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

Keith Hall, Director

February 25, 2016

Honorable Trent Franks
U.S. House of Representatives
Washington, DC 20515

Re: CBO's Cost Estimate for H.R. 308, The Keep the Promise Act

Dear Congressman:

Thank you for meeting with me on February 2, 2016, to discuss how CBO prepared the cost estimate for H.R. 308, the Keep the Promise Act. As I noted in our meeting, CBO discussed the potential budgetary impacts of the bill with interested parties on both sides of the issue. Our conclusions were not driven by political concerns nor were they affected by political pressure. That said, I understand that you disagree with CBO's analysis of the bill, and I want to address the concerns you raised when we met and in your follow-up letter to us.

Although CBO acknowledged the possibility of lawsuits if H.R. 308 were enacted, the agency did not predict the outcome of litigation, and it provided *no estimate of the costs of such a lawsuit.* As discussed in the Basis of Estimate portion of the estimate, CBO concluded that there was too much uncertainty about whether the Tohono O'odham Nation would prevail in such a lawsuit. Given that uncertainty, the cost estimate provided background information about the range of possible outcomes.

CBO estimated that enacting the bill would have no direct spending or revenue implications. However, by prohibiting the operation of a casino by the Tohono O'odham Nation, CBO estimated that the bill would eliminate a source of revenue for the Nation and would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act. Such revenue losses would occur regardless of whether the Nation brings suit.

In your letter, you also indicated that your staff had been unable to find any other CBO cost estimates that contemplate the risk of litigation that could result from enacting legislation. Situations where CBO has identified potential litigation stemming from the enactment of legislation are rare, but they are not unprecedented. Here are some examples:

H.R. 2641, Responsibility and Professionally Invigorating Development Act of 2013
(cost estimate dated August 23, 2013)
H.R. 2641 would have imposed new requirements on federal agencies related to their regulations and guidelines under the National Environmental Policy Act. The CBO cost estimate noted the likelihood of increased litigation costs to federal agencies as stakeholders seek clarification of the new requirements or challenge an agency's compliance with those requirements. CBO had no basis for estimating the level of spending that would occur, however.

An amendment in the nature of a substitute to H.R. 3534, Consolidated Land, Energy, and Aquatic Resources Act of 2010
(letter dated July 27, 2010)
This amendment to H.R. 3534 would have imposed an annual conservation fee on all oil and gas leases on federal onshore and offshore lands. CBO concluded that enactment of the amendment would likely breach existing oil and gas leases. Therefore, CBO estimated that the additional revenues from the new fees would be partially offset by additional federal payments to resolve breach-of-contract claims.

S. 1145, Patent Reform Act of 2007
(cost estimate dated February 15, 2008)
S. 1145 would have eliminated remedies available to patent holders in some circumstances. CBO estimated that the elimination of such remedies would result in lawsuits against the federal government on the basis of a taking of private property and that the expected value of the federal government's liability would total about $1 billion.

H.R. 1375, Financial Services Regulatory Relief Act of 2003
(cost estimate dated July 14, 2003)
H.R. 1375 would have precluded the use of certain legal defenses in claims against the United States arising out of the implementation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. CBO estimated that the cost of litigating and resolving claims would increase by $15 million over five years.

S. 1259, Trademark Amendments Act of 1999
(cost estimate dated July 28, 1999)
S. 1259 would have waived the sovereign immunity of the federal government, and the cost estimate indicated that it would increase payments of claims in lawsuits, but by an insignificant amount.

Those examples are all from published letters or cost estimates. More frequently, CBO reviews draft legislation for Congressional committees and provides informal feedback about provisions that might increase the cost of litigation in legal claims against the government. In such cases, those provisions are often modified or dropped in subsequent versions of the legislation, so that a discussion of the budgetary consequences of the provisions are not included in CBO's formal cost estimates.

The limited number of cases where we conclude that litigation would stem from enacting legislation highlights the high standard that CBO employs when making such a conclusion. In the case of H.R. 308, in fact, we reached no such conclusion. Instead, we provided background information because we were unable to reach a definitive conclusion one way or another. In addition to scoring legislation, CBO cost estimates provide important budgetary information (such as costs or savings outside of the budget window) that Members of Congress may find pertinent. That is the case here in much of the discussion about potential litigation associated with H.R. 308.

I hope this additional information is useful. If you have further questions about this legislation (or about other work done by CBO), please contact me so that we can discuss further.

Sincerely,

Keith Hall
Director