WRITTEN TESTIMONY
of
GOVERNOR GREGORY MENDOZA, GILA RIVER INDIAN COMMUNITY
on
S. 2670 THE KEEP THE PROMISE ACT OF 2014
Senate Committee on Indian Affairs
September 17, 2014

Chairman Tester, Vice Chairman Barrasso and members of the Committee, I want to thank you for inviting me to testify on behalf of the Gila River Indian Community (Community) regarding S. 2670, the Keep the Promise Act of 2014. Swift enactment of this overwhelmingly bipartisan legislation is critical to protecting the existing system of tribal gaming in Arizona. That system is now under threat because the Tohono O'odham Nation (Tohono O'odham or Tribe) has broken ground on a casino project in the Phoenix metropolitan area that would unilaterally destroy the commitment made by Arizona tribes that there would be no additional casinos in that area until 2027.

In July, the Committee heard extensive testimony about why the Keep the Promise Act is necessary to protect the future of Indian gaming in Arizona. There was testimony about how Tohono O'odham used negotiations for the current tribal-state compact in Arizona to advance a secret plot to open a casino in Phoenix while telling the State officials and Arizona voters that there would be no more casinos in that very area. The Committee also heard how Arizona's desire to limit gaming in urban areas was exploited by Tohono O'odham, which recognized that tribes like the Community agreed not to open new casinos in Phoenix. Now, we also know that Tohono O'odham kept their plans secret for almost a decade while the State, local cities, and Arizona tribes relied and invested millions of dollars based upon the commitment of no additional casinos in the Phoenix metropolitan area.

By prohibiting gaming on tribal lands acquired in trust status after April 9, 2013 within the Phoenix metropolitan area until January 1, 2027, this bill maintains the commitments and promises that were relied upon during negotiations of the current gaming compacts for the duration of those compacts, which begin to expire in late 2026. It must be clearly understood that the bill does not prohibit Indian gaming on the lands beyond the sunset date of January 1, 2027 and does not prevent lands from being taken into trust status for Indian tribes. At its core, S. 2670 is a bill that would protect the agreed upon system of Indian gaming in Arizona and would prevent fraud from being committed upon tribes, local governments, and voters. Tohono O'odham has been trying to open a casino far outside its aboriginal territory and within the Phoenix metropolitan area since 2002 when it promised the State, voters, and Arizona tribes that there would be no additional casinos in this area. The promise is important because the voters of Arizona authorized a system of gaming in 2002 when the tribes essentially obtained a legal monopoly on gaming in the State, a monopoly that has benefited all Indian tribes in the State, gaming and non-gaming. But in return, the voters wanted to set a hard cap of seven casinos that would be in the Phoenix metropolitan and no more. Additionally, the voters wanted certainty about the potential proliferation of gaming, and thought that they had achieved that certainty by limiting gaming to Indian tribes on Indian reservations as they existed at the time of their vote in 2002.

To be clear, no one is trying to prevent Tohono O'odham from acquiring replacement lands pursuant to the 1986 Gila Bend Indian Reservation Lands Replacement Act ("Gila Bend Act"), Pub. L. 99-503. But, we do believe that such replacement lands should be within the aboriginal territory of Tohono O'odham and that the Tribe should not be able to utilize the 1986 law to violate the commitments and promises relied upon during the negotiations of the existing gaming compacts in Arizona.

Contrary to the testimony of Tohono O'odham, S. 2670 would not create liability for the United States or constitute an unlawful taking that would trigger constitutional protection because it is well within Congress' plenary power over Indian affairs to defend and protect the promises that tribes publicly make to obtain gaming. There is no Fifth Amendment right for tribes to violate their own promises on which other tribes and the State have relied. The Fifth Amendment does not curtail Congress's authority to protect the compacting process from broken promises and misrepresentations. To suggest otherwise is disingenuous. S. 2670 was narrowly crafted to preserve promises made during the negotiation of the existing tribal-state compact and to clarify them in a manner that is consistent with federal precedent related to the regulation of gaming on Indian lands.

We have come to Congress because you are the only entity that can provide justice in this situation. Congress allowed tribes to be sued for violations of gaming compacts once they are signed. Unfortunately, Congress did not anticipate situations like this, where a tribe commits fraud during compact negotiations. Further, the Interior Department indicates that they cannot resolve this matter because Congress, through the 1986 law, mandates them to take the Phoenix area land into trust for Tohono O'odham.

We wish we did not have to come to Congress to address this matter, but we are here because you are our only option.

THE KEEP THE PROMISE ACT PROTECTS ALL ARIZONA TRIBES

The policy objective of the Keep the Promise Act is simple, to preserve the existing model tribal-state compact that all Arizona tribes agreed to abide by and game under. Arizona's model compact is unique because it struck a delicate balance between the competing interests of the Governor, who wanted to stop the spread of gaming in cities, and Tribes, who wanted tribal exclusivity for gaming. Under the model compact the Governor agreed to tribes' exclusive right to conduct casino gaming provided certain conditions were met. These conditions include: (1) overall limits on the number of gaming devices and casinos; (2) a maximum number of gaming devices per casino; (3) specific limits on the number of casinos located in or near Phoenix and Tucson; (4) revenue-sharing arrangements between rural tribes with no casinos and tribes with casinos in urban markets; and (5) revenue-sharing arrangements between the State and Arizona tribes.

Importantly, in return for rural tribes agreeing to limits on gaming in the Phoenix and Tucson metropolitan areas, and for giving up an opportunity to seek off-reservation gaming near these lucrative markets, they are able to share in gaming revenues generated in these markets through machine transfer agreements (i.e., lease their machine rights to urban tribes). As a result, the rural non-gaming tribes receive revenues from gaming tribes located in the metropolitan

markets. There are six tribes in Arizona that currently benefit under machine transfer agreements: Havasupai, Hualapai, Kaibab-Paiute, Navajo, San Juan Southern Paiute, and Zuni. As tribes that struggle with severely limited economic opportunities, these funds are essential to many of the rural tribes. Each year, these tribes receive a combined amount that exceeds $30 million to provide basic services to their tribal members. These tribes rely on stable machine transfer revenue and stand to be hurt the most by Tohono O'odham's proposal.

Although the impact of Tohono O'odham's proposed casino will reverberate throughout Arizona, it will be felt most severely by these rural tribes who depend on revenue from transfer agreements that are only possible because through the model compact. These rural tribes are concerned about the Tohono O'odham's casino because of another feature of the model compact that is commonly referred to as a "poison pill." This provision essentially states that if the tribal gaming monopoly is disrupted in any way – i.e., if Arizona expands gaming to private non-Indians interest – tribes may then operate casinos free of any conditions imposed upon them by the model compact. If non-tribal gaming is authorized, then the existing caps on facilities and machines will disappear and there will be no requirement or reason for urban tribes to lease machines from, and share revenue with, rural tribes.

Rural tribes will not be the only tribes hurt if non-tribal gaming is authorized in Arizona. Small market gaming tribes will also suffer because gaming consumers would stop traveling to reservations for gaming, and would instead visit non-tribal casinos, which will likely be located in cities.

Commercial gaming interests have been clamoring to expand into Arizona since the 1990's and have long targeted tribal exclusivity as an argument in favor of their efforts. As Glendale Mayor Jerry Weirs told this Committee in July, "if gaming happens in Glendale, there will be a strong effort in the Arizona legislature to authorize non-Indian gaming in the State." It isn't just a position held by Mayor Weiers. There have been numerous bills introduced in the Arizona legislature in recent years to authorize non-tribal gaming, as well as a steady stream of editorials and articles calling for an end to tribal gaming exclusivity. The bottom line is that tribes, Arizona citizens, and commercial gaming interests view Tohono O'odham's plan as breaking all Arizona tribes' solemn promise not to open new casinos in the Phoenix metropolitan area under the current model compact. The opening of the Glendale casino will destroy Arizona tribes' credibility among voters and lawmakers, and will be used to justify the end of tribal exclusivity.

The Community will be negatively impacted if the Tohono O'odham opens up one or more casinos in the Phoenix-metro area. If the Tohono O'odham is successful we will have to make budget cuts that will impact our general welfare programs and employment opportunities for our members. These cuts will be especially severe if non-tribal gaming is also authorized. However, the Community will be able to weather the storm far more easily than rural non-gaming tribes who rely most on the current revenue sharing system.

In contrast to all other Arizona tribes, Tohono O'odham has a strong incentive to end the conditions under the model compact. Tohono O'odham maintains that it can operate all of its casinos in Phoenix metropolitan area. If the Tribe successfully establishes one casino in the Phoenix area and subsequently moves the rest of its existing casinos to the area, it would not

want market parity. Instead, it would want to create large mega-casinos to dominate the market. Tohono O'odham can accomplish market domination if the limitations in the model compact regarding the number of gaming machines in each casino go away.

Given Tohono O'odham's established gaming presence and its ability to unilaterally cherry-pick strategic locations in the area, it would have an overwhelming head start in any race to establish new gaming facilities in the area should gaming expand to include non-Indian interests. Thus, it would be entirely in Tohono O'odham's interest to have the "poison pill" provision triggered and eliminate restrictions on tribal gaming altogether. Tohono O'odham would then be the only tribe in Arizona able to compete with non-Indian gaming interests on equal footing.

Because Arizona law does not allow two-part determinations,[1] all other tribes would have difficulty competing in this new market and would be forced to attempt to relocate to the urban markets under dubious legal theories or face massive losses in revenue. With Tohono O'odham dominating the Phoenix market, while at the same time facing competition from non-Indian gaming interests, all other Arizona tribes would either suffer drastic cuts to tribal member services, or could be forced to shutter their gaming facilities altogether. The latter is especially true for the outlying small market tribes. Gaming competition among tribes would not increase; rather, Tohono O'odham would become the sole winner among Arizona tribes.

THE KEEP THE PROMISE ACT WOULD NOT CREATE NEGATIVE PRECEDENT

The Keep the Promise Act does not jeopardize tribal sovereignty nor create negative precedent for Indian Country. Congress routinely creates laws that restrict the ability of tribes to conduct gaming through several types of legislation. The Department often supports these bills even though they include the explicit limitations on an affected tribe's right to game. Accordingly, any arguments that S. 2670 constitutes dangerous precedent are inconsistent with common Congressional practice and are without merit.

Congress has enacted these clarifications through statutes intended to shed light on earlier legislation and settlements, prohibitions included in land-into-trust transfers, and restrictions included in federal recognition and restoration legislation. In 2011, Congress enacted the Indian Pueblo Cultural Center Clarification Act, which amended Public Law 95-232. The clarification repealed language in an early statute and provided that lands acquired in trust for certain Indian Pueblos would be treated as Indian Country, except for the purpose of gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*. Three years earlier, in 2008, Congress clarified the Mashantucket Pequot Settlement Act to provide for the 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

[1] *See* Ariz. Rev. Stat. Ann. § 5-601(C) (prohibiting the Governor from concurring in any determination by the Secretary that gaming may be permitted on Indian lands within Arizona under 25 U.S.C. § 2719(b)(1)(A)); *see also* 25 U.S.C. § 2719(b)(1)(A) (permitting gaming on Indian lands acquired in trust after October 17, 1988 where the Secretary consents and the Governor of the state in which the Indian lands are located subsequently concurs that gaming may take places on the lands in question).

of inherent authority or any Federal law . . . . on any land that is leased with an option to renew the lease in accordance with this section."). In 1978, Congress settled the Narragansett Tribe's land claims through the Rhode Island Indian Claims Settlement Act, which did not include a provision regarding gaming. 25 U.S.C. § 1701 et seq. Congress subsequently amended the Rhode Island Claims Settlement Act in 1996 to unilaterally clarify that lands acquired by the Narragansett pursuant to the Settlement Act "shall not be treated as Indian lands" for the purpose of gaming under IGRA. 25 U.S.C. § 1708(b). The practice of amending existing agreements has persisted until today.

Congress has also passed numerous tribe-specific and area-specific laws to restrict gaming in recent years. In 2012, Congress enacted Public Law 112-97 to provide lands that would ensure flood and tsunami protection for the Quileute Indian Tribe. The law transferred lands to the tribe in trust but stipulated that the tribe may not use the land for any commercial purposes and may not build any commercial or permanent structures on the land. This prohibition has the effect of preventing the tribe from exercising its right to game on the land. Two years earlier, Congress passed the Hoh Indian Tribe Safe Homelands Act, Public Law 111-323, which transferred federal and non-federal land to the Hoh Indian Tribe. The legislation specifically provided that "[t]he 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 . . . ."

This continues to be a consistent practice of Congress and is one that the Department has vocally supported in the past. This Congress alone, there have been two laws enacted to place lands in trust on behalf of Tribes while simultaneously prohibiting the benefitting Tribes from using the lands for gaming. Public Law 113-127, which placed 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 testified in support of the bill despite its prohibition on gaming. Separately, Public Law 113-134, the Pascua Yaqui Tribe Trust Land Transfer Act, placed Federal land into trust for the benefit of the Pascua Yaqui Tribe while stipulating 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 . . . ."

These examples demonstrate that it is appropriate and routine for Congress to enact legislation to clarify earlier statutes and limit gaming pursuant to IGRA in appropriate circumstances. Given the near universal opposition to the proposed Glendale casino, the Keep the Promise Act will not create harmful precedent and is in line with Congress's role in legislating in Indian Country to accurately reflect congressional intent. Rather, bad precedent would be created by allowing Tohono O'odham to operate a casino that puts all other Arizona tribes at risk.

THE KEEP THE PROMISE ACT DOES NOT CREATE LIABILITY FOR THE UNITED STATES

Tohono O'odham contends that S. 2670 would subject the United States to a Fifth Amendment Takings Claim. This objection is premised on notion that when Arizona tribes obtained IGRA compacts by promising not to attempt to use those compacts to locate any additional casinos in the Phoenix area, the Fifth Amendment somehow protects their right to violate that very promise. This could not be further from the truth. It should go without saying that Congress does not *abrogate* gaming compacts or affect a Fifth Amendment taking when it *defends and protects* the promises tribes made publicly to obtain the compacts. Neither gaming compacts nor the Gila Bend Act include an inherent right to profit from States' and tribes' detrimental reliance on a tribe's promises during the compacting process. Simply put, there is no Fifth Amendment right for tribes to commit fraud while violating their own promises. The Fifth Amendment does not limit Congress' authority to preserve the integrity of IGRA's compact process from illegality.

Nonetheless, Tohono O'odham argues that S. 2670 will give rise to a successful takings claim against the United States, a claim that the Assistant Secretary was not willing to embrace during his response to the Committee's questions during the July 2014 hearing. Such a claim would argue that S. 2670 constituted "regulatory taking" by depriving TON of an economic use of its land and interfering with an investment-backed expectation. As a threshold matter, the Fifth Amendment's Taking Clause generally applies to federal actions that affect Indian property rights formally recognized by Congress. *See generally* 1-5 *Cohen's Handbook of Federal Indian Law* § 5.04[2][c]. However, the Supreme Court's opinion in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), established a multifactor analysis for courts to consider when weighing a regulatory taking claim. The *Penn Central* test has spawned different categories of regulatory takings but it is highly unlikely that TON could successfully argue that S. 2670 fits into any one of these.

Penn Central requires an *ad hoc* factual inquiry based on three factors: (1) "'the character of the governmental action'"; (2) "[t]he economic impact of the regulation on the claimant"; and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 538-539 (alteration in original (quoting *Penn Central*, 438 U.S. at 124). Mindful of Justice Holmes's oft-cited admonition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[,]" *Mahon*, 260 U.S. at 413, courts historically have applied *Penn Central*'s inquiry stringently.

First, the character of the governmental action that would give rise to TON's taking claim would likely weigh against an unconstitutional taking. S. 2670 was narrowly crafted so TON may still use the Glendale Parcel for commercial gain or otherwise, even if it cannot operate Class II or III gaming activities on the property. The proximity of the Glendale Parcel to the Arizona Cardinals stadium will allow Tohono O'odham to pursue a wide variety of lucrative economic development activities that will bring significant revenue. Viewed from that perspective, the legislation is more akin to a zoning regulation restricting a particular land use, which tends to withstand a Takings Clause challenge. *See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Moreover, here Congress is effectively regulating gambling in the public interest. The Supreme Court has long recognized the regulation of gambling to be a traditional exercise of police power. *See Lawton v. Steele*, 152 U.S. 133, 136 (1894). And under a much older Takings Clause regime, it has held that "'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the state or its agents, or give him any right of action." *Mugler v. Kansas*, 123 U.S. 623 (1887) (discussing prohibition of alcohol). It is of great consequence for purposes of this analysis that Congress has already placed substantial limits on Indian gaming unless done in accordance with the IGRA. If allowing gaming pursuant only to IGRA's strictures is Congress's baseline approach, then S. 2670 is consistent with that public policy insofar as it closes a loophole in IGRA that is only available to TON through its bad faith negotiations with other parties.

Second, the economic impact of the regulation would clearly be significant but Supreme Court decisions have "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993). Indeed, the Supreme Court has noted that a diminution in property value as high as 75% or even 92.5% may not be a sufficiently serious impact. *Id.* at 645. Because the Glendale Parcel can be put to a range of other profitable uses, a court may well give less weight to the impact of precluding Class II and III gaming activities. It is also relevant to this analysis that S. 2670 is temporally limited so any economic impact on Tohono O'odham's ability to use the Glendale Parcel for gaming would terminate on January 1, 2027 when all Arizona tribal-state compacts will need to be re-negotiated. Further, S. 2670 would not prevent Tohono O'odham from developing a fourth casino anywhere outside of the Phoenix metropolitan area. These points illustrate how the Keep the Promise Act was drafted to avoid a permanent impairment of any economic development opportunities, including gaming, so any action challenging the Keep the Promises Act would likely fail to demonstrate a credible Takings Claim.

Third, it is unlikely that TON will be able to establish that its investment-backed expectations rise above a "unilateral expectation or an abstract need," which would be critical to establishing a Takings Claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citation and quotation marks omitted). Several courts have recognized that gambling is a highly regulated industry and that it is difficult to hold reasonable investment-backed expectations in light of that regulation. *See, e.g., Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 (4th Cir. 2007) (holding no taking of slot machine property where South Carolina banned video poker after 25 years of allowing it because "Plaintiff's participation in a traditionally regulated industry greatly diminishes the weight of his alleged investment-backed expectations"); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (holding multi-million "devastating economic impact" of ban on TouchPlay machines to be "discounted" by "heavily regulated nature of gambling in Iowa). Tohono O'odham was well aware of the inherent riskiness of gaming ventures when they purchased the Glendale Parcel. This is likely why the parcel was purchased and kept secret until a more favorable political environment improved the likelihood of success for their scheme. The attenuated timeline of this project epitomizes the highly speculative nature of gaming projects.

Again, it would be difficult for TON to argue that IGRA and the 2002 Compact guarantee a right to game on the Glendale Parcel. The Gila Bend Act and its corresponding settlement agreement did not give Tohono O'odham a right to violate its own subsequent promises in the compacting process. The Gila Bend Act is silent with respect to gaming and it was also enacted two years *before* IGRA. Further, no one can make the credible argument that by regulating Las Vegas style gaming and making it subject to the Tribal-State compacting process, that IGRA constituted a breach of contract or a taking of federally recognized tribes' inherent right to game on tribal lands. Congress could preclude Indian gaming altogether and has already enacted IGRA to establish that tribal gaming is permissible only "if the gaming activity is not specifically prohibited by Federal law," 25 U.S.C. § 2701(5), and it contains several restrictions as to the location of gaming facilitates. All of that at least arguably puts tribes on notice that Congress may at any time enact additional restrictions on tribal gaming. Moreover, the 2002 Compact—which was negotiated between the Tribes and the State of Arizona—could not estop Congress from altering IGRA. *Cf. Sioux Nation*, 448 U.S. at 410-411 (affirming Congress's power to abrogate treaties with tribes). Simply put, "[t]he pendulum of politics swings periodically between restriction and permission in such matters [as gambling], and prudent investors understand the risk." *Holliday Amusement*, 493 F.3d at 411. Nothing in the Gila Bend Act bestowed any absolute right to locate a casino on Indian lands in Phoenix—much less did it enshrine a right to violate promises Tohono O'odham and other tribes later made in pursuit of IGRA compacts with Arizona in 1993 and 2002. IGRA, not the Gila Bend Act, defines the boundaries of Indian gaming authority, and just as Congress enacted limitations on such gaming in IGRA, it can legislatively protect the IGRA compacting process from the corrosive and profoundly destabilizing effect of unkept promises made to obtain a compact.

In sum, there are considerable arguments against the viability of a Takings Clause challenge to S. 2670 that stem from the narrow scope of the legislation, arguments that the Assistant Secretary seemed to tacitly acknowledge when he responded to the Committee's inquiries on the issue. The limited nature of the government's restriction, the continued economic viability of the Glendale Parcel, and the highly regulated nature of gaming present significant barriers to a regulatory taking claim.

S. 2670 WOULD NOT IMPACT PENDING LITIGATION

Tohono O'odham likes to tell Members of Congress to let the ongoing litigation run its course before taking any action on this matter. However, the Tribe fails to tell those very same Members that the courts are unable to adjudicate the essential claims in this matter because Tohono O'odham refuses to waive its sovereign immunity. Thus, S. 2670 would not interfere with ongoing litigation and Congress is the only entity that can resolve this issue.

Two lawsuits were brought after Tohono O'odham announced its intention to acquire lands into trust for an off-reservation casino in 2009. One lawsuit challenges the Tribe's ability to have the lands taken into trust status as an Indian reservation, and that lawsuit is near completion. The other lawsuit alleges that Tohono O'odham wrongfully induced the relevant parties to enter into the compact and is violating the compact. While the courts have been able to review certain claims with respect to the express terms contained within the gaming compact, the courts have been thwarted by Tohono O'odham from addressing the claims of fraud, misrepresentation, or promissory estoppel because the Tribe asserted tribal sovereign immunity

with respect to those claims. Tribal sovereign immunity is a legal doctrine providing that Indian tribes are immune from judicial proceedings without their consent or Congressional waiver. Congress waived tribes' sovereign immunity in IGRA with respect to claims for violations of a compact once the compact is signed, but IGRA does not waive a tribe's sovereign immunity for actions that occurred prior to the signing of the compact. Since Tohono O'odham refused to waive its sovereign immunity with respect to the claims of fraud, misrepresentation and promissory estoppel, which occurred prior to the signing of the compact, the court was unable to consider those claims. It would be odd for a gaming compact to waive tribal sovereign immunity in anticipation of acts of fraud and misrepresentation, or wrongful inducement. Sadly, the 2027 Arizona compacts may require that very thing solely as a result of the actions of Tohono O'odham here.

It is these court dismissed claims that S. 2670 seeks to remedy. And, in its May 7, 2013 order the Federal District Court for the District of Arizona found that although evidence appears to support the promissory estoppel claim against Tohono O'odham, the court had to dismiss the claim also because of the Tribe's sovereign immunity.[2] Promissory estoppel is where one party makes a promise and a second party acts in reasonable and detrimental reliance on that promise. In that instance, a court would normally be able to enforce the promise that was relied on regardless of whether it was expressly stated in a contract. That's exactly what happened in this matter. Tohono O'odham made representations that there would be no additional casinos in the Phoenix area and the State and other tribes and voters relied on the Tribe's representations in deciding to give up rights to additional casinos and gaming machines, approve Proposition 202, and sign the compacts approved by the voters. And, because Tohono O'odham's false promises preceded execution of its compact with the State of Arizona, the conduct fell outside of IGRA's waiver of sovereign immunity. Neither IGRA nor any other law concerning governmental conduct would necessarily anticipate fraudulent conduct by responsibly governments, tribal or otherwise. Tohono O'odham has exploited that fundamental assumption and shielded itself from judicial review of its conduct by refusing to waive sovereign immunity.

Tohono O'odham argues that it is unreasonable to expect it to waive its sovereign immunity for what its Chairman referred to as frivolous claims. The court only found that it could not reach the claims because of sovereign immunity, not that they were without merit. Indeed, the court suggested otherwise when it stated that evidence appeared to support the claims against Tohono O'odham, notwithstanding its immunity from unconsented suit. To the contrary, it is precisely because those claims would expose the wrongful conduct that Tohono O'odham must use sovereign immunity as a shield. And, while it is common for tribes to grant limited waivers of sovereign immunity, particularly for commercial reasons such as casinos, it is hard to imagine waivers that would have expressly envisioned duplicitous conduct grounded in fraud as part of a gaming compact; perhaps the State will require such waivers of all Arizona Indian Tribes in the 2027 compacts in order to safeguard against future conduct of this sort by Tohono O'odham. In the end, waiving sovereign immunity is a political decision, and one that we respect. However, it is disingenuous for Tohono O'odham to refuse to waive its sovereign immunity in court in order to prevent resolution of certain claims and then argue that Congress should not resolve these same claims because they are being addressed in litigation.

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[2] *State of Ariz. v. Tohono O'odham Nation*,, slip op. at 26-27 (D. Ariz. May 7, 2013).

S. 2670 comes at a critical time for tribal sovereignty and Indian gaming. In May, the Supreme Court issued its opinion in *Michigan v. Bay Mills*, 134 S.Ct. 2024 (2014). 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 sought to close what it claimed was an illegal off-reservation in Vanderbilt, Michigan. The Court stated at five different points in its opinion that Congress and not courts are the proper venue to resolve issues where sovereign immunity has frustrated efforts to bring justice to parties that cannot maintain suit against tribes. Perhaps most disturbingly, Justice Scalia, who voted in favor of several Supreme Court decisions which cemented the doctrine of tribal sovereign immunity, explicitly stated in his dissenting opinion in *Bay Mills* that those votes in support of sovereign immunity were wrong and that he "would overrule" tribal sovereign immunity. Although *Bay Mills* was certainly a limited victory for Indian Country, it also put a spotlight on the fragile state of tribal sovereign immunity and the fact that the Supreme Court is one vote from limiting its application or eliminating it altogether. *Bay Mills* illustrates that off-reservation projects such as those proposed by the Bay Mills Indian Community and Tohono O'odham manipulated the process for obtaining federal approval of tribal gaming projects and have used sovereign immunity as a shield to protect fraudulent activity. From this perspective, S. 2670 is good policy for Indian Country because it will address a narrow set of facts that exploit sovereign immunity and will establish that conniving plots such as that pursued by Tohono O'odham will not be sanctioned.

There remain certain issues that are pending in litigation, but those issues are not related to the claims of fraud, misrepresentation and promissory estoppel. S. 2670 is intended to not impact any pending court case, but rather to address the issues that the court has determined that it is unable to resolve. More, the Department has also indicated that it cannot resolve the claims of fraud, misrepresentation and promissory estoppel, and that it cannot resolve this matter because Congress, through the 1986 law, mandates them to take the Phoenix area land into trust for Tohono O'odham. Thus, Congress is the only entity capable of resolving this issue and addresses issues that courts are unable to review.

For all these reasons, I respectfully ask that you pass this bill.