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Written Testimony before the U.S. Senate Committee on Indian Affairs

Oversight Hearing on “Indian Gaming: The Next 25 Years,” including H.R. 1410

“The Keep the Promise Act"

July 23, 2014

**Executive Summary**

The Salt River Pima Maricopa Indian Community (“Community”) thanks the Committee for scheduling this hearing on the future of Indian gaming. For over twenty years Arizona Indian gaming has been stable, predictable, and successful. However, sadly, the future of Indian gaming in Arizona does not look good. It is threatened by the actions of one tribe. H.R. 1410, the “Keep the Promise Act,” which is pending before the Committee, will help protect Indian gaming in Arizona. We respectfully urge the Committee to pass it.

Briefly, except for horse racing and the State’s lottery, Tribes in Arizona have been the exclusive operators of class III gaming since the first compacts were signed in 1993. But our tribal gaming exclusivity has always been at risk. During the past twenty years, non-Indian companies in Arizona, and many from out-of-state, have consistently tried to open up the State to commercial gaming. Our Tribes, often in collaboration with others, have fought against these attempts, at enormous financial cost and expenditure of other resources. But now more than ever before, our tribal gaming exclusivity is jeopardized from within, because one Tribe has requested that the Department of the Interior take land into trust for the purpose of opening a casino off-reservation in the Phoenix-metro area.

The Tohono O’odham Nation (“Tohono O’odham” or “Tohono”), who enjoys a 2.8 million acre reservation bordering Mexico and Tucson, has sought to use a 1986 federal law to mandate that the Department of the Interior add 54 acres in the Phoenix-metro area to its reservation so that it can operate a casino more than 150 miles from its government headquarters. This 54 acre parcel is outside Tohono’s aboriginal territory, and it is within my Tribe’s original 1879 reservation boundaries. Today, the parcel has a 2,000-student public high school across the street, and over 30,000 people live within two miles.

The Keep the Promise Act is a bipartisan bill that was introduced in the House of Representatives on April 9, 2013. The bill was sponsored by Representative Trent Franks (R-AZ) and is also cosponsored by Representatives Ann Kirkpatrick (D-AZ), David Schweikert (R-AZ), Paul Gosar (R-AZ), Matt Salmon (R-AZ), Dan Kildee (D-MI), Ed Pastor (D-AZ), Jared Huffman (D-CA), and John Conyers, Jr. (D-MI). H.R. 1410 would ensure that the promise made by Arizona tribes - that there would be no additional casinos in the Phoenix metropolitan area for the duration of the existing gaming compacts - is kept. The bill prohibits all Class II and Class III gaming within that specifically defined area on lands taken into trust after April 9, 2013. The gaming prohibition would sunset on January 1, 2027, when existing compacts will begin to expire and when all Arizona tribes will need to negotiate new compacts with the State. It would be proper at that point for Tohono O’odham or any other Arizona tribe to negotiate for the right to build additional casinos in the Phoenix metropolitan area. On September 17, 2013, H.R. 1410 was passed by the House of Representatives by a voice vote. The bill has been pending in the Senate Committee on Indian Affairs since that time without any action.

We understand the hesitation among some Senators to advance H.R. 1410 because of the perception that it pertains to a local intertribal dispute in Arizona, but this is not true. In addition to the twelve tribes that have spoken against Tohono O’odham’s proposal, the majority of Phoenix area municipalities, the Chairman of the Maricopa County Board of Supervisors, and the State of Arizona, itself, are also opposed to the project. Although the reaction of some Senators to the bill has been to sit back and allow H.R. 1410 to languish in Committee, inaction will hurt numerous tribes in Arizona while only benefitting one, the Tohono O’odham. Failure to act is picking a side and it is picking the side that knowingly took actions to conceal the truth and hurt other tribes.

The Department of the Interior concluded on July 3, 2014 that the 1986 Gila Bend Reservation Lands Replacement Act required it to take the parcel into trust for Tohono. And the courts have held that sovereign immunity bars recourse even though evidence supports claims that Tohono induced the State of Arizona and Arizona tribes to enter into a compact based on false promises. This leaves Congress as the only venue for justice. The bottom line is that Congress’ failure to act will result in substantial injustice to Arizona tribes and local communities who will suddenly have to worry about whether Tohono will be opening a casino in their neighborhood. Arizona is a microcosm for the broader efforts of some Tribes to twist laws to pursue off-reservation casinos without regard to other tribes, local communities, and existing tribal-state compacts and agreements. The limits in the Indian Gaming Regulatory Act are rapidly becoming irrelevant. Examples are becoming more common around Indian Country and Tohono’s actions will become a blueprint for other Tribes to follow if they succeed with their scheme. Inaction on H.R. 1410 will signal that Congress is unwilling to address a metastasizing problem that has arisen due to manipulation of Federal laws, including the Indian Gaming Regulatory Act. A failure to act on H.R. 1410 would amount to a Congressional rubber stamping of actions that were designed to circumvent the law regardless of the collateral damage to other Tribes and promises made.

This plan by the Tohono O’odham of building an additional casino in the Phoenix-metro area directly violates promises that it made, that other Arizona tribes made, and that the Governor of Arizona made to citizens who approved our compacts in November 2002. The public dissemination of the promise began on February 20, 2002, when Arizona Governor Hull issued a news release announcing to the public and media that the model compact she and 17 Tribes had negotiated for two and a half years - if it were approved - would ensure that there would be “**no additional casinos allowed in the Phoenix metropolitan area**.” This promise was then repeated by elected Tribal leaders, including Tohono’s, other Tribal representatives, and representatives of the State, both verbally and in writing, in the Arizona legislature, in television, radio and print media, and in public over the ensuing nine month initiative campaign that ended when Arizona citizens narrowly approved the model compact.

It is all the more alarming that Tohono O’odham has claimed a right under a 1986 federal law to operate up to four additional casinos on county islands in the Phoenix-metro area. This 1986 law, known as the Gila Bend Act, provided financial compensation to the Tohono O’odham for lands that were flooded by an Army Corps of Engineers project and allowed Tohono to buy replacement lands. The Gila Bend Act was passed before Congress enacted the Indian Gaming Regulatory Act but Tohono O’odham argues that the 1986 law mandates the Department of the Interior to take lands into trust for gaming without any questions asked. Also troubling is the fact, unknown until recently, that Tohono was secretly taking actions to open a casino in the Phoenix-metro area at the same time it and 16 other Arizona Tribes were conducting compact negotiations and while they were promising citizens there would be “no additional casinos in the Phoenix metropolitan area” under the compacts. Tribes made these promises specifically to convince voters to approve the model compact, which voters barely did by a very slim 50.9% to 49.1% margin.

If Congress now permits an additional tribal casino in the Phoenix-metro area in violation of the promises Tribes made to Arizona voters, in the public’s eye Tribes will lose their integrity and the moral high ground. And we believe it will be virtually impossible to protect our tribal gaming exclusivity and stop non-Indian companies from obtaining authority to conduct commercial gaming. This would harm all Tribes and put many Tribal casinos out of business.

These efforts of Tohono O’odham also will destroy our unique compact structure that allows non-gaming Tribes to receive gaming revenue from more urban gaming tribes. The compact we negotiated sets limits on the amount of gaming machines each Tribe can operate. While the compact sets limits on the number of gaming machines, a Tribe may increase the number of machines by negotiating an agreement with a non-gaming Tribe. Under such agreements, the gaming Tribe may operate more gaming machines in exchange for making substantial periodic payments to the non-gaming Tribe, which often has no market to operate even a small casino.

It is important to understand that under one provision of our compact, commonly called the “poison pill” provision, if the Arizona legislature uses the broken promises to justify permitting non-Indians to operate gaming, all limits on the number of gaming machines come off. At that point, there will absolutely be no reason for a gaming Tribe to buy additional machine rights from a non-gaming Tribe. Arizona’s non-gaming Tribes will lose their substantial revenue streams. Yet, Tohono would benefit from this collapse because, as it claims, it can hand-pick the locations of its four metropolitan casinos and it would have no limit on the number of gaming machines it can operate in those four casinos.

Twelve Arizona Tribes have gone on record as formally opposing Tohono’s plans for an additional casino in the Phoenix-metro area. Nine of these Tribes support H.R. 1410.

The State of Arizona filed litigation against Tohono O’odham, alleging that the Tribe acted fraudulently during the 1999-2002 compact negotiations, misrepresented facts, and made promises to the State regarding the location of its fourth casino which the State relied on to its detriment. In response to these claims, Tohono asserted that it did not have to defend the claims in court because it was insulated by the doctrine of tribal sovereign immunity. The court agreed and dismissed all three claims, but not because they lacked merit. In fact, the court stated that the evidence actually appeared to support the State’s promissory estoppel claim.

Undeterred, Tohono O’odham has requested that the Secretary of the Interior take the 54-acre parcel in the Phoenix-metro area into trust. Twenty days ago, on July 3, 2014, the Department of the Interior determined that the 1986 federal law mandated it to acquire the parcel into trust and create a new Indian reservation in the Phoenix-metro area and within my Tribe’s former reservation boundaries. We are unaware of any situation where the Department of the Interior has approved the creation of a reservation within another Tribe’s former reservation boundaries. This is a disturbing policy, which establishes a precedent that will open the door for other Tribes to pursue similar strategies, and undermine the sovereignty of those Tribes whose ancestral lands are once again taken from us..

Tohono claims that in passing the 1986 federal law, the United States ‘agreed’ that Tohono can operate casinos on land it acquires under that law. Tohono claims H.R. 1410 would violate that agreement. Not so. Tohono’s actions to conceal its true intentions and activities regarding gaming in the Phoenix-metro area, and its involvement in making, paying for the promotion and publication of, and not objecting to the promises made by all Tribal leaders to voters that there would be “no additional casinos in the Phoenix-metro area,” must be held to have unilaterally modified any such agreement.

To protect our tribal gaming exclusivity and the unique compact structure that allows non-gaming Tribes to receive substantial gaming revenue, and to protect Phoenix-metro cities from having additional and unwanted casino-reservations sprouting up on county islands within their boundaries, the Senate must pass H.R. 1410, the “Keep the Promise Act of 2013.”

1. **H.R. 1410**

H.R. 1410 would bring some common sense to this situation and clarify that no tribe may conduct gaming on lands taken into trust after April 9th, 2013, as was promised by the Arizona Tribes. H.R. 1410 would not amend any federal law. The bill would not take any lands away from Tohono O’odham, nor will it prevent any lands from going into trust. The bill will simply prohibit tribes from breaking the promises repeatedly made to voters – that there would be “no additional casinos in the Phoenix metropolitan area” during the term of the current compacts.

H.R. 1410 keeps the promises that the tribes of Arizona made to the State of Arizona and the voters that there would be “no additional casinos in the Phoenix-metro area” for the duration of the voter-approved gaming compacts. In our view, H.R. 1410 ratifies the agreement that the State and tribes of Arizona reached when they established a limited structure of Indian gaming in Arizona. Importantly, this bill does not amend federal law, it does not target any specific tribe, nor does it prevent Tohono from placing land into trust. H.R. 1410 is limited in geographic scope to the Phoenix metropolitan area, it applies uniformly to all Arizona tribes, including Salt River, and applies only until the expiration of the current negotiated compacts.

As we near the end of our current compacts in about 2026, all interested parties within Arizona can negotiate what gaming structure should exist in the State. Clarifying legislation like H.R. 1410 is extremely common in Indian Country. Congress routinely includes various restrictions on legislation involving Indian land, particularly gaming. For instance, it is not unusual for Congress to revisit existing statutes to clarify the party’s intent, so long as the legislation is narrowly tailored.[[1]](#footnote-1)  This is a proper and necessary role for Congress.

This continues to be a consistent practice of Congress and is one that the Department of the Interior has vocally supported in the past. This Congress alone, there have been two bills (H.R. 2388 and H.R. 507) that passed both chambers and would place lands in trust on behalf of Tribes while simultaneously prohibiting the benefitting Tribes from using the lands for gaming. H.R. 2388, which will place Federal land in trust for the benefit of the Shingle Springs Band of Miwok Indians stipulates that “class II and class III gaming under the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) shall not be permitted at any time on the land taken into trust.” The Department of the Interior testified in support of the bill despite its prohibition on gaming. Both chambers have also passed H.R. 507, the Pascua Yaqui Tribe Trust Land Transfer Act, which would place Federal land into trust for the benefit of the Pascua Yaqui Tribe. Although the bill has no relevance to gaming, it stipulates that, “The Tribe may not conduct gaming activities on the lands held in trust under this Act, as a matter of claimed inherent authority, or under the authority of any federal law, including the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission.”

Beyond these two bills which will likely be signed into law by the President in the coming days or weeks, there have been numerous other bills introduced in this Congress that also restrict or prohibit the ability of Tribes to game on trust land.[[2]](#footnote-2) Perhaps the most shocking example of legislation restricting the right of a Tribe to game is the Lumbee Recognition Act, which has been introduced as S. 1132 and H.R. 1803 in the Senate and House of Representatives, respectively. This bill, which would restore federal recognition to the Lumbee Tribe after being terminated by an Act of Congress in the 1950’s, only partially restores the rights of the Tribe. The legislation includes a gaming prohibition which provides that ‘‘The tribe may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission.” Furthermore, Department of the Interior Assistant Secretary-Indian Affairs Kevin Washburn testified in support of the Lumbee Recognition Act and even noted the gaming prohibition in his testimony. This is one of two bills that would provide federal recognition while simultaneously creating a class of Tribes whose inherent right to game has been extinguished.[[3]](#footnote-3)

Accordingly, any arguments that the H.R. 1410 creates dangerous precedent are wrong and inconsistent with common Congressional practice, and the Department’s recent positions.

The Community supports H.R. 1410 because it is narrow in scope, does not impact tribal sovereignty and is the simplest solution to this current threat to Indian gaming in Arizona. This legislation makes express what had been the common understanding of the parties that negotiated the existing gaming compacts in Arizona.

1. **The “Prop 202” Promises and Tohono’s Secret Plan for a Phoenix Casino**

We believe the existing tribal-state gaming compacts in Arizona to be the model in the Indian gaming industry. The compact strikes a precise balance between tribal, state, and federal interests; places limits in both the number of machines and facilities; and provides benefits to gaming and non-gaming tribes, the State, local municipalities, and charities throughout Arizona. However, those who benefit most from the compact are the citizens of Arizona who approved the tribal-state compacts through a voter referendum based on the promise of no additional casinos in the Phoenix area until 2027 and no gaming in neighborhoods.

Prior to the passage of the voter approved ballot initiative (“Prop 202”) which culminated in the existing Tribal-State gaming compacts, tribal leaders held extensive negotiations on an acceptable framework for all tribes. Negotiations with the State were preceded by 16 tribal leaders, including Tohono’s, signing an *Agreement in Principle* to make a good faith effort to maintain a collaborative relationship in compact renegotiations.

Specifically, in the *Agreement in Principle* Tohono’s Chairman and other Tribal leaders expressly agreed “to make a good faith effort to develop and maintain consistent positions regarding the terms and issues at issue with the State of Arizona in compact negotiations.” Further, Tohono’s Chairman, on behalf of his Tribe, expressly agreed to “make a good faith effort to notify other Tribal Leaders if they believe that they cannot abide by this Agreement or that they must take positions or actions inconsistent with those of the other Tribal Leaders.”

Tribes negotiated in good faith with each other (or so we thought at the time) to craft a model tribal-state gaming compact that preserved tribal exclusivity for casino gaming, greatly reduced the number of authorized casinos in the State, allowed for larger casinos and machine allotments with the ability to expand machine allotments through transfer agreements with rural and non-gaming tribes.

In the negotiations, the Salt River Pima-Maricopa Indian Community and the three other Phoenix-metro area tribes (Ak-Chin Indian Community, Gila River Indian Community, and the Fort McDowell Yavapai Nation) each had to give up their rights under the compacts then in effect to build one additional casino in the Phoenix-metro area. Tohono O’odham was aware of this concession, and knew that it was a key concession the State of Arizona needed if negotiations were to move forward.

However, it was only recently discovered in the State of Arizona’s litigation against Tohono, that Tohono had begun actively working to investigate and purchase casino land in the Phoenix-metro area more than a year and a half *before* the conclusion of compact negotiations and approval of the tribal-state compacts by the voters. In light of Tohono’s commitment to notify other Tribes if they would “take positions or actions inconsistent with those of the other Tribal Leaders,” it was a profound shock for the State of Arizona and the 16 other Tribes who negotiated the compact with Tohono to discover that Tohono had strategically acted to open a Phoenix-metro casino while each of the four Phoenix-metro Tribes were giving up our rights to operate another casino, and while the Tribes and State were promising voters that there would be “no additional casinos in the Phoenix-metro area.”

The brief chronology below highlights *some* (but not all) examples of when the so-called ‘Prop 202’ promises and related statements were made, and outlines *some* (but not all) of Tohono’s behind-the-scenes activities during compact negotiations to secretly secure casino land in the Phoenix-metro area.

**NOTE**: The Tohono activities shown in *italics* below were not known by any of the 16 other Tribes who participated in the negotiations nor by the State until the facts were recently disclosed in the course of the State’s litigation against Tohono. The activities shown in regular type were known to all negotiating Tribes and the State.

1999- Compact negotiations began. Sixteen Tribes, including Tohono, signed the *Agreement in Principle* under which each Tribe agreed to “make a good-faith effort to notify other Tribal Leaders if they believe that they cannot abide by this Agreement or that they must take positions or actions inconsistent with those of the other Tribal Leaders.”

*March 15, 2001 – Representatives of a corporation owned and created by Tohono O’odham under tribal law, named Vi-ikam Doag Industries (“VDI”), an entity tasked with locating land in the Phoenix-metro area for the Tohono casino, met and notes of the meeting reflect they discussed the “possibility of doing a casino” and that they were “interested in buying a piece of land and putting a casino on it.”*

*March 18, 2001 – VDI corporate representatives met with Mr. Curry, Tohono O’odham’s Assistant Attorney General and its lead compact negotiator. VDI notes of that meeting show discussion included “gaming compact-unsure what will happen.” The notes also disclosed a plan to “put in a shell company – need to keep it quiet especially when negotiations on compact at stake.”*

*June 26, 2001 – VDI meeting with Tohono San Lucy District Council was tape recorded and transcript shows discussion focused on “casino on the west end of Phoenix.” “[W]e didn’t want to publicize that because of the confidentiality.” The project was “a confidential issue”, that Tohono representatives were “holding it as confidential, because we don’t want, you know, people to know we are seriously considering this.” If the information about the secret casino plan leaked out, “there’s going to be a lot of resistance from, you know, the general public.”*

February 20, 2002 – The State of Arizona and 17 Tribes reach agreement on major terms of the new compact. The new compact would require that each Phoenix-metro tribe (Gila River, Fort McDowell, Salt River, and Ak-Chin) to give up its right under the then-existing compacts to operate one additional casino, so there would be no more than seven casinos in Phoenix metro area. (In 2002, there were only seven casinos operating in the Phoenix-metro area). At this time the 17 Tribes and the Arizona Indian Gaming Association (AIGA) began efforts to get the Arizona legislature to approve the negotiated compact. On February 20, 2002, Governor Hull issued a news release advising the public and media that the “Major points in the [negotiated] agreement include…Number of casinos…**No additional casinos allowed in the Phoenix metropolitan area** and one additional casino in the Tucson area.”

February 20, 2002 **–** The Arizona Republic reported that under the compact negotiated between the State and Tribes, **“[m]etro Phoenix will see no new casinos**; the number is frozen at seven.”

February 21, 2002 – The Arizona Republic again reported that under the negotiated compact “**metro Phoenix will see no new casinos**.”

February 21, 2002 - A spokesperson for the State, Christa Severns, announced on radio that under the new compact, “**we’re not going to see any more [casino] facilities in the Phoenix area.**”

February 22, 2002 – The Arizona Republic in an editorial stated that under the compact **“Phoenix metro area would be limited to seven casinos, the number currently in operation**.”

February 27, 2002 – Steve Hart, the State’s primary negotiator and Director of the State’s Department of Gaming, and David LaSarte, the Executive Director of the Arizona Indian Gaming Association, appeared together on Phoenix public television. Hart stated that **the number of casinos in the Phoenix area “is seven today and for the length of this Compact, 20 years, that’s the number of casinos that will be in the-kind of greater Phoenix metro area.”**

March 7, 2002 – An article in the Arizona Republic reported that David LaSarte, Executive Director of the Arizona Indian Gaming Association, “**pointed out that the agreement freezes the number of casinos in the metro Phoenix area at seven.**”

*March 11, 2002 – Tohono’s San Lucy District and its corporation, VDI, sign a “Confidentiality Agreement” with a realtor hired to find suitable casino land in the Phoenix-metro area.*

March 18, 2002 – The Tucson Citizen ran an editorial by David LaSarte, Executive Director of the Arizona Indian Gaming Association, which reported that under the compacts, “**No additional casinos could be built in the Phoenix area.**”

March 28, 2002 – The Tucson Weekly reported that under the compact negotiated between the 17 Tribes and the State, “**there would be no more casinos allowed in the Phoenix metro area.”**

*March 28, 2002 – Officers in Tohono’s corporation, VDI, met and meeting notes reflect discussion about “West [Phoenix is] not covered with casino, …the Nation wants to have another casino….We may be the only game in town.”*

April 2, 2002– The Arizona Republic reported on the negotiated compact. “[T]he accord [Governor] Hull negotiated also **would keep the number of Phoenix-area casinos at the current seven….**”

April 8, 2002 -David LaSarte, Executive Director of the Arizona Indian Gaming Association, testified before the Arizona legislature on behalf of the Association and said that one of the “**most important items within the agreement include[s] the limitation of facilities in the Phoenix-metro area** **to the current number** [that is, seven] and allows the possibility for only one additional facility in Tucson.”

*April 13, 2002 – VDI meeting transcript reflects discussion included, “And the Tucson market is saturated….But , you know, again, there’s nothing on the west end of Phoenix.”*

April 19, 2002 – Arizona Governor Hull wrote a letter to State Senate President Randall Gnant, in which Governor Hull reported that under the legislative bill approving the negotiated compact, “**there will be no additional [casino] facilities in the Phoenix metropolitan area…**”

April 25, 2002 – Arizona Governor Hull wrote an editorial published in the Arizona Republic in which she stated that under the negotiated compact, “**Phoenix will keep the same number of casinos….”**

*June 10, 2002 – VDI internal email states “yesterday at the Task Force meeting we discussed the West Phx Property [and] it was understood that VDI can proceed with the escrow,…[but] the decision is not final until the studies are completed.”*

*June 19, 2002 – VDI meeting transcript discloses further discussion about Tohono’s secret Phoenix casino project- “this is kind of a confidential deal.” Few people know about it “because, again, it’s limited because of the confidentiality situation.”*

*August 22, 2002 – VDI meeting minutes discuss the purpose of the meeting was to update Board members who did not attend “yesterday’s meeting with the [Nation’s] Gaming Board, the Commerce Committee, TON Chairman, Investment Committee Chairperson and the Treasurer. The [State of Arizona] governor wants to reduce the total numbers of casinos; every Tribe had one casino taken away except TON….”*

*August 22, 2002 – VDI meeting transcript shows discussion; “Because if that’s going to be the position of the State, they don’t want any more casinos around the Phoenix area, then they’re going to fight it….Which is why we really want to wait until the initiative passes before it gets out.”*

The 17 Tribes and the Arizona Indian Gaming Association (AIGA) continued their political campaign seeking Arizona voter approval of the negotiated compact in Prop 202. AIGA published and widely distributed a campaign pamphlet for voters entitled “*Answers to Common Questions,*” which stated that “major funding” for the voter pamphlet was provided by Tohono O’odham and three other tribes. Tohono O’odham contributed approximately $1.8 million in support of the campaign and was listed as a supporter of the Prop 202 campaign materials. The voter pamphlet, paid for in part by Tohono, explained to voters:

“**Q. Does Prop 202 limit the number of tribal casinos in Arizona?**

1. **Yes. In fact, Prop 202 reduces the number of authorized gaming facilities on tribal land, and limits the number and proximity of facilities each tribe may** **operate.** **Under Prop 202, there will be no additional facilities authorized in Phoenix,** **and only one additional facility permitted in Tucson**.”

*September 4, 2002 – Tohono’s corporation, VDI, received a casino Feasibility Report from their California gaming consultant who had secretly inspected all seven existing Phoenix-metro area casinos. The Report recommended that the Tohono casino not be “located…further west that the Glendale area” because it “would attract two to three times more volume” than other possible west Phoenix sites.*

September 14, 2002 – The Arizona Republic ran an article that included a statement by Arizona Governor Hull that **“[v]oting ‘yes’ on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area…for at least 23 years**.”

*September 19, 2002 – VDI meeting transcript reflects alarm about a possible leak of information. “So there is some type of information going out or a leak.” Discussion emphasized that possible leaks about the secret plan are “still a concern out there, especially prior to the propositions coming up for election….So we just need to be careful about, you know, things getting out and spoiling it.”*

The official Secretary of State’s Voter Guide for the November 5, 2002 General Election provided arguments for and against adoption of Proposition 202. Arizona Governor Hull urged approval of Proposition 202, explaining to voters:

“**Voting ‘yes’ on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area** and only one in the Tucson area for at least 23 years. Proposition 202 keeps gaming on Indian Reservations and does not allow it to move into our neighborhoods.”

In the Voter Guide, Arizona Attorney General Janet Napolitano also argued for approval of Proposition 202, stating: “**Most Arizonans believe casino gaming should be limited to reservations**. I agree…. [Prop 202] also prevents the introduction of casino gaming, such as slot machines, by private operators into our neighborhoods.”

September 25, 2002 – According to an Arizona Department of Gaming Memorandum dated October 2, 2002, a Town Hall meeting was held in Tucson moderated by a representative from Governor Hull’s office. The purpose of the meeting was to discuss the pros and cons of the gaming propositions on the ballot. According to the Memorandum, current Tohono O’odham Chairman, Mr. Ned Norris, represented the Tohono O’odham Nation. The Memorandum recounts that “**Mr. Norris said that 201 [a competing ballot proposition] will open gaming into cities and that the citizens of Arizona have, repeatedly over the years, expressed their desire to keep gaming on the reservation**.”

September 29, 2002 – The Arizona Republic reported that Proposition 202 **“stipulates that no more casinos could be built in Maricopa County.**”

October 22, 2002 – The Arizona Republic ran an unsigned editorial stating that **Proposition 202 “would not allow any new casinos to be built in the metropolitan Phoenix area**.”

October 23, 2002 – The Arizona Republic ran an article reporting that **Proposition 202 “would not permit any new casinos in Maricopa County.**”

*October 25, 2002 – VDI meeting transcript shows discussion about the secret casino plan and that “we are…a week and a half, two weeks away from the vote….And you know, assuming that* *it is [Prop] 202 that passes, then, you now, we’ll proceed in how we need to make that project develop.”*

October 28, 2002 – David LaSarte, Executive Director of the Arizona Indian Gaming Association, appeared on television and stated that “**They [the 17 Tribes Coalition] voluntarily made it so that there will be no new casinos in Phoenix.**”

*October 29, 2002 – VDI notes of a meeting with Tohono San Lucy District Council, attended by Mr. Curry, Tohono Assistant Attorney General and its lead compact negotiator, reflect, “Hold off until the election is over.” Transcript continues, “again, you know, propositions are about to be voted on November 5th….[W]e have been told, you know, that this information should be held in confidence, because they are concerned regarding information leaking out.”*

November 5, 2002 – Arizona voters narrowly approved Proposition 202 by a vote of 50.9% to 49.1%. Between November 1999 and December 2002, Arizona Tribes met privately over 85 times on compact negotiations and the voter campaign. During the same period, Tribes had over 35 meetings with the State regarding compact negotiations and the voter campaign.

November 6, 2002- An Article published by the Tucson Citizen reported that Prop 202 was approved by the voters. Tohono O’odham Nation Chairman at the time, Edward Manuel, who signed the 1999 *Agreement in Principle* among Tribes, was quoted as saying: “To us, this is a major victory. We stayed together. We stayed united. We will try to keep working on that to keep the unity together.”

December 4, 2002 – One month after voters approved Proposition 202, Tohono O’odham signed its new compact.

*February 10, 2003 – Transcript of VDI’s meeting shows discussion regarding the new compact: “[T]he compact has been signed, and so there are no more real concerns that might jeopardize our chances on this discussion. So I think they’re ready to move forward.”*

*February 21, 2003 – VDI memorandum to Tohono’s San Lucy District Council: “Due to the push by the Commerce Committee, Gaming Authority, and the Nation to move forward with the West Phoenix Project, we felt the need to provide a written update now…TOGA [Gaming Authority], Commerce Committee, and the Chairman made a very big commitment to move and push this project as quickly as we can so that we do not miss out on the opportunity.”*

*February 23, 2003 – VDI Minutes reflect discussion of possibly using the Gila Bend Act to acquire land and build a casino in the Phoenix-metro area, “but politically we might have problems. If we decide to, we need to put in escrow and it needs to be kept confidential for the time being.” VDI meeting transcript reflects this discussion: “I just hope too that, in terms of the political (inaudible) that’s going to be coming, that some of the metro tribes over there don’t come back and jump on us too….Might Gila River or Salt River indicate that it’s a violation of the 202 (inaudible) metro area [inaudible]?...Well that’s what I said in terms of the political impact, is that even- even those metro tribes, particularly those three that are right there, might – might say something. But that’s a big question mark. That’s all.”*

*March 12, 2003 – Tohono created a shell corporation in the State of Delaware in order to secretly buy land for a Phoenix-metro area casino.*

*August 21, 2003- Tohono’s Delaware shell corporation bought the 54-acre parcel in the Phoenix-metro area.*

In January 2009, Tohono announced its intentions and filed its application to acquire the 54-acre Phoenix-metro parcel in trust as a reservation. Upon hearing of Tohono O’odham’s plans to open a casino in the Phoenix-metro area, many Arizona Tribes who for several years had negotiated the compact with Tohono signed letters and passed resolutions formally opposing the plan, including the (1) Ak-Chin Indian Community, (2) Fort McDowell Yavapai Nation, (3) Gila River Indian Community, (4) San Carlos Apache Tribe, (5) Tonto Apache Tribe, (6) White Mountain Apache Tribe, (7) Salt River Pima-Maricopa Indian Community, (8) Pueblo of Zuni, (9) Hualapai Tribe, (10) Cocopah Tribe, (11) Quechan Tribe, and the (12) Yavapai-Apache Nation. The reasons given by all these tribes was that Tohono’s plans violated the promises made by Tribes to Arizona voters in Prop 202 and threatened tribes’ exclusive right to operate casinos in the state.

On April 29, 2011, the member Tribes of the Arizona Indian Gaming Association passed a formal Resolution reaffirming the Tribes’ Proposition 202 promises. Predictably, Tohono voted against the Resolution.

Then, on June 29, 2011, in the State’s litigation against Tohono O’odham, Tohono filed an Answer in court which admitted that in the midst of the Prop 202 campaign conducted by the 17 Tribes including Tohono O’odham - a campaign for approval of a compact that would require other Tribes to reduce the potential number of casinos in the Phoenix metro area – Tohono was simultaneously trying to buy Phoenix-metro land for a casino. Tohono O’odham also admitted that various parties “characterized the provisions of Proposition 202 requiring most tribes to give up the right to one gaming facility as ‘no additional facilities authorized in Phoenix, and only one additional facility permitted in Tucson’ and that Tohono O’odham did not contradict those statements.” Tohono admitted “that it participated in the negotiations that led to Proposition 202, supported Proposition 202, and entered into a new compact in 2002 after the voters approved Proposition 202.” Finally, Tohono admitted “that in 2002 it was considering the possibility of acquiring property in the Phoenix metropolitan area for gaming purposes; that it did not disclose that it was considering such an acquisition; and that it had no obligation to make such a disclosure” to other Tribes, to the State, or to the voters.

Tohono Chairman Norris has not denied, because he could not, that the 17 tribe coalition had made promises directly to the Arizona voters that there would be “no additional casinos in the Phoenix metropolitan area.” Remarkably, when confronted, his response to some of these Tribes was, “those are just words on a publicity pamphlet.” As children, one of the most fundamental and important lessons we all learned from our parents was, “keep your promises.” This principle has been taught for millennia. “Never promise more than you can perform.” (Publius Syrus, First Century B. C., Maxim 528). Dishonesty finds no haven, even in publicity pamphlets.

It is not an easy thing to talk about a lack of “good faith”, and we do so reluctantly. However, we ask the Senate to act on H.R. 1410, so that in future years, we will not have to look back and say to our children that “we should have done something.”

1. **Commercial Gambling Interests Have Long Opposed Tribal Gaming Exclusivity in Arizona**

Commercial gambling interests have worked to get authorization through legislative action or an Initiative to conduct commercial gaming in Arizona since the first tribal compacts were signed in 1993. Due to the concerted and persistent efforts of Arizona Tribes, these efforts have failed to date. If Congress fails to act to stop Tohono’s effort to open a casino and, as a result, Tribes are viewed by the Legislature or public as breaking the promise that there would be “no additional casinos in the Phoenix-metro area,” Tribes very likely will not be able to defeat efforts to open up the State to commercial gaming. Tribes would no longer have exclusivity, and all Tribes, both gaming and non-gaming would be significantly harmed.

To get a sense of this on-going threat to our Tribal gaming exclusivity, we highlight below a brief snapshot of the recent activity targeted to bringing commercial gaming to Arizona off of reservations.

Article, *Racino: A key budget option for the Arizona Legislature*, J. Heiler, July 21, 2009

Article, OpEd, *Senator Steve Pierce: Boosting Arizona’s Economy, How Racinos Could Save Our State*, S. Pierce, May 12, 2011

Editorial, *Racinos Could Bring Much-Needed Revenue*, The Daily Courier, January 20, 2011

Editorial, *Maybe Racinos Aren’t Such A Bad Idea*, The Paulick Report, January 27, 2011

*Application to the Arizona Secretary of State for an Initiative Petition* (to “permit[] racetracks and private casinos to operate in Arizona”), C. Nicholson, December 9, 2011

H.B. 2220, First Regular Session 2011, Arizona House of Representatives, Relating to Horse and Dog Racing

Committee on Natural Resources and Rural Affairs, Arizona State Senate, First Regular Session, Hearing scheduled for October 30, 2013 on “*Discussion of 2002 Ballot Initiative Proposition 202,*” (Hearing later cancelled)

S. B. 1468, Second Regular Session 2014, Arizona Senate, Relating to Gambling

The primary organization that Arizona Tribes formed to promote their common interests in Indian gaming is the Arizona Indian Gaming Association (AIGA). In 2009 in response to specific threats from commercial gaming companies, including out of state racino operators, Arizona Tribes also formed Arizonans for Tribal Government Gaming (ATGG). (I am currently the Chair of ATGG and on the Executive Committee of AIGA.)

A critically important mission of both AIGA and ATGG is combatting the efforts of commercial gaming interests, from both within the State of Arizona and outside the State, to gain a foothold in Arizona. Countless hours and many millions of dollars have been spent to combat these efforts. Given Arizona’s burgeoning population and particularly the population concentration in the Phoenix metropolitan area, we know that Arizona is a prime target for the expansion of commercial gaming.

Historically, when commercial gaming interests attempted to expand into Arizona, they would target the Tribes’ exclusivity as an argument in favor of their expansion efforts. These arguments have never succeeded with the Legislature or the voters because they understand that tribal gaming on reservations was unique and limited and that the Tribes had a well-established track record of delivering on their promises and honoring the terms of their compacts. If the Tribes are now viewed, due to the claims of sovereign immunity and deceit of the Tohono O’odham, as breaking their promises and engaging in off reservation gaming, then these arguments will gain credence and the Tribes’ exclusivity will be forever lost.

1. **The Tohono O’odham Nation’s Deceit is Calculated to Break Promises Made to the State of Arizona and the Voters of Arizona and Prop up Their Thriving Gaming Enterprise**

Tohono O’odham’s actions constitute the deliberate effort of one tribe to use deception and sovereign immunity as political tools to make and break promises for pecuniary benefit. The Tohono O’odham Nation already has very successful gaming enterprise. Tohono O’odham maintains two casinos in the Tucson metropolitan area and an additional casino in Why, Arizona. Additionally, under the current gaming Compact, Tohono O’odham is allowed to develop a fourth casino on their existing reservation lands, including in the Tucson metropolitan area. H.R. 1410 would not impact the Tribe’s existing three casinos or impact its ability to develop a fourth casino on its existing reservation or on its aboriginal lands.

Tohono O’odham’s success in gaming goes back to early 1992, when the State of Arizona and certain Arizona tribes, including Tohono O’odham were at a standoff regarding Indian gaming in the State. To overcome legal challenges and political opposition, the tribes repeatedly made statements that no gaming could occur outside of existing reservations without the concurrence of the Governor. During Federal District Court mediation with the State in 1993, Tohono O’odham submitted a document, “Comparison of Compact Proposals,” which argued that the State of Arizona’s insistence on compact provisions requiring the Governor’s concurrence for any off-reservation gaming was unnecessary because “existing federal law requires the Governor’s concurrence. This is adequate protection to the State and local interests.” Tohono O’odham Nation’s Comparison of Compact Proposals at 11, No 93-0001 PHX (D. Ariz. Jan. 19, 1993). In a brazenly calculated reversal, Tohono O’odham now claims that a legal loophole allows it to unilaterally pursue a casino off existing reservation lands without the concurrence of the Governor of Arizona or any input from any of the local communities.

Further, on June 8, 1993, tribal representatives met with staff for the State legislature and provided a handout entitled “After Acquired Lands,” which stated that “[a]nother exception to the prohibition of gaming on after acquired lands is when the lands are taken into trust as part of a settlement of a land claim. This will not effect [sic] Arizona because aboriginal land claims in Arizona have already been settled pursuant to the Indians Claims Commission Act of 1946.” The handout was distributed on behalf of all tribes present, including Tohono O’odham. Once State officials had received these assurances, the Governor of Arizona entered into gaming compacts with the tribes to allow tribal gaming in Arizona.

Tohono O’odham has also asserted, through its attorneys, its right to open all four of its authorized casinos in the Phoenix metropolitan area on land acquired under the Gila Bend Act. These brazen contentions demonstrate that Tohono O’odham intends to repeat its pattern of deception wherever advantageous, and will do so regardless of the promises made or the toll on all other Arizona tribes. This deliberate policy of deceit, which is calculated to avoid court review, leaves Congress as the only forum that can protect the promises made to the people of Arizona.

1. **Congress is the Only Institution that Can Provide Accountability on this Matter**

Tohono O’odham made the calculated decision of using sovereign immunity as a shield to preclude any review of its deceitful actions during the compact negotiations and Prop 202 campaigns of the early 2000’s. While Tohono tells members of Congress to let the court address this matter, in court, Tohono argues that the court does not have the jurisdiction to review its actions. Definitive action by Congress is therefore necessary to resolve, once and for all, the intent of the Arizona gaming compacts and more importantly, preserve the deal that was struck in 2002.

The State of Arizona filed a complaint in federal court against Tohono O’odham in 2011 alleging that Tohono “had a secret plan at the time it was negotiating the Compact to build a gaming facility in the Phoenix metropolitan area…, notwithstanding its contrary representations” to the State and the public. These “representations induced the State to enter into the Compact, and the State would not have signed the Compact had it known of the Nation’s plans.” In another claim, the State alleged that the Nation “materially and fraudulently misrepresented that it had no plans…to open a gaming facility in the Phoenix metropolitan area,” and that the “State’s assent to the Compact was induced by the Nation’s misrepresentations and intentional failures to disclose material facts.”

The Tohono O’odham raised tribal sovereign immunity and completely avoided scrutiny of legal claims filed by the State of Arizona that Tohono acted with fraud in negotiating its gaming compact, misrepresented facts during the negotiations, and made promises intending that the State rely on them to its detriment. Due to sovereign immunity, the federal court dismissed the fraud, misrepresentation and promissory estoppel claims, even though the court stated that “Plaintiffs’ evidence would appear to support a claim for promissory estoppel [but] it is barred by sovereign immunity.”

On May 27, 2014, the U.S. Supreme Court decided a remarkably similar case, *Michigan v. Bay Mills Indian Community*. The Court, in a 5 to 4 decision, ruled that the Bay Mills Tribe could assert tribal sovereign immunity and avoid claims filed by the State of Michigan that the Tribe’s off-reservation casino was illegal. The Court repeated several times that it was up to Congress to fix the problem of a tribe asserting sovereign immunity to avoid legal claims by a State regarding illegal gaming:

**“The Constitution grants Congress powers we have consistently described as plenary and exclusive to legislate in respect to Indian tribes…. Thus, unless and until Congress acts, the tribes retain their historic sovereign authority.”**

**“Our precedents…had established a broad principle, from which we thought it improper suddenly to start carving out exceptions. Rather, we opted to defer to Congress about whether to abrogate tribal sovereign immunity for off-reservation commercial conduct.”**

**“Congress exercises primary authority in this area and remains free to alter what we have done….”**

**“[I]t is fundamentally Congress’ job, not ours, to determine whether or how to limit tribal immunity.”**

**“[W]e decline to revisit our case law, and choose instead to defer to Congress.”**

Opinion at 5, 7, 16, 17, and 21 (internal citations and quotations omitted).

More succinctly, Justice Scalia dissented and wrote:

**In *Kiowa Tribe of Okla. V. Manufacturing Technologies, Inc.,* 523 U.S. 751 (1998), this Court expanded the judge-invented doctrine of tribal sovereign immunity to cover off-reservation commercial activities. I concurred in that decision…. I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious…. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa*….**

While the co-sponsors of H.R. 1410 and the Arizona tribes who support it, must reluctantly be critical of Tohono’s conduct here, it is hard to avoid the fact that Tohono has, from the outset, repeatedly thwarted the normal process for obtaining federal approval of Indian gaming, and used sovereign immunity as a shield to insulate it from the State’s claims against it for fraud in the inducement, material misrepresentation, and promissory estoppel. Enactment of H.R. 1410 would in no way abrogate Tohono’s sovereign immunity. That facet of its tribal sovereignty will likely remain intact in any current litigation surrounding this issue. Any circumstance where a court would find that immunity to have been abrogated would not arise because of the Keep the Promise Act. Passage of H.R. 1410 would obviate the need for the State to continue its suit against Tohono and might result in dismissal of their claims but this would not result from any repeal of sovereign immunity pursuant to the Keep the Promise Act. In fact, the intent of H.R. 1410 is to address the issues underlying the fraud, misrepresentation, and promissory estoppel claims without piercing Tohono’s immunity. However, as the branch of the Federal government with plenary power over Indian affairs, it is well within Congress’ authority to enact this legislation. It is the merits of these claims that the Keep the Promise Act is seeking to address and Congress is the only institution that can provide accountability in this matter.

1. **Conclusion**

The Salt River Pima Maricopa Indian Community urges Congress to pass H.R. 1410. It is needed to reaffirm the promise that the tribes of Arizona made to each other, the State of Arizona and voters that there would be “no additional casinos in the Phoenix metropolitan area” for the duration of the existing compacts. The clarification does not interfere with Tohono O’odham’s desire to have land taken into trust. It upholds the status quo in Arizona and does not adversely affect any tribe. Without this bill, the other Arizona Tribes will suffer because the current gaming compact structure will absolutely be compromised. We support this legislation.

1. *See e.g.*, the Rhode Island Indian Claims Settlement Act, ratifying an agreement between the State of Rhode Island and the Narragansett Tribe, and settling the Tribe’s land claims, was enacted in 1978 without a provision regarding gaming. 25 U.S.C. § 1701 *et seq.*  Congress subsequently amended the Rhode Island Indian Claims Settlement in 1996 to explicitly prohibit gaming pursuant to IGRA. *See* 25 U.S.C. § 1708(b) (“For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands”). S*ee also*, the Colorado River Indian Reservation Boundary Correction Act, to clarify or rectify the boundary of the Tribe’s reservation while also including a provision prohibiting gaming (“Land taken into trust under this Act shall neither be considered to have been taken into trust for gaming nor be used for gaming (as that term is used in the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)”), Pub. L. 109-47 (Aug. 2, 2005); Congress passed legislation to waive application of the Indian Self-Determination and Education Assistance Act to a parcel of land that had been deeded to the Siletz Tribe and Grand Ronde Tribe in 2002 but also included a gaming prohibition provision (“Class II gaming and class III gaming under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not be conducted on the parcel described in subsection (a)”) Pub. L. 110-78 (Aug. 13, 2007); Congress clarified the Mashantucket Pequot Settlement Fund, 25 U.S.C. § 1757a to provide for extension of leases of the Tribe’s land but provided that “No entity may conduct any gaming activity (within the meaning of section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703)) pursuant to a claim of inherent authority or any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq) and any regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission pursuant to that Act) on any land that is leased with an option to renew the lease in accordance with this section.”), Pub. L. 110-228 (May 8, 2008); Congress passed the Indian Pueblo Cultural Center Clarification Act which amended Public Law 95-232 to repeal the restriction on treating certain lands held in trust for the Indian Pueblos as Indian Country with the explicit clarification that although it was Indian Country it could not be used for gaming (“Gaming, as defined and regulated by the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), shall be prohibited on land held in trust pursuant to subsection (b).”) Pub. L. 111-354 (Jan. 4, 2011). [↑](#footnote-ref-1)
2. *See* H.R. 931, a bill to amend the Siletz Tribe Indian Restoration Act with the caveat that “any real property taken into trust . . . . shall not be eligible, or used, for any gaming activity carried out under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)”; H.R. 841, a bill to make technical corrections to the Grand Ronde Reservation Act but stipulating that no acquisitions made under the Act will be eligible for gaming unless they are located within a very narrow geographic area; H.R. 3313, the Santa Ynez Band of Chumash Mission Indians Land Transfer Act of 2013, which would authorize the acquisition of trust land for the benefit of the Santa Ynez Band of Chumash Mission Indians but explicitly prohibits the Tribe’s right to game on those lands “1) as a matter of claimed inherent authority; or 2) under any Federal law, including the Indian Gaming Regulatory Act . . . .”; S. 2465, the Albuquerque Indian School Land Transfer Act, which would require the transfer of four parcels of Federal land in trust for the benefit of the nineteen (19) Indian Pueblos in the State of New Mexico while noting that the lands cannot be used for gaming; and H.R. 1225, the Samish Indian Homelands Act of 2013, which would direct the Secretary of the Interior to place certain lands into trust for the Samish Indian Nation while providing that “the Tribe may not conduct on any land taken into trust pursuant to this act any gaming activities (1) as a matter of claimed inherent authority; or (2) under any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) (including any regulations promulgated by the Secretary or the National Indian Gaming Commission pursuant to that Act)).” [↑](#footnote-ref-2)
3. The other bill is the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2013 (S. 1074 and H.R. 2190), which would provide federal recognition to a number of Virginia tribes but not allow those tribes to game. [↑](#footnote-ref-3)