



THE TOHONO O'ODHAM NATION OF ARIZONA

TESTIMONY OF THE HONORABLE NED NORRIS, JR.

**Senate Indian Affairs Committee Legislative Hearing on S. 2670,
Keep the Promise Act of 2014**

September 17, 2014

My name is Ned Norris, Jr. I am the elected Chairman of the Tohono O'odham Nation. The Nation is a federally recognized tribe with more than 32,000 members. Our people have lived since time immemorial in southern and central Arizona where our non-contiguous reservation lands – including our West Valley Reservation in Maricopa County – are located. I thank Chairman Tester and the Committee for holding a legislative hearing on H.R. 1410/S. 2670, and for giving the Nation an opportunity to testify about this bill. If enacted, this legislation will effect a profound injustice upon the Tohono O'odham Nation, one that will besmirch the United States' honor and set a terrible precedent for its relationship with Indian Country. The Nation is deeply disappointed that Congress is even considering this legislation – a bill that shows no respect for the clear terms of agreements negotiated between sovereign governments, that would break the promises the United States has made to my Nation, in a land and water settlement we all agreed to, and that will re-open up water rights claims on the Gila River. I come before Congress, now for the fourth time, to highlight the many problems with this legislation.

On July 23rd, during this Committee's oversight hearing on Indian gaming, I submitted testimony describing the destruction of our Gila Bend Indian Reservation in Maricopa County, the result of perpetual flooding caused by a dam built by the United States Army Corps of Engineers. I also described the federal legislation enacted in 1986 to compensate the Nation for its losses and the Corps' wrongdoing – the Gila Bend Indian Reservation Lands Replacement Act (Pub. L. 99-503). Because I would like to focus my remarks today on the far-reaching, negative precedent that this bill would set, I will only briefly summarize my prior testimony about the destruction and loss of property and water rights suffered by the Nation. I have attached my July 23, 2014 testimony in its entirety for reference ("Norris Testimony, SCIA Oversight Hearing (July 23, 2014)"), and ask that the Committee include it in the record.

HISTORICAL CONTEXT: DESTRUCTION OF THE NATION'S GILA BEND RESERVATION AND THE 1986 GILA BEND ACT

In the 1950s, the Corps of Engineers built the Painted Rock Dam to protect large commercial farms downstream from our Gila Bend Reservation, which at that time contained about 10,000 acres of prime agricultural land. The dam caused perpetual flooding of the reservation, destroying our homes and our farms, making the land unusable, and forcing the residents to move to a 40-acre parcel known as San Lucy Village. Our tribal members continue to live there today, well below the poverty line, with multiple families crowded into small substandard housing. The Corps had no Congressional authorization or tribal consent to flood our land, and the resulting destruction constituted a taking of our property rights as well as a significant breach of trust by our federal trustee.

In an effort to avoid litigation, Congress instructed the Department of the Interior to search for agricultural replacement lands within a 100-mile radius of our flooded reservation, but none could be found. As a result, in 1986 Congress enacted legislation that would instead compensate the Nation by providing the Nation the right to locate and acquire replacement lands in Maricopa, Pima or Pinal Counties (where our various reservation areas are located). In exchange the Nation was required to relinquish its title to nearly all of the Gila Bend reservation lands and the water rights appurtenant to it, and its legal claims against the United States. That settlement statute, the Gila Bend Indian Reservation Lands Replacement Act (Pub. L. 99-503) (Gila Bend Act), provided that the Nation's replacement lands were to have the same status as the lands that we lost, i.e., the replacement lands are to be treated as a "Federal Indian Reservation *for all purposes.*" *Id.*, § 6(d) (emphasis added). The Gila Bend Act also made clear that Congress' intention was to "facilitate replacement of reservation lands with lands suitable for sustained economic use *which is not principally farming.*" *Id.* § 2(4) (emphasis added). In addition, the United States would pay the Nation \$30 million, which was only a small fraction of the value of our lost land and water rights.

As Senator DeConcini (one of the sponsors of the Gila Bend Act) noted on the pending bill, "Over 3 years of work have gone into this settlement...[P]rofessional staff of the House Interior Committee, as well as other staffs, have spent a great deal of time on trying to develop a fair and reasonable settlement." 132 Cong. Rec. S14457-01 (October 1, 1986). Relying on the United States' promises in this settlement legislation, (which Act the Department of the Interior has described as "akin to a treaty," *Tobono O'odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 22 IBIA 220, 233 (1992)) the Nation executed a settlement agreement in 1987, giving up our right to sue the United States and relinquishing our land and water rights claims.

THE GILA BEND ACT MAKES CLEAR THAT OUR LAND IS A "FEDERAL INDIAN RESERVATION FOR ALL PURPOSES" – INCLUDING GAMING

At the same time Congress was considering the Gila Bend Act, it also was holding extensive hearings on predecessor Indian gaming legislation that ultimately would become the Indian Gaming Regulatory Act, Pub. L. 100-497 (IGRA).¹ Two years prior to passage of the 1986 Gila Bend Act, the Department of the Interior testified before the House Interior and Insular Affairs Committee that 80 Indian tribes were engaged in some form of gaming on their reservations. H. Hrg. No. 98-46, at 62 (June 19, 1984)². The Nation (then known as the Papago Tribe) was one of these tribes, having operated Papago Bingo on one of its reservations outside Tucson since 1984. *Id.*, at 117.³

Given this history, and given the fact that the Gila Bend Act itself requires that the settlement land acquired under the Gila Bend Act "shall be deemed to be a Federal Indian

¹ See, e.g., Hrg. No. 98-46, on H.R. 4566 (June 19, 1984); H.R. 6390, Indian Country Gambling Regulation Act (98th Congress); H.R. 4566, Indian Gambling Control Act (98th Congress); Hrg. No. 99-55 Part I, on H.R. 1920 & H.R. 2404 (June 25, 1985); Hrg. No. 99-207, on S. 902 (June 26, 1985); Hrg. No. 99-55 Part II, on H.R. 1920 & H.R. 2404 (Nov. 14, 1985); H. Rep. No. 99-488, to accompany H.R. 1920 (Mar. 10, 1986); Hrg. No. 99-887, on S. 902 (June 17, 1986); S. Rep. No. 99-493, To Accompany H.R. 1920 (Sept. 24, 1986); H.R. 3130, An Act to Prohibit Granting of Trust Status to Indian Lands to be used for the Conduct of Gaming Activities (99th Congress); S. 2557, Indian Gaming and Authorization Act of 1986 (99th Congress); Amendment No. 3226, to H.R. 1920, 134 Cong. Rec. S15390 (Oct. 6, 1986); H.R. 1920, Indian Gambling Control Act - (99th Congress); S. 902, Indian Gambling Control Act (99th Congress); see also, Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, Arizona State Law Journal, Volume 42, Number 1, Spring 2010, 99.

² In contrast, prior to IGRA's enactment, if Congress wanted to restrict or ban gaming on new trust land, Congress explicitly included language to that effect. See, e.g., the Florida Indian Land Claims Act of 1982, Pub. L. 97-399 (Dec. 31, 1982), the Ysleta del Sur Pueblo Restoration Act, Pub. L. 100-89, Tit. I (Aug. 18, 1987) and the Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. 100-89 Tit. II (Aug. 18, 1987). If Congress had intended to impose a similar restriction on the Nation, it would have done so explicitly in the 1986 Gila Bend Act – but it did not. Just as important, the Nation absolutely never agreed to such a condition, and no such condition exists in the 1987 settlement agreement signed by the Nation and the United States.

³ The Nation's gaming establishment was discussed again in IGRA predecessor legislation hearings before the same Committee in 1985. Hrg. No. 99-55 Part I, on H.R. 1920 & H.R. 2404 at 29.

Reservation for all purposes," there can be no serious argument that Congress could not have foreseen that this land would be used for gaming. To the contrary, Congress ensured that the replacement lands would have the same legal status as the Nation's destroyed Gila Bend reservation. In IGRA, Congress similarly sought to ensure that lands acquired in trust after IGRA's 1988 enactment date as part of the settlement of a land claim would be treated equally to the pre-IGRA claim lands they were intended to replace (*i.e.*, the new lands would be gaming-eligible just as were the claim lands that were lost). As explained by former Interior Secretary Salazar:

Certain lands that are acquired after IGRA's passage in 1988 are treated under the statute as though they were part of pre-IGRA reservation lands, and, therefore, are eligible for gaming purposes...Lands that are taken into trust for *settlement of a land claim*, as part of an initial reservation, or as restoration of lands for a tribe that is restored to federal recognition are also excepted from the IGRA prohibition *in order to place certain tribes on equal footing*.

See Memorandum from the Secretary to the Assistant Secretary for Indian Affairs, "Decisions on Gaming Applications" (June 18, 2010) at 2 (emphasis added), available at <http://www.bia.gov/cs/groups/public/documents/text/idc009878.pdf>. Indeed, lands acquired pursuant to the 1986 Gila Bend Act are the quintessential type of lands that IGRA intended to protect through the equal footing exceptions. Under the Act, the Nation may acquire land to replace the acreage destroyed by the Painted Rock Dam *see* Pub. L. 99-503 at Section 6(c) so that the replacement land will have the same gaming eligibility status as the land it replaces.

THE NATION'S WEST VALLEY RESERVATION

In keeping with the requirements of the Gila Bend Act, which limit the location and the amount of replacement land the Nation may acquire, the Nation purchased unincorporated land in Maricopa County located in the "West Valley" (an area west of the City of Phoenix). The land is about 49 miles from the Gila Bend Reservation, between the cities of Glendale and Peoria. Both the federal courts and the Department of the Interior have determined that our West Valley land meets the strict statutory requirements in the Gila Bend Act. In July the Department of the Interior complied with its congressionally-imposed duty to acquire the land in trust, and it is now a part of the Tohono O'odham Reservation. Letter of Kevin Washburn, Assistant Secretary - Indian Affairs, United States Department of the Interior, to Ned Norris Jr., Chairman, Tohono O'odham Nation (July 3, 2014).

Although the Nation's West Valley reservation is a significant distance (more than twenty miles) from other tribal gaming operations in the Phoenix metropolitan area, a few tribes with

Phoenix area gaming facilities vigorously urge passage of S. 2670 / H.R. 1410. Early on they urged that the legislation was necessary because the Nation's actions violated the Gila Bend Act, the Nation's tribal-state gaming compact, and IGRA. When the federal courts rejected their claims, these tribes started to shift to new arguments. Most recently, they claim that the legislation is needed to prevent the Nation from violating some unwritten, back-room promise, and they further argue that without the legislation, there will be no way to stop an explosion of new gaming in the East Valley (the area east of the City of Phoenix). In fact, these tribes vigorously oppose the Nation's project because they have long enjoyed a monopoly in one of the biggest gaming markets in the United States, and the simple fact is that they would prefer not to share that market. Based on these market share concerns, they have urged the introduction and enactment of S. 2670 and its companion bill H.R. 1410.

Their arguments having been rejected in every other venue, the proponents of H.R. 1410/S. 2670 come to Congress as a last resort to ask it to enact legislation that unilaterally inserts into the Nation's tribal-state gaming compact a new restriction which was never negotiated and to which the Nation never would have agreed – a prohibition against developing our West Valley reservation the way we have every right to do under the Gila Bend Act, the Indian Gaming Regulatory Act, and our Secretariially-approved tribal-state gaming compact. This use of a unilateral amendment to eviscerate our land and water rights settlement is unprecedented – Congress has never in the modern era unilaterally abrogated either a settlement or a tribal-state gaming compact. And it should not start now.

H.R. 1410/S. 2670 IS DANGEROUS PRECEDENT

As discussed in more detailed elsewhere, the Gila Bend Act settles the Nation's claims for the unauthorized flooding of nearly 10,000 acres of its Gila Bend Reservation, providing for the purchase of replacement lands that will be treated the same as the Nation's lost reservation lands. In exchange, the Nation gave up it legal claims against the United States, including its water rights claims, and title to its Gila Bend reservation lands. H.R.1410/S. 2670 would fundamentally alter these terms by no longer treating the Nation's replacement land as a "federal reservation for all purposes" – enactment of this legislation would mean that the replacement land henceforth will be treated as "a federal reservation for all purposes except Indian gaming".

In testimony before the House Natural Resources Committee on S. 2670's companion bill H.R. 1410 and its predecessor bill H.R. 2938, the Department of the Interior has twice opposed the proposed legislation in no small part because it unilaterally interferes with a federally-enacted settlement and a federally-approved tribal-state gaming compact. *See Testimony of Paula Hart, Director, Office of Indian Gaming, U.S. Department of the Interior, Before the Subcommittee on Indian and Alaska Native*

Affairs, Committee on Natural Resources, U.S. House of Representatives (October 4, 2011); *Testimony of Michael Black, Director, Bureau of Indian Affairs, United States Department of the Interior, Before the Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, U.S. House of Representatives* (May 16, 2013) . The Department's objections have remained consistent, noting that:

H.R. 1410 would negatively impact the Nation's "all purposes" use of selected lands under the Gila Bend Act by limiting the Nation's ability to conduct Class II and Class III gaming on such selected lands....H.R. 1410 would specifically impact the Gila Bend Act *by imposing additional restrictions beyond those agreed upon by the United States and the Tohono O'odham Nation 25 years ago*. The Department cannot support legislation that specifically impacts an agreement so long after the fact....The effect of this legislation would be to add a tribe-specific and area-specific limitation to the IGRA.

Black Testimony at 2-3(emphasis added).

The Department further underscored its concern "about establishing a precedent for singling out particular tribes through legislation to restrict their access to equal application of the law." *Id.* We understand that the Department of the Interior will again testify at this hearing, and we trust it will raise the same concerns with the Senate Indian Affairs Committee as it did with the House Natural Resources Committee.

In her testimony before the Committee, outgoing Salt River Indian Community President Diane Enos argued that H.R. 1410 would not create a dangerous precedent, and she insisted that there are other examples of federal legislation similar to H.R. 1410. *Testimony of President Diane Enos, Oversight Hearing on "Indian Gaming: The Next 25 Years,"* at 4-5 (July 23, 2014). But this is untrue, and each of her examples is demonstrably misleading. None of the legislation she identified involved the kind of settlement agreement reached between the United States and the Nation, where in return for giving up its destroyed reservation, the United States agreed to take land into trust for the Nation and treat it as a "Federal Indian Reservation for all purposes." In fact, few of the statutes she cited involved any sort of settlement agreement at all. For example, the Colorado River Indian Reservation Boundary Correction Act, the Siletz and Grand Ronde Tribe acts, and the Indian Pueblo Cultural Center Clarification Act all involved land grants by Congress without the kind of contract and trust promises that are central to the Nation's settlement act and agreement. *See* Pub. L. 10947 (Aug. 2, 2005); Pub. L. 110-78 (Aug. 13, 2007); and Pub. L. 111-354 (Jan 4, 2011). Others, like the amendments to the Rhode Island Indian Claims Settlement Act, concerned the ability of the State of Rhode Island to prohibit gaming by multiple tribes when those tribes had agreed to state jurisdiction as part of the original settlement. *See* Pub. L. 104-208; *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm.*, 158 F.3d 1335 (D.C. Cir. 1998)). In contrast, H.R. 1410 would have Congress

unilaterally amend an agreement with a single Indian tribe that would eliminate legal rights that this tribe possesses. Finally, the amendments to the Mashantucket Pequot Settlement Act provided for *additional benefits to the tribe* (in the form of lease extensions) *at that Tribe's request*. See Pub. L. 110-228.

In short, amending settlement legislation over the express objection of the Department of the Interior (which now holds title to the land) and the Nation (for whose beneficial interest the land is held in trust) cannot even remotely be analogized to "routine restrictions" on "legislation involving Indian land" or "revisit[ing] existing statutes to clarify the party's intent" as former President Enos urged. None of the examples cited by the tribal proponents of H.R. 1410/S. 2670 are similar or even relevant to the statutory provisions in S. 2670, which would fundamentally change the terms of an existing land and water rights settlement reached by the Nation and the United States some 25 years ago over the objections of both of the parties to that settlement. H.R. 1410/S. 2670 thus serves as a powerful disincentive to tribes that are considering whether or not to enter into settlement agreements.

Think of it this way. If H.R. 1410/S. 2670 is deemed acceptable for enactment, then there also is no reason why Congress should not, at the behest of competing water users, "impose additional restrictions beyond those agreed upon by the United States and the [Community]" on the Gila River Indian Community pursuant to the Arizona Water Settlements Act, Pub. L. 108-451, and no reason why Congress should not pass legislation that "specifically impacts" the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. 100-512. Such legislation might, for example, impose additional unilateral restrictions on the manner of each Tribe's use of the water rights allocated under their respective settlement agreements. The Nation has no doubt that if Congress were trying to unilaterally amend either of these tribes' settlements, these tribes would object as strenuously as the Nation does to H.R. 1410/ S. 2670.

Given the United States' long, ugly history of unilaterally breaking its treaties with tribal nations, this Congress should think long and hard about reviving that dishonorable legacy with this legislation.

IF ENACTED, S. 2670 WILL CREATE NEW LIABILITIES FOR THE UNITED STATES AND DESTABILIZE ONGOING WATER RIGHTS LITIGATION

Because S. 2670 would deny the benefits that the United States promised to the Nation in return for the Nation waiving its land and water rights claims (by preventing the Nation from using its West Valley Reservation for economic development and as a reservation for all purposes), it would effectively unravel the settlement agreement embodied in the Gila Bend Act, giving rise to

new takings and breach of contract claims against the United States and upsetting active water rights litigation.

➤ *Fifth Amendment Takings Claim*

The U.S. Constitution provides that private property may not be "taken for public use, without just compensation." *See* U.S. Const., amend. V; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). S. 2670 would take away the Nation's right, as confirmed by the court in the litigation brought by the Nation's opponents, to use its West Valley Reservation for gaming-related economic development. *See Forest County Potawatomi Cmty. of Wis. v. Doyle*, 828 F. Supp. 1401, 1408 (W.D. Wis. 1993) (Indian tribe had a property interest in the right to game under its Tribal-State compact). By interfering with the Nation's investment-backed expectations that it can conduct gaming on its West Valley reservation under its tribal-state compact and thereby causing *substantial* economic harm to the Nation, S. 2670 would effect a taking that requires just compensation, and therefore exposes United States to liability for substantial damages.

➤ *Breach of Contract*

The Gila Bend Act provided that, in return for waiving its claims against the United States and giving up title to its land and water rights on the Gila Bend Reservation, the Nation could acquire replacement lands in unincorporated Maricopa, Pima, or Pinal Counties that would be treated as a reservation "for all purposes." In 1987, the Nation entered into a settlement agreement – i.e., a contract – with the United States in which it did indeed relinquish its claims and its land and water rights in consideration for the United States' promises in the 1986 Gila Bend Act. S. 2670 breaches that agreement. It is settled law that when the United States enters into a contract, its rights and duties under the contract are governed by the same law applicable to contracts between private individuals. *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996). If S. 2670 is enacted into law, the Nation will sue the United States for breach of this 1987 agreement. Damages will likely be substantial, based on the fact that lost future profits from the Nation's planned gaming facility during the term of the compact would amount to hundreds of millions of dollars, if not more.

➤ *Water Rights Claims*

The legislative history underpinning the Gila Bend Act makes clear that a "major component in [the tribe's] valuation of the reservation is its as-yet unquantified Winters right to the surface and underground flow of the Gila River, with a priority date of 1882." H.R. Rep. 99-851 at 8 (1986). Thus, when the Nation gave up its right to the Gila Bend Indian Reservation, it also gave up its right to the water rights appurtenant to it. The legislative history explains, "Expressed in terms of

practicably irrigable acres times 5.4 acre-feet, this right could amount to as much as 32,000 acre-feet ... [T]he tribe thus views the value of their land and its water and any damage claims against the United States and third parties to be in *excess of \$100,000,000.*" *Id.*, at 8-9 (emphasis added). In other words, the lost water right alone was worth in excess of one hundred million dollars in 1986 – certainly that water would be worth even more today.

By unilaterally altering the terms of the settlement agreement, H.R. 1410/S. 1670 effectively reopens claims that were settled by the agreement, including the Nation's claims to nearly 36,000⁴ acre-feet of water per year and additional water rights-related damage claims against the United States and third parties worth in excess of \$100,000,000 (in 1986 dollars). Because the Gila Bend Reservation has an 1882 priority date, the Nation's 36,000 acre-feet per year would have priority over the vast majority of claimants in the ongoing Gila River General Stream Adjudication. Litigation over the quantification and delivery of the Nation's Gila River water rights is ongoing, and this legislation therefore would destabilize the adjudication of the water rights claims of thousands of municipal and private interests throughout Arizona with junior priority dates.

H.R. 1410/S. 2670 BREAKS THE COURT-CONFIRMED PROMISES EMBODIED IN THE TRIBAL-STATE COMPACTS

Apart from setting dangerous precedent in the context of Indian land and water rights settlements, H.R. 1410/S. 2670 also interferes with the mutually-agreed to contractual promises that are embodied in the tribal-state compacts entered into by the State of Arizona, the Nation, and the Gila River and Salt River tribes. Although the proponents of H.R. 1410/S. 2670 attempt to re-write history by arguing that the Nation made some "promise" not to conduct gaming in the Phoenix area, in fact, as revealed in the litigation, the Gila River and Salt River tribes and the State of Arizona: (1) were well aware of the Nation's right to conduct gaming on its settlement lands long prior to the signing of the 2003 gaming compacts, and (2) *tried but failed* to insert language into the compacts to prevent tribes from gaming on after-acquired lands (such as replacement lands acquired under a land claim settlement).

In the end, the tribes and the State explicitly agreed in the tribal-state compacts they each signed that gaming on lands acquired in accordance with IGRA's equal footing exceptions would be permitted. A federal court has confirmed that "the Nation's construction of a casino on the Glendale-area land will not violate the Compact" and that "gaming on that land is expressly permitted" by IGRA. *Arizona v. Tohono O'odham Nation*, 944 F.Supp.2d at 753-54 (D. Ariz. 2013). H.R. 1410/S. 2670 would re-write the tribal-state compact to provide these wealthy tribes a

⁴ The United States later determined that the 32,000 acre foot figure cited in the Gila Bend Act's legislative history was in fact too low, and filed a claim for 35,965 acre feet of water in the Gila River Adjudication. *See*, Statement of Claimant, United States *ex rel.* Gila Bend Indian Reservation Tohono O'odham Nation, No. 39-35090 (Ariz. Super. Ct. Maricopa County Mar. 25, 1987).

monopoly that they tried and failed to obtain in good faith negotiations – and break the promises made to the Nation.

➤ *1992-2001: The Nation informs Arizona, Gila River, and Salt River of its Rights under the Gila Bend Act*

Evidence presented in court showed that the Nation's opponents were repeatedly made aware of the Nation's rights under the 1986 Gila Bend Act. During a recorded July 15, 1992 meeting, the Nation explicitly informed gaming negotiators for the State of its position that land acquired under the 1986 Gila Bend Act would be eligible for gaming. *Arizona et al. v. Tohono O'odham Nation*, CV11-0296-PHX-DGC, 7/15/92 Tohono/Arizona Reps. Mtg. Tr. 3. Later, in the mid-1990s, a representative of the Nation informed the former president of the Salt River tribe (and key 2002 compact negotiator) of the Nation's right to conduct gaming on land acquired under the 1986 Gila Bend Act. *Id.*, Antone Dep. at 76 (5/24/12). Finally, in 2001, one of the Gila River tribe's compact negotiators was informed about the Nation's land acquisition rights under the Gila Bend Act. *Id.*, Supp. Resp. to Pl. First Set of Non-Unif. Interrog. (5/14/12).

➤ *2001-2002: Arizona and Gila River Try to Introduce Compact Language to Prevent Gaming on After-Acquired Lands During Compact Negotiations; the Tribes Collectively Reject These Attempts*

What is more, as the district court noted, the Nation presented evidence that the State and Gila River "proposed during negotiations that gaming on after-acquired lands be prohibited" but that this proposal "was rejected and not included in the Compact." *Arizona v. Tohono O'odham Nation*, 944 F.Supp.2d at 767. During later compact negotiations, "some State legislators attempted to ... exclude all gaming on after-acquired lands precisely to avoid gaming on noncontiguous reservation land such as the [Nation's] Glendale-area land." *Id.* These efforts also were rejected. *Id.*

➤ *2002: Gila River, Salt River, and Arizona Agree to Language in the Compact that Expressly Permits Gaming on After-Acquired Lands*

In the end, the State, Gila River and Salt River explicitly agreed in the final tribal-state compact that gaming would be permitted on any Indian lands that meet the requirements of IGRA, including on "after-acquired lands" acquired under a land claim settlement. *See* Compact at Section 3(j)(1), Proposition 202, A.R.S. § 5-601.02(I)(6)(b)(iii). The federal court found that the tribes "*did not reach ... an agreement*" that would "prohibit the Nation from building a new casino in the Phoenix area." *Arizona v. Tohono O'odham Nation*, 944 F.Supp.2d at 753 (emphasis added).

➤ *2007: Gila River Proposes a Compact Amendment to Prevent Gaming on After-Acquired Lands in Maricopa, Pima, and Pinal Counties*

In 2007, following numerous failed attempts to protect its gaming monopoly, Gila River proposed (unsuccessfully) a compact amendment to "preclude gaming on after-acquired lands." Lunn Dep. 72. Gila River's proposal was limited to after-acquired lands in Maricopa, Pima, and

Pinal Counties – the same three counties in which the Nation is permitted to acquire settlement lands in trust under the Gila Bend Act.

➤ *2009-2012: Gila River and Salt River Build Three New Casinos in the Phoenix Metropolitan Area*

Gila River and Salt River now claim that the tribes all promised that there would be "no new casinos in Phoenix." In support of this argument Gila River and Salt River point to statements in 2002 by Arizona's then-governor: "Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area . . . for at least 23 years." But Gila River and Salt River themselves have gone on to build three new casinos in the Phoenix metropolitan area. *See, e.g., GRIC opens New Wild Horse Pass Hotel and Casino*, Gila River Indian News (November 2009, available at <http://www.gilariver.org/index.php/news/849-gric-opens-new-wild-horse-pass-hotel-and-casino>); ("On Fri, Oct. 30, the Gila River Indian Community opened the doors to its new 100,00 square foot Wild Horse Pass Casino"), *New Vee Quiva Casino & Hotel ground breaking*, Gila River Indian News (July 2012, available at <http://www.gilariver.org/index.php/july-2012-grin/2919-new-vee-quiva-casino-a-hotel-ground-breaking>) ("The official ground breaking ceremony for the new Vee Quiva Casino & Hotel commenced on June 7, 2012 in Komatke, District 6. . . 'Quite frankly I'm very impressed with the contemporary and cultural elements that will be added into this new casino-hotel,' Mendoza said"); *Casinos' quarterly revenue fall eases*, Arizona Republic (May 5, 2010, available at <http://www.azcentral.com/business/news/articles/20100505biz-casinos0505.html>) ("...the Gila and the Salt River Pima-Maricopa Indian communities. . . each invested hundreds of millions of dollars to open new casino-hotels amid the recession").

➤ *2012: Multiple Witnesses (including those representing Gila River, Salt River, and the State) Contradict the "No New Casinos in Phoenix" Argument*

Like its sister tribes Gila River and Salt River, the Nation explicitly stated at the outset of negotiations that it did not wish to be bound by the statements of other tribal leaders. In light of this fact, the court held that it "cannot conclude" that that the Nation shared the views about gaming in Phoenix that other tribal organizations may have had. *Arizona v. Tobono O'odham Nation*, 944 F. Supp.2d at 766. And as explained by witnesses not aligned with either side of the litigation, the concept of "no new casinos in Phoenix" simply was never a theme or a deal point in the negotiations over the gaming compacts and Proposition 202:

- W.M. Smith Dep. 32 (*Cocopah Tribe representative*) "Q. Do you recall the concept of no new casinos in Phoenix ever being broached in the negotiations? A. No."
- Clapham Dep. 35-36 (*Navajo Nation representative*) "Q. There was not a single event, to the best of your recollection, that could constitute a request for a tribe to waive its rights to build a casino in the Phoenix area? A. There were discussions about reducing the number of authorized facilities in exchange for transfer of machine

rights. But I don't remember any specific request to deal with not putting another facility in Phoenix.”.

- Ochoa Dep. 25 (*Yavapai Prescott Tribe representative*) “Q. So until this lawsuit came about, though, you had never heard anybody talking about how Prop 202 would permit no new casinos in the Phoenix area and only one in Tucson? A. Absolutely not. No. It wasn't discussed at the meetings I attended.”

Even Gila River, Salt River, and the State's own witnesses in litigation confirmed that the Nation never promised not to conduct gaming in the Phoenix area. *See, e.g.:*

- Walker Dep. 43 (*State representative*) “Q. ... [Y]ou can't point to any member of the Nation or any of their lobbyists or lawyers who have ever specifically stated that there would be no new casinos in the Phoenix area. Correct? A. Correct.”
- Severns Dep. 53-54 (*State representative*) “I have no recollection of a conversation in which [the Nation] mentioned they would or would not build [a casino in Phoenix].”
- Lewis Dep. 44 (*Gila River representative*) “Q...[D]uring the negotiations, no one from the Tohono O'odham Nation ever stated that the Nation would never game in the Phoenix area?...A. I don't recall any, right.”
- Makil Dep. 95 (*Salt River representative*) “Q. [Y]ou don't recall any specific representative of the Nation affirmatively stating that the Tohono O'odham would not build casinos in the Phoenix area. Correct? A. No one ever said anything to me.”
- Landry Dep. 43 (*Salt River representative*) “Q. During the negotiations, no one from the Tohono O'odham ever specifically stated that the tribe would never game in the Phoenix area, did they? A. That's correct.”
- LaSarte Dep. 62-63 (*Arizona Indian Gaming Association representative*) “Q. And at no time did the State ever ask the Tohono O'odham to agree never to game in the Phoenix metropolitan area. Correct? ... [A.] I do not recall any discussions for or against the possibility of Tohono O'odham gaming in the Phoenix metropolitan market[.]”

➤ *2012-2013: The Federal Court Rejects Gila River and Salt River's "Promise" Argument on the Merits*

The Nation's opponents have incorrectly claimed that the courts did not reach the merits of the "promise" arguments. This is not true. The district court soundly rejected that argument – and not simply on sovereign immunity grounds as the proponents of this legislation claim. In fact, as the oral argument colloquy involving Gila River's lawyer (Mr. Tuite) reveals, the court found this argument totally unconvincing:

MR. TUTTE: The plaintiffs have alleged sufficient facts to show that the parties understood and endorsed the concept that a fundamental premise of the compact was the principle that the agreement would not result in new gaming facilities being constructed in the Phoenix metropolitan area. The Nation now claims, however, that the compact permits exactly what is alleged it cannot do.

THE COURT: Mr. Tuite, if that was a fundamental premise of this compact, ***it would have been a real easy thing to say that in the compact, right?***

MR. TUTTE: Well, a lot of things in retrospect could be easy things to say. Yes, Your Honor, that's true. But we think there are, based on the allegations we made, good reasons to think that the parties didn't feel it necessary to spell that out.

THE COURT: ***Well, that's a pretty surprising idea***, in my mind, for parties who are represented by lawyers and who are negotiating a contract that will become a compact that has an integration clause that says no other understandings or agreements not in writing will be enforceable.

For somebody with that kind of a clause going into the compact saying this other understanding is so fundamental that we don't to have say it just didn't make any sense to me.

Arizona v. Tohono O'odham Nation, Tr. Mot. to Dismiss at 28:15 - 29:12 (emphasis added).

Most devastating to Gila River 's and Salt River's arguments was that section 25 of the very Compact that each Arizona tribe signed with the State includes an integration clause which explicitly provides that "This Compact contains the entire agreement of the parties with respect to the matters covered by this Compact and *no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding.*" (emphasis added). In other words, the parties agreed in the compact that the words of the compact would trump any supposed "side-bar" promises and that such promises would have no effect. *Arizona v. Tohono O'odham Nation*, 944 F. Supp.2d . at 770-74. As explained by the court, because "[t]he fully integrated compact discharges any unwritten understandings," *id.* at 774, plaintiffs' claims seeking to enforce a promise that is not in the compact were foreclosed *on their merits*. There is no basis whatsoever for Congress to overturn the district court's carefully considered conclusions at the behest of the losing litigants.

CONCERNS ABOUT EXPANSION OF GAMING

During this Committee's July 23 Oversight Hearing on Indian Gaming, concerns were expressed about the potential of another Tohono O'odham casino being developed in the East Valley. These arguments are based on the worst kind of fear mongering, and reveal that tribes pushing for enactment of H.R. 1410 and S. 2670 have run out of credible legal and policy arguments. In fact, the Nation has no other eligible land in the Phoenix Valley, and it would be a practical

impossibility to acquire such land and undertake such an effort before our existing tribal-gaming compact expires. What is more, we have repeatedly stated, again and again, that the Nation has no such plans. Nevertheless, should even stronger confirmation be needed to dispel these arguments, the Nation stands ready to work to address these concerns.

CONCLUSION

Chairman Tester, Vice Chairman Barrasso, and honorable members of this Committee, thank you for giving the Nation the opportunity to testify at this legislative hearing. It is our great hope that the United States Senate will reject a return to the era of treaty-breaking, and that you will help Congress preserve and protect the commitments the United States made to the Tohono O'odham Nation when it enacted the Gila Bend Indian Reservation Lands Replacement Act. By so doing, the Senate will also ensure that the integrity of the tribal-state gaming compacting process, as it has been set into law under the Indian Gaming Regulatory Act, will not be undermined by private special interest bills such as H.R. 1410 and S. 2670. The Nation respectfully, and urgently, asks that you help ensure these bills do not become law.