

LEGAL ANALYSIS SUMMARY
TOHONO O'ODHAM NATION'S TRUST APPLICATION FOR GAMING PURPOSES

The issues created by the Tribe's Trust Application are complex. This paper attempts to summarize succinctly the applicable legal analysis. Some factual information and legal arguments are necessarily prioritized and emphasized herein. As a result, a complete review of the City of Glendale's Statement of Legal Position is recommended.

Analysis Point: Does the Application Land comply with the requirements of the Gila Bend Act?

The Gila Bend Reservation Land Replacement Act (Gila Bend Act) requires that replacement land not be within the corporate limits of a city or town. Additionally, the replacement land can only constitute three areas, one of which must be contiguous to San Lucy Village. The purpose of these requirements is clearly to minimize the effect that creation of an Indian reservation has on a city or town and to assure the citizens of San Lucy Village are provided economic opportunities.

With respect to the city-boundary requirement, the Application Land lies within the exterior boundaries of the City. It has long been incorporated into the City's statutorily-required General Plan and the regional water and wastewater plans. As a result, the Application Land is precisely the type of land that is barred by the Act from being used as replacement land. Taking this land into trust and unexpectedly creating a new Indian reservation on a relatively small parcel completely surrounded by a municipal jurisdiction and within an a rapidly developing urban area creates untenable issues related to, e.g., governmental jurisdiction, public policy implementation, legal relationships, taxation, law enforcement, economic development, and infrastructure development. These are not new issues. Congress recognized the specific type of problem and dictated that they be avoided by restricting the land eligible for trust under the Act.

Additionally, the City has annexed a large portion of the application land. A small section of the application land was annexed in 1977. In December 2001, a much larger area, 46 acres, of the application land was also annexed into the City. That annexation was challenged but the challenged was dismissed without any order overturning the annexation. In the meantime, the City improperly deannexed the area. The attempted deannexation was not allowed by Arizona statute and was ineffective. As a result, a large portion of the application land is within the City's jurisdiction. The trust application, therefore, fails because the land identified does not meet the requirements of the Gila Bend Act.

Moreover, the Act specifically mandated that replacement land directly serve San Lucy Village. San Lucy Village was created after one of the Tribe's settlements on private land was relocated by the federal government. The Act allows for replacement land to be in three areas, one of which had to be contiguous to the newly created San Lucy Village. The Tribe has submitted two other applications for trust land, neither of which is contiguous to San Lucy Village. Therefore, the third trust request must meet this requirement.

The Tribe's Trust Application, however, relies on a waiver that was issued by the BIA that expanded the three-area requirement to five areas and eliminated the San Lucy Village-contiguity requirement. That waiver exceeded the Secretary's authority under the Act. While discretionary authority was granted to the Secretary to issue a waiver, the language clearly limits the exercise of that authority. The waiver could only be issued for a parcel that is identified with particularity and which is close enough to San Lucy Village to be managed as a single economic unit along with the Village. Contrary to the Act, the waiver was general in nature; so broadly applicable that it ostensibly waived other provisions of the Act for which there was not waiver authority. Additionally, no waiver could be granted for the Application Land, which is so far distant from San Lucy Village that it could never be managed as a single economic unit.

Because the Application Land does not meet the requirements of the Gila Bend Act, the Trust Application cannot be accepted by the Secretary and must be denied.

Analysis Point: Does Trust Application invoke a discretionary or mandatory taking into trust?

The Gila Bend Act states that the Secretary shall take replacement land into trust. Such language has been interpreted as a Congressional mandate. Relying on that interpretation, the Tribe would have the Secretary exercise none of the regulatory analysis that has been adopted for the taking of land into trust. Moreover, the Tribe seeks to avoid the other federal laws applicable to discretionary trust applications, such as National Environmental Policy Act (NEPA).

The Tribe, however, ignores the fact that its application relies on the BIA's waiver. While that waiver was improperly issued, any such waiver would inarguable be a discretionary act on the part of the Secretary. Because the Tribe's Trust Application relies on the discretionary waiver for taking the Application Land into trust, the taking is a discretionary act. As a result, the Tribe must comply with the applicable regulatory requirement, which requires consideration of the effect of the creation of its reservation for gaming purposes in the developing area of the City next to residential units and across the street from a high school. Additionally, an Environmental Impact Statement as required by NEPA must be completed to address the affects of this proposed project.

Because the Trust Application is discretionary--assuming the waiver is valid to any extent—but fails to address the required elements of federal law, it cannot be accepted by the Secretary and must be denied.

Analysis Point: Is the Application Land eligible for Indian gaming?

The Indian Gaming Regulatory Act (IGRA) prohibits gaming on land acquired after October 1988 ("off-reservation gaming"). Exception is made in IGRA § 20 for after-acquired land if the Secretary determines the activity will not be detrimental to the local community and the consent of the governor of the affected state is secured. The prohibition is avoided, however, if the land is taken as a result of the "settlement of a land claim." The Tribe asserts that the Gila Bend Act was a settlement of a land claim and, therefore, the Application Land, while after-acquired, is eligible for off-reservation gaming.

The Gila Bend Act was not, however, a land-claim settlement. A "land claim" in the relevant context of Indian Law is a claim that relates to the title or possession of the land. The Tribe had no such claim. Title to the land, which was held in trust by the United States, was never in dispute. Possession of the land remained with the Tribe. The United States took a valid easement over the land, one to which the Tribe stipulated when it was secured through the judicial process. Therefore, the Gila Bend Act was not a settlement of a land claim. Nothing in the Act required that the Tribe waive any type of land claim. The introductory section of the Act, in fact, was modified when the bill was being drafted to specifically avoid any potential of misinterpreting this Act as a land claim.

As a result, off-reservation gaming is prohibited on the Application Land and the Trust Application must be denied. The Application Land is after-acquired land and cannot comply with IGRA § 20. The detriment to the local community if Indian gaming is permitted at this location would be substantial, and the Governor of Arizona is statutorily prohibited from consenting to the taking of this land into trust for gaming purposes. Therefore, the Tribe's Trust Application cannot be approved.

Analysis Point: Does the federal government have the constitutional authority to take land into trust for purpose of creating an Indian reservation?

The United States Constitution artfully created a balance of power between the federal and the several sovereign states. The federal government was granted specific authority by the states. The states and the people, however, reserved *all other authority* for themselves. Therefore, all federal actions must be directly related to the authority granted by the Constitution. Otherwise, the federal government unconstitutionally impends upon the state's rights.

The only authority granted to the federal government to take land out of state jurisdiction and place it under federal jurisdiction is found in the Enclave Clause of Article I, § 8. That authority is limited in that it requires the express consent of the legislature of the state in which the federal enclave is created. While that same article and section of the Constitution granted Congress the authority to regulate commerce with Indians tribes, nothing in the Constitution granted any authority to take land out of state jurisdiction for that purpose.

Therefore, that section of the Gila Bend Act that requires the Secretary to take the land into trust for the benefit of the Tribe is unconstitutional. Lacking any authority to take the type of action requested, the Tribe's Trust application must be denied. While the creation of a federal enclave for an Indian tribe might be constitutionally acceptable—although it is not one of the purposes specified in the Constitution—it would require the consent of the state. The Arizona legislature has never consented to the Trust Application and for that reason, it must be denied.