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SAFEGUARDING THE INTEGRITY OF INDIAN GAMING

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JULY 22, 2015

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SAFEGUARDING THE INTEGRITY OF INDIAN GAMING

WEDNESDAY, JULY 22, 2015

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

The Committee met, pursuant to notice, at 2:15 p.m. in room 216, Hart Senate Office Building, Hon. John Barrasso, Chairman of the Committee, presiding.

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

The CHAIRMAN. Good afternoon. I call to order the hearing.

Today the Committee will examine the status of Indian gaming regulation. It has been over 27 years since the enactment of the Indian Gaming Recovery Act. The industry has grown quickly. While once a \$3 billion a year industry in 1995, Indian gaming now hovers around \$28 billion a year. Money made from Indian gaming can have a significant impact on tribal communities. Revenues from Indian gaming often pay for schools, for roads, for health care and other governmental services that benefit tribal members.

To safeguard the integrity of that industry, in 2013 Senators Cantwell, McCain, Tester and I requested the Government Accountability Office review Indian gaming regulation. The Committee received testimony regarding the preliminary findings of the Government Accountability Office during our hearing on July 23rd of 2014. The final report was issued June 3rd of 2015. The report states that the Commission is not effectively promoting voluntary compliance with Federal guidelines related to gaming regulatory standards.

Furthermore, the report indicates that the current performance measures for training and technical assistance are not outcome-oriented. In fact, some of those measures do not even comply with the Office of Management and Budget guidance to agencies for measuring progress toward achieving intended results.

Also troubling is that there is only one member of the Commission, the Chairman, Chairman Chaudhuri. Congress established a three-member Commission under the Indian Gaming Act. The Chairman has two associate members. Without the full membership, it is questionable how effectively the Commission may fulfill its statutory duties, such as adopting regulations, collecting civil fines, establishing rate fees and addressing temporary orders closing a gaming facility.

Earlier this week, Senator McCain and I sent a letter to the Secretary of Interior, Secretary Jewel, urging her to appropriately and expeditiously appoint those remaining Commission members. With such much at stake, we need to fully ensure that the integrity of Indian gaming remains strong for future generations.

Before we hear from the witnesses, I want to turn to Senator Tester for an opening statement.

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

Senator TESTER. Thank you, Mr. Chairman. I am going to apologize, I have to depart. We have a stacked hearing today and there are some other bills I have up in another hearing that I have to get to.

I do want to welcome Jonodev back to the Committee, and Anne-Marie Fennell, thank you for being here. Jamie Hummingbird, David Trujillo and Ernest Stevens, thank you all for being here today.

Indian gaming is very, very important in Indian Country. This is a very important issue. The hearing room we are having this in isn't our regular hearing room, because there are a lot more people who show up for these. Why? Because it is important for Indian Country. And it is important that we know what is going on in Indian Country. It is important we empower folks like Jonodev to do their job and tribes also.

So although I won't be here to hear your testimony, I will read your testimony. We will be presenting questions for the record, written questions. I want to thank you all again for being here. This is a very important hearing. Thank you.

Senator CANTWELL. Mr. Chairman, my colleague Senator Heitkamp and I were in the anteroom as you were finishing the markup. Can we be counted as present?

The CHAIRMAN. Absolutely. Would you like to make opening statements regarding this, either Senator Heitkamp or Senator Cantwell?

Senator CANTWELL. No, thank you.

The CHAIRMAN. Thank you.

We will now hear from our witnesses. We can start with the Honorable Jonodev Chaudhuri, Chairman of the National Indian Gaming Commission. Welcome back to the Committee.

**STATEMENT OF HON. JONODEV OSCEOLA CHAUDHURI,
CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION**

Mr. CHAUDHURI. Thank you, Chairman.

Chairman Barrasso, Vice Chairman Tester, and members of the Committee, good afternoon, Henci. Thank you for the opportunity to share the National Indian Gaming Commission's perspective on safeguarding the integrity of Indian gaming.

I am honored to appear before you today in my new role as the newly-confirmed chairman of the National Indian Gaming Commission. I thank you for your support in that regard.

Sound regulation as contemplated by the Indian Gaming Regulatory Act is critical to both the stability and integrity of Indian gaming. Sound regulation preserves public confidence, supports

tribal self-sufficiency and self-determination, protects tribal assets and promotes a safe and fair environment for all people who interact with the industry.

Tomorrow we will have finalized the 2014 Indian gross gaming revenue numbers. We will announce those numbers in detail during a public press call that we hold annually. As a preview, those numbers will indicate a fifth consecutive year of modest but stable growth in the industry.

Similarly, the Government Accountability Office's recent report reflected the overall health of the Indian gaming industry and the fact that IGRA's three-tiered regulatory structure has protected its integrity overall. We at the NIGC are mindful of the importance of sound regulation to the predictability and stability of the industry. We are proud of the role that we have played in conjunction with our regulatory partners to help bring the industry to the impactful place that it is today.

We recognize that any regulatory structure can always be refined and strengthened. To this end, we at the NIGC very much appreciated the report's technical recommendations. Certainly in my role as the newly-confirmed chairman, I am focused on looking forward to building on our commitment to sound regulation by making improvements where appropriate while not discarding things that work.

In terms of things that work, I believe the bedrock of our success is and must continue to be intelligent and respectful coordination with tribes who, under the law, must remain the primary beneficiaries of Indian gaming, and tribal regulators, who are, under the law, the primary day to day regulators of the industry. With that in mind, we view the GAO report and its recommendations as a helpful tool that we will use in our ongoing efforts to refine our work.

To me, the striking aspect of the report is not in any of the areas it flagged for potential improvement, but instead, the extent to which it is consistent with the priorities and principles we began implementing well before the report.

During my confirmation proceedings, I outlined specific agency priorities that are well-targeted to advancing the sound regulation of Indian gaming. Just to recap, they include active performance of oversight duties, engaging in our ongoing commitment to training, technical assistance and meaningful tribal consultation, staying ahead of the technology curve, supporting a strong regulatory workforce both in-house and among our partners, and strengthening dialogue and relationships with all relevant stakeholders.

To implement these priorities, the NIGC is focusing on the following specific guiding principles. Act with appropriate agency authority to address and mitigate any activity that jeopardizes the integrity of Indian gaming and by extension, the important and valuable self-determination tool that it represents. Swiftly act on anything that jeopardizes the health and safety of the public at gaming establishments, including employees and patrons. Engage in sound regulation without unnecessarily stymying the entrepreneurial spirit of tribes. And finally, protect against anything that amounts to gamesmanship on the backs of tribes.

Application of these priorities and principles in areas such as our efforts to ramp up our technological capabilities and do more to ensure that tribes are the primary beneficiaries of their operations has already seen positive results and has taken the agency beyond the GAO's recommendations. Maintaining positive relationships with our regulating partners, especially front line tribal regulators, is not only a matter of good policy and consistent with executive orders, it is also a matter of good fiscal management.

We do this through open and frank dialogue, meaningful and active consultation and by the delivery of quality training and technical assistance. We were pleased that the report recognized the importance of strong relationships between the NIGC, tribes and States. As the report details, tribes dedicated \$422 million to the regulation of Indian gaming and thousands of regulators. While it is true that the report referenced certain high-risk assessments, even those numbers, when looked at closely and in context, represent a positive trend in overall industry risks.

There are countless success stories in Indian Country of ways in which tribal nations have used gaming revenue to provide employment opportunities for themselves and surrounding communities, strengthened their governments, improved their infrastructure, invested in education, health care and culture and language preservation and provided much-needed social services to their people. The NIGC was pleased that the GAO generally highlighted the ways tribes have used gaming revenue to safeguard their people's future and pursue self-determination.

I believe that the efforts we are pursuing with our priorities and principles, drawn directly from IGRA and consistent with the GAO's recommendations, will continue to enhance the regulation of the industry. I look forward to their continuing implementation.

Thank you for your time today. I am happy to answer any questions you may have for me.

[The prepared statement of Mr. Chaudhuri follows:]

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

Chairman Barraso, Vice Chairman Tester, and members of the committee, good afternoon, and thank you for the opportunity to appear before you today to share my perspective on safeguarding the integrity of Indian gaming.

The National Indian Gaming Commission (NIGC) is firmly committed to fulfilling its responsibilities under the Indian Gaming Regulatory Act (IGRA) to ensure not only the integrity of Indian gaming is protected, but that tribes remain the primary beneficiaries of their gaming operations.

Over the course of eighteen months, the NIGC worked closely with the General Accounting Office (GAO) in its efforts to provide an overview of the Indian gaming industry. We are grateful for the GAO's report titled *Indian Gaming: Regulation and oversight by the Federal Government, States, and Tribes* and generally agree with its findings. I view the report as a tool the agency will use to refine its procedures to more fully address regulatory priorities while adhering to certain principles.

During my confirmation proceedings, I outlined specific agency priorities that are well-targeted to advancing the sound regulation of Indian gaming. These priorities include:

- 1) Active performance of regulatory duties;
- 2) Engaging in ongoing meaningful tribal consultation;
- 3) Staying ahead of the technology curve;
- 4) Supporting a strong workforce both in-house and among our regulatory partners; and

5) Strengthening dialogue and relationships with all relevant stakeholders.

To implement these priorities, NIGC is focusing on the following specific guiding principles to administer our statutory responsibilities:

- a. Act within appropriate agency authority to address and mitigate activity that jeopardizes the integrity of Indian gaming and, by extension, the valuable self-determination tool that it represents;
- b. Swiftly act on anything that jeopardizes the health and safety of the public at gaming establishments, including employees and patrons;
- c. Engage in sound regulation without unnecessarily stymieing lawful economic development activities; and
- d. Protect against anything that amounts to gamesmanship on the backs of tribes.

Application of these priorities and principles has already seen positive results and is taking the agency beyond the GAO's recommendations.

Consistent in these priorities and principles is the recognition of the value and efficiency of leveraging our relationships with our regulatory partners to meet our shared goal of compliance with IGRA. We recognize that in addition to being a matter of good policy and consistency with executive orders, it is also a matter of agency economy and good fiscal management to maintain positive relationships with our regulatory partners. We do this through open and frank dialogue, meaningful and active consultation, and by the delivery of quality training and technical assistance.

We were pleased that the report recognized the important and strong relationships between the NIGC, tribes, and states. As the report details, tribes dedicated \$422 million to the regulation of the Indian gaming industry in 2013. This includes the costs tribes bear for federal and state regulation of their gaming activity. The resources devoted to effective regulation, especially the thousands of tribal regulators, are a testament to the importance of gaming to tribal economic development and self-determination.

Sound regulation preserves public confidence, supports tribal self-sufficiency and self-determination, protects tribal assets, and promotes a safe and fair environment for all people who interact with the industry. We recognize there are still opportunities for improvement as we continue to advance the goals of IGRA, but it is appropriate to highlight the work we have done to address the GAO's recommendations.

The GAO recommended that in order to make an informed decision, the NIGC should seek input from states on its proposal to draft updated guidance on class III minimum internal control standards and withdraw its 2005 regulations. It has always been our intent to seek guidance from all of the parties involved in the regulation of Indian gaming. To assist in this goal, the NIGC added a new position: Legislative and Intergovernmental Affairs Coordinator. This addition to our staff will strengthen our communications and outreach efforts to all stakeholders.

Earlier this year, the NIGC invited tribal leaders to participate in consultations on the issuance of guidance on class III minimum internal control standards that regulators may use in developing their own class III internal controls. The purpose of these consultations was to receive tribal views on the process to be used by the NIGC in providing guidance on class III minimum internal control standards. These discussions did not involve any substantive discussions of individual controls. For example, during the consultations, tribes expressed concern over the withdrawal of the 2005 regulations and the possible void that may be left for tribes whose compacts reference or incorporate those standards. These types of issues must be addressed before we undertake drafting substantive guidance.

The NIGC recognizes and respects the sovereignty of Indian tribes and the government-to-government relationship that exists between the United States and tribal governments. The Commission is committed to implementing the President's November 5, 2009 Executive Memorandum on Tribal Consultation with Indian tribes and Executive Order 13175. This is why it is so important for the NIGC to reach out to tribes before it takes any substantive action. Once the process to be used is determined by the NIGC, it will then begin work on substantive internal control guidance.

Once drafted, the guidance will be published for comments from industry stakeholders including states. I am mindful of the fact that class III gaming is framed by the terms of compacts negotiated between tribes and states. The NIGC does not want to interfere or hinder compact negotiations or the relationships between tribes and states.

The GAO also recommended that to improve its ability to assess the effectiveness of its training and technical assistance efforts, the NIGC should review and revise, as needed, its performance measures to include additional outcome-oriented meas-

ures. The NIGC began efforts to assess the effectiveness of its training and technical assistance efforts during GAO's review. To assist in these assessments, and to contribute to the overall performance of the agency, the NIGC has established a Division of Technology. Among its responsibilities will be to capture, track, and analyze data from all of our compliance efforts.

Congress, through IGRA, mandated that the NIGC provide tribes with training and technical assistance. Our focus has been to incorporate this Congressional mandate into overall compliance efforts rather than something that is done simply as a service. The NIGC is committed to measuring the efficacy of its training and technical assistance and making adjustments, where necessary. The NIGC is actively working to develop outcome-focused assessments of its effectiveness. In recognition of the value of accurate performance measurements to continued improvement of operational management, the NIGC has actively explored a variety of tools to measure the effectiveness of the initiative.

One of the tools it has been using is an analysis of data contained in Agreed Upon Procedures (AUP) reports that tribes are required to submit to the Agency. A comparison of AUP findings from before the NIGC began emphasizing training and technical assistance with findings after implementation of this approach show a 34 percent decline in high risk findings and a 36 percent decline in overall findings. The Agency is mindful, however, of narrow reliance on any one data source in assessing its ongoing training and technical assistance. In addition to a review of data collected by existing means, the NIGC has recently developed additional tools to track its operations. These include voluntary internal control assessments and IT threat assessments.

Further, the NIGC is considering developing knowledge reviews that will be conducted during training sessions. The report recommends that the NIGC apply the recommendations found in the GAO report titled *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*, GAO-04-546G (Washington, D.C.: March 2004). The NIGC is currently reviewing this report to ascertain whether it is practical to track and apply individual training results to improvements in IGRA compliance. The NIGC anticipates coordinating the development of performance measures with the regulated industry.

Finally, the GAO recommended, to help ensure letters of concern are more consistently prepared and responses tracked, that the NIGC develop documented procedures and guidance to (1) clearly identify letters of concern as such and to specify the type of information to be contained in them, such as time periods for a response; and (2) maintain and track tribes' responses to the NIGC on potential compliance issues. Since the NIGC began utilizing letters of concern it has been examining and refining their use.

The NIGC's regulations related to letters of concern were first promulgated on August 9, 2012, and established a system of graduated enforcement. The NIGC recognized that there was a lack of clarity in these letters and that action timetables were needed. A standardized format for these letters has been developed that include deadlines for tribes. Further, the NIGC is refining its procedures for tracking responses to these letters.

The NIGC was pleased that the GAO report highlighted many of the success stories in Indian gaming; including the manifold ways tribes have used gaming revenue to safeguard their peoples' futures and pursue self-determination. We were also pleased that the report's technical recommendations were consistent with many of the positive efforts we have actively pursued in recent months to support tribal economic development by strengthening the regulatory structure of the Indian gaming industry. I believe that all of the NIGC's responses to the issues raised by the GAO will only enhance the regulation of the industry and I look forward to their continuing implementation.

Thank you for your time today. I am happy to answer any questions you may have.

The CHAIRMAN. Thank you very much, Mr. Chairman. We appreciate your comments.

Next I would like to call on Anne-Marie Fennell, the Director of Natural Resources and Environment, Government Accountability Office. Thank you for joining us.

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

Ms. FENNELL. Thank you. Mr. Chairman, Vice Chairman Tester and members of the Committee, I am pleased to be here today to discuss our June 2015 report on the Regulation and Oversight of Indian Gaming.

Over the past 25 years, Indian gaming has grown and now includes more than 400 gaming operations in 28 States with revenues totaling \$28 billion in fiscal year 2013. IGRA was enacted in 1988 to provide a statutory basis for the regulation of gaming on Indian lands.

My testimony today highlights the key findings from our June 2015 report. Specifically, I will discuss (1) Interior's review process to help ensure the tribal-State compacts comply with IGRA; (2) how States and selected tribes regulate Indian gaming; (3) the Commission's authority to regulate Indian gaming; and (4) the Commission's efforts to ensure tribes' compliance with IGRA and its regulations.

First, we found that Interior uses a multi-step review process to help ensure that tribal-State compacts comply with IGRA. From 1998 through 2014, Interior reviewed and approved most of the 516 compacts the States and tribes submitted.

Second, the roles of States and tribes in regulating Indian gaming are established in compacts for Class III gaming and tribal gaming ordinances for Class II and III gaming. For States, we found that the regulatory roles vary among the 24 States that had Class III gaming, ranging from active monitoring to limited monitoring. For the 12 tribes we visited, each had established regulatory agencies responsible for day to day operations.

Third, we found that IGRA authorizes the Commission to issue and enforce minimum internal control standards for Class II gaming, but not for Class III gaming. The Commission proposes issuing guidance with updated standards for Class III gaming to be voluntarily used by the tribes and has consulted with the tribes on this.

However, we found that the Commission does not have a clear plan for conducting outreach to affected States. Along with tribes, States' input could aid the Commission in making an informed decision. We recommended that the Commission obtain input from the States and the Commission agreed.

Fourth, we found that the Commission helps ensure the tribes comply with IGRA through various activities, including reviewing independent audit reports. Under the ACE initiative implemented in 2011, the Commission has emphasized working collaboratively with tribes to encourage voluntary compliance with IGRA. The Commission chair may also take enforcement actions when violations occur, and has taken a small number of actions in recent years.

As part of the ACE initiative, the Commission uses several approaches, including providing training and technical assistance and sending letters of concern to help tribes voluntarily comply with IGRA. However, the effectiveness of these two approaches is unclear.

We found that the Commission had a limited number of performance measures that assess outcomes achieved from its training and technical assistance efforts. We recommended that the Commission review and revise its performance measures to better assess these efforts. The Commission agreed.

We also found that the Commission does not have documented procedures consistent with Federal internal control standards about how to complete or track letters of concerns to help ensure tribal actions to address identified potential compliance issues. We recommended that the Commission develop procedures to help ensure the consistency and the effectiveness of the letters sent to tribes. The Commission agreed.

In conclusion, Indian gaming has grown and evolved since the enactment of IGRA. Our recommendations are intended to help the Commission make informed decisions and improve efforts to help ensure the integrity of the Indian gaming industry.

Mr. Chairman, Vice Chairman Tester and members of the Committee, this concludes my prepared statement. I am happy to respond to any questions.

[The prepared statement of Ms. Fennell follows:]

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

INDIAN GAMING—Regulation and Oversight by the Federal Government, States, and Tribes

Why GAO Did This Study

Over the past 25 years, Indian gaming has become a significant source of revenue for many tribes, reaching \$28 billion in fiscal year 2013. IGRA, the primary federal statute governing Indian gaming, provides a statutory basis for the regulation of Indian gaming. Tribes, states, Interior, and the Commission have varying roles in Indian gaming.

This testimony highlights the key findings of GAO's June 2015 report (GAO-15-355). Accordingly, it addresses (1) Interior's review process to help ensure that tribal-state compacts comply with IGRA; (2) how states and selected tribes regulate Indian gaming; (3) the Commission's authority to regulate Indian gaming; and (4) the Commission's efforts to ensure tribes' compliance with IGRA and Commission regulations. For the June 2015 report, GAO analyzed compacts and Commission data on training, compliance, and enforcement; and interviewed officials from Interior, the Commission, states with Indian gaming, and 12 tribes in six states GAO visited based on geography and gaming revenues generated.

What GAO Recommends

In its June 2015 report, GAO recommended that the Commission: (1) obtain input from states on its plans to issue guidance on class III minimum internal control standards; (2) review and revise, as needed, its performance measures to better assess its training and technical assistance efforts; and (3) develop documented procedures and guidance to improve the use of letters of concern. The Commission generally agreed with GAO's recommendations.

What GAO Found

In its June 2015 report, GAO found that the Department of the Interior (Interior) has a multistep review process to help ensure that compacts—agreements between a tribe and state that govern the conduct of the tribe's class III (or casino) gaming—comply with the Indian Gaming Regulatory Act (IGRA). From 1998 through fiscal year 2014, Interior approved 78 percent of compacts; Interior did not act to approve or disapprove 12 percent; and the other 10 percent were disapproved, withdrawn, or returned.

GAO also found that states and selected tribes regulate Indian gaming in accordance with their roles and responsibilities established in tribal-state compacts for class III gaming, and tribal gaming ordinances, which provide the general framework for day-to-day regulation of class II (or bingo) and class III gaming. In addi-

tion, the 24 states with class III Indian gaming operations vary in their approaches for regulating Indian gaming, from active (e.g., daily or weekly on-site monitoring) to limited (e.g., no regular monitoring). Further, all 12 selected tribes GAO visited had regulatory agencies responsible for the day-to-day operation of their gaming operations.

In GAO's June 2015 report, GAO found that the National Indian Gaming Commission (Commission)-an independent agency within Interior created by IGRA-has authority to regulate class II gaming, but not class III gaming, by issuing and enforcing gaming standards. The Commission is considering issuing guidance with class III standards that may be used voluntarily by tribes and has held consultation meetings to obtain tribal input. However, in June 2015, GAO found the Commission does not have a clear plan for conducting outreach to affected states on its proposal. Federal internal control standards call for managers to obtain information from external stakeholders that may have a significant impact on the agency achieving its goals. Along with tribes, state input could aid the Commission in making an informed decision.

Even with differences in its authority for class II and class III gaming, GAO found that the Commission helps ensure that tribes comply with IGRA and applicable federal and tribal regulations through various activities, including monitoring gaming operations during site visits to Indian gaming operations and Commission-led audits. In addition, since 2011, the Commission has emphasized efforts that encourage voluntary compliance with regulations, including providing training and technical assistance and alerting tribes of potential compliance issues using letters of concern. However, the effectiveness of these two approaches is unclear. GAO found in June 2015 that the Commission had a limited number of performance measures that assess outcomes achieved. With such additional measures, the Commission would be better positioned to assess the effectiveness of its training and technical assistance. Further, GAO found the Commission does not have documented procedures, consistent with federal internal control standards, about how to complete or track letters of concern to help ensure their effectiveness in encouraging tribal actions to address identified potential compliance issues. Without documented procedures, the Commission cannot ensure consistency or effectiveness of the letters it sends.

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

I am pleased to be here today to discuss our June 2015 report on the regulation and oversight of Indian gaming.¹ Over the past 25 years, Indian gaming has become a significant source of revenue for many tribes. In fiscal year 2013, the Indian gaming industry included more than 400 gaming operations in 28 states and generated revenues totaling \$28 billion. The Indian Gaming Regulatory Act (IGRA) was enacted in 1988 to provide a statutory basis for the regulation of gaming on Indian lands.² IGRA established three classes of gaming and outlined regulatory responsibilities for tribes, states, and the Federal Government. Class I gaming consists of social games played solely for prizes of minimal value and traditional gaming played in connection with tribal ceremonies or celebrations. Class I 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. Both tribes and the Federal Government have a role in class II and class III gaming. Class III gaming is also subject to state regulation to the extent specified in compacts between tribes and states that allow such gaming to occur. Compacts are agreements between a 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) within the Department of the Interior (Interior) to regulate class II and oversee class III Indian gaming.

My testimony today highlights the key findings of our June 2015 report on Indian gaming.³ Specifically, I will discuss (1) the review process that Interior uses to help ensure that tribal-state compacts comply with IGRA; (2) how states and selected tribes regulate Indian gaming; (3) the Commission's authority to regulate Indian gaming; and (4) the Commission's efforts to ensure tribes' compliance with IGRA and Commission regulations.

¹GAO, *Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes*, GAO-15-355 (Washington, D.C.: June 3, 2015).

²Pub. L. No. 100-497, 102 Stat. 2467 (1988).

³GAO-15-355.

For our June 2015 report,⁴ we examined IGRA and relevant federal regulations and policies, including Interior regulations and documentation on its compact review process, as well as Commission regulations, policies, and guidance on its regulation of Indian gaming. We also analyzed tribal-state compacts in effect through fiscal year 2014 and various Commission data corresponding to the Commission's oversight activities for fiscal years 2005 and 2014 to the extent these data were available and reliable based on their sources.⁵ For example, for fiscal years 2011 to 2014, we analyzed Commission data on site visits and reviewed documentation related to a random, nongeneralizable sample of 50 site visits to Indian gaming operations; for fiscal years 2005 to 2014, we analyzed publicly available information on enforcement actions taken by the Commission Chair. We also interviewed Interior and Commission officials about their roles in regulating and overseeing Indian gaming. To determine how states and selected tribes regulate Indian gaming, we contacted all 24 states that have class III gaming operations.⁶ We collected written responses, conducted interviews, and obtained additional information about how each state oversees Indian gaming, including information on each state's regulatory organizations, staffing, funding, and expenditures, as well as the types of monitoring and enforcement activities conducted by state agencies.⁷ We visited six states—Arizona, California, Michigan, New York, Oklahoma, and Washington—selected for geographic representation and having the most gaming revenues generated.⁸ For each of the six states, we met with at least one federally recognized Indian tribe,⁹ interviewing officials from 12 tribes willing and available to meet with us.¹⁰ In addition, we contacted 10 tribal gaming associations including the National Indian Gaming Association and the National Tribal Gaming Commissioners/Regulators, to obtain additional information on tribal perspectives on Indian gaming. See our June 2015 report for additional details of the methods used to conduct our work.¹¹

The work on which this testimony is based was performed 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 obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Interior Uses a Multistep Review Process to Help Ensure that Tribal-State Compacts Comply with IGRA and Has Approved Most Compacts

In our June 2015 report,¹² we found that Interior uses a multistep review process to help ensure that tribal-state compacts, and any compact amendments, comply with IGRA, other federal laws not related to jurisdiction over gaming on Indian lands, and the trust obligation of the United States to Indians.¹³ Interior's Office of Indian Gaming is the lead agency responsible for managing the multistep process

⁴GAO-15-355.

⁵To assess the reliability of these data, we interviewed Commission officials and reviewed documentation on the Commission's data system. We found the data to be sufficiently reliable for our purposes.

⁶Twenty-four states have Indian gaming operations with both class II and class III gaming, and 4 states have Indian gaming operations with class II gaming only.

⁷We obtained information from representatives of all state agencies with class III gaming except for the state of New Mexico; its representative declined participation in an interview with us. Information about New Mexico's involvement with class III gaming regulation was found in publicly available reports from the New Mexico Gaming Control Board and the New Mexico Legislative Finance Committee.

⁸Collectively, the six states we visited (Arizona, California, Michigan, New York, Oklahoma, and Washington) accounted for about 60 percent of all Indian gaming operations and Indian gaming revenue generated in 2013.

⁹Federally recognized tribes are 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. IGRA authorizes only federally recognized tribes to conduct gaming activities.

¹⁰Tribes we interviewed regarding their approaches to regulating gaming were: Chickasaw Nation, Oklahoma; Confederated Tribes of the Chehalis Reservation; Muscogee (Creek) Nation; Oneida Indian Nation of New York; Pokagon Band of Potawatomi Indians of Michigan; Puyallup Tribe of the Puyallup Reservation; Salt River Pima Maricopa Indian Community; Shingle Springs Band of Miwok Indians; Squaxin Island Tribe; Tulalip Tribes of the Tulalip Reservation; United Auburn Indian Community of Auburn Rancheria; and Yocha DeHe Wintun Nation, California. We also spoke to representatives of six additional tribes—Colorado River Indian Tribes, Gila River Indian Community, San Carlos Apache Reservation, Tohono O'odham Nation, White Mountain Apache Tribe, and Yavapai-Apache Nation—as part of an initial scoping visit in Arizona to learn more about Indian gaming and tribal perspectives generally.

¹¹GAO-15-355.

¹²GAO-15-355.

¹³The Federal Government has a fiduciary trust relationship to federally recognized Indian tribes and their members.

for reviewing compacts submitted by tribes and states.¹⁴ The Office of Indian Gaming coordinates its compact reviews with Interior's Office of the Solicitor. The Office of Indian Gaming submits a final analysis and recommendation regarding compact approval to the Assistant Secretary of Indian Affairs, who makes a final decision on whether to approve the compact. Interior has 45 days to approve or disapprove a compact once it receives a compact package from a state and tribe. Under IGRA, any compacts Interior does not approve or disapprove within 45 days of submission are considered to have been approved (referred to as deemed approved), but only to the extent they are consistent with IGRA.

From 1998 through fiscal year 2014, Interior reviewed and approved most of the 516 compacts and compact amendments that states and tribes submitted. Specifically, 78 percent (405) were approved; 12 percent (60) were deemed approved; 6 percent (32) were withdrawn or returned; and about 4 percent (19) were disapproved.

In the decision letters we reviewed for the few disapproved compacts (19 out of 516),¹⁵ the most common reason for disapproval was that compacts contained revenue sharing provisions Interior found to be inconsistent with IGRA.¹⁶ For example, Interior found the revenue sharing payment to the state in some compacts to be a tax, fee, charge, or assessment on the tribe, which is prohibited by IGRA. For one compact, Interior found the state's offer of support for the tribe's application to take land into trust did not provide a quantifiable economic benefit that justified the proposed revenue sharing payments. Consequently, Interior viewed the payment to the state as a tax or other assessment in violation of IGRA. Interior also disapproved compacts for other reasons, including that compacts were signed by unauthorized state or tribal officials, included lands to be used for gaming that were not Indian lands as defined by IGRA, or included provisions that were not directly related to gaming.

Interior did not approve or disapprove 60 of the 516 compacts submitted by tribes and states within the 45-day review period. As a result, these compacts were deemed approved to the extent that they are consistent with IGRA.¹⁷ According to Interior officials, as a general practice, the agency only sends a decision letter to the tribes and state for deemed approved compacts to provide guidance on any provisions that raised concerns or may have potentially violated IGRA.¹⁸ We reviewed the decision letters for 26 of the 60 deemed approved compacts.¹⁹ In 19 of the 26 letters we reviewed, Interior described concerns about the compact's revenue sharing provisions, and most of these letters also noted concerns about the inclusion of

¹⁴ Interior regulations require compacts and all compact amendments to be submitted for approval. The regulations specify that all compact amendments, regardless of whether they are substantive or technical, are to be submitted to Interior. 25 C.F.R. § 293.4(b). However, Interior does not review agreements concerning Indian gaming unless submitted by states and tribes. We identified several agreements and consent judgments between tribes and states regarding revenue sharing from Indian gaming operations that were not submitted to or reviewed by Interior. In these cases, the tribe and state did not consider the agreements to be compact amendments. Interior officials told us that, without examining the agreements, they could not determine whether they were compact amendments that needed to be submitted for review.

¹⁵ According to Interior officials, decision letters accompany all approved and disapproved compacts. Our discussion of the compacts disapproved by Interior is based on a review of 18 out of 19 decision letters that Interior was able to locate as of February 2015. One letter for a compact between the Coyote Valley Band of Pomo Indians and the state of California, submitted to Interior on June 1, 2004, was unavailable.

¹⁶ These revenue sharing provisions include various payment structures that may require, for example, tribes to pay states a fixed amount or a flat percentage of all gaming revenues or an increasing percentage as gaming revenues rise.

¹⁷ No court has issued a decision considering the extent to which a deemed approved compact is consistent with IGRA. Federal courts have generally dismissed lawsuits challenging deemed approved compacts because a necessary and indispensable party to the litigation—the state, tribe, or both—could not be joined to the lawsuit due to sovereign immunity. *Friends of Amador County v. Salazar*, 554 F. App'x 562 (9th Cir. 2014); *Kickapoo Tribe of Indians of the Kickapoo Reservation v. Kan. v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C. 1999); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995 (W.D. Wis. 2004), *aff'd on other grounds*, 422 F.3d 490 (7th Cir. 2005). Currently, a federal district court is hearing a challenge to a deemed approved compact that allegedly provides for class III gaming on non-Indian lands. *Amador County, Cal. v. Jewell*, 1:05-cv-658 (D.D.C.). Neither the relevant state nor the relevant tribe is a party to the suit.

¹⁸ One federal court expressed the view that the Secretary of the Interior was attempting to evade responsibility by allowing compacts to be deemed approved because he was aware that such an action would be practically unenforceable and unreviewable, leaving the tribes with no means of vindicating their rights under IGRA even though he considered the revenue sharing and regulatory fee provisions to be illegal. *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 56–57 (D.D.C. 1999).

¹⁹ Interior officials told us no decision letters were issued for the remaining 34 deemed approved compacts.

provisions not related to gaming. The remaining 7 letters we reviewed cited other concerns, such as ongoing litigation, that could affect the compact.

States and Selected Tribes Regulate Indian Gaming Based on Compacts and Tribal Ordinances, Depending on Gaming Class

As we found in our June 2015 report,²⁰ the roles of states and tribes in regulating Indian gaming are established in two key documents: (1) compacts for class III gaming and (2) tribal gaming ordinances for both class II and class III gaming. Compacts lay out the responsibilities of both tribes and states for regulating class III gaming. For example, compacts may include provisions allowing states to conduct inspections of gaming operations, certify employee licenses, review surveillance records, and impose assessments on tribes to defray the state's costs of regulating Indian gaming. Under IGRA, tribal gaming ordinances—which outline the general framework for tribes' regulation of class II and class III gaming—must be adopted by a tribe's governing body and approved by the Commission's Chair before a tribe can conduct class II or class III gaming, as required under IGRA.²¹ Tribal ordinances must contain certain required provisions that provide, among other things, that the tribe will have sole proprietary interest and responsibility for the conduct of gaming activity;²² that net gaming revenues will only be used for authorized purposes; and that annual independent audits of gaming operations will be provided to the Commission.

IGRA allows states and tribes to agree on how each party will regulate class III gaming, and we found that regulatory roles vary among the 24 states that have class III Indian gaming operations. We identified states as having either an active, moderate, or limited role to describe their approaches in regulating class III Indian gaming, primarily based on information states provided on the extent and frequency of their monitoring activities. Monitoring activities conducted by states ranged from basic, informal observation of gaming operations to testing of gaming machine computer functions and reviews of surveillance systems and financial records. We also considered state funding and staff resources allocated for regulation of Indian gaming, among other factors, in our identification of a state's role. Based on our analysis of states' written responses to questions and interviews with states we found the following:

- *Seven states have an active regulatory role:* Arizona, Connecticut, Kansas, Louisiana, New York, Oregon, and Wisconsin. These states monitor gaming operations at least weekly, with most having a daily on-site presence. Over 17 percent (71 of 406) of class III Indian gaming operations are located in these seven states, accounting for about 25 percent of gross gaming revenue in fiscal year 2013.²³ These states perform the majority of monitoring activities, including formal and informal inspection or observation of gaming operations; review of financial report(s); review of compliance with internal control systems; audit of gaming operation records; verification of gaming machines computer functions; review of gaming operator's surveillance; and observation of money counts.
- *Eleven states have a moderate regulatory role:* California, Florida, Iowa, Michigan, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Washington. Most of these states monitor operations at least annually, and all collect funds from tribes to support state regulatory activities. About 75 percent (303 of 406) of class III Indian gaming operations are located in these states and generated 69 percent of all gross Indian gaming revenue in fiscal year 2013. States with a moderate regulatory role have the broadest range of regulatory approaches. For example, according to Nevada officials, Nevada conducts comprehensive inspections of gaming operations once every 2 to 3 years and performs covert inspections, as needed, based on risk. In contrast, North Dakota officials told us they conduct monthly inspections of gaming operations and an annual review of financial reports.
- *Six states have a limited regulatory role:* Colorado, Idaho, Mississippi, Montana, North Carolina, and Wyoming. The role of these states is largely limited to negotiating compacts with tribes, and they do not incur substantial regulatory costs or regularly perform monitoring activities of class III Indian gaming oper-

²⁰ GAO-15-355.

²¹ Along with the ordinance, a tribe must also submit other documentation to the Commission Chair, including copies of all tribal gaming regulations.

²² However, IGRA authorizes tribes to adopt gaming ordinances that provide for the licensing or regulation of class II or class III gaming activities on Indian lands owned by others in certain circumstances. 25 U.S.C. § 2710(b)(4), (d)(2)(A).

²³ The gross gaming revenue percentage was calculated using both class II and class III gaming revenues.

ations. Eight percent (32 of 406) of class III Indian gaming operations are located in these states, and the operations accounted for about 4 percent of gross Indian gaming revenue in fiscal year 2013.

Tribes take on the primary day-to-day role of regulating Indian gaming. For example, each of the 12 tribes that we visited had established tribal gaming regulatory agencies that perform various regulatory functions to ensure that their gaming facilities are operated in accordance with tribal laws and regulations and, for class III operations, compacts.²⁴ The tribes' regulatory agencies were similar in their approaches to regulating their gaming operations. For example, all of the tribes' regulatory agencies had established procedures for developing licensing procedures for employees, obtaining annual independent outside audits, and establishing and monitoring gaming activities to ensure compliance with tribal laws and regulations. Among other things, representatives from tribal associations we contacted emphasized that tribal governments have worked diligently to develop regulatory systems to protect the integrity of Indian gaming and have dedicated significant resources to meet their regulatory responsibilities. For example, according to representatives of the National Indian Gaming Association, in 2013, tribal governments dedicated \$422 million to regulate Indian gaming, including funding for tribal government gaming regulatory agencies, state gaming regulation, and Commission regulation and oversight of Indian gaming collected through fees required by IGRA.²⁵

The Commission Has Limited Authority for Class III Gaming, but It Provides Some Services, as Requested, Using Standards Last Updated in 2006

In our June 2015 report,²⁶ a key difference we found between class II and class III gaming is that IGRA authorizes the Commission to issue and enforce minimum internal controls standards for class II gaming but not for class III gaming.²⁷ Commission regulations require tribes to establish and implement internal control standards for class II gaming activities—such as requirements for surveillance and handling money—that provide a level of control that equals or exceeds the Commission's minimum internal control standards. But, in 2006, a federal court ruled that IGRA did not authorize the Commission to issue and enforce regulations establishing minimum internal control standards for class III gaming.²⁸ However, Commission regulations establishing minimum internal control standards, including standards for class III gaming, that were issued before the ruling were not struck down by the court or withdrawn by the Commission. The Commission issued these regulations in 1999 and last updated the standards in 2006, which we refer to as the 2006 regulations.²⁹ Since the court decision, for operations with class III gaming, the Commission continues to (1) conduct audits using the 2006 regulations at the request of tribes and (2) provide monitoring and enforcement of these regulations for 15 tribes in California with approved tribal gaming ordinances that call for the Commission to have such a role.³⁰

The Commission plans to issue guidance with updated minimum internal control standards for class III gaming and withdraw its 2006 regulations. Commission officials told us they have authority to issue such guidance, and tribes could voluntarily

²⁴ Each of the 12 tribes we visited had gaming ordinances for class II and class III gaming that had been approved by the Commission Chair and had negotiated tribal-state compacts for class III gaming that had been approved by the Secretary of the Interior as required by IGRA.

²⁵ Specifically, the Commission is funded by fees on gross gaming revenues from both class II and class III gaming. The Commission, as required by IGRA, establishes a fee schedule but the law caps the rate of fees based on the amount of gaming revenues, as well as the total amount of all fees imposed during a fiscal year (at 0.08 percent of gross gaming revenues of all gaming operations subject to IGRA).

²⁶ GAO-15-355.

²⁷ The minimum internal control standards for gaming are specific to the gaming industry, and they are the primary management procedures used to protect the operational integrity of gambling games, account for and protect gaming assets and revenue, and assure the reliability of the financial statements for class II and class III gaming operations. These standards govern the gaming enterprise's governing board, management, and other personnel and include procedures relevant to the play of, cash management, and surveillance for specific types of games.

²⁸ *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134 (D.C. Cir. 2006).

²⁹ 25 C.F.R. Part 542. These regulations were issued in 1999 and updated in 2002, 2005, and 2006.

³⁰ State regulations issued pursuant to the tribal-state gaming compacts in California allow tribes to adopt tribal gaming ordinances that provide for Commission monitoring and enforcement of 25 C.F.R. Part 542 instead of tribal and state monitoring and enforcement of tribal minimum internal control standards.

adopt them as best practices. According to Commission officials, issuing such guidance would be helpful because updated standards could be changed to reflect technology introduced since the standards were last updated. Commission officials told us that before the agency can make a decision on how to proceed with issuing guidance for class III minimum internal control standards, it first needs to consult with tribes. In February 2015, the Commission notified tribes of plans to seek comments on its proposal to draft guidance for updated class III minimum internal control standards during meetings in April and May 2015.

States involved in the regulation of Indian gaming are also impacted by the Commission's proposal to draft updated guidance and withdraw its 2006 regulations; however, the Commission's plans for obtaining state input on this proposal are unclear. We found that many tribal-state compacts incorporate by reference the Commission's 2006 regulations establishing minimum internal control standards. For example, three states have tribal-state compacts that require tribes to comply with the Commission's 2006 regulations.³¹ If the Commission withdraws its 2006 regulations, it is not clear what minimum internal control standards the compacts would require tribes to meet. In addition, nine states have tribal-state compacts that require tribal internal control standards to be at least as stringent as the Commission's 2006 regulations.³² If the Commission withdraws its 2006 regulations, these states and tribes would no longer have a benchmark against which to measure the stringency of tribal internal control standards. *Standards for Internal Control in the Federal Government* call for management to ensure that there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals.³³ According to a Commission official, the Commission is considering conducting outreach to the states on its proposal but did not have any specific plan for doing so. Consistent with federal internal control standards, seeking state input is important, as it could aid the Commission in making an informed decision on how to proceed with issuing such guidance and whether withdrawal of its 2006 regulations would cause complications or uncertainty under existing tribal-state compacts. As a result of this finding, we recommended that the Commission seek input from states regarding its proposal to draft updated guidance on class III minimum internal control standards and withdraw its 2006 regulations. In its comments on our draft report, the Commission concurred with this recommendation.

The Commission Performs Various Activities to Help Ensure Tribes' Compliance with IGRA and Commission Regulations, but the Effectiveness of Some Activities Is Unclear

In our June 2015 report,³⁴ we found that the Commission helps ensure that tribes comply with IGRA and applicable federal and tribal regulations through various activities, including monitoring gaming operations during site visits to Indian gaming operations and Commission-led audits. Under the Commission's Assistance, Compliance, and Enforcement (ACE) Initiative implemented in 2011, the Commission places an emphasis on working collaboratively with tribes to encourage voluntary compliance with IGRA and Commission regulations. As part of the initiative, the Commission uses several approaches, including providing training and technical assistance and sending letters of concern to help tribes comply early and voluntarily with IGRA and applicable regulations. The Commission Chair may also take enforcement actions when violations occur and has taken a small number of actions in recent years.

Commission's Monitoring Activities

To help ensure compliance with IGRA and Commission regulations, the Commission conducts a broad array of monitoring activities—such as reviewing independent audit reports submitted annually by tribes, conducting site visits to tribal gaming operations to examine compliance with applicable Commission regulations, and as-

³¹ These three states are Iowa, Montana, and North Dakota.

³² These nine states are California, Florida, Louisiana, Massachusetts, Minnesota, North Carolina, Oklahoma, Wisconsin, and Wyoming.

³³ GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999). The *Standards for Internal Controls in the Federal Government* differ from the minimum internal control standards for gaming. Federal internal control standards provide a framework for identifying and addressing major performance and management challenges to help federal agencies achieve their mission and results and improve accountability. The minimum internal control standards for gaming are specific to the gaming industry and are the primary management procedures used to protect the operational integrity of gambling games, account for and protect gaming assets and revenue, and assure the reliability of the financial statements for class II and class III gaming operations.

³⁴ GAO-15-355.

sessing tribes' compliance with minimum internal control standards as part of Commission-led audits. In addition, as required by IGRA, the Commission's Chair reviews and approves various documents related to both class II and class III gaming operations, including tribal gaming ordinances or resolutions adopted by a tribe's governing body.

Training and Technical Assistance

Under its ACE initiative, the Commission has emphasized providing tribes with training and technical assistance as a means to build and sustain their ability to prevent, respond to, and recover from weaknesses in internal controls and violations of IGRA and Commission regulations. For instance, the Commission hosts two regular training events in each region. Commission staff also provide one-on-one training on specific topics, as needed, during site visits and offer technical assistance in the form of guidance and advice to tribes on compliance with IGRA; Commission regulations; and day-to-day regulation of Indian gaming operations through written advisory opinions and bulletins. Commission staff also respond to questions by phone and e-mail, among other activities.

However, the effectiveness of the Commission's training and technical assistance efforts remains unclear. The Commission's strategic plan for fiscal years 2014 through 2018 includes two goals corresponding to its focus on training and technical assistance to achieve compliance with IGRA and Commission regulations: one for continuing its ACE initiative; and another for improving its technical assistance and training to tribes.³⁵ Yet, the Commission's performance measures for tracking progress toward achieving these two goals are largely output-oriented rather than outcome-oriented, and overall do not demonstrate the effectiveness of the Commission's training and technical assistance efforts. Specifically, 12 of the 18 performance measures for these two goals include output-oriented measures describing the types of products or services delivered by the Commission. For example, they include the number of audits and site visits conducted and the number of training events and participants attending these training events. In prior work, we found that these types of measures do not fully provide agencies with the kind of information they need to determine how training and development efforts contribute to improved performance, reduced costs, or a greater capacity to meet new and emerging transformation challenges.³⁶ In that work, we concluded that it is important for agencies to develop and use outcome-oriented performance measures to ensure accountability and assess progress toward achieving results aligned with the agency's mission and goals. This is consistent with Office of Management and Budget guidance, which encourages agencies to use outcome performance measures—those that indicate progress toward achieving the intended result of a program—where feasible.³⁷

The Commission's remaining 6 measures include outcome-oriented measures that track tribes' compliance with specific requirements, including the percentage of gaming operations that submit audit reports on time and have a Chair-approved tribal gaming ordinance. They do not, however, indicate the extent to which minimum internal control standards are implemented or reflect improvements in the overall management of Indian gaming operations. In addition, they do not correlate such compliance with the Commission's training and technical assistance efforts. Additional outcome-oriented performance measures would enable the Commission to better assess the effectiveness of its training and technical assistance efforts and its ACE initiative. Commission officials told us that they recognize they have more work to do on performance measures and are interested in taking steps to ensure that their ACE initiative is meeting its intended goals. In our June 2015 report,³⁸ we recommended that the Commission review and revise, as needed, its performance measures to include additional outcome-oriented measures. In its comments on our draft report, the Commission concurred with our recommendation.

³⁵ In May 2006, the Native American Technical Corrections Act of 2006 made the Commission subject to the Government Performance and Results Act of 1993 (GPRA) and mandated the Commission to submit a plan to provide technical assistance to tribal gaming operations in accordance with GPRA. Subsequently, as required by GPRA, the Commission published a strategic plan for fiscal years 2009 through 2014 and replaced it with a strategic plan covering fiscal years 2014 through 2018.

³⁶ GAO, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*, GAO-04-546G (Washington, D.C.: March 2004).

³⁷ Office of Management and Budget, Circular A-11: *Preparation, Submission, and Execution of the Budget*, November 2014.

³⁸ GAO-15-355.

Letters of Concern

The Commission amended its regulations in August 2012 to formalize an existing practice of sending letters of concern to prompt tribes to voluntarily resolve potential compliance issues.³⁹ A letter of concern outlines Commission concerns about a potential compliance issue and, according to Commission regulations, is not a prerequisite to an enforcement action.⁴⁰ Commission regulations require that letters of concern specify a time period by which a recipient must respond but do not address which compliance issues merit a letter of concern or indicate when a letter should be sent once a potential compliance issue is discovered. The Commission also has not issued guidance or documented procedures on how to implement its regulation regarding letters of concern. In our review of letters of concern sent by the Commission in fiscal years 2013 and 2014, we found that the Commission sent 16 letters of concern to 14 tribes. Six of the 16 letters of concern did not include a time period by which the recipient was to respond, as required by Commission regulations. In addition, 12 letters did not specify in the subject line, or elsewhere in the letter, that they were letters of concern. By not including a time period for a response as required by Commission regulations and not consistently identifying its correspondence as a letter of concern, the Commission may not be able to ensure timely responses, and tribes may find it difficult to discern the significance of these letters. In addition, the Commission provided us with documentation to demonstrate whether a tribe took action to address the issues described in 8 letters of concern, but it did not provide documentation for the remaining 8 letters. Under federal internal control standards, federal agencies are to clearly document transactions and other significant events, and that documentation should be readily available for examination.⁴¹ Without guidance or documented procedures to inform its staff about how to complete letters of concern or maintain documentation tracking tribal actions, the Commission cannot ensure consistency in the letters that it sends to tribes, and it may be difficult to measure the effectiveness of the letters in encouraging tribal actions to address potential issues. As a result of these findings, we recommended in our June 2015 report,⁴² and in its comment letter the Commission generally agreed, that the Commission should develop documented procedures and guidance for letters of concern to (1) clearly identify letters of concern as such and to specify the type of information to be contained in them, such as time periods for a response; and (2) maintain and track tribes' responses to the Commission on potential compliance issues.

Enforcement Actions

IGRA authorizes the Commission Chair to take enforcement actions for violations of IGRA and applicable Commission regulations for both class II and class III gaming.⁴³ Specifically, the Commission Chair may issue a notice of violation or a civil fine assessment for violations of IGRA, Commission regulations, or tribal ordinances and, for a substantial violation, a temporary closure order.⁴⁴ The most common enforcement action taken by the Commission Chair in fiscal years 2005 through 2014 was a notice of violation. The Chair issued 107 notices of violations that cited 119 violations during this period.⁴⁵ We found that the Chair issued 100 out of 107 notices of violation prior to fiscal year 2010. Since fiscal year 2010, fewer enforcement

³⁹ 25 C.F.R. § 573.2.

⁴⁰ The Chair of the Commission is not obligated to wait for Commission staff to attempt to resolve potential compliance issues with letters of concern. If the Chair takes enforcement action before Commission staff send a letter of concern, Commission regulations require the Chair to state the reasons for moving directly to enforcement in the enforcement action.

⁴¹ GAO/AIMD-00-21.3.1.

⁴² GAO-15-355.

⁴³ The Commission refers matters that it does not have jurisdiction over to other federal agencies and states. For example, the Commission does not have the authority to enforce IGRA's criminal provisions. IGRA requires the Commission to provide information to the appropriate law enforcement officials when it has information that indicates a violation of federal, state, or tribal laws or ordinances. In 2013, the Commission referred eight matters to other federal agencies and states, including six matters to federal law enforcement agencies and two matters to the Internal Revenue Service. The Commission also notified a state about one of the eight matters.

⁴⁴ In lieu of taking an enforcement action, the Chair may enter into a settlement agreement with an Indian tribe concerning the potential compliance issue.

⁴⁵ According to Commission officials, from fiscal year 2005 to fiscal year 2014, the Commission was without a Chair or Acting Chair for approximately 4 months, so no enforcement actions could be taken. Specifically, the Commission was without a Chair or Acting Chair from September 27, 2013, to October 29, 2013, and April 26, 2014, to July 23, 2014.

actions may have been taken because recent Commission chairs have emphasized seeking voluntary compliance with IGRA.⁴⁶

Chairman Barrasso, Vice Chairman Tester, and Members of the Committee, this completes my prepared statement. I would be pleased to answer any questions that you may have at this time.

The CHAIRMAN. Thank you very much, Director Fennell. Thank you for your presentation and for being here.

Next we will hear from Mr. Jamie Hummingbird, the Chairman of the National Tribal Gaming Commissioners and Regulators Association. Thanks for being with us.

STATEMENT OF JAMIE HUMMINGBIRD, CHAIRMAN, NATIONAL TRIBAL GAMING COMMISSIONERS AND REGULATORS ASSOCIATION

Mr. HUMMINGBIRD. Thank you, Mr. Chair.

Good afternoon, Chairman Barrasso, Vice Chairman Tester and members of the Committee. My name is Jamie Hummingbird and I am a citizen of the Cherokee Nation and Director of the Cherokee Nation Gaming Commission.

I am also a Chairman of the National Tribal Gaming Commissioners and Regulators Association, an organization comprised of 64 federally-recognized tribes, formed for the purpose of promoting the exchange of best practices, information and ideas in the pursuit of consistent, stable and fair regulatory practices.

I thank the Committee for the opportunity to address an issue that is at the heart of the mission of the NTGCR, safeguarding the integrity of Indian gaming, and to comment on the current state of gaming regulation throughout Indian Country and the recent Government Accountability Office report, Indian Gaming Regulation: an Oversight by the Federal Government, States and Tribes.

I appear before you today as one of several thousand tribal gaming regulators that have dedicated their professional lives to ensuring the integrity of Indian gaming so that the benefits derived from gaming reach the intended recipients: our tribal citizens. The fiscal success of Indian gaming did not happen overnight, but was steadily built over decades. It took foresight and courage in tribal leadership to put economic development plans in motion that have made Indian gaming the \$28 billion industry it is today. That industry benefits not only tribes and their citizens but it also impacts the broader local and State economies.

To encapsulate tribal gaming regulation in a single report is a daunting task. The GAO is to be commended for their efforts. The report can be a useful tool, as gaming regulators always seek to ensure gaming is conducted fairly and honestly.

The path to implementing IGRA has not been a smooth one. However, all parties involved in Indian gaming, the State, tribal and Federal governments, have helped ensure the Act's success. True, there have been milestones along the way, but it is the culmination of a number of small victories achieved over time that are the true measure of the Act's success.

⁴⁶The Commission Chair has discretion in determining when to pursue an enforcement action. In addition, the Commission modified its regulations in 2012 so that quarterly statements or fees submitted up to 90 days late are now subject to a fine rather than a notice of violation. Almost half of the notices of violations issued between fiscal years 2005 and 2011 were for failure to submit or untimely submission of quarterly statements or fees.

I am reminded of a quote that I once heard: "The small daily improvements are the key to staggering long-term results." It is this attitude that guides tribal gaming regulators each and every day.

Like you, I have read the GAO report and understand the advice being offered. I understand that there is concern about the level of voluntary compliance achieved by tribes and the NIGC's ability to measure the effectiveness of their efforts through its ACE initiative.

Through its ACE initiative, the NIGC has set out a plan to provide training and technical assistance to equip tribal gaming regulators with the knowledge necessary to do their jobs. The NTGCR can identify with this initiative, as it shares the same goal, to see Indian gaming effectively regulated by tribes. The NIGC's renewed commitment to seeking tribal input through consultation process has ensured that those who are regulating on the ground have the ability to affect policy in a meaningful way.

While the NIGC recognizes the need to bolster their administrative metrics, let us not forget that it was tribes that developed the first set of internal controls for use in tribal gaming facilities. These were later adapted by the NIGC and published as the minimum internal control standards in 1999.

Tribes have also led in technological advances which have succeeded outside of Indian Country. Tribes continue to lend their expertise to the NIGC through tribal advisory committees, providing the benefit of our practical hands-on experience, to keep regulations current and relevant to today's tribal gaming enterprises.

Adherence to strong regulatory structure, one that balances the goals of gaming regulatory laws and controls without needlessly hindering economic viability, is not only a legal obligation that tribal gaming regulators must meet, but it is also a moral obligation that we owe to our tribal citizens.

The NTGCR is dedicated to continuing to be the front line regulators in a complex industry. It is important to remember that tribes and the regulators they entrust have the most at stake in ensuring the integrity of tribal gaming.

Should our regulations fail to protect tribal citizens and patrons, as daunting as it may be to appear before a Senate committee, it pales in comparison to facing our elders who rely on our gaming revenues for health service or our youth who need school supplies that are supplemented by those revenues.

Gaming regulators and their tribes stand ready to work in partnership with the States, the NIGC and the Senate to ensure that the benefits derived from gaming continue long into the future.

As I conclude today, I want to leave you with one more quote that I believe captures the spirit of tribal gaming regulators: "Success depends on previous preparation, and without such preparation, there is sure to be failure."

Tribal gaming regulators are prepared to meet the challenges of today and those that we will face in the years to come.

Thank you again, Chairman Barrasso and members of the Committee, for the opportunity to appear and provide testimony today. I stand ready to answer any questions you may have.

[The prepared statement of Mr. Hummingbird follows:]

PREPARED STATEMENT OF JAMIE HUMMINGBIRD, CHAIRMAN, NATIONAL TRIBAL GAMING COMMISSIONERS AND REGULATORS ASSOCIATION

Good afternoon Chairman Barrasso, Vice Chairman Tester, and Members of the Committee. My name is Jamie Hummingbird. I am a citizen of the Cherokee Nation and Director of the Cherokee Nation Gaming Commission. I am also the Chairman of the National Tribal Gaming Commissioners and Regulators Association (NTGCR), an organization comprised of 64 federally recognized tribes formed for the purpose of promoting the exchange of thoughts, information and ideas in the pursuit of consistent, stable, and fair regulatory practices.

I thank the Committee for the opportunity to address an issue that is at the heart of the mission of the NTGCR, "Safeguarding the Integrity of Indian Gaming," and to comment on the Government Accountability Office's report "INDIAN GAMING: Regulation and Oversight by the Federal Government, States, and Tribes" (GAO Report).

Background

The seeds of Indian gaming were sewn over 40 years ago when tribes opened the first bingo halls on their reservations and tribal lands as a means of economic development. The revenues produced by these operations were intended to fill the gaps left by limited federal assistance in meeting the basic needs of tribal citizens and, to the extent possible, provide adequate funding for tribal governmental programs and thereby reducing tribal dependence on federal funding.

Though the beginnings of Indian gaming were humble, the introduction of the latest technologies of the day allowed tribes to attract wider audiences and achieve an unforeseen level of success. Such success, coupled with a growing divide in Tribal-State relations, ultimately led to legal conflicts culminating in the landmark Supreme Court case of *California v. Cabazon Band of Mission Indians* of 1987.

In *Cabazon*, the Supreme Court recognized the importance of gaming to tribal economic development efforts and in providing for stable tribal economies. The Court also recognized that tribes, not the states, were responsible for regulating gaming conducted on tribal lands.

Although the *Cabazon* case affirmed the right of tribes to conduct gaming on tribal lands and acknowledged that gaming was being regulated by the tribes, the feeling of unease amongst the states was growing. Citing fears that organized crime would infiltrate and consume Indian gaming—even though there had never been a proven case of organized criminal activity to have taken place at an Indian gaming facility—states called for regulation over Indian gaming by either the states or the federal government.

In 1988, Congress used its plenary power over Indian affairs to adopt the Indian Gaming Regulatory Act (IGRA, the Act) in an effort to formulate a system for regulating gaming on Indian lands and to find balance between the political and economic interests of the state, federal, and tribal governments.

Regulating Indian Gaming

The success of Indian gaming is due in large part to the development and implementation of strong regulatory systems. IGRA sought to establish a regulatory framework under which the tribal governments are recognized as the primary regulators of Indian gaming with the federal and state governments fulfilling defined roles.

To this end, the Act provided for three (3) classifications of gaming and outlined the roles, responsibilities and authorities of the state, federal, and tribal governments respective to each class of gaming. Under IGRA, Class I gaming, which is characterized as traditional, ceremonial tribal games, was under the exclusive jurisdiction of tribes while regulatory responsibility for Class II gaming, consisting of bingo, pull tabs, and other similar games, was to be shared between tribes and the NIGC, with tribes being the primary regulatory authority. Class III gaming, which consists of any game not considered as either Class I or Class II, could only be conducted under the terms of a compact negotiated between a tribe and the respective state in which it resides.

Through IGRA, Congress called upon tribal governments to establish their own gaming laws and regulations. Through tribal gaming ordinances approved by the NIGC Chair, tribes have constructed their own regulatory frameworks and established tribal gaming regulatory authorities (TGRA) to carry out tribal responsibilities under IGRA. Among those responsibilities, TGRAs conduct background investigations on and issue licenses to gaming facility employees and vendors; review and approve all games offered by a gaming facility; perform environmental, public health and safety inspections; review management and loan agreements; and, conduct audits of gaming facility activities and financials to ensure proper accountability.

In addition to the TGRAs, other tribal governmental departments and agencies, such as risk management, environmental health, environmental protection, tax commission, and law enforcement may also be involved in overseeing activities at tribal gaming facilities. TGRAs have reporting responsibilities to their respective tribal governments, as well.

TGRAs routinely communicate and coordinate regulatory efforts to federal agencies other than the NIGC. Information and reports on financial matters are provided to the Internal Revenue Service (IRS), the Financial Crimes Enforcement Network (FinCEN), and the Secret Service. In addition, the assistance of the Federal Bureau of Investigation and Department of Justice is sought for the prosecution of violations of criminal statutes, when appropriate.

Tribal commitment to providing strong regulation over Indian gaming is evident when considering the investment made by tribal governments in their TGRAs. Collectively, tribes across 28 states employ nearly 4,000 tribal gaming regulators and spend over \$320 million in tribal resources annually to oversee the 484 gaming facilities noted in the GAO Report. These figures do not include compliance staff employed by the gaming operations.

With the wide range of responsibilities placed on TGRAs, the skill sets of TGRA staff must be equally diverse. Many tribal gaming regulators possess law enforcement experience while others maintain professional certifications such as Certified Fraud Examiner, Certified Public Accountant, Certified Internal Auditor, and Certified Information Technology Professional. As technologies change and the gaming and regulatory environments evolve, so must tribal regulatory staff. It is for this reason that many tribal gaming ordinances and some tribal-state compacts require regular training for regulatory staff.

The IGRA established the National Indian Gaming Commission (NIGC) and instituted a federal regulatory structure applicable to all tribes regardless of their state of residence. IGRA focuses the NIGC's regulatory authority largely on monitoring Class II gaming with limited authority over Class III activities. The NIGC has an operating budget of approximately \$20 million and employs 100 staff across seven (7) regional offices and two (2) satellite offices to carry out its responsibilities under IGRA.

A majority of tribes have entered into compacts with their respective states for Class III gaming. In general, the compacts contain requirements similar to those found in IGRA and NIGC regulations with respect to licensing, internal control standards, and financial accountability. The aspects that vary the most depending on the jurisdiction are the types of games allowed for play and the regulatory structure and authorities of the state. The regulatory roles and responsibilities are negotiated as a part of the compacting process and vary by state; the lead regulatory role belonging predominately to tribes.

The GAO Report identifies the different approaches taken by the states and acknowledges the state regulatory structures and activities are influenced by the regulatory systems used by TGRAs and the level of resources dedicated to those efforts. According to the GAO Report, states employ 444 regulators whose combined budgets exceed \$52 million per year. Other estimates place the state budget total closer to \$83 million per year. In recognition of the capabilities of TGRAs, many states have refrained from unnecessarily recreating a regulatory system as extensive as that which tribes collectively operate. By relying on the tribal regulators, states are able to conserve funds for use in other areas.

It is clear that, with over 4,000 full-time regulators on staff and a combined annual investment of over \$400 million by state, federal, and tribal governments, Indian gaming is being afforded a level of protection higher than almost any other industry in the United States.

GAO Report Scope and Results

The Government Accounting Office was asked to review the current state of Indian gaming and undertook a twenty-month study as a result. Particular emphasis was given to the state of regulation in the industry. The GAO was asked to review: (1) the Department of the Interior's (Interior) review process that ensures tribal-state compacts comply with IGRA; (2) how states and selected tribes regulate Indian gaming; (3) the NIGC's authority to regulate Indian gaming; and, (4) the NIGC's efforts to ensure tribal compliance with IGRA and NIGC regulations.

The GAO Report provided insight into the extensive process followed by Interior in reviewing and acting on tribal-state compacts. The review of Interior's past 17 years worth of compact reviews showed that tribal interests have been protected through Interior's two-pronged analysis with less than four percent of 516 submitted compacts being disapproved.

The regulatory structures contained in those 516 compacts, as agreed to by the tribes and states, vary as previously stated. The GAO classified the varying approaches taken by states into one of three categories—active, moderate, or limited—to describe the depth and frequency of activity performed by each state.

Regardless of the jurisdiction, regulators share common goals: to ensure the integrity of their respective gaming operations, to protect the operation from any corrupting influences, to ensure financial accountability, and to ensure gaming is conducted fairly and honestly by the patrons and the gaming operation. Under this mutual bond, tribes across the country enjoy healthy working relationships with their state and federal colleagues. Through regular interaction, tribes have been able to demonstrate their ability to effectively regulate tribal gaming facilities.

TGRAs go to great lengths to make sure that they and their gaming operations achieve the highest levels of compliance and dedicate a sizeable amount of human and financial resources to these efforts. TGRAs regularly provide reports on the compliance status of their respective gaming facilities to tribal leadership as well as any state and federal gaming authorities. In the event the desired compliance level is not achieved, however, TGRAs have it within their authority to ensure any departure from regulation is corrected using methods outlined in either compact provisions or TGRA regulations. IGRA contemplated a tribal-federal relationship with respect to Class II gaming and a tribal-state relationship for Class III gaming. State and federal regulators are also able to address issues they feel are not in line with prescribed regulation directly with the TGRA. Upon receiving notice, TGRAs are able to investigate the issue and respond with additional details and, if appropriate, any corrective measures taken to rectify the issue. These cooperative relationships indicate the goal of IGRA to ensure the sound enforcement of gaming laws and regulations is being met.

In recent years, the NIGC introduced the Assistance, Compliance, and Enforcement (ACE) initiative in further support of this goal. Training and technical assistance provided under ACE has allowed tribes with limited resources to access training and services at no cost. I applaud the NIGC's efforts and commend them for designing a program that respects the principal goal of federal Indian policy towards promoting tribal self-sufficiency and self-determination.

The breadth and scope of the NIGC training catalog has been revamped and modernized to include an Information Technology component, inclusive of technology and security assessments. The NIGC has enhanced the ACE initiative and its value to tribes by incorporating training and technical assistance that is relevant to today's gaming landscape.

This same approach has been used in recent years in drafting the minimum internal control standards (MICS) for Class II gaming. The Class II MICS have allowed the NIGC to remain a viable part of the regulatory landscape while respecting the role of TGRAs to design control systems that meet their unique needs.

The MICS covering Class III gaming, however, have not been updated since 2006, as a result of a court decision in which it was concluded that the NIGC did not have authority over Class III gaming. In light of this decision, the NIGC stated it was considering withdrawing the Class III MICS and republishing the standards in non-mandatory guidance form. This section of NIGC regulations has been included in a number of tribal-state compacts. Removing the standards from the current regulatory systems would create a void within the compacts and existing regulatory systems.

The GAO recommends the NIGC seek input from state governments as it contemplates changes to the Class III MICS. The means by which the NIGC would accomplish this are unknown; however, states have participated in developing the NIGC Class III internal controls in prior years by submitting comments on proposed rules and attending the public meetings and consultations held during the rule-making process.

Any process in which Class III internal controls are addressed must be respectful of each stakeholder's interests. Only through a collaborative effort can the desired result of ensuring the integrity of Indian gaming be achieved.

The Future of Indian Gaming Regulation

Tribes and their respective gaming regulatory authorities remain steadfast in their commitment to protect the single-most effective economic development tool available to tribes today—Indian gaming. The regulatory efforts put forth by tribes and TGRAs will remain and continue to evolve to an ever-changing industry.

It is essential to the continued success of Indian gaming for all gaming regulators to maintain a balanced approach towards regulation and compliance with the various rules, regulations, and statutes. This task is best achieved by working together with our state and federal colleagues. Most importantly, however, it is an obligation

owed to our tribal citizens. Tribal gaming regulators work tirelessly to ensure the integrity of Indian gaming so that our tribal citizens may reap the benefits from this vital industry.

Thank you, again, Chairman Barrasso and Members of the Committee for the opportunity to appear and provide testimony today. I stand ready to answer any questions you may have.

The CHAIRMAN. Thank you very much, Mr. Hummingbird.

Next we will hear from Director David Trujillo, who is the Director of the Washington State Gambling Commission. Thank you for joining us.

**STATEMENT OF DAVID TRUJILLO, DIRECTOR, WASHINGTON
STATE GAMBLING COMMISSION**

Mr. TRUJILLO. Thank you, Chairman Barrasso, members of the Committee.

For the record, as Chairman Barrasso said, my name is David Trujillo. I am accompanied today by Washington State Gambling Commission Chairman Christopher Sterns. He is in the audience over my right shoulder.

The CHAIRMAN. Welcome, Mr. Sterns.

Mr. TRUJILLO. I have spent 23 years in one form or another involved in implementing gambling laws and policy in the State of Washington, as directed by the Governor, the State legislatures or the State Gambling Commission.

Class III gaming regulation and oversight, the relationship is grounded in law. It is formalized in compact. It is government-to-government based. It is respectful and it is professional. Each compact is brought to life by people doing their very best to implement the terms and conditions of the compact.

As I have spent time with my agency, my role there is not unique. I started out as a special agent, special agent supervisor, administrator, assistant director and deputy director of operations, and now I am the director. To get where we are today and the communication that we have with tribes in Washington, we had to evolve. I will provide a little bit of historical perspective.

In years past, my own State Gambling Commission operated a uniform tribal regulatory approach that really did not respect the uniqueness of the tribes or the different tribal gaming operations. That approach was reactive and really did not encourage a lot of collaborative regulatory efforts.

We changed. We knew we had to change. It took several years but now we have adjusted our own regulatory processes within the State to work with each tribe, each tribal gaming commission, each tribal gaming agency and their processes and our processes, so they complement one another. This approach now is proactive and it encourages dialogue. It does respect the uniqueness of each tribe.

For us, we no longer operate a one size fits all model. So what we lost with that approach was cost benefit savings to us. However, we now benefit from open dialogue and a dialogue that encourages a deliberate, methodical approach that is respectful of the tribes and their uniqueness.

The tribal gaming compacting process is complex. There are no easy changes. It is by this way that the Governor, the State legislature and the State Gambling Commission and the tribal leaders

can be assured that public policy continues to be met when it concerns Class III gaming.

With the GAO report, I was happy to see the recommendation was to work with the States. Washington has maintained some Class III minimum internal control standards since the first compact was enacted in 1992.

In closing, I would like to say that Class III gaming oversight is a shared responsibility in Washington. The bond is very strong. It is very healthy.

I am proud of the relationship that my staff has with the staff of each tribe, whether that be the Gaming Commission, the tribe itself or the tribal gaming agency. The State and tribe together do an excellent job of regulating Class III gaming. If Washington is reflective of the bond that exists between the tribes and other State agencies, then I would submit that integrity is high when it comes to Class III gaming regulation and oversight.

Mr. Chairman, that would conclude my testimony today, and I stand ready to answer any questions.

[The prepared statement of Mr. Trujillo follows:]

PREPARED STATEMENT OF DAVID TRUJILLO, DIRECTOR, WASHINGTON STATE
GAMBLING COMMISSION

Good Afternoon Chairman Barrasso, Vice-Chairman Tester and Members of the Committee. Thank you for inviting me to testify before you today. My name is David Trujillo and I am the Director of the Washington State Gambling Commission. As Director of the Gambling Commission I am responsible for implementing statewide gambling policy as directed by the Washington State Legislature and the members of the Washington State Gambling Commission. Our regulatory framework extends to charitable and nonprofit organizations and commercial businesses that are authorized certain gambling activities. We work in regulatory partnership with Washington Tribes in their operation of Class III gaming activities. We enforce criminal law concerning illegal gambling and related crimes statewide. I am proud to say that the Commission enjoys a strong and mutually respectful relationship with the twenty nine Tribes in Washington.

I'd like to share some background information with you so that you can place my testimony in context with my experience. I hold a Bachelor of Arts degree and a Bachelor of Science degree. I am a Certified Public Accountant licensed by the Washington State Board of Accountancy and a long serving ethics committee member of the Washington's Society of Certified Public Accountants. I am a graduate of the Washington State Criminal Justice Training Commission and hold various law enforcement credentials from that same agency.

Last year, I led my agency through Washington Association of Sheriffs and Police Chiefs third party accreditation process. In November 2014, the Commission received Accreditation demonstrating to the public that we are dedicated to operating under industry best practices and standards. Prior to my appointment as agency Director, I served in various positions throughout the agency including a Special Agent in Field Operations, Financial Investigations and Tribal Gaming Unit, Supervisor of our Criminal Intelligence unit, and Deputy Director in charge of Operations.

Of great significance to this hearing is that I have had the opportunity to work with Washington Tribal representatives for over two decades and can speak with experience to the current relationship we enjoy with Washington Tribes and how it has evolved to its present state.

The point of my testimony today is to comment on the June 2015 GAO on Indian Gaming Regulation and Oversight by the Federal Government, States, and Tribes. Specifically, I will briefly discuss:

- 1) The cooperative regulatory partnership Washington State shares with Tribes; and
- 2) Washington's State—Tribal Gaming Compact process; and
- 3) GAO's recommendation that the National Indian Gaming Commission obtain input from states on its plans to issue guidance on Class III minimum internal controls standards.

The Cooperative Regulatory Partnership Washington State Shares With Tribes

The present relationship between the Tribes of Washington and the Washington State Gambling Commission enjoys is one that is grounded in Compact and is formal in nature. Specifically, the Tribe and State mutually agree that the conduct of Class III gaming under certain terms and conditions benefit the Tribe, and protect the citizens of the Tribe and State. In addition, both parties deem it in their respective best interests to enter into a compact. That agreement is, of course, between the highest official of the Tribal Council and the Governor of Washington State. Under certain terms and conditions, regulatory staffs of both governments do their best to implement that broad policy statement.

Our relationship has positively evolved over the years. Simply, in the early to late 1990s, our model was to apply our licensing/certification and regulatory programs in a uniform approach across the spectrum of Tribes, regardless of the various strengths of their regulatory staff, their regulatory approach, or the specific nuances of each Tribal Gaming Operation. This made it very easy for us to apply our program consistently statewide and was very cost beneficial for us.

The problem with that approach was that it was somewhat paternalistic in nature, did not encourage a coordinated regulatory approach and did little to respect the individual uniqueness of each Tribe. In the late 90s, we altered our licensing/certification program to incorporate the differences of each Tribal licensing process. No longer did we apply our licensing/certification process uniformly. Respectively, we created as many licensing/certification processes as we had compacted gaming Tribes as each Tribe had a hand in what was submitted to us. We discovered that instead of a cost savings benefit, we benefited from open discussion and dialogue and our approaches complement one another.

By 2005, we shifted our onsite regulatory processes similarly. We discontinued our singular onsite regulatory process to a process that also encourages open discussion and dialogue. At the beginning of each year, our regulatory staff meets with Tribal regulatory staff. Together both Compact enforcement teams discuss upcoming changes respective to that Tribe's gaming operations. Examples include specific types of gaming, risks associated with personnel changes, high risk areas may vary year to year, changes in electronic applications, etc.

We are still working through areas but I submit that public trust in Class III gaming in Washington State is stronger than it has ever been. This is directly reflective of the strong bond between the State and Tribes in the operation of Class III gaming.

Washington's State—Tribal Gaming Compact Process

In Washington State, authorization for gambling activities is found in the Revised Code of Washington. Specifically, the law requires that the Washington State Gambling Commission through the Director will negotiate Compacts on behalf of the State. Once a tentative agreement is reached, the Director will immediately transmit the proposed compact or amendment to all voting members of the Gambling Commission. Gambling Commissioners are appointed by the Governor for a term of six years. The law only allows Commissioners to be removed for inefficiency, malfeasance, or misfeasance in office, upon specific written charges filed by the Governor with the Chief Justice of the Supreme Court. For Tribal matters, voting members includes the Gambling Commission's ex-officio members. Two ex-officio members are from the Senate, one from the majority party and one from the minority party, both to be appointed by the president of the Senate. Two ex-officio members are from the House of Representatives, one from the majority political party and one from the minority political party, both appointed by the speaker of the House of Representatives.

Generally speaking, within thirty days of receiving a proposed compact or compact amendment, one standing committee from each house of the legislature shall hold a public hearing on the proposed compact and forward its respective comments to the Gambling Commission.

The Gambling Commission may hold public hearings on the proposed compact anytime after receiving a copy of the proposed compact or compact amendment. Within forty-five days, the Gambling Commission, including ex-officio members will vote on whether to return proposal for further negotiation or to forward the proposed compact to the Governor for review and final execution.

Through this complex process can the Governor, Legislators, Gambling Commissioners, and Tribes Leaders be assured that public policy is met, Class III gaming continues in a manner beneficial to all parties within the state, and citizens of Washington are protected.

The GAO's Recommendation That the National Indian Gaming Commission Obtain Input From States on Its Plans to Issue Guidance on Class III Minimum Internal Controls Standards

In reviewing the GAO report, I was very pleased to see the number one recommendation was for the National Indian Gaming Commission to obtain input from state on its plans to issue guidance on Class III minimum internal control standards.

Washington State has had regulatory authorized gambling activities since 1973. We are the second oldest state gambling regulatory agency; only Nevada is older. We are very good at what we do, we have our finger on the pulse of gaming within the state and we have much to offer. We have established performance measures and we consistently challenged ourselves to be more effective, more efficient, and a better regulatory partner. Consulting with Tribes is part of the solution but I submit to you that consulting with state agencies is important also. We are all in this together so it stands to reason we should all be part of an all-inclusive solution when it comes to Class III gaming. Just as each Tribe is unique, so are the capabilities of state regulatory partners. The GAO report illustrates gaming compliance visits were scaled back in fiscal years 2013 and 2014 due to sequestration. The report does not indicate any consultation with State officials as a reason for or for not conducting an onsite visit.

In conclusion, I can say without a doubt that the Tribes and State successfully monitor the terms and conditions of the Tribal-State compacts and the integrity of the Class III gaming in Washington is stronger today than in years past. In my estimation, the Tribes of Washington do an excellent and outstanding job of regulating gaming as required under the Indian Gaming Regulatory Act.

Thank you Mr. Chairman, Vice Chairman, and Committee members for the opportunity to appear before you today. I stand ready to answer any questions you might have.

The CHAIRMAN. Thank you very much for your testimony, Director Trujillo. Thank you. We appreciate your being here.

Next we will hear from Mr. Ernest Stevens, Chairman of the National Indian Gaming Association. Mr. Stevens, welcome back.

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

Mr. STEVENS. Thank you, and good afternoon, Mr. Chairman and members of the Committee. Thank you for this opportunity to testify today.

With me today are several of the National Indian Gaming Association board members, our staff, our tribal officials and professionals are joining us here today.

I want to start by saying, Mr. Chairman, that Indian gaming is the Native American success story. Today more than 240 tribes are following the Indian Gaming Regulatory Act and we are making the best of this Act work for our communities.

In 2014, Indian gaming generated more than \$32 billion in gaming and gaming-related revenue. These funds are beginning to rebuild reservations throughout this Country. At the Oneida Nation in Wisconsin, where I am from, Indian gaming is helping replenish our homelands, foster traditions through education and provide for the health and welfare of our community.

Past Federal policy sought to destroy native language and religion. But today, Indian gaming is helping to preserve our culture.

I just came from a rally on Capitol Hill to protective Native sacred sites. It was an honor to see so many people, young and old, united to protect our way of life. They presented me with these gifts and this feather today.

Mr. Chairman, my father, Ernie Stevens, Sr., was a staff sergeant in combat in the Korean Conflict. He is also the former staff

director of this Committee. For a good part of the past 18 years, he has lived at the Oneida Nation's Anna John Nursing Home. The care provided at that facility to my dad and all the other Oneida elders was long overdue respect that they have earned. All of this funding is supplemented by Indian gaming revenues.

Indian gaming is also putting American families to work. Last year, tribal gaming delivered more than 310,000 direct American jobs. With indirect impacts, that number of jobs grows to 684,000, many of which are non-Indians from surrounding communities. Without question, Indian gaming is helping to fuel an American economic recovery.

Has Indian gaming solved all our problems? Not even close. Many Native American communities continue to struggle with failed Federal policies of the past. But we are making our way back. Indian gaming is tribal government self-determination that is improving the lives and providing opportunities across all of Indian Country.

Tribal leaders know that these benefits wouldn't be possible without a strong regulatory system. In 2014, tribes spent more than \$426 million on regulation. This investment includes hiring more than 6,500 tribal, Federal and State regulators, all working in cooperation to protect Indian gaming revenues and the integrity of our operations. The funding and personnel dedicated to Indian gaming regulation far outpace State and commercial gaming regulators. I challenge anyone to compare these numbers or resources to any form of gaming worldwide.

My tribe, the Oneida Nation of Wisconsin, has 40 years of experience regulating Indian gaming. In that time, our tribal regulators have gained significant expertise. Early on, we hired a lot of outside folks, whether it was for law enforcement, military, financial institutions. That helped us to grow our industry. But today, Mr. Chairman, tribal regulators from throughout Indian Country are the experts. Many come to us with questions and ask to learn about our state of the art regulation. We are very proud of that.

The Oneida Nation regulators also participate in the tribal gaming protection network and other associations. Through these organizations we share information on threats to our operations, best practices on what is working to protect Indian gaming assets. Throughout Indian Country, tribal regulators are stopping crime and individuals that threaten our operations.

Just last week, Mr. Chairman, the tribal regulators are Shakopee Mdewakanton Sioux Community and the Hoopa Valley Tribe worked with local police to arrest individuals who had robbed banks and committed other Federal and State crimes, only to be caught by tribal regulators.

Despite all this work, experience and dedication of resources, we continue to hear the tired comparison of Indian gaming regulation as the fox watching the henhouse. These claims absolutely disrespect the hard work that tribal, Federal and State regulators conduct day in and day out to protect the integrity of Indian gaming. The bottom line is this: the system of regulation that oversees Indian gaming is working. We are not perfect, but we have a better system than any form of regulation in this Nation.

In closing, Mr. Chairman, Indian gaming is the most highly funded and staffed system of regulation in this Nation. The credit in the system goes to the tribal leaders who make the decision to fund the system and to the thousands of men and women who have dedicated their lives to protecting tribal assets and the integrity of operations. Tribal governments have made Indian gaming an American success story.

Thank you for your time. I am happy to answer any questions, Mr. Chairman and members of the Committee.

[The prepared statement of Mr. Stevens follows:]

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

Introduction

Good afternoon Chairman Barrasso, Vice Chairman Tester, 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 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. I thank the Committee for this opportunity to provide testimony on "Safeguarding the Integrity of Indian Gaming" and to comment on the Government Accountability Office's June 2015 Report on "INDIAN GAMING: Regulation and Oversight by the Federal Government, States, and Tribes." (GAO Report).

As I have stated in the past, the Indian Gaming Regulatory Act (IGRA) is far from perfect. However, over 240 tribal governments are making the Act work for our communities. IGRA established a solid foundation to protect the integrity of Indian gaming. Over the past 27 years, tribes have dedicated billions of dollars of tribal government revenues (+\$426 million in 2014 alone) to uphold the highest regulatory standards of any form of gaming in the United States.

Native Nations Pre-Dating Formation of the United States

I testified in July of 2014 before this Committee about the state of Indian gaming after 25 years under IGRA. As I did then, I would like to again place Indian gaming in proper context that includes the historic background of Native Nations pre-dating the formation of the United States and the adoption of the U.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. The U.S. Constitution, in the Commerce Clause, acknowledges the separate distinct governmental status of Indian tribes, on par with the foreign nations, and among the several states. In addition, through more than 300 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 as the supreme law of the land.

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

These policies resulted in the 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. Despite these policies, tribal governments and individual Indians persevered.

Indian Gaming Is Tribal Government Self-Determination

The United States acknowledged these policies as failures. For 45 years now, the U.S. has fostered an Indian affairs policy that supports Indian self-determination and economic selfsufficiency. See *Nixon Special Message to Congress, July 8, 1970*; See also, *The Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638)*. Every President since 1970 has reaffirmed the self-determination policy and has acknowledged that the federal government's solemn treaty and trust obligations remain fully in force.

In the late 1960s and early 1970s, a handful of tribal governments embraced self-determination and took measures to rebuild their communities by opening the first modern Indian gaming operations. These tribes used the revenue generated from early Indian bingo operations to fund essential tribal government programs and services to meet the basic needs of their communities.

These acts of Indian self-determination were met with legal and legislative challenges by state governments and commercial gaming operations in the federal courts and in Congress. 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 interference. The Court reasoned that Indian gaming is crucial to Indian self-determination, noting that gaming provides the sole source of governmental revenue and is the major source of employment for many tribes. The *Cabazon* Court acknowledged that state governments—even those subject to the Termination Era Public Law 83-280—have no role to play in regulating Indian gaming as long as they do not criminally prohibit all forms of gaming in the state. The *Cabazon* Court also acknowledged that Indian tribes had enacted their own regulations to monitor the integrity of Indian gaming—at times in cooperation with the U.S. Department of the Interior.

After *Cabazon*, states and commercial gaming interests increased their legislative efforts, urging Congress to reverse the decision. 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 there had never been one proven case of organized criminal activity. Senate Report No. 100-446 at 5 (Aug. 3, 1988). The Committee acknowledged that “the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition.. [T]he State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe have is negotiable.” *Id.* at 33.

Many tribal leaders opposed the legislative proposals that became IGRA, in large part because of the requirement that tribal governments enter into compacts with the states in order to conduct class III gaming. These leaders reasoned that Indian tribes entered into solemn treaties with the United States, not the several states. In addition to opposing Indian gaming, states had generally opposed tribal sovereignty, seeking to regulate, tax, and impose jurisdiction over Indian lands.

However, on October 17, 1988, approximately 18 months after the *Cabazon* decision, Congress enacted IGRA. The stated goals of IGRA are: promoting tribal economic development and selfsufficiency; strengthening tribal governments; and establishing a federal framework to regulate Indian gaming. The Act established the National Indian Gaming Commission (NIGC). While there are dozens of forms of gaming in the United States, the NIGC—which is dedicated to the oversight of Indian gaming—is the only federal agency to regulate gaming in the U.S.

IGRA is a compromise that balances the interests of tribal, federal, and state governments. Nevertheless, the Act is grounded in the fundamental principle of law that “by virtue of their original tribal sovereignty, tribes reserved certain rights by entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.” Senate Report No. 100-446, at 5 (Aug. 3, 1988) (“Statement of Policy”). This principle guides determinations regarding the scope of tribal regulatory authority under IGRA.

The State of Indian Gaming Today

Before moving on to discuss Indian gaming regulation, it is also important to first discuss the benefits of Indian gaming to again provide proper context. In 2014, 245 tribal governments operated 445 gaming facilities in 28 states, generating \$28.5 billion in direct revenues and \$3.8 billion in gaming-related ancillary revenues (including hotels, food and beverage, entertainment) for a total of \$32.3 billion in total revenues. Without question, Indian gaming is the most successful economic development tool for many Indian tribes.

Indian gaming revenues are helping meet significant shortfalls in basic needs. Tribes use Indian gaming revenues to improve basic health, education, and public safety services on Indian lands. Tribes are also using gaming dollars to improve tribal infrastructure, including the construction of roads, hospitals, schools, police buildings, water projects, and many others.

For many tribes, Indian gaming is first and foremost about jobs. In 2014 alone, Indian gaming operations and regulation delivered 310,438 direct American jobs. When indirect jobs are added to the mix, Indian gaming generated over 684,000 jobs in 2014 alone. These American jobs go to both Indians and non-Indians alike. Indian gaming resources are making our reservation homelands livable once again as promised in hundreds of treaties.

In addition to revitalizing tribal communities, Indian gaming is benefitting our nearby local government neighbors. In 2014, Indian gaming generated over \$13.9 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.

Finally, it is with pride that we report that Indian tribes made more than \$100 million in charitable contributions to other tribes, nearby state and local governments, and non-profit and private organizations. This statistic is unique to Indian gaming and not surprising given Indian Country's cultural history of sharing and caring for our neighbors. Through the Great Recession, tribal contributions helped prevent layoffs of local government public safety offices, teachers, health care workers, fire fighters, and many other local officials that provide essential services.

Of course, far too many Native communities continue to struggle with poverty and related social ills. Unemployment on Indian reservations nationwide averages 50 percent. Indian health care remains substandard. Violent crime is multiple times the national average. 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.

I applaud this Committee for its work in recent hearings to shine light on the struggles facing Native American youth. Indian gaming is part of the answer, but all of us—tribal leaders, parents, mentors, federal agencies, and Congress—can and must do more to provide opportunities for Native youth and for all citizens of Indian Country.

Regulation: Continuing To Safeguard the Integrity of Indian Gaming

Tribal governments realize that none of the benefits of Indian gaming would be possible without a strong regulatory system to protect revenue and preserve the integrity of our operations. For many tribes, Indian gaming is the sole non-federal source of revenue to fund the basic needs of our communities. As a result, no one has a greater interest in protecting the integrity of Indian gaming than tribal governments.

To provide Congress with an update on the state of Indian gaming regulation, the Government Accountability Office (GAO) in June of this year issued a report on "Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes." The stated objectives of the Report were to examine: (1) tribal and state government regulation of Indian gaming; (2) the NIGC's regulation of Indian gaming; and (3) the Interior Department's compliance with IGRA under the tribal-state compact review process. (GAO Report at 57).

Tribal and State Government Regulation of Indian Gaming

As noted above, many tribal leaders raised concerns and opposition to IGRA prior to enactment. The primary reason that many Indian tribes opposed the legislation was IGRA's requirement that tribal governments enter into compacts with state governments for class III Indian gaming. When Congress debated IGRA in the mid-1980s, tribal-state relations were not only contentious—in many cases they were hostile and combative. This Committee, through its Report on the bill that became IGRA, sought to put many of these concerns to rest:

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 determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to pre-

serve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land.

Senate Report 100-446, at 5 (Aug. 3, 1988) (“Statement of Policy”).

The text of IGRA provides for exclusive tribal government jurisdiction over class I gaming. It acknowledges primary tribal government regulatory authority over class II gaming. The NIGC has direct authority to monitor class II gaming on Indian lands on a continuing basis. The Act leaves the bulk of the details for the regulation of class III gaming to be determined by compact negotiations between tribes and states. However, the Act acknowledges that the NIGC will maintain a secondary oversight with regard to class III regulation. While tribes take on the primary regulatory role, IGRA requires coordination and cooperation with the federal and state governments to make this comprehensive system work.

Vesting local tribal government regulators with the primary day-to-day responsibility for regulating Indian gaming operations stands in stark contrast to the failed policy that generally continues to plague criminal jurisdiction in Indian country. Regarding criminal jurisdiction, tribes are forced to rely on federal officials to investigate and prosecute most major crimes that occur on Indian lands often from offices and courtrooms that are located hundreds of miles from Indian Country. Despite recent reforms, the system of criminal justice in Indian Country is a proven failure. Washington, D.C. is simply not equipped to police—or in the case of Indian gaming, regulate—Indian lands or make local decisions for tribal communities.

With specific regard to tribal and state government regulation of Indian gaming, the June 2015 GAO Report indicates a varying levels of state regulatory involvement. The GAO reports that: in 75 percent of class III Indian gaming operations—states have a moderate regulatory role (11 states); seven states have an active regulatory role in 17 percent of class III Indian gaming operations; and states hold a limited regulatory role in 8 percent of class III operations. (GAO Report at 27–29).

These differing levels of state regulatory involvement are not surprising. This Committee expected as much when developing the Act, noting that “The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and state, etc. . . . The Committee recognizes the subparts of each of the broad areas [subjects for compact negotiations] may be more inclusive.” Sen. Rept. No. 100-466 at 14.

While many tribes initially opposed IGRA for its tribal-state compacting requirement, over the past twenty-seven years, many tribal and state governments have worked to forge relationships many thought unheard of in 1988. In some cases, compact negotiations have been exhaustive, time consuming and costly to both parties. In other cases, they have gone smoothly. In a few unfortunate cases, states have refused to negotiate compacts in good faith pursuant to IGRA as intended by Congress. (This significant flaw in the Act is discussed in more detail below).

Over the past several decades overseeing gaming activities on Indian lands, tribal governments and tribal regulators have gained significant expertise in the field of gaming regulation. Early on, many tribal regulators came directly from federal and state gaming regulatory bodies, law enforcement, and judicial systems. Many others had backgrounds in commercial gaming regulation, banking, and accounting. However, today, many tribal regulators are homegrown, learning directly from these experts—exactly as IGRA intended. State governments have acknowledged this expertise, and rather than take on duplicative regulatory costs, some states—through compact negotiation process—have chosen to defer to tribal government expertise.

In addition to meeting and exceeding the regulatory requirements of IGRA and the NIGC’s regulations, tribal regulators have formed associations such as the National Tribal Gaming Commissioners and Regulators, the Tribal Gaming Protection Network, the Wisconsin Indian Gaming Regulators Association and many others. These organizations have taken an innovative approach to regulation by sharing vital information on individuals and threats to gaming operations as well as best practices of what is working to better protect tribal resources.

Grounded in the policy fostering Indian self-determination, this tripartite system of regulation was revolutionary at the time of its implementation. Over the past twenty-seven years, the system has proven to be incredibly successful in providing first class regulation and in balancing the interests of separate sovereigns in a financially responsible manner.

The NIGC'S Role In Regulating Indian Gaming

As noted above, while there are dozens of forms of gaming in the United States, the NIGC is the only federal agency that directly regulates any form gambling. While IGRA provides that tribal—state compacts will primarily govern the regulation of class III Indian gaming, the Act authorizes the NIGC to monitor class II gaming on a continuous basis. IGRA also acknowledged that the NIGC would maintain a role in regulating class III gaming.

The GAO Report notes that “[a] key difference between class II and class III gaming is that IGRA authorizes the Commission to issue and enforce minimum internal controls standards (MICS) for class II gaming but not for class III gaming.” (GAO Report at 32). However, the Report also indicates that tribal-state class III gaming compacts include requirements for MICS.

Tribal governments have understood the importance of MICS for decades. It is for this reason that the NIGA-National Congress of American Indians Gaming Task Force established model tribal MICS for tribal regulators prior to the NIGC adopting its own federal MICS.

The MICS enable tribal regulators to protect our resources, and to protect the integrity of our games. The MICS generally prescribe methods for removing money from games and counting it so as best to prevent theft; methods for the storage and use of playing cards so as best to prevent fraud and cheating; standards for maintaining security of electronic games access and requiring investigations under certain circumstances; and minimum resolutions and floor area coverage for casino surveillance cameras, among other areas.

The GAO Report also acknowledges that the NIGC conducts regular site visits to both class II and class III Indian gaming operations. During these visits, the NIGC provides training and technical assistance, reviews class II MICS compliance and—with the consent of tribal regulators—reviews class III tribal internal controls; reviews of background checks for key employees, conducts surveillance reviews, conducts facility license compliance for public health and safety, conducts internal audit reviews, conducts gaming ordinance reviews and conducts other regulatory compliance reviews. (GAO Report at 40–43).

With regard to audit reviews, the NIGC requires all tribal gaming facilities to have an annual financial statement audit pursuant to NIGC Regulation Part 571.12 and IGRA. This requires all tribal casinos to have a their financial statements audited by a certified public accounting firm, which require the financial statements to conform with generally accepted accounting principles (GAAP) and that the audit is completed in accordance with generally accepted auditing standards. These audited financial statements, agreed upon procedure (AUP) reports, and other documented communication are submitted within 120 days of the facility's fiscal year-end. In addition, the NIGC issues an annual compliance report to the Secretary of the Interior that lists every tribal casino and their compliance related to audits and other compliance related regulations. The majority of the CPA firms that audit tribal casinos specialize in that niche or have an industry specific team that are experts in Indian gaming. Grant Eve, the gaming partner of the accomplished accounting firm Joseph Eve, CPA, has worked with commercial casino in Las Vegas and with gaming operations throughout Indian Country. Mr. Eve has repeatedly testified that Indian gaming operations meet or exceed the standards of commercial casinos.

In addition to these activities, the NIGC's class III regulatory powers also include: reviewing for approval class III tribal gaming regulations and ordinances, reviewing all tribal management contracts, and monitoring the implementation and enforcement of class III tribal gaming ordinances and provisions of tribal-state compacts. Congress also vested the NIGC with broad authority to issue regulations in furtherance of the purposes of IGRA. Along with 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.

This comprehensive system of regulation is expensive and time consuming, but tribal leaders know what is at stake and know that strong regulation is the cost of a successful operation. Through the Recession, tribal governments continued to dedicate tremendous resources to the regulation of Indian gaming. In 2014, tribes spent \$426.4 million on tribal, state, and federal regulation:

- \$320.2 million to fund tribal government gaming regulatory agencies;

- \$85.6 million to reimburse states for state regulatory activities negotiated and agreed to pursuant to approved tribal-state class III gaming compacts; and
- \$20.6 million to fully fund the operations and activities of the National Indian Gaming Commission.

This funding employs over 6,500 tribal, state, and federal regulators working together to maintain the integrity of Indian gaming.¹ This includes approximately 5,900 tribal government gaming regulators, and approximately 570 states regulators. At the federal level, the NIGC employs more than 100 regulators and staff.

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.

NIGA applauds the work of the current Administration's Department of Justice for its increased cooperation and coordination of FBI agents and U.S. Attorneys with tribal gaming regulators, tribal police, and tribal justice officials. In past years, tribal governments raised a number of concerns that U.S. Attorneys refused to prosecute cases that fell below a certain dollar threshold. This Administration has generally removed those arbitrary thresholds and is working with tribal justice officials to investigate and prosecute all crimes against Indian gaming operations. More generally, this Administration has made it a priority to investigate and prosecute all crimes on Indian lands, which has been a welcome change to the far too many victims of violence in Indian Country. This sends a strong message that any crimes in Indian Country or against Indian gaming operations will be prosecuted to the fullest extent of the law, and has proven a strong deterrent.

NIGA also appreciates the increased consultation, training and technical assistance that the NIGC is providing to tribal government regulators, as well as the related NIGC Assistance, Compliance and Enforcement (ACE) Initiative. Increased consultation has begun to repair frayed relationships with tribal governments, and has led to increased coordination, and further improvements to Indian gaming regulation. While IGRA acknowledges tribal regulators as the primary day-to-day watchdogs of Indian gaming, tribal regulators and the NIGC share a common goal of ensuring the integrity of Indian gaming and protecting tribal governmental gaming revenue. Many tribal regulatory agencies have the resources and ability to stay informed about the latest technology in gaming regulation, access to information about individuals that have cheated at gaming or pose a danger to tribal operations, and the ability to gain needed training. However, some tribal regulators without resources benefit greatly from expertise that can be offered by NIGC field agents. These tribal regulators suffered under the punitive approach that ignored the need for training and technical assistance.

The GAO acknowledged and summarized this system of regulation and could not point to any significant gaps or weaknesses in the regulation of Indian gaming. As detailed by the GAO in their visits to tribal gaming operations, Indian Country is proud of the job they have been doing on regulation. There is no need for major changes in the current regulatory system.

Tribal—State Compacting Process

The June 2015 GAO Report also examined the role of the Interior Department to uphold the integrity of IGRA through the compact approval process. While IGRA sought to protect and safeguard Indian gaming operations through comprehensive regulation, it also sought to ensure that tribal governments are the primary beneficiaries of gaming to strengthen tribal governments and to help tribes achieve economic self-sufficiency.

Again, 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 at all. The text of IGRA, this Committee's Report on the Act, and other related legislative history of IGRA, repeatedly sought to alleviate tribal concerns. Congress clearly balanced tribal and state interests, and expressly prohibited states from using the compact process to protect existing markets or as a means of taxing tribal governments:

A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include

¹Testimony of Tracie Stevens, Chairwoman, NIGC, before the Senate Committee on Indian Affairs (July 26, 2012).

the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

Sen. Rept. 100-446, at 13. The text of IGRA makes clear that the tribal-state compact negotiation process must be limited to activities directly related to Indian gaming. The Act provides that states may negotiate for assessments necessary to defray the costs of regulating gaming-related activity. However, the Act expressly prohibits states from refusing to enter into compact "negotiations. . . based upon a lack of authority to impose such a tax, fee, charge, or other assessment." 25 U.S.C. Sec. 2710(d)(4).

Congress and this Committee acknowledged the unique nature of the compact process and the concessions that tribes would be required to make in negotiating gaming compacts with states. However, it balanced these concessions by requiring state governments to negotiate in good faith, and by providing tribal governments the right to sue states in federal court to enforce this obligation:

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."

Id. at 14-15.

This compromise and the balance that it struck were short-lived. Eight years after enactment, the United States Supreme Court destroyed the delicate balance to the IGRA compacting process in its 1996 decision in *Seminole Tribe of Florida v. Florida*. Overruling its own precedent, the Court reasoned that, "Even when the Constitution vests in Congress complete lawmaking authority over a particular area [such as Indian affairs], the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). The Court thus held that Congress did not have the authority to permit tribal governments to bring suit against state governments in federal court to enforce IGRA's good faith compact negotiation obligation. The case effectively shattered the delicate balance in the tribal-state compacting process.

For nearly twenty years now, the Supreme Court's *Seminole Tribe* decision has left tribal governments without a method to enforce the state's obligation to negotiate or renegotiate class III gaming compacts in good faith. While a number of tribes have continued to make IGRA work despite the imbalance, some tribes forced to work with intractable state administrations face the no-win proposition of either not moving forward on a project that could be its only source of governmental revenue or succumbing to what could be viewed as a direct violation of the Act.

While we are pleased that the GAO took a long needed overview of IGRA's tribal-state compacting process, the Report lacks a true examination of the integrity of that process. The Report also fails to provide recommendations to improve the current process.

Since the Court's 1996 decision, Indian Country has consistently urged Congress to restore balance to IGRA's tribal-state compact process. Restoring balance to this process is the only way to ensure the integrity and the goals of IGRA are met.

NIGA applauds the Obama Administration's efforts to renew diligent review of tribal-state compact provisions and compliance with IGRA, particularly its focus on revenue sharing provisions. The GAO Report confirmed this fact by noting that Interior officials "pay close attention to provisions that dictate terms for revenue sharing between tribes and states to ensure that state are not imposing taxes or fees on Indian gaming revenues prohibited by IGRA." (GAO Report at 18). Prior to the current

scrutiny, NIGA and our Member Tribes raised significant concerns that the Interior Department ignored its trust obligations to tribes and its legal obligations to ensure that Indian tribes are the primary beneficiaries of Indian gaming activities under IGRA.

Finally, while the subject of Internet gaming is beyond the scope of this hearing, provisions in bills that propose to authorize the activity in the United States could impact existing tribal-state compacts and the future of the compact process. A common example of these provisions is Section 111(e) of H.R. 2888, the Internet Poker Freedom Act. This provision, titled "No impact on the Indian Gaming Regulatory Act", could be read to permit state governments to authorize Internet gaming within state borders in direct conflict with existing tribal-state exclusivity provisions. Tribal governments have invested significant time and resources into the already difficult compacting negotiation process. Congress should not consider legislation that interferes with these agreements. We urge the Committee to work with the Committees of jurisdiction to ensure respect for existing tribal-state gaming compacts and ensure the any federal Internet gaming legislation adheres to the principles outlined in my testimony before this Committee in July of 2014.

Conclusion

Indian gaming revenues enable more than 240 tribal governments the ability to provide basic services to our people and rebuild our communities. Tribal governments acknowledge the great importance of what is at stake, and have committed significant resources to protect 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 each year to spend more than \$426 million to regulate their operations, and to the thousands of men and women who are day-to-day front line regulators of Indian gaming. For twenty-seven years, tribal regulators have worked closely with federal and state regulatory partners to provide for the safety of visitors to Indian Country, the integrity of Indian gaming operations, and the security of the vital resources that Indian gaming provides to tribal communities nationwide.

Chairman Barrasso 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, Mr. Stevens. Thanks to all of you who are here and shared your thoughts. I want to thank all the witnesses for your testimony.

I am now going to turn to members of the Committee for questions. We will start with Senator Lankford.

STATEMENT OF HON. JAMES LANKFORD, U.S. SENATOR FROM OKLAHOMA

Senator LANKFORD. Thank you, Mr. Chairman.

Mr. Chairman, I would like to ask unanimous consent to make a quick comment related to the markup as well, the SURVIVE Act. One of the unfinished pieces of business there is that obviously 20 percent set aside already for the crime victims fund going to tribe and other areas in the Department of Justice, that has not been capably run by the Department of Justice. That is still sitting out there. We are talking about an additional 5 percent to try to get that through the BIA.

I would like to recommend a couple of things. Once this is done and we deal with the other 20 percent and try to find out why that is not being capably run. We are dealing with the duplication aspect of it. Or then just ask BIA to be a better advocate for the tribes in that particular area and those particular sets of grants.

But I don't want to just start a new system and leave unworking systems still sitting there unresolved. So in the days ahead, I would like for us to be able to continue to address that.

Thank you for allowing me to make that mention.

Welcome to you all. Thank you for being here and being a part of this conversation. Mr. Commissioner, I want to get a chance to chat with you. It is good to see you. I know you are just getting started on this.

But the statement was made dealing with the Class III gaming that Ms. Fennell made the comment on, that there needs to be guidance for Class III gaming. Currently it is non-existent and the tribes, the States and the Commission are working together to establish that.

Tell me where we are in the process. Do you agree or disagree with that statement, that it is not there yet but can be?

Mr. CHAUDHURI. Thank you, Senator. I want to take the opportunity to thank you again for the courtesy meeting we had a while back.

So keeping in mind our primary goal is the implementation of IGRA, we have recognized for some time that there may be a potential opportunity to provide guidance in the arena of Class III gaming. However, we are mindful of case law that exists that limits our authority to issue binding minimum internal controls.

It is not something, frankly, that NIGC has tackled in recent years. I personally would like to commend our incredible team as well as our partners in Indian Country in taking a look at whether or not there is an opportunity to move the needle in terms of providing guidance for Class III gaming.

Senator LANKFORD. Tell us what you would need from us in that. Is there some kind of clarification that we can provide that you need in the process?

Mr. CHAUDHURI. I don't think so, not at this time in the sense that we always appreciate your support. However, to the extent that we are looking at anything right now, we are in the very early initial stages of looking at potential voluntary guidelines that we may consider issuing as a commission. No pen has been put to paper on that at this point.

We have held some initial tribal consultations on the matter. We look forward to hearing from other partners in the regulated community. Specifically since these matters implicate State interests, we welcome and hope to receive comments and suggestions from affected States. But we are very early in the process.

Senator LANKFORD. Let me ask you a question that is technically related. The technology, obviously, we have all seen, has dramatically increased everywhere, including in the gaming area. An electronic game in the past was considered a Class II game on the whole. Now several electronic games, actually you are competing with someone in another location, physically. That can stretch, now, over thousands of miles at this point, that you can stand in one location and actually compete with someone at another location.

How is that being handled in the regulatory scheme and the conversation at this point, Class II, Class III, legal, not legal when you open it up to competing from one machine to someone standing physically in another building, perhaps even in another State?

Mr. CHAUDHURI. Thank you, Senator. In one sense, our job is very easy, in another sense it is very hard. It is easy in the sense that as regulators, our role is to implement IGRA. We start there

and we end there. So when any question of a given game, whether it is Class II or Class III, is presented to us, we apply the tenets of IGRA to any situation.

It is difficult in the sense that IGRA is a very powerful statute. However, the industry as a whole is very nuanced. When you talk about technology, it is ever-changing. So as an agency, we are ramping up our internal capabilities, and this is one of our priorities, when I mentioned priorities and principles, by developing a division of technology to track those changes.

But to answer your question, I know what you are asking in terms of the different types of games that are out there. It is hard to speak in general without looking at the actual guts of a given game and applying it to IGRA.

Senator LANKFORD. If there was a game where they are competing with someone who is another State, is that legal at this point, or not legal at this point? How is that regulated?

Mr. CHAUDHURI. There are different types of open networks and closed networks.

Senator LANKFORD. But obviously in the gaming area, they need clear definitions on that, as the technology begins to move. Do you feel like the Commission is at a point to give rapid responses to hard questions like that? Because there are a lot of hard questions. Are there concerns about that that anyone else might have as far as bringing clarity to some of these issues?

Mr. CHAUDHURI. Thank you, Senator. We strive to give rapid responses, but our responses are based on IGRA. We stay in our lane. So I don't want to weigh in on any potential legislation without being asked specifically about any legislation. We stand ready, willing and able to provide additional perspective on any of those discussions.

But given the nature of IGRA right now, our role is to regulate activity on Indian lands. That is where we focus our attention and regulatory jurisdiction.

Senator LANKFORD. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Lankford.

Senator Franken?

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

Senator FRANKEN. Thank you, Mr. Chairman.

I talk a lot in this Committee about how the Federal Government is falling short in its commitment to Indian Country. Congress routinely fails to adequately fund Indian programs, whether we are talking about health or education, housing or transportation. Indian gaming provides tribes what the Federal Government so often fails to provide, which is resources, resources that serve the needs of their members.

Gaming is an important source of revenue for every tribe in Minnesota and for hundreds of tribes around the Country. Gaming is also a source of jobs and economic development. In fact, tribal casinos are the largest employers in some Minnesota counties. That is why proper oversight of gaming and gaming regulators is so important.

The National Indian Gaming Commission is the key Federal regulator overseeing tribal gaming. However, NIGC hasn't had a full Commission in over two years. The Senate confirmed Mr. Chaudhuri as chairman earlier this year, and Chairman Chaudhuri, I congratulate you on your confirmation, which I voted for.

However, the other two positions on the Commission remain unfilled. Unlike the chairman, who requires Senate confirmation, these positions are approved by the Secretary of the Interior. Chairman Chaudhuri, how are the functions of the Commission limited as long as it lacks a quorum?

Mr. CHAUDHURI. Thank you, Senator, and thank you for your support through the confirmation process.

The optimum and best scenario is to have a full Commission. IGRA contemplates a full Commission. And that is important, because having at least a quorum of commissioners, at least two, is necessary to do certain specific things. Those duties or those functions are clearly spelled out in IGRA. Those includes weighing in on appeals of chairman decisions, making changes to fee rates, issuing certain types of subpoenas, issuing subpoenas.

So there is importance, especially when it comes to passing new regulations. There is importance in having at least a quorum of commissioners. I am personally committed to working with whom ever gets appointed onto the Commission.

But in terms of day to day activities, IGRA does vest day to day authority within the chair. And the chair, in working with the extremely skilled and highly qualified staff that we have, does move day to day operations along. Overall, day to day, there is not a hiccup. We have been able to maintain our direction.

Senator FRANKEN. Mr. Stevens, does lack of quorum affect tribes? What does it mean for the tribes?

Mr. STEVENS. Well, I think it does. I think that we continue to advocate that those positions are filled. But as I think the record reflects, Senator, that we don't have time to wait. We have to look out for our shop and our operations. We continue to be fluid. Our commissioners are on duty. Our tribal governments are making sure that the regulation is fluid in Indian Country.

Senator FRANKEN. I encourage the Interior Department to get on that.

Mr. STEVENS. Yes, sir.

Mr. CHAUDHURI. Thank you, Senator. It is my understanding they are actively working on it.

Senator FRANKEN. Good. The National Indian Gaming Commission has been working on guidance for minimum internal control standards which deal with how gaming is monitored and how cash is handled. While a Federal court struck down the Commission's 2006 standards, nine States, including mine, Minnesota, have compacts requiring tribes to meet the 2006 standards.

So one of the open questions now is whether the Commission would withdraw its 2006 rules if it put out new guidance. Ms. Fennell, what would it mean for States like Minnesota that refer to the 2006 rules if the Commission withdrew those rules?

Ms. FENNELL. Senator, in our report we noted that this is an important topic and issue. Therefore, we recommended that the Com-

mission outreach to the States to get their input. Decisions moving forward on the internal control standards will have an impact not only on tribes, but on States. And in particular, in terms of States, there are many tribal compacts that make reference to the regulations and the minimum internal control standards.

In addition, there are three States that have compacts that require tribes to comply with the 2006 regulations. And then as you mentioned, there are nine States, including the State of Minnesota, that have tribal-State compacts that require that internal control standards be at least as stringent as the 2006 regulations.

So the decisions going forward are very critical, because it does have a direct impact on those States in terms of their tribal-State compacts. We look forward to hearing how the Commission will proceed in terms of outreach with the States in light of our recommendation.

Senator FRANKEN. Thank you. I am out of time, so I would, unless anyone has anything to add to that. It sounds like it would create some uncertainty.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Franken.

Senator Hoeven?

**STATEMENT OF HON. JOHN HOEVEN,
U.S. SENATOR FROM NORTH DAKOTA**

Senator HOEVEN. Thank you, Mr. Chairman. I want to thank all of our witnesses for coming today. Let me start out with Mr. Stevens. I want to know if you have been keeping your horseback riding skills up to snuff.

Mr. STEVENS. I just saw Earl Pomeroy the other day and we talked about our skills. I am still a couple steps up in comparison. My cowboy hat is shaped, but my horseman skills are still a little bit lacking.

Senator HOEVEN. Your horseman skills are great. Not many get to say they got to ride horseback down the Capitol Mall.

Mr. STEVENS. That was awesome.

Senator HOEVEN. It was a great day and we had a great time.

Mr. STEVENS. Yes, sir.

Senator HOEVEN. For someone who hadn't been around horses a lot, I thought your skills were fantastic.

Mr. STEVENS. Thank you. I asked them to get a very gentle horse. The one they got me was a little bit short, but it was gentle.

[Laughter.]

Senator HOEVEN. Again, thanks to all of you. The question I have for each one of you is, are there changes that you feel should be made in terms of how we handle Indian gaming? If so, what are those changes? Why are you recommending them? Are there any changes you feel that you would advocate at this point?

I will start with you, Ernie, and just work our way right up to the commissioner.

Mr. STEVENS. I think the respect for tribal sovereignty and tribal governments and our form of regulation, the impact that we are making in protecting our industry, I think that is the most important aspect here. I think that Mr. Lankford talks about, I think I interpret that as an online or internet question. Matter of fact, we

just met two weeks ago regarding this with national tribal regulators. We talked with NIGC about this. We continue to assert the roles of these parties.

We see that more as proactive. Because we don't have anything that is active, that is a law. That is not actually happening. But we want to be proactive in our ability to be able to regulate that industry. So we have talked about it, even though it is not actually happening, quite extensively so.

Again, our energy is working together and understanding and appreciating the regulatory responsibility that tribal governments serve in Indian Country.

Senator HOEVEN. And you are a strong advocate of the State-tribal compacts and would continue to support those compacts?

Mr. STEVENS. I am a strong advocate of the compliance to those compacts, to the work that we do to ensure the integrity of the operations. The Indian Gaming Regulatory Act is a law written that the tribes generally, in my late uncle's day, when he was vice chair of this organization, did not support and vehemently opposed. But when the law was passed, the tribes grasped that and championed that and we have done a great job with the Indian Gaming Regulatory Act.

So to say that we support that is one thing. But championing the compliance to that law, I think Indian gaming has an excellent record in doing so. I think that reflects our integrity.

Senator HOEVEN. You have been tremendous in working with the States on those compacts. I appreciate it very much.

Mr. STEVENS. Yes, sir.

Senator HOEVEN. Mr. Trujillo?

Mr. TRUJILLO. Yes, thank you for the opportunity to weigh in on that question. I don't know if I have any changes, so to speak. But I would just ask that all present be mindful of the State regulatory partners in this process. Washington has enacted compacts since 1992. We have worked with tribes since that time. We have had machines in place for many, many years. We have had our own lab.

So some of the questions, when it comes to what are some of the best standards or best practices, when it comes to that, we have been through that. We have been through that before.

Prior to Indian gaming beginning in Washington, my agency operated for 20 years and licensed activities, licensed gambling activities. So we brought that expertise with us into the tribal gaming world. As I testified earlier, it did take us a little bit to get to speed, where we recognized that the tribal partners are not licensees, so to speak. They are regulatory partners.

Now that we are up to speed and we are operating that way, I would just say again I am proud of the relationship that we have. Any time that we can be a resource to whomever, I would offer that up as well.

Senator HOEVEN. Thank you. Jamie, are there any changes you would like to see or feel need to be provided for Indian gaming?

Mr. HUMMINGBIRD. Thank you, Senator. At this point, I believe over the last 27 years that tribes and States and the Federal Government have made the Indian Gaming Regulatory Act a living success. It has not been easy. We have had our difficulties, as we

began implementing the Act and as technology came along, more difficulties came along.

But we addressed those. We worked in partnership with our counterparts on the State and Federal side to address those issues. I think what we have today is a workable document.

As far as anything with respect to IGRA, I would say that the process is working. But I would caution and request that any other legislation that may be impactful to Indian gaming be respectful of the successes that we have achieved over these last 27 years.

Senator HOEVEN. Ms. Fennell?

Ms. FENNELL. In our report, Senator, we identified some opportunities for the Commission to act upon in order to better determine how effective its various efforts and actions are. So we will look forward to seeing how those recommendations are ultimately implemented.

In terms of some other issues to consider going forward, regarding IGRA, IGRA has certainly sought to balance State and tribal government interest by including some different provisions limiting both State and tribal sovereign immunity. The courts have weighed in, limiting some of the effects of these provisions. So it will be important to consider how to resolve disputes between these two sovereigns going forward.

And as was previously mentioned, it will be also important to consider the challenges that are faced when commissioner vacancies exist.

Senator HOEVEN. Commissioner? And I am now over my time, so, briefly.

Mr. CHAUDHURI. Thank you, Senator Hoeven. And thank you for this opportunity for me to clarify my answer to Senator Lankford. I am not sure if I was direct enough.

In regard to internet gaming, you asked about any potential legislative tweaks that could be made. I would again suggest that if there are any specific recommendations you would like our input on, we would be happy to provide that specific language.

Generally, though, when Chairman Stevens talks about the successes of Indian Country, those lessons and any lessons regarding implementation of IGRA should help inform any potential legislative tweaks that may come down the pike regarding IGRA or internet gaming or what have you.

Ms. Fennell mentioned the balance of various interests. One thing that is always helpful for us in terms of guiding principles is the underlying policy purpose of IGRA in terms of supporting strong tribal governance, self-determination, self-sufficiency, tribal economic development.

So recognizing the longstanding leadership and vision of Indian Country as any legislative tweaks are formulated would benefit the legislative process, I would think. Certainly when it comes to NIGC, I think I have been on record as stating that as the only Federal agency that regulates any type of gaming we certainly have in-house specialized skill sets and expertise that we would be happy to bring to bear in whatever capacity Congress so chooses.

Thank you, Senator.

Senator HOEVEN. Thanks for your indulgence, Mr. Chairman. I appreciate it.

The CHAIRMAN. Thank you, Senator.
Senator Heitkamp?

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

Senator HEITKAMP. Thank you, Mr. Chairman.

Mr. Stevens, saying that you are a better horseman than Congressman Pomeroy is not exactly a ringing endorsement of your skills.

[Laughter.]

Senator HOEVEN. He definitely is.

Senator HEITKAMP. That isn't telling me much, is it, John? We have to tell him we had a little fun at his expense.

I always have to start these discussions with kind of a little history lesson which goes back to the history of Indian gaming. I think a lot of people think that is a gift that the United States Congress gave to the tribes, when in reality it is a restriction on the sovereign rights of tribes as outlined by the Cabazon case.

So I think when we talk about Indian gaming, it is critically important that we put it in that context, that we not start from the standpoint of this is an authorization we gave you and we want to know how you are doing with it. We have to start in a government-to-government respectful relationship.

Now, one of the advantages of the Indian Gaming Regulatory Act is there has to be some assurances to the gaming public that when they walk into a casino, no matter where it is, that the game isn't rigged, that they actually have a chance of winning, that all of the games are monitored in such a way and personnel is monitored in such a way that it is safe. I speak with some amount of expertise, because I used to be the entity in North Dakota that was responsible for actually regulating Indian gaming.

So I want to start out, Mr. Stevens, maybe talking about the dual role that we have, which is, we have the Federal regulating agency, we have many States who in their compacts have negotiated a regulatory responsibility, and as the GAO report outlines, that is a sliding scale, some which simply check the box and some like Washington that have a full-on, regulatory responsibility at the State level. Then obviously, Mr. Hummingbird, you are here representing those entities within tribal governments that are working.

Senator Lankford and I have been spending a lot of time talking about regulatory burdens and talking about inconsistent regulation across layers of sovereign entities. So Mr. Stevens, I am curious about whether you think we do enough to harmonize all those layers of regulation and whether we work collaboratively enough among all three layers to come up with a plan that really represents best practices, that can be used then in training personnel that can be used to continue to expand and build on the safety for the gaming public.

Mr. STEVENS. Yes, Senator, I think that the best practices, the bottom line is that we are responsible to our communities and to the next seven generations. So it is imperative that our regulators continue to uphold the integrity of our operations. So as primary regulators of our industry, that is ultimately who we are respon-

sible to. That is why we are so passionate that we protect our industry.

Senator HEITKAMP. Wouldn't you say that there is a varying degree of participation in the various tribal regulatory authorities in terms of how they look at their responsibility under gaming? Couldn't they learn from those of you who are seasoned and experienced?

Mr. STEVENS. Yes. In my testimony, Senator, a lot of times now they are coming to us to learn about our seasoned experience because of the priority we have and the money, the input we have into this industry to regulate it. We are now the experts. We have people who have come through college, some have 10 and 20 years' experience. We have 40 years of regulating Indian gaming.

Senator HEITKAMP. One of the comments from GAO is really inconsistency at the level of regulation. So how do we in tribal-to-tribal relationships and certainly within the regulatory authority and probably within the association, how do we encourage and build on your experience and expand that expertise?

Mr. STEVENS. As I understand it, I don't agree with that. I think that the consistency is there. I think that through the tribal-State compact process that they have access. I don't know the number, I might have it in my testimony here, but the extensive audit process that our tribes have to adhere to. And that is independent of our tribal regulators.

So I think that check and balance is there.

Senator HEITKAMP. So there are parts of the GAO report that you would not necessarily agree with?

Mr. STEVENS. Not particularly, no. I think that the GAO report was a good report, because I think it reflects good on Indian Country when you have that much extensive review. Any time you take a look at our industry in any way, shape or form, it is another check and balance. And I think that is a good thing.

Senator HEITKAMP. I think this certainly has been a success story over the last 27 years. I think it has been not because it has been led by Congress or led by the States, it is because it has been led by a maturing industry within Indian Country. I really do applaud all of you. I think you are doing a great job. But there is always more that can be done. Protecting the integrity of the game is absolutely essential to the economic benefits that you can receive. Because when people don't trust when they walk through your door, you lose a customer, you lose an opportunity to actually raise more revenue.

Thanks so much, Mr. Chairman.

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

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

Senator MCCAIN. Thank you, Mr. Chairman. I thank the witnesses. As you know, Mr. Chairman, I had the honor of working with the late Senator Dan Inouye and offering the Indian Gaming Regulatory Act of 1986. The law complied with the Supreme Court's landmark Cabazon decision, which held that tribes have sovereign rights to conduct gaming in States that also allow gam-

ing. We also know that today, the \$28 billion industry, we have come a long way since we passed that law in 1986.

Ms. Fennell, I want to thank you for your GAO report. It is very comprehensive. I believe that it can get the attention of all of us. One of the areas that concerns me about your report is that roughly 25 percent of all Indian gaming operations remain at high audit risk. That represents a decrease from 38 percent in 2009, but I would ask Mr. Chaudhuri, isn't that rather high, 25 percent?

Mr. CHAUDHURI. Thank you, Senator McCain. It is always good to see a fellow Arizonan, even though I have one foot in Oklahoma as well. Any risk is high. But one thing I do want to point out is that we have a shared interest as regulators with the tribal regulatory community because sound regulation prevents loss of resources and nobody has a stronger interest than the tribes to prevent loss.

Senator MCCAIN. Let me ask you if you think that that is very high.

Mr. CHAUDHURI. It is better than 38 percent, where it was in 2009.

Senator MCCAIN. I am sure it is better than 90. I am not questioning that. Is it too high?

Mr. CHAUDHURI. The number itself is an internal administrative tool that we use. In a vacuum, it is hard to answer, without proper context.

Senator MCCAIN. I am asking you a question whether you think that is too high or not. I guess you could tell me yes or no and why.

Mr. CHAUDHURI. We would like it to be lower.

Senator MCCAIN. And I will ask for the final time. Is it too high?

Mr. CHAUDHURI. Compared to, I mean -

Senator MCCAIN. Obviously you are not going to answer the question.

Mr. CHAUDHURI. No, I appreciate that. We would like it to be lower.

Senator MCCAIN. I will move on, Mr. Chaudhuri. Because you are obviously not going to answer the question.

How effective, Ms. Fennell, do you think that letters of concern are as opposed to the other enforcement tools that are available to the Commission?

Ms. FENNEL. Letters of concern are a practice that was then implemented into Commission regulations. It serves as an approach or opportunity for the Commission to work with the tribes in pointing out issues of concern and then helping to work with the tribes in terms of ensuring that actions could be taken to address potential compliance issues.

We identified that there were some opportunities for improvement in using this particular approach and tool and made specific recommendations as to how the Commission could improve it, so that it could serve as a tool that is in compliance with Federal internal control standards and can be more effective than it currently is.

Senator MCCAIN. Thank you. As one of the authors, one of the two authors of the legislation, I am sometimes amused when people tell me what the intent of Congress was. I can tell the Commission that the intent of Congress was not for parachuting into metropoli-

tan areas without the agreement of the local authorities and citizens. What we are seeing in Glendale, Arizona is a very serious situation. It is a complicated, to some degree, issue.

But it was certainly was not the intent of Senator Inouye and me to see a situation such as evolved there. So in the future, there may be other attempts to move into the center of metropolitan areas. I believe that it is wrong and I believe that it is contrary to the intent of the law that we passed. The only reason why we got it passed was because we assured governors, attorneys general and others that that wouldn't happen, that it would be contiguous lands or lands that had the approval of all of the local people for the expansion of Indian gaming.

So I hope we don't have to see a situation arise again such as I just saw in Glendale, Arizona. Because I can assure you, as the author of the bill, that that is not what was envisioned by Senator Inouye and me when we wrote the legislation and got the agreement of the National Governors Association and the National Attorneys General Association. So I hope that the Committee will take that for what it is worth, and that is, the intent of Congress by the author.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator McCain.

Ms. Fennell, your written testimony noted that the National Indian Gaming Commission's efforts to encourage voluntary compliance by tribal gaming facilities with its regulations basically used two primary approaches, training and technical assistance and letters of concern to alert tribes of potential compliance issues. Your testimony further states that the effectiveness of these two approaches is still unclear.

I think without an effective approach to monitoring and compliance, how can Congress and the tribes be assured that the tribal gaming facilities are adequately protected from internal control weaknesses and from revenue losses due to crime?

Ms. FENNELL. Mr. Chairman, we will be very interested to see how the Commission plans to implement our recommendations. We are encouraged that they agreed with our recommendations, which indicated that they could benefit from having measures in place to determine how effective their efforts are. We will continue to monitor that, and I think it will be very important to see how those recommendations ultimately get implemented.

The CHAIRMAN. Senator McCain just spoke as one of the original authors of the Indian Gaming Regulatory Act. Do you believe that that Act should be amended to provide more guidance to or more extensive role for the Commission in Class III casino style gaming to ensure regulatory compliance?

Ms. FENNELL. Our recommendations were focused on the Commission itself. We didn't have any particular matters for consideration for the Congress at this time. But we are certainly happy to work with your staff in terms of any suggestions or language that you might be entertaining as a Committee, and work with you on that.

The CHAIRMAN. Thank you, Ms. Fennell.

Chairman Chaudhuri, the GAO has provided several recommendations to improve the National Indian Gaming Commis-

sion's efforts to help tribes achieve regulatory compliance. Your written testimony doesn't really provide a clear time frame to fully implement these recommendations or the other improvements, such as updating the Class III minimum internal control standards from 2006, upon which many tribes rely. I know you have only been fully confirmed for a relatively short period of time.

Could you provide this Committee with a date certain that we can expect the implementation of the Government Accountability Office recommendations?

Mr. CHAUDHURI. Thank you, Chairman. As I mentioned in my opening statement, we are very appreciative of the GAO's technical recommendations. Certainly our first order of business since I have been there is to look at everything that we do that targets compliance and see if we can do it better.

So the GAO recommendations fall in line with that. Frankly, they fall in line with Indian Country's interest in safeguarding its important economic development tool.

But in terms of a date certain for all the recommendations, the recommendations are consistent with a lot of positives that we are already doing. It is consistent with the technology division that we are creating. It is consistent with us ramping up on our efforts to ensure tribes are primary beneficiaries. So it is hard to put time frames on everything.

But we could go over a few examples. In terms of the Technology Division, that will help us track data, capture data and analyze data. We just created the division, we have an acting director who is newly-named and we will be publicizing very shortly, a technology manager. We are going to be moving very quickly as time goes on, so that we have internal capabilities to track and analyze data. That is hugely important when it comes to outcome measures.

Similarly, when it comes to outreach with States, we are in the early stages of considering possible routes for voluntary guidance regarding Class III. We are actively considering having a special comment period that is targeted at States that are maybe affected by Class III guidelines so that we can review input directly from States.

So in the near future, but we want to be thorough rather than rigid regarding time frames.

The CHAIRMAN. Mr. Hummingbird, the GAO recommends that the National Indian Gaming Commission include outcome-oriented metrics as part of its performance measures for its training and technical assistance efforts. This training and technical assistance is intended to help prevent internal control weaknesses at tribal gaming facilities which need to keep pace with an evolving industry.

Can you tell me how tribes measure the effectiveness of their own tribal gaming structure, including regulatory staff, enforcement efforts? How do you look at that?

Mr. HUMMINGBIRD. Thank you, Mr. Chairman. For the outcome measures, I would first look to a number, actually, there are a number of things to look at. First of all, are the audits that are conducted by our tribal gaming regulators on a regular basis. Depending on the types of facilities that we have, we have anywhere

between six to nine audits that we have to perform at least annually. For us at Cherokee Nation, we perform close to 63 audits on all of our gaming facilities on an annual basis.

You couple that with the reporting that we have placed upon our operations for financial reporting for financial accountability, as well as in instances of environmental public health and safety issues. We also take into account any other financial reporting or any other type of reporting that we are obligated to do to other agencies besides the NIGC.

So we take all these pieces and look at them in context to see exactly where our gaming facilities are in relation to the level of compliance we want them to achieve. So we look at the instances that we have on our radar every month. We also look at all of our internal compliance that is formed within our gaming facilities as well.

So in addition to the tribal regulators on the governmental side, we also have internal compliance people who assist us in those efforts as well.

The CHAIRMAN. Thank you. Mr. Trujillo, your written testimony highlights the experience of the Washington State Gambling Commission in regulating gaming activities. You state that the State Commission has established performance measures and you challenge yourselves to be more effective and more efficient. You have a long history of this.

Can you describe some of those performance measures which help ensure that the Indian gaming establishments are protected from the loss of revenues due to criminal activity?

Mr. TRUJILLO. Yes, thank you for that question. We have some measures. We report to our own office of financial management. You could consider that an activity measure. That activity measure would be, how often are we, as State regulators onsite, working with the tribes. That way we can demonstrate to the citizens of Washington that we are working together. That is an activity measure.

We do have performance measures based upon how often do we work on case reports or investigations with tribal gaming regulatory agents. We strive to do all together.

There are other activity measures we have when it comes to receiving submissions from tribes that we review. That could be internal control modifications, it could be new game submissions, it could be new electronic submissions, what have you.

Those particular metrics that we use are two-fold. One would be, do we just get those in. And then others are, how fast can we process those and if we are processing those fast enough, are we working with the tribal gaming regulatory agency that is responsible for submitting those.

Those are just a few of those measures. Another way that you can look at how effective a regulatory framework is, the amount of trust the public places in that activity. In Washington, tribal gaming has enjoyed continual increase, albeit modest these past few years, for annual gaming receipts.

It is a little bit different than in the materials presented by the GAO where actually, overall, there was a slight decrease. But I would just submit that all of that together demonstrates that the

tribe and the State and the National Indian Gaming Commission are all in this together. That is how it was designed.

I keep talking about Washington, but that is my experience. And that is, I believe, the regulatory framework has created the relationship that we have and that was envisioned by the Indian Gaming Regulatory Act when it comes to whether or not there is a mechanism for continual Class III enforcement or what have you. The States are there. States do a good job, I believe.

So working through that is primarily why I am here today, which is to underscore that number one recommendation in the GAO report.

The CHAIRMAN. Thank you, Mr. Trujillo.

Mr. Stevens, in your written testimony it talked about in 2014, I think the tribes spent over \$426 million on tribal, State and Federal regulations, including over \$320 million for tribal gaming regulatory agencies and employing about 5,900 regulators, according to your written testimony.

Mr. STEVENS. Yes, sir.

The CHAIRMAN. It further stated that the Department of Justice has repeatedly testified there has been no substantial infiltration of organized crime on Indian gaming. I am just wondering, organized crime is not the only criminal threat to Indian gaming. So can you talk about what performance measures exist to ensure that these 5,900 regulators, that they can effectively detect and prevent other types of crimes, including embezzlement?

Mr. STEVENS. Yes, sir. I don't want to say much about organized crime. I think that is a little bit rhetorical, but not out of the question. That is what we set out to do 30 years ago. So it is still a high priority.

But like you say, we are watching for cheats and scams and different things. They float all over this Country. There are several associations and regional associations that deal with these issues. But the tribal gaming protection network was established at the National Indian Gaming Association. A couple of years ago I had the chairman of that body with me to testify. That is what we are trying to do, trying to immediately, as soon as something hits the fan, immediately we are talking.

That is why I mentioned the arrests having to do with the bank robbery and things like that. These things are happening immediately, and we are helpful to law enforcement throughout this Country that goes far beyond even just gaming regulation because of our technology and our folks working together.

So I think it is more serious about the potential scams and cheats that are working in our industry. But I think that our guys are on top of it. That is what our priority is, to protect our industry. I think that we are doing a good job of that.

But in this world, you never know. They could do anything. Some people are straightforward bold and some people are very sophisticated with the outside building of computers and technology. We have to be on top of it. That is where we credit several other bodies, including working with the national tribal regulators. Our tribal gaming protection network was set up specifically to network all these, the brainchild of this regulation, for us to work together and

try to head off these, or when they start to happen, we talk to people throughout the Country, we put the red alert out there.

The CHAIRMAN. Thank you, Mr. Stevens.

Does anyone have anything else they want to add on these points? Mr. Hummingbird.

Mr. HUMMINGBIRD. Thank you, Mr. Chairman.

To supplement Chairman Stevens' comments just now, one of the things that we look at on a day to day basis, in addition to looking at the system generated reports, whether it is the gaming system, the financial accounting system, those types of reports are reviewed daily, weekly, monthly.

We also have invested millions and millions of dollars in surveillance and other computer systems that are designed to help catch the cheaters and scammers that Chairman Stevens referred to. One thing that I think you will see today and probably more so in the future is a great amount of attention being paid to cybersecurity. Because as we know, the backbone of any modern gaming facility out there is computer networks. So it is a very important piece for us to keep a watchful eye, not just on what is going on inside the facility on the gaming floor, but in the back of house and on our computer networks as well.

The CHAIRMAN. Yes, Mr. Chaudhuri.

Mr. CHAUDHURI. Chairman, I would just like to add to that. In a supporting role, we are mindful of cyber threats and IT vulnerability. I do want to highlight that Division of Technology in reference to some of the recommendations. I think there is absolute consistency.

One of the services that we provide is IT vulnerability assessments, free of charge to Indian Country partners. That is a new offering that has been presented in recent months. We will go in free of charge and look at any potential vulnerabilities that we see and provide a report with written recommendations.

So we are trying to do what we can, similar to internal control assessments that we have been doing for some time. We are doing what we can to support that end of the equation.

The CHAIRMAN. Thank you. Seeing no further questions, no further comments, other members will be able to submit written questions.

Mr. STEVENS. Mr. Chairman, if I could just quickly add something. On the GAO report, we are hoping, with all due respect, that in the future those evaluations could include more about site visits with tribes and review and our gaming commissions and our proven track record of regulation. Again, as I told the Senator from North Dakota, we think that adding more checks and balances is a good thing.

And regarding that 25 percent, I think Chairman Chaudhuri agrees that 25 percent is too high. I don't know that we agree with that number. But that number is not acceptable to the communities we represent. I just wanted to add that today, Mr. Chairman.

The CHAIRMAN. Thank you.

The hearing record will be open for two weeks. I want to thank all of you for being here today, for your time and for your testimony.

The hearing is adjourned.

[Whereupon, at 3:44 p.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JAMES LANKFORD TO JONODEV OSCEOLA CHAUDHURI

Question 1. To what level of detail could a Tribe and state agree to a compact on matters not directly related to gaming? For instance, could a Tribe and state compact on standards for disability accessibility, construction standards, or energy standards?

Answer. The Indian Gaming Regulatory Act prescribes gaming compacts governing the conduct of Class III gaming activities on a tribe's Indian lands be negotiated in good faith between tribes and states.¹ IGRA assigns the authority to approve or disapprove any compact entered into between a tribe and a state to the Secretary of the Interior.² Further, the Office of Indian Gaming, as part of the Bureau of Indian Affairs, is responsible for providing assistance to tribes and states during the compact negotiation process. Additionally, in 2008 the BIA issued regulations governing the Class III compact process at 25 C.F.R. part 293.

IGRA limits the subjects a tribal-state compact may include to provisions related to the following: (1) the application of the criminal and civil laws and regulations of the tribe or the State that are directly related to, and necessary for, the licensing and regulation of gaming activity; (2) the allocation of criminal and civil jurisdiction between the state and the tribe necessary for the enforcement of gaming laws and regulations; (3) the assessment by the state of such activities in such amounts as are necessary to defray the costs of regulating gaming activity; (4) taxation by the tribe of gaming activity in amounts comparable to amounts assessed by the state for comparable activities; (5) remedies for breach of contract concerning gaming activity; (6) standards for the operation of gaming activity and maintenance of the gaming facility, including licensing; and (7) any other subjects that are directly related to the operation of gaming activities.³

The extent to which a tribe and state could potentially agree to a compact on matters not directly related to gaming is limited in that the Secretary may disapprove a compact if the compact violates any provisions of IGRA, any other provision of Federal law not relating to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.⁴

Finally, on June 15, 2012, the Office of Indian Gaming issued a letter to the Pascua Yaqui Tribe, which explains how the Secretary reviews compact provisions that may be "directly related to the operation of gaming activities"⁵ and provides insight into the Department of Interior's views on that subject. The letter is attached.

Question 2. Is it currently legal for a Tribe to operate interstate electronic gaming?

Answer. Yes, under the Indian Gaming Regulatory Act, tribes may legally operate interstate electronic gaming, but certain criteria must be met. Chiefly, all aspects of the gaming activity—prize, chance, and consideration—must occur on Indian lands for the gaming to be permitted under IGRA.⁶

Question 2a. What are the rules for electronic machines (class II or class III) connected across state lines on either internal or external networks?

¹ 25 U.S.C. § 2710(d)(3)(A).

² 25 U.S.C. § 2710(d)(8).

³ 25 U.S.C. § 2710(d)(3)(C).

⁴ 25 U.S.C. § 2710(d)(8)(B).

⁵ 25 U.S.C. § 2710(d)(3)(C)(viii).

⁶ *Brief for the United States as Amicus Curiae Supporting Appellee at 12, Coeur d'Alene Tribe v. AT&T Corporation*, No. 99-35088 (9th Cir. July 20, 1999). See also, *Fed. Comm'n's Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 290, 74 S. Ct. 593, 598, 98 L. Ed. 699 (1954) and *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir.), cert. denied, 409 U.S. 914 (1972), *United States v. Calamaro*, 354 U.S. 351, 354 (1957).

Answer. The National Indian Gaming Commission has rulemaking authority for Class II games on Indian lands and has exercised that authority by promulgating Technical Standards⁷ and Minimum Internal Control Standards.⁸ These regulations apply to all Class II gaming systems and their electronic aids, regardless of whether they cross jurisdictional lines to get from one Indian lands location to another Indian lands location. Other federal laws⁹ apply to gaming that crosses state lines, but the NIGC has not been charged with administering or interpreting those laws.

Question 2b. In any circumstances could a person sitting at a machine in Oklahoma play against a person sitting at a machine in California or even another country?

Answer. Yes, a person sitting at a machine at a tribal gaming facility in Oklahoma could play against a person sitting at a machine in a tribal gaming facility in another state provided that each machine is legal in the jurisdiction(s) in which they are being operated.

Question 2c. Can electronic machines located in different parts of a Tribe's reservation or within their boundaries be connected on the same network and play against each other?

Answer. Yes, electronic machines located in different parts of a tribe's reservation or within the reservation boundaries can be connected on the same network and play against each other, so long as all machines are located on lands eligible for gaming.

Question 3. May Tribes conduct off-reservation gaming or gaming outside of their boundaries? If no, has this ever occurred and was it halted? If yes, do Tribes have sole proprietary authority over these operations?

Answer. (a) Tribes gaming under the Indian Gaming Regulatory Act may do so only on their *Indian lands*.¹⁰ IGRA defines *Indian lands* as reservation lands, and also trust lands and lands held subject to a restriction against alienation.¹¹ IGRA further restricts which trust land acquired after the passage of the Act is eligible for gaming.¹²

Tribes may own and operate gaming facilities which are not located on *Indian lands*, but they do so under the laws of the jurisdiction in which they are operating,¹³ not under IGRA. For example, the Greektown Casino in Detroit, Michigan, was, at one time, owned and operated by the Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe), subject to Michigan law. Currently, the Mohegan Sun Pocono Casino in Plains, Pennsylvania, is owned by the Mohegan Tribe of Indians of Connecticut, subject to Pennsylvania law.

Incidentally, if a tribe operates a gaming facility on *Indian lands* ineligible for gaming under IGRA, the NIGC Chairman can order the facility to close.¹⁴ For instance, on July 21, 2009, the Chairman issued a notice of violation to the Fort Sill Apache for conducting Class II gaming on *Indian lands* ineligible for gaming at its Akela Flats, New Mexico parcel, ordering the immediate cessation of gaming.¹⁵

(b) Where land is not *Indian land* under IGRA and the generally applicable gaming laws are not followed, the entity with jurisdiction over the land may exercise its ordinary regulatory or police powers over the gaming.¹⁶ The Department of Justice may also enforce applicable federal laws. In a recent notable case, *Michigan v. Bay Mills Indian Community*, the Bay Mills Indian Community began gaming operations on fee lands in violation of local law.¹⁷ Michigan sued the Community for compact violations. The U.S. Supreme Court held that the state could not sue the

⁷ 25 C.F.R. part 547.

⁸ 25 C.F.R. part 543; 25 C.F.R. § 543.8 (Bingo) and 543.20 (Information & Technology) specifically address Class II gaming systems, including their electronic aids.

⁹ Most notable of these are the Unlawful Gambling Enforcement Act (31 U.S.C. § 5361–5366), the Johnson Act (15 U.S.C. §§ 1171, *et seq.*), and the Federal Wire Act (18 U.S.C. § 1081 *et seq.*).

¹⁰ 25 U.S.C. § 2710(b) (“An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe’s jurisdiction, if . . .”) and 2710(d) (“Class III gaming activities shall be lawful on Indian lands only if . . .”).

¹¹ 25 U.S.C. § 2703(4).

¹² 25 U.S.C. § 2719.

¹³ *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (“Indians going beyond reservation boundaries” are subject to any generally applicable state law.”).

¹⁴ 25 U.S.C. § 2713(b)(1); 25 C.F.R. § 573.4(a)(13).

¹⁵ *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014).

¹⁶ *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014).

¹⁷ *Bay Mills*, 134 S. Ct. at 2029.

Community without a waiver of sovereign immunity, but reminded the state that it could exercise many powers over the operation.¹⁸

(c) When gaming under IGRA, Tribes are required to retain the sole proprietary interest in their gaming operations.¹⁹ When gaming off Indian lands, the sole proprietary interest requirement in IGRA is not applicable.

In summary, because IGRA only applies to *Indian lands* as defined by IGRA, in the absence of *Indian lands*, IGRA grants neither the Commission nor the Chair any jurisdiction to exercise regulatory authority. State and other applicable federal laws, however, may apply. Therefore, a tribe may engage in gaming off of its Indian lands, pursuant to state laws, and IGRA would not apply.

Question 4. May Tribes Conduct Class III gaming without a compact with the state government. If no, has this ever occurred, was it halted, and what rights do states have in this situation? If yes, in what situations would be permissible?

Answer. Under the Indian Gaming Regulatory Act, Class III gaming activities must be conducted pursuant to a tribal-state compact.²⁰ However, if a tribe and state are unable to reach a compact agreement to govern the operation of Class III gaming activities, the Secretary of the Interior may issue gaming procedures.²¹ The Northern Arapaho Nation, for instance, currently operates under the Third Amended Class III Gaming Procedures approved by the Assistant Secretary, Indian Affairs on August 2, 2007. Also, the Rincon Band of Mission Indians currently operates under Secretarial Procedures, effective February 8, 2013.

The operation of Class III games in the absence of an effective tribal-state compact (or Secretarial Procedures) is a substantial violation of IGRA,²² which could lead to an enforcement action and fine or closure of a facility. For example, in 2004, the Coyote Valley Band of Pomo Indians operated Class III gaming devices and table games without an approved compact in violation of IGRA. Consequently, the NIGC Chairman requested that the Tribe cease such gaming activity.²³ When the Tribe failed to comply with NIGC's request, the NIGC issued a closure order.²⁴

In some instances, circumstances dictate alternative solutions. For example, the Pueblo of Pojoaque and the State of New Mexico's Class III compact expired on June 30, 2015. The Pueblo and the United States are engaged in litigation with New Mexico surrounding the validity of the compacting process and the Secretary's authority to issue Class III gaming procedures.²⁵ During the pendency of litigation, the NIGC has exercised its discretion to withhold any enforcement action against the Pueblo for the operation of Class III gaming absent an effective compact provided certain conditions are met by the Pueblo, as verified by the NIGC on a continuing basis.

In another case, the Flandreau Santee Sioux Tribe and State of South Dakota failed to reach agreement over the terms of a new compact before it expired. The Tribe continued to offer Class III gaming and during mediation, the attorney for South Dakota stated that it had no plans to take or encourage any action to shut the casino before the litigation concluded.²⁶ NIGC continued to monitor the case, which was ultimately settled without the need for enforcement action.

Question 5. Please clearly define the difference between Class II and Class III gaming and explain how you work with both Tribes and states to ensure all parties fully understand the differences.

Answer. Congress defined Class II gaming to include the following games: (a) bingo; (b) pull tabs when played in the same location as bingo, and (c) non-banked card games authorized or not explicitly prohibited by the state in which the tribal operation is located.²⁷ All other games are Class III, except for certain social or traditional forms of gaming.²⁸ Class III games include, but are not limited to the fol-

¹⁸ *Bay Mills*, 134 S. Ct. at 2034 ("But a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory.").

¹⁹ 25 U.S.C. § 2710(b)(2)(A).

²⁰ 25 U.S.C. § 2710(d)(1).

²¹ 25 U.S.C. § 2710(d)(7)(B)(vii).

²² 25 U.S.C. § 2710(d)(1)(C); 25 C.F.R. § 573.4(11).

²³ NOV-04-01 (June 4, 2001).

²⁴ CO-04-01 (June 10, 2004).

²⁵ *New Mexico v. Department of the Interior*, 1:14-cv-0695 JP/SCY, (D.N.M. Sept. 11, 2014) on appeal 14-2222.

²⁶ *Flandreau Santee Sioux Tribe v. S. Dakota*, No. CIV. 07-4040, 2011 WL 2551379 (D.S.D. June 27, 2011).

²⁷ 25 U.S.C. § 2703(7). IGRA's Class II definition includes other games played in the same location as bingo (lotto, punch boards, tip jars, instant bingo, other games similar to bingo), but they are so rarely encountered that they do not merit discussion here.

²⁸ 25 U.S.C. § 2703(8) and (6).

lowing: baccarat, *chemin de fer*, blackjack, slot machines, and electronic or electromechanical facsimiles of any game of chance.²⁹

(a) In games held out to be bingo, the critical difference between Class II and Class III games is that Class II games require the participation of more than one player. In a Class II gaming system (i.e., bingo played through electronic interface terminals), the terminal the player interacts with is essentially an empty box with flashing lights and a display. The terminal connects to a server network. The server houses the logic for the game (including the random number generator) and connects to a network of other player terminals in any number of locations. These terminals and the servers they connect to are electronic aids, specifically authorized by Congress to broaden participation in the game.³⁰ The game does not begin until at least two players have activated it.

Courts and Congress have been clear that where a device eliminates, rather than broadens, the need for competition, a Class III electronic or electromechanical facsimile exists. The Senate first identified the need for player-to-player competition in its report on IGRA when discussing allowable technology to broaden participation:

[S]uch technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.³¹

Relying upon the Senate's distinction, the Ninth Circuit determined that a lotto game played by only one participant and the machine was Class III:

The player can participate in the game whether or not anyone else is playing at the same time. Rather than broadening potential participation in a bingo-like game, Pick Six is an electronic facsimile in which a single participant plays against the machine. Accordingly, it cannot be classified as a Class II gaming device.³²

Using the same reasoning eight years later, the Ninth Circuit contrasted the MultiMania bingo game with the Pick Six game to find that MultiMania bingo game was not an electronic facsimile.³³ The court explained that while the game looked like a slot machine, the terminal merely allowed the player to connect to a network of other players and the game could not be played with fewer than twelve players.³⁴

(b) Pull tabs are a game, similar to scratch off lottery tickets, and are considered Class II when played in the same location as bingo. Entertaining displays may also be used for pull tabs, but the outcome of the game must be determined by a pre-printed card, independent of the display.³⁵

(c) The classification of card games requires a two-prong analysis. The first question is whether the game is banked.³⁶ The second is whether the game is authorized or not specifically prohibited by state law.³⁷ If it is allowable by state law, the game must be played in conformity with state laws and regulations regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.³⁸

As to the first prong, only non-banked card games are Class II.³⁹ In non-banked card games, players compete against each other, rather than a "bank", (typically, the house, but it may also be a single player⁴⁰ or pool acting as the bank).⁴¹ The classic example of a non-banked card game is a traditional version of poker,⁴² such as Omaha or Texas Hold 'Em, in which players compete against each other for the

²⁹ 25 U.S.C. § 2703(7)(B).

³⁰ 25 U.S.C. § 2703(A)(i).

³¹ S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988).

³² *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir.1992).

³³ *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1099-101 (9th Cir. 2000).

³⁴ *Id.*

³⁵ *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000).

³⁶ 25 U.S.C. § 2703(7)(B)(i).

³⁷ 25 U.S.C. § 2703(7)(A)(ii).

³⁸ 25 U.S.C. § 2703(7)(A)(ii).

³⁹ 25 U.S.C. § 2703(7)(B)(i).

⁴⁰ *Chemin de fer* is a player-banked version of baccarat specifically identified as Class III in IGRA. 25 U.S.C. § 2703(7)(B)(i).

⁴¹ 25 C.F.R. § 502.3(c).

⁴² A word of caution, several of the newer variations of poker (Caribbean Stud, Pai Gow, and Three-Card, for example) are banked games. Regardless of the moniker, the key element is who the players compete against.

better hand. In contrast, traditional blackjack is a banked game in which players compete against the dealer's hand.

For the second prong, Class II games must be authorized or not explicitly prohibited by state law. The Seventh Circuit recently issued an opinion regarding Class II poker in Wisconsin that illuminates the factors to consider when examining state law. For more detailed discussion of the state law analysis, please see *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076 (7th Cir.) *cert. denied*, 136 S. Ct. 231 (2015).

(d) To ensure states and tribes fully understand the difference between Class II and Class III gaming, the NIGC Office of General Counsel issues game classification opinions and publishes them on its website, conducts regular training courses in regulating gaming technology, and publishes guidance in the form of bulletins.

Attachment



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240



JUN 15 2012

Honorable Peter S. Yucupicio
Chairman, Pascua Yaqui Tribe of Arizona
7474 S. Camino de Oeste
Tucson, Arizona 85737

Dear Chairman Yucupicio:

On February 17, 2012, you issued a letter to the Assistant Secretary -- Indian Affairs requesting guidance on several issues relating to class III tribal-state gaming compact negotiations between the Pascua Yaqui Tribe (Tribe) and the State of Arizona (State).

In your letter, you presented the Department of the Interior (Department) with two questions:

1. Whether a Memorandum of Understanding that would substantively amend the Tribe's existing class III gaming compact requires review and approval by the Secretary of the Interior; and,
2. Whether the terms of a proposed Memorandum of Understanding (MOU) impermissibly includes provisions seeking to regulate activities beyond those which are directly related to the operation of gaming activities.

The Indian Gaming Regulatory Act (IGRA) prescribes that class III gaming compacts are to be negotiated in good faith between states and tribes, and the Department will not upset the balance struck by Congress in enacting this requirement. Under IGRA, the Department's formal role involving class III gaming compacts commences when a compact is submitted for review by the Secretary.¹ The Department is committed to maintaining the integrity of its important role in reviewing gaming compacts as prescribed by Congress in IGRA.

Periodically, tribes and states have called upon the Department's Office of Indian Gaming (OIG) to furnish technical assistance to tribes and states before or during their compact negotiations. The OIG's assistance has been limited to providing information about the Department's past compact decisions, directing tribal and states to cases involving gaming compacts or related issues, and answering procedural questions about the Department's review process.² The OIG

¹ See generally 25 U.S.C. § 2710 (d) (5).

² On December 5, 2008, the Department issued regulations codifying long-standing procedures for reviewing proposed gaming compacts at 25 C.F.R. Part 293.

has observed that ensuring tribes and states have accurate information about the Department's past decisions, regulatory requirements, and current policies is critical to assisting them find common ground and successfully negotiate class III gaming compacts. I have been directed to respond to the questions you have presented to the Department.

A. Amendments to Tribal-State Compacts Must Be Reviewed and Approved by the Department.

IGRA provides that class III gaming on tribal lands is permitted only where such gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." 25 U.S.C. § 2710(d)(1)(C). IGRA further states that "[a]ny State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). The latter provision provides that a compact must be approved by the Secretary (affirmatively or by operation of law) to be valid and enforceable. Together, those two provisions require Department approval of tribal-state class III gaming compacts prior to the operation of gaming activities. This authority also includes approval of amendments to class III tribal-state compacts.

In 2008, the Department published regulations governing the class III tribal-state gaming compact process at 25 C.F.R. Part 293 (December 5, 2008) ("Regulations"). The Regulations state, "[t]he Secretary has the authority to approve compacts or amendments 'entered into' by an Indian tribe and a State, as evidenced by the appropriate signature of both parties." 25 C.F.R. § 293.3. The Regulations further provide that "[a]ll [compact] amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary." 25 C.F.R. § 293.4(b). As explained in the preamble to the Regulations:

Another comment asked for identification of the Secretary's authority for approving amendments.

Response: IGRA requires that the Secretary review all compacts. The Secretary must review amendments to insure that the terms of the compact, as amended and considered as a whole, do not violate any provision of IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

Fed. Reg. Vol. 73, No. 235, 74005 (Dec. 5, 2008).

Accordingly, the Secretary must review and approve all amendments to gaming compacts. It is of no consequence that such a document is titled "memorandum of understanding" or something else. Absent Secretarial review and approval of an amendment to a compact, and publication of the notice of approval in the Federal Register, it would have no force or effect under IGRA. This

requirement ensures that we maintain the balance struck by Congress in enacting IGRA, and that gaming on Indian lands is conducted in a lawful manner.³

B. Tribal-State Compacts Regulate A Limited Scope of Activities Involving Class III Gaming on Indian Lands.

In 1987, the United States Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*, which affirmed the right of tribes to conduct gaming activities on their Indian lands in states where those activities were not prohibited under a criminal statute.⁴ The following year Congress enacted IGRA largely in response to the *Cabazon* decision, and declared that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701. Thus, Congress established a statutory scheme that limited tribal gaming and sought to balance tribal, state, and federal interests in regulating gaming activities on Indian lands.

As part of this balance of interests, Congress limited the subjects over which tribes and states could negotiate a class III gaming compact. Pursuant to IGRA, a tribal-state compact may include provisions relating to:

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [governing gaming activities Indian lands];
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies for breach of contract;

³ In 2003, the Assistant Secretary – Indian Affairs noted that "[n]ot requiring Secretarial review of compact amendments] would render the Secretary's approval authority meaningless because it would permit substantive and controversial provisions to escape Secretarial review through the amendment process." Letter from Acting Assistant Secretary – Indian Affairs Aurene Martin to Honorable Janet Napolitano, Governor of Arizona at 3 (January 24, 2003). This letter was issued before the Department promulgated its regulations at 25 C.F.R. Part 293 in 2008.

⁴ 408 U.S. 202 (1987).

- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
- (vii) any other subjects that are *directly related to the operation of gaming activities*.

25 U.S.C. § 2710(d)(3)(c) (emphasis added).

These provisions ensure that the Department will fulfill its trust responsibility to tribes, protect tribal authority to govern their own affairs, and ensure compliance with IGRA by requiring the Secretary to review and approve tribal-state gaming compacts.⁵

IGRA's tribal-state compact provisions allow for the consideration of states' interests in the regulation and conduct of class III gaming activities. The above referenced provisions limit the subjects over which states and tribes can negotiate a tribal-state compact. *Id.* In doing so, Congress also sought to establish "boundaries to restrain aggression by powerful states."⁶ *Rincon Band v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (citing S. Rep. No. 100-446, at 33 (1988) (statement of Sen. John McCain)).

In the Senate debate regarding S.555, which was enacted as the Indian Gaming Regulatory Act, Senator Evans submitted:

As we are all aware, many Indian tribes are opposing S.555 at least in part because of the potential of extending State jurisdiction over Indian lands for certain gaming activities. I wish to make it very clear that the committee has only provided for a mechanism to permit the transfer of limited State jurisdiction over Indian lands where an Indian tribe requests such a transfer as part of a tribal-State gaming compact for class III gaming. We intend that the two sovereigns – the tribes and the States – will sit down together in negotiations on equal terms and come up with a recommended methodology for regulating class III gaming on Indian lands. Permitting the States even in this limited way in matters that are usually in the exclusive domain of tribal government has been permitted only with extreme reluctance. As discussed in the committee report, *gambling is a unique situation and our limited intrusion on the right of tribal self-governance or State-tribal relations*.

S.Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071 (emphasis added).⁶

We conduct our review of tribal-state gaming compacts against this historical and statutory backdrop. Tribal governments have inherent authority to regulate gaming activities on their own lands, where such lands are located within a state that permits the conduct of gaming, and the

⁵ 25 U.S.C. § 2710(d)(3)(A).

⁶ In the same colloquy, Sen. Inouye discussed the compact negotiation process, stating, "There is no intent on the part of Congress that the compacting methodology be used in such areas as taxation, water rights, environmental regulation, and land use." *Id.*

scope of a state's regulatory interest in these activities is limited as congressionally prescribed in IGRA. Therefore, we must view the scope of prescribed state regulatory authority over tribal gaming activities narrowly.

Furthermore, when the Department reviews a tribal-state compact or amendment submitted under IGRA, we look to whether the provisions fall within the scope of categories proscribed at 25 U.S.C. § 2710(d)(3)(c). One of the most challenging aspects of this review is determining whether a particular provision adheres to the "catch-all" category at § 2710(d)(3)(c)(vii): "...subjects that are directly related to the operation of gaming activities."

In the context of applying the "catch-all" category, we do not simply ask, "but for the existence of the Tribe's class III gaming operation, would the particular subject regulated under a compact provision exist?"⁷ If this question were used to provide the standard for determining whether a particular object of regulation was "directly related to the operation of gaming activities," it would permit states to use tribal-state compacts as a means to regulate tribal activities far beyond that which Congress intended when it originally enacted IGRA.⁸

As tribal gaming has matured, many Tribes have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spas, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities. It does not necessarily follow, however, that such ancillary businesses are "directly related to the operation of gaming activities" and therefore subject to regulation through a tribal-state compact.

While each compact is reviewed according to its unique facts and circumstances, the Department often views such businesses and amenities as not "directly related to gaming activities" unless class III gaming is conducted within those businesses or the parties to the compact can demonstrate particular circumstances establishing a direct connection between the business and the class III gaming activities.⁹ These particular circumstances must also implicate the state interests Congress sought to protect through IGRA's compacting provisions.

⁷ Under IGRA, it would not be appropriate for tribal-state compacts to provide for state regulation of activities such as tribal housing developments, government programs, or reservation infrastructure. Those activities involve intervening factors and otherwise are not "directly related" to class III gaming activities under IGRA.

⁸ In 2011, we disapproved a proposed tribal-state gaming compact because we determined that it included provisions restricting tribal land use beyond the scope of specific subjects IGRA permits tribes and states to include in class III gaming compacts. See, Letter from Donald Lavardure, Principal Deputy Assistant Secretary -- Indian Affairs, to Kimberly Vele, President of the Stockbridge-Munsee Community of Mohican Indians (February 18, 2011) (Stockbridge-Munsee Letter). In that instance, the proposed compact restricted the Stockbridge-Munsee Community of Mohican Indians from using the proposed gaming site for any purpose other than class III gaming. *Id.*

⁹ The American Recovery & Reinvestment Act of 2009 (ARRA) is instructive on this point. ARRA created several new types of tax-exempt bonds and tax credit bonds under the Internal Revenue Code. As required by ARRA, the IRS consulted with the Secretary of the Interior to develop guidelines to allocate \$2 billion in tax-exempt bonding authority. Published as Notice 2009-51, the IRS provided the following "safe harbor" language to reassure potential buyers that tribally-issued bonds would be considered tax exempt by the IRS because the bonds did not finance a casino or other gaming establishment: "As a safe harbor, a structure will be treated as a separate building [and

One example of such particular circumstances is Section 10.7 of the 2000 model tribal-state gaming compacts with the State of California, relating to on-site employees and organized labor:

...organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

The Coyote Valley Band of Pomo Indians and other tribes located in California sued the State of California under IGRA's remedial provisions, alleging that the organized labor provisions were unrelated to gaming activities, and that by insisting on their inclusion in the compact, the State had refused to negotiate the tribal-state gaming compacts in good faith in violation of IGRA. *In Re Indian Gaming Related Cases*, 331 F. 3d 1094 (9th Cir. 2003). The Court of Appeals for the Ninth Circuit held otherwise, finding "that this provision is 'directly related to the operation of gaming activities' and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vi). Without the 'operation of gaming activities,' the jobs this provision covers would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs." 331 F. 3d at 1116.

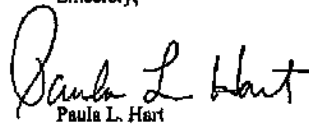
The Department's review of tribal-state compacts does not strictly adhere to the "but for" analysis implied in *In Re Indian Gaming Related Cases*. Although the Ninth Circuit found a direct relationship between certain employees and tribal gaming operations, no other court has evaluated this issue in other contexts.

Finally, the Department has reviewed a number of tribal-state compacts with provisions concerning vendors and contractors to tribal gaming facilities. Whether such provisions comply with IGRA will depend upon whether vendors and contractors subject to regulation provide products or services that directly relate to class III gaming activities as prescribed in IGRA. The Department will continue to make such determinations on a case-by-case basis and upon review of the particular circumstances of each compact.

Finally, as noted above, the Department is committed to maintaining the integrity of its important role in reviewing gaming compacts as prescribed by Congress in IGRA. Our obligations to review tribal-state compacts under IGRA, coupled with the complex and time-intensive nature of compact negotiations, may counsel the inclusion of a severability clause that would permit a tribal-state compact to take effect even if a discrete provision were deemed to violate IGRA.¹⁹

Thank you for your inquiry on this important issue.

Sincerely,



Paula L. Hart
Director, Office of Indian Gaming

therefore tax exempt) if it has an independent foundation, independent outer walls and an independent roof. Connections (e.g., doorways, covered walkways or other enclosed common area connections) between two adjacent independent walls of separate buildings may be disregarded as long as such connections do not affect the structural independence of either wall." For more information about IRS Guidance on Tribal Economic Development Bond Provisions, see <https://www.irs.gov/irb/2012-04/revproc2012-04/20120401.html> (site last accessed on June 5, 2012).

¹⁹ In 2011, we approved a tribal-state gaming compact between the Kiakage Tribal Town and the State of Oklahoma. In doing so, however, we severed a provision of that agreement purporting to address tobacco taxes, stating, "we believe that [the tobacco provisions are] not an appropriate term for inclusion within this Compact. Therefore, I disapprove this provision and it is hereby severed from the Compact." Letter from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Tiger Hobbs, Mekko of the Kiakage Tribal Town (July 8, 2011).