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MEMORANDUM

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To Dr. Ned Norris, Jr.
Chairman
Tohono O'odham Nation

From Seth P. Waxman SPW

Re **Analysis of Arizona House Bill 2297**

You have asked us to analyze whether Arizona House Bill 2297 is preempted by federal law and whether the bill, on its face or as applied to the Tohono O'odham Nation, violates the federal Constitution.[1] For purposes of this analysis, we have assumed that annexation of the Nation's land by the City of Glendale under H.B. 2297 would necessarily prevent the United States from holding the land in trust pursuant to the Nation's pending fee-to-trust application. While that question is outside the scope of this memorandum, we note that there may well be meritorious arguments to the contrary.

Assuming that annexation under H.B. 2297 would in fact thwart the pending fee-to-trust application, we conclude that H.B. 2297 poses an obstacle to achieving the purposes of the Lands Replacement Act and should therefore be held to be preempted by federal law. Moreover, the bill raises serious constitutional concerns under the Due Process Clause and the Equal Protection Clause. Finally, if H.B. 2297 were enacted, and if the City of Glendale were to annex the Nation's land under the authority of the bill, there is a strong argument that the annexation would work a taking, giving rise to a substantial claim for just compensation.

Preemption

Under the Supremacy Clause, "the Laws of the United States" are "the supreme Law of the Land," and conflicting state law must yield. U.S. Const. art. VI. A state law conflicts with federal law and must be set aside if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) (brackets, citations, and internal quotation marks omitted).

Here, the relevant federal law is the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. 99-503, 100 Stat. 1798, enacted in 1986 to enable the Nation to replace lands it lost when construction of the Painted Rock Dam flooded about 10,000 acres of reservation land. Congress found that "[t]he lack of an appropriate land base severely retards the economic self-sufficiency of the O'odham people" and contributes to their "high unemployment and acute

[1] We have not considered the validity of H.B. 2297 under Arizona law.

health problems," and that the Act would "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming and do[es] not require Federal outlays for construction, and promote the economic self-sufficiency of the O'odham Indian people." *Id.* § 2(3), (4). The Act accordingly provides:

> The Secretary [of the Interior], at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to [the Act] 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.

Id. § 6(d). The United States' acquisition of land in trust is thus mandatory as long as the land meets the requirements of Section 6(d), including that the land not be "within the corporate limits of any city or town."

H.B. 2297 would not only pose an obstacle to the achievement of the Act's purposes, it appears to be specifically intended to frustrate those purposes. The bill's sponsors have openly acknowledged that it is designed to serve one principal goal: blocking the Nation's pending fee-to-trust application under the Lands Replacement Act. In effect, H.B. 2297 grants the City of Glendale—and similarly situated cities within the scope of the bill, if any exist—the power to veto an Indian tribe's application to have its land taken into trust if the tribe's land is bordered by the city on three or four sides. A state may not, however, prohibit an action that, as here, Congress has specifically authorized. *See, e.g.*, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 27-28 (1996); *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985). Nor may a state impose additional conditions for invocation of a federal right beyond those contained in the federal statute. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131, 144 (1988); *Forest Park II v. Hadley*, 336 F.3d 724, 731 (8th Cir. 2003). Here, H.B. 2297 effectively adds to the requirements of the Lands Replacement Act a requirement that neighboring cities or towns consent to the trust acquisition of land within the scope of the bill—a requirement that Congress chose not to impose.

In addition, H.B. 2297 penalizes the Nation for its lawful invocation of a federal right by depriving it of the procedural protections afforded to other landowners whose land might be subject to annexation, including the requirement that a majority of affected landowners consent to any annexation, and the right to notice and a hearing. *See* Ariz. Rev. Stat. § 9-471. State laws that, like H.B. 2297, impose special burdens on the exercise of federal rights are, as a general rule, preempted. "[S]tate action must ordinarily be invalidated if its manifest effect is to penalize or discourage conduct that federal law specifically seeks to encourage." 1 Laurence S. Tribe, *American Constitutional Law* § 6-29, at 1181-1182 (3d ed. 2000); *see also Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994); *Xerox Corp. v. County of Harris*, 459 U.S. 145, 152 (1982); *Nash v.*

Florida Indus. Comm'n, 389 U.S. 235 (1967); *City of Morgan v. South Louisiana Elec. Coop. Ass'n*, 31 F.3d 319, 322 (5th Cir. 1994). That is precisely the effect of H.B. 2297.

Due Process/Equal Protection

The Fourteenth Amendment forbids a state to "deprive any person of life, liberty, or property, without due process of law" or to "deny to any person within its jurisdiction the equal protection of the laws." The manner in which H.B. 2297 targets a small group of Indian tribes for disfavored treatment, together with the retroactive nature of the bill, raises serious concerns under both the Due Process Clause and the Equal Protection Clause.

Although "[t]he party asserting a ... due process challenge must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way," *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985), both the purpose of H.B. 2297 and the means it employs to achieve that purpose raise significant due process questions. As set out above, frustrating Indian tribes' ability to exercise their rights under federal law is not a legitimate purpose for state legislation. And "a regulation that fails to serve any legitimate governmental objective" contravenes the Due Process Clause. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005). Moreover, the means that the State chose to achieve its end also support the view that H.B. 2297 is unconstitutionally arbitrary and irrational. H.B. 2297 is not legislation that merely "adjust[s] the burdens and benefits of economic life." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1975). Rather, it imposes a significant political disability on the Nation (and potentially on a small group of other Indian tribes), permitting cities to annex property that falls within the scope of the statute without any of the procedural protections accorded to other landowners. There is no evident rational explanation for that distinction other than the legislature's confessed desire to thwart the Nation's pending trust application.

The retroactive nature of H.B. 2297 as applied to the Nation bolsters the conclusion that the bill raises serious due process questions. A law is retroactive if it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). Such laws "raise particular concerns" under the Due Process Clause because they permit the legislature "to sweep away settled expectations suddenly" and may be used "as a means of retribution against unpopular groups or individuals." *Id.*; *see also Eastern Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

Here, H.B. 2297 "attaches new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 270, by providing that the Nation's filing of its fee-to-trust application in January 2009 changes the generally applicable rules governing a city's power to annex adjoining unincorporated territory, in a manner that allows the City of Glendale to defeat the trust application itself. And, given the way in which the bill targets the Nation for disfavored treatment, there is a strong argument that H.B. 2297 is precisely the type of legislation that renders retroactivity suspect—legislation that serves "as a means of retribution against unpopular

groups or individuals." *Id.* at 266. Moreover, H.B. 2297 deprives the Nation of its legitimate investment-backed expectation that it would be able to use the land it bought for the lawful purpose for which the land was intended—another feature of retroactive legislation that renders it constitutionally suspect. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

For similar reasons, H.B. 2297 raises serious questions under the Equal Protection Clause. The manner in which the bill strips a tiny group of landowners of the rights accorded to all other landowners, without any apparent justification for the distinction, suggests that it is not rationally related to a legitimate government purpose. The Supreme Court has several times struck down laws that discriminate without a rational basis for doing so. In particular, the Court has invalidated laws drawing a distinction among citizens that appears to rest on a prejudice against a particular unpopular group, even if the group is not a suspect class. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). The Court has also found unconstitutional laws drawing distinctions that simply appeared entirely arbitrary. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989).

Here, H.B. 2297 singles out certain Indian tribes—and, in particular, the Nation—for disfavored treatment. The bill applies only to landowners in certain counties whose land is surrounded on three or four sides by a city and who "ma[k]e an application to the federal government as required by a specific federal statute or regulation" to "take ownership of [their land] or hold [it] in trust." It is difficult to conceive of a rational justification for limiting H.B. 2297 in this manner other than a desire to thwart the Nation without affecting other, possibly more politically influential constituencies. The distinction drawn by the bill thus both suggests animus toward a particular unpopular group and appears to have no legitimate basis.

Takings

Under the Takings Clause, private property may not "be taken for public use, without just compensation." U.S. Const. amend. V. In order to constitute a taking, a government action need not physically occupy or confiscate property—regulations that restrict the ability to use or convey property can also amount to takings. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The Lands Replacement Act confers on the Nation the right to convey its title to land to the United States to "be h[e]ld in trust for the benefit of the Tribe." Pub. L. No. 99-503, § 6(d). Annexation under H.B. 2297 would eliminate that right. Even though the Nation would retain other rights in its property, the right of conveyance to the federal government, and the resulting beneficial ownership of trust land, is central to the Nation's ownership interest in the land. A strong argument can thus be made that the deprivation of that right of conveyance is a taking. "The interests that Indian tribes hold in real ... property represent a unique form of property right in the American legal system, shaped by the federal trust over tribal land." Newton et al.,

Cohen's Handbook of Federal Indian Law § 15.01 (rev. ed. 2005). And the Supreme Court has held that regulation "amount[ing] to the virtual abrogation of the right to pass on a certain type of property" is a taking. *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

In determining whether restrictions on the use or conveyance of land work a taking, courts examine three factors: (1) "the extent to which the regulation interferes with reasonable investment-backed expectations," (2) "the regulation's economic impact on the land," and (3) "the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Here, those factors support the conclusion that annexation of the Nation's property under H.B. 2297 would be a taking requiring just compensation.

The "extent to which the regulation has interfered with distinct investment-backed expectations" is "particularly" significant. *Penn Central*, 438 U.S. at 124. Indeed, in some cases, the interference may be "so overwhelming" that "it disposes of the takings question." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). As discussed above, there is a strong argument that H.B. 2297 interferes with the Nation's reasonable investment-backed expectations. The Nation purchased the land with the reasonable expectation that it would be entitled to have the land taken into trust and to establish a gaming operation on the land. Indeed, one could argue that this is a case in which the Nation's expectations were bolstered by an "explicit governmental guarantee," *id.* at 1011, making their frustration particularly troubling. Under Arizona law, when the Nation purchased its land, it could not be annexed unless the City first obtained the consent of persons who own 50% or more of the value of the land, as well as the consent of more than 50% of the property owners whose land would be subject to taxation by the city if the land were annexed. Ariz. Rev. Stat. § 9-471. And, under federal law, the Nation had a right to have the land taken into trust by the United States upon request. Pub. L. 99-503, § 6(d). In addition, the Nation reasonably expected that, under the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, it would be entitled to conduct gaming on the land once it was taken into trust. The Nation spent more than $13 million, almost half of the settlement funds granted by the Lands Replacement Act, to buy the land based on those expectations, all of which H.B. 2297 would frustrate.

The resulting negative economic effect on the Nation will be substantial. The Nation will be prevented from using the land for its most profitable purpose, a resort and gaming facility. The Nation will also lose the significant tax benefits that flow from having land held in trust by the United States. Once held in trust, the property would not be subject to state and local property taxes, *see Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995), and the Nation would have its own power to tax the land, *see Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 653 (2001).[2] Beyond those economic effects, annexation under H.B. 2297 would

[2] The tax benefits to the Nation would not, however, have a negative impact on state or local government. The Lands Replacement Act provides that, after the land is placed into trust, "the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes." Pub. L. No. 99-0503, § 7(a).

significantly impair the Nation's sovereignty interests. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (recognizing that impairment of noneconomic interests in land is relevant to takings analysis). Annexation would impede the Nation from exercising sovereign powers over its land, frustrating the Lands Replacement Act's purpose to provide the Nation with reservation lands to replace the reservation land the United States rendered unusable.

Finally, the character of the government action here is, to say the least, unusual. The means by which H.B. 2297 permits annexation of the Nation's land is extraordinary: it effectively deprives the Nation (and potentially a few other tribes) of rights accorded to all other Arizona citizens. The bill thus can be said to single out the Nation to bear a substantial burden not shared by others—one hallmark of a taking. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (plurality). In doing so, moreover, the bill frustrates the Nation's ability to exercise its federal rights, guaranteed to it as part of a settlement of the Nation's claims after its former reservation lands were destroyed, and eliminates what is likely the Nation's most significant property interest in the land.

For these reasons, the Nation has a strong argument that annexation of its land pursuant to H.B. 2297 would be a taking, entitling the Nation to just compensation for the loss of the highest and most profitable use of its property.