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Written Testimony before the U.S. House of Representatives

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

Executive Summary

The Salt River Pima Maricopa Indian Community ("Community") would like to thank Rep. Trent Franks (R-2nd/AZ) along with Reps. Paul Gosar (R-1st/AZ), Ben Quayle (R-3rd/AZ), David Schweikert (R-5th/AZ), and Jeff Flake (R-6th/AZ) for sponsoring this important legislation, H.R. 2938, the "Gila Bend Indian Reservation Land Replacement Clarification Act." We also want to thank Representative Dale Kildee, long a champion of tribal rights, for his co-sponsorship of this bill.

This bill will prevent gaming on lands acquired by the Tohono O'odham Nation ("Nation") in Arizona pursuant to the Gila Bend Indian Reservation Lands Replacement Act in 1986 (P.L. 99-503, 100 Stat. 1798) ("Gila Bend Act") and protect the current Indian gaming structure in Arizona.

H.R. 2938 is necessitated by the Nation's efforts to manipulate the Gila Bend Act in a manner that would directly violate their commitments made in the current Arizona compacts. The Nation is currently trying to utilize the 1986 Gila Bend Act to acquire lands more than 100 miles from its existing reservation, in our tribe's aboriginal lands,[1] to develop a casino in the Phoenix metropolitan area.

Congress passed the Gila Bend Act in 1986. The purpose of this law was to allow the Nation to replace up to 9,880 acres of primarily agricultural lands that were being intermittently flooded due to Federal dam projects. These lands were located in southern Arizona near the existing reservation of the Nation. The law provided $30 million to the Nation to purchase replacement lands.

While there is no mention of gaming in this law, two years later Congress passed the Indian Gaming Regulatory Act (25 U.S.C. 2701, *et seq.*) ("IGRA"), which specifically restricted the ability of Indian tribes to conduct gaming activities on lands acquired after October 1988, except in certain very narrow circumstances.

The Nation is now asking that the Secretary of the Interior take a fifty-three acre portion of this land near Glendale, Arizona into trust status for the purpose of developing a Las Vegas-

[1] The map attached as Exhibit 1 clearly demonstrates that the lands in Glendale are the aboriginal lands of the Pima Maricopa people, not the Papago (who are now represented by the Nation).

style casino on it. The Nation argues that the Gila Bend Act 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 prohibitions in IGRA and the promises made by the Nation during the Compact negotiations and the Prop 202 process.

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. A federal district court has issued an injunction prohibiting the Secretary from doing so until the appeals from that decision have run. The Gila Bend Act was passed before IGRA and was not intended to allow for gaming on these lands. Congressman Franks' bill would clarify Congress' intent.

In addition to seeking to sidestep the limits of the Indian Gaming Regulatory Act, the efforts of the Nation also jeopardize a well-balanced system of gaming in Arizona, that the Nation helped to construct. 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 the Nation to develop a fourth casino (the Nation currently operates three successful casinos) in the Tucson metropolitan area, where the Nation has historically been located.

The Nation financially and publicly supported the development of the current gaming system in Arizona.[2] However, unbeknownst to the other tribes, the State and the voters of Arizona, 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, the Nation was entering into a confidential agreement with a realtor to buy land in the Phoenix area for a casino.

Twelve American Indian tribes in Arizona oppose the efforts of the Nation to develop a casino in the Phoenix metropolitan area; as does the Governor of Arizona and the Cities of Glendale, Phoenix, Scottsdale and others, and no other Arizona Indian tribe has indicated support of the casino development.

Congress did not intend this type of situation to occur when it passed the Gila Bend Act. H.R. 2938 would bring some common sense to this situation and clarify that lands purchases through the Gila Bend Act cannot be used for gaming, confirming the promises made by the Nation in 2002 to the tribes, to the State and the voters of Arizona. H.R. 2938 will not make any amendments to the Indian Gaming Regulatory Act. The bill would not take any lands away from

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[2] The Tohono O'odham Nation was a major contributor to the entire referendum process, contributing over $1.8 million, and participating in the direction and implementation of the campaign throughout. One particularly telling example of the promise that they were endorsing in the campaign materials for the Compact is attached as Exhibit 2. In it, on page 5, appears the following text:

"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 NEW ADDITIONAL FACILITIES AUTHORIZED IN PHOENIX, AND ONLY ONE ADDITIONAL FACILITY PERMITTED IN TUCSON."**

the Nation, nor will it prevent any lands from going into trust status. The bill will only prohibit the Nation from conducting gaming on lands acquired pursuant to the Gila Bend Indian Reservation Lands Replacement Act of 1986 which is critical in order to be able to protect the entire Arizona Indian gaming structure.

I. H.R. 2938

As its title makes clear H.R. 2938 clarifies the Gila Bend Act to expressly prohibit Class II or Class III gaming, as defined in IGRA, on lands placed into trust pursuant to the Gila Bend Act. H.R. 2938 is a simple one sentence amendment that clarifies that the Gila Bend Act was not intended to authorize gaming on newly acquired lands.

H.R. 2938 does not jeopardize tribal sovereignty nor create negative precedent for Indian Country. H.R. 2938 simply seeks to clarify that Las Vegas-style gaming is not permitted on land acquired pursuant to the Gila Bend Act. In fact, this type of legislative restriction is common in Indian Country. Congress has included various restrictions in legislation involving Indian land, particularly gaming. For instance, it is not unusual for Congress to revisit existing statutes to clarify that gaming is prohibited, so long as the legislation is narrowly tailored. [3] Similarly, legislative bills consistently grant federal recognition to tribes or grant land-into-trust status with

[3] *See e.g.*, the Rhode Island Indian Claims Settlement Act, settling the Narrangansett's land claims, was enacted in 1978 without a provision regarding gaming. 25 U.S.C. § 1701 *et seq.* Congress subsequently amended the Rhode Island Indian Claims Settlement in 1996 to explicitly prohibit gaming pursuant to IGRA. *See* 25 U.S.C. § 1708(b) ("For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands"). S*ee also*, the Colorado River Indian Reservation Boundary Correction Act, to clarify or rectify the boundary of the Tribe's reservation while also including a provision prohibiting gaming ("Land taken into trust under this Act shall neither be considered to have been taken into trust for gaming nor be used for gaming (as that term is used in the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)"), Pub. L. 109-47 (Aug. 2, 2005); Congress passed legislation to waive application of the Indian Self-Determination and Education Assistance Act to a parcel of land that had been deeded to the Siletz Tribe and Grand Ronde Tribe in 2002 but also included a gaming prohibition provision ("Class II gaming and class III gaming under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not be conducted on the parcel described in subsection (a)") Pub. L. 110-78 (Aug. 13, 2007); Congress clarified the Mashantucket Pequot Settlement Fund, 25 U.S.C. § 1757a to provide for extension of leases of the Tribe's land but provided that "No entity may conduct any gaming activity (within the meaning of section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703)) pursuant to a claim of inherent authority or any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq) and any regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission pursuant to that Act) on any land that is leased with an option to renew the lease in accordance with this section."), Pub. L. 110-228 (May 8, 2008); Congress passed the Indian Pueblo Cultural Center Clarification Act which amended Public Law 95-232 to repeal the restriction on treating certain lands held in trust for the Indian Pueblos as Indian Country with the explicit clarification that although it was Indian Country it could not be used for gaming ("Gaming, as defined and regulated by the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), shall be prohibited on land held in trust pursuant to subsection (b)."") Pub. L. 111-354 (Jan. 4, 2011).

an explicit provision prohibiting gaming pursuant to IGRA. [4] This is a proper and necessary role for Congress.

This continues to be a consistent practice of Congress. Recently, 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 intro trust for the benefit of the Tribe under this Act shall not be used for gaming under the Indian Gaming Regulatory Act"). *See* Exhibit 3.

The Community supports H.R. 2938 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. Instead, this legislation merely makes express what had been the common understanding of the rights and remedies available under the Gila Bend Act.

II. The Gila Bend Act Did Not Create a Right to Conduct Gaming

In 1950, Congress enacted the Flood Control Act, Pub. L. No. 81-516, 64 Stat. 163, authorizing the construction of the Painted Rock Dam in central Arizona. The Painted Rock Dam was built ten miles downstream from the Nation's Gila Bend Reservation, which was held in trust by the United States for the benefit of the Nation. H.R. Rep. No. 99 851 at 4 (1986).

[4] *See e.g.*, Hoh Indian Tribe Safe Homelands Act, Pub.L. 111-323 (Dec. 22, 2011), transferred federal and non-federal land to the Hoh Indian Tribe. The legislation specifically provided that "[t]he Tribe may not conduct on any land taken into trust pursuant to this Act any gaming activities—(1) as a matter of claimed inherent authority; or (2) under any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) (including any regulations promulgated by the Secretary of the National Indian Gaming Commission pursuant to that Act)); the Omnibus Public Land Management Act of 2009 included a land transfer to the Washoe Tribe but restricted the use of land for gaming: "Land taken into trust under paragraph (1) shall not be eligible, or considered to have been taken into trust, for class II gaming or class III gaming (as those terms are defined in section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703)) Pub. L. 111-11, 123 Stat. 1115 (Mar. 30, 2009); Pechanga Band of Luiseno Mission Indians Land Transfer Act of 2007, Pub. L. 110-383 (Oct. 10, 2008) transferred federal land in trust to the Pechanga Reservation but prohibited gaming such that "[t]he Pechanga Band of Luiseno Mission Indians may not conduct, on any land acquired by the Pechanga Band of Luiseno Mission Indians pursuant to this Act, gaming activities or activities conducted in conjunction with the operation of a casino—(A) as a matter of claimed inherent authority; or (B) under any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) (including any regulations promulgated by the Secretary or the National Indian Gaming Commission under that Act))"; Albuquerque Indian School Act, Pub.L. 110-453 (Dec. 2, 2008) that authorized the Department of Interior to take land into trust for the benefit of nineteen (19) pueblos and included a prohibition on gaming: "No gaming activity (within the meaning of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)) shall be carried out on land taken into trust under section 103(a)"; Congress passed a bill to provide for lands to be held in trust for the Utu Utu Gwaitu Paiute Tribe and included a gaming restriction: "Lands taken into trust pursuant to subsection (a) shall not be considered to have been taken into trust for, and shall not be eligible for, class II gaming or class III gaming (as those terms are used in the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.))", Pub. L. 109-421 (Dec. 20, 2006).

Before completion of the dam, the Army Corps of Engineers (the "Corps") repeatedly attempted to obtain a flowage easement over the lands (both Indian trust lands and non-Indian fee lands) that would be intermittently flooded as a result of the dam's construction. Id. at 5. Because the Corps could not reach an agreement with the Nation or other non-Indian landowners, it eventually instituted condemnation proceedings in federal district court. Id. Through those proceedings, the Corps obtained a condemnation of fee title for the non-Indian lands and a flowage easement for the affected Indian and non-Indian lands pursuant to a 1964 federal court decree.[5] Id.

The flowage easement for Painted Rock Dam did not "take" the Gila Bend Reservation from the Nation but rather authorized intermittent flooding of approximately 7,700 acres of the Nation's Gila Bend Reservation, for which the Corps paid $130,000 in compensation to the Nation. Id. In the late 1970s and early 1980s, high rainfall caused repeated flooding upstream of Painted Rock Dam, "each time resulting in a large standing body of water." Id. "[T]he floodwaters destroyed a 750-acre farm that had been developed at tribal expense and precluded any economic use of reservation lands." Id. at 5-6. In 1981, the Nation petitioned Congress "for a new reservation on lands in the public domain which would be suitable for agriculture." Id. at 6.

We understand the inexcusable damage done to the cemetery and the houses in the San Lucy village and we believe that Congress rightfully enacted the Gila Bend Act in 1986 to address the unexpected flooding and its effects. To be certain, however, the Gila Bend Reservation was not inundated or otherwise rendered inhabitable. The most predominant effect was the wide spread growth of tamarisks (salt cedars) on the Nation's reservation lands, which are an invasive species that is difficult to destroy and makes agricultural development extremely difficult.

Thus, the Gila Bend Act gave the Nation the means to replace 9,880 acres with 9,880 acres of other land. It provided that if the Nation assigned the entire reservation to the United States, it would receive in return funds to be used for the purchase of replacement land and for other related purposes. Specifically, Section 4(a) authorized payment of $30 million to the Nation, plus interest from the date of enactment, if it agreed to assign "to the United States all right, title, and interest of the Tribe in nine thousand eight hundred and eighty acres of land within the Gila Bend Indian Reservation."

In other words, the Gila Bend Act authorized an acre for acre exchange of land funded by the federal government in order to put the Nation back into the position it was before Painted Rock Dam was constructed – in possession of land suitable for agricultural development. Thus,

[5] Many tribes across the Nation, including various Missouri River valley tribes impacted by the Pick-Sloan project, and even the Seneca Nation of Indians in New York impacted by the Kinzua Dam have been the subject of such proceedings.

the Nation made such an assignment shortly after enactment and received the statutory funds in return.

The Nation seeks to justify the operation of gaming in the Phoenix metro area on the ground that the Gila Bend Act qualifies as a "settlement of a land claim" within the meaning of IGRA. But a "land claim" is a claim to land, rather than a claim for damage to land. To read "land claim" to mean a claim to title or possession is faithful to historical congressional and judicial usage, to the statutory text of IGRA, and to IGRA's implementing regulations. In contrast, to read "land claim" as the Nation suggests defies the statutory text of IGRA.

The regulations define a "land claim" as one that (i) arises under the U.S. Constitution, federal common law, federal statute or treaty; (ii) accrued on or before October 17, 1988 and (iii) involves "any claim by a tribe concerning the impairment of title or other real property interest or loss of possession." The regulations make clear that the term "land claim" for purposes of Section 20 relates to claims concerning the title of the land or loss of possession. The term "land claim" does not encompass all claims relating to land, such as ones for injury to the land.

A "land claim" as that term has been used by Congress for over a hundred years is a claim to land—a claim to title. Every occurrence of the term "land claim" located in federal statutes confirms this interpretation. The prototypical Indian land claims when Congress enacted IGRA were claims such as those made by Eastern tribes pursuant to the Indian Nonintercourse Act. See, title 25, Chapter 19, United States Code. In each instance, a state or other non-Indian entity acquired title and possession of the Indian land in contravention of federal law.

As a result, the Indian tribes brought actions for the immediate possession of the land and ejectment of the non-Indian occupants based upon the tribe's superior title to the land as recognized and guaranteed by federal law. Thus, the hallmark of an Indian land claim is one in which an Indian tribe claims a right to a parcel of land, either by title or possession, against an adverse claim of title. This Congress has enacted at least thirteen (13) "land claim" settlements, each of which arose out of claims filed or asserted by Indian tribes alleging the illegal dispossession of their land and a possessory interest based upon superior title. *See* 25 U.S.C. Chapter 19, §§ 1701-1778h.

The Gila Bend Act did not settle any "land claim" and mentions no such claim. Rather, it settled "any and all claims of water rights or injuries to land or water rights (including rights to both surface and ground water)." Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798, 9(a) (1996). The Nation has proffered a number of self-serving assertions of viable "land claims" allegedly settled by the Gila Bend Act, none of which hold up when analyzed under well settled law.

III. H.R. 2938 Recognizes and Supports Tribal Sovereignty

The Community, along with the 12 other tribes in support of H.R. 2938, 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.

There is no better example of this united and collective action among Arizona tribes than the 17 tribe coalition that jointly negotiated and worked to pass by voter referendum Proposition 202 – the 2002 Tribal – State compacts between Arizona gaming tribes, including the Nation, and the State of Arizona. Ironically, however, it is Tohono O'odham's unilateral breach of this very Compact and the spirit of unity that has bound each tribe to the commitments made in those agreements that now threatens tribal sovereignty and has compelled the Community and 11 other Arizona tribes to publicly oppose Tohono O'odham's efforts.

We are here today in support of H.R. 2938 because in our view, H.R. 2938 explicitly recognizes and respects tribal sovereignty by upholding the commitments that all of the 17 tribes made during the compact process and that were memorialized through passage of Proposition 202.

Here, H.R. 2938 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. 2938, 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. 2938 to uphold tribal sovereignty.

IV. Arizona Compact

We and many other Arizona tribes believe that the existing tribal-state gaming compacts are 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 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 project by the Nation runs contrary to what the voters approved in 2002 and threatens the existing tribal-state gaming compacts. For example,

prior to the passage of the voter approved ballot initiative ("Prop 202") which culminated in the existing Tribal-State gaming compacts, tribal leaders held extensive negotiations on an acceptable framework for all tribes. Importantly, 16 tribal leaders, including the Nation, signed an Agreement in Principle ("AIP") to make a good faith effort to maintain a cooperative relationship as to gaming matters and compact renegotiation. *See* Exhibit 4.

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 limited the number of casinos in the Phoenix metropolitan area. In order to reach a deal with the Governor of Arizona all tribes, including the Nation, 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 one casino. The Tohono O'odham tribe was aware of this concession on the part of other tribes and was fully aware 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 the Nation began actively seeking to purchase land in the Phoenix area for the sole purpose of establishing a casino, prior to the ratification of the tribal-state compacts. As a result, many Arizona tribes have opposed the actions of the Nation. Indeed, Exhibit 5, 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.

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 more casinos in the Phoenix metropolitan area. When confronted his public response to some of these tribes was, "those are just words on a publicity pamphlet."[6]

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, for the State, and the people of Arizona.

[6] *See also* Exhibit 6, in which the Nation admits in documents filed in federal district court that "various parties" viewed the statements made in the voter materials and otherwise as a commitment that there would be no new gaming sites in the Phoenix metropolitan area. (Admission 40, pp. 6-7).

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 the Nation 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 said something."

V. The Nation already has a thriving gaming enterprise with three operating casinos.

The Nation already has very successful gaming enterprise. The Nation operates two casinos in the Tucson metropolitan area and an additional casino in Why, Arizona. The success of the Nation's gaming enterprise was recently highlighted in Indian Country Today. *See* Exhibit 7. Additionally, under the current gaming Compact, the Nation is allowed to develop a fourth casino on their existing reservation lands, including in the Tucson metropolitan area. H.R. 2938 would not impact the Tribe's existing 3 casinos or impact its ability to develop a fourth casino on its existing reservation.

VI. Congressional action is necessary

The Nation'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. Significantly, however, not one of these cases has dealt with the Nation's claim that the Glendale land is the "settlement of a land claim".

Why? Because the Nation has manipulated the land-into-trust and gaming eligibility process in a calculated way to prevent the public and any other interested party from ever challenging their notion that the Gila Bend Act settled a land claim or that the Glendale parcel actually qualifies for Indian gaming. Definitive action by Congress is therefore necessary to resolve, once and for all, the intent of the Gila Bend Act and more importantly, preserve the deal that was struck in 2002.

Indeed, this Congress has often clarified – even retroactively – that certain land acquisition bills were never intended to be used for gaming, especially on lands far flung from existing reservation lands. Of course, the Nation prefers to keep things tied up in court while blaming everyone else for the state of uncertainty created by their unilateral actions. More problematic, however, is the Nation's public relations campaign that is premised on taking procedural orders from the various courts and implying that the law sanctions off-reservation urban gaming in Arizona. Nothing could be farther from the truth. Only Congress has the power to put an end to the Nation's costly courtroom tactics.

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 the Nation claims the trust responsibility would be violated by this measure. In reality, the trust responsibility is a further reason to enact HR 2938 – without it, the self-interested economic desires of one tribe would be advanced to the detriment of every other gaming tribe in Arizona.

Furthermore, because courts often struggle with interpreting congressional intent and will often invite Congress to clarify a statute that has become controversial, Congress is uniquely situated to clarify the Gila Bend Act that is being misused by Tohono O'odham and to address an issue that the administration seems reluctant to address. In doing so, Congress can ensure that Tohono O'odham will not be allowed to develop a casino in Glendale, a result never envisioned by Congress in the first instance, and which the Nation explicitly promised it would not do in the Compact and Prop 202 process.[7]

The Nation has manipulated the regulatory review process in a thus far successful attempt to shield the ultimate question – gaming eligibility – from judicial review. If the bill fails and the process continues, there is a strong possibility that the Department of Interior has been maneuvered into a position where it will be forced to render an opinion on gaming eligibility totally separate from any vehicle that would give interested parties the opportunity to challenge that decision. Thus Congress must act.

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 the Nation. The result is that this bill would clarify what everyone except the Nation understands, that the Gila Bend Act cannot be used to shoehorn an off-reservation casino into Glendale or any other location not on its existing reservation.

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[7] Contrary to the Nation's statements that this legislation is being prompted by its victories in court, the Nation has either lost or is fighting an appeal on major issues. For example, the federal district court issued an injunction against the United States prohibiting it from taking the land into trust until the appeals on lower court decisions have been heard and decided. In June, a court rejected the Nation's attempt to keep other Arizona tribes out of a legal action aimed at protecting the integrity of the gaming compact, and the court rejected Tohono O'odham's attempt to dismiss the legal counts of that suit. In August, the NIGC disapproved the Nation's request for approval of an amendment to its gaming ordinance, and, in September, a court ruled against the Nation's attempts to stop the discovery of salient facts about Tohono O'odham's purchases of land under the Gila Bend Act, including its use of a sham corporation.

While the Arizona tribes who support H.R. 2938 do not want to have to be critical of the Nation's conduct here, it is hard to avoid the fact that it has repeatedly thwarted the normal process for obtaining federal approval of Indian gaming by trying to get federal regulators at the National Indian Gaming Commission to approve the Tribe's Glendale plan as part of its existing gaming ordinance and by engineering procedural moves at Interior to avoid review there.

VII. Summary

The Salt River Pima Maricopa Indian Community, and the other tribes from Arizona that are present today, urge Congress to pass H.R. 2938. It is needed to clarify the original Gila Bend act so that any land purchased since its enactment is not eligible for Class II or Class III gaming pursuant to the Indian Gaming Regulatory Act (IGRA). The clarification does not interfere with the Nation'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 compacts could be nullified. This bill does not prevent the Nation from acquiring the land in trust and establishing other economic development. We support this legislation.