



**CITY OF GLENDALE
INITIAL STATEMENT OF LEGAL POSITION**

Regarding:

**Tohono O'odham Nation's Application for the
Department of Interior to Take into Trust 134.88 Acres of Land
Near 91st and Northern Avenues, Glendale, Arizona**

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3 June 2009



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PREFACE

This position statement sets forth the City of Glendale's legal position with respect to the Tohono O'odham Nation's application (the "Trust Application") to the Department of Interior requesting that the Secretary take into trust approximately 135 acres of land within the City's municipal planning area (the "Application Land"). The Tohono O'odham Nation (the "Tribe") submitted the Trust Application for the purpose of the developing an Indian gaming facility on the Application Land.

While there are very significant policy issues faced by the State and the affected local governments, this position statement focuses solely on the legal issues raised by the Trust Application. This statement sets forth the City's preliminary assessment of the law relevant to the Trust Application. The City continues to investigate the facts and evaluate the law pertaining to the Trust Application, and nothing in this statement shall bind or estop, or operate as a waiver against, the City with respect to its legal arguments. The City's legal position may be altered at any time without the necessity of modifying of this position statement.

EXECUTIVE SUMMARY

In 1986, Congress enacted the Gila Bend Reservation Lands Replacement Act (the "Gila Bend Act" or the "Act"). Replacement lands were deemed appropriate by Congress because the Tribe had lost some of their existing reservation land due to flooding behind a dam constructed by the federal government. The land was properly flooded in accordance with an easement secured by the United States. Nevertheless, this Act provided the Tohono O'odham Nation with funds to purchase replacement lands. Under the terms of the Act, upon request of the Tribe the replacement land was to be taken into trust by the Secretary of the Interior for the Tribe's benefit, effectively creating a new Indian reservation.

The Act imposed several restrictions on the land that could be taken into trust as replacement land. Among other requirements, the replacement land had to be outside the boundaries of a city or town. It also could be composed of only three areas, one of which had to be contiguous to San Lucy Village. San Lucy

Village was created when a settlement of the Tribe was moved from privately-owned land under the terms of the federal easement secured by the United States for the flooding.

The Tribe's application fails to meet the requirements of the Act in two respects. First, the Application Land is within the corporate limits of the City of Glendale. While the Application Land is under county jurisdiction, it is completely surrounded by Glendale and is within the exterior boundaries of the city. Therefore, this land does not qualify as replacement land under the Act.

Additionally, the Application Land is not contiguous with San Lucy Village as required by the Act. The Tribe has filed two other applications for replacement lands, neither of which pertain to land contiguous to San Lucy Village. Therefore, this third application must pertain to land contiguous to that community. The Tribe relies on a purported waiver of this contiguity requirement issued by the Bureau of Indian Affairs ("BIA"). The Act did provide the Secretary of the Interior with authority to waive the contiguity requirement; however, that authority was limited and specific. The BIA, to which the Secretary delegated the waiver authority, granted the waiver contrary to the provision of the Act. Therefore, the waiver is illegal and the Application Land does not comply with the contiguity requirement of the Act.

Nevertheless, if the waiver were effective, it would make the Tribe's trust application a discretionary agency action. The Secretary must exercise his discretion in granting the waiver. Because the discretionary waiver is a necessary prerequisite for the Tribe's application to comply with the Act, the taking of the land into trust is, therefore, discretionary. Any discretionary agency action to secure federal land requires, among other things, an Environmental Impact Statement under the National Environmental Policy Act ("NEPA"). The Tribe's trust application fails to include an Environmental Impact Statement. Consequently, the Tribe's trust application is deficient and cannot be granted.

The Tribe's Trust Application for gaming purposes also must be denied because it fails to meet the requirements of the federal statute governing Indian gaming. A trust application for gaming purposes must comply with the Indian Gaming Regulatory Act ("IGRA"). Land taken into trust for gaming purposes after October 1988 ("after-acquired land") requires a determination that the use will not be detrimental to the local community. It also requires the consent of the Secretary and the governor of the affected state. The Tribe's Trust Application has a profound negative effect on the local governments. Additionally, the Governor of Arizona is statutorily precluded from consenting to gaming on after-acquired land.

To avoid this legal obstruction which is fatal to its Trust Application, the Tribe relies upon IGRA's exception for after-acquired land that is part of the settlement of a land claim. Contrary to law, the Tribe takes the position that the Gila Bend Act constituted the settlement of a land claim. Land claims, however, are claims as to disputed title or possession of the land. In this instance, there was no claim related to the title or possession of the former Gila Bend Reservation. That land was held in trust for the Tribe, a fact over which there was never a dispute. The United States properly condemned a flooding easement and had the necessary right to possession to the extent of the flooding—a fact that also was never in dispute. Title to or

possession of the land was never at issue and the Gila Bend Act was never intended to settle that type of dispute. Therefore, the settlement-of-a-land-claim exception to the provision of IGRA requiring consideration of the local community—something the Tribe desperately seeks to avoid—and the approval of the Arizona Governor—which cannot be granted—is inapplicable. The latter requirement, consent of the State, cannot be obtained and requires the Secretary to deny the Tribe’s application.

Lastly, Congress lacks the constitutional authority to remove land from the jurisdiction of the State of Arizona without the State’s consent. The only Constitutional authority granted to the federal government to take land from state jurisdiction is found in the Enclave Clause. Federalizing land under the Enclave Clause requires the consent of the State, which was not secured at the time of the Act and has never been secured with respect to the Tribe’s pending trust application. As a result, the provision of the Act authorizing the Secretary to take land into trust without the State’s consent is an unconstitutional violation of the Tenth Amendment, which reserves to the several States all powers which are not delegated to the United States. The lack of legal authority to grant the Tribe’s request requires that the Tribe’s trust application be denied.

Therefore, the Tribes most recent request for the Secretary to take land into to trust cannot be granted. The trust application fails to comply with the Gila Bend Act, IGRA, and NEPA, among other federal law. Moreover, the Tribe requests that the Secretary to remove land from the State without the State’s consent, an unconstitutional act. The Secretary cannot comply with that request. Therefore, the Tribe’s application must be denied.

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FACTUAL BACKGROUND

Indian law places a significant weight on history.¹ As a result, an understanding of the relevant history leading the Tribe's Trust Application is critical to the proper legal analysis of this situation.

A. Gila Bend Reservation Land Replacement Act

Consistent with the authority granted by Congress in the Flood Control Act of 1950² the Army Corps of Engineers constructed the Painted Rock Dam across the Gila River. The dam was completed in 1960.³ Prior to its completion, the United States repeatedly but unsuccessfully attempted to obtain from the Tribe a flowage easement over the land affected by the dam.⁴ As a result, the United States condemned title to some of the affected non-Indian lands and obtained a flowage easement for the remaining non-Indian and all Indian land intermittently flooded by the dam.

During the late 1970's and early 1980's, Arizona experienced unusually high rainfall, each time resulting in a large body of standing water behind the Painted Rock Dam.⁵ "[T]he floodwaters destroyed a 750-acre farm that had been developed at tribal expense and precluded any economic use of reservation lands" primarily because "deposits of salt cedar (tamarisk) seeds left by the floods produced thickets so dense that economic use of the land was not feasible."⁶ In 1981, because of the effect of flooding on the reservation land, the Tribe petitioned Congress "for a new reservation on lands in the public domain which would be suitable for agriculture."⁷ In response to the Tribe's requests, in 1982 Congress directed the Secretary of Interior to conduct a study to find "which lands, if any, within the Gila Bend Reservation have been rendered unsuitable for agriculture by reason of the operation of the Painted Rock Dam."⁸

¹ [T]he intricacies and peculiarities of Indian law demand an appreciation of history." Felix Frankfurter, *Foreword to a Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 RUTGERS L. REV. 355, 356 (1954).

² Pub. L. No. 81-516, 64 Stat. 170 (1950).

³ H.R. REP. NO. 851, 99th Cong., 2d Sess. 5 (1986)("HOUSE REPORT")(Attachment 1).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 5-6.

⁷ *Id.* at 6 [emphasis added].

⁸ Pub. L. No. 97-293, § 308, 96 Stat. 1261 (1982)[emphasis added].

The Secretary's search for new, federally-owned land for replacement of the Gila Bend Reservation proved unsuccessful. Thus, in 1986, Congress enacted the Gila Bend Reservation Land Replacement Act (the "Gila Bend Act").⁹ The Gila Bend Act required the Tribe 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" for \$30,000,000 for purchase of replacement lands.¹⁰ Rather than arguing with the Tribe over damages to the reservation land, and regardless of the merits of the Tribe's position, Congress merely purchased all of the Gila Bend Reservation.¹¹

B. Indian Gaming in Arizona

The Tribe submitted the Trust Application for the purposes of developing an Indian gaming facility.¹² As a result, knowledge of the history of Indian gaming in Arizona is critical to the Secretary's consideration of this application.

There are 21 Indian tribes in Arizona. Some of these tribes are in areas that have no viable gaming opportunities. Others have lands that are close to metropolitan areas and have developed significant gaming interests. Tribes with gaming interests have worked closely with the state to formulate a balance of the public policy and legal issues surrounding gaming and the benefit it brings to the tribes.

The work toward that balance began on July 1, 1992 when the Arizona Governor signed the legislation that allowed Indian gaming facilities to operate within the State.¹³ On April 25, 1994, those statutes were amended to expressly state a well-recognized proposition concerning state sovereignty and provide unequivocal notice to the federal government of the State's intention to maintain jurisdictional control over its territory. That amendment stated:

Notwithstanding any other law, this state, through the governor, may enter into negotiations and execute tribal-state compacts with Indian tribes in this state pursuant to the Indian gaming regulatory act of 1988 (P.L. 100-497; 102 Stat. 2467; 25 United States Code §§ 2701 through 2721 and 18 United States Code §§ 1166 through 1168). *Notwithstanding the authority granted to the governor by this subsection, this state specifically reserves all of its rights, as attributes of its inherent sovereignty, recognized by the tenth and eleventh amendments to the United*

⁹ Gila Bend Reservation Land Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986)("Gila Bend Act").

¹⁰ *Id.* § 4(a).

¹¹ Congress subsequently appropriated a total of \$34,700,000 to the Tribe under the Gila Bend Act. *See* Pub. L. No.100-202 101 Stat. 1329 (1987); Pub. L. No. 100-446 (102 Stat 1774)(1988); Pub. L. No. 101-121 (103 Stat 701)(1989).

¹² Tohono O'odham Nation Fee-to-Trust Application: 134.88 Acres of Land Near 91st and Northern Avenues, dated January 28, 2009 (hereinafter "Trust Application").

¹³ Act effective July 1, 1992, Ch. 286, § 2 (codified at A.R.S. § 5-601(A)).

States Constitution. The governor shall not execute a tribal-state compact which waives, abrogates or diminishes these rights.¹⁴

In that amendment, the Indian gaming statutes were further modified to specifically state that “[t]he governor shall not concur in any determination by the United States secretary of the interior that would permit gaming on lands acquired after October 17, 1988.”¹⁵ The date cited in the statute was the effective date of the federal Indian Gaming Regulatory Act (“IGRA”).¹⁶ As further discussed below, IGRA prohibited the Secretary from taking into trust land for gaming purposes after the October date, which is often referred to as “after-acquired land,” unless that land meets certain exceptions. One of those exceptions is the concurrence of the state’s governor. The purpose, therefore, of the April 25, 1994 amendment to the Arizona Indian gaming statutes was to clearly express that no Indian gaming would be conducted on after-acquired land.¹⁷

The Indian gaming statutes were, however, found lacking on some respects. Repeated attempts to reach a legislative solution to the statute’s deficiency came to naught. Therefore, the subject of gaming in Arizona was taken up by the Arizona electorate through the initiative process.

Three propositions modifying Arizona’s gaming laws were crafted, and sufficient signatures of the electorate were gathered to place these propositions on the November 2002 ballot. Proposition 200 was developed by limited interests and supported by a single tribe, the Colorado River Indian Community.¹⁸ Proposition 201 would have allowed gaming on existing horse and dog tracks in Arizona and was forwarded to the voters and supported during the campaign by the racetrack industry.¹⁹ Proposition 202 resulted from extensive negotiations among several interests, including the Arizona Governor and several Arizona tribes.²⁰ This proposition was publically supported by 17 of the Arizona tribes, including the Tohono O’odham Nation, and became known as the 17-Tribe Initiative.²¹

Moreover, Arizona law requires that the Secretary of State publish a publicity pamphlet for each ballot measure that is to be submitted to the voters.²² The publicity pamphlet must include

¹⁴ Act approved by Governor April 25, 1994, Ch. 285, § 2 (codified as amended at A.R.S. §§ 5-601(A), (B)).

¹⁵ *Id.*

¹⁶ 25 U.S.C. § 2701, *et seq.*

¹⁷ Indian gaming conducted on after-acquired land is commonly referred to as “off-reservation gaming.”

¹⁸ Publicity Pamphlet, 2002 Ballot Propositions, Proposition 200, p. 33 (Attachment 2)(“Prop 200 Pamphlet”).

¹⁹ Publicity Pamphlet, 2002 Ballot Propositions, Proposition 201, p. 58-64 (Attachment 3)(“Prop 201 Pamphlet”).

²⁰ Publicity Pamphlet, 2002 Ballot Propositions, Proposition 202, p. 96-7 (Attachment 4)(“Prop 202 Pamphlet”).

²¹ *Id.*

²² A.R.S. § 19-123.

arguments submitted “for” and “against” the proposition.²³ In the official publicity pamphlet for each of the propositions, Governor Jane Hull submitted a statement for each of the proposition’s publicity pamphlets in which she spoke “for” Proposition 202 and against the others, arguing:

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.*²⁴

Janet Napolitano, former Arizona Attorney General, at the time a candidate and then elected Governor, and currently Secretary of Homeland Security, also submitted arguments favoring Proposition 202 and opposing Propositions 200, stating:

Most Arizonans believe casino gaming should be limited to reservations. I agree . . . *It [Proposition 202] also prevents the introduction of casino gaming, such as slot machines, by private operators into our neighborhoods . . .*²⁵

In addition, Arizona Senator John McCain, an original sponsor of the federal act upon which the Trust Application is based, also wrote in support of Proposition 202.²⁶

During the campaigns for these propositions, most of the Arizona Indian tribes, including the Tohono O’odham Nation, spoke very publicly against Propositions 200 and 201; advocating instead for the proposition they sponsored—Proposition 202. Many of the statements on behalf of the tribes urged support for the Indian gaming proposition on the basis that gaming would then exist only on existing Indian reservations, out of the cities and towns. In support of their initiative, the 17 tribes published their own media material. For example, one of tribes’ documents was entitled “*Yes on 202, The 17-Tribe Indian Self-Reliance Initiative, Answers to Common Question.*” The format of this document is question-and-answer and the question: “Does Prop 202 limit the number of tribal casinos in Arizona?” The answer states: “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.”²⁷ In fact, at a Town Hall Meeting in Tucson held on September 25, 2002, Ned Norris, now Chairman of the Tribe, in speaking against Proposition 201,

²³ A.R.S. § 19-124.

²⁴ Prop 200 Pamphlet, p. 40; Prop 201 Pamphlet, p. 65; Prop 202 p. 97 [emphasis added].

²⁵ Prop. 202 Pamphlet, p. 97 [emphasis added].

²⁶ Prop. 202 Pamphlet, p. 98.

²⁷ *Yes on 202, The 17-Tribe Indian Self-Reliance Initiative, Answers to Common Question* (Attachment 5).

argued that 201 would open gaming into cities and that the citizens of Arizona have, repeatedly over the years, expressed their desire to keep gaming on the reservation.²⁸

On November 5, 2002, Arizona voters approved Proposition 202. Two of the most important bases for broad public support of Proposition 202 were the commitment that Indian gaming facilities would be limited to the then-existing reservation land. In return, Arizona Indian tribes were granted exclusivity over gaming in the State.

It is also interesting to note that during 2002, and while the campaigns for the three propositions were being publicly debated, the Arizona Department of Gaming was negotiating the State's current gaming compact with the Tribe. The statements of the State's and the Tribe's political leadership clearly set the context of this compact—that Indian gaming would remain on existing reservation land. The duty of good faith that each party owed to the other required that any intended variance from this context be part of the negotiations of the compact.²⁹ The Tribe, however, remained silent with respect to its intentions for the Gila Bend Act. Nonetheless, the Tribe's compact was signed on December 4, 2002. Under that compact the Tribe operates its three existing casinos, two Desert Diamond Casinos near Tucson and the Golden Ha:san Casino in Why, Arizona.

C. History of Tribe's Trust Application

The relevant history leading to the Trust Application requires knowledge of the Tribe's acquisition of the Application Land. Also critical is an understanding of how the Tribe has interacted with the affected local community. Consideration of this interaction and its potential impact on the future development of federal Indian policy is imperative.

1. Tribe's Purchase of Land

On August 21, 2003, only a few months after the Tribe's very public support of Proposition 202 and the signing of its Compact, the Tribe concluded its purchase of 134.88 acres in the southwest quadrant of the intersection of 91st and Northern Avenues in the name of a corporate entity apparently formed to disguise the identity of the purchaser. The transaction was conducted using the name "Rainier Resources, Inc."³⁰ Rainier Resources was incorporated on March 12, 2003

²⁸ Arizona Department of Gaming Memorandum, from Henry Leyva to Rick Pyper, October 2, 2002, re: Town Hall Meetings (Attachment 6).

²⁹ See *Rawlings v. Apodaca*, 151 Ariz. 149, 153, (1986) ("The essence of th[e] duty [of good faith] is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship.")

³⁰ Trust Application, Tab 4, Memorandum dated January 28, 2009 from Samuel Daughety, Assistant Attorney General to George T. Skibine, Assistant Secretary of Indian Affairs, *et al.*, re: Tohono O'odham Nation Fee-to-Trust Application: 134.88 Acres of Land Near 91st and Northern Avenues (hereinafter "TO AG Memo").

and domiciled in the State of Delaware.³¹ Its mailing address was Seattle, Washington, the address of its president, Richard J. Busch.³²

The corporation purposefully had no obvious, direct connection to the Tribe. From its purchase of the Application Land in 2003 until January 2009, when title for the Application Land was finally transferred in name to the Tohono O’odham Nation,³³ the Tribe held this property with the intent to convert the Application Land to off-reservation trust lands in order to develop a casino. All during that time the Tribe said nothing of its plans. In the meantime, hundreds of millions of dollars were invested by private and public entities to develop the area surrounding the Application Land. The City of Glendale exercised land-use regulatory authority and taxing authority over the surrounding development. Moreover, the City and the State have invested significant amounts of public funds in the area, including building a \$450 million stadium, \$200 million arena, and \$90 million Major League Baseball spring training facility. All of these public and private investments were made without any expectation that an Indian reservation with a gaming facility would be created nearby. Neighborhoods were built nearby; a multi-family housing complex abutting the Application Land was completed; a public high school was opened across the street from the Application Land, all while the Tribe lay in wait with its intentions hidden.³⁴

2. Tribe’s Notice to the City

Despite holding this property for six years with plans to develop it for gaming purposes, it was not until January 28, 2009 that the Tribe met with Mayor Elaine Scruggs of the City of Glendale. This was the first contact whatsoever with the City about this proposed development. No information about the purpose of the meeting was provided to the Mayor prior to the meeting. During that meeting, the Chairman of the Tribe, Ned Norris, the same Tribal leader that encouraged voters to support this Proposition in 2002 to keep gaming on existing reservations and out of the

³¹ Incorporation Certification of the Delaware Secretary of State (March 12, 2003)(Attachment 7).

³² TO AG Memo, Ex. G; Special Warranty Deed from 91st & Northern SWC, LLC to Rainier Resources, Inc., Official Records of Maricopa County Recorder, No. 20031156746 (Attachment 8).

³³ General Warranty Deed from Rainier Resources, Inc. to the Tohono O’odham Nation, Official Records of Maricopa County Recorder, No. 20090068776 (Attachment 9).

³⁴ Developing plans that severely impact local communities without any communication or coordination with local communities appears to be the mode of operation adopted by the Tohono O’odham Nation unlike other Arizona tribes with land near non-Indian communities. In May 2009, the Tribe informed the Town of Sahuarita, Arizona, a community of approximately 25,000 located about 15 miles south of Tucson, that it had long been planning to build a privately-owned, 1,500-bed federal maximum security prison on the Town’s border and within 500 feet of a residential development. The Tribe’s notice to the Town consisted of a mailed an Environmental Assessment with a letter asking the Town for comments within for two days. Obviously, the Tribe sought no meaningful input from the local community. On the contrary, the Tribe’s leadership publicly stated that the local community had no input whatsoever into the proposal regardless of the plans affect on the local, non-Indian community. See Dennis Wagner, *Small Town Resisting Prison on Tribal Land*, THE ARIZONA REPUBLIC, May 21, 2009 (Attachment 10).

neighborhoods, informed the Mayor that the Tribe intended to create Indian trust lands for gaming purposes on the Application Land—off-reservation and right in the middle of the City’s neighborhoods. That same day, the Tribe filed its Trust Application with the Secretary. The next day, the Tribe held a press conference and announced its intentions to the public.

The Tribe’s announcement of its Trust Application came as a complete shock to the City and its citizens. Prior to the announcement, the City had no contact or relationship with the Tribe. The Tribe has no aboriginal lands anywhere close to the City. In fact, the Tribe’s closest land is approximately 60 miles and an hour and half from this City in Gila Bend, Arizona. The Tribe’s governmental seat is in Sells, Arizona, over 180 miles from the Application Land. Between the Application Land and Sells are lands held in trust for the Gila River, Fort McDowell, Salt River-Pima Maricopa, and Ak-Chin tribes. The Tribe’s current casino operations are over 100 miles away, near Tucson, Arizona. The City has no casinos, racetracks, or other gaming facilities. The Tribe has never engaged in any dialogue with the City, the school district, the county or the state regarding its plans, even though converting this urban land into a reservation raises very significant development issues; such as property access, street design and construction, water and sewer service, signage, building height (which is critical given the existence of the City’s municipal airport in the immediate area), public safety coordination, or any other matter of concern to the City or other governmental entities.

The City has given due consideration to the Tribe’s arguments and position as publicly presented and as reflected in its Trust Application. The City has also met with the Tribe and considered the very limited information that the Tribe has been willing to share with the City. In light of the severe legal and policy consequences of the creation of trust lands, particularly for gaming purposes, within the City’s Municipal Planning Area, the Glendale City Council adopted its Resolution opposing the Trust Application on April 7, 2009.³⁵

³⁵ Resolution of the City of Glendale, No. 4246 (April 7, 2009)(Attachment 11).

LEGAL ANALYSIS

The Tribe's Trust Application is premised on three arguments. First, the Tribe argues its Trust Application complies with the Gila Bend Act—it does not. Secondly, the Tribe contends that by its Trust Application the Secretary is mandated to take the Application Land in trust—the Secretary is not. Lastly, the Tribe asserts that the Gila Bend Act is a settlement of a land claim and, therefore, it need not seek approval of the Secretary, Arizona's Governor, or be subject to consideration of the impact on the local community before conducting gaming on the Application Land. The Tribe is incorrect; the Act did not settle a land claim.

In the first instance, it is axiomatic that for land to qualify as replacement land under the Gila Bend Act, it must comply with the several requirements of that law. Moreover, while a trust application under the Act could be mandatory if the subject land met the Act's requirement, in this instance the Tribe relies on a purported waiver of the Act's requirements in order to contend that the Trust Application falls within the Act. That waiver is inconsistent with the Act and is illegal. For that reason, the Application Land cannot be considered for taking into trust under the Act. Nevertheless, the granting of the waiver was a discretionary act by the Secretary. The Trust Application, which rests on the discretion waiver, is therefore itself discretionary.

A discretionary trust application requires consideration under Department of Interior regulations.³⁶ Trust applications for gaming purposes are further scrutinized under specific rules developed by the Department of Interior's Bureau of Indian Affairs to assure this purpose complies with the language and intent of the federal law governing Indian gaming. The Tribe demands that its Trust Application be approved without any reference to or consideration under these regulations and rules. However, the Tribe's desire to foreclose any consideration of the rights, interests, and effects upon the other governmental entities and their citizens is without legal basis. The State of Arizona, the County of Maricopa, the Peoria Unified School District, and the City of Glendale cannot legally or as a matter of good public policy be excluded from the process of creating an Indian trust land for a gaming establishment at this location.

³⁶ 25 C.F.R. Part 151.

A. The Trust Application Fails to Comply with the Gila Bend Act

The Gila Bend Act provided the Tribe with \$30 million “for land and water rights acquisition, economic and community development, and relocation costs.”³⁷ Under the Act, “the Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate [9,880] acres.”³⁸ The Act also states:

The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.³⁹

As explained below, the Trust Application must be denied because the Application Land is within the corporate limits of a city, which is specifically prohibited by the Act. Additionally, the Trust Application is the Tribe’s third such application and none are contiguous to San Lucy Village. While the Tribe seeks to rely on the Secretary’s purported waiver of this requirement, that waiver is contrary to the statute and not valid. For that reason, the Tribe’s Trust Application must also be denied.

1. The Application Land is Within the Boundaries of a City or Town

The Gila Bend Act states:

The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection . . . [L]and does not meet the requirements of this subsection if it is . . . within the corporate limits of any city or town.⁴⁰

The clear intent of this requirement is to assure that the land taken into trust will not unduly affect local governments. It is inarguable that Congress sought to restrict the replacement land to rural areas, comparable to the type of land that the Tribe sold to the United States.

³⁷ Gila Bend Act, §§ 4(a), 6(a).

³⁸ *Id.* § 6(c).

³⁹ *Id.* § 6(d).

⁴⁰ *Id.* [emphasis added].

The Application Land, however, is not rural land and taking this land into trust for the Tribe's benefit will unduly affect a local government. The Application Land is "within" the exterior boundaries of the City of Glendale and does not meet the requirements of the Act. Despite that fact, the Trust Application states that the land at issue is located "near the City of Glendale."⁴¹ In reality, the land is completely encircled by land annexed by the City, thereby making it within the City's "corporate limits," as that term is used in the Act. Reading the phrase "land . . . within the corporate limits of any city or town" to exclude parcels which are completely encircled by a city or town but which have not been annexed ignores the plain meaning of the words. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "within" as "on the inside or on the inner side; inside the bounds of a place or region."⁴² As a result, the Trust Application is not consistent with the common meaning of the Act's language.

Additionally, creating Indian trust lands on the Application Land is contrary to the expressed intent of the Act. While remaining under the jurisdiction of Maricopa County, this land is surrounded by the City and is within the City's Municipal Planning Area.⁴³ It has been included in all of the regional water and wastewater plans that have been developed over decades.⁴⁴ Even though the land at issue constitutes an unincorporated county island, Arizona law recognizes it as inside the exterior boundary of the City of Glendale.⁴⁵ No other municipality has the statutory right to annex or provide water or wastewater services to the Application Land.

Congress plainly intended that the replacement land not affect a local government. This land, however, abuts a new residential multi-family housing development, is within one mile of hundreds of existing residential homes, and is across the street from a new high school.⁴⁶ The proposed development incorporates very large buildings.⁴⁷ It is designed to attract a significant number of visitors at all hours.⁴⁸ This development will require substantial municipality

⁴¹ TO AG Memo, p. 7.

⁴² WEBSTER'S NEW WORLD EDITION 962, 698-99 (Victoria Neufeldt, David B. Guralnik eds. 3rd ed 1991).

⁴³ City of Glendale General Plan, *Glendale 2025, The Next Step* (2002)(as amended) (Attachment 12 (relevant portions attached)).

⁴⁴ Maricopa Association of Government 208 Water Quality Management Plan - Final, Fig. 4.8 (October 2002)(Attachment 13 (relevant portions attached)).

⁴⁵ See *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 558 (1978)(holding that the City of Flagstaff's "corporate limits" as that term is used in statute means its "exterior boundary").

⁴⁶ See Aerial Map of Application Land (Attachment 14).

⁴⁷ Project Description, West Valley Resort at Northern Avenue, Tohono O'odham Nation (Attachment 15).

⁴⁸ *Id.*

infrastructure.⁴⁹ Taking the land into trust will preclude the City from addressing any of the issues these facts raise. The City will lose governmental jurisdiction over the land, leaving its ability to address any issues and collect for any costs at the Tribe's discretion. As a result, this proposal has an enormous affect on the City, which is completely inconsistent with the Act.

The fact is that the Act authorizes the Secretary of Interior to take up to 9,880 acres of replacement lands into trust. This large amount of land was to replace remote land in southern Arizona, only a small portion of which was even under agricultural cultivation. That acreage was limited to three parcels. Congress made clear that the property was to be rural in nature and not in urban areas. The Act was never intended to provide the Tribe an ability to create off-reservation trust lands on relatively small parcels of land within municipalities.

Had Congress intended for the Tribe to have relatively small urban parcels taken into trust, it could have provided that any "unincorporated area" within the listed counties qualify under the Act's requirements. Congress, in fact, has used the term "unincorporated" in similar pieces of legislation.⁵⁰ In this case, however, Congress deliberately and specifically excluded lands "within . . . corporate limits" from being taken into trust pursuant to the Gila Bend Act. Along those lines, had Congress contemplated the taking of lands in urban areas pursuant to the Act, it surely would have provided the local planning jurisdiction some viable role and means to have its interests and concerns addressed. For instance, in the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act Congress authorized the Secretary to acquire trust lands of up to 640 acres within Riverside County, California.⁵¹ That statute states, however, that if these lands are located "within [the] incorporated boundaries" of a city and a majority of the city's governing body opposes the land acquisition, then the trust application must be denied.⁵²

In contrast the Torres-Martinez Act, the Gila Bend Act contains no comparable language. Clearly, Congress did not intend for the land to which the Gila Bend Act was applicable to be within the exterior boundary of a city. If it had, Congress would have imposed similar restrictions.

⁴⁹ Memorandum from Elliot Pollack, Elliot D. Pollack & Company, to Ed Beasley, City Manager, City of Glendale re: Economic Implications of the Proposed Tohono O'odham West Valley Resort and Casino (February 13, 2009)(Attachment 16).

⁵⁰ *See e.g.*, Maine Indian Claims Settlement Fund of 1980, 25 U.S.C. § 1724. (1980).

⁵¹ 25 U.S.C. § 1778d (2000).

⁵² *Id.*

2. Land is Not Contiguous to San Lucy Village

As mentioned above, the Gila Bend Act limits the number of parcels to three that can be taken into trust as replacement land. Additionally, it requires that at least one of the parcels be contiguous to San Lucy Village. The Act provides that:

Land meets the requirements of this subsection only if it constitutes *not more than three separate areas* consisting of contiguous tracts, at least *one of which areas shall be contiguous to San Lucy Village*.⁵³

On May 31, 2000, the Bureau of Indian Affairs, as the Secretary's designee,⁵⁴ issued a letter purporting to waive the three-area and San Lucy-contiguity requirements ("Waiver Letter").⁵⁵ This was ostensibly done under the authority granted by the Act which states: "The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate."⁵⁶ That waiver, however, was granted contrary to law and constituted an arbitrary and capricious act on the part of the Secretary.

The genesis of the Tribe's request for the above waivers was purportedly because of limitations on available land next to San Lucy Village.⁵⁷ The Tribe claimed that it had been unable to negotiate acceptable terms on a 1,181-acre parcel adjacent to San Lucy Village.⁵⁸ Based only on that information, the BIA Regional Director issued the Waiver Letter. That letter purportedly waived the statutory requirements of the Act such that the Secretary was then permitted to take into trust as replacement land up to five areas.⁵⁹ It also eliminated the San Lucy-contiguity requirement.⁶⁰

a. Review of Agency Action

The propriety of a grant or denial of a statutory waiver is a legal question that must be evaluated under the actual language of the statute and the intent of Congress.⁶¹ The U.S. Supreme

⁵³ Gila Bend Act, § 6(d).

⁵⁴ On April 4, 2000, the Assistant Secretary--Indian Affairs issued a memorandum to the Western Regional Director of the Bureau of Indian Affairs authorizing the Western Regional Director to conduct the determinations and issue waivers where appropriate. Memorandum from Kevin Gover, Assistant Secretary—Indian Affairs re: Gila Bend Reservation Lands Replacement Act (April 4, 2000)("Gover Memo")(Attachment 17).

⁵⁵ Letter from Barry W. Welch, Acting Regional Director, Western Regional Office, Bureau of Indian Affairs (May 31, 2000)("Welch Letter")(Attachment 18).

⁵⁶ *Id.*

⁵⁷ Gover Memo, *supra* n. 54.

⁵⁸ It should be noted that the Waiver Letter indicated that the 1,180 acres the Tribe was interested in had decreased to 400 acres because of pending sales to other interests. Welch Letter, *supra* n. 55, p. 6. Obviously, the property could be purchased, but no determination of the adequacy of the Tribe's actual attempts to purchase the property complying with the Gila Bend Act is reflected in the letter.

⁵⁹ Welch Letter, *supra* n. 55, p. 7-8.

⁶⁰ *Id.*

⁶¹ See generally, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

Court has held that a federal agency's action is subject to a dual review.⁶² If an agency's action fails either level of review, it is invalid.

First, the agency's action must be consistent with Congressional intent. "[T]he question [is] whether Congress has directly spoken to the precise question at issue."⁶³ "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁶⁴ Secondly, if Congressional intent is not clear, the agency's action must be permissible under the statute's language. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute."⁶⁵

b. The Waiver is Inconsistent with Congress's Clear Intent

With respect to Congressional intent, in this instance the language of the Gila Bend Act is clear and unambiguous. The Secretary, upon the request of the Tribe, could take land into trust only if it met the Act's specific requirements: is within specific counties, is not within the boundaries of a municipality, is among one of three parcels contiguous to San Lucy.⁶⁶ The Secretary could waive one of the Act's specific requirements under certain conditions.⁶⁷ As a result, the Secretary's authority to waive the contiguity requirement is exceedingly narrow and there is no logical way for this authority to be properly exercised unless it is applied to a particular parcel.

The Waiver Letter, however, was neither granted with respect to any specific parcel of land, nor any trust application, nor any anticipated acquisition. It was, instead, merely a non-specific prospective waiver, apparently applicable to any land the Tribe requested be taken into trust in the future. Such a waiver is contrary to the language and intent of the Act.

The legislative history of the Act defines the term "appropriate," stating:

The Committee intends that the term 'appropriate' include circumstances in which the tribe might purchase private lands that, while not entirely contiguous, are sufficiently close to be reasonably managed as a single economic or residential unit.⁶⁸

⁶² *Id.*

⁶³ *Id.* at 842.

⁶⁴ *Id.*, at 842-43.

⁶⁵ *Id.* at 843.

⁶⁶ Gila Bend Act, § 6(d).

⁶⁷ *Id.*

⁶⁸ HOUSE REPORT, at 11.

The BIA, however, made no determination of “appropriateness” when the non-specific waiver was granted. The “appropriate” requirement of the Act that is mandated in order for a waiver to be valid was completely ignored. As a result, the Waiver Letter is invalid.

It is impossible for the Secretary to determine whether a waiver is “appropriate” within the meaning of the Act without, at the very least, knowing the location of a parcel relative to San Lucy Village or other replacement lands acquired pursuant to the Act. In this instance, the Application Land is distant—more than 50 miles—from San Lucy Village. There is no reasonable argument that the Application Land can be managed with San Lucy Village or with other replacement lands as a single economic unit.

The Gila Bend Act granted no authority to the Secretary to issue a non-specific waiver of the Act’s requirements. Rather than complying with the Act’s clear directive and acting within the bounds of the authority granted the Secretary, the BIA attempted to rewrite the Act. As a result, the waiver issued by the BIA was inconsistent with the Act and contrary to law.

The Trust Application is grounded on the BIA’s illegal waiver, and therefore must be denied. The Tribe has submitted two other applications for the Secretary to take land into trust,⁶⁹ neither of which is contiguous to San Lucy Village. Contrary to the original language of the Gila Bend Act, this third application concerns land that is also non-contiguous to San Lucy Village and is far too distant to be appropriate for waiver of the contiguity requirement.

c. The Waiver Was Not Based on Permissible Statutory Construction

Because the Waiver Letter is inconsistent with the unambiguous language of the Gila Bend Act, it is unlawful. But even if the waiver provision was ambiguous, the Waiver Letter would still be unlawful as arbitrary and capricious and an abuse of discretion. If the language of a statute is ambiguous, the second step in the analysis of an agency’s action is to determine whether an agency’s interpretation of a statute is reasonable and subject to deference.⁷⁰ Courts consider the ambiguous language of a statute in light of the structure and purpose of the statute and judicial precedent.⁷¹ An agency’s action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, if the agency “relied on factors which Congress has not intended it to consider, entirely failed

⁶⁹ TO AG Memo, p. 8.

⁷⁰ See e.g., *AFL-CIO v. Chao*, 409 F.3d 377, 383, 391 (D.C. Cir. 2005) (holding that general trust reporting requirements exceeded the Secretary’s authority to require only reporting that is “necessary to prevent circumvention” or evasion of the [Labor-Management Reporting and Disclosure Act] Title II reporting requirements “in light of the provision’s “language, structure, and purpose.”).

⁷¹ *Id.*

to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency”⁷²

Additionally, in statutory waiver cases, as is at issue here, a determination of “reasonableness” is based on whether the waiver is granted pursuant to an appropriate standard and whether the application of the waiver advances the purpose of the statute.⁷³ Waiver provisions “are not a device for repealing a general statutory directive”⁷⁴ and agencies may not act out of unbridled discretion or whim in granting waivers.⁷⁵

With respect to the Gila Bend Act, the waiver provision must be read in light of the structure of that section of the statute. The Act does not instruct the Secretary to hold all lands acquired with the Replacement Act funds in trust.⁷⁶ Rather, at the request of the Tribe, the Secretary is to hold in trust only those lands purchased by the Tribe that meet all the restrictions of the Act.⁷⁷ The Secretary can waive only certain requirements. Therefore, in order to grant a valid waiver, the Secretary must assure that the requested trust land meets the other requirements of the Act.

In this instance, the Tribe asked the BIA to waive statutory requirements for future unspecified trust applications. By granting the waiver without giving effect to or considering the full terms of the provision, namely compliance by a specific parcel with all of the requirements of the land, BIA “relied on factors which Congress has not intended it to consider” and “entirely failed to consider an important aspect of the problem.”⁷⁸ As a result, the BIA’s Waiver Letter was arbitrary and capricious. Further, by issuing a blanket, prospective waiver, BIA undercut its and the Secretary’s ability to evaluate whether future land-into-trust requests were consistent with the terms and the purpose of the Act.

Furthermore, the BIA’s waiver was given without adequately considering the purpose of the Act and, therefore, is invalid because it “entirely failed to consider an important aspect of the

⁷² *Motor Vehicles Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁷³ See *American Trucking Ass’n, Inc. v. Federal Highway Admin.*, 51 F.3d 405, 411, 414 (4th Cir. 1995) (upholding the agency’s determination that they did not have discretion to waive “the entire universe of the intended objects of the particular statutory provision”); *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (holding that the FCC must state the basis for its denial of waiver).

⁷⁴ *American Trucking Ass’n.*, 51 F.3d at 414.

⁷⁵ *WAIT Radio*, 418 F.2d at 1159.

⁷⁶ See Gila Bend Act, § 6(d).

⁷⁷ *Id.*

⁷⁸ *State Farm*, 463 U.S. at 43. It should also be noted that in considering the waiver request, the BIA apparently did nothing more than accept the findings of a task force created by the Tribe for the purpose of gathering information in support of the Tribe’s request. Nothing in the Waiver Letter indicates the BIA conducted any independent investigation before amending Congress’ intent. The BIA merely reacted to what is clearly a self-serving request by the Tribe. See, Waiver Letter, *supra*, n. 55.

problem.”⁷⁹ The Gila Bend Act was intended to facilitate replacement of the Gila Bend Reservation lands with lands that were suitable for sustained economic use and to promote the economic self-sufficiency of the Tribe’s San Lucy District.⁸⁰ Congress clearly intended the replacement lands to provide economic and social development opportunities for tribal members residing at San Lucy Village, and in nearby communities, where 80% of the able-bodied work force was unemployed.⁸¹ The various requirements of the Act define how the Tribe was to develop a “land base” to provide economic and social development opportunities *for tribal members living in, and near, San Lucy Village*.⁸² That fact is outstandingly clear—Congress limited the Secretary’s authority to waive the San Lucy-contiguity requirement provided the land was still sufficiently close to San Lucy Village “to be reasonably managed as a single economic or residential unit.”⁸³

The only “reasonable” waiver of the contiguity requirement would be one that advances economic and social development of the San Lucy Village population. The Waiver Letter completely ignores that limitation on the Secretary’s authority and thereby eviscerated a primary intent of the Act.

d. The Tribe’s Trust Application Must be Denied

Whether the statute is considered ambiguous or unambiguous, the plain effect of the Waiver Letter was to rewrite the Gila Bend Act, eliminating entirely the intended requirement that it maintain the existence and assist with the livelihood of those members living in San Lucy Village. That effect can be no plainer than it is in the Trust Application, in which it refers to the Act’s requirements as permitting five areas for trust acquisitions, as if the provisions of BIA’s purported waiver were grafted into the Act as a Congressional action.⁸⁴ For all these reasons, the Waiver Letter was not a valid exercise of Secretary’s authority and therefore provides no support for the Trust Application.

⁷⁹ *State Farm*, 463 U.S. at 43.

⁸⁰ Gila Bend Act, § 2(4).

⁸¹ HOUSE REPORT, at 7.

⁸² *Id.* [emphasis added]. *See also* Gila Bend Act, § 4(a), 6(a).

⁸³ HOUSE REPORT, at 11.

⁸⁴ *See* Trust Application, p. 1 (citing to the Gila Bend Act and referencing the five-area limitations on acquisitions); *see also* TO AG Memorandum, p. 9.

B. The Trust Application is a Discretionary Taking into Trust

The Tribe asserts that the Secretary's taking the Application Land into trust is mandatory.⁸⁵ This assertion is based on the errant premise that the Application Land meets the requirement of the Gila Bend Act. Nevertheless, the Tribe's assertion that the taking of the Application Land is mandatory is incorrect.

Because the Trust Application is—as explained below—discretionary, it must be evaluated under the Department of Interior regulations for taking lands into trust.⁸⁶ These regulations require the Secretary to consider various factors before taking the land into trust or denying the Trust Application. The Tribe, however, desires to avoid analysis under these regulations because the Trust Application would have to be denied.

The language of the statute allowing for land to be taken into trust determines the discretionary nature of any trust application. The Gila Bend Act states that “[t]he Secretary, at the request of the tribe, shall hold in trust for the benefit of the tribe any land which the tribe acquires pursuant to subsection (c) which meets the requirements of this subsection”⁸⁷ Generally, statutes stating that the Secretary “shall” accept certain property into trust are treated as mandatory, provided the proposed acquisition meets any other requirements of the statute.⁸⁸ Therefore, if the Application Land met the original requirements of the Act, the Trust Application might be mandatory.

As detailed above, however, the Application Land does not meet the requirements of the Act. It is, for one, not contiguous to San Lucy Village as is required by the Act.⁸⁹ In order to avoid the San Lucy-contiguity requirement of the Act, the Tribe relies on the BIA's waiver of that requirement. As explained above, that reliance is misplaced because the waiver is illegal. Nevertheless, if the waiver were legal, it would change the nature of the Trust Application from mandatory to discretionary.

⁸⁵ See Trust Application, pp. 8-14.

⁸⁶ 25 C.F.R. Part 151.

⁸⁷ Gila Bend Act, § 6(d).

⁸⁸ See *Confederated Salish & Kootenai Tribes v. U.S. ex. rel. Norton*, 343 F.3d 1193, 1194-95 (9th Cir. 2003) (provision “authoriz[ing]” Secretary to take land into trust provided for discretionary, not mandatory, acquisitions); *Nevada v. U.S.*, 221 F.Supp.2d 1241, 1246-47 (D. Nev. 2002) (finding that statute which provided that lands purchased with certain funds “shall be taken into trust” was mandatory, and thus BIA was not required to follow the procedures set forth in 25 C.F.R. § 151.10 for discretionary acquisitions); *Churchill County v. U.S.*, 199 F.Supp.2d 1031, 1033 (D. Nev. 2001) (“Shall is a mandatory term, indicating the lack of discretion on the part of the Secretary.”); *Sault Ste. Marie Tribe of Lake Superior v. U.S.*, 78 F.Supp.2d 699, 702 (W.D. Mich. 1999).

⁸⁹ Gila Bend Act, § 6(d).

Setting aside the fact that the Application Land lies within the corporate limits of the City—which in itself disqualifies the Application Land as a mandatory acquisition under the Act—the Trust Application is premised on the Secretary’s exercise of discretion in granting the waiver.⁹⁰ Otherwise, the location of the land in violation of the San Lucy-contiguity requirement would preclude consideration of the Trust Application. The granting of that waiver, if it were properly done, would be discretionary. The Act states that the Secretary “may” waive the requirements if he determines a waiver is appropriate. The permissive language of the Act’s language after consideration of various factors⁹¹ is nothing but an exercise of discretion. Therefore, the Trust Application, which is based only on a discretionary waiver of the Act’s requirements, is discretionary and not a mandatory trust application as the Tribe would desire.

A discretionary trust application requires compliance with 25 C.F.R. Part 151. Part 151 establishes the policy and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes.⁹² These regulations require that the Secretary notify the state and local governments having jurisdiction over the land to be acquired. These affected government bodies then have merely thirty days to comment on the potential impacts of any application.⁹³

Under Part 151, the Secretary must consider the following factors when evaluating a request to take land into trust:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or tribe for additional land;
- (c) The purpose for which the land will be used;
- (d) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from tax rolls;
- (e) Jurisdictional problems and potential conflicts of land use which may arise;
- (f) If the land to be acquired is in fee status, whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status;

⁹⁰ See *Confederated Salish & Kootenai Tribes*, 343 F.3d at 1196 (statutory provision that “authorized” Secretary to make trust acquisitions was discretionary, not mandatory; Congress’s use of “shall” in one section and “authorized” in other section made Congressional intent plain).

⁹¹ The Act was intended to facilitate replacement of the San Lucy reservation lands with lands suitable for sustained economic use and to promote the economic self-sufficiency of that community. Gila Bend Act, § 2(4). Congress required that the Secretary take lands into trust on behalf of the Tribe so that the Tribe might develop a “land base” to provide economic and social development opportunities for tribal members living in, and near, San Lucy Village. HOUSE REPORT, at 7. When the Tribe sought to alter a Congressional directive by its waiver, the Secretary must have completed a thorough review of the Trust Application to determine that the Application Land acquisition fulfilled Congress’ intent. Unless that review was completed, granting a waiver of the Act’s would, in addition to other reasons, be invalid.

⁹² See 25 C.F.R. § 151.1.

⁹³ See 25 C.F.R. §§ 151.10, 151.11.

- (g) Compliance with the National Environmental Policy Act (“NEPA”) and other environmental requirements;
- (h) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe’s reservation; and
- (i) Where the land is being acquired for business purposes, the anticipated economic benefits associated with the proposed use.⁹⁴

The Tribe seeks to avoid consideration of its Trust Application under these regulatory requirements by asserting its application is mandatory. This is because its Trust Application would unquestionably fail under the regulations to qualify for taking into trust. This would be true even if the Application Land met the other requirements of the Act.

The Tribe’s desire to avoid regulatory scrutiny and consideration of its Trust Application and the affect it has on state and local interests is without any legal basis. This Trust Application, if not found invalid for the other reasons stated herein, is discretionary and must comply with Part 151 regulations. Moreover, the Trust Application fails to address important provisions of the required Part 151 factors. It must, therefore, be denied.

C. Settlement of Land Claim Exception

Congress enacted the Indian Gaming Regulatory Act (“IGRA”) in October 1988.⁹⁵ IGRA prohibits the Department of Interior from taking land into trust for gaming purposes after the date it was enacted.⁹⁶ IGRA does, however, provide certain exceptions to that prohibition (“§ 20 Exceptions”).⁹⁷ One of the § 20 Exceptions allows “lands taken into trust as part of the settlement of a land claim” after October 1988 to be taken into trust.⁹⁸ The Tribe’s Trust Application is grounded on this particular § 20 Exception.

The Tribe asserts that lands acquired under the Gila Bend Act are “lands taken into trust as part of the settlement of a land claim.”⁹⁹ The characterization of the Act as a settlement of land claims is incorrect. Statutory history, Department of Interior Regulations, and the applicable case law fail to support the Tribe’s assertion that the Act is a “settlement of a land claim under IGRA.”

⁹⁴ See 25 C.F.R. §§ 151.10 and 151.11.

⁹⁵ 25 U.S.C. § 2701.

⁹⁶ 25 U.S.C. § 2719(a).

⁹⁷ 25 U.S.C. § 2719(b).

⁹⁸ 25 U.S.C. § 2719(b)(1)(B)(i).

⁹⁹ Trust Application, p. 2; TO AG Memo, pp. 14-21.

1. “Land Claim” Defined

a. Congressional Use of the Term “Land Claim”

Congress did not specifically define the term “land claim” as it is used in IGRA. Indian land claims were, however, well known at the time of IGRA’s enactment. Congress had substantial experience with Indian land claims and knowledge of the particularities of these types of claims. That knowledge and experience is incorporated into IGRA’s provisions.¹⁰⁰

When IGRA was enacted, the term “land claim” referred to the resolution of matters involving the illegal taking of Indian land. By the late 1970’s, several tribes had filed litigation based on Indian land cessions that were negotiated by the states in violation of the Federal Indian Trade and Intercourse Act.¹⁰¹ Congress resolved these land claims by passing several acts during the late 1970’s through the 1980’s.¹⁰² Congress’ use of the term “land claim” in IGRA at the same time it was resolving actual Indian land claims clearly establishes the meaning of that term.

It is also notable that the Gila Bend Act is absent from the section of the United States Code entitled “Indian land claim settlements.”¹⁰³ While the intent of legislation cannot always be derived from the placement in the organizational structure of the published Code, Congress’ decision not to include the Gila Bend Act in the “Indian Land claim settlements” chapter is indicative of the purpose of the Gila Bend Act. That fact is solidified by the history that gave rise to the legislation, the Congressional record of the legislation, and the actual language of the Gila Bend Act, as explained below.

Furthermore, a review of the laws codified as “Indian land claim settlements” highlights the fundamental differences between those laws and the Gila Bend Act. The laws codified as “Indian land claim settlements” expressly acknowledge asserted claims that allege an illegal dispossession of title or taking of possession of their land without any legitimate right.¹⁰⁴ Those laws also require

¹⁰⁰ See *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000)(when Congress uses a word or phrase with a settled meaning at common law, it is presumed to know and adopt that meaning unless the statute indicates otherwise);. See also *Neder v. U.S.*, 527 U.S. 1, 21 (1999).

¹⁰¹ 25 U.S.C. § 177, 23 Stat. 729 (1834)(and subsequent amendment thereto). See Reynold Nebel, JR., Comment, *Resolution of Eastern Indian Land Claims: A Proposal for Negotiated Settlements*, 27 AM. U.L. REV. 695, 699, 727 (1978).

¹⁰² See e.g., 25 U.S.C. §§ 1701(a) (Rhode Island); 1721(a)(1) (Maine); 1741(1) (Florida (Miccosukee)); § 1751(a) (Connecticut); 1771(1) (Massachusetts); 1772(1) (Florida (Seminole)); 1773(2) (Washington); 1775(a)(5) (Connecticut (Mohegan)); 1776(b) (Crow); 1777(a)(1) (Santo Domingo Pueblo); 1778(a) (Torres-Martinez); 1779(8), (12), (14)-(15) (Cherokee, Choctaw and Chickasaw).

¹⁰³ 25 U.S.C., chap. 19.

¹⁰⁴ See 25 U.S.C. §§:

- 1701(a) (Rhode Island - two consolidated actions involving claims to land in the town of Charlestown);
- 1721(a)(1) (Maine - claims asserted by tribe for possession of lands allegedly transferred in violation of Nonintercourse Act);

Congress to affirmatively ratify and confirm the transfers that caused each tribe to be wrongly dispossessed of its land and require that the tribe waive any further claim of title to lands.¹⁰⁵

The Gila Bend Act, on the other hand, makes no recognition of dispossession of title or possession of land without a legitimate right. Nor does the Act require the Tribe waive a title claim to the land. It merely required that the Tribe waive potential claims related to “injuries to land.”

There was, in fact, never any disputed ownership or possession of the Tribe’s reservation land,¹⁰⁶ as is necessary to have constituted a “land claim.” Instead, the Tribe’s only potential claim, if any, was that its land had been injured. This is not a “land claim” and, therefore, the Gila Bend Act is not a settlement of a land claim. As a result, the § 20 Exceptions asserted by the Tribe is

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- 1741(1) (Florida (Miccosukee) - lawsuit pending concerning possessory claim to certain lands); § 1751(a) (Connecticut - tribe had civil action pending in which it claimed possession of lands within the town of Ledyard);
 - 1771(1) (Massachusetts - pending lawsuit claiming possession of certain lands within the town of Gay Head);
 - 1772(1) (Florida (Seminole) - pending lawsuit and other claims asserted but not yet filed involving possessory claims to lands);
 - 1773(2) (Washington - tribe claimed right to ownership of specific tracts of land and rights-of-way, and disputed intended reservation boundaries);
 - 1775(a)(5) (Connecticut (Mohegan) - pending lawsuit by tribe relating to ownership of land);
 - 1776(b) (Crow Boundary - settling a dispute over the tribe’s unfavorable reservation boundary resulting from an erroneous survey by the federal government);
 - 1777(a)(1) (Santo Domingo Pueblo) (pending claims by tribe to lands within its aboriginal use area);
 - 1778(a) (Torres-Martinez - lawsuits brought by U.S. on behalf of tribe, and by tribe directly, claiming trespass by water districts on reservation land);
 - 1779(8), (12), (14)-(15) (Cherokee, Choctaw and Chickasaw - tribes filed lawsuits against United States challenging the settlement and use of tribal trust land by non-Indians due to federal government’s mistaken belief that land belonged to the state; settlement required that tribes forever disclaim all right, title to and interest in certain lands).

¹⁰⁵ For example, each of the statutes listed in the previous footnote contains (i) language extinguishing Indian title to the land wrongfully alienated and (ii) retroactive ratification of the unlawful transfers that caused the tribe to lose possession of the land. See 25 U.S.C. §§:

- 1705(a) (ratification of allegedly invalid land transfers, extinguishment of aboriginal title);
- 1723 (“Approval of prior transfers and extinguishment of Indian title and claims of Indians within State of Maine”);
- 1744(1) (“Approval of prior transfers and extinguishment of claims and aboriginal title involving Florida Indians”);
- 1772c (same (Florida Seminole));
- 1753(a) (“Extinguishment of aboriginal titles and Indian claims; approval and ratification of prior transfers”);
- 1771b (“Approval of prior transfers and extinguishment of aboriginal title and claims of Gay Head Indians”);
- 1773a (“Resolution of Puyallup tribal land claims”);
- 1775b(d)(2) (“Approval by the United States; extinguishment of claims”);
- 1776c (Crow Boundary - same);
- 1777c (Santo Domingo Pueblo – confirmation of reservation boundary, extinguishment of claims to title);
- 1778f (conveyance of permanent easement);
- 1779c (confirmation of riverbed title, release of all tribal claims to title to and interest in riverbed lands).

¹⁰⁶ That portion of the land at issue was actually held in trust for the Papago Tribe of Arizona, the former name of the Tohono O’odham Nation. See *U.S. v. 7,743 Acres of Land, more or less*, Complaint in Condemnation, Case No. CIV. 3504-PHX. (“Reservation Condemnation Case”)(Attachment 19)(The Tribe errantly cites to and includes in its Trust Application a companion case, *U.S. v. 18,866.50 Acres of Land, et al.*, Case No. CIV. 3586-PHX, filed to condemn nearby land of which the Tribe had no interest.)

inapplicable. The Tribe must comply with § 20 of IGRA, which requires consideration of the effect of the gaming proposal on the local community and the approval of both the Secretary and the Governor of Arizona.¹⁰⁷

b. Department of Interior’s Definition of the Term “Land Claim”

Although Congress has not specifically defined the term “land claim,” the Department of Interior has defined that term in duly-adopted regulations. In 2008, the Department adopted regulations pertaining to its statutory authority to take tribally-owned land into trust for gaming purposes.¹⁰⁸ These regulations state:

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

- (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
- (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
- (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.¹⁰⁹

By definition, a “land claim” for purposes of IGRA § 20 Exceptions is a claim that relates only to the title of land or loss of possession of land. The term does not incorporate every type of claim related to land. It does not include such claims as trespass or, most importantly, injury to the land.

Under the regulations, for the Gila Bend Act to qualify as a § 20 Exception for settlement of a land claim, the Act must have sought to redress the United States’ claim to the land that were in conflict with the Tribe’s title or possession. At the outset, it should be noted that the Tribe did not have fee title to any of the land that was the subject of the Gila Bend Act. The Trust Application cites Congress’ remedial actions related to two areas. As explained below, some members of the Tribe were tenants at sufferance from land held by private interests. The second area was the Gila River Reservation. That reservation was, however, held in trust by the United States for the Tribe’s benefit.

In any event, it was never the case that the Tribe asserted the loss of title or possession to land as is required for a “land claim.” Furthermore, there was never any legitimate claim that the

¹⁰⁷ The Governor of Arizona is statutorily prohibited from approving any gaming proposals on after-acquired land submitted under § 20 of IGRA. *See* A.R.S. § 6-501(c).

¹⁰⁸ *See* 73 Fed. Reg. 35,579 (June 24, 2008)(codified at 25 C.F.R. Part. 292).

¹⁰⁹ 25 C.F.R. § 292.2 [emphasis added].

United States did not have the right to use the land as a reservoir for the dam. If the Tribe had any viable legal claim at all, which it did not, it could only have been with respect to the amount of compensation paid for the flowage easement—an issue addressed below—or for an asserted injury to the land.¹¹⁰

In fact, when settling matters by the Gila Bend Act, the United States only required that the Tribe waive potential claims related to injury to the land.¹¹¹ These were the only types of potential claims that Congress recognized. Thus, this Act was not a settlement of an asserted impairment of title, property interest, or loss of possession—it was not, in fact, ever a land claim.

The Tribe attempts to support its application of a § 20 Exception for a settlement of a land claim by stating:

“[t]he Department of the Interior plainly was aware that such legal claims against upstream parties existed, since on June 16, 1986, the Department testified before Congress that it had ‘filed notice of claims against third parties upstream of the reservation which it intends to pursue on behalf of the tribe within three to five years.’”¹¹²

These “claims,” however, were against upstream-water users who were allegedly injuring the Tribe’s water rights through excessive pumping of groundwater.¹¹³ The Tribe’s attempt to support its Trust Application with these specific claims, which themselves were never “land claims,” is improper.

The Tribe also argues that “[r]elief accorded under the settlement of a land claim may be broad” and that “a land claim need not request the return of land at issue.”¹¹⁴ While the relief granted for a settlement of a land claim may be broad, an underlying basis for the land claim must be consistent with the regulatory and common law definition of that term. It must, in other words, be an assertion of a claim upon title.

The Tribe’s desired definition of a “land claim” is exceedingly and unjustifiably broad and would include any claim that even remotely relates to land whether viably or not. If the Tribe’s definition is accepted, the intended exception for “land claims” would completely swallow any rule to which it is applied. Under the Tribe’s definition, a land claim would encompass any circumstance,

¹¹⁰ The Tribe argues that its Application falls within the § 20 Exception for land claim settlements because the legislative history of the Gila Bend Act demonstrates that the tribe “possessed claims with regard to payment of unjust compensation under th[e] condemnation action,” and that it “could have litigated claims related to both the condemnation action and for damages to these lands resulting from the construction of the Painted Rock and other dams.” Trust Application, p. 19. According to the Application, the “Tribe suffered an impairment of its real property interests both through a condemnation action by the United States in 1964 (which created the flowage easement) and by virtue of its the loss of use of 9,880 acres of land due to major flooding in the late 1970s and early 1980s.” Trust Application, p. 6 (internal citations omitted).

¹¹¹ See Gila Bend Act, § 9(a) (1986)(requiring waivers by the Tribe of claims for injury to land, not for any land title claims).

¹¹² TO AG Memo, p. 6.

¹¹³ See House Hearing (June 16, 1986).

¹¹⁴ Trust Application, p. 19.

including Congressional recognition of its moral obligation and trust duty for Indian welfare. The regulatory definition, however, is clear that such claims only encompasses a loss of right, title or possession that is in conflict with the asserted rights of a third party. The regulations do not incorporate any other circumstances; certainly not the circumstances surrounding the Gila Bend Act. The Act at most addresses the use of the land the Tribe lost as a result of flooding. That loss, however, had previously been fully compensated and the Tribe had no actual legal claim.

Because the regulations do not support the Tribe's assertion of a § 20 Exception, it argues that its Trust Application is "grandfathered" such that regulations do not apply. The so-called "Grandfather Clause" of the new regulations states:

These regulations apply to all requests pursuant to 25 U.S.C. 2719, except:

- (a) These regulations do not alter *final agency decisions* made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.
- (b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for *a particular gaming establishment*, provided that the Department or the NIGC retains full discretion to qualify, withdraw, or modify such opinions 25 C.F.R. § 292.26 of the new regulations. .¹¹⁵

To support their argument, the Tribe first points to a series of memoranda and other informal correspondence that ultimately resulted in a 1992 Field Solicitor memorandum. In late 1991, the BIA's local Realty Office had requested confirmation from the Field Solicitor—but not, importantly, the Central Office of the Office of the Solicitor or the Department of Interior—that land the Tribe acquired pursuant to the Gila Bend Act would not be subject to IGRA's prohibition against gaming on land acquired after 1988.¹¹⁶

In a memorandum dated January 24, 1992, the local Realty Officer wrote to the Field Solicitor offering an opinion that land acquired under the Gila Bend Act was a settlement of a land claim.¹¹⁷ The basis for that opinion was that the lands would "replace the Gila Bend Indian Reservation lands that were destroyed due to the construction and operation of the Painted Rock

¹¹⁵ 25 C.F.R. § 292.26 (a)-(b) [emphasis added].

¹¹⁶ TO AG Memo, Ex. R.

¹¹⁷ TO AG Memo, Ex. S.

Dam.”¹¹⁸ That memorandum also mentions that the Act provides land acquired with the Act’s proceeds would be “treated as an Indian reservation ‘for all purposes.’”¹¹⁹ Although neither of these facts create a viable land claim, on February 10, 1992, the Field Solicitor responded with a single paragraph “concur[ing] in the conclusion reached by the Branch of Real Estate Services.”¹²⁰ The Field Solicitor clearly never conducted the appropriate and required legal analysis, and at best the correspondence is nothing more than an ineffective opinion of an employee unauthorized to render binding decisions of the Secretary concerning § 20.

Regardless of the impropriety of the opinion, the Field Solicitor’s memorandum is not a “final agency action” as is required by the Grandfather Clause.¹²¹ Therefore, the regulations are applicable to the Tribe’s Trust Application. Perhaps in recognition of this fact, the Trust Application only asserts paragraph (b) of the Grandfather Clause as a basis for exemption from the regulation; claiming that it acted in reliance upon the Field Solicitor’s memos.¹²²

Paragraph (b), however, specifically states that it is only applicable to agency opinions previously issued “for a *particular* gaming establishment.”¹²³ The Field Solicitor’s memo, however, was written for land that the Tribe never actually purchased.¹²⁴ As a result, paragraph (b) cannot grandfather the Trust Application; the documents that the Tribe relies upon do not apply to Application Land.

Moreover, the Department’s regulations also provide that the Department or the National Indian Gaming Commission retains full discretion to qualify, withdraw, or modify any opinions that are deemed to fall within the Grandfather Clause.¹²⁵ Given the very significant effect of the Tribe’s Trust Application to the State of Arizona, the County of Maricopa, and the City of Glendale, even if the Grandfather Clause was deemed applicable, the Department would be acting arbitrarily and capriciously and abusing its discretion if it were not to review the Tribe’s Trust Application under its current regulations.¹²⁶

¹¹⁸ *Id.* Certainly the lands were never “destroyed” and remained useful to the Tribe’s interests. The Act granted the Tribe hunting, fishing, and gathering rights on the land. Gila Bend Act, § 4(b).

¹¹⁹ *Id.*

¹²⁰ TO AG Memo, Ex. T.

¹²¹ 25 C.F.R. § 292.26(a).

¹²² *Id.*

¹²³ 25 C.F.R. § 292.26(b) [emphasis added].

¹²⁴ TO AG Memo, p. 16.

¹²⁵ *See* 25 C.F.R. § 292.26(b).

¹²⁶ *Chevron*, 467 U.S. at 842-44.

c. Judicial Interpretation of the Term “Land Claim”

Two federal decisions have addressed the settlement of a land claim under § 20 of IGRA.¹²⁷ In these cases, the key determination regarding whether there was a “land claim” was whether by distributing funds, Congress settled a claim to infringement of a title because the Indian tribe had been unlawfully deprived of title to or dispossessed of its land.

In *Wyandotte Tribe v. National Indian Gaming Commission*,¹²⁸ the court made clear that while a “‘land claim’ does not limit such claim to one for the return of land,” it must, nevertheless, “include[] an assertion of an existing right to the land.”¹²⁹ In this lawsuit, the Wyandotte Tribe brought an action against the United States for cessations to tribal land located in Kansas City, Kansas. The Indian Claims Commission (“ICC”) concluded that the tribe did have recognized title to an undivided one-fifth interest in the land and the tribe had been unlawfully deprived of that title interest.¹³⁰ The tribe presented title claims that were in conflict with the title claimed by the United States, which claimed that the tribe had no title to the land. The ICC awarded the tribe compensation for the lands that were ceded.

Despite this ICC’s conclusion, the National Indian Gaming Commission (“NIGC”) decided that the § 20 Exception for settlement of a land claim did not apply because there was no “land claim.” The tribe appealed and the District Court reversed the NIGC agency decision. The District Court made clear that while a “land claim” could include a monetary remedy and not just the return of land, there must be “an assertion of an existing right to the land.”¹³¹

In *Citizens against Casino Gaming in Erie County (“CACGEC”) v. Hogen*,¹³² the Western District Court of New York confirmed the holding of *Wyandotte*.¹³³ In *CACGEC*, the Seneca Nation purchased a nine-acre parcel of land within the City of Buffalo, New York with funds that had been allocated by Congress to assist in resolving past inequities.¹³⁴ NIGC approved the Seneca’s application to allow gaming under the § 20 Exception for settlement of a land claim and the Tribe started construction on a casino.¹³⁵

¹²⁷ *Wyandotte Tribe v. National Indian Gaming Commission*, 437 F.Supp.2d 1193, 1208 (D. Kan. 2006); *Citizens against Casino Gaming in Erie County (CACGEC) v. Hogen*, 2008 WL 2746566 (W.D.N.Y. July 8, 2008).

¹²⁸ 437 F.Supp.2d 1193, 1208 (D. Kan. 2006)

¹²⁹ *Id.* [emphasis added].

¹³⁰ *Id.* at 1198.

¹³¹ *Id.*

¹³² 2008 WL 2746566 (W.D.N.Y. July 8, 2008)

¹³³ *Id.* at *12.

¹³⁴ *Id.*

¹³⁵ *Id.* at *16-17. The Seneca tribe actually began gaming in a temporary facility. Construction on the permanent casino building was halted during the lawsuit.

CACGEC, a citizens' group of concerned citizens and business owners near the proposed casino, appealed. The District Court reversed the NIGC's decision. The court held that the settlement of a "land claim" exception was not satisfied because the tribe had no enforceable claim to the land; rather "[t]he most that can be said is that the agreement, as effectuated by the [Seneca Nation Settlement Act of 1990], remedied the acknowledged unfairness."¹³⁶ The court held that the United States had not infringed upon the Seneca's title because the Tribe had no such enforceable rights. Therefore, it had not been unlawfully deprived of title to or dispossessed of its land.

2. Tribe's Trust Application Does Not Qualify for a § 20 Exception

As stated above, the Gila Bend Act was never intended to settle a dispute claim as to land title. The Tribe's requested damages are only for injury to its trust land.¹³⁷ The Tribe was never unlawfully dispossessed of title or possession of any land. The United States constructed a flood control project pursuant to Congressional authority and lawfully acquired a flowage easement over portions of the Gila Bend Reservation. While the Tribe may have lost some use of the trust land, unlike the facts of the *Wyandotte* case, the Tribe had no claim to title that was in conflict with the right of the United States to utilize its properly-acquired flowage easement. Moreover, the Tribe, as in the *CACGEC* case, had no viable land claims. Congress' decision to remedy some perceived "unfairness," as it chose to do in *CACGEC* case, is within its prerogative but that decision does not amount to a land claim.

In this instant matter, the United States had Congressional authority to construct the Painted Rock Dam and had lawfully acquired a flowage easement over portions of the Gila Bend Reservation. The United States paid the Tribe just compensation and, therefore, there was no possessory claim to the lands addressed by the Gila Bend Act.

In fact, Congress expressly removed any findings from the drafts of the legislation that might have implied some type of settlement. The original bill reflecting the Act included in the findings language that reflected a "need to settle prospective O'odham legal claims against the United States as well as provide alternative lands for the tribe."¹³⁸ The potential claims asserted by the Tribe at that time included disputing the amount judicially awarded 20 years prior in the condemnation action, improper taking by the United States of the flowage easement 20 years prior, damages to land resulting from the Painted Rock Dam, and a breach of trust for failing to prosecute third parties for

¹³⁶ *Id.* at *16.

¹³⁷ Trust Application, p. 19.

¹³⁸ HOUSE REPORT, at 9.

damages to the land and water resources.¹³⁹ The Corps of Engineers and the Department of Interior disputed the viability of these claims and, in fact, opposed the Act in the House Committee for that reason.¹⁴⁰

Regardless, none of these potential claims presents a land claim to be settled by the Act. The final House Report completely rejected findings that might have suggested any such thing. The Report states:

These findings replace those in the original bill which stressed the need to settle prospective O’odham legal claims against the United States as well as to provide alternative lands for the tribe. As such, they did not adequately reflect the principal purpose of the legislation—to provide suitable alternative lands and economic opportunity for the tribe.¹⁴¹

Thus, clearly the Act was never intended as a settlement of any type of land claim. To the contrary, the language of the Act required the Tribe waive only claims related to “injuries to land.”¹⁴² The Act, in fact, has no requirement that the Tribe waive any title claims, which would have necessarily have been present had this Act been a settlement of a land claim.

All of the Tribe’s claims, as the Corps of Engineers and the Department of Interior recognized, were specious. The Tribe, for example, asserts that lands greater than that over which the flowage easement was taken were flooded thereby creating a right to additional compensation. The Tribe premises their Trust Application on an assertion that this claim is a “land claim” qualifying its Trust Application for a § 20 Exception for settlement of a land claim.¹⁴³ That is a baseless assertion. As explained above, claims for additional compensation are not a “land claim” as defined by the Department of Interior regulations.

Moreover, the Tribe did not have any viable claim for any such compensation. During Senate consideration of the Gila Bend Act, the Corps of Engineers specifically objected to this assertion—in addition to objecting to the Act as a whole—on the ground that the Tribe “ha[d] already been compensated for the flowage easement in this land in the same manner as all other landowners in the reservoir.”¹⁴⁴ The Corps testified that contrary to the representation that the

¹³⁹ *Id.* at 7.

¹⁴⁰ *Id.* at 8.

¹⁴¹ *Id.* at 9.

¹⁴² Gila Bend Act, § 9(a). The Tribe was also required to waive any claims related to water rights. This provision is not unexpected; efforts to settle water rights issues with the Arizona tribes had been going on for decades.

¹⁴³ Trust Application, p. 3; TO AG Memo, pp. 2, 14-21. *See* 25 U.S.C. § 2719.

¹⁴⁴ Hearing Before the Senate Select Committee on Indian Affairs, S. Hrg. 99-935 (July 23, 1986)(Statement of Lieutenant Colonel Norman I. Jackson, Deputy Commander, Los Angeles District)(“SENATE HEARING”).

flooding on the Reservation was greater than anticipated, it was actually less than authorized. As a result, the Tribe was compensated in full and due no further amount.¹⁴⁵

Therefore there is no justification for the Tribe's assertion of a settlement of a land claim based on the Painted Rock Dam caused flooding to occur over an area larger than that taken by the easement. The fact is that the flowage easement that was secured through the condemnation action included approximately 7,700 acres of the Gila Bend Reservation;¹⁴⁶ for which the United States paid the Tribe \$130,000.¹⁴⁷ Although some of the non-Indian landowners complained that the affected area was actually larger than the flowage easement, the Corps of Engineer's estimate of the affected

¹⁴⁵ Statement of Lieutenant Colonel Norman I. Jackson, Deputy Commander, Los Angeles District:

The Department of the Army opposes the enactment of S. 2105 for the reason that the Papago Tribe of Arizona has been compensated for the acquisition of the flowage easement and *any damages* which result from the operation of Painted Rock Dam.

For Painted Rock Dam, Congress authorized construction of the dam "substantially in accordance with the recommendations of the Chief of Engineers" in the House Document which states that it shall be "generally in accordance with the plan of the district engineer" and with "such modifications thereof as in the discretion of the Chief of engineers may be advisable." The dam, as finally designed and constructed, has been operated in furtherance of the congressionally mandated project purpose. The Reservoir Regulation Manual for the project sets for the three methods for operating the dam. Two of these methods involve fixed operation schedules for the dam, one of which is substantially similar to that in the House Document for the project. However, these schedules are designed for controlling the standard project flood – that is to say, the largest flood anticipated given poor ground conditions. *The manual specifically states that the Corps may operate the dam on a prediction basis during floods that are smaller than the standard project flood in order to maximize flood control benefits.*

Operation on a prediction basis establishes the rate of release of floodwaters from the dam based on upstream and downstream conditions including prior and forecasted rainfall and runoff, ground conditions, current reservoir storage, conditions at upstream dams, the status of dams on the Colorado River, and the relationship between reservoir releases and downstream damages. Unlike a fixed operation schedule which provides a fixed rate of release for specific water elevations in the reservoir, the prediction basis provides greater flood control benefits for floods that are smaller than the standard project flood.

All the floods that have occurred at the project since its construction have been smaller than the standard project flood and the Corps of engineers has operated the dam on a prediction basis pursuant to the manual.

The issue of whether the Corps of Engineers may properly operate Painted Rock Dam on a prediction method rather than in accordance with the fixed schedule method set forth in the House Document for the project is the subject of two cases currently pending with non-Indian owners of other lands in the reservoir. One case is pending in the U.S. District Court in Arizona. The other case is before the U.S. Claims Court. The Department of Justice believes that these cases will be resolved in favor of the United States and will confirm the right of the Corps of Engineers to operate the dam on the prediction method *without the payment of additional compensation to the owners of land within the flowage easement area of the reservoir.*

In summary, the Department of the Army opposes S. 2105 because the Papago Tribe has already been compensated for the flowage easement in its land in the same manner as all other landowners in the reservoir. The Corps of Engineers has operated the dam within the scope of its flowage easement and applicable law. No further compensation is due the Papago Tribe because of the construction and operation of Painted Rock Dam.

SENATE HEARING. [emphasis added].

¹⁴⁶ HOUSE REPORT, at 5.

¹⁴⁷ *See Id.* ("Having failed to reach agreement on either an easement or acquisition of relocation lands, the United States on January 3, 1961, initiated an eminent domain proceeding in federal district court to obtain a flowage easement. In November, 1964, the court granted an easement giving the United States the perpetual right to occasionally overflow, flood and submerge 7,723.82 acres of the reservation (75 percent of the total acreage) and all structures on the land, as well as to prohibit the use of the land for human habitation. (Lands at lower elevations that would be inundated at least once every five years were acquired in fee.) Compensation in the amount of \$130,000 was paid to the Bureau of Indian Affairs on behalf of the [Tribe]).

land, which was used to establish the extent of the flowage easement, was subsequently upheld by the Ninth Circuit and compensation paid according to that estimate was deemed legally appropriate.¹⁴⁸

The Corps of Engineer's position was later found by the courts to be exactly correct. In *Pierce v. United States*,¹⁴⁹ non-Indian landowners sued the United States asserting that the Painted Rock Dam "caused the flood waters to back up and effectively submerge large parts of [their] land" and "that the easement did not permit the type of flooding that occurred here."¹⁵⁰ They claimed entitlement to further damages because the government "deviate[d] from the recommended water discharge schedule" and thus "not with the scope of the [Flood Control Act]."¹⁵¹ The Ninth Circuit Court of Appeals rejected that claim, holding instead that "the Government's decision to deviate from the discharge schedule was for the purpose of enhancing its capacity to control flood waters [and] therefore, were integrally related to the flood control purpose of the statute authorizing the dam."¹⁵²

Therefore, the United States was never liable for further damages or the payment of compensation as a result of the flooding notwithstanding the assertion of the Tribe in its Trust Application. Still, even if the Tribe had such a claim, that type of claim is not a "land claim" for purposes of a § 20 Exception to IGRA prohibition on gaming on after-acquired land.

Lastly, a portion of the flowage easement prohibited human habitation.¹⁵³ One of the Tribe's settlements, Sil Murk Village, was located within the uninhabitable area. Sil Murk Village was not part of the trust land held by the United States for the Gila Bend Indian Reservation. It was not, therefore, part of the land that was addressed by the Gila Bend Act and was never part of the replacement land.¹⁵⁴ It is therefore, irrelevant to the Trust Application.

¹⁴⁸ In *Pierce v. U.S.*, 650 F.2d 202 (9th Cir. 1981), non-Indian landowners brought suit against the government claiming that operation of the Painted Rock Dam "caused the flood waters to back up and effectively submerge large parts of [their] land" and although the government acquired a flowage easement, the appellants contended "that the easement did not permit the type of flooding that occurred here." *Id.* at 203. They claimed entitlement to further damages because the government "deviate[d] from the recommended water discharge schedule" and thus "not with the scope of the [Flood Control Act]." *Id.* at 204. The Ninth Circuit rejected this claim and held that "the Government's decision to deviate from the discharge schedule was for the purpose of enhancing its capacity to control flood waters [and] therefore, were integrally related to the flood control purpose of the statute authorizing the dam." *Id.* at 205. Therefore, the government was not liable for further damages or the payment of compensation because the operation of the dam was within the authorization of the Flood Control Act.

¹⁴⁹ 650 F.2d 202 (9th Cir. 1981).

¹⁵⁰ *Id.* at 203.

¹⁵¹ *Id.* at 204.

¹⁵² *Id.* at 205.

¹⁵³ Declaration of Taking, Reservation Condemnation Case, *supra*. n. 106 ("Declaration")(Attachment 19).

¹⁵⁴ Gila Bend Act, § 2(1) ("Section 308 of Public Law 97-293 '96 Stat. 1282' authorizes the Secretary of the Interior to exchange certain agricultural lands of the *Gila Bend Indian Reservation* . . ."), § 4(a) ("If the tribe assigns 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*

In any event, the disposition of Sil Murk Village provides no basis for a § 20 Exception for settlement of a land claim. In 1964, Congress authorized the Secretary of Interior to receive and hold in trust for the Tribe \$269,500 to be paid by the Corps of Engineers for relocation of Sil Murk Village (the “Sil Murk Village Act”).¹⁵⁵ The legislative history of the Sil Murk Village Act explains its necessity:

By Executive Order 1090 dated June 17, 1909, the boundaries of the Indian reservation were realigned [sic] and certain lands returned to the public domain, including the lands underlying Sil Murk Village. Thereafter these lands were acquired by private interests and were considered a portion of the Gila Ranch Corps. land holdings. While the inhabitants of the village were never forced to vacate these lands by the owners, their occupancy was considered to have been merely that of tenants-at-sufferance. On March 23, 1961, the United States filed a ‘declaration of taking’ in condemnation proceedings for acquisition of a comprehensive flowage easement over the lands of the Gila River Ranch Corps., which encompassed the lands of Sil Murk Village. Thereafter, on March 27, 1961, the Gila River Ranch Corps., by two deeds, quitclaimed to the Papago Tribe the lands underlying Sil Murk Village and the tribal cemetery; these conveyances are subject to the rights of the United States previously acquired by the aforesaid condemnation proceedings.¹⁵⁶

This legislation is clear that the land upon which Sil Murk Village was located was not part of the Gila Bend Reservation. The Village was located on land owned by the Gila Ranch Corp, a private entity. Unlike the Gila Reservation land, it was not held in trust for the benefit of the Tribe. As the Act states, the Village inhabitants were merely tenants at sufferance¹⁵⁷ on this land. With the filing of the Declaration of Taking, title immediately vested with the United States.¹⁵⁸ Therefore, while the land was in private ownership, the United States took the flowage easement that precluded habitation of the Village. After the Declaration was filed, the private landowner transferred its title to the Tribe. The Tribe took this title subject to the United States’ easement, which precluded

Reservation . . .’), § 9(a) (“The Secretary shall be required to carry out the obligations of this Act only if within one year after the enactment of this Act the Tribe executes a waiver and release in a manner satisfactory to the Secretary of any and all claims of water rights or injuries to land or water rights (including rights to both surface and ground water) with respect to the lands of the *Gila Bend Indian Reservation* from time immemorial to the date of the execution by the Tribe of such a waiver.)

¹⁵⁵ Pub. L. No. 88-462 (1964).

¹⁵⁶ H.R. REP. NO. 1352, 88th Cong. 2d Sess. 4-5 (1964).

¹⁵⁷ “Since a tenant at sufferance is a wrongdoer, and in possession as a result of the landowner’s laches or neglect, the tenant has no term, and no estate or title, but only a naked possession without right, and wrongfully held. A tenant at sufferance acquires no permanent rights because the landowner neglects to disturb his or her possession, and the landowner is entitled to resume possession, and the tenant is entitled to quit, at any time without notice. Additionally, a tenant at sufferance has no estate that can be granted by him or her to a third person, and one who enters on land pursuant to a lease or assignment from such tenant is a disseisor, and is liable in trespass, at the option of the landowner.” 52 C.J.S. *Landlord & Tenant* § 282 (2009).

¹⁵⁸ 40 U.S.C. § 1314(b).

habitation by the Tribe's tenants at sufferance.¹⁵⁹ In other words, the Tribe took the land without the right of the Village to continue at its location.

In light of the easement, the Tribe and its inhabitants had no legal claim to continued use of the Sil Murk Village land for habitation. The Sil Murk Village Act could not, therefore, be a settlement of a land claim because there was no legitimate legal claim.

Accordingly, the Gila Bend Act was never a settlement of land claim. Thus, the Trust Application does not qualify as a § 20 Exception for a land claim settlement. In order to conduct gaming on the Application Land, the Tribe would have to satisfy one of the other § 20 Exceptions, which it cannot do. Facts justifying one of the other § 20 Exceptions for an initial reservation of a newly recognized tribe or for restoration lands are not present.¹⁶⁰

Therefore, the Tribe could only look to the general exception for after-acquired land—assuming that the Application Land met the requirements of the Act. That exception would require that the Tribe satisfy the two requirements: (1) A determination by the Secretary that the gaming facility would not be detriment to the local community; and (2) the consent of the Governor of Arizona.¹⁶¹ Arizona's Governor, however, is statutorily required to deny any concurrence with off-reservation gaming on after-acquired land.¹⁶² Because any consideration of the effect of the Trust Application on the local community will demonstrate a clear detriment and because the Governor cannot by law approve of the § 20 Exception for after-acquired land, the Trust Application must be denied.

D. Constitutionality of Taking Land Into Trust for the Benefit of an Indian Tribe

The federal government's taking of land into trust for Indian tribes and removing it from state and local control creates several issues. Land taken into trust becomes "Indian country" and is not subject to state and local taxation. Clear congressional authorization can provide for state and local taxation, but generally the land is removed from the local property tax rolls decreasing state and local revenues.¹⁶³ Nevertheless, the local government is most often left with providing services to the trust land or as a result of activity on that land. Federal regulations also attempt to exempt trust

¹⁵⁹ Declaration, *supra*. n. 153.

¹⁶⁰ See 25 USC § 2719(b)(1)(B).

¹⁶¹ 25 U.S.C. § 2719(b)(1).

¹⁶² A.R.S. § 5-601(C).

¹⁶³ E.g., *Cass County v. Leech Lake Bank of Chippewa Indians*, 524 U.S. 103, 110 (1998); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992).

land from state and local land use regulation.¹⁶⁴ In addition to lost revenue and diminished control over land use, the state's civil and criminal jurisdiction may be significantly compromised where tribal land or members are involved.¹⁶⁵ And, under certain conditions, tribes may conduct gaming on trust land under IGRA, an activity that creates several significant associated issues.¹⁶⁶ The proliferation of Indian gaming since IGRA was enacted has resulted in substantially increased burdens on states and local communities.

It must be recognized that there are over 562 federally-recognized Indian tribes.¹⁶⁷ Several tribal acknowledgment petitions are pending at the BIA.¹⁶⁸ The number of tribes seeking to secure trust land for whatever purpose makes the issue of creating new Indian reservation or trust lands a growing and highly-controversial issue. Currently, the federal government is improperly seeking to increase tribal land at the expense of the states' territorial boundaries. Without the states' consent, this is unconstitutional.

1. Congressional Authority to Create a Federal Enclave is Limited

The Constitution provides the federal government only limited ability to reduce the land under control of the states. Under the Enclave Clause,¹⁶⁹ congressional power is limited to establishing a federal "enclave," land over which the federal government exercises "exclusive jurisdiction," to that needed for "the erection of forts, magazines, arsenals, dock-yards, and other needful Buildings"¹⁷⁰ Even then, the land cannot be taken into federal jurisdiction without first obtaining the affected State's consent.¹⁷¹ No other provision of the Constitution provides the federal government the authority to take land from state jurisdiction.¹⁷²

Various courts, including the Supreme Court, have described "Indian country" and Indian

¹⁶⁴ 25 C.F.R. § 1.4 (2003).

¹⁶⁵ Compare *U.S. v. Stands*, 105 F.3d 1565 (8th Cir. 1997) with *U.S. v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999).

¹⁶⁶ 25 U.S.C. § 2703(4).

¹⁶⁷ Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs; Notice, 73 F.R. 18,553 (2008).

¹⁶⁸ Department of Interior, Bureau of Indian Affairs Report, *Status Summary of Acknowledgement Cases* (September 22, 2008), <www.doi.gov/bia/docs/ofa/admin_docs/Status_Summary_092208.pdf> [Last visited May 30, 2009](Attachment 21).

¹⁶⁹ U.S. Const. art. I, § 8 ("To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings")

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See also U.S. Const. art. IV, § 3 (expressly prohibiting the "involuntary reduction" of the State's sovereign territory in the creation of the new state.)

reservations as federal enclaves.¹⁷³ The creation of these enclaves requires the consent of the affected state. Our federal system was created upon the premise of the dual state and federal sovereignty. The lack of Constitutional authority to reduce state jurisdiction reflects the founders' respect for the territorial jurisdiction and integrity of the states as a fundamental aspect of their sovereignty. As the annals of the Constitutional convention reflect, delegates proposed and eventually adopted the Enclave Clause in the interest of safeguarding our nation's then-unique system of federalism.¹⁷⁴ To this end, the Enclave Clause grants Congress the right of exclusive legislative power over federal enclaves as prophylactic against undue state interference with the affairs of the federal government.¹⁷⁵ Yet, ever sensitive to the risk of granting the federal government unchecked power, the founders limited and balanced this grant of power by requiring state consent to the federal acquisition of land for an enclave.¹⁷⁶

The federal government lacks Constitutional authority to take land from the states without the state's consent. This would include taking land into trust for Indian tribes outside an original Indian reservation created prior to statehood without the consent of the state. Such acquisitions transform the land into "Indian country" under federal law and thereby divest the states of their rightful sovereignty over the land.¹⁷⁷

¹⁷³ See *U.S. v. Antelope*, 430 U.S. 641, 648 n.9 (1977); *U.S. v. Goodface*, 835 F.2d 1233, 1237, n. 5 (8th Cir. 1987)(stating that the phrase "within the exclusive jurisdiction of the United States" in 18 U.S.C. 1153 refers to the law in force in federal enclaves, including Indian country."); *U.S. v. Maryses*, 557 F.2d 1361, 1364 (9th Cir. 1997); *U.S. v. Sloan*, 939 F.2d 499, 501 (7th Cir. 1991), *cert denied*, 502 U.S. 1060 (1992)(tax code imposes taxes upon U.S. citizens through the nation not just in federal enclaves "such as ... Indian reservations"). Notwithstanding this fact, the First Circuit rejected an argument that taking trust lands for Indian tribes violates the Enclave Clause. *Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007), *rev. on other grounds*, *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058 (2009). That Court found that the Enclave Clause is inapplicable because the taking of land into trust by the federal government for the benefit of an Indian tribe is not one of the Clauses's enumerated permissible actions. The court also dismissed the assertion that taking land into trust by the federal government is an Enclave Clause violation because there is some sharing of jurisdictional authority between state and federal governments. *Id.* citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)("[Th]e Supreme Court offered an Indian reservation as a "typical illustration" of federally owned land that is not a federal enclave because state civil and criminal laws may still have partial application thereon."). The First Circuit reliance on *Surplus Trading* is a gross error. That case was decided well before the Indian Reorganization Act of 1934, which created the notion of Indian trust lands, and presented other facts rendering the court's premises unsupportable. And, the fact that States retain some jurisdiction over some matters in "Indian country" does eliminate the protection that the Enclave Clause provides to the territorial integrity of the states.

¹⁷⁴ *Commonwealth of Va. v. Reno*, 955 F.Supp. 571, 577 (E.D. Va. 1997) *vacated on other grounds*, *Commonwealth of Va. v. Reno*, 122 F.3d 1060 (4th Cir. 1997).

¹⁷⁵ *Id.*

¹⁷⁶ As James Madison noted, many delegates expressed concern that Congress' exclusive legislation over federal enclaves would provide it with the means to "enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [national] government." James Madison, 2 Debates in the Federal Convention, 513 (quoting Elbridge Gerry of Massachusetts). Ultimately, the delegates' apprehension about excessive federal power was allayed by requiring the national government to obtain the states' express consent to acquire and employ state property for federal purposes. *Id.*

¹⁷⁷ *U.S. v. Roberts*, 185 F.3d 1125, 1131 *cert. denied*, 529 U.S. 1108 (2000) (Tenth Cir. 1999); *U.S. v. John*, 437 U.S. 634, 648-649 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). Federal property acquired under the powers found in the Constitution's Property Clause, U.S. Const. art. IV, §. 3, are generally subject to state laws

2. Congress Lacks Constitutional Authority Without State Consent

The Constitution created a federal government with only specifically enumerated powers.¹⁷⁸

Under the Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.¹⁷⁹

The powers delegated to the federal government and those reserved to the states are mutually exclusive.¹⁸⁰ Therefore, all federal statutes must be grounded upon a power enumerated in Article I of the Constitution.¹⁸¹ If the Congressional act lacks Article I authority, then the federal government has invaded the province of the states' reserved powers.¹⁸²

James Madison wrote during the process by which the various states ratified the Constitution, that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite.”¹⁸³ The United States Supreme Court has also stated:

Just as the separation and independence of the coordinate branches of the federal Government serves to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the Federal*

except to the extent they are contrary to federal law. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529 (1976). When acquisitions are made by taking land into trust for Indian tribes, thereby creating “Indian country,” the federal government’s position is that state jurisdiction is preempted. This is based on the notion of “‘semi-independent position’ of Indian tribes [which gives] rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980). In *White Mountain Apache*, the Supreme Court explained the two barriers are that such authority may be pre-empted by federal law and such authority may infringe upon the “right of reservation Indians to make their own laws and be ruled by them.” *Id.* While the court was referring to Indian reservations and not trust land, the federal government would expand that to all Indian Country such that the preemption is a profound displacement of state authority. The application of this federal preemption” and related barriers to state regulation on any newly-acquired land for Indians has significant and immediate ramifications for a state’s authority over that land. One of the earliest Supreme Court cases stated that “the laws of [a state] can have no force” within reservation boundaries. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *See also Williams v. Lee*, 358 U.S. 217, 219 (1959). Recent Supreme Court cases continue to presume that state jurisdiction over Indian country is automatically diminished. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (“Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States”); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). Generally, absent the tribe’s consent or an express congressional authorization, a state cannot exercise certain criminal or civil jurisdiction in Indian country. *See* 25 U.S.C. §§ 1321, 1322; *McClanahan*, 411 U.S. at 171-72, (1973). As to regulatory matters, the federal courts apply a complex balancing test to determine if the state’s interests in regulating a matter outweigh the federal government’s interest in tribal self-government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144-5; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

¹⁷⁸ U.S. Const., art. I, § 8.

¹⁷⁹ U.S. Const., amend. X.

¹⁸⁰ *See New York v. U.S.*, 505 U.S. 144 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . .”)

¹⁸¹ *Id.* at 155.

¹⁸² *Id.*

¹⁸³ THE FEDERALIST NO. 45, pp. 292 - 293 (J. Madison)(C. Rossiter, ed. 1961).

*Government will reduce the risk of tyranny and abuse from either front.*¹⁸⁴

With the exception of the Enclave Clause, the federal government lacks any Constitutional authority to impinge upon state sovereignty by removing land from a state's jurisdiction. Any removal, therefore, is a violation of the Tenth Amendment, which limits the powers of the federal government to those specifically enumerated in the Constitution. Consequently, any law that ostensibly allows the federal government to remove land from a state is unconstitutional.

a. Section 6(d) of the Gila Bend Act is Unconstitutional

In this matter, the Trust Application relies upon § 6(d) of the Gila Bend Act, which states:

The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes.¹⁸⁵

This section of the Act, however, diminishes and infringes on the inherent sovereign rights of the states because it provides the federal government with authority that is not granted to Congress by the Constitution. The Act's trust provision impermissibly expands the federal government's Constitutional powers. Nowhere in the Constitution is found authority for Congress to take land into trust at the expense of state sovereignty. Consequently, Congress cannot delegate any such authority to the Secretary.

It is axiomatic that Congress cannot unilaterally expand its authority, or the authority of any other branch of the federal government, with respect to the states. As the Supreme Court noted, “[s]tates are not mere political subdivisions of the United States The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.”¹⁸⁶ Congress cannot infringe upon the rights retained by the states under the Tenth Amendment.

The Gila Bend Act impinges upon state sovereignty because it constitutes a limitless

¹⁸⁴ *U.S. v. Lopez*, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)[emphasis added].

¹⁸⁵ Gila Bend Act, § 5(d).

¹⁸⁶ *New York*, 505 U.S. at 156-57 (“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. The benefits of this federal structure have been extensively cataloged elsewhere, but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. “The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.” [citations omitted.]

authorization by Congress to effect a major adjustment of the balance of power between a state and the federal government. The conversion of vast tracts of land outside designated reservation boundaries negatively affects the ability and authority of the State of Arizona to discharge its responsibilities to all of its citizens, both non-Indian and Indian alike. The Supreme Court has said that “there is a significant geographical component to tribal sovereignty.”¹⁸⁷

That geographical component, with the exception of properly created federal enclaves, belongs exclusively to the states. Congress has no authority to diminish that component. The Trust Application, which relies on the Secretary’s ability to take the land into trust, is premised entirely on an unconstitutional provision of the Gila Bend Act. The Trust Application, therefore, cannot be acted upon because the Secretary does not have the legal authority to take the action requested.

b. Limitations of the Indian Commerce Clause

The Indian Commerce Clause¹⁸⁸ is often cited as the authority for Congressional actions with respect to Indian tribes.¹⁸⁹ Federal courts deciding Tenth Amendment challenges have often based their opinions on the false assumption that Article I provides Congress with plenary authority over all matters involving Indians, no matter how remote, indirect, or tenuous the facts of the case related to the notion of “commerce,” which is the only Constitution authority actually granted the federal government.¹⁹⁰ Although lower courts have interpreted the Indian Commerce Clause to give Congress “plenary power . . . to deal with the special problems of Indians,” the Supreme Court has limited this assertion of plenary power.¹⁹¹

That limitation is appropriate. The language of the Constitution does not support the assertion of plenary authority under the Indian Commerce Clause. That clause grants the federal government authority “to regulate commerce with . . . the Indian tribes.”¹⁹² In the legal and constitutional context, however, “commerce” means only mercantile trade.¹⁹³ The phrase “to regulate commerce” has long meant to administer the *lex mercatoria* (law merchant) governing

¹⁸⁷ *White Mountain Apache v. Bracker*, 448 U.S. at 151.

¹⁸⁸ U.S. Const. art I, § 8, cl. 3. “The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

¹⁸⁹ See e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).

¹⁹⁰ See e.g., Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER UNI. L. REV. 201, 217 (2007) (“Natelson”) (“When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian ‘affairs.’”).

¹⁹¹ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 45 (1996).

¹⁹² U.S. Const. art I, § 8, cl. 3.

¹⁹³ Natelson, *supra* n. 189, at 214.

purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.¹⁹⁴ Further study reveals that the common use of the phrase “to regulate commerce,” and similar phrases, at the time of the Constitutional Convention “almost invariably meant ‘trade with the Indians’ and nothing more It was generally understood that such phrases referred to legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.”¹⁹⁵

The ability to distinguish a reference to “commercial activities” and references to all other activities was common in the vernacular of the time.

“When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian ‘affairs.’¹⁹⁶

Federal documents treated “affairs” as a much broader term than “trade” or “commerce.”¹⁹⁷ An academic article studying of the Indian Commerce Clause states:

A 1786 congressional committee report proposed reorganization of the Department of Indian Affairs Their report showed the department's responsibilities as including military measures, diplomacy, and other aspects of foreign relations, as well as trade. The congressional instructions to Superintendents of Indian Affairs . . . clearly distinguished ‘commerce with the Indians’ from other, sometimes overlapping, responsibilities. Another 1787 congressional committee report listed within the category of Indian affairs: ‘making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former.’¹⁹⁸

There is, therefore, no basis to argue that the language of the Constitution grants plenary authority over any matter that concerns Indian affairs. The text of that Constitutional provision provides only authority over Indian commerce.

Congress’ lack of authority over any Indian matters beyond those related to commerce, coupled with the lack of any authority to remove land from a state without the consent of the state,

¹⁹⁴ *Id.* (“Thus, ‘commerce’ did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life. This conclusion can be a surprise to no one who has read the representations of the Constitution's advocates during the ratification debates. They explicitly maintained that all of the latter activities would be outside the sphere of federal control.”)

¹⁹⁵ *Id.* at 215-16.

¹⁹⁶ *Id.* at 216-17 (“Contemporaneous dictionaries show how different were the meanings of ‘commerce’ and ‘affairs.’ The first definition of ‘commerce’ in Francis Allen's 1765 dictionary was ‘the exchange of commodities.’ The first definition of ‘affair’ was “[s]omething done or to be done.” Samuel Johnson's dictionary defined “commerce” merely as “[e]xchange of one thing for another; trade; traffick.’ It described ‘affair’ as “[b]usiness; something to be managed or transacted.’ The 1783 edition of Nathan Bailey's dictionary defined “commerce” as “trade or traffic; also converse, correspondence, but it defined ‘affair’ as ‘business, concern, matter, thing.’” [citations omitted.]

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 217-18.

leads to the conclusion that § 5 of the Gila Bend Act is unconstitutional. Because the Trust Application rests solely on the Secretary's exercise of unconstitutional authority, the Secretary cannot take the land into trust as requested by the Tribe.

CONCLUSION

The Trust Application is deficient in several respects. The Application Land does not comply with Gila Bend Act's several restrictions on characteristics of replacement land. The Application Land is within the boundaries of a city or town. It is also not contiguous with San Lucy Village as required by the Act. The Tribe's reliance on a BIA waiver of this contiguity requirement is misplaced. The BIA, to which the Secretary delegated his authority to grant such a waiver, did so in contravention of the provision of the Act. Therefore, that waiver is illegal and the Application Land fails to comply with the requirements of the Act. As a result, the Trust Application must be denied as a matter of law.

Even assuming the contiguity waiver was effective (and, for purposes of argument, setting aside the fact that the Application Land is within the boundaries of a city), the Trust Application is fatally deficient. The granting of the contiguity waiver is a discretionary agency action. The discretionary waiver is a necessary prerequisite for the Tribe's Trust Application to comply with the Act. Therefore, the taking of the Application Land into trust is a discretionary act. Any discretionary agency action to secure federal land requires, among other things, a NEPA Environmental Impact Statement. The Trust Application includes no Environmental Impact Statement. This deficient request precludes the granting of the Trust Application.

Lastly, all trust applications for gaming purposes must comply with IGRA. The Tribe seeks to avoid addressing the detriment its Trust Application has on the local communities. It also attempts to forego obtaining the approval of the Secretary and consent of the Governor of Arizona, which cannot legally be obtained in any event. The Tribe erroneously relies on the settlement-of-a-land-claim exception. The Gila Bend Act, however, was not a settlement of a land claim. There was never any claim as to the title or possession of the former reservation land. There was never a dispute that the reservation land was held in trust for the Tribe. The United States properly condemned a flooding easement and had the necessary right to possess the Application Land as a result of flooding from the Dam. That fact was also never in dispute. The language of the Act makes no reference to the settlement claims related to title or possession. On the contrary, the legislative history of the Act shows that modifications of the language in the original bill were made to avoid any confusion with respect to the purpose of the Act. Therefore, the settlement-of-a-land-claim exception does not apply. The Tribe must secure the approval of the Secretary, who must consider the impact of the Trust Application on the local communities. It must also obtain the consent of Arizona's Governor, which it cannot because the Governor is statutorily prohibited from

consenting to the Trust Application. While a determination of the detrimental impact to the local communities would cause the Trust Application to fail, the inability of the Tribe to obtain the State's consent is fatal to the Trust Application.

Finally, Congress lacks the constitutional authority to remove land from the jurisdiction of the State of Arizona without the State's consent. The federal government only has the constitutional authority to take land from state jurisdiction under the Enclave Clause. Invoking the Enclave Clause requires the consent of the State. Arizona never consented to the Gila Bend Act. As a result, the provision of the Act authorizing the Secretary to take land into trust without the State's consent is unconstitutional. The federal government's lack of legal authority to grant the Tribe's request requires that the Trust Application be denied.

The City of Glendale's opposition to the Tribe's request for the Secretary to take the Application Land into trust is supported by law. The Trust Application fails to comply with the Gila Bend Act, IGRA, and NEPA. Moreover, the Tribe requests the Secretary to perform an unconstitutional act. The Secretary cannot comply with that request. Therefore, the Tribe's Trust Application must be denied. In doing so, the Secretary will honor and preserve the social, political and financial status created by considerable effort of the State and the local communities. The Secretary will preserve the delicate balance with respect to Indian gaming that the Indian tribes and State worked diligent to achieve over many years.

For all the reasons set forth herein, it is the legal position of the City of Glendale that the Secretary of the Interior must deny the Tohono O'odham's most recent Trust Application to take land into trust.

ATTACHMENTS

1. [H.R. Rep. No. 851, 99th Cong., 2d Sess. \(1986\)](#)
2. [Publicity Pamphlet, 2002 Ballot Propositions, Proposition 200](#)
3. [Publicity Pamphlet, 2002 Ballot Propositions, Proposition 201](#)
4. [Publicity Pamphlet, 2002 Ballot Propositions, Proposition 202](#)
5. [*Yes on 202, The 17-Tribe Indian Self-Reliance Initiative, Answers to Common Question*](#)
6. [Arizona Department of Gaming Memorandum from Henry Leyva to Rick Pyper, October 2, 2002, re: Town Hall Meetings](#)
7. [Incorporation Certification of the Delaware Secretary of State \(March 12, 2003\)](#)
8. [Special Warranty Deed from 91st & Northern SWC, LLC to Rainier Resources, Inc., Official Records of Maricopa County Recorder, Document No. 20031156746](#)
9. [General Warranty Deed from Rainier Resources, Inc. to the Tohono O'odham Nation, Official Records of Maricopa County Recorder, Document No. 20090068776](#)
10. [Dennis Wagner, *Small Town Resisting Prison on Tribal Land*, THE ARIZONA REPUBLIC, May 21, 2009](#)
11. [Resolution of the City of Glendale, No. 4246 NS \(April 7, 2009\)](#)
12. [City of Glendale General Plan, *Glendale 2025, The Next Step* \(2002\)](#)
13. [Maricopa Association of Government 208 Water Quality Management Plan - Final, Fig. 4.8 \(October 2002\)](#)
14. [Aerial Map of Application Land](#)
15. [Project Description, West Valley Resort at Northern Avenue, Tohono O'odham Nation](#)
16. [Memorandum from Elliot Pollack, Elliot D. Pollack & Company, to Ed Beasley, City Manager, City of Glendale re: Economic Implications of the Proposed Tohono O'odham West Valley Resort and Casino \(February 13, 2009\)](#)
17. [Memorandum from Kevin Gover, Assistant Secretary—Indian Affairs re: Gila Bend Reservation Lands Replacement Act \(April 4, 2000\)](#)
18. [Letter from Barry W. Welch, Acting Regional Director, Western Regional Office, Bureau of Indian Affairs \(May 31, 2000\)](#)
19. [U.S. v. 7,743.82 Acres of Land, more of less, Complaint in Condemnation, Case No CIV. 3504-PHX](#)
20. [Declaration of Taking, U.S. v. 7,743.82 Acres of Land, more of less, Case No CIV. 3504-PHX](#)
21. [Department of Interior, Bureau of Indian Affairs Report, *Status Summary of Acknowledgement Cases* \(September 22, 2008\)](#)
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[U.S. Const., Amend. X](#)

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[25 U.S.C. § 1321](#)

[25 U.S.C. § 1322](#)

[25 U.S.C. § 1701](#)

[25 U.S.C. § 1724](#)

[25 U.S.C. § 1741](#)

[25 U.S.C. § 1771](#)

[25 U.S.C. § 1772](#)

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[25 U.S.C. § 2703](#)

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[Gila Bend Act, Pub. L. No. 99-503 \(100 Stat. 1798\)\(1986\)](#)

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