

INDIAN GAMING

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

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JULY 29, 2010

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INDIAN GAMING

THURSDAY, JULY 29, 2010

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. The hearing will come to order.

This is a hearing of the Indian Affairs Committee of the U.S. Senate. Today we are having an oversight hearing on the subject of Indian gaming.

As all of you know, we have been working very hard in this Congress, in this Committee, on the subject of Indian health care, and the passage of the Indian Health Care Improvement Act in this Congress this year is a very, very significant achievement. I am proud to say as well that this afternoon, I believe at 4:45 today, the President will sign the Tribal Law and Order Act, which has been a priority of this Committee, and which originated in this Committee.

We have made substantial progress in this Congress, unprecedented progress, really, on some very big issues during this Congress. The one subject we have not held an oversight hearing on is the subject of Indian gaming. And it is a very important subject.

It is the case that Indian gaming, since the *Cabazon* decision some long while ago now, has had a very substantial impact on economic development for many tribes across the Country. In some cases, it has been an unbelievable boon when tribes have existed near very large population centers and have opened some very large and very successful Indian gaming facilities.

In other cases, tribal lands far away from population centers have also opened gaming facilities with less success, but still providing some amount of funding for other needs and other priorities for the tribes.

Today we are going to hear from the Chair of the National Indian Gaming Commission. Although Chair Stevens has been in office only a very short time, we want to hear her priorities and hear a discussion about what she intends to do and what she believes the strengths and the weaknesses might be as they currently exist. We are also going to hear from Phil Hogen, the former Chair of the

NIGC. Mr. Hogen, it is nice to see you today. We will hear from Ernie Stevens, the Chair of the National Indian Gaming Association, and Mark Brnovich, the Director of the Arizona Department of Gaming. We appreciate all four of you being here.

There are about 230 tribes that operate 419 gaming facilities in 28 States in this Country. I mentioned that it has been, in my judgment, a very substantial contribution to the tribes that have successful gaming operations to provide a stream of income for housing, for education, to address the issue of poverty, for health issues. So I understand that this has been very significant.

In my home State, we do have gaming facilities on reservation land. In most cases, they are not close to population centers, but have been quite successful. It has provided about 1,500 jobs on the Indian reservations in North Dakota, which is not an insubstantial benefit.

Over the past decade, gaming revenues from Indian gaming facilities have gone from \$9.8 billion to \$26.5 billion. There was a very slight decrease in the last year because of the economic downturn. But the decrease was about \$200 million out of \$26.5 billion.

It seems to me that in economic times like this, it is essential to make certain that tribal gaming is well-regulated. You can see the growth of gaming revenue to the various Indian tribes across the Country on these charts. If it is going to remain a strong economic tool for Indian tribes, then it has to be subject to effective regulation.

The tribes, as primary beneficiaries of Indian gaming, have the greatest interest in making sure their operations are well-run. I fully understand that.

It is also important, I believe, and I have always believed, that there needs to be multi-levels of regulation in the gaming industry. In the case of Indian gaming, the multiple levels are needed because of the importance of the industry to the tribes, the tribal members and the local communities. We regulate in a way that provides, number one, a requirement of regulation by the tribe itself; and then number two, either a very substantial State regulation or Federal regulation, so that you have dual regulatory capabilities.

The Indian Gaming Regulatory Act was written to make sure that multiple levels of regulation exist in Indian gaming. And as I said, the Tribal Gaming Commission at the local tribe will always be the first level and the most important level. But there needs to be a second layer. All of us understand that we have had things happen with respect to court decisions. The *Colorado River* decision has had a significant impact on limiting the effectiveness of the National Indian Gaming Commission with respect to Class III gaming. So we will discuss all of that today.

I want to thank the witnesses for traveling here today and for being willing to testify. Let me call on my colleague, Senator Franken, for an opening statement.

**STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA**

Senator FRANKEN. Thank you, Chairman Dorgan, for holding this hearing. I would like to thank all the witnesses for being here today. Ms. Stevens, it is good to see you again. I would like to congratulate you on your confirmation. I am looking forward to seeing how you manage the important work of the NIGC.

Gaming plays a significant role in Minnesota, employing over 40,000 people across our State. Most of these jobs employ people living in rural areas where economic development is often the most challenging. All 11 of Minnesota's tribes have gaming as a source of revenue. We have major casinos operated by the Shakopee, Mille Lacs and Prairie Island Tribes. Again, those, as the Chairman noted, are closest to dense population centers.

So my State has a deep interest in the work of NIGC and making sure that it is executing its regulatory duties in an effective, efficient manner.

When we held Ms. Stevens' confirmation hearing back in May, we talked some about the role of the NIGC and where Ms. Stevens envisions the agency moving during her tenure. There are important questions to be asked about the NIGC's jurisdiction over different classes of gaming, its efficacy in addressing the needs of tribes and its coordination with the Department of the Interior, the States and tribal governments. I am looking forward to delving deeper today into these questions and hearing the various perspectives that we have represented on our panel. I want to thank you all for traveling here.

Mr. Chairman, thank you again for holding this hearing.

The CHAIRMAN. Senator Franken, thank you very much.

We will hear first today from the Honorable Tracie Stevens, Chairman of the National Indian Gaming Commission. She is accompanied by Mr. Lawrence Roberts, who is the General Counsel of the National Indian Gaming Commission here in Washington, D.C.

Ms. Stevens, normally I would have a separate panel and then the other panelists following you. With your permission, I would ask that all of the panelists join us at the table. The reason for that is, we have a vote in about an hour and ten minutes or so on the Floor. I wanted to try to, with some expeditious capability, get through this hearing and make sure everybody has the opportunity to have full testimony.

So you are brand new, if that is a way of describing it. You have been on the case for a very short period of time. But you have had very substantial experience in these areas. So we are anxious to hear your testimony, your analysis of where we are at this point, what you see ahead, what your priorities are and what you see the Commission needing to do. Then we will hear from the other three witnesses, and then I will ask questions and have inquiry for all of the panelists.

Ms. Stevens, why don't you proceed. Your entire statement will be made a part of the permanent record, and we will ask all witnesses to summarize.

**STATEMENT OF HON. TRACIE STEVENS, CHAIRWOMAN,
NATIONAL INDIAN GAMING COMMISSION; ACCOMPANIED BY
LAWRENCE S. ROBERTS, GENERAL COUNSEL**

Ms. STEVENS. Thank you, Chairman Dorgan and members of the Committee, for inviting me to testify today. It is an honor to appear before you for the first time in my capacity as the Chairwoman of the National Indian Gaming Commission.

One month ago today, I was officially sworn into this position. I want to thank the Committee for its expeditious action on my nomination.

Over the past three to four weeks, I have worked closely with Vice Chairman Steffani Cochran, Associate Commissioner Dan Little and Commission staff to begin identifying priorities, needs and opportunities for improvement. My first priority has been to fill much-needed positions. Last week, I appointed Larry Roberts, of the Oneida Tribe of Wisconsin, as the new General Counsel. And he is here with me today. I am also in the process of appointing a chief of staff and filling other vacancies.

In addition to this internal work, I have also participated in government-to-government consultations with tribes, most recently in the Pacific Northwest. As a matter of fact, Commissioners Cochran and Little are unable to join us today because they are currently conducting consultations with tribes in California. These consultations are the beginning of fulfilling a commitment I made to this Committee and to Indian Country to strengthen government to government relations with tribes, through meaningful and collaborative consultation.

The Indian Gaming Regulatory Act makes clear that the tribes, States and Federal Government each have defined and distinct regulatory roles to fulfill. As I stated at my confirmation hearing, it is one of my priorities to build a strong collaborative regulatory framework and relationship between all three regulatory bodies.

The Federal role in implementing IGRA is shared between the NIGC and the Department of the Interior. Thus, the relationship between these Federal agencies is very important to all of Indian Country. It is my view that the communication and cooperation is imperative at all levels to promote the twin purposes of IGRA: to protect Indian gaming through consistent and thoughtful regulation and to fulfill IGRA's goals of tribal self-governance and economic development.

Currently, Indian gaming is being conducted in 28 States by 233 of the 564 federally-recognized tribes. Tribes have used gaming revenue both to generate jobs and to provide fundamental services to their communities, such as health care, housing, basic infrastructure, and education, to name a few. As the primary day to day regulators on the ground, 24 hours a day, 7 days a week, tribes have a vested interest in safeguarding an industry that has greatly contributed to the invaluable improvements to their communities. It is a testament to tribal leadership and to the work of their dedicated employees that Indian gaming has remained protected and stable.

In 2009, as was illustrated previously, tribal facilities generated \$26.5 billion in gross gaming revenue and \$26.7 billion in 2008. With continued collaboration, NIGC will work with tribes to ensure

the continued protection and success of the industry through diligent, professional oversight and enforcement.

As I explained during my confirmation process, my goals for the Commission include working collaboratively with tribes to identify areas of improvement. I am a strong supporter of this Administration's commitment to Indian Country in terms of nation building, honoring tribal sovereignty and self-determination, and engaging in meaningful consultation with tribes.

The Commission is focused on developing a more workable and fulfilling government to government consultation process, in line with President Obama's November 5th, 2009 memorandum on tribal consultation. It is through meaningful government-to-government consultation that NIGC will be able to make well-informed, fully-considered decisions concerning regulations and policies.

The Commission is also committed to renewing old relationships and building new ones. Given that all three commissioners are new to the NIGC, there is a fresh opportunity to work in collaboration with tribes and other regulatory bodies to oversee and protect Indian gaming. As part of my initial evaluation process, I plan to examine the regulatory successes in States like my own home State of Washington to identify best practices, determine the possibility of replicating positive aspects of their regulatory frameworks or perhaps fashion new approaches that may reach the same positive result.

We will also review current regulations, examine their effectiveness and discuss with tribes their experiences in an effort to identify areas of improvement that would support NIGC's oversight responsibility. Of course, successful regulation depends upon a properly trained work force. And the Commissioners and I view training and technical assistance as a valuable component of NIGC's mission.

As such, we are examining ways to more effectively provide information and training. We are asking questions such as: Are we meeting the training needs of tribes? Does our program correlate with audit findings and compliance issues? Are there tribes or regions that have specific needs? A good, well-targeted technical assistance and training program can preempt the need for additional regulations or enforcement actions, can reduce compliance issues and can enhance operational performance and integrity.

Finally, we will complete a top-down review of the internal workings of the NIGC. As you know, NIGC is funded by fees paid by tribes engaged in Indian gaming. Being a good steward of these tribal fees is a top priority of mine. I want to make certain that the NIGC complies with every applicable law, regulation, rule and executive order, so as to give this Committee and tribes the confidence that NIGC is as concerned with how it runs its own operations as we are about how the tribes run theirs.

While I have only been on the job for a very short time, I am more committed than ever to working closely with this Committee and Indian Country to ensure the integrity of Indian gaming. Thank you again, Chairman Dorgan and members of the Committee, for your time and attention today. And I am happy to answer any questions you may have.

[The prepared statement of Ms. Stevens follows:]

PREPARED STATEMENT OF HON. TRACIE STEVENS, CHAIRWOMAN, NATIONAL INDIAN GAMING COMMISSION

Thank you Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee for inviting me to testify today. It is an honor to appear before you for the first time in my capacity as Chairwoman of the National Indian Gaming Commission (NIGC or Commission). One month ago today on June 29, 2010, I was officially sworn into this position. I want to thank the Committee for its expeditious action on my nomination.

Over the past four weeks, I have worked closely with Vice-Chairwoman Steffani Cochran, Associate Commissioner Dan Little, and Commission staff to begin assessing and evaluating the agency to identify priorities, needs, and opportunities for improvement. My first priority has been to fill much needed key positions within the agency. Last week, I appointed Larry Roberts of the Oneida Tribe of Wisconsin as the new general counsel. I am also in the process of appointing a new chief of staff and filling other vacancies. In addition to the internal work, in the few short weeks on the job, I have also participated in government-to-government consultations with many tribes, most recently in the Pacific Northwest. As a matter of fact, Vice-Chairwoman Cochran and Associate Commissioner Little are unable to join us today because they are conducting consultations with tribes in California. The Commission has scheduled additional consultations this summer and more are anticipated in the coming year. These consultations are the beginning of fulfilling a commitment I made to this Committee and to Indian country to strengthen government-to-government relations with tribes through meaningful and collaborative consultation.

The National Indian Gaming Commission—Powers, Duties, and Responsibilities

The Indian Gaming Regulatory Act (IGRA) makes clear that the tribes, states, and the federal government (through NIGC and DOI) each have defined and distinct regulatory roles to fulfill. As I stated at my confirmation hearing, it is one of my priorities to build a strong collaborative regulatory framework and relationship between all three regulatory bodies.

In terms of the NIGC, the powers, duties, and oversight responsibilities of the Chairwoman and Commission are focused and specific. I would like to take a few moments to walk through some of the primary provisions of IGRA that frame the Commission's role. I will also briefly discuss the relationship between the NIGC and the Department of the Interior (DOI) in three key areas.

Section 2702 states the policy and purpose of IGRA. Among those is "to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue."

Section 2703 defines *Chairman* as "the Chairman of the National Indian Gaming Commission" and *Commission* as "the National Indian Gaming Commission established pursuant to section 2704 of this title."

Section 2704 of IGRA establishes the Commission, stating in part, "There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission."

- The Commission is composed of three full-time members.
- The President, with the advice and consent of the Senate, appoints the Chairman while the Secretary of the Interior appoints the two associate commissioners.
- IGRA provides that "not more than two members of the Commission shall be of the same political party" and "at least two members of the Commission shall be enrolled members of any Indian tribe."
- The Chairman and the associate commissioners serve three-year terms.

Section 2705 of IGRA enumerates the powers of the Chairman, which are subject to appeal to the full Commission. The Chairman has the power to:

- "issue orders of temporary closure of gaming activities as provided in section 2713(b) of this title";
- "levy and collect civil fines as provided in section 2713(a) of this title";
- "approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title";

- “approve management contracts for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title”; and
- exercise “such other powers as may be delegated by the Commission.”

Section 2706 lists the powers of the Commission. The Chairman is also a voting member of the Commission. Some of the Commission’s powers are not subject to delegation:

- “upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title”;
- “to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title”;
- “by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title”;
- “by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title”; and
- “by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.”

The Commission’s other powers and duties under Section 2706 are subject to delegation to the Chair. Those powers and duties include:

- monitoring “class II gaming conducted on Indian lands on a continuing basis”;
- inspecting and examining “all premises located on Indian lands on which class II gaming is conducted”;
- conducting “or cause to be conducted such background investigations as may be necessary”;
- “demand[ing] access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under the chapter”; and
- “promulgating such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.”

The federal role in implementing IGRA is shared between the NIGC and the DOI. As a necessity, for a few years directly following the passage of IGRA and before the Commission began to function, the DOI regulated gaming under IGRA. This changed with the appointment of the first Commission in the early 1990s, when the NIGC fully assumed its share of powers, duties, and responsibilities.

The IGRA reserves three key areas to the DOI, which maintains the sole authority to:

- take land into trust;
- review and approve Class III gaming compacts; and
- review and approve Revenue Allocation Plans.

The relationship between the NIGC and the DOI is very important to all of Indian country. It is my view that communication and cooperation is imperative at all levels to promote the twin purposes of IGRA: to protect Indian gaming through consistent and thoughtful regulation and to fulfill IGRA’s goals of tribal self-governance and economic development.

It is evident that the role of the NIGC and the Chairwoman is complex and embodies important oversight responsibilities. I view my job as Chairwoman to lead the NIGC as we fulfill our duties, to live up to our responsibilities, and to exercise our powers with integrity and diligence. I must also provide leadership and a voice within Indian gaming that is meaningful and has substance as the industry continues to provide vital resources for Indian people.

The State of the Industry

Currently, Indian gaming is being conducted in 28 states by 233 of the 564, federally recognized tribes. Tribes have used gaming revenue both to generate jobs and to provide fundamental services to their communities, such as health care, housing, basic infrastructure and education, to name a few. While tribal gaming generates modest to considerable revenues for individual tribes, tribal gaming facilities in some regions simply provide jobs in areas otherwise suffering from high unemployment.

As the primary day-to-day regulators on the ground 24 hours a day, 7 days a week, tribal governments and their regulatory bodies have a vested interest in safe-

guarding an industry that has greatly contributed to invaluable improvements to their communities. It is a testament to the leadership of tribal governments and the work of their dedicated employees that the Indian gaming industry has remained protected and stable. In 2009, tribal facilities generated \$26.5 billion in gross gaming revenue as compared to \$26.7 billion in 2008. With continued collaboration, the NIGC will work with tribal governments and their employees to ensure the continued protection and success of the industry through diligent, professional oversight and enforcement. Accordingly, while collaborative results are desirable, I commit to upholding the statutory authority and responsibilities of my position to oversee the regulation of Indian gaming, and where appropriate, take enforcement action.

Vision for the Agency

A fundamental policy of IGRA is “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,” to ensure the regulatory and statutory compliance of all tribal gaming facilities, and to safeguard tribal gaming operations from organized crime and corrupting influences. As I explained during my confirmation process, my goals for the Commission include working collaboratively with tribes to identify areas of improvement in carrying out this policy. Some of these goals include examining ways to improve the consultation process and the manner in which the Commission provides technical assistance. Another component includes taking a fresh look at the current regulations and whether there exists a need for changes that may be appropriate to the industry today. We are also focused on ensuring strong working relationships with tribal governments to further facilitate statutory and regulatory compliance. Finally, our work includes focusing on the internal operations of the Commission to ensure that the agency is in compliance with all relevant laws, regulations, rules, and executive orders such that our work is appropriately transparent.

My goals are to work collaboratively with Tribes to identify areas of improvement for the agency. I have identified the following priorities:

1. Consultation and Building Relationships

I am a strong supporter of this Administration’s commitment to Indian country in terms of nation building, honoring tribal sovereignty and self-determination, and engaging in meaningful consultation with tribes. The Commission is focused on developing a more workable and fulfilling government-to-government consultation process in line with President Obama’s November 5, 2009 Memorandum on Tribal Consultation, which directs federal agencies to comply with Executive Order 13175, “Consultation and Coordination with Tribal Governments.”

The NIGC will be greatly benefited by complying with this Executive Order and is beginning a renewed outreach to tribes based on this Administration’s commitments. The NIGC will renew its government-to-government relationship with tribes and will work together with tribes to define and achieve the regulatory and policy goals of the agency. It is through meaningful government-to-government consultation that the NIGC will be able to make well informed, fully considered decisions concerning regulations and policies.

The Commission is also committed to renewing old relationships and building new ones. Given that all three Commissioners are new to the NIGC, there is an opportunity to work in collaboration with tribes and other regulatory bodies to oversee and protect Indian gaming. One regulatory agency alone cannot do this. It must be a collective effort. In addition to working with tribes, we also will work with other regulatory bodies to promote the integrity of Indian gaming. As part of my initial evaluation process, I plan to examine the regulatory successes in states like my own home state of Washington to identify best practices, determine the possibility of replicating positive aspects of their regulatory frameworks, or perhaps fashion new approaches that may reach the same positive result. By doing this, I hope to renew these relationships in order to strengthen both the agency and the tribes’ ability to protect this viable and successful economic development tool that has made a difference in so many lives of Indian people. Rebuilding relationships will also greatly aid in meeting another of my priorities, a review of NIGC’s regulatory activity.

2. Review of Past Regulations and Assess Regulatory Needs

It is my view that in previous years the NIGC could have benefitted from additional consultation with tribes in the promulgation of regulations. This would have enhanced tribal relationships and shifted the focus to practical problem solving through such mechanisms as technical assistance. Over the coming months, we will review current regulations, examine their effectiveness, and discuss with tribes their experiences in an effort to identify areas of improvement and any needed changes.

Currently, we are holding regional consultations on outstanding policies, specifically the NIGC NEPA manual, records retention policy, and consultation processes. Before moving forward with any new regulatory initiatives, we will consult with tribes to examine the need for new regulations and identify areas of greatest priority that would support NIGC's oversight responsibility for safeguarding and protecting the industry.

3. Technical Assistance

Of course, successful regulation depends upon a properly trained workforce, and the Commissioners and I view training and technical assistance as a valuable component of the NIGC's mission. Further, the Commission is statutorily required to provide technical assistance to tribes. As such, we are examining ways to more effectively provide information and training. I believe that an emphasis on training and technical assistance will continue to provide a foundation that will help to maintain the integrity and success of Indian gaming.

We are reviewing the NIGC's current technical assistance and training program by asking questions such as:

- Are we meeting the training needs of tribes?
- Does our program correlate with audit findings and compliance issues?
- Are there tribes or regions that have specific needs?

Our review could indicate additional opportunities and approaches for training. Rather than take the exceptions and make rules, the goal is to provide assistance to exceptions in order to bring them into compliance. A good, well-targeted, technical assistance and training program can preempt the need for additional regulations or for enforcement actions, can reduce compliance issues, and can enhance operational performance and integrity.

4. Ensuring Agency Compliance

This goal will require a top-down review of the internal workings of NIGC. As you know, the NIGC is funded by fees paid by the tribes engaged in Indian gaming. Being a good steward of the fees paid by the tribes is a top priority of mine. I want to make certain that the NIGC complies with every applicable law, regulation, rule and executive order so as to give this Committee and the tribes confidence that the NIGC is as concerned with how it runs its own operations as we are about how the tribes run their operations. As such, the Commission intends to undertake a comprehensive review of its budget and spending priorities. A guiding principle of our review and budgeting decisions will be that the NIGC has a responsibility to use tribal resources wisely. As such, our agency expenditures need to be both fiscally responsible and transparent. We will strive, consistent with applicable law, to be transparent with regard to the expenditures of tribal fees for the accomplishment of the NIGC's statutory responsibilities. The Commission is working to ensure that the agency is operating in a manner that uses these tribal resources most efficiently and effectively.

IGRA requires that NIGC comply with the Government Performance Results Act. I will initially review past budgets as well as review the five-year strategic plan (2009–2014). This review will be an agency-wide endeavor that will require the development of an action plan with appropriate timelines. We will consult with tribes as we move forward in this review.

Conclusion

While I have been on the job for only a very short time, I am more committed than ever to working closely with this Committee and Indian country to ensure the integrity of Indian gaming. Thank you again, Chairman Dorgan, Vice Chairman Barrasso and members of the Committee for your time and attention today. I am happy to answer any questions that you may have for me.

The CHAIRMAN. Chairwoman Stevens, thank you very much for your testimony. We appreciate that.

Next we will hear from Mr. Phil Hogen. Mr. Philip Hogen was previously the Chairman of the National Indian Gaming Commission. He is now of counsel with Jacobson, Buffalo, Magnuson, Anderson & Hogen, in St. Paul, Minnesota. Mr. Hogen, you may proceed.

**STATEMENT OF PHILIP N. HOGEN, FORMER CHAIRMAN,
NATIONAL INDIAN GAMING COMMISSION**

Mr. HOGEN. Good morning, Mr. Chairman. I am Phil Hogen, Oglala Sioux from South Dakota. And I need to clarify at the outset I am here on my own. That is, I don't represent my law firm, I don't represent any tribes. I am here on my own nickel, drove in, like they say out in our country, Mr. Chairman, this cowboy came a long way to ride in this rodeo.

I am very privileged to be here with the new Chair of the National Indian Gaming Commission. I wish Chair Stevens and the other new commissioners the very best in leading the NIGC. They have very important work to do. They have a good, strong, honorable, talented staff there. If they can show strong leadership there and work with that team, I am confident that things will continue to go in a very good direction.

In my written testimony I made nine points that are kind of all over the map, and they are not necessarily in any priority. But I do want to mention those areas where I think some action could be taken, either administratively or legislatively to make Indian gaming stronger, safer; a better economic development tool.

One of the problems we had with respect to doing our role in the background investigation process for those folks that work in and serve Indian gaming is that we couldn't send vendors, folks that sell gaming supplies and so forth, to tribes, their fingerprints through the FBI fingerprint process. Now, the Indian Law and Order Act may address that. But this would be a very useful tool if tribes could background those folks as thoroughly as they background those that get the regular licenses for gaming.

The NIGC, of course, has a statutory role under IGRA to review and approve management contracts when tribes enter into an arrangement with an outside developer to run the gaming. There are other arrangements that don't measure up to a management contract, but nevertheless critically affect the way the relationship between the gaming operation and somebody they are doing business with works. And NIGC doesn't have the jurisdiction to look at those.

Under legislation that this Committee did consider here in recent sessions, that would have been changed to expand that scope. From my position at the NIGC, seven years as Chair, we saw instances where, for example, arrangements of some smaller, particularly rural tribes with gaming machine vendors really didn't look fair to us. It looked like the vendor was getting a bigger share of the pie than might be appropriate. But NIGC didn't have any authority to inquire. I don't think NIGC should be a bottleneck, slow down all gaming contracts. Nevertheless, that might be useful to take a look at that.

In terms of the background investigations, when a management contract comes in, if it is just for Class III gaming, casino gaming, NIGC doesn't have the authority to do that thorough background investigation on those Class III management contractors. There is really no reason that they do it for Class II and shouldn't for Class III. I think that is something that could be easily and should be changed.

We developed in the late 1990s Minimum Internal Control Standards that are kind of the rule book on how you make sure transactions are documented, observed and so forth. Those have to be continually updated because of the quick changes in the technology and so forth in the industry. There are some proposed regulations that I hope soon get adopted and enacted, or revised and then enacted. The industry is changing; they need those tools to keep it safe and secure, and to make it work.

With respect to NIGC's role over Class III gaming, as you observed, Mr. Chairman, the CRIT, *Colorado River Indian Tribe* decision kind of booted NIGC out of part of that arena. And I think there are instances where the industry would be better served if NIGC had that authority. Not that it is not working well in lots of places, but there are places where there could be greater scrutiny, and NIGC could fulfill that.

The economic downturn necessarily is going to mean people are going to have to tighten their belt. It is important that tribes don't take shortcuts in the regulatory area, even though those aren't viewed as revenue centers in many instances. It is important that they fund regulation fully, even though the dollars are shorter.

And they can't take the money out of the operation and leave a negative cash flow in the business. You have to have enough working capital in the businesses.

NIGC has looked at some recent instances of mis-use, abuse of tribal gaming revenue, often by tribal leaders. Money was not appropriately sent their way, and those are important cases. The victims of those cases are the tribal members: the children, the elderly, those folks that aren't running the show. And I urge NIGC to take strong and proper action in those instances.

I think the Department of the Interior recently attempted to sort out who is calling the shots with respect to what are Indian lands, where can Indian gaming occur. It is good that there is some clarification there. But as that relationship between DOI and the NIGC continues, NIGC was intended to have independence, and it is important that they assert that as the statute was written.

Finally, just for what it is worth, I think salaries are too low for the commissioners. If you are going to attract good people, and I don't mean a commentary on those that are there, if you are going to do million dollar deals, regulate and supervise them, you have to attract people used to dealing in those areas. If a former Chairman doesn't say it, I don't know who will, but you need to raise those salaries so that you always get good, qualified people to serve in those positions.

I will be happy to try to respond to any questions that might arise.

[The prepared statement of Mr. Hogen follows:]

PREPARED STATEMENT OF PHILIP N. HOGEN, FORMER CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Good morning Chairman Dorgan and Vice Chairman Barrasso. I am Phil Hogen, an Oglala Sioux from the Black Hills of South Dakota, and recently chaired the National Indian Gaming Commission (NIGC.) Thank you for the invitation to share some of my insights about Indian gaming, which I've picked up along the way, during my tenure as an Indian Country United States Attorney, and a member, and

then Chairman of the National Indian Gaming Commission, over the past 20-plus years.

It's a privilege to appear on the same panel as newly appointed NIGC Chair, Tracie Stevens. While I served on the Commission, Tracie was a careful observer of challenges to the Indian gaming industry and the critical role of its regulators at the Tribal, State and national levels, and often contributed to the dialogue we held with Indian leadership. She will bring a strong and refreshing point of view to the NIGC, and I wish her, and Commissioners Cochran and Little the very best as they undertake the challenge of federal oversight of the economic engine of so many Indian nations throughout the country. I expect that if this strong new team has not already learned, they soon will, that while you always try to do your best, and try do what you think would most enhance the economic development gaming offers to Indian country, there will be times when the strictures of the Indian Gaming Regulatory Act will limit and define some of those opportunities, and that fidelity to that law is of critical importance to the real and perceived integrity of the Indian gaming industry. And as they encounter such limitations, I encourage them, as the Commissioners I served with and I did, to offer suggestions for improvement to this Committee. It is sometimes said in tribal circles that we "mustn't open IGRA." But during my tenure, it was amended twice, primarily with regard to NIGC's funding, and disaster did not befall us, and I think the industry is stronger for that. Any consideration of IGRA amendments, of course, should be done in consultation with the tribes that are served by it, and I know that even now, NIGC is working to strengthen its consultation policy and practice.

My comments today will be rather wide ranging, but I do want to mention several areas where I think changes in law, policy and practice might result in a stronger Indian gaming industry. There will be no particular order or priority to my list, but I think they are worthy of consideration.

Assistance with Criminal Background Checks

As recently interpreted, the laws and regulations relating to how NIGC provides FBI criminal history information to tribes regarding applicants for tribal gaming licenses has not permitted the submission of fingerprint cards for those who are vendors of gaming supplies and services to tribal gaming operations. This limits tribes' ability to fully investigate the suitability of a critical sector of their business, and makes them vulnerable to those who may have unsavory backgrounds and connections, and exposes the tribes and their gaming revenues and assets to unnecessary risks. If this can be changed, by way of FBI, NIGC or other regulations, or legislation if necessary, this gap could be closed, and the industry would be safer. I don't think the law should say the NIGC *must* be involved in the backgrounding of gaming vendors, but if asked by tribes for access to the FBI database for this purpose, it should be permissible. It might also be useful to design an optional "standardized" vendor application that NIGC could administer, so that vendors might avoid confronting dozens of individual and different application forms and processes, resulting in savings to tribes and vendors.

Review of Contracts other than Management Contracts

Along the lines of NIGC's review of arrangements for services to Indian gaming operations, IGRA, of course, dictates that management contracts be reviewed and approved to valid. This Committee not long ago considered an expansion of that authority to extend to all gaming contracts. Valid concerns were raised that NIGC could become a bottleneck that would slow down the industry, and those measures were not enacted. While tribes most often look after themselves quite well, while serving on the Commission I observed a number of arrangements, often with tribes with smaller facilities, where contracts for gaming machines extracted what appeared to be unduly high rates for what they received, and there was no mechanism for NIGC to, as they do with management contracts, examine those rates or apply standards, as Congress has set forth with management contracts. A device to permit review or examination of those arrangements when appropriate might be a useful service, particular to smaller tribes.

Background Investigations of Outside Managers of Class III Casinos

With respect to NIGC's review of management contracts, the law presently limits the background investigations NIGC conducts for such contracts when they only relate to Class III, or casino gaming. NIGC must, and it does, conduct thorough background investigations for management contractors providing Class II or bingo-type service, but not for those that relate exclusively to casino gaming. This distinction doesn't seem to make any sense, and it would be very useful to the Commission and gaming tribes if the thorough background investigation requirement for management contractors were the same, regardless of the type of gaming to be conducted.

Minimum Internal Control Standards

During my ten years on the Commission, I concluded that the best tool that we developed and utilized to strengthen the Indian gaming industry and its integrity, were the Minimum Internal Control Standards (MICS), which, with the assistance of a tribal advisory committee, were put together in the late 1990's.

MICS are rules that say things like the same guy who takes the money out of the slot machine won't be the guy who counts it and takes it to the vault—and that someone will be watching while that's done (Documentation, separation of functions, etc.).

It was my opinion, and that of some of the NIGC staff, that before the MICS were adopted and compliance was required, about two thirds of the industry faced serious risks and losses, on account of gaps in their control systems. After the MICS were implemented and accepted, that share of the industry was dramatically reduced. It's not perfect out there now, but it's much improved. The industry was young and growing rapidly, of course, and the requirement of the MICS brought most of it to maturity much faster than otherwise would have been the case. If the National Association of Fraud Examiners estimates are to be believed, I would estimate that tribal compliance with the NIGC MICS has saved tribes well over \$1 billion since their implementation. This is not to say, of course, that tribes would not have taken these important safety and security measures without the NIGC MICS, but it is true that before the MICS many had not, and having a standard rulebook to adhere to made this process easier and more thorough.

Given the dynamic nature of the gaming industry, with its heavy reliance on rapidly evolving electronic technology, these standards are always trying to keep up, and likely will always be somewhat obsolete. Nevertheless, it is imperative that there be a continual effort to update them and to keep pace with developments in the industry. On the NIGC website are a set of MICS updates that were thoroughly vetted by the NIGC staff and its tribal advisory committee, and if implemented would bring greater clarity to the MICS system and increased security to tribal gaming operations. With two types of commercial gaming in Indian country—Class II and Class III—each somewhat unique in their nature, but also sharing many common processes, it is important to address each in a set of standards. The most recent effort would bring clarity to these distinctions, and address newer technologies that earlier drafts had not addressed. I expect they are not perfect, and likely even now are dated in some respects, but if they need improvement, that can occur in a subsequent review. I would urge prompt implementation of those revised standards.

NIGC Regulation of Class III Gaming

As stated, the MICS address both Classes of gaming. IGRA clearly directs NIGC to have a direct regulatory role in Class II (bingo, etc.) regulation, and standards in this area are imperative. While the original MICS were mandatorily applied to all Indian gaming—II and III—the court in *Colorado River Indian Tribes v. NIGC* held that NIGC could not require compliance in the Class III area, as under IGRA, that was to be left to the tribes and the states in their Class III compacts. So, since that decision several years ago, NIGC has stepped back in many instances. Nevertheless, many Tribal-State compacts reference the NIGC MICS and dictate compliance. Class III regulation by NIGC for tribal operations have been required under Secretarial Procedures in the absence of a compact, and a number of tribes, notably in California, have acted to adopt and recognize the NIGC MICS in their tribal ordinances, even though it is not Federally required. Thus, there must be an on-going effort to update and keep current the Class III MICS, in spite of the holding in the *CRIT* case. I continue to believe that the IGRA amendment which this committee considered following the *CRIT* case which would have clarified that NIGC had authority in this area would have been useful, and that as in the past, that NIGC would not be too intrusive under such an arrangement, but would continue, in a cooperative way, to help protect tribal gaming revenues and assets. In the pre-*CRIT* era, no NIGC enforcement actions were taken for MICS violations, yet many problems were addressed to bring tribal operations in compliance with the safe, secure processes required by the NIGC MICS in the Class III area.

I believe that since *CRIT*, NIGC's auditors have been as busy as they always were, but I'm not sure they have been able to focus their efforts where they were most needed. With the pre-*CRIT* responsibility and perspective, NIGC attempted to prioritize its work where the most tribal dollars appeared to be at risk. Now audits of the tribal casino gaming—Class III—where most of the money is, is by invitation only, and sometimes those requests come in only after losses have been discovered.

Impacts of the Economic Downturn

In this recent era of economic downturn, tribal gaming operations have not been immune. While tribal gaming perhaps has weathered this storm better than other sectors of the gaming industry, in many places Indian gaming revenues are down. At such times, gaming operations have to make choices as where to make cuts, or where not to fill vacancies. Too often the regulatory sector—viewed by some as not being revenue centers—get neglected or under funded. If a decision has to be made to buy a new neon sign, or fill an open internal auditor position for the tribal gaming operation, it can be tempting to short-cut the regulatory area, but tribes do so at their peril. When times are tough, perhaps, is when tribes need to be most watchful to assure that their dollars don't walk out the back door.

Also, in terms of economic downturn observations, while we see some declines in revenues, we do not always see declines in the amounts tribes are taking from their gaming operations to fund their programs. This can result in seriously low working capital in tribal gaming operations that put those operations on fragile footing. It is easy to understand that tribes will want to meet the needs of their tribal members and tribal programs when times are tough, but they must safeguard their economic base in the process.

Strong Oversight Regard Misuse of Tribal Gaming Revenues

Along the lines of NIGC economic oversight, we are seeing a number of cases where the Commission has investigated instances of abuse of the use of tribal gaming revenues—often by members of tribal leadership. These instances seem to be seen where accountability at the *tribal* level is most lax. IGRA specifically identifies the purposes for which tribal gaming may be used, including the requirement for Revenue Allocation Plans for *per capita* payments. These are very important cases, as those who suffer and lose in these instances are the tribal members—children, elders, those infirm—who rely on integrity at their governmental level to assure fair dealing, but sometimes don't get it. This was one of the important reasons IGRA created the NIGC, and it is important that emphasis continue in this area, and that nothing gets swept under the rug. Tribal memberships are counting on NIGC to do its job in this area. Tribal leaders work hard to make their tribal gaming operations successful, and they should be adequately compensated for those efforts. But the process must be properly authorized and transparent, and comply with tribal processes, and when it isn't NIGC has an important role to play to bring things into account.

Indian Lands Issues and NIGC Independence

An important project which was underway during my tenure as NIGC Chair was the building of a data base of Indian lands for which tribes use, or may use for gaming. Where gaming is permissible under IGRA can raise some very complicated and technical issues, and to the extent that clarity and agreement can be fostered by a solid, reliable source of records and information in this regard, distractions and disagreements can be minimized, and I am hopeful that this effort will continue.

In terms of the determinations of which lands constitute those Indian lands which IGRA deemed eligible for gaming, during my tenure, there were a number of instances when NIGC's office of general counsel and the Department of the Interior's Solicitor did not agree, and those were regrettable. To the extent that clarity has come, or can be brought to this area, that will be useful. NIGC needs to always appreciate that a ruling which may apply to a gaming instance may be extended to all of Indian country, and that consistency and fidelity to settled law and Federal Indian policy is essential. The Solicitor's office needs to be aware of the urgency which often attends determination of such Indian lands questions, and having served as the Associate Solicitor for Indian Affairs, I know how over-taxed that division is. To the extent that adequate resources can be provided to serve these needs, I would urge this Committee to address this concern.

And while the determination of Indian Lands may be on its way to settlement, the NIGC and the Department of the Interior need to be mindful of the independence for the Commission which IGRA's authors intended. NIGC is not a partisan operation—it's bi-partisan by statute—and it's dominated by Indian leadership. Gambling is a risky business, financially and socially, and that's why it's always been heavily regulated where legalized. And it's a sophisticated and specialized area. The Federal Family's role in the regulation of Indian gaming needs to rest with the NIGC, and to the extent that there are temptations in the Department to reach into that area, those ought to be resisted, and NIGC needs to defend the independence which was intended for it and which this Committee has recognized. Indian gaming will be stronger for this, and the Department will have plenty of other things to do anyway.

Commissioner Salaries

Among those things in IGRA which may be appropriate for review would be the salary levels for the Commission. I know it will be easy for this comment to be misinterpreted, and I think Indian gaming has been very fortunate in most of the choices that have been made for these important posts. But when responsibility for the oversight of a \$27 billion+ industry at stake, the country and the tribes ought not risk that some of those best qualified to serve in that role, decline to consider it because of compensation. When dealing with multi-national corporations and arrangements dealing with millions of dollars—often the tribes' dollars—it will be important to have in positions of authority those to whom such amounts are not unfamiliar. In the long run, the government will get what it pays for, and the Indian gaming industry cannot afford to be regulated on the cheap.

Conclusion

Finally, I would say to the new Commission don't lose perspective as you do your important jobs. There is a good, strong, honorable staff at the NIGC, show them strong leadership, and rely on their hard work and advice. Work closely with tribal leaders, as well as those organizations formed to advance their cause. But keep an appropriate distance, and never forget that you are sworn regulators, not cheerleaders, and that tribal communities throughout the country, as well as those patrons who spend their dollars to make the industry work are depending on you.

Good luck.

I stand ready to respond to any questions the Committee may have for me, Mr. Chairman. I thank you for this opportunity.

The CHAIRMAN. Mr. Hogen, thank you very much.

Next we will hear from Mr. Ernest Stevens, Chairman of the National Indian Gaming Association. Mr. Stevens, you may proceed.

STATEMENT OF ERNEST L. STEVENS, JR., CHAIRMAN, NATIONAL INDIAN GAMING ASSOCIATION; ACCOMPANIED BY: MARK VAN NORMAN, EXECUTIVE DIRECTOR, AND JASON GILES, DEPUTY GENERAL COUNSEL

Mr. STEVENS. Good morning, Mr. Chairman and members of the Committee. My name is Ernie Stevens, Jr., and I am a member of the Oneida Nation of Wisconsin. I have the honor of serving as the Chairman of the National Indian Gaming Association.

I am accompanied today by our Executive Director, Mr. Mark Van Norman, and our Deputy General Counsel, Jason Giles. Thank you for inviting me to testify today.

Let me begin by saying, Indian gaming regulation is strong and tribes are proud of the regulatory track record in the Indian gaming industry. In 2009, gaming generated more than 628,000 direct and indirect jobs, and \$26.2 billion in gross revenue. These revenues fund tribal government services, such as police and fire departments, health and education services, as well as other essential government services for our tribal citizens.

The benefit of Indian gaming doesn't stop at the reservation border. Indian gaming generated over \$9 billion for Federal, State and local government treasuries through sales and payroll taxes. Tribal governments understand that none of these benefits will be possible without solid regulation. Tribes across the Nation have committed significant resources to protect our customers and the integrity of our operations.

Tribal gaming operations are regulated at three distinct levels. Tribes, States and the Federal Government all employ more than 3,400 expert regulators and staff to protect Indian gaming. Tribal governments directly employ approximately 2,800 tribal gaming commissioners and regulators. State regulatory agencies employ

500 gaming personnel and law enforcement officers that have a role in the regulation of Indian gaming. The NIGC employs over 100 employees that help regulate tribal gaming.

As a result of this three-tier system, Indian gaming is subject to more oversight by more people than any other jurisdiction that has gaming in the United States. At a time when many tribal gaming operations across the Country have experienced a decrease in revenues, money spent on Indian gaming regulation continues to be a priority.

In 2009, tribal governments spent a total of almost \$350 million to regulate their gaming operations. That number breaks down as follows. Tribal governments spent approximately \$250 million in direct regulatory costs to fund the tribal gaming commissions. Tribal governments also paid over \$80 million to State regulatory agencies. In addition, tribal governments paid \$16 million in regulatory fees to fund the National Indian Gaming Commission.

Indian Country is working to promote a positive relationship between tribes and the NIGC as we move forward. NIGA's member tribes look forward to working with the new commissioners at the NIGC and have made it a priority to build a cooperative relationship with the emphasis on government-to-government consultation.

Against the backdrop of comprehensive regulation, Indian gaming has developed a strong security and regulatory record. Tribal gaming commissions and the agencies employ highly qualified individuals from tribal, State and Federal law enforcement agencies, and after 25 years in the Indian gaming industry, we are now a source of our own experienced and well-trained regulators.

As IGRA intended, tribal, State and Federal governments all play a role in regulation of Indian gaming. Under IGRA, Congress intended for the three sovereigns to work in cooperation on the regulation of Indian gaming. Each regulatory body has a distinct and supporting role for three different classes of Indian gaming. The idea was to avoid duplication, but to provide complete oversight. The system is costly, it is comprehensive, and our experience in Indian Country shows that it is working.

In conclusion, Mr. Chairman, I want to reiterate that the tribes spend almost \$350 million on regulation each year. Tribes realize that regulation is the cost of a successful operation and it is needed to protect our resources and our customers.

Indian gaming's success in regulation is the result of hard work by tribal governments and tribal leaders who recognized the need for solid regulation and have made it their priority. Indian gaming is working. It is rebuilding tribal economies and providing hope for future generations of Indian people. It is benefitting non-Indian communities by providing jobs and promoting economic activity outside the reservation. Tribes are proud of this record and are working hard to ensure that tribal gaming regulation remains strong in the future.

On behalf of the leadership in Indian Country as well as the very hard working regulators, I want to again thank you for this opportunity to testify. That concludes my remarks, and I have submitted a written testimony to you also, Mr. Chairman.

[The prepared statement of Mr. Stevens follows:]

PREPARED STATEMENT OF ERNEST L. STEVENS, JR., CHAIRMAN, NATIONAL INDIAN GAMING ASSOCIATION

Introduction

Good morning Chairman Dorgan, Vice Chairman Barrasso, and Members of the Committee. My name is Ernest Stevens, Jr., Chairman of the National Indian Gaming Association and a member of the Oneida Nation of Wisconsin.

The National Indian Gaming Association (NIGA) is an intertribal association of 184 federally recognized Indian Tribes united behind the mission of protecting and preserving tribal sovereignty and the ability of Tribes to attain economic self-sufficiency through gaming and other economic endeavors.

I want to thank the Committee for this opportunity to provide our views on the state of Indian gaming and its regulatory systems.

Indian Tribes as Governments

To place Indian gaming in proper context, I'd like to first discuss background of the status of Indian Tribes in the United States Federal system of government.

Before contact with European Nations, Indian tribes were independent self-governing entities vested with full authority and control over their lands, citizens, and those visitors to Indian lands. The Nations of England, France, and Spain all acknowledged Tribes as sovereigns and entered into treaties with various Tribes to establish commerce and trade agreements, form wartime alliances, and preserve the peace.

When the United States was established, it too recognized the sovereign status of Tribes through treaties for these same reasons. The United States Constitution specifically acknowledges the importance of trade with tribal governments in the Commerce Clause, which states that "Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., Art. I, §8, cl. 3.

Tribal citizens are referred to in the Apportionment Clause ("Indians not taxed") and excluded from enumeration for congressional representation. The 14th Amendment repeats the original reference to "Indians not taxed" and acknowledges that tribal citizens were not originally thought to be "subject to the jurisdiction of the United States". This is important because, by its very text, the Constitution establishes the framework for Federal government-to-government relations with Indian tribes and affirmed 100 years of treaty-making. These treaties guarantee Indian Tribes a right to self-government.

For these reasons, the United States policy on Indian affairs in the formative years of the new Republic was one of respect and recognition that tribal governments were necessary allies to protecting the Union both politically and economically.

As we sadly know, the United States policies on Indian affairs throughout the 1800s abrogated these promises and in the 19th and 20th Centuries, the United States destroyed traditional American Indian economies through warfare, genocide, dispossession and theft of lands. In an article entitled, "Exiles in Their Own Land (2004)," U.S. News and World Report explained that:

The vast primeval forests that once blanketed the eastern United States were once home to millions of Indians. But starting in the 17th century, shiploads of European settlers arrived in superior numbers, bearing superior weapons. By 1830, war, genocide, and pestilence (diseases such as smallpox and measles to which the Indians had no immunity) had conspired to kill most Eastern Indians.

Throughout most of the 19th and 20th Century, our people endured poverty and social dislocation because of the destruction of traditional tribal economies. In *California v. Cabazon Band of Mission Indians and Morongo Band of Mission Indians* (1987), the Supreme Court acknowledged that Indian tribes in California were removed from their lush agricultural lands and seaside dwellings to rocky outcroppings at the edge of the desert. As the Court explained it, California Indians were left with reservations that "contain no natural resources which can be exploited."

Yet through these hardships, many generations of our grandmothers and grandfathers maintained our original, inherent right to tribal self-government. The Federal Government had a number of programs to promote economic development on Indian lands but few worked because of a lack of infrastructure, natural resources, and capital and remoteness from markets.

Tribal Self-Determination and Indian Gaming

In the 1960s, Presidents Kennedy and Johnson included Indian Tribes in federal community development programs, in the War on Poverty, and in Civil Right legislation to strengthen tribal self-governance. In 1970, President Nixon formally announced the federal policy supporting Indian Self-Determination, and repudiated the Termination Policy. At the heart of the new policy was the federal government's commitment to foster reservation economic development and helping tribal governments to attain economic self-sufficiency. The federal government began to make available to tribal governments a number of the programs that were used to help state and local governments. These programs provide Tribes with the ability to rebuild their communities, and have created new economic opportunities throughout Indian country.

In addition, in the late 1960s, Tribes began to look for a steady stream of tribal governmental revenue—separate from federal program or appropriation funds. At the time, the recent rise in State government lottery systems caused a number of Tribes to consider gaming as the answer for their budgetary concerns.

State governments and commercial gaming operations challenged the rights of Tribes to conduct gaming on their lands. These challenges culminated in the Supreme Court case of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Court in *Cabazon* upheld the right of Tribes, as governments, to conduct gaming on their lands free from State control or interference. The Court reasoned that Indian gaming is crucial to tribal self-determination and self-governance because it provides tribal governments with a means to generate governmental revenue for essential services and functions.

In 1988, one year after the *Cabazon* decision, Congress enacted the Indian Gaming Regulatory Act (IGRA) to promote “tribal economic development, tribal self-sufficiency and strong tribal government.” 25 U.S.C. §2702. IGRA established three classes of Indian gaming with a comprehensive framework of regulation for each class of gaming. The Act also established the National Indian Gaming Commission (NIGC). While there are dozens of forms of gaming in America, the NIGC is the only Federal Commission that currently exists to regulate gaming in the United States.

The Indian Gaming Regulatory Act is an important part of the more than forty-year Federal policy supporting Indian Self-Determination that acknowledges Indian Tribes as sovereign governments with authority over their lands, members, and those who enter into consensual relationships with their governments. In the year 2000, President Clinton issued Presidential Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments, which provides:

Our Nation, under the law of the United States . . . has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and their territory. The United States . . . work[s] with Indian tribes on a government-to-government basis concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

On September 23, 2004, President Bush issued an Executive Memorandum affirming Executive Order 13175. The memorandum was addressed to the Executive Departments and Agencies on the Government-to-Government Relationship with Tribal Governments, which explains:

My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respect tribal sovereignty and self-determination for tribal governments in the United States.

On November 5, 2009, President Obama issued an Executive Memorandum directing each federal agency to submit to the Director of the Office of Management and Budget (OMB), a detailed plan to implement the policies and directives of Executive Order 13175. This plan was to be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. Agency heads were also directed to submit to the OMB, within 270 days of the Memorandum and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

It is clear from the actions of the past three Presidents that consultation between sovereigns remains the cornerstone of the Federal-Tribal government-to-government relationship.

State of Indian Gaming

In approximately 35 years (22 years under IGRA), Indian gaming has proven to be the most successful tool for economic development for many Indian Tribes. Today, approximately 233 federally recognized Indian Tribes in the lower 48 states (65 per-

cent) have chosen to use gaming to aid their communities. Indian gaming has helped many Tribes begin to rebuild communities that were all but forgotten. Because of Indian gaming, our Tribal governments are stronger, our people are healthier and our economies are beginning to grow.

In 2009, Indian gaming is responsible for 628,000 direct and indirect jobs nationwide and generated \$26.2 billion in gross tribal government revenues (net tribal gaming revenues are much smaller when accounting for payroll, operating costs, overhead, and debt service). Indian gaming is funding essential tribal government services, including schools, health clinics, police and fire protection, water and sewer services, and child and elderly care. Gaming revenues also enable Tribes to diversify their economies beyond gaming. Because of gaming, Tribes have invested in renewable energy projects, manufacturing, and other entrepreneurial ventures.

Indian gaming also benefits Federal, State, and local governments. In 2009, Indian gaming generated over \$9 billion in added revenue for the Federal, State and local governments. Despite the fact that Indian Tribes are governments, not subject to direct taxation, individual Indians pay federal income taxes, the people who work at casinos pay taxes, and those who do business with casinos pay taxes. As employers, Tribes also pay employment taxes to fund social security and participate as governments in the federal unemployment system.

Indian Tribes also made over \$100 million in significant charitable contributions to other Tribes and their non-Indian neighbors. In short, Indian gaming is not only helping rebuild Indian communities, but it is also revitalizing nearby communities and has become a vital piece of the national economy.

As this Committee has highlighted over the past several years, Indian country still has a long way to go. Too many of our people continue to live with disease and poverty. Indian health care is substandard, violent crime is multiple times the national average, and unemployment on Indian reservations nationwide averages 50 percent. However, Indian gaming has proven to be one of the best available tools for Tribal economic development, and tribal governments are committed to protecting and preserving the industry through a strong system of regulation and oversight.

Regulation and Responsible Gaming

As noted above, Congress, through the Indian Gaming Regulatory Act, established three classes of gaming, the National Indian Gaming Commission, and a comprehensive regulatory system to oversee each form of Indian gaming.

Class I games are social or traditional and cultural forms of Indian gaming, conducted for minimal prizes or in connection with ceremonies or celebrations, and is solely regulated by the tribes.

Class II Indian gaming is defined as bingo and related games played as well as non-banking card games, if those games are otherwise lawful within the states where tribes conduct those activities. Class II gaming is regulated by the National Indian Gaming Commission and Tribal Gaming Commissions (TGC) established and operated by tribal governments.

Class III Indian gaming is defined as all forms of gaming that are neither class I nor class II. Class III games are commonly referred to as casino or "Las Vegas" style gaming. Class III games regulated according to the terms of compacts negotiated between tribal and state governments.

As you can see, it takes coordination and cooperation of three sovereigns to make this comprehensive regulatory system work. The tribal, state, and the federal governments must all work hand-in-hand to ensure the effective regulation of Indian gaming.

Tribal governments have dedicated tremendous resources to the regulation of Indian gaming. Tribes spent over \$345 million last year nationwide on tribal, state, and Federal regulation:

- \$250 million to fund tribal government gaming regulatory agencies;
- \$80 million to reimburse states for state regulatory work under the Tribal-State Compact process; and
- \$16 million for the NIGC's budget.

At the tribal, state, and Federal level, more than 3,400 expert regulators and staff protect Indian gaming:

- Tribal governments employ former FBI agents, BIA, tribal and state police, New Jersey, Nevada, and other state regulators, military officers, accountants, auditors, attorneys and bank surveillance officers;
- Tribal governments employ more than 2,800 gaming regulators and staff;

- State regulatory agencies assist tribal governments with regulation, including California and North Dakota Attorney Generals, the Arizona Department of Gaming and the New York Racing and Wagering Commission;
- State governments employ more than 500 state gaming regulators, staff and law enforcement officers to help tribes regulate Indian gaming;
- At the Federal level, the NIGC employs more than 100 regulators and staff.

Tribal governments also employ state-of-the-art surveillance and security equipment. For example, the Mashantucket Pequot Tribal Nation uses the most technologically advanced facial recognition, high resolution digital cameras and picture enhancing technology. The Pequot's digital storage for the system has more capacity than the IRS or the Library of Congress computer storage system. In fact, the Nation helped Rhode Island state police after the tragic nightclub fire by enhancing a videotape of the occurrence, so state police could study the events in great detail.

Indian gaming is also protected by the oversight of the FBI and the U.S. Attorneys. The FBI and the U.S. Justice Department have authority to prosecute anyone who would cheat, embezzle, or defraud an Indian gaming facility—this applies to management, employees, and patrons. 18 U.S.C. 1163. Tribal governments work with the Department of Treasury Financial Crimes Enforcement Network to prevent money laundering, the IRS to ensure Federal tax compliance, and the Secret Service to prevent counterfeiting. Tribal governments have stringent regulatory systems in place that compare favorably with Federal and state regulatory systems.

No one has a greater interest in protecting the integrity of Indian gaming than tribes. As noted above, Indian gaming provides the best opportunity for tribal communities to attain economic self-reliance in generations. Under IGRA, Tribal Gaming Commissions are the day-to-day front line regulators of Indian gaming.

The National Indian Gaming Commission (NIGC) plays a leading role in monitoring the regulation of Indian gaming at the Federal level. The Commission is comprised of a Chairman and two Commissioners, each of whom serve on a full-time basis for a three-year term. The Chairman is appointed by the President and must be confirmed by the Senate. The Secretary of the Interior appoints the other two Commissioners.

The NIGC has authority to approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of IGRA. The NIGC also is vested with authority to approve management contracts for class II gaming and class III gaming. In addition, the NIGC adopts regulations for the assessment and collection of civil fines for regulatory violations.

With regards to Class II gaming, the NIGC has direct authority to monitor class II gaming on Indian lands on a continuing basis and has full authority to inspect and examine all premises on which class II gaming is being conducted.

However, in support of the regulatory framework established by the Tribal-State Compact process under IGRA, the NIGC has a background role in overseeing Class III gaming. When a Tribe and State have a valid compact:

- NIGC reviews and approves Class III tribal gaming regulatory laws;
- NIGC reviews Class III tribal background checks and gaming licenses;
- NIGC receives independent annual audits of tribal gaming facilities, including Class III gaming and all contracts for supplies and services over \$25,000 annually are subject to those audits;
- NIGC approves management contracts; and
- NIGC works with tribal gaming regulatory agencies to ensure proper implementation of tribal gaming regulatory ordinances.

Conclusion

The Indian Gaming Regulatory Act has worked well to promote “tribal economic development, self-sufficiency, and strong tribal governments,” as Congress intended, and as discussed above, Indian gaming is a Native American success story—and indeed, a true American success story for the Nation as a whole, as many Native Americans begin to see the promise of the American dream of a job and economic self-sufficiency.

In short, Indian Country is proud of its gaming regulatory history and we are working hard to ensure that tribal gaming regulation remains strong into the future.

The CHAIRMAN. Mr. Stevens, thank you very much.

Finally, we will hear from Mark Brnovich, the Director of the Arizona Department of Gaming in Phoenix, Arizona. Mr. Brnovich?

**STATEMENT OF MARK BRNOVICH, DIRECTOR, ARIZONA
DEPARTMENT OF GAMING**

Mr. BRNOVICH. Thank you very much, Chairman Dorgan, members of the Committee. Thank you for providing me this opportunity to discuss the regulation of gaming in Indian Country.

I was appointed the Director of the Arizona Department of Gaming in April of 2009. I am fortunate to have inherited an agency where my predecessors have placed a great emphasis on cooperating on a daily basis with our tribal partners to ensure the integrity of gaming in Arizona.

Prior to my appointment, I served as an Assistant United States Attorney for the District of Arizona. I have a lot of familiarity with prosecuting crimes in Indian Country, especially those involving gaming enterprises. Accordingly, I believe I provide a unique perspective on the current regulatory environment.

Although in Arizona we had to overcome many initial hurdles, tribal governments in the State of Arizona entered gaming compacts in the early 1990s. At that time, neither the State nor the tribes had much experience in regulating gaming. The voter initiative process in 2002 in Arizona led to our current gaming compact and current regulatory structure. Each of these compacts have 10-year terms with an automatic 10-year renewal period when there is substantial compliance. In Arizona, the compacts define the scope, the nature and the size of tribal gaming.

For example, there are restrictions on the types of games, wagering limitations, allocations of devices and the location of facilities. They also create responsibilities for tribal and State regulators, including the licensing and certification of employees and vendors, as well as the inspection of Class III devices.

Currently, there are 14,511 Class III gaming devices in Arizona's 22 tribal gaming facilities. There are 219 poker tables, 274 blackjack tables and 6 facilities providing live Keno games. This amounts to a \$2 billion a year industry in Arizona alone. To ensure the integrity and viability of such enterprises, it is essential that operations are well-regulated. Based upon my experience, I would submit the following needs to be incorporated in any effective regulatory system.

First, a recognition of each respective tribe in the State that gaming is a unique industry, it is in the best interest of all parties that it is well-controlled. Gaming is a cash-intensive industry where there is not an exchange of goods or services between a vendor and a purchaser, but instead, cash is the commodity.

Historically, the nature of the business attracted criminal elements, including organized crime, crimes of opportunity and other corrupting influences. For example, in my experience as an AUSA, I have prosecuted casino-related crimes involving thefts ranging from \$5,000 to more than \$600,000, to more than half a million dollars. I was co-counsel in the successful prosecution of four individuals who attempted to rob an armored van that was refilling ATM machines at tribal casinos.

While no amount of controls can stop every crime, I believe a recognition that such events can occur in the gaming environment is an important step in ensuring successful investigations and prosecutions.

Second, it is vital for tribal and State regulators to develop a working relationship that fosters a spirit of cooperation. This requires regular interaction with the tribal gaming offices and the gaming enterprise. For example, tribal gaming agents have a constant presence in the gaming operation and State gaming agents visit the tribal facilities on a regular basis, sometimes daily for the urban facilities.

This occurs even if there are no major incidents or issues. But I believe this frequent interaction allows both tribal and State gaming agents to foster a good working relationship. In other words, the State and the tribes shouldn't be having discussions or exchanging information only when necessary, but they should do so without need.

I also believe it is very important for the Department that employees be cognizant of their compact requirements and to be respectful of the tribal gaming environment. Additionally, I believe it is important to share best practices. Information sharing is especially important because cheats or criminals frequently move from one facility or even one State to another. So therefore, it is important to gather and disseminate intelligence information between the tribal communities as well as between States.

One method in Arizona that we share information by is via the Indian Gaming Working Group. The Indian Gaming Working Group was created by the Department of Justice to address tribal gaming issues. Our working group meets on a regular basis and includes members of the FBI, IRS and NIGC and the Department of the Interior.

Furthermore, the Department works very closely with the Arizona Tribal Gaming Regulators Association to conduct training on a regular basis. And the Department co-sponsors a training academy for all new tribal agents.

Third, the necessary resources must be committed to ensuring the integrity of gaming. This includes a checks and balances approach that has served us well. For example, the tribal gaming operation is independently audited on an annual basis to ensure Class III net win is correctly reported. The State has access to this information and the ability to communicate with the auditors. Furthermore, the Department has its own audit unit with ten employees, including two CPAs. They conduct both financial and compliance audits on a regular basis. Our machine compliance unit inspects every machine before those go into play on the gaming floor.

In summary, I believe this approach, a recognition, a communication and cooperation between the tribes and the States, and a commitment to committing necessary resources will ensure the integrity of tribal gaming and ensure the continued public support for such operations. Thank you and I am available to address any questions.

[The prepared statement of Mr. Brnovich follows:]

PREPARED STATEMENT OF MARK BRNOVICH, DIRECTOR, ARIZONA DEPARTMENT OF GAMING

Chairman Dorgan, Vice-Chairman Barrasso, and members of the Committee, thank you for providing me the opportunity to discuss the regulation of gaming in Indian Country. I was appointed the Director of the Arizona Department of Gaming in April, 2009, and I'm fortunate to inherit an agency where my predecessors had

placed on emphasis on working together with our tribal partners to ensure the integrity of gaming in Arizona. Prior to my appointment, I served as an Assistant United States Attorney for the District of Arizona, where I prosecuted casino related crimes. Accordingly, I believe I can share a unique perspective on the current regulatory environment.

Although we had to overcome some initial hurdles, the tribal governments and the state of Arizona began entering gaming compacts in the early 1990's. At that time, neither the state nor the respective tribal governments had much experience in regulating gaming. The voter initiative process in 2002 enacted our current regulatory structure and the state began entering gaming compacts with each respective tribe in 2003. While each compact holds a term of 10 years, there is an automatic 10 year renewal provided substantial compliance.

In Arizona, the gaming compacts define provisions regarding the scope, nature, and size of tribal gaming. For example, there are restrictions on the types of games, wagering limitations, allocation of devices, and the location of facilities. They also create responsibilities for tribal and state regulators, including the licensing and certification of employees and vendors, as well as the inspection of class III gaming devices.

Currently, there are 14,511 class III gaming devices in Arizona's 22 tribal gaming facilities. There are 219 poker tables, 274 blackjack tables and 6 facilities providing live keno games. This amounts to a \$2 billion a year industry in Arizona.

To ensure the integrity and viability of such enterprises, it is essential that gaming operations are well regulated. Based upon my experience, I would submit that any system needs to incorporate the following:

First, a recognition by each respective tribe and the state that gaming is a unique industry and it is in the best interest of all parties that it is well controlled. Gaming is a cash intensive industry where there is not an exchange of a good or service between a vendor and purchaser, but instead cash is the commodity. Historically the nature of the business has attracted criminal elements, including organized crime, crimes of opportunity, and other corrupting influences.

For example, in my experience as an AUSA, I have prosecuted casino related cases involving employee thefts ranging from \$5,000 to over half a million dollars. I was also co-counsel in the successful prosecution of 4 individuals who attempted to rob an armored van that was refilling ATM machines at a tribal casino. While no amount of controls can stop every crime, I believe a recognition that such events can occur in a gaming environment is an important step in ensuring successful investigations and prosecutions that will serve as a deterrent to further criminal activity.

Second, it is vital for tribal and state regulators to develop a working relationship that fosters a spirit of cooperation. This requires regular interaction with the tribal gaming offices and the gaming enterprise. For example, tribal gaming agents have a constant presence at the gaming operation and state agents visit on a regular basis, sometimes daily for urban facilities. Even if there are no major incidences or issues to discuss, this frequent interaction allows both tribal and state gaming agents to foster a better working relationship. In other words, the state and tribe shouldn't be having discussions or exchanging information only when necessary, but should do so without any need. I also believe that it is very important for Department of Gaming employees to be cognizant of their compact requirements and duties and to be respectful of the tribal gaming environment. For example, every department employee notifies the tribal gaming office when they enter a facility and our machine technicians try to minimize the disruption to gaming operations by conducting inspections during slow times of the day.

Additionally, it is important to share information and best practices. Information sharing is especially important because cheats frequently move from one facility to another. By attempting to gather and disseminate intelligence information throughout the state, it confirms that we all have an interest in ensuring the integrity of gaming. Another method by which information can be shared is via an Indian Gaming Working Group. Created by the Department of Justice to address tribal gaming issues, our working group meets on a quarterly basis and includes members of the FBI, IRS, NIGC, and the Department of the Interior. Additionally, we work closely with the Arizona Tribal Gaming Regulators Association and co-sponsor a training academy for new agents.

Third, the necessary resources must be committed to ensuring the integrity of gaming. This includes a "checks and balances" approach that has served us well. For example, the tribal operation is independently audited on an annual basis to ensure Class III net win is correctly reported. The state has access to this information as well as the ability to communicate with the auditors. Furthermore, the Department's audit unit is comprised of 10 employees, including 2 CPAs. They conduct

both financial and compliance audits on a regular basis. We also have a machine compliance unit that inspects every machine before it enters play at the facility as well as conducting random machine inspections.

I believe that this approach—recognition, communication and cooperation, and committing the necessary resources, will ensure the integrity of tribal gaming and ensure the continued public support for such operations. Thank you for your time and consideration.

The CHAIRMAN. Mr. Brnovich, thank you very much. We appreciate your testimony.

Ms. Stevens, let me ask some questions of you to try to understand what you intend to do with the NIGC, what directions, what plans and so on. First of all, let me ask about Class III gaming in the *Colorado River* decision. What is your sense of the impact these decisions have on the oversight or regulatory capability of the NIGC to believe there is effective regulation? Is there a need for legislation? Is there a need for other actions to address the *Colorado River* decision, in your judgment?

Ms. STEVENS. Thank you, Chairman Dorgan, for that question. What I will say is that I recognize the *Colorado River Indian Tribe* decision did clarify the authority of the NIGC when it comes to Class III MICS enforcement. I understand that there are areas where there is strong tribal-State regulatory, Class III regulatory authority. My personal experience is from Washington, but I was happy to hear Mr. Brnovich's testimony, because it is very, very familiar to the State of Washington.

But I also understand that there are areas where there are gaps. We are, as I mentioned in my confirmation process, and I will tell you today, and it was submitted in my testimony, I am undertaking a comprehensive review of not just the regulations and how the NIGC is working, but of this particular issue, because I know it is of concern to you and members of this Committee.

I have begun that process and have tasked the NIGC staff to begin to look into and assess, review and examine the status of Class III regulatory oversight. Until I have more information and facts in front of me, I really wouldn't be able to say what needs to happen, whether it is legislation or what we can do at the NIGC.

The CHAIRMAN. The jurisdiction here is very important. So I will be anxious to receive the results of your review. Some feel very strongly that there is a void as a result of the *Colorado River* decision and there should be legislative actions to respond. Others feel differently.

How many auditors does the NIGC have? In the matter of the jurisdiction, how many auditors does the NIGC have to audit the 419 tribal gaming operations?

Ms. STEVENS. I don't know the exact answer to that right now.

The CHAIRMAN. Is there staff with you that would know?

Ms. STEVENS. Let me check with my staff here.

Approximately 20, but we can get you an exact answer later.

The CHAIRMAN. I guess that raises the question in my mind of, what kind of audit capability is necessary for the NIGC? Mr. Brnovich says that for the State of Arizona alone, he has 10 people in an audit unit to audit 22 gaming facilities, is that correct?

Mr. BRNOVICH. Chairman Dorgan, that is correct.

The CHAIRMAN. Does that audit unit include the folks you discussed toward the end of your testimony that were looking at the more complex financial transactions?

Mr. BRNOVICH. Chairman Dorgan, the way that the Department of Gaming is organized in Arizona is we have several units. One of them is an audit unit that does conduct regular audits of financial records within the tribal casino, as well as conducting an annual compact compliance review audit as well, to make sure the compact is being complied with. So those are their primary focus and responsibilities, separate from our machine unit, which conducts machine random inspections and everything else.

The CHAIRMAN. Give me the gross number, not just audit, but the folks that are going out checking machines and so forth. How many people do you have?

Mr. BRNOVICH. Chairman Dorgan, there are approximately 110 employees at the Arizona Department of Gaming. Of those 110, 35 of them are sworn peace officers. Many of them are retired Phoenix and Department of Public Safety personnel. So we have an investigation unit. Those folks regularly go out to facilities, usually in teams, forge those one on one relationships at the tribal gaming offices. We have a machine compliance unit with approximately 10 individuals. They are the folks that do the regular machine inspections. Then we also have an audit unit.

The CHAIRMAN. So you have a pretty robust group of people. Coming back to Ms. Stevens, at the National Indian Gaming Commission we have roughly 400 tribal gaming operations. I think you said roughly 20 auditors.

At a prior Committee hearing, we were told that the NIGC was carrying a \$10 million reserve fund. And actually, I don't know what it is now, if your staff would know, the funding for the NIGC is through fees assessed by the tribal gaming facility, or to the tribal gaming facility. So one would expect that the NIGC might have some carry-over funds. But a \$10 million balance seemed excessive to me.

What is the status of the reserve fund, do you know?

Ms. STEVENS. Thank you for that question, and I have actually heard the same thing from tribes. I recall that it was a question that has come up previously during my confirmation process, at which time I committed I would look into that. I am in the process of doing that right now. I have had one budget meeting with our comptroller to try to identify those funds and find the source of those funds and evaluate that going forward.

Certainly as I find out information I will be happy to work with you and members of this Committee to further understand those funds.

The CHAIRMAN. Report to this Committee on that.

I am going to ask two additional questions, then I will call on my colleagues.

Mr. Stevens, Mr. Brnovich describes what we have already known to be a robust State regulatory approach, which means you have a dual approach in Arizona. You have the tribal approach, they are very serious as well, and as I understand it, Mr. Brnovich, the tribes are doing well. Then you have an aggressive State approach.

It is the case, however, that in a number of States, they have a part-time person, perhaps at the Attorney General's office, or maybe one person designated to take a look at what the compact provides and what the gaming facilities are doing. So that to me doesn't really represent the kind of capability you have in Arizona. You have only the tribal regulatory authorities and then kind of an after-thought by some States.

Do you think in those cases, where the State doesn't have what I am told Arizona and California and some others have, do you think there needs to then be more authority for the NIGC to be involved in that separate regulatory oversight? If you want to chat about that just for a second, I will ask Mr. Hogen the other question. Why don't you go ahead and I will ask Mr. Hogen the other question.

Mr. Hogen, you were Chair of the NIGC for how long?

Mr. HOGEN. Seven years.

The CHAIRMAN. You heard the question I asked Ms. Stevens about the number of auditors available, number one, and number two, the regulatory authority, particularly with respect to post-*CRIT* decisions on Class III gaming. Do you feel there is a legislative requirement here to address the *CRIT* decision? And is there a need to further boost the strength of auditors, number of auditors and investigators at the NIGC?

Mr. HOGEN. I think there is a need for a legislative *CRIT* fix. I know how appropriately and jealously tribes guard their sovereignty. And this undoubtedly would be an infringement.

But the way this happened was, when IGRA was passed, Congress decided, well, casino gaming is complicated, and the only people that know how to do that are the States. They were thinking, I think, for there were only a couple of States to do that, Nevada, and New Jersey had just started.

Well, it turned out more States than they thought actually permitted casino gaming. So that is where Indian gaming went. And those States didn't have experience like Nevada did to do that regulation. Arizona is the shining example of how a State regulatory body can look over and work with tribes.

But North Dakota, South Dakota, Minnesota, are places where there just really isn't a State presence. There are other States where there is kind of a presence. But mainly what they are worried about is, are they getting their share of the revenue, under the revenue-sharing arrangements. They really don't regulate the gaming.

When NIGC had the authority, which they exercised before the court decision, it was working beautifully, I think. We weren't infringing, we weren't intrusive. We never closed anybody for not following our MICS and so forth.

But there was the principle of the thing. And that is what the case was decided upon. If I were going to say what the priorities are, I would clarify that NIGC needs and has that authority. And where States are there, NIGC should back off.

In terms of the numbers of auditors, NIGC has good, strong auditors. They could always use more, I expect. They are staying busy now, but they are not staying busy where they really need to be. If they can go where the identified revenue, and it is in Class III,

90 percent of the gaming is Class III, that is where they should be. They are busy, but I don't think focusing on the appropriate priorities.

The CHAIRMAN. Mr. Stevens, I am going to ask you to hold your answer, because I have gone way over my time. I want to make sure that my colleagues have adequate time. So I will come back and ask you that question.

Senator Udall?

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Chairman Stevens, you just heard the discussion with Mr. Hogen. Could you comment on that? What he was saying, is what your priorities are going to be? He talked about having those auditors focus in particular areas. What are your thoughts on what he just said?

Ms. STEVENS. Thank you, Senator Udall. One of the things I do want to clarify is that tribes have duplicative auditing reviews. Many tribes have auditors within their own operation. Their regulatory bodies may have auditors. And then on top of it, the NIGC requires an outside audit, and many States require an independent audit on top of that.

I think if we talk about duplication of services, as Chairman Hogen had mentioned earlier in his testimony, we want to stay away from that, again being mindful of how we use the tribal resources.

What I will say is that my priorities are to review this particular situation and have an informed considered decision about how to address Class III regulatory oversight and if there are any innovative ways that we can draw from States like Arizona and Washington and others, certainly to take that on. But before I make any decisions or take any actions in that direction, I want to gather information.

Senator UDALL. You had a great deal of experience in working with casinos before you came into the job you are in now. Based on that experience, are there any immediate changes that you made or you would like to see? You probably dealt with the National Indian Gaming Commission on a number of occasions. Have you already made changes as a result of what you saw dealing with them on the outside?

Ms. STEVENS. Thank you again for that question. I am in that review process, both externally and when I say externally, I mean dealing with tribes and regulations and what our primary statutory responsibilities are. That is going to be a comprehensive review.

But internally, there are a number of issues that I am still in the process of assessing. One of them is the budget and fee systems. Having come from an environment in management, I want to gather these facts before I make decisions, although it is a priority of mine to make sure that we are using these fees properly and that we are meeting our statutory responsibilities.

Senator UDALL. Thank you.

Mr. Hogen, in your testimony you speak quite a bit about background checks and background investigations of outside managers and other individuals. In your experience, what has been the ex-

tent of the problems that have emerged as a result of the limitations in the ability of tribes to access criminal records and the limitations on NIGC's ability to conduct background investigations? What is the extent of opportunities for bad actors to work their way into tribal gaming facilities?

Mr. HOGAN. To their credit, tribes do a very good job of licensing the folks that are going to work on the floor and so forth. But they also do business with the vendors, people selling Pepsi-Cola, Coca-Cola, paper towels and gaming supplies, machines and equipment. When those folks aren't licensed but are just a vendor, then they can't do the same thorough investigation of those backgrounds.

And so occasionally, there were instances where they found out they were doing business with crooks. And there were other instances where they said, well, we are not going to do business with these folks because we can't do the investigation and maybe they missed a good deal with an honest vendor. So I think you could broaden that opportunity to do a more thorough background investigation. You would make the industry more secure.

I think the vendors would go for it. If they know somebody is going to look at their background, they are not going to come in with a dirty record, probably. They will stay away. And that would be good for the industry.

Senator UDALL. Thank you very much.

Thank you, Chairman Dorgan. I appreciate it.

The CHAIRMAN. Thank you very much.

Mr. Stevens, the question I asked was generally about the different levels of enforcement, the multi-layers of enforcement that most of us believe are necessary and what exists, for example, in Arizona, but perhaps would not exist in some of the smaller States. And therefore, the NIGC would be required to have more enforcement authority there. Your assessment of that?

Mr. STEVENS. I can't really speak about how that State angle works. But we talk about Arizona being the shining example. And I agree with that 100 percent. But I think Indian Country's regulators are a shining example also. They work with local and municipal law enforcement agencies, with the State Attorney General's office to make sure that all laws are adhered to.

In my State of Wisconsin, as a result of our work in gaming, we have a multi-jurisdictional conference that we worked, brought tribes together with law enforcement from throughout the State. That has even become a national conference.

So I think that again, tribes are the shining example here. They work hard, and they work cooperatively with the States. I think they are doing a good job and I really can't speak to where there might be shortcomings on the State side. I think that tribes are working with the States, and I think that they are the shining example in this regulatory situation.

The CHAIRMAN. Yes, the question is not meant to disparage tribal enforcement at all.

Mr. STEVENS. No, I don't think that.

The CHAIRMAN. I think most tribes understand that without effective enforcement, you run a very substantial risk of ruining the very opportunity that is available through Indian gaming. That op-

portunity didn't exist for a long, long, long time, until the *Cabazon* decision. At that point, it opened up this new opportunity.

So I am well aware of the effective efforts of many tribes across the Country to regulate.

As you know, gaming is not available in the States unless there is a compact with the State. So the States have the ability to determine, first of all, whether gaming will exist, and then second, they have a requirement, once they decide it will exist, to provide some oversight. But it is the case I think in a number of States that that oversight is kind of an afterthought, and in other States it is not at all. It is a very significant priority.

Let me also ask about Mr. Hogen's notion of contractors. Ms. Stevens, Mr. Hogen's contention kind of runs into this area of tribal sovereignty and decision-making and so on. He is raising questions about when should the NIGC be able to take a look at contracts and contractors. Mr. Hogen mentioned that when you go in and you see a contractor with gaming equipment itself that is taking too large a portion, and the NIGC has the capability to get that and see it, and then take action, should the NIGC have that capability?

Mr. Hogen, I think you are saying it does not now have the capability. Should the NIGC have that capability and if so, how extensive should it be? He is raising a whole series of questions about the ability of the NIGC to review contracts. Pushback by tribes that say, wait a second, that is our business, not the NIGC's business. Do you have an assessment of that at this point? Are you looking at that?

Ms. STEVENS. There are management contract regulations in place, and I will be looking at those as part of the comprehensive review. But I will say that the NIGC does have authority to approve or disapprove management contracts. There are detailed definitions about what management provisions are, not necessarily that they are labeled management contracts, but provisions. Those provisions may not necessarily always exist in what we would deem as management contracts.

We have seen in recent incidents lately that if there are provisions in lending agreements, the NIGC does need to approve or disapprove those. Tribes are, and in response, and maybe since Phil's departure, the NIGC has been responding to tribes submitting various types of contracts to us for management provisions.

The concern is if there are management provisions in any contract, whatever vehicle or label they might have, there is a possibility that those might not be valid. So what we are doing is in response to tribes requesting review of lending agreements, other types of contracts for management provisions, we have been providing, the general counsel's office will provide opinions about provisions in those types of contracts or agreements.

So we are being proactive in response to incidents that have happened of late. It doesn't have to necessarily be labeled a management contract for us to review it for management provisions or approve or disapprove.

The CHAIRMAN. Mr. Brnovich, you said you are a former U.S. Attorney?

Mr. BRNOVICH. Yes, that is correct.

The CHAIRMAN. From your perspective now, as a State regulator, give me your assessment of the Federal law that establishes and provides the jurisdiction for the NIGC. Are there areas where you believe there are shortcomings? If so, what are they?

Mr. BRNOVICH. Chairman Dorgan, once again, I believe the folks at NIGC would probably be in the best position, and I know that former Chairman Hogen was a United States Attorney. So he probably has a very good perspective on this as well.

I do believe that the mechanism, the gaming compact we have in place in Arizona addresses many of the issues or the concerns that folks generally start talking about when they talk about any form of gaming, whether it is Indian or other commercial establishments. And that is the need to have a vigorous structure in place that fosters that communication, that fosters those background investigations, certifications.

In Arizona, our compacts provide that any provider of vendors and gaming devices, manufacturers, have to be certified. Gaming services over a certain threshold, they have to be certified. So there are a lot of those checks that are meant to prevent this from coming in.

But I do know, based on my experiences as a former Federal prosecutor, that no matter what system you have in place, in any cash-intensive industry, folks are going to be tempted. They are going to try to, whether it is through the front door, trying to rob, make a theft from an armored car, or whether it is employee thefts, crimes of opportunity where people maybe manipulate gaming tickets, voucher tickets, there are going to be those opportunities and people will try to take advantage of them.

I do know of one case that I had where an employee had stolen hundreds of thousands of dollars from a tribal gaming facility. He was ultimately caught because there was MICS, there was minimum internal control standards, in place via our State compact that required dual signatures. And he was creating falsified jackpot slips. And he was falsifying and signing them with one signature. Someone at the cage said, wait a minute, aren't there supposed to be two signatures on this? Told the supervisor and that ultimately led to the unraveling of him, for a year and a half period, of having submitted false jackpot slips. And it was done because someone at the cage, someone who was fairly new, who was just trained, said, wait a minute, there are supposed to be two signatures on this, why isn't there?

So I do think it is important to have controls and standards in place in order to not only prevent things from happening, but once they are happening, once they happen, to ensure that those crimes are not only detected but successfully prosecuted. That serves as a deterrent.

The CHAIRMAN. And those minimum internal control standards are standards that Mr. Hogen, you testified about previously, before this Committee on Indian gaming, particularly with respect to Class III gaming, I believe, did you not?

Mr. HOGEN. Yes. Under the CRIT decision, the Class III MICS are basically advisory only, although a number of States incorporate or adopt the NIGC MICS. And in a couple of cases, secretarial procedures have been implemented where compacts couldn't

be obtained. And NIGC has been tasked to do some Class III regulation. You need Class III MICS for that. And particularly in California, a number of tribes, to try and push the State back a little bit, have invited the NIGC in, adopted the NIGC MICS. For that reason, they need to be kept current. I think it works best when those are the rules.

The CHAIRMAN. This is a really important set of issues. Mr. Brnovich said it appropriately, that when you have a cash-intensive industry, in this case \$25 billion, \$26 billion dollars, there are a lot of interests that want to find their way and put their fingers into that industry.

Senator McCain, welcome. I said at the start of this hearing, we have really focused in this Congress on the Indian Health Care Improvement Act, which is now law, the Tribal Law and Order Act, which will be signed at the White House this afternoon. We have had great success on a couple of really big issues. But we have not focused on Indian gaming. I wanted to have an oversight hearing today, at least to begin a process of this discussion.

Mr. Hogen, who left as Chair of the NIGC, counseled an agenda during Senator McCain's chairmanship in which we had a number of hearings on these issues, on the CRIT fix issues and others. I appreciate, Senator McCain, your being able to come by. Let me now call on Senator McCain for inquiry.

**STATEMENT OF HON. JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA**

Senator MCCAIN. Thank you, Mr. Chairman, and thank you for your stewardship of this Committee and the many successes and accomplishments under your chairmanship. It has been a great honor and privilege for me to have had the opportunity to serve with you on addressing a number of important issues to Indian Country and the Nation.

Chairman Hogen, maybe you could just give the Committee, for the record, an assessment of what you think, in your view, the record of the Indian Gaming Commission's original charter, as you understood it, and intervening events to how effective do you think that the Indian Gaming Commission can be today?

Mr. HOGEN. They were writing on a blank slate when they started back in, they actually got going, I think, in 1992. And it was a real challenge and a real adventure. But they undertook it with dispatch and put together an effective regulatory organization that has good relationships with tribes for the most part, and States, and have fostered the dramatic growth of the Indian gaming industry. That doesn't mean it is perfect.

I think the most effective thing that happened in the relatively early days was the adoption and development of Minimum Internal Control Standards, a handbook that casinos and bingo halls could follow to say who takes the money out of the slot machine and who takes it to the vault and who counts it, that sort of thing. That brought all of Indian gaming up to a more professional level and saved a lot of dollars from going out the back door. That was a dramatic development and an improvement.

At the time they were adopted, there was the argument, well, do you really have the authority to do this for the casino gaming for

Class III, isn't that supposed to be left to the States and the tribes under the compacts? NIGC said, no, we have that authority. But the court agreed with the tribes. So we were kind of unceremoniously booted out of the oversight of much of the Class III gaming.

Senator MCCAIN. Which has had what effect?

Mr. HOGEN. Well, in places like Arizona, it had little effect, because Arizona has a good, strong, effective State regulatory group, pursuant to their compact, that is they are there all day, every day. In many other States, there isn't any State presence, primarily because they don't have any experience in regulating casino gaming, because they don't otherwise do it.

So I think tribal gaming regulators do a better job if somebody is looking over their shoulder. I know I sure do when I am doing something.

Senator MCCAIN. Is there sufficient authority for the Indian Gaming Commission to do that?

Mr. HOGEN. Under the *CRIT* decision, not with casino or Class III gaming, 90 percent of the gaming.

Senator MCCAIN. Does that concern you?

Mr. HOGEN. Yes, it does. Yes. Not to say that it is bad out there every place. Absolutely not. Most places it is great. But there are soft spots, and they can't and won't be effectively addressed, I think, unless or until that authority is restored or clarified.

Senator MCCAIN. So it is your view that Congress should act legislatively to clarify that situation?

Mr. HOGEN. That was my view when the Congress had that legislation before it, and that is still my view, yes, Senator.

Senator MCCAIN. And is that view shared by Indian Country?

Mr. HOGEN. Well, some in Indian Country. It is not universally held, no. They jealously guard sovereignty, as they should. And they view that as an incursion. But you need to protect that resource, and I think this is the best way to do it in this complex environment.

Senator MCCAIN. So does that open it to problems such as the situation that happened with Mr. Ivy Ong and the Seminole Nation?

Mr. HOGEN. Well, that was back in the days when NIGC still could do Class III gaming.

Senator MCCAIN. I guess my question is, because of the *CRIT* decision, has this made it more or less likely that corruption can creep into Indian gaming?

Mr. HOGEN. I am afraid more likely. One of our auditors was telling me shortly before I left about when he was at a training conference. A tribal auditor came up to him and said, we have found that we have variances between what the meters say that machine takes in and what the actual count is. Our manager says, just rely on the actual count. Don't worry about that. Should we be concerned?

Well, of course they should be concerned, because that is the basic tool you use to verify is the equipment working, is somebody stealing the money. But NIGC didn't have the authority, because it was Class III. Those kinds of things are unfortunate but they

happen. If NIGC had that Class III authority, they could go there when asked or when they observed it.

Senator MCCAIN. Are you concerned that many tribes, that there is no separation between the Gaming Commission and the tribal authorities?

Mr. HOGEN. There needs to be independence of regulation. That is not always true.

Senator MCCAIN. Mr. Chairman, I have been worried ever since the *Colorado River* decision. I don't believe that it is an infringement on tribal sovereignty when the majority of the patrons of Indian gaming operations are non-Indians. If it were strictly an Indian operation, I would be less inclined to try to repair this loophole that has been created by the CRIT decision. I appreciate your having this hearing.

I think we need to stay on top of this, because there are many experts on gaming that believe that there will be some scandals because of the kind of oversight and regulation that exists in the State of Nevada. I have always used that as an example of how we can prevent corruption from creeping into gaming operations. And even in Nevada, it is a day to day operation.

So as a strong supporter of the *Cabazon* decision and one who believes in Indian sovereignty, I remain deeply concerned. I thank you for holding this hearing, Mr. Chairman.

The CHAIRMAN. Senator McCain, you used the word scandal. I was just thinking, you and I know a fair amount about that, having chaired the hearings. You chaired, and I was the Ranking Member of the hearings on the Abramoff issue that related to the theft from Indian tribes. That was an important body of work by this Committee, and I appreciated your leadership there.

I said when you came in that when you were Chairman, you held a number of hearings on the gaming issue. I just described to Mr. Stevens, there is no notion by me that tribal authorities don't take seriously their responsibility for oversight and regulation. I do think there needs to be effective dual oversight capability. Arizona is an awfully good example of that; a serious, thoughtful, sizeable agency that pays a lot of attention to it.

There are some States where there is a half-time person in the Attorney General's office that is tasked with doing it. That is not effective.

What we wanted to do was put on the record today a discussion about this. Mr. Hogen, you said you drove here. Is that really true?

Mr. HOGEN. Yes, it is.

The CHAIRMAN. From St. Paul, Minnesota?

Mr. HOGEN. I drove in from the Black Hills of South Dakota. I stopped to see my grandson, my three-month old grandson in Minnesota and wrote my testimony in a Denny's in Indiana.

[Laughter.]

The CHAIRMAN. We appreciate your accepting the invitation as a former Chair to come to this hearing. You know there are airplanes that are available.

[Laughter.]

Mr. HOGEN. Thank you.

The CHAIRMAN. But it is nice to see the Country as you go along. I appreciate very much your willingness to be here.

We have a vote starting in about five minutes. Senator McCain, do you have anything?

Senator MCCAIN. Mr. Chairman, could I just ask Chairwoman Stevens, what does she think of this exchange that Mr. Hogen and I just had? Do you share those same concerns that he has?

Ms. STEVENS. Thank you, Senator McCain. I am actually really glad that we are having this hearing early on, so I can hear your concerns. I really appreciate former Chair Hogen's assessment and his concerns, something that I certainly can learn from. The aftermath of the *CRIT* decision is of concern to me. I was mentioning to the Committee earlier that the top priority is to review this situation so I can get a better understanding.

Senator MCCAIN. Do you have any understanding so far?

Ms. STEVENS. I am in the process of working through this regulatory review.

Senator MCCAIN. Do you have any understanding so far?

Ms. STEVENS. I do in areas like Washington State, that has something equivalent to the State of Arizona. And I know that they do work in some areas. I know that as you have mentioned, and Chairman Dorgan has mentioned, there are areas that need improvement. I want to know what those are.

It is complicated, because there are 28 States with different, varying compacts. And I want, as much as you do, an assessment of the post-*CRIT* world in Indian Country.

Senator MCCAIN. I hope you will give us some recommendations when you reach some conclusions.

Mr. Stevens, you probably disagree with some of my assertions there.

Mr. STEVENS. Mr. Chairman, we are happy to convene the leadership of Indian Country. In the past discussions around this matter, we convened probably 16 national tribal leaders in conjunction with working with the National Congress of American Indians. We continue to assert, and I said earlier in my testimony, it is in my submitted testimony, \$350 million to regulate this industry. That is the kind of money that is paid through our industry. Our people, our leaders and our regulators have made it our top priority.

And we are doing, I believe, more. We talked about the MICS. Ninety-five percent of that exists in Indian Country at that level if not stronger. And as far as looking over our shoulder, Phil talks about looking over our shoulder, we have our tribal constituents looking over our shoulder. We have the State. We have local law enforcement looking over our shoulder.

And we answer to the leadership in our tribes. Our tribes are very efficient at this level. After 25 years, we believe we are doing a good job. At the same time, with no disrespect to your feelings, we would be happy to convene the NIGA-NCAI task force to reevaluate this issue. But again, we are concerned about the strength of tribal sovereignty as we move forward.

Senator MCCAIN. Thank you. But I am not comforted by the knowledge that local authorities are looking over your shoulder. Because as you just asserted, tribal sovereignty does not allow local authorities to oversight.

Mr. Brnovich, what have you learned?

Mr. BRNOVICH. Chairman Dorgan, Senator McCain, thank you. We are fortunate in Arizona that our gaming compacts specifically provide that the Minimum Internal Control Standards must be incorporated and must be followed by the tribes. So we are in a little bit of a different situation than some other folks in Indian Country, because we have those Minimum Internal Control Standards, and we have a vigorous compact that provides for various layers of protection, everything from certification of vendors, employees, surveillance requirements.

So we are in a different situation. I feel uncomfortable commenting generally on the MICS. I just know that they work in Arizona. And I think that because gaming is such a cash-intensive industry, you do have to have that regulation and oversight, because there are going to be constant attempts at penetration by either organized or even unorganized criminal elements.

Senator MCCAIN. Mr. Stevens, I suggest that you and the NCAI and NIGA have a look at what we have achieved in Arizona by virtue of agreements that were freely entered into, which I think has been of significant beneficial effect and provides, I think, some confidence on the part of all of us that there are significant safeguards against corruption. And Mr. Stevens, the fact is that wherever money is exchanged in the way that it is in gambling, it is open to corruption. It is just one of the realities of life. The more oversight and cooperation we can have between State and local government and tribal authorities, the better off we are, and the more success, I think, will accrue to Indian gaming.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator McCain, thank you very much.

Let me just finally say, Ms. Stevens has been in office only one month. I recognized when I invited her that we were not going to be able to have someone here that would give us a full complement of new policies she has developed.

But I also wanted her to be here to give us her impressions. I invited Mr. Hogen for a very specific purpose. He has been in this position for seven years, has seen the substantial growth of Indian gaming. And I appreciate very much not the fact that you wrote your testimony at a Denny's, but I appreciate very much your driving here from the Black Hills of South Dakota and giving us, once again, the benefit of your experience.

Mr. Stevens, thank you very much, and Mr. Brnovich, thank you very much for coming. Chairwoman Stevens, thank you very much for your work.

This hearing is adjourned.

[Whereupon, at 10:43 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. CARLOS BULLOCK, TRIBAL COUNCIL CHAIRMAN,
ALABAMA-COUSHATTA TRIBE OF TEXAS

Introduction

Mr. Chairman and members of the Committee, thank you for the opportunity to provide testimony. My name is Carlos Bullock and I am the Tribal Council Chairman of the Alabama Coushatta Tribe of Texas. Today, we request that you correct a drafting error in our Restoration Act such that, consistent with Congressional intent, we are to be treated the same as other federally-recognized Indian tribes with respect to gaming on our reservation. It is unfortunate that we have to make such a request; but, the courts have told us that, regardless of how sympathetic they may be to our position, we must ask Congress to correct the problem.

Brief History

Our Tribe is known to be traditional and religious. We still speak our native language and practice our traditional ways. Our reservation, once vast, is now about 7,000 acres of largely forest area. We are excellent stewards of our resources and have won awards for our forestry conservation program.

We also have a long, rich history in Texas. The Alabama and Coushatta were originally separate tribes, both of whom migrated from Louisiana to east Texas in the early 1800s. Both participated in the Mexican War of Independence from Spain. The Coushatta Tribe, in particular, rendered valuable service to Sam Houston during the Texas War for Independence. They served as guides for Houston's army on its way to victory at San Jacinto and slaughtered their cattle to feed starving women and children fleeing Santa Anna's army.

Because of this service, within less than a year after Texas won its independence at San Jacinto in April 1830, the Republic of Texas enacted its first Indian bill. An Indian agent for the Coushatta and Alabama Tribes was established and appropriation was made to cover the cost. In 1840, the Fourth Congress of the Republic of Texas authorized President Lamar to set aside land located in rural east Texas for each of the Coushatta and Alabama Tribes.

Establishment as a Federally Recognized Tribe

By 1928, the United States authorized the Secretary of the Interior to purchase land for the benefit of both the Alabama and Coushatta Tribes in Polk County, Texas, resulting in the initial federal recognition of the Alabama and Coushatta Tribes. Because the land was deeded to both the Alabama and Coushatta Tribes, the name "Alabama and Coushatta Tribes of Texas" was used to describe the Tribes and the name was, thereafter, used for federal recognition purposes.

In 1934, Congress passed the Indian Reorganization Act, also known as the Wheeler-Howard Act. The Act authorized tribes to organize for their welfare and to exercise local self-governance. Pursuant to the Act, the Alabama and Coushatta Tribes organized as one tribe under a constitution and bylaws approved in 1938. However, as described below, our government to government relationship with the Federal Government was cut short as a result of federal policies designed to assimilate and terminate tribes, such as ours.

Termination of Federal Status and Transfer of Trust Responsibility to State of Texas

As a result of the federal termination policies of the 1950s, our Tribe's status as a federally-recognized Indian tribe was terminated in 1957. Unlike most termination actions in the 1950s, rather than simply terminating the federal government's trust responsibilities, Congress transferred that responsibility to the State of Texas. In 1953, Texas Governor Allan Shivers wrote a letter to the Assistant Secretary of the Interior, Orme Lewis, stating that both the Alabama and Coushatta Tribes of Texas wanted trust responsibility for their lands transferred to the State of Texas and that the Texas Legislature had agreed to accept the trust responsibility. In fact, in 1954,

President Eisenhower signed Public Law 627, 83d Cong.(68 Stat. 768), terminating the trust relationship between the Tribe and the United States and transferring all trust responsibility for the Tribe to Texas.

From 1954 through 1983, Tribal affairs were administered by the Texas Board for Texas State Hospitals and Special Schools. Although monies appropriated for the benefit of the Tribe were subject to fluctuation, we were able to survive and we continued to live on our lands in east Texas.

The trust relationship with Texas lasted only until 1983 when the Texas Attorney General, Jim Mattox, issued an opinion that the trust relationship violated the Texas Constitution. The fallout from that opinion was swift and devastating. The State Comptroller of Public Accounts, Bob Bullock, began imposing State severance taxes on Tribal oil and gas royalties. The Appraisal Districts of Polk County issued notices of appraised value on reservation trust lands. Later, the Texas Legislature cut off appropriation of all State funds to our Tribe.

As State Comptroller Bob Bullock described the resulting situation in Texas, "These Indian chiefs better get over to the A.G.'s office and light up their peace pipe if they want to keep getting this wampum, because Mattox is holding the tomahawk now."

The Restoration Act

Fortunately, in 1984, Congressmen Charlie Wilson and Ronald Coleman introduced legislation to restore the Tribe to federal recognition. Congressman Wilson stated that "the principal purpose of this legislation is to give the Alabama-Coushatta the same status as other Indian tribes in the United States." It took several years, but finally, in 1987, when our Tribe was on the brink of losing all its assets to the State of Texas, Congress restored our status as a federally-recognized Indian tribe. The passage of the Yselta Del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act, Pub. Law No. 100-89, August 18, 1987 (the "Restoration Act") was seemingly a huge victory for our Tribe.

It was not until later that we would see that, due to a drafting error in the Restoration Act which was compounded by mistaken court decisions by the Fifth Circuit Court of Appeals interpreting our Restoration Act, we would not be able to enjoy the same rights and privileges as other federally-recognized Indian tribes with respect to gaming.

This result is particularly disturbing as the record demonstrates that it was intended that when Congress restored our federal status that we would achieve full status as a federally-recognized tribe. Indeed, Congress intended to provide us with the authority to govern gaming on our lands consistent with the landmark Supreme Court decision, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which was issued just months before the language of the bill was being finalized. Yet under the precedent created by erroneous court decisions issued by the Fifth Circuit, we are now somehow less of a tribe—similar to a second-class citizen.

Today, the situation on the reservation is one of desperation. The average median household income for tribal members is about \$10,000 per year. Only one in three people are gainfully employed and only one out of every 100 members has been able to pursue and attain a college degree. Diabetes is rampant, affecting more than 50 percent of our Tribe and access to health care is extremely limited. Every summer, our I.H.S. funding runs out. This July, we went on "priority one" status, meaning that our tribal members can only see a doctor if their illness or injury is potentially fatal. We urgently need to improve our situation and provide a better quality of life for our members. We know we can do so by offering gaming on our tribal lands.

Further, despite its claims to the contrary, the State of Texas is a gaming state. The State itself operates one of the largest and most progressive state lotteries. There is commercial bingo, horse racing, dog racing, cruises to nowhere and carnival nights. Also, the Kickapoo Tribe of Texas conducts gaming in Texas. Yet, due to a quirk in federal law, the Alabama Coushatta may not engage in the same activities as the State or the Kickapoo Tribe. With this Texas stands alone where federally-recognized tribes within the same state are treated differently for gaming.

Notably, we are not seeking additional rights or more advantageous rights to game. We are not attempting to conduct off-reservation gaming. We are simply asking for the same rights and privileges as any other federally-recognized tribe under the Indian Gaming Regulatory Act. We believe it is the fair thing to do given the facts of our situation. Moreover, we recognize that our gaming will be regulated under the Act and we accept that regulation.

It should also be noted that our Tribe's attempts to seek restoration were initiated long before the arrival of Indian gaming and occurred in direct response to the State's oppressive policies that sought to destroy our way of life. In fact, when the initial bill, H.R. 6391, seeking to restore the Alabama-Coushatta Tribe (and another

tribe in Texas, the Ysleta del Sur Pueblo), was introduced in 1984, it made no mention of our right to conduct gaming activities.

In 1985, Congressmen Ronald Coleman and Charlie Wilson reintroduced the Restoration Act as H.R. 1344 and again, there was no mention of gaming. Indeed, Congressman Wilson stated that "the principal purpose of the legislation is to give the Alabama-Coushatta Tribe the same status as the other Indian tribes in the United States." During this period, most tribes were not engaged in any gaming activities other than a few tribes that had bingo operations, and our Tribe was not engaged in any gaming activities.

However, in late 1985, State Comptroller Bullock, whose office regulated charitable bingo in Texas, became concerned that our Tribe might, in the future, operate unregulated bingo and demanded changes to the bill. He employed scare tactics, stating, "If this bill passes like it's written, we might as well get the highway department to put up a sign at the state line that says 'Gangsters Welcome.'"

In 1986, faced with deteriorating financial conditions and increasingly desperate to pass the Restoration Act, we provided a Tribal resolution to Congress not to operate gaming. Again, at that time, the Supreme Court had not decided the *Cabazon* case, detailed below, so the only thing we thought we may be giving up was bingo.

In February of 1987, the Supreme Court decided the case of *California v. Cabazon Band of Mission Indians*, holding that tribes have a federal right to govern gaming activities on a tribe's Indian lands, consistent with State public policy. Thus, under *Cabazon*, the Alabama-Coushatta would be allowed to engage in gaming activities because Texas allowed bingo at that time, and now allows horse racing, dog racing and a state lottery.

After the *Cabazon* decision, the Restoration Act (then H.R. 318) was significantly amended to codify the rationale and holding of *Cabazon*; see Testimony of Alex Skibine, 133 Cong. Rec. H6972-75. The House concurred with the Senate's amendments to H.R. 318.

Significantly, at all times during the consideration of the Restoration legislation (H.R. 318), Congressman Morris K. Udall was the Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, which had general jurisdiction over Indian legislation and affairs and had exclusive jurisdiction over H.R. 318 and all Indian gaming legislation. All Committee reports on bills, including those on H.R. 318, were prepared under the supervision of, and approved by, Chairman Udall; and as I am sure the members of this Committee are aware, he was very well-respected and highly regarded and his remarks should have carried great weight.

When Congressman Udall asked for and received unanimous consent for House concurrence with the Senate's amendments, he confirmed that our Tribe, like all other tribes, would have the benefit of the ruling in the recent *Cabazon* decision:

The Senate amendment makes changes to Sections 107 and 207 of the Bill. These sections deal with the regulations of gaming on the respective reservations of the two tribes. It is my understanding that the Senate amendments to these sections are in line with the rationale of the recent Supreme Court decision in the case of *Cabazon Band of Mission Indians v. California*. This amendment, in effect, would codify for these tribes the holding and rationale adopted in the Court's opinion in the case.

133 Cong. Rec. H6975.

The pertinent language from the Restoration Act is as follows:

Section 207. GAMING ACTIVITIES.

(a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in tribal resolution No. T.C. 86-07 which was approved and certified on March 10, 1986.

(b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 736(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be con-

strued as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Indian Gaming Regulatory Act, 25 U.S.C. § 737.

Though the intent of Congress was to allow the Tribe the same rights as other tribes to operate gaming, ambiguity exists in the Restoration Act because the 1986 Tribal resolution not to operate gaming was mistakenly retained within the Act, which otherwise codified *Cabazon*. Professor Alex Skibine, then the principal Indian Affairs Committee staff member who was assigned to the bill and who is now a professor of federal Indian law at the S.J. Quinney College of Law at the University of Utah, has testified that the Tribe's resolution was mistakenly left in the final draft and should have been omitted.

Because of this mistake, the Fifth Circuit Court of Appeals has held that our Tribe is not covered by the 1988 Indian Gaming Regulatory Act, but, rather, gaming for the Tribe is governed by the Restoration Act and that gaming on our lands is illegal. The Court relied largely on the 1986 pre-*Cabazon* tribal resolution to overcome the more general *Cabazon* language and barred the Tribe from gaming. In other words, the Court ignored the intent of Congress.

Because of the failure of the Court to follow the law, the Court's opinion has been criticized by legal scholars and those with personal knowledge of the facts surrounding the passage of the Restoration Act:

It would seem to be a clear case of judicial activism in which the courts have effectively undermined the intent of Congress and even the authority of Congress under the Commerce Clause to determine Indian law and policy. Only the Congress can correct the court's errors.

Testimony of Virginia W. Boylan before the Senate Committee on Indian Affairs, June 18, 2002.

Most egregious in the Fifth Circuit opinion is the concept that a court can somehow alter the rights granted by Congress to tribes and create different classes of Indian tribes. The Court, in this case, undermined the intent of Congress and severely impacted the rights that we would otherwise enjoy as a federally-recognized Indian tribe, resulting in a severe injustice that should not be left uncorrected.

Conclusion

We request that language be added to Section 207 of the Restoration Act clarifying that it was not the intent of Congress to treat the Alabama-Coushatta differently, and that the Tribe should have the same rights, and be regulated in the same manner, as other federally recognized tribes under the Indian Gaming Regulatory Act.

Accordingly, in the interests of fairness, we ask for your help in correcting this injustice and allowing us the opportunity, as Congress intended, to be restored fully to federal recognition and to have the same status, rights and obligations as do all federally-recognized Indian tribes, as it pertains to gaming and all other forms of economic development.

Thank you for your time.

PREPARED STATEMENT OF HON. STANLEY "BUCK" SMITH, CHAIRMAN, CONFEDERATED
TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

On the behalf of the Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon, I, Stanley "Buck" Smith, Chairman of the Warm Springs Tribal Council, hereby submit this testimony for the Senate Committee on Indian Affairs Oversight Hearing on Indian Gaming, held July 29, 2010 in Washington, D.C., and request that it be made a part of the hearing's official record.

Mr. Chairman, Members of the Committee, I am Stanley "Buck" Smith, currently the Tribal Council Chairman of the Confederated Tribes of the Warm Springs Reservation of Oregon. Prior to our most recent election three months ago, I served for two previous three-year terms on the Tribal Council including one term as Vice Chairman. Throughout my service on the Warm Springs Tribal Council, we have been working hard to fulfill the directive given to the Council by the Warm Springs tribal membership in a 2001 referendum. That referendum, approved by 80 percent of the tribal voters, told us to pursue a gaming development in the Columbia River Gorge, which is less than an hour's drive north of our Reservation and is within the heart of our traditional homeland and 1855 Treaty ceded area along the Columbia River. Because the Gorge is our homeland where we have always lived and fished, that is where our forefathers negotiated and signed our 1855 Treaty with the United States and where, today, our tribal members exercise Treaty fishing, hunting and other off-Reservation rights. An Indian Claims Commission judgment in 1967 legally confirmed what we have always known—that the Gorge was our land, within the exclusive use and occupancy of our Treaty signing forefathers in 1855.

In the course of pursuing a gaming project in the Gorge, first on a gaming-eligible trust allotment owned by the Tribe near Hood River, Oregon and, later, at a mostly empty industrial park in community of Cascade Locks, we have learned much about the tremendous human and financial cost imposed on the Tribe by the numerous delays and changes in Interior Department policies and rules imposed on us by the Bush Administration and now by the Obama Administration.

In my remarks today, I want to focus just on the unwarranted costs imposed on the Tribe in connection with the off reservation gaming application process. First, however, I want to explain that Warm Springs has undertaken the effort to develop a gaming project in the Gorge all on its own. We have no financial backer or partner. It has been entirely our own tribal funds that have paid for this effort—and have had to pay the huge additional costs incurred due to the Interior’s delays, changes in policy and added requirements. Second, I want to explain why our nearly 5,000 tribal members voted overwhelmingly in the 2001 referendum to have our Tribal Council pursue this project. The reason is simple: we live on a beautiful but very isolated Reservation that has always depended on the Reservation’s timber resources to generate revenues to provide essential governmental services to our people and others who come onto our Reservation. However, like most rural Northwest communities, the Warm Springs Reservation has suffered greatly from the collapse of the timber industry over the past 20 years. Just to show how badly the timber collapse has hurt us, in 1994, Warm Springs generated \$23.8 million in timber stumpage. This past year, 2009, we received only \$1.5 million from our timber resources. Due to this huge decline in tribal revenues, and also due to the current national economic downturn that has hit rural Oregon especially hard, our Reservation has an unemployment rate of nearly 60 percent.

As you can see, our Tribe’s financial circumstances are very, very bleak. We simply must find a major new source of revenue to fund our government and to create jobs for our membership, 80 percent of whom live on the Reservation, mostly in substandard housing. While we continue to try to attract job-creating industry to the Reservation and we continue to investigate a number of business development possibilities, the only opportunity we see with the potential to turn around our dire financial situation and create hundreds of jobs for our tribal members is the Gorge casino.

Given our worsening financial situation, and considering that we must bear all of the costs of pursuing IGRA Section 20 and gaming fee-to-trust approval for the Cascade Locks gaming project, we are understandably very resentful of any costs unnecessarily added by the Interior Department due to the following:

- Interior’s long and unexplained delays in processing our application;
- Interior’s unnecessary and unannounced changes in the policies and rules we must follow to obtain approval; and
- Interior’s unjustified additional requirements imposed on our application.

Let me explain what I mean.

In early April, 2005, Warm Springs filed with the BIA our IGRA Section 20(B)(1)(A) off-reservation gaming application and our 25 CFR 151 fee-to-trust application to take the 25 acre Cascade Locks industrial park site into trust and have it determined to be eligible for gaming. We came to this site at the invitation of the Cascade Locks City Council and Port Commission, the Hood River County Commission and the Governor of Oregon, Ted Kulongoski. These local community leaders and the Governor asked us to develop this site because our project is the type of tourism-based development that is promoted in the towns and cities of the Columbia Gorge by

the Gorge National Scenic Area Act. The local community and the Governor also urged the Tribe to take the Cascade Locks industrial park site into trust instead of building a casino on our gaming-eligible tribal trust land located 17 miles to the east on a forested and pristine hillside outside the town of Hood River.

Immediately after we filed our IGRA Section 20 application and fee-to-trust application we joined with the BIA Portland Regional Office and contracted with an environmental engineering firm to do the NEPA work, which would result in a full Environmental Impact Statement. The BIA, the environmental contractor and the Tribe all estimated the full NEPA process, ending in a final EIS and a Record of Decision, would take 18 to 24 months and the contractor would be paid \$2,800,000 in tribal funds. It is now over five years later, the NEPA process is not finished and the Tribe has paid the contractor over \$4 million with \$78,000 still to be paid to complete the process and have the Record of Decision published in the Federal Register.

Why has the NEPA process taken so long and cost so much more than we were told? The reason is simple, Interior Department officials in Washington, D.C. deliberately delayed and extended the process and thereby increased the cost. It began early in the process, when Interior officials ordered the BIA in Portland reopen the scoping phase, adding months to the process. Then Interior officials in Washington, D.C. required that the EIS include study of one additional alternative, and then, later, another alternative. Those additions to the EIS added at least a year to the process and required the Tribe to pay the contractor over \$700,000 more in fees. Then, Interior officials required that the public comment period on the draft EIS be enlarged from the usual 30 days with one public meeting to 90 days with five public meetings, again adding months and thousands of dollars to the cost of the NEPA process.

Then, there have been the very long and unexplained delays in the NEPA process. The draft EIS for the Cascade Locks project was ready for publication in the Federal Register of the Notice of Availability for public comment in June, 2007. Usually, it takes just a few weeks for the NOA to be published in the Federal Register. But, in our case, the Department did not make the draft EIS available to the public until nearly nine months later, in February, 2008. At the time, officials in Secretary Kempthorne's office said the reason for the delay was so that the Administration could develop a new Indian gaming policy. Now, in an echo of the past, the final EIS for the Cascade Locks project has been awaiting approval for Federal Register publication since September, 2009 — over ten months. Again, using the same justification as the last administration, officials in Secretary Salazar's office explain the delay by saying that they are working on a new Indian gaming policy. Never mind that the final EIS is not a decision document and NEPA does not dictate whether the project will be approved, Secretary Salazar's de facto moratorium on Indian gaming decisions has inexplicably been extended to block or indefinitely delay routine NEPA actions such as release to the public of our final EIS.

Our problems and frustrations with delays and added costs go well beyond the NEPA process. Since we filed our fee-to-trust and gaming eligible application in April, 2005:

- Interior has reversed past practice and overruled precedent by refusing to approve our Class III gaming compact with Oregon's governor because the gaming site is not yet in trust;

- Interior has modified the Office of Indian Gaming Management's "checklist" requirements for the gaming acquisitions process with the clear objective of making the process more time consuming, costly and difficult;
- Interior has promulgated new regulations governing the IGRA Section 20 process with no grandfathering, thus forcing Portland BIA staff and the Tribe to "consult" with a dozen additional cities and counties more than three years after consultations under the former rules had been completed;
- After the time period for additional consultations with the surrounding community was concluded, Interior granted consultation status to a tribe located 100 miles from the gaming site, even though the new regulations call for such tribes to be no more than 25 miles from the gaming site;
- Interior announced in an internal policy guidance memo a new "commutability" standard, which only later Warm Springs was determined to have met after Secretary Kempthorne directed the Acting Deputy Assistant Secretary for Indian Affairs personally to drive the distance between the Cascade Locks gaming site and the Reservation.
- After ceasing all Central Office processing of off reservation gaming documents, including NEPA documents, in September 2009 in order, reportedly, to conduct a review of Indian gaming policy, Secretary Salazar issued a June 18, 2010 Memorandum on Decisions on Indian Gaming Applications to Assistant Secretary Larry Echo Hawk. The memo instructs the Assistant Secretary to "undertake a thorough study of these [off reservation "two-part"] issues and review current guidance and regulatory standards to guide the Department's decision-making in this important area." After a nine month delay during which the Secretary's office was supposedly conducting its own gaming policy review, the Secretary's memo, which neither acknowledges or mentions any progress on its gaming study, essentially instructs the Assistant Secretary to begin a gaming policy review all over again, starting from scratch. The memo goes on to note that, in this renewed study, "delay" should be expected and that the Department should "take the necessary time" for the review.

These changes in the rules, policies, and procedures within the off reservation gaming process have proven to be extremely time consuming and costly. Coupled with the added costs in the NEPA process, Warm Springs officials estimate that we have spent from \$10 million to \$11 million of our own diminishing funds pursuing this project as set out in IGRA and federal regulations and shifting policies.

In all honesty, the Tribe cannot afford this process that has lasted far longer and cost far more than BIA officials led us to believe when we started. Maybe that is what Interior officials in the last administration and in this administration hope; that we will exhaust our resources and simply give up in frustration. But we cannot afford to do that. We have been in the process too long—almost ten years since our membership passed the Gorge casino referendum—and it is too important to the future of our people and our land to quit now because we have been treated so

unfairly. Instead, we must insist that this administration promptly and fairly complete consideration of our application. We will rely on our justifiable expectation that this administration will act in good faith to implement the federal laws enacted by Congress to assist tribes with gaming-related economic development. To that end, we wrote to Interior officials demanding that they comply with federal statutes and regulations requiring timely completion of the NEPA process. As we stated in our letter, the unjustified delay in completing the NEPA process for our project is not only unfair, it is unlawful.

We will continue to write letters and seek meetings with senior Interior Department officials to voice our concerns about unwarranted delays with NEPA and the overall gaming and land acquisitions process. So far, we have had no success with these efforts. Indeed, since last November, all of our meeting requests with senior political officials in Interior to discuss the Cascade Locks project have been denied. So, we now have a situation where Interior officials not only refuse to move our application forward, in addition they refuse to talk to us about it. This has been a huge disappointment for us. We expected so much more from the new Obama Administration. Nonetheless, our Tribal Council has an obligation to our nearly 5,000 members to continue to work as hard as we can to make this project a reality and fulfill the hopes and aspirations of our people. We will never back down from that responsibility.

Thank you.

