TESTIMONY OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE
ON S. 2670

September 17, 2014

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

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

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

Gila Bend Indian Reservation Lands Replacement Act

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

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

Despite these assurances, construction of the dam resulted in continuous flooding of nearly 9,880 acres of land within the San Lucy District, rendering them unusable for economic development purposes. Included among the destruction was a 750-acre farm that had previously provided

tribal revenues. The loss of these lands forced a number of the Nation's citizens to crowd onto a 40-acre parcel of land.

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

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

Eventually, the Nation purchased a 53.54 acre parcel in Maricopa County, Arizona, and requested that the Secretary acquire the land in trust pursuant to the Gila Bend Act. On July 23, 2010, Assistant Secretary Echo Hawk issued a letter to Ned Norris, Jr., Chairman of the Tohono O'odham Nation, stating that the Nation's request for the trust acquisition of this parcel satisfied the legal requirements of the Gila Bend Act and that the Department was obligated to, and therefore would, acquire the land in trust pursuant to Congressional mandate. This decision was remanded to the Department by the United States Court of Appeals for the Ninth Circuit for further consideration of the meaning of section 6(d) of the Act. On July 3, 2014, I made a final agency determination on behalf of the Department to acquire the parcel in trust for the Nation. The land was acquired in trust – as required by law – on July 7, 2014.

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

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

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

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

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

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

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

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

Historical Context with the Gila Bend Act and Indian Gaming

It is important to understand the historical context of gaming at the time of passage of the Gila Bend Act. When Congress enacted the Gila Bend Act in 1986, it was well aware of the Indian

gaming industry. By that time, Indian gaming was already quite controversial. Indian gaming legislation was introduced in Congress as early as 1984 and 1985. A good deal of litigation over Indian gaming had occurred in the late 1970s and early 1980s. Indeed, cases had been fully litigated through federal appeals courts with reported decisions by 1981. Federal litigation was proceeding in California, Florida, Minnesota and Wisconsin in the early 1980s. In sum, gaming was spreading like wildfire across the country in the early and mid-1980s.

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

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

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

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

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

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