by future compacts, inconsistent with the goals of IGRA.") Letter to Cyrus Schindler from Secretary Norton, November 12, 2002, at 5. Available at *http://www.nigc.gov/images/uploads/indianlands/47_senecanationofindns.pdf* (last reviewed November 12, 2015).

112th Congress. In the 112th Congress, Representative Franks introduced H.R. 2938, the *Gila Bend Indian Reservation Lands Replacement Clarification Act* on September 15, 2011. It was co-sponsored by Representatives Baca, Boren, Flake, Gosar, Kildee, McCollum, Quayle, and Schweikert. On October 4, 2011, the Subcommittee on Indian and Alaska Native Affairs of the House Natural Resources Committee held a hearing on the bill. On November 17, 2011, the Committee ordered the bill, as amended, to be reported by a rollcall vote of 32–11.

The House of Representatives passed the bill on June 19, 2012. It was received by the Senate the following day and referred to the Committee on Indian Affairs. No further action was taken on the bill.

COMMITTEE ACTION AND RECOMMENDATION

On April 29, 2015, the Committee held a duly called business meeting to consider S.152. No amendments were offered to the bill. By majority voice vote, the Committee ordered the bill to be reported and recommended that the bill, without amendment, do pass.

SECTION-BY-SECTION ANALYSIS OF S. 152

Section 1. Short title

This Act may be cited as the "Keep the Promise Act of 2015".

Section 2. Findings

Section 2 provides that in 2002, the voters in the state of Arizona passed Proposition 202 and, to gain support for the vote, Indian tribes agreed to limit the number of casinos in the state and Phoenix metropolitan area; and this bill would preserve that agreement until the expiration of the gaming compacts authorized by Proposition 202.

Section 3. Definitions

Section 3 defines key terms used in the Act. The terms "Indian tribe", "class II gaming", and "class III gaming" have the same meaning as the terms are defined in the Indian Gaming Regulatory Act. This section also provides a defined area for the "Phoenix metropolitan area" in Maricopa and Pinal counties in Arizona.

Section 4. Gaming clarification

Section 4 prohibits Class II gaming and Class III gaming on land within the Phoenix metropolitan area acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after April 9, 2013. This prohibition expires on January 1, 2027.

COST AND BUDGETARY CONSIDERATIONS

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 12, 2015.

Hon. JOHN BARRASSO,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 152, the Keep the Promise Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

KEITH HALL.

Enclosure.

S. 152—Keep the Promise Act of 2015

S. 152 would prohibit gambling (other than social games for prizes of minimal value) on property near Glendale, Arizona that is owned by the Tohono O'odham Nation and held in trust by the United States for the benefit of the tribe. That prohibition would last until 2027. The Tohono O'odham Nation is currently constructing a resort and casino on this property and expects to begin operations within a year.

Based on information from the Tohono O'odham Nation, CBO expects that if S. 152 were enacted, the tribe would pursue litigation against the federal government to recover its financial losses caused by the prohibition on gambling. Whether the tribe would prevail in such litigation and when those proceedings might be concluded are both uncertain. The basis for any judicial determination of the tribe's financial losses is also uncertain. CBO estimates that possible compensation payments from the government could range from nothing to more than $1 billion; however, we have no basis for estimating the outcome of the future litigation. Because enacting S. 152 could increase direct spending, pay-as-you-go procedures apply. Enacting S. 152 would not affect revenues.

CBO estimates that enacting S. 152 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2026.

By prohibiting gambling on land that the tribe is currently planning to use for such a purpose, the bill would impose an intergovernmental mandate, as defined in the Unfunded Mandates Reform Act (UMRA). Absent the bill, CBO estimates that the tribe will collect more than $100 million annually once the casino begins operations, probably in 2016. Those costs would exceed the annual threshold established in UMRA ($77 million in 2015, adjusted annually for inflation) in at least one of the first five years after enactment of the bill.

S. 152 contains no private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: CBO expects that the Tohono O'odham Nation would pursue litigation against the federal government if S. 152 is enacted. CBO has no basis for judging the outcome of that litigation. It is possible that the federal govern-

ment would incur no compensation costs, or that it would pay the tribe a settlement or be ordered to pay compensation by a court. Any such payment would increase direct spending, and the amount could exceed $1 billion. The federal government also would incur discretionary costs, which are subject to appropriation, to defend itself in the expected litigation. The amount of such costs would depend on the length and extent of the legal challenges.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the end of 2015 and that under current law the Tohono O'odham Nation will probably commence gambling operations and begin generating gambling revenue in 2016.

Outcome of future litigation

CBO expects that enacting the legislation would probably result in litigation against the federal government by the Tohono O'odham Nation. Based on information from the tribe, CBO expects the tribe would seek compensation for financial losses caused by S.152. To date, the tribe has prevailed in disputes with Arizona and other tribes about its planned gaming operations on the property. A 2013 district court decision on whether gambling on the site is consistent with current federal law concluded that "the Glendale-area land acquired by the Nation with LRA[65] funds qualifies for gaming under IGRA[66] § 2719(b)(1)(B)(1). The land also qualifies for gaming under § 3(j)(1) of the Compact, which specifically authorizes gaming on after-acquired lands that qualify for gaming under § 2719."[67]

That decision is now under appeal at the Ninth Circuit Court of Appeals. Although the tribe has been successful in litigation thus far and construction of its resort and casino is underway, it may be more difficult for the tribe to prevail in a claim brought after enactment of S. 152 because of the types of claims available to it and the facts of this particular situation. The outcome of such litigation is uncertain. CBO expects the tribe would argue that the legislation caused either a regulatory taking of the tribe's property interest in gaming on that land, or a breach of the settlement agreement that permitted the tribe to acquire the land for non-agricultural economic development purposes. In either circumstance, the federal government could be required to compensate the tribe. Any such compensation would probably be paid from the Judgment Fund (a permanent, indefinite appropriation for claims and judgments against the United States).

Amount of compensation

To estimate the amount of compensation that might be due to the tribe, CBO reviewed the outcome of other cases involving regulatory takings, tribal land settlements, and gaming disputes. We also consulted with the Tohono O'odham Nation, other Arizona tribes, and federal and state agencies that regulate tribal gaming to estimate the net receipts that the tribe may realize from the casino operations of the resort now under construction.

CBO concluded that:

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[65] Gila Bend Indian Reservation Lands Replacement Act, Public Law 99–503.
[66] Indian Gaming Regulatory Act, Public Law 100–497.
[67] State of Arizona, et al. v Tohono O'odham Nation, 944 F. Supp. 2d 748, 756 (D. Ariz. 2013).

- Regulatory taking claims are often unsuccessful and usually do not lead to significant economic awards when (as in this case) the taking does not fully diminish the economic value of the property;
- The outcomes of disputes about tribal gaming and land settlement agreements vary and are generally dependent on the specific facts of each dispute, making it difficult to use past disputes to predict the outcome of new cases;
- Prohibiting the tribe from operating gambling activities at the resort and casino near Glendale could result in a loss of net income to the tribe of more than $1 billion over the next decade; and
- Whether gaming was among the nonagricultural economic development activities envisioned under the tribe's land settlement agreement is unclear because the property was acquired as a result of a land settlement agreement with the federal government that was enacted two years before the Indian Gaming Regulatory Act, which authorized gambling on tribal lands under certain circumstances.

CBO estimates that possible awards to the tribe following litigation could range from no monetary award to more than $1 billion. After considering the uncertainties about whether the tribe would prevail in a future lawsuit against the federal government, and the unpredictability of the amount of any award, CBO concluded that there is no basis to predict the amount of monetary award or settlement, if any, that the tribe would receive as a result of the enactment of S. 152.

Pay-As-You-Go-considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting S. 152 could increase direct spending over the 2015–2025 period; however, CBO has no basis for estimating the amount or timing of such spending, if any.

Increase in long term direct spending and deficits: CBO estimates that enacting S. 152 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2026.

Estimated impact on state, local, and tribal governments: By prohibiting gaming on land that the tribe is currently planning to use for such a purpose, the bill would impose an intergovernmental mandate, as defined in UMRA. Absent the bill, CBO estimates that the tribe will net more than $100 million annually once the casino begins operations, probably in 2016. That estimate is a probabilistic assessment based on information from the tribe about projected revenues, accounting for uncertainty of projected revenues, operating expenses, and payments the tribe is required to make from gaming revenue, which all may be higher or lower than expected. It also accounts for the possibility that already pending legal actions could delay or prohibit gaming activities on the land. The cost of that mandate on the tribe would exceed the annual threshold established in UMRA ($77 million in 2015, adjusted annually for inflation) in at least one of the first five years after enactment of the bill, CBO estimates.

If the bill is enacted and the tribe submits a successful claim for damages against the federal government, such settlement amounts would benefit the tribe.

Estimated impact on the private sector: S. 152 contains no private-sector mandates as defined in UMRA.

Previous CBO estimate: On April 24, 2015, CBO transmitted a cost estimate for H.R. 308, the Keep the Promise Act of 2015, as ordered reported by the House Committee on Natural Resources on March 25, 2015. The two bills are very similar, and the CBO cost estimates are the same.

Estimate prepared by: Federal Costs: Kim Cawley; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Amy Petz.

Estimate approved by: H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 152 would have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has not received any Executive Communications on S. 152.

ADDITIONAL VIEWS OF JON TESTER

While proponents of the bill discuss the issue as one of purely local concern for the State of Arizona and tribes located in the state, it should be pointed out that the solution provided by S. 152 could impact future negotiations to settle claims by tribes against the United States. In the Gila Bend Act, the Tohono O'odham Tribe entered into a settlement waiving its claims against the United States related to the flooding of its lands. For waiving its claims, the Tribe secured new lands to be held in trust for the Tribe by the United States, which Congress intended to be used specifically for sustained economic development to "promote the economic self-sufficiency of the O'odham Indian people."[1] Passage of S. 152 would run counter to fulfilling the goals of the Gila Bend Act.

The Majority correctly points out that other Acts of Congress have included gaming restrictions. However, these restrictions are usually included contemporaneously with an underlying action and the tribal stakeholder has agreed to its inclusion to gain support for the underlying action. Here, Congress would be establishing a land use restriction on settlement lands nearly thirty years after passage of the underlying action and imposing the restriction on the Tribe's settlement lands over the Tribe's objections.

In its discussion and footnotes, the Majority disagrees with the assertion that passage of S. 152 would harm future negotiations resolving tribal claims against the United States. While tribes are already aware that Congress' plenary authority over Indian Affairs poses some risk to the certainty of any settlement between tribes and the United State, passage of S. 152 would only highlight that agreements ratified by Congress decades earlier could still be altered by a future Congress over tribal objections. While the extent of the impact on future negotiations cannot be known, it is plausible that tribes would be more reluctant to enter into settlement agreements due to the passage of S. 152 or similar acts that place restrictions on tribal development.

Finally, The Congressional Budget Office has raised concerns that the cost of litigation against the United States could result in significant liability to the American taxpayer—perhaps as much as $1 billion. While such analysis is speculative, it should not be dismissed.

JON TESTER.

[1] Pub. L. No. 99–503, Section 2(4)

ADDITIONAL VIEWS OF JOHN MCCAIN

I introduced this legislation on behalf of Arizona mayors and other local-elected officials who objected strenuously that the Tohono O'odham Nation, or any other Indian tribe, would be allowed by the Interior Department to airdrop a gaming facility into their community. During the wake of the Supreme Court's landmark *Cabazon* decision, the Senate contemplated the impact that Indian gaming facilities could have on non-Indian communities. Congress then enacted the Indian Gaming Regulatory Act of 1988 (IGRA) that, among other things, prohibits Indian gaming on land not contiguous to an extant Indian reservation but for very limited exceptions. As one of the authors of IGRA, as well as the Gila Bend Indian Reservation Replacement Lands Act, I can attest that it was not the intent of Congress that IGRA's land-claim settlement exception would apply to the West Valley lands now held in trust by the Department of the Interior for the Tohono O'odham Nation.

The imminent opening of the Tohono O'odham Nation gaming facility has created tremendous controversy in Arizona among non-Indian communities and tribal governments alike. Therefore, this legislation would prohibit the operation of class II and class III Indian gaming in the Phoenix metropolitan until 2027 when state and tribal parties may address this matter through the state-tribal gaming compact renegotiation process.

JOHN MCCAIN.

CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the bill, S. 152, as ordered reported, would make no changes in existing law.

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