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SENATE

{ REPORT
109-136

MODIFYING THE DATE AS OF WHICH CERTAIN TRIBAL LAND OF THE LYTTON PANCHERIA OF CALIFORNIA IS DEEMED TO BE HELD IN TRUST

SEPTEMBER 12, 2005.—Ordered to be printed

Mr. MCCAIN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 113]

The Committee on Indian Affairs, to which was referred the bill (S. 113) modifying the date as of which certain tribal land of the Lytton Rancheria of California is deemed to be held in trust having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 113 is to require the Lytton Band of Pomo Indians (the “Band”) to go through the administrative process set forth in the Indian Gaming Regulatory Act, 25 D.S.C. 2701 et. seq. (“IGRAI”), before engaging in Class II or Class III gaming on land recently acquired in trust for the Band in the City of San Pablo, California.

BACKGROUND

A. THE LYTTON RANCHERIA

The Lyttons are a federally recognized tribe of approximately 280 members. From the late 1930s to the late 1950s, the Lyttons, composed of the descendants of two families, lived on the 50-acre Lytton Rancheria in Sonoma County’s Alexander Valley, about 80 miles from the City of San Pablo in the San Francisco Bay Area. During the termination policy era of the 1950s, Congress attempted to terminate the federal trust in the rancheria and transferred title to the land to individual members, who subsequently sold it to non-

Indians. In the 1980s, the Lyttons joined a lawsuit against the Bureau of Indian Affairs challenging the termination. Finding that the government had not met the conditions called for in the termination statute to make the termination effective, a federal court approved a settlement of the case in 1991. The settlement restored the Lyttons to their pre-termination status, but did not return the rancheria to them or give them any other land. It also required that any gaming they conducted in the area around their original rancheria be in conformance with the Sonoma County general plan for land use. The Sonoma County general plan does not permit gaming.

B. PUBLIC LAW 106-568, SECTION 819

Prohibited from conducting gaming in the area around their original rancheria, the Lyttons, with the help of outside investors, sought land elsewhere for a casino. They identified a nine and one-half acre property off a major freeway in the City of San Pablo, twenty miles from San Francisco, that already had a card room operating on it. Elected officials in the City of San Pablo, which has a population of about 30,000 and an unemployment rate almost twice that of the San Francisco Bay Area, supported, and continue to support, the proposed Lytton casino. In 2000, a provision sought by Congressman George Miller, whose district includes San Pablo, was included in the Omnibus Indian Advancement Act of 2000 (P.L. 106-568). The provision directed the Secretary to take the San Pablo property into trust, and deemed the land to have been held in trust prior to October 17, 1988 (the date IGRA was enacted). This “deeming” provision had the effect of obviating IGRA’s restrictions on Indian gaming on lands acquired after that date. Section 819 of P.L. 106-568 reads as follows:

Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that certain grant deed dated and recorded on October 16, 2000, in the official records of the County of Contra Costa, California, Deed Instrument Number 2000-229754. The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 467). Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.

There have been efforts to modify the Lytton provision in Section 819 of P.L. 106-568 since shortly after its enactment. A provision in the FY2002 Interior Appropriations bill (P.L. 107-63), of indeterminate effect, provided:

SEC. 128. The Lytton Rancheria of California shall not conduct Class III gaming as defined in Public Law 100-497 on land taken into trust for the tribe pursuant to Public Law 106-568 except in compliance with all required compact provisions of section 2710(d) of Public Law 100-497 or any relevant Class III gaming procedures.

C. THE APRIL 5, 2005, HEARING

On April 5, 2005, the Committee held a legislative hearing on S. 113, at which Senator Feinstein and Congressman George Miller testified. The Department of Interior also testified on behalf of the Administration. The Department stated that it did not object to S. 113 because it believed waiving the requirements of IGRA § 20 for any particular tribe was inappropriate. In response to questioning from Committee Members, the Department also stated that it was of the opinion that S. 113 did not constitute a “taking” of private property rights of the Band pursuant to the Fifth Amendment of the United States Constitution.

Also testifying were the Band, the City of San Pablo, the California State Assemblywoman in whose district the subject land is located, and the Pechanga Band of Luiseno Indians. The City testified regarding its desire to have the Band operate a casino in San Pablo, however, the Assemblywoman testified that other surrounding communities were strongly opposed to the casino. The Pechanga Band testified that it supported S. 113 because it believed all tribes should follow the dictates of IGRA § 20, and that S. 819 violated a “promise” made by California tribes to the California electorate, that tribes would not seek “urban” casinos.

Subsequent to the hearing, the Committee requested the views of the Department of Justice regarding whether S. 113 might constitute a “taking” of private property pursuant to the Fifth Amendment of the United States Constitution. The Department of Justice responded by letter on September 9, 2005, stating that it was of the view that S. 113 would not constitute a “taking.” (A copy of the letter is included with this report.)

SUMMARY OF MAJOR PROVISIONS

S. 113 amends Section 819 of Public Law 106–568 by simply striking the last sentence of the provision in the Omnibus Indian Advancement Act of 2000 that “deems” the Band’s San Pablo property to have been taken into trust prior to 1988. The intent of this is to require the Band to comply with IGRA’s restrictions on Class II and Class III gaming that apply to land acquired after 1988.

LEGISLATIVE HISTORY

S. 113 was introduced on January 24, 2005, by Senator Feinstein and was referred to the Committee on Indian Affairs. Senators Coburn and Ensign were added as cosponsors on July 18, 2005.

On April 5, 2005, a legislative hearing on S. 113 was conducted by the Committee. Senator Feinstein and Congressman George Miller appeared to provide testimony at the hearing. Also appearing to provide testimony was the Department of Interior, the Band, the City of San Pablo, the California State Assemblywoman in whose district the subject land is located, and the Pechanga Band of Luiseno Indians.

On June 29, 2005, the Committee held an open business meeting during which S. 113 was considered. During the business meeting, the Committee voted to favorably report S. 113 to the full Senate with a recommendation that the bill do pass.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On June 29, 2005, the Committee, in an open business session, considered S. 113. Upon a motion by the Chairman for approval of S. 113, and a request for a roll call vote by Sen. Inouye, the Committee held a roll call vote on the motion, with 10 Members voting aye and 3 Members voting nay. With a majority of Members having voted in the affirmative, the Committee ordered S. 113 favorably reported to the full Senate with a recommendation that the bill do pass.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 113 as calculated by the Congressional Budget Office, is set forth below:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 113—A bill to modify the date as of which certain tribal land of the Lytton Rancheria of California is deemed to be held in trust

Summary: S. 113 would eliminate a provision of the Omnibus Indian Advancement Act that effectively made certain land held in trust for the Lytton Rancheria tribe eligible for use as a gaming site without meeting certain requirements of the Indian Gaming Regulatory Act (IGRA). CBO estimates that implementing S. 113 would have no significant impact on the federal budget.

Making the Lytton Band of Indians subject to the requirements of IGRA would be considered an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). While the total cost of this mandate is very uncertain, CBO expects that it would likely exceed the threshold established in UMRA (\$62 million in 2005, adjusted annually for inflation) in at least one of the next five years. S. 113 contains no private-sector mandates as defined in UMRA.

The bill would amend legislation enacted in 2000 that ordered the Department of the Interior (DOI) to take land in California into trust for the Lytton Rancheria. That legislation contained a provision deeming the trust status of that land to be retroactive, effectively permitting the tribe to install electronic bingo machines or slot machines without meeting the conditions imposed by section 20 of IGRA. Section 20 requires additional regulatory review and approval of proposed Indian gaming facilities by DOI and the appropriate governor as well as consultation with local communities. S. 113 would delete that provision of the 2000 act, thereby making the tribe's gaming operations subject to section 20 of IGRA.

Estimated cost to the Federal Government: If S. 113 is enacted, DOI would probably incur additional administrative expenses to review a proposal by the Lytton Rancheria for approval of its plans to operate gaming machines on the affected land. CBO estimates that such costs would be less than \$500,000.

Based on information provided by the Department of Justice, CBO assumes that the United States would not be held responsible for economic losses incurred by the tribe if it is unable to obtain approvals to operate gaming machines on the trust land as a result of enacting this legislation. If a court were to determine that the government must compensate the tribe for such a possible loss,

however, federal spending (probably from the Claims and Judgments Trust Fund) would be significant. We estimate that enacting this legislation would have no effect on other direct spending or revenues.

Estimated impact on state, local, and tribal governments: By making the Lytton Rancheria land subject to section 20 of IGRA, S. 113 would significantly affect the Rancheria's gaming operations. The affected site is currently in use as a card room, but the tribe plans to install 500 electronic bingo machines by the fall of 2005, and possibly more in the future. Should S. 113 be enacted, the tribe would be prohibited from operating these machines until they completed the process required by section 20 of IGRA and received the necessary approvals. It is uncertain whether the tribe would receive such approvals or how long the process might take. In the meantime, the tribe would lose the earnings from those machines. These lost earnings would be the primary cost of the mandate.

Based on information received from tribal representatives and from the National Indian Gaming Commission, CBO estimates that the annual cost of the mandate, in the form of lost earnings, could reach \$50 million to \$100 million within the next five years. The tribe also would incur administrative and legal costs to comply with the additional conditions. This estimate is subject to a great deal of uncertainty concerning both the level of revenue that would be generated by the initial 500 machines, as well as the possibility that the tribe would expand its operations in the absence of this legislation. It is also possible that the threat of this legislation would affect the situation even without it becoming law. CBO believes it is likely, however, that the cost would exceed the UMRA threshold at some point within the next five years. (The threshold is \$62 million in 2005, adjusted annually for inflation.)

Estimated impact on the private sector: S. 113 contains no private-sector mandates as defined in UMRA.

Estimate prepared by: Federal costs: Deborah Reis; impact on state, local, and tribal governments: Marjorie Miller; impact on the private sector: Alicia Handy.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

SEPTEMBER 12, 2005.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 113, a bill to modify the date as of which certain tribal land of the Lytton Rancheria of California is deemed to be held in trust.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Deborah Reis and Marjorie Miller.

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee has concluded that S. 113 will not require the promulgation of regulations so the regulatory and paperwork impact should be minimal.

EXECUTIVE COMMUNICATIONS

The following executive communication was received on this legislation.

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., September 9, 2005.

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: In a July 18, 2005 letter, you requested the Department of Justice's views on S. 113, a bill to modify the date as of which certain tribal land of the Lytton Rancheria of California is deemed to be held in trust. The Committee recently held a hearing on S. 113, at which the Department of the Interior testified that S. 113, if enacted, would not constitute a "taking" pursuant to the Fifth Amendment of the United States Constitution. While the Department of Justice (the "Department") did not testify at that hearing, you have asked whether the Department believes S. 113 would constitute a Fifth Amendment "taking" of a property right of the Lytton Rancheria of California. Thank you for the opportunity to present the Department's views on the bill.

The Department understands S. 113 to clarify the effect of section 819 of the Omnibus Indian Advancement Act of 2000, which deemed the property to have been held in trust since before the enactment of the Indian Gaming Regulatory Act ("IGRA"). IGRA prohibits gaming on land "acquired" after its enactment (unless the Tribe undergoes an additional regulatory process). 25 U.S.C. §2719(a) & (b)(I)(A). Section 819 deemed the land to be held in trust prior to IGRA's enactment; it did not deem the acquisition date to be earlier. To the extent there exists any ambiguity in section 819, S. 113 will clarify Congressional intent.

Moreover, enactment of S. 113 should not constitute a taking, as it 1) simply clarifies the economic regulatory scheme applicable to the property and 2) if the bill were deemed to alter the uses of the property, it only addresses economic regulation and does not deprive the property of all economically viable uses. Congress has plenary authority to regulate gaming on Indian lands, and can freely alter applicable laws. Because gaming is a highly regulated industry, those who engage in gaming-related activity should anticipate the possibility that the law may change. S. 113 is an application of Congressional authority to regulate such economic activity.

Thank you for your attention to this matter. If we may be of additional assistance, please do not hesitate to contact this office. The Office of Management and Budget has advised that there is no ob-

jection from the standpoint of the Administration's program to the presentation of this letter.

Sincerely,

WILLIAM E. MOSCHELLA,
Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 113, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

PUBLIC LAW 106-568

To authorize the construction of a Wakpa Sica Reconciliation Place in Fort Pierre, South Dakota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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TITLE VIII—TECHNICAL CORRECTIONS

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SEC. 819. LAND TO BE TAKEN INTO TRUST.

Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that certain grant deed dated and recorded on October 16, 2000, in the official records of the County of Contra Costa, California, Deed Instrument Number 2000-229754. The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 467). **Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.**

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