NATIONAL INDIAN GAMING ASSOCIATION

Rebuilding Communities Through Indian Self-Reliance

TESTIMONY OF ERNEST STEVENS, JR., CHAIRMAN,
NATIONAL INDIAN GAMING ASSOCIATION
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
"INDIAN GAMING: ISSUES AND OPPORTUNITIES"

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INTRODUCTION

Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. My name is Ernest Stevens, Jr. I am a citizen 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 appreciate this chance to provide our views about issues and opportunities to ensure the success of Indian gaming over the next 30 years.

February 25, 2017 marked the 30-year anniversary of the U.S. Supreme Court's historic *California v. Cabazon Band of Mission Indians* decision, which held that state governments could not impose their regulatory gaming laws to stop tribal governments from engaging in gaming to provide jobs and economic opportunity for their communities. In the 30 years since *Cabazon*, Indian gaming has proven to be the single most successful economic development tool for tribal governments in more than two centuries.

As this Committee examines issues and opportunities to help Indian gaming succeed over the next 30 years, we urge you to work with other Committees of jurisdiction to closely examine emerging gaming markets such as Internet gaming, daily fantasy sports, and sports betting. These activities pose both potential expansion opportunities and challenges to existing tribal gaming operations and tribal-state compact agreements. Indian Country will continue to work in partnership with federal and state regulators to stay ahead of the technology curve to protect Indian gaming revenues and the integrity of our operations. Finally, to help Indian Country achieve its full economic potential, we call on Congress to extend the respect for tribal sovereignty and the distinct status of Indian tribes in our federalist system to all areas of federal law. This means treatment of Indian tribes for purposes of federal labor laws, respect for tribes in the U.S. Tax Code, and direct federal investments to address the more than $50 billion in unmet need for infrastructure on Indian lands.

NATIVE NATIONS IN THE U.S. FEDERALIST SYSTEM OF GOVERNMENT

As noted above, the Supreme Court's 1987 *California v. Cabazon* decision affirmed inherent rights Indian tribes, as distinct governments, to engage in gaming on their lands free from state

interference—even those subject to the Termination era Public Law 83-280. The Court acknowledged that Indian gaming was an exercise of tribal government self-determination and noted that gaming provides the sole source of governmental revenue for some tribes and is the major source of employment for many.

The *Cabazon* Court also reasoned that tribal governments' exercise of sovereignty through Indian gaming aligned with the now longstanding federal policy supporting Indian self-determination and the goal of encouraging economic self-sufficiency.[1] The Court found particularly persuasive statements from President Reagan's Interior Department supporting tribal government gaming. The Court cited the Reagan Interior Department's March 2, 1983 policy directive, which stated that the Administration would "strongly oppose" any proposed legislation that would subject tribes or tribal members to state gambling regulation. "Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983."

President Reagan's 1983 policy statement discussed the historical recognition and treatment of Indian tribes as sovereigns and reaffirmed the then-existing federal policy supporting Indian self-government:

> When European colonial powers began to explore and colonize this land, they entered into treaties with the sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national priorities, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States, which this administration pledges to uphold.... The administration intends to ... remove[e] the obstacles to self-government [that] will be charted by the tribes, not the Federal Government.... Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination....

President Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983).

President Reagan's policy statement conforms with historical and foundational treatment by the United States of Indian tribes as separate distinct governments in our federalist system. When the United States formed, it acknowledged Indian tribes as sovereign governments, entering into hundreds of treaties with tribes to establish commerce and trade agreements, form alliances, and preserve the peace. In so doing, the U.S. followed the practice of the nations of England, France, and Spain. The U.S. Constitution affirmed these treaties and the sovereign authority of Indian tribes as separate governments. The Constitution's Commerce Clause also expressly provides

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[1] President Nixon formally ushered in the federal policy supporting Indian self-determination in a Special Message to Congress on July 8, 1970. He stated, "It is long past time that the Indian polices of the Federal government began to recognize and build upon the capacities and insights of the Indian people.... The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by *Indian acts and Indian decisions*." (Emphasis added).

that "Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[2]

Thirty years ago, the *Cabazon* Court also acknowledged the unique position of Indian tribes as separate distinct governments in the U.S. federalist system of government. Indian Country was encouraged to hear the most junior Supreme Court Justice, Neil Gorsuch, give a nod to this legal status during his confirmation hearings earlier this year. Senator Sasse asked then-Judge Gorsuch a broad question about federalism and the idea of separation of powers. Gorsuch replied as follows:

> We divide power in a way that was quite unique. Federalism. You can think of separation of powers as having a horizontal axis and a vertical axis. So that the federal government has certain enumerated powers and authorities, and what the federal government doesn't enjoy the states do, as sovereigns. In this country as well, we have tribes which also bear sovereignty in our part of the world, and bear recognition as such, and I'm glad to have the opportunity to recognize that fact here as a Westerner.

Statement of Neil Gorsuch before the Senate Judiciary Committee (March 22, 2017).

THE STATE OF INDIAN GAMING: 30 YEARS POST-*CABAZON*

A handful of tribal governments in the late 1960's and early 1970's, tired of waiting on the United States to fulfill its treaty and trust obligations, took measures to rebuild their communities by opening the first modern Indian gaming operations. These tribal governments used the revenue generated from Indian gaming to fund essential tribal government programs, cover the federal shortfalls, and to meet the basic needs of their people. From this point forward, Indian tribes began to take their rightful and historical place alongside the federal and state governments, preserving tribal culture and way of life and caring for and protecting tribal government citizens and residents.

Indian gaming operations were spurred by the forward-looking policies of Presidents Nixon and Reagan. As Tribal Governments began to use their gaming revenues to fund essential governmental services and programs and make "Indian decisions" as President Nixon had foreseen, reservation economies and opportunities began to increase. President Reagan's policy statements and support of tribal economic self-sufficiency helped persuade the *Cabazon* Court to uphold the tribal government exercise of Indian gaming free of infringement from the states.

After *Cabazon*, states and commercial gaming interests urged 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). This Committee acknowledged that "the interests of the states

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[2] In addition, the U.S. Constitution refers to tribal citizens in the Apportionment Clause, as "Indians not taxed", 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. The Constitution also acknowledges that treaties are the Supreme law of the land.

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 Tribes have is negotiable." *Id.* at 33 (Additional views of Senator McCain).

Prior to the Cabazon decision, in 1984, the Interior Department's Deputy Assistant Secretary for Indian Affairs testified to this Committee that approximately 80 tribal governments were engaged in gaming with estimated revenues in the tens of millions. At the time, most tribal gaming operations were run out of temporary pop-up buildings or local tribal gyms. Over the past 30 years since the *Cabazon* decision, Indian gaming has responsibly grown to provide a steady source of governmental revenue for Indian tribes nationwide.

In 2016, 244 tribal governments operated 484 gaming facilities in 28 states, helping Indian gaming grow to $31.2 billion in direct revenues (a 4.4% increase over 2015) and $4.2 billion in ancillary revenues[3] for a total of $35.4 billion in total revenues. Without question Indian gaming has been and continues to be the most successful tool for economic development for many Indian tribes in over two centuries.

Many tribes have used Indian gaming revenue to put a new face on their communities. Tribal governments 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, communications systems, and so much more.

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.

Nationwide, Indian gaming is a proven job creator. In 2016, our industry generated more than 310,000 direct jobs. When indirect jobs are included, Indian gaming employs nearly 700,000 Americans. 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 homelands, as promised in hundreds of treaties. These American jobs go to both Indians and non-Indians alike.

Indian Gaming Regulation

Tribal governments realize that none of these benefits would be possible without a strong

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

regulatory system to protect tribal gaming revenues and preserve 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. No one has a greater interest in protecting the integrity of Indian gaming and our assets 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.

This comprehensive system of regulation is expensive and time consuming, but tribal leaders know that a successful operation relies on strong regulation. In 2016, tribes spent more than $449 million on tribal, state, and federal regulation:

- $336.5 million to fund tribal government gaming regulatory agencies;
- $90.4 million to reimburse states for state regulatory activities negotiated and agreed to pursuant to approved tribal-state class III gaming compacts; and
- $22.2 million to fully fund the operations and activities of the National Indian Gaming Commission.

Tribal, state, and federal regulators work together to maintain the integrity of Indian gaming operations, the security of our patrons and visitors, and Indian gaming revenues. There are approximately 6,000 tribal gaming regulators serving as the primary regulators of Indian gaming.[4] The number of personnel at the state level dedicated to Indian gaming regulation varies from state to state, but it is estimated that 24 states employ nearly 1,000 regulators at the state level.[5]

At the federal level, the NIGC employs approximately 131 regulators and staff in Washington, D.C. and in their various field offices. In addition to the NIGC, tribal governments 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.

Today, safeguarding gaming systems and supporting IT infrastructure is a critical part of all tribal gaming operations. Our cybersecurity challenges are essentially no different than other governments and large businesses in that we must defend against a variety of cyber threats on a daily basis—malware, ransomware, external attacks on our networks, and potential malicious insiders. Indian gaming operations employ and develop skilled and qualified IT professionals to manage our IT environments. Many possess the same IT and security certifications such as

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[4] NIGC Budget Justifications and Performance Indication FY18 at NIGC-2; https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_nigc_budget_justification.pdf

[5] At least four of the 28 states that have Indian gaming operations within their borders have refused to negotiate a Class III gaming compact with tribal governments, and thus, do not play a role in regulating Class II gaming.

Network+ and CISSP required by DoD and other Federal Agencies. We acknowledge the need to continually develop IT personnel to meet the future challenges and threats of an increasingly digital world.

Technology also plays a major role in our capability to protect, detect and respond to a variety of cybersecurity events. Like other enterprises, our defenses also include a layered approach to protect networks, servers, and data. Many fundamental controls such as patch management, least privileged access controls, and network segmentation continue to be very effective at protecting systems. However, we also employ other technologies to enhance those protections such as automated vulnerability scanning processes to identify and eliminate security weaknesses. Tribal regulators are also utilizing next generation firewalls and intrusion protection systems to automatically detect and prevent malicious activities on the networks, as well as active malware detection systems and advanced threat defenses to add additional layers of protections to server based systems. Commercial 24x7 security operations centers that continuously analyze logs from firewalls and other critical systems issue alerts whenever anomalous activities are detected. In addition, critical systems are continuously synchronized with redundant systems at hot-site locations to provide high availability and a supplement to traditional backups. Indian Country will continue to invest, adapt, and develop an increasingly stronger and more resilient security posture in response to the current and future cybersecurity threat environment.

NIGA applauds the NIGC and Chairman Chaudhuri for establishing its Division of Technology and for the technical assistance that the Commission provides to all tribal government gaming regulators to identify and eliminate or reduce cybersecurity vulnerabilities. Working together we are staying ahead of the technology curve to sustain responsible growth and security of tribal gaming operations nationwide.

Finally, in light of the horrific shooting this past Sunday night that involved the Mandalay Bay casino in Las Vegas, it seems appropriate to briefly discuss the work that tribal governments and regulators do to ensure the health and public safety of our patrons and visitors. Of the thousands of personnel dedicated to Indian gaming regulation, many are public safety and security officers. We cannot stop every random senseless act of violence, but we acknowledge that more can and must be done to prevent crime on Indian lands.

Sadly, Indian Country is no stranger to violence. Through more than a dozen oversight hearings that led to the development of the Tribal Law and Order Act of 2010 (TLOA), this Committee highlighted the complex system of justice in place on Indian lands that has led to a crisis of violent crime that has persisted for decades. The Committee report to TLOA "found that the divided system of justice in place on Indian reservations lacks coordination, accountability, and adequate and consistent funding."

Indian Country is doing our part to improve coordination and cooperation with state and federal law enforcement to protect our communities. This coordination includes cross-deputization agreements and special law enforcement commissions that empower officials to investigate and make arrests of suspects regardless of their race or which government's law is implicated.

IGRA vests local tribal government regulators with the primary day-to-day responsibility for regulating Indian gaming operations. This system stands in stark contrast to the failed system that continues to plague criminal jurisdiction in Indian country, where Native communities are often forced to rely on federal officials who are often located hundreds of miles from the Indian lands they are sworn to protect and serve. Despite reforms sought through TLOA, the system of criminal justice in Indian Country is a proven failure. We call on the United States to do more to provide all tribal governments with sorely needed resources to hire tribal justice officials, including police officers, court officials, detention personnel, and mental health counseling to prevent crime on Indian lands—as well as the equipment needed to do their jobs.[6]

This system of comprehensive multi-layered system of regulation is costly has proven itself year after year. The funding, equipment, and personnel dedicated to Indian gaming regulation at the tribal, state, and federal government levels far outpace state and commercial gaming regulators. I challenge anyone to compare these numbers and resources to any form of gaming worldwide.

The credit for this system goes to the tribal leaders who make the decisions to fund this system and to the thousands of men and women who have devoted their lives to protecting tribal assets and the integrity of our operations.

INDIAN GAMING: THE NEXT 30 YEARS—ISSUES AND OPPORTUNITIES

Issues and Ongoing Concerns

NIGA is confident that the next thirty years will see Indian gaming maintain steady responsible growth that will further empower tribal communities. Just as much has changed since the Supreme Court's historic *Cabazon* decision in 1987, Indian Country will continue to adapt, anticipate future changes, and make our own positive change to advance tribal sovereignty and tribal government self-sufficiency. One change that NIGA will continue to work for is the longstanding need to restore balance to the IGRA tribal-state compacting process.

Restore Balance to the Tribal – State Compacting Process

As Congress debated IGRA in the mid-1980s, tribal-state relations were combative, with state governments joining forces with commercial gaming interests to limit or put a stop to Indian gaming through legislation and litigation.

Many prominent tribal leaders opposed IGRA because of the class III compacting process, which required tribal governments to engage in negotiations with states in order to conduct Class III gaming. After *Cabazon*, many tribal leaders viewed the compacting process as a limitation on inherent tribal government rights to engage in Indian gaming free of state control affirmed in the Supreme Court's 1987 decision.

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[6] Indian Country fully supports the Department of Justice FY18 Budget, which proposes a 7% set aside for Indian tribes from all DOJ Office of Justice Programs accounts and a 5% set aside for tribes from the Crime Victims Fund to provide shelters, medical and mental health counseling, and other services to the far too many victims of crime on Indian lands.

In addition, many tribes did not trust that state governments would respect their obligations to negotiate in good faith, or more fundamentally—negotiate. Members of this Committee shared tribal leader concerns. This Committee's Report on IGRA sought to alleviate these concerns:

> 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.... 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....

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

IGRA 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 those instances, the agreements reached have greatly benefitted the tribal, state, and local governments involved.

In a few unfortunate cases, tribal-state compact negotiations have yet to even take place.

This compromise and the balance that it struck were short-lived. Eight years after enactment, the U.S. 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.

In large part because of the *Seminole* decision, we are concerned that in some situations, the tribal-state compacting process is beginning to deteriorate. Some states are using the imbalance to abuse the compacting process beyond what this Committee intended. 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 agree to compact provisions that directly violate IGRA in the form of revenue sharing that amounts to nothing more than direct taxation or concessions that go beyond the regulation, licensing or enforcement of Indian gaming as set forth in IGRA.[7]

As former Assistant Secretary for Indian Affairs, Kevin Washburn, stated, "the Department reviews revenue sharing requirements in gaming compacts *with great scrutiny*." Revenue sharing should only be permitted where a state offers meaningful concessions—such as exclusive

[7] IGRA did not intend for Indian gaming to help balance state budgets or impose state laws that go beyond the enforcement of gaming-related activities. The Act expressly prohibits states from refusing to enter into a compact "based on the lack of authority to impose a tax, fee, charge or other assessment." *See* 25 U.S.C. 2710(d).

rights to offer gaming that provide substantial economic benefits to the tribe.

To prevent any further deterioration of the tribal-state compacting process and to ensure that Indian gaming succeeds over the next 30 years, we urge this Committee to begin the debate to fix this crucial process that has now been broken for more than two decades.

Ongoing Need for a Strong Class II Indian Gaming Industry

In large part because of the Supreme Court's 1996 *Seminole Tribe* decision, Class II Indian gaming has grown in importance to tribal governments nationwide.

Class II gaming is another aspect of Indian sovereignty that has undergone continuous change and challenges from state governments to the commercial gaming industry. Congress fully intended continuous and positive changes to Class II Indian gaming. IGRA and NIGC regulations define Class II games to include bingo and lotto, and if played in the same location, games similar to bingo—which can be used in connection with electronic, computer, or other technologic aids. Class II games also include nonbanking card games that State law explicitly authorizes, or does not explicitly prohibit, and are played legally anywhere in the state.

This Committee's Report to IGRA clarifies its intent that the definition of class II gaming is not static, and instead must be flexible to enable tribal governments to employ advancements in 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....

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

From the early 1990s to the mid-2000s, the NIGC and the Justice Department worked against tribal government interests to limit class II Indian gaming in direct conflict with the above-stated congressional intent. The NIGC's own economic impact review found that the Commission's 2007 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.[8]

The NIGC and the Justice Department likewise engaged in a series of federal court cases, seeking to limit the ability of Indian tribes to utilize advanced technology in class II games. Federal courts uniformly rejected these arguments. 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 hometowns 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.

U.S. v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1101 (9th Cir. 2000).

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.

However, 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.

Indian Country will remain vigilant to ensure 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. In recent years, the NIGC and Tribal regulators have worked together to strengthen all regulatory aspects of Indian Gaming. Indian gaming is 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 thirty years under IGRA.

Emerging Gaming Markets

[8] 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

For nearly two decades, Congress has considered legislation to either expand or prohibit various forms of gaming in the United States. Most of the debate has focused on Internet gaming. However, in recent years, the discussion has extended to daily fantasy sports wagering and sports betting.

More than 240 tribal governments have made significant investments in their gaming operations based in part federal laws that regulate or prohibit certain forms of gaming. The great majority of these tribal governments have entered into compacts with states that include exclusivity provisions, most often promises on the part of the state to not permit other forms of gambling within the state in return for a portion of the tribal government's Indian gaming revenue.

NIGA, from an organization perspective, does not support or oppose these new markets. However, if Congress does act to establish or prohibit these emerging forms of gaming, we do ask that this Committee work with other committees of jurisdiction over these activities to first consider the impacts on Indian gaming, and work to limit impacts on tribal Indian gaming operations.

While NIGA and our Member Tribes are developing a formal position on sports betting, our existing position on Internet gaming is instructive to all emerging gaming markets under consideration by Congress.

NIGA's Internet gaming principles are directives from our tribal leadership. They are guided by and grounded in NIGA's overall mission to protect tribal sovereignty and to protect rights of all tribes to shape their economic futures. In short, NIGA and our Member Tribes are working to ensure that any federal legislation that authorizes a new form of gambling in the new United States: acknowledge that tribal governments have a right to legalize or prohibit the new activity—not subject tribal eligibility in the new market to a state government's decision to opt-out of the activity; provide all federally recognized Indian tribes with equal access to the new market; acknowledge that tribal government revenues generated from the new market are not subject to taxation, as tribal government revenues are dedicated to the benefit of our communities and thus are 100% taxed; and protect existing tribal government rights under tribal-state compacts and IGRA. This basic framework conforms with the U.S. Constitution's recognition of Indian tribes as separate governments as well as the federal policy supporting tribal government self-determination and economic self-sufficiency.

Opportunities: Economic Development Beyond Indian Gaming

All of Indian Country has been and continues to strive for economic self-sufficiency beyond Indian gaming. In my time as Chairman of NIGA, I have worked with our Member Tribes to encourage economic diversification beyond 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 Native owned businesses and procurement of Native-produced goods and services. Empowering tribal entrepreneurs and tribal government owned businesses, will help shape our communities and empower the next generation of Native leaders.

While Indian gaming has worked well to empower tribal governments, provide reservation jobs and supplement basic governmental programs and services, 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 gaming is part of the answer, but we all must do more to reverse these horrific statistics and establish more opportunities for all residents of Indian Country.

Tribal governments need help to fulfill Indian Country's full potential. That potential can only be achieved by reforming and aligning federal laws with the U.S. Constitution's acknowledgment of Indian tribes as separate distinct governments in the United States' federalist system of government. Federal laws and policies should follow a dual purpose of respecting Indian tribes as governments while also working to uphold the federal governments treaty and trust obligations to Indian tribes.[9]

The Tribal Labor Sovereignty Act

One of the most prominent examples of a federal law's failure to acknowledge Indian tribes as governments is the National Labor Relations Act (NLRA).

In 2004, the National Labor Relations Board (NLRB) reversed decades of its own precedent to apply the NLRA to tribal government enterprises.[10] The NLRB has read the Act's governmental exemption to cover the U.S. federal government, states and political subdivisions (counties, cities, etc.), the District of Columbia, and U.S. territories and possessions—and commercial enterprises owned and operated by these entities.[11] *As a result of the NLRB's 2004 decision, Indian tribes are the only form of government in the United States not exempt from the NLRA.*

The Board reasoned that "tribal casinos and similar businesses are commercial enterprises in direct competition with similar non-tribal businesses." This is a dangerous misstatement of fact that disrespects tribal sovereignty and ignores the economic realities facing many tribal governments. Tribal Laws require, and Federal Law mandates, that revenues generated from

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[9] Through treaties, tribal governments ceded hundreds of millions of acres of tribal homelands to help build this great Nation. In return, the United States incurred a solemn obligation to provide for the education, health, public safety and general welfare of Indian people. President Nixon embraced these obligations in his Special Address to Congress in 1970 ("The special relationship between Indians and the Federal government is the result 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.").

[10] *See NLRB Opinion in Fort Apache Timber Co. and Construction* (Oct. 19, 1976)(Holding that a tribal government owned and operated "commercial enterprise" located on Indian lands is not an "employer" for purposes of the NLRA).

[11] The NLRA was enacted in 1935 to address upheavals in private industry. Government employers were expressly exempted from the Act. Although the NLRA did not list all forms of government subject to the exemption, the NLRB has consistently interpreted the government exemption to include the District of Columbia, U.S. territories and possessions, and—until 2004—tribal governments.

Indian gaming be used entirely for government purposes. Commercial gaming enterprises conversely are for-profit individually owned operations.

With specific regard to Indian gaming, tribal casinos are wholly owned and operated by tribal governments. Tribal governments generally lack an effective tax base—Indian lands are held in trust by the U.S. and cannot be subjected to real estate taxation, high reservation unemployment makes income taxation unworkable, and restrictive Supreme Court rulings have severely limited tribal government sales taxes. For many tribal governments, Indian gaming operations, tribal timber operations, and other tribal government enterprises constitute the sole source of governmental revenue that is used to fund tribal public safety, education, health, housing and other essential services to reservation residents. Ignoring the purpose of tribal government enterprises subjects vital tribal government programs to shutdowns and work stoppages.

Equating Indian gaming to commercial gaming also completely ignores the text and intent of the Indian Gaming Regulatory Act (IGRA). Congress imposed IGRA on Indian gaming operations to establish a system of federal regulation and "to provide a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." IGRA mandates that tribes use revenues generated from Indian gaming for one of five government purposes: to fund tribal government operations, programs, and services; to provide for the general welfare of the community; to promote tribal economic development; to donate to charitable organizations; or to fund local government operations.

NIGA thanks Senator Moran and the co-sponsors of S. 63, the Tribal Labor Sovereignty Act, which would restore acknowledgment of Indian tribes as governments for purposes of the NLRA. We also thank this Committee for advancing the bill in February of this year.

NIGA has made clear from the beginning that this effort to amend the NLRA to restore the longstanding treatment of Indian tribes as other forms of governments is not anti-labor. This effort is purely about respect for tribal sovereignty and the U.S. Constitution's acknowledgement of Indian tribes as separate forms of governments within our federalist system.

Comprehensive Tax Reform

The U.S. Tax Code is also rife with provisions that ignore the federal government's treaty and trust obligation to Indian Country, the federal policy supporting tribal government self-determination and economic self-sufficiency, and the Constitution's recognition of Indian tribes as separate sovereigns—all to the great detriment of Indian Country employment and economic development.

Federal tax policy has a significant and in most cases positive impact on the economies of state and local governments, and U.S. territories. The U.S. Tax Code provides governmental entities with preferred access to capital to finance infrastructure projects, provides tax incentives to individuals and corporations to invest in governmental and economic development projects. Many of these federal tools for governmental economic development are not available to Indian tribes, or require tribes to apply to state governments in order to receive a portion of the benefit.

Rep. Ron Kind (D-WI) and Rep. Lynn Jenkins (R-KS) have sponsored H.R. 3138, the Tribal Tax and Investment Reform Act. The bill acknowledges that Indian tribes face historic disadvantages in accessing the underlying capital to build the necessary infrastructure for job creation, and recognizes that "codifying tax parity with respect to tribal governments is consistent with Federal treaties recognizing the sovereignty of tribal governments."

H.R. 3138 seeks to establish parity for tribal governments with state and local governments for purposes of several provisions in the Tax Code, including: the issuance of tax-exempt bonds for tribal government projects; treatment of tribal government pensions; treatment of tribal government foundations and charities; and acknowledgement of tribal court / tribal government authorized adoptions for purposes of the federal tax credit for the adoption of special needs children; among other items.

The enactment of these provisions will reinforce the governmental status of tribes, facilitate equal access to federal tax and financing tools enjoyed by other governmental entities, and permit tribes to make important investments in their own communities. We understand that a companion bill is under consideration in the Senate and we urge Members of this Committee to support that bill when it is introduced.

I want to highlight two additional glaring examples of the Tax Code's lack of respect for the status of Indian tribes as governments: the federal New Markets Tax Credit and the Low Income Housing Tax Credit. While these federal programs have worked well to incentivize outside investment in state, local, and territorial government housing and economic development projects—they have fallen far short in Indian Country.

For more than thirty years, the Low Income Housing Tax Credit program (LIHTC) has been the most significant producer of affordable housing in the United States. Congress enacted the LIHTC Program in 1986 to provide the private market with greater incentives to invest in affordable rental housing. In 2014, the annual expense credits for the LIHTC program was $6.7 billion, making the program one of the largest corporate tax programs administered by the federal government.

All 50 states, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands receive direct LIHTC allocations, which they competitively issue to developers who construct, rehabilitate, or acquire rental housing for lower-income households. Indian tribal governments are the only sovereign in the United States to not receive a direct LIHTC allocation.

While the Indian Housing Block Grant program and federal housing loan guarantee programs have worked to cut into the housing shortfalls in Indian Country, these programs do not meet the significant housing needs of Indian Country.[12] Providing Indian Country with direct access to

[12] Over 90,000 American Indian families are homeless or under-housed. More than 30% of American Indian families live in overcrowded housing—a rate six times the national average. Approximately 40% of Indian Country housing is inadequate according to the federal definition, compared to only 6% nationwide. It is estimated that it would take approximately 33,000 housing units on Indian lands to alleviate overcrowding and an additional 35,000 units to replace existing housing in grave condition—at an approximate cost of $33 billion.

LIHTC would significantly improve the ability of Indian tribes to leverage capital from these existing programs and help address the housing shortage on Indian lands.

While individual Native Americans are counted towards a state's population for purposes of the tax credit, the housing projects that stem from the credits have failed in many cases to reach Indian Country. The most common reason that these credits do not reach Indian Country is that state governments do not consider low income housing on Indian lands as an affordable housing priority reflected in the state's qualified allocation plan (QAP), or state QAPs establish criteria and requirements that do not exist in most rural tribal communities—making tribal housing project ineligible to even apply for the credit.

As Congress moves towards comprehensive tax reform this year, we urge this Committee to work with the Senate Finance Committee and others to reform the Tax Code to acknowledge the governmental status of Indian tribes and align it with the federal policy supporting Indian tribal self-government and economic self-sufficiency.

CONCLUSION

As the *Cabazon* Court acknowledged more than thirty years ago, Indian gaming is Indian self-determination. Less than 18 months later, Congress enacted IGRA in part to foster and strengthen these acts of self-determination. The Act has generally delivered on its stated goals of strengthening tribal governments and empowering Indian communities. However, the careful balance struck in IGRA's compacting process is broken and must be addressed to pave a path for the success of Indian gaming's next 30 years.

Indian gaming is one tool that is helping tribal governments overcome decades of injustice. In order to meet the needs of tribal communities, Congress must work to empower tribes with the same tools that other governments are provided under our federalist system, most prominently respect for Indian tribes for purposes of federal labor laws, and tax credits and other incentives to help tribal governments reach their full economic potential.

Chairman Hoeven and Members of the Committee I again thank you for this opportunity, and I am prepared to answer any questions.