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INDIAN GAMING: THE NEXT 25 YEARS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JULY 23, 2014

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INDIAN GAMING: THE NEXT 25 YEARS

WEDNESDAY, JULY 23, 2014

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

The Committee met, pursuant to notice, at 3:30 p.m. in room 628, Dirksen Senate Office Building, Hon. Jon Tester, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

The CHAIRMAN. I will call the Committee on Indian Affairs to order.

I want to welcome everybody to this hearing. As the Chairman of this Committee, I am very aware of the dire need for access to capital and economic development on reservations across this Nation. In some parts of Indian Country, gaming is become the primary component of creating and sustaining a tribal economy.

Over the 25 years since enactment of the Indian Gaming Regulatory Act, we have witnessed a tremendous growth of tribal gaming. One of the architects of that Act is a member of this Committee, Senator John McCain. He and Mo Udall, then a Congressman, crafted this bill in the House while Senator Inouye led this issue in the Senate. I want to thank Senator McCain for his leadership, both then and now, on issues of importance to Indian Country.

The Indian Gaming Regulatory Act sought to protect tribal gaming revenues and ensure that the funds were used for job creation and health care, infrastructure, education and other programs to benefit tribal members. The Act sought to ensure that gaming on Indian lands would be preserved as a viable means of achieving economic self-sufficiency for tribal governments.

As Stand Up California recognized in a recent letter to me and the Vice Chairman, it said in the short span of two decades and a half, IGRA has achieved the goal of economic self-determination for tribes previously not thought possible. The Indian Gaming Regulatory Act established and charged the National Indian Gaming Commission with the responsibility to monitor gaming activity, inspect the gaming premises, conduct background investigations, audit and review financial records, and take enforcement actions where necessary.

At the same time, the Act acknowledged that tribal governments would continue to serve as the day-to-day regulators of Indian gam-

ing operations. Today, there are nearly 6,000 regulators at the tribal level, 570 at the State level and more than 100 individuals at the National Indian Gaming Commission.

In 2013, tribal governments spent more than $400 million to regulate their gaming facilities. The National Indian Gaming Commission is funded $20 million annually through fees levied against tribal gaming operations. Tribal gaming has come a long way in the 25 years since IGRA was enacted.

While not a cure-all for many serious challenges facing Indian Country, gaming has provided numerous benefits to the communities who operate successful facilities. These are sophisticated operations, often employing significant numbers of tribal members and non-Indians in their communities. Tribal sovereignty and self-governance are important issues for me and for this Committee. While gaming is not the answer for every tribe, all tribal nations have the right to determine the best possible future for their people.

Today we are going to hear from witnesses how gaming has benefited Indian Country over the 25 years since IGRA was enacted. We will also hear about where the industry is heading and how tribal and Federal regulators address any issues that arise.

We will also get a preview from the General Accountability Office examination of Indian gaming that is being done at the request of myself, the Vice Chairman, Senator Cantwell and Senator McCain.

Before I ask Senator McCain if he has any opening statement, I would just like to say that there are a number of issues affecting Indian Country. Since I became Chair earlier this year, this Committee has held numerous Committee hearings on education, health, energy, economic development, trust, natural resources, that list goes on and on. I wish we had the kind of crowd we have here today at those hearings.

Indian gaming has been a great opportunity for Indian Country. But all of these other issues are ones that require this level of attention. I hope this is something we can continue to highlight in this Committee.

With that, Senator McCain, do you have any opening statements?

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

Senator MCCAIN. I thank you, Mr. Chairman. I thank you for your leadership in this Committee and your dedication to Indian Country.

These are very difficult and complex issues, as you mentioned, that come before this Committee. I serve on a number of committees, and I would argue perhaps the most complex issues that I have been engaged in in many ways are those that come under the jurisdiction of this Committee. I thank you for your leadership and I thank you for holding today's oversight hearing on Indian gaming. It has been more than 25 years since Congress enacted the Indian Gaming Regulatory Act of 1988. And I am proud to say that Indian gaming stands today as a proven economic driver that empowers over 240 gaming tribes across the Nation to pursue the principles of Indian self-determination and tribal self-governance.

I worked closely with the late Senator Dan Inouye to work to develop IGRA in response to the Supreme Court's landmark Cabazon decision that held that Indian tribes have a sovereign right to conduct a certain level of gaming on reservation lands, particularly when States allow some form of gaming. It was left to Congress to address several unresolved questions such as the appropriate level of Federal, State and tribal oversight, and what tribal lands are eligible for gaming facilities.

The process of enacting IGRA was complex, but in the end, I believe that it has achieved a careful balance between the concepts of tribal sovereignty and States' rights. Today, as you mentioned, Mr. Chairman, the gaming industry generates about $28 billion a year. In my home State of Arizona, tribes collect roughly $1.8 billion a year in gaming revenues. Non-Indian communities in Arizona have also benefited under the Arizona Tribal-State Gaming Compact by receiving over $1 billion in gaming shared revenues since 2002 for a variety of public benefits, including education, local governments, tourism, trauma care services and wildlife conservation.

I am hopeful that today's oversight hearing will revisit the importance of Indian gaming by highlighting its achievements and airing the challenges that exist today. One of my primary concerns continues to be the performance and legal limitations of the National Indian Gaming Commission as the chief Federal regulator for Indian gaming. We should also discuss the matter of off-reservation gaming including the situation in my home State of Arizona and elsewhere across the Nation. It has been many years since Congress has evaluated the impacts of Indian casinos on nearby non-Indian communities which is increasingly relevant given the desire of many in Congress to enact a Carcieri effect that would address the 2009 Supreme Court ruling preventing the Interior Department from taking land into trust for a large number of tribes across the Country.

Mr. Chairman, I want to thank you again for inviting witnesses from Arizona. I look forward to the Committee hearing, in particular the views of the proposed casino in Glendale, Arizona. As my colleagues know, IGRA allows for a Vegas-style gaming facility to be built on trust lands if they were acquired by an Indian tribe under a congressionally approved land claims settlement, in Glendale's case, the Gila Band Indian Reservation Lands Replacement Act of 1986. That law compensated the Tohono O'odham nation for lands that were flooded by the Army Corps Painted Dam near Gila Bend, Arizona. The Tohono O'odham Tribe is one of the small number of tribes in the Nation, I believe one out of three, that are using this IGRA exception but under a great deal of controversy and litigation.

I share the objections of many Arizonans when I see a casino being air-dropped into the metro Phoenix area. However, I also understand that the Federal district court has decided in favor of the Tohono O'odham nation to acquire the land consistent with the technical wording of the Arizona compact and that the Glendale city council recently voted in support for the casino, which was a reversal, I might add.

These and other factors could complicate Senate consideration of the bill that passed the house last year to prohibit gaming on the Glendale parcel. It is my desire that the Committee fully understand the tremendous amount of controversy that this situation has generated in Arizona and how the courts are applying the land claims settlement exception under IGRA. I know it is a complex issue, Mr. Chairman, and I appreciate your attention to it. I say to my friends from Arizona, I still hope that we can resolve this issue by sitting down, party to party, individual to individual, tribe to government, and try and resolve this issue which has caused so much controversy and difficulties in our State of Arizona. I know I speak for Senator Flake when I say both of us are committed to try to help resolve this issue.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator McCain. I want to thank you for your leadership over the many, many years that you have served both in the House and the Senate on Indian Country issues. We are going to need your guidance and your input on this Arizona issue as it progresses.

With that, Senator Barrasso, your opening statement.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman, for holding this hearing. I welcome Representative Gosar, Representative Grijalva, I see them both in the back there. There is a line, Mr. Chairman, way down the hall out there. Obviously there is a lot of interest in this. Welcome to the Committee.

According to the National Indian Gaming Commission, gross revenues for Indian gaming in 2013 totaled $28 billion. Gaming activities must be regulated effectively. No one, be it contractors, vendors, players or employees should illegally benefit at the expense of the tribes or the gaming public. So to protect the integrity of Indian gaming, the National Indian Gaming Commission implemented an initiative focused on assistance, compliance and enforcement. I, along with Senators McCain and Cantwell and you, Mr. Chairman, requested the GAO, the Government Accountability Office, to conduct a study on Indian gaming with an emphasis on regulation. The GAO is still conducting that study and will provide us with preliminary findings today.

I look forward to hearing the GAO evaluation of the commission's initiative, and also urge the commission to work closely with the GAO in this study.

I also understand the President has announced his intent to nominate Mr. Chaudhuri, one of our witnesses today, as chairman of the National Indian Gaming Commission. Congratulations. The commission needs to be appropriately staffed so that it may conduct its responsibilities as outlined in the Indian Gaming Regulatory Act.

I want to welcome the witnesses and look forward to the testimony. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Vice Chairman Barrasso. Before we get to our first panel, we are honored today to have a couple of our colleagues from the House with us, Congressman Gosar and Con-

gressman Grijalva. Thank you for being here today to discuss the current issues affecting tribal gaming in Arizona. I want to thank you for being here to discuss those topics. With that, we will begin with you, Congressman Gosar.

STATEMENT OF HON. PAUL A. GOSAR, U.S. REPRESENTATIVE FROM ARIZONA

Mr. GOSAR. Thank you, Chairman Tester and members of the Committee. Thank you for the opportunity to testify regarding the future of Indian gaming and the need of passage of H.R. 1410.

I have been actively involved in the troubling off-reservation gaming issue in my home State of Arizona involving the Tohono O'odham Nation. The tribe is attempting to move from their ancestral lands in Tucson into another tribe's former reservation in the Phoenix metropolitan area for the sole purpose of building a casino. This comes after the Tohono O'odham and other Arizona tribes adopted a compact approved by Arizona voters which expressly promised that there would be no additional casinos or gaming in the Phoenix metro area until 2027.

In exchange for this promise, the voters granted the tribes a statewide monopoly on gaming and other tribes gave up significant rights. This Committee has before it H.R. 1410, the Keep the Promise Act, sponsored by my good friend and colleague, Trent Franks, from Arizona, that ensures the promise of no additional casinos in the Phoenix area is kept until the existing tribal-State gaming compact expires without interfering in the trust acquisition itself.

In exchange for exclusivity in Arizona, the tribes agreed to cap the number of casinos in the state and particularly in the Phoenix metro area, to restrict the number of machines in the State and to share the machine revenues with the rural, non-gaming tribes so that all could benefit. Every urban tribe except for the Tohono O'odham agreed to this limitation. Tohono O'odham refused, citing the need for a new casino in the Tucson city area, or in the rural part of the tribe's reservation. The State and other tribes finally agreed to the restrictions on gaming being pushed by Arizona's governor and others, but also yielded to the TO's stated need.

After the agreement was reached, the tribes and the State promoted their model compact by saturating the airways with press releases, voter handouts, billboards and television and radio interviews. Tohono O'odham spent nearly $1.8 million urging Arizona voters to rely on the limitation that included no additional casinos in the Phoenix area.

However, in 2001, while negotiations were ongoing and unbeknownst to everyone, Tohono O'odham had begun efforts to find land in the Phoenix area to open their fourth casino. What is worse is that while Tohono O'odham was planning to buy the land in Glendale for a casino, the city of Glendale was building a public school a few blocks away. That school opened in 2004; the Tohono O'odham kept their intentions concealed until five years later.

The voters approved the tribal-State compact in 2002 and rejected two competing propositions to expand gaming in the metropolitan area. In 2003, a few months after the voters approved the compact, Tohono O'odham finalized its multi-year effort to purchase land in Glendale for a casino and used a shell corporation to

conceal its identity. The voters approved the proposition of the 17-tribe coalition because it was sold to the voters as the only proposition that would halt the growth of gaming in Phoenix and keep Indian gaming out of local communities.

The system was a national model. It was working well until 2009, when the Tohono O'odham announced that it would seek lands in trust off the reservation and in the Phoenix area for gaming. Tohono O'odham's dismissal of their promise to build no additional casinos in Phoenix is not something that Congress can ignore when the result would be so harmful to something that has been such a prominent national model. No entity, government or otherwise, should be rewarded for deceptive conduct that violates a compact and is contrary to the will of the voters.

TO likes to say that to date, they are winning in the courts, which is a continuation of the deceitful manner in which they have dealt with this issue. Tohono O'odham fails to mention that the reason the court did not rule against them in a recent case was not due to the strength of their position, but because of the issue of sovereign immunity.

In fact, after reviewing one of the claims, the district court stated that the evidence would appear to support the claim that the Tohono O'odham fraudulently induced other tribes and the State into agreeing to the gaming compact. However, the court did not rule because it was barred by the nation's sovereign immunity.

The Supreme Court recently has in fact ruled on a similar issue, but not in the favor the tribe is boasting. In the case of Michigan v. The Bay Mills Indian Community, the court upheld the tribe's sovereign immunity from being sued by the State of Michigan. But, it also stated that only Congress can act when a tribe raises such immunity. That is exactly why this legislation is necessary. Failure to adopt this common sense legislation will negatively impact gaming and upend compacts throughout the Nation.

I would also like to submit for the record a map that shows all the different islands within the city of Phoenix in which such gaming could occur. To give a slight aspect to this, one small little aspect in here is 100 acres, right here. It is kind of hard to see, but that little tiny dot is 100 acres.

So with that, I yield back the balance of my time and thank you for the opportunity to express my views.

[The prepared statement of Mr. Gosar follows:]

PREPARED STATEMENT OF HON. PAUL A. GOSAR, U.S. REPRESENTATIVE FROM ARIZONA

Chairman Tester and members of the Committee, thank you for the opportunity to testify regarding the future of Indian gaming and the need for passage of H.R. 1410.

I have been actively involved in a troubling off-reservation gaming issue in my home state of Arizona involving the Tohono O'odham Nation. The tribe is attempting to move from their ancestral lands in Tucson, into another tribe's former reservation in the Phoenix metro area, for the sole purpose of building a casino.

This comes after Tohono O'odham and other Arizona tribes adopted a compact, approved by Arizona voters, which expressly promised there would be no additional casinos or gaming in the Phoenix metro area until 2027. In exchange for this promise, the voters granted the tribes a statewide monopoly on gaming and other tribes gave up significant rights.

This Committee has before it, H.R. 1410, the Keep the Promise Act, sponsored by my good friend and colleague Trent Franks from Arizona. This legislation was introduced to ensure that the promise of no additional casinos in the Phoenix area is kept until the existing tribal-state gaming compacts expire, without interfering in the trust acquisition itself.

Let me explain how H.R. 1410 came to be and why it must be enacted into law.

In return for exclusivity in Arizona, the tribes agreed to a cap on the number of casinos in the state and in the Phoenix metro area, to restrict the number of machines in the state and to share machine revenue with rural non-gaming tribes so they could benefit from the compact.

Every urban tribe, except for Tohono O'odham, agreed to this limitation. Tohono refused, citing the need for a new casino in Tucson or on the rural part of the tribe's reservation. The state and other tribes finally agreed to the restrictions on gaming being pushed by Arizona's Governor and others, but also yielded to Tohono's stated need.

After the agreement was reached, the tribes and state promoted their model compact by saturating the airwaves and newspapers with the message that under the compact there will be no additional casinos in Phoenix and only the possibility for Tohono O'odham to build one more facility in the Tucson area.

The Governor and tribes pushed this message in press releases, voter handouts, billboards, and in television and radio interviews. Tohono O'odham alone spent $1.8 million dollars urging Arizona voters to rely on this limitation.

However, in 2001, while negotiations were ongoing and unbeknownst to everyone, Tohono had begun efforts to find land in the Phoenix area to open their fourth casino.

What is worse is that while Tohono O'odham was planning to buy land in Glendale for a casino, the City of Glendale was building a public high school directly across the street. That school opened in 2004 but Tohono O'odham kept their intentions concealed until five years later.

The voters approved the tribal state compact in November 2002 and rejected two competing propositions. The first would have allowed unrestricted tribal gaming without any revenue sharing for rural non-gaming tribes; the second would have allowed for full commercial gaming without restriction.

In 2003, a few months after the voters approved the compact, Tohono finalized its multiyear effort to purchase land in Glendale for a casino and used a shell corporation to conceal its identity.

The voters approved the proposal of the 17-tribe coalition because it was sold to the voters as the only proposition that would halt the growth of gaming in Phoenix and keep gaming out of local communities.

The system was a national model, and was working well, until 2009 when the Tohono O'odham announced that it would seek lands into trust off their reservation and in the Phoenix area for gaming.

Tohono's dismissal of their promise to build no additional casinos in Phoenix is not something that Congress can ignore when the result will be so harmful to what had been a national model.

I fully support Indian gaming, if done under the rule of law, both in letter and spirit.

No entity, governmental or otherwise, should be rewarded for deceptive conduct that violates a compact and is contrary to the will of voters. Failure to adopt this commonsense legislation will negatively impact gaming and compacts throughout the nation.

Thank you again for the opportunity to testify before the Committee Mr. Chairman and with that, I yield back.

Attachment

Congress of the United States
Washington, DC 20515

The Honorable Jon Tester
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

July 23, 2014

Re: Testimony of Representatives Ed Pastor and Ann Kirkpatrick to the Senate Committee on Indian Affairs' Oversight Hearing on "*Indian Gaming: the Next 25 Years*"

Dear Chairman Tester, Vice Chairman Barrasso, and Members of the Committee:

As Democratic Members of the Arizona Congressional delegation, we thank you for holding this important hearing on "*Indian Gaming: the Next 25 Years*," and greatly appreciate the opportunity to share our support for H.R. 1410, the Keep the Promise Act of 2013.

As you know, in 2002 the voters of Arizona, through Proposition 202, approved a statewide compact that granted Indian tribes a monopoly on gaming in the State until 2027. In return, voters wanted to limit the number of casinos in the State's two metropolitan areas- Phoenix and Tucson. This agreement, put together by Arizona tribes and supported by State leadership, froze the existing number of tribal gaming facilities in the Phoenix metro area but allowed one tribe to build an additional facility in the Tucson area. This meant that most tribes that could have built additional casinos under their existing compact gave up those rights under the new agreement.

Arizona voters keyed into one campaign promise in particular: the 17 tribal chairmen—including then-Chairman Edward D. Manuel of the Tohono O'odham Nation—claimed that "voting 'yes' on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area." But today, as Tohono O'odham is poised to begin construction on a new casino in downtown Glendale, we are concerned that the system of tribal gaming is now being jeopardized.

It is out of this concern that we urge your support of H.R. 1410, which would simply make sure that promises made to our constituents during consideration of Arizona Proposition 202 are maintained. This bill would prohibit any additional casinos within the Phoenix metropolitan area for the duration of the existing tribal-state gaming compact. This temporary restriction is consistent with commitments and negotiations made amongst the tribes, State leadership, and voters, and would protect the current system of tribal gaming in Arizona.

Mr. Chairman, supporting H.R. 1410 was not a decision we came to lightly. We consider ourselves champions on Native American issues. We both strongly support the sovereign rights of our tribal nations, and believe that tribal governments must be able to aggressively pursue economic development to provide for the welfare of their people. That is why we worked with

our Republican colleagues to refine and limit the scope of this legislation, which simply prohibits new casinos in the Phoenix metropolitan area through 2026, as the voters were promised.

It is just as important to highlight what this bill does not do: H.R. 1410 does not prohibit Tohono O'odham or any other tribe from taking land into trust in the Phoenix area. It does not impact the ability for the Tohono O'odham tribe to acquire the land it is entitled to under the 1986 Gila Bend Indian Reservation Lands Replacement Act, nor does it prohibit Tohono O'odham from opening its fourth gaming facility outside of the Phoenix area. And, it does not prohibit any tribe from pursuing new gaming facilities in the Phoenix area after the current compact expires in 2027.

We believe this legislation achieves our two co-equal goals; it preserves the sovereign rights of tribal governments and it respects the clear intent of Arizona voters. That is why the bill has the strong support of both tribal and municipal leaders in the state, and why a bipartisan majority of Arizona's Congressional delegation worked to ensure its overwhelming approval by the House of Representatives on the Suspension Calendar last year.

Again, Mr. Chairman, we appreciate your willingness to consider this important legislation and to accept our testimony this afternoon. We look forward to working with you and your colleagues on the Committee to ensure that the promises made to our constituents are kept, and that the tribal governments in our State can continue to prosper. In order to do this, we need you to pass H.R.1410 this year.

Sincerely,

Ed Pastor
Member of Congress
Arizona's 7th District

Ann Kirkpatrick
Member of Congress
Arizona's 1st District

The CHAIRMAN. Thank you for your statement, Congressman Gosar. We appreciate it.

Congressman Grijalva?

STATEMENT OF HON. RAUL M. GRIJALVA, U.S. REPRESENTATIVE FROM ARIZONA

Mr. GRIJALVA. Good afternoon, Chairman Tester, Vice Chairman Barrasso and my friend, Senator McCain. Thank you for including H.R. 1410 in this hearing.

Most of the Tohono O'odham nation's reservation and its 32,000 enrolled members are located within my congressional district. I have known and worked with the nation for a very, very long time, and I am privileged to represent them here in Washington. And I truly appreciate the Committee's invitation to come and speak at your hearing.

The Corps of Engineers destroyed nearly 10,000 acres of the nation's reservation known as the Gila Bend Indian reservation. The Gila Bend Reservation is located in Maricopa County and serves the nation's San Lucy District. The suffering of the people who live in the san Lucy District and the economic harm the destruction did to the nation as a whole are well documented in the legislative history of the 1986 Gila Bend Indian Reservation Lands Replacement Act. The 1986 Act provided that if the nation would waive its legal

claims against the United States, and if the nation would relinquish its rights to the land and water for most of the Gila Bend Reservation, that the United States in return would provide replacement reservation lands to the nation. The 1986 Act also required that those replacement lands be treated "as a reservation for all purposes." That legislation was introduced by an icon of our State, Congressman Mo Udall, and co-sponsored by another icon from our State, then-Representative John McCain.

Complying with all Federal laws and agreements, including the 1986 Act, a 1987 settlement agreement, the Indian Gaming Regulatory Act and the tribal-State compact, in 2009 the nation asked the Department of Interior to take into trust replacement reservation land in the west valley portion of Maricopa County. Earlier this month, Interior completed that process and the West Valley land is now part of the nation's reservation.

The proponents of H.R. 1410 raise many arguments as to why the nation's West Valley land could not be taken into trust as part of the replacement reservation which the United States promised in the 1986 Act. But the Federal courts rejected these arguments and sent the issue back to Interior. Now Interior has issued a lengthy opinion in support of the nation and taken the land into trust to be part of the nation's reservation.

The proponents of H.R. 1410 then argue that the nation's tribal-State gaming compact does not allow the nation to conduct gaming in the greater Phoenix area. The proponents of H.R. 1410 again took this argument to the Federal courts; but again, the Federal courts rejected their arguments, finding that, "No reasonable reading of the compact could lead a person to conclude that it prohibited new casinos in the Phoenix area."

The proponents of H.R. 1410 also argued that the Indian Gaming Regulatory Act prohibits gaming on land a nation acquires under the 1986 Act. But here too, Federal court ruled that gaming on this land is "expressly permitted by the Indian Gaming Regulatory Act." Finally, they have argued the nation must be held to some phantom promise. But the same court noted that the express language of the compact itself makes it clear, even if there had been such a promise, it could never have been, in the courts words, valid or binding.

Contrary to recent lobbying rhetoric, the fact is, the official position of most of the municipalities in the West Valley is one of support for the nation's economic development project and opposition to H.R. 1410. In addition to nearby West Valley cities of Peoria, Tolleson, the mayor of Phoenix, Surprise, also the city of Glendale now formally support the nation's proposed economic development and oppose H.R. 1410. I realize that the mayor of Glendale's personal views are not in sync with those of the city council, but it is important to underscore that Glendale's official position is embodied in two recent resolutions, one which opposes H.R. 1410 and another which supports gaming-related economic development in the West Valley reservation. To the best of my knowledge, the only municipality to take an official position supporting H.R. 1410 is the city of Scottsdale, which conveniently is located on the other side of Phoenix in the East Valley.

I should take a moment to recognize in the audience today Mayor Bob Barrett of Peoria, and Glendale City Councilmen Gary Sherwood and Sammy Chavira. They are here today to urge the Committee to not move H.R. 1410 forward.

I want to underscore one thing, that we need to be cognizant that if we enact H.R. 1410, other liabilities will be open to the United States: taking of land, breach of contract for the bargain that was struck in the 1986 Act. We would be liable for hundreds of millions of dollars. The way I see it, we are essentially asking the American taxpayer to pay for special interest legislation designed to protect East Valley's tribes' gaming market and the American taxpayer would bear the full liability for that protection.

The United States of America, in the 1986 Act, the intention was to make the nation whole. It did. And every court case, every administrative review has upheld that law and the tribe's right to the West Valley and the development of that.

So I would hope that this Committee looks further into it, examines it, but essentially we have a commitment as a nation. It is an honorable commitment. And I think we should not move this law forward, and honor the commitment that we made in 1986. With that, I yield back.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF HON. RAUL M. GRIJALVA, U.S. REPRESENTATIVE FROM ARIZONA

Good afternoon Chairman Tester, Vice Chairman Barrasso, and Members of the Committee, and special greetings to my colleague from Arizona, Senator McCain. Most of the Tohono O'odham Nation's Reservation and its 32,000 enrolled members are located within my congressional district. I have known and worked with the Nation for a very long time, and I truly appreciate the Committee's invitation to speak at today's hearing.

The Corps of Engineers inadvertently destroyed nearly 10,000 acres of that part of the Nation's reservation known as the Gila Bend Indian Reservation. The Gila Bend reservation is located in Maricopa County, and serves the Nation's San Lucy District. The suffering of the people who live in the San Lucy District, and the economic harm the destruction did to the Nation as a whole, are well documented in the legislative history of the 1986 Gila Bend Indian Reservation Lands Replacement Act. The 1986 Act provided that if the Nation would waive its legal claims against the United States, and if the Nation would relinquish its rights to the land and water at most of the Gila Bend reservation, the United States in return would provide replacement reservation lands to the Nation. The 1986 Act also required that these replacement lands be treated, and I quote, as a "reservation for ALL purposes."

Complying with all federal laws and agreements, including the 1986 Act, a 1987 settlement agreement, the Indian Gaming Regulatory Act, and its tribal-state compact, in 2009 the Nation asked the Department of the Interior take into trust replacement reservation land in the West Valley portion of Maricopa County. Earlier this month, Interior completed that process, and the West Valley land is now part of the Nation's reservation.

The proponents of H.R. 1410 raised many arguments as to why the Nation's West Valley land could not be taken into trust as part of the replacement reservation which the United States promised in the 1986 Act. But the federal courts rejected those arguments and sent the issue back to Interior. Now Interior has issued a lengthy opinion in support of the Nation, and taken the land in trust to be part of the Nation's reservation.

The proponents of H.R. 1410 then argued that the Nation's tribal-state gaming compact does not allow the Nation to conduct gaming in the greater Phoenix area. As they had a right to do, the proponents of H.R. 1410 again took their arguments to the federal courts. But again, the federal courts rejected their arguments, finding that, and I quote again, "no reasonable reading of the Compact could lead a person to conclude that it prohibited new casinos in the Phoenix area".

The proponents of H.R. 1410 also argued that the Indian Gaming Regulatory Act prohibits gaming on land the Nation acquires under the 1986 Act. But here too, a federal court ruled that gaming on this land is, quote, "expressly permitted" by the Indian Gaming Regulatory Act. Finally, they have argued that the Nation must be held to some phantom "promise", but the same court noted that the express language of the compact itself makes clear that even if there had been such a promise it could never have been, in the court's words, "valid or binding".

Contrary to recent lobbying rhetoric, the fact is that the official position of most of the municipalities in the West Valley is one of support for the Nation's economic development project and opposition to H.R. 1410. In addition, the nearby West Valley cities of Peoria, Tolleson, and Surprise, the City of Glendale now formally supports the Nation's proposed economic development, and opposes H.R. 1410. I realize that the Mayor of Glendale's personal views are not in sync with those of his City Council, but it is important to underscore that Glendale's official position is embodied in two recent resolutions, one which opposes H.R. 1410 and another which supports gaming-related economic development on the Nation's West Valley reservation. To the best of my knowledge, the only municipality to take an official position supporting H.R. 1410 is the City of Scottsdale, which is located on the other side of Phoenix in the East Valley.

I should take a moment now to recognize in the audience today Mayor Bob Barrett of Peoria, and Glendale Councilmen Gary Sherwood and Sammy Chavira. They are here today to urge this Committee to not take action to move H.R. 1410 forward.

I want also to underscore that we need to be cognizant that enactment of H.R. 1410 likely will create for the Nation a new set of claims against the United States, including a claim for an unconstitutional taking of the Nation's confirmed property rights in its West Valley reservation, and a claim for breach contract based on the Unites States' failure to live up to its end of the bargain struck in the 1986 Act. The amount of money damages that could be awarded to the Nation could run into the hundreds of millions of dollars. The way I see it, we essentially are asking the American taxpayer to pay for special interest legislation designed to protect the East Valley tribes' market.

The Nation has been subjected to a long, ugly campaign by the proponents of H.R. 1410. The Nation has patiently accepted every challenge and answered every question. Over the last five years, the federal courts and the Department of the Interior have studied every allegation, and have now made their pronouncements. In every case, the judicial and executive branches of the Federal Government have found the Nation to have acted honorably within the letter and spirit of the law.

After the United States illegally destroyed nearly 10,000 acres of the Tohono O'odham Nation's land, it made a solemn promise to make the Nation whole by allowing the Nation to acquire new land that would be treated as a replacement reservation, as 1986 Act says, for ALL purposes. The West Valley reservation lies in the same county, and has the same gaming eligibility status, as the land that was destroyed. When the Department of the Interior took that land into trust, it honored the obligation that the United States took on when it made into law the 1986 Act. The acquisition of replacement land as required by land claim settlements simply cannot fairly or honestly characterized as "reservation shopping"—these acquisition are instead the fulfillment of federal promises for compensation for historical wrongdoing.

The federal courts and the executive branch have done their part to honor the United States' commitments in the 1986 Act, and it is my great hope that we in Congress will also do our part, by not moving H.R. 1410 even one step further towards enactment into law.

I thank you again for your kind invitation to testify today, and I am happy to answer any questions you might have for me.

The CHAIRMAN. Congressman Grijalva, thank you. Thank you for your testimony as well as Congressman Gosar's testimony. I think each of your testimony indicates this is a complicated issue; there is some difference of opinion. We appreciate your both coming to the good side and visiting with us.

[Laughter.]

The CHAIRMAN. Thank you very much.

Mr. GOSAR. Mr. Chairman, I also have a letter from Ed Pastor that found its way over. I would like to have that included in the record, in support of H.R. 1410.

The CHAIRMAN. I would just say, without objection, this record will stay open for two weeks. If you have more things you want to put into the record, it will be in. Thank you all.

We are going to have our first panel of witnesses that we can question come up, which includes Kevin Washburn, Assistant Secretary for Indian Affairs at the Department of the Interior. We are also going to hear from Jonodev Chaudhuri, Vice Chairman of the National Indian Gaming Commission. As the Vice Chairman pointed out, he is nominated to be the next chairman of the National Indian Gaming Commission. Congratulations, Jonodev.

And finally, Ms. Ann-Marie Fennell, who is Director of Natural Resources and Environment at the Government Accountability Office. I want to thank you all. Your full written statements will be part of the record. We would ask you to keep your statements to within five minutes. As always, the hearing record is going to remain open for a couple of weeks, as I told the previous panel, for those who wish to submit written statements.

Before we start with your testimony, Assistant Secretary Washburn, it was a few months ago Brian Cladoosby, Swinomish Tribe, was up as NCAI chair and you were giving him a bad time. I want to have Brian come to the well for a second, because he has a presentation for you.

[Laughter.]

Mr. CLADOOSBY. Thank you, Senator. As you know, a couple of months ago Kevin and I testified on *Carcieri*. He told you, any questions that you have, just to point them to me, point them to the guy with the basket on his head.

The CHAIRMAN. That is right.

Mr. CLADOOSBY. So thank you very much for allowing me to present the Assistant Secretary, Kevin Washburn, with this cedar hat from the Northwest. He will also be known as the man with the basket on his head.

The CHAIRMAN. So we will know to direct the questions to Kevin.

[Laughter, applause.]

The CHAIRMAN. Once again, thank you all for being here today.

Senator MCCAIN. I think you should wear it for the entire hearing.

[Laughter.]

The CHAIRMAN. I guess we could entertain a motion to that effect.

Kevin, you may proceed.

STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. WASHBURN. Thank you very much, Chairman, and thank you, Vice Chairman Barrasso and Senator McCain, especially for your continuity on this subject. You are the one person who we have here who has been involved with Congress since IGRA was passed. It is good to have you here.

Indian gaming, like this Committee, is bipartisan and non-partisan. Though sometimes it is fairly parochial, I guess as we saw from the first panel. But Indian gaming is very, very important to Indian tribes. No one believes, I don't believe, that we have enough

money to fulfill our trust responsibility to Indian tribes in the Federal appropriations process. I think it is fair to say that the Federal government doesn't have enough money to do a lot of the things that it needs to get done. I am sure that the trust responsibility is in that same category.

Gaming revenues eclipse by a very large measure the amount of revenues that we have in my budget in Indian Affairs at the Department of Interior, including the BIA and the BIE. Our budget is about $2.5 billion and Indian gaming revenues are about $28 billion. So our budget is less than 10 percent of what comes in through Indian gaming. In fact, gaming revenues eclipse by a large measure all the Federal revenues toward Indian tribes. So gaming is an important piece of the puzzle for economies on Indian reservations.

I also am a big believer in tribal self-governance. And frankly, Indian gaming, much more than our own appropriations, has underwritten tribal self-determination and tribal self-governance. It has funded those things, and that is a very important aspect of Indian gaming.

Chairman, most of the subjects that you mentioned, you have been holding a lot of hearings, and most of the subjects that you mentioned are, at least at some tribes, underwritten by Indian gaming revenues. We need greater Federal appropriations, perhaps, but Indian gaming revenues help out a lot.

The sad thing is, and I tried to get this across in my written testimony, is that Indian gaming revenues have really plateaued. They have been pretty flat since about 2007. Unlike commercial gambling, commercial gaming operations and revenues continue to grow, especially when you consider racinos. Indian gaming has really started to plateau. This in some ways causes us a concern. I don't anticipate dramatic future growth. I think we have seen that the days of tremendous growth are probably behind us for Indian gaming. That means we are going to have to learn to live with the existing amounts of revenues.

We continue in some ways to hope for increased Indian gaming, but we also are in an awkward position when a new gaming operation is proposed. Competition is bad and predictability is good, and existing gaming operations are very happy not to have competition. And we proceed with great caution and great care when someone asks us to take land into trust for a new gaming operation and we will continue to do that. We will exercise great scrutiny and we will always follow the law when we are asked to do that.

So the next 25 years for Indian gaming I believe is uncertain. Nothing lasts forever. No great economic resource lasts forever, and I am concerned where we will be in another 25 years. For now, Indian gaming remains a very, very important part of the picture on Indian reservations. It would be folly not to recognize that.

With that, I will stop and await further questions. Thank you.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Good afternoon Chairman Tester, Vice Chairman Barrasso, and Members of the Committee. My name is Kevin Washburn and I am the Assistant Secretary for In-

dian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide the Department's views at this oversight hearing on the Indian Gaming Regulatory Act (IGRA).

Indian Gaming 25 Years After the Enactment of IGRA

As this Committee is well aware, in 1987 the Supreme Court affirmed the right of tribes to conduct gaming on their reservations. The following year, Congress enacted IGRA to establish a federal regulatory framework for the conduct of gaming on Indian lands. When IGRA was enacted, non-Indian casino gaming was limited primarily to Nevada and New Jersey. At that time, tribal gaming on Indian lands generated estimated annual revenues of between $100 million and $500 million.

More than twenty-five years later, much has changed. Tribal gaming on Indian lands since 1987 has grown dramatically. However, since 2007, Indian gaming revenues have grown very little and have stabilized in the range of $26 to $28 billion annually. Commercial (non-Indian) gaming is now much larger than Indian gaming, and the commercial gaming industry continues to grow, particularly when so-called "racinos" are included. In sum, while Indian gaming growth appears to have plateaued, commercial gaming continues to grow. Put another way, Indian gaming's overall share of the gaming market is decreasing.

After 25 years, the benefits of Indian gaming are readily apparent. Indian gaming revenues are important for tribal governments. Gaming revenues eclipse, by a large measure, all federal appropriations for Indian tribes. Gaming revenues are devoted to every aspect of tribal communities—from housing to elder care to language revitalization and job training. Gaming provides employment opportunities and spurs business development in many communities that otherwise struggled through generations of poverty. While Indian gaming is not a panacea to poverty for all tribal communities, it has dramatically righted the trajectory for many tribes and helped them to become much more successful and self-sufficient.

While we attribute much of the improvement in the delivery of governmental services in Indian country in recent decades to the development of the federal policy favoring tribal self-governance, Indian gaming has helped to underwrite many of the successes we have seen. Indian gaming revenues have helped to develop tribal governmental capacities in myriad ways. For example, many members of the newest generation of tribal lawyers, doctors and other professionals were supported by scholarships made possible through Indian gaming.

While most of the Indian gaming revenues are used to pay wages, the costs of financing, and other ordinary costs of doing business, the profits from Indian gaming are used primarily to improve the welfare of Indian people. Indian gaming, after all, is required by law to be owned and licensed by tribal governments and to primarily benefit the Indian tribe and Congress has specified that Indian gaming revenues may be used only for specific purposes.

While tribes remain leaders in the industry and continue to dominate in some regional markets, they are facing more and more competition from state-licensed commercial casinos. In contrast to governmental revenues developed by Indian gaming, the profits of non-Indian commercial casinos are used differently. Commercial casinos are ordinary "for profit" businesses and they have a different legal duty: to enrich their shareholders. It is thus disappointing to us, in some ways, that we see growth in Indian gaming slowing and commercial gaming taking an ever larger share of the gaming market.

We frequently face a misperception that tribes are acquiring land and opening gaming facilities at a fast pace. The growth numbers alone belie this argument. Of the over 1,700 successful trust acquisitions processed since the beginning of the Obama administration in 2009, fewer than 15 were for gaming purposes and even fewer were for off-reservation gaming purposes. Also, it is not uncommon for a decade of thoughtful deliberation to pass between the time a tribe applies for land into trust for gaming and the Department decides on the application and, if successful, takes the land into trust.

The numbers of gaming operations provided by the NIGC in its annual revenue reports confirm that the number of gaming operations has remained flat in recent years. In 2009, the NIGC announced in its annual gaming revenue report that there were 419 Indian casinos operating nationwide, and then it announced 422 in 2010, 421 in both 2011 and 2012, and 416 in 2013. In sum, concerns about dramatic growth of Indian gaming are unfounded today.

In contrast, commercial non-Indian gaming casinos and racinos have grown considerably during the same time period. Expanding commercial gaming makes tribes nervous.

Of course, not all of the potential new competition comes from commercial casinos. Some of the competition comes from other tribes. Though new Indian casinos are

rare, they too can cause disruption to existing facilities. Competition can be tough in maturing markets with slower growth. The potential for disruption to existing facilities is a concern that we understand and it is one of the reasons we follow the law so carefully in making decisions. Because of the potential impact on tribes, we know that we must always be very cautious in authorizing new Indian gaming opportunities and that we should do so only with clear legal authorization and careful adherence to existing regulatory procedural requirements.

The Regulatory Framework of IGRA

As you know, IGRA creates a regulatory scheme that seeks to balance tribal, state, and federal interests in regulating gaming activities on Indian lands: Class I gaming is regulated exclusively by Indian tribal governments; Class II gaming regulation is reserved to tribal governments in cooperation with the federal government; and, Class III gaming is regulated primarily by tribal governments in cooperation with the federal government and, to the extent negotiated in an approved compact, a state government. The Department has certain roles in the regulation of Indian gaming; other roles are performed by the National Indian Gaming Commission and tribal or state gaming regulators. Specifically, under IGRA the Department of the Interior reviews tribal-state gaming compacts and fee-to-trust applications for gaming. The NIGC reviews tribal gaming ordinances and management contracts and retains civil enforcement authority for violations of IGRA.

With regard to compacts, IGRA carefully describes the topics to address in a compact. Congress specifically named six subjects related to the operation and regulation of Class III gaming activity that may be addressed in a compact, and also included a limited catchall provision authorizing the inclusion of provisions for "any other subjects that are directly related to the operation of [Class III] gaming activities." The Department closely scrutinizes tribal-state gaming compacts and disapproves compacts that do not squarely fall within the topics delineated in IGRA. For example, Class II gaming is not an authorized subject of negotiation for Class III compacts. The regulation of Class II gaming is reserved for tribal and federal regulation.

As the Committee is well aware, section 20 of IGRA generally prohibits gaming on lands acquired in trust after IGRA's enactment on October 17, 1988, and contains only a few exceptions. These limited and narrow exceptions operate to provide equal footing for certain tribes that were disadvantaged in relation to land. These include: the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, restored lands for tribes restored after termination, and lands acquired in settlement of a land claim. In other cases, off-reservation trust lands are eligible for gaming only if the Department makes a two-part determination that gaming on the parcel is in the best interest of the tribe and not detrimental to the surrounding community and the Governor of the State concurs in that determination. In the 25 years since the passage of IGRA, only 8 times has a governor concurred in a positive two-part determination.

The previous Administration promulgated extensive regulations to implement section 20 and the Department continues to apply these rigorous standards to every gaming decision. Also, the Department's review of trust applications—regardless of location or the activity the Tribe proposes to acquire the land for—is lengthy and deliberate. For trust acquisitions, the Department carefully considers the concerns of all stakeholders, including, of course, the applicant tribe, but also the potentially impacted state, local and tribal governments and the public at large. The Department actively solicits the views of these stakeholders to insure that the decision is a fair decision for the entire community.

It is important to note that the public, state and local governments, and other tribal governments have many opportunities to participate throughout the trust-acquisition process. Prior to deciding whether to place the land into trust, the Department seeks comment from state and local governments; the public and local governments are notified and given an opportunity to provide input during the environmental review process under the National Environmental Policy Act (NEPA). Moreover, before off-reservation land can be found eligible for gaming through the two-part determination process, the Department requests additional comments from nearby tribal, state and local governments. Among other interests, the Department is interested in the economic consequences to the local community. Of course, in most cases, significant cooperation occurs between tribes and state and local governments in light of needs for adequate water treatment at new facilities, resolving traffic, transportation and other infrastructure issues, and sometimes emergency services. As a result of all of this communication, we find that the interests of tribes and their surrounding communities often become accommodated, if not aligned.

Conclusion

The future of Indian gaming is difficult to predict. Revenues from Indian gaming have had a strongly positive impact on tribal governments, helping tribes to build capacity and develop governmental infrastructure. That said, few economic resources remain productive forever. We continue to encourage gaming tribes to diversify economically, just as we encourage non-gaming tribes to be creative in seeking out economic development opportunities.

This concludes my prepared statement. Thank you for inviting the Administration to testify. I am happy to answer any questions the Subcommittee may have concerning our role with respect to Indian gaming.

The CHAIRMAN. Thank you for your testimony, Kevin. With that, Jonodev, you may proceed.

STATEMENT OF JONODEV OSCEOLA CHAUDHURI, VICE CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Mr. CHAUDHURI. Thank you, Chairman. Good afternoon, Chairman Tester and Vice Chairman Barrasso and Senators McCain and Heitkamp and other members of the Committee.

My name is Jonodev Osceola Chaudhuri. I am a member of the Muscogee Creek Nation and I serve as the Acting Chairman of the National Indian Gaming Commission. Thank you for providing the NIGC with this opportunity to testify today at this oversight hearing.

For a more detailed discussion of the NIGC and its role pursuant to IGRA, I direct you to our written testimony that we have submitted.

I am honored by the Vice Chairman's congratulations; I am deeply honored to receive the very recent nomination from the President. I do look forward to a confirmation hearing at some point. But today I am here to provide a brief overview of the agency and discuss our thoughts on regulation of the Indian gaming industry in the future.

Since being appointed to the commission over 10 months ago, I have worked closely with Associate Commissioner Dan Little, who is in the audience today, and commission staff, to build on the initiatives of the last four years. The NIGC is committed to upholding the statutory authority and responsibilities to oversee the regulation of Indian gaming and where appropriate and necessary, take enforcement action. But the NIGC recognizes that it cannot fulfill its responsibilities alone. As the primary day to day regulators on the ground, tribal governments and their regulatory bodies have the greatest interest in safeguarding an industry that has greatly contributed invaluable improvements and opportunities to their communities. It is a testament to the leadership of tribal governments, their citizens and the work of their dedicated employees that the Indian gaming industry has remained protected and stable.

In 2013, tribal facilities generated $28 billion in gross gaming revenue as compared to $27.9 billion in 2012. Through collaboration with all levels of gaming regulators, the NIGC will continue to ensure the protection and success of the gaming industry through diligent professional oversight and enforcement.

To accomplish IGRA's stated policy goals, the NIGC continues to be proactive in several areas, including consultation, ongoing regulatory and operational review, training and technical assistance

and agency accountability. The agency supports the Administration's commitment to Indian Country, in terms of nation building, honoring tribal sovereignty and self-determination and engaging in meaningful consultation with tribes. 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.

So far this year, the commission has conducted four separate consultation sessions which were attended by representatives of more than 36 tribes. In addition to consulting and working with tribes, we also work with other regulatory bodies, including State agencies, such as those in the Department of Gaming and the Nevada Gaming Control Board, to name a few.

We do this to promote the integrity of Indian gaming. Successful regulation depends on a properly trained workforce, and the NIGC views training and technical assistance as a valuable component to the agency's mission. We appreciate the reference to the ACE Initiative made in opening statements today. We deem the ACE Initiative as a pillar of our success over the last few years. Our written testimony goes into detail regarding the ACE Initiative. But bottom line, the idea is to invest resources into working with tribes and tribal regulators on the front end to minimize compliance issues on the back end.

As to the next 25 years of the industry, we recognize that gaming will continue to play a significant role in many tribes' nation-building efforts in the foreseeable future. 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." The NIGC understands how important gaming is to tribal economic development and we are committed to maintaining our ability to safeguard the industry, so that the policy goals of IGRA are fully met.

Additionally, the NIGC realizes that constant technological advances are not only changing the face of Indian gaming but also necessitate that the NIGC continue to adapt to meet the regulatory needs of the industry. As tribal gaming evolves, the NIGC wants to continue to play a relevant role and ensure it can meet the demands of new regulatory issues in a timely manner. This desire has helped guide all recent agency activity, great and small.

A perfect example of this is our use of our recent headquarters relocation to upgrade existing IT capabilities. Although it is impossible to predict the nature of the industry in five years, let alone 25, we are confident that Indian gaming in the future will continue to be shaped by many of the same forces that have shaped it since the enactment of IGRA. Specifically, tribes will continue to drive operational and technological innovation within relevant legal parameters and consistent with their respective cultural values and business landscapes. Sound regulation helps provide a level playing field for each tribe to consider whether and how to conduct gaming, given the respective needs and opportunities.

We at the NIGC are committed to ensuring that we regulate in a way that allows all gaming facilities, no matter how big or small, to reach their full business potential and provide the greatest contribution to their economic development and nation-building ef-

forts. The NIGC is committed to working closely with this Committee and with Indian Country to ensure the integrity of Indian gaming.

Thank you again, Chairman Tester, Vice Chairman Barrasso, and members of the Committee. I appreciate your time and attention today. I am happy to answer any questions that you may have.

[The prepared statement of Mr. Chaudhuri follows:]

PREPARED STATEMENT OF JONODEV OSCEOLA CHAUDHURI, VICE CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Thank you Chairman Tester, 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 Vice Chairman of the National Indian Gaming Commission (NIGC or Commission).

Over the past ten months, I have worked closely with Associate Commissioner Dan Little and Commission staff to build on the initiatives of the last four years.

Today I will provide you an overview of the status and future of Indian gaming with an emphasis on the regulation of the industry.

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

The National Indian Gaming Commission (NIGC) was established by the Indian Gaming Regulatory Act (IGRA) in order to provide Federal civil regulatory oversight of Indian gaming. The NIGC is composed of three members—the Chairperson and two associate commissioners. The Chairperson is appointed by the President and must be confirmed by the Senate. The associate commissioners are appointed by the Secretary of the Interior. Under IGRA, at least two of the three commissioners must be enrolled members of federally recognized Indian tribes, and no more than two members may be of the same political party. Each commissioner serves a three-year term, but a commissioner may serve after the expiration of his or her term until a successor has been appointed.

IGRA establishes three classes of Indian gaming, each of which has a different regulatory structure. Class I gaming is defined as traditional and social gaming for minimal prizes. Class I gaming is regulated exclusively by tribes.

Class II gaming is defined as the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) and, if played in the same location as bingo, pull tabs, punch boards, tip jars, instant bingo, or other games similar to bingo. Class II also includes non-banking card games, such as poker, if such card games: (1) are explicitly authorized by the laws of the State, or (2) are not explicitly prohibited by the laws of the State, and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games of limitations on wagers or pot sizes in such card games.

IGRA also specifies that Class II does not include slot machines or electronic facsimiles of any game of chance. A tribe may conduct, license, and regulate Class II gaming if the state in which the tribe is located permits such gaming for any purpose and the tribal government adopts a gaming ordinance which has been approved by the NIGC Chair. Class II gaming is regulated by tribes with oversight by the NIGC. States have no role in the regulation of Class II gaming.

Class III gaming includes all forms of gaming that are not Class I or II, such as black jack, slot machines and craps. Class III is generally referred to as full-scale casino style gaming. Class III gaming may be lawfully conducted by an Indian tribe if: (1) the state in which the tribe is located permits that particular type of Class III gaming for any purpose by any person or organization; (2) the tribe and the state have negotiated a compact that has been approved by the Secretary of the Interior; and, (3) the tribe has adopted a tribal gaming ordinance that has been approved by the NIGC. The Act contemplates that the regulation of Class III gaming will be negotiated by the tribes and states in a compact. However, given that the NIGC must approve and provide regulatory oversight of items in the tribe's gaming ordinance and Class III management contracts, it too has a role in the regulation of Class III gaming.

Under IGRA, the NIGC has several specific responsibilities. First, the NIGC Chairman must approve all tribal gaming ordinances before Indian tribes may operate gaming on Indian lands. Also, if a tribe wishes to use an outside contractor to

manage its gaming operation, the NIGC Chairman must first approve the management contract. In conjunction with such review, the principals of each management company must pass a detailed background investigation conducted by NIGC investigators. IGRA also provides authority for the NIGC to inspect gaming operations and monitor the tribes' use of gaming revenue. The NIGC Chairman has the authority to bring enforcement actions and assess civil fines against tribes or outside managers for any violation of IGRA, the NIGC's regulations, or an approved tribal gaming ordinance. Appeals from the NIGC Chairman's decisions regarding tribal gaming ordinances, management contracts, and enforcement actions are heard by the full Commission. Regulations and subpoenas are also issued by the full Commission. IGRA also contains criminal provisions related to theft from gaming operations on Indian lands. However, since the NIGC has no criminal law enforcement authority, IGRA directs the agency to report any potential criminal violations to the appropriate law enforcement agency. These responsibilities enable the agency to fulfill its statutory mission to protect tribes from organized crime and other corrupting influences and ensure that tribes are the primary beneficiary of the gaming activity.

In addition to the duties assigned to NIGC, IGRA also provides a role for the Secretary of the Interior. Interior is charged with approving tribal-state gaming compacts, issuing Class III gaming procedures, and approving tribal revenue allocation plans. In many instances, the Secretary must take land into trust before a parcel of tribal land can be eligible for gaming under IGRA. Typically, Interior will only take land into trust for gaming purposes if it first determines that the land would be eligible for gaming. In 2008, Interior promulgated regulations establishing procedures for determining whether or not any of IGRA's exemptions for allowing gaming on trust lands acquired after October 17, 1988, would apply.

Under IGRA and the NIGC regulations, each Indian tribe must license every primary management official and key employee in its gaming operations, as NIGC regulations define those terms. Before issuing such licenses, the tribes must conduct individual background investigations that include a search of the FBI's criminal history database. One method of accessing such files is through the NIGC. A tribe may enter an agreement with the NIGC whereby the tribe sends its fingerprint cards to the NIGC, and the NIGC then forwards all cards received to the FBI for criminal history searches. The NIGC and the FBI operate under a memorandum of understanding for these purposes.

Indian gaming can only occur on Indian lands, which IGRA defines as: All lands within the limits of an Indian reservation; and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power. Under IGRA, gaming is prohibited on lands acquired by the Secretary of the Interior into trust for the benefit of an Indian tribe after October 17, 1988, unless the land falls within certain exceptions listed in that provision.

To determine whether lands are Indian lands on which a Tribe may conduct gaming, the Department of the Interior and the NIGC entered into a memorandum of understanding which establishes a collaborative process for determining whether a Tribe may conduct gaming on specific parcels. Generally, Interior will determine whether lands are reservation lands and Interior and NIGC will collaborate on whether the Tribe has jurisdiction over those lands. If the lands are not within a reservation, then Interior and NIGC will collaborate to determine whether the lands meet the second test of trust or restricted lands. If the lands qualify as Indian lands under IGRA but are ineligible for gaming, the NIGC or the United States Attorney may close the facility. If the lands are not Indian lands, the state and local laws apply and jurisdiction over gaming on such lands is vested in the particular state where the parcel is located.

IGRA restricts the uses of tribal gaming revenues to primarily governmental purposes. However, if gaming revenues can adequately cover such needs, then the tribe also may make per capita payments to individual tribal members from the remaining proceeds (taxable as personal income), provided such distributions are made pursuant to a revenue allocation plan approved by the Secretary of the Interior. Many gaming tribes make no per capita payments at all.

The NIGC is funded entirely by fees paid from the Indian gaming. The NIGC's headquarters office is located at 90 K Street, NE, in Washington, D.C. The agency has six regional offices: Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK; Oklahoma City, OK; and Washington, D.C. The NIGC's region offices house NIGC staff in the Compliance Division, making it possible to have regular contact with tribes at their gaming locations.

Over the last five years, the Commission has identified and launched a series of major initiatives consistent with its statutory mission. These included consultation

and relationship building, conducting a comprehensive regulatory review, providing technical assistance and training, and improving agency operations. In advancing these initiatives, the agency has changed its consultation process to have a dialogue with tribes before regulatory changes are implemented and before the rule-making process is initiated. Further, the Commission revised its training program to more closely align with the needs of the regulated community. To that end, the Commission reviewed more than 20 regulations or potential regulations, utilizing an informal pre-rulemaking process that respected tribal sovereignty by soliciting tribal involvement early in the process. Finally, the Commission created better communication systems, developed practices and policies that allow employees to better perform their duties, and created a line-item-specific budget that allows it to be more fiscally responsible.

The State of the Industry

Currently, Indian gaming is being conducted in 28 states by 243 of the 566, 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. In addition, tribes both through their compacts and charitable outreach regularly contribute to surrounding communities to support infrastructure, emergency services, and other community programs such as schools. While tribal gaming generates modest to considerable revenues for individual tribes, tribal gaming facilities in some regions 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 the greatest interest in safeguarding an industry that has greatly contributed to invaluable improvements to their communities. It is a testament to the leadership of tribal governments, their citizens, and the work of their dedicated employees that the Indian gaming industry has remained protected and stable. In 2013, tribal facilities generated $28 billion in gross gaming revenue as compared to $27.9 billion in 2012. 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, the agency is committed to upholding the statutory authority and responsibilities of my position to oversee the regulation of Indian gaming, and where appropriate, take enforcement action.

Indian Gaming—The Next 25 years

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. To accomplish these goals the NIGC continues to be proactive in several areas including: Consultation and Building Relationships, ongoing Regulatory Review, Training and Technical Assistance, and Agency Accountability.

The NIGC realizes that constant technologic advances are not only changing the face of Indian gaming, but also necessitate that the NIGC continue to adapt to meet the regulatory needs of the industry. As tribal gaming evolves, the NIGC wants to continue to play a relevant role in tribal gaming and ensure that it can meet the demands of new regulatory issues in a timely manner.

Indian gaming is means by which tribes can achieve greater self-determination and self-sufficiency. The NIGC understands how important gaming is to tribal economic development and we are committed to maintaining our ability to safeguard the industry so that the policy goals of IGRA are fully met.

1. Consultation and Building Relationships

The agency supports the 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 developed a new 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."

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. This year the Commission conducted four separate consultations sessions. These sessions were attended by representatives of more than 36 tribes.

The NIGC makes a point of attending the meetings and conferences held by national and regional tribal associations, such as the Great Plains Indian Gaming Association (GPIGA), the Oklahoma Indian Gaming Association (OIGA), the Washington Indian Gaming Association (WIGA), the California Nations Indian Gaming Association (CNIGA), the Midwest Alliance of Sovereign Tribes (MAST), New Mexico Indian Gaming Association (NMIGA), National Indian Gaming Association (NIGA), National Congress of American Indians (NCAI) National Tribal Gaming Commissioners/Regulators (NTCG/R) and United South and Eastern Tribes (USET).

The Commission is also committed to strengthening relationships and building new ones. In addition to working with tribes, we also will work with other regulatory bodies such as the Nevada Gaming Control Board and the New Jersey Division of Gaming Enforcement to promote the integrity of Indian gaming.

2. Regulatory Review

In November of 2010, the Commission commenced a full-scale regulatory review to examine the effectiveness of our regulations and identify any areas for improvement. Through a Notice of Inquiry followed by more than 50 consultations with tribes and numerous comments from the public, the Commission considered 20 regulations or potential regulations with 17 of those being adopted and implemented and one being repealed. It is our belief that reviews of regulations should be done regularly so that the NIGC is responsive to changes in the gaming industry and not serve as a barrier to progress.

3. Training and Technical Assistance

Successful regulation depends upon a properly trained workforce, and the NIGC views 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. NIGC recognizes that Tribes have a vested interest in their gaming operations. They are an important source of funding for government programs and are often the largest employer of tribal citizens and their neighbors. We also recognize that in the 26 years since IGRA was passed, Tribes have responded to their new role by creating sophisticated gaming regulatory bodies of their own.

While the NIGC has an important regulatory role, Tribes are the on-the-ground regulators of gaming. With over 5,410 tribal gaming regulatory employees nationwide it is a much more efficient use of resources to build their capabilities through training, technical assistance, and coordination, than to go it alone.

To that end, we have been implementing the A.C.E. approach: Assistance, Compliance, and Enforcement. This approach prevents foreseeable problems through effective communication, training and technical assistance, and compliance efforts. The first step of this initiative is to provide assistance to achieve compliance with IGRA and the NIGC regulations. This means staying abreast of industry changes and communicating what they mean to gaming operators and regulators through more and better training. Last year, we provided 194 training events to 2751 participants. Currently this year we have provided 147 of training events to 2140 participants. By working with tribal gaming regulators and sharing our knowledge, we increase the number of people who can extinguish issues before they become blazing problems.

The second prong is Compliance. The Agency communicates with Tribes early in the process if there is a potential compliance issue and works with them to resolve any issues voluntarily.

The Agency uses its final tool—enforcement action—when necessary.

This three tiered approach ensures that the agency's statutory responsibilities are performed in an efficient manner by respecting the benefit of meaningful collaboration with tribes who are the primary regulators of Indian gaming and have a foremost interest in safeguarding tribal resources.

4. Agency Accountability

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 has been a top priority of the Commission. We are committed to complying with all applicable laws, regulations, rules and executive orders 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. Recently, the Commission undertook a comprehensive review of its budget and spending priorities. A guiding principle of the review and budgeting decisions was 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 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.

Conclusion

The NIGC is committed to working closely with this Committee and Indian country to ensure the integrity of Indian gaming. Thank you again, Chairman Tester, 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. Thank you, Jonodev.

Anne-Marie, you are up. Thanks.

STATEMENT OF ANNE–MARIE FENNELL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. FENNELL. Chairman Tester, Vice Chairman Barrasso and members of the Committee, I am pleased to be here today to provide preliminary observations on our ongoing review of the Indian Gaming Oversight.

Over 25 years ago, the Indian Gaming Regulatory Act of 1988 was enacted and serves as the primary Federal statute governing Indian gaming. Since that time, Indian gaming has become a significant revenue source for many tribes. In fiscal year 2012, over 40 percent of federally-recognized tribes operated more than 420 gaming establishments across 28 States.

My testimony today will describe our preliminary observations from our ongoing work that examines, (1) how Interior helps ensure compliance with IGRA through its review of tribal-State compacts; (2) how States and selected tribes regulate Indian gaming; and (3) how the National Indian Gaming Commission regulates and oversees Indian gaming and whether recent organizational changes have affected its oversight approach.

First, Interior has a multi-step review process designed to help ensure that tribal-State compacts comply with IGRA provisions that may be contained in those compacts. Our review indicated that 78 percent of the compacts submitted to Interior for review since 1998 have been approved. While compacts approved by Interior contain similar provisions, they do vary in some respects, such as the types of revenue-sharing arrangements between States and tribes.

Second, the roles of States and tribes in regulating Indian gaming are established in tribal-State compacts for Class 3 gaming and tribal gaming ordinances for both Class 2 and 3. Based on our preliminary observations for three States that we have visited, Arizona, California and Oklahoma, we found that approaches to regulating Indian gaming varied, as seen through differences in the regulatory agency's organization, their funding and their staffing levels.

For example, California divides its oversight responsibilities between two agencies, whereas Arizona and Oklahoma each have one agency.

For the seven tribes we have visited so far, each has established tribal gaming commissions that perform various regulatory functions to help ensure that their gaming facilities are operating according to applicable tribal laws and regulations and compacts.

Third, the commission plays an important role in regulating and overseeing Indian gaming and ensuring compliance with IGRA. Specifically, the commission monitors tribal gaming activities, inspects gaming premises and takes enforcement actions when necessary. In 2011, the commission implemented its Assistance, Compliance and Enforcement initiative, which emphasizes providing technical assistance to tribes to help achieve compliance with IGRA. According to commission officials, enforcement actions have decreased significantly in part as a result of this initiative.

Also in 2011, the commission merged its enforcement and audits division into one compliance division, which commission officials said was done in part to emphasize compliance assistance under its initiative.

In conclusion, Indian gaming has grown and evolved since IGRA was enacted. Our ongoing work over the next several months will continue to examine how tribes, States and the Federal Government oversee gaming activities within the important regulatory framework established by IGRA.

Chairman Tester, Vice Chairman Barrasso, and members of the Committee, this completes my prepared statement. I would be pleased to respond to any questions you may have.

[The prepared statement of Ms. Fennell follows:]

PREPARED STATEMENT OF ANNE-MARIE FENNELL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

INDIAN GAMING—PRELIMINARY OBSERVATIONS ON THE REGULATION AND OVERSIGHT OF INDIAN GAMING

Why GAO Did This Study

Over the past 25 years, Indian gaming has become a significant source of revenue for many tribes, reaching $27.9 billion in 2012. At that time, about 240 of the 566 federally recognized tribes operated more than 420 gaming establishments ranging from bingo halls to multimillion dollar casinos across 28 states. IGRA, the primary federal statute governing Indian gaming, provides, among other things, a statutory basis for the regulation of Indian gaming to assure that it is conducted fairly and honestly. Tribes, states, Interior, and the National Indian Gaming Commission have roles in regulating or overseeing Indian gaming.

This testimony is based on GAO's preliminary observations from ongoing work that examines (1) the process Interior uses to ensure compliance with IGRA through its review of tribal-state compacts and the types of provisions contained in these compacts; (2) how states and selected tribes regulate Indian gaming; and (3) how the Commission regulates and oversees Indian gaming and how, if at all, recent organizational changes have affected its regulatory or oversight approach.

In its ongoing work, GAO analyzed compacts; visited three states and seven tribes (selected for geographic representations and revenue generation) to discuss the oversight of Indian gaming; reviewed Commission data on technical assistance and enforcement actions; and interviewed Interior and Commission officials. GAO will continue to collect information on these topics and produce a final report.

GAO is not making any recommendations in this testimony.

What GAO Found

The Department of the Interior (Interior) has a multistep review process designed to help ensure that compacts comply with the Indian Gaming Regulatory Act (IGRA). Such compacts are agreements between a tribe and state that governs the conduct of the tribe's Class III (or casino) gaming activities. Based on GAO's preliminary review, Interior has approved 78 percent (382) of the tribal-state compacts submitted since 1998. While the provisions in compacts approved by Interior are largely similar, they do vary in some respects, such as the terms of "revenue sharing" arrangements established between states and tribes. For example, some compacts do not provide for revenue sharing with states, while some require tribes to share significant portions of revenue with states. The remaining 22 percent (106)

of compacts reviewed were either (1) considered approved without action by the Secretary of the Interior, (2) withdrawn, or (3) disapproved by Interior for various reasons, such as when they were not consistent with IGRA.

The roles of states and tribes in regulating Indian gaming vary and are established in two key documents: (1) compacts for Class III gaming and (2) tribal gaming ordinances, which provide the general framework for day-to-day tribal regulation of Class II (including bingo) and Class III gaming facilities. Based on GAO's preliminary observations of ongoing work, GAO found that the three states visited—Arizona, California, and Oklahoma—varied in their approaches to regulating Indian gaming, as seen through differences in their regulatory agencies' organization, staffing levels, and funding. For the seven tribes GAO visited, each has established tribal gaming commissions that perform various regulatory functions to help ensure that their gaming facilities are operated in accordance with tribal laws and regulations and, for Class III operations, the compact.

The National Indian Gaming Commission (Commission), an independent commission created by IGRA within Interior, plays an important role in regulating and overseeing Indian gaming by ensuring that Class II and Class III gaming facilities comply with IGRA and applicable federal regulations and tribal ordinances or resolutions. Among other things, the Commission monitors tribal gaming activities, inspects gaming premises, and takes enforcement actions when necessary. In 2011, the Commission implemented its Assistance, Compliance, and Enforcement initiative, which emphasizes providing assistance to tribes to achieve compliance with IGRA. Through this initiative, the Commission has sought to provide technical assistance and training to tribes so that compliance issues may be resolved early and voluntarily without the need for enforcement actions. According to Commission officials, in part, as a result of this initiative, the number of enforcement actions has decreased significantly. Also in 2011, as part of a broader organizational realignment, the Commission merged its Enforcement and Audits divisions into one Compliance Division. According to Commission officials, this merger was deemed necessary, in part, to better support the Commission's emphasis on compliance assistance under its initiative.

Chairman Tester, Vice Chairman Barrasso, and Members of the Committee:

I am pleased to be here today to provide some preliminary observations from our ongoing review of Indian gaming oversight for this committee. Over the past 25 years, Indian gaming has become a significant source of revenue for many tribes. In fiscal year 2012, the Indian gaming industry generated revenues totaling $27.9 billion and included 420 gaming establishments in 28 states.

The Indian Gaming Regulatory Act (IGRA) was enacted in 1988 to provide a statutory basis for the regulation of gaming on Indian lands. IGRA created three classes of gaming and sets out regulatory responsibilities for tribes, states and the federal government. Class I gaming consists of social games played solely for prizes of minimal value or traditional gaming played in connection with tribal ceremonies or celebrations. This type of gaming is within the exclusive jurisdiction of the tribes. Class II gaming includes bingo, games similar to bingo, and certain card games. Class III gaming includes all other types of games, including slot machines, craps, and roulette. Class II and Class III are subject to federal regulation or oversight; however, Class III is also subject to state regulation to the extent specified in compacts between the tribe and state that allow such gaming to occur. Compacts are agreements between the tribe and state that establish the terms for how a tribe's Class III gaming activities will be operated and regulated, among other things. The Secretary of the Interior (Secretary) approves compacts and must publish a notice in the *Federal Register* before they go into effect.

IGRA also created the National Indian Gaming Commission (Commission), a commission within the Department of the Interior (Interior), and charged it with regulating and overseeing various aspects of Indian gaming. The Commission is composed of a Chair, appointed by the President and confirmed by the Senate, and two associate commissioners, appointed by the Secretary. The Commission maintains its headquarters in Washington, D.C. and has seven regional offices and three satellite offices and it has approximately 100 full-time employees. To help ensure compliance with IGRA and its implementing regulations, the Commission engages in various activities to monitor the work of tribal gaming regulators—such as examining records of gaming operations, inspecting gaming facilities, and assessing tribe's compliance with minimum internal control standards for Class II gaming.[1] In addition,

[1] Although the Commission's regulations establishing minimum internal control standards applied to both Class II and Class III, in 2006, a federal circuit court ruled that IGRA did not authorize the Commission to issue regulations establishing minimum internal control standards

the Chair reviews and approves various documents related to gaming operations, including tribal ordinances or resolutions adopted by a tribe's governing body.[2] In 2011, the Commission reorganized its oversight program by consolidating its Enforcement and Audit divisions into a single Compliance Division.

This testimony reflects our preliminary observations from our ongoing review that examines (1) the process Interior uses to help ensure compliance with IGRA through its review of compacts and the types of provisions contained in these compacts; (2) how states and selected tribes regulate Indian gaming; and (3) how the Commission regulates and oversees Indian gaming and how, if at all, recent organizational changes have affected its regulatory or oversight approach.

To determine the process Interior uses to help ensure compliance with IGRA through its review of compacts and the provisions contained in these compacts, we obtained a list from Interior of all Indian gaming compacts in effect as of July 2014 and analyzed the compacts to identify key provisions, including those provisions related to tribal and state regulation. We also obtained from Interior a list of all compact decisions (e.g., approved, disapproved) from 1998 to the present. We are in the process of verifying the accuracy of this list. We also examined written guidance and other relevant documentation describing Interior's process for reviewing gaming compacts and we interviewed agency officials about how this review process helps ensure compliance with IGRA.

To determine how states and selected tribes regulate Indian gaming, for our ongoing review of Indian gaming oversight, we are in the process of contacting all 28 states that have Indian gaming operations. We are collecting information about how each of the 28 states oversees Indian gaming including information on the states' regulatory organizations, staffing, funding and expenditures, and the types of monitoring and enforcement activities conducted by state agencies. For our ongoing review, we are visiting 6 states—Arizona, California, Michigan, New York, Oklahoma, and Washington. We chose these states to provide geographic representation and because they are among the states with the greatest revenue generated from Indian gaming. We have completed visits to Arizona, California, and Oklahoma, which have about 45 percent of all Indian gaming operations.[3] We are limiting the discussion of our site visits to these three states for our preliminary observations in this testimony. We are in the process of contacting the remaining 22 states by telephone. Given that there are over 200 tribes that conduct gaming, we will not be able to obtain information that is representative of all gaming tribes. Rather, for each of the 6 states that we visit, we are interviewing officials from at least one or two federally recognized tribes with gaming operations regarding their approaches to regulating Indian gaming.[4] Our discussion today will focus on 7 tribes that we have already visited.[5]

To determine how the Commission regulates and oversees Indian gaming and how, if at all, recent organizational changes have affected its regulatory and oversight approach, for our ongoing review we are in the process of collecting information on the Commission's policies and procedures related to its regulation and oversight of Indian gaming. Also, for fiscal years 2004 through 2013, we plan to obtain and analyze data from the Commission about (1) technical assistance and training provided to tribes, (2) monitoring activities and enforcement actions taken, and (3) tribal compliance rates. We are also obtaining information about the Commission's recent consolidation of its Enforcement and Audit divisions into a Compliance Division, including impacts of this consolidation, if any, on the Commission's regulatory and oversight approach.

We are conducting our ongoing work in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence

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for Class III gaming. *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n,* 466 F.3d 134 (D.C. Cir. 2006).

[2] 2While IGRA refers to both tribal ordinances and resolutions, this testimony will use the term tribal ordinances.

[3] While the number of gaming establishments was 420 in 2012, as of July 7, 2014, the Commission reported 477 gaming establishments. About 45 percent of the gaming establishments (216 out of 477) were located in Arizona, California, and Oklahoma.

[4] IGRA only authorizes federally recognized tribes—those recognized by the Secretary of the Interior as eligible for the special programs and services provided by the United States to Indians because of their status as Indians—to conduct gaming activities.

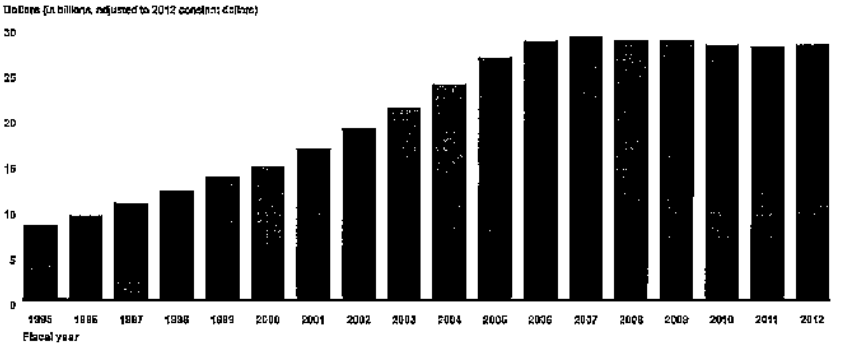
[5] As of this testimony, we have visited the Salt River Pima-Maricopa Indian Community and the San Carlos Apache Tribe in Arizona; Shingle Springs Band of Miwok Indians, United Auburn Indian Community of the Auburn Rancheria, Yocha Dehe Wintun Nation in California; and Chickasaw Nation and the Muscogee (Creek) Nation in Oklahoma.

we plan to obtain will provide a reasonable basis for our findings and conclusions based on our audit objectives. We provided a draft of this statement to Interior and the Commission for their review. The Commission provided technical comments which we incorporated as appropriate.

Background

Since fiscal year 1995, revenue from Indian gaming has grown from $8.2 billion to $27.9 billion in fiscal year 2012 (see fig. 1). In fiscal year 2012, about 240 of the 566 federally recognized tribes operated more than 420 Indian gaming establishments across 28 states. These establishments included a broad range of operations, from tribal bingo to multimillion dollar casino gaming facilities. Of these establishments, a few large operations account for a major portion of the revenue.

Figure 1: Growth of Indian Gaming Revenues, Fiscal Years from 1995 to 2012



Source: GAO analysis of National Indian Gaming Commission data. | GAO-14-743T

IGRA is the primary federal statute governing Indian gaming.[6] IGRA provides, among other things, a statutory basis for the regulation of Indian gaming to shield it from corrupting influences, assure that gaming is conducted fairly and honestly by both the operators and the players, and ensure that tribes are the primary beneficiaries of gaming operations. The act establishes the following three classes of gaming.

- Class I gaming consists of social gaming solely for nominal prizes or traditional gaming played in connection with tribal ceremonies or celebrations and is regulated solely by tribes and not subject to IGRA.
- Class II gaming includes bingo, pull-tabs,[7] punch boards,[8] and certain card games[9] and is regulated by the tribes and the Commission.
- Class III gaming includes all other forms of gaming, including casino games and slot machines, and although both Interior and the Commission play a role in overseeing certain aspects of Class III gaming, it is regulated by the tribes and the states pursuant to compacts.

A tribe may only conduct Class III gaming activities if such activities are conducted in conformance with a compact, among other things. According to the relevant Senate committee report, IGRA was intended to provide a means by which tribal and state governments can realize their unique and individual governmental objectives.[10] The Senate committee report also noted that the terms of each compact may vary extensively and may allocate most or all of the jurisdictional responsibility

[6] Pub. L. No. 100–497, 102 Stat. 2467 (1988).

[7] A pull-tab is a gambling ticket that is sold as a means to play a pull-tab game. The object of the ticket is to open the perforated windows on the back of the ticket and match the symbols inside the ticket to the winning combinations on the front of the ticket. The winning pull-tab ticket is turned in for a monetary prize.

[8] A punch board is a small board full of holes in which each hole contains a slip of paper with symbols printed on it; a gambler pays a small sum of money and pushes out a slip in the hope of obtaining one that entitles the gambler to a prize.

[9] Class II card games are nonbanking card games that the state explicitly authorizes, or does not explicitly prohibit, and are played legally elsewhere in the state, and are played in conformity with state laws and regulations, if any, regarding hours, periods of operation, and limitations on wagers and pot sizes.

[10] S. Rep. No. 100–446 at 6 (1988).

to the tribe, to the state, or to any variation in between.[11] These compacts are negotiated agreements that establish the states' and tribes' regulatory roles and specify the games that are allowed, among other things. IGRA specifies that compacts may include provisions related to:

- the application of criminal and civil laws and regulations of the tribe and the state that are directly related to and necessary for the licensing and regulation of gaming,
- the allocation of civil and criminal jurisdiction between the tribe and the state necessary to enforce those laws and regulations,
- state assessments of gaming activities as necessary to defray costs of regulating gaming,
- tribal taxation of gaming activities,
- remedies for breach of contract,
- standards for gaming activity operations and gaming facility maintenance, and
- any other subjects directly related to the operation of gaming activities.

IGRA authorizes the Secretary to approve compacts and only allows the Secretary to disapprove a compact if it violates IGRA, any other federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians. Compacts only go into effect when a Notice of Approval from the Secretary has been published in the *Federal Register*.

Class II and Class III gaming may only be conducted on Indian lands in states that permit such gaming. Indian lands, as defined in IGRA, are (1) all lands within the limits of an Indian reservation; (2) lands held in trust by the United States for the benefit of an Indian tribe or individual over which the tribe exercises governmental power; and (3) lands held by an Indian tribe or individual that are subject to restriction against alienation and over which the tribe exercises governmental power.[12]

Interior Uses a Multistep Review Process to Help Ensure That Compacts Comply with IGRA

Interior has a multistep review process that helps to ensure that compacts comply with relevant IGRA provisions and other applicable laws. While compacts approved by Interior share similar provisions, they do vary in some respects, such as the terms of "revenue sharing" arrangements between states and tribes and the extent to which the compact addresses tribal interactions with local governments. Interior cited a variety of reasons for allowing compacts to take effect without Secretarial action (deemed approved) and for disapproving compacts.

Interior's Process for Reviewing Compacts

Interior's Office of Indian Gaming, under the supervision of the Deputy Assistant Secretary of Indian Affairs Policy and Economic Development, is responsible for reviewing compacts. According to Office of Indian Gaming officials, on the day that a compact is received, the Office of Indian Gaming date-stamps the compact and files the original version. The Office of Indian Gaming has 10 days to conduct an initial review of the compact. During this time, they will contact the applicant tribe or state if any additional information is needed. After this initial review, the Office of Indian Gaming sends a copy of the compact to Interior's Office of the Solicitor to conduct a legal review of the compact. The Office of the Solicitor has 10 days to review the compact. After the Office of the Solicitor's review is complete, the Office of Indian Gaming provides a copy of the compact and a summary of relevant information to the Assistant Secretary of Indian Affairs, who has 45 days to approve or disapprove the compact. Under IGRA, if a compact is not approved or disapproved within 45 days of its submission, then the compact is considered to have been approved (referred to as "deemed approved"), but only to the extent that it is consistent with IGRA.

On June 18, 2014, the Office of Indian Gaming provided us with a list of compacts that were approved, deemed approved, disapproved, or withdrawn each year from 1998 to the present. We are in the process of verifying the accuracy of this list. Based on our preliminary analysis of this list of compacts, the Secretary received a total of 490 compacts during this time period to review. Of these, 78 percent (382)

[11] S. Rep. No. 100–446 at 14 (1988).

[12] 25 U.S.C. § 2703(4). In addition, IGRA generally prohibits gaming on lands acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after October 17, 1988, although the act also contains several exceptions to the general prohibition. Alienation is the transfer of property.

were approved; 12 percent (60) were deemed approved; 6 percent (28) were withdrawn; and 4 percent (18) were disapproved.[13] The number of compacts submitted varied from year to year, from a high of 66 in 1999 to a low of 8 in 2006.

Variety of Provisions Contained in Compacts Approved by Interior

The compacts approved by Interior share similar provisions but vary in some respects. For example, while IGRA does not authorize states to impose a tax or fee on tribes, apart from the assessment to defray regulatory costs, the Secretary has approved compacts that contain provisions for revenue sharing with states, so long as the states provide the tribe with a comparable benefit in return—a benefit to which the tribe would not otherwise be entitled. The amount of revenue sharing varied widely in the compacts we reviewed. Some compacts do not provide for revenue sharing, such as the 1991 compact between the Fond du Lac Band of the Minnesota Chippewa Tribe and the state of Minnesota, or the 2011 compact between the Flandreau Santee Sioux Tribe and the state of South Dakota. In contrast, some compacts require the tribe to share significant portions of revenue with the state. For example, the 2010 compact between the Seminole Tribe of Florida and the state of Florida establishes percentages of net revenue that the tribe must give to the state—as much as 25 percent—based on how much revenue the tribe makes each year.

Approved compacts had provisions that varied in other ways, such as the extent to which the compacts require the tribe to enter into agreements with local governments. For example, the 2003 compact between the La Posta Band of Diegueno Mission Indians and the state of California requires the tribe to consult with the county and other relevant local governments to develop agreements to prevent and mitigate effects from any proposed gaming facility. Some compacts make no mention of agreements with local governments.

Reasons Compacts Are Deemed Approved or Disapproved

Compacts that are not approved or disapproved within 45 days are deemed approved,[14] but only to the extent that they comply with IGRA. According to Federal Register notices or decision letters that accompany the compacts, Interior might not take action on a compact within the statutory deadline for a variety of reasons. *Federal Register* notices indicate that some compacts take effect without Secretarial action because they only change the expiration date of a previously approved compact and do not require additional review. According to decision letters accompanying other compacts, the compacts were deemed approved because they contained provisions that the Secretary found to be questionable but not outright objectionable. For example, the 2014 compact between the Mashpee Wampanoag Tribe and the state of Massachusetts contained terms that could provide the possibility in the future for the state to regulate certain Class II games, which IGRA does not authorize, and Interior's letter cautioned the state and tribe against implementing the compact in a way that violated IGRA.

Of the disapproved compacts we reviewed, the reasons for disapproval varied. For example, compacts were disapproved because lands proposed to be used for gaming were not Indian lands as defined by IGRA or the compact established a management contract that did not meet the requirements of IGRA.[15]

15A tribe many enter into a management contract for the operation and management of its Class II or Class III gaming activity. A management contract is any contract or collateral agreement between a tribe and contractor, or a contractor and subcontractor, that provides for the management of all or part of the gaming operation. Management contracts must be approved by the Chair of the Commission.

State and Tribal Regulation of Indian Gaming

Compacts establish the responsibilities of both tribes and states for regulating Class III gaming and identify the standards for the gaming operation and maintenance of gaming facilities, as well as the state and tribal laws and regulations that will be used to regulate the gaming, among other things. In addition, tribal gaming ordinances, which apply to Class II and Class III gaming, provide the general framework for tribal regulation of gaming facilities. The ordinances include specific procedures that must be followed by tribes and standards that they must meet, among other things. Based on our preliminary observations of ongoing work, we found that the approaches of the three states we have visited to regulating Indian

[13] For two of the compacts on the list provided by Interior, the decision was not indicated. We are following up with Interior to clarify the decision for these compacts.

[14] Interior uses the term "deemed" approved to refer to those compacts that take effect without Secretarial action, as opposed to those the Secretary approves outright.

[15]

gaming vary, as seen through differences in their regulatory agencies' organization, staffing levels, and funding. For the seven tribes we have visited, each has established tribal gaming regulatory agencies that govern the day-to-day operations of their gaming facilities. These agencies perform various regulatory functions to help ensure that their gaming facilities are operated in accordance with tribal laws and regulations and, for Class III operations, the compact.

Compacts and Tribal Gaming Ordinances Establish the Roles of States and Tribes

The roles of states and tribes in regulating Indian gaming vary and are established in two key documents: (1) compacts for Class III gaming and (2) tribal ordinances for both Class II and Class III gaming. Compacts that govern Class III gaming on Indian lands lay out the responsibilities of both tribes and states for regulating gaming. For example, compacts may include, but are not limited to, provisions allowing the state to conduct inspections, certify employee licenses, and review surveillance records. They may also include tribal responsibilities to notify the state when they hire a new employee or when they make changes to their gaming regulations or rules for gaming.

In addition, IGRA requires a tribe's governing body to adopt, and the Commission Chair to approve, a tribal gaming ordinance before a tribe can conduct Class II or Class III gaming. According to the Commission, the tribal gaming ordinances are a key part of IGRA's regulation for tribal gaming, providing the general framework for tribal regulation of gaming facilities, and including specific procedures and standards to be met. For the Chair to approve the ordinances, they must provide, among other things, that:

- the tribe will have sole proprietary interest in the gaming activity;
- gaming revenues will only be used for authorized purposes;
- annual independent audits of gaming operations will be provided to the Commission;
- the construction, maintenance, and operation of the gaming facilities will be conducted in a manner that adequately protects the environment, public health and safety; and
- the tribe perform background investigations and the licensing of key employees and primary management officials in accordance with certain requirements.

Along with the ordinance, a tribe must also submit other documentation to the Commission, including copies of all tribal gaming regulations. The Chair has 90 days after submission of a tribal gaming ordinance to approve or disapprove it; if the Chair does not act within 90 days, the ordinance is considered to have been approved but only to the extent it is consistent with IGRA.

States Vary in Their Approaches to Regulating Class III Indian Gaming

Based on our preliminary observations, the three states that we have visited—Arizona, California, and Oklahoma—vary in their approaches to regulating Class III gaming. As illustrated in table 1, the three states differ in their organization, funding, and staffing levels.[16] For example, California divides its regulatory responsibilities between two agencies, whereas Arizona and Oklahoma each have one agency. We also observed that state budgets for the regulation of Class III Indian gaming ranged from $1.1 million to $19.8 million and staffing levels ranged from 3 to 136 full-time equivalents.

We also observed that the three states engaged in a variety of regulatory activities, including conducting background checks on current and prospective employees, licensing gaming devices, inspecting gaming operations, and reviewing the gaming operator's surveillance.

Tribes Are Responsible for the Day-to-Day Regulation of Indian Gaming

The Commission recognizes that tribal governments are responsible for the day-to-day regulation of gaming conducted on Indian lands. While tribal governments have the authority to engage in gaming, the Commission stresses the importance of tribes establishing a comprehensive regulatory framework for gaming. According to the Commission, comprehensive regulation by tribes is a necessary component to ensure the integrity of the games and to protect the interest of the tribe.

Each of the seven tribes we visited in Arizona, California, and Oklahoma for our preliminary observations have established tribal gaming regulatory agencies—also called tribal gaming commissions or tribal gaming agencies—that perform various regulatory functions to ensure that their gaming facilities are operated in accord-

[16] These differences are not, by themselves, an indication of effectiveness.

ance with tribal laws and regulations and, for Class III operations, the compact. For each of these tribes, the tribal gaming regulatory agency was established by the tribal government for the exclusive purpose of regulating and monitoring gaming on behalf of the tribe. In general, the regulatory functions that can be performed by tribal gaming regulatory agencies include:

- developing licensing procedures for all employees of the gaming operations,
- conducting background investigations on primary management officials and key employees,
- obtaining annual independent outside audits and submitting these audits to the Commission,
- ensuring that net revenues from any gaming activities are used for the limited purposes set forth in the gaming ordinance,
- promulgating tribal gaming regulations pursuant to tribal law,
- monitoring gaming activities to ensure compliance with tribal laws and regulations, and
- establishing or approving minimum internal control standards or procedures for the gaming operation.

As part of our ongoing work, we plan to visit additional tribes to discuss their approaches to regulating Indian gaming, and we will summarize our findings in our final report.

The Commission's Regulation and Oversight of Indian Gaming and Impacts of Recent Reorganization

The Commission plays an important role in regulating Class II gaming and overseeing Class III gaming to ensure compliance with IGRA and applicable federal and tribal regulations. Among other things, the Commission monitors Class II gaming, inspects Class II gaming premises, and takes enforcement actions when necessary. In 2011, the Commission implemented its Assistance, Compliance, and Enforcement (ACE) initiative, which emphasizes providing assistance to tribes to achieve compliance with IGRA. Through this initiative, the Commission has sought to provide technical assistance and training to tribes so that compliance issues may be resolved early and voluntarily without the need for a Notice of Violation, which we refer to as an enforcement action. Also in 2011, as part of a broader organizational realignment, the Commission merged its Enforcement and Audits divisions into one Compliance Division. According to Commission officials, this merger was deemed necessary, in part, to better support the Commission's emphasis on compliance assistance under its ACE initiative.

The Commission Is Responsible for Ensuring That Gaming Facilities Comply with IGRA and Applicable Federal and Tribal Regulations

IGRA established the Commission within Interior to provide federal regulation of Class II and oversight of Class III Indian gaming. Among other things, the Commission

- monitors tribal Class II gaming activity;
- inspects Class II gaming premises;
- reviews licenses issued by tribes for key employees and primary management officials;
- audits and reviews financial records of Class II gaming operations (and Class III operations when tribal gaming ordinances provide for it);[17]
- provides technical assistance and training to tribal gaming commissions and operations, and;
- when appropriate, undertakes enforcement actions for violations of IGRA, the Commission's regulations and approved tribal gaming ordinances.

The Commission also monitors tribal compliance with minimum internal control standards, which specify in detail the minimum practices tribes must establish and implement for gaming activities. The Commission adopted these standards for gaming operations on Indian lands in 1999; however, in 2006, a federal circuit court ruled that IGRA did not authorize the Commission to issue regulations establishing

[17] Notwithstanding the decision in *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n,* Commission officials told us that some tribal gaming ordinances authorize the Commission to conduct audits and reviews of Class III gaming activities.

minimum internal control standards for Class III gaming.[18] Commission officials explained that the impact of the court's decision is tempered by compacts requiring tribes to adopt tribal internal control standards for Class III gaming and that, in most cases, these standards are at least as stringent, if not more, than the Commission's Class III minimum internal control standards. Specifically, as of July 2014, Commission officials said 115 compacts in six states require tribes to adopt tribal internal control standards that are at least as stringent as the Commission's Class III standards. In addition to these compact provisions, Commission officials said that 15 tribes in California have gaming ordinances that provide for Commission enforcement of the Commission's Class III minimum internal control standards in lieu of the tribe ensuring compliance with tribal internal control standards and state verification of that compliance. However, Commission officials expressed concern that its minimum internal control standards are out of date since the Commission does not have the authority to amend these standards for Class III gaming. For example, gaming reporting functions have improved since the Class III minimum internal control standards were promulgated in 1999, and now this reporting is in digital format rather than in the analog format that the Class III minimum internal control standards suggest.

The Commission's Recent Initiative Seeks to Resolve Tribal Compliance Issues Voluntarily, When Possible

In 2011, the Commission implemented its ACE initiative, which emphasizes, among other things, providing assistance to tribes to achieve compliance with IGRA. Through this initiative, the Commission seeks to provide technical assistance and training to tribes so that compliance issues may be resolved voluntarily without the need for enforcement actions. However, Commission officials told us that enforcement actions will still be taken when necessary.

As part of its ACE initiative, the Commission provides guidance, technical assistance, and training to tribes to help build and sustain their capacity to prevent, respond to, and recover from internal control weaknesses and violations of IGRA and Commission regulations. To improve the technical assistance and training that the Commission offers to tribes, the Commission tracks the number of training and technical assistance events it offers, their length in hours, the number of people the training and technical assistance reaches, and satisfaction rates with the training the Commission offers. In fiscal year 2013, the Commission held 194 training and technical assistance events that provided 754 hours of training and technical assistance and reached 2,751 participants who were largely satisfied with the training and technical assistance provided, according to a Commission report (see table 2).

Table 2: National Indian Gaming Commission Assistance to Gaming Tribes, Fiscal Years 2011 through 2013

Training and technical assistance	2011	2012	2013	2011–2013 performance goal[a]	2014–2018 performance goal
Events held	83	84	194	70	82
Participants attending	2,309	2,013	2,751	2,000	2,000
Percent of tribes attending	84%	65%	81%	70%	70%
Percent of attendees satisfied	86%	93%	91%	85%	85%
Hours	659	748	754	[b]	[b]

Sources: GAO analysis of National Indian Gaming Commission performance reports and its strategic plan. | GAO-14-743T

[a]The National Indian Gaming Commission refers to its performance goals for fiscal year 2011 to 2013 as benchmarks in its Summary Performance Dashboard reports.

[b]No performance goal has been set.

As indicated in table 2, the Commission has met or exceeded its goals for training and technical assistance, with the exception of the percentage of tribes attending training in fiscal year 2012.

To monitor tribal compliance with IGRA and applicable federal and tribal regulations for both Class II and Class III operations—another component of the Commission's ACE initiative—the Commission conducts site visits and audits and evaluations of tribal gaming facilities, among other things. The Commission has developed various performance measures related to these compliance activities to help measure progress toward achieving its goals. As shown in table 3, the Commission met

[18] *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n,* 466 F.3d 134 (D.C. Cir. 2006).

its goals for conducting site visits and audits in fiscal years 2011 and 2012, but it did not meet its goals for these activities in fiscal year 2013.[19]

The Commission also tracks tribal compliance with what it defines as eight primary obligations under IGRA, which are:

- obtaining a compact approved by Interior prior to conducting Class III gaming;
- submitting investigative reports and suitability determinations on each key employee and primary management official, summarizing the results of the tribal background investigation;
- submitting fingerprint cards to the Commission for processing;
- submitting gaming employee applications to the Commission at the commencement of employment;
- adopting a gaming ordinance for Class II or Class III gaming that has been approved by the Commission;
- paying a fee assessment to the Commission based on gaming revenues;
- issuing a separate license for each facility where gaming is conducted; and
- submitting an annual independent audit of each Class II gaming operation to the Commission.

In its 2012 report to the Secretary regarding tribal compliance with these obligations, the Commission stated that tribes were in compliance with most of the obligations. However, the report stated that a number of tribes did not meet established deadlines for submission of fee payments and audit reports.[20]

In recent years, the Commission has rarely initiated enforcement actions. Our analysis of the last 10 years of publicly available Notices of Violation—documents that describe the circumstances surrounding the violation of the law, Commission regulation or tribal ordinance and measures required to correct the violation—peaked in fiscal years 2008 and 2009 (see table 4) before the implementation of the ACE initiative. Prior to fiscal year 2010, the Commission issued Notices of Violation most frequently to address untimely submissions of annual audit statements or untimely fee statements.

Table 4: National Indian Gaming Commission Notices of Violation, Fiscal Years 2004 through 2013

Reason cited	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
Failing to submit an agreed upon procedures report[a]	0	0	0	1	1	0	0	0	0	0	2
Class III gaming without a compact	1	0	0	0	0	0	0	0	0	0	1
Gaming without an ordinance	0	0	0	0	1	0	0	0	0	0	1
Gaming on ineligible land	0	0	0	0	1	0	0	0	0	0	1
Unlawful proprietary interest[b]	0	0	0	0	0	0	0	2	0	0	2
Failing to forward background investigations	0	0	2	1	1	0	0	0	0	0	4
Untimely quarterly statement or fee submission	2	9	5	0	0	38	1	0	0	0	55
Untimely annual audit report submission	4	3	9	3	19	6	1	0	0	0	45
Operating under an unapproved management contract	0	1	3	1	0	0	0	1	1	0	7
Inappropriate use of gaming revenue	0	0	0	0	0	0	1	0	0	0	1
Improper per capita payment made[c]	0	0	1	0	0	1	0	0	0	0	2
Total	7	13	20	6	23	45	3	3	1	0	121

Source: GAO analysis of Notices of Violation published on the National Indian Gaming Commission website. | GAO-14-743T

[a]Agreed upon procedures reports are assessments to verify whether a gaming operation is in compliance with the Commission's minimum internal control standards and/or a tribe's internal control standards, or a system of internal control standards that provide at least the same level of controls as the Commission's minimum internal control standards.

[b]Under the Indian Gaming Regulatory Act tribes must have the sole proprietary interest and responsibility for conducting gaming unless a tribal ordinance or resolution provides for Class II gaming entities other than the tribe on Indian lands.

[c]A tribe may use net gaming revenues to make payments directly to tribal members, called per capita payments, if the tribe has a revenue allocation plan approved by the Secretary of the Interior. This plan describes how the tribe intends to allocate net gaming revenues among the allowable uses under the Indian Gaming Regulatory Act, which includes funding of tribal government operations or programs and promoting tribal economic development.

Commission officials attributed the decline in the Commission's enforcement actions since fiscal year 2009 to its more proactive, preventative approach taken to help ensure compliance as called for by the ACE initiative. Specifically, the ACE ini-

[19] The Commission scaled back site visits in 2013 due to the automatic, across-the-board cancellation of budgetary resources in fiscal year 2013, known as sequestration.

[20] National Indian Gaming Commission, Report to the Secretary of the Interior on Compliance with the Indian Gaming Regulatory Act, Dec. 31, 2012.

tiative seeks to prevent violations from occurring since Commission officials are working collaboratively with tribal regulators. Under the ACE initiative, Commission officials said that enforcement is generally viewed as a tool of last resort. Also, the Commission modified its regulations in 2012 so that fees or quarterly statements submitted late are now subject to a fine rather than a Notice of Violation.[21] As these were the most common enforcement action initiated prior to fiscal year 2010, some decline in enforcement actions would be expected. We are continuing to collect and analyze data related to the Commission's regulations and oversight of Indian gaming, and we will present that information in our final report.

The Commission's Reorganization Appears to Align with Its Emphasis on Compliance Assistance

In 2011, as part of a broader organizational realignment, the Commission merged its Enforcement and Audits divisions into one Compliance Division. According to Commission officials, this merger was deemed necessary, in part, to better support the Commission's emphasis on compliance assistance through its ACE initiative. These officials explained that centralizing compliance, enforcement, and auditing staff into one division improves communication among these staff and allows the Commission to identify compliance issues early. Early identification of compliance issues, in turn, allows the Commission to provide assistance to tribes before an issue becomes more serious. In keeping with the ACE initiative, Commission officials said they would prefer not to let compliance issues reach the enforcement stage. We will continue to collect information on the Commission's reorganization, and we will present this information in our final report.

Chairman Tester, Vice Chairman Barrasso, and members of the Committee, this completes my prepared statement. I would be happy to respond to any questions that you or other members of the Committee may have.

The CHAIRMAN. Thank you, Anne-Marie, for your statement. And we do have questions.

I will start out with you, Kevin Washburn. The Department approves Class 3 tribal-State gaming compacts. In 2012, the Secretary disapproved a compact between the Mashpee Tribe and the Commonwealth of Massachusetts because it violated the tenets of IGRA. How many times has the department disapproved a compact?

Mr. WASHBURN. Roughly 20 times, I believe, since 1998. I think the GAO just said that we have approved compacts 78 percent of the time, I think that was the figure. So about one-fifth of the time we failed to approve a compact.

The CHAIRMAN. Is there any sort of pattern for the reasons why they are disapproved?

Mr. WASHBURN. Well, and this I think also sort of reflects a little bit what the GAO testified to, revenue sharing with States is something that comes up often in those compacts and the disapprovals. Indian gaming is primarily supposed to benefit Indian tribes. So we have looked with great scrutiny where a compact has revenue sharing with a State. It is supposed to be Indian gaming, not taxation for the State. So that is one of the areas that is a hot issue.

Other issues are, for example, when the Class 3 gaming compact addresses Class 2 gaming, because tribes are the exclusive regulators, along with the NIGC, of Class 2 gaming. So the States shouldn't have too much to say about what happens with Class 2 gaming.

Another area is when it appears that a State is trying to go beyond gaming. When it is trying to exercise authority over other matters, water rights, land rights, that sort of thing.

[21] Late payments are those received between 1 and 90 days late. Payments received after 90 days are failures to pay, which subjects the tribe to a potential notice of violation and civil fine assessment.

The CHAIRMAN. IGRA has a provision that if the Secretary doesn't approve an act within a certain period of time, it is deemed approved. Has that ever happened?

Mr. WASHBURN. Absolutely. And let me explain why. If I affirmatively approve a compact, I am basically vouching for its legality. I am saying, this compact is okay. If instead we deem it approved, it is deemed approved only to the extent it is consistent with the Indian Gaming Regulatory Act. And as Senator McCain probably knows better than anybody, the Indian Gaming Regulatory Act is not a model of clarity in some respects. It is not art, there are a lot of compromises that were made in the Act. We sometimes have concerns about the legality of a compact, but it is not necessarily a concern that goes right to the heart of the compact, it is around a peripheral issue. In those circumstances, we sometimes will allow the compact to become deemed approved so we don't have to decide on that question.

In essence what we are doing in that situation is punting it to the parties or the courts to answer those questions. We are loathed to disapprove a compact. We don't like to do it.

The CHAIRMAN. In your testimony you talk about the Secretary's role in approving land into trust for gaming purposes and the four exceptions in IGRA that allow tribes to do gaming acquired after 1998. Do you know why Congress included these exceptions in IGRA and if there are sound policy reasons today for Congress to leave these exceptions in place?

Mr. WASHBURN. Yes, Chairman. IGRA ensures that newly-recognized tribes or restored tribes are also allowed to game. That is one of the reasons we have those exceptions. Or landless tribes, tribes that did not have land in 1988, in general, IGRA prohibits gaming on lands acquired after 1988. But that would not be fair to some tribes if that were the final statement.

So there are some exceptions in IGRA that allow gaming on lands after 1988, so that the new tribes are on an equal footing with the pre-existing tribes.

The CHAIRMAN. Jonodev, one of NIGC's roles is determining whether a particular game is Class 2 or 3. The distinction is important for tribes like Poarch Creek, where the State will not negotiate a Class 3 compact and the tribe can only conduct Class 2 gaming.

How do you answer folks who say that any gaming machine is Class 3 gaming?

Mr. CHAUDHURI. Thank you for the question. IGRA is very specific as to the elements of Class 2 gaming as well as the elements of Class 3. We are guided by IGRA, we implement IGRA. We solely look, we start and end with the elements set forth in IGRA in any gaming determination that we make. So in terms of a specific game, it is hard to weigh in on any specific game in the abstract. But when games are brought to the commission, we are guided by the language of IGRA.

The CHAIRMAN. Senator Barrasso?

Senator BARRASSO. Thank you very much, Mr. Chairman. If I could just continue and follow up on that.

The Indian Gaming Regulatory Act sets forth specific duties and responsibilities for the chairman. And I know this isn't a confirma-

tion hearing, but the specific duties for the chairman of the National Indian Gaming Commission. For example, the chairman can temporarily close a gaming facility, approve tribal ordinances, management contracts. Without a chairman right now, what enforcement actions can the commission take?

Mr. CHAUDHURI. Thank you for your question, Vice Chairman. Fortunately, given the nomination that was made very recently, my authorities as acting chairman have resumed. So any chair-specific authorities set forth in IGRA, the agency is fully capable of carrying out. That said, much of the day to day work that the agency performs requires close coordination with regulatory partners as well as tribal and local and State officials. That day to day activity takes place on the ground through our regional offices as well as with support from compliance officials at headquarters. All that day to day work is not impacted by the absence of a chair.

Senator BARRASSO. And you mentioned the ACE Initiative, as you said, Assistance, Compliance and Enforcement. It is intended to help tribes safeguard the integrity of their gaming operations. Can you talk about some of the performance measures that you have established to evaluate the success of the ACE Initiative?

Mr. CHAUDHURI. Thank you. As I alluded to in my spoken testimony, and as I elaborated in my written testimony, we are firmly of the mindset that adequate regulation requires a trained workforce. And a trained workforce requires full communication between and among all agency stakeholders.

So we work very closely through our training and technical assistance capabilities with tribal regulators on the ground. A wonderful metric for the success of the agency is in our trainings as well as our site visits. Our trainings are way up since implementation of the ACE Initiative. Just last year, in 2013, we trained 2,751 participants in Indian Country on up to date regulations and best practices. Just this year, in 2014, we have trained 2,140. So that is a great metric.

But on top of that, nothing about our enforcement responsibilities, our oversight responsibilities is in any way diminished by the recognition of the benefits of working with tribal regulators on the front end.

Senator BARRASSO. Thank you. I know, and these aren't just a couple of training events. I understand about 341 different events over the last two years with almost 5,000 participants attending. So when we get to the next panel, I am going to ask them, and they can prepare for this, if they can explain how this initiative has actually reduced criminal activity in and improved the integrity of Indian gaming. So we will hear how this initiative has actually helped on the ground with activities.

Ms. Fennell, your written testimony noted that in 2011 the National Indian Gaming Commission did implement this ACE Initiative, it emphasizes technical assistance, this training for tribes to achieve compliance. Based on your review so far, how effective is the initiative?

Ms. FENNELL. At this point, we are still waiting for compliance data and information to do additional analyses that will allow us to look at the effectiveness of this particular initiative. Right now what you have in our statement is information that is available

that has shown how they have set goals and how they have achieved those goals. But we plan to do additional work that will allow us to fully look at what the compliance information shows about the effectiveness of the initiative.

Senator BARRASSO. Thank you. Because Mr. Chairman, I think effectiveness of a key point of this whole thing. So we will look forward to that additional follow-up report. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Barrasso. Senator Heitkamp?

STATEMENT OF HON. HEIDI HEITKAMP, U.S. SENATOR FROM NORTH DAKOTA

Senator HEITKAMP. Thank you, Mr. Chairman.

Just a couple quick questions. Kevin, obviously the whole dream of Indian gaming is not just to provide a recreational outlet for the surrounding areas, but it is to provide a betterment for Indian Country and for people who live in the community.

There has been some really interesting research that was done in terms of gaming tribes and what they are able to do. I think we don't notice those benefits as often as what we should.

So this year, we have seen these studies. I am wondering if you could just comment on the unseen benefits, the things that we may not always count but we know are happening in Indian Country as a result of this opportunity.

Mr. WASHBURN. Yes, thank you, Senator Heitkamp. Given your concern for children, gaming has been tremendous in that particular area. Chief Hicks is here from the Eastern Band of Cherokee. There was a study over the past couple of years in North Carolina that showed that even modest per capita payments to people in poverty can make a huge difference, on mental health, on dropout rates, on things like that, sort of negative demographic effects. And children and tribal citizens are doing much better, even with modest per capita payments of just a few thousand dollars.

Certainly most Indian gaming revenues don't even go to per capita payments, they go to social services and other benefits for tribes that help them with governmental infrastructure. So it has tremendous value, even if it is just a small amount of gaming revenues.

Senator HEITKAMP. And I would add to that that in many places, the casino itself has become a cultural center, a place of kind of understanding culture, being able to educate the people who come into Indian Country about the culture, about what has happened and provide that communication with other communities. I can tell you that the surrounding communities, we don't frequently add up the economic benefit to the surrounding communities as well, both in terms of employment and economic activity.

Anne-Marie, as someone who actually regulated Indian gaming in my previous life, I am curious as you have kind of gone through your study so far, what advice would you give both in terms of negotiating a compact in terms of the regulatory structure and what advice would you give to State regulatory agencies in terms of your judgment at this point of best practices?

Ms. FENNELL. Senator, I appreciate the question. I think it is still a little bit early for us to be able to draw out the best practices

at this stage. We have actually conducted three site visits, we have three more that will be coming up. We are contacting the remaining 22 States. We anticipate that we will be able to show the variations that exist and different approaches, and we will be able to perhaps draw some conclusions at that particular time in terms of the various approaches that have been taken.

Senator HEITKAMP. I think it is important to point out that where you look at casinos in Las Vegas, they are regulated by the State, maybe a little bit of control by Las Vegas. But as you look at regulatory authority, we have tribal regulation, we have State regulation and we have Federal regulation. It has all been geared to respond to people's concerns that Indian gaming may in fact prove to be fraudulent in some places, may not offer a fair chance to folks. I will tell you from the standpoint of my experience, that has absolutely not been true.

So I think at some point we need to rethink that regulatory structure and think about whether at some point we haven't anticipated problems that haven't shown up. Maybe they haven't shown up because of the regulation. But certainly I think it is a fair question to ask.

The CHAIRMAN. Thank you, Senator Heitkamp. Senator McCain?

Senator MCCAIN. Thank you, Mr. Chairman.

Mr. Washburn, I take it that you are familiar with the issue that concerns us in Arizona concerning the proposed casino in Glendale, Arizona. I understand that Interior took the land into trust last week after following the court's decision in favor of the Tohono O'odham Nation and the interpretation of the Gila Bend Reservation Lands Replacement Act. Is that true?

Mr. WASHBURN. Yes, sir, it is true.″

Senator MCCAIN. And that was basically on the grounds that the Gila Bend Reservation Lands Replacement Act allowed for the casino or the land to be taken by the tribe, and then there was no prohibition as to what that land should be used for, is that correct?

Mr. WASHBURN. That is correct, Senator, and I would go a little bit further and say that we believe that the Gila Bend Act actually mandated us to take that land into trust for the Tohono O'odham Nation. We are following the law by doing so.

Senator MCCAIN. And of course, when that legislation, the Gila Bend Reservation Lands Replacement Act, there was no Indian gaming at the time. So it was certainly not anticipated, this controversy, at the time of the passage of that legislation. Would you agree?

Mr. WASHBURN. Well, I am not sure I would fully agree, Senator. There was certainly, Indian gaming was a hot issue in the 1980s. It led to the Cabazon case in 1987. There were court cases in California and Florida that went to the district courts, then the circuit courts, and then the Cabazon case in the Supreme Court. So at least there was some inkling of Indian gaming at that time. And the Gila Bend Act just did not address gaming.

Senator MCCAIN. Does the Department of Interior need to issue a final legal opinion on whether the Glendale parcel is legally able to house a gaming operation?

Mr. WASHBURN. Well, there are some steps that need to happen. I am not sure, given the district court opinion in the case, that we

need to do anything further with regard to an Indian lands determination, because Judge Campbell did address that matter in his opinion. However, the operation, if they do choose to open an operation in Glendale, the Tohono O'odham Nation will need a facility license under IGRA, which will require them to interact with the NIGC to make sure that that is a lawful facility. They will likely also have to deal with the city of Glendale. If they are going to try to open up an operation that is within a county island within some of the exterior boundaries of the city of Glendale, they will probably need to work with Maricopa County and the city of Glendale on issues related to such a facility, such as traffic, water services and those sorts of things, emergency services.

So I suspect there will be some negotiations along those lines and some more hurdles for them to cross before they could actually open a casino.

Senator MCCAIN. Those are largely what is normally needed when you set up an operation, or any business, actually. Are you familiar with H.R. 1410, that is the legislation that was proposed that would prevent this from happening? Does that present a constitutional takings problem in your view?

Mr. WASHBURN. Well, I would have to consult with my lawyers to answer that question, Senator. It is arguable.

Senator MCCAIN. When you make these decisions, at least to some degree the opinion of the local authorities and governments are taken into some consideration, I would assume.

Mr. WASHBURN. In a discretionary situation, they certainly are. We consult with the local community and the local governments and the State government usually before taking land into trust. We ask them questions about land use conflicts and jurisdictional conflicts and the effect on the county tax rolls and that sort of thing. So we do solicit their views quite a bit. We also in the NEPA process, the National Environmental Policy Act process, we also ask for the views of the public and local communities.

Senator MCCAIN. Do you ask for the opinion of other Indian tribes who are engaged in gaming in the vicinity?

Mr. WASHBURN. We do certainly for off-reservation acquisitions. Not necessarily for on-reservation acquisitions, but for off-reservations acquisitions, yes, we do.

Senator MCCAIN. And have you taken the strong opinion by other tribes from Arizona concerning this operation being set up by the Tohono O'odham Tribe?

Mr. WASHBURN. Senator McCain, that has been one of the most agonizing parts of this whole process. Because I have enormous respect for my friends at the Gila River Indian Community and the Salt River Pima-Maricopa Community and many other tribes in Arizona. And I have endeavored to listen to them and hear their views. Ultimately this was a legal question as to what was the meaning of the Gila Bend Act. We made the decision, we called it like we saw it. But we certainly consulted at great length with other tribes in Arizona.

Senator MCCAIN. So unless Congress acts in a way to prohibit what is happening now, it is inevitable that you will see the

Tohono O'odham tribe operating a casino in Glendale? Is that pretty much the inevitability here?

Mr. WASHBURN. Well, they have the hurdles that I mentioned.

Senator MCCAIN. Yes, the normal hurdles.

Mr. WASHBURN. It is the normal hurdles, although nothing is ever really a sure thing in Indian gaming, Senator. I have seen a lot of these things go sideways during their development. There is a significant amount of financing that will be required and lots of other issues.

Senator MCCAIN. You can tell all parties involved that you have thoroughly examined this issue? That it is, even though a tough decision, that you have given it a great deal of time and thought and consultation?

Mr. WASHBURN. I have, Senator.

Senator MCCAIN. I thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Senator Franken?

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

Senator FRANKEN. Thank you, Mr. Chairman. Assistant Secretary Washburn, it is good to see you again.

There is a lot of debate about gaming in general. But one aspect that is undeniable is the economic development benefit of Indian gaming to tribes. In 2012, Indian gaming pulled in $27.9 billion in revenue. As you said in your testimony, between $26 and $28 billion yearly. That revenue creates jobs, in answer to Senator Heitkamp's question you said that it makes a difference. It makes a difference to kids, it makes a difference to education. It funds direct payments to tribal members, as you said, in some cases. Health care, schools, water projects.

Due to the Federal trust responsibility, those are services that the Federal Government would be responsible for funding, were it not for the revenue that gaming provides, right?

Mr. WASHBURN. That is right.

Senator FRANKEN. And we all know how underfunded the Federal trust responsibility is, unfortunately.

Mr. WASHBURN. Yes.

Senator FRANKEN. If Indian gaming vanished tomorrow and all those needs shifted to Federal trust responsibility, what would that look like? What would the budgetary impact on your agency be?

Mr. WASHBURN. I shudder to think. Senator, Indian gaming, the figure you quoted is more than ten times what the BIA and BIE budgets are together. So we would have fewer tribal police officers, we would have fewer scholarships for Indian children. And we know the cost of higher education these days. We would have fewer social workers. We would have fewer of all of the things that we need in Indian Country to have healthy communities.

Indian gaming is not for all tribes. It is less than half of tribes that actually have Indian gaming. But for those tribes, it is a significant source of income. I believe all 11 tribes in Minnesota have Indian gaming. And for some of them, it is not a huge source of income, but it is a source.

And I would shudder to think what Indian Country would look like without the revenues that come in from Indian gaming.

Senator FRANKEN. In your testimony you describe the rise of commercial gaming and you compare it as it is happening, the flatlining of Indian gaming. We are also going to hear today, as Senator McCain talked about, inter-tribal competition for gaming market share. We have already just laid out the importance of Indian gaming for so many services, tribal lands.

What is the biggest threat to Indian gaming today and in the future? Does a race to provide off-reservation gaming invite more competition from commercial gaming?

Mr. WASHBURN. Senator Franken, I don't believe it does. I think it is quite the opposite. Nature abhors a vacuum and markets abhor a vacuum. So if there is not Indian gaming, commercial gaming goes in typically where there is not already Indian gaming. We are about to have gaming in Maryland. I would just as soon that be Indian gaming, rather than commercial gaming. Commercial gaming goes to enrich shareholders. Indian gaming goes to help poor people, usually. It goes to support tribal governments. It is governmental-owned gaming.

And so I would much rather see Indian gaming existing than commercial gaming expanding.

Senator FRANKEN. Let me ask Mr. Chaudhuri, do you have the same take on that?

Mr. CHAUDHURI. Absolutely. Both from a regular, well, at the commission our emphasis is on the regulation of Indian gaming. But in our work, we work closely with various agency stakeholders, I know there will be testimony later today from the National Indian Gaming Association, who track some of the direct tie-ins between gaming revenue and services and nation-building efforts on the ground. The threats to Indian gaming are largely market-driven, but there are some regulatory issues that we track. In short answer, yes.

Senator FRANKEN. Okay. It is, I know I only have six seconds left, technology. As new technology changes the industry, what threats are there?

Mr. CHAUDHURI. The threats don't necessarily raise regulatory concerns in terms of the regulatory language that applies to our mission. Gaming is inherently a technology-driven industry. So when we are talking about protecting the industry, we have to talk about staying up to date to minimize vulnerabilities at any operational facility.

In terms of staying up to date, we need to stay up to date ourselves to make sure that our training and technical assistance is up to date. So obviously with any technology-driven industry, you are worried about third-party threats, cyber vulnerabilities. Those are ongoing concerns of the industry.

Senator FRANKEN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you all. Just as a bit of housekeeping, Anne-Marie, the Indian gaming study, when will that be ready for prime time? When will you be done with it?

Ms. FENNELL. We anticipate conducting additional audit work over the next few months and will be speaking with your staff regarding an actual issuance date. But we would anticipate early in the new year.

The CHAIRMAN. Thank you very much, and I want to thank all the panel members. Kevin, wear the basket well.

Now I am going to ask the next panel to come up. That panel will include Chairman A.T. Stafne, of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. I want to thank Chairman Stafne for coming from beautiful Montana to be with us here today and provide testimony on this important issue.

After A.T. gets done, we are going to hear from Principal Chief Michell Hicks, of the Eastern Band of Cherokee Indians. And finally, Mr. Ernest Stevens, Chairman of the National Indian Gaming Association. I want to thank you all for being here today. We look forward to your testimony, as you get organized. As I said, we are going to hear from some tribal folks and some regulatory folks. So with that, I would ask you, Chairman Stafne, to begin.

If you can keep your testimony to five minutes, it would be helpful, because we have another panel after this one. Your full testimony will be a part of the record. Chairman Stafne, you may begin.

STATEMENT OF HON. A.T. STAFNE, CHAIRMAN, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION

Mr. STAFNE. Thank you, Chairman Tester, Vice Chairman Barrasso, Senator McCain, Senator Heitkamp and Senator Franken. Thank you for allowing me to testify today concerning the next 25 years of Indian gaming.

I am A.T. Stafne, Chairman of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, located in northeastern Montana. I will be blunt: for the 13,000 members of the Assiniboine and Sioux Tribes, we have seen little economic benefit from Indian gaming over the last 25 years. Unless Congress acts and amends IGRA to alter the unequal playing field that now exists between Indian tribes and the States, we do not expect to see much improvement for our tribes in the next 25 years.

If Congress continues to share our view that the Act's original purposes empowering tribal governments and generating much-needed income are important goals, it should consider amendments to IGRA that give all tribes an opportunity to benefit from Indian gaming and to curb unnecessary and costly litigation which too often harms rather than helps Indian tribes. In short, reversing the Rumsey Rancheria decision I discuss below.

In adopting Indian gaming to strengthen tribal governments, we doubt Congress intended a balance of power so heavily weighted in favor of the States. Nor do we think Congress intended to pit tribes and States against each other in costly litigation that drags on for years. We also don't think Congress intended to allow States to impose their laws and regulations upon tribes in order for tribes to engage in gaming once the civil, regulatory and criminal prohibitory mandate is met; or that States should dictate to tribes the types of games offered, prize limits or the number of games or facilities.

However, after 25 years, States now hold that power. State boundary lines should not dictate the economic welfare of federally-recognized Indian tribes.

Two Federal court decisions greatly limited our negotiation strength against Montana to take full advantage of IGRA, as many

tribes have done to great success. The first is the Supreme Court's Seminole decision that barred tribes from suing States that did not negotiate gaming compacts in good faith.

The second case is the Ninth Circuit's Rumsey Rancheria case, which held that States subject to the court's jurisdiction, like Montana, can lawfully limit tribes to just the type of Class 3 games played elsewhere in the State. Our games are really no different than those played elsewhere in the State. As a remote reservation, we lack the location and infrastructure to attract large numbers of tourists. With some modest exceptions, we offer the same games as the public can play elsewhere in Montana, such as video poker, Keno and limited live poker. Our isolation and limited games really don't allow us to compete with 1,600 licensed gambling operators and locations that offer 17,000 video gambling machines to the public.

We have a small profit margin, which yields less than $500,000 per year. The net profits that we earn represent less than $40 per member. That buys about 10 gallons of gas in Wolf Point. Our gaming profits actually go into the general fund for governmental services, for our members, for programs not funded or not adequately funded by the Federal Government.

We are a poor reservation. Nearly half the people living on the reservation are below the Federal poverty level. At least 1,600 Native families on the reservation must survive on incomes somewhere between $12,000 and $32,000 per year. It should shock no one that we have the poorest health in the State, and the average age of death of our tribal members in the past two years has been 51.

Unprecedented oil exploration and development is occurring in Bakken just off our reservation. We are not ready for it. Our services and infrastructure are struggling to keep up, as our cost of living rises. Despite the Federal Government's promotion of Bakken oil exploitation, it has done little to fund the ailing communities surrounding the Bakken. In looking ahead to the next 25 years, we urge this Committee to consider whether congressional policy has been fulfilled. For some tribes, Indian gaming has been a huge success. But for the majority of rural, remote, large land-based tribes, without a distinctive Las Vegas style casino to compete against State licensed gaming establishments, IGRA weakened and undermined by the Seminole and Rumsey decisions, has not delivered the promise of economic independence. Far from it.

Litigation over licensing and regulation, location, types of eligible gaming activities and the process for the negotiation of gaming compacts has been relentless. Too often courts have ruled against tribal interests.

In conclusion, Congress has the authority and the obligation consistent with its historic trust responsibility to tribes to ensure that opportunities for economic advancement and self-sufficiency through gaming are available to all Indian tribes. Congress can play an instrumental role in bettering our economic condition if it chooses to act.

We hope you do, and thank you for the opportunity.

[The prepared statement of Mr. Stafne follows:]

PREPARED STATEMENT OF HON. A.T. STAFNE, CHAIRMAN, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION

My name is A.T. Stafne and I am the Chairman of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I would like to thank the Committee for the opportunity to share our perspective, as a large, rural, remote, and impoverished Tribe that has seen little economic benefits from Indian gaming over the last 25 years.

The sparsely populated Fort Peck Reservation spans 2.1 million acres of Montana's northeastern plains, which is roughly twice the size of Glacier National Park. Our Reservation's Indian population is approaching 8,000 while our overall Tribal enrollment is approximately 13,000 members.

Our Reservation remains one of the most impoverished communities in the country. Nearly half of the people living on the Reservation are below the federal poverty level. Recent U.S. Housing and Urban Development (HUD) data reveals that nearly 1,600 Native families residing on the Reservation have household incomes from less than 30 percent of Median Family Income to 80 percent of Median Family Income. Roosevelt County, where most of our Reservation is located, has the poorest health in the state of Montana. Moreover, our review of recent data suggests that the average age of death of Fort Peck Tribal members in the past two years is 51 years of age. It is not surprising, then, that almost half the population living on the Reservation is under the age of twentyfour. Thus, we are a poor, unhealthy, and young community.

In an effort to improve the social and economic conditions on our Reservation, Tribal leadership at Fort Peck entered into a gaming compact under the newly adopted Indian Gaming Regulatory Act with the State of Montana in 1992. Although Las Vegas or Atlantic City-style gaming did not, and does not now, exist in Montana, Class III gaming, as it is defined under the Indian Gaming Act, was permitted. Specifically, the State sanctioned its lottery, video poker and keno, limited live poker, and horserace betting, along with a handful of games of chance. During our negotiations, Montana took the position that it could not agree to a compact that allowed the Tribes to engage in games that were not permitted in the rest of the State—a position the State continues to maintain.

Although we did not, and do not believe that Congress intended to allow states to impose its laws and policies upon tribes in the context of on-Reservation gaming, litigation was not a viable alternative for us. Of course, the Supreme Court closed that door for us in the *Seminole* decision, which barred tribes from suing states that did not negotiate gaming compacts with tribes in good faith. And in the *Rumsey Rancheria* case, the full Ninth Circuit court of appeals held that states can lawfully limit tribes to just the type of Class III games played elsewhere in the State, as Montana does.

The Fort Peck Tribes have done the best we can in these restricted circumstances, but it has not been good enough to improve conditions on our Reservation in any major way. The State of Montana and the Fort Peck Tribes entered into a Compact in 1992, which was modified several times over the years and rewritten a few years ago. The basic tenets of the compact remain consistent with Montana's original position of allowing only those types of games permitted under state law. Under our compact, then, we have conducted video poker and keno, limited live poker and a few other games of chance since 1992.

The nature of these games is to redistribute money among the players, with a payout of roughly 90 percent of the money played. In other words, the Tribes and its licensees share in only about a 10 percent profit margin. Although gross gaming receipts total roughly $10 million per year, the Tribes' annual profit on those receipts is normally less than $500,000. Therefore, gaming provides very little income to our Tribes.

We have no major metropolitan area anywhere near our Reservation. Indeed, the total population of Montana is only about 1 million, despite being geographically, the fourth largest state in the nation. Still, tourism is a sizeable industry in Montana. Although Montana's policy makers have not decided to include large-scale gaming in its array of tourist activities, Montana's tribes should not be precluded from making that policy decision themselves.

The ability of Tribal leadership to make decisions concerning our Reservation has never been more important than now. Unprecedented oil exploration and development is occurring in the Bakken just off our Reservation. Our services and infrastructure are struggling to keep up with the dramatically increased demand and population increases as a result of the neighboring boom, but we are receiving little in return. Despite the Federal Government's promotion of Bakken oil exploitation, it has done little to fund the ailing communities surrounding the Bakken. Similarly,

the State of Montana has been unable to keep pace with the rapidly increase demands in cities and counties surrounding the Bakken.

Not only is there a need for greater revenue for government's like ours, we are now realizing the population and traffic increases that could support larger-scale gaming on our Reservation. Thus, there is no better time to consider Indian gaming a means to generate revenue in our region to fund vital governmental services, build infrastructure to enhance our economy, and strengthen our Tribal government.

In 1988 Congress found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," and enacted the Indian Gaming Regulatory Act with a principal purpose "to protect [Indian] gaming as a means of generating tribal revenue."

In looking ahead to the next 25 years of Indian Gaming we must, then, consider whether Congressional policy has been fulfilled and its purposes achieved. What have we learned in the last 25 years?

First, we know that Indian gaming has been, for some Tribes, the largest single producer of revenue in history. For those Tribes engaged in large-scale gaming enterprises, Indian gaming has produced unprecedented income, boosting Tribal economies and Tribal self-sufficiency, and enhancing Tribal government.

Second, we know that despite the success of some Tribes, Indian gaming has provided little benefit to many tribes. Geographical location is a barrier for economic development of any kind, and certainly Indian gaming is not immune from geographical limitations. However, geography is not the only barrier to Tribes interested in seeking self-sufficiency through gaming. Indeed, the long arm of state law and regulation—strengthened by the *Seminole* and *Rumsey* decisions—continues to prohibit many Tribes, including Fort Peck, from obtaining economic independence through gaming.

Third, we know that the realm of Indian gaming has been fraught with costly litigation. Competing interests of tribal, state and federal licensing and regulation, the location of gaming facilities, the type of gaming activity, and the process for the negotiation of gaming compacts, have been a constant topic of litigation over the last 25 years. Although Congress declared that one of the purposes of the Indian Gaming Regulatory Act was "to provide a statutory basis for the regulation of gaming by an Indian tribe," which includes "clear standards," the courts have nevertheless been called upon to determine issues involving Indian gaming at a disproportionate rate. Indeed, through litigation, one primary component of the compact negotiation process was struck down, namely Tribe's ability to sue states who fail to negotiate with Tribes in good faith.

So we know that Indian gaming can serve to fulfill the purposes established by Congress in 1988. Gaming can provide a meaningful source of revenue that strengthens tribal economies, helps tribes in the pursuit of self-sufficiency, and promotes strong tribal governments. If Congress continues to share our view that these goals are important, it should consider the other lessons we have learned in the context of Indian gaming, including ways to ensure all tribes are afforded an opportunity to benefit from Indian gaming and to curb the unnecessary need for litigation which is costly and time consuming.

In our view, Congress should reconsider the balance of power that now exists between tribes and states with regard to Indian gaming, and in particular, the balance of power in negotiating compacts with Tribes for Class III gaming. Congress cannot change the *Seminole* decision, because *Seminole* is based on the Court's reading of the Constitution-but it could alter the result of the *Rumsey* decision and allow tribes to conduct any Class III games the Tribe wants to play, free of any limits elsewhere in a state that allows Class III games.

Congress should reconsider whether it intended in 1988 to allow states to impose its laws and regulations upon tribes in order for tribes to engage in gaming. We do not think Congress intended for states to dictate to tribes the types of games offered for play, betting and prize limits, or the number of games or facilities. However, after 25 years, it is quite clear as a practical matter that states now hold that power. This leads to uneven results. As just one example, since North Dakota allows tribes to conduct a very broad array of Class III games, our neighboring tribe to the east—the Three Affiliated Tribes of Fort Berthold—is able to operate a far more lucrative gaming casino than we or any Montana tribe can do.

We do not think that was the balance of power Congress had in mind, nor do we think this result is fair or consistent with Congress's unique trust obligation to Indian tribes. We know that there will always be barriers to prosperity, like geography and population. But we truly believe that Congress has the authority and the obligation, consistent with its historic trust responsibility to Indian tribes and our members, to ensure that opportunities for economic advancement and self-suffi-

ciency through gaming are available to all Indian tribes. Thank you for your serious consideration of these important issues.

I would be happy to answer any of your questions.

The CHAIRMAN. Thank you, Chairman Stafne.

Chief Hicks?

STATEMENT OF HON. MICHELL HICKS, PRINCIPAL CHIEF, EASTERN BAND OF CHEROKEE INDIANS

Mr. HICKS. Good afternoon, Chairman. It is good to see you, Vice Chairman Barrasso, and Senator Heitkamp and Senator Franken. Thank you for allowing me to speak just a few minutes today.

My name is Michell Hicks. I am Principal Chief of the Eastern Band of Cherokee Nation. We reside in western North Carolina. I have been in my capacity for about 11 years, and I have been before this Committee in previous years. Again, I am here to tell just a short story about our successes with gaming. The story of my people is one of persecution, survival, endurance and of course now, emergence. The survival of our language and our culture and the willingness of our people to protect our aboriginal lands and territory. Of course, our dedication to educating our people and our recent emergence as an economic power in our region. It makes us very unique.

I testify today that gaming has brought not only economic benefits to our reservation but also positive social impacts, of which I will give some examples just a little later on. On life expectancy, poverty rates, educational attainment, physical and mental well-being of Cherokee children and families. And you know, for my responsibility, that is what it is all about.

Before gaming came to Cherokee, our people struggled to survive. The beauty of our homelands and our location at one of the entrance points to the Great Smokey Mountains National Park made us a natural industry for tourism on our reservation. But seasonal tourism could not pull us out of poverty.

Our community has changed dramatically since our permanent casino in 1997. Gaming revenues have allowed us to supplement the shortage of Federal and State and of course internally-generated funds we used to rely on, and helped us to become more self-sufficient. I want to describe today just a few of the critical ways in which these funds are improving the lives of our people. And I will assure this Senate Committee today that we are a priority-based tribe that is addressing issues head on. Whether it is economic or whether it is social, health, education, we are addressing them head on.

I want to draw your attention to the picture to my right. We created a language academy about 10 years ago and fortunately we were able to redo a hotel and permanently move in our academy, where Cherokee is the first language within this academy. Of course, we have to follow State standards. Our oldest class currently is fifth graders. So we are very proud of what we have been able to accomplish with this school. Of course, it took a significant investment to create this educational opportunity for these kids, not just building a building, but creating that curriculum that can be taught and maintained in the schools.

I will also refer to the next picture, which is the Cherokee Central Schools. This was a significant project. We are going to be starting our fifth year. It is Leeds certified. One of the things that we put into place approximately in 2005 was an environmental proclamation. Every tree that came off this 143 acres went back into the school. There are 350 wells. We take advantage of the solar aspects and for lighting of the facility. There are cultural aspects of the facility, as you can see in this next picture here. It identifies the importance of that to our students and to make sure that they clearly understand their responsibility as they grow older to the tribe and to maintain our culture and traditions.

We also, as we built this school, one of the things we did was invest in 400 miles of fiber in western North Carolina. Nobody thought we could do it, but we did it because we had to. All schools, including the Cherokee Schools, are linked into this fiber loop in western North Carolina. So we increased the opportunity for any of our children, both for Indians and non-Indians. Again, we are very proud of that aspect.

In regard to the health of our people, like many of the nations, we deal with an epidemic of diabetes. So one of the things we have been very proud of but also very diligent about is we created a number of athletic and recreational and multi-purpose facilities to allow our kids to enjoy these facilities from many perspectives. Not all children are athletic, but there are opportunities for them to defeat the disease of diabetes. We have created seven of these facilities throughout our tribe.

We converted an old textile factory into a fitness center, which includes cardio, weight room, indoor walking track, gymnasium and also an indoor pool, which also a lot of our elders take advantage of, outside of our children. We designed a state of the art skate park for bike riders and those who like skateboards. Also a number of family parks and green areas.

We just recently opened a youth center. We have had a youth center in Cherokee since 1997, but we created a youth center in a very remote part of our reservation. It was about 45 miles away and we wanted to provide additional opportunities for those kids. Overall, we serve about 400 children in the youth center activities on a daily basis. This particular facility will serve about 100.

Also as it relates to the health of our children, we have created a women and children's center which includes children's dental, a WIC program, of course psychological services, among many other services. We are in the process of constructing a new hospital that is technologically advanced, with MRI systems, C-scan systems and of course the hospital system, along with the other systems in western North Carolina, are additionally hooked into our fiber that we have created.

I do want to tell one short story today. We are in the process of taking over all the social services from the State that we live in, which is North Carolina. We had a scenario occur a few years ago where a young lady, she was less than two years old, was supposed to be overseen by the county social services, of course, the county police. And this young lady ended up dying, she froze to death. So one of our major priorities is to make sure that, and you all know this sitting in this room today, that family can take care of family

best. And so we are taking over all those social services, pulling those back into the tribe.

So as I sit here today and think about our responsibilities as tribal leaders and leaders of this nation, all leaders should first and foremost, in my opinion, be to children and family. I feel that through these resources that we have been blessed with at the Eastern Band that we have made it priority to make sure that the infrastructure is in place but also the training is in place, the teachers are in place, et cetera, to make sure we are successful.

One last point, Mr. Chairman, I know I have run over, I do want to call your attention, there is a study that was done by Duke Medical School, the lady's name was Jane Costello. I would like to submit this for the record. But it does talk about, when you improve the financial income within a family, you can definitely improve their lives.

With that, that concludes my testimony today and I appreciate the opportunity.

[The prepared statement of Mr. Hicks follows:]

PREPARED STATEMENT OF HON. MICHELL HICKS, PRINCIPAL CHIEF, EASTERN BAND OF CHEROKEE INDIANS

Thank you, Chairman Tester and Vice Chairman Barrasso, for the opportunity to testify at this hearing today on tribal government gaming.

My name is Michell Hicks; I am currently serving my third four-year term as Principal Chief of the Eastern Band of Cherokee Indians, a tribal government based in Cherokee, North Carolina, comprised of the Cherokees that avoided the Trail of Tears and continue to live in the mountains of Western North Carolina. We have about 15,000 tribal members and most of our people live on the Eastern Band Cherokee Reservation.

The story of my people is a story of persecution, survival, endurance, and emergence. The history of the Eastern Band people suggests that we should no longer exist. Oppressive federal policies, competition and taking of our lands and resources, and efforts to turn our people from Cherokee into non-Indians have all failed because of the strength of spirit of our people.

This strength is demonstrated in many ways: the survival of our language and culture, the willingness of our people to protect our aboriginal lands and territory, and our recent emergence as a growing economic power in our region of the country. Tribal government gaming has been the primary driver for our ability to address the problems in our community, on our terms, and support the culture and traditions that never left. I can testify today that gaming has brought not only economic benefits to our reservation but also positive impacts on Cherokee life expectancy, poverty rates, educational attainment, and the physical and mental wellbeing of Cherokee children.

My testimony today will focus on the positive impacts Cherokee tribal gaming has had on Cherokee children.

Eastern Band Cherokee Reservation Before Gaming

Before tribal government gaming came to Cherokee, our people struggled to get by in challenging economic conditions. The beauty of our homeland in the Great Smokey Mountains and our location at one of the entrance points of the Great Smokey Mountains National Park made tourism a natural industry for our reservation. But tourism in the mountains was seasonal. Most of the non-BIA or tribal government jobs were related to the tourism that came in May and left in October. Most of these jobs were for minimum wage in motels, craft shops, and small diners. Most of the rest of year provided very limited economic opportunities.

Many families found themselves being split because people would have to travel off the reservation for work, sometimes for extended periods of time, to support their families in construction or other jobs. This situation tore at the fabric of the foundation of our society, our families.

Eastern Band Cherokee Reservation After Gaming

In 1983, the Eastern Band opened its first bingo hall in Cherokee. Known as "big money bingo" at the time, the bingo operated twice monthly, offering higher payouts

than other local bingos at the churches and employing less than 100 people. While bingo brought limited income and employment to the Tribe, many of our people learned more about the business of gaming and what added resources could do to change our community.

The casino opened in November 1997 and has grown from a simple tribal operation to a large, complex, multi-product enterprise and tourist destination attracting 3.1 million visitors in 2013.

Today, the reservation economy of the Eastern Band is in a period of strong growth. Visitor-generated gaming revenue totaled $513 million in 2013.

The casino's economic impact extends to the Western North Carolina region, boosting per capita income from 70 percent of the state average in the mid-1990s to more than 80 percent today, reducing historically high unemployment rates and raising employment to the statewide average. Our Tribal gaming enterprise spent $28 million on North Carolina vendors for goods and services in 2011.

The Cherokee Preservation Foundation, funded by gaming revenues to create new businesses and initiatives that provide the region's residents with greater opportunity and stability, has contributed a leveraged impact of about $99 million for additional social improvements, environmental enhancements, workforce development, and cultural preservation in the region.

With gaming dollars, the Tribe spent $5 million on Downtown Revitalization Project, $13 million on affordable housing, and $20 million on a new Justice Center.

The Eastern Band is helping to build infrastructure with a $16 million investment into a 300-mile broadband fiber network that connects to every school and hospital in Western North Carolina

The Eastern Band is creating jobs for our people and our neighbors. 80 percent of our 3,000 plus employees are non-members of the Eastern Band.

Impacts on Cherokee Children

Today, a new generation of Cherokee children can learn their native Cherokee language through the creation of the Kituwah Language and Preservation Academy, which is funded with $7 million from gaming revenues. The school operates for children ages 6 weeks through the fifth grade and has adopted North Carolina state education standards. Our children study a standard course of education using Cherokee as their first language. But our commitment to our children's success has driven us to develop an English course as well.

Thanks to gaming, the Cherokee tribal schools have one of the most beautiful facilities of any school in the region. The Tribe's $130 million investment into Cherokee Central Schools, which are LEED certified, pre-k–12, and reflect Cherokee culture, brings greater opportunity to our young folks and builds pride in the community. This intergenerational learning complex was designed utilizing the most current theory of educational models including natural sunlight in every classroom, gymnasium, library and student spaces. It features a Gathering Place, a theatre in the round for the elementary students to host cultural programs. The Gathering Place is designed in the model of traditional council houses with seven sides. The classroom buildings are of similar design with interior courtyards. The Cherokee Central Schools also features a cultural arts center theatre with dance studios, an art gallery and a state of the art theatre which has hosted the North Carolina Symphony and the Atlanta Shakespeare Theatre as well as our own Cherokee Cultural night for students to showcase their own talents. More important is the athletic component of the school complex which was designed to address the diabetes epidemic in our community. We believe that teaching the children to control their health is an essential life lesson.

The Eastern Band has built other athletic complexes to address that issue as well including the John A. Crowe Recreation Complex, softball and baseball fields, community gymnasiums in Birdtown, Painttown, Wolfetown, Big Cove, Big Y, and Snowbird. We have also converted an old textile factory building into the Ginger Welch Fitness Center, which includes a cardio room, weight room, indoor walking track, gymnasium and indoor pool to be enjoyed by children and families.

The Tribe has constructed the Cherokee Skate Park, which was designed by our young people in conjunction with a professional design firm. The skate park provides another amenity for our people and for the visiting public. The Skate Park is also adjacent to the Cherokee Family Park, which hosts a public playground, picnic area and access to the Cherokee Riverwalk greenway.

I was so pleased last week to help open the Snowbird Youth Center, a Boys and Girls Club located in the isolated Snowbird community located 45 minutes from Cherokee. The new $4.1 million center replaces an older center and provides classrooms, a dance studio, multipurpose room, gymnasium, teaching kitchens, a computer lab and hiking trails. The facility was built in conjunction with the National

Forest Service through a land use agreement. We believe this partnership will foster more programs for this remote section of tribal lands in education and community forest partnerships.

Even more profound than facilities and programs, research from Duke University Medical School, the Great Smokeys Study, shows that an infusion of income to tribal members can have a significant impact on the health and wellbeing among Cherokee children who grow up in the most financially stressed homes.

Professor Jane Costello, an epidemiologist from Duke Medical School, had been following for four years 1,420 children living in rural Western North Carolina, a quarter of whom were Cherokee. Roughly one-fifth of the rural non-Indians in her study lived in poverty, compared with more than half of the Cherokee children. By 2001, gaming revenues had grown to a level that allowed the Tribe to provide direct assistance to tribal members. As a result, the number of Cherokees living below the poverty line had declined by half.

According to the Duke study, the poorest children tended to have the greatest risk of psychiatric disorders, including emotional and behavioral problems. But just four years after the payments to Cherokee families from gaming revenues began, Professor Costello observed substantial improvements among those who moved out of poverty. The frequency of behavioral problems in Cherokee children declined by 40 percent, nearly reaching the risk level of children who had never suffered from poverty.

Minor crimes committed by Cherokee youth declined. On-time high school graduation rates improved. And by 2006, when the payments had grown to about $9,000 yearly per member, Professor Costello observed that the earlier the financial payments arrived in a child's life, the better that child's mental health in early adulthood.

These Cherokee youth were roughly one-third less likely to develop substance abuse and psychiatric problems in adulthood, compared with the oldest group of Cherokee children and with neighboring rural whites of the same age.

The Duke study also found that improvements to family income improved parenting quality. The assistance from gaming eased the strain of the feast-or-famine existence too many of our families were surviving in.

Other evidence shows that these direct investments actually save the Tribe and the federal government money in the long run. Randall Akee, an economist at the University of California at Los Angeles and a collaborator of Professor Costello's, calculates that 5 to 10 years after age 19, the savings incurred by the Cherokee payments from gaming are greater than the initial costs. This study says that the Eastern Band Cherokee Tribal Government and the federal government benefit from savings in reduced criminality, a reduced need for psychiatric care, and savings gained from not repeating grades.

These third-party studies demonstrate the remarkably positive influence Cherokee gaming has had on our Cherokee children.

Conclusion

In conclusion, tribal government gaming is not simply about generating revenue for the tribal governments. The Eastern Band Cherokee experience is that gaming can dramatically impact the lives of Cherokee families, particularly our precious children in ways even we never dreamed possible.

Thank you again for this opportunity to tell our story.

The CHAIRMAN. Thank you, Chief Hicks. Jane Costello has been in front of this Committee and actually used your tribe as an example. It was compelling testimony.

Ernie Stevens, you are up.

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

Mr. STEVENS. Good afternoon, Mr. Chairman, Vice Chairman Barrasso. I would like to thank you for allowing me this opportunity. I would like to acknowledge the tribal leadership in the room today led by President Brian Cladoosby of the National Congress of American Indians.

Thank you for this opportunity to testify on the next 25 years of Indian gaming. Any discussion of Indian gaming must begin with

tribal sovereignty, sovereignty that is acknowledged by the constitution through treaties with this Nation and through hundreds of Federal court decisions like the Supreme Court's Cabazon case. Finally, sovereignty that is acknowledged through the hundreds of Federal laws like the Indian Gaming Regulatory Act.

Indian gaming is Indian self-determination. Gaming is an exercise of inherent authority affirmed, confirmed and guided by the Indian Gaming Regulatory act. One of the Committee's earliest hearings on Indian gaming took place in 1984. At the time there were approximately 80 tribes engaged in gaming. Many of those operations took place in temporary pop-up buildings or local tribal gyms.

Back in the early 1970s, I remember the frustration as a young athlete wanting to work out in a basketball facility. Too often the gym was full with tables and food in preparation for evening bingo games. Back then, two moms that are still told about in this book called The Bingo Queens, they were community leaders, they sat me down and explained to me that our nation, with an economy that would keep our lights on, that was to help me understand that I couldn't play in the basketball gym if there were no lights. We played bingo to pay the bill.

From those humble means, Indian gaming has responsibly grown to provide a steady source of revenue for 245 tribes in 28 States. In 2013, Indian gaming generated $28 billion in direct revenue. Today the Oneida Nation has a state of the art fitness center and more than one gym that is dedicated to promoting exercise for all ages in our community. All this is a direct result of Indian gaming.

For many tribes, Indian gaming is first and foremost about jobs. Indian gaming has provided opportunities that bring entire families back to the community. In the early 1980s, I couldn't find a job in my home or in the city of Green Bay and I left our community. As Indian gaming started to evolve, I finished my education and made it back home. I was elected to the tribal council in 1993 as gaming was really getting underway. With the success of our gaming operation, we had an employment base of 3,800 people. We were the top employer in northeast Wisconsin.

Fast forward now to 2013. Indian gaming generated more than 650,000 direct and indirect jobs. These jobs go to Indian and non-Indians alike. Without question, Mr. Chairman, we are putting people to work. Today Indian gaming is helping to maintain, generate and fuel an American economic recovery. Before I speak to regulation, I want to acknowledge the National Tribal Gaming Commission and Regulators Association Chairman Jamie Hummingbird, who had to cancel his trip today to stay with his family. Our prayers go out to the Hummingbird family, Mr. Chairman.

Regulation is vital, and tribal leaders understand its importance. In 2013 alone, tribes invested $422 million on regulation. Our system employs 6,500 tribal, Federal and State regulators and staff to protect Indian gaming. The system is costly, it is comprehensive and our record and experience show us that it is working, Mr. Chairman.

The first 25 years under IGRA has proven that Indian gaming is a strong tool that helps tribes overcome injustice and rebuild our communities. However, gaming is only one tool. To ensure that suc-

cess continues for the next 25 years, we are working to diversify beyond gaming to strengthen small business in our young Native entrepreneurs. The next 25 years will also bring changes and constant challenges to Indian gaming, challenges that we are aware include concerns with the IGRA compacting process and the prospect of internet gaming.

As you have heard, and you will hear more on the next panel, the issue of off-reservation gaming is also a challenge. The issue isn't new. It came to a head in Congress in 2006. NIGA member tribes took this issue head on. Indian gaming is about rebuilding Indian homelands. NIGA supports regulations to implement IGRA Section 20 that require tribes to show an aboriginal or historical connection to land sought for gaming. It also urges all tribes to respect and minimize any impacts on aboriginal rights of nearby tribes. NIGA has a standing resolution to this issue, Mr. Chairman.

To prepare for these changes and challenges, Indian Country will rely on a strong partnership with this Committee, Congress and the Administration. Indian Country will remain united and work with NCAI in maintaining an open dialogue to build consensus. We must all work together to continue to meet IGRA's goal of strengthening tribal governments and achieving tribal economic self-sufficiency.

In closing, Mr. Chairman, I want to share a very, very brief story. A year ago, when we wrapped up our legislative summer summit, a year ago almost to the day, sir, I returned home to be by my grandmother's side. I was able to hold her hand her last three days of her life. As I look back, we were able to celebrate her life's accomplishments. As a young girl, she was taken from her home and put into government-run boarding schools, as many as five in three States before she finished high school. The educational system that she endured was much different than when she retired from the Oneida Nation's school system in her mid-90s as a certified language instructor. She worked in a state of the art educational institution providing quality education combined with the strong language culture and tradition that was once forbidden in her world of boarding schools. She and her late brother, Amos Christjohn, who is also in this book, were certified school teachers into their 90s. My grandmother was a Turtle Clan faith keeper and young folks have been appointed to fill her shoes. Together they wrote a dictionary in the Oneida language as one of many things they did to preserve what was once forbidden in the educational system, the Oneida language. Again, this language was forbidden.

Long after her brother's passing, one of Grandma's final projects, into her late 90s, was to digitize her own voice in this dictionary. After retirement, as Grandma wound down her life surrounded by her family and community, she did so in a state of the art nursing home named after her late sister, Anna John, her son, Ernie, Sr., also a resident, by her side.

This is a clear and proud reflection of how far we have come. A new school for our children, a nursing home for our elders and a livable home for our community. Mr. Chairman and members of the community, I again thank you for this opportunity to testify and am prepared to answer any questions.

[The prepared statement of Mr. Stevens follows:]

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

Introduction

Good afternoon Chairman Tester, Vice Chairman Barrasso, and Members of the Committee. My name is Ernest Stevens, Jr. I am a member of the Oneida Nation of Wisconsin and Chairman of the National Indian Gaming Association (NIGA). NIGA is an intertribal association of 184 federally recognized Indian tribes united behind the mission of protecting tribal sovereignty and preserving the ability of tribes to attain economic self-sufficiency through gaming and other endeavors. I want to thank the Committee for this opportunity to provide testimony on "Indian Gaming: the Next 25 Years."

Over the course of the five-year Great Recession, Indian gaming not only survived but thrived in many regions. During the Recession, Indian gaming revenues helped many nearby communities get through the tough times, saving American jobs by providing funds for police officers, teachers, prosecutors, and much more. Indian gaming has played and is playing a large role in America's economic upturn. Today, tribal governmental gaming is producing more jobs and generating more income than ever before, and we are helping fuel America's recovery.

Gaming has been a part of Native American culture from the beginning of time. Whether it is hand and stick games, bowl and dice games, horse and relay races, and much more—gaming has always been a part of our culture, ceremonies, and way of life. In contemporary times, Indian gaming added tribal bingo and pull-tabs operations that began in the 1960s and 1970s. These acts of Indian self-determination were met with legal challenges that eventually led to Congress' enactment of the Indian Gaming Regulatory Act (IGRA) in 1988.

As I will detail below, the Act is far from perfect. However, over 200 tribal governments have made IGRA work for our communities. The first twenty-five years of Indian gaming under IGRA have seen our Nations generate billions in tribal governmental revenue to rebuild our communities, provide reservation-based jobs to many who never worked before, and offer hope for an entire generation. I am confident that our industry is here to stay. The next twenty-five years will see Indian gaming maintain steady growth that will continue to strengthen Native governing bodies, empower tribal communities, restore and strengthen Native culture and language, and reinforce and build new relationships with our neighbors. We will continue to accomplish all of this while remaining dedicated to upholding the highest regulatory standards of any form of gaming in the United States.

Native Nations: Pre-Dating the U.S. Constitution

Any discussion of Indian gaming must begin with the historic background of Native Nations that pre-dates the U.S. Constitution, evolves with the formation of the United States, and exists as a vital part of this Nation's Constitution.

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

Upon its formation, the United States also acknowledged the sovereign authority of Indian tribes and entered into hundreds of treaties. Through these treaties, Indian tribes ceded hundreds of millions of acres of tribal homelands to help build this great Nation. In return, the United States made many promises to provide for the education, health, public safety and general welfare of Indian people. The U.S. Constitution specifically acknowledges these treaties and the sovereign authority of Indian tribes as separate governments. The Commerce Clause provides that "Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian tribes." 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 subject to the jurisdiction of the United States. By its very text, the Constitution establishes the framework for the Federal Government-to-government relationship with Indian tribes. The Constitution finally acknowledges that Indian treaties, and the promises made, are the supreme law of the land.

Over the past two centuries, the Federal Government has fallen far short in meeting these solemn promises and the government's resulting trust responsibility. The late 1800's federal policy of forced Assimilation authorized the taking of Indian children from their homes and sending them to military and religious boarding schools where they were forbidden from speaking their language or practicing their Native

religions. The concurrent policy of Allotment sought to destroy tribal governing structures, sold off treaty-protected Indian lands, eroded remaining tribal land bases, and devastated our economies. Finally, the Termination policy of the 1950's again sought to put an end to tribal governing structures, eliminate remaining tribal land bases, and attempted to relocate individual Indians from tribal lands with the help of one-way bus tickets from Indian lands to urban areas with the promise of vocational education.

These policies resulted in death of hundreds of thousands of our ancestors, the taking of hundreds of millions of acres of tribal homelands, the suppression of tribal religion and culture, and the destruction of tribal economies. The aftermath of these policies continues to plague Indian Country to this day.

Tribal Government Self-Determination and IGRA

Tribal governments and individual Indians persevered. The United States acknowledged that Indian tribes were not going to fade away and recognized the failures of these policies. For more than 40 years now, the United States has fostered an Indian affairs policy that supports Indian self-determination and economic self-sufficiency.

President Nixon made clear that the policy of self-determination is a direct rebuke to this Country's previous policy of termination. This self-determination policy has been reaffirmed by every successive President and continues to acknowledge that the Federal Government's solemn treaty and trust obligations remain fully in force. In his historic 1970 Message to Congress on Indian Affairs President Nixon stated the following:

> "The special relationship between Indians and the Federal Government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans."

Tired of waiting on the United States to fulfill these promises, a handful of tribal governments in the late 1960s and early 1970s embraced self-determination and took measures to rebuild their communities by opening the first modern Indian gaming operations. These tribal governments used the revenue generated to fund essential tribal government programs, cover the federal shortfalls, and to meet the basic needs of their people.

State governments and commercial gaming operations challenged these acts of Indian self-determination both in Congress and in the federal courts. The legal challenges to the exercise of tribal governmental gaming culminated in the Supreme Court's *California v. Cabazon Band of Mission Indians* decision issued in February of 1987. The *Cabazon* Court upheld the right of Indian 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. The decision vindicated the right of tribal governments to engage in gaming activity free of interference from state governments. With the *Cabazon* decision, the debate in Congress and the legislative momentum and leverage shifted from the state/commercial gaming industry position to the tribal government position.

After *Cabazon*, states and commercial gaming interests nevertheless doubled their legislative efforts, urging Congress to enact limits on Indian gaming. Their primary rationale for opposing Indian gaming was the threat of organized crime. However, this Committee found that after approximately fifteen years of gaming activity on Indian reservations (as of 1988) there had never been one clearly proven case of organized criminal activity.

At the same time, many tribal leaders opposed the legislative proposals that became IGRA. Their opposition focused primarily on the proposal in IGRA that required tribal governments to enter into compacts with the states in order to conduct Class III gaming. States have historically been adversaries of tribal sovereignty, seeking to regulate, tax, and impose jurisdiction over Indian lands. In addition, Indian tribes entered into solemn treaties with the United States, not the several states.

In October of 1988, approximately 18 months after the *Cabazon* decision, Congress enacted IGRA. The stated goals of IGRA include the promotion of tribal economic development and self-sufficiency, strengthening tribal governments, and establishing a federal framework to regulate Indian gaming. The Act also established the National Indian Gaming Commission (NIGC). While there are dozens of forms of gaming across America, the NIGC is the only federal agency that directly regulates gambling in the United States.

In the end, IGRA is a compromise that balances the interests of tribal, federal, and state governments. However, the Act is grounded and premised on the fundamental principle of Indian law that government powers retained by an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished." The Act acknowledges that Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute. This principle guides determinations regarding the scope of tribal authority in general and in particular when implementing and interpreting IGRA.

As you can see, IGRA did not come from Indian Country. The Act is far from perfect, and the U.S. Supreme Court has added to its imperfections. However, for twenty-five years now, more than 200 tribes nationwide have made IGRA work to help begin to rebuild our communities and meet the stated goals of the Act.

The State of Indian Gaming: IGRA'S First 25 Years

It would be an understatement to say that Indian gaming has come far in the past twenty-five years. Congress first began consideration of legislation to regulate Indian gaming in 1984. In June of 1984, the Interior Department's Deputy Assistant Secretary for Indian Affairs testified that approximately 80 tribal governments were engaged in gaming with estimated revenues in the tens of millions. At the time, and for some time after the enactment of IGRA, many tribal gaming operations began in temporary pop-up buildings or local tribal gyms.

Back in the early 1980s, I was playing basketball in the gym on our Reservation. I remember that at least once a week the volunteers and community leaders would chase us kids away to make room for chairs and tables and food and to prepare for the evening's bingo games. Those hard working Tribal volunteers and tribal government workers explained at that time how Bingo revenues paid for the recreational equipment we used and for the utility bills that kept the lights on at the gym. Those prescient leaders probably foresaw today as our reservation has a state of the art fitness center with more than a few gyms for our Tribal youth to enjoy.

I know many Tribes whose gaming operations began from these humble means, and Indian gaming has responsibly grown to provide a steady source of governmental revenue for Indian tribes nationwide. In 2013, 245 tribal governments operated 445 gaming facilities in 28 states, helping Indian gaming grow to $28.6 billion in direct revenues and $3.5 billion in ancillary revenues [1] for a total of $32.1 billion in total revenues. This represents a 2.5 percent increase from 2012. It's been said before, but it holds true to this day: Indian gaming is the most successful tool for economic development for many Indian tribes in over two centuries.

Many tribes have used revenue from Indian gaming to put a new face on their communities. Indian tribes have dedicated gaming revenues to improve basic health, education, and public safety services on Indian lands. We have used gaming dollars to improve tribal infrastructure, including the construction of roads, hospitals, schools, police buildings, water projects, and many others.

Indian Gaming and Job Creation

For many tribes, Indian gaming is first and foremost about jobs. While Indian gaming has provided a significant source of revenue for some tribal governments, many tribes engaged in Indian gaming continue to face significant unmet needs in their communities. For these communities, Indian gaming and its related activities have brought the opportunity for employment to Indian lands that have been without such opportunity in recent memory.

I went to college at Haskell University in the early 1980s in part because I could not find a job, not on my Reservation or even in the surrounding Green Bay community. As Indian gaming started to evolve I finished my education and made my way back home. I was elected to the Tribal Council in 1993, as gaming was really getting underway for our Tribe. With the success of our Gaming operation we had an employment base of 3,800 people on our reservation that drew heavily from the surrounding Green Bay community. We remain one of the top employers in north-

[1] Ancillary revenues include hotels, food and beverage, entertainment, and other activities related to a tribal government's gaming operation.

eastern Wisconsin. Not only did Indian gaming find work for a lot of Indian people in my neighborhood, but we also found work for a lot of non-Indian people in our neighboring communities who came and worked for the Oneida Tribe.

Nationwide, Indian gaming is a proven job creator. Indian gaming delivered over 665,000 direct and indirect American jobs in 2013 alone. Indian gaming has provided many Native Americans with their first opportunity at work at home on the reservation. Just as importantly, jobs on the reservation generated by Indian gaming are bringing back entire families that had moved away. Because of Indian gaming, reservations are again becoming livable homesteads, as promised in hundreds of treaties. As I noted above, these American jobs go to both Indians and non-Indians alike. Throughout the Recession, Indian gaming continued to create jobs and keep people employed in one of the toughest times in American history. Without question, we are putting people to work.

Of course, far too many tribal communities continue to suffer the devastating impacts of the past failed federal policies. 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. Our Native youth are the most at-risk population in the United States, confronting disparities in education, health, and safety. Thirty-seven percent of Native youth live in poverty. Native youth suffer suicide at a rate 2.5 times the national average. Fifty-eight percent of 3- and 4-year-old Native children do not attend any form of preschool. The graduation rate for Native high school students is 50 percent.

Indian gaming is part of the answer, but all of us-tribal leaders, mentors, federal agencies, and Congress—can and must do more to reverse these horrific statistics and establish more opportunities for all residents of Indian Country.

Expanding the Reach of Indian Gaming's Benefits

To broaden the economic success of Indian gaming, NIGA is working with our Member Tribes to further encourage tribe-to-tribe giving and lending. Through our American Indian Business Network, we work to highlight the benefits of hiring Native owned businesses and procurement of Native produced goods and services. Empowering tribal entrepreneurs and tribal government owned businesses, will serve to further diversify and strengthen tribal economies.

NIGA applauds the Administration's efforts to strengthen implementation of the Buy Indian Act by targeting qualified tribal government-owned and individual Indian-owned businesses in the federal procurement process. These efforts fully comport with the stated goals of Indian self -determination and the government's treaty and trust obligations to Indian Country.

Indian gaming operations offer an anchor to reservation economic development for 225 Native Nations, but tribal governments need help to fulfill Indian Country's full potential. That help must come from the Federal Government in the form of infrastructure development, tax incentives, consistent and strong base funding levels to meet treaty and trust obligations to help tribal governments provide basic services to our citizens, and more.

For decades, the primary barrier to tribal economic development has been the lack of basic infrastructure for water, roads, and sewer services. In addition, there is a massive digital divide in Indian Country that not only fails to support new businesses—it scares them away. Indian gaming helps provide some tribes with funding for massive infrastructure projects, but many more continue to rely on federal funds for these significant projects. Federal funding mechanisms for infrastructure development should be altered to provide direct funding to tribal governments in the same manner that federal funds flow to state and local governments for infrastructure development. Self-determination is not a termination of the government's treaty and trust obligations. We must continue to work together to rebuild our communities.

Indian gaming is helping shape our next generation of Native leaders. Gaming revenues are providing Native youth with educational opportunities that were not available prior to gaming. Many others see their friends and relatives become Native entrepreneurs, and see that it's possible to succeed. We have to continue that trend. We have to move our economies forward, not just in diversifying beyond gaming to other tribal government-run entities, but by providing incentives for our Native entrepreneurs to stay home or come home to build their dream business. But we can't do it alone.

Good Neighbors: Reinforcing Existing and Forging New Relationships

> "It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated

in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands." Sen. Rept. No. 100–446, at 5.

IGRA's requirement that tribal governments enter into compacts and other agreements with state governments was the primary reason that many Indian tribes opposed the legislation. When Congress debated IGRA in the mid-1980s, tribal-state relations were not only contentious—in many cases it was hostile and combative.

However, over the past twenty-five years under IGRA, many tribal and state governments have forged strong relationships that have worked to benefit all Americans. An unexpected outgrowth of IGRA is the increased partnerships that have been forged between tribal, state and local governments over the past twenty-five years. Effective tribal-state partnerships enhance economic development in both of our communities.

IGRA of course envisioned that tribal and state leaders would come together in the best interests of their citizens and their governments to negotiate and reach agreements on Class III gaming compacts. In some cases, these compact negotiations were exhaustive, time consuming and costly to both parties. In some case, they have gone smoothly. In a few unfortunate cases, they have yet to take place. In those instances where the compacting process has worked, it has greatly benefitted both tribal and state communities.

The overall bottom line is that Indian gaming, in addition to revitalizing tribal communities, has established a steady source of revenue to state governments.

In 2013, Indian gaming generated over $13.6 billion for federal, state and local government budgets through compact and service agreements, indirect payment of employment, income, sales and other state taxes, and reduced general welfare payments. 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 tribal casinos pay taxes. As employers, tribes also pay employment taxes to fund social security and participate as governments in the federal unemployment system.

While IGRA is explicitly limited to gaming-related agreements,[2] the gaming compact negotiation process has brought many tribal and state governments to the negotiating table that never sat in the same room. Putting tribal leaders together with state governors, legislators, and local government officials has fostered relationships that have led to a wide array of inter-governmental agreements covering areas of taxation, cross-deputization, and more. These agreements have fostered goodwill and greater understanding that serves everyone involved.

In addition, Indian tribes also made more than $100 million in charitable contributions to other tribes, nearby state and local governments, and non-profits and private organizations. A June 2011 National Public Radio report, titled "Casino Revenue Helps Tribes Aid Local Governments," acknowledged that contributions from the Stillaguamish Tribe of Washington helped prevent additional layoffs at the local Everett, Washington prosecutor's office. The article also noted to the $1.3 million that the Tulalip Tribes recently gave to the local school district after they heard about possible budget cuts and teacher layoffs. These same scenarios took place in hundreds of local jurisdictions throughout the United States. Indian gaming revenues saved thousands of jobs for American health care workers, fire fighters, police officers, and many other local officials that provide essential services through the Recession.

Indian gaming has also increased the political participation of tribal governments and individual Native Americans nationwide. One positive outgrowth of this increased participation is that many Native people are now seeking office in state and local government.

The National Caucus of Native American State Legislators (NCNASL), formed in 1992, now has 76 members in 17 states. My good friend Kevin Killer served as Treasurer of the Caucus' Executive Board in 2013. The Caucus works to promote

[2] IGRA is clear that the tribal-state compacting process is limited to activities related to Indian gaming. The Act provides that state may negotiate for assessments in such amounts as are necessary to defray the costs of regulating gaming-related activity. However, the Act is explicit in providing that it does not confer "upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe. . .to engage in a Class III activity. No State may refuse to enter into [compact] negotiations. . .based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment."

a better understanding of state-tribal issues among policymakers and the public at large. Members work to encourage a broad awareness of state-tribal issues and raise the profile of tribal issues throughout the state legislative arena. The strength of individual Native American legislators increases the ability of the state legislatures to more appropriately address tribal issues and develop public policy in cooperation with tribal governments.

While Indian Country has come a long way in the past twenty-five years, the relationships built with our neighboring governments will benefit future generations in ways that we have yet to realize.

Indian Gaming Regulation

Tribal governments realize that none of these benefits would be possible without a strong regulatory system that protects tribal revenue and preserves the integrity of our operations. The regulatory system established under IGRA vests local tribal government regulators with the primary day-to-day responsibility for regulating Indian gaming operations. This only makes sense, because no one has a greater interest in protecting the integrity of Indian gaming than tribal governments.

While tribes take on the primary day-to-day role of regulating Indian gaming operations, IGRA requires coordination and cooperation with the federal and state governments to make this comprehensive regulatory system work. Under the Act, 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.

Class III gaming is primarily regulated through a framework established through individual tribal-state gaming compacts. Here the two sovereigns agree upon a framework to regulate Class III gaming based on arm's length negotiations.

However, Congress intended that the NIGC would maintain an oversight of Class III gaming. As a result, under the Act, the NIGC:

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

This comprehensive system of regulation is expensive and time consuming, but tribal leaders know what's at stake and know that strong regulation is the cost of a successful operation. Through the Recession, tribal governments have continued to dedicate tremendous resources to the regulation of Indian gaming. In 2013, tribes spent more than $422 million on tribal, state, and federal regulation:

- $319 million to fund tribal government gaming regulatory agencies;
- $83 million to reimburse states for state regulatory activities negotiated and agreed to pursuant to approved tribal-state Class III gaming compacts; and
- $20 million to fully fund the operations and activities of the National Indian Gaming Commission.

There are over 6,500 tribal, state, and federal regulators working together to maintain the integrity of Indian gaming.[3] NIGC is the Federal civil regulatory agency primarily responsible—along with tribal and state regulators—for regulation of Indian gaming on Indian lands. Tribal governments employ approximately 5,900 gaming regulators and states employ approximately 570 regulators.[4]

At the federal level, the NIGC employs more than 100 regulators and staff. In addition to the NIGC, a number of other federal officials help regulate and protect Indian gaming operations. Tribes work with the FBI and U.S. Attorneys offices to investigate and 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 regulators also work with the Treasury Department's Internal Revenues Service to ensure federal tax compliance and the Financial Crimes Enforcement Network (FinCEN) to prevent money laundering. Finally, tribes work with the Secret Service to prevent counterfeiting.

[3] NIGC Testimony before the Senate Committee on Indian Affairs, July 25, 2012.
[4] *Id.*

Against this backdrop of comprehensive regulation, the FBI and the Justice Department have repeatedly testified that there has been no substantial infiltration of organized crime on Indian gaming. This system is costly, it's comprehensive, and our record and our experience shows that it's working.

Indian Gaming: The Next 25 Years

As I stated at the onset, NIGA is confident that the next twenty-five years will see Indian gaming maintain steady responsible growth that will further empower tribal communities. Just as much has changed in the first twenty-five years under IGRA, Indian Country will continue to adapt and anticipate future changes and make our own positive change to advance tribal sovereignty and tribal government self-sufficiency.

Tribal-State Compacting Process

One change that NIGA will continue to work for is to restore balance to the IGRA compacting process. I've twice noted to the fact that many prominent tribal leaders opposed IGRA because of the Class III compacting process. These leaders did not trust that state governments would respect their obligations to negotiate in good faith, or more fundamentally—negotiate.

This Committee's Report on IGRA sought to alleviate these concerns:

> "[IGRA] grants a tribe the right to sue a State if compact negotiations are not concluded. This section is the result of the Committee balancing the interests of States in regulating such gaming. Under this Act, Indian tribes will be required to give up any legal right they may now have to engage in Class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate Class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how to best encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealing with tribes in Class III gaming negotiations. . . . The Committee recognizes that this may include issues of a very general nature and, and course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes."
>
> Senate Report 100–446, at 15 (Aug. 3, 1988).

This compromise and the balance that it struck were short-lived. Eight years after enactment, the United States Supreme Court destroyed any balance to the IGRA compacting process in its 1996 decision in *Seminole Tribe of Florida v. Florida.* The Court held that Congress did not have the power to waive the states' 11th Amendment sovereign immunity from suit in federal court to enforce IGRA's good faith compact negotiation obligation imposed on the states.

Without a method to enforce the state's obligation to negotiate or renegotiate compacts in good faith, many tribal governments are left with the no-win proposition of either not moving forward on a project that could be its only source of non-federal revenue or succumbing to what could be viewed as a direct violation of the Act. IGRA makes clear that the compacting process cannot be used by the states to impose any tax or other fee upon the tribes that is not directly related to its regulatory expenses under the compact. The Act provides—"No State may refuse to enter into [compact] negotiations . . . based upon a lack of authority to impose such a tax, fee, charge, or other assessment."

NIGA's Member Tribes have consistently held the position against opening IGRA for amendment. However, if Congress makes the decision to alter the Act, the first provision in any proposal must either restore balance to the compacting process or provide teeth to an alternative administrative compacting process.

Class II Indian Gaming

Another aspect of Indian gaming that has undergone continuous change over the first twenty-five years and will continue to face change is the Class II industry. Indian Country is vigilant that any changes to Class II Indian gaming are positive changes consistent with Congress' intent that tribal governments take advantage of the advancing technology to facilitate the play of such games.

As discussed above, the *Seminole* decision destroyed the careful balance that IGRA struck in the Class III tribal-state gaming compacting process. This decision has resulted in a number of states that condone and regulate other forms of gaming essentially exercising veto authority over Class III Indian gaming. As a result, some tribes rely solely on Class II gaming to generate governmental revenue to provide essential services to meet the many needs of their communities.

IGRA defines Class II Indian gaming as the game of chance commonly known as bingo (whether or not played in connection with electronic or technologic aids), played for monetary prizes, with cards bearing numbers or other designations, in which the card holder covers numbers, in which the game is won by the first person covering an arrangement, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo.

This Committee's Report to IGRA clarifies the intent the definition of Class II gaming is not static, and instead must be flexible to enable tribal governments to employ advanced and latest technology:

> The Committee specifically rejects any inference that tribes should restrict Class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their Class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels . . .
>
> Section (4)(8)(A) also makes clear the Committee's intent that pull-tabs, punch boards, tip jars, instant bingo and similar sub-games may be played as integral parts of bingo enterprises regulated by the act and, as opposed to free standing enterprises of these sub-games, state regulatory laws are not applicable to such sub-games, just as they are not applicable to Indian bingo.
>
> Senate Report 100–446, at 9 (Aug. 3, 1988).

From the early 1990s to the mid-2000s, the NIGC and the Justice Department worked to the detriment of tribal governments, creating great uncertainty in the area of Class II Indian gaming. The Commission and DOJ narrowly defined the scope of Class II games. With little tribal input, the NIGC developed unworkable proposed gaming classification standards that went beyond the statutory authority granted to the Commission in IGRA and that threatened the economic viability of Class II gaming. Many of these proposed regulations sought to limit Class II games to only those in play in 1988. These views stood in direct conflict with the above-stated congressional intent. A Report commissioned by the NIGC, titled "The Potential Economic Impact of the October 2007 Proposed Class II Regulations." The Report found that the NIGC proposal "would have a significant negative impact on Indian tribes", including decreases in gaming and non-gaming revenue, Indian gaming facility closures, a decrease in jobs, and wide range of broader negative impacts on Native economies.[5]

In 2005, the Department of Justice proposed amendments to the Johnson Act, entitled the "Gambling Devices Act Amendments of 2005." This proposal would have radically restructured the regulatory scheme that applies to Indian gaming. It would have also reduced the scope of Class II gaming by either rendering existing Class II games unlawful or reclassifying them as Class III games.

A number of federal courts addressing the application of the Johnson Act to Class II gaming have found that the Act simply does not apply to Class II technologic aids. *See United States v. 162 Megamania Gambling Devices,* 231 F.3d 713, 715 (10th Cir. 2000) ("Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid."); *United States v. 103 Electronic Gambling Devices,* 223 F.3d

[5] Meister, "The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations" submitted to the NIGC, February 1, 2008. Found at *http://www.nigc.gov/Portals/0/NIGC%20Uploads/lawsregulations/proposedamendments/MeisterReport2FINAL2108.pdf*

1091, 1102 (9th Cir. 2000) (rejecting the notion that the Johnson Act extends to technologic aids to the play of bingo); *Diamond Game Enterprises v. Reno,* 230 F.3d 365, 367 (D.C. Cir. 2000) (noting that Class II aids permitted by IGRA do not run afoul of the Johnson Act); *United States v. Burns,* 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (indicating that IGRA makes the Johnson Act inapplicable to Class II gaming and therefore tribes may use "gambling devices" in the context of bingo).

The Ninth Circuit in *United States v. 103 Electronic Gambling Devices* rejected the Justice Department's antiquated reading of the scope of bingo under IGRA:

> "The Government's efforts to capture more completely the Platonic 'essence' of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole and legal requirements for a game to count as Class II bingo. . . . All told . . . the definition of bingo is broader than the government would have us read it. We decline the invitation to impose restrictions on its meaning besides those Congress explicitly set forth in the statute. Class II bingo under IGRA is not limited to the game we played as children."

In *Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Commission,* 327 F.3d. 1019, 1032 (10th Cir. 2003), the Tenth Circuit similarly rejected the NIGC's narrow reading of Class II games. That court held that:

> "Absent clear evidence to the contrary, we will not ascribe to Congress the intent both to carefully craft through IGRA this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA. A better reading of the statutory scheme is that through IGRA, Congress specifically and affirmatively authorized the use of Class II technologic aids, subject to compliance with the other IGRA provisions that govern Class II gaming. Moreover, by shielding Indian country users of Class II technologic aids from Johnson Act liability, this construction gives meaning to both statutes, rather than neutering one of legal import."

The federal courts and public sentiment sufficiently put to rest the NIGC's narrow proposed rule and the Justice Department's dangerous legislative proposal to narrowly interpret Class II Indian gaming. The NIGC proposed rules were withdrawn and the DOJ proposal did not gain traction in Congress.

In recent years, the NIGC and Tribal regulators have worked together to strengthen all regulatory aspects of Indian Gaming. Indian gaming is one of the most regulated industries in America and we are proud to stand on our record of strong regulation, adaptive technologies, and revolutionary gaming innovations. We look forward to further strengthening Class II Indian gaming, changing with advances in technology as this Committee intended over the next twenty-five years under IGRA.

Internet Gambling in the United States

Any discussion of the future of Indian gaming, and for that matter, the future of the gaming industry in the United States, must acknowledge the Internet as part of that future. The debate in Congress regarding Internet gaming has been ongoing for more than 15 years. NIGA's position on the issue has been consistent from the beginning. I first testified on the issue before the House Financial Services Committee in July of 2001. Then I stated that, "NIGA is not seeking legislation that would expand, promote, or prohibit Internet gaming. However, we do ask that any legislation that goes forward, preserves the rights of Tribal governments under existing law, and offers them the same opportunity to participate in Internet gaming as any other entity." Our position has not changed.

Over the ensuring years, NIGA's Member Tribes have developed principles to guide legislation that would legalize Internet gaming in the United States. These principles were developed over dozens of meetings with NIGA's Internet Gaming Subcommittee, the NIGA-National Congress of American Indians' (NCAI) Gaming Task Force, and with input from many of the regional tribal gaming associations. In sum, they are directives from our tribal leadership, which is guided by the mission to protect tribal sovereignty and to protect rights of all tribes to shape their economic futures. Our principles are grounded in that mission. If Congress acts to legalize Internet gaming in the United States, such legislation must:

- acknowledge Indian tribes as sovereign governments with a right to operate, regulate, tax and license Internet gaming, and those rights must not be subordinated to any non-federal authority;

- make legal Internet gaming available to all federally recognized Indian tribes, and tribal Internet gaming must be available to customers in any location where Internet gaming is not criminally prohibited;
- acknowledge that tribal Internet gaming revenues are not subject to taxation, as tribal government revenues are dedicated to the benefit of our communities and thus are 100 percent taxed;
- existing tribal government rights under tribal-state compacts and IGRA;
- not open IGRA for amendments in Congress;
- provide positive economic benefits to Indian Country to offset potential economic harm caused by legalization; and
- provide tribal governments with the right to opt in to a federal regulatory scheme, and not subject tribal eligibility to a state government's decision to opt-out.

We simply ask that Congress acknowledge the Constitution's recognition of Indian tribes as separate governments. In addition, we ask that, like IGRA, federal Internet gaming legislation acknowledge that Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication "as a necessary result of their status." These fundamental principles of federal Indian law must be maintained.

Land Into Trust For Gaming Purposes

The issue of Indian gaming on lands placed into trust for gaming purposes has been a point of debate since enactment. From 2005 to 2006 the 109th Congress examined several proposals to amend IGRA's Section 20 process. IGRA's Section 20 establishes the general rule that Indian gaming shall be conducted on Indian lands held in trust prior to enactment of the Act on October 17, 1988. However, the same provision balances this general prohibition with several exceptions to account for past wrongs imposed by federal policies that decimated the homelands of many Indian tribes.

Several bills were introduced in the 109th Congress to amend IGRA to address concerns with off-reservation gaming. These proposals would have set a dangerous precedent by subjecting all tribal governments to the political whims of state and local governments.

NIGA facilitated dozens of meetings with our Member Tribes and with the NIGA–NCAI Indian Gaming Task Force to debate the issue internally. The elected tribal leadership was actively engaged in this important discussion. The result of these negotiations was NIGA Resolutions adopted in 2006 and 2007 that opposed the proposals to amend IGRA and undermine tribal sovereignty. One of these Resolutions calls upon all tribal governments to respect the homelands and aboriginal territory of our brother and sister tribes. In addition, it acknowledges and urges the United States to uphold its legal and moral fiduciary trust obligations to ALL federally recognized Indian tribes, including tribes that could be impacted by off reservation gaming. NCAI adopted similar resolutions.

In recent Congress', including the current 113th Congress, the issue of land into trust for gaming purposes is again being discussed. NIGA's Board met in October of 2013 and reaffirmed our past resolutions 1–PHX–GM–3-28–07,[6] which reaffirmed

[6] The resolved clause in the Phoenix Resolution states "NOW THEREFORE BE IT RESOLVED, that NIGA reaffirms the position taken in Resolution 2 ABQ 4-4-06, and will continue to work with the Department of the Interior on its efforts to promulgate regulations to implement Section 20 of IGRA and to ensure that full consultation with Indian Tribes nationwide is accomplished prior to promulgation of a final rule."

The resolved clauses of the Albuquerque resolution state "NOW THEREFORE BE IT RESOLVED, NIGA strongly opposes amending Section 20 of the Indian Gaming Regulatory Act, as proposed in S. 2078 and H.R. 4893; BE IT FURTHER RESOLVED, NIGA opposes legislation that would diminish the sovereign rights of Tribal Governments and opposes any effort to subordinate Tribal Governments to local governments;

BE IT FURTHER RESOLVED, NIGA does hereby call upon Tribal Governments proposing off-reservation gaming locations to promote positive relationships with State and local governments and minimize impacts on the aboriginal rights of nearby Tribes;

BE IT FURTHER RESOLVED, NIGA does hereby call upon Tribal Governments proposing off-reservation gaming locations under the Section 20 two-part Determination Process to demonstrate both: 1) aboriginal or historical connection; and 2) cultural ties, based upon actual inhabitance, to the proposed site, and to promote positive relationships with State and local governments and minimize impacts on the aboriginal rights of nearby Tribes; BE IT FURTHER RESOLVED, that NIGA calls upon state and Tribal Governments to work together to ensure

Continued

our consensus 2006 Albuquerque Resolution 2–ABQ–4-4–06 on this important issue. The Title of the 2006 Resolution was "Supporting The Secretary Of Interior's Promulgation Of Regulations Concerning Gaming On After-Acquired Lands and opposing the provisions of S. 2078 and H.R. 4893 that would amend Section 20 of the Indian Gaming Regulatory Act (IGRA). While Interior has since promulgated regulations to implement IGRA's Section 20 enforcement of the regulation has been at times unclear and other times inconsistent.

The NIGA Tribal Membership's position on land into trust for gaming purposes acknowledges that federal legislation must uphold the existing policy of strengthening Indian self-determination and tribal governments. At the same time, our position acknowledges and urges respect for the diversity of our Member Tribes and the unique issues and needs that each sovereign tribe faces at home.

Rebuilding Our Tribal Land Bases

A separate issue that has wrongly been linked to so-called "off-reservation gaming" is the important issue of restoring tribal homelands. For five years, NIGA and all of Indian Country has been dedicated to enacting legislative to reserve the Supreme Court's attack in the 2009 *Carcieri v. Salazar* decision. The decision strikes at the core of tribal sovereignty: the ability of Tribes to restore our homelands. The results of the *Carcieri* decision across Indian Country are widespread, killing jobs and deterring investment and economic development on Indian lands.

The decision has led to dozens of related federal court challenges, including *Patchak* and more recently the *Big Lagoon Rancheria v. California* decision.

Three years after issuing the Carcieri decision, the U.S. Supreme Court in June of 2012 compounded its attack on tribal governments issuing the decision in *Match-E-Be-Nash-She-Wish Band of Potawatomi v. Patchak*. The *Patchak* Court held that any individual has standing under the Administrative Procedures Act (APA) to bring a federal lawsuit to challenge the Interior Department's tribal land to trust determinations. The Court reasoned that Patchak's claim falls within the "zone-of-interests" that the IRA regulates. The zone-of-interests standard is subject to a low threshold, and merely requires a recognizable relation to the acquisition or use of Indian lands. As a result, the *Patchak* case opens up to legal challenges ALL tribal land to trust decisions made within the past six years, which is the statute of limitations under the APA.

On January 21, 2014, the Ninth Circuit, in *Big Lagoon*, further raised the urgency for a legislative fix to the land into trust issue. The court, in this highly questionable decision, refused to respect the status of Indian lands placed into trust 20 years ago. It conducted an ad hoc determination of whether the Tribe was under federal jurisdiction—establishing a new and higher bar.

While *Carcieri* initially divided Indian Country into two classes of Tribes, the *Patchak* and *Big Lagoon* decisions hold potential to threaten the existing trust lands of ALL tribal governments.

For five years, Indian Country has worked with Congress to enact a legislative fix that would take this issue out of the hands of the federal courts and restore certainty to the sovereign status of Indian lands. However, we've encountered obstacles from folks who view *Carcieri* as an Indian gaming issue. These distortions ignore the fact that the *Carcieri* case involved a housing development for tribal elders, not a gaming project. Indian gaming remains subject to IGRA, and off-reservation gaming is subject to that act and the regulations put in place by Interior. None of this involves the land-into-trust process under the Indian Reorganization Act. Instead, *Carcieri* is about jobs, cultural preservation and securing a land base to improve Indian housing, education, health care and other basic tribal government services for our citizens.

Conclusion

As the *Cabazon* Court acknowledged, Indian gaming is Indian self-determination. Native Nations, as separate governments acknowledged in the Constitution, began using contemporary Indian gaming to generate revenue to provide for the basic

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that local government concerns are addressed through the existing Tribal-State Compact process and the Section 20 two-part determination process;

BE IT FURTHER RESOLVED, that NIGA does hereby call upon Congress to adhere to the significant process set forth in IGRA's Section 20 with due deliberation process of Congress and to refrain from appropriations riders that bypass Section 20 or otherwise amend IGRA; BE IT FINALLY RESOLVED, that NIGA supports the promulgation of regulations by the Department of Interior, working directly with Tribal Governments in accordance with Executive Order 13175, governing the implementation of the Section 20 two-part determination process, respecting the interests and rights of Tribal Governments, including nearby Indian Tribes, and state and local governments.

needs of tribal communities. Congress enacted IGRA in part to foster and strengthen these actions. While IGRA has its shortfalls, overall the Act's first twenty-five years have delivered on its stated goals of strengthening tribal governments and empowering Indian communities. For our part, tribal governments nationwide have committed significant resources to protecting these gains by maintaining a strong, seamless, and comprehensive system of regulation. Much of the credit for this success goes to the tribal leaders who make the decision to spend more than $422 million each year to regulate their operations, and to the thousands of men and women who are day-to-day front line regulators of Indian gaming operations.

Indian gaming is one tool that is helping tribal governments overcome social and economic ills resulting from decades of injustice. However, Indian gaming can't do it alone and Indian Country can't do it alone.

Over the next twenty-five years, Indian gaming will face changes and constant challenges. To anticipate those changes and meet those challenges, Indian Country will rely on a strong partnership with this Committee, Congress and the Administration to ensure that the goals of IGRA continue to meet its stated intent of strengthening tribal governments and a means of achieving tribal economic self-sufficiency. Working together, we will make a brighter future for Indian country. Our children should expect nothing less than our best efforts to provide safe, healthy tribal homelands.

Additional testimony

The National Indian Gaming Association offers this supplemental statement for the record of the Senate Indian Affairs Committee Oversight Hearing on July 23rd, 2014, "Indian Gaming: The Next 25 Years."

As an initial matter and on behalf of the 184 member Tribes of the National Indian Gaming Association, I express my full support of the testimony provided by the The Honorable A.T. Stafne, Chairman, Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation. As an organization, our mission is to defend Tribal Sovereignty and promote Tribal economic self-sufficiency. We join Chairman Stafne in his call for Congress and Federal Agencies to ensure that Indian Gaming serves and fulfills the purposes of IGRA for all of Indian Country. Indian Gaming is a proven, meaningful source of revenue that strengthens tribal economies and aids in our Tribal Nations' pursuit of self-sufficiency and strong, effective tribal government. Chairman Stafne is correct that the Supreme Court's *Seminole* decision and the Ninth Circuit's Rumsey decision have upended these promises for many tribes, particularly in states that refuse to negotiate gaming compacts. Since I have been Chairman, one of NIGA's priorities has been to ensure that all tribes, if they choose, can use Indian gaming as a tool to strengthen their communities.

We believe that Congress intended for Tribes to have the ability to enforce the obligation of state governments to negotiate gaming compacts in good faith. With this option gone due to the *Seminole* decision, the Interior Department must exercise its authority under IGRA and invoke Secretarial procedures where necessary to ensure that all Tribes can pursue their economic destiny. Further, we agree with Chairman Stafne that Congress did not intend for IGRA to limit a tribes' choice of games to offer on its reservation. The *Rumsey* decision continues to prevent many tribes from obtaining economic independence through gaming as a result of this limitation. Congress and the Department of Interior, as well as the Department of Justice, must make it clear in their policy statements and regulations that IGRA is not a limiting statute, but rather, a forward looking law that balances the public policy interests of states in regulating gaming within their borders, with the sovereign authority of Tribes within their reservation boundaries. These limitations infringe on the sovereign authority of tribes such as those in Montana and prevent them from reaching their full economic potential.

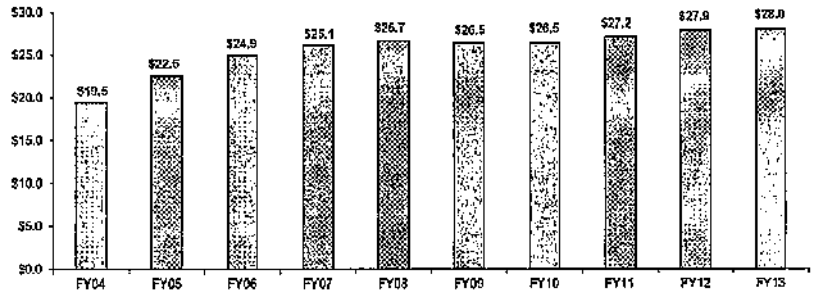
The Strength and Resiliency of Indian Gaming

In his testimony before the Senate Committee on Indian Affairs, Secretary Kevin Washburn remarked that Indian Gaming revenues have "plateaued" and "flatlined," especially as compared to the growing commercial gaming industry. The National Indian Gaming Association would like to set the record straight in that regard. All the current economic indicators demonstrate that Indian Gaming is strong, tribal governments have maintained their market share during the "Great Recession," and Indian Gaming will continue to grow as the Nation's economy improves. In 2008, the United States suffered its worst recession since 1929. The National Bureau of Economic Research (NBER) dates the beginning of the recession as December 2007. According to the Department of Labor, roughly 8.7 million jobs were shed from February 2008 to February 2010, and GDP contracted by 5.1 percent. Unemployment rose from 4.7 percent in November 2007 to peak at 10 percent in October of 2009.

In 2007 Commercial Gaming Revenue was at an all-time high of $37.52 billion. Indian Gaming revenue at that time was $26.1 Billion. Over the next two years during the worst of the recession, Commercial gaming dropped to $34.28 while Indian Gaming rose to $26.5 billion. Commercial gaming has not yet regained its pre-recession revenue high of $37.52 billion and it currently holds slightly below at $37.34 billion—despite the fact that an additional five states, Maryland, West Virginia, Ohio, Maine and Kansas, have legalized or expanded to commercial gaming since 2007.

Growth in Tribal Gaming Revenues in Past 10 Years
($ in Billions)

Source: National Indian Gaming Commission



Meanwhile, Indian gaming has shown remarkably consistent growth from 2009's Gross Gaming Revenue of $26.5 billion to July 2014's just released revenue numbers of $28.0 billion. Thus, it is inexact for Secretary Washburn to compare commercial gaming's recent increase with Indian Gaming's revenue results these past five years. Further, it is wrong to conclude that Indian Gaming revenues have "plateaued."

It is undisputed that Indian gaming was a decisive factor in helping many regions survive the Recession. Indian gaming continued to create jobs and keep people employed in one of the toughest times in American history. In hundreds of local jurisdictions throughout the United States, Indian gaming revenues and charitable donations from tribal governments saved thousands of jobs for American health care workers, fire fighters, police officers, and many other local officials that provide essential services to children, elders, and others.

Indian gaming's strength is the diversity of offerings at our operations: world class gaming, A-list entertainment, five star restaurants, and a destination/cultural experience that is unmatched worldwide. Despite decades of federal policies that sought to force the assimilation and decimation of American Indian cultures, our people, our language, our food and our ways of life have persevered. As Senator Heitkamp noted, many tribal governments use our gaming operations as both a gathering place for the community and a place to teach visitors about our history and culture. Further, many states highlight our Tribal gaming operations during their summer tourism promotions.

In addition, Indian gaming is Indian Self-Determination. Indian gaming revenues are 100 percent devoted to helping rebuild tribal communities. Our revenue goes to fund health care, education, housing, transportation, elder care, language revitalization, job training, and much more.

We acknowledge that our industry will face challenges in the coming years. We have consistently faced and defeated similar challenges nearly every year of the first 25 years under IGRA. However, our industry remains strong, and our strength is helping fuel this Nation's economic recovery. From the first act of self-determination and sovereignty that opened the first Indian bingo hall, all we have ever asked is to be treated fairly.

While I acknowledge that one purpose of the Assistant Secretary's testimony is to urge tribal government economic diversification, I submit that Indian Country has worked—within available means—to diversify our economies, support tribal en-

trepreneurship, and encourage Native citizens to stay and work on our Indian homelands. However, the facts and data do not add up to support his conclusion that Indian gaming is done growing.

Moving forward through the next 25 years under IGRA, we will need a strong partnership with the Committee, Congress, and the Administration to ensure a level playing field that will help create opportunities for Native communities throughout Indian Country. I urge the Assistant Secretary to work with Congress and tribal leaders nationwide to remove the many federal barriers to economic development and diversification on Indian lands, and equally important—to ensure that all Indian tribes are afforded the sovereign choice to conduct gaming on their lands as Congress originally intended under IGRA.

Chairman Tester and Members of the Committee I again thank you for this opportunity to testify today. I am prepared to answer any questions you have.

The CHAIRMAN. Thank you for your testimony, Ernie. Your grandmother would probably be a pretty strong supporter of my language immersion bill.

Mr. STEVENS. Yes, sir.

The CHAIRMAN. I am going to start with you, Chairman Stafne. Some tribes that haven't had success negotiating compacts with States have moved forward with Class 2 gaming. Has Fort Peck examined whether a Class 2 gaming facility would be feasible for your reservation?

Mr. STAFNE. Chairman Tester, yes, we have. We have done a study. With the population we have, we do not track that many people around there. I might add, Montana is surrounded by four States, and every one of those States has Class 3 gaming: North Dakota, South Dakota, Wyoming and Idaho. And to the north, Canada also has gambling. So people are not coming to Montana to gamble. There just are not enough people in Montana to visit us. If they are going to visit to go gambling, they are going to where they can win big bucks.

The CHAIRMAN. My dad used to describe Highway 2 as a direct route between Seattle and Chicago, and Highway 2 goes right through your neck of the woods. Unfortunately, from a people standpoint, or maybe not unfortunately, the interstate was routed through the southern part of the State. Have you been able to do, and I don't know that you have, I am just curious, have you been able to do any studies to see if there is the traffic going through Highway 2 or is it your belief that a Class 3 facility would actually attract people to come there that normally would not?

Mr. STAFNE. That is the tribal executive board, the governing body believes, they have sponsored studies, not one, but more than one study, and they have all come up with the same results. Other tribes have come, and offered to build casinos. And they have done studies. And not one has built a casino yet.

The CHAIRMAN. Okay. Chief Hicks, gaming operations have made a huge impact on your community. You spent most of your testimony talking about that. Can you talk about the unmet needs that still exist, where you are heading, to address some of the issues and potentially using gaming and tourism money for those?

Mr. HICKS. I would say, of course, living in the mountains of western North Carolina, our demographics are quite tough. One of the things that we have worked hard on from an environmental perspective, also to make sure that we have allowed for the growth is, we are in the process of upgrading our wastewater treatment fa-

cility. Of course, that makes a difference in a lot of ways. Historically we have been single home septic tanks. So now we are trying to tie in all these fingers around our communities into this wastewater system. We just recently upgraded our water treatment facility.

So as we look at the opportunities in Cherokee, both service and economic, we know this has to be a priority.

I think the other thing is just to make sure that we continue to find the necessary technology to make sure that we stay ahead of the game related to diabetes and other health traumas that we have in Cherokee. We put a lot of effort into making sure that we have diabetes clinics, wound care clinics in place to address the needs of our people.

The CHAIRMAN. Thank you. I would just say thank you for the work you have done. I think a lot of this really brings up another issue, and that is the general exclusion issue from the IRS we need to deal with. Thank you.

Ernie, Secretary Washburn talked about how tribal gaming revenues have plateaued. I understand for the first time commercial gaming growth has exceeded tribal gaming. I don't know if that is true or not. But we have heard about casinos in Atlantic City closing. Do you think we have reached the point of market saturation, that we could see actually a decline over the next 25 years? What is your perspective? What does your crystal ball say?

Mr. STEVENS. I don't think I agree with the Assistant Secretary. I do that carefully, because he is a good friend. But I think we have to be prepared to deal with those kinds of challenges, so to that extent I think advocacy related to that may be accurate. But in our world, in Indian Country, with the great recession that has come about, it is like, welcome to our world. Indian Country has always had to deal with these kinds of challenges and we continue to do so.

The CHAIRMAN. So in your testimony you talked about gaming being a job creator, creating 650,000 direct and indirect jobs. We just heard Chief Hicks talk about building water systems and sewer systems. Are those kinds of jobs in the 650,000? Give me an idea what you are talking about.

Mr. STEVENS. Yes, we definitely expand those numbers into indirect employment.

The CHAIRMAN. Do you have any idea how many of those jobs are filled by tribal folks and how many by non?

Mr. STEVENS. We batted that around a little bit today and we really don't have the accurate number. I think we are close to half. It is about 50–50. But I don't have that accurate number with me today.

The CHAIRMAN. Senator Barrasso.

Senator BARRASSO. Thank you, Mr. Chairman.

Chief Hicks, I want to start with you. We talked about the ACE Initiative, Assistance, Compliance, Enforcement, technical assistance to tribes, tribal gaming regulators. We heard that there are 341 training events that occurred over the last two years, almost 5,000 participants attending and trained. Can you explain how this initiative has reduced criminal activity and improved the integrity of Indian gaming?

Mr. HICKS. I will tell you that we have had a gaming commission in place since our inception. One of the things we have done is try and stay ahead of the curve. We have over 60 sworn officers in Cherokee. Of course, that is an additional expense that we felt we had to incur. So as you look at the entire structure of the regulatory bodies, we felt that of course the more training we could get the better off we would be.

When you have cash systems, people are going to test the systems. I guess as a regulatory body, the best thing we can do is make sure we have controls in place to catch as soon as possible if these type of things happen. But again, we try and stay ahead of the curve.

Senator BARRASSO. It sounds like you are fully engaged. Do you think this is a program that is useful across the board?

Mr. HICKS. I think without question. More training, whether it is officers, whether it is the regulatory body itself, and the commission, any time we can provide additional training it is going to benefit the operation of the tribe.

Senator BARRASSO. Chairman Stafne, any additional thoughts on that?

Mr. STAFNE. Well, we certainly would like to have that problem, where we had, or I wouldn't consider it a problem, a benefit really.

Senator BARRASSO. You see value in the process?

Mr. STAFNE. Yes, absolutely.

Senator BARRASSO. Good. Chairman Stevens, any additional thoughts on the whole ACE Initiative?

Mr. STEVENS. Regulation?

Senator BARRASSO. The Initiative itself, the ACE Initiative, in terms of it is actually helping to reduce criminal activity. Obviously in North Carolina they are staying ahead of the curve. What are you seeing kind of across the Country?

Mr. STEVENS. Yes, absolutely. We even would go further to discuss the tribal gaming regulators training, that NIGA does on a regular basis throughout the Country. In addition to that, we have auditor training in different types of elements to help prepare our tribes for this.

We also have a national organization. I believe the last time I testified I brought the chairman of that, Mr. Rocky Papsadora, with me. National Tribal Gaming Protection Network, they kind of come together national and regional folk working together. We really feel like we continue to monitor.

Now, we are not perfect. You read on occasion that we have different types of operations that exist in gaming. But that is what these national networks are about, to be able to identify. Most of those people have been put in prison as far as I know. Certainly if you bend the rules or anything happens in Indian gaming, you either lose your license or lose your job or both.

Senator BARRASSO. I agree with Chief Hicks, people will try to test systems, will try to find ways around them. Anything we can do through additional training, additional information and working with more participants and more training sessions I think is probably going to be very helpful. Thank you.

Mr. STEVENS. Yes, sir, Mr. Vice Chairman, and that is kind of our national network, Tribal Gaming Protection Network, that is

what we are talking about, constantly keeping each other abreast on a national and regional level, so that we are to be on top of this. And again, it is the regulators and folk talking and networking.

Senator BARRASSO. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Vice Chair Barrasso. I want to thank this panel for their testimony. I think that both the panels before and the one coming up too, it is an opportunity to look at the Indian Gaming Act over the last 25 years and see where we have been and try to predict where we are going. I want to say to the leaders, thank you for your proactive leadership and your hard work on your respective reservations. To Ernie, thank you very much for your leadership on the regulatory end. So we thank you very, very much.

With that, we are going to get our final panel up today. I thank everybody for hanging in there. This has been a long hearing, but it is an important issue. We are going to deal with an issue now that is reasonably State-specific, although it could have impacts on other States.

Our final panel today, I want to welcome President Diane Enos of the Salt River Reservation; Mayor Jerry Weiers of the city of Glendale, and Chairman Ned Norris of the Tohono O'odham Nation. I want to thank all of you for being here, and just say that we touched on this when the two Congressmen were here. This is a simple issue in some ways but it is a much more complicated issue in others. So we just want to say thank you. We look forward to your testimony.

As with the previous panels, and I would ask you this, to try to hang with us. I have been pretty flexible with the time and I will probably stay flexible with you. But the closer you can keep it to five minutes, the better off we are going to be. Your full written testimony is going to be a part of the record. And there will be questions after this panel and there will be also written questions that we will be able to present for the record, as the record will be open for another couple of weeks after we adjourn today.

So once again, Diane, thank you for being here. Mayor Weiers, thank you for being here. Ned, thank you for being here. And we will start with President Enos with her testimony. You may begin.

STATEMENT OF HON. DIANE ENOS, PRESIDENT, SALT RIVER PIMA–MARICOPA INDIAN COMMUNITY

Ms. ENOS. Mr. Chairman and members of the Committee, thank you for the opportunity to testify.

For 20 years, Arizona Indian gaming has been stable and successful. But today we face a crisis: off-reservation gaming. The Tohono O'odham Nation wants a casino 150 miles from its government center on 54 acres that is within my tribe's original 1879 reservation. I am sorry to have to say this, this is a problem that only Congress can fix. We cannot fix it without your help. Congressional action on H.R. 1410 is the only remaining recourse for the tribes and voters of Arizona.

So I am here today to ask that you swiftly enact this legislation. The bill is a measured and appropriate solution to a horrendous predicament. Beginning in 1999, 17 Arizona tribes came together to begin renegotiating our expiring gaming compacts. I was on

council at the time. We had a real challenge. The State insisted on a single compact for all tribes that reduced the allowable number of casinos and restricted casinos from being opened in urban areas.

It was tough negotiating. Tribal leaders met more than 85 times. We met with the State more than 35 times. Our relationships solidified as meetings lasted late into the night, some lasting several days.

Once we agreed on the compact, Arizona voters had to approve it. Tribes, including TO, contributed more than $23 million to the campaign. We worked tirelessly with the governor's office, speaking on television and radio, giving interviews, buying ads, distributing voter pamphlets.

The major thrust of the campaign was to promise voters there would be limited gaming or "no additional casinos in the Phoenix metro area." We repeated this promise over and over for two reasons. Number one, we believed in it. The governor had demanded the four Phoenix metro tribes, Salt River, Ak Chin, Gila River and Fort McDowell each give up their right to operate an additional casino under the compacts then in effect.

So we gave up those rights to ensure that all tribes in Arizona could continue to benefit from the gaming exclusivity. That was the goal of our fight.

The second reason was because through polling, tribes knew this promise would help convince voters to approve the compact, which they barely did on election day, 50.9 percent. The day after the vote, Tohono's chairman was quoted in the Tucson paper as saying, "To us this is a major victory. We stayed together, we stay united." We now know that this was not true. Our partners in this effort, the same people we fought alongside day in and day out, had been working behind our backs and behind the backs of Arizona voters the entire time.

Documents recently disclosed by Tohono reveal that they were acting secretly to buy casino land in metro Phoenix as early as March 2001. A full year and a half before voters approved the compacts. And at the very same time, the tribes and the State were promising voters that there would be no additional casinos in the Phoenix metro area.

They made a calculated choice to keep their plans secret for years from other tribes and to violate our promise to voters. They looked us in the face and lied. They broke faith with us and the voters of Arizona. Now even our existing establishments are in jeopardy as corporate gaming interests point to this deception to justify opening up Arizona to commercial gaming, like Montana.

This deception will also impact the State-tribal compact renewal in 2027. That is why, Mr. Chairman, many Arizona tribes, cities, the State and city of Glendale, are fighting so hard to oppose the Glendale casino. We want to ensure that our word is good and that tribes in Arizona and across the Country can continue to benefit from the economic engine of IGRA.

There remains poverty and great need for services in all Arizona tribes. The loss of gaming revenue would be devastating.

With me today are over 25 elected officials from tribes and Phoenix metro cities. We reluctantly come to Congress to fix a problem caused by Tohono's decision to violate our promise to voters. Our

attempts to persuade the tribe have failed and the courts are powerless to remedy Tohono's fraud and misrepresentation, because they chose to raise sovereign immunity. The Keep the Promise Act simply conforms tribal behavior to tribal promises. It doesn't change Indian gaming. It doesn't create precedent. And it doesn't amend the Gila Bend Act. It protects Arizona Indian gaming.

If you believe that government integrity matters, move the bill out of this Committee. Thank you. I am happy to take questions.

[The prepared statement of Ms. Enos follows:]

PREPARED STATEMENT OF HON. DIANE ENOS, PRESIDENT, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

Executive Summary

The Salt River Pima-Maricopa Indian Community ("Community") thanks the Committee for scheduling this hearing on the future of Indian gaming. For over twenty years Arizona Indian gaming has been stable, predictable, and successful. However, sadly, the future of Indian gaming in Arizona does not look good. It is threatened by the actions of one tribe. H.R. 1410, the "Keep the Promise Act," which is pending before the Committee, will help protect Indian gaming in Arizona. We respectfully urge the Committee to pass it.

Briefly, except for horse racing and the State's lottery, Tribes in Arizona have been the exclusive operators of class III gaming since the first compacts were signed in 1993. But our tribal gaming exclusivity has always been at risk. During the past twenty years, non-Indian companies in Arizona, and many from out-of-state, have consistently tried to open up the State to commercial gaming. Our Tribes, often in collaboration with others, have fought against these attempts, at enormous financial cost and expenditure of other resources. But now more than ever before, our tribal gaming exclusivity is jeopardized from within, because one Tribe has requested that the Department of the Interior take land into trust for the purpose of opening a casino off-reservation in the Phoenix-metro area.

The Tohono O'odham Nation ("Tohono O'odham" or "Tohono"), who enjoys a 2.8 million acre reservation bordering Mexico and Tucson, has sought to use a 1986 federal law to mandate that the Department of the Interior add 54 acres in the Phoenix-metro area to its reservation so that it can operate a casino more than 150 miles from its government headquarters. This 54 acre parcel is outside Tohono's aboriginal territory, and it is within my Tribe's original 1879 reservation boundaries. Today, the parcel has a 2,000-student public high school across the street, and over 30,000 people live within two miles.

The Keep the Promise Act is a bipartisan bill that was introduced in the House of Representatives on April 9, 2013. The bill was sponsored by Representative Trent Franks (R–AZ) and is also cosponsored by Representatives Ann Kirkpatrick (D–AZ), David Schweikert (R–AZ), Paul Gosar (R–AZ), Matt Salmon (R–AZ), Dan Kildee (D–MI), Ed Pastor (D–AZ), Jared Huffman (D–CA), and John Conyers, Jr. (D–MI). H.R. 1410 would ensure that the promise made by Arizona tribes—that there would be no additional casinos in the Phoenix metropolitan area for the duration of the existing gaming compacts—is kept. The bill prohibits all Class II and Class III gaming within that specifically defined area on lands taken into trust after April 9, 2013. The gaming prohibition would sunset on January 1, 2027, when existing compacts will begin to expire and when all Arizona tribes will need to negotiate new compacts with the State. It would be proper at that point for Tohono O'odham or any other Arizona tribe to negotiate for the right to build additional casinos in the Phoenix metropolitan area. On September 17, 2013, H.R. 1410 was passed by the House of Representatives by a voice vote. The bill has been pending in the Senate Committee on Indian Affairs since that time without any action.

We understand the hesitation among some Senators to advance H.R. 1410 because of the perception that it pertains to a local intertribal dispute in Arizona, but this is not true. In addition to the twelve tribes that have spoken against Tohono O'odham's proposal, the majority of Phoenix area municipalities, the Chairman of the Maricopa County Board of Supervisors, and the State of Arizona, itself, are also opposed to the project. Although the reaction of some Senators to the bill has been to sit back and allow H.R. 1410 to languish in Committee, inaction will hurt numerous tribes in Arizona while only benefitting one, the Tohono O'odham. Failure to act is picking a side and it is picking the side that knowingly took actions to conceal the truth and hurt other tribes.

The Department of the Interior concluded on July 3, 2014 that the 1986 Gila Bend Reservation Lands Replacement Act required it to take the parcel into trust for Tohono. And the courts have held that sovereign immunity bars recourse even though evidence supports claims that Tohono induced the State of Arizona and Arizona tribes to enter into a compact based on false promises. This leaves Congress as the only venue for justice. The bottom line is that Congress' failure to act will result in substantial injustice to Arizona tribes and local communities who will suddenly have to worry about whether Tohono will be opening a casino in their neighborhood. Arizona is a microcosm for the broader efforts of some Tribes to twist laws to pursue off-reservation casinos without regard to other tribes, local communities, and existing tribal-state compacts and agreements. The limits in the Indian Gaming Regulatory Act are rapidly becoming irrelevant. Examples are becoming more common around Indian Country and Tohono's actions will become a blueprint for other Tribes to follow if they succeed with their scheme. Inaction on H.R. 1410 will signal that Congress is unwilling to address a metastasizing problem that has arisen due to manipulation of Federal laws, including the Indian Gaming Regulatory Act. A failure to act on H.R. 1410 would amount to a Congressional rubber stamping of actions that were designed to circumvent the law regardless of the collateral damage to other Tribes and promises made.

This plan by the Tohono O'odham of building an additional casino in the Phoenix-metro area directly violates promises that it made, that other Arizona tribes made, and that the Governor of Arizona made to citizens who approved our compacts in November 2002. The public dissemination of the promise began on February 20, 2002, when Arizona Governor Hull issued a news release announcing to the public and media that the model compact she and 17 Tribes had negotiated for two and a half years—if it were approved—would ensure that there would be "no additional casinos allowed in the Phoenix metropolitan area." This promise was then repeated by elected Tribal leaders, including Tohono's, other Tribal representatives, and representatives of the State, both verbally and in writing, in the Arizona legislature, in television, radio and print media, and in public over the ensuing nine month initiative campaign that ended when Arizona citizens narrowly approved the model compact.

It is all the more alarming that Tohono O'odham has claimed a right under a 1986 federal law to operate up to four additional casinos on county islands in the Phoenix-metro area. This 1986 law, known as the Gila Bend Act, provided financial compensation to the Tohono O'odham for lands that were flooded by an Army Corps of Engineers project and allowed Tohono to buy replacement lands. The Gila Bend Act was passed before Congress enacted the Indian Gaming Regulatory Act but Tohono O'odham argues that the 1986 law mandates the Department of the Interior to take lands into trust for gaming without any questions asked. Also troubling is the fact, unknown until recently, that Tohono was secretly taking actions to open a casino in the Phoenix-metro area at the same time it and 16 other Arizona Tribes were conducting compact negotiations and while they were promising citizens there would be "no additional casinos in the Phoenix metropolitan area" under the compacts. Tribes made these promises specifically to convince voters to approve the model compact, which voters barely did by a very slim 50.9 percent to 49.1 percent margin.

If Congress now permits an additional tribal casino in the Phoenix-metro area in violation of the promises Tribes made to Arizona voters, in the public's eye Tribes will lose their integrity and the moral high ground. And we believe it will be virtually impossible to protect our tribal gaming exclusivity and stop non-Indian companies from obtaining authority to conduct commercial gaming. This would harm all Tribes and put many Tribal casinos out of business.

These efforts of Tohono O'odham also will destroy our unique compact structure that allows non-gaming Tribes to receive gaming revenue from more urban gaming tribes. The compact we negotiated sets limits on the amount of gaming machines each Tribe can operate. While the compact sets limits on the number of gaming machines, a Tribe may increase the number of machines by negotiating an agreement with a non-gaming Tribe. Under such agreements, the gaming Tribe may operate more gaming machines in exchange for making substantial periodic payments to the non-gaming Tribe, which often has no market to operate even a small casino.

It is important to understand that under one provision of our compact, commonly called the "poison pill" provision, if the Arizona legislature uses the broken promises to justify permitting non-Indians to operate gaming, all limits on the number of gaming machines come off. At that point, there will absolutely be no reason for a gaming Tribe to buy additional machine rights from a non-gaming Tribe. Arizona's non-gaming Tribes will lose their substantial revenue streams. Yet, Tohono would benefit from this collapse because, as it claims, it can hand-pick the locations of its

four metropolitan casinos and it would have no limit on the number of gaming machines it can operate in those four casinos.

Twelve Arizona Tribes have gone on record as formally opposing Tohono's plans for an additional casino in the Phoenix-metro area. Nine of these Tribes support H.R. 1410.

The State of Arizona filed litigation against Tohono O'odham, alleging that the Tribe acted fraudulently during the 1999–2002 compact negotiations, misrepresented facts, and made promises to the State regarding the location of its fourth casino which the State relied on to its detriment. In response to these claims, Tohono asserted that it did not have to defend the claims in court because it was insulated by the doctrine of tribal sovereign immunity. The court agreed and dismissed all three claims, but not because they lacked merit. In fact, the court stated that the evidence actually appeared to support the State's promissory estoppel claim.

Undeterred, Tohono O'odham has requested that the Secretary of the Interior take the 54-acre parcel in the Phoenix-metro area into trust. Twenty days ago, on July 3, 2014, the Department of the Interior determined that the 1986 federal law mandated it to acquire the parcel into trust and create a new Indian reservation in the Phoenix-metro area and within my Tribe's former reservation boundaries. We are unaware of any situation where the Department of the Interior has approved the creation of a reservation within another Tribe's former reservation boundaries. This is a disturbing policy, which establishes a precedent that will open the door for other Tribes to pursue similar strategies, and undermine the sovereignty of those Tribes whose ancestral lands are once again taken from us.

Tohono claims that in passing the 1986 federal law, the United States 'agreed' that Tohono can operate casinos on land it acquires under that law. Tohono claims H.R. 1410 would violate that agreement. Not so. Tohono's actions to conceal its true intentions and activities regarding gaming in the Phoenix-metro area, and its involvement in making, paying for the promotion and publication of, and not objecting to the promises made by all Tribal leaders to voters that there would be "no additional casinos in the Phoenix-metro area," must be held to have unilaterally modified any such agreement.

To protect our tribal gaming exclusivity and the unique compact structure that allows non-gaming Tribes to receive substantial gaming revenue, and to protect Phoenix-metro cities from having additional and unwanted casino-reservations sprouting up on county islands within their boundaries, the Senate must pass H.R. 1410, the "Keep the Promise Act of 2013."

I. H.R. 1410

H.R. 1410 would bring some common sense to this situation and clarify that no tribe may conduct gaming on lands taken into trust after April 9th, 2013, as was promised by the Arizona Tribes. H.R. 1410 would not amend any federal law. The bill would not take any lands away from Tohono O'odham, nor will it prevent any lands from going into trust. The bill will simply prohibit tribes from breaking the promises repeatedly made to voters—that there would be "no additional casinos in the Phoenix metropolitan area" during the term of the current compacts.

H.R. 1410 keeps the promises that the tribes of Arizona made to the State of Arizona and the voters that there would be "no additional casinos in the Phoenix-metro area" for the duration of the voter-approved gaming compacts. In our view, H.R. 1410 ratifies the agreement that the State and tribes of Arizona reached when they established a limited structure of Indian gaming in Arizona. Importantly, this bill does not amend federal law, it does not target any specific tribe, nor does it prevent Tohono from placing land into trust. H.R. 1410 is limited in geographic scope to the Phoenix metropolitan area, it applies uniformly to all Arizona tribes, including Salt River, and applies only until the expiration of the current negotiated compacts.

As we near the end of our current compacts in about 2026, all interested parties within Arizona can negotiate what gaming structure should exist in the State. Clarifying legislation like H.R. 1410 is extremely common in Indian Country. Congress routinely includes various restrictions on legislation involving Indian land, particularly gaming. For instance, it is not unusual for Congress to revisit existing statutes to clarify the party's intent, so long as the legislation is narrowly tailored.[1] This is a proper and necessary role for Congress.

[1] See e.g., the Rhode Island Indian Claims Settlement Act, ratifying an agreement between the State of Rhode Island and the Narragansett Tribe, and settling the Tribe's land claims, was enacted in 1978 without a provision regarding gaming. 25 U.S.C. § 1701 et seq. Congress subsequently amended the Rhode Island Indian Claims Settlement in 1996 to explicitly prohibit gaming pursuant to IGRA. See 25 U.S.C. § 1708(b) ("For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands"). See also,

This continues to be a consistent practice of Congress and is one that the Department of the Interior has vocally supported in the past. This Congress alone, there have been two bills (H.R. 2388 and H.R. 507) that passed both chambers and would place lands in trust on behalf of Tribes while simultaneously prohibiting the benefitting Tribes from using the lands for gaming. H.R. 2388, which will place Federal land in trust for the benefit of the Shingle Springs Band of Miwok Indians stipulates that "class II and class III gaming under the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) shall not be permitted at any time on the land taken into trust." The Department of the Interior testified in support of the bill despite its prohibition on gaming. Both chambers have also passed H.R. 507, the Pascua Yaqui Tribe Trust Land Transfer Act, which would place Federal land into trust for the benefit of the Pascua Yaqui Tribe. Although the bill has no relevance to gaming, it stipulates that, "The Tribe may not conduct gaming activities on the lands held in trust under this Act, as a matter of claimed inherent authority, or under the authority of any federal law, including the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission."

Beyond these two bills which will likely be signed into law by the President in the coming days or weeks, there have been numerous other bills introduced in this Congress that also restrict or prohibit the ability of Tribes to game on trust land.[2] Perhaps the most shocking example of legislation restricting the right of a Tribe to game is the Lumbee Recognition Act, which has been introduced as S. 1132 and H.R. 1803 in the Senate and House of Representatives, respectively. This bill, which would restore federal recognition to the Lumbee Tribe after being terminated by an Act of Congress in the 1950's, only partially restores the rights of the Tribe. The legislation includes a gaming prohibition which provides that "The tribe may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission." Furthermore, Department of the Interior Assistant Secretary-Indian Affairs Kevin Washburn testified in support

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the Colorado River Indian Reservation Boundary Correction Act, to clarify or rectify the boundary of the Tribe's reservation while also including a provision prohibiting gaming ("Land taken into trust under this Act shall neither be considered to have been taken into trust for gaming nor be used for gaming (as that term is used in the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)"), Pub. L. 109-47 (Aug. 2, 2005); Congress passed legislation to waive application of the Indian Self-Determination and Education Assistance Act to a parcel of land that had been deeded to the Siletz Tribe and Grand Ronde Tribe in 2002 but also included a gaming prohibition provision ("Class II gaming and class III gaming under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not be conducted on the parcel described in subsection (a)") Pub. L. 110-78 (Aug. 13, 2007); Congress clarified the Mashantucket Pequot Settlement Fund, 25 U.S.C. § 1757a to provide for extension of leases of the Tribe's land but provided that "No entity may conduct any gaming activity (within the meaning of section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703)) pursuant to a claim of inherent authority or any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq) and any regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission pursuant to that Act) on any land that is leased with an option to renew the lease in accordance with this section."), Pub. L. 110-228 (May 8, 2008); Congress passed the Indian Pueblo Cultural Center Clarification Act which amended Public Law 95-232 to repeal the restriction on treating certain lands held in trust for the Indian Pueblos as Indian Country with the explicit clarification that although it was Indian Country it could not be used for gaming ("Gaming, as defined and regulated by the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), shall be prohibited on land held in trust pursuant to subsection (b).") Pub. L. 111-354 (Jan. 4, 2011).

[2] See H.R. 931, a bill to amend the Siletz Tribe Indian Restoration Act with the caveat that "any real property taken into trust. . . . shall not be eligible, or used, for any gaming activity carried out under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)"; H.R. 841, a bill to make technical corrections to the Grand Ronde Reservation Act but stipulating that no acquisitions made under the Act will be eligible for gaming unless they are located within a very narrow geographic area; H.R. 3313, the Santa Ynez Band of Chumash Mission Indians Land Transfer Act of 2013, which would authorize the acquisition of trust land for the benefit of the Santa Ynez Band of Chumash Mission Indians but explicitly prohibits the Tribe's right to game on those lands "(1) as a matter of claimed inherent authority; or (2) under any Federal law, including the Indian Gaming Regulatory Act. . . ."; S. 2465, the Albuquerque Indian School Land Transfer Act, which would require the transfer of four parcels of Federal land in trust for the benefit of the nineteen (19) Indian Pueblos in the State of New Mexico while noting that the lands cannot be used for gaming; and H.R. 1225, the Samish Indian Homelands Act of 2013, which would direct the Secretary of the Interior to place certain lands into trust for the Samish Indian Nation while providing that "the Tribe may not conduct on any land taken into trust pursuant to this act any gaming activities (1) as a matter of claimed inherent authority; or (2) under any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) (including any regulations promulgated by the Secretary or the National Indian Gaming Commission pursuant to that Act))."

of the Lumbee Recognition Act and even noted the gaming prohibition in his testimony. This is one of two bills that would provide federal recognition while simultaneously creating a class of Tribes whose inherent right to game has been extinguished.[3]

Accordingly, any arguments that the H.R. 1410 creates dangerous precedent are wrong and inconsistent with common Congressional practice, and the Department's recent positions.

The Community supports H.R. 1410 because it is narrow in scope, does not impact tribal sovereignty and is the simplest solution to this current threat to Indian gaming in Arizona. This legislation makes express what had been the common understanding of the parties that negotiated the existing gaming compacts in Arizona.

II. The "Prop 202" Promises and Tohono's Secret Plan for a Phoenix Casino

We believe the existing tribal-state gaming compacts in Arizona to be the model in the Indian gaming industry. The compact strikes a precise balance between tribal, state, and federal interests; places limits in both the number of machines and facilities; and provides benefits to gaming and non-gaming tribes, the State, local municipalities, and charities throughout Arizona. However, those who benefit most from the compact are the citizens of Arizona who approved the tribal-state compacts through a voter referendum based on the promise of no additional casinos in the Phoenix area until 2027 and no gaming in neighborhoods.

Prior to the passage of the voter approved ballot initiative ("Prop 202") which culminated in the existing Tribal-State gaming compacts, tribal leaders held extensive negotiations on an acceptable framework for all tribes. Negotiations with the State were preceded by 16 tribal leaders, including Tohono's, signing an *Agreement in Principle* to make a good faith effort to maintain a collaborative relationship in compact renegotiations.

Specifically, in the *Agreement in Principle* Tohono's Chairman and other Tribal leaders expressly agreed "to make a good faith effort to develop and maintain consistent positions regarding the terms and issues at issue with the State of Arizona in compact negotiations." Further, Tohono's Chairman, on behalf of his Tribe, expressly agreed to "make a good faith effort to notify other Tribal Leaders if they believe that they cannot abide by this Agreement or that they must take positions or actions inconsistent with those of the other Tribal Leaders."

Tribes negotiated in good faith with each other (or so we thought at the time) to craft a model tribal-state gaming compact that preserved tribal exclusivity for casino gaming, greatly reduced the number of authorized casinos in the State, allowed for larger casinos and machine allotments with the ability to expand machine allotments through transfer agreements with rural and non-gaming tribes.

In the negotiations, the Salt River Pima-Maricopa Indian Community and the three other Phoenix-metro area tribes (Ak-Chin Indian Community, Gila River Indian Community, and the Fort McDowell Yavapai Nation) each had to give up their rights under the compacts then in effect to build one additional casino in the Phoenix-metro area. Tohono O'odham was aware of this concession, and knew that it was a key concession the State of Arizona needed if negotiations were to move forward.

However, it was only recently discovered in the State of Arizona's litigation against Tohono, that Tohono had begun actively working to investigate and purchase casino land in the Phoenix-metro area more than a year and a half before the conclusion of compact negotiations and approval of the tribal-state compacts by the voters. In light of Tohono's commitment to notify other Tribes if they would "take positions or actions inconsistent with those of the other Tribal Leaders," it was a profound shock for the State of Arizona and the 16 other Tribes who negotiated the compact with Tohono to discover that Tohono had strategically acted to open a Phoenix-metro casino while each of the four Phoenix-metro Tribes were giving up our rights to operate another casino, and while the Tribes and State were promising voters that there would be "no additional casinos in the Phoenix-metro area."

The brief chronology below highlights some (but not all) examples of when the so-called "Prop 202" promises and related statements were made, and outlines some (but not all) of Tohono's behind-the-scenes activities during compact negotiations to secretly secure casino land in the Phoenix-metro area.

> *NOTE:* The Tohono activities shown in italics below were not known by any of the 16 other Tribes who participated in the negotiations nor by the State until the facts were recently disclosed in the course of the State's litigation against

[3] The other bill is the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2013 (S. 1074 and H.R. 2190), which would provide federal recognition to a number of Virginia tribes but not allow those tribes to game.

Tohono. The activities shown in regular type were known to all negotiating Tribes and the State.

1999—Compact negotiations began. Sixteen Tribes, including Tohono, signed the *Agreement in Principle* under which each Tribe agreed to "make a good-faith effort to notify other Tribal Leaders if they believe that they cannot abide by this Agreement or that they must take positions or actions inconsistent with those of the other Tribal Leaders."

March 15, 2001—Representatives of a corporation owned and created by Tohono O'odham under tribal law, named Vi-ikam Doag Industries ("VDI"), an entity tasked with locating land in the Phoenix-metro area for the Tohono casino, met and notes of the meeting reflect they discussed the "possibility of doing a casino" and that they were "interested in buying a piece of land and putting a casino on it."

March 18, 2001—VDI corporate representatives met with Mr. Curry, Tohono O'odham's Assistant Attorney General and its lead compact negotiator. VDI notes of that meeting show discussion included "gaming compact-unsure what will happen." The notes also disclosed a plan to "put in a shell company—need to keep it quiet especially when negotiations on compact at stake."

June 26, 2001—VDI meeting with Tohono San Lucy District Council was tape recorded and transcript shows discussion focused on "casino on the west end of Phoenix." "[W]e didn't want to publicize that because of the confidentiality." The project was "a confidential issue", that Tohono representatives were "holding it as confidential, because we don't want, you know, people to know we are seriously considering this." If the information about the secret casino plan leaked out, "there's going to be a lot of resistance from, you know, the general public."

February 20, 2002—The State of Arizona and 17 Tribes reach agreement on major terms of the new compact. The new compact would require that each Phoenix-metro tribe (Gila River, Fort McDowell, Salt River, and Ak-Chin) to give up its right under the then-existing compacts to operate one additional casino, so there would be no more than seven casinos in Phoenix metro area. (In 2002, there were only seven casinos operating in the Phoenix-metro area). At this time the 17 Tribes and the Arizona Indian Gaming Association (AIGA) began efforts to get the Arizona legislature to approve the negotiated compact. On February 20, 2002, Governor Hull issued a news release advising the public and media that the "Major points in the [negotiated] agreement include. . .Number of casinos. . .No additional casinos allowed in the Phoenix metropolitan area and one additional casino in the Tucson area."

February 20, 2002—The Arizona Republic reported that under the compact negotiated between the State and Tribes, "[m]etro Phoenix will see no new casinos; the number is frozen at seven."

February 21, 2002—The Arizona Republic again reported that under the negotiated compact "metro Phoenix will see no new casinos."

February 21, 2002—A spokesperson for the State, Christa Severns, announced on radio that under the new compact, "we're not going to see any more [casino] facilities in the Phoenix area."

February 22, 2002—The Arizona Republic in an editorial stated that under the compact "Phoenix metro area would be limited to seven casinos, the number currently in operation."

February 27, 2002—Steve Hart, the State's primary negotiator and Director of the State's Department of Gaming, and David LaSarte, the Executive Director of the Arizona Indian Gaming Association, appeared together on Phoenix public television. Hart stated that the number of casinos in the Phoenix area "is seven today and for the length of this Compact, 20 years, that's the number of casinos that will be in the-kind of greater Phoenix metro area."

March 7, 2002—An article in the Arizona Republic reported that David LaSarte, Executive Director of the Arizona Indian Gaming Association, "pointed out that the agreement freezes the number of casinos in the metro Phoenix area at seven."

March 11, 2002—Tohono's San Lucy District and its corporation, VDI, sign a "Confidentiality Agreement" with a realtor hired to find suitable casino land in the Phoenix-metro area.

March 18, 2002—The Tucson Citizen ran an editorial by David LaSarte, Executive Director of the Arizona Indian Gaming Association, which reported that under the compacts, "No additional casinos could be built in the Phoenix area."

March 28, 2002—The Tucson Weekly reported that under the compact negotiated between the 17 Tribes and the State, "there would be no more casinos allowed in the Phoenix metro area."

March 28, 2002—Officers in Tohono's corporation, VDI, met and meeting notes reflect discussion about "West [Phoenix is] not covered with casino, ...the Nation wants to have another casino . . ..We may be the only game in town."

April 2, 2002—The Arizona Republic reported on the negotiated compact. "[T]he accord [Governor] Hull negotiated also would keep the number of Phoenix-area casinos at the current seven . . ."

April 8, 2002 -David LaSarte, Executive Director of the Arizona Indian Gaming Association, testified before the Arizona legislature on behalf of the Association and said that one of the "most important items within the agreement include[s] the limitation of facilities in the Phoenix-metro area to the current number [that is, seven] and allows the possibility for only one additional facility in Tucson."

April 13, 2002—VDI meeting transcript reflects discussion included, "And the Tucson market is saturated . . .But , you know, again, there's nothing on the west end of Phoenix."

April 19, 2002—Arizona Governor Hull wrote a letter to State Senate President Randall Gnant, in which Governor Hull reported that under the legislative bill approving the negotiated compact, "there will be no additional [casino] facilities in the Phoenix metropolitan area . . ."

April 25, 2002—Arizona Governor Hull wrote an editorial published in the Arizona Republic in which she stated that under the negotiated compact, "Phoenix will keep the same number of casinos . . ."

June 10, 2002—VDI internal email states "yesterday at the Task Force meeting we discussed the West Phx Property [and] it was understood that VDI can proceed with the escrow, . . .[but] the decision is not final until the studies are completed."

June 19, 2002—VDI meeting transcript discloses further discussion about Tohono's secret Phoenix casino project—"this is kind of a confidential deal." Few people know about it "because, again, it's limited because of the confidentiality situation."

August 22, 2002—VDI meeting minutes discuss the purpose of the meeting was to update Board members who did not attend "yesterday's meeting with the [Nation's] Gaming Board, the Commerce Committee, TON Chairman, Investment Committee Chairperson and the Treasurer. The [State of Arizona] governor wants to reduce the total numbers of casinos; every Tribe had one casino taken away except TON . . ."

August 22, 2002—VDI meeting transcript shows discussion; "Because if that's going to be the position of the State, they don't want any more casinos around the Phoenix area, then they're going to fight it . . .Which is why we really want to wait until the initiative passes before it gets out."

The 17 Tribes and the Arizona Indian Gaming Association (AIGA) continued their political campaign seeking Arizona voter approval of the negotiated compact in Prop 202. AIGA published and widely distributed a campaign pamphlet for voters entitled "Answers to Common Questions," which stated that "major funding" for the voter pamphlet was provided by Tohono O'odham and three other tribes. Tohono O'odham contributed approximately $1.8 million in support of the campaign and was listed as a supporter of the Prop 202 campaign materials. The voter pamphlet, paid for in part by Tohono, explained to voters:

> "Q. Does Prop 202 limit the number of tribal casinos in Arizona?
>
> A. Yes. In fact, Prop 202 reduces the number of authorized gaming facilities on tribal land, and limits the number and proximity of facilities each tribe may operate. Under Prop 202, there will be no additional facilities authorized in Phoenix, and only one additional facility permitted in Tucson."

September 4, 2002—Tohono's corporation, VDI, received a casino Feasibility Report from their California gaming consultant who had secretly inspected all seven existing Phoenix-metro area casinos. The Report recommended that the Tohono casino not be "located.further west that the Glendale area" because it "would attract two to three times more volume" than other possible west Phoenix sites.

September 14, 2002—The Arizona Republic ran an article that included a statement by Arizona Governor Hull that "[v]oting 'yes' on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area . . .for at least 23 years."

September 19, 2002—VDI meeting transcript reflects alarm about a possible leak of information. "So there is some type of information going out or a leak." Discussion emphasized that possible leaks about the secret plan are "still a concern out there, especially prior to the propositions coming up for election . . .So we just need to be careful about, you know, things getting out and spoiling it."

The official Secretary of State's Voter Guide for the November 5, 2002 General Election provided arguments for and against adoption of Proposition 202. Arizona Governor Hull urged approval of Proposition 202, explaining to voters:

> "Voting 'yes' on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area and only one in the Tucson area for at least 23 years. Proposition 202 keeps gaming on Indian Reservations and does not allow it to move into our neighborhoods."

In the Voter Guide, Arizona Attorney General Janet Napolitano also argued for approval of Proposition 202, stating: "Most Arizonans believe casino gaming should be limited to reservations. I agree . . . [Prop 202] also prevents the introduction of casino gaming, such as slot machines, by private operators into our neighborhoods."

September 25, 2002—According to an Arizona Department of Gaming Memorandum dated October 2, 2002, a Town Hall meeting was held in Tucson moderated by a representative from Governor Hull's office. The purpose of the meeting was to discuss the pros and cons of the gaming propositions on the ballot. According to the Memorandum, current Tohono O'odham Chairman, Mr. Ned Norris, represented the Tohono O'odham Nation. The Memorandum recounts that "Mr. Norris said that 201 [a competing ballot proposition] will open gaming into cities and that the citizens of Arizona have, repeatedly over the years, expressed their desire to keep gaming on the reservation."

September 29, 2002—The Arizona Republic reported that Proposition 202 "stipulates that no more casinos could be built in Maricopa County."

October 22, 2002—The Arizona Republic ran an unsigned editorial stating that Proposition 202 "would not allow any new casinos to be built in the metropolitan Phoenix area."

October 23, 2002—The Arizona Republic ran an article reporting that Proposition 202 "would not permit any new casinos in Maricopa County."

October 25, 2002—VDI meeting transcript shows discussion about the secret casino plan and that "we are . . .a week and a half, two weeks away from the vote . . .And you know, assuming that it is [Prop] 202 that passes, then, you now, we'll proceed in how we need to make that project develop."

October 28, 2002—David LaSarte, Executive Director of the Arizona Indian Gaming Association, appeared on television and stated that "They [the 17 Tribes Coalition] voluntarily made it so that there will be no new casinos in Phoenix."

October 29, 2002—VDI notes of a meeting with Tohono San Lucy District Council, attended by Mr. Curry, Tohono Assistant Attorney General and its lead compact negotiator, reflect, "Hold off until the election is over." Transcript continues, "again, you know, propositions are about to be voted on November 5th . . .[W]e have been told, you know, that this information should be held in confidence, because they are concerned regarding information leaking out."

November 5, 2002—Arizona voters narrowly approved Proposition 202 by a vote of 50.9 percent to 49.1 percent. Between November 1999 and December 2002, Arizona Tribes met privately over 85 times on compact negotiations and the voter campaign. During the same period, Tribes had over 35 meetings with the State regarding compact negotiations and the voter campaign.

November 6, 2002—An Article published by the Tucson Citizen reported that Prop 202 was approved by the voters. Tohono O'odham Nation Chairman at the time, Edward Manuel, who signed the 1999 *Agreement in Principle* among Tribes, was quoted as saying: "To us, this is a major victory. We stayed together. We stayed united. We will try to keep working on that to keep the unity together."

December 4, 2002—One month after voters approved Proposition 202, Tohono O'odham signed its new compact.

February 10, 2003—Transcript of VDI's meeting shows discussion regarding the new compact: "[T]he compact has been signed, and so there are no more real concerns that might jeopardize our chances on this discussion. So I think they're ready to move forward."

February 21, 2003—VDI memorandum to Tohono's San Lucy District Council: "Due to the push by the Commerce Committee, Gaming Authority, and the Nation to move forward with the West Phoenix Project, we felt the need to provide a written update now . . .TOGA [Gaming Authority], Commerce Committee, and the Chairman made a very big commitment to move and push this project as quickly as we can so that we do not miss out on the opportunity."

February 23, 2003—VDI Minutes reflect discussion of possibly using the Gila Bend Act to acquire land and build a casino in the Phoenix-metro area, "but politically we might have problems. If we decide to, we need to put in escrow and it needs to be kept confidential for the time being." VDI meeting transcript reflects this discussion: "I just hope too that, in terms of the political (inaudible) that's going to be coming, that some of the metro tribes over there don't come back and jump on us too . . .Might Gila River or Salt River indicate that it's a violation of the 202 (inaudible) metro area [inaudible]? . . .Well that's what I said in terms of the political

impact, is that even- even those metro tribes, particularly those three that are right there, might—might say something. But that's a big question mark. That's all."

March 12, 2003—Tohono created a shell corporation in the State of Delaware in order to secretly buy land for a Phoenix-metro area casino.

August 21, 2003- Tohono's Delaware shell corporation bought the 54-acre parcel in the Phoenix-metro area.

In January 2009, Tohono announced its intentions and filed its application to acquire the 54-acre Phoenix-metro parcel in trust as a reservation. Upon hearing of Tohono O'odham's plans to open a casino in the Phoenix-metro area, many Arizona Tribes who for several years had negotiated the compact with Tohono signed letters and passed resolutions formally opposing the plan, including the (1) Ak-Chin Indian Community, (2) Fort McDowell Yavapai Nation, (3) Gila River Indian Community, (4) San Carlos Apache Tribe, (5) Tonto Apache Tribe, (6) White Mountain Apache Tribe, (7) Salt River Pima-Maricopa Indian Community, (8) Pueblo of Zuni, (9) Hualapai Tribe, (10) Cocopah Tribe, (11) Quechan Tribe, and the (12) Yavapai-Apache Nation. The reasons given by all these tribes was that Tohono's plans violated the promises made by Tribes to Arizona voters in Prop 202 and threatened tribes' exclusive right to operate casinos in the state.

On April 29, 2011, the member Tribes of the Arizona Indian Gaming Association passed a formal Resolution reaffirming the Tribes' Proposition 202 promises. Predictably, Tohono voted against the Resolution.

Then, on June 29, 2011, in the State's litigation against Tohono O'odham, Tohono filed an Answer in court which admitted that in the midst of the Prop 202 campaign conducted by the 17 Tribes including Tohono O'odham—a campaign for approval of a compact that would require other Tribes to reduce the potential number of casinos in the Phoenix metro area—Tohono was simultaneously trying to buy Phoenix-metro land for a casino. Tohono O'odham also admitted that various parties "characterized the provisions of Proposition 202 requiring most tribes to give up the right to one gaming facility as 'no additional facilities authorized in Phoenix, and only one additional facility permitted in Tucson' and that Tohono O'odham did not contradict those statements." Tohono admitted "that it participated in the negotiations that led to Proposition 202, supported Proposition 202, and entered into a new compact in 2002 after the voters approved Proposition 202." Finally, Tohono admitted "that in 2002 it was considering the possibility of acquiring property in the Phoenix metropolitan area for gaming purposes; that it did not disclose that it was considering such an acquisition; and that it had no obligation to make such a disclosure" to other Tribes, to the State, or to the voters.

Tohono Chairman Norris has not denied, because he could not, that the 17 tribe coalition had made promises directly to the Arizona voters that there would be "no additional casinos in the Phoenix metropolitan area." Remarkably, when confronted, his response to some of these Tribes was, "those are just words on a publicity pamphlet." As children, one of the most fundamental and important lessons we all learned from our parents was, "keep your promises." This principle has been taught for millennia. "Never promise more than you can perform." (Publius Syrus, First Century B. C., Maxim 528). Dishonesty finds no haven, even in publicity pamphlets.

It is not an easy thing to talk about a lack of "good faith", and we do so reluctantly. However, we ask the Senate to act on H.R. 1410, so that in future years, we will not have to look back and say to our children that "we should have done something."

III. Commercial Gambling Interests Have Long Opposed Tribal Gaming Exclusivity in Arizona

Commercial gambling interests have worked to get authorization through legislative action or an Initiative to conduct commercial gaming in Arizona since the first tribal compacts were signed in 1993. Due to the concerted and persistent efforts of Arizona Tribes, these efforts have failed to date. If Congress fails to act to stop Tohono's effort to open a casino and, as a result, Tribes are viewed by the Legislature or public as breaking the promise that there would be "no additional casinos in the Phoenix-metro area," Tribes very likely will not be able to defeat efforts to open up the State to commercial gaming. Tribes would no longer have exclusivity, and all Tribes, both gaming and non-gaming would be significantly harmed.

To get a sense of this on-going threat to our Tribal gaming exclusivity, we highlight below a brief snapshot of the recent activity targeted to bringing commercial gaming to Arizona off of reservations.

Article, *Racino: A key budget option for the Arizona Legislature*, J. Heiler, July 21, 2009

Article, OpEd, *Senator Steve Pierce: Boosting Arizona's Economy, How Racinos Could Save Our State*, S. Pierce, May 12, 2011

Editorial, *Racinos Could Bring Much-Needed Revenue*, The Daily Courier, January 20, 2011

Editorial, *Maybe Racinos Aren't Such A Bad Idea*, The Paulick Report, January 27, 2011

Application to the Arizona Secretary of State for an Initiative Petition (to "permit[] racetracks and private casinos to operate in Arizona"), C. Nicholson, December 9, 2011

H.B. 2220, First Regular Session 2011, Arizona House of Representatives, Relating to Horse and Dog Racing

Committee on Natural Resources and Rural Affairs, Arizona State Senate, First Regular Session, Hearing scheduled for October 30, 2013 on *"Discussion of 2002 Ballot Initiative Proposition 202,"* (Hearing later cancelled)

S. B. 1468, Second Regular Session 2014, Arizona Senate, Relating to Gambling

The primary organization that Arizona Tribes formed to promote their common interests in Indian gaming is the Arizona Indian Gaming Association (AIGA). In 2009 in response to specific threats from commercial gaming companies, including out of state racino operators, Arizona Tribes also formed Arizonans for Tribal Government Gaming (ATGG). (I am currently the Chair of ATGG and on the Executive Committee of AIGA.)

A critically important mission of both AIGA and ATGG is combatting the efforts of commercial gaming interests, from both within the State of Arizona and outside the State, to gain a foothold in Arizona. Countless hours and many millions of dollars have been spent to combat these efforts. Given Arizona's burgeoning population and particularly the population concentration in the Phoenix metropolitan area, we know that Arizona is a prime target for the expansion of commercial gaming.

Historically, when commercial gaming interests attempted to expand into Arizona, they would target the Tribes' exclusivity as an argument in favor of their expansion efforts. These arguments have never succeeded with the Legislature or the voters because they understand that tribal gaming on reservations was unique and limited and that the Tribes had a well-established track record of delivering on their promises and honoring the terms of their compacts. If the Tribes are now viewed, due to the claims of sovereign immunity and deceit of the Tohono O'odham, as breaking their promises and engaging in off reservation gaming, then these arguments will gain credence and the Tribes' exclusivity will be forever lost.

IV. The Tohono O'odham Nation's Deceit is Calculated to Break Promises Made to the State of Arizona and the Voters of Arizona and Prop up Their Thriving Gaming Enterprise

Tohono O'odham's actions constitute the deliberate effort of one tribe to use deception and sovereign immunity as political tools to make and break promises for pecuniary benefit. The Tohono O'odham Nation already has very successful gaming enterprise. Tohono O'odham maintains two casinos in the Tucson metropolitan area and an additional casino in Why, Arizona. Additionally, under the current gaming Compact, Tohono O'odham is allowed to develop a fourth casino on their existing reservation lands, including in the Tucson metropolitan area. H.R. 1410 would not impact the Tribe's existing three casinos or impact its ability to develop a fourth casino on its existing reservation or on its aboriginal lands.

Tohono O'odham's success in gaming goes back to early 1992, when the State of Arizona and certain Arizona tribes, including Tohono O'odham were at a standoff regarding Indian gaming in the State. To overcome legal challenges and political opposition, the tribes repeatedly made statements that no gaming could occur outside of existing reservations without the concurrence of the Governor. During Federal District Court mediation with the State in 1993, Tohono O'odham submitted a document, "Comparison of Compact Proposals," which argued that the State of Arizona's insistence on compact provisions requiring the Governor's concurrence for any off-reservation gaming was unnecessary because "existing federal law requires the Governor's concurrence. This is adequate protection to the State and local interests." Tohono O'odham Nation's Comparison of Compact Proposals at 11, No 93–0001 PHX (D. Ariz. Jan. 19, 1993). In a brazenly calculated reversal, Tohono O'odham now claims that a legal loophole allows it to unilaterally pursue a casino off existing reservation lands without the concurrence of the Governor of Arizona or any input from any of the local communities.

Further, on June 8, 1993, tribal representatives met with staff for the State legislature and provided a handout entitled "After Acquired Lands," which stated that

"[a]nother exception to the prohibition of gaming on after acquired lands is when the lands are taken into trust as part of a settlement of a land claim. This will not effect [sic] Arizona because aboriginal land claims in Arizona have already been settled pursuant to the Indians Claims Commission Act of 1946." The handout was distributed on behalf of all tribes present, including Tohono O'odham. Once State officials had received these assurances, the Governor of Arizona entered into gaming compacts with the tribes to allow tribal gaming in Arizona.

Tohono O'odham has also asserted, through its attorneys, its right to open all four of its authorized casinos in the Phoenix metropolitan area on land acquired under the Gila Bend Act. These brazen contentions demonstrate that Tohono O'odham intends to repeat its pattern of deception wherever advantageous, and will do so regardless of the promises made or the toll on all other Arizona tribes. This deliberate policy of deceit, which is calculated to avoid court review, leaves Congress as the only forum that can protect the promises made to the people of Arizona.

V. Congress is the Only Institution that Can Provide Accountability on this Matter

Tohono O'odham made the calculated decision of using sovereign immunity as a shield to preclude any review of its deceitful actions during the compact negotiations and Prop 202 campaigns of the early 2000's. While Tohono tells members of Congress to let the court address this matter, in court, Tohono argues that the court does not have the jurisdiction to review its actions. Definitive action by Congress is therefore necessary to resolve, once and for all, the intent of the Arizona gaming compacts and more importantly, preserve the deal that was struck in 2002.

The State of Arizona filed a complaint in federal court against Tohono O'odham in 2011 alleging that Tohono "had a secret plan at the time it was negotiating the Compact to build a gaming facility in the Phoenix metropolitan area., notwithstanding its contrary representations" to the State and the public. These "representations induced the State to enter into the Compact, and the State would not have signed the Compact had it known of the Nation's plans." In another claim, the State alleged that the Nation "materially and fraudulently misrepresented that it had no plans.to open a gaming facility in the Phoenix metropolitan area," and that the "State's assent to the Compact was induced by the Nation's misrepresentations and intentional failures to disclose material facts."

The Tohono O'odham raised tribal sovereign immunity and completely avoided scrutiny of legal claims filed by the State of Arizona that Tohono acted with fraud in negotiating its gaming compact, misrepresented facts during the negotiations, and made promises intending that the State rely on them to its detriment. Due to sovereign immunity, the federal court dismissed the fraud, misrepresentation and promissory estoppel claims, even though the court stated that "Plaintiffs' evidence would appear to support a claim for promissory estoppel [but] it is barred by sovereign immunity."

On May 27, 2014, the U.S. Supreme Court decided a remarkably similar case, *Michigan v. Bay Mills Indian Community*. The Court, in a 5 to 4 decision, ruled that the Bay Mills Tribe could assert tribal sovereign immunity and avoid claims filed by the State of Michigan that the Tribe's off-reservation casino was illegal. The Court repeated several times that it was up to Congress to fix the problem of a tribe asserting sovereign immunity to avoid legal claims by a State regarding illegal gaming:

> "The Constitution grants Congress powers we have consistently described as plenary and exclusive to legislate in respect to Indian tribes . . . Thus, unless and until Congress acts, the tribes retain their historic sovereign authority."
>
> "Our precedents . . .had established a broad principle, from which we thought it improper suddenly to start carving out exceptions. Rather, we opted to defer to Congress about whether to abrogate tribal sovereign immunity for off-reservation commercial conduct."
>
> "Congress exercises primary authority in this area and remains free to alter what we have done . . ."
>
> "[I]t is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity."
>
> "[W]e decline to revisit our case law, and choose instead to defer to Congress."

Opinion at 5, 7, 16, 17, and 21 (internal citations and quotations omitted).

More succinctly, Justice Scalia dissented and wrote:

> In Kiowa Tribe of Okla. V. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), this Court expanded the judge-invented doctrine of tribal sovereign immunity to cover off-reservation commercial activities. I concurred in that deci-

> sion. . . . I am now convinced that Kiowa was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious. . . . Rather than insist that Congress clean up a mess that I helped make, I would overrule Kiowa. . . .

While the co-sponsors of H.R. 1410 and the Arizona tribes who support it, must reluctantly be critical of Tohono's conduct here, it is hard to avoid the fact that Tohono has, from the outset, repeatedly thwarted the normal process for obtaining federal approval of Indian gaming, and used sovereign immunity as a shield to insulate it from the State's claims against it for fraud in the inducement, material misrepresentation, and promissory estoppel. Enactment of H.R. 1410 would in no way abrogate Tohono's sovereign immunity. That facet of its tribal sovereignty will likely remain intact in any current litigation surrounding this issue. Any circumstance where a court would find that immunity to have been abrogated would not arise because of the Keep the Promise Act. Passage of H.R. 1410 would obviate the need for the State to continue its suit against Tohono and might result in dismissal of their claims but this would not result from any repeal of sovereign immunity pursuant to the Keep the Promise Act. In fact, the intent of H.R. 1410 is to address the issues underlying the fraud, misrepresentation, and promissory estoppel claims without piercing Tohono's immunity. However, as the branch of the Federal government with plenary power over Indian affairs, it is well within Congress' authority to enact this legislation. It is the merits of these claims that the Keep the Promise Act is seeking to address and Congress is the only institution that can provide accountability in this matter.

VI. Conclusion

The Salt River Pima-Maricopa Indian Community urges Congress to pass H.R. 1410. It is needed to reaffirm the promise that the tribes of Arizona made to each other, the State of Arizona and voters that there would be "no additional casinos in the Phoenix metropolitan area" for the duration of the existing compacts. The clarification does not interfere with Tohono O'odham's desire to have land taken into trust. It upholds the status quo in Arizona and does not adversely affect any tribe. Without this bill, the other Arizona Tribes will suffer because the current gaming compact structure will absolutely be compromised. We support this legislation.

The CHAIRMAN. Thank you, President Enos, for your testimony. I appreciate it very much.

Mr. WEIERS. the floor is yours.

STATEMENT OF HON. JERRY WEIERS, MAYOR, CITY OF GLENDALE, ARIZONA

Mr. WEIERS. Thank you, and good afternoon Chairman Tester and all the members of the Committee.

I am here today to discuss the proposed controversial tribal casino in the city of Glendale. I will present my council's most recent views on this project, and then also my personal request for swift action on H.R. 1410, the Keep the Promise Act.

My name is Jerry Weiers, I was born in Deadwood, South Dakota. My family moved to Arizona when I was just eight years old. I am the Mayor of the city of Glendale, a city of 232,000 people, which is the 72nd largest city in the United States. Before becoming Glendale's mayor, I served in the Arizona legislature for eight years.

I supported the Arizona Proposition 202 in 2002, the Bell Initiative, which gave tribes the exclusive right to conduct gaming, but limited casinos to tribal reservations. One key aspect of the initiative was that there would be no additional casinos in the Phoenix area.

As a Glendale resident, this was the primary factor in my support for that proposition. My wife and I chose to live in Glendale in part because it was not near any of the large Phoenix area casi-

nos. We believed the initiative preserved our neighborhood as it was.

Like many Glendale residents, I was blindsided when the Tohono O'odham Nation announced in January 2009 that it was going to create a reservation and build a Las Vegas style casino on a 54-acre county island within our city limits. This announcement came seven years after the voters approved the Bell Initiative, which we thought prohibited new casinos in the area. It also came five years after Raymond Kellis High School opened just across the street from where Tohono O'odham was proposing to operate its casino, a site within two miles of 12,000 homes.

As you can imagine, we were mad. We are mad. The city has been involved in two lawsuits at an enormous financial cost. The city council passed a resolution opposing the casino because it would hurt the interests of our residents. My wife and I were completely shocked at what we learned while Tohono O'odham and other tribes were telling voters that there would be no additional casinos in the Phoenix area, Tohono O'odham was actively looking to purchase casino land in Glendale. Moreover, they knew what they were doing was wrong. The tribe went to great lengths to keep their plans secret from other tribes, local governments and voters.

The deceit did not stop there. Tohono O'odham had already purchased its Glendale land when the school district announced plans to build a new Kellis High school just across the street. Tohono O'odham watched us build the school while continuing to keep its casino plans secret and said nothing. We never thought our children would be across the street from a Las Vegas style casino.

My city has been in chaos for the past five years and the Federal Government seems unwilling to help us. Last week, after the Interior Department decision to take the Tohono O'odham's land into trust, the city council voted four to three to repeal our 2009 resolution opposing the casino, and passed a new resolution. This new resolution says that Glendale does not object to the trust land being utilized for gaming.

President Kennedy once said, let us never negotiate out of fear. Well, with few choices left, a slim majority of my council felt that we had to come to the bargaining table with the TO. Our choice was not ideal, continue to fight and hope for action from this body, or give into this casino being forced on us. It is frustrating to be a city of our size and have no choice on a casino proposed by a tribal government that is more than 100 miles away.

It is important to note that Glendale may not be the only city impacted. Our sister cities know that unless Congress acts, they may be next. There are over 200 other county islands in the Phoenix metropolitan area. And Tohono O'odham attorneys have said that the tribe has the right to close its existing three casinos and open them on these county islands.

We are a test case, but it is the start of a very slippery slope. If Congress does not act, the entire Phoenix area should be prepared for more off-reservation casinos.

As a former State legislator, I know that if gaming happens in Glendale, there will be a strong effort in the Arizona legislature to authorize non-Indian gaming in the State. That will have a devastating effect on all of our tribes. Even if the State legislative ef-

fort to authorize non-Indian gaming is not successful, these compacts are only valid for another dozen years. At that time, tribes will have to go back to the voters and after what we have experienced, I can't say I would blame the voters for questioning agreements of the past.

That is why I urge this Committee to approve H.R. 1410, so that it may be quickly adopted by the Senate. The bill is not about holding one tribe back, but preserving its much-needed economic development tool for all of Arizona's tribes.

Thank you once again for the opportunity to testify. I am happy to answer any questions that you may have, sir.

[The prepared statement of Mayor Weiers follows:]

PREPARED STATEMENT OF HON. JERRY WEIERS, MAYOR, CITY OF GLENDALE, ARIZONA

Good afternoon Chairman Tester and members of the Committee. I am here today to discuss a proposed and controversial tribal casino in the City of Glendale. I will present my Council's most recent views on this project, and also my personal request for swift action on H.R. 1410, the Keep the Promise Act.

My name is Jerry Weiers. I was born in Deadwood, South Dakota and my family moved to Arizona when I was 8 years old. I am the Mayor of Glendale, a city of 232,000 and the 72nd largest city in the country. Before becoming Glendale's Mayor, I served in the Arizona Legislature for eight years.

I supported Arizona Proposition 202, the 2002 ballot initiative which gave tribes the exclusive right to conduct gaming, but limited casinos to tribal reservations. One key aspect of the initiative was there would be no additional casinos in the Phoenix area.

As a Glendale resident, this was a primary factor in my support for the Proposition. My wife and I chose to live in Glendale in part because it was not near any of the large Phoenix area casinos, and we believed the initiative preserved our neighborhood as it was.

Like many Glendale residents, I was blindsided when the Tohono O'odham Nation, who I will refer to respectfully as T.O., announced in January 2009 that it was going to establish a reservation and build a Las Vegas-style casino on a 54-acre county island within our City. This announcement came seven years after the voters approved the ballot initiative which we thought prohibited new casinos in the area. It also came five years after Raymond Kellis high school opened across the street from where T.O. is proposing to operate its casino, a site within two miles of 12,000 homes.

As you can imagine, we were mad. The City has been involved in two lawsuits, at an enormous financial cost. The City Council passed a resolution opposing the casino because it would hurt the interests of our residents.

My wife and I were completely shocked at what we learned. While T.O. and the other tribes were telling the voters that there would be no additional casinos in the Phoenix area, T.O. was actively looking to purchase casino land in Glendale. Moreover, they knew what they were doing was wrong. The Tribe went to great lengths to keep their plans secret from the other tribes, local governments and voters.

The deceit did not stop there. T.O. had already purchased its Glendale land when the school district announced plans to build the new Kellis High School across the street. T.O. watched us build the school while continuing to keep its casino plans secret and said nothing. We never thought our children would be across the street from a Las Vegas-style casino.

My City has been in chaos for the past five years, and the federal government seems unwilling to help us. Last week, after the Interior Department's decision to take T.O.'s land into trust, the City Council voted 4–3 to repeal our 2009 resolution opposing the casino and passed a new resolution. This new resolution says that Glendale "does not object to the Trust Land being utilized for gaming." President Kennedy once said, "Let us never negotiate out of fear." Well, with few choices left, a slim majority of my Council felt that we had to come to the bargaining table with T.O. Our choice was not ideal: continue to fight and hope for action from this body, or give in to this casino being forced on us. It is frustrating to be a city of our size and have no voice on a casino proposed by a tribal government more than a hundred miles away.

It is important to note that Glendale may not be the only city impacted. Our sister cities know that unless Congress acts, they may be next. There are over 200

other county islands in the Phoenix metropolitan area. And, T.O. attorneys have said the Tribe has the right to close its existing three casinos and open them on these county islands. We are a test case, but it is the start of a very slippery slope. If Congress does not act, the entire Phoenix area should be prepared for more off-reservation casinos.

As a former State legislator, I know that if gaming happens in Glendale, there will be a strong effort in the Arizona Legislature to authorize non-Indian gaming in the State. And that will have a devastating effect on all Tribes.

And even if the state legislative effort to authorize non-Indian gaming is unsuccessful, these compacts are only valid for another dozen years. At that time, the tribes will have to go back to the voters. After what we have experienced, I can't say I'd blame voters for questioning agreements of the past.

That is why I urge this Committee to approve H.R. 1410 so that it may be quickly adopted by the Senate. The bill is not about holding one tribe back, but preserving this much needed economic development tool for all Arizona tribes.

Thank you once again for the opportunity to testify today, and I am happy to answer any questions the Committee may have.

Attachment

RESOLUTION NO. 4828 NEW SERIES

A RESOLUTION OF THE COUNCIL OF THE CITY OF GLENDALE, MARICOPA COUNTY, ARIZONA, REPEALING RESOLUTION NO. 4246, EXPRESSING THE CITY'S SUPPORT TO THE CREATION OF AN INDIAN RESERVATION ON A PARCEL WITHIN THE GLENDALE MUNICIPAL PLANNING AREA.

WHEREAS, in 2003 the Tohono O'odham Nation purchased approximately 134 acres generally located at the southwest corner of 91st and Northern Avenues (the "Trust Land");

WHEREAS, the Tohono O'odham Nation has now submitted and received approval of an application to the Bureau of Indian Affairs to have the Proposed Reservation Land taken into trust by the U.S. Government and held for the benefit of the Tohono O'odham Nation in order for the Nation to conduct gaming activity on the land;

WHEREAS, the City Council of the City of Glendale passed Resolution No. 4246 New Series on April 7, 2009 opposing the Tohono O'odham Nation's application filed with the Secretary of the Interior and the Bureau of Indian Affairs to have the Proposed Reservation Land taken into trust by the U.S. Government and opposed the approval of the land being available for gaming; and

WHEREAS, House of Representatives Bill 1410 was introduced for legislative consideration on April 9, 2013;

WHEREAS, the City Council of the City of Glendale expressed its opposition to House of Representatives Bill 1410 "Keep the Promise Act of 2013" on March 25, 2014 under Resolution No. 4783 New Series; and

WHEREAS, the City Council of the City of Glendale directed the City Manager and City Attorney to undertake a fact finding mission with the Tohono O'odham Nation and enter into negotiations with the Tohono O'odham Nation in a good faith attempt to discuss and resolve outstanding issues; and

NOW THEREFORE, IN RECOGNIZTION AND RELIANCE UPON THOSE EFFORTS, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF GLENDALE as follows:

SECTION 1. That the City of Glendale repeals Resolution No. 4246 New Series.

SECTION 2. That the City of Glendale hereby does not object to the Trust Land being utilized for gaming.

SECTION 3. That the City Clerk is hereby authorized and directed to send a certified copy of this resolution to the members of the Arizona Federal delegation setting forth the City of Glendale's official position.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Glendale, Maricopa County, Arizona, this _____ day of _____, 2014.

_____
MAYOR

The CHAIRMAN. Mayor Weiers, thank you for your testimony. Chairman Norris, you have the floor.

STATEMENT OF HON. NED NORRIS, JR., CHAIRMAN, TOHONO O'ODHAM NATION OF ARIZONA

Mr. NORRIS. Thank you. Mr. Chairman, members of the Committee, my name is Ned Norris, Jr. I am chairman of the Tohono O'odham Nation. I am here today representing the nation's more than 32,000 members.

Since time immemorial, the nation and its members have lived in southern and central Arizona. Our reservation is composed of several non-contiguous areas in Pima, Pinal, and Maricopa counties. Most of our reservation land is located in remote, isolated areas and our population is one of the poorest in the United States, with average individual incomes of just over $8,000.

In the 1960s, the Corps of Engineers built a dam to protect nearby non-Indian commercial farms. The dam backed up and flooding destroyed nearly 10,000 acres of our Gila Bend Reservation land in a fertile area of Maricopa County, ruining homes, farms and our local church. Our elders recall the desecration of their cemetery as a result of flooding. Tribal members were forced to move onto a small, 40-acre parcel of land known as San Lucy Village where today they crowd into small houses and live well below the poverty line.

In 1986, Congress enacted the Gila Bend Act to compensate the nation for its losses. Pursuant to the Act, the nation settled our legal claims and gave up nearly 10,000 acres of our reservation land and water rights. In return, we have the right to acquire replacement reservation land without any conditions on future use. We acquired replacement land in the West Valley in Maricopa County and the Department of Interior took it into trust. Four West Valley cities, Peoria, Tolleson, Surprise and now the city of Glendale, have taken formal positions of support for the nation's project and against H.R. 1410. I am honored to be joined today by Mayor Barrett of Peoria and council members Sherwood and Chavira from Glendale.

We are respectful of rights of individuals, like Mayor Weiers, to express their personal opinions regarding the nation's project. However, official, formal positions of the communities in the West Valley could not be more clear. They support the project. Undaunted by this local support, opponents of the nation's project have pushed H.R. 1410, a bill that would undo a nearly 30-year old land and water rights settlement agreement, all in order to protect the interests of a few East Valley gaming tribes. Proponents of H.R. 1410 asserted a wide range of legal claims to block the nation's project. But a Federal court has now explicitly confirmed that the Arizona gaming compact that the nation, the State and all tribes explicitly signed, provides that the nation has the right to conduct gaming on this property.

The court roundly rejected interpretations of the compact advanced by proponents of H.R. 1410, calling them "entirely unreasonable."

Mr. Chairman, this is the third time in five years I have had to testify before Congress in defense of the nation's rights. The nation has complied with the letter of every applicable law, and has gracefully answered every allegation, no matter how ridiculous or how offensive, in every lawsuit and in every congressional hearing. But

the millions of dollars the nation has been forced to spend defending its rights would have been better spent to build houses for our elderly, pay for college tuition for our children and bolster our Head Start programs.

Honorable Chairman of the Committee and members of the Committee, the nation respectfully requests that you put an end to this self-serving, mean-spirited, multi-million dollar lobbying campaign against our people and stop this piece of 19th century throwback legislation. We ask that you see this legislation for what it is: the first time in the modern era in which Congress would unilaterally renege on the solemn promises made by the United States in an Indian land and water rights settlement.

This project is fully in line with IGRA Section 20, equal footing exceptions, and would benefit the nation, local communities and the State of Arizona for the next 25 years and beyond.

I thank you for your time. The nation is happy to answer any questions.

[The prepared statement of Mr. Norris follows:]

PREPARED STATEMENT OF HON. NED NORRIS, JR., CHAIRMAN, TOHONO O'ODHAM NATION

My name is Ned Norris, Jr. I am the elected Chairman of the Tohono O'odham Nation. The Nation is a federally recognized tribe with more than 32,000 members. Our people have lived since time immemorial in southern Arizona where our several non-contiguous reservation lands—including our West Valley Reservation in Maricopa County—are located. I thank the Committee for giving the Nation an opportunity to testify today.

The United States' Promise to the Nation

Within my lifetime, the United States Corps of Engineers built a dam to protect large, commercially-owned farms near the Nation's Gila Bend Indian Reservation, which at the time encompassed nearly 10,000 acres of prime agricultural land in Maricopa County. That dam caused perpetual flooding of our reservation, ruining homes, individually- and tribally-run farms, and our local church. I often have listened to elders describe how their cemetery was desecrated as the result of the flooding. These are not easy stories to tell, and these are wounds that have not yet healed.

All of the residents of this nearly 10,000-acre reservation were forced to move onto a small 40-acre parcel of non-flooded land known as San Lucy Village. Our San Lucy tribal members continue to live there well below the poverty line with multiple families crammed into small HUD houses. Despite these hardships, they live there still because the Gila Bend Indian Reservation is their homeland.

The Corps of Engineers flooded the Nation's Gila Bend Indian Reservation even though it had no authority from Congress, and certainly no consent from the Nation, to do so. The destruction caused by the flooding effected an unconstitutional taking of the Nation's federally-protected property rights, and an unconscionable breach of trust by our federal trustee. Looking for a solution and a way to avoid litigation over the matter, Congress instructed the Department of the Interior to search for replacement lands with comparable agricultural potential (including comparable senior water rights). After several years of looking for available lands within a 100-mile radius of the destroyed reservation, Interior ultimately reported to Congress that there was no way to replace the Nation's destroyed lands with new agricultural lands. H.R. Rep. 99–851 at 6 (1986).

As an alternative way to compensate the Nation for its losses and for the Corps' wrongdoing, Congress enacted federal legislation in 1986 in which the United States promised that if the Nation relinquished its considerable legal claims against the United States, relinquished its considerable water rights (which in 1986 were estimated to be worth $100 million), and relinquished its title to nearly all of the Gila Bend Indian Reservation, the United States would in return acquire a limited amount of replacement trust land for the Nation in Maricopa, Pima or Pinal Counties (where our other reservation areas are located). That statute, the Gila Bend Indian Reservation Lands Replacement Act (Pub. L. 99–503) ("1986 Gila Bend Act")

promised that the Nation would be able to use its replacement lands as a "Federal Indian Reservation for all purposes". Id. § 6(d) (emphasis added). Under this legislation, which the Department of the Interior has described as "akin to a treaty," *Tohono O'odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 22 IBIA 220, 233 (1992), the United States also agreed to pay the Nation $30 million. I want to be clear that $30 million was only a small fraction of the actual value of our relinquished land and water rights—the primary way in which the United States compensated the Nation was through its promise that the Nation would have a right to acquire replacement land that would have the same legal status as the destroyed land.

Relying on the United States' promise in the 1986 Gila Bend Act that we could acquire new land that would be treated as a reservation for all purposes, in 1987 the Nation executed a settlement agreement with the United States by which the Nation gave up its right to sue the United States and relinquished its rights to the land and water of the destroyed Gila Bend Reservation.

The Nation's Reservation in the West Valley

The Nation acquired unincorporated Maricopa County land that is located in the "West Valley" (a broad area west of the City of Phoenix), which is about 49 miles from the Gila Bend Reservation, and which lies between the cities of Glendale and Peoria. The land we purchased in the West Valley meets the strict requirements set forth in the 1986 Gila Bend Act, which limits the location and the amount of land the Nation may acquire as replacement trust land. Because the federal courts and the Department of the Interior agreed that our West Valley land met these strict statutory requirements, the Department of the Interior completed its congressionally-imposed duty to acquire the land in trust, and it is now part of the Tohono O'odham Reservation. Letter of Kevin Washburn, Assistant Secretary—Indian Affairs, United States Department of the Interior, to Ned Norris Jr., Chairman, Tohono O'odham Nation (July 3, 2014) ("Decision Letter").

The tribes pushing for passage of H.R. 1410 made a series of arguments as to why the Nation's West Valley land did not meet the requirements of the 1986 Gila Bend Act, but every one of these arguments has been rejected by the federal courts and by the Department of the Interior, the agency with the most relevant expertise on these matters. For more information about how and why the Nation's West Valley land meets the requirements imposed by Congress in the 1986 Gila Bend Act, please see the following:

1. Memorandum of the Field Solicitor, Phoenix Field Office Re: Proposed Acquisition of Land for Gaming Purposes by Tohono O'odham Nation (February 10, 1992);

2. Memorandum of the Field Solicitor, Phoenix Area Office Re: Acquisition of 134.88 Acres by Tohono O'odham Nation Pursuant to P.L. 99–503 (April 30, 2009);

3. Letter of Larry Echo Hawk, Assistant Secretary—Indian Affairs, United States Department of the Interior, to Ned Norris Jr., Chairman, Tohono O'odham Nation (July 23, 2010);

4. *Gila River Indian Community v. United States,* 776 F.Supp.2d 977 (2011); *Tohono O'odham Nation v. City of Glendale,* 253 P.3d 632 (Ariz. App. 2011);

5. *Tohono O'odham Nation v. City of Glendale,* 2011 WL 2650205 (D. Ariz. 2011);

6. *Gila River Indian Community v. United States,* 729 F.3d 1139 (9th Cir. 2013);

7. *Arizona et al. v. Tohono O'odham Nation,* 944 F.Supp.2d 748 (D. Ariz. 2013);

8. Letter of Kevin Washburn, Assistant Secretary—Indian Affairs, United States Department of the Interior, to Ned Norris Jr., Chairman, Tohono O'odham Nation (July 3, 2014).

The "Shell Purchase"

The Nation's opponents make much of the fact that the Nation acquired its West Valley Resort property through a wholly-owned separate corporate entity called Rainier Resources. But this is standard business practice for large land purchases—fundamentally, it is "just good business sense." H.R. 2938, *"Gila Bend Indian Reservation Lands Replacement Clarification Act": Hearing Before the H. Subcomm. On Indian and Alaska Native Affairs,* 112 Cong. 8 (2011) (statement of Rep. McClintock (RCA)). Indeed, as Rep. McClintock noted, when Walt Disney acquired the land for his development project without revealing that he was the purchaser, it was in no small part to ensure that the price for the land would not be artificially inflated by the sellers. Similarly, it is common practice in the Phoenix metropolitan area for

large land purchases to be made through holding companies. See, for example, local land acquisitions by the Church of Jesus Christ of Latter Day Saints. J. Craig Anderson, LDS purchases Maricopa land from builders, Arizona Republic, Nov. 2, 2008 (available at *http://www.azcentral.com/arizonarepublic/business/articles/2008/11/02/20081102bizmormonland1102. html).* The Nation's government would have ill-served our people if we had not taken the same precautions to ensure that we could acquire our land at fair market value.

The proponents of H.R. 1410 continue to harp on how the Nation originally purchased the land, and continue to ignore the clear record of the Nation's genuine efforts to reach out to, and work with, local West Valley governments and civic organizations as the Nation began to move forward with having the land taken into trust. I respectfully request that the Committee take careful note of the written testimony provided by the West Valley cities of Glendale, Peoria, Tolleson, and Surprise to better understand the integrity and sincerity with which the Nation has worked with the local community to create an economic development project that will be good not just for the Tohono O'odham Nation, but also for our neighboring communities. It is also important to note that this is precisely what Congress intended in drafting the 1986 Gila Bend Act. As the Department stated in its Decision Letter, the Act's terms "protects the status quo for Arizona municipalities, ensuring that their incorporated lands and the zoning, taxation, and other regulatory schemes that they have enacted are not altered under the Act by the Nation." Decision Letter at 9.

Under the 1986 Gila Bend Act, the West Valley Reservation is a "Federal Indian Reservation For All Purposes"—Including Gaming

As I mentioned before, the 1986 Gila Bend Act requires that the Nation's West Valley reservation be treated as "a Federal Indian Reservation for all purposes". Pub. L. 99–503, § 6(d). This means, among other things, that the land will have the same legal status as the Gila Bend Reservation land that was destroyed. The tribes that are trying to prevent the Nation from using its West Valley Reservation for gaming like to tell everyone that there is no way Congress could have foreseen that the Nation would use its settlement land for gaming. But that is not true. To begin with, Congress explicitly declared its intent to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming." Id. § 2(4) (emphasis added). As the Department of the Interior noted in its Decision Letter, "Congress envisioned that Nation land could be in close proximity to other local governments..Reading the Gila Bend Act as [Gila River and Salt River] propose potentially hinders a key goal of the Act—promoting the Nation's economic self-sufficiency in areas that are not rural." Decision Letter at 9–10.

The Nation's Gila Bend Act became law two years prior to the enactment of the Indian Gaming Regulatory Act (IGRA) and the restrictions on gaming on newly acquired trust lands that it imposed. In 1986, when the Gila Bend Act was passed, Indian gaming was legal on all reservation lands, and in fact, the Nation itself was operating a gaming business on another part of its Reservation in 1986. It is not plausible that in 1986 Congress would have had no inkling that the Nation's new reservation land could be used for gaming.

Indeed, before IGRA was enacted in 1988, if Congress wanted to prevent a tribe from gaming on newly acquired lands, it had to do it with specific legislative language; otherwise there simply were no limitations on the location of Indian gaming operations. *See, e.g.,* the Florida Indian Land Claims Gila Bend Act of 1982, Pub. L. 97–399 (Dec. 31, 1982), the Ysleta del Sur Pueblo Restoration Act, Pub. L. 100–89, Tit. I (Aug. 18, 1987) and the Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. 100–89 Tit. II (Aug. 18, 1987). In each of those pre-IGRA statutes, Congress explicitly restricted or banned gaming on new trust land acquired by those tribes. If Congress had intended to impose a similar restriction on the Nation, it would have had to do so explicitly in the 1986 Gila Bend Act—but it did not. Just as importantly, the Nation most certainly never agreed to such a condition, and no such condition exists in the 1987 settlement agreement signed by the Nation and the United States.

Further, IGRA itself includes a carve out from its restrictions on gaming on newly acquired trust lands that specifically protects the gaming-eligibility of lands—like our West Valley Reservation—that have been acquired as part of a land claim settlement. IGRA Section 20(b)(1)(B)(i) specifically states that IGRA's ban on gaming on newly acquired lands "will not apply when . . . lands are taken into trust as part of . . . a settlement of a land claim". It is important to note also that some of the same legislators who crafted the 1986 Gila Bend Act (Senator DeConcini and then- Congressman John McCain) also crafted the Indian Gaming Regulatory Act.

A Federal Court Held That 1986 Gila Bend Act Lands Can Be Used For Gaming

In 2011, the two wealthy East Valley tribes pushing for enactment of H.R. 1410—the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community—together with the State of Arizona filed suit in the U.S. District Court for the District of Arizona to challenge the eligibility of the Nation's West Valley land for gaming. On May 7 and June 25, 2013, following a lengthy and voluminous discovery process, the court held that the Nation's West Valley Resort property was acquired under the "settlement of a land claim" and "qualifies for gaming" under both the Indian Gaming Regulatory Act and the tribal-state gaming compact. *Arizona v. Tohono O'odham Nation,* 944 F.Supp. 2d, 748, 756 (D. Ariz. 2013).

Contrary to the arguments made by proponents of H.R. 1410, the district court concluded that "gaming on [the West Valley reservation] is expressly permitted by the federal statute that authorizes Indian gaming [IGRA]," id. at 754 (emphasis added), and that the West Valley reservation falls within IGRA's "settlement of a land claim" provision, id. at 755–56. The Court explained that "[t]he extensive flooding caused by the federal government's dam gave rise to claims by the Nation for a trespass severe enough to constitute an unlawful taking," which "by definition interfered with the Nation's title to and possession of its land." *Id.* at 756. Moreover, the Gila Bend Act "specifically required the Nation" to waive claims against the government stemming from the flooding, and "[t]his is a classic settlement." *Id.* Accordingly, the West Valley reservation "qualifies for gaming under IGRA." Id. The district court's decision was fully consistent with an opinion from the Department of the Interior's Office of the Solicitor which had confirmed as far back as 1992 that land acquired under the 1986 Settlement Act could be used for gaming.

A Federal Court Has Rejected The Claim That The Nation Agreed Not To Game In The Phoenix Area

In its decision, the district court also rejected on the merits plaintiffs' claim that the tribalstate gaming compact barred the Nation from gaming on its West Valley reservation and their alternative claim that—even if the compact did not reflect it—the Nation had separately agreed not to game in the Phoenix area.

During the litigation, the Nation provided plaintiffs, including Gila River and Salt River, with voluminous discovery—requiring the Nation to expend enormous time and resources—into all aspects of the "negotiation of the Compact, the parties' intent and understanding, and the Proposition 202 campaign" leading to the voters' endorsement of the compact. *Arizona v. Tohono O'odham Nation,* 944 F. Supp. 2d at 761. The district court carefully reviewed all the evidence plaintiffs submitted and held that there was no way that a supposed promise not to game in Phoenix would have been omitted from the compact. To the contrary, the district court concluded that, even taking all of plaintiffs' evidence into account, the language of the tribal-state gaming compact simply was not reasonably susceptible to plaintiffs' interpretation. Indeed, plaintiffs' interpretation of the compact was "entirely unreasonable": "[N]o reasonable reading of the Compact could lead a person to conclude that it prohibited new casinos in the Phoenix area." *Id.* at 768. The court further found that the Nation's plans do not violate any covenants of "good faith and fair dealing." *Id.*

Gila River and Salt River tried to backstop their IGRA and tribal-state compact arguments by also claiming that the Nation made a back-room, side-bar promise—a "gentlemen's agreement"—that it would not conduct gaming in the greater Phoenix area. The district court soundly rejected that argument as well—and not simply on sovereign immunity grounds as opponents like to claim. Most devastating to Gila River and Salt River's arguments was that section 25 of the very Compact that each Arizona tribe individually signed with the State explicitly provides that "This Compact contains the entire agreement of the parties with respect to the matters covered by this Compact and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding." (emphasis added). In other words, the parties agreed in the compact that the words of the compact would trump any supposed "side-bar" promises and that such promises would have no effect. *Id.* at 770–74. Accordingly, because "[t]he fully integrated compact discharges any unwritten understandings," *Id.* at 774, plaintiffs' claims seeking to enforce a promise that is not in the compact were foreclosed on their merits. There is no basis whatsoever for Congress to overturn the district court's carefully considered conclusions at the behest of the losing litigants.

What makes Plaintiffs' litigation claims even more disturbing is that in the evidentiary discovery which took place as the result of their lawsuit, it became clear that representatives of the Gila River Indian Community, the Salt River Pima Maricopa Indian Community, and the State all were aware of the Nation's rights to con-

duct gaming on its settlement lands during the negotiations that led up to the signing of the 2003 gaming compacts. Most notably, during a July 15 1992 meeting, the Nation explicitly informed gaming negotiators for the State of its position that land acquired under the 1986 Gila Bend Act would be eligible for gaming. These officials did not object; however, and as the district court noted, the Nation presented evidence that, during later compact negotiations, "some State legislators attempted to . . . exclude all gaming on after-acquired lands precisely to avoid gaming on noncontiguous reservation land such as the [Nation's] Glendale-area land." *Id.* at 767. Later, during the mid-1990s, a representative of the Nation similarly informed the former president of the Salt River Pima-Maricopa Indian Community (and key 2002 compact negotiator) of the 1986 Gila Bend Act and the Nation's right to conduct gaming on land acquired under the Nation's settlement act. *Arizona et al. v. Tohono O'odham Nation,* CV11–0296–PHX–DGC, Antone Dep. at 76 (5/24/12). And in 2001, the Governor of the Gila River Indian Community and one of the Gila River Indian Community's compact negotiators were presented with a copy of a tribal council resolution from the Nation describing the Nation's rights under this legislation. Resolution No. 01–031 (2001).

Interior Opposes H.R. 1410, and it Opposed Predecessor Bill H.R. 2938

In hearings before the House Natural Resources Committee, the Department of the Interior twice testified that the Nation's proposed development is lawful under IGRA. On October 4, 2011 the Department testified on H.R. 2938, the predecessor bill to H.R. 1410, as follows:

> The Department opposes H.R. 2938.
>
> Congress was clear when it originally enacted the Gila Bend Act in 1986, where it stated that replacement lands "shall be deemed to be a Federal Indian Reservation for all purposes." By this language, Congress intended that the Nation shall be permitted to use replacement lands as any other tribe would use its own reservation trust lands.
>
> H.R. 2938 could also alter established law that prohibits gaming, authorized under the Indian Gaming Regulatory Act (IGRA), on lands acquired by the Secretary into trust for the benefit of an Indian tribe after October 17, 1988, except in certain circumstances. The effect of this legislation would be to add a tribe-specific and site-specific limitation to IGRA's prohibition. The process for determining whether lands qualify for an exception to this prohibition is firmly established.

Testimony of Paula Hart, Director, Office of Indian Gaming, United States Department of the Interior, Before the Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, U.S. House of Representatives (October 4, 2011) (emphasis added). Following the introduction of H.R. 1410 in the current Congress, the Department again testified in opposition to the bill, noting that it "has a similar effect" as H.R. 2938:

> H.R. 1410, would negatively impact the Nation's "all purposes" use of selected lands under the Gila Bend [1986 Settlement] Act by limiting the Nation's ability to conduct Class II and Class III gaming on such selected lands.
>
> H.R. 1410 would specifically impact the Gila Bend [1986 Settlement] Act by imposing additional restrictions beyond those agreed upon by the United States and the Tohono O'odham Nation 25 years ago. The Department cannot support legislation that specifically impacts an agreement so long after the fact.

Testimony of Michael Black, Director, Bureau of Indian Affairs, United States Department of the Interior, Before the Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, U.S. House of Representatives (May 16, 2013).

In sum, the Department of the Interior consistently has recognized that H.R. 1410, like its predecessor H.R. 2938, contravenes the 1986 Gila Bend Act's (and the 1987 Settlement Agreement's) express terms, which require the United States to hold in trust and treat as reservation land "for all purposes" the Nation's West Valley Reservation land.

The Nation's Takings and Breach of Trust Claims Against the United States if H.R. 1410 is Enacted

Fifth Amendment Takings Claim. The United States Constitution provides that private property may not be "taken for public use, without just compensation." See, U.S. Const., amend. V; *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978). H.R. 1410 would take away the Nation's court-confirmed right to use its West Valley Reservation for gaming related economic development. See, *Forest*

County Potawatomi Cmty. of Wis. v. Doyle, 828 F. Supp. 1401, 1408 (W.D. Wis. 1993) (Indian tribe had a property interest in the right to game under its Tribal-State compact). By interfering with the Nation's investment-backed expectations that it can conduct gaming under its tribal-state compact and thereby causing substantial economic harm to the Nation, H.R. 1410 would qualify as a taking requiring just compensation. Enactment of H.R. 1410 exposes taxpayers to liability for substantial damages.

Breach of Contract. The Nation's 1986 Gila Bend Act provided that, in return for waiving its claims against the United States and giving up title to its land and water rights on the Gila Bend Reservation, the Nation could acquire replacement lands in unincorporated Maricopa, Pima, or Pinal Counties that would be treated as a reservation "for all purposes," including gaming. In 1987, the Nation entered into a settlement agreement with the United States in which it did indeed relinquish its claims and its land and water rights in consideration for the United States' promises in the 1986 Gila Bend Act. H.R. 1410 breaches that agreement. It is settled law that when the United States enters into a contract, its rights and duties under the contract are governed by the same law applicable to contracts between private individuals. *United States v. Winstar Corp.,* 518 U.S. 839, 895 (1996). Accordingly, if H.R. 1410 is enacted into law, the Nation can sue the United States for breach of this 1987 agreement. What is more, damages for this breach would likely be substantial, given that the lost future profits from the Nation's planned gaming facility during the term of the compact would amount to hundreds of millions of dollars, if not more.

The Nation is a Large Tribe with an Impoverished Membership

The Nation has more than 32,000 members, many of whom live in remote and isolated areas on the Nation's reservation in southern Arizona. Because of our location, economic development and self-sufficiency have been, and continue to be, an ongoing struggle. In addition, the Nation's main reservation borders 75 miles of the international boundary with Mexico, which creates significant additional expense for the Nation in dealing with border-related security, illegal immigration and drug trafficking—expenses that are unique to the Nation, exceed $ 3 million annually, and are not reimbursed by the federal government.

In 2009, although it was not required, the Nation submitted to Interior with its West Valley land fee-to-trust application a Report on the Nation's significant unmet economic needs entitled "The State of the Tohono O'odham Nation: a Review of Socioeconomic Conditions and Change by the Taylor Policy Group." As noted in the Taylor Report, while the Nation's existing gaming operations have had some positive effects for the Nation, providing employment and additional services and programs for members funded by gaming revenue, given the size of the Nation's membership, the Nation's needs are still significantly underserved. The Report, as well as more recent census data, shows very clearly that the Nation continues to lag far behind both non-Indian populations and other Arizona tribes in terms of income, life expectancy, education, quality housing, and stable family households. For example, the average income per capita for members on the Nation is a little over $8,000, far behind that of average Americans (less than a third of the average American income), and well below the average incomes of other Indians in Arizona and across the United States. Forty-six percent of the Nation's families live below the poverty line, and 31 percent live in overcrowded (more than one occupant per room) homes. Rates of violent crime are high and continue to increase. Forty-four percent of the Nation's children drop out before completing high school; only about fourteen percent of the Nation's members have more than a ninth-grade education, and only eight percent have an associate's degree or higher.

In short, we continue to face great challenges in achieving economic self-sufficiency, and as federal grants and funding available to Tribal nations continue to shrink, the challenges only increase. We need a way to provide for our government and our people, without relying on the federal government. The West Valley project is a major component of our strategy for achieving economic independence, which also will benefit the surrounding communities.

The Assault on the Nation Must End

This is the third time in five years I have had to testify before Congress in defense of the Nation's right to have its West Valley property taken into trust and its right to use that land for gaming-related economic development. The Nation's right is based on the promises the United States made in the 1986 Gila Bend Act and in the 1987 Settlement Agreement. The Nation's right is based on the commitments the State made to the Nation in the arms' length negotiations which led to our tribal-state gaming compact. The Nation's right is based on the clear provisions

of the Indian Gaming Regulatory Act. And the Nation's right is based on the United States' fundamental and solemn obligation to act in good faith, as our trustee, to implement these laws as they are written.

The Nation is respectful of the rights of tribal and state governments to have differing views of the law, and of all parties' right to access the federal courts to ensure that the laws are being properly implemented. At every juncture during the five and a half years since the Nation announced its plans, the Nation has done everything within its power to ensure that it has complied with the letter of every applicable law. The Nation has consistently articulated its support for and faith in the judicial process, and it has gracefully tolerated answering every allegation, no matter how ridiculous or how offensive, in every lawsuit and in every congressional hearing.

But with all due respect, the millions and millions of dollars the Nation has been forced to spend to patiently defend its rights would instead have been better spent to build houses for our elderly, pay for college tuition for our children, and bolster our Head Start programs. If two wealthy East Valley tribes had not embarked on this convoluted market-protection campaign, the Nation already would be employing thousands of people from the local community and from the Nation, and already would be generating revenue that could be deployed to assist the people of San Lucy Village and the rest of the Nation's membership.

Chairman Tester, Vice Chairman Barrasso, and Honorable Members of the Committee, the Nation is begging you once and for all to put an end to the self-dealing, mean-spirited, multi-million dollar lobbying campaign against the Nation by bringing an end to any further consideration of this monstrous piece of nineteenth-century throw back legislation. We ask that you see this legislation for what it is—the first time in the modern era in which Congress would unilaterally renege on the solemn promises made by the United States in an Indian land and water rights settlement.

My people suffered a real and devastating harm when our Gila Bend Reservation was destroyed. We are asking you to help us, finally, be able to close this chapter of our history with the United States, and to allow us to move forward to heal those wounds and help our people, as we have a right to do under current law, and as the United States has a moral obligation to help us do.

I thank you for your time today. The Nation is happy to answer any questions.

The CHAIRMAN. Thank you for your testimony. I want to thank you all for your testimony. I can feel the emotion up here. So I would just ask, I am going to ask two questions. I am going to ask one of Diane and ask one of Ned.

Number one, Diane, this question, you just heard Chairman Norris say that this would be the first time that there would be unilateral reneging on a promise. You are Native American. I want to know what your thoughts are on that statement.

Ms. ENOS. It is ironic that the Tohono O'odham talks about reneging on a promise. Because that is what they did when they sat down with us all those days and years of working with us. The promises that they violated, there was first an agreement in principle where we all signed a document agreeing to put our trust in each other, recognizing the sovereignty of each tribe but yet also requiring each tribe that signed that document, if you have an interest that is different from the group, the coalition of 17 tribes, you must tell us.

They didn't tell us. The real tragedy here today, Senator Tester, is all of this could have been avoided. All the millions that Chairman Norris talks about, all the times we have to travel and all these tribal leaders here, these city leaders that are having to come here to lobby for help, all of this could have been avoided if they had just told us during those negotiations, if they had just told us what their intentions were instead of doing this behind closed doors and keeping it secret. Not only from tribes, but the governor and the voters of Arizona. All of this could have been avoided. As a Native American, you asked me that.

The CHAIRMAN. Just to clarify, if, if, if it goes the Tohono O'odham's way, you do not believe that this would have negative impacts on Native Americans moving forward?

Ms. ENOS. The State will open up to statewide gaming, as I said in my testimony. They are waiting. They are looking.

The CHAIRMAN. Chairman Norris, claims have been made that the Tohono O'odham promised not to open up a facility when 202 was being debated and sold and voted upon. Can you tell me if that is true or false?

Mr. NORRIS. Mr. Chairman, thank you for the question. We are not here to relitigate the arguments that the opposition has already raised in front of a Federal judge. The Federal court has already ruled on every single legal challenge that the opposition has raised on this issue. The Federal courts have already ruled that there were no promises made. The Federal courts have already ruled that there was never any agreement. The Federal courts have already ruled that we will not violate the current compact. And many other decisions as well.

The CHAIRMAN. All right. And just to recap, Mayor Weiers, you are opposed to the gaming that is going to happen in your city, but the city council voted four to three to support the gaming. Is that accurate?

Mr. WEIERS. That is accurate in the sense, Mr. Chairman, the fact that our council has been split on this issue for years. And just recently, one council member switched his vote. I guess my point I would like to make is, should one person make a difference for the entire State and affect all the Native American tribes we have in Arizona. I think not.

The CHAIRMAN. We thank you.

And I just want to thank you for bringing this issue forward. It is very complex. I will tell you—excuse me for just a second—I am sitting here listening to the arguments made vacillating back and forth as you make the arguments. It is not as clear-cut, as Senator McCain said when this thing started, some of the most complex issues are issues that deal with Native Americans. If you consider the history and where we have been and where we are going, and as we talk about language and we talk about taking care of folks with education and housing and police protection and water resources, these are important issues if you are living it. And you guys are living it. And we have a lot of leaders in this audience that are living it. I can just tell you, it is very difficult.

With that, we will allow you to say something. Go ahead.

Ms. ENOS. Contrary to what Chairman Norris has asserted, the court had to dismiss the charges that the State of Arizona filed against Tohono O'odham of fraud, misrepresentation and promissory estoppel because they raised sovereign immunity defense.

The CHAIRMAN. Okay. What we need to do as a Committee is do our due diligence on all these issues.

So we thank you all. Getting back to the issue of Indian gaming, it has done some really good stuff for the folks who have been able to take advantage of it. And for the folks who can't take advantage of it, we have to figure out ways that we can allow them to take advantage of that or other opportunities to get some resources to be able to deal with the issues that are so real in Indian Country.

This hearing will remain open for two weeks. I would encourage all the stakeholders, and there were a lot of them that stood up here a minute ago, those folks and others, to submit written statements for the records. Because these are important issues as we move forward and determine a path for Indian gaming.

This hearing is adjourned. Thank you all.

[Whereupon, at 5:34 p.m., the hearing was adjourned.]

APPENDIX

PREPARED STATEMENT OF HON. SHERRY J. COUNTS, CHAIRWOMAN, HUALAPAI TRIBE

On behalf of the Hualapai Tribe, I thank Chairman Tester, Vice-Chairman Barrasso and the Senate Committee on Indian Affairs for hosting this oversight hearing on Indian Gaming. I am Sherry J. Counts, Chairwoman of the Hualapai Tribe.

Before we get into the details of Indian gaming in Arizona, I'd like to share some details about the Hualapai people in Arizona. We are a federally recognized tribe and our lands are located in rural northwestern Arizona along the Grand Canyon and the Colorado River between Kingman, Arizona and Seligman, Arizona on Route 66. Our tribal membership includes about 2,300 members with approximately 1,300 residing within the Hualapai Reservation. The Hualapai are historically hunters and gatherers. Our history and includes a dramatic alteration of our lifestyle due to a period of forceful removal from our ancestral lands that ended with our return to reduced land base altered by gold seekers, an influx of ranchers and, later the construction of the railroad through our land.

Despite our remote location, tourism, ranching and arts and crafts drive our local economy. We use our geographical location to offer hunting and river rafting, along with tours of the Grand Canyon. We receive some federal funding and gaming has provided us additional revenue to supplant dwindling funding.

We do not operate our own casino but have an executed gaming compact with the state of Arizona. Early in the Arizona's Indian gaming growth period, the Hualapai Tribe did operate a small casino; unfortunately we were forced to cease operations soon after opening. The uniqueness and remoteness of our location could not support a traditional gaming establishment. We could not compete with the amenities of nearby Nevada gaming establishments and individuals visiting our community do not seek gambling adventures, rather they come to absorb the natural beauty of the Grand Canyon, river rafting or hunting.

Despite our unsuccessful attempt at gaming in rural northwestern Arizona, gaming in the metropolitan areas of Phoenix and Tucson thrived. Casino growth in the metropolitan areas could not keep up with demand. The tribes and the Governor's office worked on a negotiated compact that included limits on facilities, limits numbers of machines for each tribe and limits on the number of machines per facility. Despite all the negotiations the decision to implement these compacts eventually became a decision of Arizona voters. Ultimately, the voters approved the negotiated terms and the result was limited gaming with tribes the exclusive providers of gaming in Arizona. Gaming was intentionally limited in the number of facilities per tribe and growth was intentionally tied to the growth in Arizona's population. This responsible growth was designed to prevent an explosion of casinos in Arizona and a market flood. For example and more specifically, when the tribes in the metropolitan areas were in need of additional machines, the solution was to allow the tribes in remote locations, like Hualapai to lease their machine allocations to the tribes with facilities that had the demand for the slot machines. It was and remains, for the most part, a win-win solution. Tribes wanting additional machines were able to increase the number of machines in their establishments and tribes without casino operations and in geographical locations that could not support a casino establishment were able to lease their machine allocation to realize some revenue. The Hualpai are one of five Arizona tribes who lease machines to other tribes. These tribes are commonly referred to as the "non-gaming tribes". Although the revenue we receive is less than the revenue earned by the tribes operating the machines, we do not bear the same financial risk as the tribes operating casinos.

This system of leasing worked well for at implementation in 2003 and for the first population increase in 2008. However, as expected, Arizona gaming has arrived at the point where tribes with casinos have reached the maximum number of machines allowed in their respective facilities under the Arizona-Tribal gaming compacts; eliminating the need to lease additional machines from non-gaming tribes. Now, the non-gaming tribes are in the position of being phased out of the market. Once our

existing lease agreements expire or if terminated by the leasing tribe, the Hualapai Tribe will no longer receive gaming machine lease proceeds, a substantial loss of revenue for our community.

Gaming and our partnerships have been beneficial to the Hualapai people. Our gaming revenues are used for basic subsistence needs for our members: infrastructure development, buildings for our tribal departments such as a Cultural Center, Head Start, Health Building, Boys & Girls Club and a Youth Detention Center. Gaming revenue helps us provide our members with emergency food and shelter assistance, utility payments, vision care, and medical assistance when Indian Health Service is insufficient, and to provide basic necessities for our elders, including the simple act of providing wood to keep homes warm in the winter. We've utilized our gaming revenue to adjust to the cuts to federal funding we have received in the past. Planning for the future, we also set aside a portion of our gaming income for scholarships to assist tribal members pursuing higher educational opportunities.

Despite our successes in Arizona, we currently face challenges. In Arizona, tribal nations are the exclusive providers of gaming, excluding horse and dog racing and some minor forms of gaming such as the state lottery and charitable bingo. Each and every year, the exclusivity to provide gaming in Arizona is challenged, either by commercial gaming interests or by Racino enthusiasts who seem to look to slot machines to save a diminishing horse and dog racing industry. We generally work our way through these challenges every year through our shared efforts and membership in the Arizona Indian Gaming Association. Unfortunately, there is one issue that stands as a significant challenge in Arizona. The effects are current and will reach beyond the next 25 years of gaming. The matter has the potential to change gaming in Arizona and perhaps Indian gaming across the nation. I am referring to the West Valley Resort, a destination style gaming facility proposed to be constructed by the Tohono O'odham Nation. While the Hualapai Tribe generally does not object to economic development opportunities for any tribal community, the proposed West Valley Resort is troubling for multiple reasons. First, as mentioned previously, when the tribes in Arizona could not finalize a compact with the Arizona Governor's Office we took the issue of gaming to the voters. The tribes made several concessions to assure that gaming growth in Arizona is limited and responsible. Every tribe, including the Hualapai Tribe agreed to relinquish at least one gaming facility allocation. Everyone agreed except the Tohono O'odham Nation. We promised the people of Arizona that the number of casinos in the Phoenix metropolitan area would be limited in number. What we didn't know is at the time we were working together for the common goal of developing a gaming compact to benefit all Arizona tribes, the Tohono O'odham Nation, although at the same negotiating table was, at the same time, planning to construct another other gaming facility in the Phoenix metropolitan area. In our opinion, the West Valley Resort would be contrary to the limit on casinos in the Phoenix metropolitan area. Thus, violating our promise to the voters of Arizona. The Hualapai Tribe understands the parcel of Glendale land purchased by the Tohono O'odham must be used for economic development purposes by virtue of the restrictions outlined in a settlement act and the Hualapai Tribe has no objection to use of the land for economic development generally. However, the Hualapai Tribe objects to use of the land for gaming purposes. It is our concern that use of this land for a casino, as planned will disrupt the delicate balance of Arizona Indian gaming as represented in our gaming compacts. While there are issues that need resolution within the compact, gaming in Arizona is generally a win-win for everyone. The Hualapai Tribe already faces the challenge of being pushed from the market due to a decline in the market for leasing machines and the Tohono O'odham Nation project potentially escalates our dismissal from gaming.

Second, the land in the Glendale area, which will become trust land for the Tohono O'odham Nation is not their ancestral land. Rather, the land is the ancestral land of the Salt River Pima-Maricopa and the Gila River Indian Community. It is extremely difficult for the Hualapai to watch the ancestral lands of one tribe be declared the trust lands of another tribe that has virtually no ties to the area. It is counter-intuitive. Further, the language of the settlement act opens the door for the Tohono O'odham Nation to purchase other parcels in three central Arizona counties, perhaps not ancestral lands for the Tohono O'odham and construct another casino. It sets a dangerous precedent and takes Indian gaming down a slippery slope.

Finally, although the land will be trust land, there is concern over the public perception regarding the resort and its impact on the off-reservation casino debate. There is much criticism regarding alleged, "reservation shopping"; tribes previously deemed "terminated" seeking federal recognition, looking for suitable property, an application to place land into trust and the development of a casino on the property. If the West Valley Resort is constructed, due to the intricacies of the situation, the

entire situation lends credibility to the complaints about reservation shopping, which, in turn, has the potential to negatively impact tribes across the country.

Arizona tribes will be forced to discuss these issues in great detail while working on the next gaming compacts. We will need to amend the structure of our gaming so that it continues to be a win-win for every tribe with a gaming compact as well as the citizens of Arizona. I remain hopeful that we will do this and continue to move into the future.

Looking forward toward the next 25 years will require tribes to be cognizant of changes in technology, the industry and the demographics of the client base. Tribes will need to be flexible and aware of changes in technology. More specifically, we will need to have a detailed discussion regarding Internet or on-line gaming. Although Internet gaming is illegal in Arizona and prohibited by our current Tribal-State gaming compacts, this issue will need to be thoroughly vetted, analyzed and reviewed. There are jurisdictions pursuing this option and who will continue to pursue this option, thus changing the market demographics completely. While Internet or on-line gaming may present opportunities for tribes in rural locations such as the Hualapai to participate in the gaming industry in a different way, there are so many variables that need to be considered, including, complex issues relating to jurisdiction and regulation.

The continued attempts by the commercial gaming industry and the racing industry to merge as "racinos" using a "something for all" appeal needs further evaluation. At a minimum, the issue deserves a detailed evaluation of the proponents' claims that the gaming industry will breathe new life into the racing industry.

More and more jurisdictions look to gaming as a fail-safe way to raise revenue in a time of shrinking economies. The American Gaming Association's annual report brags on the increased revenue in the areas of the country with commercial gaming enterprises. The American Gaming Association also claims that only approximately 8 percent of gaming revenues are retained as profit for casino operators with the remainder invested in the local communities in the form of taxes, jobs and other benefits. While jurisdictions that are new to gaming enjoy the benefits of an influx of new money, there are other jurisdictions struggling with a loss of revenue as gamblers take their money to new facilities. Essentially, the same dollar is spent, just in different gaming establishments. As the Hualapai discovered, gaming is not a fail-safe industry. It is not a "build it and they will come" environment. Rather, like every other industry, there are many factors to consider. Gaming can no longer be considered as the answer to struggling budgets, regardless of the jurisdiction.

I look forward to working with Arizona tribes and Indian country for the continued development and protection of our gaming industry. Indian gaming supports the development, subsistence and growth of Indian communities and tribal people. I ask that you keep these aspects in mind when evaluating Indian gaming generally. There are details that need work, but the overall industry has been and continues to be beneficial to our communities.

On behalf of the Hualapai People, I wish to thank the Committee for allowing me to share the Hualapai Tribe's position on this issue.

PREPARED STATEMENT OF MATTHEW CATE, EXECUTIVE DIRECTOR, CALIFORNIA STATE ASSOCIATION OF COUNTIES

Dear Chairman Tester and Vice Chairman Barrasso:

On behalf of the California State Association of Counties (CSAC), I am pleased to submit this statement for the record in conjunction with the Committee's July 23, 2014 oversight hearing on Indian gaming. Founded in 1895, CSAC is the unified voice on behalf of all 58 of California's counties. The primary purpose of the association is to represent county government before the California Legislature, administrative agencies, and the federal government.

At the outset, I would like to express CSAC's gratitude for having had the recent opportunity to appear before your Committee to provide our perspective on the significance of the U.S. Supreme Court's *Carcieri v. Salazar* decision and to convey the need for Congress to approve comprehensive reforms in the fee-to-trust process. Incidentally, we believe that these critically important issues should be a part of the Committee's discussion as it relates to the future of Indian gaming.

As CSAC has consistently stated in previous congressional testimony, statements, and correspondence, our association supports the rights of Indian tribes to self-governance and recognizes the need for tribes to preserve their heritage and to pursue economic self-reliance. At the same time, CSAC believes that existing federal laws and regulations fail to adequately serve the interests of tribes and local governments alike. In particular, the Department of the Interior's fee-to-trust process, as

authorized by Section 5 of the *Indian Reorganization Act* (IRA), lacks adequate standards and has led to significant, and in many cases, unnecessary conflict and mutual distrust of the federal decisionmaking system for trust lands.

In keeping with our association's goal of continuing to serve as a constructive voice in the Indian affairs policy arena, we are pleased to provide you with our views and recommendations on Indian gaming and related issues. As always, we stand ready to work with the Committee in an effort to promote and advance policies that balance the needs and objectives of county and tribal governments.

Indian Gaming in California—Past, Present and Future

The subject matter of the Committee's hearing, entitled "Indian Gaming; the Next 25 Years," is of unique importance to California and its 58 counties. With more federally recognized tribes and Indian gaming establishments than any other state, California—along with its local governments and communities—is disproportionately impacted by tribal gaming. As the industry grows, California will continue to face significant policy challenges, making it essential for Congress to play an active oversight role in this important matter.

The Past—Even before the 1988 enactment of the *Indian Gaming Regulatory Act* (IGRA), counties in California were experiencing impacts in rural areas from Indian gaming facilities. These establishments were places where bingo was the primary commercial enterprise in support of tribal economic self-reliance. The impacts on local communities were not significant in large part because the facilities where Indian bingo was played were modest in size and did not attract large numbers of patrons.

Following the enactment of IGRA, however, the impacts to counties from Indian gaming establishments increased with the arrival of larger facilities. Even so, the impacts to local communities from these gaming operations were generally manageable, except in certain instances.

Beginning with the 1999 signing of the State's Tribal Gaming Compacts with 69 tribes and the passage of Propositions 5 and 1A (legalizing Indian gaming in California), the ensuing rapid expansion of tribal gaming has had profound impacts beyond the boundaries of reservation lands. The result has been a myriad of significant economic, social, environmental, health, safety, and other community impacts.

The Present—Today, California has a total of 109 federally recognized tribes operating 71 gaming facilities. These establishments generate more than 25 percent of the nearly $30 billion in annual nationwide Indian gaming revenues.

While some of the Tribal-State Gaming Compacts in California require tribes to enter into agreements with county governments regarding the mitigation of off-reservation impacts—as well as impose binding "baseball style" arbitration on the tribe and county if they cannot agree on the terms of an agreement—not all of the compacts adequately address the impacts of development and/or provide meaningful and enforceable mechanisms to prevent or mitigate impacts. In such cases, county governments must shoulder the burden of addressing the impacts associated with tribal development projects.

The California experience has also made clear that particularly large casino facilities have impacts beyond the immediate jurisdiction in which they operate. Attracting many thousands of patrons per day, larger facilities in California cause traffic impacts throughout a local transportation system. Similarly, traffic accidents, crime, and other problems associated with gaming are not isolated to a casino site but may increase in surrounding communities.

The Future—Both the number of Indian casinos and the revenue generated by California's Indian gaming industry has grown in recent years and is expected to continue to grow into the future. Despite what appears to be a relatively saturated market, a number of tribes are currently seeking to build off-reservation casinos or, in some cases, expand existing gaming facilities. While certain projects are supported locally, others face strong resistance, including opposition from county boards of supervisors.

Moreover, and in addition to the state's 109 federally recognized tribes, California currently has 81 tribal groups petitioning for federal acknowledgment (which represents roughly one-quarter of all petitioners nationwide). Of these 81 petitions, 68 are active. Although presumably not all of the state's tribal groups will ultimately be successful in gaining federal recognition—nor would all likely pursue gaming—the sheer number of groups seeking recognition and the possibility of new casino operations illustrates the potential for Indian gaming to become even more pervasive in California.

Of further relevance to this discussion is the Department of the Interior's newly proposed revisions to the Federal acknowledgment process (*Procedures for Establishing That an American Indian Group Exists as an Indian Tribe*, 25 CFR Part 83,

BIA–2013–0007, RIN 1076–AF18). Pursuant to the Proposed Rule, California petitioners would generally have a much easier path to Federal acknowledgment due to a series of changes in the criteria that the Department uses to evaluate petitions. According to a recent study,[1] the rule would result in as many as 34 newly recognized Indian tribes in California and could lead to the development of 22 new casinos throughout the state.

While the aforementioned study notes that existing casinos in California are largely located outside of urban areas, the tribes that could potentially gain recognition may be located in urbanized areas, including the counties of Los Angeles, Orange, San Mateo, Santa Clara, and Ventura. The proposed regulations also would impact acknowledgement petitions in coastal areas such as Monterey, San Luis Obispo, Santa Cruz, and San Benito, and in central and northern California counties such as Kern, Mariposa, Nevada, Plumas, Shasta, and Trinity.

With over 70 gaming facilities already in operation, additional gaming applications pending, and the potential for the aforementioned rule changes to result in the recognition of new Indian tribes and the development of additional casinos, it is clear that California will continue to be heavily impacted by Indian gaming well into the future.

Current Laws and Regulations

As previously stated, current laws, regulations, and administrative procedures fail to meet the legitimate needs of tribes and counties. In particular, the Bureau of Indian Affairs' fee-to-trust process—as authorized by the IRA and governed by the Department of the Interior's Part 151 regulations—is flawed and in need of a comprehensive overhaul.

In CSAC's view, the fundamental problem with the trust land acquisition process—for gaming or non-gaming-related purposes—is that Congress has not set standards under the IRA by which any delegated trust land authority would be applied by BIA. Section 5 of the Act reads as follows: "The Secretary of the Interior is hereby authorized in his discretion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations . . . for the purpose of providing land to Indians." 25 U.S.C. § 465.

The aforementioned general and undefined congressional guidance has resulted in a trust land process that fails to meaningfully include legitimate interests, provide adequate transparency to the public, or demonstrate fundamental balance in trust land decisions. The unsatisfactory process has created significant controversy, serious conflicts between tribes and states, counties and local governments—including litigation costly to all parties—and broad distrust of the fairness of the system.

One of CSAC's central concerns with the current process is the severely limited role that state and local governments play. The implications of losing jurisdiction over local lands are very significant, including the loss of tax base, loss of planning and zoning authority, and the loss of environmental and other regulatory power. Yet, state, county and local governments are afforded limited, and often late, notice of a pending trust land application, and, under the current regulations, are asked to provide comments on two narrow issues only: (1) potential jurisdictional conflicts; and, (2) loss of tax revenues.

Moreover, the notice that local governments receive typically does not include the actual fee-to-trust application and often does not indicate how the applicant tribe intends to use the land. Further, in some cases, tribes have proposed a trust acquisition without identifying a use for the land; in other cases, tribes have identified a non-intensive, mundane use, only to change the use to heavy economic development, such as gaming or energy projects, soon after the land is acquired in trust.

Local governments also are often forced to resort to Freedom of Information Act (FOIA) requests to ascertain if a petition for an Indian lands determination—a key step in the process for a parcel of land to qualify for gaming—has been filed in their jurisdiction. Because many tribal land acquisitions ultimately will be used for economic development purposes—including gaming activities—there are often significant unmitigated impacts to the surrounding community, including environmental and economic impacts. Unfortunately, current law does not provide any incentive for tribes and affected local governments to enter into agreements for the mitigation of off-reservation impacts.

While the Department of the Interior understands the increased impacts and conflicts inherent in recent trust land decisions, it has not crafted regulations that strike a reasonable balance between tribes seeking new trust lands and the states and local governments experiencing unacceptable impacts. Indeed, the current noti-

[1] Michael L. Lawson, Ph.D., *California Indian Petitioners and the Proposed Revisions of the Federal Acknowledgment Regulations* (July 2014).

fication process embodied in the Part 151 regulations is, in practice, insufficient and falls far short of providing local governments with the level of detail needed to adequately respond to proposed trust land acquisitions. Accordingly, a legislative effort is necessary to meet the fundamental interests of both tribes and local governments.

While the IRA provides the Secretary of the Interior with the authority to take land into trust for the benefit of Indian tribes, IGRA provides the framework for tribes to conduct gaming on trust land. Under IGRA, casino-style gaming is authorized on lands located within or contiguous to the boundaries of a tribe's reservation as it existed on October 17, 1988 (the date of IGRA's enactment).

Although IGRA prohibits gaming on land taken into trust after the aforementioned date, the Act authorizes several notable exceptions to the prohibition, including cases in which the Secretary determines that gaming on newly acquired lands would be in the best interest of the tribe—as well as not detrimental to the surrounding community—and the governor concurs in the Secretary's determination (IGRA's two-part test). Additionally, post-1988 gaming acquisitions are allowed if the land is part of the initial reservation of a newly acknowledged tribe, or in cases in which a tribe is restored to federal recognition.

In California, many tribes pursue trust land under IGRA's "restored land" exception. This allows a tribe to circumvent the Act's two-part determination process, which empowers a state to manage the location and growth of gaming. The opportunities under IGRA also have been a primary factor driving many tribal groups in California to seek federal recognition.

Further, tribes have more aggressively sought lands that are of substantially greater value to state and local governments, even when distant from the tribe's existing reservation, because such locations are far more marketable for various economic purposes. The result has been increasing conflict between tribes and state and local governments.

In California, approximately 45 applications from tribes to take land into trust consisting of more than 10,000 acres of land have been submitted since 2011. California's unique cultural history and geography, and the fact that there are over 100 federally-recognized tribes in the state, contributes to the fact that no two land-into-trust applications are alike.

The Need for Intergovernmental Agreements

To follow are examples of tribes and counties forging cooperative agreements by working on a government-to-government basis on issues of common concern to both parties, not just gaming-related issues. These examples underscore the need for federal law to incentivize and facilitate intergovernmental cooperation.

Examples of Successful Tribal-County Partnerships—In Yolo County, the Yocha Dehe Wintun Nation and the County have a strong working relationship and have entered into an agreement whereby the tribe provides mitigation payments to the County for the off-reservation impacts associated with the tribe's casino expansion and hotel project. The agreement also expressly states that a purpose of the agreement is to strengthen the government-to-government relationship between the County and the Tribe.

In Sonoma County, an intergovernmental mitigation agreement between the County and the Federated Indians of the Graton Rancheria, which was approved by the Board of Supervisors, includes provisions for recurring mitigation payments to the County for law enforcement and fire and emergency management services, among other things. Similarly, the Madera County Board of Supervisors unanimously approved a comprehensive MOU between the County and the North Fork Rancheria to fund police, fire, and emergency services. The agreement also establishes new tribal/community foundations to invest in local charitable causes, education, and economic development.

In southern California, San Diego County has a history of tribes working with the San Diego County Sheriff to ensure adequate law enforcement services in areas where casinos are operating. In addition, San Diego County has entered into agreements with four tribes to address the road impacts created by casino projects. Further, a comprehensive agreement was reached with the Santa Ysabel Tribe pursuant to the 2003 Compact with the State of California.

Humboldt, Placer, and Colusa Counties and tribal governments have agreed similarly on law enforcement-related issues. Humboldt County also has reached agreements with tribes on a court facility/sub-station, a library, road improvements, and on a cooperative approach to seeking federal assistance to increase water levels in nearby rivers.

The agreements in each of the above counties were achieved only through positive and constructive discussions between tribal and county leaders. It was through these discussions that each government gained a better appreciation of the needs

and concerns of the other government. Not only did these discussions result in enforceable agreements for addressing specific impacts, but enhanced respect and a renewed partnership also emerged, to the betterment of both governments, and tribal and local community members.

Examples of Conflict—Although many successful working relationships have been forged between counties and tribes, CSAC remains concerned that many tribal development projects lead to significant unmitigated impacts to the surrounding community, including environmental and economic impacts. In fact, there are recent examples of tribal governments not complying with the requirements of the IGRA or the 1999 Compacts. In Mendocino County, a tribe built and operated a Class III gaming casino for years without the requisite compact between the tribe and the governor. In Sonoma County, a tribe demolished a hilltop to build and operate a tent casino that the local Fire Marshal determined lacked the necessary ingress and egress for fire safety.

In San Diego County, there have been impacts to neighboring water wells that appear to be directly related to a tribe's construction and use of its water well to irrigate a newly constructed golf course adjoining its casino. Additionally, several other tribal casino projects have advanced without the tribe providing mitigation for the significant traffic impacts caused by those projects.

CSAC Policy Recommendations to the Committee

CSAC's primary federal Indian gaming principle is that when tribes are permitted to engage in gaming activities under federal law, judicially enforceable agreements between counties and tribal governments must be in place. Such agreements should fully mitigate local impacts from a tribal government's business activities and fully identify the governmental services to be provided by the county to that tribe.

When tribes reach local intergovernmental agreements to address jurisdiction and environmental impacts of gaming or other development, the tribe, local government, and surrounding community benefit. In such cases, tribes should have a streamlined fee-to-trust process. Accordingly, the federal legal framework should encourage tribes to reach intergovernmental agreements by reducing the threshold for demonstrating need when mitigation agreements are in place.

If a tribe and jurisdictional local government fail to reach an agreement, federal law should require the Secretary to ensure that the interests of the tribe and the local government are balanced in the fee-to-trust process. This should be done by requiring the Secretary to determine, after consulting with appropriate state and local officials, that the proposed land acquisition would not be detrimental to the surrounding community. Additionally, the Secretary should be required to determine that tribes have taken necessary steps to ensure that jurisdictional conflicts and impacts have been mitigated. Once these requirements have been satisfied, the Secretary would be authorized to approve the tribe's development.

In sum, and in light of the long-standing deficiencies in the Indian fee-to-trust system, we urge the Committee to do the following:

- Approve legislation that would restore the Secretary of the Interior's authority to take land into trust for all Indian tribes. This action would address Indian Country's long-standing call to fix the inequities caused by the *Carcieri* decision. CSAC agrees that this inequity must be fixed;

AND

- Include as part of the *Carcieri* fix long-overdue, comprehensive reforms in the fee-to-trust process in order to address the inequities and flaws in the current trust land system, including provisions that incentivize local mitigation agreements. This would ensure that the legitimate needs and interests of both local governments and tribes are fairly balanced. Likewise, any potential amendments to IGRA also should provide an incentive for tribes and counties to engage in government-to-government discussions.

CSAC believes that it is essential for Congress to embrace the aforementioned principles as part of the same legislative package. To do one without the other would perpetuate an unfair and unbalanced system. CSAC's comprehensive fee-to-trust reform proposal seeks to create a trust land process that promotes and protects the interests of tribes and local governments.

Thank you for considering our views regarding this very important matter.

PREPARED STATEMENT OF HON. RUBEN BALDERAS, PRESIDENT, FORT MCDOWELL YAVAPAI NATION

Summary

The Fort McDowell Yavapai Nation is a small tribe located on the periphery of the Phoenix metropolitan area. Although our reservation comprises just 25,000 acres, our ancestral homelands extend from the Colorado River east to the Mazatzal Mountains, and from the Mogollon Rim south to the Gila River. This vast area includes the Glendale property upon which the Tohono O'odham Nation intends to build and operate a casino, more than 150 miles from their tribal headquarters in Sells, Arizona.

Over the past 25 years, we along with other Arizona tribes have had to repeatedly defend our right to conduct gaming on Indian lands. Whether in federal court, at the state legislature or through citizen initiative, Arizona tribes have worked together in order to secure a brighter future for our tribal members. 2002 was a watershed year for Arizona tribes. With most compacts due to expire in 2003, we negotiated a new standard form compact with Gov. Jane Hull and when the legislature failed to enact it, we took it to the ballot and won a narrow victory while defeating two competing initiative measures.

The new standard form compacts were signed in January 2003. They established statewide tribal exclusivity for casino gaming, a revenue sharing formula to fund services provided by state and local governments, and a gaming device rights transfer mechanism that provides gaming revenue to remotely located tribes. For the four Phoenix area tribes (Fort McDowell Yavapai Nation, Gila River Indian Community, Salt River Pima-Maricopa Indian Community and the Ak-Chin Indian Community) a critically important goal of the standard form compact was to maintain a competitive balance in this market so that all tribes could prosper. To that end, the four tribes agreed on the number of devices and games, as well as the number and size of casinos. Preventing the potential proliferation of tribal casinos in the Phoenix area was a key feature of the compacts, from both the tribes' and the governor's perspectives. To achieve this objective, tribes pledged to limit the number of tribal casinos in the Phoenix area to seven, the same number that existed when the compacts were signed.

This limitation on the number of metro area casinos became a key selling point to the state's voters. 17 Arizona tribes participated in the initiative campaign. The Tohono O'odham Nation was one of the participating tribes, and their leadership at that time repeated the 'no additional casinos in Phoenix' pledge at numerous public forums. So it came as stunning news when in early 2009 Tohono O'odham's current leadership announced their plans to site a casino in the Glendale area utilizing their rights under the Gila Bend Act. In so doing, Tohono O'odham betrayed its commitments to the other Arizona tribes, the state government and Arizona

voters. For Tohono O'odham leaders now to contend that there never was such an agreement is an outrageous attempt to rewrite history.

It is not an exaggeration to say that the interests of all other Arizona tribes will be put at risk if the Glendale casino is permitted. Here are some of the many negative consequences that would result if Tohono O'odham prevails in its effort to site a casino in Glendale:

Violates tribal promises made to Arizona voters in 2002

To gain approval of the current gaming compacts, Arizona tribes spent 3 ½ years negotiating the terms of the agreement. Much of that time was spent in tribe-to-tribe negotiations, seeking to ensure that every tribe would see tangible benefits under the new compacts and that tribal gaming enterprises could prosper in a stable business environment. When tribes reached agreement on a framework document with Gov. Jane Hull, we attempted to have the framework document enacted into law by the legislature, but that effort failed. At that point we had no choice but to mount an enormously expensive and challenging initiative campaign. Together with Gov. Hull, tribes promised the voters that approving our compact would guarantee that casino gaming in Arizona would remain limited in scope, well regulated and located only on Indian reservations, away from cities, neighborhoods and schools.

Integral to that commitment was the promise that no more tribal casinos would be built in the greater Phoenix metropolitan area beyond the seven existing at that time. Had voters known that one or more tribes intended to site additional casinos in the Phoenix metro area, our narrow victory at the polls would instead likely have been a decisive defeat. The proposed West Valley Resort and Casino violates that promise, and its approval would create significant and perhaps insurmountable credibility issues for tribes in all future endeavors requiring political approvals.

Threatens the structure of tribal gaming agreed to in 2002 compacts

The 2003 compacts were crafted to ensure that there would be strict limitations on the number of casinos, size of casinos, kinds and numbers of games, etc., while providing each tribe with the ability to improve its financial circumstances. These limitations were the product of long and frequently contentious negotiations. In the end, participating tribes achieved a balance that all could agree to, and created a positive and predictable business environment for every tribe's gaming enterprise. In addition to creating a competitive balance among gaming tribes, the compact also created a revenue stream for non-gaming tribes through the machine rights transfer mechanism, by which gaming tribes in big markets can put more gaming devices into play by purchasing the rights to operate those devices from tribes located in small or non-existent gaming markets. It also provided for tribal revenue-sharing with state and local

governments in exchange for tribal exclusivity for casino gaming. In the 11 years since the compacts were signed, cumulative tribal contributions to state and local governments now exceed $1 billion.

Permitting gaming at the Glendale site would put all of these achievements at risk by destroying the competitive balance that tribes have relied on in making future plans and investments, while severely eroding public trust in tribes' honesty and significantly increasing the likelihood that the legislature will consider allowing commercial casino gaming in the state.

Allows Tohono O'odham to open up to 4 casinos in the Phoenix metro market

If the Glendale casino is approved, Tohono O'odham could use the same legal maneuvering to open as many as three more casinos in the Valley. The only restrictions are that it can't operate more than four casinos overall, and the casinos must be built on 'county islands' that would be converted into Indian reservations. There are scores of county islands in the Valley, dozens of which are large enough for casinos. Here are just some of the cities with large county islands: Tempe, Gilbert, Phoenix, Paradise Valley, Mesa, Chandler, Scottsdale, Glendale, Peoria, Queen Creek, Apache Junction, Surprise, Buckeye, Goodyear and Avondale.

Tohono O'odham has refused to disclose its long term plans for the metro Phoenix market, and specifically whether they intend to site additional casinos there. If it prevails in Glendale, there will be nothing to stop it from siting additional casinos in the Phoenix metro area, a process in which nearby cities and tribes have no input, despite the impacts they would sustain.

Threatens tribal exclusivity for casino gaming

A Tohono O'odham casino in Glendale is viewed by many legislators and other state leaders as both a violation of the current compacts and the de facto expansion of gaming off of existing Indian reservations, in addition to the breaching of a promise tribes made to Arizona voters in 2002 to build no additional casinos in the Phoenix area. Numerous non-tribal gaming interests have sought the right to open off-reservation casinos in the state and tribes individually and collectively expend considerable resources every year beating back those attempts. Permitting Tohono O'odham to open a casino on its Glendale property would greatly compromise tribal efforts to defeat future threats to our exclusivity. Every tribe in Arizona would be hurt should tribal exclusivity for gaming terminate.

A number of legislators who have opposed commercial gaming have stated that should Tohono O'odham succeed in Glendale, it would make a mockery of the limits contained in the compacts, and cause them to rethink their position on commercial gaming.

Creates detrimental financial impacts to numerous other tribes

By upsetting the balance that was painstakingly achieved in the current compacts, numerous tribes would be negatively affected. All four Phoenix area tribes would experience significant reductions in gaming revenue, as would tribes outside the Phoenix area that none the less draw considerable patronage from Phoenix area residents.

Furthermore, by putting at risk tribal exclusivity for gaming, a casino in Glendale would threaten the existing revenue streams that tribes in remote regions of the state currently receive through the transfer of their machine rights to tribes located in larger markets. In the event that other interests gain the right to engage in casino gaming, tribal exclusivity would be breached and all limitations on the number and size of tribal casinos are eliminated. Tribes still could only operate casinos on Indian lands, but with the limits removed there is no longer any need to purchase gaming device rights from non-gaming tribes. The impact would be devastating to those remotely located tribes, which rely on device transfer payments to help fund critically needed services to tribal members.

Rewards dishonest dealing by Tohono O'odham

Over the course of 5 years of litigation, numerous documents have come to light that very clearly indicate that Tohono O'odham's plans for a West Phoenix area casino were hatched years before the current compacts were approved. Minutes from internal Tohono O'odham meetings reflect that these plans were deliberately withheld from other tribes, state negotiators and Arizona voters. In the process, Tohono O'odham repeatedly misrepresented its intentions, thereby violating its signed agreement with the other tribes to negotiate in good faith and fully disclose its plans and interests. And they participated in a political campaign with other tribes knowing all the while that they intended to violate the promises tribes were making to voters as part of that campaign.

Tohono O'odham cites its judicial victories as proof that it did nothing wrong during those negotiations, but always neglect to mention that the three claims dealing with their behavior during the negotiations were dismissed because Tohono O'odham invoked sovereign immunity, and not based on the merits of the claims. Indeed, the court observed that the State's promissory estoppel claim was supported by the evidence.

Conclusion

It is now clear that only Congress can put an end to Tohono O'odham's reckless attempt to site a casino in Glendale. H.R. 1410 and S. 2670 would restore the status of tribal gaming in Arizona to what the tribes, the state and the voters all thought it was. We urge your strong consideration for these bills.

PREPARED STATEMENT OF GREGORY MENDOZA, GOVERNOR, GILA RIVER INDIAN COMMUNITY

Chairman Tester, Vice Chairman Barrasso and members of the Committee, I want to thank you for considering the written testimony of the Gila River Indian Community regarding H.R. 1410, the Keep the Promise Act of 2013. By prohibiting gaming on tribal lands acquired in trust status after April 9, 2013 within the Phoenix metropolitan area until January 1, 2027 this bill maintains the commitments and promises that were relied upon during negotiations of the current gaming compacts for the duration of those compacts, which begin to expire in late 2026. Enactment of this overwhelmingly bipartisan legislation is critical to protecting the existing gaming compacts and system of tribal gaming in Arizona. It must be clearly understood that the bill does not prohibit Indian gaming on the lands beyond the sunset date of January 1, 2027 and does not prevent lands from being taken into trust status for Indian tribes.

The Arizona Republic, the largest newspaper in Arizona, summed up the current situation well when it indicated that support for an additional tribal casino in the Phoenix metropolitan area came down to one question: "Just how cool are you with being lied to?"[1] That is the question that many Arizonans are contemplating as the Tohono O'odham Nation (TON) tries to build a casino far outside its aboriginal territory and within the Phoenix metropolitan area. The question is important because the voters of Arizona authorized a system of gaming in 2002 when the tribes essentially obtained a legal monopoly on gaming in the State, a monopoly that has benefited all Indian tribes in the State, gaming and non-gaming. But in return, the voters wanted to set a hard cap of seven casinos that would be in the Phoenix metropolitan and no more, which was the number of casinos in existence at that time. Additionally, the voters wanted certainty about the potential proliferation of gaming, and thought that they had achieved that certainty by limiting gaming to Indian tribes on Indian reservations as they existed at the time of their vote in 2002 and not allow casinos to expand into non-tribal neighborhoods, such as Glendale.

The voters and State leadership thought that they got what they wanted when they supported Proposition 202 over two other gaming propositions on the ballot in 2002. But seven years later, in 2009, TON announced that it had purchased lands pursuant to a 1986 law in Glendale (a Phoenix suburb) and planned to build a casino on land located across the street from Kellis High School, a public high school that opened in 2004—two years after the voters approved Proposition 202 and thought tribal gaming would be restricted to the tribal reservation areas that they would have been aware of at the time.

As explained more fully below, Congress is the only entity that is properly suited to resolve this matter, in part because Congress created the situation and because the courts have been thwarted from being able to adjudicate the merits of the essential claims at issue.

To be clear, no one is trying to prevent TON from acquiring replacement lands pursuant to the 1986 Gila Bend Indian Reservation Lands Replacement Act ("Gila Bend Act"), Pub. L. 99–503.[2] However, TON should not be able to utilize the 1986 law to violate the commitments and promises relied upon during the negotiations of the existing gaming compacts in Arizona.

Contrary to the testimony of TON, H.R. 1410 does not create liability for the United States and does not affect pending litigation. Indeed, H.R. 1410 was narrowly crafted to preserve promises made during the negotiation of the existing tribal-state compact and to clarify them in a manner that is consistent with federal law but does not pierce TON's sovereign immunity. Furthermore, H.R. 1410 would not create liability for the United States or constitute an unlawful taking that would trigger constitutional protection because it is well within Congress' plenary power over Indian affairs to defend and protect the promises that tribes publicly make to obtain gaming. There is no Fifth Amendment right for tribes to violate their own promises on which other tribes and the State have relied. The Fifth Amendment does not curtail Congress's authority to protect the compacting process from broken promises and misrepresentations. To suggest otherwise is disingenuous.

Instead, H.R. 1410 is about preserving the spirit of the existing gaming compacts, and holding tribes, including TON, to their word that was relied upon when negotiating the existing framework of tribal gaming in Arizona. Several rural and poor tribes and other Phoenix metropolitan area tribes support H.R. 1410, as do the Governor, State legislature, and numerous cities and towns in the Phoenix area.

H.R. 1410 Does Not Create Liability for the United States

Opponents to H.R. 1410 contend that the bill would subject the United States to a Fifth Amendment Takings Claim. This objection is premised on notion that when Arizona tribes obtained IGRA compacts by promising not to attempt to use those compacts to locate any additional casinos in the Phoenix area, the Fifth Amendment somehow protects their right to violate that very promise. This could not be further from the truth. It should go without saying that Congress does not abrogate gaming compacts or affect a Fifth Amendment taking when it defends and protects the promises tribes made publicly to obtain the compacts. Neither gaming compacts nor the Gila Bend Act include an inherent right to profit from States' and tribes' detrimental reliance on a tribe's promises during the compacting process. Simply put,

[1] Doug MacEachern, Tohono O'odhams were gaming state over casino all along, Arizona Republic, Apr. 2, 2013.

[2] The Community would prefer that TON's replacement lands be within the aboriginal territory of TON. In the context of remains and cultural resources TON has respected the aboriginal boundaries of its sister tribes as we have respected is aboriginal boundaries. But in the context of gaming that respect is clearly lacking.

there is no Fifth Amendment right for tribes to commit fraud and then benefit from the fraud. The Fifth Amendment does not limit Congress' authority to preserve the integrity of IGRA's compact process from illegality.

Nonetheless, TON argues that H.R. 1410 will give rise to a successful takings claim against the United States, a claim that the Assistant Secretary was not willing to embrace during his responses to the Committee's questions during the hearing. Such a claim would argue that H.R. 1410 constituted "regulatory taking" by depriving TON of an economic use of its land and interfering with an investment-backed expectation. As a threshold matter, the Fifth Amendment's Taking Clause generally applies to federal actions that affect Indian property rights formally recognized by Congress. *See generally 1–5 Cohen's Handbook of Federal Indian Law* § 5.04[2][c]. However, the Supreme Court's opinion in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), established a multifactor analysis for courts to consider when weighing a regulatory taking claim. The *Penn Central* test has spawned different categories of regulatory takings but it is highly unlikely that TON could successfully argue that H.R. 1410 fits into any one of these.

Penn Central requires an *ad hoc* factual inquiry based on three factors: (1) "'the character of the governmental action'"; (2) "[t]he economic impact of the regulation on the claimant"; and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 538–539 (alteration in original (quoting *Penn Central*, 438 U.S. at 124). Mindful of Justice Holmes's oft-cited admonition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[,]" *Mahon*, 260 U.S. at 413, courts historically have applied *Penn Central's* inquiry stringently.

First, the character of the governmental action that would give rise to TON's taking claim would likely weigh against an unconstitutional taking. H.R. 1410 was narrowly crafted so TON may still use the Glendale Parcel for commercial gain or otherwise, even if it cannot immediately operate Class II or III gaming activities on the property. The proximity of the Glendale Parcel to the Arizona Cardinals stadium will allow TON to pursue a wide variety of lucrative economic development activities that will bring significant revenue. Viewed from that perspective, the legislation is more akin to a zoning regulation restricting a particular land use, which tends to withstand a Takings Clause challenge. *See generally Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

Moreover, here Congress is effectively regulating gambling in the public interest. The Supreme Court has long recognized the regulation of gambling to be a traditional exercise of police power. *See Lawton v. Steele,* 152 U.S. 133, 136 (1894). And under a much older Takings Clause regime, it has held that "'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the state or its agents, or give him any right of action." *Mugler v. Kansas,* 123 U.S. 623 (1887) (discussing prohibition of alcohol). It is of great consequence for purposes of this analysis that Congress has already placed substantial limits on Indian gaming unless done in accordance with the IGRA. If allowing gaming pursuant only to IGRA's strictures is Congress's baseline approach, then H.R. 1410 is consistent with that public policy insofar as it closes a loophole in IGRA that is only available to TON through its bad faith negotiations with other parties.

Second, the economic impact of the regulation would clearly be significant but Supreme Court decisions have "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 645 (1993). Indeed, the Supreme Court has noted that a diminution in property value as high as 75 percent or even 92.5 percent may not be a sufficiently serious impact. Id. at 645. Because the Glendale Parcel can be put to a range of other profitable uses, a court may well give less weight to the impact of precluding Class II and III gaming activities. It is also relevant to this analysis that H.R. 1410 is temporally limited so any economic impact on TON's ability to use the Glendale Parcel for gaming would terminate on January 1, 2027 when all Arizona tribal-state compacts will need to be re-negotiated. Further, H.R. 1410 would not prevent TON from developing a fourth casino anywhere outside of the Phoenix metropolitan area. These points illustrate how the Keep the Promise Act was drafted to avoid a permanent impairment of any economic development opportunities, including gaming, so any action challenging the Keep the Promises Act would likely fail to demonstrate a credible Takings Claim.

Third, it is unlikely that TON will be able to establish that its investment-backed expectations rise above a "unilateral expectation or an abstract need," which would be critical to establishing a Takings Claim. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984) (citation and quotation marks omitted). Several courts have recognized that gambling is a highly regulated industry and that it is difficult to hold reasonable investment-backed expectations in light of that regulation. *See, e.g., Holliday Amusement Co. of Charleston, Inc. v. South Carolina,* 493 F.3d 404, 411 (4th Cir. 2007) (holding no taking of slot machine property where South Carolina banned video poker after 25 years of allowing it because "Plaintiff's participation in a traditionally regulated industry greatly diminishes the weight of his alleged investment-backed expectations"); *Hawkeye Commodity Promotions, Inc. v. Vilsack,* 486 F.3d 430, 442 (8th Cir. 2007) (holding multi-million "devastating economic impact" of ban on TouchPlay machines to be "discounted" by "heavily regulated nature of gambling in Iowa). TON was well aware of the inherent riskiness of gaming ventures when they purchased the Glendale Parcel. This is likely why the parcel was purchased and kept secret until a more favorable political environment improved the likelihood of success for their scheme. The attenuated timeline of this project epitomizes the highly speculative nature of gaming projects.

Again, it would be difficult for TON to argue that IGRA and the 2002 Compact guarantee a right to game on the Glendale Parcel. The Gila Bend Act and its corresponding settlement agreement did not give TON a right to violate its own subsequent promises in the compacting process. The Gila Bend Act is silent with respect to gaming and it was also enacted two years before IGRA. Further, no one can make the credible argument that by regulating Las Vegas style gaming and making it subject to the Tribal-State compacting process, that IGRA constituted a breach of contract or a taking of federally recognized tribes' inherent right to game on tribal lands. Congress could preclude Indian gaming altogether and has already enacted IGRA to establish that tribal gaming is permissible only "if the gaming activity is not specifically prohibited by Federal law," 25 U.S.C. § 2701(5), and it contains several restrictions as to the location of gaming facilitates. All of that at least arguably puts tribes on notice that Congress may at any time enact additional restrictions on tribal gaming. Moreover, the 2002 Compact—which was negotiated between the Tribes and the State of Arizona—could not estop Congress from altering IGRA. *Cf. Sioux Nation,* 448 U.S. at 410–411 (affirming Congress's power to abrogate treaties with tribes). Simply put, "[t]he pendulum of politics swings periodically between restriction and permission in such matters [as gambling], and prudent investors understand the risk." *Holliday Amusement,* 493 F.3d at 411. Nothing in the Gila Bend Act bestowed any absolute right to locate a casino on Indian lands in Phoenix—much less did it enshrine a right to violate promises TON and other tribes later made in pursuit of IGRA compacts with Arizona in 1993 and 2002. IGRA, not the Gila Bend Act, defines the boundaries of Indian gaming authority, and just as Congress enacted limitations on such gaming in IGRA, it can legislatively protect the IGRA compacting process from the corrosive and profoundly destabilizing effect of unkept promises made to obtain a compact.

In sum, there are considerable arguments against the viability of a Takings Clause challenge to H.R. 1410 that stem from the narrow scope of the legislation, arguments that the Assistant Secretary seemed to tacitly acknowledge when he responded to the Committee's inquiries on the issue. The limited nature of the government's restriction, the continued economic viability of the Glendale Parcel, and the highly regulated nature of gaming present significant barriers to a regulatory taking claim.

H.R. 1410 Would Not Impact Pending Litigation

TON likes to tell Members of Congress to let the ongoing litigation run its course before taking any action on this matter. However, TON fails to tell those very same Members that the courts are unable to adjudicate the essential claims in this matter because TON refuses to waive its sovereign immunity. Thus, H.R. 1410 would not interfere with ongoing litigation and Congress is the only entity that can resolve this issue.

Two lawsuits were brought after TON announced its intention to acquire lands into trust for an off-reservation casino in 2009. One lawsuit challenges the TON's ability to have the lands taken into trust status as an Indian reservation, and that lawsuit is near completion. The other lawsuit alleges that TON wrongfully induced the relevant parties to enter into the compact and is violating the compact. While the courts have been able to review certain claims with respect to the express terms contained within the gaming compact, the courts have been thwarted by TON from addressing the claims of fraud, misrepresentation, or promissory estoppel because TON asserted tribal sovereign immunity with respect to those claims. Tribal sov-

ereign immunity is a legal doctrine providing that Indian tribes are immune from judicial proceedings without their consent or Congressional waiver. Congress waived tribes' sovereign immunity in IGRA with respect to claims for violations of a compact once the compact is signed, but IGRA does not waive a tribe's sovereign immunity for actions that occurred prior to the signing of the compact. Since TON refused to waive its sovereign immunity with respect to the claims of fraud, misrepresentation and promissory estoppel, which occurred prior to the signing of the compact, the court was unable to consider those claims. No one would expect a gaming compact to anticipate the need to waive sovereign immunity because a party would intend to commit fraud and misrepresentation, or wrongfully induce conduct. This is especially true here because Arizona tribes, including TON, signed an "Agreement In Principle" where tribes agreed to negotiate in good faith with one another. Sadly, the 2027 Arizona compacts may need to include very broad waivers of sovereign immunity as a result of the actions of TON here.

It is these claims that the courts have dismissed that H.R. 1410 seeks to remedy. And, in its May 7, 2013 order the Federal District Court for the District of Arizona found that although evidence appears to support the promissory estoppel claim against TON, the court had to dismiss the claim also because of TON's sovereign immunity.[3] Promissory estoppel is where one party makes a promise and a second party acts in reasonable and detrimental reliance on that promise. In that instance, a court would normally be able to enforce the promise that was relied on regardless of whether it was expressly stated in a contract. That's exactly what happened in this matter. TON made representations that there would be no additional casinos in the Phoenix area and the State and other tribes and voters relied on TON's representations in deciding to give up rights to additional casinos and gaming machines, approve Proposition 202, and sign the compacts approved by the voters. It is critical that TON's false promises preceded execution of its compact with the State of Arizona and fell outside of IGRA's waiver of sovereign immunity. Neither IGRA nor any other law governing fair business practices anticipates fraudulent conduct among contracting parties. TON has exploited the fundamental assumption of propriety in business practices and shielded judicial review of its conduct by refusing to waive sovereign immunity.

TON argues that it is unreasonable to expect it to waive its sovereign immunity for what its chairman referred to as frivolous claims. To the contrary, it is precisely because those claims would expose the wrongful conduct that TON must use sovereign immunity as a shield. And, while it is common for tribes to grant limited waivers of sovereign immunity, particularly for commercial reasons such as casinos, it is hard to imagine waivers that would have expressly envisioned duplicitous conduct grounded in fraud as part of a gaming compact; perhaps the State will require such waivers of all Arizona Indian Tribes in the 2027 compacts in order to safeguard against future conduct of this sort by TON. In the end, waiving sovereign immunity is a political decision, and one that we respect. However, it is disingenuous for TON to refuse to waive its sovereign immunity in court in order to prevent resolution of certain claims and then argue that Congress should not resolve these same claims because they are being addressed in litigation.

H.R. 1410 comes at a critical time for tribal sovereignty and Indian gaming. In May, the Supreme Court issued its opinion in *Michigan v. Bay Mills,* 134 S.Ct. 2024 (2014). The Court, in a 5 to 4 decision, ruled that the Bay Mills Tribe could assert tribal sovereign immunity and avoid claims filed by the State of Michigan that sought to close what it claimed was an illegal off-reservation in Vanderbilt, Michigan. The Court stated at five different points in its opinion that Congress and not courts are the proper venue to resolve issues where sovereign immunity has frustrated efforts to bring justice to parties that cannot maintain suit against tribes. Perhaps most disturbingly, Justice Scalia, who voted in favor of several Supreme Court decisions which cemented the doctrine of tribal sovereign immunity, explicitly stated in his dissenting opinion in *Bay Mills* that those votes in support of sovereign immunity were wrong and that he "would overrule" tribal sovereign immunity. Although *Bay Mills* was certainly a victory for Indian Country, it also put a spotlight on the fragile state of tribal sovereign immunity and the fact that the Supreme Court is one vote from limiting its application or eliminating it altogether. Simply put, controversial gaming projects such as those proposed by Bay Mills and TON manipulated the federal approval process to avoid legitimate state and tribal concerns and have used sovereign immunity as a shield to protect illegal or fraudulent activity. From this perspective, H.R. 1410 is good policy for Indian Country because it will address a narrow set of facts where one tribe is recklessly exploiting sov-

[3] *State of Ariz. v. Tohono O'odham Nation,,* slip op. at 26–27 (D. Ariz. May 7, 2013).

ereign immunity that if not addressed by Congress could later be cited as the reason the Supreme Court changes its mind and decides to abrogate sovereign immunity.

There remain certain issues that are pending in litigation, but those issues are not related to the claims of fraud, misrepresentation and promissory estoppel. H.R. 1410 is intended to not impact any pending court case, but rather to address the issues that the court has determined that it is unable to resolve. More, the Department of the Interior has also indicated that it cannot resolve the claims of fraud, misrepresentation and promissory estoppel. Thus, Congress and H.R. 1410 is the only entity capable of resolving this issue and addresses issues that courts are unable to review.

Thank you for holding the July 23, 2014 hearing and allowing Congressman Raul Grijalva, Congressman Paul Gosar, Mayor Jerry Weiers, Chairman Ned Norriss and President Diane Enos to testify on H.R. 1410. Now that this bill has been heard by the Senate Committee on Indian Affairs we respectfully request prompt consideration.

PREPARED STATEMENT OF REX TILOUSI, CHAIRMAN, HAVASUPAI TRIBAL COUNCIL

The Havasupai Tribe, located in the Grand Canyon, submits these comments to the Senate Committee on Indian Affairs for consideration during the oversight process for Indian Gaming.

The Havasupai Tribe does not have a casino and does not conduct gaming, however, we receive more than twice our annual budget through agreements to transfer our gaming device rights to other Tribes in the State of Arizona. During your process of oversight and consideration of changes to the Indian Gaming Regulatory Act we request that you keep in mind our Compact in Arizona that permits the transfer of gaming device operating rights.

The Havasupai Tribe received its land return in 1975 as part of the Grand Canyon Enlargement Act, (Sec. 10 of P.L. 92-620 codified at 16 USC 228i). This law restricts the use of our land to small tourist enterprises in order to protect the "scenic and natural values" of the Grand Canyon." Federal law prohibits us from having any commercial development on the reservation.

The money we receive from the transfer of our gaming device operating rights has literally saved the lives of the Havasupai. It more than doubled are tribal budget when it was first received in 2003. Today it provides more than twice the tribal budget because of cuts in federal funds and increases in the amount we receive from transfers. The Tribe provides most of the jobs in Supai and provides a small per capita payment from the transfer funds to help offset the extraordinary expense of living in the village of Supai. We have an investment plan and a savings plan to help carry us beyond the termination of the current Compact with the State of Arizona.

All of the Tribes in Arizona with a Compact and without casinos receive a share of the gaming revenues through transfer agreements negotiated by the Tribes, sovereign-to-sovereign. Arizona limits the number of gaming devices operated by each Tribe based on tribal population. The Tribes in, or near, large markets expanded operations in 2002 through the transfer of gaming devices rights from those Tribes without gaming enterprises. This met the overall political objectives of not expanding gaming in Arizona and of sharing the gaming revenue among all tribes that chose to enter a Compact.

All that the Havasupai, and other non-gaming Tribes in Arizona, have is a Compact provision permitting transfer agreements. We urge you to not take any action that will detrimentally affect the transfer mechanism in the Arizona Compact or our Tribe-to-Tribe transfer agreements.

Thank you for this opportunity to present our comments.

PREPARED STATEMENT OF HON. BEN SHELLY, PRESIDENT, NAVAJO NATION

Introduction

The Navajo Nation is the largest land-based sovereign tribal government in the United States. The Navajo Nation encompasses 27,000 square miles; it spans across the states of Arizona, New Mexico, and Utah and is approximately the size of the state of West Virginia. The number of enrolled citizens of the Navajo Nation exceeds 330,000.

Slightly over 52 percent of Navajo Nation residents are unemployed. Income of our residents is near the low-middle of the spectrum. Just over 70 percent of Navajo Nation residents report making less than $15,000 annually, while less than 3 percent report earnings over $50,000. In contrast, 51 percent of the U.S. population has an individual income over $50,000 per year.[1]

Houses within the Navajo Nation are in poor condition, generally smaller, have less access to basic utilities and experience larger rates of overcrowding. With regard to housing conditions, more than half of individuals residing in the Navajo Nation live in dilapidated structures in need of serious repairs.

There is significant demand to create opportunity for the Navajo people. Our administration's goal has been to develop infrastructure and business enterprises to promote a vibrant and robust Navajo-based economy, supporting jobs and economic security in Navajo and its surrounding communities. That is why, after many years of discussion and multiple Navajo Nation referendum votes, we moved to develop gaming as one of our economic development initiatives.

[1] 2009 United States Census American Community Survey

Navajo Nation Gaming

Gaming is a relatively new economic venture for the Navajo Nation. In January 2003, the Navajo Nation entered into its first tribal-state gaming compact to conduct Class III gaming on the Navajo Nation lands. That compact was with the state of Arizona. Then in November of 2003 the Navajo Nation compacted with the state of New Mexico. Our first casino opened its doors to the public in November 2008.

The Navajo Nation, through its Navajo Nation Gaming Enterprise, has developed four gaming projects—three in New Mexico and one in Arizona. In New Mexico, Fire Rock Navajo Casino is located near Gallup, Northern Edge Navajo is near Farmington and Flowing Water Navajo Casino is near Shiprock. In Arizona, Twin Arrows Navajo Casino Resort is about 20 miles east of Flagstaff. Navajo Nation financed each of these projects.

These Navajo casinos are critical to the future of the Navajo people in a time in which federal funds are declining, and poverty is high. The Navajo Nation is rich in natural resources (coal, oil, and natural gas) but federal regulations threaten these natural resource jobs and overall jobs are scarce. The Indian Gaming Regulatory Act (IGRA) was intended by Congress to provide a framework for tribes and states to work together to support economic development within tribal communities.

The Navajo Nation's current gaming projects provide almost 2,000 jobs with benefits. Navajos hold over 80 percent of the jobs. Gaming also creates a tribal gaming industry tax base, allowing tribal governments to tax various business activities. These tax revenues then fund social programs and support "nation-building" activities. The Navajo Nation's success to date is a prime example of IGRA working as envisioned by Arizona Senator John McCain and others who were involved in the law's development.

Given the large Navajo Nation population, the Navajo Nation does not distribute its gaming revenues to its citizens as capita payments. Instead the Navajo Nation has developed governmental gaming and taxation distribution plans whereby gaming and tax revenues are used to fund student scholarships, local Navajo government functions, and other economic development incentives. These incentives include developing infrastructure (water, electricity, waste water, roads, and telecommunication). Although the Navajo Nation does not have adequate infrastructure to provide for its residents, the lack of adequate infrastructure is one barrier to developing a robust business economy. Most communities in the United States have sufficient infrastructure to develop and attract businesses, investors, and industries, but this is still severely lacking within the Navajo Nation.

Indian Gaming – the Next 25 Years

- Restore balance in the compacting process

There is a great need to restore balance in the state-tribal compacting process. IGRA originally provided a remedy for tribes if a federal court determines that a state is negotiating a gaming compact in bad faith. This key provision created a balance between states and tribes to ensure good faith negotiations. However, the United States Supreme Court's holding in *Seminole Tribe of Florida v. Florida*[2] destroyed any balance originally envisioned when it ruled that Congress lacked the authority to waive a state's sovereign immunity from suit in federal court to enforce IGRA's good faith compact negotiation obligation imposed on the states.

The U.S. Department of the Interior tried to fill the gap, promulgating regulations to resolve issues of bad faith bargaining, but the validity of those regulations is unclear after the Fifth Circuit Court of Appeals issued the *Texas v. U.S.*[3] ("*Kickapoo*") opinion in which the chief judge concluded that the secretary lacks power to provide a remedy absent congressional delegation of such power. The high court declined to review the *Kickapoo* decision. Without a method to enforce this obligation, many tribes find themselves in a difficult position.

The Navajo Nation is undergoing negotiations with the State of New Mexico to renew our New Mexico gaming compact. The Navajo Nation's existing compact expires in June 2015, so it is urgent that we complete a renewal with the state. Navajo has twice reached an agreement with New Mexico Governor Susana Martinez, but the New Mexico legislature has not voted to approve the compact agreement, which New Mexico law requires. If this pattern continues next year, the Navajo Nation will be in a legally uncertain and tenuous position.

For the Navajo Nation, what are we to do next year if, once again, the Governor takes one position on our compact and the legislature takes another? New Mexico's gaming statute also has no recourse if the state's executive and legislative branches refuse to work together to negotiate in good faith. If the state refuses to waive its 11th amendment sovereign immunity and litigates the validity of the secretary's remedial regulations, the Navajo Nation will be left with an expired compact and no resolution. This was not the intent of Congress when it enacted IGRA. IGRA needs a resolution process in the light of the both the *Seminole* and *Kickapoo* decisions.

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[2] 517 U.S. 44 (1996)
[3] 362 F. Supp. 2d 765 (2004)

Left unresolved, the issues discussed here will cause significant damage to the Navajo Nation's growing gaming economy. That would be a tragedy for our people who are in need of many more employment opportunities.

- Restoring Homelands

There is great need for a *Carcieri* fix because it strips some tribes of their ability to restore their homelands and depletes scarce resources. The court case has lead to two classes of tribes. It has also spawned dozens of related federal court challenges, which drain the resources of tribes and the U.S. Department of the Interior.

JOINT PREPARED STATEMENT OF STEVEN ANDREW LIGHT, PH.D. AND KATHRYN R.L. RAND, J.D., CO-DIRECTORS, INSTITUTE FOR THE STUDY OF TRIBAL GAMING LAW AND POLICY

We thank Chairman Tester, Vice Chairman Barrasso, and the members of the U.S. Senate Committee on Indian Affairs, including Senators John Hoeven and Heidi Heitkamp of North Dakota, our university's home state, for this opportunity to comment on the future of Indian gaming following the Committee's July 23, 2014 oversight hearing on Indian gaming's next 25 years.

We co-direct the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota, providing legal and policy analysis and advancing research and understanding of Indian gaming. Our comments and recommendations here are informed by 18 years of collaborative research and interaction with those involved with Indian gaming.

We welcome this opportunity to contribute our views on the current state of Indian gaming after its first 25 years of regulation pursuant to the Indian Gaming Regulatory Act of 1988 (IGRA),[1] and the chance to identify key issues that will shape its next 25 years.

At the July 23 hearing, Chairman Tester articulated many of the most important dimensions of how we understand Indian gaming now:

> Tribal gaming has come a long way in the 25 years since IGRA was enacted. While not a cure-all for many serious challenges facing Indian Country, gaming has provided numerous benefits to the communities who operate successful facilities. These are sophisticated operations, often employing significant numbers of tribal members and non-Indians in their communities. Tribal sovereignty and self-governance are important issues for me and for this Committee. While gaming is not the answer for every tribe, all tribal nations have the right to determine the best possible future for their people.

At the same hearing, Senator John McCain, one of IGRA's original architects, observed:

> I'm proud to say that Indian gaming stands today as a proven economic driver that empowers over 240 gaming tribes across the nation to pursue the principles of Indian self-determination and tribal self-governance.

To build upon Chairman Tester's and Senator McCain's remarks, we concur that Indian gaming—

- has changed considerably in 25 years, both in ways that were contemplated in 1988 and ways that could not have been anticipated;
- has advanced its policy goals to benefit tribal and non-tribal communities;
- has not solved for all of the socioeconomic and other challenges facing many tribes;
- is an important expression of tribes' sovereign authority to determine their own futures as a reflection of self-determination and self-governance; and
- is but one part of a fully realized tribal economic development and diversification strategy.

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[1] 25 U.S.C. §§ 2701–2721.

Indian gaming generally continues to meet its policy goals. While IGRA is not without its compromises, challenges, and costs, some of which were unforeseen in 1988, tribal gaming writ large is working for American Indian tribes and people as an extension of their sovereignty. Its benefits extend to non-tribal governments and communities, as well as to state governments and commercial entities, which in most cases have been willing participants in and beneficiaries of the Indian gaming industry.

Yet despite its successes, Indian gaming, as the Chairman observed, has not been a "cure-all" for joblessness, poverty, inadequate healthcare or housing, or other significant challenges that still beset many Indian tribes. Indian gaming's next 25 years should incorporate a stronger commitment to achieving diversified tribal economic development and enhanced socioeconomic infrastructure at least on par with non-tribal communities.

And, as the Committee's July 23, 2014 oversight hearing revealed, controversy continues to surround tribal gaming, particularly in the area of so-called "off-reservation" gaming (or, more accurately, gaming on newly acquired trust lands removed from a tribe's existing reservation). Indian gaming's next 25 years need to resolve legal uncertainty and political divisiveness through informed and responsible policymaking. As the Chairman concluded the hearing, what is required is "due diligence on all these issues."

We believe the major immediate challenges of Indian gaming's next 25 years revolve around gaming on newly acquired trust lands, the advent of online and mobile gaming, and leveraging gaming toward economic development and diversification. We recommend a set of policy guideposts—an Indian Gaming Ethic—to guide legislative solutions to these challenges.

I. The Indian Gaming Ethic

As is extensively documented, the $27.9 billon Indian gaming industry continues to create jobs, generate revenue for tribal, state, and local economies, reshape the landscape of tribal intergovernmental relations and political influence, and transform reservation life.

The Federal Government's trust obligation to tribes in the body of federal Indian law and policy, as well as IGRA's recognition of tribal sovereignty, provide a set of accepted and largely appropriate policy and regulatory structures to tribes and states.[2] By virtually every measure, tribal gaming policy has been an enormous success. The primary metrics are those established by Congress in IGRA's stated policy goals, including promoting tribal economic development, self-sufficiency, and strong tribal self-government; providing sound regulation to shield tribes from organized crime and corruption; assuring gaming integrity; and ensuring tribes are the primary beneficiaries of gaming.[3]

This success in part is due to the fact that Indian gaming is subject to a unique and complex federal regulatory scheme, involving layers of federal, state, and tribal regulation. In the first 25 years since Congress enacted IGRA, the National Indian Gaming Commission (NIGC) and the federal Secretary of the Interior have promulgated extensive and detailed regulations, while states have used the compacting process to tailor regulatory provisions to local needs.

IGRA largely also created the terms for the politics of Indian gaming in its first 25 years. Tribal-state compacting, revenue-sharing agreements, and gaming on newly acquired lands are primary examples. A recent major shift in oversight by the political branches is the move from evaluating whether tribal gaming enterprises comply with applicable law and regulation to advance IGRA's policy goals to asking whether tribal gaming itself is a desirable political outcome. In short, the law and policy of Indian gaming has grown only more complex since IGRA's passage.

In light of these legal and political developments, we have advocated for an "Indian Gaming Ethic" to guide federal, state, and tribal policymaking in the area of legalized gambling. As an extension of IGRA's policy goals, this Indian Gaming Ethic incorporates three ideals:

1. Protection of, respect for, and responsible exercise of tribal sovereignty;
2. Promotion of tribal economic development, self-sufficiency, and strong tribal governments; and

[2] Yet IGRA also is understood as a set of political compromises that also compromise tribal sovereignty. See STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (University Press of Kansas, 2005).

[3] 25 U.S.C. § 2701. On the relative success in achieving these goals, *see* generally KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY, 2d ed. (Carolina Academic Press, 2014).

3. Incorporation of a general understanding of Indian gaming as a means to serve tribes, tribal members, and tribal values, and contribute positively to the surrounding community.[4]

The Indian Gaming Ethic encourages Congress, states, and tribes to consider the impact of any proposed legal, regulatory, or policy reforms on tribal sovereignty and tribes' gaming operations, particularly for tribes that continue to experience high levels of poverty and unemployment.

Recommendations

1. *Any proposed amendment to IGRA or new legislation pertaining to Indian Country that would touch on Indian gaming should be informed by IGRA's policy goals and the Indian Gaming Ethic.* The Ethic captures IGRA's intent and incorporates by extension tribal sovereignty as a necessary driver of federal law and policy outcomes affecting tribes.

2. *The 2015 Government Accountability Office (GAO) report and similar initiatives on Indian gaming should be informed by IGRA's policy goals and the Indian Gaming Ethic.* The Ethic can frame methodological design, data gathering, and policy evaluation in ways that capture the full picture of Indian gaming's socioeconomic impacts, and cast any cost-benefit analysis against the backdrop of tribal interests, tribal culture, and tribal sovereignty.

II. Gaming on Newly Acquired Lands

The first fundamental challenge in Indian gaming's next 25 years is gaming on newly acquired lands.[5] IGRA expressly contemplates gaming on land newly taken into trust by the U.S. Federal Government for the benefit of tribes under a limited number of exceptions to IGRA's general prohibition against gaming on newly acquired lands. The greatest opportunity for continued industry expansion, especially for tribes with rural reservations—at least in terms of "Indian gaming" as IGRA contemplates it, in brick-and-mortar casinos—is via these statutory exceptions. Yet although some perceive otherwise, the facts bear out that in Indian gaming's first 25 years, this provision simply has not resulted in any significant expansion of tribal gaming removed from tribal communities: most tribal casinos are on pre-existing reservation lands. Nevertheless, for the last decade, gaming by tribes on newly acquired lands, including so-called "off-reservation" gaming, has been a political, legal, and regulatory lightning rod.

This controversy will escalate, for four major reasons:

- the tribal gaming industry has matured to a saturation point, and existing reservation gaming cannot continue to expand;
- following successful federal acknowledgment, newly recognized tribes will continue to petition for land to be taken into trust;
- state and local governments will continue to court new tribal gaming operations on land on which they see it advantageous; and
- the U.S. Supreme Court has complicated matters significantly through recent land-into-trust decisions, a situation that will continue in the absence of a congressional "fix."

In recent years, market saturation on or near reservations, recent federal acknowledgment of tribal groups, and fluctuating U.S. Department of Interior interpretation of policy or procedure have led tribal governments to partner with commercial, local, and state interests in pursuit of gaming on newly acquired trust lands. Tribes in California, Massachusetts, and Michigan are at the forefront of recent controversies throughout the U.S. concerning federal determinations on land-into-trust for gaming purposes or Section 2719 "best interests" determinations under IGRA.

Complicating the environment for off-reservation gaming are landmark U.S. Supreme Court decisions in *Carcieri v. Salazar* and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.*[6] The Court cast doubt on the ability of the Secretary of the Interior to take land into trust for tribes not federally recognized as of 1934, when the Indian Reorganization Act (IRA) was passed, and opened the doors to individual legal challenges to Interior Department trust land acquisitions for six years after they occur. The Court's actions have thrown into flux a gamut

[4] *See* Kathryn R.L. Rand & Steven Andrew Light, *Indian Gaming on the Internet: How the Indian Gaming Ethic Should Guide Tribes' Assessment of the Online Gaming Market,* 15 GAMING LAW REVIEW & ECONOMICS 11 (2011): 681–91.

[5] 25 U.S.C. § 2719.

[6] 555 U.S. 379 (2009); 567 U.S.__, 132 S. Ct. 2199 (2012).

of issues related to off-reservation gaming, including land acquisition; tribal acknowledgment; sovereign immunity; casino financing and other operational prerequisites; and the status of existing casinos that came about following federal land-into-trust determinations.

In addition to the *Carcieri* and *Patchak* decisions, gaming on newly acquired lands is contingent on the Interior Department's stance on federal land-into-trust process for gaming purposes, and federal interpretation of state and local actions, such as the Bureau of Indian Affairs' 2012 rejection of the novel compact agreement for a $500 million casino between the recently acknowledged Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts.

Recommendations

1. *Congress should enact a Carcieri "fix."* Legally, a clean Carcieri "fix" plainly is needed. The solution is straightforward from a textual and legal perspective.

2. *Short of a clean "fix," Congress should engage in limited law reform.* Politically, a clean fix may be impossible so long as the land-into-trust process is perceived as the gateway to the unwelcome proliferation of casinos. Federal legislation to curtail "off-reservation" gaming will impact all tribes, not just those in areas where local communities are unsupportive. As we have argued elsewhere, there are presently in place numerous legal controls over gaming on newly acquired lands.[7] If there are pockets of controversy, IGRA's provisions-particularly the tribal-state compact requirement for casino-style gaming-allow states to tailor solutions to local problems.

III. Online and Mobile Gaming

The second fundamental challenge for Indian gaming in the next 25 years is the advent of online and mobile gambling. It is only a matter of time before this becomes the next wave of legalized gambling in the United States. Brick-and-mortar casinos are the lifeblood of tribal gaming as it has developed pursuant to IGRA, and among their most obvious impacts is job creation. While land-based casinos will remain the heart of the Indian gaming industry for most tribes, the lingering effects of the Great Recession and recent casino closures in Atlantic City demonstrate their relative vulnerability to macroeconomic forces and local market fluctuation.

Moreover, the gambling market is poised for fundamental change. Aside from the ubiquitous Internet, the reality is that we all have powerful, interlinked personal computers in our pockets and purses. Despite existing law effectively barring online gaming, and ongoing reluctance at the federal level to legalize poker or other games, there simply is no turning back on technological advances that continue to transform the prospects and demand for online and mobile gaming worldwide. Internet and mobile games have boomed on servers outside the U.S., and effectively have penetrated U.S. markets. The defining characteristics of Internet and mobile services include their unparalleled ability to cross virtual and physical borders, the difficulty of and public wariness regarding government regulation of personal privacy and behavior, and the pervasive integration of online and mobile services into all aspects of modern life. Because there is a seemingly insatiable global appetite for gambling—whether legal or illicit—and most everyone's desire to be wired is ever-expanding, the fit between the Internet and gaming is near-perfect.

In the absence of federal legislation, it is no surprise that California, Delaware, Florida, Nevada, New Jersey, and at least a dozen more states have considered legalizing online poker or casino-style gaming. Delaware was first out of the gates, with Nevada and New Jersey close behind. This trend will not abate. Some assumed that Congress would preempt the field with federal legislation, especially as bills to legalize online poker have been introduced in multiple sessions. Yet these efforts did not find serious traction in Congress until 2012, with attempts to legalize Internet poker and also to recognize a tribal role through the separate Tribal Online Gaming Act (TOGA).[8] However, in the face of political and commercial opposition, neither the TOGA nor other federal online gaming legislation has moved forward.

Like states, tribes are not standing still. The Alturas Indian Rancheria Tribe in rural California, seeking to launch the first tribal online gaming effort, the Chey-

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[7] *See* Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform,* 13 VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW. 11 (2006): 396–473.

[8] Tribal Online Gaming Act of 2012, S. __, Discussion Draft, 112th Cong. 2d. Sess. (2012), available at *http://www.indian.senate.gov/sites/default/files/upload/files/TOGA-Sec-by-Sec-final.pdf* (last visited Mar. 26, 2014). For our take on the TOGA, *see* Kathryn R.L. Rand & Steven Andrew Light, Statement for the Record Before the U.S. Senate Committee on Indian Affairs (July 26, 2012), *http://www.gpo.gov/fdsys/pkg/CHRG-112shrg78446/html/CHRG-112shrg78446.htm* (last visited Mar. 26, 2014). For a discussion of other policy issues related to tribal online gaming, *see* Rand & Light, *Indian Gaming on the Internet.*

enne & Arapaho Tribes in Oklahoma, developing a site catering to gamblers outside the U.S., and the Lac du Flambeau Band of Lake Superior Chippewa in Wisconsin, working on "fun-play" online gaming and seeking other partners through the Tribal Internet Gaming Alliance, are among those tribes pushing the online gaming envelope.[9]

Recommendations

1. *Congress should legalize online and mobile gaming.* The existing and potential online and mobile gaming markets are too large, too fluid, and too under-regulated for the federal, state, or tribal governments to ignore. The question today is less "Should online gaming be legalized," but rather, "By whom, when, and how?" There are abundant forces-political, legal, economic, commercial-that suggest the answer to the first question is "Soon, if not yesterday" and as for the second, if Congress doesn't act quickly, then states will—with tribes fast on their heels. Because this is a national issue and a matter of interstate commerce, federal legislation and regulation are needed.

2. *Federal legislation should explicitly authorize Tribal Online Gaming by incorporating IGRA's policy goals and the Indian Gaming Ethic.* Elsewhere, we have analyzed whether the legalization of Internet gaming would help or hurt Indian gaming.[10] The question, we believe, revolves less around whether tribes should favor legalization of online and mobile gaming and more on the level of legalization. Whether large or small, the potential erosion of tribal market share in an online gaming environment simply needs to be anticipated, acknowledged, and managed. For some tribes—and perhaps for the majority that operate gaming-failure of brick-and-mortar casinos could be devastating to fragile economies and struggling communities. Federal legislation is the best way to ensure consistency with IGRA, protect tribes' existing gaming operations (and thus, for many tribes, protect their relatively fragile economies), and preserve tribal sovereignty.

IV. Tribal Economic Development and Diversification

The third major challenge for Indian gaming in the next 25 years is tribal economic development and diversification beyond the casino. In the last decade, many tribes have sought to leverage the experience, expertise, and revenue from tribal gaming enterprises to advance broader economic development and diversification strategies. Tribes are pursuing long-term, multi-million-dollar investments in business ventures ranging from light manufacturing to banking. This move is essential, as the tribal gaming market has saturated, is increasingly subject to political scrutiny, and faces the disruptive prospect of online and mobile gaming.

Yet gaming remains the centerpiece of many tribes' economies, and their diversification efforts often focus on the hospitality sector complementing gaming operations, including hotels, golf courses, gas stations, RV parks, and chain restaurants. Even tribes with only modestly successful gaming enterprises are able to use gaming revenue to invest in other businesses. In our home state of North Dakota, for example, the Turtle Mountain Band of Chippewa has operated a metal fabrication manufacturing company, and data services and information technology enterprises—along with its Sky Dancer Casino & Resort, which features a buffet and snack bar, a 200-room hotel, and event center—all on the tribe's reservation in rural North Dakota. Altogether, the Turtle Mountain Band provides over a thousand jobs in the area, over 400 of them at the casino.

Although tribes plainly will seek to stabilize and grow reservation economies as well as strengthen tribal governments and tribal sovereignty through diverse economic ventures, it appears that the continued relative profitability of tribal gaming enterprises will keep Indian gaming a staple of many tribal economies for the foreseeable future. Yet for tribes to ameliorate the socioeconomic challenges that face them, they must diversify.

Recommendations

1. *Congress should continue to facilitate tribal economic development through gaming, the centerpiece of IGRA's policy goals.* Strong tribal economies are essential to the wellbeing of Indian people, and gaming continues to be a critical economic driver for many tribes, particularly the most impoverished. As we have stated elsewhere, Indian gaming will have fulfilled Congress's intent in enacting IGRA when all gaming tribes have—

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[9] Pamela M. Prah, "Tribes, States Eye Multibillion-dollar Online Gaming," *USA Today,* Dec. 11, 2013, *http://www.usatoday.com/story/news/nation/2013/12/11/indian-tribes-states-eye-online-gambling/3986473/* (last visited Mar. 26, 2014).

[10] Rand & Light, *Indian Gaming on the Internet.*

- stable, diversified economies to support thriving reservation communities far into the future;
- steady median household income, employment, and poverty levels in line with surrounding communities or the national baseline, and
- well funded and staffed government agencies and services that are able to meet tribal members' needs. [11]

Until these aspirations are met, Congress should be exceedingly cautious about curtailing tribes' ability to use gaming as an economic driver for their communities.

2. *Congress should facilitate tribal economic diversification.* We support recent efforts, such as those of Representative Suzan DelBene in introducing the Indian Country Economic Revitalization Act, [12] to explore how federal legislation could promote sustainable and diversified tribal economies. Congress also could facilitate federal executive initiatives with the direct involvement of tribal leadership to encourage tribal economic and infrastructure development, provide technical assistance in federal-tribal partnerships, and ease the use of federal data on tribal economic development initiatives. The current goals of the White House Council on Native American Affairs clearly are steps in the right direction. [13]

The Federal Government's trust responsibility to tribes should encompass the promotion of economic development and diversification, such that whether or not Indian gaming exists in 25 years—or in what form—tribal governments are economically self-sufficient and able to meet all tribal members' needs.

We thank the Committee for its consideration of this statement at an important juncture for Indian gaming. We would be happy to answer any questions or elaborate on the suggestions we offer here, and to address any other issues related to Indian gaming's next 25 years that the Committee deems pertinent.

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[11] Rand & Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act,* 472–73.

[12] H.R. 4699.

[13] See Press Release, White House, "Fact Sheet: Strengthening Tribal Communities Through Education and Economic Development" (June 13, 2014), *http://www.whitehouse.gov/the-press-office/2014/06/13/fact-sheet-strengthening-tribal-communities-through-education-and-econom* (last visited Aug. 1, 2014).

PREPARED STATEMENT OF HON. TERRY RAMBLER, CHAIRMAN, SAN CARLOS APACHE TRIBE

My name is Terry Rambler and I am the Chairman of the San Carlos Apache Tribe (the "Tribe"). Thank you for the opportunity to submit testimony to the U.S. Senate Committee on Indian Affairs.

Introduction and Summary

Senator McCain and Senator Flake called for this hearing allegedly to "revisit" the Indian Gaming Regulatory Act ("IGRA") as a means to ensure the integrity and vitality of Indian gaming. The San Carlos Apache Tribe does not support such a revisiting.

This Committee knows and understands the unparalleled economic opportunity provided through the IGRA to tribes. This Committee understands how vital IGRA has been to tribes, providing unequaled economic development and job growth while strengthening tribal self-determination, self-government and sovereignty. This Committee can best act to protect tribal gaming by leaving IGRA alone.

A Revisiting of IGRA is Unnecessary

Tribes were once isolated politically, economically and socially. Our members were living in extreme poverty, welfare dependency and economic despair. However, through IGRA, tribes are now economically strengthened. Gaming revenues have conferred unmatched economic development, providing jobs and funding for desperately needed services for our members.

Through tribal regulatory oversight, we provide a safer entertainment venue for our guests, free of the criminal elements surrounding other non-Indian gaming venues. Under the 2002 Gaming Compact, Arizona has a system that works for the tribes and for the State. Arizona-based tribes have a commitment and a track record of working together, and of working with the State. Because of Arizona's Gaming Compact, tribal commitment and procedures, Arizona has a system that is meeting the intent and directives of IGRA.

Arizona-based tribes have developed sophisticated internal controls, policies and procedures that provide enhanced quality assurance, customer service, and employment opportunities, through open dialog with Arizona Department of Gaming ("ADOG") and the National Indian Gaming Commission ("NIGC"). Nearly 600 people work as regulators statewide – over 100 ADOG employees and over nearly 500 tribal employees. Annually, over $35 million is spent regulating gaming.

Arizona's gaming tribes have on-going communications and comprehensive criteria for keeping up with a growing industry. We have worked effectively with the State on developing specific revisions to the Compact. Together we have been able to provide for regulations that cover increasingly complex technology for Class II and Class III machine standards that exceed NIGC internal controls.

According to the 1999 Sunset Review of Indian Gaming in Arizona, by the State's Office of the Auditor General: "the [Arizona] Department [of Gaming's] extensive oversight activities are well designed for ensuring the integrity of Class III gaming operations." The State's Auditor General found that not only does ADOG monitor gaming extensively and practice sound regulatory procedures; it also is effective at identifying violations. The Auditor General cites the State's approach as "among the most extensive nationally."

In comparison to states with 10 or more compacted Indian gaming operations, the report emphasizes that Arizona's gaming department staff and expenditures are "by far the highest." The State's Auditor General found that "While its activities are consistent with the best practices nationally for both gaming and Indian gaming regulation, the Department conducts its monitoring activities more frequently than most states."

Certification at the state and tribal levels is scrupulous. ADOG certifies businesses that provide more than $10,000 in goods and services to gaming operations in any given month, while tribal gaming regulators have a similar review process. The Auditor General found that the certification process "helps to ensure that only those companies that are found to be suitable under the provisions of the compact are permitted to conduct business at Class III tribal casinos."

ADOG and tribes also investigate and certify all non-tribal gaming employees, casino management companies, suppliers and manufacturers of gaming devices, and providers of gaming services. In addition, ADOG makes recommendations to tribes regarding licensing tribal members, but does not actually certify those members.

Like the State, Arizona tribes play a crucial role in regulating Indian gaming. Tribes have very specific regulatory responsibilities. Under Arizona's Gaming Compact, Arizona's gaming tribes are required to adopt as tribal laws ordinances which provide detailed regulation of gaming. Tribes are responsible for the operation and management of all gaming facilities. As such, tribes are required to establish a tribal gaming office, independent of the tribal government, to regulate gaming and enforce compliance with compact provisions on a tribe's behalf. That office, as described by the Auditor General report, must "inspect gaming facilities, approve internal control systems for the gaming operations investigate suspected, compact violations, and license gaming employees, casino management companies, manufacturers of gaming devices, and providers of gaming services."

Under the current regulatory framework, there exists a strong system of checks and balances that is working for Indian gaming, and meets the directives of IGRA and the Gaming Compact. Stringent and often demanding, this system, requires on-going cooperation by the tribal, state and federal governments, has been duly time-tested and, in Arizona, has proved successful.

The Committee should be cautious in considering changes to IGRA. In Arizona, tribal regulation of gaming under tribal law, along with State monitoring pursuant to the tribal-Arizona Gaming Compact, has established a highly comprehensive and effective method to regulate Indian gaming operations. Additional regulation by the federal government would only duplicate current tribal and State efforts. Moreover, IGRA clearly contemplated leaving most regulation to the states and tribes.

In light of the significant tribal and State resources already devoted to the regulation of Indian gaming in Arizona, Arizona Indian tribes believe an increase in National Indian Gaming Commission fees to fund additional federal regulation of Arizona tribal gaming is unnecessary. Certainly, members of this Committee should visit Arizona and see Arizona's system for itself. IGRA works. What is not broken does not require fixing.

IGRA's Profound Impact on Economic Development by Tribes

Beyond the federal, state and tribal regulatory framework is the more important impact – economic development. Nationally, according to the National Indian Gaming Commission, in 2013, tribal gaming revenues totaled $28 billion. However, keep this in perspective – this works out to about only a mere $5,000 per member of every American Indian and Alaska Native. Not all tribes have gaming revenue, so this number is not reflective of direct benefits to members of gaming tribes. Furthermore, as you know, gaming revenues do not fund tribal members individually. In large part, gaming revenues supplement existing federal programs, while also funding scholarships, fire departments, general assistance, and other desperately needed services that the federal government does not provide.

Nevertheless, the local impacts are profound. Since 2004, in Arizona alone, Tribes' gaming revenues contributed nearly one billion dollars to: Instructional improvement for schools; trauma centers; wildlife conservation efforts; Arizona tourism; and cities and towns through the Arizona Benefits Fund. But Arizona tribes have done so much more than just share a billion dollars with Arizona. Nationally, in 2009 alone, 237 tribes in 28 states had gaming operations that resulted in federal revenues increasing by $9 billion due to Class II and III Indian Gaming, while state and local treasury revenues increased by $2.4 billion. *See* National Indian Gaming Association, Economic Impact of Indian Gaming (2009), at 8-9.

According to a recent study, tribes are now the *third* largest employers in Arizona! *See* Taylor, Jonathan B., *The Economic Impact of Tribal Government Gaming In Arizona*, 2012. Over 15,200 people work in tribal hotels, casinos, restaurants and golf courses. Arizona tribes together are third only to Banner Health and Wal-Mart. A prior study also concluded that in counties where casinos operate, there was a correlative reduction in welfare rolls. Cornell, Stephen, *An Analysis of the Economic Impacts of Indian Gaming in the State of Arizona*, Udall Center for Studies in Public Policy.

Conclusion

IGRA is not broken and does not need to be revisited. Congress needs to do nothing more to ensure the integrity of tribal gaming. The gaming compacts between the tribes and the states are working.

Together, tribes and states have worked closely to provide regulations that ensure a safer entertainment venue for our guests, free of the criminal elements surrounding other non-Indian gaming venues. Under the 2002 Gaming Compact, Arizona has a system that works for the tribes and for the State. Arizona-based tribes have a commitment and a track record of working together, and of working with the State. Because of our Compact, our commitment and our process, Arizona has a system that is meeting the intent and directives of IGRA.

We hope that together, tribes and the states can continue to work in partnership toward a brighter future. While NIGC's role in the regulatory framework is important and should be maintained, IGRA clearly contemplated that the work of IGRA shall be largely borne by the tribes and the states. Rather than focus on the integrity of tribal gaming, this Committee must learn to understand IGRA in terms of the benefits it provides to tribes.

For the first time in our shared history, tribes have become central to the economy of the states in which they are based. Now that is historic. Tribes now invest, tribes employ and tribes build, entirely because of IGRA. In Arizona, tribal gaming is working for ALL Arizonans! Tribal gaming has not only provided for tribal self-sufficiency as anticipated in the IGRA, but it has provided much needed jobs and contributed to essential programs because of our Gaming Compact, while boosting local, surrounding economies. Clearly, IGRA is not broken and does not require fixing.

On behalf of the Tribal Council and the San Carlos Apache Tribe, thank you for considering these comments.

PREPARED STATEMENT OF HON. KEENY ESCALANTI SR., PRESIDENT, FORT YUMA QUECHAN INDIAN NATION

Good afternoon, my name is Keeny Escalanti Sr., and I am the President of the Fort Yuma Quechan Indian Nation. Our people have lived and farmed along the Colorado River for thousands of years. Today, our homeland stretches across more than 40,000 acres of California and Arizona desert, near the city of Yuma, Arizona.

The Quechan people appreciate this committee's attention to the growth of tribal gaming in the next twenty five years.

Though our location is somewhat remote, the Quechan operates a small gaming facility on our reservation. The modest revenue we receive from this facility has helped support our people and allowed us to make critical investments in our tribal housing and schools.

Make no mistake, the economic development opportunities that came along with our gaming facility have helped our people and revitalized our reservation economy. And, we firmly believe that all tribes must be able to participate in unencumbered economic development.

But today, as controversial actions by our brother and sister tribes in Arizona and California jeopardize the progress of our people, we urge this Committee to take steps to limit new casino development to a tribe's aboriginal lands.

It is our belief that restricting new casino development to aboriginal lands is the only policy that preserves tribal sovereignty and protects the rights of all tribes across the nation.

Arizona

As the Committee will hear, the situation to the east of the Quechan Reservation, in Arizona, is particularly concerning.

In 2002, Quechan and 16 other tribes in Arizona reached an agreement with the State of Arizona that would allow tribal gaming to continue in exchange for limiting the growth and placement of new casinos and creating a revenue sharing trust-fund that supports education, healthcare, wildlife conservation and other efforts.

As a part of the deal, tribal governments agreed not to open any new casinos in the Phoenix metropolitan area. The concession was highlighted by then-Governor Jane Hull, who urged support for the agreement, which subsequently became known as Proposition 202, based on the fact that "voting "yes" on Proposition 202 ensures that no new casinos will be built in the Phoenix metropolitan area." Then-Governor Hull also claimed that "Proposition 202 keeps gaming on Indian Reservations and does not allow it to move into our neighborhoods."

Unfortunately, one tribe, the Tohono O'odham Nation from south of Tucson, is now seeking to undermine the agreement by opening a casino in the Phoenix area.

The tribe's proposal is to open a new casino in the City of Glendale, just across the street from a high school and next to residential areas.

Equally concerning, the decision by the Department of the Interior to take this land into trust appears to support the tribe's duplicity and attempts to assert sovereign immunity to avoid legal action.

The Quechan Tribe stands by our word, and we support legislation pending in this Committee, H.R. 1410, which ensures that all Arizona tribes will keep the promises we made to the Arizona voters who helped approve Proposition 202. H.R. 1410 simply states that no new casinos can be permitted in the Phoenix area until 2027, the date at which our existing agreement is scheduled to expire.

California

Quechan is facing issues on the other side of the Colorado River as well.

A tribe from San Diego County, the Manzanita Band of Kumeyaay Indians, has proposed moving nearly 70 miles away from its existing reservation to open a casino in Calexico, California.

The proposal is troubling. The Manzanita Band proposal would take land into trust within Quechan's aboriginal territory, and near the sacred sites of our ancestors. We firmly believe that the Manzanita band's proposal is contrary to the letter and the spirit of the law, yet the Department of the Interior has yet to reject this misguided "two-part determination" proposal.

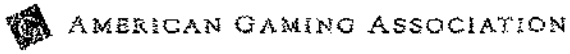
We urge this committee once again to embrace legislation and policies that would restrict unbridled reservation shopping, especially when such efforts exact such a high toll on other tribes in the region.

Conclusion

As the Quechan look forward to the next 25 years of tribal gaming, we sincerely hope that the future does not look like the present. Gaming proposals that benefit one tribe at the expense of others, or efforts to pursue gaming using methods that require hiding behind sovereign immunity, simply cannot be allowed to persist.

In the last 25 years, tribal gaming has allowed tribes across the nation to take a great leap forward. We hope that the next 25 years will build on this success, not tear it down.

Thank you once again for the opportunity to submit testimony today, and we look forward to your work to protect this important economic development tool.



GEOFF FREEMAN
President & CEO

July 29, 2014

The Honorable Kevin Washburn
Assistant Secretary for Indian Affairs
U.S. Department of Interior
MS-3642-MIB
1849 C Street, NW
Washington, DC 20240

Dear Secretary Washburn:

On behalf of the members of the American Gaming Association (AGA), I write to express our appreciation for the important work of the Bureau of Indian Affairs (BIA) in supporting tribal communities and promoting Native American sovereignty across the United States. Tribal gaming is one of Indian Country's greatest successes and the vital contributions that gaming has made to Native Americans is extraordinary. Tribal and commercial gaming have many commonalities, including a proven track record of strengthening communities, a deep passion for providing opportunities to hard-working individuals and a commitment to world-class entertainment.

As recent testimony before the Senate Indian Affairs Committee failed to portray an accurate picture of commercial gaming, I want to call attention to the fact that commercial casinos:

- Support nearly one million U.S. jobs and directly employ 340,000 workers;
- Generate more than $125 billion in spending throughout the U.S. economy; and
- Create nearly $9 billion in gaming tax revenues and another $7 billion in tax payments.

These important financial contributions positively impact communities across the country through investments in, among other things:

- Education, scholarships and schools: In Missouri, for example, casinos contributed more than $5 billion since 1994 in funding for early childhood, elementary and secondary school programs.
- Broad-based tax relief: In Pennsylvania, for example, casinos produced more than $4.7 billion in payments since 2006 to reduce property taxes for Keystone State residents.

- Health and wellness programs: In New Jersey, for example, casinos contributed $250 million in 2013 for programs supporting senior citizens and people with disabilities.

- Infrastructure, transportation and agricultural projects: In Iowa, for example, casinos generated $117 million in 2013 for the Rebuild Iowa Infrastructure Fund.

- Public retirement systems, state capital improvements and historical funds: In Colorado, for example, casinos contributed nearly $25 million toward historic preservation programs in fiscal 2013.

The relationship between tribal and commercial gaming is growing stronger, commercial companies are operating some tribal properties and we share opportunities such as Global Gaming Expo to conduct business, learn and network. By strengthening our bond, we can highlight our successes, pave the way for innovation and ensure a successful future for casino gaming in America. Please join us as partners in gaming as we work to achieve our mutual goals that casinos deliver to tribal and non-tribal communities alike.

Sincerely,

Geoff Freeman
President and CEO
American Gaming Association

July 7, 2014

The Honorable John McCain
U.S. Senator
241 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Flake
U.S. Senator
368 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator McCain and Senator Flake,

As you know, a broad coalition of community and tribal leaders, small business owners and neighbors came together in 2002 to approve new tribal/state gaming compacts that limited gaming to existing reservation lands. These compacts never intended to allow tribal gaming to occur off traditional reservation lands and in the middle of large urban areas near neighborhood schools, places of worship and homes.

Further, on May 27, 2014, the U.S. Supreme Court decided Michigan v. Bay Mills Indian Community. In this ruling, according to the Court's majority, it was up to Congress to fix the problem. We sincerely appreciate all of your public opposition and the concerns you have expressed over the potential negative impacts of off-reservation gambling. It is our hope that you once again help to drive the momentum for a hearing on this critical issue.

I support your efforts to conduct a hearing to focus on the phenomenon of off-reservation gaming. It is my hope the Committee will act on legislation to resolve the conflict here in Arizona. As an example, H.R. 1410, the Keep the Promise Act of 2013, is one measure that was approved by a U.S. House of Representatives, and is consistent with the promises repeatedly made to Arizona voters when they were asked to approve tribal gaming compacts in 2002.

If not addressed in the near future, Arizona will set a dangerous precedent that will make any county island in the Phoenix Metropolitan area vulnerable to purchase and development as a casino where tribal gaming was never intended to occur.

As always, thank you Senator McCain and Senator Flake for your leadership on this important matter.

Respectfully,

Mark W. Mitchell

Mark W. Mitchell
Mayor

City of Peoria

HONORABLE BOB BARRETT
MAYOR

8401 West Monroe Street
Peoria, Arizona 85345

Hon. Jon Tester
Chairman, Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Sen. Jeff Flake
B85 Russell Senate Office Building
Washington, DC 20510

Hon. John Barrasso
Vice Chairman, Senate Committee on Indian Affairs
307 Dirksen Senate Office Building
Washington, DC 20510

Sen. John McCain III
241 Russell Senate Office Building
Washington, DC 20510

Re: Senate Committee on Indian Affairs Hearing: "Indian Gaming: the Next 25 Years"

Dear Chairman Tester, Vice Chairman Barrasso, Senator Flake, Senator McCain:

As is evident from the attached *unanimous* Peoria City Council Resolution No. 2013-41, the City of Peoria, Arizona strongly opposes H.R.1410 (unfortunately mis-named the "Keep the Promise Act"), and has long supported the Tohono O'odham Nation's efforts to acquire trust land and bring economic development to the West Valley. I respectfully request that Peoria's Resolution, and this letter, be included in the record for the July 23, 2014 hearing on "Indian Gaming: the Next 25 Years." *The City of Peoria also respectfully requests that the Senate Committee on Indian Affairs take no further action that would allow this highly unfortunate piece of proposed legislation to become law.*

First, I want to make clear that the Nation's trust property is literally across the street (Northern Avenue) from the City of Peoria. We are the local community. I am writing on behalf of the entire City Council and our residents to make clear that enactment of H.R. 1410 would be extremely detrimental to our local community. This job-killing legislation has been pushed on us by wealthy special interests on the other side of Phoenix -- in the East Valley -- who are bent on ensuring that we in the West Valley will never have the same access to the kind of gaming-related economic development that has so benefited the cities and tribes of the East Valley. For those who are not familiar with Greater Phoenix, the "West Valley" refers to the communities west of the City of Phoenix. The Cities of Peoria and Glendale are the largest communities in the West Valley, bordering each other and Phoenix. The West Valley has suffered significantly from the recession and faces continued economic fragility.

We are in desperate need of new employment opportunities and new economic development dollars. This development is projected to create thousands of construction jobs and more than 3,000 permanent jobs — jobs needed in our community and throughout Arizona. In addition to the direct employment benefits, the planned resort will create collateral economic benefits for the local businesses that will supply the goods and services needed to construct and operate the resort. The West Valley deserves to enjoy the benefits of tribal gaming that the East Valley has enjoyed for the past ten years — benefits that flow from the very East Valley Tribes who now work so hard to deny the West Valley this same prosperity.

I want to emphasize that from the beginning the Tohono O'odham Nation has engaged in open dialogue with state and local leaders — including myself— community groups and constituents. The day this project was announced, the leaders of the Tohono O'odham Nation met with me to inform me of their plans, as they did with many others. They made it clear to me that they were committed to work closely with the City of Peoria to address the concerns I, my Council and my constituents may have. Evidence of this includes their revised site plan which re-oriented the placement of the casino in response to feedback received from the Peoria Unified School Board. It is this type of "good neighbor" approach that so impressed PUSD Board Member Joe McCord that he attended the Peoria City Council meeting where we adopted our resolution in opposition to H.R. 1410 and gave a passionate speech in support of the Nation's development plan.

The Tohono O'odham Nation has become a community partner in the West Valley. It has participated in hundreds of community meetings, it has joined our local Chambers of Commerce. It has sponsored important community charities, and tribal leadership has personally participated in local events. The Nation has met with key, potentially affected constituencies to identify early on potential issues, and to work cooperatively to resolve those before an ounce of dirt has been turned.

There are many in our local community who understand the benefits of the proposed project and fully support it. The City of Peoria is not alone in its support – the Cities of Tolleson and Surprise, and now the City of Glendale, all have enacted resolutions in support of the Nation and in opposition to H.R. 1410. If Congress really cares about what the local community thinks about this proposed project, it needs to listen to the *actual* local community – the cities and people of the West Valley.

Again, we urgently ask the Committee to do everything in its power to make sure that this job-killing special interest legislation goes not one step further towards enactment.

I thank you for giving the City of Peoria the opportunity to submit these views for the record and for including the attached testimony that was provided during the House hearing on H.R. 1410.

Sincerely,

Bob Barrett

Bob Barrett
Mayor

The Honorable Jon Tester
Chairman
Committee on Indian Affairs
U. S. Senate
Washington, D. C.

Dear Mr. Chairman:

My name is Franklin Ducheneaux. My address is 41878 Addy Lane, Ronan, Montana. From the period March 1973 to December 1990, I was the Counsel on Indian Affairs with the Committee on Interior and Insular Affairs of the U. S. House of Representatives. I respectfully request that this letter be made a part of the record of your recent oversight hearings on Indian gaming.

I have become aware of developments in the controversy surrounding the proposal of the Tohono O'odham Nation of Arizona to build a class III gaming casino on lands taken in trust for them pursuant to the Gila Bend Indian Reservation Replacement Land Act of 1986. This gaming would be conducted pursuant to the Indian Gaming Regulatory Act of 1988. Senator McCain, the senior Senator from Arizona, was reported as stating, during the hearing, that the Tohono O'odham Nation was proceeding lawfully in their proposal. Yet, subsequent to the hearing, he and Senator Flake introduced S. 2670 which would prohibit the construction of the proposed casino. The introductory statement contains the following statement, "As one of the authors (Senator McCain) of the Indian Gaming Regulatory Act and the Gila Bend Indian Reservation Replacement Land Act, Congress (sic) did not envision Indian Gaming on the kind of lands involved in the West Valley issue."

At the beginning of the 95th Congress in 1977, I was hired by Chairman Morris K. (Mo) Udall to be his Counsel on Indian Affairs on the Full Committee. I worked closely with Chairman Udall for the remainder of my time with the Committee. In particular, I worked on the drafting of the legislation settling the Gila Bend Reservation land claims of the Tohono O'odham Nation, which Chairman Udall introduced as H. R. 4216. I might add that then Congressman John McCain was a co-sponsor of the bill. I will not here go into detail on the background of the tribal claim nor the provisions of the Act. That is a matter of public record and is adequately set out in H. Rept. 99-851, which I prepared.

Through action of the U. S. in operation of the Painted Rock Dam, nearly 10,000 acres of the tribe's Gila Bend Reservation were rendered unfit for use by the tribe. The Gila Bend Act provided for the appropriation of $30,000,000 as compensation *if* the tribe waived its land claim. It authorized the tribe to acquire, at its own expense, not to exceed 9,880 acres of private land. It further provided that the tribe and the U.S. were "forever barred" from asserting any water right for such lands, thereby rendering any such lands unusable for agricultural purposes. The Act further restricted the tribe's land acquisition right. The land had to be within the boundaries of Maricopa, Pinal, or Pima County. It could not be within the corporate limits of any city or town. And the U. S. had to make payments in lieu of taxes to

Arizona and its political subdivisions on such land. In the "Purpose" section of the House Report, it is asserted that the land had to be "suitable for sustained economic use which is not principally farming and does not require Federal outlays for construction, to promote the economic self-sufficiency of the O'odham Indian people at Gila Bend, and to preclude lengthy and costly litigation."

The Introductory statement on S. 2670 implies that Congress, in passing the Gila Bend Act, did not envision Indian gaming on the kind of land involved in the tribe's proposal. Of course not. Indian gaming really wasn't a factor when Chairman Udall introduced H. R. 4216. The House was still considering his bill, H. R. 1920, regulating Indian gaming. Bingo was the only game in town. H. R. 1920 died in the Senate about the same time the Gila Bend Act was passed by the Senate. Congress, or at least Chairman Udall, envisioned that the lands would be used for non-farming, sustained economic development to promote the "economic self-sufficiency" of the O'odham people. That is exactly what a casino would represent.

I drafted the first bill on Indian gaming. Chairman Udall introduced it in the 98th Congress as H. R. 4566 on November 18, 1983. It went nowhere. I draft another bill for Chairman Udall which he introduced in the 99th Congress as H. R. 1920. As noted, then Congressman McCain was a co-sponsor.

On February 25, 1987, the Supreme Court handed down its decision in the case of *California v. Cabazon Band of Mission Indians* which upheld the right of tribes to engage in gaming authorized under State law, free of State regulation. I drafted another gaming bill for Chairman Udall which he introduced as H. R. 2507 on May 21, 1987. Twelve days later, on June 2nd, Senator McCain introduced the exact language as S. 1303. I cannot say what Senator McCain's intentions were when he introduced the language I had drafted for Chairman Udall. Only he can say.

As a mere Committee staffer, my intentions did not rise to the level of "legislative intent". However, I can say what I intended in developing the language. I did not intend that the language would impose some kind of artificial, congressional cap on Indian success. For non-Indians, the sky's the limit, but Indians can only soar so high! During the three congresses we worked on Indian gaming legislation, the off-reservation acquisition of lands for gaming purposes became an issue. A compromise was reached on that issue. The compromise was that gaming could not be conducted on lands acquired in trust off-reservation after October 17, 1988, unless agreed to by both the Secretary of the Interior and the Governor of the State involved. However, we made three exceptions to that prohibition. Gaming could be conducted on lands acquired in trust after that date for (1) land acquired as an initial reservation for a newly acknowledged tribe, (2) land acquired for a tribe restored to federal recognition, and (3) *for lands acquired in trust as a part of a settlement of a land claim.*

As the principal draftsman of the language of both the Gila Bend Act and IGRA, I was certainly aware of the right of the Tohono O'odham Nation to acquire off-reservation land in trust as a part of the land claim settlement. As the draftsman, I was certainly aware that such

lands could not be used for farming purposes. As the draftsman of section 20 of IGRA, restricting off-reservation acquisition of trust land for gaming purposes, I was certainly aware that such lands, if and when acquired, could be used for gaming purposes.

The Painted Rock Dam, which eventually destroyed the value of the Tohono O'dham's Gila Bend reservation, was completed in 1960. In 1960, the Supreme Court decided the case of *Federal Power Commission v. Tuscarora Indian Nation*, a case involving the flooding of part of the Tuscarora lands. The Court ruled against the tribe, but Justice Black, in a strongly worded dissent, said, "Great nations, like great men, should keep their word". The United States, Chairman Udall, and Congressman McCain gave their word to the Tohono O'odham people that their land claim would be honorably settled. The United States, Chairman Udall, and Senator McCain gave their word in IGRA that the right of the tribe to use their settlement land for economic development, including gaming, would be protected.

Mr. Chairman, great men, like great nations, should keep their word.

Mayor & Council Office
16000 N. Civic Center Plaza
Surprise, AZ 85374-7470

July 21, 2014

The Hon. Jon Tester
Chairman, Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

The Hon. John McCain III
241 Russell Senate Office Building
Washington, DC 20510

The Hon. John Barrasso
Vice Chairman, Senate Committee on Indian Affairs
307 Dirksen Senate Office Building
Washington, DC 20510

The Hon. Jeff Flake
B85 Russell Senate Office Building
Washington, DC 20510

Re: The City of Surprise Strongly Opposes H.R. 1410

Dear Chairman Tester, Vice Chairman Barrasso, Senator Flake, Senator McCain:

On behalf of the City of Surprise, I write to express the City's *strong opposition to H.R. 1410*, the ridiculously-named "Keeping the Promise Act of 2013". The City of Surprise is located in the West Valley and therefore is an important part of the local community surrounding the Tohono O'odham Nation's Maricopa County trust land, and views H.R. 1410, like its predecessor bill H.R. 2938, as special-interest legislation designed to protect a tribal gaming market on the other (eastern) side of Phoenix. I respectfully request that this letter, along with the attached unanimous resolution in opposition to H.R. 1410 and in support of the Nation's project, be included in the record of the Committee's hearing on "Indian Gaming: the Next 25 Years."

The City of Surprise was not provided an opportunity to testify at this hearing, nor was the City provided that opportunity at the House hearing on the same bill last year, or the House hearing in 2012 on the predecessor bill. I respectfully urge our congressional delegation and the Senate Indian Affairs Committee to listen closely to the views of the *actual* local community -- the communities in the West Valley -- and that you do everything in your power to ensure that this proposed legislative killer of economic development never becomes law.

The parties behind this bill have brought this legislation forward to try to accomplish what they have repeatedly failed to establish through years of litigation. H.R. 1410 is an overreach of federal authority, would set a dangerous precedent by altering a federal land settlement many years after its enactment, and would eliminate our ability as local government leaders to negotiate with tribal leaders to assure a high-quality economic development project that will generate thousands of jobs and be an important regional amenity for residents and visitors alike.

Local government leaders, like tribal leaders, are often frustrated when the federal government unilaterally changes the rules of the game after the game is well underway. In this

case, the impacts of this federal action would be immediate, harmful to our local economy, and effectively deny to the Nation the relief it was promised by the federal government in 1986 after nearly 10,000 acres of its lands were destroyed by a federal flood control project. In this respect, the bill would be more accurately titled the "Breaking the Promise Act of 2013".

We understand that policy matters require give and take in order to achieve the public interest. But in this instance, the only public interest being served are those of competitor casinos in the east valley of the Phoenix Metropolitan Area who perceive that they will be lose market share to a new, high quality entrant in the gaming market. The fact is, the Nation's proposed casino is more than twenty miles (as the crow flies) from any of their existing facilities.

As you know, the Nation's trust application was recently approved and the lands have been taken in trust. Given this fact, H.R. 1410 would prevent the Nation from building the type of high-quality project we would seek – leaving our community with the establishment of a small tribal trust land parcel with congressionally mandated limits on its economic value - all while our residents are denied the resulting employment opportunities of substantial scale. We are more than capable of working in concert to assure that the Nation's West Valley Resort and Casino will complement and enhance our existing community assets, and we strongly oppose federal interference with our ability to do so.

The people of Surprise join with the West Valley Cities of Glendale, Tolleson and Peoria to urge you not to proceed with this congressional power play against the Tohono O'odham Nation and our local governments. Please oppose H.R. 1410, and allow us to do our jobs on behalf of our constituents.

Regards,

Sharon Wolcott, Mayor

CITY OF TOLLESON

9555 West Van Buren • Tolleson, AZ 85353

July 17, 2014

Hon. Jon Tester
Chairmen, Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Hon. John McCain III
241 Russell Senate Office Building
Washington, DC 20510

Hon. John Barrasso
Vice Chairman, Senate Committee on Indian Affairs
307 Dirksen Senate Office Building
Washington, DC 20510

Hon. Jeff Flake
B85 Russell Senate Office Building
Washington, DC 20510

Re: Senate Committee on Indian Affairs Hearing: "Indian Gaming: the Next 25 Years"

Dear Chairman Tester, Vice Chairman Barrasso, Senator Flake, Senator McCain:

On behalf of the City of Tolleson, I respectfully submit the attached unanimous resolution of the Tolleson City Council opposing H.R. 1410 and supporting the Tohono O'odham Nation's proposed economic development project on its West Valley trust land. Let me be absolutely clear: H.R. 1410 is a direct attack on the thousands of jobs that the Nation, in partnership with our local communities, is trying to bring to the West Valley. Because the City of Tolleson has not been given an opportunity to testify at this hearing (nor was it given an opportunity to testify at either of the House hearings), I ask that this letter and Tolleson's resolution be included in the record for the above-referenced hearing, and that the Committee carefully consider the views of our community.

Tolleson finds it particularly disturbing that H.R. 1410 would circumvent the federal court decisions by which the Nation has proven, over and over again, that it has played by all of the rules set out for it by Congress and in the Tribal-State gaming compact. The myriad of arguments used by proponents of H.R. 1410 about whether the law allows the Tohono O'odham Nation to acquire its West Valley land in trust and use it for gaming have been answered, in the Nation's favor, by the federal courts.

It is time for this constant fighting to end, and it is time for this economic development project to move forward. *We need these jobs.* We want the $500 million capital investment associated with this project to happen as soon as possible. We have residents who hope to win some of the 6,000 construction jobs and we most certainly have friends and neighbors who will be applying for the more than 3,000 jobs that will be needed to support the day to day operations of the project. Now, more than ever, the West Valley and State of Arizona need the $300 million annual economic boost that will result from this development.

The City of Tolleson is a community 10 miles west of Downtown Phoenix located within the West Valley. Settled in 1912 and incorporated in 1929, we are a community that has grown from a small, agricultural town into a city with major employers including PepsiCo. and Sysco Food Systems. Through our focus on quality economic development, we have emerged as a community that provides a great environment for residents to thrive and raise their families while providing the opportunity for them to work within the same community and earn livable wage. Our vision is to retain the foundation of our family oriented, friendly, small town atmosphere while supporting a positive, diverse growth environment that maintains and enriches the quality of life for everyone – and the Nation's proposed economic development project on its West Valley trust land is a vital aspect of the regional growth and development we seek.

The Nation has met with us regularly – since 2009 – and has engaged our community and many other West Valley interests in productive dialogue about this project. Our City management has conducted site visits to the Nation's existing facilities to better understand how they operate and what type of public safety and infrastructure collaboration is necessary. We are very satisfied with the quality of the Nation's developments and the commitment of the Nation to continue to work with us – as they have demonstrated over decades of being good neighbors to Tucson and Sahuarita in Southern Arizona. We also are also excited about having a four star resort and casino in the West Valley where this type of development has lagged behind the more affluent East Valley. The entertainment and lodging amenities that the West Valley Resort will provide are absolutely needed and we welcome the project with open arms.

For these and many other reasons, which begin and end with the need for the United States to keep rather than go back on its word, my community strongly urges you to oppose H.R. 1410.

Sincerely,

Adolfo F. Gámez, Mayor
City of Tolleson

The Hon. John McCain
United States Senate
241 Russell Senate Office Building
Washington, D.C. 20510

The Hon. Jeff Flake
United States Senate
368 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators McCain and Flake:

On behalf of our cities, Glendale and Peoria, we greatly appreciate the personal time Senator McCain gave us on short notice on July 22. The personal insights shared on your history in the military and in public office were, without a doubt, the highlight of our trip. We also appreciate the candor you provided on the Tohono O'odham Nation's efforts to build a resort and casino on land that was recently taken into trust as reservation land near our cities.

Senator Flake, we also appreciated that your staff made time to see us, and we hope that you will give us an opportunity to meet with you in person in the near future before you finalize your views on H.R. 1410.

Obviously an enormous amount of ugly rhetoric has been thrown around about the Tohono O'odham Nation's efforts to engage in economic development on its West Valley reservation. But our cities believe that the rule of law, rather than the rhetoric, must guide the path forward. Whether or not the Nation should be allowed to engage in economic development on its land is a question that already has been decided by impartial federal courts.

Interests from outside the West Valley ask Congress to ignore the plain language of the applicable federal statutes, the plain language of the tribal-state gaming compact, and the plain language of multiple federal court decisions confirming the meaning of those laws and the compact. Relying on publicity stunts and contortions of the law that are unsupported by the federal court decisions, two East Valley tribes have spent a dizzying amount of money (one East Valley tribe alone has spent almost $2 million in the first half of 2014) to try to convince Congress to ignore the federal courts and ignore the plain meaning of the law – and to ignore the dire economic development needs of our cities in the West Valley.

Our cities have invested a great deal of time and resources on this issue and our constituents have been waiting patiently for these jobs for more than five years. As we discussed in our meeting with Senator McCain, and as we explained to Senator Flake's staff, for our cities it all comes down to the fact that we desperately need new job creation and new economic opportunity for our communities -- the same economic development that has so benefitted our friends in East Valley cities for more than two decades.

Let us be absolutely clear on one point: *we would not ask for your support on this issue if we had any doubts about the Tohono O'odham Nation's good faith and honesty in these matters.* Quite the contrary, we have watched as the issue has been litigated over and over in exhaustive proceedings before the Department of the Interior and the United States courts, and have seen the Nation vindicated time and time again. Everything the Nation has been telling us for more than five years has turned out to be true. We cannot say the same for everything we have been told by the Nation's opposition.

Senator McCain, we appreciated your call for dialogue among the communities impacted by the Nation's economic development project, tribal and non-tribal, to address the complexities surrounding this issue. We would be pleased to meet with our friends in the East Valley to discuss their concerns, and through conversation with many of these officials we understand that the feeling is mutual. We would welcome any role your offices could play in that dialogue. We are fully committed to addressing the East Valley's concern that there could be a proliferation of gaming in the East Valley.

That being said, please understand that while we are happy to address our East Valley colleague's concerns about the East Valley, in the meantime our cities in the West Valley can wait no longer for the long-delayed economic development in the West Valley. We have urged the Tohono O'odham Nation to begin construction as soon as possible so that we can get these jobs created *now. For these reasons, we urge that whatever action Congress may take to address the concerns of the East Valley, that Congress avoid taking any action that would kill off immediate job creation in the West Valley.*

We would be most grateful if you could find time in which we could meet with both of you while you are in Arizona during the August recess. We would like to have the opportunity to lay out the job numbers and economic development impact which the project will have in our community so that you have a better sense of its vital importance to us.

Thank you for your consideration of our views and our request for a meeting during the August recess. Senator McCain thank you again for the guidance you have provided throughout this process, and for the delightful hospitality you provided during our recent trip.

Please feel free to contact us if you have any questions.

Sincerely,

Robert Barrett Mayor City of Peoria	Gary Sherwood Councilmember, Sahuaro District City of Glendale	Sammy Chavira Councilmember, Yucca District City of Glendale

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. KEVIN WASHBURN

Question 1. How many fee-to-trust applications for gaming purposes are currently pending review by the Department?

Answer. As of November 7, 2014, there are 19 fee-to-trust applications for gaming purposes under review by the Department. Six of these applications are under review by the Office of Indian Gaming, with the rest under review by the BIA regional offices.

Question 1a. Have any of these applications been pending for more than a year without initiation of NEPA review? If so, why has the Department not initiated formal review of these applications?

Answer. Of the 19 pending applications, only the Coquille Indian Tribe has a pending application to acquire land in trust for which the NEPA review process has not been initiated. The draft Notice of Intent to prepare an Environmental Impact Statement is currently under review by the Department.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN MCCAIN TO HON. KEVIN WASHBURN

As you are aware, the Indian Gaming Regulatory Act (IGRA) generally prohibits gaming on lands acquired in trust after October 17, 1988, subject to several exceptions. One exception, known as the "Secretarial Determination" or "two-part determination," permits a tribe to conduct gaming on lands acquired in trust after 1988 where the Secretary determines: 1) that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and 2) that gaming on the newly acquired lands would not be detrimental to the surrounding

community. See 25 U.S.C. § 2719(b)(1)(A) and 25 C.F.R. § 292.13. The Department of the Interior has limited the definition of a surrounding community to include only those cities, towns, counties and Indian tribes within 25 miles of the proposed casino. 25 C.F.R. § 292.2.

Concerns have been raised by impacted surrounding communities that the BIA does not adequately consider the impact that new off-reservation casinos will have to their communities.

In light of the above, please inform the Committee as to:

Question 1. Whether any of the gaming applications under 25 U.S.C. § 2719(b)(1)(A) and/or 25 C.F.R. § 292.13 have been denied since 1988 because the gaming on the newly acquired land would be detrimental to the surrounding community;

Answer. Since 1988, one application has been denied because gaming on the newly acquired land would be detrimental to the surrounding community (a joint application for Hudson, Wisconsin, submitted by the Sokaogon Chippewa Community, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, and the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin). In that case, our decision was vacated under a court-approved settlement agreement and the application was revised by the tribes. The Secretary eventually issued a favorable two-part determination, but the governor refused to concur, which is required under a two-part determination, with the Secretary's decision.

Since the regulations, 25 C.F.R. § 292, became effective in August of 2008, no applications have been denied on this basis because applicant tribes have typically applied only after securing the support of local governments through a referendum, or an inter-governmental agreement to mitigate detrimental impacts, or both.

Question 2. What factors does Interior analyze when considering whether gaming on newly acquired land would be detrimental to the surrounding community?

Answer. The Department of the Interior considers the following factors when considering whether gaming on newly acquired land would be detrimental to the surrounding community:

- Information regarding environmental impacts, and plans for mitigating adverse impacts including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA).
- The anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community.
- The anticipated impacts on the economic development, income, and employment of the surrounding community.
- The anticipated costs of impacts to surrounding community and identification of sources of revenue to mitigate them.
- The anticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment.
- If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land.

Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments

Question 3. Since 1988, which lands taken into trust by the Interior are not for gaming purposes but were subsequently used for gaming purposes?

Answer. Since 1988, the Department has taken land into trust for tribes across the country. Section 20 of IGRA, 25 U.S.C. § 2719, establishes criteria regarding whether gaming may occur on lands acquired in trust after 1988. For example, land acquired in trust after 1988 that is within, or contiguous to, the boundaries of an Indian reservation is eligible for gaming. 25 U.S.C. § 2719 (a)(1). Similarly, lands taken into trust in Oklahoma and within the boundaries of a tribe's former reservation are eligible for gaming. 25 U.S.C. § 2719 (a)(2)(A). It is possible that trust lands within a reservation or a former reservation in Oklahoma were taken into trust after 1988 for purposes other than gaming but were subsequently used for gaming purposes.

Off-reservation lands taken into trust after 1988 would also need to comply with IGRA before such lands could be used for gaming. For example, the Keweenaw Bay Indian Community in Michigan acquired land in trust after 1988 for purposes other than gaming. Before the Keweenaw Bay Indian Community conducted gaming on

the parcel, it submitted a gaming application under IGRA's "two-part determination" exception to conduct gaming on those lands

The Department does not track how tribes use trust land unless and until Federal action is requested concerning the use of the land. The National Indian Gaming Commission (NIGC) may have additional information about other instances due to its regulatory authority over Indian gaming.

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