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Written Testimony before the U.S. House of Representatives Subcommittee on Indian and Alaska
Native Affairs
Legislative Hearing Regarding H.R. 1410
“The Keep the Promise Act”
May 16, 2013

In 1960, Justice Hugo Black reminded us all that, “Great nations, like great men, should keep their word”.

Executive Summary

The Salt River Pima Maricopa Indian Community (“Community”) would like to thank the bipartisan coalition of members, Representative Franks along with Representatives Gosar, Salmon, Schweikert, Kirkpatrick and Kildee for sponsoring this important legislation, H.R. 1410, the “Keep the Promise Act of 2013.” We also want to thank Representative Pastor, long a champion of tribal rights in Arizona, for his co- sponsorship of this bill. This bill will protect the promises that the tribes of Arizona made to each other and the State and voters of Arizona and protects the current Indian gaming structure in Arizona. Specifically, the bill will prohibit any tribe from conducting gaming on lands acquired into trust after April 9, 2013 for the duration of the existing gaming compacts which begin to expire in 2026. Thus, the bill does not target any one tribe and still allows for lands to go into trust status for tribes. But, the bill also ensures that the commitments and statements relied upon during the gaming compact negotiations are protected for the term of the existing compacts.

While the need for this bill is necessitated by the current actions of one tribe, it will prevent any other tribes, including my own tribe, from trying to renege on the commitments and promises relied upon by the voters when they authorized tribes in Arizona to conduct Las Vegas-style gaming in 2002.

In the current instance, the Tohono O’odham Nation (“Tohono O’odham” or “Tohono”) is trying to utilize a 1986 law to acquire lands more than 100 miles from its seat of government, outside its aboriginal territory and within my tribe’s former reservation boundaries, in our aboriginal lands to develop a casino. This land is located across the street from Kellis high school in the City of Glendale, one of the Phoenix suburbs. This action by the Tohono O’odham directly contradicts commitments and statements it made, and which were relied upon by others, that there would be no additional casinos built in the Phoenix metropolitan area if the voters approved tribes continuing to conduct Las Vegas-style gaming in the State..

The current actions of Tohono O’odham also contradict long-term statements that they and all other tribes have consistently made to the Governor and State Legislature that there could not be off-reservation gaming in Arizona without the Governor’s consent. The State of Arizona and Arizona voters have always worried about tribes trying to develop casinos off their existing reservations and in neighborhoods. To allay these concerns, tribes in Arizona have consistently said that they would not develop casinos off their reservations without the State’s approval. The initial gaming compacts in Arizona were developed in 1992-1993 based on statements and

agreements that the tribes would not seek to conduct off-reservation gaming without first obtaining the consent of the Governor. When the voters re-approved tribes conducting Las Vegas-style gaming in 2002, they did so based on promises and statements by tribal leaders that casinos would be kept out of neighborhoods and that the number of casinos in the metropolitan areas would be limited.

Tohono O’odham is now asking that the Secretary of the Interior take a fifty-three acre site within the City of Glendale, Arizona into trust status for the purpose of developing a Las Vegas-style casino. Tohono argues that the 1986 law mandates the Secretary to do so, and to do so without any consultation with the local communities, the State, or other American Indian tribes in Arizona despite the promises that it made to the State of Arizona and other tribes. While the Secretary of the Interior has not yet opined on whether these lands would be eligible for gaming, he has issued a decision to take the lands into trust status, although the action has not yet occurred.

On this point, we have met with the Department of Interior (“Department”) to discuss our concerns. The Department has indicated its belief that it has a trust responsibility to Tohono O’odham to allow them to take the land into trust. We want to stress the similar trust responsibilities that exist between the Department and all of the other tribes in Arizona who depend on the revenue sharing streams that exist under the current compacts and gaming framework in Arizona. This trust responsibility cannot be trumped by the concerns of a single tribe wanting to build a casino across the street from a public high school. The responsibilities that the Department has to the other tribes and to sound public policy for all citizens of Arizona cannot be dismissed so lightly. While we recognize the Department may have a trust responsibility to take lands into trust for Tohono O’odham, we do not believe the Department has any such responsibility with respect to the use of Glendale lands for gaming, particularly to the detriment of other tribes to whom the Department also has a trust responsibility, consistent with the 2002 Compact.

In addition to seeking to sidestep the limits of the Indian Gaming Regulatory Act, the efforts of Tohono O’odham also jeopardize a well-balanced system of gaming in Arizona. The State of Arizona is unique in that it has a system of gaming that was jointly negotiated amongst the tribes and the State, and then approved by the citizens of Arizona in a state-wide referendum. The Arizona system prohibits any additional casinos in the Phoenix metropolitan area, but allows Tohono O’odham to develop a fourth casino (it currently operates three successful casinos) in the Tucson metropolitan area, where it has historically been located.

Tohono O’odham, along with sixteen other tribes, financially and publicly supported the development of the current gaming system in Arizona. However, unbeknownst to the other tribes, the State and the voters of Arizona, Tohono was entering into a confidential agreement with a realtor to buy land in the Phoenix area for a casino at the same time that it was advertising to the voters and other tribes that there would be no new casinos in the Phoenix area.

Eleven American Indian tribes in Arizona and New Mexico oppose the efforts of Tohono O’odham to develop a casino in the Phoenix metropolitan area; as does the Governor of Arizona and the Cities of Glendale, Tempe Scottsdale and many others.

The State of Arizona and the voters of Arizona never intended this type of situation to occur when the gaming compacts were written and approved in a state-wide referendum. 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 make amendments to 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 status. The bill will merely prohibit any tribes from breaking the promises made to voters – “no additional casinos in the Phoenix metropolitan area”—and it will protect the Arizona Indian gaming and State revenue structure.

I. Efforts During the 112th Congress to Protect the Structure of Gaming in Arizona

In 2011, the Subcommittee on Indian and Alaska Native Affairs held a hearing on H.R. 2938, a bill that sought to address the same concerns we bring to you today. While the intent of that legislation remains as the basis of the bill before you this year, we believe that the Keep the Promise Act is improved and we hope that it too can be passed with similarly overwhelming bipartisan support.

Where H.R. 2938 imposed limitations on one tribe, the Tohono O’odham Nation, and the underlying law being exploited in support of its request to be able to game in Glendale, this bill simply seeks to reaffirm, through federal law, the promise of “no additional casinos in the Phoenix metropolitan area.” H.R. 1410 does not attempt to amend any existing statute, but rather holds each of the signatory tribes of the 2002 compact to the terms agreed upon at that time.

II. H.R. 1410

As its title makes clear, H.R. 1410 keeps the promises that the tribes of Arizona made to the State of Arizona and the voters of Arizona that there would be no additional casinos for the duration of the negotiated and voter approved tribal-state gaming compacts. H.R. 1410 is a simple bill that merely ratifies the agreement that the State and tribes of Arizona reached when they established a limited structure of Indian gaming in Arizona. This bill does not amend federal law, target any specific tribe, or prevent Tohono O’odham from placing lands into trust. H.R. 1410 is limited in geographic scope to the Phoenix metropolitan area, is limited in temporal scope and applies only until the expiration of the current compacts, and applies uniformly to all Arizona tribes.

H.R. 1410 recognizes tribal sovereignty by affirming what tribal sovereigns committed to each other and does not create negative precedent for Indian Country. H.R. 1410 merely ensures that the tribes of Arizona keep the promise that we made to the State of Arizona and the voters of Arizona that there would be no additional casinos in the Phoenix area throughout the duration of the existing gaming compacts which begin to expire in 2026. After that time, all interested parties within Arizona can negotiate what gaming scheme should exist in the State. In fact, this type of clarifying legislation 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 This is a proper and necessary role for Congress.

This continues to be a consistent practice of Congress. In the 112th Congress, Congressman Grijalva introduced the Cocopah Lands Act (H.R. 1991), a bill to transfer land in trust to the Cocopah Tribe and included a provision restricting gaming. ("Land taken into trust for the benefit of the Tribe under this Act shall not be used for gaming under the Indian Gaming Regulatory Act").

Accordingly, any arguments that the H.R. 1410 constitutes dangerous precedent are inconsistent with common Congressional practice.

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.

III. H.R. 1410 Recognizes and Supports Tribal Sovereignty

The Salt River Pima-Maricopa Indian Community, along with the 10 other tribes who oppose Tohono O'odham's reservation-shopping efforts, know firsthand the importance of tribal sovereignty. As federally recognized tribes, we fight on a daily basis to protect tribal sovereignty and provide for our people. We would not support a bill that jeopardizes tribal sovereignty. Rather, we pride ourselves on working with our brethren on issues of common concern to Arizona tribes because it strengthens our collective sovereignty and helps us fulfill our responsibilities to our individual tribal communities.

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"). See 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).

We are here today in support of H.R. 1410 because in our view, H.R. 1410 explicitly recognizes and respects tribal sovereignty by upholding the commitments that we, including Tohono O’odham, all made during the compact process and that were memorialized through passage of Proposition 202.

To be clear, H.R. 1410 simply seeks to reaffirm that no additional casinos may be built in the Phoenix metropolitan area for the duration of the existing gaming compacts. As discussed above, this type of clarifying legislation is not uncommon in Indian Country. It is sometimes necessary for Congress to step in and clarify agreements to preserve the intent of the parties. This is a proper and necessary role for Congress.

Here, H.R. 1410 is narrowly tailored to maintain the status quo and sustain the carefully negotiated gaming structure, voted on by the citizens of Arizona. Without H.R. 1410, Tohono O’odham will proceed on its path to circumvent existing gaming restriction, both under Federal and State law, conduct gaming far from their existing reservation, and most importantly jeopardize the other Arizona tribes’ existing rights under Federal law that we all share. As sovereign nations, we cannot simply stand by and watch someone, albeit another Arizona tribe, threaten our gaming rights and unravel the comprehensive and inter-connected gaming structure in Arizona. Accordingly, we urge passage of H.R. 1410 to uphold tribal sovereignty.

IV. The Promise of Limited Gaming in Arizona

We and many other Arizona tribes believe the existing tribal-state gaming compact to be the model in the Indian gaming industry. It is regulated at all levels of government (tribal, state, and federal), is limited in both the number of gaming devices and locations, benefits both gaming and non-gaming tribes alike, benefits local municipalities and charities throughout the state, and is beneficial to the State of Arizona. But most importantly, the Citizens of Arizona benefit because the tribal-state gaming compacts were the direct result of a voter approved ballot initiative in 2002.

Today, the proposed casino development proposal by Tohono O’odham runs contrary to what the voters approved in 2002 and threatens the existing tribal-state gaming compacts. 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, hard negotiations on an acceptable framework for all tribes. Importantly, 16 tribal leaders, including Tohono O’odham, signed an Agreement in Principle (AIP) to make a good faith effort to maintain a collaborative relationship as to gaming matters and compact renegotiation.

Specifically, the AIP stated that tribal leaders would make “Good Faith” efforts to share among themselves the details of compact renegotiations with the State of Arizona. Further, tribal leaders agreed to make “Good Faith” efforts to develop and maintain consistent positions and to notify other Tribal leaders if they believed they could not abide by the AIP.

We negotiated in good faith with all Arizona tribes and the Governor of Arizona to craft a tribal-state gaming compact that preserved tribal exclusivity for casino gaming, allowed for larger casinos and machine allotments with the ability to expand machine allotments through transfer agreements with rural tribes, and that was intended to limit the number of casinos in the Phoenix metropolitan area. In order to reach a deal with the Governor of Arizona all tribes,

including Tohono O’odham, had to agree that no more than seven casinos could be located in the Phoenix metropolitan area.

This meant that the Salt River Pima-Maricopa Indian Community and the three other Phoenix Metro tribes (Ak-Chin, Gila River & Fort McDowell) each had to give up their rights to build one additional casino. Tohono O’odham was aware of this concession on the part of other tribes and fully knew that this was a key deal point for the State of Arizona that needed to be made if negotiations were to move forward. .

However, it is clear that Tohono O’odham began actively seeking to purchase land in the Phoenix area for the sole purpose of establishing a casino, prior to the conclusion of compact negotiations and ratification of the tribal-state compacts.

As a result, many Arizona tribes have opposed the actions of Tohono O’odham. Indeed, a chronology of events from the time of enactment of the original land settlement further clarify the intent of Congress, the State of Arizona and Indian tribes throughout the state.

1986 October 20 – Congress adopted the Gila Bend Act. The Gila Bend Act authorized Tohono O’odham to purchase, and the Secretary to add Tohono O’odham’s reservation, up to 9,880 acres of land in Maricopa, Pinal or Pima counties. Under the Act, purchased land may not be within the corporate limits of any city and may not be purchased in more than three parcels.

1988 October 17 – Congress adopted the Indian Gaming Regulatory Act (IGRA). The Act authorized Tribes to conduct gaming, subject to requirements of the Act and the compact with the State. No provision grandfathering the Gila Bend Act was included in this Act.

1994 April 25 – The Arizona legislature intended to prohibit off-reservation casinos by adopting A.R.S. 5-601.C, which stated that the Governor of Arizona shall not concur in a so-called “two part determination” under IGRA regarding any proposed off-reservation casino. This State statute reflects Arizona’s public policy towards off-reservation casinos.

1999 - Compact negotiations began. Sixteen Tribes, including Tohono O’odham, signed the AIP 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.”

2000 January 25- Tohono O’odham asked the Secretary of the Interior to waive the three parcel limit under Gila Bend Act, which was needed in order to seek an off-reservation casino.

2000 May 31 – The Secretary approved Tohono O’odham’s request, and allowed the Tohono to buy and transfer in trust 9,880 acres in up to five parcels instead of three.

2002 February 20 - State and Arizona Tribes reach agreement-in-principle on proposed new compact. The new compact would require that each Phoenix metro tribe (Gila River, Fort McDowell, Salt River, and Ak-Chin) 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 in operation in the Phoenix metro area). After the agreement’s announcement, the 17 Tribes and the Arizona Indian Gaming Association (AIGA) began efforts to get the Arizona legislature to approve the agreement. Governor Hull issued a

News Release stating 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.”

2002 April 8 -David LaSarte, AIGA Executive Director, testified before the Arizona legislature 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 and allows the possibility for only one additional facility in Tucson.”

The legislature failed to adopt the compact. As a result, the 17 Tribes and AIGA began their political campaign seeking Arizona voter approval of the negotiated compact in Prop 202. AIGA published a campaign pamphlet for voters entitled “Answers to Common Questions,” with “major funding” 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 sponsored in part by Tohono O’odham stated:

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

A. 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.”

The Secretary of State’s official Voter Guide for the November 5, 2002 General Election provided arguments for and against adoption of Proposition 202. Governor Hull argued for adoption of Proposition 202, stating:

“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.”

Attorney General Napolitano argued for adoption 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.”

2002 March 11– Tohono O’odham signed a “Confidentiality and Non-Circumvention Agreement” with a realtor (Mr. Amavisca) to buy land for a casino in Maricopa County. In deposition, the realtor testified that Tohono O’odham “did not want outside parties knowing they were interested in land along the interstate...for a gas station, cigar store, possible casino...It was my understanding that a casino going in may get negative feedback in the area.” Also in deposition, the Business/Finance Manager for a Nation - owned corporation (Mr. Chaston) testified that the purpose of the realtor’s Confidentiality Agreement was that Tohono O’odham was “trying to keep the seller from knowing who the ultimate buyer is.” He also confirmed that the realtor was retained by Tohono O’odham to find land for a possible “gaming facility” and “that was the original reason to have Mr. Amavisca looking for us.”

2002 September 25 – According to an Arizona Department of Gaming (ADOG) Memorandum by Mr. Rick Pyper 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 ADOG Memorandum, Mr. Ned Norris represented the Tohono O’odham Nation and spoke against Prop 201, the competing proposition authored by the Colorado River Indian Tribes: “Mr. Norris said that 201 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.”

2002 November 5 – Arizona voters approved ballot initiative Proposition 202. Between November 1999 and December 2002, AIGA and Arizona Tribes met privately over 85 times on compact negotiations and the voter campaign. During the same period, AIGA Tribes had over 35 meetings with the State regarding compact negotiations and the voter campaign.

2002 November 6- 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 AIP 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.”

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

2003 March 12 – Three months later Tohono O’odham created a Delaware corporation in order to secretly buy land for a Phoenix metropolitan casino.

2003 August 21- Tohono O’odham’s secret Delaware Corporation bought the Glendale land, located in the Phoenix metro area, for a casino.

2009 January – Tohono O’odham applied to Secretary to have the Glendale land added to Tohono O’odham’s land base. In fact, Tohono O’odham told officials at the Department of the Interior that no Arizona tribes objected to this project when it submitted the application. This is not a true statement.

2009 – Upon hearing of Tohono O’odham’s plan to open a casino in the Phoenix metro area many Arizona Tribes passed resolutions opposing the plans. These tribes included the Ak-Chin Indian Community, Fort McDowell Yavapai Nation, Gila River Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe and Yavapai-Apache Nation. The reasons given by all these tribes is that Tohono’s plans violated the promises made to Arizona voters in Prop 202 and threatened tribes’ exclusive right to operate casinos in the state.

2011 April 29 – The member Tribes of AIGA passed a formal resolution to reaffirm AIGA’s Proposition 202 promises.

2011 June 29 – Tohono O’odham filed Answer in federal court to a complaint filed by the State of Arizona in *State of Arizona v. Tohono O’odham Nation*. In its Answer, Tohono O’odham 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 limit casinos in the Phoenix metro area – Tohono O’odham was concurrently 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 O’odham 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 O’odham 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.

Tellingly 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. When confronted, his response to some of these tribes was, “those are just words on a publicity pamphlet.”

Arizona Tribes overwhelmingly agree that the collaborative approach to crafting the current tribal-state compact has been a great benefit to tribal communities, local communities – such as our neighbors, the Cities of Tempe and Scottsdale, charities for the State, and the people of Arizona.

However, not then and certainly not now, did we expect to be here today to say that one of our sister tribes did not act in “good faith”. However, the record is clear there were ongoing efforts by Tohono O’odham government to purchase land, have it taken into trust status and develop a casino.

It is not an easy thing to stand here and talk about a lack of “good faith”, and we do so reluctantly. However, we act today so that in future years, we will not have to look back and say to all, that “we should have done something.”

V. 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). 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. After State officials had received these assurances, the Governor of Arizona entered into gaming compacts with the tribes to allow tribal gaming in Arizona.

A 17-tribe coalition was formed in 1999 to negotiate new gaming agreements with the State. Leaders from each member of the tribal coalition, including then-Chairman Edward Manuel of Tohono O'odham, signed an Agreement in Principle (AIP), which required that each tribe act in "good-faith" and notify the other tribes if it could not abide by the agreement or must take "positions or actions inconsistent" with the other tribes. The tribal coalition ultimately agreed that the four Phoenix-metro tribes (Ak-Chin Indian Community, Fort McDowell Yavapai Nation, Gila River Indian Community and Salt River Pima-Maricopa Indian Community) would each reduce their authorized casinos by one so there would be no more than seven casinos (the existing number at the time) in the Phoenix metro area. One Tucson-metro area tribe (the Pascua Yaqui tribe), agreed to give up a right to an additional casino, while Tohono O'odham refused to reduce its four casino allotment (Tohono O'odham already had three operating casinos, two in Tucson and one in an rural area) claiming it needed to keep its rural facility to provide jobs in that area, and that it would put the unbuilt casino in the Tucson area or the rural part of its reservation. The Governor and other tribes agreed to allow Tohono O'odham to keep its fourth casino allotment based on these commitments. Tohono O'odham is now trying to place its unbuilt facility in the Phoenix metro area and could, if allowed, relocate any of its other existing facilities there..

The tribal coalition spent over \$23 million on the campaign to pass Proposition 202, which would authorize the Governor to sign tribal-state gaming compacts. Tohono O'odham provided approximately \$1.8 million. The campaign distributed a document entitled "Answers to Common Questions" stating that "[u]nder Proposition 202, there will be no additional facilities authorized in Phoenix, and only one additional facility permitted in Tucson." Although Tohono O'odham has admitted that its funds were used to publicize these promises to the voters of Arizona, it now claims that these were misstatements to which Tohono O'odham had no obligation (legal or otherwise) to correct. Tohono O'odham has also disclosed, despite the promises contained in the AIP and those made to the State and voters, that it was "considering the possibility of acquiring land in the Phoenix 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." It has now come to light that Tohono O'odham was indeed planning to acquire land

for gaming in the Phoenix metro area as early as 2001 and eventually did so through a Tohono O’odham-owned Delaware corporation “in part to conceal its ownership” of the property.

Not only has Tohono O’odham manipulated federal law and administrative policy to shoehorn a casino into a neighborhood against the wishes of local governments and its sister tribes, 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.

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

Tohono O’odham’s secretive and deceptive actions have resulted in litigation in the federal courts from the District of Columbia to the State of Arizona and up to the Court of Appeals for the Ninth Circuit. Although these actions are still ongoing, Tohono O’odham made the calculated decision of using sovereign immunity as a shield to preclude review of its deceitful actions during the compact negotiations and Prop 202 campaigns of the early 2000’s. While Tohono O’odham tells Members of Congress to let the court address this matter, in court, Tohono O’odham 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.” Several tribes support the State’s allegations against TON.

The district court dismissed the fraud and misrepresentation claims not on the merits, but because Tohono O’odham asserted that it was protected by the doctrine of tribal sovereign immunity. Since Tohono O’odham has refused to waive its sovereign immunity with respect to these claims, the court was unable to consider them. On May 29, 2013, the court found that the evidence supported a claim for “promissory estoppel” against Tohono O’odham but that “such a claim is barred by [Tohono’s] sovereign immunity. In dismissing the fraud in the inducement, material misrepresentation and promissory estoppel claims because of Tohono’s sovereign immunity, the court noted that Congress only waived tribal sovereign immunity for claims arising from executed compacts. Therefore, the scope of this waiver does not include statements, commitments, and promises made prior to compact execution, which formed the basis of these deceit based claims against Tohono. While the commitment of the Arizona tribes not to build additional casinos in Phoenix was not written into the compact, that promise was the basis for Arizona’s acceptance of the model compact and was an implicit tenet of the State’s agreement to permit limited Class III gaming in Arizona. Congress is the appropriate entity to provide redress

to the parties who relied on the statements made by the Arizona tribes. Because Tohono O'odham has refused to waive its sovereign immunity and the merits of those claims cannot be heard by a court.

While the Arizona tribal community, the state, and the co-sponsors of the bill would welcome a resolution that ensures that there would be no casino gaming in Glendale, or other attempts to game on lands removed from Tohono O'odham's current reservation in the Tucson area, one cannot simply turn a blind eye to the fact that Tohono O'odham's current proposal to game in Glendale is illegal and violates the agreement that Tohono O'odham made with other Arizona tribes, the state, and with Arizona voters in 2002. It is therefore particularly ironic that Tohono O'odham claims the trust responsibility would be violated by this measure when in reality, the trust responsibility is a further reason to enact H.R. 1410— without it, the self-interested economic desires of one tribe would be advanced to the detriment of every other gaming tribe in Arizona.

There are also important practical considerations that compel Congressional action now. Among them, taxpayers and other tribes in Arizona should not have to wait and continue to have to spend time and money to fight against the unfair and dubious actions by Tohono O'odham. The result is that this bill would clarify what everyone except Tohono O'odham understands, that the current Arizona gaming compacts were intended to prohibit the placement of an additional casino in Glendale Arizona, in an Arizona city, town or off-reservation setting.

While the co-sponsors of H.R. 1410 and the Arizona tribes who support it, must reluctantly be critical of Tohono O'odham's conduct here, it is hard to avoid the fact that Tohono has repeatedly thwarted the normal process for obtaining federal approval of Indian gaming, and used sovereign immunity as a shield to prevent the review of claims against it for fraud in the inducement, material misrepresentation, and promissory estoppel. 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.

VII. 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 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 maintains the status quo in Arizona and does not adversely affect any tribe. Without this bill, the other Arizona Tribes may suffer because the current gaming compact structure will certainly be compromised. We support this legislation.