

**TESTIMONY OF
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CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
OVERSIGHT HEARING ON
“DOUBLING DOWN ON INDIAN GAMING: EXAMINING NEW ISSUES AND
OPPORTUNITIES FOR SUCCESS IN THE NEXT 30 YEARS”
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I. Introduction

Thank you Chairman Hoeven, Vice Chairman Udall, and members of the Committee for inviting me to testify today. It is an honor to appear before you as Chairman of the National Indian Gaming Commission.

Today I will provide an overview of the evolution of Indian gaming; the current state of the industry and our responsive initiatives; as well as some thoughts on the future of Indian gaming.

II. Evolution of Indian Gaming

Tribal gaming, as we think of it today, dates back to the 1970s when a number of Indian tribes established bingo operations as a means of raising revenue to fund tribal government operations and realize the goals of tribal self-determination.

The *California vs. Cabazon Band of Mission Indians* decision affirmed a tribe’s right to regulate gaming on tribal lands. In that case, the United States Supreme Court recognized that a tribe may engage in gaming if it is located within a state that permits such gaming for any purpose by any person, organization, or entity. The Court also found the tribal and federal interests supporting gambling – tribal self-determination and economic self-sufficiency – preempted the state interest in regulating gaming. The Court emphasized the compelling need in Indian Country for economic development and that the gaming operations were a major source of employment.

Soon after the *Cabazon* decision, Congress took up the issue of tribal gaming and conducted a series of hearings, ultimately culminating in the passage of the Indian Gaming Regulatory Act of 1988. In addition to providing a statutory basis for gaming on Indian lands, the Act incorporates the very same reasons the Court identified in *Cabazon* as compelling: to promote economic development, self-sufficiency, and strong tribal governments. The tribes’ role as primary regulators and primary beneficiaries, as well as their sovereign right to pursue gaming on their lands, was left intact, with general regulatory oversight at the federal level to be provided by the newly created National Indian Gaming Commission.

The NIGC has several specific responsibilities that it carries out pursuant to IGRA, including approving tribal gaming ordinances and management contracts with third parties and reviewing tribal gaming license decisions. We are funded entirely by fees paid by tribal gaming operations, and the current fee rate is at its lowest adopted amount since 2010. Our regulatory role is carried out at the NIGC's headquarters, located in Washington, D.C., and our seven regional offices located in: Portland, OR; Sacramento; Phoenix; St. Paul; Tulsa; Oklahoma City; and Washington, D.C. The NIGC's region offices house NIGC staff in the Compliance Division, making it possible to develop a strong working relationship with tribal gaming authorities, be accessible, and have regular contact with tribes at their gaming locations.

The NIGC is committed to fulfilling its tribal consultation obligations by adhering to the consultation framework described in the Tribal Consultation Policy. The Commission has committed to consulting with tribes before taking any action that may have a substantial direct effect on an Indian tribe on matters including, but not limited to, the ability of an Indian tribe to regulate its Indian gaming, an Indian tribe's formal relationship with the Commission, or the consideration of the Commission's trust responsibilities to Indian tribes. In fact, the Commission just completed a series of five consultations on a variety of matters, and will be engaging in another consultation at the end of October.

III. State of the Industry

Indian gaming is conducted in 28 states by 246 of the 567 federally recognized tribes. When the NIGC began tracking industry-wide gross gaming revenues in 1997, Indian gaming generated approximately \$7.4 billion. In the years since, the industry has grown tremendously, with gross revenues for fiscal year 2016 reaching \$31.2 billion. Gross revenue, though, does not include the costs of running a casino, including debt service. In other words, 31.2 billion, while an impressive number, does not equate to revenues making it to tribes. And, although one of the purposes of IGRA is to promote tribal self-sufficiency, gaming revenues do not supplant other federal programs, services, and obligations, but rather allow tribes to generate jobs and revenue which enable tribal governments to provide fundamental services to their communities. Many tribes have used gaming profits to fund education, improve health and elder care, enhance police and fire departments, build houses and roads, develop environmental programs, launch commercial ventures, and buy lands.

A. Success

The NIGC takes seriously its role in safeguarding the integrity of Indian gaming. Through IGRA, Indian gaming continues to support tribal economic development, self-sufficiency, and strong tribal governments. Indian gaming has an undeniable impact on Indian Country programs,

services, and infrastructure affecting the lives of millions of Native peoples and citizens of local communities. Across the board, Indian gaming has infused tribal program budgets with crucial funding and has allowed tribes to provide vital services to their members.

1. Economic and Community Impact

Small and medium tribal gaming operations (those earning less than \$25 million in gross gaming revenues) drive much of the industry, making up 57% of all gaming operations. Indian gaming has been a lifeline for these communities, supplementing funding the federal government provides. And, although tribal gaming varies in size and revenue, even the smallest gaming operations derive benefits from the industry, including much needed jobs for tribal and local community members. Gaming has also served as a catalyst for tribes to diversify their economic portfolios and has led to success in industries that were initially not available to them. Through these economic successes, tribes have been able to direct funding to other important tribal priorities such as healthcare, education, and infrastructure.

Tribes have always been the architects of their own success in the industry. As expertise and experience have developed, more and more tribes are looking beyond their own facilities to the tribal gaming landscape as a whole. The Indian gaming industry has provided a powerful platform for tribes to share their expansive knowledge, enhancing inter-tribal relations and further bolstering the well-being of Indian Country at large.

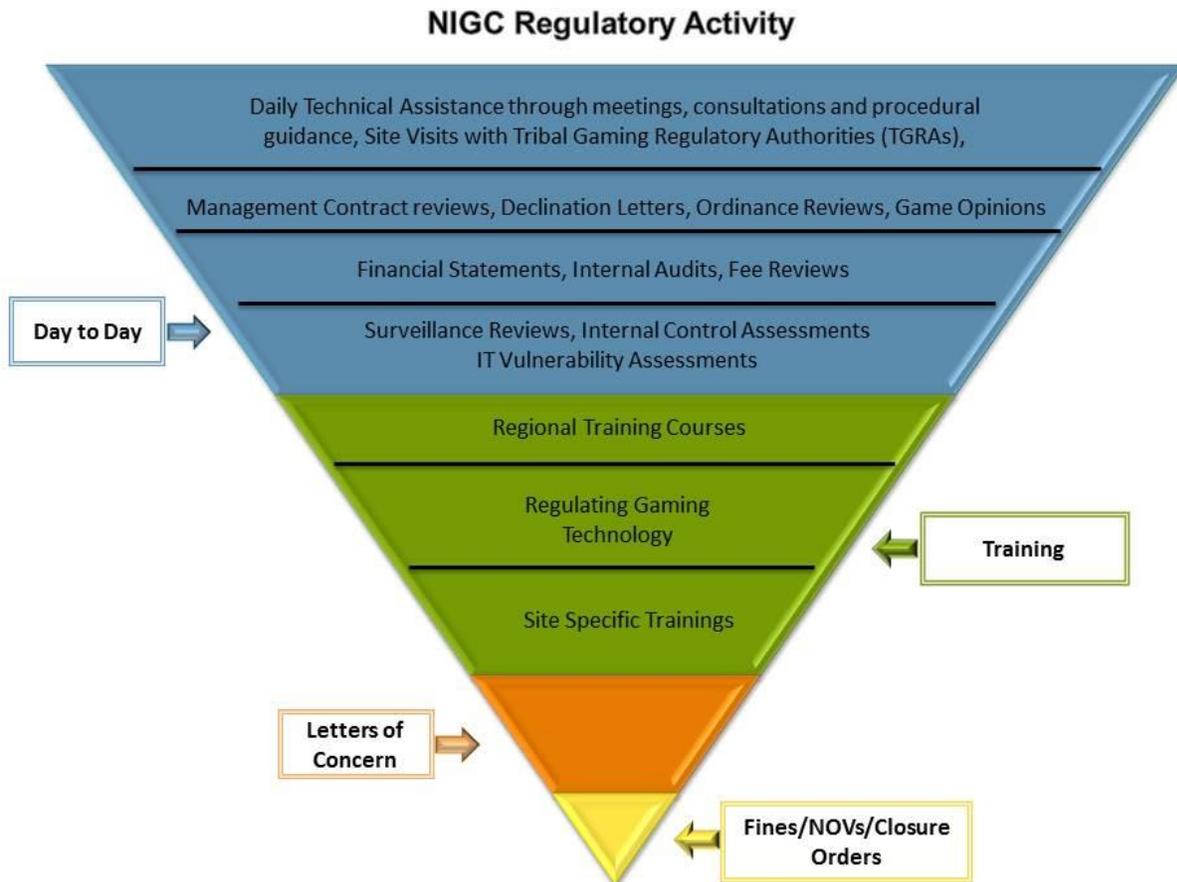
Indian gaming has an undeniably positive impact on local and state economies. It provides opportunities in some of the most economically depressed areas in the country. Indian gaming allows tribes to create and support thousands of direct and indirect jobs, to make charitable contributions, and to support local emergency services, truly impacting many lives. Its role in Indian Country as well as in surrounding communities cannot be overstated.

2. Regulatory Framework

IGRA's framework – with tribes as the primary regulators – works. Tribes themselves have the greatest interest in protecting their resources and their communities. It is a testament to the leadership of tribal governments, the regulators, and the work of their dedicated employees that the Indian gaming industry has continued to maintain security and stability. NIGC support includes working with tribal governments and their employees to ensure they have the tools necessary to protect their assets and the integrity of the industry through diligent, professional oversight and enforcement.

The NIGC remains strongly committed to upholding the statutory authority and responsibilities outlined in IGRA. We carry out these responsibilities through a comprehensive compliance approach and do not take lightly the crippling effects that closure of a casino could have on a

tribe and the surrounding communities. Before the Chair takes an enforcement action, we work with tribes and our regulatory partners to address areas of concern using a variety of tools outlined in the visual below. It is worth noting that the majority of tribes achieve compliance voluntarily. This is reflective of the good work and sound partnerships the NIGC has with tribes and regulators on the ground.



We approach our regulatory role through a multi-faceted comprehensive compliance approach of technical assistance, training, and enforcement. And, with the assistance of Indian Country through consultation, we focus on regularly improving the effectiveness of our regulations. Fiscal Year 2016 has proven to be a robust year of engagement with Indian country.

Below is a list highlighting some of our fiscal year 2016 regulatory activities:

- 599 Site Visits
- 474 audit statement reviews
- 226,857 FBI fingerprint and name checks
- 185 Surveillance Reviews
- 314 Tribal Licensing issuance reviews

- 6 Internal Control Assessments (ICA)
- 2 Internal Audit Reviews
- 33 trainings events to 1,662 participants
- 18 IT Vulnerability Assessments (ITVA)

3. NIGC Initiatives

The NIGC stresses strong partnerships and consistent communication with tribal gaming operations to achieve compliance with IGRA. The Commission works with tribes to ensure they have the tools necessary to effectively regulate their operations and meet IGRA's requirements. With its statutory mission in mind, the NIGC has focused on four initiatives, which comprise the Agency's strategic plan.

Through our initiatives, we have been able to protect the integrity of Indian gaming, expand outreach, and develop new services that support gaming operations and its staff.

Protecting against anything that amounts to gamesmanship on the backs of tribes

The Commission is committed to preventing non-tribal government interests from manipulating relationships to benefit themselves to the detriment of tribal gaming operations. Ensuring tribes are the primary beneficiaries of their gaming activities lies within the core mission of the NIGC, and preventing "gamesmanship" underpins all of the Agency's activities. A recent example of protecting against gamesmanship is outlined in a settlement agreement I entered into with the Cheyenne and Arapaho Tribes of Oklahoma on April 11, 2017. After identifying, self-reporting, and providing documentation of potential gamesmanship involving a casino parking lot to the NIGC, the Tribes and NIGC entered into a settlement agreement acknowledging that there was sufficient evidence to support an enforcement action for misuse of gaming revenue and violation of the sole proprietary interest requirement.

Staying ahead of the technology curve

The Commission created its first technology division which has spearheaded numerous projects, including providing technical assistance to tribes to better evaluate and manage their security and technological vulnerabilities. As part of this initiative, the NIGC offers no-cost IT vulnerability assessments (ITVAs) for tribes and tribal regulators, which provide a tribal gaming facility with a vulnerability analysis of its IT system. An ITVA is a high level tool that assists a tribe's IT security posture relative to its gaming systems and provides a solid base-line for internal mitigation of any risk found and assists in justifying funding for third-party assistance. In fiscal year 2017, the NIGC has conducted 19 ITVAs.

IT vulnerability assessment testing consists of two types of tests: external and internal. The external test provides an overview of security vulnerabilities, which are visible from outside the gaming system network. The scan takes into account all security layers on the network between the scanner machine and the target system. The internal network test provides an overview of vulnerabilities, which are visible from the local network, taking into account host-based security controls on the target system.

The technology division is also leading the Commission's consideration of regulatory updates to better address mobile gaming devices. Mobile gaming devices are handheld electronic devices that allow casino patrons to play anywhere within the casino or potentially other locations within a tribe's gaming eligible lands, such as restaurants and hotels.

Developing effective rural outreach to smaller gaming establishments in rural areas

The focus of the Commission's Rural Outreach Initiative is to develop an effective and responsive program to support tribes with small, rural gaming operations whose needs are unique from larger tribal gaming operations near cities. Regional staff manages the initiative and engages in direct outreach. Budget and staff constraints can make attending training away from the workplace difficult. Due to this, the Commission has added virtual training sessions to its Regional Training Courses to benefit rural gaming operations that cannot always attend in person. Through the initiative, the NIGC is increasing its communications and enhancing its regulatory partnerships with tribes with small rural gaming operations.

Supporting a strong workforce both within NIGC and among regulatory partners

The Commission has enhanced regional trainings to include more hands-on learning and is leveraging technology to receive feedback. The NIGC training program seeks to improve the content and style of its training courses and is currently revising all of its training materials. For 2017, the NIGC training program has developed a two-day workshop for internal audit and internal controls development. Additionally, the NIGC has developed training to assist tribes in recognizing "gamesmanship". The NIGC's new classes are designed to provide "how-to," hands-on learning with real-life scenarios, exercises and examples, and shared best practices. Ideally, tribal leadership, tribal regulators, and operators will not only better understand the regulations but will have the tools necessary to effectively measure and maintain compliance in their operations.

The agency also recognized that due to operational demands and staffing size, attending Regional training courses may be difficult for some tribes. In fiscal year 2017, virtual training was introduced, allowing participants to register for select courses broadcast live from the regional training location. This interactive approach allows participants to ask presenters

questions and actively engage in group discussions and breakouts. The NIGC is also in the early stages of rolling out a learning management system, which will provide on-line training courses and webinar-type training to tribal leadership, gaming commissioners, regulators, and operators. In 2016, the NIGC instituted knowledge reviews in certain audit related classes. The knowledge reviews seek to test the participant on how well they have learned the material and assist the NIGC in determining the efficacy of its training. The testing is done after the class is completed, and then repeated ninety days later.

4. Regulatory Review

As part of any regulatory agencies' obligation to maintain the effectiveness of its regulations, the Commission is contemplating changes to its regulations.

Draft Guidance on the Class III Minimum Internal Control Standards

The NIGC's Class III Minimum Internal Controls Standards (MICS) were promulgated in 1999 and last substantively revised in 2005. In 2006, the D.C. Circuit Court of Appeals held that NIGC lacked authority to enforce or promulgate these regulations. Since that time, the Class III MICS have remained unaltered in the federal register, but not enforced by the Agency. Technology has advanced rapidly, making some standards obsolete and introducing new areas of risk not contemplated by the outdated standards. In addition, tribal-state compacts—even those entered into since 2006—continue to adopt NIGC Class III MICS by reference. Recognizing the industry's need for updated standards, and after consultation with tribes, the Commission is developing updated, non-binding guidance for Class III MICS and a proposed rule that will address the outdated standards still remaining in the regulations.

Management Contract Regulations and Procedures

Pursuant to IGRA, Indian tribes may enter into management contracts for the operation and management of their gaming activity subject to the approval of the NIGC Chair. The Agency's regulations govern the review and approval of management contracts, including background investigations of entities and individuals with an interest in the management contract. These regulations are intended to protect the integrity of the Indian gaming industry and ensure that the tribe is the primary beneficiary of its gaming operation. The Commission recently consulted with tribes and sought industry feedback on any recommended changes to our regulations and procedures that may improve the NIGC's efficiency in processing management agreements and background investigations. Comments are being reviewed to determine next steps.

As part of its review of the management contract process, the Commission recently streamlined its National Environmental Policy Act (NEPA) process by creating a Categorical Exclusion for

management contracts that do not include new construction. With the categorical exclusion in place, most contracts to manage existing facilities and most contract renewals will not be required to go through the time consuming and expensive process of obtaining an Environmental Assessment or Environmental Impact Statement. The Agency recognizes and supports the important environmental protections that NEPA provides. However, in the case of most management contracts, there simply are no environmental implications that are brought to bear by a new person or company taking over the day-to-day management of a casino. And, where construction is part of the agreement, the categorical exclusion will not be applied and the NEPA process will proceed as normal.

Fees

The Commission is considering amending the language of our fee regulations to improve the fee rate analysis and to allow publication of the rate to coincide with the completion of our budget for the fiscal year and the annual release of the industry's Gross Gaming Revenue. Additionally, we anticipate this amendment would reduce the margin of error for fee calculations as the rate would be set only once within a fiscal year.

25 C.F.R. Part 547 Class II Gaming Systems

The NIGC initially implemented Technical Standards in 2008 requiring that before a Class II gaming system may be placed on the floor and offered to the public for play, it must be submitted to an independent gaming laboratory which would test the system against the Technical Standards.

It was recognized by tribes, the industry, and NIGC that implementation of the Technical Standards would come at a financial cost to tribes. Of particular concern however, was the potential financial burden on bringing gaming systems that had already been manufactured and/or put into play – and “compliant” with applicable law in the absence of the Technical Standards – into compliance with the new 2008 rule. Thus, to reduce that cost, the NIGC provided that gaming systems manufactured prior to issuance of the standards in 2008 could be certified to an alternate minimum standard, but made fully compliant or removed from the gaming floor within five years. In 2012, that “sunset provision” was extended another five years, to November 10, 2018. After extensive internal review of the technical standards and consultation with the industry, the Commission determined that it was appropriate to remove this deadline, provided that such systems are subject to additional annual review by tribal gaming regulators and with certain records and information regarding that review to be made available to the NIGC. The Commission carefully considered comments received on the issue and published a Notice of Proposed Rulemaking in the Federal Register on September 28, 2017.

5. Developing Partnerships to Stamp Out Human Trafficking

The NIGC had forged partnerships to enhance its proactive regulatory approach to educate and provide resources to combat human trafficking. While the NIGC is not aware of any data suggesting human trafficking is any more rampant in Indian gaming than any other large commercial activity with heavy customer movement, we recognize the industry's strong regulatory structure that provides the agency an area of opportunity to support broader efforts to stamp out human trafficking. Beginning in January 2017, the Agency's forward-looking approach allowed the Commission to partner with the Bureau of Indian Affairs, the Department of Homeland Security, the Department of Justice, the National Human Trafficking Hotline and other federal and non-profit organizations to provide engagement, tools and resources at our regional training conferences.

B. Challenges

While Indian gaming continues to be successful, it is not without its challenges. To that end, NIGC receives input from tribes and stakeholders through consultation efforts, daily interactions, site visits, and by observing the work of other agencies supporting Indian Country.

As we see the tremendous growth of the Indian gaming industry, it is more important than ever to not lose sight of the policies underlying IGRA. Indian gaming, while potentially lucrative, is a governmental activity, not a mere commercial enterprise. This simple idea is sometimes forgotten, but crucial when discussing Indian gaming. IGRA requires that gaming revenues are owned by, and benefit, the entire tribe rather than any particular individual; tribes may only use net revenues from their IGRA gaming for five limited governmental purposes.

Related to the misperception that IGRA gaming is a commercial, rather than a governmental, endeavor is the notion that gaming on Indian lands not within the narrow limitations of reservation boundaries is somehow inconsistent with IGRA. The narrative of "off-reservation gaming" has the potential to distract from the underlying principle behind Indian gaming – that Indian gaming development is an expression of a tribe's sovereignty and desire to provide governmental services to its people. Gaming on Indian lands, which can include reservation, trust, and restricted fee land, is what IGRA contemplates. That being said, the NIGC understands concerns may arise when a tribe decides to open a casino on a particular parcel of land. As a regulatory agency, however, our role is limited to ensuring gaming takes place on eligible Indian lands. And, although the definition of Indian lands includes reservation land, it also includes non-reservation trust and restricted fee lands over which the tribe exercises governmental power. While IGRA also prohibits gaming on trust lands acquired by tribes after 1988, it does provide for measured flexibility allowing for gaming on eligible Indian lands, besides reservation lands, in clear recognition of the diversity of histories and land bases in

Indian country. This flexibility supports the goals of tribal economic development and strong tribal governments (through the rebuilding of land bases) and is consistent with the principal goals set forth in its findings.

IV. Thoughts on the Future

IGRA's purpose remains as relevant as ever for the future of Indian gaming, with its inevitable technological evolution and expansion. The policies of IGRA have provided tribes with the support, guidance, and protection to develop a healthy, robust gaming industry. The NIGC will continue to adapt to industry advancements and work to ensure a well-regulated gaming industry that supports tribal economic development, tribal self-sufficiency, and strong tribal governments. The NIGC is unique in its expertise and great working relationships with tribal regulators and operations. Any new technology or advancement in gaming such as i-gaming, fantasy sports, or mobile gaming will have a learning curve, but the NIGC's knowledgeable and dedicated staff is up to the task of addressing those issues without undermining the intent of IGRA.

The success of the Indian gaming industry is due in large part to the expertise tribes have developed in running and regulating their operations. The Commission believes any potential legislation related to gaming must include tribes and provide a level playing field of opportunity for Indian country. Potential legislation addressing new gaming markets, such as internet gaming or the increased availability of sports betting, etc., must include dialogue with State, industry, and other stakeholders in considering regulatory structures for emerging markets and IGRA's foundational principle of supporting tribal economic development, self-sufficiency, and strong tribal governments must be the primary guide. The federal government's special relationship with tribes is a bedrock of federal law and policy. IGRA's tribal self-determination principles have resulted in the integrity and economic success of Indian gaming thus far, and should inform future dialogue regarding national gaming policy. Congress can ensure that the benefits of Indian gaming are preserved and not lost in an on-line environment in which a handful of first-to-market interests dominate.

Although technologic advancements and the face of gaming is very much on everyone's minds as IGRA approaches its thirtieth anniversary, we must also be mindful of other aspects of the Act. For example, we at the NIGC have repeatedly heard from Tribes that the issue created by the United States Supreme Court case, *Seminole Tribe of Florida v. Florida* must be addressed. In that case, the United States Supreme Court concluded that in IGRA, Congress did not waive States' immunity from suit by Indian Tribes. Thus, tribes are unable sue states for failing to negotiate compacts in good faith, thus shifting the balance of power in tribal-state compact negotiations to states. We agree that without a *Seminole* fix, the intended parity between Class III tribal gaming and commercial gaming may further deteriorate. And, as with any proposed

legislation or new developments with Indian gaming, NIGC stands ready to work with Congress, tribes, and other stakeholders to uphold the foundational principles of IGRA.

With any changes to IGRA, though, special care must be taken to ensure any future legislation or regulation related to IGRA that impacts gaming such as those related to taking land into trust or that alter federal responsibilities to tribes, builds on the success of Indian gaming and provides ample flexibility for tribes to continue to strengthen their governments, including through the rebuilding of economically-viable land bases. As a general matter, I stress that we must be mindful of unintended consequences. Some of the most disastrous federal policies from the perspective of tribal nations were the product of the good intentions of purported advocates of Native peoples. IGRA, however, does not fall into that category. And rather than evaluate any proposed revision or potential improvement to IGRA in a vacuum, I would encourage the Committee to test each idea against a backdrop of the foundational principles of longstanding federal Indian policy.

As regulators of Indian gaming, we recognize the overall success of Indian gaming over the last 30 years, both in terms of regulation and economic impact. We also recognize that that success is due in large part to IGRA's acknowledgment of the tribes' sovereign right to pursue gaming on their lands, its preservation of their role as primary regulators and primary beneficiaries of their operations, and its protection of varied avenues to allow tribes with diverse histories, land bases, and capacities to pursue gaming. We believe an adherence to these self-determination principles and flexibility that accounts for historic realities is good policy and must be central in any forward-looking discussions. As Chairman, I stand ready to make available the expertise of the NIGC to weigh-in on any IGRA-related matters, and I appreciate dialogue on what improvements, if any, should be considered to strengthen the legal framework within which Indian gaming operates.

V. Conclusion

In the nearly 30 years since the Indian Gaming Regulatory Act was passed, the Indian gaming industry has grown, matured, and evolved in ways that almost no one could have predicted at the time. And while that growth is due primarily to the ingenuity and hard work of the tribal communities that built the industry, it has occurred in the context of a piece of legislation that was enacted with core goals in mind – to promote tribal economic development, tribal self-sufficiency, and strong tribal governments. The NIGC takes seriously its role to regulate the Indian gaming industry to ensure these goals are achieved. These efforts in conjunction with IGRA's sound principles will continue guiding Indian gaming into a bright and prosperous future.