CONGRESSIONAL BUDGET OFFICE
U.S. Congress
Washington, DC 20515

April 24, 2015

Honorable Rob Bishop
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 308, the Keep the Promise Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten, who can be reached at 226-2860.

Sincerely,

Keith Hall
Director

Enclosure

cc: Honorable Raúl M. Grijalva
Ranking Member

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

April 24, 2015

H.R. 308
Keep the Promise Act of 2015

As ordered reported by the House Committee on Natural Resources on March 25, 2015

SUMMARY

H.R. 308 would prohibit gambling (other than social games for prizes of minimal value) on property near Glendale, Arizona that is owned by the Tohono O'odham Nation and held in trust by the United States for the benefit of the tribe. That prohibition would last until 2027. The Tohono O'odham Nation is currently constructing a resort and casino on this property and expects to begin operations within a year.

Based on information from the Tohono O'odham Nation, CBO expects that if H.R. 308 were enacted, the tribe would pursue litigation against the federal government to recover its financial losses caused by the prohibition on gambling. Whether the tribe would prevail in such litigation and when those proceedings might be concluded are both uncertain. The basis for any judicial determination of the tribe's financial losses is also uncertain. CBO estimates that possible compensation payments from the government could range from nothing to more than $1 billion; however, we have no basis for estimating the outcome of the future litigation. Because enacting H.R. 308 could increase direct spending, pay-as-you-go procedures apply. Enacting H.R. 308 would not affect revenues.

By prohibiting gambling on land that the tribe is currently planning to use for such a purpose, the bill would impose an intergovernmental mandate, as defined in the Unfunded Mandates Reform Act (UMRA). Absent the bill, CBO estimates that the tribe will collect more than $100 million annually once the casino it is building begins operations, probably in 2016. Those costs would exceed the annual threshold established in UMRA ($77 million in 2015, adjusted annually for inflation) in at least one of the first five years after enactment of the bill.

H.R. 308 contains no private-sector mandates as defined in UMRA.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

CBO expects that the Tohono O'odham Nation would pursue litigation against the federal government if H.R. 308 is enacted. CBO has no basis for judging the outcome of that litigation. It is possible that the federal government would incur no compensation costs, or that it would pay the tribe a settlement or be ordered to pay compensation by a court. Any such payment would increase direct spending, and the amount could exceed $1 billion. The federal government also would incur discretionary costs, which are subject to appropriation, to defend itself in the expected litigation. The amount of such costs would depend on the length and extent of the legal challenges.

BASIS OF ESTIMATE

For this estimate, CBO assumes that the bill will be enacted in 2015 and that under current law the Tohono O'odham Nation will probably commence gambling operations and begin generating gambling revenue in 2016.

Outcome of Future Litigation

CBO expects that enacting the legislation would probably result in litigation against the federal government by the Tohono O'odham Nation. Based on information from the tribe, CBO expects the tribe would seek compensation for financial losses caused by H.R. 308. To date, the tribe has prevailed in disputes with Arizona and other tribes about its planned gaming operations on the property. A 2013 district court decision on whether gambling on the site is consistent with current federal law concluded that "the Glendale-area land acquired by the Nation with LRA[1] funds qualifies for gaming under IGRA[2] § 2719(b)(1)(B)(1). The land also qualifies for gaming under § 3(j)(1) of the Compact, which specifically authorizes gaming on after-acquired lands that qualify for gaming under § 2719."[3]

That decision is now under appeal at the Ninth Circuit Court of Appeals. Although the tribe has been successful in litigation thus far and construction of its resort and casino is underway, it may be more difficult for the tribe to prevail in a claim brought after enactment of H.R. 308 because of the types of claims available to it and the facts of this particular situation. The outcome of such litigation is uncertain. CBO expects the tribe would argue that the legislation caused either a regulatory taking of the tribe's property interest in gaming on that land, or a breach of the settlement agreement that permitted the tribe to acquire the land for nonagricultural economic development purposes. In either circumstance, the federal government could be required to compensate the tribe. Any such

1. Gila Bend Indian Reservation Lands Replacement Act, Public Law 99-503
2. Indian Gaming Regulatory Act, Public Law 100-497
3. State of Arizona, et al. v Tohono O'odham Nation, 944 F. Supp. 2d 748, 756 (D. Ariz. 2013)

compensation would probably be paid from the Judgment Fund (a permanent, indefinite appropriation for claims and judgments against the United States).

Amount of Compensation

To estimate the amount of compensation that might be due to the tribe, CBO reviewed the outcome of other cases involving regulatory takings, tribal land settlements, and gaming disputes. We also consulted with the Tohono O'odham Nation, other Arizona tribes, and federal and state agencies that regulate tribal gaming to estimate the net receipts that the tribe may realize from the casino operations of the resort now under construction.

CBO concluded that:

- Regulatory taking claims are often unsuccessful and usually do not lead to significant economic awards when (as in this case) the taking does not fully diminish the economic value of the property;

- The outcomes of disputes about tribal gaming and land settlement agreements vary and are generally dependent on the specific facts of each dispute, making it difficult to use past disputes to predict the outcome of new cases;

- Prohibiting the tribe from operating gambling activities at the resort and casino near Glendale could result in a loss of net income to the tribe of more than $1 billion over the next decade; and

- Whether gaming was among the nonagricultural economic development activities envisioned under the tribe's land settlement agreement is unclear because the property was acquired as a result of a land settlement agreement with the federal government that was enacted two years before the Indian Gaming Regulatory Act, which authorized gambling on tribal lands under certain circumstances.

CBO estimates that possible awards to the tribe following litigation could range from no monetary award to more than $1 billion. After considering the uncertainties about whether the tribe would prevail in a future lawsuit against the federal government, and the unpredictability of the amount of any award, CBO concluded that there is no basis to predict the amount of monetary award or settlement, if any, that the tribe would receive as a result of the enactment of H.R. 308.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting H.R. 308 could increase direct spending over the 2015-2025 period; however, CBO has no basis for estimating the amount or timing of such spending, if any.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

By prohibiting gaming on land that the tribe is currently planning to use for such a purpose, the bill would impose an intergovernmental mandate, as defined in UMRA. Absent the bill, CBO estimates that the tribe will net more than $100 million annually once the casino begins operations, probably in 2016. That estimate is a probabilistic assessment based on information from the tribe about projected revenues, accounting for uncertainty of projected revenues, operating expenses, and payments the tribe is required to make from gaming revenue, which all may be higher or lower than expected. It also accounts for the possibility that already pending legal actions could delay or prohibit gaming activities on the land. The cost of that mandate on the tribe would exceed the annual threshold established in UMRA ($77 million in 2015, adjusted annually for inflation) in at least one of the first five years after enactment of the bill, CBO estimates.

If the bill is enacted and the tribe submits a successful claim for damages against the federal government, such settlement amounts would benefit the tribe.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 308 contains no private-sector mandates as defined in UMRA.

ESTIMATE PREPARED BY:

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