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THE TOHONO O'ODHAM NATION OF ARIZONA

TESTIMONY OF THE HON. NED NORRIS, JR., CHAIRMAN

HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
LEGISLATIVE HEARING ON H.R. 2938, THE "GILA BEND INDIAN RESERVATION LANDS REPLACEMENT CLARIFICATION ACT"

October 4, 2011

Chairman Young, Ranking Member Boren, and distinguished members of the Subcommittee on Indian and Alaska Native Affairs, my name is Ned Norris, Jr. I am the Chairman of the Tohono O'odham Nation. Twenty-five years ago the United States made a solemn promise to the Nation to redress the hardship and damage our people suffered when the Army Corps of Engineers flooded the portion of our lands known as the Gila Bend Indian Reservation. The United States' promise was enacted into federal law when Congress passed and President Reagan signed the Gila Bend Indian Reservation Lands Replacement Act (the Lands Replacement Act), Public Law 99-503.

I am here today to convey the Tohono O'odham Nation's outrage and profound sense of betrayal. H.R. 2938 would fundamentally alter the Lands Replacement Act, a settlement statute on which we have now relied for a full quarter of a century. My Nation was not consulted by the co-sponsors of H.R. 2938 before it was introduced nineteen days ago. And while I have always welcomed the opportunity to discuss the Lands Replacement Act, the Nation was not consulted as to the date of this hearing. Not only did it leave the Nation an inadequate time for preparation, it also takes place on one of the holiest of the Tohono O'odham religious days, precluding my participation in ceremonies of profound significance to my people.

That said, I do appreciate that I have been given an opportunity to share the Nation's story with you today. It is my great hope that once the Subcommittee knows more about the Nation, about our land claim settlement, and about what is really going on in the West Valley, you will reject H.R. 2938. I am confident that you will live up to Justice Hugo Black's admonition that "Great nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 US 99, 142 (1960) (Black, J., dissenting).

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THE GILA BEND INDIAN RESERVATION AND THE FLOODING CAUSED BY A FEDERAL DAM

The Tohono O'odham Nation has approximately 30,000 members. Our reservation lands are located in central and southern Arizona in Maricopa County (where Phoenix is located), Pima County, and Pinal County. Historically, the Nation's lands included four separate areas, one of which was known as the Gila Bend Indian Reservation, located near the town of Gila Bend on the Gila River. Gila Bend is located in Maricopa County, and is part of the Phoenix metropolitan area. Before the events that led up to enactment of the Lands Replacement Act in 1986, the Gila Bend Indian Reservation encompassed about 10,297 acres.

In 1950, Congress enacted the Flood Control Act, Pub. L. 81-516, 64 Stat. 176 (1950), which, among other things authorized construction of the Painted Rock Dam on the Gila River. The primary purpose of the Painted Rock Dam was to prevent the flooding of nearby non-Indian agricultural operations. As Congress and the Department of the Interior later recognized, the Flood Control Act of 1950 did not authorize the condemnation of the Nation's lands.

In the 1950s, the U.S. Army Corps of Engineers began construction of the Painted Rock Dam, ten miles downstream from the Gila Bend Indian Reservation. Construction was completed in 1960. Despite the assurances of the Bureau of Indian Affairs and the Corps that periodic flooding caused by the dam would not harm the Nation's agricultural use of its reservation lands, and despite a 1963 U.S. Geological Survey report asserting that the long range effects of flooding would be "unimportant," the Gila Bend Indian Reservation sustained almost continual flooding throughout the late 1970s and early 1980s. Most of the people living there had to be relocated to a small 40-acre village known as San Lucy. The flooding caused pronounced economic hardship, destroying a 750-acre tribally owned and operated farm that had been developed at tribal expense, and rendering the remaining acreage unusable for economic development.

In 1982, Congress authorized the Secretary of the Interior to conduct studies to determine which of the Nation's lands had been rendered unusable for agriculture. Southern Arizona Water Rights Settlement Act of 1982 (SAWRSA), Pub. L. No. 97-293, sec. 308(a), 97 Stat. 1274 (1982); H.R. Rep. No. 99-851 at 6. Congress also authorized the Secretary, with the consent of the Nation, to exchange public domain lands for those reservation lands that had been ruined. SAWRSA, Sec. 308(b), H.R. Rep. No. 99-851 at 6.

A study of the reservation lands carried out in 1983 under SAWRSA determined that the flooding had rendered almost the entire Gila Bend Indian Reservation, more than 9,952 acres, unusable for either agriculture or livestock grazing purposes. H.R. Rep. No. 99-851 at 6. A later 1986 study to identify replacement lands within a 100-mile radius of the reservation concluded that *none* of the sites identified were suitable replacement lands, from either a lands and water resources standpoint, or from a socio-economic standpoint.

THE GILA BEND INDIAN RESERVATION LANDS REPLACEMENT ACT

The destruction of nearly 10,000 acres of the Nation's lands caused extreme hardship for the Nation, giving rise to a number of claims against the United States. The United States was unable to redress the harm to the Nation by providing replacement lands for agriculture. So, in 1986, more than a quarter century after the dam was built, Congress created an alternative settlement mechanism to address the wrong done to our people and to settle our claims against

the federal government. That was the origin of the Gila Bend Indian Reservation Lands Replacement Act.

The House Committee considering enactment of the Lands Replacement Act concluded that the Nation had a reservation "which for all practical purposes cannot be used to provide any kind of sustaining economy. Significant opportunities for employment or economic development in the town of Gila Bend … simply do not exist." H.R. Rep. No. 99-851 at 7. As a result, Congress explicitly directed the Secretary of the Interior in the Lands Replacement Act to accept into trust the same number of acres that had been taken from us, and explicitly contemplated that the lands would be for non-agricultural development. Congress specifically stated in the Act that the intent was to "facilitate replacement of reservation lands with *lands suitable for sustained economic use which is not principally farming."* P.L. 99-503, sec. 2(4), *see also* H.R. Rep. No. 99-851 at 9.

The Lands Replacement Act provides funds for land acquisition, and if certain requirements are met, it directs the Secretary to accept into trust up to 9,880 acres of replacement land within the three counties (Pima, Pinal, and Maricopa) in which our other reservation lands are located . P.L. 99-503, sec. 6(c) and (d). The lands may not be incorporated into any city or town. Also, the lands must consist of no more than three areas of contiguous tracts, including one area contiguous to San Lucy Village, unless the Secretary waives this requirement. P.L. 99-503, sec. 6(d). If these statutory requirements are met, then, at the request of the Nation, the Secretary of the Interior must accept the lands in trust and the lands thereafter will be "deemed to be a Federal Indian Reservation *for all purposes*." P.L. 99-503, sec. 6(d).

Section 4(a) of the Lands Replacement Act required the Secretary to pay the Nation $30 million in three installments of $10 million if the Nation agreed to assign to the United States "all right, title and interest" to 9,880 acres of its land within the Gila Bend Indian Reservation. The Act also required the Nation to execute a waiver and release of "any and all claims of water rights or injuries to land or water rights with respect to all lands of the Gila Bend Indian Reservation from time immemorial to the date of the execution by the Nation" of that waiver. P.L. 99-503, sec. 9(a). In October 1987, less than a year after enactment of the Lands Replacement Act, the Nation executed an Agreement that contained this waiver and release, as well as the Nation's assignment of all right, title, and interest to the Gila Bend Indian Reservation. In short, Congress (i) enacted the Lands Replacement Act to compensate the Nation fairly for the nearly 10,000 acres of its lands that were lost due to the flooding caused by the Painted Rock Dam, and to allow the Nation to acquire replacement lands for economic development purposes that were not principally farming; and (ii) required in exchange that the Nation transfer property and rights to the United States and release the Nation's claims against the United States, both of which the Nation did years ago.

THE NATION'S WEST VALLEY LANDS

After enactment of the Lands Replacement Act, the Nation began working to identify lands that would satisfy the requirements of the Act, so those lands could be taken in trust and used for economic development purposes. The Department of the Interior already has taken one parcel of land (about 3,200 acres) in trust under the Act. One of the parcels that the Nation purchased is the West Valley property in Maricopa County, which is situated near the City of Peoria's upscale Peoria Crossings shopping district as well as the City of Glendale's sports and

entertainment district. The Nation's West Valley Resort project is predicted to generate some 9,000 new construction and operations jobs for the West Valley, and the Nation and many others in the area believe the project will provide a huge economic boost to the region. The Nation has worked closely with the surrounding community to establish itself as a good neighbor and has the support of many in the area for its proposed resort casino project, including the Mayor of Peoria, the Peoria Chamber of Commerce, and many local business owners.

Although the West Valley property is a significant distance from other tribal gaming operations in the Phoenix metropolitan area (the nearest tribal gaming operation is more than twenty miles away), the Nation reached out to nearby tribes to discuss its plans and to try to address concerns. The Nation also reached out the Mayor of Glendale and its City Council. Despite the expected benefits from the project and despite the Nation's efforts to work with surrounding communities and tribes, the City of Glendale opposes the project, as do the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community. These two opponent tribes collectively operate five casinos in the greater Phoenix area, a region with over 4 million people, and 20 incorporated municipalities, across a land area encompassing approximately 2,000 square miles.

THE DEPARTMENT'S DECISION TO ACQUIRE THE NATION'S LANDS IN TRUST, AND THE OPPOSITION'S EFFORTS TO TRY TO BLOCK THE TRUST ACQUISITION

On January 28, 2009, the Nation asked the Department of the Interior to accept its West Valley property in trust, as required by the Lands Replacement Act. In July 2010, the Secretary determined, despite lengthy arguments submitted in opposition by the City of Glendale and the Gila River Indian Community, that the Nation's land meets the requirements of the Lands Replacement Act and that the Secretary has an obligation to take the land in trust. Accordingly the Secretary issued a decision to take the land in trust in August of 2010. 75 Fed. Reg. 52,550 (Aug. 26, 2010). The Gila River Indian Community, the City of Glendale, and other plaintiffs challenged the decision in federal district court in Arizona, but the district court upheld the Secretary's decision. *Gila River Indian Community, et al. v. United States and Tohono O'odham Nation,* No. 10-cv-1993-DGC (D. Ariz.) (Order dated March 3, 2011). Gila River, Glendale, and the other plaintiffs have appealed that decision to the Court of Appeals for the Ninth Circuit and the appeal is pending.

Having failed to convince either the Secretary or the federal district court that the Nation was not entitled to have its West Valley property taken into trust, the City of Glendale and the Gila River Indian Community lobbied the Arizona state legislature for special legislation to allow the City of Glendale to annex the Nation's land -- without notice and without any of the procedural requirements usually required for annexation under Arizona law -- hoping that annexation would make the land ineligible for trust status under the Lands Replacement Act. The Nation challenged that state law, and the federal district court in Arizona found the state annexation law to be preempted by the federal Lands Replacement Act. *Tohono O'odham Nation v. City of Glendale and State of Arizona*, No. 11-cv-279-DGC (D. Ariz.) (Order dated June 30, 2011). The City of Glendale and the State of Arizona also have appealed that decision to the Ninth Circuit and the appeal is pending.

In fact, every decision so far relating to the Nation's fee-to-trust acquisition has confirmed the Nation's rights under the Lands Replacement Act. So now the Gila River Indian Community,

the City of Glendale, and other parties to the litigation have asked Congress to change the Act. More precisely, the proponents of H.R. 2938 ask Congress to unilaterally amend the Nation's land settlement, the Lands Replacement Act, an Act that the Department has said is "akin to a treaty." *Tohono O'odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 22 IBIA 220, 233 (1992).

ENACTING H.R. 2938 WOULD BREAK THE UNITED STATES' PROMISE TO THE NATION

Enacting H.R. 2938 would break the promise made by the United States to the Tohono O'odham Nation to compensate the Nation for the nearly 10,000 acres of land that it lost due to the actions of the United States in exchange for the transfer of the Nation's Gila Bend land and the release of its rights and claims. More than twenty-five years after the United States constructed the Painted Rock Dam, the Nation and the United States entered into a settlement, embodied both in the Lands Replacement Act and in a formal written settlement agreement. There is absolutely no justification for this Congress to back out of the terms of that agreement. If Congress enacts H.R. 2938, it not only will provide another example in the long, sad tradition of the United States breaking its promises to Indian Tribes, but it also will burden the United States and its taxpayers with very substantial liability for the breach of contract, breach of trust, and takings claims that the Nation will have against the United States for breaching the settlement agreement entered into under the Lands Replacement Act.

H.R. 2938 CONFLICTS WITH THE INTENT OF THE ORIGINAL DRAFTERS OF THE LANDS REPLACEMENT ACT

H.R. 2938 seeks to prevent the Nation from using the land it acquires under the Lands Replacement Act for gaming-related economic development. This is not a "*clarification*" of what the original sponsors of the Lands Replacement Act intended; rather, it would be completely inconsistent with what they intended.

The Nation's opponents assert that the lands acquired under the Lands Replacement Act were never intended to be used for gaming-related economic development. That is simply untrue. Indian gaming was not "invented" with the passage of IGRA in 1988. Indian gaming not only existed in 1986 when Congress passed the Lands Replacement Act, but the Nation had been operating a gaming business for several years in 1986. Moreover, due to the lack of federal restrictions on Indian gaming before the IGRA, Congress understood that, if it desired to prohibit gaming on Indian lands, it needed to do so through explicit statutory language. *See, e.g.,* the Florida Indian Land Claims Settlement 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). In each of those pre-IGRA statutes, Congress explicitly restricted or banned gaming by those tribes. If Congress had wanted to impose a similar restriction on the Nation, it could have done so in the Lands Replacement Act -- but it did not.

Moreover, no one can seriously contend that the co-sponsors of the Lands Replacement Act did not understand Indian gaming or that the Nation would be able to use its replacement lands for gaming-related economic development. Before Congress passed the Lands Replacement Act, two of its co-sponsors, Senator DeConcini and then-Representative McCain, were involved in the consideration of several pieces of Indian gaming legislation that were the

precursors of IGRA. In 1983, three years before the Lands Replacement Act was enacted, an earlier version of IGRA (H.R. 4566) co-sponsored by then-Representative McCain contained no restrictions whatsoever on when or where land could be acquired in trust for gaming. In 1985, Senator DeConcini sat on the Senate Committee on Indian Affairs when it recommended passage of H.R. 1920, which became the primary basis for IGRA. When that Committee recommended passage of H.R. 1920 with an amendment in the nature of a substitute, the amendments included a provision excepting land taken into trust as part of a settlement of a land claim from the general prohibition on gaming on lands acquired after passage of the bill. Both Senator DeConcini and then-Representative McCain would have known that land acquired under the Lands Replacement Act for "sustained economic use which is not principally farming" might be used for gaming, particularly because the Nation was operating a pre-IGRA gaming facility across the street from the Tucson airport at the very time that the Lands Replacement Act was passed. In addition, these sponsors of the Lands Replacement Act were aware of high-profile Indian gaming litigation being conducted in the federal courts during this time period, as the Ninth Circuit rendered its decision confirming the rights of tribes to conduct gaming in early 1986 in *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986).

In light of the particular knowledge of two co-sponsors of the Lands Replacement Act about Indian gaming, the restrictions Congress placed on gaming in other Indian settlements in that time frame, and the high profile litigation that then was pending in the courts, it simply is not plausible to suggest that Congress did not understand that the language "[a]ny land which the Secretary holds in trust *shall be deemed to be a Federal Indian Reservation for all purposes*" meant that the Nation would be entitled to conduct gaming on those lands. P.L. 99-503, sec. 6(d).

I also note that the Department of the Interior's Office of the Solicitor confirmed that land acquired under the Lands Replacement Act could be used for gaming as far back as 1992. Also in 1992, the Nation informed the State of Arizona during compact negotiations of the Nation's rights under the Lands Replacement Act, including its right to conduct gaming on lands acquired under the Lands Replacement Act. The State of Arizona did not object to the Nation gaming on such lands, provided they were held in trust and met the requirements of Section 20 of the IGRA. The Nation's 1993 gaming compact expressly permits gaming on such lands, as does the Nation's 2003 gaming compact.

Finally, the Gila River Indian Community was well aware that lands acquired under the Lands Replacement Act could be used for gaming when Gila River and the United States negotiated the Arizona Water Settlements Act in 2004. P.L. 108-451 (Dec. 10, 2004). Yet both Gila River and the United States agreed to water rights settlement language and settlement legislation which reaffirmed the Nation's rights under the Lands Replacement Act.

H.R. 2938 WILL CAUSE REAL HARM TO THE TOHONO O'ODHAM NATION

In addition to the injustice of changing the law enacted to compensate the Nation and on which the Nation has relied in acquiring land for gaming-related economic development, the enactment of H.R. 2938 would have a devastating effect on the Tohono O'odham Nation and its people. More than 32 percent of the Nation's households have annual incomes less than $10,000, over 46 percent of the Nation's families live below the poverty line, and there is a greater than 21% unemployment rate among Tribal members on the reservation. The Nation has

devoted an enormous amount of time and financial resources to its West Valley project in reliance on existing federal law; if H.R. 2938 is enacted, all the effort and resources the Nation has invested to reduce its dependence on federal monies and become self-sufficient, as Congress intended in the Lands Replacement Act, would be wasted.

H.R. 2938 WILL CAUSE REAL HARM TO THE WEST VALLEY: IT IS JOB-KILLER LEGISLATION

Enactment of H.R. 2938 would kill off 9,000 new construction and operation jobs for the West Valley, as well as countless thousands of other jobs that would result from new local spending generated by both the resort and the people who work there. If Congress takes affirmative action to prevent this non-taxpayer funded economic stimulus from becoming a reality, Congress effectively withholds these thousands of jobs from West Valley residents.

H.R. 2938 CIRCUMVENTS PENDING LITIGATION

Enactment of H.R. 2938 directly interferes with ongoing litigation in both federal and state courts. There are currently three separate actions pending in the federal District Court for the District of Arizona and in the Court of Appeals for the Ninth Circuit. These actions will determine whether the Nation has complied with the Lands Replacement Act, other laws, and its Tribal/State gaming compact, whether the Department of the Interior has properly implemented the Lands Replacement Act, and whether the Act is constitutional and validly enacted in the first place. Thus far, the courts have confirmed that the Nation and the Department of the Interior have acted entirely in accordance with the law. For that reason, opponents of the Nation's plans (driven largely by market protection motivations) are pushing Congress to change the law. Surely Congress' role in Indian Affairs is not to create special legislation to protect the market share of the few to the detriment of the greater good of the many.

H.R. 2938 WILL CREATE NEW LITIGATION: BREACH OF TRUST, BREACH OF CONTRACT, AND TAKINGS CLAIMS

Enactment of H.R. 2938 will create significant new liability for the United States, as it will generate causes of action against the United States for breach of contract, breach of trust, and takings claims that could result in a substantial sum of money being awarded to the Nation. The Lands Replacement Act confirmed an agreement between the United States and the Nation, and this legislation reneges on that agreement and the promises underlying it. If H.R. 2938 is enacted, the United States will be liable for the immense resources that the Nation has spent in reliance on that agreement and for the economic development benefit that has been denied it. Ultimately, the American taxpayer will have to subsidize the cost of this special interest legislation.

CONCLUSION

Mr. Chairman and Subcommittee members, I thank you again for giving me an opportunity to speak to this Subcommittee on this legislation. In sum, I must reiterate that enactment of H.R. 2938 would break the United States' promise, as that promise was set forth in a contract and in settlement legislation, to compensate the Nation for the destruction of the Gila Bend Indian Reservation. Enactment of H.R. 2938 would interfere with ongoing litigation that will decide whether the Nation is entitled to move forward with its West Valley development plan, and

would destroy the planned creation of 9,000 new jobs for the West Valley area. Enactment of H.R. 2938 would create new breach of trust, breach of contract and takings claims against the United States, thereby exposing American taxpayers to unnecessary financial risk. And finally, enactment of H.R. 2938 would add yet another black mark to the United States' long history of breaking its promises to Native Americans. With all due respect, is the breaking of commitments made in long-established Indian land and water rights settlements really going to be the 112th Congress' legacy to Indian Country?

I thank you for your time today, and I would be happy to answer any questions you may have.