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**TESTIMONY OF ERNEST STEVENS, JR., CHAIRMAN,**

**NATIONAL INDIAN GAMING ASSOCIATION BEFORE**

**THE SENATE COMMITTEE ON INDIAN AFFAIRS**

**JULY 23, 2014**

**INTRODUCTION**

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

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

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

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

**NATIVE NATIONS: PRE-DATING THE U.S. CONSTITUTION**

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

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

Upon its formation, the United States also acknowledged the sovereign authority of Indian tribes and entered into hundreds of treaties. Through these treaties, Indian tribes ceded hundreds of millions of acres of tribal homelands to help build this great Nation. In return, the United States made many promises to provide for the education, health, public safety and general welfare of Indian people. The U.S. Constitution specifically acknowledges these treaties and the sovereign authority of Indian tribes as separate governments. The Commerce Clause provides that “Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian tribes*.*” Tribal citizens are referred to in the Apportionment Clause (“Indians not taxed”) and excluded from enumeration for congressional representation. The 14th Amendment repeats the original reference to “Indians not taxed” and acknowledges that tribal citizens were not subject to the jurisdiction of the United States. By its very text, the Constitution establishes the framework for the federal government-to-government relationship with Indian tribes. The Constitution finally acknowledges that Indian treaties, and the promises made, are the supreme law of the land.

Over the past two centuries, the federal government has fallen far short in meeting these solemn promises and the government’s resulting trust responsibility. The late 1800’s federal policy of forced Assimilation authorized the taking of Indian children from their homes and sending them to military and religious boarding schools where they were forbidden from speaking their language or practicing their Native religions. The concurrent policy of Allotment sought to destroy tribal governing structures, sold off treaty-protected Indian lands, eroded remaining tribal land bases, and devastated our economies. Finally, the Termination policy of the 1950’s again sought to put an end to tribal governing structures, eliminate remaining tribal land bases, and attempted to relocate individual Indians from tribal lands with the help of one-way bus tickets from Indian lands to urban areas with the promise of vocational education.

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

**TRIBAL GOVERNMENT SELF-DETERMINATION AND IGRA**

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

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

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

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

State governments and commercial gaming operations challenged these acts of Indian self-determination both in Congress and in the federal courts. The legal challenges to the exercise of tribal governmental gaming culminated in the Supreme Court’s *California v. Cabazon Band of Mission Indians* decision issued in February of 1987. The *Cabazon* Court upheld the right of Indian tribes, as governments, to conduct gaming on their lands free from state control or interference. The Court reasoned that Indian gaming is crucial to tribal self-determination and self-governance because it provides tribal governments with a means to generate governmental revenue for essential services and functions. The decision vindicated the right of tribal governments to engage in gaming activity free of interference from state governments. With the *Cabazon* decision, the debate in Congress and the legislative momentum and leverage shifted from the state / commercial gaming industry position to the tribal government position.

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

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

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

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

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

**THE STATE OF INDIAN GAMING: IGRA’S FIRST 25 YEARS**

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

Back in the early 1980s, I was playing basketball in the gym on our Reservation. I remember that at least once a week the tribal leaders, elders, and others would chase us kids away to make room for chairs and tables and food and to prepare for the evening’s bingo games.

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

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

***Indian Gaming and Job Creation***

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

I went to college at Haskell University in the early 1980s in part because I could not find a job, not even on my Reservation. As Indian gaming started to evolve I finished my education and made my way back home. I was elected to the Tribal Council in 1993, as gaming was really getting underway for our Tribe. With the success of our Gaming operation we had an employment base of 3,800 people. We were the top employer in northeastern Wisconsin. Not only did Indian gaming find work for a lot of Indian people in my neighborhood, but we also found work for a lot of non-Indian people who came and worked for the Tribe as half of our employees were non-Indian.

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

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

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

***Expanding the Reach of Indian Gaming’s Benefits***

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

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

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

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

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

***Good Neighbors: Reinforcing Existing and Forging New Relationships***

“It is a long- and well established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.” Sen. Rept. No. 100-446, at 5.

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

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

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

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

In 2013, Indian gaming generated over $13.6 billion for federal, state and local government budgets through compact and service agreements, indirect payment of employment, income, sales and other state taxes, and reduced general welfare payments. Despite the fact that Indian tribes are governments, not subject to direct taxation, individual Indians pay federal income taxes, the people who work at casinos pay taxes, and those who do business with tribal casinos pay taxes. As employers, tribes also pay employment taxes to fund social security and participate as governments in the federal unemployment system.

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

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

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

The National Caucus of Native American State Legislators (NCNASL), formed in 1992, now has 76 members in 17 states. My good friend Kevin Killer served as Treasurer of the Caucus’ Executive Board in 2013. The Caucus works to promote a better understanding of state-tribal issues among policymakers and the public at large. Members work to encourage a broad awareness of state-tribal issues and raise the profile of tribal issues throughout the state legislative arena. The strength of individual Native American legislators increases the ability of the state legislatures to more appropriately address tribal issues and develop public policy in cooperation with tribal governments.

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

***Indian Gaming Regulation***

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

While tribes take on the primary day-to-day role of regulating Indian gaming operations, IGRA requires coordination and cooperation with the federal and state governments to make this comprehensive regulatory system work. Under the Act, the NIGC has direct authority to monitor class II gaming on Indian lands on a continuing basis and has full authority to inspect and examine all premises on which class II gaming is being conducted.

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

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

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

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

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

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

At the federal level, the NIGC employs more than 100 regulators and staff. In addition to the NIGC, a number of other federal officials help regulate and protect Indian gaming operations. Tribes work with the FBI and U.S. Attorneys offices to investigate and prosecute anyone who would cheat, embezzle, or defraud an Indian gaming facility – this applies to management, employees, and patrons. 18 U.S.C. §1163. Tribal regulators also work with the Treasury Department’s Internal Revenues Service to ensure federal tax compliance and the Financial Crimes Enforcement Network (FinCEN) to prevent money laundering. Finally, tribes work with the Secret Service to prevent counterfeiting.

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

**INDIAN GAMING: THE NEXT 25 YEARS**

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

***Tribal – State Compacting Process***

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

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

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

Senate Report 100-446, at 15 (Aug. 3, 1988).

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

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

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

***Class II Indian Gaming***

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

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

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

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

The Committee specifically rejects any inference that tribes should restrict Class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels….

Section (4)(8)(A) also makes clear the Committee's intent that pull-tabs, punch boards, tip jars, instant bingo and similar sub-games may be played as integral parts of bingo enterprises regulated by the act and, as opposed to free standing enterprises of these sub-games, state regulatory laws are not applicable to such sub-games, just as they are not applicable to Indian bingo.

Senate Report 100-446, at 9 (Aug. 3, 1988).

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

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

A number of federal courts addressing the application of the Johnson Act to class II gaming have found that the Act simply does not apply to class II technologic aids. *See United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 715 (10th Cir. 2000) (“Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a class II game, and is played with the use of an electronic aid.”); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (rejecting the notion that the Johnson Act extends to technologic aids to the play of bingo); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) (noting that class II aids permitted by IGRA do not run afoul of the Johnson Act); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (indicating that IGRA makes the Johnson Act inapplicable to class II gaming and therefore tribes may use “gambling devices” in the context of bingo).

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

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

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

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

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

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

***Internet Gambling in the United States***

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

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

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

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

***Land Into Trust For Gaming Purposes***

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

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

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

In recent Congress’, including the current 113th Congress, the issue of land into trust for gaming purposes is again being discussed. **NIGA’s Board met in October of 2013 and reaffirmed our past resolutions 1-PHX-GM-3-28-07[[6]](#footnote-6), which reaffirmed our consensus 2006 Albuquerque Resolution 2-ABQ-4-4-06 on this important issue.** The Title of the 2006 Resolution was “Supporting The Secretary Of Interior’s Promulgation Of Regulations Concerning Gaming On After-Acquired Lands and opposing the provisions of S. 2078 and H.R. 4893 that would amend Section 20 of the Indian Gaming Regulatory Act (IGRA). While Interior has since promulgated regulations to implement IGRA’s Section 20 enforcement of the regulation has been at times unclear and other times inconsistent.

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

***Rebuilding Our Tribal Land Bases***

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

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

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

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

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

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

**CONCLUSION**

As the *Cabazon* Court acknowledged, Indian gaming is Indian self-determination. Native Nations, as separate governments acknowledged in the Constitution, began using contemporary Indian gaming to generate revenue to provide for the basic needs of tribal communities. Congress enacted IGRA in part to foster and strengthen these actions. While IGRA has its shortfalls, overall the Act’s first twenty-five years have delivered on its stated goals of strengthening tribal governments and empowering Indian communities. For our part, tribal governments nationwide have committed significant resources to protecting these gains by maintaining a strong, seamless, and comprehensive system of regulation. Much of the credit for this success goes to the tribal leaders who make the decision to spend more than $422 million each year to regulate their operations, and to the thousands of men and women who are day-to-day front line regulators of Indian gaming operations.

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

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

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

1. Ancillary revenues include hotels, food and beverage, entertainment, and other activities related to a tribal government’s gaming operation. [↑](#footnote-ref-1)
2. IGRA is clear that the tribal-state compacting process is limited to activities related to Indian gaming. The Act provides that state may negotiate for assessments in such amounts as are necessary to defray the costs of regulating gaming-related activity. However, the Act is explicit in providing that it does not confer “upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe … to engage in a class III activity. No State may refuse to enter into [compact] negotiations … based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.” [↑](#footnote-ref-2)
3. NIGC Testimony before the Senate Committee on Indian Affairs, July 25, 2012. [↑](#footnote-ref-3)
4. *Id*.

   [↑](#footnote-ref-4)
5. Meister, “The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations” submitted to the NIGC, February 1, 2008. Found at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/lawsregulations/proposedamendments/MeisterReport2FINAL2108.pdf> [↑](#footnote-ref-5)
6. The resolved clause in the Phoenix Resolution states “NOW THEREFORE BE IT RESOLVED, that NIGA reaffirms the position taken in Resolution 2 ABQ 4-4-06, and will continue to work with the Department of the Interior on its efforts to promulgate regulations to implement Section 20 of IGRA and to ensure that full consultation with Indian Tribes nationwide is accomplished prior to promulgation of a final rule. “

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

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

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

   BE IT FURTHER RESOLVED, that NIGA does hereby call upon Congressto adhere to the significant process set forth in IGRA’s Section 20 with due deliberation process of Congress and to refrain from appropriations riders that bypass Section 20 or otherwise amend IGRA; BE IT FINALLY RESOLVED, that NIGA supports the promulgation of regulations by the Department of Interior, working directly with Tribal Governments in accordance with Executive Order 13175, governing the implementation of the Section 20 two-part determination process, respecting the interests and rights of Tribal Governments, including nearby Indian Tribes, and state and local governments. [↑](#footnote-ref-6)