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SENATE

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TO CLARIFY CERTAIN PROVISIONS OF PUBLIC LAW 103-116, THE CATAWBA INDIAN TRIBE OF SOUTH CAROLINA LAND CLAIMS SETTLEMENT ACT OF 1993, AND FOR OTHER PURPOSES

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DECEMBER 9, 2020.—Ordered to be printed

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

### R E P O R T

[To accompany S. 790]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 790) to clarify certain provisions of Public Law 103-116, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

#### PURPOSE

The purpose of S. 790 is to provide authority for the Secretary of the U.S. Department of the Interior to take land into trust in Cleveland County, North Carolina, on behalf of the Catawba Indian Tribe (Catawba or Tribe), for the purpose of conducting Indian gaming.

#### NEED FOR LEGISLATION

Section 14 of the *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993* (1993 Settlement Act) prohibits the Tribe from utilizing the *Indian Gaming Regulatory Act* (IGRA) and conducting gaming activities within their lands.<sup>1</sup> The Tribe is sub-

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<sup>1</sup>Section 14 of the Settlement Act states: (1) IGRA shall not apply to the Tribe, and (2) The Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State [of South Carolina] Act with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement and the State Act, *all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation.*

ject to state gaming law and regulations, which prohibit all major forms of gambling.

Under current state law, South Carolina allows [casino style] gaming on casino cruises that originate in South Carolina ports and is conducted three miles from South Carolina's shores. The Tribe has sued in South Carolina State Court to enforce its right to game under that law,<sup>2</sup> but the South Carolina State Supreme Court rejected the Tribe's argument that casino cruises triggered the Tribe's right to game under Section 14 of the Settlement Act. The court also held that South Carolina only authorized gaming outside of its boundaries (beyond the three-mile limit) and not within the state, effectively foreclosing the Tribe's right to conducting gaming in South Carolina.

Consequently, the Tribe is seeking legislative action to place lands located outside of the state in neighboring North Carolina into trust for the purposes of conducting class III gaming under IGRA. North Carolina allows for gaming through its state lottery and the Eastern Band of Cherokee Indians in North Carolina conduct class III gaming under IGRA.

#### BACKGROUND

*History of the Federal Relationship with Catawba.* The history of the Catawba Tribe is similar to many "first contact" Tribal nations located in the south and eastern parts of the United States. The "first contact" with pre-colonial settlers' attempts to lay claim to the "New World" was subject to multijurisdictional treaties. At first, these multijurisdictional treaties may have been ratified between an Indian Tribe and another sovereign, such as the King of England. However, these treaties would then be renegotiated with the newly formed colonial governments and eventually affirmed by the newly founded United States of America. These early treaties between various sovereigns and Indian Tribes included terms that recognized territorial boundaries, hunting and fishing rights, access to commerce, and other inherent Tribal rights.

From "first contact" to present day, many colonial era Tribes attempted to resolve or amend ambiguities in the earlier treaties with different sovereigns that transitioned into the role of "treaty partners" with those Tribes. The U.S. Supreme Court recognized this transition of sovereigns and held that the exclusive right of the British government to the lands occupied by the Indians passed to that of the United States.<sup>3</sup>

In an effort to resolve these centuries' old disputes, Congress passed *the Act of August 13, 1946*<sup>4</sup> that created the Indian Claims Commission (ICC). The purpose of the ICC was to hear claims from any Indian Tribe, band, or other identifiable group of American Indians against the United States. Tribes brought claims against the United States through the ICC and sought compensation for the loss of "aboriginal title" to their lands. In 1978, the ICC adjourned and transferred any pending cases to the United States Court of Claims.<sup>5</sup> These land claim suits became land claim settlements that involved the aggrieved Indian Tribe, the federal government,

<sup>2</sup> *Catawba Indian Nation v. State*, 756 S.E. 2d 900 (S.C. 2014).

<sup>3</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823).

<sup>4</sup> Pub. L. No. 79-726 (1947).

<sup>5</sup> Pub. L. No. 94-465 (1976).

and any states that may have been a party to the original claim. Executed land claim settlements would often result in the extinguishment of Tribal claims to aboriginal title. Since the adjournment of the ICC, Congress, which has sole and plenary authority to extinguish aboriginal title, is required to ratify these settlements in statute.

In 1760 and 1763, the Catawba Tribe entered into treaties with the Crown of England. Through these agreements, the Tribe ceded vast portions of its aboriginal territory in current day North and South Carolina for the guarantees of being settled on a 144,000-acre reservation.<sup>6</sup>

In 1943, the United States entered into an agreement with the Tribe and South Carolina to provide services to the Tribe and its members. South Carolina purchased 3,434 acres of land and conveyed it to the Secretary of the Interior in trust for the Tribe. The Tribe also organized under the *Indian Reorganization Act*.<sup>7</sup>

Congress took subsequent action in 1959 and enacted the *Catawba Tribe of South Carolina Division of Assets Act*.<sup>8</sup> This Act released the federal government of its obligation under the 1943 agreement, thus terminating the federal trust relationship with the Tribe and disestablishing the Tribe's reservation.<sup>9</sup>

In 1980, the Tribe sued in federal court to regain possession of their original treaty reservation. At that time, the Tribe argued that their treaty rights were preserved under the 1959 Act. To resolve the lawsuit brought by the Tribe, Congress passed the *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993* (1993 Settlement Act).<sup>10</sup>

The 1993 Settlement Act restored and extended federal recognition, rights, and services to the Tribe by repealing the original 1959 Act that terminated the Tribe. The Act also authorized settlement appropriations for the Tribe, ratified prior extinguishment of the Tribe's claim to aboriginal lands, set forth procedures for organizing the Tribal government and its membership, established a fund for acquiring more lands for the Tribe. Notably, the Settlement Act made the *Indian Gaming Regulatory Act* (IGRA) inapplicable to the Tribe, but permitted games of chance as provided under South Carolina law.

*Indian Gaming Under South Carolina State Law.* Section 14 of the *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993* requires that: (1) IGRA shall not apply to the Tribe; and (2) all laws, ordinances, and regulations of the state [of South Carolina], and its political subdivisions, govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation.

*Agency Action.* On March 12, 2020, Assistant Secretary—Indian Affairs (AS-IA) Tara Sweeney posted in the Federal Register that the Department of the Interior (Department) made the final agency determination to acquire 16.57 acres, more or less, of land in trust

<sup>6</sup>Pub. L. No. 103-116 (1993).

<sup>7</sup>*Id.*

<sup>8</sup>25 U.S.C. 931-938 (1959).

<sup>9</sup>Pub. L. No. 103-116 (1993).

<sup>10</sup>*Id.*

for the Catawba Indian Nation for gaming and other purposes.<sup>11</sup> As part of this agency action, the Department used newly established guidance<sup>12</sup> from Solicitor, Daniel H. Jorjani, to determine if the Secretary of the Interior had authority to take land into trust for an Indian Tribe under the authority of the *Indian Reorganization Act of 1934*. On July 10, 2020, this agency action was made final, and the land was placed into trust on behalf of the tribe.

#### OVERVIEW

This legislation, S. 790, would amend the *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993* to:

- Authorize the Catawba Indian Nation to own and operate a gaming facility on lands described in the bill, which are located in Cleveland County, North Carolina;
- Mandate the facility located on the newly acquired lands will be regulated in accordance with the *Indian Gaming Regulatory Act* (IGRA), except for section 20, which will not apply to the lands described in this bill;<sup>13</sup>
- Authorizes the Secretary of the Interior to take land into trust on behalf of the Catawba Tribe for the purpose of conducting gaming;
- Reserves the rights of all entities that are a party to the *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993*; and
- Provide the legal description of the land that the Secretary of the Interior may take into trust on behalf of the Tribe for conducting gaming operations.

#### LEGISLATIVE HISTORY

On March 13, 2019, Senator Graham introduced S. 790. Senators Burr and Tillis joined as co-sponsors. The bill was referred to the Committee on Indian Affairs (Committee). On May 1, 2019, the Committee held a duly called legislative hearing on S. 790. Principal Deputy Assistant Secretary of Indian Affairs at the U.S. Department of the Interior, John Tahsuda, testified. Principal Deputy Assistant Secretary Tahsuda's written testimony expressed several technical concerns with the bill. The Eastern Band of Cherokee Indians of North Carolina also provided testimony with concerns to S. 790. On November 18, 2020, the Committee held a duly called business meeting to consider S. 790. Senator Moran offered a substitute amendment, which made a number of technical, clarifying, conforming, and substantive changes to the bill as introduced.

<sup>11</sup> Land Acquisitions; Catawba Indian Nation, Kings Mountain Parcel, North Carolina, 85 Fed. Reg. 17,093 (Mar. 12, 2020).

<sup>12</sup> Daniel J. Jorjani, Solicitor, U.S. Department of the Interior Office of the Solicitor General, Procedures for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act (Mar. 10, 2020), available at [https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors\\_Procedures\\_for\\_Determining\\_Eligibility\\_for\\_Land\\_into\\_Trust\\_under\\_Category\\_1.pdf](https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors_Procedures_for_Determining_Eligibility_for_Land_into_Trust_under_Category_1.pdf). The Committee notes that this guidance is the subject of ongoing litigation.

<sup>13</sup> Section 20 of IGRA prohibits gaming on trust lands acquired after the 1988 passage of IGRA, unless an exception outlined in this section applies. The main exceptions are: (1) the Secretary of the Interior and the governor of the state affected by the gaming proposal must agree that a gaming establishment on newly acquired lands would be in the best interest of the Indian Tribe and its members, and that gaming establishment would not be detrimental to the surrounding community; (2) the land taken into trust is part of a "land claim settlement"; (3) the land taken into trust is part of a newly recognized Tribe's initial reservation; or (4) the land taken into trust is part of the restoration of lands for an Indian Tribe that is has been restored to federal recognition. (25 U.S. § 2719 (1988)).

*Amendment.* Senator Moran’s amendment affirms the U.S. Department of the Interior’s action to take the parcel into trust on behalf of the Tribe for the purpose of gaming.

The substitute amendment strikes S. 790, as introduced, and inserts the following changes:

- Clarifies that the 1993 Settlement Act’s Section 14 gaming prohibitions continue to apply to lands in South Carolina;
- Allows for gaming to be conducted by the Tribe in states other than South Carolina;
- Directs that gaming must be conducted in accordance with the IGRA and is subject to Section 1166–1168 of title 18 of the U.S. Code,
- Specifically subjects the 16.57 acres and any future lands taken into trust for the Tribe, to the requirements of Section 20(b)(1)(B)(iii) of the IGRA.

The Committee adopted the amendment and ordered the bill, as amended, reported favorably.

In the U.S. House of Representatives, Representative G.K. Butterfield introduced a similar, but not identical bill, H.R. 8255, the Catawba Indian Nation Lands Act, which seeks to reaffirm AS–IA Sweeney’s March 12, 2020 decision, on September 15, 2020, along with Representatives James Clyburn, Joe Cunningham, Alma Adams, David Price, Dan Bishop, William Timmons, and Joe Wilson as original co-sponsors. The bill was referred to the Subcommittee on Indigenous People of the United States on September 22, 2020. A legislative hearing was held on H.R. 8255, on September 24, 2020. No further action has been taken.

The Congressional Budget Office (CBO) has not issued a cost estimate prior to the end of the 116th Congress. However, the CBO did issue a cost estimate for a House bill, H.R. 8255, that is identical to the Committee passed bill, as amended. The CBO stated H.R. 8255 would not affect any direct spending or revenues.

#### SECTION-BY-SECTION ANALYSIS, AS AMENDED

##### *Section 1. Short title*

Section 1 sets forth the short title of the bill as the “*Catawba Indian Lands Act.*”

##### *Section 2. Application of current law*

Section 2 affirms the application of Section 14 of the *Catawba Indian Tribe of South Carolina Claims Settlement Act of 1993*,<sup>14</sup> which requires the state of South Carolina to approve Catawba gaming within the state. This section also clarifies that gaming conducted by the Catawba tribe outside the state of South Carolina shall be subject to the *Indian Gaming Regulatory Act*.<sup>15</sup>

##### *Section 3. Reaffirmation of status and actions*

Section 3. Reaffirms the action by the U.S. Department of the Interior to take the land into trust on behalf of the Catawba Tribe, and confirms that nothing else within the *Catawba Indian Tribe of South Carolina Claims Settlement Act of 1993*, including water rights, rights of way, or future authority to take land into trust,

<sup>14</sup>Pub. L. No. 103–116 (1993).

<sup>15</sup>Pub. L. No. 100–497 (1988).

will be diminished by this legislation. Finally, this section also affirms that the parcel taken into trust meets the section 20(b)(1)(B)(iii) “restored lands” exception of the *Indian Gaming Regulatory Act*.

#### COST AND BUDGETARY CONSIDERATION

The following cost estimate was prepared by the Congressional Budget Office for H.R. 8255, the Catawba Indian Nation Lands Act, as introduced in the House of Representative; S. 790, as amended, mirrors exactly H.R. 8255. Therefore, the following CBO estimate, as prepared for H.R. 8255, is being used for S. 790 as amended.

DECEMBER 1, 2020.

CBO’S ESTIMATE OF THE STATUTORY PAY-AS-YOU-GO EFFECTS OF H.R. 8255, THE CATAWBA INDIAN NATION LANDS ACT, AS INTRODUCED IN THE HOUSE OF REPRESENTATIVES ON SEPTEMBER 15, 2020

	By fiscal year, millions of dollars—												
	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2021–2025	2021–2030	
	Net Increase or Decrease (–) in the Deficit												
Pay-As-You-Go Effects .....	0	0	0	0	0	0	0	0	0	0	0	0	0

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues.

Estimates relative to CBO’s March 2020 baseline.

CBO estimates that H.R. 8255 would not affect direct spending or revenues. H.R. 8255 would affirm the status of approximately 17 acres of land in North Carolina taken into trust by Department of the Interior for the benefit of the Catawba Indian Nation. The legislation also would allow the tribe to operate a gaming facility on that land. If enacted, H.R. 8255 would affect spending subject to appropriation by the Bureau of Indian Affairs; CBO has not completed an estimate of that effect.

#### REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in implementing the legislation. The Committee has concluded that enactment of S. 790 will create only de minimis regulatory or paperwork burdens.

#### EXECUTIVE COMMUNICATIONS

The Committee has received no official communications from the Administration on the provisions of this bill.

#### CHANGES IN EXISTING LAW

In compliance with the Standing Rules of the Senate and the Committee Rules, subsection 12 of rule XXVI of the Standing Rules of the Senate is waived. In the opinion of the Committee, it is nec-

essary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

