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# GAMING

# HEARING

BEFORE THE

## COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON THE REGULATION OF INDIAN GAMING

APRIL 27, 2005
WASHINGTON, DC

**PART 1**

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# CONTENTS


| | Page |
|---|---|
| Statements: | |
| Coburn, M.D., Hon. Tom, U.S. Senator from Oklahoma | 20 |
| Colombe, Charles, treasurer, National Indian Gaming Association and president, Rosebud Sioux Tribe | 24 |
| DesRosiers, Norman H., commissioner, Viejas Tribal Government Gaming Commission | 22 |
| Devaney, Earl, Inspector General, Department of the Interior | 7 |
| Dorgan, Hon. Byron L., U.S. Senator from North Dakota, vice chairman, Committee on Indian Affairs | 2 |
| Heffelfinger, Thomas B., U.S. attorney, District of Minnesota, Department of Justice | 10 |
| Hogen, Phil, chairman, National Indian Gaming Commission | 3 |
| Light, Steven, assistant professor, University of North Dakota | 29 |
| McCain, Hon. John, U.S. Senator from Arizona, chairman, Committee on Indian Affairs | 1 |
| Rand, Kathryn, associate professor, University of North Dakota School of Law | 29 |
| Van Norman, Mark, executive director, National Indian Gaming Commission Association | 24 |
| Washburn, Kevin, associate professor of law, University of Minnesota | 26 |


APPENDIX


| | |
|---|---|
| Prepared statements: | |
| Devaney, Earl | 39 |
| DesRosiers, Norman H. (with attachment) | 43 |
| George, Keller, president United South and Eastern Tribes, Inc. | 53 |
| Heffelfinger, Thomas B. (with attachment) | 62 |
| Hogen, Phil (with attachment) | 76 |
| Light, Steven (with attachment) | 101 |
| Rand, Kathryn (with attachment) | 101 |
| Rose, Calvin, tribal chairman, Strawberry Valley Rancheria | 343 |
| Stevens, Jr., Earnest L., chairman, National Indian Gaming Association, Washington, DC | 346 |
| Washburn, Kevin (with attachment) | 363 |
| Additional material submitted for the record: | |
| Bullis, Paul, director, Arizona Department of Gaming, letter | 378 |

# GAMING

**WEDNESDAY, APRIL 27, 2005**

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

The committee met, pursuant to notice, at 9:31 a.m. in room 485, Senate Russell Building, Hon. John McCain (chairman of the committee) presiding.

Present: Senators McCain, Akaka, Burr, Cantwell, Coburn, Conrad, Crapo, Domenici, Dorgan, Inouye, Johnson, Murkowski, Smith, and Thomas.

## STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. In 1988, Congress enacted the Indian Gaming Regulatory Act with the intent of providing a statutory framework for the operation and regulation of gaming activities. At that time, Indian gaming was a $100-million a year industry. Today, over 220 tribes participate in an $18-billion industry. This explosive growth was not anticipated by Congress, the States or even the Indian tribes. Gaming has transformed the face of Indian country and in many respects people's perception of it.

There is no doubt that Indian gaming has benefited many tribes. It has produced economic opportunities where before there were none; paid for critically needed governmental services and strengthened tribal self-determination. In some States, the regulatory system appears to be working well. In Arizona, for example, tribal regulators work closely with State regulators to oversee a gaming industry that shares proceeds among all tribes and whose operation was approved by the voters of my State.

There also are reports, however, that the purposes of IGRA are not always being met. Rather than improve the lives of Native Americans, we have heard of cases in which gaming has resulted in non-Indian developers, investors and vendors making exorbitant sums and of tribal leaders benefiting at the expense of their own members. I hope our witnesses will address the extent to which this is occurring and the extent to which information is available that would allow an honest assessment of this.

On the issue of transparency in gaming operations, some tribes have challenged the National Indian Gaming Commission's very ability to regulate class III gaming. I disagree with this challenge, though I believe that Congress has not provided adequate funding for NIGC to carry out its charge. I recognize that there is a tension

between claims of tribal sovereignty and ensuring that the Federal law that governs Indian gaming is enforced. I believe it is time that this committee and the responsible Federal agencies engage in a constructive dialog with the gaming tribes on where the act can be positively improved or meet its original intent.

Just yesterday, the Secretary of the Senate sent the committee a legislative proposal from NIGC for amendments to IGRA. I look forward to working with the NIGC and others to implement needed changes to the laws.

Senator Dorgan.

**STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS**

Senator DORGAN. Mr. Chairman, thank you very much.

Let me thank all of those who have come to this hearing.

As you indicated, Indian gaming is something that is relatively new. It is just a little over a decade-and-a-half old. There is very little research that has been done on these issues. The Congress has done what it can and what it felt was appropriate to create a regulatory system, working within the issues of sovereignty as well. We obviously have received comments from those who contend that Indian gaming is not sufficiently regulated. Others feel that the regulation is not working appropriately.

On the other hand, Indian tribes have argued that Indian gaming is the most heavily regulated gaming industry because it is overseen by Federal, State, and Tribal Governments. I think because it has grown as rapidly as it has into an $18-billion industry, it is very important that we monitor it and work to make improvements in the law where necessary. I really appreciate the people that we have coming to testify today to help us think through some of these issues.

I did want to mention that, Mr. Chairman, we have two witnesses, Kathryn Rand and Dr. Steven Light, who co-founded what is called the Institute for the Study of Tribal Gaming Law, coincidentally at the University of North Dakota. I believe because it is a relatively new industry, there is very little research done. I think we will have some testimony from them today, and I think it will be interesting testimony as well.

I look forward to all of the witnesses' testimony today, and I look forward to working with you, Mr. Chairman, to sort through all of the recommendation we receive for future policy courses.

The CHAIRMAN. Thank you very much.

Our first panel is Phil Hogen, chairman, National Indian Gaming Commission. Would you please come forward? Earl Devaney, inspector general, Department of the Interior; and Thomas B. Heffelfinger, U.S. attorney, District of Minnesota, Department of Justice.

Welcome to our first panel of witnesses. We will begin with you, Chairman Hogen. Welcome.

**STATEMENT OF PHIL HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION**

Mr. HOGEN. Good morning, Chairman McCain and Vice Chairman Dorgan. The National Indian Gaming Commission is here in total. I am Phil Hogen, chairman, Nelson Westrin, vice chairman, and Commissioner Choney are with me this morning.

The CHAIRMAN. Welcome.

Mr. HOGEN. I think they concur in what we have said.

I have prepared a written statement and I would ask that be included in the record. I will attempt to summarize the points that I made therein.

The CHAIRMAN. Thank you. All the written statements will be included in the record, without objection. Thank you.

Mr. HOGEN. I am very happy to report that the Indian gaming industry is quite healthy. It is growing. It is doing what I think the authors intended, that is, it is bringing economic development to Indian country that desperately needed it. This success is due in no small part, of course, to the ingenuity, the hard work of the gaming tribes. But it is also due to the regulatory efforts that have been put forth from several quarters. That is, those involved in the gaming industry know that if they are going to get customers to their facilities, there has to be a degree of confidence there, and that is best generated by a well-regulated, transparent structure.

The most effort is exerted by the tribes themselves with their tribal regulatory bodies, tribal gaming commissions, and tribal gaming authorities. They are there on-site all day every day, and the other players, States when there are class III compacts and the NIGC, oversee what is done there and are partners in that effort. So regulation has been key to the success and helped the industry grow to this multi-billion dollar proportion that it has reached.

The National Indian Gaming Commission does what it does with about 80 staff members. When we, this commission, came onboard in December 2002, there were 60 folks that worked for NIGC. The limit on the amount of revenue that we could run the agency with was $8 million. That has since changed to $12 million. With that additional money, we have hired additional auditors, additional investigators. They operate out of five regional offices, and four satellite offices. About one-half of our staff is in the Washington, DC office. The other one-half is out in the field.

In 2004, we spent about $10.6 million to run the National Indian Gaming Commission. All of that, of course, is fees that are paid by the gaming tribes. We expect in this year to expend about $11.2 million, which of course is starting to approach that $12 million limit. If the industry continues to grow, as we expect it will, we will be asking Congress to increase the amount of funds available to us so that we can increase the staff to meet the challenges.

In terms of challenges that face the National Indian Gaming Commission, Mr. Chairman, you mentioned in your opening remarks the challenge to the NIGC's authority over class III gaming. Class III gaming is where the money is. That is the vast majority of the gaming in Indian country that is conducted pursuant to the tribal-State compacts. We developed in the last century minimum internal control standards. Those I think were initially suggested by you, Senator McCain. The industry itself jumped on that idea,

and came up with recommended standards, and shortly thereafter the National Indian Gaming Commission embraced those as regulations. They now apply to class II and class III gaming activity.

As we have rules, we say to tribes, you have to, at a minimum, do these things with respect to tracking the money from the time it comes in the door until it goes to the tribal bank account. There are many checks and balances therein.

However, litigation has been commenced by a tribe where we did an audit challenging our class III authority on the grounds that class II is to be regulated by the tribes with the NIGC oversight, but class III is to be regulated pursuant to the tribal-State compacts. It is the NIGC's view that we have full class III authority in as much as we are authorized to take enforcement action if there are violations of the Indian Gaming Regulatory Act, NIGC regulations or tribal gaming ordinances.

The CHAIRMAN. Where is that in the judicial system?

Mr. HOGEN. The action entitled *Colorado River Indian Tribes* v. *Hogen* is in U.S. District Court here in the District of Columbia. Oral arguments were held earlier this month, and we expect that the trial court level will be rendering a decision in the coming weeks.

The CHAIRMAN. Thank you.

Mr. HOGEN. So we will be, of course, watching that with great interest. I am sure however that comes out there will likely be an appeal. But if we lose that authority, the ability to use these minimum internal controls over the vast majority of tribal gaming activity, we will be asking Congress to fix that for us.

The CHAIRMAN. I do not mean to interrupt you. You have to excuse me. I do not understand the logic of the suit that the Colorado River Indian tribes. The purpose of IGRA was to regulate class III gaming, the primary purpose. Now, they are challenging that authority under IGRA?

Mr. HOGEN. That portion of the commission's authority is being challenged, yes, Senator.

The CHAIRMAN. On what grounds? Tribal sovereignty?

Mr. HOGEN. On the grounds that the act divided up the regulatory tasks; that class III was left to the tribes and States. Of course, we argue that, no, we have an oversight role with respect to all of it.

The CHAIRMAN. Thank you. Please proceed.

Mr. HOGEN. S. 1529 as introduced in the last Congress would have addressed this, would have clarified that NIGC's authority extended to both class II and class III.

The CHAIRMAN. Would it help you if that were passed by Congress?

Mr. HOGEN. It certainly would. It would resolve the questions before the court.

A second major challenge that faces the National Indian Gaming Commission relates to how you distinguish class II electronic aids to class II gaming, from electronic facsimiles that are class III gaming and are permitted only pursuant to tribal-State compacts. When Congress enacted IGRA in 1988, it said tribes can use computers and technology to play these class II games, bingo, pull-tabs and so forth. They have successfully utilized that technology. But

technology has now reached the point where if you look at one of these class II devices or purportedly class II devices, it looks a lot like a slot machine. It will have slot machine reels that the players view, although they really are not part of the game. They tell the player whether they have won or lost, and you push the button and the game is over.

So we, NIGC, is concerned that this has crossed the line, but we find ourselves hampered in terms of enforcing that by a lack of standards. So we are trying to write some standards. We have formed a tribal advisory committee. We have held meetings, consultation with tribes; held public hearings. We have attempted to get to the right place to reflect what Congress intended in 1988. We think that Congress clearly intended that there was going to be a difference between class II and class III.

We also think that one of the main characteristics of that difference was the class II activities were going to be activities where the players participated. We think that if the machine so aids the player so it is one touch and the game is over, you have crossed that line. There has got to be more player participation in the play of bingo and games of that nature. So we are trying to develop standards that will clearly set that out.

It is important that the industry have standards because tribes, as they use class II and they will use it in the situation where they cannot get a compact with the State. They will use it in the situation where they have a compact, but it limits their class III game numbers and so forth, and just in the traditional venues where they have always had bingo and pull-tabs and that sort of thing. It is an important tool for them to have, but they need to know the scope of that. The people that build the equipment need to know the scope of that. We need to know the scope of that so that we can adequately regulate. So we are trying to draft these regulations.

Now, the effort has been I think transparent. We have written four drafts of these standards, published them on our Web site, met with the Tribal Advisory Committee. But the tribes are giving us a great deal of criticism, saying we are way too conservative, we are too restrictive; that the one-touch-and-it-is-over is okay.

Then on the other hand, our brethren from the Justice Department take a different view with respect to the scope of the Johnson Act. The Johnson Act was enacted in 1951 to deal with illegal gambling. It was amended in 1962 to broaden the definition of these gaming devices to which it applies. I think it was intended to address unregulated gaming. Well, class II Indian gaming is regulated gaming. I think it is a horse of a different color, so to speak. But nevertheless, the Justice Department takes a perhaps more conservative view than the National Indian Gaming Commission with respect to what the Johnson Act excludes without a compact. I think they might say, even though you may have a class II bingo game, if it has some electronics connected to it, it would have to have a compact to be played.

The courts have addressed this. In many cases, those courts have sided with those who have said this is carved out from the Johnson Act. But clarity is desperately needed out there. There are over 30,000 of these devices that we think go probably beyond the pale

in play now, and there are going to be more if we do not bring some clarity to this.

If this committee thinks that we are on the wrong track, that player participation is not a crucial element, we would love to have that guidance. We are going to try to get to the right place. We are going to try to work within the Federal family. We are going to try and get where we need to get in this connection.

The CHAIRMAN. I cannot speak for the entire committee, but I do not think you are on the wrong track.

Mr. HOGEN. Thank you, Senator.

Senator DORGAN. Mr. Chairman, I share that view.

Mr. HOGEN. Thank you.

In any event, that is one of the big challenges. S. 1529 as introduced in the last Congress would also have clarified that fact that the Johnson Act would not apply to these technologic aids. That would not completely resolve the differences that we have within the Federal family, but it would help clarify this. So we are on the way to getting these technical classification standards written, but we do want to sort out some of the issues with our fellow agency, the Department of Justice.

Things are good for the most part, but there are some problems in Indian gaming. Not all tribes that are generating lots of revenue from their gaming activities have the mechanics in place to appropriately spend their gaming revenues. The Indian Gaming Regulatory Act limits what you can use the revenues for, although it gives them great flexibility. In some cases, there have been abuses. We have issued an NIGC bulletin dealing with use of tribal gaming revenues. This I think has helped address that. We have worked directly with some tribes that we think have not had the appropriate objective due process mechanisms in place, and progress is being made.

There are instances where tribal gaming authorities are not getting the resources that they need and we are encouraging tribes to expand that. But for the most part, the effort is good, the effort is adequate, and the success of the industry speaks for itself.

So the National Indian Gaming Commission will continue to try to play an effective role in the regulation of Indian gaming, working with our regulators at the tribal level, and when there are compacts with regulators from the State level, trying to avoid inefficiency and duplication, yet getting the job done. If the industry grows, we will need to grow. I think that the more open communication we have with Congress, with the tribes we are working with, and with our fellow Federal agencies such as the Department of the Interior's Office of Inspector General and the Department of Justice, the more successful we will be.

I stand ready to attempt to respond to any questions the committee might have with respect to the NIGC's role in this regard.

[Prepared statement of Mr. Hogen appears in appendix.]

The CHAIRMAN. Thank you very much.

Mr. Devaney.

**STATEMENT OF EARL E. DEVANEY, INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR**

Mr. DEVANEY. Mr. Chairman, I want to thank you and the members of the committee for inviting me up here today to talk about regulation of Indian gaming. In the last decade, my office has conducted a number of audits on issues directly related to Indian gaming regulations under IGRA, and the financial management activities of the NIGC, particularly tribal gaming revenue allocation plans and the taking of land into trust.

We have investigated or prosecuted individuals for theft and/or embezzlement from Indian gaming establishments, investigated allegations surrounding the Federal recognition process, and we are currently working with our Federal law enforcement partners on several criminal investigations related to the Indian gaming industry.

All of these audits and investigations, coupled with my personal observations and a background as a law enforcement professional for over 30 years, leads me to believe it is time to seriously consider regulatory enhancements and potential legislative changes to reflect the realities of an $18.5-billion industry.

My experience and intuition also tells me that when there is this much money involved, bad guys will come. To think otherwise or to imagine that Indian gaming will somehow escape the evils faced by non-Indian gaming equates to the proverbial ostrich sticking its head in the sand.

While the investigations we have conducted into allegations involving particular tribal recognitions made by the Department have rarely uncovered any improper behavior, we are nonetheless troubled by the invariable presence of wealthy individuals and companies invested heavily in the recognition outcome for seemingly one reason only, that is to ultimately fund and then reap the financial benefits of a new gaming operation.

As this committee well knows, one of IGRA's primary purposes was to ensure that the proceeds from Indian gaming were used to fund tribal operations, economic development and the general welfare of its members. Therefore, any loss of gaming revenue as a result of criminal behavior will obviously negatively impact the ability of the tribes to provide vital services such as health care, law enforcement, housing and education.

Our audits of IGRA and the NIGC dating back as far as 1993 chronicle the lack of Federal resources available to effectively oversee Indian gaming. For instance, in a 1993-audit report, we reported that the NIGC had only a field staff of 24 and a budget of $2 million to oversee 149 tribes which had already initiated 296 gaming operations. When we recently took a snapshot of NIGC, we found that the commission had a budget cap of $12 million and only 39 auditor-investigators in the field tasked with overseeing more than 200 tribes with over 400 gaming operations. By contrast, the Nevada Gaming Commission has a budget of $35 million with a staff of 279 folks to oversee 365 gaming operations, with total reported revenues of $19.5 billion.

One also has to consider the fact that today's Indian gaming operations range from a 30-seat bingo parlor in Alaska to a tribal op-

eration in Connecticut with six separate casinos, nearly 7,500 slots, 388 table games, 23 restaurants, and three hotels.

In our opinion, the NIGC needs additional resources to fulfill their expanding role commensurate with the escalating growth of the Indian gaming industry. However, we continue to be concerned with the dual role that NIGC's field staff often performs. One role is to act as liaisons to the gaming tribes. In this capacity, the field staff consults with the gaming tribes and provides compliance training regarding statutory requirements and regulations. On the other hand, these same staff member are also asked to issue preliminary violation notices against tribes for civil gaming violations and to refer criminal matters to the FBI.

While I understand that the NIGC does not see this as a conflict, our view is that these dual roles are wholly incompatible. Put another way, it is hard to wear a white hat on a Monday and Tuesday, and then switch to a black hat on a Friday and a Saturday.

Recently, under the direction of the attorney general's Indian country subcommittee, and specifically under the leadership of my good friend Tom Heffelfinger, the U.S. attorney for the District of Minnesota, various Federal law enforcement and local and State law enforcement entities came together to form the Indian Gaming Working Group. We are proud to be part of this effort. None of the Federal, State or local law enforcement members of this Working Group have the resources to address the potential crimes in Indian country gaming alone. Therefore, leveraging our investigative resources in a common alliance not only makes perfect sense for us, but I would submit is the kind of good government action that the American public would expect us to take.

Mr. Chairman, my greatest fear is not that the integrity or accountability of Indian gaming will be compromised from the inside of the actual casinos, but rather by the horde of paid management advisers, consultants, lobbyists and financiers flocking to get a piece of the enormous amount of revenues being generated by this industry.

For instance, when tribes enter into management contracts for the operation of their gaming activities, those contracts are submitted to and approved by the chairman of the NIGC. Included in the NIGC's review is a background investigation of the principals and investors. Some tribes have circumvented this review, approval and background process by entering into consultant agreements which, although called by a different name, do not significantly in substance differ from management contracts. As a result, the terms of these consulting agreements, including the financing and compensation, are not subject to review and approval by the NIGC, nor do the backgrounds of the consultants, principals and investors get scrutinized.

Another concern we have is the Federal statute that carves out an exception to the usual recusal period for departing Department of the Interior officials. The statute permitting these officials to represent recognized Indian tribes in connection with any matter pending before the Federal Government immediately after leaving the Department perpetuates a classic revolving door. This law was enacted in 1998 because Indian tribes often lacked effective representation in front of Federal agencies. At the time, the only per-

sons with expertise in Indian matters were DOI employees. Today, that dynamic has obviously changed and the statute has outlived its original intent. In fact, it is hard to find a law firm in Washington today that does not have a thriving Indian practice area.

IGRA prohibits gaming on trust lands acquired after 1988 unless the lands meet specific statutory exemptions. Both BIA and NIGC share responsibility for reviewing applications for converting existing trust lands into gaming. Our recent evaluation of this process found 10 instances in which tribes have converted the use of lands taken into trust by the Bureau of Indian Affairs [BIA] after 1988 from non-gaming purposes to gaming purposes without the approval of BIA or NIGC. Surprisingly, we also learned that neither the BIA nor NIGC even had a process for identifying these converted lands.

In an audit report issued in 2003, we discovered that neither the BIA nor the NIGC were monitoring gaming tribes to determine whether they were complying with their BIA-approved revenue allocation plans, or whether the tribes were making per capita distributions on gaming revenues without an approved plan. While IGRA provides that the tribes make per capita payments of net gaming revenues only after BIA's approval of their plan, it does not provide the BIA or the NIGC the authority to monitor them once they are approved. Absent a process for monitoring tribal revenue distributions, BIA's approval authority and NIGC's enforcement authorities serve little practical purpose.

Because Indian casinos are a cash-rich enterprise, they are, in our opinion, particularly attractive to money launderers. In these instances, criminals use casinos to cash-in illegal proceeds for chips, tokens or coins in amounts that do not trigger reporting requirements and then game for short periods of time to redeem clean money. Tribal financial institutions without Federal or State charters and attendant regulations are also particularly vulnerable to manipulation. For instance, the U.S. Reservation Bank and Trust is an Indian-controlled banking institution. Although represented as a bank to other financial institutions and investors, it is alleged to have been established solely to execute a Ponzi scheme. Twenty-million dollars was seized in Arizona shortly before the operators of this bank could wire the funds to an off-shore account.

Finally, as this committee so recently demonstrated, great care must be exercised by gaming tribes when they are approached by unsavory lobbyists promising imperceptible services for astonishing fees.

Mr. Chairman and members of the committee, we are currently reviewing our authorities in Indian country to determine whether we can establish an even more vigorous presence in the gaming arena. In the meantime, we have had the opportunity to review the proposed technical amendments to IGRA advanced by the NIGC. Overall, we support NIGC's efforts in regards to funding flexibilities and regulatory enhancements, particularly the provisions that would allow in-depth background investigations to be conducted on a much broader range of individuals working in or on behalf of the Indian gaming industry.

In the meantime, should this committee have specific issues of concern that might benefit from an audit, evaluation or an investigation by my office, I stand ready to assist the committee in any way I can.

Mr. Chairman and members of the committee, thank you for the opportunity to testify here today. I stand ready to answer any questions you might have.

[Prepared statement of Mr. Devaney appears in appendix.]

The CHAIRMAN. Thank you very much.

Welcome, Mr. Heffelfinger.

**STATEMENT OF THOMAS B. HEFFELFINGER, U.S. ATTORNEY, DISTRICT OF MINNESOTA, DEPARTMENT OF JUSTICE**

Mr. HEFFELFINGER. Chairman McCain, Vice Chairman Dorgan and members of the committee, thank you very much for the opportunity to appear before you.

I am Tom Heffelfinger. I am not only the U.S. attorney for the District of Minnesota, but I also am the chairman of the Native American Issues Subcommittee of the Attorney General's Advisory Committee. The NAIS is the responsible body for developing policy recommendations and practical recommendations for the Attorney General, related to the Department of Justice's involvement in Indian country.

Since 2001, the U.S. attorneys on my committee have focused on five primary priority issues, one of which is Indian gaming. In that connection, I appreciate the opportunity to speak before you today regarding the Department of Justice's role in the enforcement of Indian gaming.

There are several different components, numerous components actually, within the Department of Justice responsible for issues related to regulation and enforcement in Indian gaming. First of all are the U.S. attorneys; second, the FBI, the Criminal Division; the Environmental and Natural Resources Division; and the Office of Tribal Justice.

First of all, I would like to address one of the issues raised by my good friend Chairman Hogen, an area where there may be some disagreements as to strategy and outcomes, but there is no disagreement as to the issue, and that is on the need to clarify the distinction between class II and class III games. There has been considerable litigation regarding tribal gaming enterprises and the need to classify types of games as either class II or class III.

It is the Department of Justice's position and continues to be that whether a machine is characterized as class II or class III, the Johnson Act prohibits gambling devices absent a State-tribal compact. It is also the Department of Justice's position that both Congress and the Indian Gaming Regulatory Act intended that there be a clear distinction between class III games that require a compact and class II games that do not. In this era of creativity, the manufacturers of gaming equipment have attempted to use creative engineering and graphic design to blur the lines between these two classes.

This clarification is actually not only in the best interests of just the Department of Justice and the regulators at the NIGC, but also of the industry itself and of the tribal gaming operators. Certainty

is what is needed here. We continue to work with and will continue to work with the NIGC to attempt to develop a united strategy to present to you if appropriate.

There is a unique legal and political relationship that exists between the United States and the tribes. On September 23, 2004, President Bush recognized this relationship when he reaffirmed the longstanding policy of the United States to work with federally recognized tribes on a government-to-government basis and to support and respect tribal sovereignty and tribal self-determination.

The Office of Tribal Justice within the Department of Justice is the entity which serves to coordinate activities pursuant to this relationship between the tribes and the Department of Justice. Federal law in the area of criminal responsibility vests the Department of Justice with primary jurisdiction over most felonies that occur in Indian country. The FBI and the U.S. Attorneys' offices are the Federal law enforcement agencies primarily responsible for investigating major felonies that occur in Indian country. This includes the area of Indian gaming.

Within the Department, the FBI is the Federal criminal investigative agency primarily responsible for investigating criminal acts related to casino gaming operations, including operations that occur in Public Law 280 or State jurisdictional criminal venues.

Similarly, within title 18 of the U.S. Code, there are provisions at section 1167 and 1168 for which the FBI and the U.S. attorneys are responsible, addressing theft from Indian casinos. This is one of those areas, however, in which most States, in which the States also have parallel jurisdiction either under the Public Law 280 status or under the terms of their compact, for the prosecution and investigation of theft cases. The Johnson Act criminally prohibits among other things the transportation and operation of all gambling devices, including slot machines in Indian country, absent the existence of a tribal compact.

Within the FBI, oversight for efforts devoted to Indian country lies with the Indian country Unit Special Jurisdiction Unit. The NAIS's role is to coordinate and support the efforts of the various U.S. Attorneys around the country. In the area of Indian gaming in particular there are a variety of FBI sub-programs, the Department of Justice components I mentioned, and representatives of as many as seven other Federal agencies that have varying degrees of interest in Indian gaming.

In early 2003, the FBI and the U.S. Attorneys decided to fundamentally change our response to this rapidly growing industry, to change from a reactive posture where we waited for referrals to be received from the tribes or from other agencies, to a proactive posture in which we are developing policies and practices designed to enhance the number of referrals of criminal activity arising in the context of Indian gaming.

As part of that proactive effort, the Indian Gaming Working Group was developed by the FBI. The Indian Gaming Working Group's purpose is to identify resources through multi-agency, multi-program approaches to address the most pressing and significant criminal violations in Indian gaming. This group consists of representatives from not only the FBI and the U.S. attorneys' offices, and the criminal division within the Department of Justice,

but also, as Mr. Devaney has mentioned, the Office of the Inspector General at DOI, the NIGC, the Internal Revenue Service Office of Indian Tribal Governments, the Treasury Department's FinCEN, and the BIA's Office of Law Enforcement Services.

The Indian Gaming Working Group met several times during fiscal year 2003 in order to get structured, and since that time on a monthly basis has conducted telephone conferences among its members to address matters of a national significance and also the needs of ongoing investigations being conducted by the member groups.

The Indian Gaming Working Group is currently providing analysts, financial assistance, functional area expertise and coordination assistance in cases that have national significance or are of significant impact to the industry and to the tribes that the industry serves.

The FBI's Indian country unit offered regional training starting in fiscal year 2004 on the area of Indian gaming. Those trainings have been conducted to date in Groton, CN; San Diego, CA; Oklahoma City, and the next one is scheduled for Minneapolis in June. The purpose of these regional trainings being conducted by the FBI with the support of the NIGC and the U.S. attorneys, is to develop expertise and to encourage the establishment of local working groups. These regional conferences to date have resulted in the establishment of local groups in both Oklahoma and Arizona, this in addition to local Indian Gaming Working Groups that already exist in Sacramento, CA, and Minnesota.

In addition, in its efforts to be proactive and to marshal the resources of the FBI, in February 2004 the criminal division of the FBI sent out a communication to all of its field offices alerting the FBI nationally of the existence of the Indian Gaming Working Group, the resources it could apply, in an attempt to generate additional referrals and make resources available nationally.

Similarly in a proactive mode, in September 2003, the Native American Issues Subcommittee held a 3-day summit of Federal, State, and tribal agencies engaged in Indian gaming regulation and enforcement. The net effect of that conference and our experience in this area has been the development of a series of best practices which has been communicated to all the U.S. attorneys in an attempt to assist the U.S. attorneys in more aggressively responding to this rapidly growing industry.

Among those best practices is the suggestion that U.S. attorneys consider outreach and consultation with tribal operators and with State gambling regulators. It is also recommended that each U.S. attorney's office designate a specific assistant U.S. attorney who will gain expertise in this industry, therefore being able to be responsible for enforcement in his or her respective district, and for coordination with other Federal, State, and tribal regulators.

It is also recommended that each U.S. attorney's office participate in the trainings that are being offered and conduct trainings at a local level, not only for their own assistant U.S. attorneys, but for enforcement officers both at a State and Federal level.

Another recommendation is that each U.S. attorney's office consider flexibility in charging thresholds in order to increase the number of cases that are prosecuted at the Federal level. There is

a recognition within the Department of Justice that the Federal Government bears a unique trust relationship and a government-to-government relationship with the tribes and their gaming operators, and therefore cases which have a significant impact on the tribal gaming operation should be considered for Federal prosecution even if the amounts in question are lower than we might usually use for determining whether or not to take on a fraud case.

It is also recommended U.S. attorneys actively support the National Working Group and develop a local working group within his or her specific district. The idea of a local working group and a national working group operating in tandem is to provide an effective vehicle for the exchange of intelligence upwards and downwards and inwards and outwards among the various districts within the United States.

Another one of our policy recommendations is that the U.S. attorneys in the Department of Justice support the development of national information sharing and cooperation arrangements within the industry, whether that development is conducted either by the NIGC or by the industry itself, such as the National Indian Gaming Association. Information sharing and national cooperation are essential to having effective background investigations and criminal investigations.

The Department of Justice is making important strides in the prosecution of criminal activity arising from the conduct of Indian gaming operations. As with most law enforcement efforts, limitations exist due to resources. However, as is also true in most law enforcement operations, coordination, communication and cooperation can compensate for many of those lack of resources.

I want to thank you very much for the opportunity to speak to you. We feel that our proactive approach in response to this major industry is making major strides in improving our ability to respond to the growth in this industry. I stand ready for questions, Mr. Chairman.

[Prepared statement of Mr. Heffelfinger appears in appendix.]

The CHAIRMAN. Thank you very much.

You just stated you are making strides in enforcement in prosecution. What have you been doing lately?

Mr. HEFFELFINGER. We have tracked the statistics for the last few years and found that roughly on an average since 2000 there are about 60 cases annually that are referred to the U.S. attorneys' offices for prosecution nationally. We believe that statistic under reports the number of cases that have been referred because it only tracks those that are referred under the two sections I mentioned, 1167 and 1168. Those referrals also do not pick up the cases that are referred to prosecution in Public Law 280 jurisdictions or pursuant to compact to our State counterparts.

The CHAIRMAN. In your view, is there a problem out there? If so, is it growing less or what is the status?

Mr. HEFFELFINGER. Our view is that the number of cases reported under represents the problem that exists within the industry, that the theft incidence is in fact greater than that. Part of our effort here is to improve the referral rates from the tribes, as well as improve our own ability to detect these independent of a referral.

The CHAIRMAN. I understand that there is a difference between you and the Indian Gaming Commission as to how we can define class II gaming. I certainly would like to see those differences reconciled if at all possible because we need to act on this issue. I agree with the witnesses that now the definition is so badly blurred thanks to advances in technology that there is gaming under, quote, "class II" that is clearly not class II, certainly not the intention of the original act.

So I would hope that you could get us, first, to sit down together and see if you can work out the differences; and second, if there are differences maybe we can help work them out because I think it is very likely we may have to act legislatively on that issue. Would you all increase the level of communication and see if we cannot come up with a common position. I do believe that it is a serious problem. Do you agree, Mr. Devaney?

Mr. DEVANEY. Yes; I do. Absolutely. It has to be resolved.

The CHAIRMAN. Okay, so we need to act on that.

On the issue of managing contracts versus consultants, obviously it was the intent of the law to limit the amount of money that a, quote, "management contract" would entail, so they just changed the name to consultant. Am I right, Mr. Hogen?

Mr. HOGEN. That has happened in a number of instances, and after that trend was discovered or perceived by the National Indian Gaming Commission, we asked all tribes to send to NIGC all the agreements of this nature that they were entering into so that we could look at them even though the label said something else, "did it constitute a management contract?"

The CHAIRMAN. And some of them have been exorbitant?

Mr. HOGEN. Yes; we found many instances where at least initially on the drawing board that would have given the lion's share of the revenue to the developer. Fortunately, in some cases we got that resolved. There are still situations we are looking into, and hopefully we can make sure that in fulfilling the trust responsibility that we have, the tribes get their fair shake.

The CHAIRMAN. I think we may have to legislatively act to define the role, because they can continue to change the name, so we may have to describe exactly what that activity is or that relationship is, as opposed to a specific name.

One of the issues that is extremely sensitive here and that has aroused a lot of controversy is the taking of lands into trust status for the purpose of initiating gaming operations. I would be interested in the opinion of all three of the witnesses on that issue, beginning with you, Mr. Hogen.

Mr. HOGEN. Well, from the National Indian Gaming Commission's point of view, those are really tough questions. Fortunately for us, the Department of the Interior often is the first place that question has to be answered. But we often have to address it ourselves. For example, if a management contract arrives, we consider it. Does this really deal with gaming on Indian lands as defined under the Indian Gaming Regulatory Act?

The easy places to do Indian gaming have already been taken advantage of. It is going to take some creativity to develop new or perhaps competitive ones.

When these questions arise, they often deal with tribes that were terminated and have been restored, perhaps newly recognized tribes, and in most cases tribes that are remotely located and do not have a good opportunity to do gaming. So they want to go in some cases to old homelands and so forth.

It is not a model of clarity the way it is set up, and you cannot expect something that goes back historically through some very tragic changes in Federal Indian policy to necessarily be simple. But we need to scrutinize those instances when they come before us. We want to do justice where it is deserved, but if some developer is the driving force and there is really not a legitimate claim, we ought to say no in those instances.

The CHAIRMAN. Mr. Devaney.

Mr. DEVANEY. Senator, my critique, first of all the audit I mentioned earlier in my testimony is still in draft stage. When it is done, I will get it up to every member of the committee.

The CHAIRMAN. You have to pull the mike a little closer please.

Mr. DEVANEY. The audit that I mentioned earlier is at the draft stage and I will get it up to everybody when it is finally done. The scope of it was rather limited. We were looking at lands taken into trust prior to 1988 that had subsequently been converted to gaming without the knowledge of BIA. That is a problem. The BIA did not know it happened. So we are going to hopefully show that to the Secretary and see if we can get some closer monitoring.

But like other issues where NIGC has approval authority or BIA has approval authority, the difficulty comes after it has been approved. The monitoring of, for instance, the per capita distribution does not occur. The approval is granted and then after that nobody monitors to ensure that what was approved is actually happening. So there may be some legislative fixes needed there to give BIA and the NIGC the authority to monitor and enforce subsequent to approvals that have been given.

The CHAIRMAN. Do you have any views, Mr. Heffelfinger?

Mr. HEFFELFINGER. Yes; I do, Mr. Chairman. I agree with Chairman Hogen. This is an industry where location, location, location are the three rules and all the good locations are taken. The pressure therefore, because of the amount of money that can be had, is to identify new lands on which gaming can be operated under some kind of an arrangement. This creates great opportunities or temptations, if you will, from people outside of tribes to enter into cooperative arrangements, et cetera.

I think that the future holds a whole bunch of cooperation agreements between Indian and non-Indian entities in an attempt to develop land which can be taken into trust for purposes of gaming. As those relationships become more and more bizarre, the need for the Department of Justice to look into those is going to become greater and greater because of concerns of theft, fraud or abuse.

The CHAIRMAN. We would appreciate any legislative recommendations if you think they are necessary. I think this is a huge problem. One of the first hearings we have had this year on this committee was the designation of a place in downtown Oakland as a gaming establishment that was put into an appropriations bill, a bizarre situation to say the least.

My final question, Mr. Devaney, you have been looking at this issue of Federal employees leaving the Government and immediately beginning to work for the tribes. I understand in IGRA while we may have at the time we wrote the legislation, because the only experts on Indian gaming may have been Federal employee. It seems to me there has clearly been abuses of that. Is that your view?

Mr. DEVANEY. Well, my view is that it is not necessary any longer. I think in 1988 when this came about, there was a real need for tribes to have people that had the knowledge to be representing them before the Federal Government. Today, that dynamic has changed and it is not necessary to exclude, to carve out this exception which otherwise would be a conflict of interest violation for any other Federal employee departing Federal Government.

The CHAIRMAN. Thank you very much. I thank the witnesses.

Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you very much.

I have a couple of questions, but just a curiosity item. I know one of the issues with respect to Indian gaming is recognition of tribes. I am curious, what are the smallest or what is the smallest tribe that has been recognized that has a gaming operation?

Mr. HOGEN. I do not know of the National Indian Gaming Commission keeps statistics of that nature. I believe that there is a tribe that had a single adult member.

Senator DORGAN. One person?

Mr. HOGEN. Yes.

Senator DORGAN. I had heard as well, there is one person that sought recognition as a tribe and has a casino. I also heard that there are either three or five people that gained recognition and now have a casino. Would you send us some statistics about that, because that is another part of this issue.

Commissioner Hogen, you heard the Inspector General's assessment, which I thought was reasonably pessimistic about the challenges and the ability with the current resources to address the challenges. Would you respond to the Inspector General's testimony generally?

Mr. HOGEN. Well, I think there are a number of concerns that are legitimate concerns, for example, tracking the use of tribal gaming revenues and following up on the revenue allocation plans. I guess the first thing that I think could be said, we have to remember that Indian gaming is not a Federal program. The Indians invented Indian gaming. They are doing it and they are doing it very well, and the Great White Father should not tell them where to spend every penny.

Nevertheless, it is a specialized industry. There is a regulatory structure there. And when there are rules, you can only use the dollars for this or that, they ought to be adhered to.

When the check gets written from the casino to the tribal general fund, then those funds go in with mining and timber and grazing revenues and so forth. NIGC really is not equipped to follow that through.

Senator DORGAN. When you say "not equipped," what do you mean by "not equipped"?

Mr. HOGEN. We are experts on gaming and we know how a casino ought to be run, but in terms of distinguishing which dollars in the general fund got spent for this housing program or to send these people to that, is really not what we do, nor do we see a real mandate in the Indian Gaming Regulatory Act to do that. But it is a challenge. It ought to be better addressed. The Inspector General's report that was done here a couple of years ago clearly identified that concern and we share that concern.

Senator DORGAN. Let me ask, one of the points Mr. Devaney made that I think is important, I think Senator McCain asked a question about it, and that is the circumvention of the management contracts by calling them consulting contracts, which in one instance can cause a substantial amount of revenue to be drained away. Even more importantly, I think Mr. Devaney pointed out, it can become a feeder for organized crime and other undesirable elements to get into the system because you do not have the background check requirement.

Now, you indicate that you are taking a look at these consulting contracts in terms of the finances and whether it would bleed some of these Indian gaming operations. But are you in fact looking at any that exist with respect to background checks on all of those involved in the contracts?

Mr. HOGEN. The scenario that is often followed is, we ask the tribe, send us the agreement you have with your developer. They send us the consulting agreement, the development agreement, whatever. We look at it to determine is it a management contract that may require background investigations. IGRA only requires NIGC background investigations if it relates to class II gaming or class II and class III gaming. We think that is an area that needs to be addressed, a concern that should be fixed.

So usually if we say this looks like a management contract, they say, well, let us fix it. We will take the part out that gave us the control, so it is not a management contract. They do that, then there is no legal requirement that we do background investigations.

Now, tribes may require those individuals to be licensed at the tribal level to do investigations in that connection, but we would be out of that direct loop.

Senator DORGAN. I think the concern expressed by the Inspector General is that when you have an $18-billion industry, we have elements that will flock to that money to try to find a way to get a piece of it. I think there are several things that have been discussed today that need addressing.

With respect to the court case that you described earlier, it seems to me that the minimum internal control standards, which is apparently the subject of the lawsuit, probably especially needs to apply to class III, right? I mean, is the lawsuit contending that it should not apply to class III gaming?

Mr. HOGEN. Yes; that is what it contends.

Senator DORGAN. Wouldn't it be logical that it especially should apply to class III? Is that your position?

Mr. HOGEN. Well, that is where the money is. That is where the major action is. Yes, I think we would be a much less effective oversight body, watchdog so to speak, if we could not go there.

Senator DORGAN. I think all of you have raised a number of points. Mr. Heffelfinger, I do not know that you answered in brief form the chairman's question. Are there real causes for alarm here with respect to law enforcement and potential criminal activity? Or is this just a kind of a normal thing that you put together a working group to deal with?

Mr. HEFFELFINGER. No; we have not been able to quantify the actual theft losses, but let me share with you the figure that I have found compelling. In our meeting a couple of years ago, we had a presentation from Nevada gaming authorities. In Nevada, they estimate that 6 percent of their net gaming revenues are lost to theft, fraud, and embezzlement every year.

Now, I have no idea whether the 6 percent figure would apply in Indian gaming. Even if it is a 3-percent or a 5-percent figure, we are still talking hundreds of millions of dollars of theft losses and fraud losses in this industry every year, even assuming good enforcement and regulation such as exists in Nevada.

That amount of money being lost is money that is not going to the benefit of tribal people, as Congress intended, and it is more money than is reflected in the number of cases that have been referred to us to date. Therefore, our efforts have concluded that we had to change the way we did business. Instead of being reactive, we had to be proactive and go out and seek out referrals from the tribes and new ways to get those referrals.

Senator DORGAN. Mr. Chairman, Indian gaming is legal. Tribal sovereignty, it exists. It was not given to the tribes. They are sovereign. I think we, however, have established an architecture or a mechanism for regulatory control. The purpose of this hearing is to evaluate how effective that is, what changes if necessary should apply. I think the testimony of all three of you has been very helpful and I appreciate your being here.

The CHAIRMAN. Thank you.

Senator Thomas.

Senator THOMAS. Thank you, Mr. Chairman. I will be very brief.

The purpose of this whole operation is to have a fair, efficient and effective regulatory system. I guess I would like to ask each of you very briefly what would be your highest priority for change to cause that to happen?

Mr. DEVANEY. Senator, I think the issue that we have already talked about, the one where the term "consultant" is being substituted for "management." It gives me great concern. It is primarily due to the lack of backgrounds that get done on these folks that are now flocking to this money. I really worry about the players that are on the peripheral of this industry, that now see this enormous amount of cash there.

There is always going to be embezzlement and theft from inside the casinos themselves. I think that the tribes and the States and to the extent that we get involved in that, we are always going to be able to contain that problem. My fear is the sophisticated white-collar scheme that the tribes may not know about, that we may not know about.

Senator THOMAS. All right. Thank you.

Mr. Chairman.

Mr. HOGEN. If I were to list three or four of the priorities——

Senator THOMAS. List one. Your highest priority.

Mr. HOGEN. Just one, okay, one. I think we need to clarify that the National Indian Gaming Commission in its oversight role extends to all of the Indian commercial gaming, class II and class III. If that is in doubt, our role and our effectiveness in the structure of the Indian Gaming Regulatory Act is at risk.

Senator THOMAS. Okay. Thank you.

Yes, sir.

Mr. HEFFELFINGER. Senator, the system established under IGRA is a splintered system of shared responsibility between the tribes, the State and the Federal Government, depending on the class of gaming. But the Federal Government's role should be one, in my opinion, of organization in order to ensure that splinters don't go splintering and doesn't allow cracks to develop.

I am very, very concerned about the lack of resources that are available to oversee an industry that is generating about $18 billion of revenues. California represents this, and is growing at a rate of about $1 billion a year. It is anticipated that in California the net gaming revenues will exceed Nevada's within a year or two. Yet if you look at the State of Nevada, and what we have found is that Nevada has hundreds of regulators to regulate just that State. We do not have those resources at a Federal level, even to fulfill our portion of the responsibility in this shared area.

Senator THOMAS. All right. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Inouye.

Senator INOUYE. Thank you, Mr. Chairman.

There are slightly over 200 tribes, and those tribes operate a little over 400 gaming operations. Of that number of tribes, how many have been investigated for criminal activity?

Mr. HOGEN. At the National Indian Gaming Commission, I do not think we have categorized it annually or totally. Certainly, the vast majority of those tribes have not been the subject of criminal investigations, and there have not been reports to us that we have not followed-up on indicating criminal activity there.

Now, there may well be instances where they internally have revoked gaming licenses, referred things for local prosecution and so forth that we would not necessarily hear about, although we do have an improving line of communication in that connection.

I expect we could try to put together numbers that we have, but I cannot quantify it at this moment.

Senator INOUYE. I would appreciate that because otherwise one may have a picture of these tribal leaders or these nations are crooked. We speak of embezzlement and theft. Have any involved tribal leaders?

Mr. HEFFELFINGER. Senator Inouye, our experience has been that the vast majority of tribal leaders are working their hardest to realize the benefits of Indian gaming for their people. As Chairman Hogen has said, the industry has been very successful in that regard. In fact, the number of prosecutions, I do not have a number, but based on my experience both inside and outside of government, it is a very small handful of tribal leaders who have ever been indicted for anything arising from Indian gaming.

In fact, of the cases that we have seen within the Department of Justice over the last 5 years, the vast majority involve thefts or embezzlements or gaming scams either committed by outsiders against the casino or committed by lower-level insiders such as cashiers and the like who are doing an embezzlement.

I am not as pessimistic. This is a segue to your question. I am not as pessimistic regarding this as some others, because I believe that tribal governments and tribal members recognize the importance of profitable operations to their people. So it is difficult for someone who is outside the tribe to gain control over the money to a level that allows them to steal in great quantities.

However, there are exceptions, and it is the exceptions that worry me. But the vast, vast majority of tribal leaders and tribal members simply, in my experience, would not allow this level of embezzlement to take place by a non-tribal member.

Senator INOUYE. Would you advise the committee as to how many tribal members have been convicted?

Mr. HEFFELFINGER. Off the top of my head, I cannot, Senator Inouye, but I will do the research and we will send you a response with whatever we find.

Senator INOUYE. Do you know if any have been?

Mr. HEFFELFINGER. I do not know of a single leader who has been convicted of a violation related to Indian gaming. There have definitely been tribal leaders, one of which I know is in the district of North Dakota, Senator, within the last 3 years, who was convicted of activity independent of the gaming operations. The problem with Indian gaming is that once the revenues are realized by the tribe, it funds many other tribal operations in which tribal leaders have involvement.

So it is not quite so simple as to say that you do not stop the money at the casino door because it funds, as I said, other operations in which misconduct can occur, and I am afraid in a small number of cases has.

Senator INOUYE. I asked those questions because I wanted to commend you for protecting the Indian tribes from outside conmen.

Mr. HEFFELFINGER. Thank you, Senator.

The CHAIRMAN. Senator Coburn.

## STATEMENT OF HON. TOM COBURN, M.D., U.S. SENATOR FROM OKLAHOMA

Senator COBURN. Thank you, Mr. Chairman, for holding this hearing. I apologize for being late. I was chairing another hearing.

This is a significant issue in my home State. We have 39 recognized tribes. Indian territory law is different than the reservation law. Oklahoma has compacted with a number of them. There are a couple of questions. The Nevada Gaming Commission is a rigorous commission to deal with. They are all business. They have absolute requirements. In my personal experience, I was in on the development of a coin acceptor. It was based on disruption of the magnetic field. We could not even submit bids until myself, my family and my children submitted information to the Nevada Gaming Commission before we were ever even allowed to enter a bid.

If we really want to make sure that tribal gaming money goes to the tribes, we need to change the rules under which people deal with the tribes. We need to have a structure that assures the same kind of structure as that of Nevada gaming. You just testified they lose six percent, and they are the most rigorous in the world. For us not to have that, I think create it or create the outlines so that the tribes can have that kind of structure to assure that those moneys are going to the very people who are supposed to benefit from it. We are keenly interested in seeing that tightened up in Oklahoma.

The other thing that I would just inject is trust lands and the determination of trust lands determines the winners and losers in Oklahoma by tribe. The fact is, the observation that I have made representing all 39 tribes in Oklahoma, is that it is not necessarily a fair process. At times, those that are in the game want to keep those that are not in the game from being in the game. I think that is something else that we need to look at. Again, that is distinct for Oklahoma because of Oklahoma Indian Territory laws and the treaties that were signed for Oklahoma that are different than the other reservations.

I would love to hear your response from the Department of the Interior on that, and have you looked at the granting of trust status lands for smaller tribes, even though legitimate tribes that have been there for years, and their inability to gain trust status, to have a gaming operation.

Mr. DEVANEY. Senator, I have been in the position of investigating allegations about land into trust, as opposed to being involved in the process, which is the Department of the Interior itself that does that. There are a number of things that bother me. One of which I mentioned earlier is that every time we look at one of these, there are a lot of wealthy individuals and wealthy companies that seem to be involved in the process. It appears to us that they are there for one reason, and that is to come in at the end of the game and be the financier and reap the profits.

As an old law enforcement type, I am suspicious. But having said that, the few tribal recognitions that we have looked at, we have not really uncovered those kinds of problems. Now, it is a byzantine process and it is extraordinarily slow.

The CHAIRMAN. Unless it is put into an appropriations bill.

Mr. DEVANEY. Unless it is taken out of the Department of the Interior. But if it is in the Department of the Interior, it is slow and byzantine. So I am concerned. I am more concerned with, as I have said several times today, with the outsiders than I am with the problems that might exist inside.

Senator COBURN. I recognize tribal gaming is here to stay. Our job has to be to create the framework so that those people who are supposed to benefit from tribal gaming, do.

I again thank the chairman for having this hearing. I apologize I will not be able to stay for the rest of it, but I look forward to working with the chairman on clearing up some of these issues, especially the definition between class II and class III gaming. It needs to be clear with the technology. We need to straighten that out. And then we need to make sure that the structure is there for

the tribes in Oklahoma to manage this themselves, but also under the regulatory framework that we create.

I would just suggest that we need a tighter regulatory framework in terms of who can deal with the tribes and what they have to qualify before they can.

Thank you.

The CHAIRMAN. Thank you, Senator Coburn.

We are going to have a hearing on this issue of taking land in to trust for gaming purposes, how the process works, where it needs to be fixed. I think that is a very, very important issue.

I thank the witnesses. Mr. Heffelfinger, if you are not the right guy to negotiate with Mr. Hogen on the issue of class II, we will see if somebody else can. If we do not get agreement between the two of you, then it lessens the chances of us acting legislatively dramatically. We either have opposition from one very important player or another. So I hope we can resolve those differences because this is clearly one of the areas I think we need to act.

So Mr. Hogen, you will be ready to compromise, right?

Mr. HOGEN. We will talk long and hard, Senator. Yes.

Mr. HEFFELFINGER. Senator, I am on the team and we are meeting and we will continue to meet to get it done.

The CHAIRMAN. Thank you very much.

The testimony of all three witnesses has been very helpful, and we thank you for appearing today.

Our next panel is Norman H. DesRosiers, commissioner, Viejas Tribal Government Gaming Commission, Alpine, CA; Charles Colombe, treasurer, National Indian Gaming Association and president, Rosebud Sioux Tribe, Rosebud, SD. He is accompanied by Mark Van Norman, executive director, National Indian Gaming Association. Kevin Washburn, associate professor of law, University of Minnesota; Steven Light, assistant professor, University of North Dakota; and Kathryn Rand, associate professor, University of North Dakota School of Law.

I know that the vice chairman is pleased that the University of North Dakota is well represented here today.

Commissioner DesRosiers, would you help me with the pronunciation of your name?

Mr. DESROSIERS. DesRosiers.

The CHAIRMAN. DesRosiers. Thank you very much and please proceed.

## STATEMENT OF NORMAN H. DESROSIERS, COMMISSIONER, VIEJAS TRIBAL GOVERNMENT GAMING COMMISSION

Mr. DESROSIERS. Thank you very much, Mr. Chairman, Mr. Vice Chairman, and committee members.

It is genuinely an honor to have been invited here. To my knowledge, this may be the first time that a tribal regulator has been given the opportunity to testify. We hear usually only from Federal and State regulators. I have submitted written comments for the record.

The CHAIRMAN. All the written statements will be made part of the record.

Mr. DESROSIERS. Thank you.

You will probably hear a little different slant on things from what you heard earlier from me. On behalf of myself and my colleagues, the hundreds of men and women that do what I do every day, year-in and year-out, on-site regulation of tribal gaming facilities, we are a little bit frustrated that we continually hear how tribal gaming is insufficiently regulated.

Let me tell you what we do and who we are. The Viejas Tribe, for example, appropriates over $3.9 million just to support my budget for my agency. I have over 52 regulatory personnel, and this is to regulate one facility. This is more resources than some States appropriate. We have the latest technology. We have facial recognition technology, digital fingerprinting. We have background service, computerized databases, and the list goes on.

My staff has over 350 years cumulative law enforcement and regulatory experience. We have former IRS and Secret Service agents, and local, city, county, and State law enforcement agents on our staff. We have auditors. We have investigators, criminal investigators. We have the background investigators. We have compliance people, safety and health enforcement officers, all on our staff.

It is us that call in the Department of Justice. It is us that call in, when we find the improprieties, that find the thefts and the embezzlements, the scams, the cheats. It is our people that call in the county sheriff. We happen to be in a Public Law 280 State. The county prosecutor prosecutes our cases, most of them, for us. We have had one Federal prosecution which we asked the U.S. attorney to prosecute for us.

So we are the ones there every day doing this, and we are not an exception; Viejas is not an exception. I have personally visited dozens of tribal gaming commissions across the country, and am continually impressed with the resources that the tribes are devoting to regulating their own facilities. These gaming commissions are made up of former FBI agents, former gambling control agents from New Jersey and from Nevada and from even the State of Arizona. So it is a very competent staff that are regulating these tribes at the tribal level.

We have an excellent relationship with Chairman Hogen and the National Indian Gaming Commission. We work regularly with them.

So I am not going to sit here and of course tell you that it is a perfect world. There are a percentage, a small percentage, and you heard the prior witnesses testify that it is a small percentage that are non-compliant. The vast majority are doing a good job. The exceptions that are not complying, or are unable or unwilling to appropriate the resources, they need help or they need enforcement. But there are enforcement mechanisms in place, and I do not think more legislation necessarily is the answer to gaining compliance by those tribes that are unable or unwilling to do so. I think NIGC has done a pretty good job in identifying those non-complying tribes and initiating enforcement proceedings.

So that is who we are, what we do. You know, it is almost as if we have not existed here. All we hear about is how the State and the Federal regulators need to be doing more, but we do it. We do it every day with competent staff and we do an outstanding job.

The other issue, and I know my time is very limited, that I would like to address is the one that was addressed earlier with regards to the class II gaming technological aids. I am privileged to sit on the Advisory Committee to the National Indian Gaming Commission, along with about nine other very talented, experienced individuals, offering advice on the development of regulations for these technological aids.

If anybody would have told me 1½ years ago that bingo could be this complex and legally complicated, I never would have dreamt. But I do believe that the committee has their hands around this. We have made very viable recommendations on two parallel tracks of Federal regulations. One is the actual technical specifications for these aids and the other one is the classification of the aids, as opposed to being a class III device. That includes the parameters on the functionality of the game and how it must perform to be considered a class II aid as opposed to a slot machine.

We heard testimony earlier that technology has really blurred this line. I would disagree. Technology has enhanced it. The package that you see, that you visually see on the floor, granted, resembles a slot machine. That is where it ends. It is not at all blurry to those of us who know how slot machines work and how the electronic bingo games are operated, to know what is inside of these boxes is entirely two different animals. The regulations that we have developed with NIGC make that distinction. They are consistent with IGRA and they are consistent with what the court has ruled on several occasions with regard to the classification of technological aids for class II games.

I could go on. I know my time is limited. I will leave it at that, and be glad to answer any questions.

[Prepared statement of Mr. DesRosiers appears in appendix.]

The CHAIRMAN. Thank you, sir, for your testimony and thank you for your outstanding work and the people you represent. We respectfully disagree on the issue of what a class II is. There are very few benefits of old age, Mr. DesRosiers, but being one of the authors of the legislation, we envision class II to be the standard bingo game, the standard pull-tab, not an electronic device that closely resembles a slot machine, only it varies as to how you push different buttons.

I believe that is has been blurred by technology and I am going to try to act and this committee acts so that there is a distinction because when we wrote the act, our vision of what class II gaming was, and I am one of the authors of the act, drastically different from what is viewed as class II gaming today.

Mr. Colombe.

**STATEMENT OF CHARLES COLOMBE, TREASURER, NATIONAL INDIAN GAMING ASSOCIATION, AND PRESIDENT, ROSEBUD SIOUX TRIBE, ACCOMPANIED BY MARK VAN NORMAN, EXECUTIVE DIRECTOR**

Mr. COLOMBE. Thank you and good morning Chairman McCain, Senator Dorgan and members of the committee.

My name is Charles Colombe. I am president of the Rosebud Sioux Tribe of South Dakota and treasurer of the National Indian Gaming Association. With me this morning to my left is Mark Van

Norman. He is a member of the Cheyenne River Sioux Tribe and also the executive director of NIGA.

The CHAIRMAN. Welcome.

Mr. COLOMBE. Thank you.

The Indian Gaming Regulatory Act is working. Indian gaming is highly regulated. At the tribal, State, and Federal levels, more than 3,350 expert regulators protect Indian gaming. Tribes employ former FBI and police officers, former State regulators from New Jersey, Nevada and other States, military officers, auditors and bank surveillance officers.

Tribes employ 2,800 regulators. State governments help regulate Indian gaming. States have over 500 regulators and police to regulate Indian gaming.

Phil Hogen, chairman of the NIGC, is a former U.S. attorney. Vice Chairman Nelson Westrin is a former executive director of Michigan Gaming Control Commission and State deputy attorney general. Commissioner Chuck Choney is a former FBI agent. NIGC employs 80 Federal regulators. Tribal governments employ state-of-the-art surveillance and security equipment. For example, the Pequot use the most advanced high technology available, including facial recognition, digital cameras and picture enhancement technology.

The Pequot system has more computer storage capacity than the IRS or the Library of Congress. The Pequots helped their State police after the tragic nightclub fire by enhancing a videotape so they could study the fire in detail. Tribes dedicate tremendous resources to Indian gaming regulation. Last year, tribes spent over $290 million nationwide on regulation. That breaks down as $228 million for tribal government regulation; $55 million for State regulation; and $12 million for Federal regulation.

Indian gaming is also protected by the FBI and the U.S. attorneys. Tribes work with financial crimes enforcement network to prevent money laundering. We work with the IRS to collect taxes, and we work with the Secret Service to prevent counterfeiting. We have stringent regulatory systems. Tribes meet or exceed any Federal or State requirement. We have strong regulation because our sovereign authority government resources and business reputations are at stake. If you have advice on how to improve our systems, we will review it with tribal leaders.

Now, let me tell you how regulation works in a casino. I say this as maybe the only former operator in the room here. I ran our tribe's casino. I built it. I financed it and operated it for 5 years under a contract with the National Indian Gaming Commission. At Rosebud, we have 21,000 people living on our reservation and 37,000 people total living in a 50-mile radius. In our casino and hotel, we employ approximately 200 people. We have 250 slots, about 8 table games, and 1 bingo hall. We are small and rural, but we follow the same rules and same internal controls that the largest casinos in the world follow.

IGRA and our tribal-State compact dictate that our internal controls are at least as stringent as the State's. Ours are more stringent. We have 24 regulators on our Gaming Commission. Our commission operates a surveillance system separately and independently. When you enter our property, we have 180 cameras. Every-

one is on-camera full-time from the parking lot to the casino floor to the cage. We have three full-time inspectors who have full access to the casino at all times.

South Dakota does our gaming background checks. South Dakota puts its State seal on our slot machines, which means we cannot change the payout percentage without a State regulator being present. We also have a slot tracking system that gives us full-time monitoring of coin or cash into a machine. That system also tells us how much money is in that machine at any time.

Some would look at Little Rosebud and say, you do not need to do all this stuff, but we do. Our casino was built, like many other Indian casinos, in a time when people thought we were incapable of running a gaming operation. So we did an overkill on regulation to ensure the public that these were honest and fair games.

We are a poor tribe, so no one wants our operation to be a success more than we do. No one wants to make sure our money gets to the bank more than we do. NIGA is engaged in a series of discussions with tribal leaders throughout the Nation. We invite you to our next meeting. We also invite you to come and visit our facilities so we can show you first-hand that our regulators are experts and our technology is state-of-the-art.

In closing, we work closely with the NIGC to ensure that we have the most productive regulation possible, and we work to preserve our sovereignty. We remember what our grandfathers have told us as boys: Protect the land and take care of the people.

Thank you again, and I am happy to answer any questions you may have.

The CHAIRMAN. Thank you very much.

Professor Washburn.

**STATEMENT OF KEVIN WASHBURN, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA**

Mr. WASHBURN. Thank you, Mr. Chairman, Mr. Vice Chairman.

I am going to limit my comments to some of the issues that have risen so far, just to hopefully have a bit of a conversation about some of the problems out there. I think some of the serious problems have been identified. Vice Chairman Dorgan even brought up the problem and question, really, about small tribes. I admire the chutzpah of the Senator from North Dakota raising the question about maybe some tribes being too small, but it is a difficult problem, perhaps, that has no real good solutions, no solutions that really lend themselves

The CHAIRMAN. Maybe it has something to do with the process for recognition.

Mr. WASHBURN. Well, it may. The problem is a lot of the tribes are no longer vital. Tribes did not become small necessarily for good reasons. We should not blame tribes for being small, in some ways, just like we should not blame North Dakota for being small. We should not perhaps try to fold North Dakota into South Dakota and create one big State because we would create political problems like how do we, who gets to be the Senators in that case. It is a difficult political issue.

Senator DORGAN. Mr. Washburn. [Laughter.]

Mr. Washburn, I would observe that North Dakota is 10 times the size of Massachusetts. [Laughter.]

Mr. WASHBURN. Fair enough.

Let me leave that issue aside. [Laughter.]

It is only going to get me in trouble.

One of the things that I would like to talk about is the management contract provisions. I think it is probably fair to say that as a regulatory matter perhaps, putting politics aside, as a regulatory matter the most serious failure of IGRA was the management contract provisions. We have 200 tribes engaged in gaming, doing 300 or 400 gaming operations and we have only had the NIGC approve 45 management contracts. It is not because tribes are doing this all by themselves. There are people involved in gaming that we do not know about. We have not been able to take a look at them and figure out who they are. That is a very serious problem.

Senator Coburn talked about the very good and rigorous regulatory system that we have in Nevada for dealing with people who are making millions of dollars from working in the gaming industry. We need to have a system like that that does not have holes in it, just by changing the name of a contract, calling it a development agreement or a construction agreement.

So I desperately believe that we need to increase the NIGC's authority to background investigate, to do suitability determinations of those people.

The CHAIRMAN. Would that be by making the definition of a, quote, "management contract" an inclusive one?

Mr. WASHBURN. Perhaps, or not even use the term.

The CHAIRMAN. Maybe not use the term.

Mr. WASHBURN. Yes, Senator; I believe that is right. I think we need to get at all economic relationships, significant ones involving tribes. Those outsiders should be background investigated.

Now, what I want to encourage you to think about, though, is that perhaps that is where the regulatory interest stops, however, and that we ought not be looking at the economics of those deals. We can trust, as Mr. Colombe said, tribes want to make the most money for their people. We can trust tribes to strike their own economic decisions.

The CHAIRMAN. Doctor, in light of the hearings we have had recently, I do not think that is the case, at least in some parts of Indian country.

Mr. WASHBURN. That may well be true, Senator, but let me——

The CHAIRMAN. You are talking about an $80-million ripped off. It is more than may be true.

Mr. WASHBURN. Well, the problem is, Senator, is that who is the other option? The other option of who would be overseeing those economic decisions is the Federal Government, and the *Cobell* decision dwarfs

The CHAIRMAN. I will get into this debate with you. We have an obligation to protect all citizens, whether Native Americans or not, from exploitation. This is not a laissez faire society where people are not protected from exploitation.

Mr. WASHBURN. The problem is, Senator, is that in my view what we do is we do not protect them. Now and then, tribes strike bad deals, even tribes that have management contracts. What they

have is an approved management contract, and even if it was a bad deal in hindsight, they have a Federal document that says that was a good deal that has been approved. Even if there was malpractice in entering that deal, if there was some bad business advice or bad legal advice in entering that deal, if the NIGC has approved it, then it is deemed approved and the tribes do not have anywhere to go to get redress for that wrong. I think that that is a problem.

I think by and large that there are some problems, and often there is another way to get at them, fraud or those kinds of things that have caused tribes to enter bad agreements occasionally. But I think that there may well be legal ways at getting at those problems.

I am not sure that the fine financial analysts at the NIGC, there are two of them, are the people that should be looking over the tribes shoulder when the tribes are represented with very savvy business advisers and very savvy law firms. My sense is that we wouldn't second guess—we would have trouble with the Department of the Interior second-guessing those in this day in age, the age of self-determination, and we would have trouble given the Navajo Nation case out of the Supreme Court a couple of years ago, the *Cobell* litigation. The Federal Government has lost its legitimacy to a great degree when it is involved in regulating the economic decisions that the tribes make. And so I would respectfully encourage the committee to think about placing that decision-making in another place, other than in the NIGC, and perhaps with the tribes themselves.

Why don't I stop there and I will take questions if you have them.

[Prepared statement of Mr. Washburn appears in appendix.]

The CHAIRMAN. Do you have views on the class II, class III issue?

Mr. WASHBURN. I do, Senator. Let me preface this with, one of the problems in the Indian gaming regulatory industry, across the board is regulatory uncertainty. That is why these bad actors are willing to do these other kinds of contracts other than management contracts. They are willing to go into these things. It keeps the good people out, because they say, boy, I do not know, that looks kind of shady to me, so I am not going to even bid for that work.

The same thing happens in the class II Johnson Act kind of environment. Bad actors are willing to skate that line and do class II technological aids that arguably cover the Johnson Act. In light of the risk of Department of Justice prosecution, they are willing to do that, and so they reap the rewards of that. The bad actors do. The good companies, the solid people that have been involved in gaming for years and years, tend to stay out of those markets because they risk the threat of Federal prosecution.

Unfortunately, the Department of Justice has not been able to bring successful Federal prosecutions, and it has lost in three Circuit Court cases. The courts seems to be generally of the mind that if it fits within the definition of class II, tribes ought to be able to do that. That ultimately could be a real benefit to Indian tribes because Indian tribes can make greater revenues.

The problem is they are having to share those revenues with shady actors in the current situation. So in my view, the Johnson Act or the Indian Gaming Regulatory Act ought to be amended just

to say that the Johnson Act does not apply to lawful Indian gaming.

I think that that would allow good people to come into that industry and bid for the work. In essence, that would drive the prices down so Indians tribes get to keep more of the money. It would also allow, well, it would help to drive the bad actors out of Indian gaming. That is really what happened in Nevada, is that the background investigation process started working with people, and it really drove the bad actors out because good people could come in and do the work.

I think that that is a good model. I think strong background and licensing is a really good model, and I think that clarifying regulatory authority is very important because that will make for a clearer regulatory structure.

The CHAIRMAN. Do you agree with that, Mr. DesRosiers?

Mr. DESROSIERS. I do, Mr. Senator. I think that we have experienced that. Our agency and many of us are doing background investigations on vendors that are not required by IGRA; that are not required even by COMPACTS. But we have a very in-depth background vendor licensing program, as do many tribes, that exceed the requirements, and I think that is what has helped keep us clean and kept the bad guys out.

The CHAIRMAN. Thank you.

Dr. Light, welcome.

**STATEMENT OF STEVEN ANDREW LIGHT, ASSISTANT PROFESSOR OF POLITICAL SCIENCE AND PUBLIC ADMINISTRATION, UNIVERSITY OF NORTH DAKOTA; AND KATHRYN RAND, ASSOCIATE PROFESSOR, UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW**

Mr. LIGHT. Thank you, Senator.

Good morning, Mr. Chairman and Mr. Vice Chairman. We are very thankful to be here. As a reflection of our interdisciplinary research on the law and politics and policy of Indian gaming, Kathryn Rand and I will be testifying jointly, so Kathryn will begin.

Ms. RAND. Good morning, Mr. Chairman, Mr. Vice Chairman. We thank the committee and its members for this opportunity to appear before you today. My name is Kathryn Rand, and with me is Steven Light. We are the co-founders and co-directors of the Institute for the Study of Tribal Gaming Law and Policy, a component of the Northern Plains Indian Law Center at the University of North Dakota School of Law and the only university-affiliated research institute dedicated to the study of Indian gaming.

Our testimony today is based on our research in the field of Indian gaming law and policy over the last nine years, and on short excerpts from our two forthcoming books on the subject.

Our research suggests that discussions of Indian gaming regulation often overlook three important points: First, that there currently is an elaborate web of Government agencies and regulatory authorities that administer the law and policy that applies to Indian gaming; second, that criticism of Indian gaming regulation often focuses on tribal regulation, but fails to take into account the unique status of tribes in the American political system; and third, that tribal regulation of Indian gaming plays a primary role in trib-

al government institution building, a necessary exercise of tribal sovereignty that serves tribal and Federal interests in strong tribal governments, as well as tribal self-sufficiency and self-determination.

Finally, we suggest that any policy reform in the area of Indian gaming fundamentally should be based on accurate and complete information informed by tribal opinions and interests, and guided by the tribe's inherent right of self-determination.

Tribal gaming is the only form of legalized gambling in the United States that is regulated at three governmental levels. Under the Indian Gaming Regulatory Act, tribal, Federal and State agencies and actors determine the regulatory environment in which tribal gaming occurs.

IGRA's policy goals created a regulatory environment for Indian gaming in which the exercise of government authority reflects a markedly different intent than does that for the regulation of commercial gaming. By fostering economic development and strengthening tribal governments, IGRA's regulatory scheme promotes healthy reservation communities and effective and culturally appropriate tribal institutional capacity building, the hallmarks of tribal sovereignty and tribal self-determination.

Although regulation of Indian gaming sometimes is equated with the National Indian Gaming Commission and its extensive authority, the multi-layered and complex regulatory web governing Indian gaming involves a number of other Federal agencies, along with extensive tribal and State agencies, actors and resources.

To fulfill their regulatory role under IGRA, tribes typically create gaming commissions to implement tribal gaming ordinances and to ensure compliance with IGRA, tribal-State compacts, and other relevant tribal and Federal laws. Tribal regulators interact with tribal, State and Federal law enforcement agencies, tribal casino surveillance and security operations, and tribal court systems, as well as State and Federal authorities.

Despite the extent and sophistication of tribal regulation, critics of Indian gaming frequently are dismissive of tribal government authority, as we will revisit in just 1 moment. Under IGRA, Congress authorized States, through the tribal-State compact requirement, to regulate casino-style gaming. Typically, State gaming commissions are responsible for monitoring compliance with governing Tribal–State compacts, in concert with State laws as well as IGRA.

Despite this extraordinary regulatory scheme involving regulators and law enforcement at three levels of government, critics charge that Indian gaming is under or even unregulated. A closer look at such criticism, we suggest, particularly as it is lodged against tribal regulation, reveals further misapprehensions about Indian gaming.

Our research suggests that how we talk about Indian gaming informs how we act on Indian gaming. As you know, there is a lot of talk. Before allowing public discourse to set agendas for tribal gaming policy, policymakers should assess carefully the accuracy and context of criticisms of Indian gaming regulation.

Tribal governments frequently are portrayed as untrustworthy stewards of newfound gaming wealth and political clout. They are

variously accused of being too naive or inexperienced to realize their own best interests; easily corruptible; guilty of seeking to influence the political system to their own benefit; or out for revenge. Time magazine's 2002 expose on tribal gaming, for instance, acknowledged tribal regulation of Indian gaming, but added, "that is like Enron's auditors auditing themselves."

Criticism of tribal regulation of Indian gaming often is grounded in ignorance, purposeful or otherwise, of tribal sovereignty. Rather than an accurate understanding of tribal regulation as a reflection of tribal sovereignty and self-determination, these critiques often rely on the assertion that tribal sovereignty is simply an unfair advantage or race-based "special rights," rather than the defining aspect of a tribe's unique status in the American political system.

Mr. LIGHT. Our research indicates that the exercise of tribal sovereignty underpins tribal self-determination and self-government, which are of course the goals of current Federal Indian law and policy. Strong institutions with the capacity to exert legitimate authority in the name of tribal members are at the heart of building healthy reservation communities an interest that is appropriately shared by tribes, States and the Federal Government.

One of the largely untold success stories of Indian gaming, we believe, is the role that it has played in tribal institution building. Each gaming tribe has created its own regulatory authorities that are responsible for administering the myriad regulatory challenges of Indian gaming. In assuming responsibility for gaming regulation and for other policies, tribes determine the character and the capacity of their own governing institutions.

Tribal governments decide how to provide essential public services to their members; negotiate and contract with non-tribal commercial vendors and banks; and interact with State and local governments.

We believe it is plain that there are three key distinctions between the regulation of commercial gambling and that of Indian gaming. First, a frequently expressed concern in regulatory administration is the evolution of what is called a "capture effect." That is, that regulatory agencies begin to partner with the industry to create a regulatory environment that maximizes the benefits to industry players. Although similar accusations of capture have been levied against tribal gaming commissions, there is relatively little evidence of this capture.

Additionally, IGRA conditions how tribes can use gaming revenue for the benefit of tribal members. Gaming profits, therefore, are channeled directly into the provision of essential public services or community infrastructure. A profit motive does not in fact become the sole determinant of how tribal casino enterprises, tribal gaming commissions, and tribal governments interact.

As our research shows, this perhaps is exemplified by the experiences of tribal gaming enterprises on the Great Plains, where we are from, where job creation is the primary impetus for gaming.

Related to this first point, the policy goals of Indian gaming, and thus the regulatory scheme established by IGRA, are fundamentally different than are the goals and regulatory scheme governing commercial gambling. The vast majority of gaming tribes such as those on the Great Plains by necessity are in the business of job

creation and economic development. IGRA stringently governs how gaming revenues are to be used.

Third, critiques of Indian gaming also seem to rest disproportionately on the thesis that tribes themselves are ill-equipped to regulate their gaming operations or unwilling to do so. Again, there is relatively little evidence to back up those assertions. Subject to three levels of regulation and law enforcement authority, the Indian gaming industry perhaps is better equipped to deter or to deal with potential crime or corruption than is any other form of legalized gambling.

We do not suggest that the regulation of Indian gaming is perfect. We do, however, encourage policymakers to critically assess the critiques of Indian gaming. Misapprehensions about tribal governments, tribal sovereignty and Indian gaming should not set the terms for public policy.

One standard criticism of regulatory administration generally is that it stifles productivity, growth and innovation, and thus it dampens economic performance. We believe IGRA's regulatory scheme has accomplished precisely the opposite. The complex and comprehensive regulatory web created by IGRA in which tribal governments play a primary role has reinforced tribal sovereignty and comports with the Supreme Court's holding in *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), and the congressional goals enunciated in IGRA. Providing a foundation for initiative and expertise, IGRA has catalyzed the dramatic growth of an industry, as you know, and has created opportunities for economic growth and development for tribal and non-tribal communities across the United States.

It is in fact extraordinary that more than 200 tribes have benefitted from this new economic engine. It is also remarkable, we would note, that 30 States and myriad non-tribal communities have benefitted as well.

Although by electing to open and operate gaming enterprises within IGRA's regulatory framework, tribes by definition have been forced to give up some aspects of tribal sovereignty, the tradeoff for many tribes has been the realization of the heretofore unthinkable: The creation of well-paying jobs; a viable revenue stream with which to provide essential government services; a means to leverage economic growth, development and economic diversification; the chance to revitalize culture and tradition; and the opportunity to strengthen the institutions of tribal governance that facilitate meaningful government-to-government interactions with the Federal Government and State governments.

In this sense, IGRA has accomplished exactly what it was intended to do, and more. We would contend it therefore represents an unparalleled regulatory success story.

Thank you very much.

[Prepared statements of Dr. Light and Dr. Rand appear in appendix.]

The CHAIRMAN. I want to thank the witnesses.

On this issue of the Federal Government's role in regulating Indian gaming, I would remind the witnesses that when the *Cabazon* decision came down, we sought some way of writing legislation that would ease the relationship between States, the Federal Govern-

ment and the tribes so that there could be a process for implementing the *Cabazon* decision without ending up in just endless occasions for going to court.

When you say, Ms. Rand, that it is the only business that has three levels of regulation, the fact is the reason why Nevada cleaned up their act is because the Feds were investigating corruption. So it was not an initiative taken by the Nevada gaming industry. It was because they were about to be subject to some very severe scrutiny and perhaps oversight.

When we look at Nevada, it is not nirvana, but it certainly is an effective way of regulating the gaming industry, which is multi-billion dollars. As I mentioned in my opening statement, we started at $100 million in your industry and it is now an $18.5 billion or $19 billion industry. It seems to me it is very appropriate for us to review the law, how it has been implemented, what the effects are intended and unintended, and we have serious questions.

We have serious questions about people leaving the Bureau of Indian Affairs [BIA] and the next day working for one of the tribes that they played a role in affecting that tribe's future. We have questions about this blurring of distinctions between class II and class III gaming. As I mentioned to Mr. DesRosiers, there was no envision when we delineated class II and class III of these technologies which have blurred the distinction.

It is not the first time technology has blurred distinctions in various industries. Look at the telecommunications industry. But it requires us to exercise some oversight.

I do not want this hearing to be viewed as some attack on Indian gaming. It is not. As Senator Dorgan said, and even Senator Coburn, Indian gaming is here to stay. The question is: Do we protect the patrons of Indian gaming to fullest extent in keeping with our responsibilities?

I think we have clearly identified some areas that need to be addressed, perhaps legislatively, if not in a regulatory fashion. I do not think that the National Indian Gaming Commission has enough funds. I do not believe it because I look at the comparable regulation of gaming in Nevada. By the way, every one of those casinos, Mr. DesRosiers, has very highly qualified, highly credentialed people who oversee the gaming within those casinos, just as the tribes hire people like yourself to regulate those. But it does not remove the requirement to have the Nevada Gaming Commission from exercising its oversight responsibilities.

So I thank the witnesses, and I would be glad to hear any comments on those comments, beginning with you, Mr. DesRosiers.

Mr. DESROSIERS. Thank you. First of all, let me express my appreciation personally, and I think all of Indian country, for the efforts that you and your colleagues made in authoring the Indian Gaming Regulatory Act. Certainly, I realize the struggle in trying to balance the interests of three sovereigns. I think you did a remarkable job and the document has been very effective and worked very well for all these years.

Are there some areas where there could be some improvements? I am not going to say no. There certainly are. The Seminole issue is one of them. But make no mistake, it has been a good document and we have worked well within the framework of that. I just ap-

preciate the recognition of what tribal regulators do. I do not want it to be construed that we want to be totally, or expect to be totally independent.

We have the California Gambling Control Commission that we work closely with; the Division of Gambling Control, and of course the Federal Government. I view their roles as oversight. I personally feel there is sufficient legislation. There is sufficient regulation. It is up to us to now enforce it. I have no objection to State regulators or Federal regulators watching me, coming onto our premises, looking at what we are doing, and letting me know whether we are in compliance or not. I fully recognize that as an appropriate set of checks and balances.

I would just be very cautious of where we go with any contemplated future legislation. Thank you.

The CHAIRMAN. Thank you.

Mr. Colombe.

Mr. COLOMBE. Yes; thank you, Senator.

I think a couple of issues that I would like the opportunity to have further discussion on. Certainly one of those is the difference between the class II and class III. What was not here today is Justice's opinions have been thoroughly trounced in a number of Federal courts, I think each and every time. There must be some respect for what Federal courts do. We certainly in Indian country have to respect the outcome. That one, in its own right, I think needs study on the committee's part. I would appreciate that.

Second, I think opening up IGRA has no merit at this time. Further regulation, whether it be deed of trust, all of those issues I think are fully covered within the act. Recently, we at the San Diego conference, we did a pretty strong polling on those people who think that IGRA ought to be reopened. Certainly, there are a few people that do, but I think it is 98 percent that believe the act is working.

I think we also could talk a little about how the National Indian Gaming Commission can come to the field more. If that costs more money, I think tribes are willing to step up to the plate there.

So it is not like we are wanting to be unregulated. Frankly, I can show you at my reservation how we actually have more feet on the ground on that reservation with 250 slot machines than Deadwood, SD has with a number of licenses, a number of operators. We actually have more bodies than they do in the regulatory process.

So there is a lot to be said about what Indian gaming is doing and the regulatory process. I think frankly you are always going to have people that are chasing the almighty dollar. If it looks easy, they are going to go after it. But I think, again, class II and opening the IGRA, I believe they need a lot of study before it happens.

The CHAIRMAN. Do you believe we ought to look at this issue of the, quote, "management contract/consultant contract" issue?

Mr. COLOMBE. Frankly, it is all there. I think that

The CHAIRMAN. In other words, there are no tribes who are being exploited by individuals with unfair contracts?

Mr. COLOMBE. Today, it would be very hard to do when you have the Well Fargos who are out there willing to loan money. Obviously, you are always going to have unsophisticated people being taken advantage of by very sophisticated people, but it is a rare

deal when I can see that happening. I had a management contract. I know the process there. It is phenomenal. It is so cumbersome. Someone said there were 45 of these. The reason there is not more of them is most people do not live long enough to get one done. [Laughter.]

The CHAIRMAN. Well, some unscrupulous people have lived long enough to do extremely well by doing good.

Professor Washburn.

Mr. WASHBURN. Senator McCain, I want to come back to the comments you ended with. There is this complex web of regulation in gaming. The States came to you in 1987 and 1988 and said, we need this act; we need to have a role here.

The CHAIRMAN. No; the States did not. We recognized that there was a need for it because of the relationships between the tribes and the State, and the decision by the U.S. Supreme Court drove us to a process where we thought that we had to codify the relationship. It was not the States coming to us. It was the realization that there was a need for some kind of process that would legitimize this decision. So you are wrong. The States did not come to us. We saw that there was a problem and we acted, and it was a long and difficult process.

Go ahead.

Mr. WASHBURN. Mr. Chairman, I have reviewed some of the testimony, and whether they came to you or you guys identified the problem, one of the things that the States said in the hearings in 1987 and 1988 was that they need a regulatory hook. They need to be able to help regulate these problems because they realized what casinos posed, but did not show regulatory problems.

The CHAIRMAN. Well look, I am not going to argue history with you, but after we passed the law, the Association of National Attorneys General strenuously objected to it, and wanted it changed, and wanted it improved dramatically. We had numerous meetings with them. So I am not going to argue with you history, sir, but I am part of it so I am going to object to your interpretation of something that I was part of.

Go ahead.

Mr. WASHBURN. I am sorry, Mr. Chairman. Let me get to my point. My point is, if there was some concern that the States were going to be involved in Indian gaming regulation, with the exception of your State and now California, States did not really show up. Most States are not doing very much regulation of Indian gaming. What that tells me is that we need to have an independent entity doing that regulation. I think it is probably the NIGC.

So given that many State regulators have not taken the role that they could have taken under their tribal-State compacts, we need to locate strong regulatory power somewhere. I think that that is probably within the NIGC. So in addition to giving them more funding, I think you may need to give them much more substantial regulatory authority, too.

The CHAIRMAN. For example?

Mr. WASHBURN. Clarifying their authority over class III, for example, so that we do not run into this minimum internal control standards problem. You know, this problem, businesses do not like to be regulated. We see the exact same debate going on in Sar-

banes-Oxley right now, the financial reporting issues in Sarbanes-Oxley. Everybody is saying, we do not want to have internal controls about our financial reporting. That is what the financial industry is telling us.

Well, Indian casinos, some of them, Colorado River Indian Tribe is saying we do not want, you know, the Feds imposing internal controls on our class III gaming. Internal controls are a good idea, and there ought to be clear authority for them to be imposed.

The CHAIRMAN. I thank you, Professor Washburn. I take it you have written some other treatises on this issue?

Mr. WASHBURN. I have written a little bit, and I will write further.

The CHAIRMAN. Would you send us what you have already written? I think you have some very interesting perspectives and I think it would be very helpful in this process.

Mr. WASHBURN. I will inform my tenure committee. [Laughter.]

The CHAIRMAN. Thank you very much. We appreciate your being here.

Professor Rand or Professor Light, either one?

Ms. RAND. Thank you, Mr. Chairman.

We certainly understand why the committee would want to hold a hearing on Indian gaming regulation. I think that you are absolutely right that there are issues that are worthy of the committee's consideration. We certainly did not mean to suggest otherwise.

We would simply want the committee to bear in mind that Indian gaming serves a purpose that is very different than commercial gambling. Its regulatory scheme similarly serves a purpose that is very different from the regulatory scheme of commercial gambling. Part of that, of course, is because of the overarching context of tribal sovereignty, as well as the goals and the purposes of Federal Indian law and policy.

So we would simply ask the committee to bear those contexts in mind as it weighs its own policy options.

Mr. LIGHT. I would certainly support the idea of additional gathering of accurate information. We have heard the Senators this morning ask for additional information, which is absolutely appropriate in thinking about the regulation of Indian gaming, as it would be for the regulation of the commercial gambling generally.

We feel that there is somewhat of a dearth still remaining in terms of accurate and complete information. We feel that hearings like this are able to fill in some of those gaps. So we know that policymakers like yourselves on the Committee are always looking for the best available information with which to possibly legislate.

So in the context of possible amendments to IGRA, whether they are technical amendments or more substantive, we think it is absolutely invaluable to acquire the best information possible. In that regard, it is also important to bear in mind the considerations that Professor Rand was speaking of, but the input also of tribes and tribal members. We are sure that the Committee would absolutely be doing that.

In that context, the idea of tribal self-determination is always a theme that is going to be running through these kinds of hearings.

The CHAIRMAN. I thank you, and I am very grateful for the witnesses' testimony today.

Senator Dorgan.

Mr. VAN NORMAN. Mr. Chairman? Could I add something?

The CHAIRMAN. Sure.

Mr. VAN NORMAN. Thank you. I am Mark Van Norman, the executive director of NIGA.

I just wanted to say a couple of things. I was up visiting the Mashantucket Pequot Tribal Nation on Monday. One of the things that their gaming commission emphasized was that they are different in operating a tribal government agency than it would be in a commercial agency in a commercial gaming facility where it is run by the operator. They have their regulators right on staff, and that is a distinction and a strength of Indian gaming that is not present in commercial gaming.

I think it is also important to point out that the class II industry is a legitimate industry; that we have multimedia gaming as the largest company in class II gaming. They are publicly traded, regulated by the SEC. We also have the largest publicly traded company in gaming. IGT is in the class II market.

So I think it is important to bear that in mind as we think about class II.

The CHAIRMAN. Thank you very much.

Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you very much.

I think I am not going to ask a lot of questions. I think most all of this has been covered. I think that it is important to point out that the purpose of this hearing is not to cast aspersion on tribal regulation of gaming. For example, Mr. DesRosiers and Mr. Colombe, you described your regulatory system in some great detail with great pride. I do not know the specifics of it, but it certainly sounds impressive to me. I am sure there are other tribes that have similar systems that they feel very strongly represent and protect the interests of the tribal members.

There may well be, with all of the tribal gaming, circumstances where that does not exist with certain tribes. I do not know that either. There is actually precious little research that is available to us, and for that reason I think Dr. Light and Ms. Rand, I hope you will focus some of the research on some of the questions that have been raised today.

Having said that, I think it is just natural that when you have an industry that has grown within the time that it has to $18 billion a year now, that there will be those who want to break out of the boundaries and the restraints. Mr. Washburn said it correctly. No one likes regulation. You know, people chafe at regulation. So the Colorado suit, the decision to try to break out of the restraints here.

Regulation I think is critically important to protect, to protect Indian gaming in the long term. Sovereignty is very important to me and to Indian tribes, but so, too, is regulation of this industry. It needs to be done, done right, done effectively at several different levels.

So Mr. DesRosiers, I could tell the pride with which you conduct your activities, and the pride with which you describe your employees and the processes. This hearing is not an attempt to diminish or denigrate in any way what you and many others are doing. But

it is an attempt to try to determine, are there holes in this fence? We develop a fence. I mean, that is what this is about. Because we raised horses, I used to check the fence a lot. You know, that is a simple way of describing what we are trying to do here today, to understand what is happening.

Mr. Washburn, having a Minnesota lawyer describe North Dakota as small is——

[Laughter.]

Senator DORGAN [continuing]. Is an affront that I shall overcome. [Laughter.]

But not soon. [Laughter.]

More seriously, I think all of the witnesses today, including this panel, have contributed a lot to our understanding and given us some food for thought on how to proceed.

Thank you very much.

The CHAIRMAN. I thank the witnesses. This has been a very helpful hearing. I appreciate all of you being here today.

This hearing is adjourned.

[Whereupon, at 11:34 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

### PREPARED STATEMENT OF EARL E. DEVANEY, INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR

Mr. Chairman, I want to thank you and the members of the committee for inviting me here today to talk about the regulation of Indian gaming.

Over the last decade, my Office has conducted a number of audits on issues directly related to Indian gaming regulation such as the implementation of the Indian Gaming Regulatory Act [IGRA], the financial management activities of the National Indian Gaming Commission [NIGC] and, more recently, tribal gaming revenue allocation plans and the taking of land into trust. In addition, we have investigated and prosecuted numerous individuals for theft and/or embezzlement from Indian gaming establishments, investigated allegations surrounding the Federal recognition process and we are currently working with our Federal law enforcement partners on several criminal investigations related to the Indian gaming industry.

All of these audits and investigations, coupled with my personal observations and background as a Federal law enforcement professional for over 30 years, lead me to believe that it is time to seriously consider regulatory enhancements and potential legislative changes to reflect the realities of this $18.5 billion burgeoning industry. My law enforcement experience and intuition also tell me that when there is this much money involved, bad guys will come. To think otherwise, or to imagine that Indian gaming will somehow escape the evils faced by non-hidian gaming, equates to the proverbial ostrich sticking its head in the sand. The gaming industry in Las Vegas estimates that all casinos I typically lose 6 percent of their revenues to fraud and theft. Applying that same percentage, Indian gaming operations potentially lost $1.1 billion in 2004.

While the investigations we have conducted into allegations involving particular tribal recognitions made by the Department have rarely uncovered any improper behavior, we are nevertheless troubled by the invariable presence of wealthy individuals and companies invested heavily in the recognition outcome for seeming one reason only—that is, to ultimately fund and then reap the financial benefits of a new gaming operation.

As this committee well knows, one of IGRA's primary purposes was to ensure that the proceeds from tribal gaming were used to fund tribal operations, economic development and the general welfare of its members. Therefore, any loss of gaining revenue as a result of criminal behavior will obviously negatively impact the ability of the tribes to provide vital services such as health care, law enforcement, housing and education.

IGRA envisioned a regulatory scheme where tribes, States, and NIGC would all play a vital role. Since my office has never actually evaluated the capacity or the effectiveness of tribes and states to implement IGRA's vision in this regard, I will confine my comments today to the role the NIGC and Federal law enforcement play in this regulatory scheme.

Our audits of IGRA and the NIGC, dating back as far as 1993, chronicle the lack of Federal resources available to effectively oversee Indian gaining. For instance, in

our 1993 audit report, we reported that the NIGC only had a staff of 24 and a budget of $2 million dollars to oversee the 149 tribes which had already initiated 296 gaming operations. When we recently took a snapshot of NIGC we found the Commission with a budget cap of $11 million, and only 39 auditors and investigators tasked with overseeing more than 200 tribes with over 400 gaming. By contrast, in 2003 the Nevada Gaming Commission had a budget of $35.2 million dollars with 279 auditors and investigators to oversee 365 gaming operations with total reported revenues of $19.5 billion.

One also has to consider the fact that today's Indian gaming operations range from a 30-seat bingo parlor in Alaska to a tribal operation in Connecticut with 6 separate casinos, nearly 7,500 slots, 388 table games, 23 restaurants and three hotels. A giant step forward was achieved in 2002 when NIGC promulgated the Minimum Internal Control Standards [MICS] which established minimum standards and procedures for Class II and Class III gaming. However, the MICS also placed a training, guidance and monitoring burden on an already beleaguered NIGC. In our opinion, the NIGC needs additional resources to fulfill their expanding role commensurate with the escalating growth of the Indian gaming industry.

As the members of this committee also may recall, the National Gambling Impact Study Commission's report, issued in June 1999, encouraged Congress to assure adequate NIGC funding for the proper regulatory oversight of the industry's integrity and fiscal accountability.

While we support additional resources for the NIGC, we continue to be concerned with the dual role that NIGC civil investigators perform. One is to act as NIGC's liaison to the gaming tribes. In this capacity, the investigators consult with gaming tribes and provide compliance training regarding IGRA's statutory requirements and NIGC regulations. On the other hand, these same investigators issue preliminary violation notices against the tribes for civil gaming violations and refer criminal matters to the FBI. While I understand that the NIGC does not see this as a conflict, our view is that these dual roles are wholly incompatible and contrary to advancing compliance in Indian gaming. Put another way, it is hard to wear a white hat on Monday and Tuesday and switch to a black hat on Friday and Saturday.

Historically, Federal law enforcement has been severely challenged to address crime in Indian Country. Violent crime alone consumes most of the available resources. As a result, white collar crime relating to Indian gaining has, regrettably, often gone unattended. Recently, however, under the direction of the Attorney General's Indian Country Sub-Committee, and specifically under the leadership of Tom Heffelfinger, the U.S. Attorney for the District of Minnesota, various law enforcement entities came together to form the Indian Gaming Workgroup. We are proud to be part of this effort. None of the Federal, State or local law enforcement members of this Workgroup, alone, has the resources to address the potential crime in the Indian gaining industry. Leveraging our investigative resources in a common alliance not only makes perfect sense to us but, I would submit, is the kind of good government action that the American public would expect us to take.

Mr. Chairman, my greatest fear is not that the integrity or accountability of Indian gaming will be compromised from inside the actual Casinos, but rather by the horde of paid management advisors, consultants, lobbyists and financiers flocking to get a piece of the enormous amount of revenues being generated by Indian gaming. I would now like to briefly mention a number of obstacles and challenges that we have identified over the years that hinder effective monitoring and enforcement in Indian gaining.

When gaming tribes enter into management contracts for the operation of gaming activities, those contracts are submitted to and approved by the Chairman of the NIGC. Included in NIGC's review is a background investigation of the principles and investors. Some tribes have circumvented the review and approval process by entering into consulting agreements which, although called by a different name, do not differ significantly in substance from management contracts.

As a result, the terms of these consulting agreements, including the financing and compensation, are not subject to review and approval by the NIGC, nor are the backgrounds of the consultant's principles and investors scrutinized. Ancillary agreements related to gaining operations (such as construction, transportation, and supplies) are also ripe for abuse.

This has resulted in the management and operations of some tribal gaming enterprises under financial arrangements unfavorable to those tribes. It has also opened the window for undesirable elements to infiltrate the operations and management of tribal casinos. During a recent FBI-sponsored conference on investigations of crime in tribal gaining, it was the consensus of those law enforcement officials in attendance that if they could only change one element of IGRA, it would be to en-

sure that gaming consultants are subject to the same requirements as management contractors.

Another obstacle we have identified is the Federal statue that carves out an exception to the usual recusal period for departing Department of the Interior officials 25 U.S.C. §450 (j) permits former officers and employees of the United States to represent recognized Indian tribes in connection with any matter pending before the Federal Government. The statute requires only that the former Federal employee advise the head of the agency with which he is dealing of his prior involvement as an officer or employee of the United States in connection with the matter at issue.

This exemption was enacted because Indian tribes, at the time, lacked effective representation in front of Federal agencies. When the provision was enacted in 1988, virtually the only persons with expertise in Indian matters were Federal employees. Today, that dynamic has changed. Indian law experts (attorneys and lobbyists) are much more widely available to represent tribal interests.

Having outlived its original intent, this statutory exemption now perpetuates a "revolving door" where Federal employees who leave the government, after handling sensitive tribal issues in an official capacity, go on to represent the very same tribes on the same or similar issues before the government. Without the exemption, this would be a violation of the criminal conflict of interest laws that apply to all other departing Federal employees.

IGRA prohibits gaming on trust lands acquired after October 17, 1988 unless the lands meet specific statutory exemptions. BIA and NIGC share responsibility for reviewing applications for converting trust land use to gaming.

Our recent evaluation of the process of taking land into Federal trust status for Indian gaming found 10 instances in which tribes converted the use of lands taken into trust by the Bureau of Indian Affairs after October 17, 1988 from non-gaining purposes to gaming purposes without approval of BIA or NIGC. We determined that neither the BIA nor NIGC has a systematic process for identifying converted lands or for determining whether the IGRA exemptions apply. Therefore, unless a tribe abides by the rules and applies for approval, conversion of trust lands to gaming purposes goes essentially unchecked. Neither the Department nor NIGC has a way to ensure that Indian gaming is being conducted only on approved lands.

In another OIG audit report issued in 2003, we discovered that neither the BIA nor the NIGC was monitoring Indian tribes to determine whether gaming tribes comply with BIA-approved revenue allocation plans [RAP] or whether tribes are making per capita distributions of gaming revenues without an approved plan.

IGRA provides that tribes may make per capita payments of net gaming revenues only after BIA's approval of their RAP. IGRA provides the NIGC authority to enforce RAP requirements, but does not provide either BIA or NIGC the authority to monitor. Absent a process for systematic monitoring of tribal revenue distributions, BIA's approval authority and NIGC's enforcement authority serve little practical purpose.

To illustrate this problem, we conducted a review of the per capita distribution of the Table Mountain Rancheria Tribe of California at the request of BIA. BIA was responding to complaints by tribal members. We determined that the Rancheria had significantly exceeded their authorized per capita distribution and referred the matter to NIGC. In reply to NIGC's letter citing the tribe with violating IGRA, the Rancheria said the problem was caused by prior leadership and they would comply with the plan. Without authority to do so, NIGC has been unable to make any further verification.

Finally, some Indian casinos and financial institutions are particularly vulnerable to becoming the victims of financial fraud. Gaming tribes' new-found wealth has only added to that dynamic, and unfortunately, many tribes have little experience managing or dealing with financial operations that are particularly vulnerable to a myriad of fraud schemes.

Because Indian casinos are a cash-rich enterprise, they are, in our opinion, particularly attractive to money launderers. In this example, criminals would use casinos to cash in illegal proceeds for chips, tokens, or coins in amounts that do not trigger reporting requirements. The criminals then game for short periods of time to redeem "clean" money.

The failure to provide background investigations on all individuals involved in tribal gaming is a serious weakness in the regulatory system. For example, in January 2005, a gaming regulator from the Santa Ynez Band of Chumash Indians was convicted for a felony offense. The offense occurred in November 2004. Rather than receiving notice from the tribe, the NIGC became aware of the conviction as a result of an article in the Los Angeles Times.

Tribal financial institutions without Federal or State charters, and attendant regulation, are also particularly vulnerable to manipulation. In 1992 and 2001, the U.S.

Reservation Bank & Trust [USRB&T], an Indian-controlled banking institution, was granted business licenses by the Rosebud Sioux Tribe in South Dakota and the Salt River Pima-Maricopa Indian Community in Arizona. Although represented as a bank to other financial institutions and investors, USRB&T is alleged to have been a financial institution established solely to execute a "Ponzi" scheme. $20 million was seized by the Federal Government in Arizona shortly before the operators of USRB&T intended to wire the funds to an off-shore account.

Absent sound regulation, these Indian casinos and financial operations remain extremely vulnerable to criminal exploitation. As this committee so recently demonstrated, greater care must be exercised by gaming tribes when they are approached by unsavory Indian gaming lobbyists promising imperceptible services for astonishing fees.

Mr. Chairman and members of the committee, as you can see, Federal regulators and law enforcement personnel face a host of challenges in their effort to protect the interests of individual Indians and tribes that emanate from Indian gaining operations and proceeds.

My office has been reviewing our audit and investigative authorities in Indian country to determine whether we can establish an even more vigorous presence in the gaming arena. In the meantime, we have had the opportunity to review the proposed technical amendments to IGRA advanced by NIGC. Overall, we support NIGC's effort in regard to funding flexibilities and regulatory enhancements, particularly the provisions that extend background checks to a broader category of individuals working in the Indian gaming industry.

The Office of Inspector General will continue to explore opportunities to identify weaknesses and gaps in the Federal oversight and regulation of Indian gaming, and formulate recommendations to correct these shortcomings. We will also continue to conduct investigations into allegations of crime that adversely affects tribes and gaming establishments. Should this committee have specific issues of concern that might benefit from an audit, evaluation or investigation by the Office of Inspector General, I stand ready to assist the committee in any way I can.

Mr. Chairman, members of the committee, thank you for the opportunity to testify here today. I am happy to answer any questions you may have.

**TESTIMONY TO THE SENATE COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARING ON REGULATION OF TRIBAL GAMING, APRIL 27, 2005**

Mr. Chairman, Mr. Vice Chairman, Honorable Committee Members,

My name is Norman DesRosiers. I have been a Tribal Gaming Commissioner or Executive Director for approximately 13 years. From 1998 to present I have served the Viejas Band of Kumeyaay Indians as the Commissioner and Chief Administrator of their Tribal Governmental Gaming Regulatory Agency. In addition I serve as Chairman of the National Tribal Gaming Commissioners and Regulators (NTGC/R) organization. Prior to this I also have a law enforcement background.

I would like to respectfully share my views on the current state of the regulation of Indian gaming.

It seems that we constantly hear that Indian gaming is insufficiently regulated. There is also a notion among many that "if it is not State regulated then it is not regulated". The implications being that Tribes are either unable or unwilling to regulate themselves.

With all due respect, I, and those who do the same job that I do in hundreds Tribal jurisdictions, find it offensive that this myth is consistently perpetuated.

I would like to speak a moment about Viejas Gaming Commission. Since its creation the Tribe has approved multi-million dollar annual budgets for the agency. Fiscal year 2005 has an approved budget of nearly $4 million ($3,927,556.00). We have fifty-two (52) full time regulatory staff, just regulating one gaming facility. This is more financial and human resources than some gaming States appropriate, and nearly equivalent to the NIGC's budget not too many years ago.

With those resources we have the latest technology in computerized data bases and communications, digital fingerprinting equipment with electronic transmissions to NIGC, digital surveillance recording and storage, video facial recognition technology and the list goes on.

We have within the agency, highly qualified internal auditors, information technology (IT) personnel, background investigators who conduct in depth backgrounds on all of the casino's 2,400 employees (not just key employees), compliance officers who control the shipping, installation, testing, certification, and security of all slot machines and other gaming equipment, highly trained surveillance officers and a staff of inspectors/investigators who conduct all investigations of criminal activity, internal controls violations, and patron disputes. They wrote over 1,300 investigative reports last year. We have over 350 years of combined law enforcement and regulatory experience on our staff, including former IRS and Secret Service agents and numerous city, county and state law enforcement officers.

I know first hand that we are not an exception in providing this high level of competent Tribal gaming regulation. Over the years I have personally visited dozens of Tribal regulatory agencies across the country and have been consistently impressed with the level of professionalism and resources dedicated to regulatory compliance and enforcement.

I would not sit here and attempt to convince you that it is a perfect world out there and that every single Tribe is at the same level of expertise. I am fully aware that some Tribal gaming agencies do not have the same level of experience and expertise as others. Some Tribes simply don't have the revenues to appropriate the same level of financial resources as others. However, some smaller facilities with smaller regulatory agencies can still effectively regulate. It usually boils down to working smarter and gaining the required knowledge on "how to" effect compliance.

To this end, the Tribes that I have had the privilege of serving have allowed me, at their expense, to share to my knowledge and experience with other Tribes. I am frequently called upon by NIGA to teach Gaming Commissioner certification classes. The NTGC/R organization is dedicated to the constant training of Tribal Commissioners. For the last 5 years I have established all of the training seminars for our biannual NTGC/R conferences. Due to the turnover in Tribal regulators there is a constant need for training and we are filling that gap.

Now, to comment on some of the current challenges.

I have had the honor of having been selected to sit on the Tribal Advisory Committee to NIGC for the development of Federal Regulations for electronic bingo systems or technological aids to bingo (Class II) gaming. We have been working on the project for a year. There have been some deep divides in opinions between the expert members of the committee and the NIGC. It would appear that the primary consideration influencing the decision making of the NIGC, is their overwhelming concern that the Department of Justice will challenge the products manufactured in accordance with our regulatory guidelines and attempt to insist that the technological aids are facsimiles or Class III devices. The committee believes that the recommended guidelines for the aids are completely defensible and the product is technically distinguishable from Class III slot machines. Nonetheless the DOJ threat looms.

There is also the concern about the insistence of the DOJ that technological aids to bingo (electronic player terminals) are subject to the Johnson Act even though only involved in Class II gaming. This would appear contrary to recent appellant court rulings. Congress contemplated fixing that with an amendment to IGRA which would have specifically exempted Class II gaming equipment. However, the DOJ expressed a strong desire to have this equipment regulated in the same fashion as slot machines. The Tribes and NIGC are perfectly capable of regulating these games without "Johnson Act" controls.

Another contemplated amendment to IGRA relates to backgrounding and licensing of vendors or contractors providing goods and services to Tribal casinos. Most of us are already doing that. Many jurisdictions have Compact requirements. I would urge great caution in any language which would allow Federal involvement in the process. My preference would be to simply authorize the NIGC to assist in backgrounding vendors only if and when asked to do so by a Tribal Gaming Agency.

In closing, while we genuinely share Chairman McCain's concern for ensuring the integrity of Indian gaming through competent effective regulation, we do not share the opinion that it is not happening. We believe that the vast majority of Tribes are doing at least an adequate, if not exemplary, job of regulating their gaming operations. We also believe that the majority should not be punished for the sins of the few who are unable or unwilling to effectively regulate. Adequate enforcement remedies already exist to bring the minority of non-compliant Tribes into compliance.

I wish to sincerely express my appreciation for the honor and privilege of having been invited here to address you on this most important matter. I will be most happy to answer any questions you may have or be of service to you with any future needs.

Sincerely,

Norman H. DesRosiers

Viejas Tribal Gaming Commissioner
5000 Willows Road
Alpine, CA 91901
**619-659-1703**

May 20, 2005

The Honorable John McCain, Chairman
U.S. Senate Committee on Indian Affairs
836 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman,

Thank you for the opportunity to provide written responses to your questions regarding Tribal Gaming Regulation. I will answer them in the order presented.

1) a. "What steps were taken by our Tribal Government to ensure that we had the independence to effectively regulate this Tribe's gaming facility?"

Under our Tribal Gaming Ordinance (law) the Gaming Commission is established as an independent governmental regulatory agency. The Commissioner reports only and directly to the Tribal Council. The Commissioner is employed under minimum two (2) year contracts and can only be terminated for negligence of duty or if convicted of a felony or gaming crime. This isolates and insulates the Commissioner from Tribal politics or employment at will. The Commissioner submits annual budgets for the agency directly to the Council (governing body) and when approved are funded with appropriations from the Tribal government's general fund. Under the Ordinance the Commissioner is granted an enormous amount of general and specific authority and responsibility, too lengthy to articulate here. I will enclose a copy of our Ordinance and Regulations for your review. It is worth noting that both documents exceed NIGC and Compacted regulatory requirements.

b. "What, if any, opposition would there be to amending IGRA to provide for the independence of Tribal Gaming Regulators if their mission is to ensure that the games and the proceeds are protected?"

I can't speak for all Tribes, however I personally would not oppose such an amendment. Although, it is not a problem in this jurisdiction, I must admit that I frequently hear complaints from Tribal regulators in other jurisdictions that they are routinely exposed to political or management interference in the performance of their duties and responsibilities.

May 20, 2005
Page Two

2) a. "What, if any, records do gaming Tribes keep on suspected illegal activity in casinos?"

Typically, Tribal Gaming Regulatory authorities write and maintain incident reports on all real or suspected illegal activity. This is generally also a requirement in most Compacts. Upon completion of these investigative reports, if it is deemed that there is sufficient cause to believe that illegal activity has occurred which would warrant prosecution, the appropriate law enforcement authorities are contacted for jurisdictional criminal proceedings. This could be Tribal, State, or Federal authorities depending on the jurisdictional nature of the crime. Our Tribal Gaming Ordinance directs the Tribal Gaming Commission to cooperate fully with the appropriate law enforcement agencies to pursue prosecutions when necessary and appropriate. We in fact have had numerous successful prosecutions on both the State and Federal level.

b. "Do we share this information with NIGC?"

I would have to say that we do not typically share this information with NIGC. It is not that we wouldn't if asked, but NIGC is not generally perceived as playing the role of a criminal law enforcement agency. It should be noted however, that the application process to achieve a "certificate of self-regulation" requires us to prove to NIGC that we do effectively investigate and prosecute criminal activity.

It should also be noted that we do routinely advise the NIGC of all regulatory sanctions we impose such as license denials or revocations and the imposition of fines.

c. "Who provides criminal law enforcement at our facility?"

California is a Public Law 280 State which grants the State law enforcement authority for crimes committed on Tribal lands. Typically our Tribal regulatory agents. (most of whom have former law enforcement experience) will conduct the bulk of the initial investigations. We then contact the detectives for the San Diego County Sheriff's Department and work with them in whatever final report or evidentiary matters need attention, and the case is then turned over to the County Prosecutor. The Prosecutor does have the discretion to decline prosecution or pursue prosecution. Virtually all cases we have submitted have been prosecuted. We did have one case of such a magnitude, that I sought and received the cooperation of the U.S Attorney and FBI for a successful prosecution. In a Public Law 280 State we would rarely bother Federal law enforcement authorities knowing that they are very busy with homeland security matters. However in this case I wanted to make an example of these employees who embezzled tens of thousands of dollars from the Tribe's gaming operation.

3. a) "What State agencies do we interact with as a Tribal Gaming Commissioner in California, and how is that relationship working?"

As previously mentioned we routinely work with the San Diego County Sheriff's Department on criminal matters. I am proud to say that this relationship has been excellent.

Several times a year we have unannounced inspections of all busses bringing patrons to Viejas. We license all private bus companies which bring charters, junkets, or route pickups to our facility and hold them to the highest safety standards. Normally we will have ten to fifteen busses a day. These inspections are conducted in cooperation with the California Highway Patrol, the Department of Transportation and the California Public Utilities Commission. These agencies genuinely appreciate our efforts and cooperation.

Pursuant to Compact requirements we routinely work with the California Department of Justice, Division of Gambling Control and the California Gambling Control Commission. We cooperate on backgrounding and licensing both vendors and key employees. The Division also monitors our compliance enforcement with a myriad of other requirements including building codes, health, fire and safety codes, integrity of games, auditing and dozens of other regulatory responsibilities. Generally the cooperative relationship is courteous and respectful although we do not always agree on everything.

We work with the state Franchise Tax Board and Child Protective Services requiring employees, as a condition of licensing, to pay tax liens and child support.

In addition, we work with the California Department of General Services for all major construction projects. They are involved in project plan review and building inspections, assisting us in ensuring compliance with the appropriate building codes. That relationship has been excellent as well.

It is my understanding that Viejas has a reputation with all agencies that we work with, as setting and maintaining the highest regulatory standards. In fact, the State took language verbatim from the "Unlawful Acts" section of our Gaming Ordinance and used it in recently passed legislation for gaming crimes in the State Penal Code. Additionally, the California State Gambling Control Commission attempted to enact several of our Tribal Gaming Regulations as uniform statewide gaming regulations.

b. "Do the State agencies assist us in performing background checks? What other regulatory assistance do they provide".

Under California Compacts the State Division of Gambling Control can and will assist Tribes with background investigations if asked by the Tribes. I am not personally aware of any Tribes who may have asked for such assistance. I believe that most Tribal agencies conduct their own background investigations. Agents from the Division have visited our agency on numerous occasions seeking to copy our background investigation files on vendors to reduce duplication in efforts by their agents.

The only other regulatory assistance that has been offered is that the Division has offered to assist in criminal investigations in casinos if called upon. I do not know for certain if any Tribes have requested that assistance, however, that could be a valuable service for Tribal agencies with smaller or less experienced staff levels.

4. a) "Because some gaming Tribes with smaller facilities can't afford to invest the same resources into regulation as our Tribe does, would we recommend that the NIGC put more of its resources into oversight of those smaller facilities?"

As a practical matter, in reality I believe that NIGC is actually doing this. However, it is important to keep in mind that everything is scaled down with smaller facilities and consequently adequate regulation can be executed with fewer resources. Many of the resources that we enjoy could be characterized as luxuries. Although, they enhance our ability to be a model enforcement agency, they are not necessarily needed or required to adequately maintain compliance. I have worked for a smaller Tribal agency and we were able to get the job done with far less resources. It is a matter of building trust and confidence with the NIGC by demonstrating actual competence and compliance. Once that is accomplished the NIGC need not necessarily devote more oversight effort to a smaller facility than a large one.

My larger concern is for those Tribes who knowingly lack the will to devote the effort and attention to regulatory compliance responsibilities. Although there are very few, it is known that some Tribes view regulatory responsibilities as unnecessary overhead, an inhibitor to business or infringement upon their sovereign freedom. It is these such cases that deserve significant NIGC oversight attention.

b. "Do we agree with the position that NIGC should be given the authority to prosecute vendors and other outside parties, instead of only being able to punish Tribes?"

I must apologize, but I am not quite clear on what this question is asking. If a vendor or outside a party commits a crime warranting prosecution, it would seem that sufficient Federal (or if appropriate, State) law enforcement agencies already exist for criminal prosecution. I think the more appropriate authority that NIGC should have is to prohibit

vendors or outside parties from any business relationships with any Tribes if they have been found to have violated an Tribal, State, or Federal laws or regulations or have engaged in undesirable business practices.

Again, thank you for the opportunity to respond to your thoughtful regulatory questions. If I can be of any future service to you please do not hesitate to call.

Sincerely,

Norman H. DesRosiers
Commissioner

UNITED SOUTH AND EASTERN TRIBES, INC.
711 Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214
Telephone: (615) 872-7900 • Fax: (615) 872-7417

STATEMENT BY

KELLER GEORGE
PRESIDENT
UNITED SOUTH AND EASTERN TRIBES, INC.

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARING ON THE REGULATION OF INDIAN GAMING.

April 26, 2005

Good afternoon Chairman McCain, Ranking Member Dorgan, and distinguished members of the Committee on Indian Affairs. My name is Keller George, and I am President of United South and Eastern Tribes, Inc. I also am an enrolled member of the Oneida Indian Nation, where I serve on the Council as a representative of the Wolf Clan. I am pleased to submit written testimony to the Committee on the subject of the Indian Gaming Regulatory Act.

United South and Eastern Tribes, Inc. ("USET") is a non-profit, inter-tribal organization that collectively represents its member Tribes at the regional and national levels. USET represents twenty-four federally recognized Tribes.[1] Included among the members of USET are some of the largest gaming tribes in the United States, such as the Mashantucket Pequots, the Mohegan Tribe, the Oneida Indian Nation, the Mississippi Band of Choctaw, the Seminole Tribe, and the Miccosoukee Tribe. We also represent tribes with more modest gaming facilities, as well as tribes that currently do not engage in gaming. To be specific, of the 24 Indian nations that comprise USET, 15 engage in

[1] The members of USET are: The Chitimacha Tribe of Louisiana, the Seneca Nation of Indians, the Coushatta Tribe of Louisiana, the Eastern Band of Cherokee, the Mississippi Band of Choctaw, the Seminole Tribe of Florida, St. Regis Band of Mohawk Indians, the Miccosukee Tribe, the Penobscot Indian Nation, the Passamaquoddy Pleasant Point Tribe, and the Passamaquoddy Indian Township Tribe, the Houlton Band of Maliseet Indians, the Tunica-Biloxi Indians of Louisiana, the Poarch Band of Creek Indians, the Narragansett Indian Tribe, the Mashantucket Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), the Alabama-Coushatta Tribe of Texas, the Oneida Indian Nation, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Jena Band of Choctaw Indians, the Mohegan Tribe of Connecticut, and the Cayuga Nation.

Indian gaming pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA" or "the Act"). Nine tribes conduct Class III gaming pursuant to a tribal-state compact, and six tribes engage in Class II gaming.

Congress enacted the IGRA "to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[2] The Act is doing just that. Indian gaming has been described as "the only federal Indian economic initiative that ever worked." That is absolutely correct. Indian gaming has served as a critical economic tool to enable Indian nations to once again be able to provide essential governmental services to their members, re-assert their sovereignty, and promote the goals of self-determination and self-sufficiency.

Prior to the advent of Indian gaming, many Indian nations, while legally recognized as sovereign governments, were not able to provide basic, governmental services to their people. They had all of the legal attributes of sovereign nations, but many did not have the practical ability to be an effective government for their members. Consequently, despite a strong and proud tradition, Indian nations were stuck in a two hundred year cycle of poverty.

Today, the proceeds of Indian gaming operations go directly into providing essential governmental services to tribal members. Our Members have used these revenues to invest in dozens of Member programs, including home ownership initiatives, tuition assistance for everything from private schools to post-doctorate work, national health insurance for tribal members, and access to top-notch health clinics. Gaming has also allowed Indian nations to take tremendous steps to reclaim their heritage.

Reclaiming a past heritage has been a priority for all USET members, and gaming proceeds have enabled Indian nations to make tremendous gains in this area. In many respects, these efforts culminated in the dedication of the National Museum of the American Indian in September 2004. I am proud to note that the three largest contributions to the building of this tremendous institution came from Indian nations that are Members of USET.[3]

Unfortunately, however, USET has been increasingly concerned with a handful of Indian tribes and wealthy non-Indian developers who are seeking to establish Indian casinos far away from their existing reservations in different states from where the tribes are currently located.

In at least twelve states, Indian tribes are seeking to move across state lines to take advantage of more lucrative gaming markets. In most cases, these efforts are being funded by shadowy developers who underwrite the litigation expenses, lobbyists fees, and even the cost of land in exchange for a cut of the profits.

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[2] 25 U.S.C. §2701(4)

[3] Jim Adams, *Leaders guide museum with humble yet historic partnership*, Indian Country Today (Lakota Times), Sept. 22, 2004, at 1.

In addition, many of these developers purposefully structure their deals with tribes to avoid federal scrutiny. In this manner, the developers are able to extract larger payments from tribes than would be permissible under IGRA. They also are able to avoid being subject to criminal background checks. Some of these developers likely would not be able to survive such scrutiny.

This kind of "reservation shopping" runs contrary to the intent behind IGRA and well-established federal Indian policies. The basic idea of IGRA was to protect the *governmental* rights of tribes over their lands while assuring regulation of casino gaming. But these proposed Indian casino deals are not based on governmental rights. In most instances, the developers and tribes are using land claims or the threat of land claims to promote casinos in far-off places. In these instances, Indian gaming is not being used as a tool by tribes to promote economic activities on their lands, it is being used as a tool by developers who simply need Indian tribes to make their deals for casinos work.

Let me give you a typical scenario for how the developers normally seek to gain approval for an Indian casino on behalf of an out-of-state tribe. First, the developer will extend a "carrot" to the state and local governments. The developer hires lobbyists who try and convince state and local officials that an Indian casino will benefit the state by creating jobs and economic activity. The developer will offer the state and local communities a cut of the proceeds of the Indian casino in exchange for state support. In most cases, these offers violate IGRA's prohibition against taxing Indian casinos. But the out-of-state tribes are willing to pay a tax because these ventures do not impact the enterprises where the tribes are currently located. The developers also are willing to agree that the out-of-state tribe will waive most aspects of its sovereignty. In other words, the out-of-state tribe will agree to submit to state and local jurisdiction in return for the ability to establish an Indian casino in a new state. Whatever concessions the out-of-state tribes are willing to make are fine because they do not impact the tribes' primary reservation.

Unfortunately, when there are other tribes located in those states where out-of-state tribes are seeking a casino, the offers to submit to state jurisdiction and pay hefty taxes on their gaming facilities severely undermine the in-state tribes' continuing efforts to defend their sovereignty. Why? Because the out-of-state tribes' offers become the new baseline upon which the State will seek concessions from the in-state tribes when negotiating gaming compact renewals, tax compacts, and local community jurisdictional agreements. The State will ask the in-state tribe why it won't be as reasonable as the out-of-state tribes who are willing to relinquish their sovereignty in exchange for the right to operate a casino.

If the "carrot" approach does not work for the developer, the developer typically raises the specter of land claims litigation as a "stick" to compel the state to negotiate with the tribe for a casino. In fact, there seem to be a handful of developers who have created a new business model that relies on tribes with existing or potential land claims as a means to establish lucrative casinos in geographically attractive locations.

So far, none of the out-of-state Indian tribes has obtained the necessary approvals to establish the casinos they are seeking. If even one of these deals is approved, however, the floodgates for this kind of reservation shopping will open throughout the United States. There will be no legal rationale to prohibit other tribes from establishing casinos in far away states, and developers will seek casinos for potentially dozens of other tribes throughout the United States and even Canada. There are many tribes that assert land claims to land formerly occupied by ancestors of tribal members. Other tribes would undoubtedly be encouraged to assert such claims as a route to casino riches. Given that most tribes in the west previously migrated from lands in the east, it will not be difficult for them to contrive some nexus to lands situated in the eastern part of the United States—especially in areas that are potentially lucrative casino sites.

In the meantime, the activities of these developers and out-of-state tribes create uncertainty for states and local communities, and undermine the ability of in-state Indian nations to defend their homelands and sovereign rights.

Consequently, in early 2003, USET was the first Native American organization to adopt a resolution raising concerns with the encroachment of out-of-state tribes on lands on which they have no recognized jurisdiction. The resolution called on Congress to oppose the efforts of these so-called "out-of-state tribes" to establish casinos in different states.[4] A copy of this Resolution is attached.

This year, USET again adopted a resolution opposing reservation shopping.[5] A copy of this Resolution is attached. The Resolution includes the following admonition to Congress:

> Resolved that the USET Board of Directors calls upon the United States Congress to enact legislation that would prohibit, and oppose any legislation that would allow, individual Indian Nations or Tribes from establishing a reservation, acquiring trust land or exercising governmental jurisdiction in a state other than the state where they are currently located or at a remote location to which they have no aboriginal connection....[6]

In order that the Committee understands the extent of this kind of reservation shopping across the country, the following is a summary of what we know is happening in at least twelve different states.

**Colorado**

Cheyenne-Arapahoe Tribes of Oklahoma: In 2004, the consolidated Cheyenne-Arapahoe Tribes filed a 27 million acre land claim with the Department of Interior, claiming all of Denver and Colorado Springs. In exchange for dropping

[4] *Illegal Gaming by the Seneca-Cayuga Tribe of Oklahoma in the State of New York*, USET, Inc. Res. No. 2003:057, Feb. 6, 2003
[5] *Reservation Shopping*, USET, Inc. Res. No. 2005:022, Feb. 10, 2005
[6] *Id.*

the claims, the Cheyenne-Arapahoe Tribes have proposed to develop a Las Vegas-style gaming facility near the Denver Airport. This proposal has met opposition from the state and federal representatives of Colorado. In late 2003, a developer sought to purchase 500 acres east of Denver, near the Denver International Airport, to create a reservation for the tribes.[7]

**Georgia**

Kialegee Tribal Town of Oklahoma: The tribe sought to move to Hancock County, Georgia to establish a casino and entertainment project. County officials were interested in the plan, because of extreme poverty in the county, but the previous Governor was opposed to casino gaming. The tribe also sought land in Texas and other parts of Georgia in the past.[8]

**Illinois**

Miami Tribe of Oklahoma: The tribe is seeking 2.6 million acres in east-central Illinois based upon a treaty from the 1800s. The tribe sued landowners in 2000, and dropped the lawsuit in 2002. The tribe has indicated it would agree to a casino in exchange for dropping the claim.[9]

Ho-Chunk Nation of Wisconsin: The tribe is seeking to build the largest casino in Illinois, which would be located in the Chicago suburb of Lynwood. There is strong opposition from the community, but the plan has been supported by Congressman Jesse Jackson, Jr. (D-IL). The proposed casino would be located approximately 296 miles from the tribe's current reservation.[10]

Prairie Band Potawatomi Nation of Kansas: The tribe has sought a gaming compact with the Governor, which prompted the State's legislature to pass legislation that would require the Governor to get approval from the General Assembly before signing a deal with any Native American tribe. The Governor vetoed the bill, but the veto was overridden and has gone into law. The tribe was seeking land outside of Chicago for a casino.[11]

**Indiana**

Miami Tribe of Oklahoma: The tribe is negotiating with the state to put a casino in Gary, Indiana. The tribe has negotiated with the mayor of Gary since 2002. The tribe unsuccessfully attempted to place a casino in Terre Haute, Ind. as well. The proposed casino would be located approximately 610 miles from the tribe's current reservations.[12]

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[7] "Owens to denounce casino," *The Denver Post*, August 29, 2004; "Indians' leveraged efforts for casinos reach beyond Colo.," *The Denver Post*, August 16, 2004

[8] "Kialegee gamble on casino bid," *The Tulsa World*, November 14, 1999

[9] "Johnson testifies on Hill; Bill centers on tribal land disputes," *The Pantagraph*, May 9, 2002

[10] "Village opposes Lynwood casino," *Chicago Tribune*, November 19, 2004; "Weller will battle Ho-Chunk proposal," *Chicago Tribune*, August 28, 2004.

[11] "Indian gaming law takes effect," *The Daily Chronicle*, November 20, 2004.

[12] "Tribe wins step in fight for N.Y. casino," *The Daily Oklahoman*, November 16, 2004; "Midwest Tribes See Big Payoffs in the East," *The New York Times*, March 24, 2003; "...the Oklahoma-based tribe, which

**Kansas**

Delaware Tribe of Oklahoma: The tribe signed with a California-based developer to help secure gaming rights near Kansas City, Kansas. A land claim is pending.[13]

Miami Tribe of Oklahoma: The tribe attempted to open a casino in Kansas in 1999, but the plan was rejected by the federal government.[14]

Wyandotte Tribe of Oklahoma: The tribe expressed interest in opening a casino in Edwardsville, KS, and U.S. Congressman Dennis Moore (D-KS) introduced legislation in 2002 to allow the casino. The Governor has expressed reservations with this plan.[15]

**Maryland**

Delaware Nation of Oklahoma: The tribe agreed to take over land in Anne Arundel County to create a landfill, run by a local development company. The tribe expressed interest in the land for establishing a high stakes bingo parlor, and if slots are approved by the state, offering those as well.[16]

**New Jersey**

Delaware Tribe of Oklahoma; Delaware Nation of Oklahoma: The two tribes (which are separate entities recognized by the federal government) attempted to open a casino in 1999 in Wildwood, New Jersey, but state and local officials opposed the plan.[17]

**New Mexico**

Fort Sill Apache Tribe of Oklahoma: The tribe is considering building a casino in southern New Mexico, and might oppose plans by an in-state tribe, the Jemez Pueblo to build in the area as well.[18]

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has been negotiating to open a casino in northern Indiana, recently declared that the tribe has a legal claim to 100 percent of the land in [5] counties." "An obvious ploy," *South Bend Tribune*, July 2, 2002.

[13] "Delaware Indian tribes face long odds to win gambling effort," Newsday.com article, May 15, 2003.

[14] "Tribe aims for casino deal," *The Pantagraph*, Jan. 12, 2003.

[15] "Sebelius not sure she'll support tribal gambling plan," *Associated Press*, Jan. 25, 2003.

[16] "[Halle Cos.] has agreed to pay an Oklahoma-based Indian tribe as much as $1.4 million a year to take over the land and to apply to make it tribal property...To make its case to the [BIA], the tribe presented its history, including evidence of its ancestral ties to Maryland." "Surprising Ally Joins Landfill Quest; Thwarted Developer Would Make Indian Tribe Owner of Arundel Site," *The Washington Post*, November 1, 2004.

[17] Newsday.com article, "Delaware Indian tribes face long odds to win gambling effort," AP, May 15, 2003; Philly.com article, "2 Okla. tribes seek fortune in Penna.," *Philadelphia Inquirer*, July 7, 2003

[18] "Local tribes unable to play," *Las Cruces Sun-News*, November 14, 2004 "[Tribal chairman] Houser said it is his hope the Fort Sill Apaches can return to New Mexico under an act of Congress that would grant land to the tribe as compensation for the U.S. government's past acts." (Source: "Okla. Apaches Seek to Build N.M. Casino," *Albuquerque Journal*, November 7, 2004.)

**New York**

Stockbridge-Munsee Tribe of Wisconsin: This tribe has offered to settle a land claim with the state in exchange for a casino in New York. The tribe has signed with a developer to build one of the planned Indian casinos in the Catskills. A Federal court is poised to drop the tribe's land claim against the state because it is not supported by the Federal Government. After years of opposing any governmental presence in New York by an out-of-state tribe, Governor Pataki agreed to give the tribe the right to establish a Las Vegas-style facility in the Catskills. On April 15, 2005, however, Governor Pataki withdrew his proposed legislation before the New York Legislature to approve the settlement agreement.[19] Nevertheless, the Stockbridge-Munsee Tribe of Wisconsin continues to push for a settlement that would include establishing a casino in New York.

Seneca-Cayuga Tribe of Oklahoma: The Seneca-Cayuga Tribe of Oklahoma purchased land in New York and declared its intention to build and operate an Indian gaming facility more than 1,100 miles from its reservation in Oklahoma. The Indian tribe claims that it has sovereign authority over these newly acquired lands, which if it were true, would provide the tribe with the right to engage in high-stakes bingo without obtaining approval from the federal government or the State of New York.

The Seneca-Cayuga Tribe asserts that its participation in the land claim litigation involving the Cayuga Nation and the State of New York provides it with political jurisdiction over land in New York. Governor Pataki announced a settlement agreement with the Seneca-Cayuga on November 12, 2004, allowing the tribe to establish a Las Vegas-style gaming facility in the Catskills. On April 15, 2005, however, Governor Pataki withdrew his proposed legislation before the New York Legislature to approve the settlement agreement.[20] Nevertheless, the tribe continues to push for a settlement that would include establishing a casino in New York.

Oneida Tribe of Wisconsin: This tribe is a party to a land claim suit with the Oneida Nation of New York and the Oneida of the Thames Band. On December 7, 2004, the Governor announced an agreement with the tribe that will allow them to establish a Las Vegas-style gaming facility in the Catskills in exchange for the tribe dropping their land claim. On April 15, 2005, however, Governor Pataki withdrew his proposed legislation before the New York Legislature to approve the settlement agreement.[21] Nevertheless, the tribe continues to push for a settlement that would include establishing a casino in New York.

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[19] "*Pataki Withdraws Five Casino Bill*," *GlobeSt.com*, April 26, 2005
[20] *Id.*
[21] *Id.*

**Ohio**

Eastern Shawnee Tribe of Oklahoma: The tribe is preparing a 4 million acre land claim suit and is seeking to build anywhere from five to seven casino resorts in Ohio. Additionally, Allen County (OH) commissioners turned down a proposal by the tribe to take out an option on county-owned land for a casino. The tribe has a contract to buy 150 acres in Monroe (OH) and plans to approach state officials in December or January. The tribe would need to enter into a compact with the state for the casinos.[22]

**Pennsylvania**

Delaware Tribe of Oklahoma; Delaware Nation of Oklahoma: These two tribes declared a claim on 315 acres of land in Pennsylvania near Allentown after their plans for a casino on the New Jersey shore failed. The tribes are seeking to build a casino in exchange for dropping their claims. Governor Rendell has so far refused to negotiate with the tribes for a casino.[23]

**Texas**

Delaware Tribe of Oklahoma; Delaware Nation of Oklahoma: In addition to casino plans in New Jersey and Pennsylvania, these two tribes have attempted to build a travel plaza in Texas.[24]

Kialegee Tribal Town: Attempted to establish lands and gaming in Texas, but were rejected.[25]

The above-referenced activities are opposed by the majority of Indian nations, including the 24 member-nations of USET. Consequently, we strongly urge the Committee to consider legislation that would address these reservation shopping activities by clarifying that Indian tribes cannot cross state lines to establish casinos in states where they are not currently located. As you know, in the House of Representatives, Chairman Pombo is considering legislation that would prevent an Indian nation from migrating across state lines to establish a casino. In addition, the Committee may want to consider amending IGRA to ensure that deals between developers and tribes are subject to federal scrutiny.

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[22] "Indians' leveraged efforts for casinos reach beyond Colo.," *The Denver Post*, August 16, 2004; "Allen County, Ohio, leaders turn down offer from tribe on casino," *The Lima News*, November 12, 2004; "Monroe gets look at casino proposal," *The Cincinnati Enquirer*, November 11, 2004

[23] "2 Okla. tribes seek fortune in Penna.," *Philadelphia Inquirer*, July 7, 2003; "...two Delaware Indian tribes from Oklahoma want to reclaim 315 acres in the Lehigh Valley that they say were stolen from their Pennsylvania ancestors 200 years ago...Stephen A. Cozen, the Philadelphia lawyer representing the tribes, said the group is prepared to file a federal lawsuit to reclaim the land and pursue gaming unless they can reach an agreement with [Governor] Rendell to open a casino." (Source: "Indians seek N.E. Pennsylvania land for casino," *Philly.com* article, May 15, 2003.

[24] Newsday.com article, "Delaware Indian tribes face long odds to win gambling effort," *Associated Press*, May 15, 2003

[25] "Kialegee gamble on casino bid," *The Tulsa World*, November 14, 1999)

Department of Interior Secretary Gale Norton recently noted that, "[t]ribes are increasingly seeking to develop gaming facilities in areas far from their reservations, focusing on selecting a location based on market potential rather than exercising governmental jurisdiction on existing Indian lands."[26] If tribes are permitted to conduct gaming in different states far away from their recognized reservations, Secretary Norton's concerns will have been fully realized. There is no precedent for these kinds of activities, and if allowed to continue, it will usher in a new era of "portable sovereignty" across the country.

We appreciate the opportunity to submit written testimony to the Committee, and we look forward to working with the Committee as it considers legislation to amend IGRA.

[26] Letter from Department of Interior Secretary Gale Norton to New York Governor George Pataki, Nov. 12, 2002, at 2.

**STATEMENT OF THOMAS B. HEFFELFINGER**
**UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA**

**Committee on Indian Affairs**
**U.S. Senate**

**April 27, 2005**

**"Federal Law Enforcement in Indian Gaming"**

Chairman McCain, Vice Chairman Dorgan, and Members of the Committee, I am Thomas B. Heffelfinger. I am the United States Attorney for the District of Minnesota. I am also the Chairman of the Native American Issues Subcommittee of the Attorney General's Advisory Committee. The membership of the Native American Issues Subcommittee (NAIS) consists of United States Attorneys from across the country whose offices enforce federal law within Indian Country in their districts.[1] The NAIS helps develop effective law enforcement policies for the Department of Justice in Indian Country. It is an honor to appear before you today to discuss the issue of federal law enforcement and Indian gaming.

Statutory and Regulatory Background

In the 1970s and 1980s, some federally recognized tribes and state governments developed an interest in gaming as an additional source of income. As a result, conflict arose when states attempted to regulate tribal gaming. The Indian Gaming Regulatory

[1] "Indian country" is the legal term used to describe reservations and other lands set aside for Indian use, such as Indian allotments, and lands held in trust for Indians or Indian tribes. 18 U.S.C. § 1151.

Act was enacted by Congress in 1988 shortly after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon,* the Court invalidated the State of California's regulation of Indian bingo on the ground that such regulation was civil rather than criminal in nature and therefore was not authorized by Public Law 280. 18 U.S.C. § 1162(a). As a practical result of *Cabazon*, Indian tribes were free to offer gaming on tribal lands subject only to federal prohibitions and regulation, or state criminal prohibitions. Although Congress had been considering bills to regulate Indian gaming for several years, *Cabazon* left something of a regulatory vacuum that made the issue of Indian gaming regulation more pressing and resulted in the passage of IGRA. The IGRA defines the regulatory relationship between federal, state and tribal governments when gaming operations are sponsored by tribes.

Pursuant to IGRA, federal regulatory authority is exercised by the National Indian Gaming Commission (NIGC). The NIGC's primary mission is to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences; to ensure that Indian tribes are the primary beneficiaries of gaming revenue; and to assure that gaming is conducted fairly and honestly by both operators and players. The IGRA's purpose is to promote tribal economic development, self-sufficiency, and strong tribal governments through a statutory framework for tribal gaming.

Today, the IGRA and regulations promulgated by the NIGC pursuant to IGRA are the primary law governing gaming in Indian country. IGRA provides a statutory basis for the gaming operations of Indian Tribes. The IGRA also gives the FBI federal criminal jurisdiction over acts directly related to casino gaming establishments, including those located on reservations under state criminal jurisdiction. The Johnson Act criminally prohibits among other things the transportation and operation of all gambling devices, including slot machines, in Indian Country absent the existence of an approved Tribal-State compact.15 U.S.C. §§ 1171-1178.

Total revenues related to the Indian gaming industry have grown from approximately $100 million in 1988 to more than $16 billion in 2004, with projections for significant continued growth. According to the NIGC, there are approximately 400 Indian gaming operations currently operating in 28 states within the United States. The top five states, by number of Indian casinos or bingo halls are California, Oklahoma, Washington, Arizona, and Minnesota.

The IGRA establishes three classes of gaming. Class I gaming includes traditional Indian gaming and social games for prizes of a minimal value, and is regulated solely by the tribe. Gaming defined as Class II can be regulated by the tribe if the state allows any such gaming and the National Indian Gaming Commission approves the tribe's gaming ordinance. Class II games include bingo, whether or not electronic computer or other technological aids used in connection therewith, and other games similar to bingo such as

pull-tabs, lotto, punch boards, tip jars, and instant bingo, if in the same location. Class III gaming includes anything not classified as Class I or Class II and is often referred to as casino-style gaming.

The IGRA allows for compacting between state and tribal governments to permit the highest level of Class III gambling within a state. In order for a tribe to sponsor Class III gaming operations, the tribal gaming facility must be located within a state permitting such gaming, enter into a compact with the state approved by the Secretary of the Interior, and adopt an ordinance pertaining to gambling approved by the Commission of the NIGC.

There has been considerable litigation regarding tribal gaming enterprises stemming from the need to classify certain types of games as either Class II or Class III. In its administrative enforcement actions against uncompacted Class III gaming, the NIGC makes classification determinations regarding the types of games being offered. It is the Department of Justice's position that whether machine gaming is characterized as Class II or Class III, the Johnson Act prohibits the gambling devices absent a Tribal-State compact. It is also the Department's position that the IGRA intended a clear distinction between Class III games that require a compact and Class II gaming which does not. Manufacturers of gaming equipment have attempted to use creative engineering to blur the line between these two classes.

DOJ INDIAN COUNTRY DEDICATED PERSONNEL AND COMPONENTS

The United States Constitution, treaties, federal statutes, executive orders, and court decisions establish and define the unique legal and political relationship that exists between the United States and Indian tribes. On September 23, 2004, President Bush re-affirmed the longstanding policy of the United States to work with federally-recognized tribes on a government-to-government basis and to support and respect tribal sovereignty and self-determination for tribal governments. The Office of Tribal Justice is the entity within the Department of Justice which serves to coordinate activities pursuant to this relationship within the Department, and between the Department and outside entities. Federal law vests the Department of Justice with primary jurisdiction over most felonies that occur on Indian lands.[2] The Federal Bureau of Investigation (FBI) and the United States Attorneys' Offices are the federal law enforcement agencies responsible for investigating and prosecuting felony crimes that occur in Indian country.

A variety of FBI sub-programs and seven federal agencies have varying degrees of interests in the enforcement and/or regulation of the Indian gaming industry. To coordinate these various interests and to better use investigative resources in Indian gaming cases, the Indian Gaming Working Group (IGWG) was created by FBI's Indian Country-Special Jurisdiction Unit. The Indian Gaming Working Group's purpose is to identify resources through a multi-agency, multi-program approach to address the most

[2] 18 U.S.C. §§ 1152, 1153.

pressing criminal violations in Indian gaming. This group consists of representatives from the FBI, the United States Attorneys' Offices, the Department of Interior Office of Inspector General, the National Indian Gaming Commission (NIGC), Internal Revenue Service-Office of Indian Tribal Governments, the Treasury Department's FINCEN, and the Bureau of Indian Affairs-Office of Law Enforcement Services.

The Indian Gaming Working Group met several times during FY2003, and since early FY2004 and into FY2005 it utilizes monthly conference calls to address Indian Gaming matters which have national significance. The Indian Gaming Working Group is currently providing analysts, financial assistance, functional area expertise, and coordination assistance in cases deemed to have a significant impact on Indian communities and/or the Indian gaming industry.

LAW ENFORCEMENT AND PROSECUTOR TRAINING

The FBI's Indian Country-Special Jurisdiction Unit has offered regional training conferences during FY 2004 and FY2005 on the topic of Indian Gaming in Groton, Connecticut; San Diego, California; and Oklahoma City, Oklahoma. The purpose of such regional conferences is to encourage establishment of local working groups. Recent regional conferences, held earlier this year, have already resulted in the formation of local Indian working groups in Oklahoma, which has scheduled its first meeting in May, and in Arizona. A local Indian Gaming Working Group had previously been established in Minnesota.

The Criminal Investigative Division of the FBI sent a communication to all field offices in February 2004 to provide information on the Indian gaming industry, further define the FBI's roles and responsibilities in respect to Indian gaming, provide recommended actions so that its divisions can quickly identify and apply resources to criminal activity impacting the Indian gaming industry, and provide information on how to obtain resources via the Indian Gaming Working Group.

Current investigations impacting the Indian gaming industry involve primarily internal theft or embezzlement of proceeds derived from Indian gaming. Some investigations, however, involve potential organized crime, public corruption, financial institution fraud, criminal enterprises involved in cheating scams, and tribes operating illegal gambling enterprises.

In September 2003, the NAIS held a three-day summit of federal, state and tribal agencies engaged in Indian gaming regulation and enforcement. As a result of this summit, its experience and discussions with federal law enforcement in the context of tribal gaming, the NAIS has developed the following "Best Practices" for United States Attorney's Offices. Each United States Attorney's Office with Indian Country jurisdiction should consider :

- outreach to and consultation with their respective state gaming regulator and the tribal gaming operators and tribal governments conducting gaming in his or her District;

- designating one or more Assistant United States Attorneys (AUSAs) to be responsible for enforcement of federal laws related to Indian gaming and for coordination with other federal, state and tribal organizations responsible for Indian gaming issues;
- training for AUSAs, agency counsel, and investigators on issues related to Indian gaming;
- for crimes committed in or against Indian casinos, tribal enterprises, or tribal organizations, being flexible when considering the prosecution of theft cases with loss amounts lower than what the Office would typically accept, because the federal government has a unique relationship with Indian gaming operations arising from the government's trust relationship with Native American tribes and Congress' passage of the IGRA. Cases which have a "significant impact" on tribal organizations and enterprises, including gaming operations, should be considered for prosecution despite lower loss thresholds in order to facilitate prosecution and deterrence;
- as a general policy, actively supporting the activities of the Indian Gaming Working Group established by the FBI, Department of Interior - Office of Inspector General, and the NIGC. The Indian Gaming Working Group focuses on criminal cases with a national impact, including any cases that

might involve public corruption and nationally significant crimes which could arise from gambling activities on Indian reservations;.

- establishing an Indian Gaming Task Force to investigate criminal cases with a local impact. Such coordination activity will significantly increase the flow of information between national and local investigators and prosecutors;
- as a general policy, supporting the development of a national information sharing system and/or cooperation arrangements either by the NIGC and/or the industry, *e.g.* the National Indian Gaming Association. Such information sharing and national cooperation is essential to having effective background investigations and internal/criminal investigations.
- supporting the development and implementation of refined data collection and case-tracking within the Department of Justice for capturing Indian gaming statistics.

Conclusion

The Department of Justice is making important strides in prosecution of crimes arising from gaming on Indian reservations. As with most law enforcement efforts, limitations exist due to lack of resources. However, the creation of the IGWG has allowed the efficient coordination of law enforcement resources among a number of federal agencies. The degree of inter-agency cooperation, however, as evidenced by the IGWG, and the local "best practices" evidences the Department's commitment to this effort.

Thank you for the opportunity to address the Committee. I look forward to answering any questions you may have.

**Senate Committee on Indian Affairs**
**Questions For the Record**
**Hearing of April 27, 2005**
**"Federal Law Enforcement in Indian Gaming"**

**Response of U.S. Attorney for the District of Minnesota**
**Thomas B. Heffelfinger to Questions from Senator McCain**

**Question 1. You raise the issue of the distinction between Class II and Class III gaming. There has been considerable litigation over the issue of whether IGRA intended the Johnson Act to apply to Class II bingo and pull-tab games, and the courts have uniformly found the IGRA did not intend for the Johnson Act to apply to bingo and pull-tab games.**

> **Is it the Department's position that the mere use of electronics in playing bingo, triggers the Johnson Act? Should a lawful activity be turned unlawful merely because electronics can make it easier to play?**
>
> **The NIGC informs me that they, as the primary Federal regulator of Indian gaming, are working on regulations to distinguish legitimate Class II games from Class III games. Does the DOJ support these efforts? If not, why?**

**Response:** The Department of Justice and the National Indian Gaming Commission (NIGC) agree that a lack of clarity and a climate of uncertainty exist in the context of Class II/Class III classification. The Department of Justice maintains its position that the IGRA did not repeal the Johnson Act's prohibition on the use of Johnson Act gambling devices within Indian Country for Class II gaming. We continue to believe, based upon our reading of the statutes and the legislative history, that when Congress enacted the IGRA, Congress did not intend to permit the use of Johnson Act gambling devices in uncompacted Class II gaming. The federal statutes have not changed and we maintain this position, notwithstanding the current split in the decisions among the Circuit Courts of Appeals.[1]

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[1]There is a split among the Circuit Courts of Appeals as to whether the IGRA repealed the Johnson Act's prohibition on the use of gambling devices in Indian country for class II gaming using technological aids. In United States v. Santee Sioux Tribe of Oklahoma, 324 F.3d 607 (8th Cir. 2003), the Eighth Circuit held that the IGRA did not repeal the Johnson Act with respect to Class II gaming, thus holding that the use of Johnson Act gambling devices as technological aids to uncompacted Class II gaming was prohibited. The court then went on to find that the machine at issue was not a gambling device as that term is defined by the Johnson Act. In contrast, the Tenth Circuit in Seneca-Cayuga Tribe of Oklahoma v. NIGC, 327 F.3d 1019 (10th Cir. 2003) and United States v. 162 MegaMania Gambling Devices, 231 F.3d 712 (10th Cir. 2000), the Ninth Circuit in United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000), and the District of Columbia Circuit in Diamond

The Department's position is consistent with IGRA's provision for the use of technological aids in Class II gaming. As IGRA provides, technological aids may be used in connection with Class II gaming. The mere use of electronics, computers, telecommunications equipment, etc., in order to make the play of bingo easier and to broaden participation is generally allowed so long as the aid does not fall within the Johnson Act's definition of a gambling device as set forth in 15 U.S.C. § 1171. It is important to note that many of the machines currently being used as technological aids are far more than "mere electronics" and in fact constitute Johnson Act gambling devices that are virtually indistinguishable from the high-speed slot machines used in compacted Class III gaming.

Both the NIGC and the Department of Justice agree there is now uncertainty as to what constitutes permissible Class II versus Class III gaming under the IGRA. This uncertainty stems in large part from technological and design enhancements to Class II gambling devices developed by the device manufacturers. As a result, from the perspective of the player, the distinction between Class II and Class III games has become blurred. The Department of Justice has had several meetings with the National Indian Gaming Commission about this issue. The Department believes that there is a need for regulations that draw a bright line between Class II and Class III gaming consistent with applicable statutes, including the Johnson Act and IGRA. We support the NIGC's efforts to clarify what constitutes Class II gaming. As stated above, the Department's position is that current federal law prohibits machines constituting Johnson Act gambling devices to be used as technologic aids to class II gaming. In contrast, the proposed current draft NIGC regulations would permit the use of such machines in Class II gaming which would be inconsistent with current federal law.

The Department and the NIGC agree that the distinction between Class II and Class III gaming must be clear. We are working together to consider ways to accomplish this end, including the potential adoption of appropriate legislation and supporting regulations.

**Question 2. The DOJ has reported to Congress numerous times over the years, that there has been no systemic infiltration of organized crime into Indian gaming. Yet news reports indicate that recently several tribal Off-Tack Betting Parlors were somehow involved in a nationwide syndicate that was laundering money through tracks in New York and other states.**

> **Has organized crime become a bigger concern for Indian gaming? Will the Indian Gaming Working Group be able and committed to preventing this type of thing from happening again?**

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Games Enterprises v. Reno, 230 F. 3d 365 (D.C. Cir. 2000), found that the IGRA did permit the use of gambling devices as technologic aids. The Supreme Court's denial of certiorari on this issue in the Santee Sioux and Seneca Cayuga cases did not resolve this issue.

**Response.** Since the passage of IGRA in 1988, the potential for infiltration of organized crime into Indian gaming has been a consistent concern of the Department of Justice. To date, no evidence of systematic infiltration of organized crime into the Indian gaming industry has been discovered. The apparent absence of elements of organized crime in Indian gaming is attributable in part to tribal, federal and state oversight and in large part to the strong proprietary interest that tribes and tribal members have in their gaming operations.

Nevertheless, the potential for infiltration of organized crime into Indian gaming is very real. This is particularly true in parts of the country in which tribal casinos are located in or near areas where elements of organized crime are known to have a physical presence. In addition, the very nature of gambling generally, and Indian gaming specifically, has generated concerns about possible infiltration by criminal elements, including organized crime. For example, when tribes are initially developing casinos, they often have no experience managing them. Similarly, tribes frequently lack the financial resources to finance the initial development or subsequent expansion of casinos. Both situations cause the tribes to turn to outsiders for management or financial assistance, which can leave them vulnerable to criminal infiltration. In addition, the casino industry is a people industry reliant upon large numbers of employees, such as dealers, cash room attendants and security personnel, all of whom are vulnerable to outside influences from criminal elements and the temptation of large amounts of cash. The rapid expansion of Indian gaming has meant that the pool of trained and experienced casino employees nationally is much smaller than the demand. This only increases the risk of casino employees succumbing to outside influence or temptation. The Department's concerns are also heightened by the fact that Indian casinos, like all casinos, deal in large amounts of cash and are therefore always potential conduits for money laundering. Sophisticated means of electronic communications such as the internet have only increased our concerns as tribal casinos, even in remote areas, can unwittingly be influenced, infiltrated or impacted by organized crime. The Indian Gaming Working Group (IGWG) has been and will continue to be fully committed to investigating, prosecuting and preventing organized criminal activity in Indian gaming.

**Since its inception, how many cases have been investigated by the Indian Gaming Working Group?**

**Response.** Since its inception, the Indian Gaming Working Group has investigated sixteen cases. This number of cases is not limited to organized crime investigations; it includes public corruption, fraud, and other violations of federal law. The cases are investigated by one or more IGWG member agencies and are brought to the IGWG for expertise, coordination or resource assistance. Further, the investigations addressed through the IGWG are only those cases deemed to have "national significance" by virtue of their complexity, scope or sensitivity within the Indian Gaming community. As such, this number does not include cases which are being investigated by one or more of the IGWG member agencies on a state or local level and have not been referred to the IGWG.

**Question 3. I have been told that there is a lack of consistency with which Indian gaming tribes refer suspicious activity to federal law enforcement authorities for investigation. Some tribes rely on their in-house security, while others rely on their tribal police departments and still others rely on their Commissioners.**

**How often do Indian tribes operating casinos make suspicious activity referrals to federal law enforcement and prosecution agencies?**

**Response.** There are numerous ways in which Indian gaming tribes can refer suspicious activity or criminal activity to law enforcement authorities and there is no national consistency in how such reports are referred. For example, referrals can be made directly to the local FBI office or U.S. Attorneys' office; to the regional offices of the NIGC or the Department of Interior Office of Inspector General; or to state gaming regulators pursuant to the terms of a compact; or to state law enforcement officials in P.L. 280 states. As a result of this lack of consistent means for reporting, there is no way to accurately report the number of suspicious or criminal activity referrals being made by Indian gaming tribes. The statistics which are available, though, understate the number of actual referrals. For example, over the last three years (2002 - 2004), Indian casinos have submitted 1,594 Suspicious Activity Reports (SARS) to the U.S. Department of Treasury. Last year (2004), the FBI opened more than 50 investigations nationally under 18 U.S.C. § 1167 (theft from gaming establishments on Indian lands). Many, but not all, of these investigations were initiated as a result of a referral from an Indian tribe. During 2003, the U.S. Attorneys' offices collectively prosecuted 18 cases (23 defendants) under 18 U.S.C. §§ 1167 and 1168. In 2004, those same offices prosecuted 21 cases (30 defendants) for the same violations. Again, many, but not all, of these prosecutions were the result of referrals from Indian gaming operators.

**What is the biggest obstacle to investigating and the successful prosecution of federal theft of gaming revenue cases?**

**Response**. In light of the almost $20 billion size of the Indian gaming industry, the number of trained and experienced federal regulators, investigators and prosecutors capable of responding to reported federal crime is inadequate. This inadequacy is ever more apparent when compared with the state regulators, investigators and prosecutors dedicated to gaming-related crime in gaming states like Nevada or New Jersey. The IGWG, the Native American Issues Subcommittee within the Department of Justice and the NIGC have all worked cooperatively to reduce the inadequacy in terms of training and available resources. Nevertheless, the lack of resources is a major obstacle to successful investigation and prosecution.

Based on industry experience (Indian and non-Indian gaming), the reported incidence of criminal activity related to Indian gaming operations is significantly lower than one would expect. This is either the result of failure to detect criminal activity or failure to report such activity to appropriate law enforcement authorities. Either situation presents an obstacle to investigation and prosecution. Through

outreach to tribal gaming operators, training and adjustments to prosecutorial "best practices," the Department has attempted to reduce this gap. Nevertheless, the need to increase criminal referrals remains.

The ability to successfully investigate and prosecute crimes occurring in Indian gaming operations is almost entirely dependent upon the quality of evidence developed at the casino itself; e.g., surveillance videos, internal audit reports, internal investigation reports. Throughout the industry there is significant inconsistency in the quality of such self-protection operations and the resulting evidence. This inconsistency impacts the quality and quantity of criminal referrals from tribal gaming operators. There appears to be a direct relationship between the profitability of a tribal gaming operation and the sophistication of its surveillance, internal audit and internal investigation operations. Although the Minimum Internal Control Standards promulgated by the NIGC have helped standardize the operations, national inconsistencies are a continuing obstacle to effective investigation and prosecution.

**PHILIP N. HOGEN**
**CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION**

**BEFORE THE**
**SENATE COMMITTEE ON INDIAN AFFAIRS**

**April 27, 2005**

Good morning Chairman McCain, Vice-Chairman Dorgan, Members of the Committee and Staff. My name is Philip Hogen. I am the Chairman of the National Indian Gaming Commission ("NIGC") and a member of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation in South Dakota. Seated with me today are Commissioners Nelson Westrin, a former Executive Director of the Michigan Gaming Control Board, and Cloyce "Chuck" Choney, a member of the Comanche Nation of Oklahoma and former Special Agent for the Federal Bureau of Investigation.

I'm very pleased to bring you a report of the activities of the NIGC and its efforts to fulfill the role assigned it under the Indian Gaming Regulatory Act ("IGRA"), and to address the concerns that Congress expressed in IGRA regarding the operation and regulation of gaming on Indian lands.

In general, the health of the Indian gaming industry provides profits and opportunities for economic growth in Indian country. There continues to be a steady increase in the revenues generated by over 400 tribal gaming operations, operated by more than 225 gaming tribes in 28 states. While only some gaming tribes have become wealthy, tribes that conduct gaming are able to provide jobs to run the operations and governmental programs with the revenues generated. These revenues fund tribal programs, strengthen tribal governments, promote and diversify economic development on those tribes' reservations, and address many needs that were not addressed before the advent of Indian gaming. Certainly, Indian gaming has not resolved all of the economic challenges in Indian country, but I believe it has been the most effective tool that tribes

nationwide have yet employed to seek, and in a number of cases achieve, self-sufficiency, and, of course, to promote self-determination and strengthen tribal sovereignty.

Like all other market-oriented enterprises, Indian gaming has been, and will continue to be, most successful in those areas where there is ready access to population centers and where the market for gaming opportunities has not been saturated. Unfortunately, many tribes are located remotely from such markets and likely will never be able to rely on gaming for economic development in a large way.

One of the keys to the significant success Indian gaming has enjoyed has been the perception, and the reality, of adequate regulation. This regulation is first and foremost provided by the tribes themselves by way of their tribal gaming commissions and gaming authorities. Where tribes have entered into compacts for Class III gaming with the states in which they are located, regulatory tasks have been shared, to one degree or another, by the state governments with whom the tribes have compacted. There is great diversity with respect to the extent of the states' roles, and it is difficult to generalize with respect to the extent and nature of states' regulatory involvement in tribal gaming. Suffice it to say, many tribal-state compacts provide for very limited state regulatory involvement regarding Class III tribal gaming.

The economic miracle that Indian gaming became for many tribes in the late 20th century, and continues to be as we enter the 21st century, is rightfully attributed to the initiative, creativity and resourcefulness of the gaming tribes. It might be said that this success was achieved in spite of restrictions which IGRA imposes. But no small part of this success is attributable to the fact that Indian gaming was required to be, and is, thoroughly regulated. In particular, IGRA's direction to the NIGC to provide federal regulatory oversight and to develop, promulgate and administer federal standards significantly contributed to that regulatory effort and the related success of Indian gaming. I don't mean to assert that Indian gaming is successful solely because of the NIGC's regulatory role, but I don't think it can be fairly said that its success was achieved in spite of the NIGC's regulatory role.

Under IGRA, the NIGC was tasked with providing an oversight regulatory role, and the Commission continues to strive to effectively provide that oversight and not be more intrusive than necessary. We strive to be efficient and avoid duplicating regulation that the tribes, and in some cases the states, already adequately provide. In particular, where the tribes and states have agreed to specific regulatory standards in their compact, we defer to the compacted standards. However, where the compact is silent, we have followed Congress' direction to promulgate and implement minimum federal internal control standards necessary to ensure adequate regulation and control and to carry out the provisions of the Act and accomplish its purposes.

**RESOURCES FOR FEDERAL OVERSIGHT OF TRIBAL GAMING**

As you know, the NIGC has not received an appropriation of tax payers' dollars to fund its operations since 1998. Rather, the NIGC's operations are funded solely by the fees, authorized under IGRA, assessed on the tribes' gaming revenues. As authorized by the Interior Appropriation Act of the 108th Congress, the amount of fees the NIGC may assess and collect may not exceed $12 million annually. While the industry has grown, and the needs of the NIGC for resources to provide oversight have similarly grown, the NIGC was able to fund its role with an expenditure of $10.4 million in 2004 (calendar year), and contemplates that it will be able to adequately fund oversight of the growing industry in 2005 and 2006 within its current $12 million assessment cap.

A general breakdown of the NIGC's past and projected expenditures is set forth in the following table:

## NIGC EXPENDITURES

(in 000's)

| | Actual 2004 | Preliminary 2005 |
|---|---|---|
| Compensation | 7,014 | 8,100 |
| Travel | 612 | 700 |
| Occupancy | 893 | 900 |
| Computer | 500 | 100 |
| Services & Printing | 1,257 | 1,100 |
| Supplies | 378 | 300 |
| Total Expenses | $10,654 | $11,200 |

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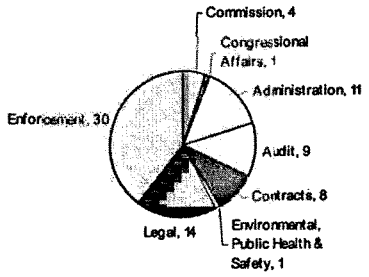
The NIGC, like most regulatory agencies, expends most of its budget to compensate its personnel. There are currently 78 individuals employed by the NIGC. The breakdown of personnel is as follows:

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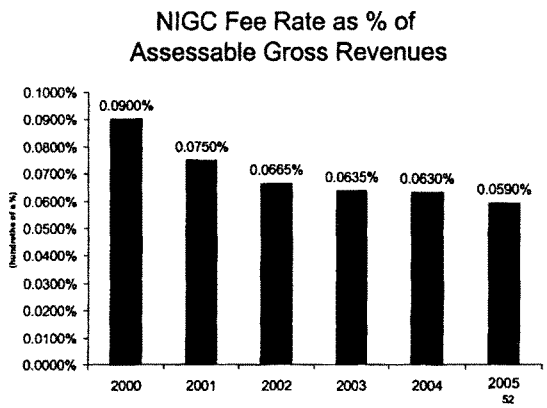
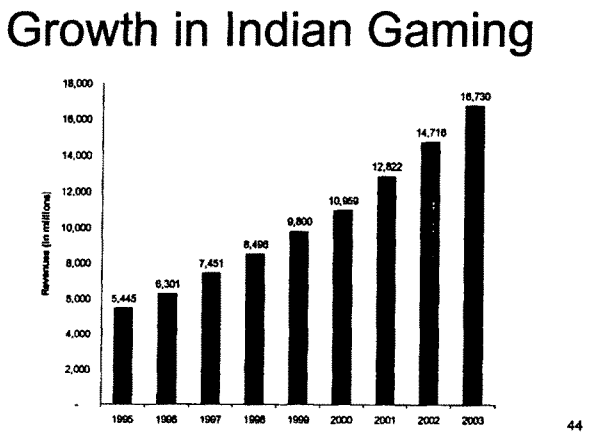
The rate for the fee assessments is established annually by the NIGC, based upon aggregate tribal gaming revenues nationwide. The NIGC has established a preliminary assessment rate of .059% to fund the current year's operations, based on 2004 tribal gaming revenues. A final rate will be established after all 2005 revenues are calculated.

The following chart demonstrates the rate the NIGC has assessed tribes in years past:




The declining rate has been made possible by the fact that tribal gaming revenues continue to grow at a healthy and steady pace. The following table reflects the growth of gaming revenues in the last several years.



**CHALLENGES TO NIGC OVERSIGHT**

There will always be a dynamic tension between the regulator and the regulated community, and this is and has been true of the NIGC and the Indian gaming community. It is my perception that there is a growing feeling among some gaming tribes that the yoke of federal oversight, as structured in IGRA, ought to be thrown off, and I am concerned about this trend. Tribes should and do stand up for their sovereignty, and they should resist unmerited intrusions into their affairs. As Indian gaming is now successfully conducted, however, it is within the carefully crafted framework established by IGRA. If this structure becomes unbalanced, the success it has enjoyed is placed at risk. A manifestation of this trend, in my view, would be widespread tribal support for current litigation which challenges application of the NIGC's Minimum Internal Control Standards to Class III gaming activities. In my experience, the Minimum Internal Control Standards have been the single most comprehensive and effective tool the NIGC has developed to ensure consistent quality operation and regulation of gaming activity on Indian lands, and, of course, the vast majority of tribal gaming activity and revenues occur within Class III gaming. Similarly, tribal resistance to NIGC efforts to clarify the distinction between Class II gaming, which does not require tribal-state compacts, and Class III gaming, which does, is another manifestation of this trend, and does not, in my view, bode well for the continued success of the carefully crafted regulatory structure Congress established for Indian gaming.

The NIGC is currently a defendant in an action entitled *Colorado River Indian Tribes vs. Hogen*, pending in U.S. District Court for the District of Columbia, wherein the Colorado River Indian Tribes raise challenges to the application of the NIGC's Minimum Internal Control Standards to the Tribes' Class III gaming operations. The Tribes assert that while the NIGC may have a role with respect to Class II gaming activities, Class III gaming is governed solely by the tribal-state compact the Tribes negotiated with the State of Arizona.

If the Tribes prevail, and the holding is applied throughout the Indian gaming industry, the NIGC's oversight regulatory role would be severely curtailed. In my

opinion, if this were to happen, a vacuum with respect to tribal gaming regulation would be reasonably perceived and cause the states, and perhaps Congress, to step in to fill the void and create a more onerous regulatory structure than presently exists. This I believe would be contrary to tribes' best interests.

The NIGC currently plays a vital and effective role with respect to oversight of all commercial tribal gaming – Class II and Class III. The use and application of its Minimum Internal Control Standards is one of the primary tools utilized in carrying out this important federal oversight role. The Indian gaming industry and the NIGC will await and watch with interest developments in this litigation. Should the NIGC's Minimum Internal Control Standards be held inapplicable to Class III gaming, the NIGC will ask this Committee to consider and support legislation to restore and clarify that authority, as originally suggested in S1529, which was introduced in the 108th Congress.

**CHALLENGES TO NIGC'S REGULATORY ROLE**

Among the difficult decisions the NIGC confronts daily is how to distinguish Class II games played with computer, electronic and other technologic aids, which do not require tribal-state compacts, and Class III slot machines and electronic facsimiles of games of chance, which do require tribal-state compacts. Dramatic strides have been made in technology with respect to gaming activities since the enactment of IGRA in 1988. Electronic player stations, linked to central computer servers, have been developed and utilized in the play of games Congress identified as Class II, such as bingo and pull-tabs. These electronic player stations, and the servers to which they are attached, automate the play of bingo. The player stations display bingo cards electronically on video screens. The server draws numbers in batches or groups, and the player stations allow players to "daub" matching numbers on their cards all at once, with the press of a button or touch of the video screen. Often, the player stations add entertaining video displays. After the numbers are drawn and marked, and winning bingo patters are determined, the player stations display equivalent winning (and losing) results in the form of video slots machine reels, poker hands, or even horse races. Payment of bingo

happens right at the player station, either electronically or in the form of a ticket or voucher.

The Johnson Act (15 U.S.C. §§ 1171-1178) broadly defines and prohibits the use and possession of gambling devices in Indian country. IGRA provides that Johnson Act gambling devices may be used in Indian country under tribal-state compacts. IGRA further provides, however, that Class II games may be played with the use of computers, electronic, and other technologic aids. Thus, the question arises: does the Johnson Act prohibit the use and possession of a gambling device in Indian country, if the device is a permissible technologic aid to the operation and play of Class II gaming under IGRA?

Several courts that have addressed this question have disagreed with the position of the United States that the Johnson Act's prohibitions against the use and possession of gambling devices apply to Class II. Nonetheless, there are limitations to what the courts that have addressed this issue have said about the extent of permissible Class II gaming. A myth has developed in this area that there are few limitations on the use of such equipment. In fact, the circuit court opinions that have been rendered are really relatively narrow, and, for the most part, confine themselves to the characteristics of the gaming machines presented in those cases. The United States government recently petitioned the United States Supreme Court to review two of these decisions, but the Supreme Court declined to undertake that review. Consequently, there has been difficulty in enforcing the Johnson Act, and, there has been less restraint on tribes or gaming equipment manufacturers from moving in the direction of Class II games that resemble slot machines more and more.

When the NIGC encounters gaming equipment that it perceives as going beyond electronic aids to the play of bingo, or pull-tabs being played without the benefit of a Class III compact, we ask tribes to discontinue such play or obtain the necessary tribal-state compacts to authorize that play. There has been considerable voluntary compliance by tribes, but that has not been universal. Consequently, the NIGC has been forced to take enforcement action in a number of instances, several of which resulted in the closure

of tribal gaming facilities and the imposition of fines on tribes amounting to millions of dollars.

The NIGC has also been asked, on a regular basis, to issue advisory opinions with respect to various electronic player stations and related equipment intended for use as technologic aids in the play of Class II games. In a number of instances, the NIGC has opined that such equipment, if played as represented, would constitute permissible Class II gaming aids. Other opinions have found the purported Class II aids to be Class III facsimiles or slot machines. These opinions were not final or official NIGC actions, but were merely advisory in nature. They have taken weeks, months, and, in some cases, years to prepare, and, in many instances, were obsolete when issued, since the equipment to which they applied was no longer being used.

Hence, a great need currently exists to bring clarity to the distinction between Class II technologic aids and Class III electronic facsimiles and slot machines. This line has become blurred, by advances in technology. This lack of clarity, as well as different views on the applicability of the Johnson Act to legitimate Class II technologic aids, undermines the regulatory structure that Congress established for Class II and Class III Indian gaming in IGRA.

Recognizing the seriousness of the problem, the NIGC embarked upon an effort to clarify these issues by consulting with tribes and by assembling a joint federal-tribal advisory committee, which includes tribal gaming experts nominated by the gaming tribes. The NIGC attempted to be as transparent as possible in this effort, formulating drafts of proposed classification and technical standards, publishing those drafts on its website, and asking for, receiving and reviewing tribal comments on those drafts. The latest manifestation of this effort was the publication of the NIGC's fourth draft of proposed Class II electronic game classification standards on January 7, 2005, and the second draft of its proposed Class II game technical standards on February 2, 2005.

An action was initiated in U.S. District Court in the District of Columbia in March of 2005, seeking to enjoin this effort on the basis that the use of a tribal advisory committee violated the Federal Advisory Committee Act. The Confederated Salish and Kootenai Tribes and the Santa Rosa Rancheria sought a temporary restraining order, although that request was denied. Litigation continues, and the relief those tribes seek includes suspension of the NIGC's current rulemaking effort and a requirement that the NIGC start over again on the regulations. .

The NIGC submits that its draft regulations would bring clarity to the issue. The NIGC has carefully studied the legislative history of IGRA, as well as the court opinions that have addressed these issues. The NIGC sincerely wants to draft regulations that will permit tribal use of computers and electronic technologic aids in the play of Class II games, yet not transgress the limits established by the IGRA. That is, the regulations should not be used as a pretext to permit the play of Class III electronic facsimiles of games of chance or slot machines without a tribal-state compact.

I firmly believe that Congress, in the passage of IGRA, intended that a difference was to exist between equipment used to aid the play of Class II games and gaming that requires tribal-state compacts. I further believe that Congress intended that this distinction be more than an arcane mathematical difference in the algorithm contained within a computer chip in an electronic player station or linked computer server for the play of bingo, and the algorithm in the computer chip that operates a slot machine. I believe that Congress understood that the bingo it described in IGRA was a competitive game actively played among participating players. I believe that it included language permitting the use of computer, electronic and other technologic aids to the play of Class II games to enhance that competitive participation, but also intended that these technologic aids were to be distinguished from computerized electronic gaming machines that automatically perform all, or nearly all, of the functions required in the game.

I am trying to implement and administer a set of regulations that will be consistent with the intent underlying IGRA. I believe that if tribes attempt to find a "loophole" in

IGRA, where Class II gaming equipment so closely parallels Class III facsimiles and slot machines, then the carefully crafted regulatory structure of IGRA will disintegrate. In the end, the advantageous position that tribes have negotiated under the Class III compact structure, which has afforded them exclusivity with respects to gaming opportunities in some cases and market advantages in others, will be destroyed, as states move to permit non-Indian enterprises to expand and compete with tribes, and, perhaps, saturate gaming markets where tribes currently enjoy advantages. Such gaming proliferation would not further the stated purposes of IGRA nor inure to the benefit of tribes and tribal members who desperately need continued economic development opportunities. The NIGC soon will need to determine its course with respect to the regulations it has under consideration.

The NIGC stands very ready to receive any guidance this Committee might have to offer, and if the Committee perceives the NIGC's perceptions of the Class II/Class III structure intended in IGRA to be inapposite, the NIGC would greatly benefit from the Committee's view in this connection. This important issue remains one of the NIGC's principal challenges in the days ahead, and, if and when resolution comes to this matter, the industry will be well served.

As referenced above, the NIGC's Minimum Internal Control Standards continue to be one of the NIGC's most effective tools in strengthening regulation throughout Indian gaming and permitting the NIGC to adequately fulfill its oversight rule. Just as technological advances mandate constant vigilance in the area of game classification, technological advances mandate continuous review and modernization of the Minimum Internal Control Standards. To this end, the NIGC has formed a tribal advisory committee, has periodically reviewed its MICS, and has published in the Federal Register two sets of proposed changes to enhance those internal control standards. This will be an ongoing effort.

**STRENGTHS AND WEAKNESSES IN IGRA'S STRUCTURE**

The NIGC's inspectors and auditors, working from five regional offices, four satellite offices, and the NIGC headquarters in Washington, D.C., have maintained a continual oversight presence at tribal gaming facilities throughout the country. Most of what the NIGC's inspections and audits have observed and disclosed have been the positive operational and regulatory efforts of tribal governments, acting both independently, and in the case of Class III gaming, together with state participation to ensure adequate regulation of tribal gaming enterprises. In many instances, however, regulatory weaknesses, and instances of risk and loss to tribal gaming revenues, assets and the integrity of tribal gaming, have been identified. While many tribes have developed and implemented sophisticated and effective regulatory structures and controls, and invested large sums of money and other resources for regulation of their gaming operations, many others have not.

On one hand, as the result of our oversight efforts, the NIGC can report to the Committee numerous examples of tribes doing an outstanding job of ensuring the integrity of their gaming operations. Under their authority as primary regulators, tribes regularly deny licenses to unsuitable employees and to unsuitable vendors who have sold illegal machines or engaged in questionable business practices; remove individuals managing their gaming operations without NIGC approved management contracts; detect and report suspected criminal activities to the appropriate law enforcement agencies; and develop and implement internal controls that equal, and often surpass, those in place in non-Indian casinos. The overwhelming, majority of tribes also do an excellent job of ensuring that the gaming revenues from their operations are used for the purposes authorized under IGRA.

On the other hand, NIGC oversight regularly uncovers serious breakdowns in regulation at Class II and Class III tribal gaming operations throughout the country, even where apparent adequate tribal regulation and control is in place. Examples of instances where tribal gaming operational and regulatory efforts have been found deficient include the following:

During the course of investigations and Minimum Internal Control compliance audits, NIGC investigators and auditors discovered that an extraordinary amount of money was flowing through two off-track betting (OTB) operations on two reservations. The amount of money was so high in comparison to the amount that could reasonably flow through such OTB operations that our investigators immediately suspected money laundering or similar activities. These two operations were the first referrals to the FBI's working group in which we participate. The FBI investigations found that they were part of a widespread network of such operations off reservation as well, with organized crime links and several federal criminal law violations. Unfortunately, the tribes' gaming management allowed them to gain access and operate as part of their Class III tribal gaming operations, and the tribes' gaming regulators completely failed to take any action against these illegal OTB operations.

There are also examples where tribes continued to operate, without modification or correction, a gaming facility that had long been identified as a serious fire hazard; permitted gaming activities to be conducted by companies owned by individuals with known criminal associations; distributed large amounts of gaming revenues without requisite approved revenue allocation plans or the financial controls necessary to account for them; knowingly operated gaming machines that were plainly illegal; and appointed gaming commissioners and regulatory employees, and licensed and employed gaming employees whose criminal histories indicated that they were unsuitable and serious risks to the tribes' gaming enterprise. An accurate assessment of Indian gaming regulation must also reflect the unfortunate examples of tribes that are so politically divided that they are unable to adequately regulate their gaming activities, as well as instances where tribal officials have personally benefited from gaming revenues at the expense of the tribe itself. In addition, there have been many instances where apparent conflicts of interest have undermined the integrity and effectiveness of tribal gaming regulation. In all of these troubling situations, it was necessary for the NIGC to step in to address the problems.

The NIGC continues to address a number of Indian land questions. To approve a management contract, to approve site-specific tribal ordinances and to exercise our authority over Indian gaming, we must first decide whether the lands are Indian lands on which the tribe may conduct gaming. Many gaming operations do not present any real issue. Those are generally tribal operations conducted on lands within the tribes' reservations, trust lands acquired prior to October of 1988, or trust lands in Oklahoma within the tribes' former reservations. Other Indian land questions can be far more complex and require ethnohistorical research and extensive legal analysis. These complex questions are where we focus our resources. We do so by coordinating with the Department of the Interior, which also has an interest in our conclusions.

Finally, as the Committee reviews these issues, we encourage you to consider the proposed technical amendments to IGRA that were submitted to the President of the Senate on March 23, 2005. Those proposed amendments would standardize the NIGC's background investigation responsibilities so that Class III management contractors receive the same level of scrutiny that the NIGC exercises over Class II contractors; clarify the NIGC's authority; authorize the NIGC to pursue actions against individuals; require that tribal gaming commissioners and commission employees be subject to background investigations; and allow the NIGC's fee cap to fluctuate with expansion or contraction in the size of the industry.

We appreciate the time and attention that the Chairman and Committee are devoting to Indian gaming. If we can be of any assistance or answer any questions, do not hesitate to ask.

June 3, 2005

The Honorable John McCain, Chairman
Senate Committee on Indian Affairs
638 Hart Senate Office Building
Washington, DC 200510

Dear Chairman McCain:

The National Indian Gaming Commission (NIGC) would like to thank you for your leadership as Chairman of the Senate Committee on Indian Affairs. We would also thank you for holding the Committee hearing on April 27, 2005 to hear witnesses discuss the oversight of Indian gaming.

We are in receipt of your letter dated May 19, 2005 which contained several questions regarding Indian gaming including our oversight role and responsibilities. We would like to provide answers to the questions in that correspondence.

Question #1:

*In 2003, you stated to this Committee that, "with the current number of auditors, it would take us well over 30 years to get around to auditing the internal controls of each tribal gaming operation."*

*a) Have you been able to hire more auditors? Do you have an estimate of how long it will take you to "get around" to each tribal gaming operation?*

*b) What does the NIGC do to ensure that gaming revenues are being used for the purposes specified in IGRA?*

Yes. The Audit Division now has 8 members – the Director and 7 auditors – and 2 vacant auditor positions for which we are recruiting. This is up from 4 members in 2002, a Director and 3 auditors (and two auditor vacancies).

The NIGC believes, however, that it needs an additional five positions so that the Audit Division would have a Director, a Senior Auditor, a financial analyst, and twelve field auditors. Those numbers would allow us to confirm fee payments to the

NATIONAL HEADQUARTERS 1441 L St. NW, Suite 9100, Washington, DC 20005 Tel: 202.632.7003 Fax: 202.632.7066 WWW.NIGC.GOV
REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

NIGC, evaluate tribal casino internal audit processes, examine any accounting functions deemed by the external accountant to be inconsistent with Generally Accepted Accounting Principles, and perform comprehensive compliance audits of the gaming operation's internal control systems, an auditing process consistent with that performed by the established gaming jurisdictions such as the State of Nevada.

Even at that staffing level, however, the NIGC could only perform 15 comprehensive compliance audits per year – that would result in testing approximately $1.5 billion in gross gaming revenue – and 25 examinations of fee payments, audit processes, and accounting functions: 40 gaming properties in all, out of a total of some 400. It would take approximately 10 years, by that math, to review every tribal gaming operation. Conceivably, it could take longer if we do not add auditors beyond the proposed additional five. As a practical matter, in addition to the functions listed above, auditors also play a supporting role in the NIGC's enforcement efforts, providing financial analyses as part of ongoing investigations.

All of that said, tribes are the primary regulators of Indian gaming, and many tribes regulate excellently. That fact, together with analysis of the tribes' required audited financial statements and CPA testing of internal control systems for indicators of noncompliance, allows the NIGC to target oversight where it is most needed.

This year, the NIGC provided a bulletin to the leadership of each gaming tribe entitled, "Use of Net Gaming Revenue." It outlines the proper uses of net gaming revenue as required by IGRA, provides detailed examples of permissible and impermissible uses of such revenues, and explains when tribes must enact and distribute revenues in accordance with a revenue allocation plan.

The NIGC, through its inspectors, looks to see if tribes are complying with their revenue allocation plans. When it appears they do not, the NIGC investigates further. If that reveals noncompliance, we first seek compliance through dialogue with tribal leadership that points out specific deficiencies of the particular tribe's use of gaming revenue and the requirements of IGRA. If dialogue fails, the NIGC possesses the authority to undertake enforcement actions against tribes for uses of gaming revenue not in compliance with IGRA. Such action may result in civil fines and/or closure of the tribal gaming facilities.

Despite all of this, there is no systematic monitoring of tribes' compliance with approved revenue allocation plans or their use of net gaming revenues by Interior or the NIGC. IGRA does not specifically provide a mechanism to monitor distributions of net gaming revenue, either for purposes of revenue allocation plans or to ensure that such distributions comply with the uses set forth in the statute. This could be fixed legislatively by mandating that all gaming tribes submit an annual financial certification to the NIGC and Interior, detailing all gaming revenue earned and itemizing all specific distributions and expenditures of it.

Question #2:

*You have indicated that IGRA does not give the Commission the tools for preventing outside investors or other unsuitable individuals from victimizing tribes, but instead you are forced to punish the tribes.*

*a) What does the NIGC do to make sure tribes are the primary beneficiaries of their gaming activities?*

*b) Can you tell us, specifically, what tools you would recommend to address this problem?*

To assure that tribes are the primary beneficiaries of their gaming activities, the NIGC takes several approaches. We review management and other contracts, monitor the accounting and expenditures of gaming revenues, and, when all else fails, take formal enforcement actions against tribes or managers that are not following the requirements of IGRA.

The NIGC, through the management contract review and approval process, assures that the tribe receives no less than 60% of the net revenues of the gaming operation and that the management contractor receives no more than 40%, and significantly less in most cases. Class II management contractors are also subject to a suitability determination by the NIGC which includes a background investigation of the contractor and its principals.

The NIGC also seeks a voluntary submission of other contracts such as consulting, developing and lending contracts to determine whether the contracts are management contracts and therefore subject to Commission approval. As outlined in my February 1, 2005, letter to you, we also review such contracts to determine whether the contract grants a proprietary interest in the tribes' gaming operations. As contractors and tribes have become aware of this review, we have seen a tremendous financial savings to the tribes.

The NIGC, through its enforcement process, identifies those situations where entities are managing a gaming operation without an approved contract or misusing gaming revenues. Generally, the NIGC first seeks voluntary corrective actions but may take formal enforcement action. Enforcement action can include the closure of gaming operation or a civil fine assessment.

Subjecting non-management contractors to stricter scrutiny is one way to address the issue. A cash business such as gaming can draw in individuals who are not concerned with the best interests of the Indian tribes. With that in mind, on March 23, 2005, we submitted to the President of the Senate and Speaker of the House proposed technical amendments to IGRA. One provision would authorize the Commission to pursue enforcement actions directly against individuals instead of just against tribes or

operators, as is the case now. Another suggestion is to require suitability determinations of some of the non-management contractors – such as consultants, lenders or vendors.

It has been further suggested that a worthwhile purpose would be served by NIGC conducting background investigations and issuing certificates of suitability which tribes might utilize, or not, as they saw fit, with respect to firms that offer particular products or services to the Indian gaming community, or those who do business with the Indian gaming community in excess of a specified dollar amount. An advantage that this process would afford the Indian gaming industry is that a thorough background investigation would be conducted by an entity well equipped to do so (the NIGC), and those national or multi-national vendors that meet the criteria specified, would only need to complete such a process annually, rather than repeating it in each tribal jurisdiction where they are doing business. Such an arrangement could permit tribes to honor the NIGC's finding of suitability, or to include it with other criteria they may specify, or to ignore it and do their own determinations.

As a practical matter, IGRA requires tribes to conduct background investigations of its primary management and key employees. These investigations are facilitated by the NIGC and some states by serving as the conduit for FBI criminal history and fingerprint checks because many tribal gaming jurisdictions do not have access to FBI criminal histories and fingerprint databases. Further, some tribes do not have the resources to do thorough background investigations on multinational gaming entities. Consequently, an NIGC suitability determination might provide greater security for tribal entities and more efficiency for providers of services and funding for tribal gaming.

Any expansion of NIGC's responsibility to make suitability determinations with respect to those engaging in Indian gaming would need to include an arrangement to fund or pay for that process. In most other gaming jurisdictions, and in IGRA with respect to suitability determinations for management contractors, the applicants reimburse the regulators for the cost of performing the determinations. Further, any such arrangement would need to provide for the periodic updating or renewal of the suitability determinations, during the period of time the applicants continue to participate in the Indian gaming industry.

Question #3:

*The tribes state that over $290 million is spent annually on Indian gaming regulation between their efforts and the efforts of states. They have raised concerns about the duplication of regulation activities.*

*a) Are there circumstances where the NIGC might be unnecessarily duplicating the efforts of tribal gaming commissions, or similar state regulatory efforts, required through tribal-state gaming compacts?*

*b) Do you have concerns regarding the level and effectiveness of state regulatory involvement?*

It is the policy of the NIGC to avoid duplication of effort whenever possible. For example, where tribes are required to submit employee background information to both the state and the NIGC, it is NIGC's policy to negotiate to eliminate the duplication of the submitted information. To the maximum extent possible, the NIGC relies on information submitted to the state, rather than requiring the tribe to submit the same information to both entities. Similarly, in discharging its oversight responsibilities, the NIGC attempts to identify those aspects of a gaming operation which the tribe and/or the state are effectively regulating, so that the NIGC can focus its resources and attention on compliance areas which are not otherwise adequately being addressed.

The regulation being performed by tribes and states differs significantly from operation to operation. The NIGC recognizes that the tribe is the primary regulator of its gaming operations and, accordingly, the tribe is given the first opportunity to address regulatory violations within its own facilities. Where the tribe is unable to effectively correct a particular compliance problem, the NIGC attempts to do so consistent with its authority under the IGRA.

Some, but not all, states have broad regulatory authorities under their tribal-state compacts. Where such states develop effective regulatory programs, the need for NIGC oversight is greatly reduced. For example, in states where the tribal-state compacts call for regular state oversight, institute technical standards and testing protocols for gaming machines and establish internal control requirements, the NIGC's oversight role will be minimal. Some states, however, have assumed a minimal regulatory role. Further, some compacts establish ineffective remedies for major violations. Consequently, under circumstances where the states do not have a significant regulatory presence, the NIGC must undertake a range of compliance activities which often severely strain its resources.

Question #4:

*In some of the testimony submitted the issue of tribes converting non-gaming trust lands into gaming purposes is raised.*

*Do you review the appropriateness of the land used for gaming when approving the opening of a casino? If so, what review process do you conduct?*

Except for gaming conducted with an approved management contract, IGRA does not require Commission approval before an operation may be opened. A tribe may conduct gaming if it has an approved tribal ordinance, an approved tribal-state compact for Class III, and meets the other requirements of IGRA. While a tribe must have an ordinance approved by the Chairman, these ordinances are not generally site specific and are usually in place years before gaming is actually conducted.

Furthermore, except for gaming conducted with a management contract, IGRA does not require that a tribe notify the NIGC before it plans to game on a specific parcel. Consequently, there are instances where tribes do establish gaming operations without first notifying the Commission.

The extent of the problem of conversion of non-gaming trust lands into gaming lands may be overstated. There are approximately 400 separate Indian gaming operations with some opening and closing each year. Most of the parcels that constitute conversions from non-gaming use to gaming use, off of a reservation, arise in Oklahoma. Section 2719 of IGRA generally prohibits gaming on lands acquired into trust after October of 1988. Oklahoma Indian lands often fall within an exception that allows gaming on lands within a tribe's former Oklahoma reserve regardless of when the land was acquired into trust.

We are reviewing other trust land use conversions and other proposed gaming operations. We do so by first contacting the tribe, the State Attorney General, and the Office of the Solicitor in the Department of the Interior, and asking for any information or analysis that might assist in our analysis. If the Tribe bases its analysis on the restored lands exception to Section 2719, we ask for an expert's report on the historical relationship between the tribe and the lands on which it plans to conduct gaming. The Office of the General Counsel then consults with the Office of the Solicitor before it issues an advisory opinion on the status of the lands.

These opinions tend to be lengthy and complex, and we do not have the resources to issue opinions on every operation. Consequently, the NIGC has focused its resources on the Indian lands questions when there is doubt about the legality of gaming conducted on a particular parcel, or when we have a management contract pending approval.

Question #5:

*As the primary Federal regulator of Indian gaming, are you confident that the NIGC can develop regulations that provide a meaningful distinction between the Class II bingo electronic aids and Class III slot machines?*

The Indian Gaming Regulatory Act includes general definitions of Class II gaming, which may be conducted by tribes without a tribal-state compact, and Class III gaming (generally all gaming not otherwise falling into Class I or Class II as defined by IGRA, and specifically including electronically or electronic facsimiles of any game of chance or slot machine of any kind,) which only may be performed in accordance with tribal-state compacts. However, these definitions lack the precision with which to readily identify where one class stops and anther begins.

The National Indian Gaming Commission has grappled with this issue for some time. Its efforts to achieve greater clarity in this respect have included issuing Notices of Violation and Closure Orders and the imposition of fines totaling millions of dollars

against tribes who utilized Class III devices without the benefit of tribal-state compacts, as well as first adopting, and then revising regulations with respect to the definitions of the classes of gaming. Further, the Commission has issued a series of "Advisory Opinions" which have attempted to identify particular devices NIGC concluded fall within the definition of Class II gaming equipment.

Recognizing that there is a great need within the Indian gaming industry to provide clarity with respect to the distinction between Class II electronic and technologic aids and Class III electronic and electromechanical facsimiles of games of chance, NIGC assembled a tribal advisory committee and embarked upon a process to develop regulatory standards to clarify this distinction so that tribes and gaming equipment manufactures can build and utilize gaming equipment without fear of enforcement actions by the NIGC or the Department of Justice (DOJ). The DOJ has responsibility for enforcement of the Johnson Act (15 USC § 1171, et seq, which generally prohibits the use of "gambling devices" as described therein, in Indian country, without the benefit of an approved tribal-state Class III gaming compact).

The effort to promulgate classification standards, together with technical standards relating to requirements of computers and other technologic and electronic aids which may be used in connection with the play of Class II gaming, began in May 2004, and proceeded apace, with a goal of publishing proposed regulations earlier this Spring. However, the Department of Justice expressed concern that the Commission's approach would not comply with their view of Johnson Act. The Commission therefore deferred its publication of proposed rules to permit consultation with the Department of Justice, in an effort to resolve their disagreements. Those efforts are ongoing.

The National Indian Gaming Commission is the only agency in the Federal government whose sole mission focuses on Indian gaming activities, and it has developed considerable experience and expertise in the area. The National Indian Gaming Commission is fully confident that it can accurately construe what Congress has written in the Indian Gaming Regulatory Act, what it intended in that writing, and what the Federal courts have said with respect to the distinctions between Class II and Class III gaming and embody those distinction in fair, workable regulations. It is desirable that the standards that the Commission eventually promulgates in this connection be fully supported by the Department of Justice and that questions not linger with respect to a tribe's ability to utilize those technologic and electronic aids in the play of Class II activities, without fear of Johnson Act enforcement. Our efforts in this connection will continue and we are cautiously optimistic that this exercise will soon be completed and that the formal rule-making process will commence.

Question #6:

*The Committee has been investigating the activities of a lobbyist and a consultant who charged exorbitant fees to a number of gaming tribes.*

*a) Is payment of these fees permitted under IGRA?*

*b) Should IGRA be amended to address this or are these decisions properly left to tribal governments?*

We believe that payment of lobbying and consulting fees, to a certain extent, does fall within the permitted uses of IGRA and that we should be wary of being too intrusive into the governmental decision-making processes of the tribes. That said, we also believe there are some changes to IGRA that could assist in our regulation of these issues.

IGRA limits the use of gaming revenues to funding tribal government programs, providing for the general welfare of the tribe, promoting economic development, donating to charities and funding local governments. Generally, lobbying and consulting activities fall within the broad parameters of economic development. Certainly, the expertise that tribes have gained by being able to hire lobbyists and consultants has placed them on equal footing with other governments and organizations.

There are already laws in place to protect tribes from exorbitant fees, such as those laws designed to prevent fraud and theft. There is a point where a consultant's fees may cross the line where a consultant acquires an equity interest in the gaming operation. When this happens, the fees do run afoul of the IGRA which requires the tribe to have the sole proprietary interest in the gaming operation.

One suggestion that has merit to remedy those problems is to broaden the category of persons involved in gaming who are subject to suitability determinations. In addition, the Commission, in its March 23, 2005, proposed technical amendments to the IGRA, sought the authority to pursue actions against a broader range of individuals who violate IGRA.

Question #7:

*In written testimony, a former General Counsel at NIGC opines that NIGC should be given a larger role in conducting background checks and licensing of a broad range of people, not just "contractors" involved in Indian gaming operations. He also recommends, however, that Congress eliminate NIGC's role in regulating the economic aspects of agreements between Indian casinos and outside parties.*

*What do you think of these recommendations?*

We agree the NIGC should be given a larger role in conducting background checks and licensing of a broad range of people, not just "contractors" involved in Indian gaming operations.

However, we disagree with his characterization of what the NIGC does and the recommendation that Congress eliminate NIGC's role in regulating the economic aspects of agreements between Indian casinos and outside parties. In his testimony, he

characterized NIGC as "second guessing tribal decisions." To the contrary, the NIGC assures compliance with the law: Congress enacted limits on the percentage of revenues a management contractor can receive and provided the criteria for determining where in the range the percentage can fall. Congress also required that a tribe must have the sole proprietary interest in the gaming operation and be the primary beneficiary of its gaming. The argument to eliminate oversight can only benefit the contractors because the NIGC's oversight effectively reduces the percentage that contractors receive. Congress included the provision to protect the tribes, and the NIGC's actions are aimed at carrying out those provisions.

Question #8:

*The former General Counsel also writes that, with some exceptions, states have been largely absent from the regulation of tribal gaming.*

*Do you agree? What should be done about this?*

As we stated in our response to question number 3, some states do not have an extensive regulatory role in Indian gaming. It is not practical, however, to require states to regulate Indian gaming more than it already does. Consequently, clarifying and expanding NIGC's authority would assure oversight over the primary tribal regulators. Those amendments could include a requirement for suitability determinations for Class III management contractors, tribal gaming commissions and its employees, and gaming-related contractors; a resolution of the Johnson Act issue that plagues the distinction between Class II and III gaming; the issuance of NIGC regulations establishing Class II classification and technical standards; establishment of a Commission fee cap that fluctuates with the expansion or contraction of the size of the industry; a clarification of the Commission's Class III authority; authorization of the Commission to pursue actions against all individuals and entities that violate IGRA; and possibly other requirements that support effective tribal regulation of gaming.

Question #9:

*While Tribal self-regulation is the primary form of gaming regulation, the former General Counsel noted in his testimony that tribal gaming commissioners are not sufficiently independent of tribal governments and they run the risk of being "captured" by the regulated community.*

*Do you agree?*

Tribal regulation continues to be a very effective way to assure the adequate regulation of gaming. Gaming tribes are able to use the gaming revenues to support important governmental functions and provide opportunities to their members that were unheard of 20 years ago. Tribes have a very strong interest in assuring that their operations are adequately regulated.

Consequently, some tribes have gaming commissions supported by multimillion dollar budgets that employ highly experienced former regulators from Nevada and New Jersey or former law enforcement officers. These commissions, as well as many smaller commissions with very small budgets, have identified scams and cheats; refused to license unsuitable job applicants; removed vulnerable machines from play; as well as performing a multitude of other regulatory functions.

Nonetheless, some gaming commissions are not sufficiently independent of the tribal governments or the managers that operate the gaming operation. For example, it is not unheard of for the tribe's leadership to insert themselves as the controllers of the gaming operation with ready access to the cash cage. In one instance, the tribal leader was allegedly misusing revenues. The leader's relative headed the gaming commission and failed to take any action. In another instance, the tribe's gaming commission could not help but easily recognize what looked like money laundering through an OTB operation. The tribe was profiting tremendously from that operation however, and the gaming commission simply looked the other way. Additionally, commissions are reluctant to declare a questionable machine to be Class III rather than Class II because such a decision would reduce the tribe's revenue.

In this connection something may be learned from the history of the established gaming jurisdictions, particularly Nevada. The effectiveness of a gaming regulatory authority is realized over time and, in the case of the referenced state, the process evolved over a forty year period and is continuing to improve and respond to change. Only after creation of a separate regulatory authority solely devoted to the regulation of gaming did the reputation of the industry acquire an effective champion. Beginning in the late 70's, significant inroads were made into the identification and extraction of individuals and commercial entities intent upon exploitation and corruption. Although many factors contributed to the noted environment's ripeness for corruptive influences, one aspect functioned as a facilitator. Due to the rather deprived financial position of the state and local governments, the governmental agencies charged with regulatory oversight were also dependent, albeit desperate, for the potential revenues this growing industry might provide. From the Nevada experience, we can conclude an axiom that is exceedingly simplistic; as the government charged with regulation becomes increasingly dependent upon the profitability of the industry being regulated, the effectiveness of the regulatory effort may diminish.

Inherent to gaining an understanding of the regulator – operator relationship is the recognition that the overseers are motivated by a mission to safeguard the reputation of an industry; whereas, the operator is driven by a desire to maximize profits. These two objectives are not necessarily in sync, particularly in the short term. Generally accepted gaming regulatory standards would dictate that the function has certain key elements. Owners, operators and vendors are suitable to be involved in and associated with an industry as vulnerable as gaming and the interests of the public, investor and creditor are adequately protected. Relevant to the operation of a gaming enterprise, the regulatory authority will require internal controls be implemented to ensure the accurate recognition and recordation of financial data and safeguard the conduct of the gambling

games from compromise. Obviously, effective control systems have a cost and history has clearly revealed that, left to the discretion of the gaming operator, such system will be insufficient to protect the industry's reputation.

Generally, in tribal gaming, the tribal council is the ultimate governmental authority responsible for ensuring the gaming operation generates the greatest return on investment and that, in doing so, is effectively regulated. Such an organizational structure has challenges because the motivations lack congruity. Inevitably, from time to time, one objective may be foregone in pursuit of the other and, many times it is the oversight function. Although some tribes have recognized the organizational weakness and have installed procedures to counteract its effect, others have not and, as a result, the effectiveness of their regulatory processes is significantly diminished from that of the established gaming jurisdictions.

We appreciate the opportunity to engage in this sort of dialogue with you and your staff regarding Indian gaming. Again, thank you for your hard work and leadership as Chairman of the Senate Committee on Indian Affairs.

Please feel free to contact me with additional questions.

Sincerely,

Philip N. Hogen
Chairman

**Statement of**

**Kathryn R.L. Rand**
**University of North Dakota School of Law**
**Co-Directors, Institute for the Study of Tribal Gaming Law and Policy**

**and**

**Steven Andrew Light**
**University of North Dakota**
**Department of Political Science and Public Administration**

**Before the**

**United States Senate**
**Committee on Indian Affairs**

**April 27, 2005**

Good morning. We thank the Committee and its members for this opportunity to appear before you today to discuss an issue of great importance to this Committee and to American Indian tribes throughout the United States: the regulation of Indian gaming. My name is Kathryn Rand, and I am an associate professor and the Associate Dean for Academic Affairs at the University of North Dakota School of Law. With me is Steven Light, an assistant professor of political science and public administration at the University of North Dakota. We are the co-founders and co-directors of the Institute for the Study of Tribal Gaming Law and Policy, a component of the Northern Plains Indian Law Center at the University of North Dakota School of Law.

The Institute for the Study of Tribal Gaming Law and Policy provides legal and policy assistance related to tribal gaming enterprises to all interested governments and organizations, assists tribes with gaming enterprises in pursuing reservation economic development and building strong tribal governments, and contributes to the scholarly and practical research and literature in the area of tribal gaming. The Institute's primary focus is on the particular issues faced by tribes in the Great Plains, including North Dakota, South Dakota, Nebraska, Iowa, Kansas, Wyoming, and Montana. As the only university-affiliated research institute dedicated to the study of Indian gaming, the Institute offers an interdisciplinary perspective on tribal gaming, incorporating law, political science, and public administration.

Our testimony today is based on our research in the field of Indian gaming law and policy over the last nine years[1] and on short excerpts from two forthcoming books, Steven Andrew

[1] See Steven Andrew Light, Kathryn R.L. Rand, and Alan P. Meister, "Spreading the Wealth: Indian Gaming and Tribal-State Revenue-Sharing Agreements" *North Dakota Law Review* 80 (forthcoming 2005); Steven Andrew Light, "The Third Sovereign: Indian Gaming as a Teaching Case in Intergovernmental Relations and Public

Light and Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (Lawrence: University Press of Kansas, forthcoming Fall 2005), and Kathryn R.L. Rand and Steven Andrew Light, *Indian Gaming Law and Policy* (Durham: Carolina Academic Press, forthcoming Winter 2005/2006).

Our research suggests that discussions of Indian gaming regulation often overlook three important points: first, that there currently is an elaborate "web" of governmental agencies and regulatory authorities that administer the law and policy that applies to Indian gaming at three governmental levels, federal, state, and tribal; second, that criticism of Indian gaming regulation often focuses on tribal regulation but fails to take into account the unique status of tribes in the American political system; and third, that tribal regulation of Indian gaming plays a primary role in tribal government institution building, a necessary exercise of tribal sovereignty that serves tribal and federal interests in strong tribal governments as well as tribal self-sufficiency and self-determination. Our testimony today covers each of these points in detail. Finally, we suggest that any policy reform in the area of Indian gaming fundamentally should be based on accurate and complete information, informed by tribal opinions and interests, and guided by tribes' inherent right of self-determination.

**Government Regulation of Indian Gaming**

Tribal gaming is the only form of legalized gambling in the United States that is regulated at three governmental levels: under the federal Indian Gaming Regulatory Act of 1988 (IGRA), tribal, federal, and state agencies and actors determine the regulatory environment in which tribal gaming occurs. IGRA assigns regulatory authority over Indian gaming according to the type of gaming involved. Tribes maintain exclusive regulatory jurisdiction over Class I gaming, or traditional tribal social or ceremonial games of chance, while Class II bingo and other similar games fall under tribal regulatory jurisdiction with National Indian Gaming Commission (NIGC) oversight. Class III casino-style gaming requires both tribal regulation and a tribal-state compact, thus giving the state regulatory authority as well. The NIGC and the Secretary of the Interior also have regulatory roles regarding Class III gaming. Various other tribal, state, and federal agencies enforce applicable laws with regard to all three classes of gaming.

This regulatory web is designed to further Congress's overarching stated goals for Indian gaming: to promote tribal economic development, self-sufficiency, and strong tribal governments. Through IGRA, Congress also sought to provide a basis for the regulation of Indian gaming to prevent the infiltration of organized crime or other corrupting influences, to

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Administration," *Journal of Public Affairs Education* 10 (2004): 311-27; Steven Andrew Light and Kathryn R.L. Rand, "Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy," *Nevada Law Journal* 4 (2004): 262-84; Kathryn R.L. Rand, "There Are No Pequots on the Plains: Assessing the Success of Indian Gaming," *Chapman Law Review* 5 (2002): 47-86; Kathryn R.L. Rand, "At Odds? Perspectives on the Law and Politics of Indian Gaming," *Gaming Law Review* 5 (2001): 297-98; Steven A. Light and Kathryn R.L. Rand, "Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin," *Gaming Law Review* 5 (2001): 351-63; Kathryn R.L. Rand and Steven A. Light, "Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota," *Gaming Law Review* 5 (2001): 329-40; Kathryn R.L. Rand and Steven A. Light, "Do 'Fish and Chips' Mix? The Politics of Indian Gaming in Wisconsin," *Gaming Law Review* 2 (1998): 129-42; Kathryn R.L. Rand and Steven A. Light, "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity," *Virginia Journal of Social Policy and the Law* 4 (1997): 381-437.

assure honest and fair gaming, and to ensure a tribe is the primary beneficiary of its gaming enterprise. IGRA's policy goals created a regulatory environment for Indian gaming in which the exercise of government authority reflects a markedly different intent than does that for the regulation of commercial gaming, which primarily seeks to facilitate profit maximization and the minimized infiltration of organized crime. Although IGRA, too, expresses Congress's concern about organized crime, the regulatory foundation for Indian gaming was intended to further the goals of federal Indian policy and to improve reservation life. By fostering economic development and strengthening tribal governments, IGRA's regulatory scheme promotes healthy reservation communities and effective and culturally appropriate tribal institutional capacity building, the hallmarks of tribal sovereignty and tribal self-determination.

The multi-layered and complex regulatory web governing Indian gaming has many actors whose roles span numerous federal, tribal, and state agencies. Although regulation of Indian gaming sometimes is equated with the NIGC and its extensive authority, the web of regulatory authority involves a number of other federal agencies, actors, and resources, along with extensive tribal and state agencies, actors, and resources.

***Federal Agencies***

*Department of the Interior*

A number of the U.S. Department of the Interior's functions and responsibilities directly relate to Indian gaming. Under IGRA, only federally recognized tribes may conduct tribal gaming, and then only on federally defined Indian lands. The Interior Department, through its Bureau of Indian Affairs (BIA), administers the tribal recognition process and accordingly plays a fundamental role in controlling which groups qualify as acknowledged Indian tribes and thus may conduct gaming on their reservations. The Interior Secretary also has primary authority to take lands into trust for the benefit of tribes, and therefore has power to effect the acquisition of Indian lands under IGRA. Although IGRA generally prohibits gaming on lands acquired by a tribe after 1988, it allows for several exceptions, including when the Secretary determines that gaming on newly acquired lands is in the best interest of the tribe and its members, and would not be detrimental to the surrounding community. The Secretary's authority to formally recognize tribes and to place land in trust, and its determinations under IGRA's newly acquired lands exceptions, have become increasingly contentious political issues.

IGRA charges the Interior Secretary with other specific duties related to Indian gaming, including, for example, the authority to approve a tribe's plan for per capita distribution of gaming revenue. With regard to IGRA's compact requirement for Class III gaming, the Secretary has power to approve tribal-state compacts and to adopt an administrative "compact" when a state fails to negotiate in good faith.

Within the BIA is the Office of Indian Gaming Management (OIGM), charged with implementation of the responsibilities assigned by IGRA to the Interior Secretary. The OIGM develops policies and procedures for review and approval of tribal-state compacts, per capita distributions of gaming revenue, and requests to take land into trust for the purpose of

conducting gaming. The OIGM coordinates with the NIGC as well as state, local, and tribal governments.

*National Indian Gaming Commission*

Also located within the Interior Department, the NIGC is the federal agency empowered by IGRA to regulate Indian gaming. The Commission's three members are appointed by the president and the Interior Secretary. The NIGC has expansive authority to promulgate rules and regulations to implement IGRA. The Commission exercises wide-ranging oversight of tribal regulation of gaming operations, including its power to approve tribal regulatory ordinances and to oversee tribal licensing of key employees and management officials. Through its authority to close Indian gaming operations and to impose civil fines, the Commission is further empowered to enforce IGRA's provisions, federal regulations promulgated by the NIGC, and tribes' own gaming regulations, ordinances, and resolutions.

Despite its broad authority, the NIGC variously has been accused of being underfunded, understaffed, and underempowered to regulate tribal gaming. The Commission, some assert, has overlooked numerous regulatory problems and created opportunities for the possible infiltration of organized crime in some casino operations. It also has been accused of granting too much deference to inadequate tribal regulatory authorities or improperly serving as a guardian for tribal sovereignty more generally. Others see the Commission as overzealous, asserting that it uses its powers under IGRA to promulgate regulations that effectively remove or override tribal authority over Indian gaming and thus undercut tribal sovereignty. Still others simply see the Commission as lacking the resources necessary to be a fully effective regulatory authority.

*Department of Justice*

As the executive official charged with enforcing federal laws, the U.S. Attorney General plays a role in ensuring compliance with IGRA and other applicable federal laws related to gaming. The Attorney General heads the U.S. Department of Justice, which includes federal law enforcement agencies, such as the Federal Bureau of Investigation (FBI) and the nation's prosecutors, the U.S. Attorneys.

The FBI exercises federal jurisdiction in investigating criminal activity on tribal lands, including crimes related to Indian gaming. With the NIGC, the FBI created in 2003 the Indian Gaming Working Group, which reviews pending cases for "national importance," or significant impact on the tribal gaming industry, and coordinates federal resources in the investigation and prosecution of such cases.

Located in federal judicial districts in each state, the U.S. Attorneys serve as the principal prosecutors on behalf of the United States and at the direction of the Attorney General. Working in conjunction with federal law enforcement agencies, including the FBI, the U.S. Attorneys prosecute criminal and related cases involving Indian gaming. The U.S. Attorneys have power to initiate criminal prosecutions and forfeiture actions under IGRA's criminal provisions, the Johnson Act, and other federal statutes.

*Department of the Treasury*

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) regulates financial transactions and assists in investigation of money laundering under the federal Bank Secrecy Act. Tribal casinos, like commercial casinos, are subject to the Act's money-laundering controls, including recordkeeping and reporting requirements for large transactions. Besides FinCEN's regulatory role, the Internal Revenue Service (IRS) enforces civil regulations under the Bank Secrecy Act as well as federal tax laws and regulations that apply to tribal gaming operations. The Treasury Department's law enforcement agencies, including the Secret Service and the IRS's Criminal Investigation Division, coordinate with the U.S. Attorneys in bringing appropriate enforcement actions in federal court.

***Tribal Gaming Commissions***

Before a tribe may operate either Class II or Class III gaming, IGRA requires that the tribe adopt a gaming ordinance that must be approved by the NIGC Chair. The ordinance must address a number of issues, including the tribe's proprietary interest in and responsibility for gaming, use of gaming revenues, audits, vendor contracts, facility maintenance, and background checks and licensing. Typically, tribes create gaming commissions to implement the tribal gaming ordinance and to ensure compliance with IGRA, tribal-state compacts, and other relevant tribal and federal laws. A tribe's certificate of self-regulation issued by the NIGC under IGRA creates additional tribal responsibility for regulating Class II gaming, while a tribal-state compact may further detail the tribe's obligations with regard to Class III gaming. Tribes, of course, also are free to adopt additional ordinances and regulations governing their gaming operations.

Tribal gaming commissioners are either elected or appointed. Although commissions are funded through tribal budgetary allocations, they usually are otherwise independent of the tribal political bodies. A Gaming Commissioner typically serves as chief administrative and enforcement officer, with responsibilities that include monitoring and enforcement of employee background checks, surveillance, inspection, auditing, compliance, licensing, and rule promulgation. Tribal ordinances authorize the hiring of professional commission staff and may establish appointive gaming review boards that approve regulations and hear appeals concerning licensing, fines, and patron disputes.

As regulatory, rather than managerial, agencies, tribal gaming commissions are empowered to promulgate regulations and to hold hearings. Commissions monitor compliance with tribal internal control standards (ICS) and the NIGC's mandatory minimum internal control standards (MICS). They have unrestricted access to the tribe's gaming facility and its records, and have authority to enforce regulatory provisions through such means as license suspension or revocation.

Tribal regulators interact with tribal, state, and federal law enforcement agencies, tribal casino surveillance and security operations, and tribal court systems, as well as state and federal regulatory authorities. New commissioners may receive on-the-job training from current commissioners, take courses, or enroll in a formal training program. In 2000, the National Indian Gaming Association (NIGA) created a commissioner certification program at which tribal

regulators receive training on such topics as jurisdiction, human resource management, due process, MICS, compliance auditing, avoiding scams, budgeting, and rule promulgation. Commissioners may belong to such organizations as the National Tribal Gaming Commissioners and Regulators Association, the North American Gaming Regulators Association, or similar state-level organizations, such as the Arizona Tribal Gaming Regulators Association.

According to NIGA's *Analysis of the Economic Impact of Indian Gaming in 2004*, more than 220 tribal gaming agencies currently employ at least 2,800 commissioners and regulatory staff. Tribes in 2004 spent more than $150 million on regulatory activities and reimbursed states over $58 million for their regulatory costs. Through IGRA-mandated fees, tribes funded the NIGC with more than $11 million. Despite the extent and sophistication of tribal regulation, critics of Indian gaming frequently are dismissive of tribal government authority, as we discuss in greater detail below.

***State Gaming Commissions***

The scope and extent of state regulatory authority concerning tribal gaming is defined and limited by IGRA. Because both Class II and Class III gaming is allowed only in states that permit such gaming, state gaming commissions, along with state policymakers, play a role in determining the overall regulatory environment of legalized gambling within a state's borders. With NIGC and Interior Secretary oversight, Class III gaming falls under state as well as tribal jurisdiction as set forth in the negotiated tribal-state compact.

Tribes' sovereign status, according to the U.S. Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*, rendered states without regulatory authority over tribal gaming independent of congressional delegation. Under IGRA, however, Congress authorized states, through the tribal-state compact requirement, to regulate casino-style gaming. Typically, state gaming commissions are responsible for monitoring compliance with governing tribal-state compacts in concert with state law and public policy as well as IGRA.

State gaming commissions implement, monitor, and enforce state law and public policy regarding all types of legalized gambling allowed in a state. State commissions (or variously, agencies, departments, divisions, and gaming control or racing and wagering boards) often are composed of officials appointed by the governor and confirmed by the state legislature. Commissioners may be required by state law to have different political and professional backgrounds. Commissions are supported by a professional staff that may include auditing, compliance, inspections, law enforcement, legal, licensing, and taxation personnel or divisions. Some commissions report directly to the governor or to the state's attorney general. Commissions may interact with tribal regulatory or law enforcement agencies, state public safety, law enforcement, or other regulatory agencies, local regulatory and law enforcement agencies, and the NIGC or other federal agencies concerning regulatory and enforcement issues related to Indian gaming.

Although the responsibilities and authority of state gaming commissions vary with the type and scope of legalized gaming within a state, there are several similarities. State regulation of commercial casinos typically follows one of two models: the "Nevada" model, which

encourages maximization of economic benefits to the state, and the "New Jersey" model, which focuses on addressing or mitigating negative social and economic impacts associated with gambling. Both approaches include developing and overseeing minimum internal control standards, conducting audits, issuing licenses, and so on. State regulation of Indian gaming, of course, varies under individual tribal-state compacts, but similar requirements typically apply to tribal casinos.

Through numerous regulatory agencies at the federal, tribal, and state levels, Indian gaming is subject to an elaborate, multi-layered web of governmental regulation. Despite this extraordinary regulatory scheme, involving regulators and law enforcement at three levels of government, critics charge that Indian gaming is under- or even unregulated. A closer look at such criticism, particularly as it is lodged against tribal regulation, reveals further misapprehensions about Indian gaming.

**Criticism of Indian Gaming Regulation**

Indian gaming and "casino Indian" imagery have become a phenomenon widely visible in popular culture, the mass media, and the discourse used by public policymakers. A number of pervasive anti-Indian gaming themes dominate the public debate over tribal gaming. Our research suggests that how we talk about Indian gaming informs how we act on Indian gaming. Before allowing public discourse to set agendas for tribal gaming policy, policymakers should assess carefully the accuracy and context of criticisms of Indian gaming regulation.

Before the Indian gaming industry exploded, discussion of the complexities of federal Indian policy and the legal and political issues facing tribes had long been isolated to tribal governments, the BIA, this Committee, and the U.S. Supreme Court. Today, on any given day, one can open the newspaper or a magazine and read about how gaming tribes throughout the nation are interacting with federal, state, and local government officials as well as local economies. That Native Americans have assumed such a prominent place in non-tribal public and policy discourse is almost entirely an artifact of Indian gaming. What is said about tribal gaming reflects the vigorous political activity, primarily at the tribal, state, and local levels, that is reshaping federal Indian law and policy. For better or worse, Indian gaming determines how we talk about tribes today – and how we talk about tribes governs how we act on Indian gaming.

Indian gaming is a magnet for criticism. In examining the charges levied against tribes and tribal regulation of Indian gaming, we rely extensively on the actual words, reflecting a lexicon of skepticism and accusation, used by those commenting on tribes and on the Indian gaming industry.

*Tribal Governments Cannot Be Trusted*

One pervasive theme in the public debate over Indian gaming is that tribal governments cannot be trusted. Tribal governments are portrayed as untrustworthy stewards of newfound gaming wealth and political clout. Somewhat incongruously, they are variously accused of being too naïve or inexperienced to realize their own best interests, easily corruptible, guilty of seeking to influence the political system to their own benefit, and out for "revenge."

At perhaps their most benign, expressed concerns revolve around tribes' naïveté in dealing with outside interests, or inexperience in starting, owning, and operating successful businesses and handling the resultant influx of revenue. As relative business ingénues, tribes are seen as too unsophisticated to deal with crafty outside investors, or unscrupulous management companies all-too-eager to take advantage of tribes. Asserted the *Providence Journal*, tribes "fall into hands of investors far more interested in making quick bucks . . . than in plowing profits into local Indian projects and development."[2] The *Boston Globe* described the Mohegan Tribe in Connecticut as being "outmaneuvered" and "taken" by an outside management company,[3] while *The Progressive* magazine characterized a tribe as "buffaloed" and "taken for a ride" by "casino cowboys."[4]

A more serious accusation is that tribal governments are corrupted or corruptible, as manifested in a lack of casino oversight, the misuse of gaming revenues, and tolerance of criminal behavior generated by casinos. Indian gaming is portrayed as unregulated or, alternatively, regulated by corrupt tribal government officials. *Time* magazine's 2002 exposé, for instance, acknowledged tribal regulation of Indian gaming, but added, "[T]hat's like Enron's auditors auditing themselves."[5] As the fox guarding the henhouse, tribal governments are perceived as likely to misappropriate funds and bury evidence of wrongdoing. Critics' claims often reach hyperbolic levels. As *Time* continued, "[t]he tribes' secrecy about financial affairs – and the complicity of government oversight agencies – has guaranteed that abuses in Indian country growing out of the surge of gaming riches go undetected, unreported and unprosecuted. Tribal leaders sometimes rule with an iron fist. Dissent is crushed. Cronyism flourishes."[6] The calculus of cash flow means that "[t]ribes now coldly eject members, sometimes so that fewer members can split the dough," according to one media commentator. Recently recognized tribes are so corrupt that "[e]ach new 'reservation' introduces government in direct conflict with California notions of healthy civic life."[7] An editorial in the *Detroit News* described one tribal government as "more like Moscow 1936 than Michigan 2001."[8]

Among the social ills ascribed to tribal casinos is a rise in crime, whether inside the casino or in the community. Tribal governments are portrayed as unwilling or unable to control criminal behavior. An op-ed in the *L.A. Daily News* asserted that "betting in casinos is unregulated by officially sanctioned watchdogs," while "widely publicized rules, laws, inspections, and strict police background checks for employees. . . . are absent from reservation wagering."[9] While some see gambling-related crime as inevitable, others imply that tribes are inclined to tolerate drug-related or even violent crime. In 1999, Donald Trump financed a series of advertisements opposing a proposed Mohawk casino in upstate New York. The ads depicted cocaine and drug needles and asked, "Are these the new neighbors we want?"[10] Testifying

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[2] "Revisiting Indian Casinos" [Editorial], *Providence Journal* (RI), August 2, 2001, B06.
[3] Sean P. Murphy, "Mohegan Sun Buyout Deal Remains Mystery," *Boston Globe*, January 31, 2001.
[4] Bill Lueders, "Buffaloed: Casino Cowboys Take Indians for a Ride," *Progressive*, August 1994, 30.
[5] Donald L. Barlett and James B. Steele, "Playing the Political Slots," *Time* (December 23, 2002), 59.
[6] Donald L. Barlett and James B. Steele, "Wheel of Misfortune," *Time* (December 16, 2002), 48.
[7] Jill Stewart, "New 'Tribes' Shopping for Casino Sites" [Op-ed], *L.A. Daily News*, June 12, 2004.
[8] "Chippewa Strife Argues for Limiting Casinos" [Editorial], *Detroit News*, August 8, 2001.
[9] Joseph Honig, "Arnold Could Have Played Cards Better" [Op-ed], *L.A. Daily News*, June 5, 2004.
[10] Neil Swidey, "Trump Plays Both Sides in Casino Bids," *Boston Globe*, December 13, 2000.

before Congress in 1993, Trump asserted, "That some Indian chief is going to tell Joey Killer to get off his reservation is unbelievable."[11]

But under IGRA's mandates, tribes' gaming operations are subject to extensive tribal, state, and federal regulations that do not tolerate lax enforcement, at the price of being audited or even shut down by the NIGC, prosecuted by the federal government, sued by the state, or, of course, subject to penalties under tribal law. Further, concerns raised about "self-regulation" in the context of commercial casinos are inappropriate and inapplicable, as tribal government-owned and -operated Indian gaming is more akin to state lotteries – and no one raises self-regulation as an issue in that context. A gaming tribe simply is not Enron, nor is it MGM Mirage or Harrah's Entertainment. Tribes also stress that regulations promulgated by the NIGC, adopted by the tribe, and required by the tribal-state compact concerning such subjects as MICS and background checks are exceedingly stringent. When it comes to the prevention of gambling-related and other types of crime in and around a casino, no matter how large or small, tribal regulation and security is pervasive and extensive, again pursuant to the mandates of federal, tribal, and state law. As an MGM Mirage vice president observed, "From a security and surveillance standpoint, [tribal casinos] are as sophisticated as we are."[12]

*Tribal Sovereignty Is an Unfair Advantage*

Criticism of tribal regulation of Indian gaming often is grounded in ignorance, purposeful or otherwise, of tribal sovereignty. Rather than an accurate understanding of tribal regulation as a reflection of tribal sovereignty and self-determination, these critiques often rely on the assertion that tribal sovereignty is simply an unfair advantage, rather than the defining aspect of tribes' unique status in the American political system.

In an article on growing opposition to Indian gaming, the *New York Times* reported that tribal sovereignty is a "major element" contributing to public objections to tribal casinos.[13] Sovereignty, in the minds of many Americans, simply means unearned money for tribal members. "[P]eople have learned that that phrase 'sovereign rights' translates to 'special interests,'" said Brett Fromson, the author of one of a handful of exposé-style books purporting to debunk the Mashantucket Pequots' tribal status.[14] "Sovereignty promotes unfair competition in the business community," asserted citizen group Stand Up for California!'s Cheryl Schmit.[15] Under the heading "Nightmare Neighbors," an article in *Time* charged, "Indian casinos are overloading other communities across the country. One exacerbating factor: because of tribal sovereignty, if a casino overwhelms local emergency services, draws down the local water supply or pollutes the environment, local authorities have no recourse." Said a California resident of the tribes, "They use sovereignty as a shield."[16] One freelance journalist, writing for the American Enterprise Institute, characterized sovereignty as allowing tribes "to operate outside American law." Tribal sovereignty, according to vociferous critics, "is a profoundly

[11] Swidey, "Trump Plays Both Sides."
[12] James P. Sweeney, "High Stakes Showdown," *San Diego Union-Tribune*, July 22, 2001.
[13] Iver Peterson, "Resistance to Indian Casinos Grows Across U.S.," *New York Times*, February 1, 2004.
[14] Brett D. Fromson, "California Must Hedge Its Bet" [Editorial], *Los Angeles Times*, November 25, 2003, B15.
[15] Matt Krantz, "Indian Tribe Bets on Diversification for Longevity," *USA Today*, January 30, 2004, 5B.
[16] Barlett and Steele, "Playing the Political Slots," 58.

flawed body of federal law – some say an outright scam – that creates bogus tribes, legalizes race-based monopolies, creates a special class of super-citizens immune to the laws that govern others, and Balkanizes America."[17]

Some critics have asserted that Indian gaming amounts to "race-based" "special rights," and that tribes are able to use their sovereignty to exclude commercial competitors from the marketplace. In 2001, Arizona race tracks sued Governor Jane Hull to prevent her from negotiating any further tribal gaming compacts. Said an attorney for three of the tracks, "There are no commercial slots in the state except on Indian land. No privilege, no business opportunity, can be based on race."[18] Similar assertions are made in other states. "Whatever happened to one nation under God indivisible?" asked a town selectman from Connecticut. "I have a real problem with this country being set up where there are different rights for different groups – different privileges, different immunities."[19] Asked one unidentified "analyst," quoted in the American Enterprise Institute article, "Should we give Hispanics the liquor industry? Should blacks get cigarettes? What about the Asian boat people?"[20]

An article in the *Boston Globe* series implied that tribal sovereignty amounted to corporate misconduct, stating that "tribes have been using sovereignty to claim the right to act as the primary overseers of their own casinos, and to hide financial information about gambling operations that is routinely disclosed by commercial gambling houses." The article also linked tribal sovereignty to crime, asserting without substantiation that "inadequate oversight of Indian casinos and increasingly vociferous sovereignty claims could open the door to a new wave of criminal activity."[21]

Rich Lowry, in an editorial for the *National Review*, lambasted tribes, calling for the outright demise of tribal sovereignty:

> It's time to ditch the fiction of tribal sovereignty, and recognize the tribes for what they are: good, old-fashioned, all-American sleaze merchants and scam artists. . . . The ultimate answer to the Indian scam is to end the fiction of tribal sovereignty. . . . Sovereignty has not only allowed tribes to make an end-run around laws against gambling, but has perpetuated arbitrary third world-style government on reservations that makes it impossible for businesses to operate there. End tribal sovereignty and perhaps Indians can begin to find ways to make money less sketchy than slot machines, and our image of Indians can again become something more noble.[22]

As these criticisms of Indian gaming clearly demonstrate, tribes face substantial obstacles rooted at best in misinformation and ignorance and at worst in prejudice and racism in their

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[17] Jan Golab, "The Festering Problem of Indian 'Sovereignty,'" in *One America* (Washington DC: American Enterprise Institute, 2003).
[18] Carol Ann Alaimo, "Race-Based Monopoly?" [Op-ed], *Arizona Daily Star*, April 14, 2001, B7 (quoting Neil Wake).
[19] 60 Minutes II, "Are Pequots Really Pequots?", CBS television broadcast, May 23, 2000 (quoting Preston, Connecticut selectman Bob Congdon).
[20] Golab, "Festering Problem of Indian 'Sovereignty.'"
[21] Michael Rezendes, "Tribes Make Easy Criminal Targets," *Boston Globe*, December 13, 2000.
[22] Rich Lowry, "Indian Scam," *National Review*, August 25, 2003.

efforts to realize the promise of tribal sovereignty. Tribes and Indian people alternately are put in an educational or a defensive posture in which they are required to explain the history and meaning of tribal sovereignty, how it differs from state sovereignty, and what are its practical ramifications in the context of Indian gaming. Tribal sovereignty has a legal and political status that must be respected, both as a practical matter and one of principle. As former NIGA chair Rick Hill reminded critics,

> Our first principle is that Indian Nations and Tribes are sovereign political communities that were here before Columbus. . . . To understand Indian Nations and Tribes, you must be clear that while the Constitution, Treaties, and Laws of the United States acknowledge Indian sovereignty, our traditional right to self-government comes to us from the Creator and reflects the will of our Native peoples who established our societies in Pre-Columbian times. . . . Indian gaming is an exercise of sovereign governmental authority by Indian tribes.[23]

**Tribal Regulation of Indian Gaming as Institution Building**

Broadly speaking, sovereignty is a nation's ability to chart its own legal, political, economic, and social future without illegitimate or unjust constraints. Our research indicates that the exercise of tribal sovereignty underpins tribal self-determination and self-government, the goals of current federal Indian policy. Effective and responsive tribal self-governance necessitates strong institutions. Governing institutions with the capacity to exert legitimate authority in the name of tribal members are at the heart of building healthy reservation communities, an interest appropriately shared by tribes, states, and the federal government.

Tribal sovereignty's legal and political dimensions require strong government institutions to give meaning to tribal self-governance and tribes' government-to-government relations with the United States and state governments. But strong institutions of governance also are necessary to effect tribal sovereignty's cultural and spiritual dimensions, as tribal self-determination is embodied in culturally specific and appropriate institutions.

One of the largely untold success stories of Indian gaming is the role it has played in tribal institution building. The NIGC frequently is spotlighted as the agency "in charge" of regulating Indian gaming. This overly simplistic characterization overlooks both the more complex and far-reaching requirements for government regulation of Indian gaming under IGRA and the fact that each gaming tribe has created its own regulatory authorities that are responsible for administering the myriad regulatory challenges of Indian gaming. In assuming responsibility for gaming regulation, tribes determine the character and capacity of their own governmental institutions. The political branches of many tribal governments have separated themselves from regulatory and economic development commissions and boards. Tribal governments are in a position today to make continual and informed decisions about how to provide essential public services to their members, how to negotiate and contract with non-tribal commercial vendors, banks, and investors to determine the trajectory of economic development, and how to interact with state and local governments on a range of issues.

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[23] Rick Hill, "Some Home Truths About Indian Gaming," *Indian Country Today*, December 27, 2000.

**Policy Implications**

We believe it is plain that there are key distinctions to be drawn between the regulation of commercial gambling and that of Indian gaming. Three main points are relevant in this regard.

First, a frequently expressed concern in regulatory administration is the evolution of a capture effect – that is, regulatory agencies begin to partner with the industry to create a regulatory environment that maximizes the benefits to industry players. The regulatory agency becomes subject to the use of political power for private gain. Although similar accusations have been levied against tribal gaming commissions, there is little credible evidence of agency capture. Many tribes effectively maintain separation between regulatory and law enforcement authorities and elected public officials. Additionally, IGRA conditions how tribes can use gaming revenue for the benefit of tribal members. Gaming profits, therefore, are channeled directly into the provision of essential public services or community infrastructure. A profit motive does not become the sole determinant of how tribal casino enterprises, tribal gaming commissions, and elected tribal governments interact. As our research shows, this perhaps is exemplified by tribal gaming enterprises in the Great Plains, where job creation is the primary impetus for gaming. Moreover, by contrast to the regulation of the non-tribal gaming industry, there are three levels of regulation mandated by IGRA. State gaming commissions and law enforcement entities monitor and enforce a tribe's compliance with the existing tribal-state compact. And, of course, the NIGC and other federal agencies exercise overarching regulatory authority, as well.

Related to this first point, the policy goals of Indian gaming, and thus the regulatory scheme established by IGRA, are fundamentally different than are the goals and regulatory scheme governing commercial gambling. The vast majority of gaming tribes, such as those in the Great Plains, by necessity are in the business of job creation and economic development. Up to 100 percent of gaming revenues are turned back to the tribal government, and IGRA stringently governs how those revenues are to be used. The congruence between IGRA's stated policy goals and the regulatory scheme intended to facilitate them simply creates a regulatory environment that differs significantly than that for commercial gambling, a key distinction that we believe policymakers would do well to bear in mind.

Third, critiques of Indian gaming also seem to rest disproportionately on the thesis that tribes themselves are ill-equipped to regulate their gaming operations, or unwilling to do so. Again, there is little credible evidence to back up these assertions. Many studies show that crime is neither rampant in and around tribal casinos, nor more prevalent at tribal casinos than at commercial casinos. It appears that tribes have been successful in preventing the infiltration of organized crime. Subject to three levels of regulation and law enforcement authority, the Indian gaming industry perhaps is better equipped to deter or deal with potential crime and corruption than is any other form of legalized gambling.

We do not suggest that the regulation of Indian gaming is perfect. We do, however, encourage policymakers to critically assess the critiques of Indian gaming. At times, the claims made by tribal gaming's opponents may be ill-informed, strident, and one-sided and, although certainly subject to rebuttal, set the tone of the public conversation about Indian gaming. They

also may set the agenda for public policy. Misapprehensions about tribal governments, tribal sovereignty, and Indian gaming should not set the terms for public policy.

In our forthcoming book, *Indian Gaming and Tribal Sovereignty: The Casino Compromise*, we caution that the plainly apparent need for accurate and complete information on Indian gaming, coupled with the dangers of ill-informed and hasty policymaking in the face of mounting political pressure for reform, create a challenging environment for federal policymakers. We call on Congress to be guided by high-quality information and analysis as well as tribal opinions and interests, and to look to tribes' inherent right of self-determination as a lodestar for effective Indian gaming policy. Today, too, we urge that a clear and full understanding of tribal sovereignty is a necessary foundation for any policy concerning Indian gaming.

One standard criticism of regulatory administration is that it stifles productivity, growth, and innovation, and dampens economic performance. We believe IGRA's regulatory scheme has accomplished precisely the opposite. The complex and comprehensive regulatory web created by IGRA, in which tribal governments play a primary role, has reinforced tribal sovereignty and comports with the Supreme Court's holding in *Cabazon* and the congressional goals expressed in IGRA. Providing a foundation for tribal initiative and enterprise, IGRA has catalyzed the dramatic growth of an industry and created opportunities for economic growth and development for tribal and non-tribal communities across the United States. It is extraordinary that more than 200 tribes have benefited from this new economic engine; it also is remarkable that some 30 states and myriad non-tribal communities have as well.

Although by electing to open and operate gaming enterprises within IGRA's regulatory framework tribes have been forced by definition to give up some aspects of tribal sovereignty, the trade-off for many tribes has been the realization of the heretofore unthinkable: the creation of well-paying jobs, a viable revenue stream with which to provide essential government services, a means to leverage economic growth, development, and diversification, the chance to revitalize culture and tradition, and the opportunity to strengthen the institutions of tribal governance that facilitate meaningful government-to-government relations with federal and state governments on a more level playing field. In this sense, IGRA has accomplished exactly what it was intended to do, and more – and therefore represents an unparalleled regulatory success story.

These issues surrounding the regulation Indian gaming are of vital importance to tribes and American Indians throughout Indian country. We wish to express our appreciation to the Committee for engaging in a thoughtful discussion of Indian gaming law and policy, and for allowing us to contribute to that dialogue. We thank you for this opportunity to testify before the Committee.

# Indian Gaming & Tribal Sovereignty

## THE CASINO COMPROMISE

STEVEN LIGHT & KATHRYN R.L. RAND

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# Preface

Our collaboration on Indian gaming issues began, as these things sometimes do, with the proverbial scribbles on a cocktail napkin. It was the summer of 1995, and we were sharing a pizza while on vacation with Kathryn's parents near Bemidji, Minnesota. At the time, Steve was a graduate student at Northwestern University and Kathryn was a federal judicial clerk in Milwaukee. We recently had met at an engagement party for some mutual friends and were exploring our common interests. On the way to dinner in Black Duck, we passed some billboards for nearby tribal casinos, sparking a discussion of whether the casinos would improve relations between Native Americans and non-Natives in the area. Picking up the theme of Indian gaming, Kathryn described a case recently decided by the judge she worked for that involved an intratribal dispute over the legitimacy of the tribe's government and resulting control of casino revenue.[1] Steve, who had been ruminating on a paper topic for an upcoming political science conference, commented on the political issues intertwined with the seemingly dry legal question of whether the Indian Gaming Regulatory Act of 1988 (IGRA) allowed tribal members to challenge tribal government actions in federal court. From a few scribbled ideas on a paper napkin, we wrote our first paper on Indian gaming.[2]

As we chatted with Kathryn's parents in the pizzeria, and over the course of countless subsequent conversations with friends, colleagues, and new acquaintances, we found that folks of different stripes all were interested in Indian gaming. Gambling, of course, permeates our society. But besides

discussing tabloid coverage of Donald Trump, the recent family vacation in Las Vegas, or yesterday's ten-dollar win on a state lottery ticket, we haven't encountered a single American who doesn't know something about—and doesn't have an opinion on—tribal gaming. Indeed, most people we encounter feel more strongly about Indian gaming than about any other aspect of legalized gambling. Casual conversations about "who's getting rich" from legalized gambling don't focus on Trump, Steve Wynn, or other high-profile commercial casino magnates or on the latest $250 million lottery winner from West Virginia, other than for his fifteen minutes of fame, but on the how and why of tribal casinos and "rich" Indians.

A frequent question animating these discussions is "Why do tribes get to have casinos?" This is sometimes expressly, other times only implicitly, followed with "when the rest of us don't." This, we've found, is the most common misapprehension about Indian gaming—the lack of knowledge about tribal sovereignty and tribes' legal and political status in the American system. In his book on Indian gaming, W. Dale Mason recounted how a conversation about his research with the outgoing president of the American Political Science Association led that distinguished scholar to call over a graduate student he thought shared Mason's interests: an East Indian studying game theory.[3] We too have found that non-Natives, even well-educated lawyers and political scientists, often share a surprising ignorance about tribes and tribal sovereignty. Whereas most of us would hesitate to share our observations about game theory with *any* expert, perhaps feeling ill-informed on the topic, we also have found that a lack of knowledge about tribes does not necessarily preclude some people's willingness to discuss strongly held opinions about Indian gaming—and gaming tribes.

As we continued to research and write about Indian gaming, we observed that this fundamental misapprehension—the relationship between tribal sovereignty and tribal gaming—permeated mass media accounts, from the *New York Times* to *The Simpsons,* and policymaking, from local government officials to Congress. Legalized gambling seems to have become an accepted part of the fabric of American culture—Las Vegas is now on a par with Disney theme parks as a premier "family-friendly" destination, and professional or even celebrity high-stakes poker makes for riveting television viewing—but tribal casinos are often presented as either fodder for jokes or as the new seamy underbelly of the gambling industry. It's easy to read about Indian gaming, as plenty of journalists have written about reservation casinos in a vast number of newspaper and magazine

articles, and every day one can find an account of how policymakers intend to "fix" the "problems" with tribal gaming.

We also noticed that much of the discussion about Indian gaming focused on one specific stereotype driven by the enduring image of one particularly successful gaming tribe. When the federal government granted official recognition to the nearly extinct Mashantucket Pequot Tribal Nation in Connecticut and the tribe built the Foxwoods Resort Casino, the most successful casino in the world, and then authorized per capita payments for tribal members, the die was cast for the Pequots to become the poster child for the "rich casino Indian" stereotype. At least three book-length accounts purporting to debunk the tribe's authenticity have been best sellers. Whatever the merits of these "tell-all"exposÈs, we did not believe they related the whole story of Indian gaming's successes or failures as public policy. The Pequots are true outliers on one pole of a spectrum of success measured exclusively in terms of net profits.

Not surprisingly, we suppose, critics of the Pequots seemed to ignore or even ridicule the tribe's rejoinders to charges that its members were not really Native Americans and that its financial success was un-Indian and even un-American. For those persuaded by Jeff Benedict's and others' accounts, anthropological evidence or sociolegal history might seem less relevant than the story of Pequot leader Richard Hayward identifying his race as "white" on his 1969 marriage license.[4] The discounting of other tribal accounts of Indian gaming was more surprising. Despite repeated and pointed responses from tribal leaders across the country, the same criticisms cropped up again and again in mainstream media. The effect was that the Pequots colored Indian gaming for all tribes. This extends to policymaking: in Connecticut, state leaders, based on perceived problems with the Pequots, have called for national legislation that would affect *all* tribes.

At the University of North Dakota, we founded the Institute for the Study of Tribal Gaming Law and Policy to further research and public discourse on Indian gaming, with a particular focus on tribes in the Great Plains.[5] We've learned how difficult it is to effectively counter overgeneralizations and misapprehensions about Indian gaming. In our own efforts to highlight the experiences of tribes in North Dakota, questions about the Three Affiliated Tribes, the Turtle Mountain Band of Chippewa, and the Sisseton-Wahpeton, Spirit Lake, and Standing Rock Sioux Tribes are easily outnumbered by queries about the "free" money given to tribal members

and "bogus" gaming tribes—neither, if one has any sense of the facts, a serious issue in North Dakota. After a discussion for a student group on the role of tribal governments in conducting Indian gaming, Steve was asked whether a student, if he claimed some Native heritage, could open his own casino. When Kathryn invited tribal leaders to her Indian Gaming Law class, despite the guest lecturers' accounts of tribal gaming's positive effects on reservation poverty in North Dakota, they were asked why the tribes continued to operate casinos if gaming hadn't eradicated unemployment. And after a conversation about the history of intergovernmental relations between the United States and "treaty" tribes in North Dakota, a journalist asked us, "But how do you explain that one-person tribe in California with a casino?"

We wondered why stereotypes and misinformation pervade how people talk about Indian gaming, and although we understand that good information can't always change minds, we came to believe it could at least guide effective policymaking. Through our work, we have emphasized that one cannot understand Indian gaming without understanding the context of tribal sovereignty. Indian gaming is an exercise of tribal sovereignty; state and federal regulation of Indian gaming is a limitation on tribal sovereignty. In this book, we rely on tribal sovereignty, both in its limited form under federal law and in its broader conception as tribes' inherent right to choose their own futures, as a framework to both explain Indian gaming law and policy and guide legislative and political reform. Although we certainly don't expect a Hollywood movie option,[6] our intent is to provide a more accurate and complete account of Indian gaming, from the Pequots to the Plains and beyond.

Our work over the years, including this book, has benefited immeasurably from a number of people. We are indebted to our editor, Nancy Scott Jackson, whose enthusiastic communication the morning she received our prospectus was our first clue that the University Press of Kansas was the right home for this project. Nancy's experience and excellent judgment every step of the way have been invaluable. Thanks also to Susan McRory, Susan Schott, Hilary Lowe, Dorothea Anderson, Michael Briggs, and all others at the press who have smoothed our learning curve. Special gratitude to David E. Wilkins, whose careful and critical comments and multidisciplinary expertise greatly improved this book. Thanks to our colleagues at the University of North Dakota Department of Political Science and Public Administration and School of Law, and especially to Stacy L. Leeds for her

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# Introduction: What Is Indian Gaming?

Wow, man—Indians have it good!
—*Eric, upon arriving at the "Three Feathers" casino, on television's South Park*[1]

Indian gaming,[2] perhaps more so than any other issue facing Native American tribes in the last half century, is a subject of ever-increasing public fascination and policy debate. In tribal gaming's second decade of rapid expansion across the United States, amid popular culture's recent obsession with casinos and gambling,[3] the mass media's depiction of contemporary Native Americans appears to center on a widespread stereotype of wealthy gaming tribes and rich Indians. On an episode of the popular television series *Malcolm in the Middle,* an Alaskan Native opens a casino in her home and immediately cashes in at the expense of her white customers. The long-running Fox series *The Simpsons* has depicted tribal casinos as being run by mystical yet practical Native people who wear traditional headdresses and espouse platitudes in stereotypical accents while micromanaging the bottom line. In one thread of a *Sopranos* episode, mob boss Tony Soprano and his crew are surprised to discover that the CEO of a Connecticut tribe's casino, who "discovered" his Native heritage when the casino opened, wears an expensive suit, looks "white," and displays a cutthroat, borderline-corrupt "I'll scratch your back if you'll scratch mine" business savvy. And a particularly pointed recent episode of Comedy Central's animated *South Park* series, entitled "Red Man's Greed," depicts virulent white community

backlash against a tribe due to its intention to purchase and demolish a town to construct a superhighway leading to the tribal casino's door.[4]

These story lines reveal both the place of Indian gaming at the forefront of popular discourse and the common fundamental misapprehension of tribal gaming. As the *Malcolm in the Middle* episode indicates, some Americans—at least those who write network sitcoms—seem to believe that any person of Native American heritage has the "right" to open a casino. This, of course, could not be further from the truth. Only federally recognized tribal governments may open casinos and, for casino-style gaming, only after a protracted negotiation process with state government. Some tribal casino managers may, at times, don ceremonial dress—but none would likely do so in the workplace. Most tribal members are just as unrepresentative of Indian stereotypes as are most Italian Americans unlike Mafiosos. And, of course, Native Americans are not "red men," they do not seek to use Indian gaming as a form of vengeance against "the white man," and they are unable to simply buy and destroy a city. Yet, although easily discredited in academic circles, these and other misperceptions and overgeneralizations about tribal gaming exemplify themes that appear to reflect and influence both public opinion and public policy. As states, tribes, and the federal government struggle to regulate a booming industry within the complicated context of tribal sovereignty, Indian gaming raises highly significant questions of law and policy.

Given the increasing importance of answering these questions with the best information available, however, it is unfortunate that both the general public and policymakers share a set of fundamental misapprehensions of tribal gaming. Public opinion is shaped by popular media accounts that often reflect prevailing stereotypes and fail to contextualize Indian gaming against the backdrop of tribal sovereignty and the history of tribes' relationship with federal and state governments. Subject to similar failings, as well as the perceived opinions of their constituents and awareness of the big money at stake in Indian gaming, policymakers focus on the economics of immediacy rather than on how tribal interests and rights fit into the bigger societal picture.

The stakes of Indian gaming are too high to allow stereotypes, a lack of accurate information, or a faulty calculation of who "wins" or "loses" from tribal gaming to determine its future. In this book, we demonstrate how the law and politics surrounding Indian gaming represent a series of compromises—some through mutual agreement, most through federal and state

imposition—among competing legal rights and political interests of tribal, state, and federal governments as well as the nontribal gambling industry. We describe Indian gaming in detail: what it is and how it became one of the most politically charged phenomena for tribes and states today and the compromises that shape its present and will determine its future. We believe that a clear account of the law and politics undergirding the development of Indian gaming, viewed through the lens of tribal sovereignty, is needed to fully understand tribal gaming today, as well as to create sound law and public policy governing Indian gaming for tomorrow.

What is Indian gaming, then? As defined by federal law, "Indian gaming" is gaming conducted by an "Indian tribe" on "Indian lands"—that is, by a federally recognized tribal government on a federal reservation or on trust lands. Tribal gaming is different than commercial gambling not because of race or ethnicity, but because it is conducted by tribal governments for the primary benefit of tribal members.[5]

## INDIAN GAMING IS A COMPROMISE: THE LAW AND POLITICS OF TRIBAL GAMING

"Compromise" results from negotiation that in the end amounts to either a mutual give-and-take between equals or a one-sided imposition by the party with greater power or leverage. The result is either a compromise of interests or compromised interests. Most Americans seem to view Indian gaming as, at best, a fairly negotiated compromise that balances federal, state, and tribal interests or, at worst, an unfair advantage for tribes that compromises state economic or social well-being. From a tribal perspective, however, Indian gaming law and policy is the result of one-sided "negotiations" that impose state and federal law on the tribes in direct contravention of tribal authority. In the context of Indian gaming, tribal sovereignty has been flagrantly compromised.

We believe that the law, politics, and public policy surrounding Indian gaming represent an uneasy and frequently uneven compromise—the "casino compromise" we describe throughout this book. This imposed legal and political compromise, resulting from competing rights and interests of tribal, state, and federal governments as well as the nontribal gambling industry, is explained by three primary frameworks: federal Indian law and policy, revolving around the dominant society's concepts of tribal sovereignty; the law of Indian gaming, particularly the 1988 federal Indian Gaming Regulatory Act

(IGRA), which established the rules for how tribes may operate gaming;[6] and the developing politics of Indian gaming. The imperfectly realized casino compromise has resulted in a rapidly growing industry that, for many tribes, has rejuvenated tribal government and reservation life while fueling widespread controversy among policymakers and the non-Native general public, as well as among Native people. We add a fourth foundational framework—indigenous perspectives of Indian nations on tribal sovereignty. Incorporating Native views, we use a broader understanding of tribal sovereignty to argue for replacing the uneven and imposed compromise of Indian gaming law and policy with a new compromise based on mutual consent and respect.

### Tribal Sovereignty and Federal Indian Law and Policy

Indian gaming differs from any other form of gambling in the United States because it is grounded in the exercise of tribal sovereignty. For many reasons, most non-Native people simply do not know much about tribes or Native Americans. Many policymakers have an extremely limited working knowledge of federal Indian law, and even less of an understanding of how and why tribes have a distinct legal status in the American political system. The further notion that tribes possess an inherent right of self-determination that predates the existence of the United States truly is a foreign concept for non-Native people. Our first purpose in this book, therefore, is simply to inform—to explain that tribal sovereignty exists and what it means. This descriptive step is the first move toward informed law and policymaking in the context of Indian gaming.

The second step is to explain how and why Indian gaming, as public policy, as an industry, and as a political phenomenon, is what it is today. The legal definition of tribal sovereignty rooted in federal Indian law has considerable explanatory force in accomplishing this purpose. Indeed, our account throughout much of this book necessarily relies on this definition of tribal sovereignty. One simply cannot understand the past and present of Indian gaming without it.

The third step is to demonstrate how tribal sovereignty presents an opportunity in the context of Indian gaming. We draw upon Native conceptions of tribal sovereignty to develop a broader view of Indian gaming's success and to suggest policy reform. Indeed, as we argue in the concluding chapters, there perhaps is no greater opportunity today than Indian gaming to transcend the federal definition of tribal sovereignty to allow for the eventual emergence, and ultimate authority of, tribes' inherent right of

self-determination. This is the third step toward informed law and policy-making on Indian gaming and for the future of intergovernmental relations more broadly.

As it is commonly understood, sovereignty is a nation's independent and supreme authority to govern its citizens and interact with other nations. Sovereignty connotes political legitimacy and autonomy rooted in self-governance, the freedom and independence of a nation to determine its future. Sovereignty can be both absolute and nonabsolute, reflecting the divergence between political theory and the coexistence of nations in the real world. Absolute in its extent and character, the supreme and inherent nature of sovereignty cannot be denied. Yet in practice, the *scope* of sovereign authority may be limited by mutual concession or by political or legal imposition.

Tribal sovereignty stems from tribes' status as self-governing indigenous nations with legal, political, cultural, and spiritual authority.[7] At the heart of tribal sovereignty is tribes' inherent right of self-determination. Tribes' authority to determine membership, establish and enforce laws, provide for the health and welfare of members, protect and nurture tribal traditions and culture, and interact with federal and state governments all stem from tribal sovereignty. In short, tribal sovereignty is the freedom of tribes to choose their future.[8]

The federal legal doctrine of tribal sovereignty, however, reflects a much narrower view of tribal sovereignty embedded in more than two hundred years of byzantine federal Indian law and policy. Though U.S. law ostensibly recognizes tribes' inherent sovereignty as nations, the defining aspect of the federal legal doctrine of tribal sovereignty is that tribal sovereignty may be limited or even extinguished by Congress. This should be incompatible with the concept of sovereignty, yet this is federal law as it currently exists. In this way, the federal legal doctrine of tribal sovereignty has compromised the inherent authority of tribes. Understood in this dual sense, tribal sovereignty is the key variable driving Indian gaming, yet its realization is compromised: sovereignty fundamentally informs federal Indian law and policy, but it also effectively is undercut by that same law and policy.

We rely on two conceptions of tribal sovereignty: the federal definition, which is grounded in federal Indian law, and indigenous perspectives, which deny the extent of federal authority and are rooted in tribes' inherent right of self-determination. The tension between these two conceptions is yet to be resolved. The federal definition compromises tribal self-determination,

as many Native scholars have asserted. We are persuaded by the force of the arguments supporting indigenous conceptions of sovereignty and agree that ideally tribal self-determination should inform all intergovernmental relations with tribes. In the context of Indian gaming, this ideal has not yet been realized; rather it is the federal definition that has shaped the law and politics of Indian gaming today. Throughout much of this book, we resort to the federal definition of tribal sovereignty for its explanatory power, but we believe that indigenous perspectives should shape the future of tribal gaming, an idea that we develop in the book's conclusion.

### The Law and Politics of Indian Gaming

One cannot understand the practicalities of Indian gaming without understanding IGRA, a complex and comprehensive federal statutory scheme governing the regulation of tribal gaming at three levels of government—tribal, state, and federal—and critical subsequent legal developments. IGRA grew out of a federally mandated political compromise between state and non-Indian gaming interests to control the spread of gambling, on the one hand, and tribal and federal interests in promoting reservation economic development on the other. Through IGRA, Congress delegated power to the states to regulate casino-style Indian gaming—in its view, a clear and perhaps necessary compromise between state power and tribal sovereignty, but in the view of many tribes, a clear compromise of tribal sovereignty. In addition to shaping and compromising the role of tribes, IGRA created and defined the role of state law and state actors, thus providing the framework for Indian gaming across the United States.

Today, the public policies governing Indian gaming are shaped as much by politics as by applicable law.[9] Indeed, following the Supreme Court's 1996 invalidation of IGRA's legal cause of action allowing tribes to sue states,[10] Indian gaming policy has evolved through political compromise and compromised politics as much as through litigation and law reform. This trend threatens to accelerate as the compromise between state power and tribal authority plays out.

### Tribal Sovereignty and Indian Gaming

Tribal governments' right to conduct gaming on reservations stems from their political authority as preconstitutional sovereign nations. IGRA, frequently and wrongly identified as the source of tribes' right to open casinos,[11]

actually creates a set of limitations on tribal authority, compromising inherent tribal sovereignty. In particular, under IGRA, tribes that choose to game must submit to federal and, for casino-style gaming, state regulation.

In practice, then, tribal sovereignty plainly is compromised in the context of Indian gaming: the decision to open a casino is an exercise of a tribe's sovereign authority, yet under federal law, tribal casinos must submit to federal and state regulation, circumscribing tribes' sovereign rights. Thus, tribal casinos represent tribes' decisions, or at least acquiescence to Congress's mandate, to compromise their inherent sovereignty in order to pursue gaming as a strategy for economic development. But far beyond Congress's intentions as represented by IGRA, subsequent legal developments have dramatically increased the political power that states wield over tribal gaming. This has exacerbated the compromised nature of tribal sovereignty in the context of Indian gaming, making gaming tribes' sovereign rights vulnerable to state power and public opinion alike.

This compromise of tribal sovereignty is at the heart of our theoretical framework and the three steps we follow in this book. First, tribal sovereignty, even in this compromised form, is misunderstood and ignored by the general public and policymakers alike. Second, compromised sovereignty underpins, and thus explains, the current law and politics of Indian gaming. Third, indigenous views of tribal self-determination hold promise for a practical solution to compromised sovereignty in the context of Indian gaming—a *compromise* without *compromising*, an argument we develop in the concluding chapter.

## INDIAN GAMING IS BIG BUSINESS

In less than three decades, accompanied by the explosive growth in legalized gambling in the United States, Indian gaming has become big business, generating nearly $17 billion in revenues in 2003. At the same time, tribal gaming accounts for less than one-quarter of gambling industry revenues nationwide.[12] Twenty-five years ago, Indian gaming consisted of a few tribes' high-stakes bingo halls and card rooms in a handful of states. Seeing gaming's marked impacts on tribal economies, other tribes followed suit but were met with state efforts to shut down their casinos. In 1987, the U.S. Supreme Court ruled that so long as gambling did not violate state public policy, tribes could operate gaming establishments free of state regulation.[13] On

the heels of the Court's decision, Congress passed IGRA, which both encouraged tribes to pursue gaming as a means of reservation economic development and created an extensive regulatory scheme governing tribal gaming operations. Today, 30 states are home to more than 350 tribal gaming establishments operated by over 200 tribes that decided to pursue gaming as a strategy for economic development.[14]

Indian gaming, however, is far from the only game in town. The steady growth in tribal gaming tracks the growth in the legalized gambling industry generally: no longer confined to Las Vegas, Reno, and Atlantic City, gambling has spread across the United States. The vast majority of Americans have gambled at least once. One can place bets on dog and horse races in 43 states, buy lottery tickets in 40 states, gamble for charity in 47 states, and play at commercial casinos in 11 states. All but two states allow some form of gambling.[15] The nation's 443 commercial casinos produced nearly double the revenue of Indian gaming—just under $29 billion in 2003. Americans spent more at commercial casinos than they did at amusement parks and movie theaters combined. All told, nontribal gaming is a more than $50-billion-a-year industry.[16]

For those tribes that have chosen to open casinos, the overriding impetus has been relatively consistent: socioeconomic adversity. Reservations historically have had some of the most difficult living conditions in the United States. Many Native Americans, particularly those residing on reservations, were poor, unemployed, and living in overcrowded and inadequate housing in communities with minimal government services. In some areas, reservation unemployment topped 80 percent, even as neighboring non-Indian communities experienced historically low unemployment rates. At the start of a new century, conditions on many reservations still lag significantly behind those of the general population in the United States, yet there have been marked improvements for many Native American communities, largely due to gaming revenue.[17]

For many tribes, gaming profits are a significant source of government revenue, strengthening tribal governments and bringing about a renaissance of sorts on reservations throughout the United States. On balance, nontribal jurisdictions benefit from tribal casinos as well. States with Indian gaming operations, as well as the numerous nonreservation communities located near tribal casinos, have accrued extensive economic and social benefits from tribal gaming, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged.[18]

## INDIAN GAMING IS A SPECTRUM

A number of overgeneralizations prevail in media accounts of gaming tribes today—that all tribes game; that all members of gaming tribes are wealthy, like the Mashantucket Pequots in Connecticut; that federal recognition of tribes is all about casinos; that tribal gaming is a policy failure because it has not lifted some tribes from poverty; and that tribal sovereignty unfairly advantages tribes.[19] Although popular media accounts tend to lump tribes together, providing a pan-Indian narrative of tribal gaming, there is considerable variation among tribes and tribal experiences with casino-style gaming.[20] As a strategy for reservation economic development and a means to raise tribal government revenue, many tribes have chosen to exercise their sovereign right to own and operate casinos. Today, about 85 percent of the 225 or so tribes in the 48 contiguous states conduct some form of gaming operations on their reservations.[21] However, many other tribes have decided *not* to pursue casino-style gaming or, in some cases, any form of gaming. Only about one-third of the approximately 560 tribes in the United States recognized by the federal government conduct casino-style gaming on their reservations.[22]

Conceptually, tribes fall along a full spectrum of Indian gaming, ranging from tribes in states that prohibit gambling, where Indian gaming simply is not an option, to gaming tribes whose economic success is undisputed, such as the Mashantucket Pequots. Tribes that game do so with varying profitability, falling along a smaller spectrum of economic success, but also see other forms of success, as our two case studies in Chapter 5 demonstrate. Although Indian gaming falls along a full spectrum of tribal experiences, from tribes without casinos to those with highly profitable ones, we focus on gaming tribes because that is what the law and politics of Indian gaming focus on—and that is where the crucible of law and politics produces public policy affecting gaming tribes.

### Not All Tribes Have Casinos

For some tribes, gaming simply is not an option because their reservations are located in states that disallow any form of gambling.[23] For others, isolated locales or lack of financial resources may restrict their ability to open or sustain a casino. Even in the absence of these practical limitations, a few tribes have chosen not to pursue gaming enterprises based on tribal values and beliefs.[24] Perhaps the most cited example is the Navajo Nation's past rejection of gaming—but that may change.

The Navajo Nation is both the largest tribe, with over 250,000 enrolled members, and the largest reservation in the United States, covering 17.5 million acres in northwest New Mexico, northeast Arizona, and southeast Utah. In the mid-1990s, the tribe twice voted down referenda to build a casino. Opposition to a tribal casino was strongly influenced by Navajo beliefs that gambling can corrupt and destroy.[25] In 2002, Arizona voters approved Proposition 202, which allotted casino and slot-machine rights to both the Navajo and the Hopi, who also have rejected gaming in the past. The referendum allowed each tribe to open its own casinos or to lease its rights to other tribes in the state. Recently, the Navajo announced plans to build a casino near Albuquerque in the Tohajilee Reservation, a small satellite of the main Navajo reservation.[26] Despite tribal teachings against gambling, many Navajo hope that gaming may help raise the living standard of a people whose unemployment rate is 44 percent and whose per capita income is just over $6,000. "We thought we would be better off economically if we could do the same thing that other tribes have done in the area," said Tohajillee chapter president Tony Sacatero. "Even if you don't have a casino here, people are still going to go someplace else. But if you build it here, the money is going to stay here."[27]

### Not All Tribes' Casinos Are Successful

Although common sense dictates that the spectrum of economic success should include tribal casinos that do not earn enough to stay open, this appears to be a relatively rare occurrence.[28] One recent cautionary tale is that of the Santa Ana Pueblo in Albuquerque, New Mexico. In 2003, the tribe was nearly $90 million in debt on a number of economic ventures, including its casino. The tribe attributed declining profits at the casino to the negative economic impact of the September 11, 2001, terrorist attacks, the overall downturn in the state and national economy, and increased competition from other gaming tribes. For now, Santa Ana Pueblo has kept its casino open, in part with a $75-million loan from the Sandoval County Commission.[29] One might expect, however, that as legalized gambling continues to expand in the United States, competition from commercial as well as tribal casinos may drive some tribal casinos out of business.[30]

### The Spectrum of Success

For those tribes with casinos, financial success is varied. On one end of the spectrum, nearly half of all tribal gaming enterprises earn less than $10 million in annual revenue, and a quarter of Indian gaming operations earn less

than $3 million each year—often just enough to keep the casino open and provide modest funding for tribal government programs. On the other end of the spectrum, only about forty tribal casinos—just over one in ten—take in two-thirds of all Indian gaming revenue, each earning over $100 million annually.[31] Further complicating measures of economic success, the calculus involves a complex weighing of social and economic variables that determine Indian gaming's relative costs and benefits to tribes, localities, and states.

In some states, Indian gaming is limited to bingo and similar games because state public policy or other law prohibits casino-style gaming. For example, although Alaska is home to some 225 tribes and Native villages, it has only a handful of tribal gaming operations, offering mainly bingo and pull-tabs.[32] State law currently prohibits casino-style games, although state policymakers recently have considered a casino in Anchorage. Extraordinarily rural locales and limited reservation lands in the state, however, may further restrict any possible expansion of tribal gaming in Alaska.[33] In Oklahoma, another "bingo-only" state, state legislators recently considered allowing tribes to offer some casino games, including video blackjack and video poker. Industry experts expect that Indian gaming revenues would increase dramatically with the introduction of even limited casino-style gaming in Oklahoma.[34] Typically, of course, casino games, particularly slot machines, earn more revenue than does even high-stakes bingo.

In terms of simple economics, the spectrum of success for tribal casinos appears obvious—one merely need compare a rural bingo hall to a Las Vegas-style casino near a metropolitan area. We tell two stories in Chapter 5 to illustrate the spectrum's poles: those of the phenomenal profitability of the Pequots' Foxwoods Resort Casino in Connecticut and the modest-at-best economic success of Plains Tribes' casinos in North Dakota. But the two stories reveal that, for tribes, success may take more forms than profits. Using indigenous perspectives on tribal sovereignty to further examine success, we consider the effects of even modest casino profits on tribal government and reservation life. For many tribes, gaming revenue can provide the financial means for self-determination—for tribes to choose their own futures.

## INDIAN GAMING IS CONTROVERSIAL: PUBLIC OPINION AND PUBLIC POLICY

Due in large part to the vast sums of money changing hands, to the perception that gambling is a vice, to prevailing stereotypes, and to tribes'

complicated status as sovereign nations, tribal gaming is at the forefront of public discourse today concerning Native Americans, having prompted federal, state, and local policymakers and the popular media to pay attention to the actions of tribes to a degree far greater than at any other time in recent history. Not all of this attention is positive. Indeed, despite what appears to some observers to be a demonstrable, even stunning, public-policy success, Indian gaming is more controversial than ever.[35] As the Mashantucket Pequots have learned, criticism and backlash often accompany tribal gaming profits. The Pequots' Foxwoods Resort Casino is the most financially successful casino in the world—and the Pequots themselves may be the most intensely scrutinized tribe in the United States. The Pequots have attracted vast national media attention and have inspired two recent exposÈ-style books purporting to debunk the Pequots' status as a federally recognized tribe. Questions surrounding the Pequots' authenticity and their newfound wealth fuel criticism of the tribe, as well as of the federal recognition process and Indian gaming generally.

Although discussed less frequently in lieu of more dramatic and controversial narratives like the tale of the Pequots, tribes with only modestly successful casinos, such as those scattered throughout the Great Plains, are described in the mainstream media as providing further evidence of the failure of Indian gaming as public policy. In North Dakota, for example, tribes continue to struggle with what by non-Native community standards are staggering reservation unemployment and poverty rates and other socioeconomic adversity.

In 2000, the *Boston Globe* decried the poverty of many Native Americans in the face of the "mind-boggling wealth" of a few gaming tribes: "[Twelve] years after the federal government made gambling a staple of its Indian policy, the overall portrait of America's most impoverished racial group continues to be dominated by disease, unemployment, infant mortality, and school drop-out rates that are among the highest in the nation."[36] Echoing the criticisms of the *Globe* series, *Time* magazine in 2002 published an extensive two-part exposÈ of Indian gaming, labeling it the "wheel of misfortune" and asserting that tribal casinos extensively benefit wealthy non-Native investors but "provide little to the poor."[37] According to these accounts, IGRA thus represents a policy failure of the highest level.

The media's attention to Indian gaming and its specific focus on the success of tribes like the Pequots and the supposed failure of tribes like those on the Plains have inspired demand for policy reform at the state and federal

levels. In Chapter 6, we critique this discourse as ignoring the significance of tribal sovereignty. We draw on both the limited federal definition of tribal sovereignty—criticism of Indian gaming often ignores even this narrow and artificial construction of tribal authority—and indigenous perspectives on tribal sovereignty to reveal pervasive popular misapprehensions of Indian gaming and tribal governments.

## INDIAN GAMING IS AN OPPORTUNITY: A PROPOSAL

In this book, we set out a theoretical framework, grounded in tribal sovereignty, for understanding Indian gaming. We believe that tribal sovereignty provides the necessary foundation for informed and effective law and policymaking in the area of Indian gaming. In Chapter 1, we explain tribes' unique status in the American political system—that tribal sovereignty exists, and what it means. We rely on the narrow federal legal doctrine of tribal sovereignty to describe the development of current Indian gaming law and policy in the following chapters, explaining how law and politics shape the realities of Indian gaming today.

In the book's latter chapters, we return to indigenous views of tribal sovereignty: tribal nations' inherent right of self-determination. We draw upon Native conceptions of tribal sovereignty to form the theoretical foundation for exploring current empirical evidence of socioeconomic impacts of tribal gaming. Furthering the move toward an explanatory account of Indian gaming from a law and policy perspective, we critique public opinion and public policy based on the spectrum of success of Indian gaming, from the Pequots to the Plains. We examine the prevailing discourse surrounding tribal gaming by situating the issues within the framework of tribal self-determination. Rather than asking what appear to be the two standard questions that are the starting point for most discussions—Who is benefiting or losing from Indian gaming? or more simplistically, Is Indian gaming good or bad?—we ask, Does Indian gaming embody the exercise of tribal sovereignty? That is, does it further tribes' freedom to choose their own futures? We believe that in large part it does—or, at least, it can.

In the concluding chapter, then, we set forth a proposal for a new compromise, one between sovereigns with mutual benefits to each. We argue that tribal sovereignty, seen as tribes' right of inherent self-determination, provides the necessary foundation for assessing whether Indian gaming in

fact is successful and reveals more common interests and goals of tribal and nontribal governments than does a simple economic bottom line. We propose that tribal sovereignty should drive both public discourse and public policymaking concerning Indian gaming. Tribal gaming presents a significant opportunity to give practical meaning to tribal self-determination and to reshape how tribal sovereignty is recognized and realized through legal and political processes. In rejecting the compromised nature of the federal legal doctrine of tribal sovereignty and reaching a new compromise among sovereigns, state, tribal, and federal political actors may craft fair and effective Indian gaming law and policy. A compromise reached by sovereign governments need compromise neither the interests of non-Indians nor the future of Native Americans.

# Part I

## FRAMEWORKS: THE LAW AND POLITICS OF INDIAN GAMING

# Indian Gaming and Tribal Sovereignty

> Tribal sovereignty is more than a legal doctrine, it is our existence and our continued survival.
>
> —*Coeur d'Alene tribal leader David Matheson*[1]

Indian gaming is fundamentally different from most forms of gambling, from church bingo nights to the slots at Las Vegas's MGM Grand Casino, because it is conducted by tribal governments as an exercise of their sovereign rights. Tribal sovereignty—a historically rooted concept recognizing tribes' inherent rights as independent nations, preexisting the United States and its Constitution—informs the primary legal and political foundation of federal Indian law and policy and thus of Indian gaming. Yet tribal sovereignty, whether viewed through the lens of federal law or the perspectives of indigenous peoples, is perhaps the most misunderstood aspect of Indian gaming.

We explore tribal sovereignty from two different perspectives: the federal definition found in the legal doctrine of tribal sovereignty and broader indigenous conceptions centered on tribes' inherent right of self-determination. As defined by federal law, tribal sovereignty is limited by federal authority; that is, Congress may narrow or even extinguish tribal sovereignty. Tribal governments and tribal members maintain deeply held convictions about the origins, meaning, and immutability of tribal sovereignty that fundamentally are at odds with the federal legal doctrine. Nevertheless, federal Indian law and policy continue to constrain tribal

self-government and self-determination. In the realm of Indian gaming law and policy, tribal sovereignty has been compromised.

## WHAT IS TRIBAL SOVEREIGNTY?

As political scientist and legal scholar David Wilkins notes, there is "a bewildering array of interpretations of the nature and extent of tribal sovereignty."[2] Although at the heart of tribal identity, sovereignty as a legal and political doctrine is "one of the most misunderstood concepts within Western jurisprudence."[3] Some adhere to the doctrine of tribal sovereignty found in federal law; others strive to bring meaning to the term beyond legislation, regulation, or the U.S. Supreme Court's interpretation. Sovereignty is "the heart and soul" of Native people, according to Comanche tribal leader Wallace Coffey, and "no one has jurisdiction over that but God."[4] The import and scope of the term, for many, precludes simple definition. Law professor Robert Porter, on the other hand, has stated succinctly that tribal sovereignty "simply means freedom, the freedom of a people to choose what their future will be."[5]

Indigenous perspectives on tribal sovereignty capture both the tangible and intangible aspects of sovereignty and emphasize its inherent and undiminishable nature. Native views provide a fuller and more accurate picture of tribal sovereignty than does the federal legal doctrine. Many non-Natives, however, are unaware of even the limited and flawed version of tribal sovereignty found in the federal definition. In this first descriptive step of exploring tribal sovereignty in the context of Indian gaming, we begin with the federal legal doctrine to introduce the explanatory power of the federal definition in shaping tribal gaming law and policy and to provide contrast for broader indigenous perspectives on sovereignty.

### The Federal Legal Doctrine of Tribal Sovereignty

The federal legal doctrine of tribal sovereignty, or what most frequently is erroneously referred to in federal law and jurisprudence as well as the legal literature as simply "tribal sovereignty," incongruously refers to both the political status of tribes as preconstitutional and extraconstitutional nations and the body of federal Indian law that defines and limits that political status. This problematic conflation of tribal sovereignty with the federal law that diminishes it is confusing to most people, including policymakers, and frustrating to Indian law scholars.[6] The federal definition of

tribal sovereignty, as it is applied in U.S. laws, court decisions, and regulations, grows out of, diminishes, occasionally crushes, and sometimes supports tribes' inherent self-determination—but does not equate with it.

At the foundation of the constitutional status of tribes and federal Indian law is the principle that tribes' powers of self-governance are inherent and original, rather than delegated by acts of Congress.[7] Tribes, of course, may voluntarily cede sovereign authority, or, according to the federal legal doctrine, Congress may limit tribal sovereignty. The corollary is that tribes maintain inherent authority over their internal affairs unless a treaty or federal statute explicitly removes that power. As federal Indian law scholar Felix S. Cohen wrote, "What is not expressly limited remains within the domain of tribal sovereignty."[8]

Tribes' ability to govern their members and territories stems from their inherent powers as preconstitutional sovereign nations. As the original inhabitants of North America, indigenous peoples governed themselves without external influence. The federal government's establishment of a legal relationship with the tribes meant that they continued to exercise extraconstitutional authority over their members. This authority translated into the right of self-governance. Under the doctrine of reserved rights, tribes maintain rights they have not specifically ceded to the federal government through treaty or agreement. Because it implies such broad powers, "the right of self-government may be [tribes'] most valuable reserved right."[9]

Yet the development of a legally codified doctrine of tribal sovereignty also reflects the curtailment of tribes' original and inherent right of self-determination. From the outset, colonizers imposed a particular framework of self-governance upon the tribes that circumscribed their extraconstitutional status. First Europeans and then the federal government imposed Western concepts of self-governance, treating tribes as political entities with official representatives.[10] Subsequently, through a series of early decisions commonly called the Marshall Trilogy, the U.S. Supreme Court characterized tribes as "domestic dependent nations," whose governmental authority was subject to the overriding sovereignty of the United States. At the same time, the federal government assumed a responsibility to tribes to protect this truncated form of self-governance. As tribes' "protector," the federal government had a duty to defend tribal sovereignty against unauthorized state encroachment.[11]

The federal legal doctrine of tribal sovereignty is inextricably linked to tribal self-government. Thus, claims of tribal sovereignty are strongest on

tribal lands and over tribal members. The modern Supreme Court has interpreted the "dependent" status of tribes as limiting sovereignty to those powers "necessary to protect tribal self-government or to control internal relations" or crucial to the "political integrity, the economic security, or the health or welfare" of the tribes.[12] Because tribal sovereignty is so closely tied to reservation land under federal law, tribes have little legal control over off-reservation politics or policymaking that may affect tribal interests. The legal doctrine of tribal sovereignty thus creates political limitations on tribes' ability to exercise their sovereignty. Cohen's description of the federal legal doctrine of tribal sovereignty remains a useful summation of the political principles underpinning the doctrine as well as its practical meaning:

> The history of tribal self-government forms the basis of the exercise of modern powers. The present right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government today are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. They necessarily are observed and protected by the federal government in accordance with a relationship designed to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished.[13]

The legally protected political autonomy of Indian tribes is a peculiar tenet of federal Indian law. Unlike other racial or ethnic groups, for whom social, political, and cultural integration or assimilation was a primary goal of federal antidiscrimination law and policy, "Indians have enjoyed a legal status that was, at the outset, designed primarily to protect their cultural separateness and political autonomy."[14]

### Cultural Sovereignty

Several noted legal scholars have taken pains to point out numerous legal and historical flaws and inconsistencies in the development of the federal definition of tribal sovereignty. Many take more fundamental issue with the extent of federal power embodied in the legal doctrine, particularly Congress's authority to limit tribal sovereignty unilaterally.[15] Recognizing that tribal authority under the federal definition of tribal sovereignty depends in large part upon the federal government's recognition of tribal independence, some Indian law scholars and Native activists have criticized

the federal legal doctrine as inappropriately grounded in U.S. law rather than in the inherent status of tribes and too narrowly tied to reservation lands and tribal members.[16] As an alternative, legal scholars Wallace Coffey and Rebecca Tsosie have argued for a focus on what they call "cultural sovereignty," rooted in tribal conceptions of inherent self-determination.

Without a focus on internal priorities and values, sovereignty lacks a Native perspective and becomes only what the dominant society allows. Cultural sovereignty, as understood by Coffey and Tsosie, encompasses the ability of tribes to define their own histories and identities, in part to counter stereotypes and imagery of the dominant society. As Coffey and Tsosie define it, cultural sovereignty is "the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures."[17] Self-governance, then, may be less integral to cultural sovereignty than is self-determination.

Scholars and activists Vine Deloria, Jr., and Clifford Lytle distinguish between self-governance, seen as merely a measure of compliance with external norms and expectations, and self-determination, which turns on tribal culture. "Self-government . . . has come to mean those forms of government that the federal government deems acceptable and legitimate exercises of political power and that are recognizable by the executive and legislative branches." As Professor Sharon O'Brien suggests, "While closely related, the terms sovereignty and self-government are not synonymous. Sovereignty refers to the intangible and spiritually derived feeling of oneness. [Unlike powers of self-government,] [s]overeignty is not something that one government can delegate to another."[18] In that light, self-government, driven by federal recognition and control, is distinct from self-determination, which is internally generated.[19]

Cultural sovereignty, then, is the internally generated power to embrace and effect a Native people's cultural norms and values. According to sociologist Duane Champagne, "cultural sovereignty for a Native community is the right to adopt or reject social and cultural innovations and make social changes that are culturally compatible with Native traditions and world views."[20] Fundamentally, as attorney Francine Skenandore argues, "cultural sovereignty does what politically-based sovereignty cannot do, which is to empower tribes to define who they are in accordance with their respective values and norms, not the values and norms of the larger society that are reflected in federal policies and case law."[21] Similarly, Coffey and Tsosie assert that cultural sovereignty is necessary for tribes' cultural survival. "The

concept of cultural sovereignty is valuable because it allows [tribes] to chart a course for the future. In that sense, cultural sovereignty may well become a tool to protect [tribal] rights to language, religion, art, tradition, and the distinctive norms and customs that guide [each society]."[22]

Common to these perspectives is the fundamental assertion that, in contrast to the curtailment of tribal sovereignty by the dominant society's application of its laws to the tribes, cultural sovereignty reflects a community's own decisions about what is important and valuable.

### Incorporating Indigenous Perspectives on Tribal Sovereignty

David Wilkins attempts to fuse these two perspectives on tribal sovereignty: first, the extent to which tribal sovereignty is enforceable and has been recognized, at various points and to various degrees, by the federal government, and second, indigenous perspectives on sovereignty that critique the federal definition and incorporate Native tradition and culture. Wilkins posits that sovereignty has two basic dimensions—a "political/legal dimension" and a "cultural/spiritual dimension." The political/legal dimension encompasses tribal independence from other governments and the power to regulate internal affairs, including a tribe's ability to choose a form of government, determine and exclude members, establish property rights, levy taxes, and administer justice.[23] The cultural/spiritual dimension takes on a collective spiritual meaning for the tribal community that reflects a communal sense of nationhood. Wilkins thus expands his definition of sovereignty to include "the intangible and dynamic cultural force inherent in a given indigenous community, empowering that body toward the sustaining and enhancement of political, economic, and cultural integrity. It undergirds the way tribal governments relate to their own citizens, to non-Indian residents, to local governments, to the state government, to the federal government, to the corporate world, and to the global community."[24]

Wilkins views this broader form of sovereignty, which stems from tribes' inherent self-determination, as both a precursor to and an imperative that supersedes its common federal doctrinal definition. The political/legal and cultural/spiritual dimensions of tribal sovereignty are both original and inherent, encompassing a multidimensional set of rights that span centuries, and thus cannot be delegated to the tribes—or taken away—by either the federal government or the states. At the same time,

Wilkins recognizes that "fundamentally the tribal relationship to the United States is a political one," and "the relationship between American Indian tribes and the U.S. federal government is an ongoing contest over sovereignty."[25] Although sovereignty is original and inherent to Native people, in a practical sense, aspects of tribal sovereignty and hence self-determination have been circumscribed or abrogated through the actions of nontribal political institutions, particularly through federal Indian law and policy.[26] As Wilkins and Lomawaima acknowledge, "In the real world, sovereignty operates within constraints."[27]

Robert Porter argues that any definition of tribal sovereignty must take into account three perspectives: that of a Native people, that of the dominant society, and that of the international community. "Bringing together both the Indigenous and colonial perspectives, as well as the developing global perspective, is necessary for a comprehensive understanding of what Indigenous nation sovereignty really means."[28] Such a conception of tribal sovereignty does not lend itself to a single definition; each tribe must determine its own definition according to three factors: belief, ability, and recognition. Sovereignty, then, is variable and evolving, depending upon a Native people's "belief . . . in their own sovereignty," "ability . . . to carry out their belief in their own sovereignty," and "the extent to which [they] have their sovereignty belief recognized and respected" by the people themselves as well as by external institutions.[29] Porter suggests that this concept of sovereignty provides not only a theoretical framework but also a practical opportunity to change the current reality of tribal sovereignty under federal law. In Porter's view, internalization commences the process of social change: "To succeed, it will first require that this belief be accepted among one's own people, and then blended with their collective abilities to bring that belief to life. Eventually, if the commitment is true and the effort is earnest, . . . pursuing such a strategy will be the best chance for ensuring the survival of that Indigenous society into the future."[30]

Similarly, in Deloria and Lytle's opinion, "cultural self-government and cultural self-determination must precede their political and economic counterparts if developments in these latter areas are to have any substance and significance."[31] Yet in a practical sense, "government-to-government relationship," when used to describe the relative status of tribal governments to the federal government and in some instances the states, represents a reasonably "accurate characterization of the goal of Indians in clarifying their relationship with the United States."[32] As tribal leaders and

Native people turn to an ideology of inherent self-determination rather than the externally driven concept of self-governance, Deloria and Lytle suggest that tribes' "internal integrity" will facilitate realization of both self-determination and self-governance in cultural, religious, sociological, and political arenas.[33]

### Tribal Sovereignty and the Law and Politics of Indian Gaming: Our Approach

Incorporating indigenous perspectives leads to a broad and accurate understanding of tribal sovereignty as inherent self-determination. We return to Native conceptions of tribal sovereignty in the final chapters, drawing on this framework to develop an alternative view of Indian gaming. We believe that a definition of tribal sovereignty that incorporates the perspectives of indigenous nations is necessary for fair and mutually respectful intergovernmental relations and sound public policy. This framework is the basis for the policy reform we propose in our conclusion.

Before we view Indian gaming through the lens of tribes' inherent right of self-determination—the final step in our process of understanding how tribal sovereignty relates to Indian gaming—we must undertake the second, explanatory step. To explain current tribal gaming law and policy, we largely utilize the federal doctrine of tribal sovereignty, as it assists in describing and analyzing the law and politics surrounding tribal gaming that have developed under the application of this very doctrine, from key U.S. Supreme Court decisions, to the overarching federal regulatory scheme governing Indian gaming, to the political and legal power wielded by the states and federal government in shaping the day-to-day realities of tribal gaming. It is only through the underpinnings of the legal doctrine that one may see the compromises among tribal, state, and federal power and interests, as well as the compromised nature of tribal sovereignty under the federal definition.

Typical non-Native understandings of tribal sovereignty range from acceptance of the federal legal doctrine's constraints on tribal authority, to disregard for even the limited federal definition, to ignorance of tribal sovereignty's very existence. We believe that federal Indian law's definition of tribal sovereignty has great legal and practical impact on Indian gaming.[34] As we discuss, and as numerous commentators have noted, this is a constrained and flawed version of sovereignty; yet, it is in many ways the concept that defines and drives the compromises inherent to the law,

politics, and policy of Indian gaming. That does not mean it is right. Although our discussion and analysis of the law and politics of tribal gaming is founded upon the legal doctrine of tribal sovereignty, we do not accept that the legal doctrine provides the only feasible definition of sovereignty for Native people—far from it.

We are conscious of Porter's and others' frustrations with the uncritical study of federal Indian law as "complicit in the effort of the United States to subordinate Indigenous conceptions of Indigenous nation sovereignty to the American conception."[35] Vine Deloria has argued that policymakers, jurists, and academics have abstracted federal Indian law to the point that it is disconnected from the real world: "Legal theories are tested not by comparison with reality, but by comparison with abstractions which idealize human rationality in order to give events and incidents a sense of meaning which they would not otherwise enjoy."[36] Such an abstruse intellectual exercise is devoid of concreteness, as it conveys "almost no significant meaning, it rarely is tangent to the world of human affairs, and it covers a multitude of historical sins with the shellac of legality."[37] Similarly, David Wilkins concludes that federal Indian law as a "discipline having coherent and interconnected premises is wholly a myth."[38] We believe, however, that most scholars and activists—including those mentioned here—would acknowledge that the institutions that produce federal Indian law and policy, primarily the U.S. Supreme Court and Congress, have a real and tangible effect on the day-to-day lives of Native people. Again, that does not mean it is right.

In focusing on the federal legal doctrine for its power to explain tribal gaming law and policy, we do not diminish the significance of indigenous conceptions of tribal sovereignty. By explaining the federal definition and its limitations, we seek to push its bounds and to suggest pragmatic steps to incorporate Native interpretations of tribes' inherent authority into Indian gaming law and policy.

## A SHORT HISTORY OF FEDERAL INDIAN POLICY

"Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith."[39] So wrote Felix Cohen, noting the unique and complicating fact of tribal sovereignty: federal Indian policy affects not merely

groups of people linked by ethnicity, race, or culture, but societies that existed long before the American Revolution. The federal government's treatment of Native Americans involves not just the all-too-familiar story of oppression of a minority group by the majority, but the near-eradication of indigenous societies by colonizers. This near-eradication in large part was prompted by colonists' and then settlers' quest to acquire land.[40]

Although sovereignty and property ownership are two distinct concepts, they are linked in federal Indian law and policy. Under federal law, indigenous nations were divested of full property rights over their territories, diminishing, according to the United States, tribes' sovereign rights to govern those same territories. This is a questionable legal position at best, grounded as it is in colonization, "manifest destiny," and racism. Yet it continues to influence the federal doctrine of tribal sovereignty in modern times. The federal legal doctrine of tribal sovereignty may be summarized as follows: tribes, while ostensibly recognized as independent, self-governing sovereigns by federal law, are subject to federal authority, and tribal sovereignty may be limited or even extinguished by Congress. This definition of tribal sovereignty reflects the "framework of power" embodied in federal Indian law and policy, "a legal structure that generally privileges the powers of the federal government over the powers of tribes."[41] Native definitions of tribal sovereignty rooted in inherent self-determination are at odds with the federal legal doctrine. Again, although Native perspectives provide a more accurate view of tribal sovereignty, the federal definition nevertheless remains a strong force in shaping federal Indian law and policy. Indeed, the sovereignty contest between the United States and tribes has shaped federal Indian law and policy for much of the last two hundred years.

### Preconstitutional Policy

Throughout the eras of exploration and colonization, Great Britain and other European nations treated the indigenous American tribes as sovereign nations. During and after the Revolutionary War, the nascent United States followed a similar approach to dealing with the tribes and the issue of westward expansion; yet problems with individual colonies trading and waging war with the tribes, who for their part did not necessarily differentiate among the colonies, framed the issue as one of states' rights.[42] In devising the national charter for the United States, advocates of federal control over U.S.-tribal relations emphasized the difficulties in asserting state power over the tribes. Federalists argued that only the national government

had any hope of adequately controlling the tribes to allow the peaceable existence and continued expansion of the new country. In the end, the nation's first charter, the Articles of Confederation, delegated to the federal government the power of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[43]

### The Constitution and the Tribes

The flaws inherent in the Articles of Confederation inspired a caucus to amend the charter's provisions. Although the fledgling country's concerns with Indian affairs are apparent in the debates over the Articles, the lack of discussion at the Constitutional Convention suggests that there was general consensus that dealings with the tribes should be left to the federal government rather than the states.[44] The expression of that power in the Constitution, however, is surprisingly brief. Known as the "Indian Commerce Clause," the Constitution delegates to Congress the power "to regulate commerce . . . with the Indian Tribes."[45] Through the drafting and ratification of the Constitution, the states delegated power, including the power to regulate commerce with the tribes, to the federal government and acknowledged that federal law was "the supreme Law of the Land."[46] The tribes, of course, were not represented at the Constitutional Convention, nor did they ratify the Constitution. Accordingly, they remained extraconstitutional sovereigns, separate from the U.S. system of government and free of the constraints of the Constitution.

### Early Federal Indian Policy

After the ratification of the Constitution, Congress soon exercised its power to regulate commerce with the Indian tribes. At the direction of President George Washington and Secretary of War Henry Knox, Congress passed a series of laws known as the Intercourse Acts, charting the course for the nation's early Indian policy. In his annual message of 1791, Washington called for justice, fair regulation of commerce with the tribes, due process for land purchases, training for tribal members, and protection of Indian rights.[47]

Soon a federal agency was created to carry out Indian law and policy. In 1806, President Thomas Jefferson established the Office of the Superintendent of Indian Trade within the War Department. Originally intended to oversee the purchase of goods for factories and transmission of stores to the frontier, under President James Monroe the Office was expanded to a

more-generalized Bureau of Indian Affairs in 1824. Secretary of War John C. Calhoun charged the Bureau with administering funds related to regulating the Indian tribes, refereeing claims arising between Indians and whites under the Intercourse Acts, and facilitating the War Department's regular dealings with the tribes. In 1848, the Bureau of Indian Affairs was moved to its current home within the Department of the Interior.[48]

### Removal Policy

Under the Indian Removal Act, recommended to Congress by President Andrew Jackson and passed in 1830, the president could exchange U.S. territory west of the Mississippi for eastern land held by tribes.[49] Jackson was an advocate of removal of the tribes to the unsettled western territory. Although Jackson urged "voluntary" removal of Indians to the West, a tribe's "refusal to emigrate meant the end of federal protection and abandonment to state jurisdiction," and Jackson endorsed use of the military to "voluntarily" remove tribes.[50] At the time, some states were openly hostile to tribes, passing laws that facilitated white trespass on tribal lands. Mississippi statutes, for example, purported to abolish the Choctaw government and subjected any tribal officer to criminal penalties. Despite the federal power to regulate commerce with the tribes and to enter into and enforce treaties, Jackson informed the tribes that the federal government was powerless to stop state encroachment on tribal lands and rights and encouraged tribes to move westward. As a result, a number of tribes entered into treaties with the United States conditioning federal protection from state hostility on the tribes' removal to the west.[51] The federal government's removal policy infamously and tragically culminated in the Trail of Tears, the forced relocation of thousands of Native Americans from a dozen tribes.[52]

### The Marshall Trilogy and Federal Indian Jurisprudence

During this period, the U.S. Supreme Court defined and judicially codified the federal government's relationship to tribes. In a series of cases commonly referred to as the Marshall Trilogy, Chief Justice John Marshall delineated the relationship, providing a legal rationale for treating tribes as having less than the complete sovereignty enjoyed by nation-states.[53]

First, in *Johnson v. M'Intosh*, the Court resolved a dispute between competing land titles, one based on a purchase from the Indians and the other based on a grant from the United States.[54] The Court held that the title to land conveyed by Indians to non-Indians was not entitled to federal recogni-

tion. The Court based its holding on the character of tribal lands under a doctrine of discovery:[55] although the tribes retained a "title of occupancy" to their lands, "complete ultimate title" was vested in the United States.[56] In other words, the federal government, rather than the tribes themselves, had power to convey tribal lands. The Court defended its interpretation of the doctrine of discovery based in part on its perception of tribes: "The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness."[57]

Marshall's interpretation of the discovery doctrine was a significant departure from prior European law and practice. As David Wilkins and K. Tsianina Lomawaima point out, "The question should have been whether private individuals could purchase Indian land, or whether only the national government had that authority." Such an approach would have been consistent with the "preemptive doctrine of discovery," meaning merely that when an indigenous tribe agrees to sell its land, the "discovering" nation has a first right of refusal. As Wilkins and Lomawaima persuasively argue, this conception of the doctrine of discovery is grounded in law and historical practice. Marshall's more expansive construction of the discovery doctrine in *Johnson v. M'Intosh* gave the United States ownership of tribal lands irrespective of tribal consent, "reduc[ing] Indian tribes to mere tenants, whose legal claims to their aboriginal homelands are secondary to the claims of the 'discoverers.'"[58]

In *Cherokee Nation v. Georgia,* the second case of the Marshall Trilogy, the Supreme Court held that tribes' sovereign status was akin to that of neither foreign nations nor states, presumably falling somewhere in between. The Cherokees challenged Georgia state laws designed to forcibly undermine the Cherokee Nation by annexing tribal lands, abolishing tribal government, courts, and laws, and establishing a process for seizing tribal land and allocating it to white citizens, all of which were enforced through intimidation and violence.[59] In deciding whether the case triggered federal jurisdiction, the Court considered whether the Cherokee Nation was a foreign government. Famously, the Court stated that the Nation was "a state, . . . a distinct political society, separated from others, capable of managing its own affairs and governing itself, "but nevertheless determined that the Cherokee Nation was not a "foreign state."[60] Invoking language that would shape federal Indian law, Chief Justice Marshall characterized the tribes as "domestic dependent nations": "They occupy a

territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[61]

The Court's characterization of tribes as wards lacking competence to manage their affairs was related to *Johnson v. M'Intosh*'s expansive interpretation of the discovery doctrine: full legal title to tribal lands could not be entrusted to tribes and instead must be managed through the federal government's benevolent guardianship. The responsibility of the United States as tribes' guardian gave rise to the trust doctrine. Although there is scholarly disagreement over the origins of the trust doctrine and no settled definition of it, most scholars agree that it connotes an obligation on the part of the United States to protect tribes and tribal assets.[62]

In a case that soon followed, *Worcester v. Georgia*, the Court appeared to retreat from its expansive interpretation of the discovery doctrine.[63] Worcester, a missionary living among the Cherokees, refused to take an oath of allegiance to the state, as required by Georgia law. The case raised questions about federal and state authority over tribes. Chief Justice Marshall wrote that the discovery doctrine only "gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it" and reaffirmed the existence of tribes' sovereign authority.[64] Importantly, *Worcester* also clarified that tribes were subject to federal power but not state power. The Court clearly defined the extent of state authority over the tribes, holding that the Cherokee Nation "is a distinct community, occupying its own territory, with boundaries accurately described, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States."[65]

In the Supreme Court's interpretation of the Indian Commerce Clause, the Constitution granted the federal government exclusive authority to deal with tribes, conferring on Congress "the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded."[66]

At one level, the case was a victory for the tribes over the states' assertion of authority. But as law professor Nell Jessup Newton noted, "Although the Court in *Worcester* recognized that Indian tribes possess inherent sovereignty rights, the decision was really a defense of federal over state power, not a defense of Indian tribal sovereignty."[67] Cherokee leaders wondered whether the federal government's legislative and executive branches would conform to the Court's decision. As one put it, "The Chicken Snake Andrew Jackson has time to crawl and hide."[68] The statement, "John Marshall has made his decision; now let him enforce it," infamously and perhaps erroneously attributed to President Jackson, nevertheless accurately reflected his stance, as he ignored the Court's ruling and took no action to stop state abuses against tribes.[69]

The exclusivity of federal power described in *Worcester* later was mischaracterized as a plenary—meaning complete and unlimited—power of Congress.[70] As many Indian law scholars have persuasively argued, this version of Congress's authority over tribes as absolute is insupportable in American constitutional law.[71] Nevertheless, it continues to influence federal Indian law and policy.[72]

At the close of the Marshall Trilogy, the inconsistent—some would say schizophrenic—nature of the Court's approach to tribes was apparent. Indians were "fierce savages" yet resembled "wards" in a "state of pupilage." Tribes were both "domestic dependent nations" and "distinct communities" with political independence.

### Allotment and Assimilation

By the end of the 1830s, several tribes had been removed to what became known as "Indian territory," west of the Mississippi. As white settlers' thirst for land proved unquenchable, tribes were pushed to move further westward or to remain on ever-smaller tracts of land.[73] When gold was discovered in California, only the Great Plains remained as land perceived to be devoid of resources useful to settlers. Still, fortune hunters and pioneers had to cross through middle America to reach the riches of the West, and the Plains tribes fought hard to protect their lands against intrusion.

The United States ceased making treaties with the tribes in 1871, when it unilaterally deemed them insufficiently foreign to require formal treaty negotiation.[74] At the same time, the federal government embarked on a policy of assimilation, attempting to eradicate Native traditions and cultures. Again, land acquisition was the primary goal: "Proponents of assimilation

policies maintained that if Indians adopted the habits of civilized life they would need less land, and the surplus would be available for white settlers. The taking of these lands was justified as necessary for the progress of civilization as a whole."[75]

In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, which began the policy of federally mandated allotment of tribal lands to reservation Indians.[76] Following the act, several tribe-specific laws replaced tribal ownership of land with title held by individual tribal members. Individual members were "allotted" a specified parcel, and the resulting "surplus" of tribal land was opened to white settlement, often resulting in "checkerboard" patterns of Indian and non-Indian land ownership.[77]

The assimilationist purpose behind the federal allotment policy was no secret. President Theodore Roosevelt described it as "a mighty pulverizing engine to break up the tribal mass."[78] Indeed, the result of federal allotment policy was a nearly two-thirds reduction in the acreage of tribal lands—and a corresponding impoverishment of Native Americans.[79] Allotment and other assimilationist policies also furthered detribalization, and thus tribal governments, traditions, and cultures were weakened.[80]

### Reorganization and Self-Government

In the late 1920s, the devastating and chaotic effects of the allotment era inspired a shift in federal Indian policy from assimilation to relative tolerance and protectionism. After the influential Meriam Report's exhortation to respect "the rights of the Indian. . . . as a human being living in a free country," the federal government undertook efforts to improve the socioeconomic status of tribes.[81] In 1934, Congress ended allotment and forced assimilation of individual Indians and passed the Indian Reorganization Act, which was meant to facilitate reformation of tribal governments.[82] The act restored unsold surplus lands to tribal ownership and imposed restrictions on the conveyance of tribal lands.[83] The Act also reinstated some governmental authority to the tribes, granting them the right to adopt a constitution, subject to approval by the Bureau of Indian Affairs.[84] The act did nothing, however, to return allotted lands to the tribes or to increase tribal jurisdiction.[85]

### Termination

Federal Indian policy soon swung back to assimilation, however, this time in the form of an official policy of "termination," which set out to dismantle tribal communities and the federal programs that supported them.[86] In 1953,

after severe criticism of Indian reorganization policies,[87] Congress adopted a resolution that stated: "It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States."[88]

Termination policy spawned a comprehensive federal legislative and administrative program to cede exclusive federal authority to deal with tribes to the states and to end tribes' special status within the American political system. Congress statutorily terminated the federal relationship with approximately 109 tribes and bands. The end of the federal-tribal relationship meant the end of federal assistance and protection from state authority. Additionally, federal services to tribes, including health and education, were turned over to states, tribal lands were sold to non-Indians, tribal economic development was replaced with incentives for Indians to seek off-reservation employment, and tribal jurisdiction was truncated.[89] As part of its termination policy, Congress passed Public Law 280, which unilaterally imposed state civil and criminal jurisdiction over some tribes.[90] Public Law 280 also provided that any other state could assume similar jurisdiction over tribes within its borders merely by passing a state law, regardless of tribal consent or wishes.[91] Although not all tribes were terminated, the policy's assimilationist imperatives were far reaching and resulted in the declining socioeconomic health of Native American tribes and people throughout the United States.[92]

### Self-Determination

The civil rights movement and growing tribal opposition to termination catalyzed fundamental and seemingly contradictory changes in federal Indian policy. In 1968, President Lyndon Johnson identified the "new goal" of federal Indian policy as one of "partnership and self-help," providing Indians "an opportunity to remain in their homelands, if they choose, without surrendering their dignity; an opportunity to move to the towns and cities of America, if they choose, equipped with the skills to live in equality and dignity."[93] At the same time, Congress passed the Indian Civil Rights Act of 1968, which unilaterally imposed on tribal governments several of the protections of individual rights found in the Bill of Rights.[94] As the 1970s began, President Richard Nixon continued the trend in federal Indian policy of "self-determination," calling for the end of termination and paternalism

and urging Congress to return control of federal Indian programs to the tribes.[95] In a special message to Congress, Nixon stated,

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. 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.[96]

In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, which allowed tribes to assume control of federally funded programs, including tribal law enforcement, social services, health care, and natural resource management.[97] Other legislation, including the Indian Child Welfare Act of 1978[98] and several laws intended to promote reservation economic development and improve tribal government services, strengthened tribal authority. Nevertheless, as one critic observed, the federal government's self-determination policy "involve[d] contracting with tribes, rather than actually transferring power to them."[99]

### Economic Self-Sufficiency

By the end of the 1970s, there was growing political opposition to federal support for tribal authority and rights. This coincided with Reagan-era goals of decreasing federal spending, downsizing federal programs, and "devolution," or increasing state and local control over government services.[100] The Reagan Administration's Indian policy reflected its general approach of reducing reliance on federal programs.[101] Couched as a necessary part of self-determination, President Reagan focused on "removing the obstacles to self-government and . . . creating a more favorable environment for the development of healthy reservation economies" in order to ultimately "reduce [tribes'] dependence on Federal funds."[102]

Though espousing self-determination through economic development, by the 1990s the federal government was forced to concede that the tribes, as a result of past federal policy more than anything else, possessed limited economic choices.[103] Focusing on tribes' ability "to compete economically," federal Indian policy under President Bill Clinton undertook "to create jobs, raise incomes, and develop capital for new businesses." Specifically, Clinton encouraged "the tribes to continue to benefit from gaming."[104]

Indian gaming, whose advent coincided in large part with Reagan-era cuts in Indian subsidies and the federal government's encouragement of tribal economic self-sufficiency and entrepreneurial activity, presented an ongoing opportunity to solve the "Indian problem"[105]—essentially the same problem addressed by federal Indian policy since its inception—but without the perceived need to commit as many federal resources to the tribes. As some scholars have noted, this era of federal Indian policy "might be seen as either a period of the strengthening of the respect for tribal self-determination or as a period of termination by cessation of funding."[106]

Over the course of more than two centuries of federal-tribal government interactions, the political relationship between the United States and tribes has been far from consistent. The treaty era, during which the United States dealt with tribes as foreign powers, reflected what law professors Robert N. Clinton, Carole E. Goldberg, and Rebecca Tsosie term an "international model of self-determination," characterized by mutual respect for each sovereign's power to totally control "its lands, its citizens and its destiny." Federal-tribal relations also have fallen within another extreme, a "colonial domination model," in which the federal government has imposed U.S. law and policy on tribes regardless of tribal consent and federal obligations. This model was most apparent during the termination era. Much federal Indian law and policy falls between these two poles, following either a "treaty federalism model," marked by tribal consent to limit governmental autonomy in exchange for U.S. protection in the form of a treaty-like agreement, and a "colonial federalism model," in which tribes retain limited sovereignty but are subject to federal authority, with or without their consent.[107] Although plainly not without both legal and moral flaws, the federal doctrine of tribal sovereignty is best described as falling within the colonial federalism model of tribal-federal relations: the federal government, while recognizing tribal sovereignty, may unilaterally limit that sovereignty.

## INDIAN GAMING AND THE FEDERAL LEGAL DOCTRINE OF TRIBAL SOVEREIGNTY

The federal legal doctrine of tribal sovereignty delimits the law and policy of Indian gaming. In theory, tribal governments' right to conduct gaming on reservations stems from their status as preconstitutional sovereign nations possessing an inherent right of self-determination. The U.S. Supreme

Court recognized this right in *California v. Cabazon Band of Mission Indians,*[108] and Congress codified it in the 1988 Indian Gaming Regulatory Act (IGRA).[109] At the same time, both the *Cabazon* Court and Congress acted in accordance with the limited conception of tribal sovereignty under the federal doctrine. As the Court noted, "Indian tribes retain attributes of sovereignty over both their members and their territory, and . . . tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states[.] It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided."[110]

Through IGRA, though recognizing tribes' right to conduct gaming on reservation lands, Congress exercised its power to limit tribal sovereignty, regardless of tribal consent. Thus, Congress did not create tribes' right to conduct gaming through IGRA; instead, IGRA is a set of limitations on this right. In particular, under IGRA, in order to exercise their sovereign right to operate gaming establishments, tribes are required to submit to federal and, for casino-style gaming, state regulation.

In practice, then, tribal sovereignty, from the indigenous perspective of inherent self-determination, clearly is compromised in the context of Indian gaming: the decision to open a casino is an exercise of a tribe's sovereign right; yet federal law requires a tribal casino to submit to federal and state regulation, circumscribing that tribe's sovereign right. Through IGRA, Congress has mandated that those tribes that choose to open casinos must compromise their inherent sovereignty in order to pursue gaming as a strategy for reservation economic development.[111] This outcome is determined by the federal doctrine of tribal sovereignty, and plainly is irreconcilable with Native conceptions of tribal self-determination. But far beyond Congress's intentions as represented by IGRA, subsequent legal developments have dramatically increased the political power that states wield over tribal gaming, thus even further compromising tribal sovereignty. The process of negotiating tribal-state compacts epitomizes this phenomenon. Tribes have been placed in the position of abrogating aspects of their inherent sovereignty in order to exercise the sovereign right to open gaming establishments. This has further exacerbated the compromised nature of tribal sovereignty under the federal definition, making gaming tribes' sovereign rights more vulnerable to state power.

As we will see, distinguishing between compromise in the sense of a mutual accommodation and the sense of an imposed, one-sided concession in the context of Indian gaming is nearly impossible without the foundation

of tribal sovereignty. It is only with an understanding of both the federal legal doctrine and indigenous conceptions of tribal sovereignty, and the tension between the two, that one may evaluate whether current tribal gaming law and policy is fair and just. With this necessary grounding in mind, we turn in the next two chapters to a discussion of the law and politics of Indian gaming.

# Indian Gaming as Legal Compromise

> [The Indian Gaming Regulatory Act] was a fragile compromise, at that time, and it is still a fragile compromise.
>
> —*U.S. senator Harry Reid (D-Nev.)*[1]

As a result of the federal government's early Indian policies of removal and diminishment of tribal lands and subsequent development of federal Indian law, tribes have had few means of economic development available to them on their reservations. Tribes pursuing reservation economic development face a number of obstacles, including rural locales and limited access to capital. Typically, reservations yield little access to commercial enterprises or opportunities to market on-reservation goods and services to non-Native populations.[2] Nevertheless, many tribes have pursued a "vastly creative" array of economic development projects to generate revenue and to create jobs. A few tribes with resource-rich reservations have been successful in marketing natural resources such as oil, gas, and timber. Other tribes have had varying success with business ventures ranging from smoke shops to cosmetics to light manufacturing.[3] While promoting tribal self-determination through economic development, the federal government had to acknowledge that tribes could pursue only limited avenues of economic growth.

In the late twentieth century, the nation's reservations were places of extraordinary poverty. Between one- and two-thirds of reservation Indians

lived below the poverty level, and unemployment rates reached staggering levels in some areas.[4] Yet many Native Americans retained a "firm, almost fervent commitment to the reservation as the centerpiece of contemporary Indian life."[5] Perhaps purely as a means of survival, tribes have been forced, against the odds, to pursue some form of reservation economic development. With origins in economic imperatives not of tribes' own making, the law governing Indian gaming represents a series of compromises.

## THE SUPREME COURT RAISES THE STAKES: *CALIFORNIA V. CABAZON BAND OF MISSION INDIANS*

Gambling is a part of many traditional North American tribal cultures.[6] Historically, tribes have used games as a means of redistributing wealth and circulating possessions within a community. Tribal games of chance included games similar to dice and shell games; games of dexterity included archery, ball games, races, and "hoop and pole." All games could be wagered on. Typically, such games were tied to religious beliefs and sacred rituals, and the gambler is a figure that appears throughout Native legend and mythology.[7]

Profit as a primary motive for gaming is a more modern concept. In the late 1970s and early 1980s, a few tribes, notably in California and Florida, opened high-stakes bingo palaces as a means of raising revenue when faced with the Reagan administration's policy of encouraging tribal self-sufficiency and economic development while cutting funding to Indian programs.[8] The strategies available to tribes were limited: reservation economies had been depressed for a century, in part because of the location and nature of the lands assigned to the tribes by the federal government. Bingo was an attractive option to tribal governments. Start-up costs were relatively low, bingo enterprises had a minimal impact on the environment, and the game had potential for high returns on the tribes' investment.[9]

Bingo was legal in California and Florida, as it was in many states at the time, but state law stringently regulated the game through both civil and criminal penalties. Because federal Indian law generally precluded state regulation of tribes, tribal bingo operations frequently did not comply with state gambling laws. In Florida, the Seminole Tribe, planning to open a high-stakes bingo hall, sued to prevent the state from enforcing its bingo restrictions on the tribe's reservation. The federal court concluded that Florida could not enforce its regulatory laws against the tribe: "Where the

state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed."[10] Following the Seminoles' lead, the Barona Group of the Capitan Grande Band of Mission Indians opened a bingo palace on the tribe's reservation in San Diego County, California. After the local sheriff threatened to shut down the tribe's bingo operation and arrest its patrons, asserting that state law limitations on bingo applied on the tribe's reservation, the Baronas sued in federal court. Like the Seminoles, the Baronas won: the court held that because California generally allowed bingo games, bingo did not violate state public policy and thus the state lacked authority to enforce its bingo regulations against the tribe.[11]

Under the aegis of the *Barona* and *Seminole* cases, more than eighty tribes across the country turned to gaming as a means of generating much-needed tribal revenue. Some tribes opened card rooms, offering poker or blackjack, but Indian gaming operations at the time primarily consisted of bingo. Even without slots or other typical casino-style games, the Indian gaming industry grew rapidly in the 1980s, grossing over $110 million in 1988.[12] Yet despite federal court rulings in the tribes' favor, states continued to enforce their gambling regulations on reservations, forcing tribes to relitigate the issue of state power on tribal land.

As their sole source of government revenue, two tribes, the Cabazon and Morongo Bands of Mission Indians, operated bingo halls and a card club on their reservations in Riverside County, California. California law permitted charitable bingo games but restricted the amount of jackpots and the use of gaming profits. The tribes challenged the state's enforcement of its regulations on the tribes' reservations, and the case culminated in the U.S. Supreme Court's landmark 1987 decision in *California v. Cabazon Band of Mission Indians*.[13]

California argued that although states ordinarily lacked authority over tribal lands, Congress had granted California criminal and some civil authority over the tribes within its borders through a federal statute known as Public Law 280.[14] In the state's view, this authorized application of California's bingo regulations on the tribes' reservations. In an earlier case, the Supreme Court had ruled that Public Law 280's grant of civil jurisdiction was limited and did not provide broad authority for state regulation generally.[15] Accordingly, the *Cabazon* Court explained that if California's gambling laws were criminal prohibitions against gambling, then the state

could enforce them against the tribes under Public Law 280. If, on the other hand, California's gambling laws were civil regulatory laws, then the state did not have authority to enforce them against the tribes. Relying on this "criminal/prohibitory-civil/regulatory" distinction,[16] the Court examined the state's public policy concerning gambling, noting that California operated a state lottery and permitted parimutuel horse-race betting, bingo, and card games. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery," the Court reasoned, "we must conclude that California regulates rather than prohibits gambling in general and bingo in particular."[17] Accordingly, because the games did not violate state public policy, Public Law 280 did not grant California authority to regulate tribal gaming operations.

The *Cabazon* Court also considered whether any exceptional circumstances might allow state regulation of the tribes even in the absence of congressional authorization. Such circumstances are rare and depend on federal preemption: "state jurisdiction is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[18] The Court noted that the relevant federal interests in the case were "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[19] Here, the tribes' interests paralleled those of the federal government: "The Cabazon and Morongo Reservations contain no natural resources whiccan be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."[20] The Court decided that, on balance, the "compelling" federal and tribal interests at hand outweighed California's asserted interest in preventing the infiltration of organized crime in tribal gaming operations and thus preempted state regulation.[21]

In the end, *Cabazon* was a victory for tribes, as the Court held that states lacked authority to regulate tribal gaming. The tribes' win rang somewhat hollow, however, as Congress already was considering exercising its authority to regulate Indian gaming at the federal level.

## THE INDIAN GAMING REGULATORY ACT OF 1988

### Legislative History

As the Supreme Court considered *Cabazon,* states and tribes lobbied Congress to pass legislation governing Indian gaming. The growth in Indian gaming during the 1980s and the accompanying tensions between state power and tribal sovereignty attracted Congress's attention as early as 1985, when it held hearings on tribal gaming. At that time, the Department of the Interior estimated that about eighty tribes were conducting gaming on their reservations. Some of the tribal high-stakes bingo halls grossed nearly $1 million each month. Many tribes owned and operated their gaming establishments. Others had contracted with outside management companies, and a few were owned and operated by individual tribal members.[22]

The states wanted Congress to exercise its power to limit tribal sovereignty by authorizing state regulation of tribal gaming operations, citing the state interest in preventing the infiltration of organized crime into Indian gaming. Nevada was particularly concerned that any incidence of organized crime at a tribal casino would trigger a federal crackdown on state-licensed gaming as well.[23] The states also asserted economic interests, asking Congress to abolish the tribal "exemption" from state regulation to place tribes on a level playing field with private and charitable gaming operations. The states further argued for federal law allowing states to tax Indian gaming operations.

The tribes opposed state regulation and lobbied for exclusive tribal regulation. The tribes' position was grounded in preservation of tribal sovereignty generally, as well as protection of Indian gaming as an economic development strategy for tribal governments. The success of some tribal bingo operations cast gaming as one of the very few viable avenues for reservation economic development and job creation. In Florida, for example, the Seminole Tribe's bingo hall had slashed reservation unemployment from 60 percent to less than 20 percent, and improvements in the quality of life on the reservation were apparent in upgraded housing and increased high school graduation rates.[24] Anticipating that Congress would insist on some form of regulation of Indian gaming, however, tribes supported federal regulation over state regulation.

Initially, federal legislative efforts concerning Indian gaming focused on preserving it in the face of an anticipated decision against the tribes in *Cabazon.* Early versions of a tribal gaming bill sought to maintain Indian gaming as

a means of tribal economic development by preempting state regulation.[25] The tribes' unexpected victory in *Cabazon,* however, "threw the ball into Congress's lap to do something, fast."[26] The Court's holding catalyzed Indian gaming opponents, who vociferously lobbied for state regulation.[27] According to U.S. senator Harry Reid (D-Nev.), after the Court decided *Cabazon,* "there was little choice except for Congress to enact laws regulating gaming on Indian lands. The alternative would have been for the rapid and uncontrolled expansion of unregulated casino-type gambling on Indian lands."[28] As Reid saw it, a political compromise was necessary to bridge the gap between the state and tribal positions, as well as to ensure that gaming was available to tribal governments as a means of generating revenue in accord with federal interests in tribal self-sufficiency and economic development.

Reid, along with Senator Daniel Inouye (D-Hawaii) and Representative Morris Udall (D-Ariz.), at the time the chairs of the Senate Indian Affairs Committee and the House Interior Committee, respectively, began work on a bill to regulate Indian gaming. One of the key innovations of the bill was to categorize types of gambling and to assign regulatory authority accordingly. Traditional tribal games of chance were left to exclusive tribal jurisdiction. With almost a decade of tribal experience and relatively few problems, bingo would continue to be regulated by the tribes, with some federal oversight.

Casino-style gambling, however, was seen as potentially a greater regulatory problem than bingo. As a "cash business," many believed that casino gaming necessarily attracted crime, whether organized or unorganized. As one commentator noted, "The problem was not that it was Indian gambling, but that it was gambling, period."[29] The states' interests in preventing the infiltration of organized crime and controlling gambling generally appeared most persuasive in the context of casino-style gaming. As Reid told it, "There was no intention of diminishing the significance of the *Cabazon* decision," but the Supreme Court's reasoning, in the eyes of the bill's drafters, was tied to the bingo and poker games at issue in the case, rather than to casino gambling.[30]

To balance competing state and tribal interests in casino gambling, Congress conceived of "tribal-state compacts," in which a state and tribe would negotiate the regulatory structure for casino-style gaming on the tribe's reservation. Reid credits the compact provision amendment in the Senate with breaking the "logjam" of competing interests holding up the federal legislation: "[the bill] provided protection to the states without violating either

the *Cabazon* decision or the concept of Indian sovereignty."[31] Yet the tribal-state compact provision was not limited to states with greater authority over tribes under Public Law 280 but applied in all states—thus expanding state power over tribes and diminishing tribal sovereignty.

The Indian Gaming Regulatory Act (IGRA)[32] was enacted on October 17, 1988. It first passed the Senate and then was moved through the House without referral to committee or amendment in hopes of a quick passage.[33] In the end, IGRA significantly changed the law of Indian gaming after *Cabazon* through Congress's attempt to balance the competing interests of the federal government, the tribes, the states, and nontribal gaming operators. As Reid noted, a key part of the compromise was an active role for the states in regulating Indian gaming through the tribal-state compact requirement for casino-style gaming. Though seen as a necessary and fair political compromise by Congress, in reality the compact provision unfairly compromised tribal sovereignty.

### Overview

Congress's formal findings and its declaration of policy in IGRA reflect the varied interests involved in Indian gaming and Congress's intent to create a comprehensive regulatory framework that ostensibly balanced tribal sovereignty and reservation economic development with state interests in controlling crime. In enacting IGRA, Congress found that (1) a number of tribes had opened gaming establishments as means of generating tribal government revenue; (2) several tribes had entered into outside management contracts, but federal standards governing such contracts were not clear; (3) federal law did not provide clear guidance on appropriate regulation of Indian gaming generally; (4) a principal goal of federal Indian policy was to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and (5) tribes have exclusive regulatory jurisdiction over tribal gaming that is not prohibited by either federal law or state public policy.[34] Thus, the congressional purposes served by IGRA were to codify tribes' right to conduct gaming on Indian lands as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments, while providing sufficient regulation to ensure legality and to protect the financial interests of the tribes. Additionally, Congress enacted IGRA to establish an independent federal regulatory authority in the form of the National Indian Gaming Commission (NIGC).[35] IGRA permits and regulates "Indian gaming," defined as gaming conducted by

**TABLE 2.1. REGULATION OF INDIAN GAMING BY CLASS**

| Class I "Traditional" | Class II "Bingo" | Class III "Casino-Style" |
|---|---|---|
| • Includes social games played for low-value prizes and traditional forms of tribal gaming associated with Native American ceremonies<br>• Within exclusive tribal jurisdiction<br>• Not subject to IGRA's requirements | • Includes bingo and other games similar to bingo, such as lotto, pull-tabs, and punch boards, if played in the same location as bingo, and nonbanked card games<br>• Within tribal jurisdiction with NIGC oversight<br>• Subject to IGRA's requirements | • Includes all games not within either Class I or Class II, such as slot machines, banked card games, and casino games<br>• Within the jurisdiction of both the tribe and the state, allocated according to compact, with NIGC oversight<br>• Subject to IGRA's requirements<br>• Requires a tribal-state compact |

*Source:* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (2001).

an "Indian tribe" on "Indian lands" in states that allow such gaming. An Indian tribe is a tribe or other organized group that is eligible for federal Indian programs and services and has been recognized as possessing powers of self-government; Indian lands are reservation lands and trust and restricted lands.[36]

One of IGRA's key innovations was its categorization of Indian gaming for regulatory purposes. Stated simply, IGRA allocates jurisdictional responsibility for regulating tribal gaming according to the type of gaming involved. In so doing, IGRA establishes three classes of gaming, as shown in Table 2.1: Class I, or social or traditional tribal games; Class II, or bingo and similar games as well as nonbanked card games; and Class III, or casino-style games.

### Casino-Style Gaming

Gambling is a national pastime: Americans have made various forms of gaming into a more than $70 billion industry. Compare any local bingo palace to the Strip in Las Vegas and it is obvious that the money is in casino gaming.[37] Though widely popular, casino-style gambling remains controversial and the most highly regulated form of gaming. The same is true in the context of tribal casinos.

Under IGRA, Class III gaming includes all other games not included in Class I or Class II.[38] These games, typically high-stakes, include slot machines, banked card games such as baccarat, chemin de fer, blackjack, and pai gow poker, lotteries, pari-mutuel betting, jai alai, and other casino games such as roulette, craps, and keno.[39] A tribe may operate Class III gaming on tribal lands only in states that permit such gaming for any purpose by any person.[40] Before opening its Class III casino, the tribe must adopt a regulatory ordinance that incorporates several specific provisions and has been approved by the chair of the NIGC.[41] IGRA limits tribes' ability to decide how to spend gaming profits. Tribes may use net gaming revenues for only six purposes: (1) to fund tribal government operations or programs; (2) to provide for the general welfare of the tribe and its members; (3) to promote tribal economic development; (4) to donate to charitable organizations; (5) to help fund operations of local government agencies; and (6) to make per capita payments to tribal members.[42] With significant political and legal implications, before a tribe may conduct Class III gaming on its reservation, IGRA requires the tribe to enter into an agreement with the state, called a "tribal-state compact."

### Negotiating Gaming: The Tribal-State Compact Requirement

A valid tribal-state compact is a prerequisite for casino-style tribal gaming under IGRA. To operate Class III games, a tribe must enter into an agreement with the state in which the games will be located. This provision created an active role for states in regulating casino-style gaming within their borders by both requiring the tribe to negotiate an agreement with the state and giving the state, along with the tribe, the power to sue in federal court to enforce the provisions of the tribal-state compact by seeking to enjoin any Class III gaming activity that violates the governing compact.[43]

If a tribe wants to conduct Class III gaming, it first must formally request that the state enter into compact negotiations with the tribe. Once the state receives the tribe's compact negotiation request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact."[44] A compact (and, by logical extension, the compact negotiations between the state and the tribe) may include provisions concerning (1) the application of the state's and the tribe's criminal and civil laws and regulations "that are directly related to, and necessary for, the licensing

and regulation" of Class III games; (2) allocation of criminal and civil jurisdiction between the state and the tribe "necessary for the enforcement of such laws and regulations"; (3) payments to the state to cover the state's costs of regulating the tribe's Class III games; (4) tribal taxation of Class III gaming, limited to amounts comparable to the state's taxation of similar activities; (5) remedies for breach of contract; (6) operating and facility maintenance standards, including licensing; and (7) "any other subjects that are directly related to the operation of gaming activities."[45] IGRA expressly prohibits states from seeking, through a tribal-state compact, to tax or charge the tribe a fee, other than the reimbursement of the state's regulatory costs.[46]

As it was written, IGRA created a mechanism to enforce the state's duty to negotiate in good faith: if the state failed to do so, the tribe could sue the state in federal court.[47] IGRA sets forth detailed procedures governing the tribe's legal cause of action against the state for its failure to negotiate in good faith. After the tribe's formal request that the state enter into compact negotiations, if the state fails to respond or if the state and the tribe are unable to reach a compact, then a cause of action accrues and the tribe may file suit against the state in federal court.[48] In determining whether the state negotiated in good faith, the court may consider several factors, including the public interest of the state, as well as issues of public safety, criminality, financial integrity, and adverse economic impacts on existing gaming operations in the state. If the court finds that the state fulfilled its duty to negotiate in good faith, then the court must decide the case in favor of the state.

If the court finds that the state did not negotiate in good faith, then the court must order the state and the tribe to reach a compact in 60 days,[49] and, if that fails, the court will appoint a mediator and direct the state and the tribe each to submit proposed compacts—the state's and the tribe's "last best offers"—to the mediator. The mediator then will choose the proposed compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court."[50]

If the state accepts the mediator's compact, then the compact is treated as though the state and the tribe successfully negotiated it and the compact is submitted to the secretary of the interior for approval.[51] If, however, the state does not agree to the mediator's compact, then the interior secretary will consult with the tribe to draft a "compact" to govern the tribe's Class III

gaming.[52] The secretary has the power to approve or disapprove a tribal-state compact, whether reached through amicable negotiations between the state and the tribe or through the tribe's cause of action in federal court. The secretary may disapprove a compact for any of three reasons: (1) the compact violates one or more of IGRA's provisions; (2) the compact violates federal law, other than the federal law allocating jurisdiction over gambling on reservation lands; or (3) the compact violates the federal government's trust responsibility to the tribes.[53]

As a legal codification of the political compromise between tribal and federal interests on the one hand and state interests on the other, IGRA's compact provisions reflect Congress's efforts to balance competing interests.

## THE SUPREME COURT AND STATES' RIGHTS: *SEMINOLE TRIBE V. FLORIDA*

As tribes pressed states to negotiate compacts authorizing casino-style gaming, some states resisted the expansion of gambling within their borders. States soon challenged IGRA's creation of the state obligation to negotiate tribal-state compacts in good faith and the federal cause of action against the states as unconstitutional. In its landmark decision in Seminole Tribe v. Florida, the U.S. Supreme Court undermined IGRA's compromise by holding that the Eleventh Amendment's grant of state sovereign immunity prevents Congress from authorizing such suits by tribes against states.[54] In effect, the Court gave states even more authority over tribes than did Congress through IGRA.

The Supreme Court has interpreted the Eleventh Amendment broadly to preclude generally federal suits against the states, including state officials acting in their official capacity, without the state's consent. This general rule has a few exceptions, including Congress's limited ability to abrogate states' immunity from suit and what is commonly known as the "Ex parte Young exception": state sovereign immunity does not extend to state officials acting unconstitutionally or contrary to federal law, so that they may be sued despite the state's immunity from suit.[55]

In 1991, the Seminole Tribe filed a suit against the state of Florida and Governor Lawton Chiles under IGRA, alleging that the state had refused to negotiate a tribal-state compact allowing the Seminoles to offer Class III games on their reservation. Florida moved to dismiss the tribe's action, arguing that the lawsuit violated state sovereign immunity under the Eleventh

Amendment. Essentially, the case raised two questions: first, whether Congress's authorization, through IGRA, of a suit against the state violated the Eleventh Amendment, and second, whether the tribe's suit against the governor of Florida fell within the Ex parte Young exception.

Congress's power to abrogate state sovereign immunity is limited. Prior to Seminole Tribe, the Supreme Court had held that only the Fourteenth Amendment and Article I's Interstate Commerce Clause provide sufficient constitutional authorization for Congress to override the Eleventh Amendment. Congress did not enact IGRA under either the Fourteenth Amendment or the Interstate Commerce Clause, instead relying on its power to regulate the tribes under the Indian Commerce Clause.[56]

In a 1989 case, Pennsylvania v. Union Gas Co.,[57] the Supreme Court had held, through a plurality opinion, that the Interstate Commerce Clause gave Congress power to override state sovereign immunity. In the Seminole Tribe's view, if the Interstate Commerce Clause authorizes congressional abrogation of state immunity, then it logically followed that the Indian Commerce Clause should grant Congress similar power. The Seminole Tribe Court, however, expressly overruled Union Gas and held that neither the Interstate Commerce Clause nor the Indian Commerce Clause authorizes Congress to abrogate state sovereign immunity. In other words, Congress may not create a cause of action against the states under the Indian Commerce Clause, as it attempted to do through IGRA.

The Seminole Tribe also argued that the Ex parte Young exception allowed the suit against Florida's governor for violation of federal law, namely IGRA's provision requiring the state to negotiate in good faith. The Court, however, disagreed, holding that because IGRA's cause of action against the state is narrower than the general remedy allowed under the Ex parte Young doctrine, the exception does not apply to suits under IGRA.

Thus, the Seminole Tribe Court held that a state could not be sued in federal court by a tribe under IGRA without the state's consent.[58] The Court's decision dramatically turned the tables on tribes. Without the enforcement mechanism against the states, the states' duty to negotiate tribal-state compacts in good faith lacked teeth. Even beyond IGRA's imposition of state authority over tribes through the compact requirement, Seminole Tribe gave states a further unfair advantage by removing the limited protections for tribes included by Congress. In the wake of the Court's decision in Seminole Tribe, a state effectively could prevent a tribe from engaging in Class III gaming simply by refusing to negotiate a tribal-state

compact. Indeed, no Class III tribal-state compact was finalized for over two years following Seminole Tribe, as states took advantage of the Court's holding. As the tribal gaming industry continued to grow, and as public debate intensified, states wielded their newfound political power to shape Indian gaming policy within their borders.

# 3 Indian Gaming as Political Compromise

Let us see if the states will deal fairly with these compacts.
—*Former Secretary of the Interior Stewart L. Udall*[1]

What's changed? The state economy is in the toilet and Indians have stuff.
—*Tribal gaming consultant Michael Lombardi*[2]

By strengthening state power at the expense of tribes, the U.S. Supreme Court's 1996 decision in *Seminole Tribe v. Florida* set the stage for the increasing politicization of Indian gaming. Although the federal government continues to mediate how tribes and states interact in the context of Indian gaming, after *Seminole Tribe,* states have wielded political power to shape tribal gaming within their borders. The growth of the industry and the heightened role of politics have given rise to a vast array of political and policy issues.

## FEDERAL RESPONSES TO INDIAN GAMING

As Indian gaming has expanded, so too has the interest and involvement of the federal government in fact-finding, regulating, and legislating on tribal gaming. Through the implementation and oversight of the federal agency responsible for regulating Indian gaming and the creation of a national commission charged in part with studying and reporting on Indian gaming's social and economic impacts, Congress has continued to monitor

the expansion of the tribal gaming industry. Over time, members of Congress have unsuccessfully proposed amending the Indian Gaming Regulatory Act of 1988 (IGRA) to increase tribal responsibility to federal or state regulatory authorities or to mandate the redistribution of tribal casino revenues to states or localities.

### Regulation: The National Indian Gaming Commission

Through IGRA, Congress established the National Indian Gaming Commission (NIGC), an independent federal regulatory agency within the Department of the Interior.[3] The NIGC enjoys a broad mandate to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of" IGRA.[4] Perhaps most notably, in 1999, the commission promulgated "minimum internal control standards," or MICS, for tribal gaming operations. Tribes must adopt, at a minimum, these highly detailed standards that cover aspects of gaming, ranging from mandating that a bingo ball be displayed to patrons before it is called to requiring two employees to initial a corrected error on a slot machine count.[5] The NIGC also has authority, through the power to close Indian gaming operations and to impose civil fines, to enforce IGRA's provisions, federal regulations promulgated by the commission, and the tribes' own gaming regulations, ordinances, and resolutions.[6]

The commission's other key powers relate to approving tribal gaming ordinances and management contracts and its oversight role in regulating tribal bingo operations and some limited card game operations. The chair's approval of tribal ordinances or resolutions relating to bingo and casino-style gaming is a prerequisite for tribal operation of the games.[7] Similarly, the chair has the power to approve management contracts for the operation and management of bingo and casino-style gaming establishments.[8] The NIGC also has oversight powers over tribal regulation of gaming operations, including the power to approve tribal regulatory ordinances and to oversee tribal licensing of key employees and management officials.[9]

Despite its broad authority, some observers have criticized the NIGC as being underfunded, understaffed, and generally lacking the organizational capacity to act under Congress's and its own mandates. Calling the commission "the impotent enforcer," an article in *Time* magazine charged that the NIGC was essentially powerless to oversee Indian gaming and to enforce federal gaming laws. As evidence, the article stated that "the NIGC has yet to discover a single major case of corruption—despite numerous complaints

from tribe members."[10] Another commentator called the NIGC a "toothless tiger," repeating the oft-cited criticism of the commission's lack of funding.[11] Given the commission's proactive stance on Class III gaming, its promulgation of the MICS and other regulations, and the practical reach of its regulatory authority, gaming tribes and tribal interest groups such as the National Indian Gaming Association (NIGA) tend to disagree with these criticisms. They also point out that with applicable regulations and regulatory authorities at the tribal, state, and federal levels, Indian gaming is the most heavily regulated form of gambling in the United States.[12]

### Fact Finding: The National Gambling Impact Study Commission

In the mid-1990s, Congress began to consider funding research on the social and economic impacts of the rapid expansion of legalized gambling throughout the United States, including state lotteries as well as commercial and Indian casino-style gaming.[13] Congress created the National Gambling Impact Study Commission (NGISC) in 1997, charging it with conducting a "comprehensive legal and factual study of the social and economic impacts of gambling" on federal, state, local, and tribal governments as well as on "communities and social institutions."[14] Composed of nine members appointed by the president and the leadership of each house of Congress, the commission was to provide "fair and equitable representation of various points of view" on the current state of gambling and gambling policy throughout the nation.[15]

Specifically, the commission was to review and assess (1) existing policies and practices concerning the legalization or prohibition of gambling; (2) the relationship between gambling and crime; (3) the nature and impact of pathological and problem gambling; (4) the impacts of gambling on individuals, communities, and the economy, including depressed economic areas; (5) the extent to which gambling revenue has benefited various governments, and whether alternative revenue sources existed; and (6) the effects of technology, including the Internet, on gambling.[16] At the conclusion of its two-year existence, the commission was to provide to federal, state, and tribal governments a comprehensive report of its findings, conclusions, and recommendations.[17]

According to Senator Paul Simon (D-Ill.), one of the authors of the enabling legislation, the commission should be composed of "men and women of outstanding character, strength, objectivity, and impartiality."

Representative Frank Wolf (R-Va.), the bill's cosponsor and an opponent of the spread of legalized gambling, concurred: "What you really do not need are zealots on either side." Citing this expressed intent, critics of every stripe immediately lambasted Speaker of the House Newt Gingrich (R-Ga.), Senate Majority Leader Trent Lott (R-Miss.), and President Bill Clinton for making ideologically biased and otherwise ill-advised appointments.[18] Two commissioners were accused of having a deeply embedded preexisting moral opposition to gambling: James Dobson, president of the evangelical group Focus on the Family, who reportedly said he believed God chose him to be on the commission, and commission chair Kay Cole James, another Focus on the Family member and dean of government at televangelist Pat Robertson's Regent University. On the other side, three commissioners had ties to Nevada commercial casino interests: J. Terrence Lanni, chair and CEO of MGM Grand, Inc., the largest hotel-casino resort in Las Vegas; Bill Bible, former chair of the Nevada Gaming Control Board; and John Wilhelm, president of the Hotel Employees and Restaurant Employees International Union, the parent union for 40,000 Las Vegas resort employees. Three commissioners with little experience in gambling policy were criticized as political patronage appointments: Richard Leone, former New Jersey state treasurer; Leo McCarthy, former California lieutenant governor; and radiologist Paul Moore, the next-door neighbor of Senator Lott, who appointed him to the commission. Lone tribal representative Robert Loescher was a member of Alaska's nongaming Tlingit Tribe and was criticized as a perceived advocate of tribal sovereignty.[19]

The commission's final report was released in 1999. It included a separate section on Indian gaming, as well as detailed findings on gambling's socioeconomic impacts based on a study commissioned from the University of Chicago's National Opinion Research Center. Among its many recommendations, the NGISC called on Congress to resolve recurring legal issues under IGRA, including *Seminole Tribe's* invalidation of the federal cause of action for a state's breach of the duty to negotiate tribal-state compacts in good faith. At the same time, the commission recommended that "tribes, states, and local governments should continue to work together to resolve issues of mutual concern rather than relying on federal law to solve problems for them."[20]

As the federal government's priorities shifted following the September 11, 2001, terrorist attacks and state governments began to view lotteries as well as revenue-sharing agreements with gaming tribes as new revenue sources to combat budgetary crises, the commission's policy recommendations

appeared to lessen in priority, while its directive that states and tribes "work together" played out with varying results.

### Legislative Initiatives

Proposed federal legislation introduced in Congress between 1989 and 2004 primarily runs a gamut of attempts to limit the spread of Indian gaming and to increase state and local input into and authority over decisions concerning tribal gaming policy.

Most strikingly, Congress has entertained proposals to impose moratoria on the negotiation of tribal-state compacts or on new Indian gaming operations altogether.[21] Other bills would have curtailed the expansion of gaming by newly recognized tribes or off-reservation Indian gaming by setting the terms of use for newly acquired tribal trust land.[22] The Indian Trust Lands Reform Act, for example, introduced in 1995 and again in 1997, would have prohibited the secretary of the interior from taking any lands outside a reservation in trust for an "economically self-sufficient tribe" if they were to be used for gaming or "commercial" purposes.[23] Short of such dramatic measures, there have been a number of efforts to limit the spread of Indian gaming by increasing state authority over decisions to pursue casino developments or even by providing states with formal veto power over Indian gaming.[24]

IGRA grants states the authority to negotiate compacts with tribes governing tribal operation of casino-style gaming. In most states, this power is exercised solely by the governor, with only a few states requiring any state legislative involvement. Short of outright bans on the expansion of Indian gaming have been proposals to increase state or even local authority over the tribal-state compacting process. In 1991, Congress considered mandating the consent from the governor of any state located within forty-five miles of a proposed casino on newly acquired tribal lands, taking the extraordinary step of providing veto power over a policy initiative in one state to another state's governor.[25] Several proposed bills would have mandated local participation in tribal-state compact negotiations.[26] Recently in a number of states, governors and state legislatures have begun to toy with the idea of requiring legislative input into, approval of, or oversight of newly negotiated compacts. Congress has entertained this notion as well. In early 2004, Representatives Frank Wolf and Christopher Shays (R-Conn.) introduced legislation that would amend IGRA to require state legislative approval of new tribal gaming facilities.[27]

Other proposals would have increased state authority over tribal gaming through increased regulatory burdens, fee rates, and taxation, as well as mandatory employment practices.[28] Congress also has considered bills to classify or reclassify games under IGRA's framework. By moving video bingo from Class II to Class III gaming, for instance, Congress would have granted to states the ability to regulate such games through tribal-state compacts.[29] Bills have sought to shift the burden of proof from a state to a tribe in a compact-related cause of action initiated by a tribe and to amend federal criminal law to extend state authority over gaming violations on tribal lands.[30]

As tribal revenue sharing with states has continued to increase, Congress has taken note of the relative lack of guidance in IGRA's provisions concerning revenue sharing. In mid-2003, Senator Ben Nighthorse Campbell (D-Colo.) introduced a bill that would have amended IGRA to set clearer guidelines on revenue-sharing agreements.[31] George Skibine, the Interior Department's acting deputy assistant secretary for policy and economic development, suggested that the proposed legislation should include a firm percentage cap to preclude what could be tantamount to state taxation of tribes' net winnings, illegal under IGRA. "If the payment greatly exceeds the value of the benefit [to tribes], our view is . . . that's a tax," testified Skibine before the Senate Indian Affairs Committee. NIGA chair Ernest L. Stevens responded that any express standards in IGRA concerning revenue-sharing agreements would lend support to states' recent efforts to close budgetary gaps using Indian gaming revenue, opening the floodgates for state taxation of tribes. Said Stevens, "Tribes did not create these state budget problems, and tribal governments should not be looked to as a way out."[32]

## STATE POWER AFTER *SEMINOLE TRIBE*

Although Congress has been slow to move beyond the proposal stage to address the booming Indian gaming industry and the myriad political and legal issues surrounding tribal casinos, states have not. Enjoying the practical expansion of state power over tribal gaming after *Seminole Tribe*, states increasingly have shaped the terms under which Indian gaming operates within their borders.

During congressional debate over the bills leading to IGRA's passage in 1988, some senators and representatives expressed concern about unchecked

state power over tribal gaming. The tribal-state compact requirement for Class III gaming was Congress's attempt to balance competing interests of tribal and state governments. IGRA's legislative history reflects Congress's conclusion that the compact requirement was "the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises" such as casinos. The "practical problem," as Congress recognized, was "the need to provide some incentive for states to negotiate with tribes in good faith." According to Congress, the appropriate incentive was the state role in regulating Class III gaming through the compact requirement with its concomitant good-faith duty, enforceable through IGRA's legal cause of action—that is, the tribes' right to sue the state in federal court. Congress recognized that if a state simply refused to negotiate a compact, the tribe effectively would lose its right to conduct gaming, while the state's rights would not be lessened. "Given this unequal balance," Congress chose the cause of action against the state as "the least offensive option" to encourage fair dealing with tribes.[33] Senator Daniel Evans (R-Wash.) further described the intent behind the compact requirement: "We intend that the two sovereigns—the tribes and the States—will sit down together in negotiations on equal terms and come up with a recommended methodology for regulation of class III gaming on Indian lands. Permitting the States even this limited say in matters that are usually in the exclusive domain of tribal government has been permitted only with extreme reluctance."[34]

Congress's hope that states and tribes could tackle politically contentious issues through the compacting process seemed naïve to some commentators but was not without its successes. For example, in Minnesota, the first state to sign Class III gaming compacts under IGRA, the state and tribes reached with little difficulty what appeared to be a mutually satisfactory agreement.[35]

Nevertheless, a number of disputes arose between tribes and states in the years following IGRA's passage, as some states resisted the duty to negotiate in good faith. Many of these were resolved by the federal courts in accordance with IGRA's cause of action to enforce the state duty of good-faith negotiation. For instance, Connecticut state law allowed charities to operate casino-style gaming at "Las Vegas Nights." Viewing the state law as permitting tribal operation of casino games under IGRA, the Mashantucket Pequot Tribe in 1989 initiated compact negotiations with Connecticut. The state, however, refused to negotiate with regard to the type of games allowed

under the Las Vegas Nights law, asserting that the tribe could operate such games only if it abided by the state law restrictions. The tribe sued, and the federal court readily rejected the state's argument as contrary to IGRA. If the state's position were correct, the court reasoned, "the compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible."[36] As a result of the court's decision, Connecticut and the Mashantucket Pequots reached a compact governing casino-style gaming on the tribe's reservation, and the Pequots' Foxwoods Resort Casino rapidly became the most successful casino in the United States.

From the start, however, states asserted Eleventh Amendment immunity from such suits, and several lower courts refused to reach the merits of the disputes, instead dismissing the cases on the basis of state sovereign immunity. The U.S. Supreme Court settled the issue of whether tribes could sue states without their consent under IGRA in *Seminole Tribe v. Florida,* and, as a result, the referee role of the federal courts was available to tribes only if the state consented to suit. Tribes could no longer force states to negotiate in good faith, or at all. As one legal commentator assessed the practical impact of *Seminole Tribe,* "although some states might continue to bargain, and one or two might even waive their Eleventh Amendment immunity, many states [were] likely simply to hold the line and refuse to bargain."[37]

Some states, though not refusing to negotiate gaming compacts, demanded concessions from the tribes, ranging from a share of gaming profits to relinquishment of centuries-old treaty rights. Because states could avoid litigation of whether the demands were fair or even legal by asserting state sovereign immunity, in practice *Seminole Tribe* created opportunities for states to leverage political clout over tribes in an almost no-holds-barred form of negotiation. In Wisconsin, for example, Governor Tommy Thompson insisted that the abrogation of tribes' hunting and fishing treaty rights and state taxation of reservation cigarette and gasoline sales were fair issues to include in the renegotiation of the tribes' gaming compacts.[38] Thompson's chief of staff defended the governor's stance, stating, "It is not in any way unreasonable for the governor to expect [the tribes] to show flexibility on some nongaming issues if they are going to continue to benefit from the monopoly they enjoy on gaming enterprises."[39] Although Thompson's position resonated with many Wisconsin residents, it was of questionable legality under IGRA as well as under broader federal Indian law. Yet without recourse to the

federal courts, the tribes had little choice but to seek resolution at the bargaining table or by pressing their case in the court of public opinion. In the end, the tribes succeeded in defending their treaty rights and agreed to the state's demand for annual payments in the range of $100 million, far in excess of the cost of state regulation.[40] As the Wisconsin example shows, little is "off the table" for states after *Seminole Tribe*.

## DEVELOPING ISSUES

As a relatively young and booming industry with defining shifts in law and policy, including *Cabazon*, IGRA, and *Seminole Tribe*, Indian gaming raises a myriad of political issues. These issues are complicated by the fact of tribal sovereignty and ongoing relationships between tribes and non-Native political institutions, as well as the general public's perception of Native Americans and tribal governments. Indian gaming, perhaps more than any other issue facing tribes today, has captured the attention of policymakers and the public across the country. Issues surrounding tribal gaming, especially casino-style gaming, arise and develop on a daily basis, making both local and national headlines.

Four key issues in the current public debate illustrate the politicized nature of Indian gaming. Some, such as revenue sharing and off-reservation casinos, are directly influenced by heightened state power after *Seminole Tribe;* others, such as federal tribal recognition and tribal political clout, are examples of the growing role of state and local actors more generally in determining the political realities of Indian gaming. Because each of these issues is developing rapidly, no doubt additional events, negotiations, and intrigues will have taken place after the time of this writing. Nevertheless, these are crucial topics of current political and policy debate and illustrate the political compromises and compromised politics of tribal gaming.

### Who Is "Indian"? Federal Tribal Recognition and the Schaghticoke

As interpreted by the U.S. Supreme Court, Congress's power to regulate tribes includes the authority to acknowledge or "recognize" groups of Native Americans as tribes, akin to the federal government's recognition of foreign governments.[41] In 1978, the federal government changed its practice of ad hoc determinations and adopted detailed regulations and procedures for tribal recognition. The regulations require the group seeking

acknowledgment to formally petition the federal Bureau of Indian Affairs (BIA) for recognition and to meet seven mandatory criteria.[42]

Many tribes have long histories of federal recognition, dating back to treaties and other interactions with the newly formed United States. Other tribes have organized (or, more accurately, reorganized) only recently and must satisfy the federal procedures for recognition. Federal acknowledgment formally recognizes a tribe as a self-governing political entity, entitled to exercise tribal sovereignty and to claim concomitant benefits under federal law. One such benefit is the ability to operate gaming enterprises under IGRA.[43]

Before *Cabazon* and IGRA, the federal recognition process was relatively uncontroversial and fairly arcane, largely the domain of anthropologists, genealogists, and historians. But with the tremendous growth in Indian gaming, acknowledgment is perceived by many as the gateway to casino gambling. As a result, the process often is hotly contested by interested individuals, nontribal governments, and competing gaming tribes and occasionally is bankrolled by outside investors and nontribal gaming interests. The experiences of the Schaghticokes illustrate the growing controversy at the intersection of tribal recognition and gaming.

The Schaghticoke Tribal Nation, located in northwestern Connecticut in the town of Kent, had sought federal recognition for twenty-five years, filing thousands of pages of documents in an effort to detail the tribe's history from colonial times to the present. In January 2004, the BIA formally recognized the tribe, which has about 300 members and has claimed 2,100 acres in Kent in addition to the tribe's current 400-acre reservation. The Schaghticoke Nation is Connecticut's fourth federally recognized tribe, joining the Mashantucket Pequots and the Mohegans, both with hugely successful casinos, and the Eastern Pequots, whose recent federal recognition has been appealed by state leaders.[44] Schaghticoke tribal chief Richard L. Velky has indicated that a casino may be part of the tribe's plan for economic development, and at least one Connecticut city, Bridgeport, has expressed interest in partnering with the tribe to build an off-reservation casino.[45] The Schaghticokes' Bridgeport casino plans and recognition efforts were bankrolled by Subway Restaurants founder (and nontribal member) Frederick A. DeLuca to the tune of an estimated $9 million.[46]

Although the Schaghticokes' initial recognition efforts did not garner much attention, the explosive success of the Mashantucket Pequots' Foxwoods Resort Casino and the Mohegans' Mohegan Sun Casino has made Indian gaming an extraordinarily contentious issue in Connecticut. State

leaders and antigambling organizations such as the Connecticut Coalition against Casino Expansion (CCACE) oppose the expansion of tribal gaming in the state and thus the Schaghticokes' recognition. Connecticut attorney general Richard Blumenthal has condemned the BIA decision as "arbitrary and lawless" and has vowed to fight the decision all the way to the U.S. Supreme Court.[47] Opponents have also decried the Schaghticokes' and other tribes' financial backing from potential casino investors and political lobbying tactics during the recognition process, as well as the perceived malleability of federal recognition standards. State leaders have called for a moratorium on tribal recognition at the federal level, federal monies to fund local efforts to block recognition, and revision of the state's recognition process (the Schaghticokes have long been recognized as a tribe under Connecticut law). But, as one observer noted, "I'll guarantee you that if there was no casino issue, no one would care less" about the recognition process.[48]

Opponents of the Schaghticokes' recognition insist that their position is not grounded in anti-Indian sentiment but rather in the need for reexamination of the federal recognition process and concern over the social and economic impacts of tribal casinos on surrounding communities. "This has so little to do with Native Americans," said CCACE president and founder Jeff Benedict, the author of a best-selling but widely criticized exposé of the Mashantucket Pequots. "When you are Mohegan Sun and Foxwoods you are really about money."[49] Others perceive that the controversy over tribal recognition in Connecticut stems from hostility toward tribal governments and Native Americans more generally. "It's very unfortunate [that recognition opponents] took a people who are one of the first families of the state and turned this into a gaming issue," said Schaghticoke chief Velky. "They don't care about our culture, history, or survival. It's bordering on racist."[50] Mohegan tribal chair Mark Brown agreed. "It's an attack on Native Americans as a whole. Why is that going on? We are the major [revenue] contributor to the state of Connecticut."[51]

In Connecticut and elsewhere, tribes seeking federal recognition continue to generate considerable interest from casino investors. There are approximately 291 "would-be tribes" seeking federal recognition, some of them bankrolled by wealthy outsiders.[52] Donald Trump is reported to be one of several financiers who have poured $35 million into the attempts by several Connecticut tribes to obtain federal recognition. The one-time Mashantucket Pequot critic appeared to have adopted an "if you can't beat 'em, join 'em" approach, investing as much as $9 million in the recognition

efforts of the Eastern Pequot Tribe of Connecticut—before being unceremoniously dropped by the tribe after it received recognition in 2002. Shopping mall developer Tom Wilmot and Subway restaurant chain founder DeLuca each invested about $10 million in the efforts of the Golden Hill Paugussett, a Trumbull, Connecticut-based group seeking to build a casino in Bridgeport.[53]

The increased costs of pursuing federal recognition—in hiring what has been labeled a "tribe" of paid consultants and experts including historians, genealogists, treaty experts, lobbyists, and lawyers—have led Blumenthal and other state leaders to argue that "money is driving the federal tribal recognition process."[54] Blumenthal asserted that the BIA is riddled with conflicts of interest, as senior officials who also are tribal members either have prior relationships with casino interests or intend to become gambling consultants upon leaving the public sector.

The BIA was the subject of a 2001 General Accounting Office (GAO) investigation following allegations of the improper recognition of a Massachusetts tribe. The GAO report expressed concern about the role of outside investors, concluding that "the result could be that the resolution of tribal recognition cases will have less to do with the attributes and qualities of a group as an independent political entity deserving a government-to-government relationship with the United States, and more to do with the resources that petitioners and third parties can marshal to develop successful political and legal strategies."[55] The BIA rejected assertions of bias or worse, impropriety, in the tribal recognition process, noting the standardized procedural hurdles faced by groups seeking recognition. Said Interior Department spokesperson Dan DuBray, "Federal acknowledgment of an Indian tribe is a very serious and very deliberative process, and in that process all affected parties have a voice, and they have due process."[56]

While the recent involvement of DeLuca, Trump, and others, as well as the recognition of the Schaghticokes in Connecticut, has drawn public attention and criticism, the larger picture does not show that the BIA has adopted a "rubber stamp" approach to tribal recognition. Since 1978, when Congress authorized the BIA to recognize tribes, it has approved just fifteen applications and denied approximately twenty, including its 2004 rejection of the Golden Hill Paugussett and the Nipmuc Nation in Massachusetts, which had expressed its intent to open a casino on the Connecticut border.[57] During a recent hearing before the U.S. House Government Reform

Committee, even the BIA's most vocal critics acknowledged the lack of evidence that Indian gaming interests had improperly influenced tribal recognition decisions.[58]

The outcome of the controversy in Connecticut and elsewhere over the federal recognition process is yet to be determined.[59] One thing is clear, however. Indian gaming has dramatically changed the politics of tribal recognition.

### Coming to a City Near You? Tribal Land Acquisition and Off-Reservation Indian Gaming

Generating ever-increasing attention, particularly at the local level, a small but growing number of tribes are pursuing off-reservation casino developments on newly acquired tribal lands. Off-reservation casinos may afford tribes the opportunity to capitalize on nontribal jurisdictions' pursuit of economic development while extending tribal political and economic influence beyond reservations.

IGRA generally prohibits Class II and Class III gaming on Indian lands placed in trust after October 17, 1988, IGRA's date of passage. Such lands are commonly referred to as "newly acquired" or "after acquired" lands. An exception is made, however, when the interior secretary, after consulting with tribal, state, and local officials, determines that gaming on newly acquired off-reservation lands is "in the best interest of the tribe and its members, and would not be detrimental to the surrounding community," and the state's governor concurs.[60] Accordingly, federal agreement to place off-reservation land in trust for the express purpose of casino development is likely to follow intense and highly politicized negotiations among tribal, state, and local governments.[61]

Until recently, when Washington state's Kalispel tribe acquired federal and state approval to open a casino in a Spokane suburb, the Forest County Potawatomi Tribe of Wisconsin operated the nation's only off-reservation casino.[62] Wisconsin tribes pursuing more than a half-dozen proposed off-reservation casinos have been at the forefront of recent efforts by a few tribes across the United States.[63] Small rural Wisconsin communities, hit hard by dire economic conditions and population drains, have seen potential tribal casino developments as a key to leveraging jobs and economic development. Of the Bad River and St. Croix Chippewa Bands' plans to build a massive casino development in Beloit, a city of 35,000 on the Wisconsin-Illinois border that has suffered the loss of several major employers in recent years, Beloit

City Council president Tom Ryan said, "Tribal gaming has pulled [the tribes] out of poverty, and it'll also help pull us out of poverty."[64] "We're struggling. This would be a big economic engine for us," said the mayor of a Chicago suburb about negotiations with the Ho-Chunk Nation in Wisconsin to build a casino and entertainment complex thirty minutes outside of Chicago.[65] All such strategies have proved controversial, but the Oneida Nation of Wisconsin's efforts to leverage the settlement of an ongoing land dispute with the state of New York into an off-reservation casino in that state have generated the most intense recent scrutiny as well as criticism.

In the early 1970s, the Oneida Nations of Wisconsin and New York and Canada's Thames Band of Oneida filed suit against New York state, claiming rightful ownership of 250,000 acres of ancestral homeland taken in twenty-six illegal transactions in the late eighteenth and early nineteenth centuries.[66] The U.S. Supreme Court in 1985 held in favor of the tribes,[67] but despite subsequent rounds of negotiations, no settlement agreement was reached. Then, in 2002, New York governor George Pataki and New York Oneida Nation chair Ray Halbritter announced a $500 million settlement providing the Wisconsin Oneidas with $250 million and New York Oneidas with $225 million and up to 35,000 acres in reservation land.[68] Surprising many observers, in November 2003 the Wisconsin Oneidas announced they had acquired two tracts of land in upstate New York and were considering building at least one new casino development in the area. One of the tracts is located thirty miles east of Syracuse in Verona, only a few miles from the Turning Stone Casino, owned and operated by the New York Oneida Nation. The other tract is in the Catskills, some ninety miles outside of New York City. In return for the option to locate at least one casino on the newly acquired land, the Wisconsin Oneidas offered to forgo the state's share of the monetary settlement. Despite the tribes' common heritage and Supreme Court victory, the Wisconsin Oneidas' land purchases and subsequent settlement offer prompted Halbritter to accuse the Wisconsin tribe of being "greedy outsiders."[69]

In 1999, Governor Pataki had stated he supported the development of tribal casinos in economically depressed resort areas, and the state legislature in 2001 approved the development of three tribal casinos in the Catskills.[70] A number of tribes, including the New York Senecas, St. Regis Mohawks, the Cayuga Nation of New York, and the New York Oneidas, initiated efforts to take advantage of the opportunity.[71] Pataki and other state leaders were said to be eager to use increased gaming revenues to close budget shortfalls

and fund the massive costs stemming from a 2003 court order requiring the state to fix its public school aid system. Subsequent to the Wisconsin Oneidas' land purchases, however, Pataki reversed course, saying he would not sign off on any compacts with out-of-state tribes, and the state's legislative leadership hinted at the possibility of allowing the development of commercially owned casinos.[72] Some observers suggested that state officials were playing the Wisconsin Oneidas against New York tribes in an effort to squeeze additional concessions from each.[73]

Reiterating their offer to give up the monetary settlement of their land claim, the Wisconsin Oneidas have been responsive to these political pressures, announcing they would hire union workers, in contrast to the employment practices at Turning Stone, and would negotiate sales tax and revenue-sharing deals with the state. Commentators suggested that the Wisconsin Oneidas, for their part, saw the Verona site, with its relatively limited market and close proximity to Turning Stone, as a bargaining chip in pursuit of a substantially more lucrative Catskills casino.[74]

To the extent that state and local political actors make economic growth and development decisions based on jurisdictional self-interest, tribes appear able to use the prospect of an off-reservation casino to leverage increased political capital in pursuit of economic gain. But as the Oneidas' efforts illustrate, off-reservation tribal casinos may generate political gamesmanship from state and local officials who might otherwise embrace the anticipated economic windfall from a similar nontribal enterprise, as well as intertribal tensions. When it comes to off-reservation casinos, explained Kevin Gover, former head of the BIA, "the stakes are higher . . . . As the tribes have more economic power, they . . . have the ability to influence the quality of life of non-Indians in their vicinity, so . . . they come under more scrutiny than they have before."[75]

### Buying Political Power? Tribal Political Clout

Indian gaming revenue can generate political leverage to advance policy agendas related to gaming and other tribal interests.[76] Although tribes always have pursued their interests and sought to influence political outcomes, especially at the federal level, tribal casino profits have increased tribes' political influence at all levels of government. As political scientist and Indian law scholar David Wilkins noted, "Indian gaming has wrought a revolutionary shift in the involvement of some tribes in state and federal politics on an unprecedented scale."[77]

The unique position of tribes in the American political system complicates analysis of tribal lobbying efforts and campaign contributions, while at the same time coloring public perception of tribes' spending. Tribes, without formal representation in either Congress or state government, must rely in large part on non-Indian politicians' awareness of and sympathy to issues facing tribes and individual Native Americans. Their well-being depends, in many ways, on the goodwill of nontribal governments. In this light, tribal financial contributions and lobbying are unremarkable and expected mechanisms of political influence.

Tribes are perhaps unfairly criticized for converting casino profits into political clout. Although criticism of tribal political influence abounds, little of it is grounded in a coherent argument as to why tribal spending and lobbying in particular is troublesome.[78] Instead, opposition appears to stem from the view that lobbying efforts of gaming tribes are indicative of the unfair role of casino cash in bankrolling political clout. Tribes thus fall prey to the perception that "special interests" govern American politics. Yet tribes are not merely special interest groups, as they have a particular, and constitutionally recognized, relationship to the federal government and the states rooted in tribal sovereignty. As a practical matter though, tribes' "plight," more than tribes' rights, historically has been a catalyst for tribal political influence—influence that paradoxically often comes in the form of non-Native actors' policy decisions on tribes' behalf. Economic success generates the perception that tribes simply are doing too well. "Indians enjoy the advantage with voters by being—in the public mind—impoverished, and a group that suffered injustices in the past," said Bruce Cain of the University of California at Berkeley's Institute for Governmental Studies. "But can they squander that by acting like a wealthy special interest? Absolutely."[79]

California's roller-coaster ride of recent political issues surrounding Indian gaming illustrates both the benefits of and backlash against tribal political clout at the state level. Gaming tribes in California lead the nation in casino profits, earning as much as a third of the Indian gaming industry's total revenue and making California's total gambling revenue second only to that of Nevada. The tribal casinos' economic successes have generated both positive and negative political responses at the state level, leading tribes to seek to influence public opinion as well as electoral politics and policy outcomes through expenditures on such conventional modes of political participation as campaign contributions, lobbying, and advertising.

Since 1998, tribes have spent more than $120 million on state political campaigns. Tribes' recent forays into state politics have not been without controversy, generating accusations of undue tribal influence over electoral and policy outcomes. The tribes see these expenditures as a necessary means to make their voices heard in a political system that otherwise silences them. "The tribes were invisible until they started writing checks," noted Jim Knox of California Common Cause. "There is no better illustration of the power of money in politics."[80]

Fueling much of the debate over tribal influence on California politics was a series of three elections between 1998 and 2003. The first two, voter initiatives to legalize tribal casino-style gaming in the state, are examples of the success tribes can have when they pursue political goals that appeal to non-Native voters. The third, the 2003 California recall election, is perhaps an example of backlash against what the non-Native public may perceive as casino-money largesse in the political arena.

Proposition 5 was a response to Governor Pete Wilson's refusal to include slot machines in tribal-state compact negotiations for Class III gaming in California. Wilson asserted that slot machines violated the state's otherwise relatively permissive stance on gambling, a position validated by a federal court in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*.[81] *Rumsey* was followed, however, by a California Supreme Court decision suggesting that state law allowed some electronic gaming devices, possibly including slot machines with revised prize systems, thus making Wilson's failure to negotiate over slot machines a potential violation of IGRA's good faith requirement.[82] Wilson then begrudgingly negotiated a "model" compact with one tribe, but many tribes found the "Wilson compact" unacceptable and decided to take the issue directly to California voters through a 1998 ballot initiative. Proposition 5 guaranteed that any tribe in California eligible to game under IGRA would be allowed to operate certain types of Class III games, including slot machines.[83]

In campaigning for Proposition 5's passage, the tribes faced the well-funded opposition of Nevada and California commercial gaming interests, religious conservatives, organized labor, and Governor Wilson. The tribes spent liberally on a public relations campaign couched in terms of tribal self-reliance and economic development. Following what was at the time the most expensive voter initiative campaign in U.S. history—the tribes spent $63 million while Proposition 5's opponents spent $29 million—the tribes successfully transcended party lines in their appeal to California's rank-and-

file voters, as the initiative passed by a two-thirds majority.[84] The tribes' victory was short-lived. Less than a year after its passage, the California Supreme Court struck down Proposition 5 on the ground that it authorized Las Vegas-style casinos in violation of a state constitutional provision prohibiting the type of casinos "currently found in Nevada and New Jersey."[85]

Yet the November election had ushered in more than just Proposition 5: Democrat Gray Davis was elected as California's new governor. Supported by a number of tribes who had contributed to his campaign, Davis quickly drafted a model gaming compact that largely tracked Proposition 5's terms. Tribes' acceptance of the model was conditioned on the passage of Proposition 1A, a voter initiative that would amend California's constitution to exempt tribes from the prohibition on Las Vegas-style casinos. After the tribes spent some $8 million on television spots, California voters revalidated their support for tribal gaming by approving Proposition 1A in 2000. Indian gaming under the newly negotiated Davis compacts appeared secure for at least the next two decades, the minimum duration of the model compact.[86]

But just two years later, faced with a budget shortfall of nearly $35 billion, Davis proposed renegotiating the tribal-state compacts. Looking to Connecticut, where the state's two tribal casinos contribute an estimated $400 million per year to the state treasury, Davis offered to consider increasing the maximum number of slot machines tribes could operate in exchange for annual revenue payments to the state of $1.5 billion. Not surprisingly, Davis's suggestion was not welcomed by tribes. By mid-2003, Davis had reduced his revenue-sharing demands to $680 million per year, but in the meantime, his political viability was fading fast. Republicans and others dissatisfied with Davis's performance had successfully initiated a fall recall election, and Hollywood actor Arnold Schwarzenegger entered the race.[87]

As Davis entered the autumn campaign to retain his job, the governor who had received tribal campaign contributions and secured Indian gaming in California saw tribal support wane. Lieutenant governor and gubernatorial candidate Cruz Bustamante, who promised to renegotiate existing compacts to increase the number of slot machines allowed in tribal casinos, became the new primary beneficiary of tribes' contributions.[88] Schwarzenegger, meanwhile, launched a series of attacks on tribal casinos, criticizing California's gaming tribes for being "special interests" who should "pay their fair share" to help reduce the state's enormous budget deficit.[89] Davis lost the recall election, and Schwarzenegger became the new governor of California.

Recent events in California suggest that political support for casino-style gaming is hard-won and easily lost; indeed, it may be that such backing can be maintained only at significant financial and political cost to tribes. The symbolic form of the political message appears to matter a great deal. When gaming tribes frame political and policy issues as furthering tribal self-sufficiency and self-governance, the voting public as well as policymakers may be sympathetic. However, if tribes are perceived as using ill-gotten gaming revenue to try to influence political events that circumscribe or impede the interests of nontribal members, the reaction may be hostile.[90] Tribal leaders have taken these lessons to heart. Said Michael Lombardi, of the Augustine Band of Mission Indians in Coachella, "Changing public perception about Indian gaming has become a wake-up call for our leaders."[91]

The newfound influence of tribal gaming interests on state politics is made problematic by the public's distaste for the appearance that any "special interest" is "buying votes." While Indian gaming interests are spending nontrivial amounts of money on campaigning and lobbying, these expenditures pale before those of other industries, including commercial gaming. The development of federal law, particularly IGRA and the Supreme Court's decision in *Seminole Tribe,* has made Indian gaming highly politicized. Because tribal gaming depends on tribal-state compacts, the tribes must be players in the political arena, and campaign, lobbying, and advertising expenditures generate necessary leverage. As Viejas Band chair Anthony Pico said, "We will be glad to keep our money at home. [But] as long as this state wants to regulate our business, we have to be interested in state government."[92] To some, this simply is how the American political system works. "This is a very, very American way to spend your money," argued tribal lobbyist Cate Stetson. "It's what Americans have taught tribes to do."[93] In that light, as state politicians like California governor Schwarzenegger increasingly seek to renegotiate tribal compacts for political or economic gain, it may be difficult to argue that the tribes should not use mainstream vehicles of political participation to realize or secure their interests.

### Spreading the Wealth? Revenue Sharing

Perhaps the most significant developing political issue is revenue sharing, as states increasingly leverage their political clout over tribes to encourage them to make annual payments to state and local governments. As the Indian gaming industry continues to grow, and a few tribal casinos find extraordinary financial success near the nation's population centers, some

states have negotiated revenue-sharing provisions as a condition of Class III compacts. In a revenue-sharing agreement, a tribe commits to paying a portion of its gaming revenues to the state in exchange for the right to conduct casino-style gaming in the state, sometimes including a guarantee of exclusivity; that is, the state promises to limit, or at least not to expand, commercial gaming within the state. The Mashantucket Pequots and Connecticut reached the first revenue-sharing agreement in 1992, in which the tribe agreed to pay the state 25 percent of its slot revenues in exchange for the exclusive right to operate slot machines in the state.

Through the mid-1990s, revenue-sharing provisions were a rarity, perhaps limited to the nearly unparalleled market of the Pequots' Foxwoods Resort Casino and the peculiarities of Connecticut's gambling laws.[94] Following the Supreme Court's decision in *Seminole Tribe,* which coincided with both steadily increasing Indian gaming profits and state budgetary crises, more states, including Wisconsin, New Mexico, New York, and California, have sought their "fair share" of tribal casino profits.[95] Without the ability to challenge a state's demand for revenue sharing in federal court under IGRA (unless, of course, the state consents to suit, as has California), the possibility exists that states can simply charge tribes what in practice amounts to a fee in the tens or even hundreds of millions of dollars to conduct Class III gaming, tantamount to the tax prohibited by IGRA.[96] Yet some tribes have entered into revenue-sharing agreements while others balk at state demands. Two examples, California's successful efforts to include a revenue-sharing provision in its tribal-state compacts and Minnesota's recent attempts to renegotiate its existing compacts to require revenue sharing, illustrate this developing issue. Moreover, California is on the forefront of what may become a new trend in mandated revenue sharing—not with the state, but with nongaming tribes.

With over one hundred federally recognized tribes and some 35 million residents, California boasts more tribes and more people than any other state and, as such, represents a vast potential market for the continued expansion of Indian gaming. Generating as much as an estimated $5 billion in revenue in 2003, Indian gaming in California, conducted by the approximately sixty tribes that have entered into tribal-state compacts, far outpaces other states: Tribal casinos in California earn as much as a third of the Indian gaming industry's total revenue and help to rank California's total gambling revenue third after only that of Nevada and of New Jersey.[97] California, along with Connecticut, also leads the nation in setting precedent

for tribal-state political interactions over gambling, particularly with regard to revenue sharing. Two gubernatorial administrations, two ballot initiatives, and two key court decisions resulted in tribal-state compacts in California with two revenue-sharing provisions.[98] In exchange for allowing tribes the exclusive right to conduct casino-style gambling in the state, the tribes agreed to make payments to two funds under Governor Gray Davis's model tribal-state compact.

The first of these funds, the Special Distribution Fund, is available for appropriation by the state legislature for a number of gaming-related purposes and essentially is a limited-purpose revenue-sharing agreement with the state.[99] Under the terms of the model compact, tribes pay a graduated percentage of net slot machine revenue, up to 13 percent, based on the number of machines operated by the tribe. In one of the few court cases addressing the legality of tribal-state revenue-sharing agreements, the federal court held that the restrictions on the state legislature's use of tribal gaming revenue and the bargained-for tribal exclusivity over casino-style gaming sufficiently complied with both IGRA and concomitant congressional intent: "We do not find it inimical to the purpose or design of IGRA for the state, under these circumstances, to ask for a reasonable share of tribal gaming revenues."[100]

The second fund into which the tribes are required to pay, the Revenue Sharing Trust Fund, was the first to require "tribe-to-tribe" revenue sharing. Under the model compact, tribes are required to purchase "licenses" to operate more than a minimum number of slot machines. The cost of the license follows a progressive fee structure depending on the number of slot machines operated by the tribe. For a tribe operating 2,000 slot machines, the maximum number of machines allowed under the model compact, the licensing fee would be just under $4.6 million each year.[101] With the fees paid into the Revenue Sharing Trust Fund, each nongaming tribe in California is paid up to $1.1 million each year. California's novel tribe-to-tribe revenue-sharing requirement has been lauded as a way to spread the wealth of the Indian gaming industry more equitably among all tribes. As the federal court commented, the provision advances the congressional goal of promoting tribal economic development, tribal self-sufficiency, and strong tribal governments "by creating a mechanism whereby *all* of California's tribes—not just those fortunate enough to have land located in populous or accessible areas—can benefit from class III gaming activities in the state."[102] Others, however, see the provision as an infringement of tribal sovereignty, akin to requiring California to share its tax revenue with Nevada.

Currently, gaming tribes in California pay about $130 million each year into the two funds.[103] Not long after negotiating the model compact, however, Governor Gray Davis sought additional help from the tribes in addressing the state's fiscal crisis. Perhaps conscious of the federal court's reasoning in upholding the tribal-state revenue-sharing provision, Davis offered to increase the number of slot machines allowed under the compact in exchange for a larger contribution to the state. Davis also required tribes entering into new compacts to agree to make a payment directly to the state treasury, bypassing the use limitations of the model compact's Special Distribution Fund. During his gubernatorial campaign and after taking office, Arnold Schwarzenegger adopted a similar stance, promising to renegotiate the current compacts (which were to have been in effect for twenty years) to require tribes to pay their "fair share" to the state, which he estimated as similar to Connecticut's 25 percent take of the Pequots' and Mohegans' slot revenues.[104] In California, a quarter of tribal gaming revenue could amount to more than $1 billion in annual payments to the state. "What's changed [since the negotiation of Davis's model compact]?" asked a gaming consultant about the state's demands for higher payments. "The state economy is in the toilet and Indians have stuff."[105]

The same rhetorical question raised by recent negotiations in California—what's changed since prior compacts were negotiated—might be posed in Minnesota. The state's recent efforts to renegotiate existing tribal-state compacts reflect the influence of revenue-sharing agreements in other states, as well as the highly politicized relationship between state and tribal governments.

Minnesota was the first state to sign tribal-state compacts allowing Class III gaming. Some tribes in Minnesota, located in the state's more rural northwest, have only modestly successful casinos due to a limited market. The Red Lake and White Earth Bands of Chippewa, two of the most populous and impoverished tribes in Minnesota, both operate casinos with only modest gaming profits and continue to experience high rates of unemployment and poverty. Two tribes in southeastern Minnesota, however, have seen extensive financial benefits under the fifteen-year-old tribal-state compacts: the Shakopee Mdewakanton Sioux Community and the Prairie Island Sioux Community, both located near the "Twin Cities" metropolis of Minneapolis-St. Paul. The Shakopee's Mystic Lake Casino Hotel, boasting an enormous laser spotlight "tipi" projected into the sky, is the largest gaming facility in Minnesota and one of the most profitable tribal casinos in the

nation, while the Prairie Island Sioux's Treasure Island Casino and Resort is the second-largest gaming facility in Minnesota.[106]

Minnesota's compacts, which were to have remained in effect indefinitely, required the tribes to pay the state's annual regulatory costs of $150,000.[107] As other states negotiated revenue-sharing agreements in the tens and hundreds of millions and possibly even billions of dollars, state leaders in Minnesota recently looked to Indian gaming to help solve the state's budgetary crisis. Governor Tim Pawlenty sought ways to reduce the state's projected $185 million deficit in 2004 without raising taxes, including demanding $350 million in annual payments to the state from gaming tribes as well as tribe-to-tribe revenue sharing. To pressure tribes to renegotiate the perpetual compacts, Pawlenty threatened to consider a "racino" project at Canterbury Downs, a horseracing facility just up the road from Shakopee's Mystic Lake.[108] And in what may have been a divide-and-conquer political strategy, the state also proposed a joint tribal-state off-reservation casino venture with the White Earth and Red Lake Bands. The casino would be located near the Twin Cities' Mall of America, which already attracts some 42 million visitors each year, and would be in direct competition with Mystic Lake's and Treasure Island's metropolitan market.

Although generally popular with the non-Native public, California's and Minnesota's demands for revenue sharing have drawn criticism from tribal leaders as amounting to illegal taxation and unfair extortion. Shakopee tribal attorney William Hardacker accused state legislators of "greed and racism" and said that "there's a sense that because this tribe has achieved economic success that people are willing to set aside . . . sovereignty."[109] Said NIGA chair Ernest Stevens, Jr., "Indian gaming [did not cause] state budget shortfalls, and it should not be used as a way out."[110]

As these and the other examples of developing political issues show, the highly politicized nature of Indian gaming in large part is driven by perceptions of who "wins" or "loses." But how are those calculations made? We next turn to an examination of the varying assessments of tribal gaming's socioeconomic impacts.

# Part II

## ASSESSING THE SUCCESS OF INDIAN GAMING

# 4 Is Anyone Winning?

> Gambling has ruined countless lives. . . . The level of crime, suicide, and bankruptcy in a community invariably rises when a casino opens its doors.
>
> —*U.S. representative Frank R. Wolf (R-Va.)*[1]

> Indian gaming offers hope for the future.
>
> —*National Indian Gaming Association chair Ernest L. Stevens, Jr.*[2]

In states where tribes operate casinos, policy debates over Indian gaming revolve around assessments of its socioeconomic impacts. Researchers frequently distinguish between the economic and social effects of tribal gaming while seeking to quantify each and assess their net impact on communities. Policymakers often weigh various social and economic outcomes generated by Indian gaming. With the continued rapid growth of the Indian gaming industry, the National Gambling Impact Study Commission's (NGISC) 1999 report on gambling's social and economic impacts was at the forefront of researchers' efforts to facilitate greater understanding of the empirical impacts of gambling generally and tribal gaming specifically. Perhaps needless to say, the data, and its interpretation, have painted a mixed portrait of those social and economic effects. Although many of tribal gaming's socioeconomic effects are intertwined and some are potentially unquantifiable, we take the categorical distinctions between economic and social impacts as our starting point in assessing whether anyone is winning from Indian gaming.

## METHODOLOGIES OF ESTIMATION AND ANALYSIS

### Economic Impacts

Some economists have argued that gambling inherently "produces . . . no new wealth" and thus "makes no genuine contribution to economic development."[3] On the other hand, it appears difficult to argue with the proposition that gambling creates both positive and negative externalities—benefits as well as costs—that flow from gambling transactions.[4] The impacts of these externalities ripple outward beyond any one individual's decision, rational or otherwise, to drop a quarter into an electronic slot machine and the resultant payout—or, more likely, disappointment.

The methodologies underpinning studies of Indian gaming's economic impacts vary somewhat but ultimately boil down to estimations relying on similar types of data and modeling techniques. Data quality and methodological sophistication matter, but arguably the real distinctions among studies result from how the data is used in relation to what questions are asked: the quality of analysis, biases reflected in conclusions, and whether policy prescriptions simply make sense all speak to that critical issue.

Virtually all studies of Indian gaming's economic effects share the same basic goal of modeling its costs and benefits to a given economy (tribal, local, state, or national) and assessing the net economic effects. Representative major studies of Indian gaming exemplify researchers' use of similar methodological approaches but differing impact estimation models and distinct terminology.

One common approach to economic impact estimation is input-output economic and fiscal impact analysis.[5] Standard input-output models allow one to trace the secondary economic effects generated by direct expenditures in a particular industry. The input, or direct effect, of Indian gaming consists of consumer gaming and nongaming expenditures (primarily spending on food, beverages, hotel, retail, and entertainment) at tribal gaming operations. This spending has secondary effects—each dollar spent at a slot machine sends additional dollars rippling throughout the economy in the form of indirect and induced effects. Indirect effects result from business-to-business purchases of goods and services. That is, to serve meals at a tribal casino's all-you-can-eat buffet, the tribe must contract with local or regional food goods and services suppliers. These vendors in turn purchase goods from their own regional suppliers, who themselves contract with larger agribusiness concerns and trucking firms located throughout

the nation. Induced effects stem from the wages that are directly or indirectly earned by employees of tribal gaming facilities, the numerous industries that interact with the tribal gaming industry, and the public sector, such as regulators or law enforcement personnel.

Input-output analysis produces three major categorical measures of economic activity: output, wages, and jobs. Output measures the dollar value of production. Wages encompass household income and the dollar value of employee benefits. Jobs are quantified by person-years of employment as a measure of those who are fully employed as a result of the Indian gaming industry. Fiscal impact analysis measures the financial impacts of Indian gaming in two forms: tax revenue and revenue sharing by tribes. Tribal casinos generate corporate profits taxes, income tax, sales tax, property tax, and excise and licensing fees and fines. Under the terms of negotiated revenue-sharing agreements, tribes directly contribute gaming revenue to state and local governments and special distribution funds.[6]

A second common approach to economic impact estimation seeks to model tribal gaming's direct impacts, gross impacts, and net impacts.[7] Direct economic impacts include job creation and employment, payment of wages and salaries, purchase of supplies and services, revenue transfers to government, and taxes paid or withheld. Gross impacts model the ripple effects of spending on goods and services as well as those flowing from other direct impacts. Net impacts derive from "but-for" analysis: but for tribal casinos, what would the area's economy look like? As in input-output analysis, this type of impact estimation model incorporates economic multiplier effects. Each dollar a consumer spends at the casino generates additional expenditures: the casino's infrastructure must in the first place be built, parking lots and roads paved, food and other goods and services purchased from vendors, utilities purchased from public or private suppliers, labor costs and taxes paid, and so forth. One can calculate a standardized economic multiplier to account for these transactions. Ultimately, researchers assess the larger policy question of whether tribal casinos produce a net positive or net negative impact on the area's economy.[8]

Data, method, or analysis may affect a given study's validity as well as its contributions to policy debates. Data insufficiencies, limitations of impact estimation modeling,[9] and the possibility of ideological bias stemming from the polarizing nature of the debate between perceived "proponents" and "opponents" of tribal gaming or legalized gambling more generally are among the difficulties inherent to systematically quantifying the economic

impacts of tribal gaming in a manner that satisfies either scholars or policymakers. Many studies of gaming's economic impacts are conducted by private consulting firms or commissioned by organizations that may have a vested interest in the outcome of an economic impact study. Some have suggested that such research may suffer from poor design or bias.[10] As we discuss below, studies of Indian gaming's economic impacts generally use some variant of cost-benefit analysis that itself raises issues of methodological and interpretive accuracy.

### Social Impacts

The question of whether tribal gaming produces a net economic benefit or detriment to a state frequently is accompanied by inquiry into whether tribal gaming results in unacceptable social costs either to non-Native communities that surround reservations or to the state as a whole. Accordingly, research on Indian gaming also seeks to measure its social impacts. Although social impacts are perhaps distinct from economic impacts, the two are difficult to isolate. For example, problem and pathological gambling results in social costs, including divorce and domestic abuse, and also imposes direct economic costs, such as treatment costs. Recognizing the overlap between social and economic impacts, many studies attempt to express social impacts in dollar amounts, but the usual focus appears to be on social costs rather than social benefits. This oversight yields an inherently one-sided analysis, as researchers and policymakers attempt to weigh economic benefits against social costs in an artificial dichotomy. Reservation communities stand the most to gain from tribes' decisions to open casinos. With great poverty comes great opportunity in terms of measurable socioeconomic gains. Although often overlooked, particularly in studies of states and nontribal communities, the social impacts of Indian gaming include social benefits as well as social costs.[11] Further complicating the equation, both social costs and social benefits may be difficult to quantify, and there may be social impacts that do not lend themselves to an easily reduced cost-benefit calculation.

Yet many studies employ a cost-benefit evaluation of casino gambling, summing the economic benefits and costs as well as social costs expressed in dollar amounts (negative or "real-resource-using harmful externalities") to compare individual consumer utility with and without the introduction of casinos.[12] One method of estimating social costs is to identify the average individual costs of problem and pathological gamblers, multiplied by

the prevalence of problem and pathological gamblers in the general population. Another method is to measure the impact of casinos on a particular variable, such as crime rates. The first approach, by itself, accounts only for social costs of problem and pathological gambling. It does not undertake to measure and weigh any possible social benefits or other social costs. Although the second approach may measure both positive and negative effects on a particular variable, its methodological difficulty lies in isolating the impact of casino gambling. The typical cost-benefit analysis, incorporating one or both of the basic methodological approaches, struggles with the problems inherent to each.

In an attempt to minimize these problems, a recent national study, commissioned for the NGISC's final report, employed multilevel modeling to isolate the socioeconomic impacts of casino gambling over time. Researchers at the National Opinion Research Center (NORC) at the University of Chicago examined social and economic changes attributed to "casino proximity," defined as one or more casinos operating within fifty miles of a community, in one hundred sample communities between 1980 and 1997. In 1980, five of the sample communities were located near casinos; by 1997, forty-five sample communities were near casinos. Thus the NORC study compared both communities with and without a nearby casino and the years before and after a casino opened near a sample community.[13]

To measure social effects, the NORC study selected several specific indicators, including crime rates, health indices, and employment and income data, and standardized the indicators across the sample communities by calculating per capita rates based on permanent resident population. The NORC study employed a multilevel model to reflect comparisons both of sample communities and of years within a specific sample community. This multilevel sequencing controlled for changes in communities that occurred independently of casino proximity.[14] The NORC study is among the handful of systematic national assessments of the socioeconomic impacts of legalized gambling. It, too, is subject to closer scrutiny on the basis of its methodology and conclusions.

### Impacts on Tribal Communities

Critics suggest that a number of economic impact studies either overlook social costs and benefits to tribal communities or disaggregate their analysis of benefits accruing to tribes from their assessment of how Indian gaming affects the state in which those tribes are located. The NORC study,

for example, did not include any tribal communities in its sample. Statewide studies rarely isolate effects on tribal communities, choosing instead to focus on impacts affecting the state's residents as a whole. The net assessment of gaming thus appears to turn on its benefits or costs to nontribal communities. Still others suggest that cost-benefit impact analysis ultimately seems artificially sterile and divorced from the complex social realities of public policymaking, particularly as they relate to tribes.

Many of the social benefits to Indian gaming are most readily apparent in tribal communities. The creation of new jobs on reservations may be the most basic economic benefit that directly translates to social benefits for tribal members and others. Beyond that, "tribes have invested in economic development; basic infrastructure; police, fire, and emergency services; health, housing, and social programs; education; natural resource management; language retention; Indian material and cultural heritage; land base re-acquisition; and individual member incomes."[15] These benefits need not be conceived as exclusive to the tribe; a healthy reservation economy ultimately benefits both surrounding nontribal communities and the state.

The near absence of tribal communities in research on the socioeconomic effects of casino gambling is perhaps justified by the small population size of Native communities (in a statewide cost-benefit analysis, for example, any impacts on a tribal community should be considered only relative to the community's size), the general methodological difficulties in breaking out statewide impact analysis to the community level, and the practical difficulties in acquiring data specific to tribal communities.[16]

Some researchers have sought to incorporate a focus on tribal communities. Affiliates of the Harvard Project on American Indian Economic Development have undertaken to examine the effects of tribal gaming in particular, rather than legalized gambling in general.[17] We have argued elsewhere that studies accounting for gaming's impacts on tribal communities only according to their population size inappropriately minimize the impacts of Indian gaming on its intended beneficiaries—tribal governments and tribal members—and overlook IGRA's specific policy goals.[18] Given the limited availability of comprehensive quantitative data concerning Indian gaming's impacts on reservation life, accounts of tribal gaming's socioeconomic impacts frequently are multimethodological and may be historically grounded and thick with qualitative and anecdotal evidence. Such research serves the important role of incorporating the experiences

and perspectives of tribes and tribal members into the public discourse over casino gambling. Too, it reveals possible social benefits not accounted for in the usual statistical modeling methods, such as strengthening tribal governments and realizing tribal self-determination.

To the extent possible in the account that follows, we separate economic costs and benefits from social costs and benefits and discuss Indian gaming's effects on each. As most studies engage in cost-benefit analysis across these axes, they tend to artificially or unsystematically weigh economic and social benefits and costs against each other. At the same time, we recognize that it is difficult and somewhat artificial to disaggregate the social and economic effects of gaming. But as we hope to make clear, the impacts of Indian gaming must be assessed in view of the intersections of both sets of axes—economic versus social and costs versus benefits.

There is general consensus among a number of influential studies that Indian gaming generates economic benefits for tribes, as well as for local and state governments. There is some divergence, however, about the extent of these economic benefits. More fundamental disagreements arise over the appropriate weight to be assigned to tribal gaming's economic benefits during the policymaking process. Here, we do not attempt to resolve these debates; instead, we simply wish to summarize the results of typical research conducted on Indian gaming's economic benefits and costs. With regard to Indian gaming's social costs and benefits, our goals are to clarify the growing amount of data and its analysis and to separate, where possible, research from recommendations. We focus on the three most frequently cited and studied social effects of Indian gaming: problem and pathological gambling, crime, and reservation quality of life.

## ECONOMIC BENEFITS AND COSTS OF INDIAN GAMING

### National Overview

Although most obviously and directly affecting tribes, Indian gaming's economic impacts extend beyond reservation borders. For nontribal communities, the economic benefits derived from Indian gaming range from tribal revenue sharing with state and local governments to the ripple effects generated by job creation and increased business and consumer spending. While not exhaustive, Table 4.1 lists a number of representative economic benefits identified in various studies of Indian gaming's impacts. These benefits can accrue at the tribal, federal, state, and local levels.[19]

**TABLE 4.1. ECONOMIC BENEFITS OF INDIAN GAMING**

| | Tribal | Federal | State | Local |
|---|---|---|---|---|
| Attraction of out-of-state tourism dollars | X | | X | X |
| Changes in consumer spending patterns | X | | | |
| Charitable and civic contributions | X | | X | X |
| Compensation for problem and pathological gambling programs | X | X | X | X |
| Compensation for state regulation of tribal-gaming facilities | | | X | |
| Compensation to local governments for public services | | | X | X |
| Contracts with nontribal construction firms | | | X | X |
| Decreased percentage of household income from public assistance | X | | | X |
| Decreased transfer payments from public assistance programs | X | X | X | |
| Development of rural and economically depressed regions | X | X | X | X |
| Federal income tax on per capita payments to tribal members | | X | | |
| Federal payroll tax withheld for employees | | X | | |
| Increased consumer spending and resulting sales tax | X | | X | X |
| Increased personal and household earnings | X | X | X | X |
| Increased small business revenue | X | | X | X |
| Job creation on and off reservations | X | X | X | X |
| Land development and increased property values | X | | X | X |
| Multiplier effects from gaming and nongaming revenue | X | X | X | X |
| Population retention or in-migration into rural states | X | | X | X |
| Purchases of goods and services from vendors and suppliers | X | | X | X |
| Recapture of residents' out-of-state spending | X | | X | X |
| Revenue sharing | | | X | X |
| State payroll tax withheld for nontribal employees | | | X | |
| Tribal economic development and economic self-sufficiency | X | X | X | X |

Researchers and policymakers acknowledge many of the economic benefits generated by Indian gaming enterprises but cite various economic costs, a disproportionate number of which may be borne by nontribal communities and governments. Table 4.2 lists representative costs identified and measured by those studying tribal gaming across jurisdictions.[20]

The federal National Indian Gaming Commission (NIGC) reported that the Indian gaming industry generated $16.7 billion in revenue in 2003, a 14

**TABLE 4.2. ECONOMIC COSTS OF INDIAN GAMING**

| | Tribal | Federal | State | Local |
|---|---|---|---|---|
| Changes in consumer spending patterns, including substitution effects | | | X | X |
| Competition with and among existing retail, tourism sectors | X | | X | X |
| Construction and maintenance of roadways and other infrastructure | X | X | X | X |
| Costs of increased crime | X | X | X | X |
| Costs of problem and pathological gambling | X | X | X | X |
| Costs of regulating tribal gaming facilities | X | X | X | X |
| Increased property tax rates where property values increase | | | | X |
| Increased traffic | X | | X | X |
| Law enforcement, fire protection, ambulance services | X | X | X | X |
| No direct state taxation of tribal gaming facilities | | | X | |
| No state or local sales tax on goods or services purchased on-reservation | | | X | X |
| No state income tax paid by tribal employees | | | X | |
| Property devaluation | | | X | X |

percent increase over the prior year, while the tribal National Indian Gaming Association (NIGA) estimated the industry has created over 550,000 jobs.[21] In his third annual study on the Indian gaming industry, economist Alan Meister derived similar findings, calculating that tribal gaming generated $16.2 billion in gaming revenue and $1.5 billion in nongaming revenue in 2003. These figures highlight the continued growth of the tribal gaming industry, representing 12 to 16 percent increases over the prior year.[22] Overall, Meister estimated that Indian gaming contributed roughly $43 billion in output, $16.3 billion in wages, and 460,000 jobs to the national economy, generating over $5 billion in tax revenues shared by federal, state, and local governments.[23]

### States and Surrounding Nontribal Communities

The economic benefits of Indian gaming to states and nontribal communities are spurred by tribal revenue-sharing agreements with state and local governments, the economic multiplier effects induced by gaming revenue, and tribes' charitable and civic contributions. Negative economic impacts may result from instances where tribal gaming facilities alter retail spending or employment patterns in ways that take a toll on nonreservation economies, or from increased costs of traffic, law enforcement, or infrastructure.

**Revenue-Sharing Agreements**

The most direct economic impact of Indian gaming on state and local governments occurs when tribes make payments pursuant to revenue-sharing agreements. Although IGRA prohibits state taxation of tribal casinos as a condition of signing a tribal-state compact,[24] as interpreted by the secretary of the interior, tribes can make payments to states in return for additional benefits beyond the right to operate Class III gaming.[25] Tribes thus have agreed to make "exclusivity payments," in which they pay a percentage of casino revenues to the state in return for the exclusive right to operate casino-style gaming.[26] The Mashantucket Pequots in Connecticut were the first to do so, agreeing to make a 25 percent payment of gross slot machine revenues in return for the exclusive right to operate casino-style gaming in that state.[27] Current revenue-sharing agreements with state and local governments take a number of forms, including percentage payments, fixed compact payments, impact or mitigation fees and taxes, contributions to community funds, and redistribution to nongaming tribes.[28]

Most such payments are based on a percentage of gaming revenue. Some tribes pay a fixed percentage directly to the state, like Connecticut's 25 percent take of slot revenue. Other tribes make payments based on a sliding percentage scale contingent upon varying criteria. As of 2003, California tribes, for example, made payments to the state ranging from zero to 13 percent of slot revenue based on number of operational machines, while New Mexico tribes currently pay 3 to 8 percent of gaming machine revenue, dependent upon net revenues. In New York, tribal payments begin at 18 percent of electronic gaming revenues and top out at 25 percent after the current compact's seventh year. A small and decreasing number of compacts require tribes to make fixed annual payments to the state. For instance, until a number of Wisconsin tribes renegotiated their tribal-state compacts in 2002 and agreed to make payments based on annual revenue, each of the state's eleven gaming tribes made flat annual payments.[29]

A growing number of tribes have signed revenue-sharing agreements with local governments, and some also contribute to special community funds. Tribes in Arizona, California, Louisiana, Michigan, and Washington make annual payments directly to local governments. After Idaho voters approved a ballot initiative containing a tribal-state revenue-sharing agreement, tribes in the state also agreed to contribute 5 percent of gaming revenue to local schools and education programs. Tribes in Oregon pay between

5 and 6 percent of net gaming revenue to a community benefit fund.[30] Tribes also contribute to state and local programs seeking to lessen the effects of problem and pathological gambling. Tribes in Arizona, for instance, contributed approximately $760,000 to the state's Department of Gaming—more than double the amount contributed by the Arizona Lottery—while the Salt River and Tohono O'odham Tribes provide about 85 percent of the Arizona Council on Compulsive Gambling's annual budget.[31]

Depending on the type of agreement and, most importantly, the amount of gaming revenue tribes earn, annual revenue payments to state and local governments can add up rapidly, contributing significant revenue to state coffers. In 2003, Connecticut tribes paid the state about $400 million and California tribes provided approximately $132 million, while Arizona tribes paid roughly $43 million and Michigan tribes provided about $32 million to state and local governments. Increasingly, states, including California, have requested that tribes entering the field share gaming revenue or have sought to renegotiate existing compacts or revenue-sharing agreements to provide larger revenue transfers from tribes. Following a protracted tribal-state compact renegotiation process, for example, Wisconsin tribes in early 2004 agreed to a five-fold increase in annual revenue payments to the state, from $20 million to more than $100 million, in return for exclusivity and the ability to operate additional casino-style games.[32] All told, in 2003 alone, tribes provided $759 million to state and local governments, nearly a one-third increase over the prior year.[33]

**Direct, Indirect, and Induced Effects: What Do States Net?**

A growing number of studies, commissioned as well as independent, estimate the economic impacts of tribal gaming on state economies. One prominent study found that in 2003 state and local governments collected approximately $1.5 billion in tax revenue generated by Indian gaming.[34] Such research indicates that the Indian gaming industry generates sales, jobs and wages, and tax revenue that ripple throughout regional economies. Two studies of tribal gaming's economic impacts on state economies are typical of these accounts.

A 2001 study of the economic impacts of tribal gaming in Idaho found that the five Class III gaming facilities in the state generated approximately 4,500 jobs, $84 million in wages and earnings, $250 million in sales, and $11 million in property and sales tax revenues. Since the opening of the casinos, reservation unemployment decreased from 70 percent to near zero for

some tribes in the state, while annual public entitlement payments declined by over $6 million. Tribes in Idaho leveraged gaming revenues to diversify their economies, opening and operating convenience stores, gas stations, restaurants, hotels and resorts, gift shops, and farming, mining, and forest products companies. These enterprises generated about 850 jobs, $21.5 million in wages and earnings, $63 million in sales, and over $2 million in property and sales taxes. Tribes also used gaming revenue to bolster tribal government programs and services, creating additional reservation jobs. The study found that tribes contributed substantially to economic development in Idaho's most rural and low-income areas, funding infrastructure development, including utilities, roads, and industrial parks, and social services, including medical clinics, schools, cultural centers, and job-training enterprises.[35]

In Oklahoma, the Harvard Project on American Indian Economic Development reported that the fifty-five Class II gaming facilities in the state generated $208 million in gaming revenue in 2000. Having a gross regional impact of $329 million and a net regional impact of up to $201 million, tribal gaming was responsible for creating as many as 8,100 net jobs and adding as much as $14 million to the state treasury. Tribal casinos in Oklahoma rely heavily on nontribal resources. About one-fourth of tribal casino employees were non-Native, and off-reservation vendors provided a high proportion of the casinos' $73 million in goods and services. Tribes used gaming revenues to diversify their economies through businesses ranging from a T-shirt shop to an electronic gaming machine company.[36]

While state-by-state analyses of Indian gaming's social and economic impacts commissioned from private consulting firms or "think tanks" are increasingly common,[37] publicly commissioned or otherwise independently conducted rigorous studies that attempt to assess local impacts of legalized gambling are rare. The NORC's widely cited report on behalf of the NGISC systematically examined data on thirty-two socioeconomic indicators for a national sample of one hundred communities spanning sixteen years.[38] The study compared communities before and after the introduction of gaming facilities and communities experiencing casino introductions with those that did not. It found consistent and substantial net benefits and few if any aggregate harms accruing to the communities with casinos. Among other economic benefits were a 12 percent drop in unemployment, a 13 percent decline in income from income maintenance programs, and a 17 percent decrease in income from unemployment insurance programs.[39]

Affiliates of the Harvard Project compared impacts of tribal casinos with those of commercial casinos. The study used NGISC data to determine whether communities located near tribal casinos experienced different socioeconomic impacts than did those proximate to commercial gaming facilities. The study's findings indicated that locale influenced the positive impacts on a community. Because communities near tribal casinos in the first place tended to be underdeveloped and impoverished, they experienced greater socioeconomic gains once the casinos were introduced than did comparable communities near nontribal casinos. Unemployment rates fell, while general income and earnings rates rose. Per capita income from public entitlement programs in communities near tribal casinos decreased to levels below those of comparable communities. Tribal casinos also attracted more new net spending than they displaced from existing businesses in the leisure and hospitality sectors in surrounding communities. Local government revenues increased as well. Overall, the introduction of a tribal casino produced "substantial beneficial economic and social impacts on surrounding communities."[40] As the researchers concluded,

> This evidence would tend to allay the policy concern that, while Indian gaming may be a boon to tribes, it could come at the expense of the surrounding communities. Indeed, it suggests exactly the opposite, i.e., that Indian gaming is not only a development tool that poorer-than-average tribes have used to pull ahead in their cohort, it is a tool of development by which tribes have improved the economic lot of their non-Indian neighbors as well.[41]

There appears to be relative consensus across available research that Indian gaming generates direct, indirect, and induced economic benefits for state and local communities. These benefits, however, must be adjusted to account for tribal gaming's costs to state and local economies.

As Table 4.3 illustrates, a tribal casino could generate five types of economic impacts on a tribal reservation, nontribal community located near a tribal casino, or state. A "destination effect" occurs if tourists spend money at the casino or at hotels, restaurants, gas stations, and other local retail establishments the region would not otherwise see. The tribe, the surrounding community, and the state all can benefit from this phenomenon. If the tribal casino competes with existing off-reservation entertainment and retail options, altering spending patterns and displacing jobs, the casino can have a "substitution effect" that is positive for tribes but negative for the

**TABLE 4.3. EXPECTED ECONOMIC EFFECTS OF A TRIBAL CASINO BY JURISDICTION**

| | Tribe | Surrounding Community | State |
|---|---|---|---|
| Destination Effects | + | + | + |
| Substitution Effects | + | – | + or – |
| Cannibalization Effects | + | – | + or – |
| Multiplier Effects (Net) | + | + | + |
| Intensity Effects | + | + or – | + or – |

surrounding community and possibly for the state. If tribal casinos exert a "cannibalization effect" on nontribal gaming establishments (if any exist in that state), the effect is positive for the tribe but may be negative for surrounding communities or the state. Together, these three effects allow one to calculate a net direct impact on the regional economy associated with Indian gaming's multiplier effects. The net impacts may be positive for all jurisdictions; somewhat antithetically, given limited resources available on the reservation, off-reservation communities tend to realize a higher positive effect than do tribes, but the impact on tribes may seem greater in a relative sense. Lastly, an "intensity effect" reflects changes in consumer spending patterns away from basic goods and services and toward leisure expenditures at a tribal casino. The effect may be positive for the tribe but negative for surrounding communities or the state. Intensity effects may reflect expenditures by problem or pathological gamblers that also represent social costs.[42]

As one can see, the economic impacts of a tribal casino represent a complex set of calculations. The type and direction of expected effects may differ by jurisdiction; for instance, tribal and state economies may experience a net positive impact while the community located near a casino may be affected negatively. While one jurisdiction "loses out," the net overall impact across jurisdictions may be positive, or vice versa—one economy may "win" while the sum total represents a net loss. The main point here is that the calculation of economic impacts is not a simple matter. Further complicating the issue, because negative economic effects can generate social costs, studies of Indian gaming's socioeconomic effects also generally seek to quantify the negative impacts of identified social costs. By imputing a monetary value to social costs, such studies draw conclusions about their economic impacts as part of a cost-benefit analysis.

### Charitable and Civic Contributions

Above and beyond any tribal-state compact requirements, gaming tribes contribute millions of dollars annually to charitable and civic organizations. A 2001 NIGA survey found that tribes donate some $68 million annually to youth and elder projects, schools, health and rehabilitation services, sports-related programs, arts and cultural organizations, language preservation efforts, emergency relief, community and economic development organizations, and various social welfare programs. Over two-thirds of the reporting tribes donated to local charities, 10 percent to statewide organizations, and 6 percent to national groups. Nearly 40 percent of the recipients were nontribal organizations. Half of the tribes cited "sharing and reciprocity" as a guiding rationale behind their donations.[43]

### Tribes

Most of the empirical research on the economic effects of Indian gaming has focused on state and local governments. Perhaps surprisingly, the economic impacts of tribal gaming on tribes themselves have been underreported and understudied. Methodologically, the economic impacts of Indian gaming on tribes are difficult to assess, largely because tribes are not subject to public information requirements and available data can be sketchy. To the extent that tribes derive economic benefits from casino operations, these benefits usually are calculated solely in terms of gaming revenue.

In 2003, there were over 350 tribal gaming facilities located in 30 states. The total amount of gaming revenue earned by tribal casinos varied tremendously from state to state and tribe to tribe across a financial spectrum of success. According to Meister's most recent study, successful Class III tribal gaming operations in just five populous states generated the lion's share of gross revenue in 2003, about $9.9 billion. California tribes led the way with over $4.2 billion produced by fifty-six tribal gaming facilities. In Connecticut, the Foxwoods Resort Casino and Mohegan Sun facilities alone generated a staggering $2 billion. Tribal casinos in California and Connecticut accounted for nearly 40 percent of the industry's revenue. Indian gaming operations in Minnesota (nineteen casinos), Arizona (twenty-two casinos), and Wisconsin (twenty-two facilities) yielded roughly $3.7 billion in revenue. Together, tribal casinos in these five states generated 61 percent of total Indian gaming revenue.[44]

At the other end of the spectrum, tribes in the remaining twenty-five states earned just over one-third of all gaming revenue, approximately $6.3 billion. Tribes operating modestly successful Class III gaming facilities included those in the Great Plains states: Idaho, whose six casinos generated $119 million in total revenue; North Dakota, whose five operations produced $95 million; South Dakota, whose twelve facilities earned nearly $50 million; and Montana, whose twenty-five casinos generated about $15 million. Tribes operating generally less lucrative Class II gaming operations included those in Oklahoma, whose seventy-three facilities nevertheless produced $466 million in total revenue.[45]

As one might expect, it seems plain from the results of much available research that tribes derive economic benefits from their casinos. Because tribes own and often manage their casinos, revenues are transferred directly to tribal governments and tribes obtain the economic benefits of Indian gaming with relatively few transaction costs. Tribal gaming revenue generates gross impacts—sales, wages, jobs, and taxes—that are virtually unassailable net positives for tribal communities. The ripple effects induced by gaming revenue further multiply its benefits to tribes. And tribal governments use gaming revenue to provide a myriad of public services to tribal members.

The economic "costs" of Indian gaming to tribes mostly take the form of lessened economic benefits. For instance, the direct revenue transfers from tribal casinos to tribal governments are technically, in the eyes of some economists, a "tax" at a rate of up to 100 percent, theoretically bypassing private economic development. The preexisting underdeveloped condition of many reservation economies minimizes positive multiplier effects—that is, there are fewer opportunities for a dollar to "ripple" throughout a tribal economy. Revenue "leakages" to nontribal commercial and public entities further reduce the economic impact of gaming revenue on tribes, as most suppliers of goods and services are located off-reservation. Revenue sharing with state and local governments directly siphons off gaming revenue. And where tribes have chosen to make per capita payments, which benefit individual tribal members, tribal government revenue decreases.

## SOCIAL COSTS AND BENEFITS OF INDIAN GAMING

The overlap of social and economic impacts complicates a cost-benefit analysis of Indian gaming, as both researchers and policymakers attempt

**TABLE 4.4. SOCIAL BENEFITS OF INDIAN GAMING**

| | Tribal | Federal | State | Local |
|---|---|---|---|---|
| "Can do"-ism and self-esteem of tribal members | X | | | |
| Charitable and civil contributions | X | | X | X |
| Economic development | X | X | X | X |
| Improved reservation quality of life (such as health care, schools, housing, utilities) | X | X | X | X |
| Improvements in socioeconomic indicators related to poverty (such as infant mortality, suicide, substance abuse, crime, domestic violence) | X | X | X | X |
| Increased access to leisure activities | X | | X | X |
| Increased opportunities for intergovernmental relations | X | X | X | X |
| Increased tribal membership | X | | | |
| Job creation on and off reservations | X | | X | X |
| Political participation and mobilization | X | X | X | X |
| Population retention and in-migration on reservations | X | X | X | X |
| Preservation and rejuvenation of tribal traditions, language, culture | X | | | |
| Pride in tribal government and culture | X | | | |
| Reacquisition of tribal lands | X | | | |
| Strengthened tribal governments and institutions | X | X | | |
| Tribal self-determination, economic self-sufficiency, and sovereignty | X | X | | |

to weigh the negative externalities of social costs against economic benefits. With social costs and benefits, too, the emphasis of most studies is on impacts occurring off the reservation. In Tables 4.4 and 4.5, we list representative social benefits and costs of tribal gaming and the jurisdictions they may impact.[46]

### Problem and Pathological Gambling

Perhaps the most pressing social cost associated with gambling—not isolatable, incidentally, to the existence of Indian gaming—is the prevalence of problem and pathological gamblers in the United States. Pathological gamblers often exhibit destructive and desperate behavior, including debt accumulation, criminal activity, substance abuse, domestic abuse, and suicidal ideation.[47] Problem or pathological gambling can have drastic effects not only on an individual's social and economic life but on the larger community as well.

**TABLE 4.5. SOCIAL COSTS OF INDIAN GAMING**

| | Tribal | Federal | State | Local |
|---|---|---|---|---|
| Economic competition with nontribal businesses (such as decreased sales, downsizing, closings) | | | X | X |
| Economies vulnerable to dependence on legalized gambling market | X | X | X | X |
| Erosion of traditional tribal culture and values | X | | | |
| Erosion of trust in tribal government | X | | | |
| Increased crime and related costs (such as victimization, incarceration, physical and mental injury, death) | X | X | X | X |
| Increased gambling | X | | X | X |
| Increased substance abuse | X | | X | X |
| Intratribal and intertribal political clashes | X | | | |
| Political impropriety | X | X | X | X |
| Pollution (such as air, water, noise, light) | X | | X | X |
| Problem and pathological gambling and related costs (such as physical and mental stress, crime, child neglect or abuse, domestic violence, suicide) | X | X | X | X |
| Reliance on per capita payments and other "unearned" wealth | X | | | |
| Tribal membership disputes | X | | | |

The American Psychiatric Association classifies pathological gambling as an impulse control disorder and uses ten criteria to identify pathological gambling. Pathological gamblers meet at least five criteria, while problem gamblers meet fewer than five criteria.[48] In its 1999 report, the NGISC cited estimates that in 1998 between 1.2 and 1.5 percent of the adult population in the United States (or approximately 3 million people) were pathological gamblers at least at some point during their lives, while another 1.5 to 3.9 percent of adults (or between 3 and 7.8 million people) were problem gamblers.[49]

Most predictably, perhaps, one would expect that problem and pathological gamblers would incur large amounts of debt from gambling. Filing for bankruptcy is far more common among problem and pathological gamblers than among nongamblers or low risk gamblers: nearly one in five pathological gamblers has filed for bankruptcy, compared to less than one in twenty-five nongamblers.[50] The rates of household debt and payment of unemployment and welfare benefits are also higher for problem and pathological gamblers than for nongamblers or low-risk gamblers. Fifteen percent of pathological gamblers received unemployment benefits in the prior

year, compared to less than 5 percent of nongamblers; a larger percentage of problem and pathological gamblers received welfare benefits than did other categories of gamblers; and the average household debt of a pathological gambler was higher than for any other category of gambler.[51]

Gambling problems, especially pathological gambling, often occur in conjunction with other problems related to physical and mental health. The NORC study found higher rates of mental health treatment, manic and depressive episodes, and alcohol and drug dependency among problem and pathological gamblers. Problem and pathological gamblers also have higher rates of arrest and conviction and are more likely to have lost a job in the past year or to have declared bankruptcy, all of which may cause stress-related or other impacts on an individual's health.[52] The National Council on Problem Gambling reported that about one in five pathological gamblers has attempted suicide. About two-thirds of the 400 Gamblers Anonymous members in a recent survey reported they had contemplated suicide, and more than three-quarters stated they had wanted to die.[53]

Domestic problems, including abuse and divorce, are considerable concerns among problem and pathological gamblers. More than half of pathological gamblers reported that they have had an emotionally harmful family argument about gambling. Gamblers have a divorce rate twice as high as nongamblers, and nearly one-third of Gamblers Anonymous members credit their separations or divorces to their problem or pathological gambling.[54] A recent study indicated a possible correlation between intimate partner violence and problem gambling, while other studies have found that spouses and children of pathological or problem gamblers are more likely to experience emotional problems and addictions of their own.[55]

Although the economic and personal costs incurred by the individual problem or pathological gambler can be devastating, the costs to society are considerable as well. The NORC study attempted to quantify the consequences of problem gambling in the larger community in economic terms. Taking into account the greater prevalence of divorce, poor physical and mental health, unemployment and lessened productivity, bankruptcy, and involvement in the criminal justice system among problem and pathological gamblers as well as the costs of treating problem gambling, the study estimated that each pathological gambler costs society $10,550 over his or her lifetime, while each problem gambler costs society just under half that amount.[56] Multiplying the estimated individual costs to society of problem and pathological gamblers by the estimated prevalence of

problem and pathological gambling in the general population, the NORC study calculated total societal costs of about $4 billion each year. At the same time, the NORC study noted that these costs were a fraction of those incurred by society in relation to drug and alcohol abuse, mental illness, heart disease, and smoking. [57]

Whatever the root causes of problem and pathological gambling, most researchers appear to agree that as gambling opportunities become more widely available, problem and pathological gambling will increase.[58] Between 1975 and 1998 (the dates of the two most recent studies of the prevalence of gambling), the number of Americans who had gambled at least once in their lives increased from 68 percent to 86 percent. This increase presumably was attributable to the greater availability of gambling opportunities. In 1998, only three states prohibited gambling entirely; in all other states, Americans could place legal wagers of some form, ranging from state lotteries to casino games to off-track betting.[59] Although the diagnosis of problem and pathological gambling has changed significantly since 1975, it appears at least intuitively reasonable to expect that increased access to gambling has resulted in higher prevalence rates of problem or pathological gamblers.[60] As the NGISC noted, in the 1990s, a decade of expansion for commercial gambling, state lotteries, and tribal gaming, the number of Gamblers Anonymous chapters doubled.[61] Other researchers, however, have emphasized the absence of a clear pattern of increasing pathological gambling as legalized gambling increases and have suggested that expansion of legalized gambling has resulted only in a greater number of low-risk gamblers.[62]

### Crime

While there appears to be a link between problem and pathological gambling and crime—problem and pathological gamblers have higher rates of arrest and conviction than do nongamblers—a more difficult question is whether there is a link between casinos and increased crime. The common wisdom has been that casinos cause marked increases in street crime, such as prostitution, illegal drugs, violent crime, and theft, as well as white-collar and organized crime. The cautionary tale of Atlantic City, as related by researchers and laypeople alike, is that casinos breed crime, evidenced by a 150-percent increase in Atlantic City's crime rate after it legalized gambling.[63] Despite mixed results of studies exploring the link between gambling and crime, the perceived connection between casinos and crime is a

powerful influence on policymaking; the threat of increased street crime almost invariably is raised in opposition to opening a casino.[64]

More recently, however, researchers have turned a critical eye toward the assumption that casinos cause crime. Some have cited the lack of evidence supporting significant increases in crime as legalized gambling has expanded, perhaps particularly the dearth of evidence connecting newly opened casinos to organized crime.[65] Others have suggested that casinos are no different than other tourist attractions, such as concert venues or sports arenas, in attracting crime.[66] And some have argued that taking into account the large number of visitors to a community reveals that crime rates are stable or even decreasing.[67] Still others have emphasized that some casinos, particularly in areas with high unemployment rates, have had the effect of reducing poverty-related crimes.[68]

The most recent comprehensive national study, NORC's analysis of social and economic changes in one hundred communities between 1980 and 1997, measured the effects of "casino proximity" on criminal activity. To isolate the effects of a casino on a community's crime rate, the study used four models that incorporated variables of community, time, and casino proximity.[69] The NORC study concluded that the presence of a casino in or near a community did not significantly increase crime. To the contrary, it appeared that crime rates were reduced, "but not in an overwhelming way."[70]

Using the NORC study's dataset, affiliates of the Harvard Project explored the possibility that tribal casinos might result in a net social benefit for underdeveloped economies and impoverished communities on and near reservations. If Indian gaming can reduce poverty in a locale, it should follow that related social ills will decline as well, perhaps offsetting the social costs typically attributed to gambling. The study found that tribal casinos had more pronounced positive effects than did nontribal casinos on a number of indicators. For example, communities near tribal casinos experienced a five-times-greater decrease in income from welfare programs. Where the NORC study found no statistically significant results for any of the crime variables, the Harvard research found a substantial net decline in auto theft and robbery associated with a community's proximity to a tribal casino. The authors concluded that the overall results suggest that the introduction of a tribal casino to a previously economically depressed locale may reduce rather than increase crime.[71]

The NGISC, although stating that there may be a link between casinos and increased crime surrounding the casino, found the research on the

issue inconclusive. Nevertheless, as the commission noted, the prevailing perception seems to be that increased crime is associated with casinos.[72]

### Reservation Quality of Life

Historically, Native Americans, particularly those living on reservations, have been among the most impoverished people in the United States. The 1990 Census painted a statistical portrait of the extreme poverty on many Indian reservations. While 13 percent of the general population fell below the poverty level, nearly one-third of Native Americans lived in poverty, and unemployment rates on reservations often exceeded 50 percent.[73] Income and education levels on reservations also were substantially lower than those of the rest of the United States. South Dakota's Pine Ridge Reservation, the poorest locale in the nation according to the 1990 Census, had a poverty rate in excess of 60 percent, an unemployment rate approaching 90 percent, and an average annual family income of less than $4,000.[74]

Extreme poverty is closely linked to a myriad of social problems, ranging from substance abuse to crime to domestic violence. Native Americans have disproportionately high rates of infant mortality, suicide, drug and alcohol abuse, obesity, and mental health problems.[75] They are more likely to be victims of violent crime than are members of any other racial group in the nation.[76] Native Americans also have significantly higher mortality rates from illness such as diabetes, tuberculosis, and alcoholism.[77]

The 2000 Census provided a subsequent statistical snapshot of Native Americans and life on reservations. While poverty is still prevalent on reservations, several of the twenty-five largest tribes in the United States saw improvements in poverty and income rates from 1990 to 2000.[78] Overall, the poverty rate for the Native population decreased to 26 percent and the median household income increased to nearly $32,000.[79] Some saw these modest improvements as indicative of a turning point in the well-being of tribes, perhaps reflecting the positive impacts of Indian gaming; others saw the changes either as tracking national trends through the 1990s or simply as too small to justify tribal gaming as a foundation for economic development. These differing perspectives are reflected in specific accounts of gaming's impact on reservation life.

Anecdotal evidence indicates marked improvements in the standard of living for many tribal communities across the United States. For some, casino revenue has resulted in vast personal wealth for individual tribal members; for others, more modest casino revenue nevertheless has revitalized

reservation life. In its report, the NGISC concluded, "As was IGRA's intention, gambling revenues have proven to be a very important source of funding for many tribal governments, providing much-needed improvements in the health, education, and welfare of Native Americans on reservations across the United States."[80] "The advantages [of Indian gaming] are becoming self-sufficient, picking ourselves up by the bootstraps," said a tribal leader in California. "[We're] getting back to the pride for the tribe and being able to be good citizens."[81] As another commentator observed, "Gaming revenues have taken some Native people out of 'survival mode' and brought back the significance of balance and connection to family and the land."[82] A member of the Yavapai-Apache Nation said, "I have come back here because I can have a life here now, on the reservation where my family [is] from."[83] The success stories are numerous and heartfelt. We mention just a few here.

The Oneida Nation of New York operates the Turning Stone Casino Resort, one of the most successful tribal gaming enterprises in the country. Gaming profits have allowed the Oneida Nation to diversify its economy through enterprises ranging from gas stations to news media to clothing design. As a result, the tribe is one of the largest employers in central New York state. The improvements in the Oneidas' quality of life are plain, as the Oneida Nation has used casino revenue to provide housing, health care, education, employment, and other essential government services to its members.[84] As a seventy-year-old Oneida tribal member remarked about her new two-bedroom house, built in part with gaming revenue, "Never in my life did I dream I would have a house like this."[85] Half a continent away, the Oneida Nation of Wisconsin enjoys similar gaming success, as extolled by a report issued by the Wisconsin Policy Research Institute: "The Oneida Tribe . . . is enjoying its first generation of prosperity in more than two centuries. For the Oneidas, the gaming franchise has been more successful than all previous anti-poverty programs in providing jobs, self-esteem, and a bright future."[86] The poverty rate among the Wisconsin Oneidas dropped ten-fold between 1990 and 2000, from nearly 50 percent to just 5 percent, in large part due to the tribe's casino.[87]

In neighboring Minnesota, the Prairie Island Sioux Community credits its Treasure Island Casino and Resort with improving the lives of tribal members by providing funds for government services, including constructing housing, a government administration building, a community center, and a wastewater treatment facility. The tribe also uses casino revenue to provide

health care and education to its members.[88] For the Tohono O'odham Nation in southern Arizona, gaming revenue has paid for a new community college and nursing home, as well as for health care, fire protection, and youth recreation centers.[89] In California, the Viejas Band of Kumeyaay Indians uses gaming revenue to provide government services for its members, including law enforcement, road maintenance, and waste removal.[90]

"[T]here's no question that we are steadily bringing [the Native American] population out of poverty, really like never before," said one proponent of tribal casinos in Wisconsin. "Indians [who] had literally been living in tar paper shacks before gaming are now living in their own homes for the first time in their lives. If they want to go to college, they can go to college now. And if they need health care, they can get it."[91] Jacob LoneTree, former president of the Ho-Chunk Nation in Wisconsin, concurred. "Gaming has provided a new sense of hope for the future among a Nation that previously felt too much despair and powerlessness. . . . The economic development generated by gaming has raised our spirits and drawn us close together."[92]

Some tribes have used gaming revenue to preserve and revitalize cultural traditions, as well as to strengthen tribal communities. They have built museums and heritage centers celebrating and preserving their histories, instituted Native language classes in their schools, and infused Native values and traditions into public services and institutions ranging from clinics to courts, all with casino profits.[93] For example, with gaming revenue, the Oneida Nation in New York built the Shako:wi Cultural Center and Museum as well as a ceremonial longhouse. The tribe offers classes on the Oneida language and traditional Haudenosunee dances and has undertaken a project to preserve the oral histories of its elders. The tribe also has successfully repatriated human remains and cultural artifacts.[94] In Oklahoma, tribal governments have used gaming revenue to invest in cultural preservation and revitalization programs, including tribal history and language courses.[95] "With jobs on the reservation now, . . . the religion and culture will become stronger again," said a tribal leader in New Mexico.[96]

The specifics of these tribes' experiences are mirrored by those of other gaming tribes throughout the United States. As Ernest L. Stevens, Jr., chair of NIGA, said:

> Perhaps the most important point is that Indian gaming has served to build strong tribal governments, and promote tribal economic self-

> sufficiency. Tribes now have schools, health clinics, water systems, and roads that exist only because of Indian gaming. Tribes have a long way to go because too many of our people continue to live with disease and poverty, but Indian gaming offers hope for the future.[97]

Anecdotes, however, yield evidence of the social costs of casinos on reservations as well. "Prosperity brings problems, too," said Fred Sanchez of the Yavapai-Apache Nation in California, referring to drug and alcohol abuse among the tribe's youth.[98] Tribal political in-fighting and membership disputes make headlines when casinos are involved.[99] In California, where Indian gaming revenues are measured in billions of dollars, tribal membership is a heated topic. Some Native Americans seeking membership charge that they are excluded from their fair share of gaming profits by greedy tribal members; the tribes, however, see both disingenuous applications for membership as well as applications from the descendants of erstwhile members who abandoned the reservations during hard times.[100] After the Pechanga Band of Luiseno Mission Indians in southern California opened its casino in 1995, the number of enrollment applications increased twenty-fold, leading the tribe to place a temporary moratorium on new members. A group opposed to the moratorium staged a protest outside the tribe's casino and filed suit in federal court seeking to stop monthly $10,000 per capita payments to current Pechanga members.[101] In 2004, as its annual casino profits approached an estimated $185 million, the tribe dropped 130 members from its rolls, prompting another challenge in federal court. The Pechanga Band is not alone; the Redding Rancheria ousted nearly a quarter of its members in 2004.[102]

Indian gaming also appears to fuel disputes over the legitimacy of tribal governments, as evidenced by recent controversies in New York and Iowa. In 2003, New York governor George Pataki and the St. Regis Mohawk Tribe reached an agreement to settle the tribe's land claims and to allow the Mohawks to open a casino in the Catskills. In 2004, however, casino plans were slowed when a federal court ordered a review of the legitimacy of the tribal government, in place since 2000, by the U.S. Department of the Interior.[103] In Iowa, the NIGC closed the Meskwaki Tribe's casino for over six months in 2003 after finding that a formally unrecognized tribal council was controlling the casino's profits, some $3 million in weekly gross revenue. The impact of the casino's closure was felt beyond the limits of the reservation:

with 1,300 workers, the casino is the county's largest employer. After the casino reopened, tribal members associated with the rival government faction were barred from the casino.[104]

For some, a casino-based economy is inconsistent with traditional tribal values. Tim Giago, a Native journalist and vocal critic of Indian gaming, said that some gaming tribes "have turned into what they've deplored all of their lives. They're bureaucracies and they're being run by attorneys and accountants—white attorneys and accountants."[105]

The Navajo Nation famously has chosen not to pursue gaming, based in part on traditional Navajo beliefs. According to the Navajo story of Noqoìlpi, or "He-who-wins-men," a gambler-god descended from the heavens to the Pueblo people.

> When he came, he challenged the people to all sorts of games and contests, and in all of these he was successful. He won from them, first their property, then their women and children, and finally some of the men themselves. Then he told them he would give them part of their property back in payment if they would build a great house; so when the Navajos came, the Pueblos were busy building in order that they might release their enthralled relatives and their property. They were also busy making a race-track, and preparing for all kinds of games of chance and skill.[106]

The Pueblo people continued to gamble against Noqoìlpi, losing their property and freedom and becoming enslaved by the gambler-god. Though a young Navajo eventually defeated Noqoìlpi, the legend is interpreted as a warning against gambling. Explained Johnson Dennison, a Navajo healer, "There are many Navajo mythologies about gambling and it's always been a part of Navajo culture, but it is associated with control and can make you go crazy. . . . Gambling is not an honest way to make a living or to make money. It's a form of poverty."[107]

The Tohono O'odham struggle with cultural destruction of another kind: the impact of tourism on tribal communities. "On the one hand, [increased gaming-related tourism is] good. On the other hand, the feeling [among tribal members] is, 'We don't need people coming onto the nation because they don't have the kind of respect that we expect, for the land, for the people, and for sacred sites.'"[108] "We're trading our souls for money," said one tribal member of Indian gaming in New Mexico. "We are supposed to be stewards of this land. And we're not very good stewards now, allowing all of this [casino development] to take over."[109]

Some predict that the current boom in legalized gambling will be short-lived and that tribal economies dependent on casino revenues will collapse.[110] If Indian gaming ends, whether due to ordinary market forces, state imposition, or by federal legislative fiat, the effect on reservation economies could be devastating. Accordingly, tribes, aware of the legal and political uncertainties attached to Indian gaming, have sought to diversify tribal economic bases. As one commentator put it, "There is a sense of urgency in Indian land to diversify tribal economies, which is why we're seeing tribal leaders invest in all forms of enterprises, from airline assembly plants to minimarts to shopping centers."[111]

The Mississippi Band of Choctaw Indians often is lauded for exemplary tribal economic diversification. The band is one of Mississippi's largest employers, providing more than eight thousand full-time jobs through its twenty-two business ventures, ranging from an auto-parts plant to a timber-management service to a shopping center. In Wisconsin, the Oneidas have used gaming revenue to invest in a wide range of businesses, including an industrial park, a hotel and conference center, and a printing business.[112] The San Manuel Band of Mission Indians, owner of a large casino in southern California, has invested in hotels, up-scale restaurants, and office buildings. Along with the Viejas Band of Kumeyaay Indians, the Oneida Nation of Wisconsin, and the Forest County Potawatomi in Wisconsin, in 2004 the San Manuel Band opened a Marriott Residence Inn just a few blocks from the Smithsonian's National Museum of the American Indian in Washington, DC. "Gaming is not the only asset we have," says San Manuel Band chair Deron Marquez.[113]

That the availability of gambling on reservations may contribute to continued poverty is another tribal concern. Wayne Taylor, chair of the Hopi Tribe, observed that "most of our people on most reservations and tribal communities find it difficult enough to accumulate enough income on a monthly basis to meet the most basic needs of their families." The spread of legalized gambling, he explained, tempts tribal members to spend their money in casinos, to the potential detriment of their families.[114]

Perhaps the most prominent criticism of Indian gaming is its failure to lift all Native Americans out of poverty. The wide divergence between extraordinarily lucrative tribal casinos, such as the Pequots' Foxwoods Resort Casino, and tribal enterprises, gambling or otherwise, that may be barely breaking even or operating at a loss has resonated with many critics. Indian gaming, some charge, is doing too little for some tribes and too much for

others.[115] Conversely, the contrast of "too little" of government subsidies and "too much" of gaming profits generates concern about the corrupting influence of wealth on reservations. Ready, "unearned" cash feeds substance abuse, wasteful spending, and attitudes at odds with the American work ethic, critics charge. "It's killing us. It's killing our people," said one prominent Indian leader. "They never had money in their lives and they don't know what to do."[116]

Is anyone winning from Indian gaming? Like any industry, tribal gaming has both positive and negative effects. Studies identifying, measuring, and weighing tribal gaming's economic and social impacts draw varying conclusions about the degree or intensity of its effects on tribes, states, localities, and the United States. What is most clear is that the stakes are particularly high for tribes. Tribal experiences with gaming may be a net positive thus far, but they plainly fall along a spectrum of success. We turn now to an in-depth exploration of the Pequots and of Plains Tribes, whose experiences fall at the spectrum's poles and thus clearly demarcate the challenges and opportunities presented by Indian gaming.

# 5 Stories of Compromise: From the Pequots to the Plains

> [The Pequots] don't look like Indians to me and they don't look like Indians to Indians.
>
> —*Donald Trump*[1]

> [The Plains] region needs to be highlighted, because our treaties are going to be attacked and [critics] are going to say, "Hell, these aren't a bunch of Indians, these are a bunch of gaming tribes."
>
> —*Kurt Luger, executive director, North Dakota and Great Plains Indian Gaming Associations*[2]

Critics of Indian gaming increasingly charge that it simply does not work as a matter of federal law and policy. One of the foremost arguments raised against tribal gaming is that a few tribes, some "newly discovered," have grown fabulously wealthy, while the "Indian problem" persists in middle America, where unemployment and poverty still define reservation life for many Native Americans. Indian gaming reflects a spectrum of success within the broader range of tribal experiences with, or without, gaming. Two case studies illustrate the polar extremes of the spectrum of success and demonstrate each pole's limitations in accurately characterizing the success of an individual gaming tribe, as well as Indian gaming writ large.[3]

The nearly unparalleled economic success of the Foxwoods Resort Casino has made Connecticut's Mashantucket Pequots the most intensely scrutinized and highly criticized tribe in the United States. We revisit the oft-recounted

story of the Pequots and their rise from a nearly extinct tribe to the owners of the largest and most profitable casino in the world. The Pequots frequently are invoked as a cautionary tale of the perceived excesses and unfairness of Indian gaming. In contrast to the Pequots, we posit the experiences of Plains Tribes, embodied by the five tribes located in North Dakota. The Plains Tribes often are cited as exemplifying the failure of Indian gaming: despite the tribes' casinos, many of their members continue to experience extreme poverty. The Pequots exemplify the dozen or so highly successful gaming tribes in the United States, and the Plains Tribes illustrate the experiences of the majority of tribes with modestly profitable casinos.

## THE PEQUOTS

### Tribal History

At one time, the Mashantucket Pequots were a powerful presence on the eastern seaboard.[4] In the mid-seventeenth century, however, English settlers emigrating from the Massachusetts Bay Colony ignited a war that nearly eradicated the tribe.[5] The victors split the few surviving Pequots into small groups controlled by rival tribes.[6] In 1666, the Colony of Connecticut created a two-thousand-acre reservation for the remaining Pequots in what is now Ledyard, Connecticut. To facilitate white settlement, Connecticut reduced the reservation by more than half in 1761. The tribe owned a 989-acre parcel until 1856, when the state authorized the sale of almost 800 acres of the Pequots' land at public auction.[7] Proceeds from the auction were deposited in an account used to fund the tribe's basic needs, including food, medical care, housing, and funerals, into the early twentieth century.[8] The Pequots' condition worsened as these funds dwindled. Housing on the reservation fell into disrepair and the population accordingly declined.[9] Following World War II, only two people of Pequot descent lived on the reservation: Elizabeth George Plouffe and her half-sister, Martha Langevin Ellal.[10] Together they protested Connecticut's treatment of the Pequots and the state's attempts to enforce its laws on the reservation, jealously guarding what remained of the Pequot reservation and fighting for improved housing conditions.[11]

In 1973, Elizabeth George died. To preserve the tribe, several of her relatives considered returning to live on the reservation. Concerned with the lack of adequate housing, the relatively few remaining Pequots decided to establish a more formal tribal structure to better seek government assistance.[12]

During this restructuring, Elizabeth George's grandson, Richard "Skip" Hayward, was elected president of the tribe. Hayward promised to improve reservation housing and to achieve economic independence for the tribe.[13]

Hayward's grandmother often had told him that the state had stolen the Pequots' land. Encouraged by research supporting this account, the Pequots paid careful attention to several lawsuits brought by other tribes claiming that states had unlawfully sold tribal lands. In 1976, the Pequots filed a similar suit, seeking the return of tribal lands sold by Connecticut at auction in 1856.[14] The legal theory for the suits was based on the Non-Intercourse Act of 1790, which prohibited the sale of tribal lands without prior federal approval.[15] Because Connecticut had not obtained federal approval for the 1856 sale, the Pequots argued that the lands rightly belonged to the tribe. This novel legal theory garnered enough attention and success to allow the tribe's attorneys to negotiate a settlement with the state.[16]

In exchange for the dismissal of the pending lawsuit, the tribe received federal funds to purchase replacement land for that which was sold in 1856, as well as federal recognition. After negotiating the settlement with the state, the tribe successfully lobbied for congressional codification of the settlement's terms to allocate federal funds and formally recognize the Pequots as a tribe within the United States. In 1983, President Reagan signed into law a bill that extinguished the Pequots' claims to hundreds of acres of land, provided $900,000 to the Pequots to entice landowners to sell their property to the tribe for more than its actual value, and granted federal recognition to the Pequots.[17]

### Gaming at Foxwoods

With the return of a significant portion of their original reservation, the Pequots turned to other concerns, particularly economic development. By the mid-1980s, the tribe had built a successful bingo hall that attracted a thousand visitors per day and generated estimated annual gross revenues of $20 million.[18] After Congress passed IGRA, the Pequots pursued casino-style gaming, despite opposition from the state and surrounding communities. In 1990, in a victory for the tribe, a federal court ruled that because Connecticut allowed limited casino-style gambling for charitable purposes, such gambling did not violate state public policy and thus the tribe could open a casino on its reservation.[19] Although the court decision paved the way for a tribal-state compact under IGRA, the types of Class III gaming the tribe could offer remained controversial because Connecticut law prohibited

slot machines. Aware that slot machines typically generate about two-thirds of a casino's revenue, the tribe pursued state authorization, negotiating a deal with the state for the exclusive right to operate slot machines in exchange for a 25 percent state cut of the slot revenues.

Local lenders declined to finance the Pequots' new Las Vegas-style casino. In 1991, the tribe, under Hayward's leadership, found a willing financier in Malaysian construction magnate-turned-casino-operator Lim Goh Tong. Lim recognized the potential economic success of the Pequots' venture and readily financed a $58 million construction loan and a $175 million line of credit to the tribe. In addition to interest on the two loans, Lim would receive approximately 10 percent of the casino's adjusted gross income until 2016.[20]

The Pequots' Foxwoods Resort Casino opened its doors in 1992 and enjoyed immediate and enormous financial success. Located only 110 miles from Boston and 130 miles from New York City, Foxwoods attracts over 40,000 visitors each day. Foxwoods is the world's largest casino, boasting more than 6,400 slot machines, a 3,200-seat high stakes bingo hall, and over 350 gaming tables, including blackjack, roulette, craps, baccarat, keno, and poker.[21] The casino's annual gross revenue tops $1 billion. The tribe paid Connecticut approximately $200 million in the 2002–2003 fiscal year under the revenue-sharing terms of its tribal-state compact.[22]

The tribe uses its casino revenue to offer a vast array of government services as well as per capita payments to its approximately six hundred members. Each tribal member receives a payment of at least $50,000 per year, and some members are provided with free homes, medical care, and day care. Tribal members also receive retirement payments and educational scholarships.[23]

Off the reservation, Foxwoods has played a large part in revitalizing Connecticut's economy, which had suffered severely following federal cutbacks in defense spending. Most casino patrons travel to Foxwoods from other states, spurring a boom in construction of nearby hotels and restaurants. Visitors also flock to the tribe's Mashantucket Pequot Museum and Indian Research Center, which attracts more than 250,000 people each year. Foxwoods has created over 40,000 new jobs in the state and has had an impact on the state's economy measured in billions of dollars.[24]

### The Pequots Scrutinized

Along with casino patrons, the Pequots' nearly unrivaled success has been a magnet for criticism. Formerly sleepy New England communities

surrounding the reservation have fought hard against the expansion of gaming, complaining of increased traffic, pollution, crime, and bankruptcies. The state of Connecticut, along with three towns near the Pequots' reservation, filed suit in federal court to block the tribe from acquiring more land in trust and, having failed that, sought congressional intervention.[25] Perhaps predictably, much of the criticism centered on the Pequots themselves: the tribe was too successful, and many of its members did not fit popular conceptions of Native Americans. Donald Trump expressed the judgment of many when he stated that the Pequots "don't look like Indians to me and they don't look like Indians to Indians."[26] Responding to challenges to the Pequots' "Indianness," Hayward said,

> [People] don't understand why we're black, white, red, yellow. You know, 'Why, you're not Indian; you don't look Indian.' What does an Indian look like? You gotta look like the guy on the nickel. . . . [A]nd you've got to have blue black straight hair, and your nose has got to be shaped just so, and your lips have got to be just so. You've got to look like the part or you're not one of the original natives."[27]

As the first decade of the Foxwoods operation neared a close, two book-length exposés of the tribe and its casino purported to use investigative journalism to debunk the Pequots' status as a tribe. In *Without Reservation*,[28] law student Jeff Benedict attacked the tribe, reaching the conclusion that tribal members were not Pequots at all; instead, he asserted, many of them were descendants of other tribes or African Americans.[29] Indeed, Benedict said that while writing the book, "I didn't believe I was writing about Indians. I was writing about imposters."[30] The Pequots, as Benedict tells it, were able to hoodwink lawyers and politicians to falsely obtain tribal recognition for the sole purpose of exploiting laws allowing Indian gaming. In *Without Reservation*'s epilogue, Benedict called for Congress to reinvestigate the tribe's authenticity based on the information presented in the book.[31] Some reviewers criticized Benedict's journalism, but it nevertheless "won instant credibility."[32] As the *Boston Globe* reported, Benedict's book made him a hero in non-Native communities in Connecticut: *Without Reservation* was included on a Ledyard High School reading list, and some area residents said Benedict should run for president.[33]

Kim Isaac Eisler's *Revenge of the Pequots*[34] expressed similar doubts about the Pequots' legitimacy, although couched in perhaps slightly milder rhetoric.[35] Eisler's story similarly focused on the Pequots' success in using

federal law to their financial advantage; yet, as the book's title indicates, Eisler suggested that turnabout may be fair play for a group nearly wiped out by colonization. Nevertheless, in explaining his motivation for writing the book, Eisler stated that he had heard "that the whole thing was a giant scam and that Chief 'Skip' Hayward and his band were nothing but imposters."[36] Eisler concluded that the Pequots had unfairly used laws meant to benefit "real" tribes, "creat[ing] a new modern-day paradigm that changed the face of the country—not Native American, but Casino-American."[37] In an article accompanying the release of *Revenge of the Pequots,* Eisler implied that the answer to the problem of the Pequots may be a return to forced assimilation.[38]

The comments of local residents, fueled by Benedict's and Eisler's books, and the national media attention they generated, revealed the economic underpinnings of the "authenticity" question.[39] One resident referred to the Pequots as "a shake-and-bake and fabricated tribe," while another explained that "it's hard for people like us, who are working our butts off. . . . They never had a pot to pee in, and all of a sudden they're driving in $40,000 cars." An attorney for Upstate Citizens for Equality, a grassroots antigaming organization of non-Indian homeowners in New York, called the Pequots "an emblem of what's wrong with the whole operation. . . . In the 1980s, if someone said 'Indian,' people would think of a picture of a guy with a tear running down his face, caring for the environment. If you say Indians now they think of casinos."[40] Benedict himself recalled his impression upon first visiting the Pequot reservation in 1998: "I saw $40,000 vehicles, but I didn't see an Indian tribe."[41] Eisler, too, noted that "the amount of money being tossed around on the reservation is obscene," concluding that "if the Pequots and Foxwoods have been victimized by negative public attitudes, it is in part their own gaudy success that is the culprit."[42]

Benedict's and Eisler's books were dismissed by Pequot leaders as not worthy of substantive response. "We are tired of people trying to label us or paint what they want an Indian to look like," said Kenny Reels, current chair of the tribe. Former tribal chair Richard Hayward was more succinct, calling Benedict "a damn lunatic."[43]

The Pequots' experiences with Indian gaming fall at one end of the spectrum of gaming success, marked by the perceived intersections of tribal authenticity and newfound wealth. On the other end are the Plains Indians, exemplified by North Dakota's tribes, where tribal authenticity is not likely open to serious challenge and relative wealth is a virtual non-issue.

## THE PLAINS

### Tribal History

Upon arriving on the Great Plains of middle America, European explorers dubbed the area "the Great American Desert," believing that the Plains could not sustain human life. They were wrong, of course. Archaeological evidence indicates that humans inhabited the Great Plains as early as twelve thousand years ago. Several different Native American tribes have resided in what is now North Dakota, including the Assiniboin, Chippewa, Mandan, Hidatsa, Arikara, Cheyenne, Yanktonai, Cree, Dakota, and Lakota.[44]

Today, North Dakota's five reservations encompass nearly 5 million acres and are home to approximately thirty thousand tribal members of the Standing Rock Sioux, the Spirit Lake Nation Sioux, the Sisseton-Wahpeton Sioux, the Three Affiliated Tribes, and the Turtle Mountain Band of Chippewa.[45] Each of the state's five tribes operates a casino on reservation lands in North Dakota.

### The Great Sioux Nation

The Sioux, who called themselves Dakota, were a confederation of seven tribes: the Mdewakanton, Wahpeton, Wapekute, Sisseton, Yankton, Yanktonai, and the Teton (also known as Lakota).[46] As early colonists achieved military dominance over tribes in the East, including the Pequots, the Great Sioux Nation strengthened its own intertribal government and developed an economy based largely on buffalo hunting. Western explorers encountered Sioux in the Devil's Lake region of north-central North Dakota around 1738.[47]

By the early 1800s, the Sioux dominated a large part of the Midwest, including what is now North and South Dakota. The latter half of the nineteenth century brought the invasion of white settlers into Sioux lands and marked a turning point for the Great Sioux Nation. In 1868, the Sioux, under the leadership of Red Cloud, entered into a treaty with the United States, in which the federal government promised that settlers would enter Sioux territory only with tribal consent in exchange for the Nation's promise to cease raiding American forts.[48] Under the treaty's terms, the Sioux retained a large portion of land, equivalent to the size of present-day South Dakota, just west of the Missouri River.[49] In the 1870s, however, gold was discovered in the Black Hills, prompting the federal government to breach the terms of the treaty and leading to an all-out war between the

Sioux Nation and the United States.[50] Although the Sioux won the infamous Battle of Little Big Horn against Colonel George Custer, the federal government succeeded in exhausting the tribes' resources. In 1876, the Sioux surrendered the Black Hills and forcibly were relocated onto reservations established by the federal government.[51]

Currently, the Spirit Lake Sioux Nation, formerly known as the Devils Lake Sioux, is located on a reservation in northeastern North Dakota, between Devils Lake to the north and the Cheyenne River to the south. Just fifteen miles south of the city of Devils Lake, the Spirit Lake reservation is nearer to an urban area than is any other reservation in North Dakota.[52] The reservation is approximately 405 square miles and home to many of the tribe's over 5,000 enrolled members.[53] Located in the south-central part of the state, the Standing Rock reservation straddles the North Dakota–South Dakota border. The reservation is about forty miles south of Bismarck, the nearest urban area and North Dakota's state capital. The Standing Rock Sioux Tribe has over ten thousand enrolled members, and its reservation covers a total area of 2.3 million acres, approximately half of which is owned by the tribe.[54] The Sisseton-Wahpeton Sioux Tribe is located on the Lake Traverse reservation in southeastern North Dakota. The reservation spans five counties in South Dakota and two counties in North Dakota, covering 250,000 acres, with about one-tenth of the acreage tribally owned. The tribe has over ten thousand enrolled members.[55]

**The Three Affiliated Tribes**

The Three Affiliated Tribes are the Mandan, Hidatsa, and Arikara Tribes. When encountered by European explorers in 1738, the Mandan had a population of about fifteen thousand living in "six large, well-fortified villages along the Missouri River."[56] According to anthropologists, the Mandan may have come to what is now North Dakota as early as the fourteenth century when they moved west from the Mississippi Valley and then up along the Missouri. The Hidatsa became close allies with the Mandan in the seventeenth century when they moved from the Red River Valley to the Missouri River, near the Mandan villages.[57] The Sioux pushed the Arikara northward to the Dakotas during the 1700s, and the tribe eventually settled in a village abandoned by the Mandan after a smallpox epidemic in the 1830s. In 1850, the Arikara joined the Mandan and Hidatsa at Fort Berthold.[58] The Three Affiliated Tribes' reservation originally was established by the 1851 Treaty of Fort Laramie, which granted the tribes over 12 million acres. It was reduced

by 1870 and 1880 federal executive orders to less than 3 million acres and then again through allotment.[59]

Currently, the Three Affiliated Tribes are located on the Fort Berthold reservation, along the Missouri River in west-central North Dakota. The creation of Lake Sakakawea by the damming of the Missouri River permanently flooded over 150,000 acres on the reservation. Along with the inundated land, the tribes lost natural resources, long-established population centers, and farms and ranches located along the fertile Missouri River bottomlands.[60] Presently, the reservation consists of 981,215 acres and is located about seventy-five miles from Minot. The tribal government is headquartered in New Town, North Dakota, and the tribes' combined membership is about ten thousand.[61]

**The Turtle Mountain Band of Chippewa**

The Chippewa Tribe, also called the Ojibwe, was one of the largest tribes north of Mexico in the seventeenth century.[62] Originally from the area that is now Wisconsin, the Chippewa were forced westward to Minnesota by white settlement.[63] French Jesuits visited the Chippewa in 1642, when they resided on the shores of both Lake Huron and Lake Superior.[64] At the beginning of the eighteenth century, some Chippewa moved further west into what is now North Dakota, establishing hunting grounds along the Red River and just west of the Turtle Mountains. The Chippewa fought against the United States in the Plains Indian Wars until the conflict was resolved through a treaty with the federal government in 1815. The treaty set aside reservations for the Chippewa in Michigan, Wisconsin, Minnesota, and North Dakota.[65] The 1861 federal law establishing the Dakota Territory also set aside 10 million acres for Chippewa tribes as well as the Metis in northeastern North Dakota. Although other Chippewa tribes negotiated smaller reservations with the United States once the Dakota Territory was opened to white settlement, the Turtle Mountain Band held fast. In 1892, the tribe negotiated an agreement with the federal government in which the tribe received payment for the land taken under the 1861 law.[66]

The Turtle Mountain reservation is located just south of the Canadian border in north-central North Dakota, about 150 miles from Grand Forks. The present reservation consists of about 34,000 acres, most of it individually owned; the tribe also has acquired another 35,000 acres off the reservation. The Turtle Mountain Band is the state's largest tribe, with some 28,000 members.[67] About 17,000 members live on or near the

reservation.[68] Belcourt, North Dakota, is home to the tribal government and, with a population of about 2,000, is the state's largest Native American community.[69]

**Commonalities**

The histories of North Dakota's tribes reveal several commonalities that define and shape their contemporary experiences, including those concerning tribal gaming. First is the tribes' long history of government-to-government relations with the United States. The federal government recognized each of North Dakota's tribes as a sovereign nation during the settlement era of the nineteenth century. As "treaty tribes," tribes like those in North Dakota have a strong tradition of tribal identity and sovereignty that continues to shape the tribes' priorities and interactions with state and federal government.

Second, the tribes in North Dakota are land-based, their reservations originally established by treaty. Economic opportunities available to the tribes are governed in large part by the resources, natural or otherwise, existing on reservation land. As the histories of North Dakota's tribes indicate, the federal government typically located reservations in areas deemed least useful to white settlers. Unsurprisingly, then, there has been little or no access to commercial enterprises on the state's reservations and few opportunities to market goods or services produced on-reservation to non-Native populations.

Third, as is typical of reservations in the Great Plains, each tribe's reservation consists of mostly small communities often far removed from urban areas. In the recent past, tribal communities in North Dakota have lacked commercial development much beyond a local grocery store, and some homes have gone without such basics as electricity, running water, or telephone service.[70] Still, each of the state's tribes has a membership numbering in the thousands, many of whom grew up on and continue to reside on the reservation. Yet the scarcity of opportunities in North Dakota's tribal communities have led many tribal members to seek education or employment off the reservation.

As a result of the economic constraints faced by the state's tribes, North Dakota's reservations historically have been among the nation's poorest localities. In the early 1990s, unemployment rates on the state's reservations were staggering, reaching over 80 percent in some areas, even as the rest of the state experienced low unemployment rates that mirrored the generally robust national economy.[71] As one Turtle Mountain tribal member said,

"[It's hard] to see these statistics; [it's] harder to live them." Typically, tribal members living on the reservation are "people who grew up in poverty and just don't have anything at all."[72]

### Gaming on the Great Plains

In the early 1990s, tribes in North Dakota turned to casino gaming as a means to alleviate poverty, provide jobs, improve government services, leverage economic development, and entice tribal members to return to the reservation. In 1992, Governor George Sinner signed tribal-state compacts allowing casino-style gaming on the state's reservations.[73] Currently, there are five tribal casino developments in North Dakota: the Four Bears Casino and Lodge near New Town, owned by the Three Affiliated Tribes; the Sky Dancer Hotel and Casino in Belcourt, owned by the Turtle Mountain Band of Chippewa Indians; the Spirit Lake Casino and Resort in Spirit Lake, owned by the Spirit Lake Sioux Tribe; the Prairie Knights Casino and Resort in Fort Yates, owned by the Standing Rock Sioux Tribe; and the Dakota Magic Casino and Hotel in Hankinson, owned by the Sisseton-Wahpeton Sioux Tribe.[74] Each of the tribal casinos in North Dakota is owned, operated, and controlled by the tribal government.[75]

Each of the tribes considers its casino a success, despite profits being a far cry from those of the Pequots' Foxwoods.[76] The varied economic success of tribal casinos is not surprising. Even before the spread of Class III gaming following IGRA's enactment, the profits of tribal bingo halls had been determined largely by access to metropolitan markets.[77] Nevertheless, many tribes facing dire socioeconomic conditions, including those in North Dakota, opted for even the modest increases in employment and revenue accompanying gaming in a rural market. As Mark Fox, a member of the Three Affiliated Tribes and former treasurer of the National Indian Gaming Association (NIGA), emphasized, the success of Indian gaming in North Dakota is reflected in job creation.[78] The Three Affiliated Tribes' casino has helped to slash reservation unemployment from 70 percent to approximately 30 percent.[79] On the Standing Rock Sioux reservation, the tribe's casino created 356 gaming-related jobs for tribal members, significantly cutting the tribe's nearly 90 percent unemployment rate and making the tribe's casino the county's largest employer.[80] Similarly, the Turtle Mountain Band of Chippewa's casino has created 360 new jobs on the reservation.[81] Together, the state's five tribal casinos have directly created more than 2,000 jobs, over 80 percent of which are held by Native Americans.[82]

Even relatively modest casino revenue may allow a tribe to diversify economic development. The Standing Rock Sioux, for example, have launched several casino-related businesses, including a hotel, RV park, and marina,[83] while the Three Affiliated Tribes have started data entry and manufactured homes businesses.[84] The Turtle Mountain Band of Chippewa has used gaming revenue to finance a start-up data entry business and currently is pursuing recycling and construction companies, as well as tourism-related businesses.[85]

Tribal casino revenue and job creation also benefit surrounding non-Indian communities, as well as the state economy. In North Dakota, the five tribal casinos have a total annual payroll exceeding $30 million each year. Many workers employed at the casinos previously were unemployed and receiving public assistance. According to calculations using economic multipliers, in the year 2000 the economic benefits to the state resulting from the casinos' payroll and purchases was nearly $125 million, making tribal gaming one of North Dakota's top economic engines. The cumulative benefits of Indian gaming in the state are striking. Between 1997 and 2000, North Dakota accrued nearly $500 million in economic benefits from Indian gaming.[86]

Revenue can revitalize communities as well as economies. In North Dakota, none of the tribes disburses casino revenue in the form of per capita payments; instead, profits from the tribal casinos allow the tribes to provide essential government services to their members.[87] Increased employment opportunities and available government services have enticed tribal members to return to North Dakota's reservations.[88] As the state struggles to maintain its general population, its Native American population grew by 20 percent during the last decade.[89]

### The Plains Tribes Scrutinized

In December 2000, the *Boston Globe* ran a four-part series titled "Tribal Gamble: The Lure and Peril of Indian Gambling."[90] The first article of the series asserted, "Born partly of a desire to apply the '80s faith in free enterprise to the nation's poorest ethnic group, the story of Indian gaming is now one of congressional intentions gone awry." Alluding to the fact that only about one-third of the approximately 560 federally recognized tribes have chosen to pursue gaming, the article stated that "two-thirds of Indians get nothing at all" from tribal gaming enterprises.[91] The *Globe* series decried the poverty of many Native Americans in the face of

the "mind-boggling wealth" of a few gaming tribes, most notably the Pequots. Citing modestly successful rural casinos as proof of Indian gaming's failure as public policy, the article pointed to the Plains: "Tribes of the Greater [*sic*] Sioux Nation, with thousands of members in North and South Dakota, run about a dozen gambling halls but generate comparatively little in the way of revenue."[92]

*Time* magazine's December 2002 cover story, "Wheel of Misfortune," highlighted South Dakota's Oglala Sioux as an example of "needy Native Americans" passed over by Indian gaming's jackpot. Although the Oglala Sioux tribe's casino generates nearly $2.5 million in annual profits, which the tribe uses to fund government programs and services, including education and elder care, the article cast the tribes' casino as a financial failure. The tribe's individual members, according to the article, benefit "not at all" from tribal gaming, since the casino's profits would amount to "a daily stipend of just 16¢ for each of the 41,000 tribe members."[93]

Tribal leaders across the United States criticized the *Boston Globe*'s and *Time*'s slant on Indian gaming. Rick Hill, then-chair of NIGA, responded to the *Boston Globe*'s characterization of tribal gaming as a policy failure. "The truth is," he said, "Tribes generate important governmental revenue through gaming. . . . We are using our own resources to teach our children and grandchildren to speak our own languages, to restore our traditional villages, and to build new economies to take the place of those that were destroyed. Indian gaming is one of the important means of doing so." Said Oglala Sioux tribal president John Yellow Bird Steele of the tribe's casino, "Our gaming facility is not among the largest, but we would be hard pressed to replace the jobs and revenue that gaming generates."[94] Responding to the *Time* cover story, NIGA chair Ernest L. Stevens, Jr. wrote:

> As American Indians, we find it highly offensive that *Time* published an article belittling tribal self-government and the very positive attempts of tribal governments to overcome dispossession, poverty, and social wrongs for hundreds of years. . . . Indian gaming has positively impacted local communities, and has transformed tribal communities that were once forgotten. It provides jobs to many who never worked before, provides care for our elders, and brings hope and opportunity to our children.[95]

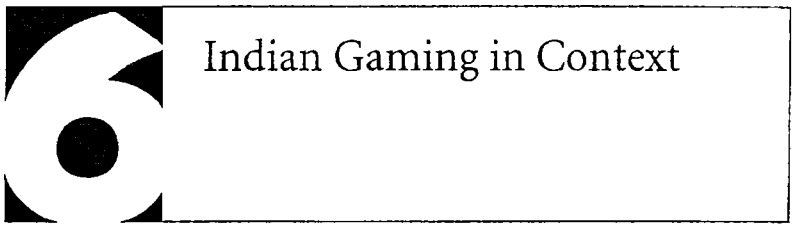
Tex G. Hall, president of the National Congress of American Indians and chair of the Three Affiliated Tribes, called *Time*'s treatment of Indian

gaming "misleading," pointing out the benefits of tribal gaming in the Plains. "My tribe's casino, very modest by Las Vegas standards," he wrote, "provides jobs to our people that are extraordinarily important to our economy, and revenue that our tribal government uses to provide services to the 10,000 members of our tribe. This is the case for the majority of tribes with gaming ventures."[96]

Like the case study of the Pequots, North Dakota Plains Tribes' experiences with tribal gaming demonstrate the oversimplification and lack of accurate and complete information in many conventional accounts of Indian gaming's successes and failures. Comparatively, the case studies illustrate the varying experiences of tribes with divergent pasts and present circumstances, as well as the common experiences of gaming tribes throughout the United States. Misinformation and the oversimplification of the law and politics of Indian gaming sets the terms of contemporary political discourse and mediates policy outcomes. In describing the legal and political compromises inhering to each case study of Indian gaming, we use the foundation of tribal sovereignty to reexamine both the experiences of and the criticism directed at the Pequots and the Plains Tribes.

# Part III

## TOWARD INFORMED LAW AND POLICY



# Indian Gaming in Context

> In the 1980s, if someone said "Indian," people would think of a picture of a guy with a tear running down his face, caring for the environment. If you say Indians now, they think of casinos.
>
> —*Peter Gass, attorney for Upstate Citizens for Equality*[1]

Tribal sovereignty must underlie informed discussion and effective law and public policy governing Indian gaming. Current critiques of Indian gaming are flawed in their failure to recognize and to consider fully tribal sovereignty. To rectify this problem, a more concretely realized understanding of tribal sovereignty is needed to level the playing field for tribes and states as they seek political compromise over Indian gaming policy.

## CRITIQUING CURRENT DISCUSSION

Until Indian gaming came along, the image of Iron Eyes Cody, the "Crying Indian" in 1970s television commercials for the anti-littering campaign of Keep America Beautiful, may have been the most enduring depiction of a Native American in non-Native popular culture in the last three decades.[2] Now, by far the most frequent allusions to Native Americans are on mainstream television shows like *The Simpsons, The Sopranos,* and *South Park*—and whether it's the subject of an entire episode or a single punch line, the reference invariably has to do with tribal gaming.

Before the Indian gaming industry exploded, discussion of the complexities of federal Indian policy and the legal and political issues facing tribes had long been isolated to tribal governments, the Bureau of Indian Affairs (BIA), the Senate Indian Affairs Committee, and the U.S. Supreme Court. Today, on any given day, one can open the newspaper or a magazine and read about how gaming tribes throughout the nation are influencing local economies and interacting with federal, state, and local government officials.

That Native Americans have assumed such a prominent place in nontribal public and policy discourse is almost entirely a result of Indian gaming. What is said about tribal gaming reflects the vigorous political activity, primarily at the tribal, state, and local levels, that is reshaping federal Indian law and policy. For better or worse, Indian gaming determines how we talk about tribes today—and how we talk about tribes governs how we act on Indian gaming.

### "Shake-and-Bake Tribes," "Special Interests," and "Scam Artists": How We Talk about Indian Gaming

Indian gaming generates a lot of attention. Although critical to tribal welfare, more mundane areas of federal Indian policy are virtually invisible to non-Natives. As Senator Ben Nighthorse Campbell (R-Colo.) complained while attending a 2004 hearing on Indian gaming, "I wish we had this many people here when the issue was Indian health care or education."[3] With its tales of political and financial intrigue, combined with the ongoing fascination with how traditional Native imagery meets contemporary popular culture, Indian gaming, more than any other subject, reflects as well as molds how people think and talk about Native Americans. Richard Williams, the executive director of the American Indian College Fund, observed, "These days, if one were to ask a random sampling of Americans about their thoughts on Indian people, almost inevitably their lexicon would include words like 'casinos, money, and rich.'"[4]

Indian gaming is a magnet for criticism. Based on the events recounted throughout prior chapters, we identify in this section five anti-Indian gaming themes that are pervasive in discussions of tribal gaming. We rely extensively on the actual words, reflecting a lexicon of skepticism and accusation, used by those commenting on tribes and on the Indian gaming industry.

**Tribes Are Composed of "Casino Indians"**

Gaming tribes have come to be seen as bands of "casino Indians," for whom identification as a Native American is wrapped up in the prospects for untold—and undeserved—riches. The Mashantucket Pequots' federal recognition and subsequent economic success have generated a considerable political backlash in Connecticut while placing several purported exposès on the national bestseller lists, even as the tribe has helped to revitalize the state's economy, contributing some $200 million each year to the state's treasury. The Pequots have been identified as the paradigmatic case of the "inauthentic" tribe seeking federal recognition to cash in on Indian gaming.

In this view, the Pequots were successful at "manipulating government policy and playing on public sentiments of 'Lo, the poor Indian'" to gain federal recognition. Other "would-be," "shake-and-bake," and "fabricated" "casino tribes" like the Pequots have come to be seen as "essentially a creation of the casino, rather than the other way around."[5] Individual tribes can be identified solely by their status as gaming or nongaming tribes; the *Baltimore Sun,* for example, differentiated between the federally recognized "Casino Mohegans" in Connecticut, who own the Mohegan Sun, and the "Native American Mohegans," who have not received federal recognition.[6] "Self-proclaimed" tribes of "casino Indians" like the Golden Hill Paugussett or Eastern Pequots in Connecticut continue to "come out of the woodwork" seeking recognition, a status that, "in essence, has become a matter of casino privilege."[7] One California media commentator has disparaged "highly questionable 'tribes' cobbled together by slick lawyers" pursuing federal recognition.[8]

The prevailing assumption is that tribes' pursuit of federal recognition is all about an entitlement to Indian gaming rather than tribal authenticity, sovereignty, or even eligibility for federal assistance. As one editorial writer asked, "I'm 1/64th Huron. Hey, why aren't I rich?"[9] An article in the 2000 *Boston Globe* series asserted that since "federal recognition now carries with it the right to operate a casino, the government's stamp of authenticity is not just a matter of Indian pride, but the key to enormous fortunes."[10] "Make no mistake," an editorial stated about the Schaghticokes' recognition, "this is all about big wampum." Calling the BIA recognition process "absurd" and "insane," the editorial continued, "There's little doubt that with enough money, the East Hartford Moose Club could gain federal recognition."[11]

Perhaps, needless to say, many tribes and Native people wholeheartedly disagree with such characterizations. Following the BIA's 2004 refusal of federal recognition to the Nipmuc Nation in Massachusetts, tribal member Carole Jean Palavra said, "Everyone looks at a native person today and says, 'Oh, they just want a casino.' It's not about a casino. . . . It's about our dignity."[12] As Walter Vickers, chief of the Hassanamisco Nipmuc Nation, wrote in the *Boston Globe,* "Regardless of what our tribe does upon recognition, it will never be all about gaming. . . . Regardless of the federal decision, we know who we are, and we will never be less than that."[13]

The discourse of the inauthentic "casino Indian" provides a license to use stereotypes and to otherwise express preexisting as well as newly manifested prejudice and backlash. Exaggerated analogy or outmoded and offensive historical imagery are reflected in hyperbolic criticism of tribal authenticity and Indian gaming. *Revenge of the Pequots* author Kim Isaac Eisler labeled the Mashantucket Pequots and Foxwoods Resort Casino "the Kuwait of Connecticut," describing tribal members "living in $300,000 four-bedroom, three-car-garage wigwams."[14] A political cartoon in a North Dakota newspaper titled "The Evolution of Native Artifacts" depicted arrowheads, pottery, and eagle feathers under the year 1800, and a slot machine under the year 2000.[15] In a particularly strident editorial titled "Indian Scam," *National Review* editor Rich Lowry charged, "American Indians have always occupied an outsized place in our imagination, usually as a noble people at one with a pristine North American continent. It's time to upgrade the image. Forget buffalo, eagle feathers, and tribal dancers. Think slots, Harrah's, and dirty politics."[16] An article in the *Wall Street Journal* asserted, "Bet by bet, the Indians are scalping customers for millions."[17]

Although perhaps unusual, proponents of Indian gaming report being subjected to racial epithets, including "the only good Indian is a dead Indian," as well as signs saying, "We took your land—get over it!"[18] One tribe, hit hard by wildfire in California shortly after the 2003 gubernatorial recall election, received telephone calls saying, "That's what you Indians deserve."[19]

**Tribes Should Pay Their "Fair Share"**

State and local policymakers across the country have realized that, despite any misgivings they may have about gambling or gambling policy, recent budgetary squeezes could in part be offset by Indian gaming revenue, a politically popular message that loses few allies and gains many. California gubernatorial candidate Arnold Schwarzenegger aired campaign ads in 2003

accusing tribes of not paying their "fair share" to the state, vowing to pursue the matter once in office. Said Schwarzenegger in one such ad, "It's time for them to pay their fair share. . . . Their casinos make billions, yet pay no taxes and virtually nothing to the state."[20] Schwarzenegger's characterization of tribal payments of some $130 million into state and tribal revenue-sharing funds as "virtually nothing" was echoed by Pequot exposè author Brett Fromson. "California gets no money currently to speak of from its Indian casinos," he said. Referring to now-governor Schwarzenegger's demands for revenue payments of $1 billion, Fromson continued, "Schwarzenegger is attempting to try to get that state a little bit of money."[21]

As Schwarzenegger was in the midst of negotiating new compacts with five successful gaming tribes in 2004, his fair-share rhetoric continued to resonate throughout the state. The citizens group Stand Up for California! was representative of similar organizations seeking local control over the siting and operation of tribal casinos and mandatory revenue sharing, as well as various other "safeguards to protect the public."[22] "All we want," said Stand Up codirector Cheryl Schmit, "is for [tribes] to be accountable and responsible to local and surrounding areas and pay their fair share."[23] Four California counties formed a joint powers agreement to lobby state and federal officials to allow local input and control over land-use and revenue-sharing decisions concerning tribal casinos in the North Bay area.[24] Opponents of the fall 2004 ballot initiative proposed by California tribes and proponents of the competing initiative favoring card rooms and race tracks sponsored a television ad focusing on a "California Indian Casino Monopoly" game board and stating that tribes "pay no taxes" to the state.[25]

The assertion that tribes get rich at the expense of nontribal communities without paying their fair share is echoed across the United States. In the midst of New York state's negotiations with the Oneida Nation of New York over the tribe's proposed off-reservation casino, the *National Review*'s Rich Lowry asserted that the Oneidas' Turning Stone Casino was part of an "Indian scam." "At least Foxwoods pays taxes," he wrote. "The cash-rich casino-operating Oneida Nation has basically taken over the surrounding area."[26] A *New York Times* op-ed called the compact between the state of New York and the Oneida Nation "unfair and lopsided" and suggested using gaming compacts as leverage to collect state taxes on reservation cigarette and gasoline sales. "The proceeds should be shared with communities like those around [the Oneidas'] Turning Stone, which need their fair share."[27]

Gaming tribes express frustration over what they see as the dismissal of existing revenue-sharing agreements, as well as the larger economic benefits of Indian gaming to nontribal economies. As Jacob Coin, executive director of the California Nations Indian Gaming Association, asserted in mid-2004, California tribes "are playing a key and significant role in turning around the state's economy and are proud of that record."[28] Tribal representatives also remind critics of Indian gaming's historical context. Said National Indian Gaming Association (NIGA) chair Ernest L. Stevens, Jr., "Despite the fact that these same critics stole hundreds of millions of acres of our land, and ignored our communities for over 200 years, I'm here to tell you that Indian tribes are doing their fair share, and a lot more."[29]

**Indian Gaming Is a Federal Welfare Program for Tribes**

Rather than as a manifestation of tribes' sovereign political rights, recognized by the U.S. Supreme Court and Congress, Indian gaming frequently is discussed as though it were a federal welfare program granted to tribes—"slot machine welfare," as one editorial dubbed it.[30] This characterization places tribes in a no-win situation: if gaming "works," especially if it works too well, as for the Pequots, tribes do not deserve their newfound wealth; conversely, if gaming "fails" to lift tribes like those on the Plains from poverty, the program is fatally flawed—or perhaps the tribes themselves are to blame. Either way, the tribes lose for winning, and lose for losing.

The idea of Indian gaming as a welfare program is linked to the popular misconception that tribal gaming began as a privilege granted by federal and state governments, stemming from what Brett Fromson labeled "historical guilt." According to Fromson, "citizens and political leaders felt empathy for the downtrodden and thought gambling was an easy fix."[31] Echoing this sentiment, a commentator asserted in the *New York Times* that "one can't help thinking that Foxwoods and its counterparts run by other tribes function like settlement taxes that guilt-ridden Americans have imposed on themselves. They are certainly less painful than any reparations would be."[32]

"Sure, we want to help Indians," said Stand Up for California!'s Cheryl Schmit, "but this isn't about that. It's about greed."[33] The view that Indian gaming is a kind of welfare not only allows critics to call for a cap on "benefits" but also raises other possible negatives not ordinarily linked to successful business enterprises. Guilt-induced federal largesse in the form of Indian gaming privileges breeds wealth, laziness, and irresponsibility, at

least according to former college instructor Richard Reeb, writing for a local California newspaper:

> Congress's mandate for Indian gaming in rural areas is . . . a payback for unfair treatment of Indians. . . . [I]nstead of encouraging members of Indian tribes to join the ever-growing American economy, Congress decided on the quick fix of gaming. . . . Indian gaming gives no incentive to work and save. Tribal members live in a virtual reservation in which those who make the cut are guaranteed an income without working.[34]

Tribes and their members express frustration with being criticized for their success. "Why is it," asked former BIA assistant secretary for Indian Affairs Ada Deer, "that whenever tribes show progress in their self-determination and economic development, it seems that the dominant society wants to sweep that away?"[35] Said Viejas tribal spokesperson Nikki Symington, "When it's Starbucks, it's good business. When it's Wal-Mart, it's free enterprise. Why is it that Indians, in their businesses, can't be any different?"[36]

On the other hand, Indian gaming is critiqued as not being successful enough. Criticism of Indian gaming that is founded on its supposed failure to help all Native Americans, particularly the poorest, like those on the Plains, has commanded attention from the popular media, the public, and policymakers. The *Boston Globe*'s 2000 series and *Time* magazine's 2002 cover story counted as one of tribal gaming's many scandals its variations in economic impact on reservations across the country. Faulting Indian gaming, the *Globe* described "the vast majority of America's Indians [who] remain mired in poverty, victimized by ill-conceived federal policies," while *Time* charged that the Indian Gaming Regulatory Act of 1988 (IGRA) "gives . . . nothing to hundreds of thousands of Native Americans living in poverty." After describing the destitute living conditions of a tribal member on the Oglala Sioux Tribe's reservation in Pine Ridge, South Dakota, *Time* asked, "So how, exactly is [she] prospering from the [multi-billion-dollar] Indian gaming industry? Like most Native Americans, not at all." Part of Indian gaming's "chaos, and . . . system tailor-made for abuse," according to the article, is its failure "to wean tribes from government handouts."[37]

In responding to this strain of criticism, tribal leaders are faced with the difficulty of educating their critics in federal Indian law and policy and the history of federal-tribal relations. As NIGA chair Stevens wrote, "Indian gaming is not a federal program. . . . The federal programs you refer to as handouts represent an attempt by the federal government to live up to

thousands of treaty obligations incurred when establishing the land base for this Nation. . . . Indian gaming is self-reliance."[38] An editorial in the *Native American Times* emphasized the connection between tribal sovereignty and reservation socioeconomic conditions:

> Indian people are still the poorest race of people in the country. They still have the highest instances of infant mortality. They still have the lowest life expectancy. They are still the victims of more acts of racist violence among any racial group. [But] *Time* would have Indian people put in a position to never be able to correct these numbers.[39]

The *Wall Street Journal,* reporting on the debate spurred by the 2000 *Boston Globe* series, stated that Indian gaming, "often viewed as an economic self-sufficiency program for exploited Native Americans, is now shadowed by controversy" that stems from both poles of the spectrum of success.[40] Writing in the *Washington Times,* Philip Burnham summed up the lose-for-winning, lose-for-losing dilemma facing gaming tribes:

> Nobody loves a rich Indian, much less a rich tribe. For more than a century, the public has asked Indians to become 'self-sufficient'—but with one caveat. Native people should be dependable and hard-working, the ethic goes, but not too entrepreneurial. A tribe that runs itself like an aggressive corporation is a threat, a dangerous competitor where one had previously imagined only an indigent neighbor on welfare."[41]

**Tribal Governments Cannot Be Trusted**

Tribal governments are portrayed as untrustworthy stewards of newfound gaming wealth and political clout. Somewhat incongruously, they are variously accused of being too naïve or inexperienced to realize their own best interests, easily corruptible, guilty of seeking to influence the political system to their own benefit, and out for "revenge."

At perhaps their most benign, expressed concerns revolve around tribes' naïvetè in dealing with outside interests, or inexperience in starting, owning, and operating successful businesses and handling the resultant influx of revenue. Perceived as lacking business savvy, tribes are also seen as too unsophisticated to deal with crafty outside investors or unscrupulous management companies all too eager to take advantage of them. Asserted the *Providence Journal,* tribes "fall into hands of investors far more interested in making quick bucks . . . than in plowing profits into local Indian projects

and development." The *Boston Globe* described the Mohegan Tribe in Connecticut as being "outmaneuvered" and "taken" by an outside management company, while the *Progressive* magazine characterized a tribe as "buffaloed" and "taken for a ride" by "casino cowboys."[42]

A more serious accusation is that tribal governments are corrupt or corruptible, as manifested in a lack of casino oversight, the misuse of gaming revenues, and tolerance of criminal behavior generated by casinos. Indian gaming is portrayed as unregulated or, alternatively, regulated by dishonest tribal government officials. *Time* magazine's 2002 exposè, for instance, acknowledged tribal regulation of Indian gaming, but added, "That's like Enron's auditors auditing themselves."[43] As the fox guarding the henhouse, tribal governments are perceived as likely to misappropriate funds and bury evidence of wrongdoing. Critics' claims often reach hyperbolic levels. *Time* continued, "The tribes' secrecy about financial affairs—and the complicity of government oversight agencies—has guaranteed that abuses in Indian country growing out of the surge of gaming riches go undetected, unreported and unprosecuted. Tribal leaders sometimes rule with an iron fist. Dissent is crushed. Cronyism flourishes."[44] The calculus of cash flow means that "tribes now coldly eject members, sometimes so that fewer members can split the dough," according to media commentator Jill Stewart. Recently recognized tribes are so corrupt, she wrote, that "each new 'reservation' introduces government in direct conflict with California notions of healthy civic life."[45] An editorial in the *Detroit News* described one tribal government as "more like Moscow 1936 than Michigan 2001."[46]

Among the social ills ascribed to tribal casinos is a rise in crime, whether inside the casino or in the community. Tribal governments are portrayed as unwilling or unable to control criminal behavior. Writing in the *L.A. Daily News* in 2004, television scriptwriter Joseph Honig asserted that "betting in casinos is unregulated by officially sanctioned watchdogs," while "widely publicized rules, laws, inspections, and strict police background checks for employees . . . are absent from reservation wagering."[47] While some see gambling-related crime as inevitable, others imply that tribes are inclined to tolerate drug-related or even violent crime. In 1999, Donald Trump financed a series of advertisements opposing a proposed Mohawk casino in upstate New York. The ads depicted cocaine and drug needles and asked, "Are these the new neighbors we want?" Testifying before Congress in 1993, Trump asserted, "That some Indian chief is going to tell Joey Killer to get off his reservation is unbelievable."[48]

Tribes emphasize that under IGRA's mandates their gaming operations are subject to extensive tribal, state, and federal regulations that do not tolerate lax enforcement, at the price of being audited or even shut down by the National Indian Gaming Commission (NIGC). Further, concerns raised about "self-regulation" in the context of commercial casinos are inappropriate and inapplicable, as tribal government-owned and -operated Indian gaming is more akin to state lotteries—and no one raises self-regulation as an issue in that context.[49] William R. Eadington, widely regarded as one of the nation's leading experts on gambling policy, has questioned whether tribal officials are any more or less likely than are corporate directors to engage in corrupt activities.[50] Tribes also stress that regulations promulgated by the NIGC concerning background checks as well as training of casino employees are exceedingly stringent. When it comes to the prevention of gambling-related and other types of crime in and around a casino, no matter how large or small, tribal regulation and security is pervasive and extensive, again pursuant to the mandates of federal law. As an MGM Mirage vice president observed, "From a security and surveillance standpoint, [tribal casinos] are as sophisticated as we are."[51]

Tribes are perceived as having won or purchased recent political clout in ways that fundamentally differ from other participants in the American political system. Gaming tribes are accused of collectively being a "rich, powerful special interest" that is corrupting state politics and turning state capitals into "casino central."[52] At the same time, tribal sovereignty is seen as giving tribes an unfair advantage in the political process. Wealthy tribes like the Pequots are described as Goliath to state and local government Davids.[53]

Unlike other groups, successful gaming tribes, accused of manipulating the political system, find themselves on the horns of a dilemma. On the one hand, the motivations and actions of financially successful gaming tribes, like the Pequots or some California tribes, may be questioned if—when negotiating compacts or revenue-sharing agreements, qualifying ballot initiatives, lobbying, or contributing to political campaigns—they appear to act in their own self-interest and not for the "greater good" of other tribes. These tribes are subject to the expectation that all tribes, or even all Native Americans, share monolithic political and economic interests. Tribes respond by asking why they, as nations with distinct legal, political, and cultural identities, should act any differently than would state governments. "Is New York required to subsidize Arkansas or Alabama?" asked NIGA chair Stevens.[54] Indian gaming consultant Michael Lombardi believes recognizing

the use of political power as an exercise of tribal sovereignty requires treating individual tribes like the sovereign governments they are. "The fact is, tribes are just like governments: We will protect and defend our own."[55]

Alternatively, if gaming tribes do appear to pursue collective tribal interests, they run the risk of being accused of using shared racial identity or their constitutionally protected sovereign status to manipulate the political system to unfair economic advantage. "If tribes are sovereign nations," asked the *National Review*'s Rich Lowry, "why are they allowed to interfere in U.S. elections by contributing huge amounts of money?"[56] Tribes respond that tribal sovereignty is not "unfair," it simply is a fact—and regardless, they are playing within the rules of a political game not of their own making.

The combination of these and other accusations appears to present yet another no-win situation in the American political system for the governments of gaming tribes. Hence the hyperbolic claims in *Time:*

> Indian gaming interests have come up with a one-two punch that is helping them get their way with politicians. Indian constituents, acknowledged as long-suffering victims of ill-conceived government policies, often succeed at requesting political favors. Meanwhile, they or their wealthy backers are dumping money—staggering amounts of it—into political campaigns, lobbying, and state ballot initiatives. This combination has helped create the out-of-control world of Indian gaming, a world where the leaders of newly wealthy tribes have so much political power that they can flout the rights of neighboring communities, poorer tribes and even some of their own members.[57]

Yet the most strident accusation that tribal governments cannot be trusted is that they are motivated by payback for historical wrongs. Although somewhat facetiously depicted in television's *South Park,* tribal governments in pursuit of "red man's revenge" hardly is limited to cartoons mocking American vulgarity.[58] The same theme appears in a book review in the *New York Times:* "Dozens of tribes across the country . . . all seem to be exacting their revenge on the white man by lavishly supplying his vices. Once it was only cigarettes and firecrackers; now, it is the addictive thrill of craps and slots."[59]

### Tribal Sovereignty Is Simply an Unfair Advantage

In an article on growing opposition to Indian gaming, the *New York Times* reported that tribal sovereignty is a "major element" contributing to

public objections to tribal casinos. Sovereignty, in the minds of many Americans, simply means unearned money for tribal members.[60] "People have learned that that phrase 'sovereign rights' translates to 'special interests,'" said Brett Fromson. "Sovereignty promotes unfair competition in the business community," asserted Stand Up for California!'s Cheryl Schmit.[61] Under the heading, "Nightmare Neighbors," an article in *Time* charged that "Indian casinos are overloading other communities across the country. One exacerbating factor: because of tribal sovereignty, if a casino overwhelms local emergency services, draws down the local water supply or pollutes the environment, local authorities have no recourse." Said a California resident of the tribes, "They use sovereignty as a shield."[62] One freelance journalist, writing for the American Enterprise Institute, characterized sovereignty as allowing tribes "to operate outside American law." Tribal sovereignty, according to vociferous critics, "is a profoundly flawed body of federal law—some say an outright scam—that creates bogus tribes, legalizes race-based monopolies, creates a special class of super-citizens immune to the laws that govern others, and Balkanizes America."[63]

Others respond that tribal sovereignty has a legal and political status that must be respected, both as a practical matter and one of principle. As Rick Hill reminded critics,

> Our first principle is that Indian Nations and Tribes are sovereign political communities that were here before Columbus. . . . To understand Indian Nations and Tribes, you must be clear that while the Constitution, Treaties, and Laws of the United States acknowledge Indian sovereignty, our traditional right to self-government comes to us from the Creator and reflects the will of our Native peoples who established our societies in Pre-Columbian times. . . . Indian gaming is an exercise of sovereign governmental authority by Indian tribes.[64]

Some critics have asserted that Indian gaming is a "race-based" monopoly and that tribes are able to use their sovereignty to exclude commercial competitors from the marketplace. In 2001, Arizona race tracks sued Governor Jane Hull to prevent her from negotiating any further tribal gaming compacts. Said Neil Wake, an attorney for three of the tracks, "There are no commercial slots in the state except on Indian land. No privilege, no business opportunity, can be based on race."[65] Similar assertions are made in other states. "Whatever happened to one nation under God indivisible?" asked a town selectman from Connecticut. "I have a real problem with this

country being set up where there are different rights for different groups—different privileges, different immunities."[66] Asked one unidentified "analyst," quoted in the American Enterprise Institute article, "Should we give Hispanics the liquor industry? Should blacks get cigarettes? What about the Asian boat people?"[67]

Tribes respond that their right to operate tribal casinos flows from tribal sovereignty, which reflects their status as preconstitutional political entities rather than as racial groups. "Race," at least as it is interpreted in terms of federal equal protection law, therefore has no bearing on tribes' right to operate casinos. Moreover, Indian gaming as permitted under federal law is a reflection of state public policy: if a state wishes to abrogate tribes' exclusive right to operate electronic slot machines, for example, it merely has to revise state law.[68]

An article in the *Boston Globe* series implied that tribal sovereignty facilitates what amounts to corporate misconduct, stating that "tribes have been using sovereignty to claim the right to act as the primary overseers of their own casinos, and to hide financial information about gambling operations that is routinely disclosed by commercial gambling houses." The article also linked tribal sovereignty to crime, asserting without substantiation that "inadequate oversight of Indian casinos and increasingly vociferous sovereignty claims could open the door to a new wave of criminal activity."[69] Rich Lowry lambasted tribes, calling for the outright nullification of tribal sovereignty:

> It's time to ditch the fiction of tribal sovereignty, and recognize the tribes for what they are: good, old-fashioned, all-American sleaze merchants and scam artists. . . . The ultimate answer to the Indian scam is to end the fiction of tribal sovereignty. . . . Sovereignty has not only allowed tribes to make an end-run around laws against gambling, but has perpetuated arbitrary third world–style government on reservations that makes it impossible for businesses to operate there. End tribal sovereignty and perhaps Indians can begin to find ways to make money less sketchy than slot machines, and our image of Indians can again become something more noble.[70]

In 2004, *Indian Country Today* reported on the increasing number of organizations opposed to tribal sovereignty, fueled by "resentment of Indian success, and particularly of the wealth generated by a few tribal casinos." Some groups, like the New York–based Upstate Citizens for Equality, have

used public demonstrations to protest tribal sovereignty, including picketing gas stations and convenience stores owned by the Oneida Nation. "We've been labeled a hate group and racist right from the start," said one of the organization's leaders. "Nothing could be further from the truth. We've been right on every issue right from the beginning, but nobody wanted to listen."[71]

As these five prevalent anti-Indian gaming themes clearly demonstrate, tribes face substantial obstacles rooted at best in misinformation and ignorance and at worst in prejudice and ethnocentrism in their efforts to realize the promise of tribal sovereignty. Tribes and Native people alternately are put in an educational or a defensive posture in which they are required to explain the history and meaning of tribal sovereignty, how it differs from state sovereignty, and what its practical ramifications are in the context of Indian gaming. At times, the claims made by tribal gaming's opponents may be ill-informed, strident, and one-sided and, although certainly subject to rebuttal, set the tone of the public conversation about Indian gaming. They also may set the agenda for public policy.

### The "Indian Problem": How We Act on Indian Gaming

The *Providence Journal* repeatedly has blasted the federal tribal recognition process while encouraging Congress to amend IGRA, the "irresponsible" law that "unleashed a casino explosion on America."[72] The *Journal* hardly is alone in calling for action, not just talk. Spurred by the *Boston Globe* and *Time* magazine series as well as Benedict's and Eisler's books and other media accounts of Indian gaming, a few members of Congress have become outspoken critics of tribal casinos, echoing the language of the exposès as well as the prevalent anti-Indian gaming themes we identify above. Here, we revisit in greater detail several recent congressional initiatives referenced in our discussion of the politics of Indian gaming in Chapter 3.[73]

Media accounts asserting a laundry list of Indian gaming's flaws and abuses have triggered congressional calls for extensive reform. At a press conference following the *Boston Globe* series, Representative Frank Wolf (R-Va.), a frequent critic of legalized gambling, said that "the unforeseen inequities of the Indian Gaming Regulatory Act [have] resulted in . . . massive revenue windfalls for the gambling industry and a few well-connected individuals, and worst of all, continuing poverty for most Native Americans." In late 2000, Wolf and Representative Christopher Shays (R-Conn.) called for a congressional investigation of the entire Indian gaming industry. "The whole thing looks completely and totally out of control," said

Wolf. "It's gone beyond the point of helping Indians, to the point where the process is very corrupt and the way casino facilities are run is very corrupt," said Shays. Shays criticized tribes for using sovereignty to withhold tribal financial information, particularly the amount of money spent on "lawyers and law firms that are politically connected," while Wolf accused tribes of using political contributions to fend off investigations into tribal casinos. Wolf was careful to acknowledge the long and troubled history of federal-tribal relations, calling on the federal government to "do more on a legitimate basis to help Indians."[74] Said Wolf, "The vast majority of Native Americans have not been well-served by the gambling industry. Our current system is unfair to both Native and non-Native Americans."[75]

Joined by Shays and Representative Robert Riley (R-Ala.), Wolf introduced a bill in June 2001 to address IGRA's failure "to broadly improve the living conditions of most Native Americans." Wolf elaborated,

> The intent behind IGRA was that it would allow Native Americans to lift themselves out of poverty through self reliance, but the law has not worked as it was intended. . . . If we continue to rely on gambling for the future welfare of Native Americans then most will continue to live in serious poverty[, while] . . . the victims of the gambling industry will continue to mount. . . . Gambling has ruined countless lives and increasing its prevalence will only increase the number of victims. . . . The level of crime, suicide and bankruptcy in a community invariably rises when a casino opens its doors.[76]

The legislation proposed by Wolf, optimistically titled the Tribal and Local Communities Relationship Improvement Act, was intended to strengthen state and local control over Indian gaming while a commission studied U.S. policy on tribal welfare.[77]

Similarly echoing the Indian-gaming-as-welfare-program theme, Representative Rob Simmons (R-Conn.) called for a program to redistribute tribal gaming revenues among all tribes. "If gambling is going to be the engine for economic benefits, how can you be sure it's going to benefit everyone in Indian country?" he asked. Responded NIGA director Mark Van Norman, "Indian gaming is a tribal government initiative, not a federal government initiative. . . . [W]e don't see it [as] respectful of Indian sovereignty for the federal government to impose wealth distribution."[78] Some members of Congress saw tribal gaming as a substitute for the federal "dole." In 2000, Senator Slade Gorton (R-Wash.) argued that once

tribes become economically self-sufficient, they should forfeit federal aid. Senator Ben Nighthorse Campbell (R-Colo.) responded that federal aid to tribes is an entitlement based on past land and resource concessions to the United States, rather than a needs-based welfare system. "[Tribes] lost a hell of a lot more than they're getting, I'll tell you that," said Campbell. Tribal leaders criticized Gorton's views as shortsighted and as an attempt to punish successful tribes. "You could hardly call us wealthy," said a Cow Creek Band attorney. "But before the advent of gaming, you certainly could call us destitute. Now, we're just in a position where we feel like maybe we've got a chance."[79]

The theme of "casino Indians" abusing the federal tribal recognition process also has permeated recent federal legislative efforts. Several members of Congress, including Wolf, Shays, and Simmons, as well as Senator Chris Dodd (D-Conn.), have called for reform of the BIA acknowledgment process. "This is out of hand. This is all about casinos now," said Dodd.[80] Recent controversy over BIA approval of the Schaghticokes' recognition petition in view of the tribe's announced desire to open a Connecticut casino has fueled criticism of the recognition process. In 2004, Simmons introduced legislation to codify the BIA acknowledgment criteria and called for an investigation on the Schaghticoke decision and a moratorium on BIA tribal recognition. "Federal recognition policies," said Simmons, "are turning the 'Constitution State' into the 'Casino State.' "[81]

Recent debate over off-reservation casinos has also attracted Congress's attention. In 2003, Representative Sherwood Boehlert (R-N.Y.) called for increased local input on proposed Class II tribal gaming establishments on newly acquired lands.[82] Representative Jim McCrery (R-La.) called for a flat prohibition on off-reservation casinos. "They can take land into trust, build a gaming establishment and pay zero taxes" under current law, said McCrery. "I think that is wrongheaded public policy."[83]

The recent congressional effort to amend IGRA to establish the parameters of revenue-sharing agreements—a sort of federally defined "fair share" that might in practice cap the amount of tribal gaming revenues states could obtain—met with opposition from a number of state and federal policymakers. Perhaps most notably, California's Arnold Schwarzenegger characterized the proposal as an unfair limitation on the ability of states to negotiate the terms of tribal-state compacts. On the eve of his $1 billion revenue-sharing agreement with five successful gaming tribes in June 2004, Schwarzenegger asserted that the proposed federal legislation "shifts the

balance unfairly in favor of the Indian tribes and undermines the ability of the state to adequately protect its own citizens from the adverse consequences of tribal gaming." Connecticut attorney general Richard Blumenthal similarly asserted that it would be "supremely unwise" to interfere with states' rights to negotiate with tribes.[84]

Perhaps the most serious political threat to tribes stemming from Congress's consideration of Indian gaming is the potential assertion of unfettered plenary power over tribes under the federal legal doctrine of tribal sovereignty. Commenting on several issues related to tribal gaming, Representative Ernest Istook (R-Okla.) emphasized his interpretation of the extent of federal power over tribes. "Tribal sovereignty is subject to the jurisdiction of Congress," he said. "[Congress] could change it, or even undo it altogether."[85]

## INDIGENOUS PERSPECTIVES ON TRIBAL SOVEREIGNTY AND INDIAN GAMING

We believe that viewing Indian gaming through the lens of indigenous conceptions of tribal sovereignty as inherent self-determination—that is, the freedom of tribes to choose their own futures—allows one to clearly understand Indian gaming and is necessary to informed and effective policymaking. This starts with a reassessment of tribal gaming's success with a focus on self-determination rather than profits. How we talk about and how we act on Indian gaming too often reflects an ignorance—purposeful or otherwise—of the law and politics of Indian gaming and, more fundamentally, of tribal sovereignty. Many people are unaware of even the limited federal doctrine of tribal sovereignty. But even more striking is the seeming discounting and rejection of tribal perspectives on Indian gaming and tribal sovereignty.

### The Spectrum of Success Revisited

The case studies of the Pequots and Plains Tribes illustrate the broad and varying spectrum of success of Indian gaming. They also reflect both how we talk about and how we act on Indian gaming. As we have seen throughout this account, for tribes that earn significant casino revenues, the policy implications include a redefinition of their relationship to nontribal governments. Perceptions of the Pequots have set the tone for how state officials as well as members of Congress have debated the implications of financially

successful tribes and threaten to set the terms for congressional action to amend IGRA. As one commentator noted, "One thing that's undeniable is that the Pequot have become emblematic of what is perceived as an Indian 'problem'—by competitors, neighbors, the media, and the public alike."[86]

Both words and actions seem to indicate that there is a point at which a tribe is "too" successful—meaning, in large part, too wealthy. This is perceived not as the embodiment of the American Dream, or even as an incredible achievement against the odds of reservation life, but instead as an abuse of the law and politics that "allow" Indian gaming. Wealthy tribes like the Pequots are cast as a political problem, requiring a policy solution—according to critics, a way to "equalize" the earnings of the relatively few wealthy tribes across the United States, among other tribes, states, local governments, or commercial businesses. This might be done in a number of ways: through revenue-sharing agreements with states or among tribes, expanded legalized nontribal gaming, means testing for federal aid to tribes, reform of the federal tribal recognition process, overhauling of IGRA, or various other limits on tribal sovereignty. "Will the United States government ever allow Indian tribes to be both 'rich' and 'Indian' at the same time?" wondered legal scholar Alex Tallchief Skibine. "Money does funny things," he noted, and the existence of a "rich tribe" strongly influences law and politics concerning tribal interests.[87]

On the other side is the perception that Indian gaming has "failed" to lift all tribes to prosperity—or at least to an acceptable level of wealth. Against the background of "long-standing deficits of income, infrastructure, employment, education, and social health that plague Indian Country,"[88] the inroads of gaming in addressing reservation poverty seem hardly worth the trouble to critics. As the *Boston Globe* and *Time* series indicated, typical Plains Tribes, like those in North Dakota, with large memberships and little access to metropolitan markets, are unlikely to experience dramatic economic and social rejuvenation based solely on casino revenues.[89] Hundreds or even thousands of new casino jobs can significantly lessen tribal unemployment, but plainly cannot cure it.[90] For example, the Turtle Mountain Band's casino in rural North Dakota created 360 jobs on the reservation, but with some 28,000 members, most of whom live on or near the reservation, the tribe must continue to combat extensive poverty and unemployment.[91]

While improvements in the quality of reservation life experienced by tribes like those in North Dakota may seem small to critics, the tribes' perception is that gaming has benefited tribal governments and members

markedly. When asked if the success of tribal casinos in North Dakota was accurately characterized as "modest," J. Kurt Luger, the executive director of the North Dakota Indian Gaming Association, emphasized the necessity of considering the tribes' circumstances prior to opening their casinos. "When you have nothing, and then you have something," he said, calling profits "modest" does not convey the importance of gaming revenue to tribes.[92] As former NIGA chair Rick Hill explained:

> If we are still facing poverty, unemployment, diabetes and heart disease, suicide and untimely death, you should understand that the United States forced Indian Tribes onto small, arid, unproductive reservations while at the same time stealing our more productive lands. Today, we are using Indian gaming to overcome many of the conditions that the United States has created. . . . Today, Indian gaming helps many of our Nations and Tribes to empower our people.[93]

Indeed, a more careful look at tribes across the United States suggests that the 1990s marked a possible reversal for many tribes in reservation unemployment and poverty, fueled in large part by gaming revenue. Yet less than two decades of casino-style gaming should not be expected to eradicate the extraordinarily high levels of tribal unemployment and poverty that are history's legacies.[94]

Recently, tribes like those in North Dakota have worked to publicize policy issues that are important to them, such as tribal sovereignty, government infrastructure, employment, and health care. Yet these issues, so central to many tribes throughout the United States, get lost in the public debate over a few tribes like the Pequots, controversy that threatens to define policy applicable to all tribes. Kurt Luger, speaking with characteristic bluntness, put it this way:

> We are not damn gaming tribes, we are treaty tribes. . . . We are getting our ass kicked because of [wealthy, newly organized tribes]. [The Plains] region needs to be highlighted, because our treaties are going to be attacked and [critics] are going to say, "Hell, these aren't a bunch of Indians, these are a bunch of gaming tribes."[95]

Indian gaming's detractors, particularly policymakers, contend that they are concerned about the welfare of all Native Americans and merely seek to avoid injustice. Yet the proposed legislative and administrative responses to the perceived problems associated with tribes like the Pequots are likely to

undo the tenuous gains achieved by many gaming tribes at the other pole of the spectrum of success. The *Boston Globe* and *Time* identified several Plains Tribes as the embodiment of what the articles decried as the failed experiment of Indian gaming. The tribes themselves, however, describe their gaming enterprises as successes.

By failing to adequately take into account the varying circumstances, experiences, and goals of tribes, critics are able to conclude that tribes are either too poor or too rich and thus that Indian gaming works for no tribe. Tribes that have become wealthy through gaming no longer deserve the "privilege" of casinos, while tribes that remain impoverished indicate the failure of the Indian gaming "welfare system." Yet, as the Pequot and the Plains case studies demonstrate, such simplistic assessments of tribal gaming define success too narrowly along the spectrum of success, while overlooking the interests and experiences of many, if not most, gaming tribes across the United States. By viewing Indian gaming through the lens of indigenous conceptions of tribal sovereignty, the spectrum of success expands beyond the standard economic bottom lines to include indicators of success based on tribal self-determination: tribal self-sufficiency, strengthened tribal governments, and healthy reservation communities.

### Tribal Sovereignty as a Measure of Success

The federal legal doctrine of tribal sovereignty—the status of tribes as preconstitutional and extraconstitutional nations, as defined and circumscribed by the tenets of federal Indian law and policy—has considerable explanatory force in describing the past and present of Indian gaming. Yet we believe the future of Indian gaming lies in indigenous perspectives on tribal sovereignty that encompass cultural and spiritual sensibilities linked to a communal awareness of nationhood, in short, tribes' inherent right of self-determination. Having fully developed our account of the law and politics of Indian gaming, we return to Native conceptions of tribal sovereignty to show how tribal sovereignty is a measure of tribal gaming's success.

What political scientist and legal scholar David Wilkins labeled the political/legal and cultural/spiritual dimensions of tribal sovereignty are imperfectly realized against the background of federal Indian law and policy.[96] Beyond tribal authority recognized by the federal legal doctrine, tribal sovereignty has cultural and spiritual dimensions of self-determination that are crucial to tribes' internally generated conceptions of sovereignty. Contrary to the limited and limiting tenets of self-governance prescribed by the

federal government, tribal self-determination encompasses tribes' ability to define their own histories and identities and to establish their own norms and values.[97] For individual tribal members as well as tribal governments, a common sense of nationhood takes on a collective cultural and spiritual meaning that transcends time as well as the bounds of legal and political authority. A far-sighted historical perspective throws sovereignty's political/legal and cultural/spiritual dimensions into high relief, illustrating how tribes have aspired throughout time to realize the full potential of tribal sovereignty as a means of tribal self-determination. We believe that Indian gaming, viewed against this background and as a product of legal and political compromises embodied in the frameworks of federal Indian law and policy, provides an opportunity to change the calculus of the possible as well as the probable. By incorporating indigenous perspectives on tribal sovereignty into the measuring of the success of Indian gaming, policymakers have the chance to fulfill tribal sovereignty's potential without compromising tribal interests or the common interests of tribes, states, and the federal government.

Generally speaking, gaming can benefit tribes in two primary ways. First, casinos can provide economic benefits by creating jobs, personal income, and government revenue. Using tribal gaming as a means to leverage economic development on reservations as well as off, tribes have fostered near-term entrepreneurial spirit and encouraged far-sighted business acumen. Gaming has become a vehicle for long-term economic empowerment for tribal governments as well as individual tribal members—a sort of "anti-poverty" strategy embraced by many tribes that really works. While gaming-based economic development has not proved a silver bullet for reservation poverty, the economic effects of tribal gaming "are making dents in the long-standing problems of poverty and associated social ills in Indian Country."[98] One factor emphasized by Plains Tribes like those in North Dakota is job creation. Employment opportunities generated by tribal casinos are an important source of reservation jobs for many tribes. Increased employment, of course, can lead to positive changes in a community's general social health.[99]

Compared to the history of indigenous people in North America and the particular history of federal Indian policy, the story of the Indian gaming industry is a recent one. In less than two decades, gaming tribes have experienced enormous changes in reservation economies. However Congress may have envisioned the goal of promoting tribal economic self-sufficiency

through Indian gaming in 1988, it has become an effective economic development strategy for many tribal governments. In this light, the entire spectrum of Indian gaming reflects the ways in which tribes have chosen and are able to use gaming as an economic development strategy, as refracted through a variable marketplace whose legal and regulatory parameters are established by tribal, state, and federal governments. Indian gaming thus is similar to commercial gaming, as well as to any number of other industries. A critical difference, however, is the foundation of tribal sovereignty.

If one sees gaming as a means of economic and community development selected by tribal governments as an aspect of self-determination, one can better understand the rationales behind tribes' sovereign decisions to pursue gaming, as well as the needs of individual tribal communities that would influence a tribal government's decision, and enact public policy accordingly. This mode of thought and action in law- and policymaking emphasizes the long-term goal of tribal economic development through gaming and diversification opportunities, which is to build thriving reservation communities.

The second overarching benefit gaming can provide tribes is institutional. Economic, political, and cultural capacity building is a hallmark of the newfound legacies of tribal gaming. Because gaming revenue enables implementation of tribal government decisions and programs, as well as tribal independence from federal and state programs and bureaucracies, casinos can benefit tribes by strengthening tribal government and preserving or enhancing tribal sovereignty.[100] Strong tribal governments are the vehicle for tribal self-determination in all of its dimensions.

Some of these benefits may be difficult to quantify, such as improvements to the quality of life on reservations. Net gaming revenues, however, are quantifiable, and there is a clear relationship between the fiscal health of a tribal government and its ability to deliver public services. Observed NIGA chair Ernest L. Stevens, Jr.:

> Before Indian gaming, our sick and elderly had no place to go for a doctor. Today, we're building health clinics and providing quality health care and medicine for our people. Before Indian gaming, our communities faced the highest dropout and suicide rates. Today, we're building schools, granting scholarships and providing hope for an entire generation of Indian youth. In addition, Indian gaming is providing tribal

> leaders with resources to rebuild the basic infrastructure that so many other communities take for granted. Indian gaming enables tribal governments to build roads, construct sewage and water treatment plants, implement basic communications systems and much more.[101]

As a manifestation of strengthened tribal governments, tribes have created an expanding political network through regional and national gaming associations to share information and experiences. They have built the means to participate more fully in the American political system, employing sophisticated lobbying, advertising, and other interest-group-style techniques to exercise legitimate political influence with nontribal voters and policymakers. Tribal governments have become increasingly effective political transmission belts, translating the preferences of tribal members into tribal public policy, and have used their increasing institutional capacity to engage in government-to-government relations with state and local governments.

With greater institutional capacity, tribes also have used Indian gaming to bolster and even recover aspects of traditional culture and spirituality. Gaming revenues have underwritten tribal governments' capacity to build museums that celebrate the past, and also to teach children about traditions, languages, values, and religious ceremonies that will carry forward into the future. Fostering interest in and connection with tribal culture encourages individual as well as collective definitions of history and identity, a fundamental feature of the cultural and spiritual dimensions of tribal sovereignty. These benefits ultimately undergird individual as well as collective tribal self-determination and thus are priceless.

Overall, Indian gaming has provided the means to fulfill the various dimensions of tribal self-determination via effective self-governance, economic self-sufficiency, and cultural and spiritual vitality. The institutionalization of self-determination for tribes throughout the United States also represents a reversal of the negative effects of historically flawed federal Indian policy. Gaming revenue reinforces tribal sovereignty, according to one New York Oneida Nation leader, "giv[ing] us the tools we need to bridge the gap between merely surviving and thriving."[102] As to be expected in any burgeoning industry, however, there have been growing pains: allegations of tribal corruption, one-sided deals with management companies and outside investors, contentious disputes with state and local governments.

These problems are exacerbated by the fact that legalized gambling is far from uncontroversial, as well as by recurring legal and political uncertainties and the uneasy and uneven compromises that have shaped the Indian gaming industry.

But in view of how we talk about and act on Indian gaming, is gaming an effective means of tribal self-determination in its legal, political, cultural, and spiritual dimensions? Or are the law and politics of Indian gaming so compromised as to preclude meaningful tribal self-determination? Is Indian gaming the common ground for fostering tribal self-determination and establishing fair government-to-government relations among tribes, states, and the federal government?

Our account of the genesis and growth of the Indian gaming industry and the law and politics shaping it brings us to a fundamental conclusion: from the Pequots to the Plains to the Pacific Coast, indigenous conceptions of tribal sovereignty should drive both public discourse and public law and policy concerning Indian gaming. Tribal gaming presents a significant opportunity to give practical meaning to tribal self-determination and to reshape how tribal sovereignty is recognized and respected by states and the federal government. In the context of Indian gaming, federal, state, and tribal political actors can achieve shared goals and interests—potentially a win-win outcome for all involved. Recognition of these common interests and goals reveals how tribal self-determination is the essential means to their achievement and provides a key incentive for nontribal governments to engage in government-to-government relations with tribes on a fair and level playing field.

# Conclusion: Compromise among Sovereigns

> The courts have long held that Indians have the right under the Constitution to govern ourselves. But having that right without adequate economic resources is a hollow dream.
>
> —*Anthony R. Pico, chair of the Viejas Band of Kumeyaay Indians*[1]

> When the legitimate exercise of their rights brings sovereign states into conflict with one another, the universally accepted practice is for them to negotiate an agreement that serves the interests of all parties.
>
> —*Former U.S. representative Tony Coelho (D-Calif.)*[2]

> Without talk and conversation, there is no hope for the future of tribal-state relations.
>
> —*Federal Indian law scholar Frank R. Pommersheim*[3]

Indian gaming is more controversial and politically charged than ever, and the legal framework of the Indian Gaming Regulatory Act (IGRA) may not be able to withstand the mounting hydraulic pressure of politics. We believe the time is right for an intelligently conceived and clearly realized shift in Indian gaming policy. In Chapters 1, 2, and 3, we described in detail the three frameworks that have shaped tribal gaming today: federal Indian law and policy, the law of Indian gaming, and the developing politics of Indian gaming. Building on the fourth foundational framework introduced in Chapter 1 and detailed in Chapter 6, tribal sovereignty as tribes'

inherent right of self-determination, we suggest that to pursue a fair and just future for tribal gaming, Congress should act to ensure true government-to-government relations among tribes, states, and the federal government.[4] Tribes possess the political savvy to protect their interests, but, despite commonly portrayed images to the contrary, many still lack the political clout to do so. Tribes are entitled to a level playing field on which to negotiate Indian gaming policy, and indigenous perspectives on tribal sovereignty provide the necessary context for understanding what a level playing field looks like and how best to achieve it. Tribal self-determination also helps to reveal common goals and interests shared by tribes and states as well as appropriate means to pursue them. With Native conceptions of tribal sovereignty as the foundation for Indian gaming law and policy, tribes can use Indian gaming as a strategy not only for economic development but ultimately to fulfill tribal sovereignty in its legal, political, cultural, and spiritual dimensions. The best way for tribes to continue to build healthy, independent, and strong tribal communities is to foster meaningful tribal self-determination.

## MOUNTING POLITICAL PRESSURE

As Congress intended, IGRA has provided a relatively effective legal framework for the development of Indian gaming as an industry and a tool for tribal economic development. Nonetheless, as recent events in a number of states illustrate, including California, Connecticut, Minnesota, New York, and Wisconsin, there is mounting political pressure on tribes to concede to state interests and on Congress to amend IGRA accordingly. States and localities have not wanted to remain on the sidelines, and demand for dramatic reform is trickling up from the local level to the state level to federal representatives, as policymaking efforts in Connecticut clearly show. Over the last two decades, cuts in federal aid to tribes alongside the resurgence of states' rights have circumscribed tribal political influence. Indian gaming revenue has opened doors to tribal political clout at the state level mainly through campaign spending and lobbying, but tribes remain constrained by federal Indian law's definition of tribal sovereignty as well as by state power and public skepticism. As political scientist David Wilkins put it,

> Even as tribes are exercising political muscle by forming new organizational alliances with other tribes to protect and enhance their economic

> base and political status and are being more active in participating in local, state, and federal elections, they are confronted by internal and external constraints—from federal and state court rulings, [a] conservative Congress, a fickle public, and emboldened state governments—which threaten to derail tribal efforts to become relatively self-sufficient sovereigns, alongside the states and federal government.[5]

IGRA has been a bulwark for public policy that has contained political spillover up until now, but two "worst-case scenarios" for the future of Indian gaming demonstrate the potential hazards of the current highly contentious political atmosphere.

One possibility is that, by leaving IGRA unchanged, Congress will allow political pressures from state and local governments as well as anti–Indian gaming sentiment to continue to increase, squeezing gaming tribes from all sides. In this scenario, it appears likely that states and localities will continue to tolerate Indian gaming, but will demand a price from gaming tribes, particularly in the form of revenue sharing.[6] The typical revenue-sharing agreement gives both tribes and states a vested interest in maximizing gaming profits—tribes, to maintain tribal exclusivity over gaming or other favorable compact terms, and states, to obtain greater revenue transfers to states and localities. A focus on maximizing casino profits could have the effect of slowing tribal economic development, since a significant portion of tribal casino revenue will go to the state rather than the tribe and tribes out of necessity may focus on gaming alone rather than on diversifying their economies. As the economic stakes of Indian gaming mount on both sides, states as well as tribes will become increasingly dependent upon gambling profits to prop up their economies. Along the way, a number of contentious political issues will continue to garner headlines and attention from nontribal interests: the incentive for wealthy outside backers of tribal recognition by the Bureau of Indian Affairs will increase, "rich" and newly recognized tribes will provide more fodder for tribal authenticity challenges, state public policy will be squarely in opposition to increasing concerns about the widespread expansion of legalized gambling, and many tribes will continue to see only modest profits from their casinos. Ultimately, in this scenario, the eventual decline or at least plateauing of tribal gaming predicted by some industry experts will come about sooner rather than later. Even if this worst-case scenario plays out only in a few states, it undoubtedly will have an impact on tribal gaming across the United States.

At worst, tribes will be forced to forfeit gaming, either because of declining profits or changes in gambling law and policy, without having had the opportunity to leverage gaming revenues into fully diversified reservation economies. This will slow or even halt progress toward strengthened tribal governments and their capacity to deliver public services and employment opportunities to tribal members, and may find the tribes losing ground gained in recent years.

Alternatively, the escalating political pressure on Congress to act decisively will result in hasty and ill-conceived amendments to IGRA. The current political tendency is to give states and localities more control over Indian gaming and to curb what is perceived as unfair tribal power. Proponents of tribal rights are unlikely to prevail in Congress against the widespread perception of tribes as the Goliath to local and state governments' David. If Congress gives in to state pressure, the potential outcome at best will speed the result of the first scenario as states exert even more control over Indian gaming, and at worst will significantly erode tribal self-determination and tribal capacity-building by allowing states to essentially treat tribes as subordinate political jurisdictions or state "localities." This latter possibility, of course, would be near fatal to tribal sovereignty and, by nearly all accounts informed by the assimilation and termination eras of past federal Indian policy, would result in devastation to many tribal communities.

It is this high-pressure political environment, with its potential "worst-case scenarios," that leads us to propose legislative and political reform, accompanied by a clear policy shift to recognize and respect tribes' inherent right of self-determination.

## COMPROMISE AMONG SOVEREIGNS: A PROPOSAL

### Tribal-State Intergovernmental Relations and Indian Gaming

Casino-style gaming on reservations necessitates, under IGRA, tribal-state interactions through the compacting requirement. Congress intended to encourage cooperative efforts between tribes and states to reach mutually agreeable compacts. Conceived in the late 1980s, IGRA's compact requirement was a manifestation of a larger trend in intergovernmental relations in the United States, known as the "new federalism" or "devolution," in which federal power is relinquished to state and local governments and

state authority is strengthened.[7] The tribal-state compacting process involved the states in what was historically an exclusively federal domain: regulation of tribal government actions.[8]

IGRA also expanded state rights at the expense of tribal rights. In effect, Congress gave states the right to have a tribal-state compact in place before a tribe could exercise its right to conduct casino-style gaming on its reservation. Tribal exercise of the sovereign right recognized in 1987 by the U.S. Supreme Court in *Cabazon* essentially became conditioned on state consent. Acknowledging the long history of conflict between tribes and states, Congress recognized that tribal rights were more vulnerable than state rights, since a tribe's right to conduct Class III gaming could be thwarted by a state's refusal to negotiate a compact while a tribe's refusal to negotiate did little to harm state interests. Congress therefore required states to negotiate gaming compacts in good faith, a duty that until the 1996 *Seminole Tribe* decision was enforceable through the federal courts.

The balance of political power between tribes and states in the context of gaming shifted dramatically after *Seminole Tribe*. Yet the requirement that a tribe must enter into a compact with the state before it may conduct casino-style gaming remains. To some, this situation has resulted in yet another chapter in the long history of bitterly hostile relations between tribes and states, in which states are tribes' "deadliest enemies."[9] As one commentator described it, post-*Seminole Tribe*, "The states have no incentive to bargain in good faith, and the unfortunate cycle of political disenfranchisement for Indian nations appears to have started anew."[10] Indeed, as political scientist Dale Mason observed, with Indian gaming, "the intergovernmental power struggles between the tribes and the states are now more intense than at any time since [the removal era of the nineteenth century]."[11]

For better or worse, it appears that in the area of casino gaming, tribes will have to continue to deal with states and states will have to continue to deal with tribes.[12] Legal scholar Alex Tallchief Skibine succinctly put it, "The federal government and the Indian nations can no longer politically pretend that the states are not there anymore than the states can pretend that the Indian nations are not there or will soon go away."[13]

Tribes and states may, however, reach cooperative and mutually beneficial policy solutions to political disputes. In recent years, tribes and states successfully have negotiated a growing number of cooperative agreements, akin to the treaty-like tribal-state compact model adopted in IGRA, to resolve jurisdictional or substantive conflicts in areas such as

natural resources, land use, law enforcement, zoning, and taxation. Compacts between tribes and states may carry a number of benefits. First, like treaties, compacts establish public policies and thus have impact value beyond their specific legal terms. Second, compacts allow states and tribes to reach political compromises, avoiding the "win-lose" posture of litigation. Third, the compacting process brings states and tribes to the table as sovereign governments. At their best, "negotiated compacts reduce intergovernmental tensions and encourage cooperation that transcends historical prejudices."[14]

At their worst, however, rather than embodying government-to-government negotiation, compacts simply codify the coerced subordination of tribal rights to state interests.[15] The danger for tribes in expanded tribal-state interactions is that tribal sovereignty will be subordinated to state sovereignty. Law professor Rebecca Tsosie pointedly asked whether tribal-state compacts under IGRA reflect what Native studies scholar Vine Deloria called the "consent principle" of the treaty-making era—a negotiated balance of power between sovereigns—or whether they are in fact coercive "agreements" that benefit states at tribes' expense.[16] In our words, are gaming compacts *compromises*, or are they *compromised*?

Throughout this book, our account of the law and politics of Indian gaming reveals the compromised nature of tribal sovereignty as it is defined by federal Indian law. Yet this is not an inevitable consequence of intergovernmental relations between states and tribes. As Mason explained,

> Although the political trend is to strengthen state governance and return governing authority to localities, those goals are not necessarily at odds with strengthening tribal governance and tribal-state intergovernmental relations. What remains to be seen is whether the historic tribal-state conflict can be alleviated and replaced by a new era of trust and cooperation. Tribes and states have much in common and share many of the same problems and resources. Cooperation is not a zero-sum game and does not mean that either tribes or states have to divest themselves of sovereignty.[17]

For many tribes and Indian law scholars and activists, mutually respectful government-to-government relations with both the federal government and the states are a laudable goal.[18] Federal Indian law scholar Frank Pommersheim has encouraged tribes to pursue enhanced and meaningful intergovernmental relations through policy dialogue and various substantive means

to specify, develop, and review a working framework for ongoing tribal-state interactions.[19] According to National Indian Gaming Association chair Ernest L. Stevens, Jr., "Our goal is to strengthen sovereignty, strengthen government-to-government relations and defend the rights we have."[20]

Rebecca Tsosie is less optimistic that gaming compacts under IGRA could resolve disputes between states and tribes in a mutually satisfactory way. Tsosie, noting the "ample precedent" of fairly and successfully negotiated tribal-state agreements in other policy areas, nevertheless asserted that in the context of gaming, states and tribes lack the necessary perceived mutual benefits that would ensure good-faith negotiations and fair dealing by the states. "A successful negotiation requires an agenda broad enough to allow the parties to discover common ground from which they can fashion an agreement. But what is the common ground within Indian gaming?"[21] Tsosie concluded that in the area of gaming, states and tribes share "little common ground" and thus fall into old patterns of adversity:

> At the root of the controversy over Indian gaming lies the historical conflict between states and tribes over tribal sovereignty and cultural survival. The states have historically failed to perceive any value in the continuation of tribal sovereignty and independence from state jurisdiction, while the tribes have been forced to recognize that expanded state jurisdiction often threatens to extinguish the separate cultural and political status that the tribes seek to preserve. Indian gaming encapsulates this long-standing political battle.[22]

As the various accounts throughout this book show, Tsosie undoubtedly is correct in viewing Indian gaming as potentially replicating old and damaging political battles between states and tribes. We believe, however, that Indian gaming also carries equal potential for transcending the adversarial, zero-sum struggles between states and tribes.

From the perspective of tribes, it is plain that state power over Indian gaming, both in the current compacting process's imbalance of bargaining power and the states' ability to wield political influence more generally, is greater than Congress intended under IGRA and threatens to undercut federal and tribal goals of strengthening tribal governments, building strong reservation economies, and fostering tribal self-determination. Additionally, especially after *Seminole Tribe,* some corrective mechanism is needed to create a balance of power between tribes and states. Even with a balance of power, however, Tsosie has argued that gaming negotiations between

tribes and states are undercut by the lack of common interests between the two parties. This, we assert, has changed dramatically in recent years. Trends in the politics of Indian gaming indicate that while there is no doubt that some issues are highly contentious, the rapid growth of the industry and tribal success stories from across the United States, coupled with struggling local economies and drastically underfunded state coffers, create shared interests that previously were unrecognized or did not exist.

Our proposal to capitalize on these shared interests by leveling the playing field and finding common ground in the law and politics of Indian gaming has two parts. First, the socioeconomic effects of Indian gaming have been insufficiently studied and understood. The particularities of Indian gaming must be examined objectively, rather than relying on assumptions or extrapolation from studies of legalized gambling generally. Second, policymakers at all levels must recognize and respect the role of tribal self-determination when fashioning and implementing Indian gaming law and policy. This is not merely a one-sided benefit to tribes. The lens of indigenous perspectives on tribal sovereignty, we posit, reveals goals and interests shared by states and tribes as well as means for achieving them. These common goals and interests include reducing reservation poverty and unemployment rates; creating jobs for Native and non-Native employees; stimulating local economies and leveraging economic development; increasing government revenue and funding delivery of public services; reducing disbursement of public entitlement benefits; minimizing social ills associated with gambling, including crime and addiction; preserving and strengthening tribal tradition, culture, and communities; and facilitating stated federal goals of tribal self-governance and self-determination. In the end, full acknowledgment of tribes' inherent right of self-determination will result in true government-to-government relations among tribes, states, and the federal government, as well as effective law and policy in the area of tribal gaming. In the spirit of not allowing the pursuit of perfection to preclude forward-thinking action, our goal here is to provide a practical roadmap for informed policymaking that negotiates the existing terrain of federal Indian law and policy as well as the aspirational ideal of indigenous perspectives on tribal sovereignty and tribal self-determination.

### Informed Discourse, Informed Law and Policy

Quality information is the foundation of sound public policymaking in a democratic system. It is obvious in light of our overview in Chapter 4 of

existing research on the social and economic impacts of Indian gaming that policymakers are neither fully cognizant of nor acting upon sufficient and complete information about legalized gambling generally and Indian gaming specifically. Instead of allowing politics to outpace deliberation, we suggest that Congress should authorize funds for a commission to study fully and accurately the socioeconomic effects of tribal gaming—what we will call the National Indian Gaming Impact Commission (NIGIC). Our call for a comprehensive study is not made in the seemingly traditional spirit of political wheel-spinning; rather, it is grounded in the imperative of data gathering and analysis as a precursor to informed policymaking.

The National Gambling Impact Study Commission's (NGISC) 1999 report, along with the individual studies commissioned by the NGISC, were important contributions to public understanding of the impacts of legalized gambling, but the NGISC failed to contextualize Indian gaming as an industry in some ways standing apart from legalized gambling. Some five years after the release of its report, a number of the NGISC policy recommendations remain sensible if underinformed.[23] Yet the shortcomings of the NGISC report and studies, especially when viewed in light of the continuing controversy over and pervasive misapprehensions about Indian gaming, evidence a need for better information than the NGISC provided. As the NGISC noted at the close of its report, "What is very clear is that there is still a dearth of impartial, objective research" to guide informed and effective public policymaking on legalized gambling.[24] This is particularly true, we believe, for Indian gaming. At least one reputable study, conducted under the auspices of the Harvard Project on American Indian Economic Development, suggested that what is true for commercial casinos may not extend to tribal casinos.[25] Both quantitative and qualitative evidence appears to call into question a number of common assumptions about Indian gaming, including its links to increased crime and its undesirability as an economic building block for tribal and surrounding communities. Perhaps most importantly, we believe that Indian gaming's effects on *tribes* generally are not systematically accounted for; moreover, full accounts of these effects must weigh Indian gaming's impacts on tribal self-determination. The new commission's study should strive to address these shortcomings.

As the spectrum of success reveals, the impacts of Indian gaming plainly are not uniform across all tribes or all regions of the country. The broader spectrum of Indian gaming accounts for tribes that do not operate casinos or other gaming enterprises for a number of reasons, while the spectrum of

success describes the range of economic success tribal casinos enjoy due to numerous factors, including location near a populous area. As our case studies of the Pequots and the Plains Tribes demonstrate, economic bottom lines miss much of the picture of Indian gaming's successes across the United States, particularly those associated with preserving or enhancing tribal self-determination. The new commission's study should take into account the wide variation of tribal experiences with gaming—the spectrum of success revisited through the lens of Native conceptions of tribal sovereignty—and seek to examine gaming's impacts in the context of differing tribal and regional circumstances.

At the same time, the results of the new commission's study must be contextualized against the background of generally accepted and legalized gambling throughout the United States so as not to artificially distinguish Indian gaming as somehow inherently "worse" than other forms of gaming, including commercial casinos, charitable gambling, and state lotteries. The NIGIC's study should include a comparative analysis of the impacts of these different types of gaming. Here, too, it is important for the new commission to ground its study and analysis in indigenous views on tribal sovereignty. For example, a comparison of the economic impacts of commercial and tribal casinos should take into account the fundamentally different goals of each, while a comparison of regulatory schemes should consider the similarities of state lotteries and tribal gaming in terms of government function. The NIGIC should be cognizant that opposition to tribal gaming may be different than objections to gambling generally, as some evidence suggests that popular attitudes toward casinos are more positive when Indian gaming is not an issue.[26]

The plainly apparent need for accurate and complete information on Indian gaming, coupled with the dangers of ill-informed and hasty policymaking in the face of mounting political pressure for reform, create an imperative that both states and tribes meaningfully participate in the new commission's study in two ways. First, through the enabling legislation for the NIGIC, Congress should mandate that the commission's work be grounded in understanding of and respect for indigenous perspectives on tribal sovereignty. Tribal self-determination is a necessary framework for understanding Indian gaming, and ignorance of or purposeful disrespect for tribal authority will undermine the study's accuracy and completeness, as well as its utility. The commissioners themselves must share an understanding of federal Indian policy as well as the legal and political status of

tribes in the American system. Similarly, the commissioners must share an understanding of and respect for state sovereignty and state governments' obligations to their citizens, as well as informed optimism for tribal-state relations. To inform the new commission's purpose and selection of commissioners, Congress should seek and implement the input and recommendations of leaders from tribes across the United States and across the broad spectrum of Indian gaming.

Second, tribes and states must disclose information necessary to the study. We acknowledge that exemptions for tribes from publicly disclosing detailed information on their gaming operations make it difficult for tribal members, state citizens, and policymakers at all levels to act on Indian gaming in a fully informed manner. Both tribes and states have vested interests in acquiring full information on Indian gaming's impacts as well as in effective and appropriate policymaking in the area of tribal gaming. Tribes undoubtedly will be wary of disclosing economic data and other information, given the often inaccurate information and suspicious treatment of Indian gaming enterprises and the tribes themselves in the public discourse as well as the troubled history of federal Indian policy and tribal-state relations. Yet perhaps the best hope for correcting pervasive misinformation about tribal gaming is to counter it with accurate and complete information. At the same time, the new commission should be cognizant of the basis for tribes' right to refuse to disclose information as well as the potential misuse of such information. As long as tribes' inherent right of self-determination is seen as a legitimate and necessary larger context for the NIGIC study and as an appropriate indicator of Indian gaming's impacts, tribes should be required to disclose such information to the commission.[27]

The NIGIC study should precede federal legislative efforts to reform Indian gaming law. Through its grounding in Native conceptions of tribal sovereignty, the new commission's study should provide a sound basis for policymaking and implementation at the federal level and, just as importantly, provide information to states and tribes to identify common goals and interests and the best means to achieve them.

## Reforming the Law and Politics of Indian Gaming

### Tribal Sovereignty as the Foundation for a Level Playing Field

Conceptions of political fairness or a level playing field between states and tribes often overlook tribes' inherent right of self-determination and the

history of federal Indian policy and tribal-state relations. Such an ahistorical perspective, unmoored from the foundation of tribal sovereignty, leads some policymakers to view "fairness" as necessitating abrogation of tribal authority while strengthening state power.

For example, Senator Harry Reid (D-Nev.), one of IGRA's original architects, believes that the courts as well as the tribes have interpreted IGRA more broadly than Congress intended. From limiting off-reservation gaming to protecting Nevada's commercial gaming interests, which "have to pay significant taxes that Indian gaming doesn't have to pay," Reid has become an advocate of amending IGRA. "What we need is to level the playing field," he stated, presumably to even out perceived imbalances between "favored" tribes and "disfavored" nontribal interests, including commercial casinos, states, and localities.[28] Reid's position that tribes have been unfairly advantaged by the law and politics of Indian gaming as they have played out in the last fifteen years, tilting the playing field in their favor, is one that increasingly is articulated by media commentators and policymakers alike. U.S. representative Frank Wolf's (R-Va.) proposed amendments to IGRA to increase state and local control over Indian gaming at the expense of tribal authority similarly reflect this decontextualized conception of "fairness."[29]

What is "fair" must be determined against the backdrop of the long history of federal Indian policy and tribal-state relations, as well as within the context of indigenous views of tribal sovereignty. Because of perceived threats to hard-won rights and recently achieved, if variable, economic, political, and cultural successes, the level playing field tribes seek is one on which federal, state, and local policymakers as well as others recognize and respect tribal sovereignty. Without this context, tribal sovereignty is simply abstracted out, and the result is not "fair" at all—it is simply further advantaging the states at the tribes' expense.

Despite their general lack of legal authority over tribal matters, policymakers should remember that states have a number of existing political advantages over tribes. States are represented in Congress while tribes are not. State residents obviously outnumber tribal members, state-taxed property far exceeds tribal lands, and even with current budget crises, state coffers outweigh tribal government revenue. State sovereignty enjoys express constitutional protection, as evidenced by the U.S. Supreme Court's decision in *Seminole Tribe,* while the Court has ruled that tribes are subject to Congress's self-proclaimed plenary power. In the specific context of Indian

gaming, IGRA's requirement that tribes negotiate a tribal-state compact in and of itself is a concession to state sovereignty. *Seminole Tribe*'s invalidation of IGRA's enforcement mechanism against states further reinforced state sovereignty at tribes' expense. Even tribes' sovereign right to conduct gaming is not absolute but is limited by state public policy: under both the Supreme Court's and Congress's interpretation, each state has the ability to prohibit tribal gaming entirely simply by making all gambling illegal within its borders.[30] In view of these advantages, we believe that the only fair and level playing field, and the necessary foundation for government-to-government relations, is one that recognizes and respects tribal sovereignty.

**Restoring the Balance of Bargaining Power**

*Seminole Tribe* invalidated the key compromise of IGRA—Congress's attempt to balance state and tribal bargaining power through a judicial enforcement mechanism that allowed tribes to sue states. Without that corrective device in place, state political power exceeds that of tribes, creating an imbalance in gaming negotiations. With inherent tribal sovereignty as the foundation for a level playing field, however, it is plain that the current negotiating status of tribes and states requires a new corrective mechanism in order to facilitate mutually respectful government-to-government relations. We believe that Congress should enact legislation to restore an appropriate balance of tribal and state authority over Indian gaming. The federal government's role in ensuring mutual respect for tribal self-determination and state sovereignty is necessary to protect both federal and tribal interests at stake and is appropriate given the federal government's trust responsibility to the tribes.[31]

As legally enforceable rights and duties play a crucial role in equalizing political bargaining power and bringing parties to the table, it is imperative to reinstate IGRA's cause of action to enforce the state duty to negotiate tribal-state gaming compacts in good faith, whether in federal court or through federal administrative regulations, perhaps coupled with tools of alternative dispute resolution.[32] To avoid the constitutional problem of *Seminole Tribe,* some commentators have suggested that the U.S. attorney general institute suits on behalf of tribes against states that allegedly have violated the good-faith duty.[33] Another offered the "fix" of congressional authorization of *Ex parte Young* actions against state governors, affording tribes the opportunity to utilize IGRA's cause of action without state consent.[34] An alternative to a judicially enforced corrective mechanism is to

follow the secretary of the interior's post-*Seminole Tribe* regulations. These regulations, currently on the books but rarely if ever utilized, are meant to replicate IGRA's cause of action through administrative procedures.[35] Congress might also consider making well-informed federal mediators available to assist tribes and states in reaching compacts as well as adopting other aspects of alternative dispute resolution in conjunction with a corrective mechanism to enforce the state duty to negotiate in good faith.[36] Whatever form of corrective device Congress chooses, tribes must have a vehicle through which to enforce their rights and to bring states to the table.

In addition to one or more of the enforcement mechanisms described above, Congress should consider defining more clearly the state's duty to negotiate in good faith. Fundamentally, the state's good-faith duty should encompass state respect for tribal governments and tribes' inherent right of self-determination. Further, Congress might delineate in more detail appropriate topics for negotiation.[37] If Congress, as we think is likely, decides to keep revenue sharing on the table as a legitimate point of negotiation, it should consider ensuring a balance of state and tribal power by setting some limitations. For example, Congress could require a prerequisite similar to that which IGRA placed on tribal per capita payments to members: only after tribal government operations and programs, tribal economic diversification plans, and appropriate local government agencies are adequately funded may the state request a take of the tribe's gaming revenue.[38] Another possibility is to require the state to justify its demand as reasonable in light of both tribal and state needs. Congress might set, say, 10 percent as a rebuttable presumptive cap on revenue sharing: the state may receive more than 10 percent, but only after the state shows that more is necessary to meet the shared policy goals of the tribe and the state.[39]

Finally, Congress should retain the secretary of the interior's role in approving tribal-state compacts. In addition to IGRA's current requirement that compacts must be consistent with IGRA, other federal law, and the federal government's trust obligations,[40] the secretary also should be required to consider whether both tribal and state sovereignty are adequately protected, that is, whether the terms of the compact appear fair and reasonable, taking into account tribal self-determination. This evaluation should be informed by the results of the new commission's study of socioeconomic impacts of Indian gaming, as we propose above. Congress should exercise its oversight function to ensure that the secretary is acting fairly and consistently pursuant to these factors.

At bottom, any new legislation or amendment to IGRA passed by Congress should have as its goals the preservation of tribal sovereignty and the facilitation of fair government-to-government negotiations between tribes and states. Although, purely by virtue of exercising authority over tribes, any action by Congress could be seen as merely perpetuating the compromised nature of tribal sovereignty under the federal legal doctrine and thus undercutting tribal self-determination, it is our intent that the federal legislative reform we propose here ultimately will serve as a means for compromise in the sense of mutual give-and-take between equals rather than merely masking continued coercion.

**Finding Common Ground in the Compacting Process**

With a level playing field informed by tribes' inherent right of self-determination and firmly established through appropriate corrective mechanisms, Congress will have set the stage for fair and successful negotiations between tribes and states, not only as mutual sovereigns, but as partners in cooperative policymaking. Indian gaming has the potential to induce both positive and negative socioeconomic impacts. The costs of tribal gaming should be an important part of any policy calculus. It is safe to say, however, that a substantial body of empirical research finds that Indian gaming produces net economic and social benefits that may outweigh its economic and social costs. Tribes arguably stand the most to gain, in terms of both quantifiable economic benefits like tribal government revenue and job creation and intangible social benefits like cultural preservation, spiritual self-determination, and strengthened tribal sovereignty. Nontribal communities, however, also obtain a number of economic and social benefits from their proximity to tribal casinos, making them "natural allies" with gaming tribes. States, in turn, reap such substantial socioeconomic benefits as revenue sharing, job creation, and the economic development of impoverished rural areas that include reservations and surrounding communities. These win-win outcomes suggest that "tribes and states need not be adversaries over compacting for casinos" or in other policy arenas in which balanced government-to-government relations stand to benefit all.[41]

The first step in tribal-state negotiations should be to identify common goals and interests shared by the tribe and the state. The foremost common goal should be mutual respect for each other's authority and obligations to its citizens. While state sovereignty is important and should be acknowledged by the tribe, it would be naïve not to take note of the fact that "tribal-

state relations are such that it is necessary for states to demonstrate publicly and in writing that they recognize tribal sovereignty—that is, the right of tribal governments to exist, to endure, and to flourish."[42] To formally place tribes and states on level footing, the compacting process should be viewed as akin to establishing a "sovereignty accord" in which respect for tribal sovereignty is applied to the legal and political realms of Indian gaming.[43] By the same token, as federal Indian law scholar Frank Pommersheim has asserted, it is important to foster a growing tribal recognition that "dialogue and negotiation with the state on (legitimate) issues is not a 'sell out' of tribal sovereignty, but rather, part of the contemporary political and legal struggle to define and to achieve a tribal sovereignty that advances the flourishing of tribal life."

Beyond a formal statement of recognition and respect for both state and tribal sovereignty, the parties should use the new commission's study of the socioeconomic impacts of Indian gaming to identify shared goals and interests particular to a specific tribe or region. For example, a shared goal might be reducing reservation unemployment to meet state levels while creating jobs for non-Natives as well. Other shared policy goals and interests could include raising various tribal socioeconomic indicators to state levels, addressing burdens on local communities, minimizing environmental impacts, preventing and reducing crime, addressing problem gambling, and encouraging economic diversification. Codified in a tribal-state compact, these common goals carry the weight of joint statements of public policy and assign shared responsibility to state and tribal officials in their implementation.

The terms of the compact should focus on the means to achieve the identified common goals and interests. This structure also serves as a tool to assess whether the state and the tribe are achieving their shared goals. At regular intervals, the tribe and the state should provide to each other and to the secretary of the interior an assessment of how and whether they are meeting the compact's common goals. The assessments should be public documents to encourage transparency in Indian gaming policy to state citizens and tribal members.

Compact negotiations should constitute cooperative policymaking and implementation between sovereigns. As described by one tribal leader,

> Each government which is a party to intergovernmental agreements must 'get' something from such agreements, and each government must

be willing to 'give' something in return. By the very nature of the aspects of sovereignty attributed to both the tribes and the states, each must be willing to bargain with the other for an end result that is fair and adequate to meet the needs of both.[44]

## LOOKING FORWARD

As Alex Tallchief Skibine observed, "The enactment of IGRA represented official congressional recognition that states and tribes do not have to be each other's 'deadliest enemies' " and that "it was time for the state and the tribes to resolve their problems by working together as equal partners."[45] But that vision of mutual compromise has been clouded by the increasingly acrimonious politics of Indian gaming. As a result, tribal sovereignty has been compromised to an extent not intended by Congress and detrimental to tribal self-determination and the federal and tribal goals of tribal economic development, self-sufficiency, and strong tribal governments. Indian gaming is not a failed policy experiment—far from it—but Congress must act to ensure that it serves to further tribes' inherent right of self-determination and mutually respectful government-to-government relations. As the National Indian Gaming Commission (NIGC) concluded in a 2004 policy memorandum,

> IGRA's statutory system of shared regulatory authority and responsibility for Indian gaming will work most effectively to further the Act's declared policies and purposes, when the three involved sovereign governmental authorities work, communicate, and cooperate with each other in a respectful government-to-government manner. Such government-to-government relationships will make it possible for all three sovereign governments to mutually resolve their issues and concerns regarding the operation and regulation of Indian gaming, and efficiently coordinate and assist each other in carrying out their respective regulatory responsibilities for Indian gaming under IGRA.[46]

Indian gaming is one of the most "exciting and creative ways to move tribal-state relations forward."[47] In addition to establishing the foundation for effective and appropriate law and policy for tribal gaming enterprises, we believe that our proposal for a new compromise among sovereigns will help to strengthen tribal self-determination. Even beyond tribal sovereignty's legal and political dimensions, cooperative policymaking facilitated by

Congress between states and tribes and a resulting political environment that maximizes Indian gaming's benefits while minimizing its costs will further tribal sovereignty's cultural and spiritual dimensions, helping to build strong and healthy tribal communities in the long term. In this way, Indian gaming may move from an uneasy and frequently uneven compromise to a new "casino compromise"—one negotiated on a level playing field and characterized by mutual give-and-take between equals.

# APPENDIX
# INDIAN GAMING BY STATE AND BY TRIBE

| State | Tribe | Gaming Venues |
|---|---|---|
| Alabama | Poarch Band of Creek Indians | 3 |
| Alaska | Kake Tribe of Alaska | 1 |
| | Klawock Cooperative Association | 1 |
| | Metlakatla Indian Community | 1 |
| Arizona | Ak Chin Indian Community | 1 |
| | Cocopah Indian Tribe | 1 |
| | Colorado River Indian Tribes | 1 |
| | Fort McDowell Mohave-Apache Indian Community | 1 |
| | Fort Mojave Indian Tribe | 1 |
| | Gila River Indian Community | 3 |
| | Pascua Yaqui Tribe of Arizona | 2 |
| | Quechan Indian Tribe | 1 |
| | Salt River Pima-Maricopa Indian Community | 2 |
| | San Carlos Apache Tribe | 1 |
| | Tohono O'odham Nation | 3 |
| | Tonto Apache Tribe | 1 |
| | White Mountain Apache Tribe | 1 |
| | Yavapai Apache Tribe | 1 |
| | Yavapai-Prescott Indian Tribe | 2 |
| California | Agua Caliente Band of Cahuilla Indians | 2 |
| | Alturas Indian Rancheria | 1 |
| | Auberry Big Sandy Rancheria | 1 |
| | Augustine Band of Mission Indians | 1 |
| | Barona Band of Mission Indians | 1 |
| | Big Valley Rancheria of Pomo Indians | 1 |
| | Bishop Paiute Tribe | 1 |
| | Blue Lake Rancheria | 1 |
| | Cabazon Band of Mission Indians | 1 |
| | Cahto Tribe of the Laytonville Rancheria | 1 |
| | Cahuilla Band of Mission Indians | 1 |
| | Campo Band of Kumeyaay Indians | 1 |
| | Chemehuevi Indian Tribe | 1 |
| | Chicken Ranch Band of Me-Wuk Indians | 1 |
| | Colusa Band of Wintun Indians | 1 |
| | Coyote Valley Band of Pomo Indians | 1 |
| | Dry Creek Rancheria Band of Pomo Indians | 1 |
| | Elk Valley Rancheria | 1 |
| | Hoopa Valley Tribe | 1 |

| | | |
|---|---|---|
| California | Hopland Band of Pomo Indians | 1 |
| | Jackson Rancheria Band of Miwuk Indians | 1 |
| | La Jolla Band of Luiseno Indians | 1 |
| | Lake Miwok Indian Nation of the Middletown Rancheria | 1 |
| | Mooretown Rancheria | 1 |
| | Morongo Band of Mission Indians | 2 |
| | Pala Band of Mission Indians | 1 |
| | Paskenta Band of Nomlaki Indians | 1 |
| | Pauma Band of Mission Indians | 1 |
| | Picayune Rancheria of Chukchansi Indians | 1 |
| | Pit River Tribe | 1 |
| | Quechan Tribe of Fort Yuma | 1 |
| | Redding Rancheria | 1 |
| | Rincon San Luiseno Band of Mission Indians | 1 |
| | Robinson Rancheria of Pomo Indians | 1 |
| | Rumsey Indian Rancheria | 1 |
| | San Manuel Band of Mission Indians | 1 |
| | San Pasqual Band of Mission Indians | 1 |
| | Santa Rosa Band of Tachi Indians of the Santa Rosa Rancheria | 1 |
| | Santa Ynez Band of Chumash Indians | 1 |
| | Sherwood Valley Rancheria | 1 |
| | Smith River Rancheria | 1 |
| | Soboba Band of Mission Indians | 1 |
| | Susanville Indian Rancheria | 1 |
| | Sycuan Band of Kumeyaay Indians | 1 |
| | Table Mountain Rancheria | 1 |
| | Pechanga Band of Luiseno Mission Indians | 1 |
| | Trinidad Rancheria | 1 |
| | Tule River Band of the Tule River Indian Reservation | 1 |
| | Tuolumne Band of Me-Wuk Indians | 1 |
| | Twenty Nine Palms Band of Mission Indians | 1 |
| | Tyme Maidu Tribe of the Berry Creek Rancheria | 1 |
| | United Auburn Indian Community of the Auburn Rancheria | 1 |
| | Viejas Band of Kumeyaay Indians | 1 |
| Colorado | Southern Ute Indian Tribe | 1 |
| | Ute Mountain Ute Tribe | 1 |
| Connecticut | Mashantucket Pequot Tribal Nation | 1 |
| | Mohegan Tribe of Indians of Connecticut | 1 |
| Florida | Miccosukee Tribal Indians of Florida | 1 |
| | Seminole Tribe | 5 |
| Idaho | Coeur d'Alene Tribe | 1 |
| | Kootenai Tribe of Idaho | 1 |
| | Nez Perce Tribe | 2 |
| | Shoshone-Bannock Tribes | 2 |
| Iowa | Omaha Tribe of Nebraska | 1 |
| | Sac & Fox Tribe of Mississippi in Iowa | 1 |
| | Winnebago Tribe of Nebraska | 1 |

| | | |
|---|---|---|
| Kansas | Iowa Tribe of Kansas and Nebraska | 1 |
| | Kickapoo Nation of Kansas | 1 |
| | Prairie Band of Potawatomi | 2 |
| | Sac and Fox Nation of Missouri | 1 |
| | Louisiana Chitimacha Tribe of Louisiana | 1 |
| | Coushatta Tribe of Louisiana | 1 |
| | Tunica-Biloxi Tribe of Louisiana | 1 |
| Maine | Penobscot Indian Nation | 1 |
| Michigan | Bay Mills Indian Community | 2 |
| | Grand Traverse Band of Ottawa and Chippewa | 2 |
| | Hannahville Indian Community | 1 |
| | Keweenaw Bay Indian Community | 2 |
| | Lac Vieux Desert Band of Lake Superior Chippewa | 1 |
| | Little River Band of Ottawa Chippewa | 1 |
| | Little Traverse Bay Bands of Odawa Indians | 1 |
| | Saginaw Chippewa Indian Tribe | 2 |
| | Sault Ste. Marie Tribe of Chippewa Indians | 5 |
| Minnesota | Bois Forte Band of Chippewas | 1 |
| | Fond du Lac Band of Lake Superior Chippewa | 2 |
| | Grand Portage Band of Chippewa Indians | 1 |
| | Leech Lake Band of Chippewa Indians | 3 |
| | Lower Sioux Indian Community | 1 |
| | Mille Lacs Band of Chippewa Indians | 2 |
| | Prairie Island Indian Community | 1 |
| | Red Lake Band of Chippewa Indians | 3 |
| | Shakopee Mdewakanton Sioux Community | 2 |
| | Upper Sioux Community | 1 |
| | White Earth Band of Chippewa Indians | 2 |
| Mississippi | Mississippi Band of Choctaw Indians | 2 |
| Montana | Assiniboine & Sioux Tribes of the Fort Peck Reservation | 4 |
| | Blackfeet Tribe of Indians | 2 |
| | Chippewa Cree Tribe of the Rocky Boy's Reservation | 1 |
| | Confederated Salish and Kootenai Tribes | 15 |
| | Crow Indian Tribe | 1 |
| | Fort Belknap Indian Community | 1 |
| | Northern Cheyenne Tribe | 1 |
| | Siyeh Tribe | 1 |
| Nebraska | Santee Sioux Tribe of Nebraska | 1 |
| Nevada | Fort Mojave Indian Tribe | 1 |
| | Las Vegas Paiute Tribe | 2 |
| | Moapa Band of Paiute | 1 |
| New Mexico | Jicarilla Apache Tribe | 1 |
| | Mescalero Apache Tribe | 1 |
| | Pueblo of Acoma | 1 |
| | Pueblo of Isleta | 2 |
| | Pueblo of Laguna | 3 |
| | Pueblo of Pojoaque | 3 |

| | | |
|---|---|---|
| New Mexico | Pueblo of San Felipe | 1 |
| | Pueblo of San Juan | 1 |
| | Pueblo of Sandia | 1 |
| | Pueblo of Santa Ana | 1 |
| | Pueblo of Santa Clara | 1 |
| | Pueblo of Taos | 1 |
| | Pueblo of Tesuque | 1 |
| New York | Cayuga Indian Nation | 1 |
| | Oneida Nation of New York | 1 |
| | Seneca Nation of Indians | 4 |
| | St. Regis Mohawk Tribe | 2 |
| North Carolina | Eastern Band of Cherokee Indians | 2 |
| North Dakota | Sisseton-Wahpeton Sioux Tribe | 1 |
| | Spirit Lake Sioux Nation | 1 |
| | Standing Rock Sioux Tribe | 1 |
| | Three Affiliated Tribes of the Fort Berthold Reservation | 1 |
| | Turtle Mountain Band of Chippewa Indians | 1 |
| Oklahoma | Absentee-Shawnee Tribe of Oklahoma | 1 |
| | Cherokee Nation of Oklahoma | 6 |
| | Cheyenne and Arapaho Tribes of Oklahoma | 3 |
| | Chickasaw Nation of Oklahoma | 18 |
| | Choctaw Nation of Oklahoma | 11 |
| | Citizen Band of Potawatomi Indians of Oklahoma | 1 |
| | Comanche Indian Tribe | 4 |
| | Delaware Tribe of Western Oklahoma | 1 |
| | Eastern Shawnee Tribe of Oklahoma | 2 |
| | Fort Sill Apache Tribe of Oklahoma | 1 |
| | Iowa Tribe of Oklahoma | 1 |
| | Kaw Nation of Oklahoma | 1 |
| | Kickapoo Tribe of Oklahoma | 2 |
| | Miami Tribe of Oklahoma | 1 |
| | Modoc Tribe of Oklahoma | 1 |
| | Muscogee (Creek) Nation | 9 |
| | Osage Nation | 2 |
| | Otoe-Missouria Tribe of Oklahoma | 1 |
| | Pawnee Nation of Oklahoma | 1 |
| | Peoria Tribe of Indians of Oklahoma | 1 |
| | Ponca Tribe of Oklahoma | 1 |
| | Quapah Tribe of Oklahoma | 1 |
| | Seminole Nation of Oklahoma | 1 |
| | Seneca-Cayuga Tribe of Oklahoma | 1 |
| | Thlopthlocco Tribal Town | 1 |
| | Tonkawa Tribe of Oklahoma | 1 |
| | United Keetoowah Band of Cherokee | 1 |
| | Wyandotte Tribe of Oklahoma | 1 |
| | Oregon Burns Paiute Tribe | 1 |
| | Confederated Tribes of the Coos, Lower Umpqua, Siuslaw | 1 |
| | Confederated Tribes of the Grand Ronde Community | 1 |

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| Oklahoma | Confederated Tribes of the Siletz Indians | 1 |
| | Confederated Tribes of the Umatilla Indian Reservation | 1 |
| | Confederated Tribes of the Warm Springs Reservation | 1 |
| | Coquille Indian Tribe | 1 |
| | Cow Creek Band of Umpqua Indians | 1 |
| | Klamath Tribes | 1 |
| South Carolina | Catawba Indian Nation | 1 |
| South Dakota | Cheyenne River Sioux Tribe | 1 |
| | Crow Creek Sioux Tribe | 1 |
| | Flandreau Santee Sioux Tribe | 1 |
| | Lower Brule Sioux Tribe | 1 |
| | Oglala Sioux Tribe | 2 |
| | Rosebud Sioux Tribe | 2 |
| | Sisseton-Wahpeton Sioux Tribe | 2 |
| | Standing Rock Sioux Tribe | 2 |
| | Yankton Sioux Tribe | 1 |
| Texas | Kickapoo Traditional Tribe of Texas | 1 |
| Washington | Confederated Tribes and Bands of the Yakama Indian Nation | 1 |
| | Confederated Tribes of the Chehalis Reservation | 1 |
| | Confederated Tribes of the Colville Reservation | 3 |
| | Jamestown S'Kallam Tribe | 1 |
| | Lummi Nation | 1 |
| | Kalispel Tribe of Indians | 1 |
| | Makah Indian Tribe of the Makah Indian Reservation | 1 |
| | Muckleshoot Indian Tribe | 1 |
| | Nisqually Indian Tribe | 1 |
| | Nooksack Indian Tribe | 1 |
| | Port Gamble S'Kallam Tribe | 1 |
| | Puyallup Tribe of Indians | 2 |
| | Quinault Indian Nation | 1 |
| | Shoalwater Bay Indian Tribe | 1 |
| | Skokomish Tribe | 1 |
| | Spokane Tribe of Indians | 5 |
| | Squaxin Island Tribe | 1 |
| | Stilliguamish Tribe | 1 |
| | Suquamish Tribe | 1 |
| | Swinomish Indian Tribal Community | 1 |
| | Tulalip Tribes of Washington | 2 |
| | Upper Skagit Indian Tribe | 1 |
| Wisconsin | Bad River Band of Lake Superior Tribe of Chippewa Indians | 2 |
| | Forest County Potawatomi Community | 2 |
| | Ho-Chunk Nation | 6 |
| | Lac Courte Oreilles Band of Lake Superior Chippewas | 2 |
| | Lac du Flambeau Band of Lake Superior Chippewa Indians | 2 |
| | Menominee Indian Tribe of Wisconsin | 1 |
| | Oneida Tribe of Indians of Wisconsin | 1 |
| | Red Cliff Band of Lake Superior Chippewas | 1 |
| | Sokaogon Chippewa Community | 1 |

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|---|---|---|
| Wisconsin | St. Croix Chippewa Indians of Wisconsin | 3 |
| | Stockbridge-Munsee Community | 1 |
| Wyoming | Northern Arapaho Tribe of the Wind River Indian Reservation | 1 |

*Sources:* Adapted from NIGC, "Gaming Tribes," http://www.nigc.gov/nigc/nigcControl?option=TRIBAL_DATA; Alan P. Meister, *Indian Gaming Industry Report, 2004–2005 Ed.* (Newton, MA: Casino City Press, 2004), 10–11; Arizona Department of Gaming, "Arizona Tribes with Casinos," http://www.gm.state.az.us/casinos.htm; California Gambling Control Commission, "Tribal-State Gaming Compact Casinos in California," http://www.cgcc.gov/tribalcasinos.html; Colorado Division of Gaming, "Tribal Casinos," http://www.revenue.state.co.us/Gaming/wrap.asp?incl=tribal; Iowa Racing and Gaming Commission, "Indian Gaming," http://www3.state.ia.us/irgc/indian.htm; Kansas Racing and Gaming Commission, "Casinos in Kansas," http://www.accesskansas.org/ksga/casinos_in_kansas.htm; Michigan Gaming Control Board, "Michigan Tribal Communities with Casinos," http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2183—,00.html; Montana Department of Justice, "State-Tribal Gaming Compacts," http://www.doj.state.mt.us/gaming/tribalgamingcompacts.asp; New York State Racing and Wagering Board, "Indian Gaming," http://www.racing.state.ny.us/indian/FAQ.html; Washington State Gambling Commission Tribal Gaming Unit, "Tribal Casinos in Washington State" (October 27, 2004), http://www.wsgc.wa.gov/docs/Tribal/TribalCasinos.pdf.

# NOTES

## PREFACE

1. See Davis v. Coyhis, 869 F. Supp. 1401 (E.D. Wis. 1994).
2. 25 U.S.C. §§ 2710–21 (2000). See Kathryn R.L. Rand and Steven A. Light, "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity," *Virginia Journal of Social Policy and the Law* 4 (1997): 381–437.
3. W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* (Norman: University of Oklahoma Press, 2000), xv.
4. See Jeff Benedict, *Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino* (New York: Harper Collins, 2000), 1–4.
5. The iInstitute is a component of the University of North Dakota School of Law's Northern Plains Indian Law Center. See "Institute for the Study of Tribal Gaming Law and Policy," http://www.law.und.nodak.edu/NPILC/tglpi.html.
6. Benedict's *Without Reservation* reportedly was optioned for a Hollywood film (Joel Lang, "Reading Jeff Benedict; Should You Believe His Revelations about the Pequots and the Making of the World's Largest Casino?," *Hartford Courant*, December 3, 2000, 5).{\Rear}

## INTRODUCTION: WHAT IS INDIAN GAMING?

1. *South Park*, "Red Man's Greed," Comedy Central television broadcast, April 28, 2003.
2. "Indian gaming" is a legal term that is firmly embedded in the mainstream lexicon. Throughout this book, we refer interchangeably to Indian gaming and tribal gaming, as well as to Native Americans, Native people, and occasionally Indians. We also refer to "federal Indian law" and related legal terms, while recognizing that to some, each of these terms is laden with potentially problematic connotations.
3. As Jarvis et al. note, "Gaming has worked its way deep into the American psyche, and its influence now is felt in everything from architecture to fashion to product styling. Robert M. Jarvis et al., *Gaming Law: Cases and Materials* (Newark, NJ: Matthew Bender, 2003), 20–21 (the authors list examples, including novels and films). Gambling's recent ubiquity is perhaps particularly apparent on television. See, for instance, *American Casino*, A&E television series, 2004; *American Poker Championship*, Fox Sports Net television broadcast, October 26, 2004; *The Casino*, Fox television series, 2004; *Celebrity Poker Showdown*, Bravo television series, 2003–2004; *dr. vegas*, CBS television series, 2004; *Las Vegas*, NBC television series, 2003–2004; *Poker Superstars Invitational Tournament*, Fox Sports Net television series, 2004; *World Poker Tour*, Travel Network television series, 2004; *World Series of Poker*, ESPN television series, 2004.

4. *Malcolm in the Middle,* "Cliques," Fox television broadcast, May 5, 2001; *The Simpsons,* "Bart to the Future," Fox television broadcast, March 13, 2000, and *The Simpsons,* "Dude, Where's My Ranch?" Fox television broadcast, April 27, 2003; *The Sopranos,* "Christopher," HBO television broadcast, September 29, 2002; *South Park,* "Red Man's Greed." But see "American Indians 5, Sopranos 0—But with Honors" (editorial), *Indian Country Today,* October 7, 2002, http://www.indiancountry.com/article/1033953427 (asserting that the episode "left a long way to go in how Indians are portrayed in media but it hit a lot of good points"); and Melissa Hart, "'South Park,' in the Tradition of Chaucer and Shakespeare," *Chronicle of Higher Education,* October 25, 2002, B5 (arguing that the show's depictions of prejudice and bigotry are meant to reveal "the stupidity of it all"). For additional recent examples of television's treatment of Indian gaming, see *Reno 911,* "Milkshake Man's Death," Comedy Central television broadcast, September 15, 2004 (perpetrator running a street craps game claims to have a "tribal permit" in "smoke signals"); *Wanda at Large,* "Wanda and Bradley," Fox television broadcast, August 22, 2004 (describing Indian gaming as the equivalent of reparations to African Americans for slavery); *MXC* (Most Extreme Elimination Challenge), "Gaming Industry vs. Medical Professionals," Spike TV television broadcast, April 1, 2004 (making a brief reference to Indian gaming); *Chris Isaak Show,* "The Family of Man," Showtime television broadcast, January 10, 2004 (featuring a story line in which Chris plays at a reservation casino after a tribal artifact is found on his land); *The Family Guy,* "The Son Also Draws," Fox television broadcast, May 9, 1999 (featuring a family trip to a tribal casino that results in Peter's attempt to prove that he has Native American "blood"). Indian gaming increasingly is referenced in popular fiction as well. In addition to Louise Erdrich's acclaimed novel *The Bingo Palace* (New York: HarperCollins, 1995), see, for example, Laurence Shames, *Tropical Depression* (New York: Hyperion, 1996), and Donald E. Westlake, *Bad News* (New York: Warnerbooks, 2001), both of which tell stories of fraud and manipulation against the backdrop of tribal casinos.
5. Indian Gaming Regulatory Act, 25 U.S.C. § 2701(4) (2000). Our point here is to emphasize the distinction between government-sponsored and for-profit commercial gambling. As government-sponsored gaming, some suggest that Indian gaming is akin to state lotteries. The analogy is useful but not perfect. For many tribes, as we discuss throughout, the primary impetus for gaming is economic development, including job creation, rather than raising government revenue.
6. 25 U.S.C. §§ 2701–21.
7. See David E. Wilkins, *American Indian Politics and the American Political System* (Lanham, MD: Rowman & Littlefield, 2002), 48.
8. See Robert B. Porter, "The Meaning of Indigenous Nation Sovereignty," *Arizona State University Law Journal* 34 (2002): 75.
9. Our work elsewhere consistently reflects this argument. See generally Steven Andrew Light and Kathryn R.L. Rand, "Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy," *Nevada Law Journal* 4 (2004): 262–84; Kathryn R.L. Rand, "There Are No Pequots on the Plains: Assessing the Success of Indian Gaming," *Chapman Law Review* 5 (2002): 47–86; Kathryn R.L. Rand, "At Odds? Perspectives on the Law and Politics of Indian Gaming," *Gaming Law Review* 5 (4) (2001): 297–98; Steven A. Light and Kathryn R.L. Rand, "Are All Bets Off? Off-Reservation Indian Gaming

in Wisconsin," *Gaming Law Review* 5 (4) (2001): 351–63; Kathryn R.L. Rand and Steven A. Light, "Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota," *Gaming Law Review* 5 (4) (2001): 329–40; and Kathryn R.L. Rand and Steven A. Light, "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity," *Virginia Journal of Social Policy and the Law* 4 (1997): 381–437.

10. Seminole Tribe v. Florida, 517 U.S. 44 (1996).
11. See, for instance, Iver Peterson, "Cayugas Change Stance on Casinos," *New York Times*, May 9, 2003 (inaccurately referring to "the [tribes'] federally granted right to sponsor gambling").
12. National Indian Gaming Commission (NIGC), "NIGC Announces Indian Gaming Revenue for 2003," Press Release, July 13, 2004, http://www.nigc.gov./nigc/documents/releases/pr_revenue_2003.jsp; National Indian Gaming Association (NIGA), "Regulation of Indian Gaming," http://indiangaming.org/info/pr/regulation.shtml; American Gaming Association, "Gaming Revenue: Current-Year Data," http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=7.
13. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
14. See Appendix. These figures represent all gaming operations, that is, Class II (bingo) as well as Class III (casino-style) gaming. We discuss IGRA's distinctions among gaming classes in Chapter 2.
15. American Gaming Association, "States with Gaming," http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=15. Utah and Hawaii prohibit legalized gambling.
16. See American Gaming Association, "Gaming Revenue: Current-Year Data," http://www.americangaming.org/Industry/factsheets/statistics detail.cfv?id=7. Timothy Boone, "Gaming Trips Are on a Roll," *Sun Herald* (Biloxi, MS), June 6, 2004 (discussing American Gaming Association's annual survey results).
17. National Gambling Impact Study Commission (NGISC), *Final Report* (1999), 6–2, http://govinfo.library.unt.edu/ngisc/reports/finrpt.html (hereinafter, NGISC *Final Report*). Stephen Cornell et al., *American Indian Gaming Policy and Its Socio-Economic Effects: A Report to the National Gambling Impact Study Commission* (Cambridge, MA: Economics Resource Group, 1998).
18. See, for example, Jonathan B. Taylor, Matthew B. Krepps, and Patrick Wang, *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000), http://www.ksg.harvard.edu/hpaied; NIGA, "Regulation of Indian Gaming."
19. See, for example, "Playing the Political Slots," "Wheel of Misfortune," and "Who Gets the Money?" all by Donald L. Barlett and James B. Steele, *Time*, December 16, 2002, 44–58; Ellen Barry, "A War of Genealogies Rages," *Boston Globe*, December 12, 2000, A1; Micah Morrison, "El Dorado at Last: The Casino Boom," *Wall Street Journal*, July 18, 2001, A18; Sean P. Murphy, "A Big Roll at Mohegan Sun," *Boston Globe*, December 10, 2000, A1; Michael Rezendes, "Few Tribes Share in Casino Windfall," *Boston Globe*, December 11, 2000, A1; Michael Rezendes, "Tribal Casino Operations Make Easy Criminal Targets," *Boston Globe*, December 13, 2000, A1.
20. See Rand, "There Are No Pequots"; Rand and Light, "Raising the Stakes."
21. Cornell et al., *American Indian Gaming Policy*, 11–12.

22. NGISC, *Final Report*, 6–2.
23. Under IGRA, Class II and Class III gaming is allowed only in those states that permit "such gaming for any purpose by any person, organization, or entity." 25 U.S.C. §§ 2710 (b)(1), (d)(1).
24. It is difficult to ascertain how many tribes have at one time considered and rejected gaming on this basis; media accounts of such occurrences are rare.
25. Steve Schmidt, "The Tribe That Won't Play," *San Diego Union-Tribune*, October 20, 2002, A1; Ben Schnayerson, "A Tale of One Tribe, Two Cities," *San Bernardino Sun*, December 29, 2003.
26. The new casino is expected to cost $60 million and have 1,200 slot machines. Schmidt, "The Tribe That Won't Play;" Schnayerson, "A Tale of One Tribe;" Jeff Jones, "Navajo Leader Signs N.M. Pact for Casino," *Albuquerque Journal*, September, 20, 2003, A1.
27. Schnayerson, "A Tale of One Tribe."
28. Content searches of tribal and nontribal media outlets revealed virtually no accounts of tribes closing their casinos for lack of business.
29. See Thomas J. Cole, "Sandoval OKs Loan to Pueblo," *Albuquerque Journal*, February 3, 2004, A1.
30. On the other hand, competition may cause tribes to explore additional ways to attract casino customers, as happened with the Bay Mills Band of Ojibwe in Michigan's Upper Peninsula. One of the first tribes to open a casino in the 1980s, Bay Mills soon faced competition from the nearby Sioux St. Marie tribe when that tribe opened a casino in Sioux St. Marie, closer to the limited population in Michigan's Upper Peninsula. According to Michael Parish, president of Bay Mills Community College, when the competition arose, the tribe opted to build another casino. "We knew when building the new casino that we couldn't compete with the St. Marie so we went for a resort-style place. We had to offer something new that would make people be willing to take the drive." Parish reports that the new casino has been successful. "When the Sioux in Canada [just across the border] opened a casino, the St. Marie tribe saw a 20 percent bite. Bay Mills saw a 1 to 2 percent increase at the same time." Telephone interview with Michael Parish, February 18, 2004.
31. National Indian Gaming Commission (NIGC), "Tribal Gaming Revenues," http://www.nigc.gov/nigc/nigcControl?option=TRIBAL_REVENUE.
32. Pull-tabs, classified under federal law as similar to bingo, 25 U.S.C. § 2703(7), are instant-win tickets: a player buys a paper ticket from a deck and pulls a tab on the ticket to reveal whether the player has won.
33. Sean Cockerham, "Poker Player Deals State House in on Casino Bill," *Anchorage Daily News*, April 7, 2004. David Hulen, "Alaska Plays by Own Rules," *Anchorage Daily News*, May 7, 1995, B1. For a straightforward discussion of the unique legal relationship between Alaska Natives and the United States, see Stephen L. Pevar, *Rights of Indians and Tribes*, 3d ed. (Carbondale, IL: Southern Illinois University Press, 2002), 299–303.
34. Paula Burkes Erickson, "On a Roll," *Daily Oklahoman*, March 28, 2004, 1B. In Oklahoma, a law allowing tribes to offer casino-style games passed in March 2004, but opposition to expansion of gaming in the state spurred its repeal before it could take effect. As of this writing, a similar proposal will appear on the November ballot for a statewide vote. Paul English, "Senate Endorses Switch on Gaming,"

*Tulsa World*, May 12, 2004, A1. For a detailed discussion of the development of Indian gaming in Oklahoma, see W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* (Norman: University of Oklahoma Press, 2000), 176–230.

35. See Rand, "There Are No Pequots," 55–59 (describing recent vociferous criticism of Indian gaming).
36. Rezendes, "Few Tribes Share in Casino Windfall."
37. Barlett and Steele, "Playing the Political Slots"; Barlett and Steele, "Wheel of Misfortune."{\Rear}{\Rear}

### CHAPTER 1. INDIAN GAMING AND & TRIBAL SOVEREIGNTY

1. David Matheson, "Tribal Sovereignty: Preserving Our Way of Life," *Arizona State University Law Journal* 34 (2002): 20.
2. David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 20.
3. Rebecca Tsosie, "Introduction: Symposium on Cultural Sovereignty," *Arizona State University Law Journal* 34 (2002): 1. Though Western concepts of sovereignty stem from the power of the monarchial sovereigns in Europe, sovereignty "has taken on an almost iconic role in Indian country." Robert N. Clinton, Carole E. Goldberg, and Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* (Newark: Matthew Bender, 4th ed., 2003), 16.
4. Wallace Coffey and Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," *Stanford Law and Policy Review* 12 (2001): 191.
5. Robert B. Porter, "The Meaning of Indigenous Nation Sovereignty," *Arizona State University Law Journal* 34 (2002): 75.
6. We appreciate the need for clear distinctions in sorting through convoluted federal law and policy defining tribal sovereignty while calling for legal and political reform based on broader definitions of tribal sovereignty—perhaps the difference between tribal sovereignty as it is *recognized* by federal law and tribal sovereignty as it *exists*. Throughout, therefore, we will distinguish the "federal legal doctrine" or "federal definition" of tribal sovereignty from tribal sovereignty as defined by indigenous leaders and scholars. As we explain in detail in this chapter, the federal definition of tribal sovereignty recognizes its existence but defines it as subject to Congress's unilateral limitations. Native conceptions of tribal sovereignty focus on tribes' inherent right of self-determination.
7. See Rennard Strickland et al., *Felix S. Cohen's Handbook of Federal Indian Law* (Charlottesville, VA: Michie Company, 1982), 231 (hereinafter cited as Cohen, 1982 *Handbook*). Cohen wrote that "Indian tribes consistently have been recognized, first by the European nations, later by the United States, as 'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." Ibid., 232 (internal citations omitted).
8. Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, DC: Government Printing Office, 1942), 122 (hereinafter cited as Cohen, 1942 *Handbook*), quoted in Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, *American Indian Law: Cases and Materials*, 3d ed. (Charlottesville, VA: Michie Company, 1991), 320.

See also David H. Getches, Charles F. Wilkinson, and Robert A. Williams, *Cases and Materials on Federal Indian Law*, 4th ed. (St. Paul, MN: West, 1998), 373 ("self governing powers of tribes survive to the extent the general government has not abolished them").

9. Getches, Wilkinson, and Williams, *Cases and Materials on Federal Indian Law*, 4.
10. See ibid., 2–3. By recognizing tribes as sovereign nations and negotiating agreements with these representatives, colonizers could exercise a right of title to Indian lands.
11. Cohen, 1982 *Handbook*, 229–57. Although tribal sovereignty may be limited by federal law, the states have no constitutionally granted powers over tribes and generally lack authority to regulate them.
12. Montana v. United States, 450 U.S. 544, 564 (1981); Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).
13. Cohen, 1982 *Handbook*, 232 (internal citations omitted).
14. Clinton, Newton, and Price, *American Indian Law: Cases and Materials*, 1.
15. See, for example, David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001); Russell Lawrence Barsch and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980), 59–60.
16. See, for example, Coffey and Tsosie, "Rethinking the Tribal Sovereignty Doctrine," 195; Robert Porter, "A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law," *University of Michigan Journal of Law Reform* 31 (1998): 899; Sarah Krakoff, "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty," *American University Law Review* 50 (2001): 1177. One Indian law scholar has roundly criticized the U.S. Supreme Court's treatment of tribes as grounded in racism, calling for reform that appropriately recognizes tribal sovereignty. Stacy L. Leeds, "The More Things Stay the Same: Waiting on Indian Law's *Brown v. Board of Education*," *Tulsa Law Review* 38 (2002): 73.
17. Coffey and Tsosie, "Rethinking the Tribal Sovereignty Doctrine," 191.
18. Sharon O'Brien, "The Concept of Sovereignty: The Key to Indian Social Justice," in Donald E. Green and Thomas V. Tonnesen, eds., *American Indians: Social Justice and Public Policy* (Milwaukee: University of Wisconsin System Institute on Race and Ethnicity, 1991), 64. Although not necessarily the case for all tribes or Native people today, "a traditional Indian view of sovereignty . . . does not separate the secular from the religious, or the political from the legal. Rather, Indian philosophy unifies all aspects of life. The spiritual, secular, political and legal are indivisible." Ibid., 46.
19. Vine Deloria, Jr., and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty*, 2d ed. (Austin: University of Texas Press, 1998), 18–19.
20. Duane Champagne, "Challenges to Native Nation Building in the 21st Century," *Arizona State Law Journal* 34 (2002): 47.
21. Francine R. Skenandore, "Revisiting *Santa Clara Pueblo v. Martinez*: Feminist Perspectives on Tribal Sovereignty," *Wisconsin Women's Law Journal* 17 (2002): 347.
22. Coffey and Tsosie, "Rethinking the Tribal Sovereignty Doctrine," 197.
23. Wilkins, *American Indian Sovereignty*, 21.
24. David E. Wilkins, *American Indian Politics and the American Political System* (Lanham, MD: Rowman & Littlefield, 2002), 48 (italics omitted).

25. Wilkins, *American Indian Sovereignty*, 21; Wilkins and Lomawaima, *Uneven Ground*, 5.
26. Wilkins, *American Indian Sovereignty*, 20–21.
27. As Wilkins and Lomawaima point out, this is true for the United States as well as for states and tribes: both the federal government and states, for example, are constrained by the U.S. Constitution. Wilkins and Lomawaima, *Uneven Ground*, 4–5.
28. Porter, "The Meaning of Indigenous Nation Sovereignty," 77.
29. Ibid., 101–2.
30. Ibid., 111–12.
31. Deloria and Lytle, *The Nations Within*, 256.
32. Ibid., 263 (italics omitted).
33. Ibid., 264, 266–67.
34. We believe the practical limitations inherent to federal Indian law in many ways define the practical political realities of tribal sovereignty, particularly in the area of Indian gaming. See generally Steven Andrew Light and Kathryn R.L. Rand, "Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy," *Nevada Law Journal* 4 (2004): 262–84; Kathryn R.L. Rand, "There Are No Pequots on the Plains: Assessing the Success of Indian Gaming," *Chapman Law Review* 5 (2002): 47–86; Kathryn R.L. Rand, "At Odds? Perspectives on the Law and Politics of Indian Gaming," *Gaming Law Review* 5 (4) (2001): 297–98; Steven A. Light and Kathryn R.L. Rand, "Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin," *Gaming Law Review* 5 (4) (2001): 351–63; Kathryn R.L. Rand and Steven A. Light, "Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota," *Gaming Law Review* 5 (4) (2001): 329–40; Kathryn R.L. Rand and Steven A. Light, "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity," *Virginia Journal of Social Policy and the Law* 4 (1997): 381–437.
35. Porter, "The Meaning of Indigenous Nation Sovereignty," 99; see also generally Wilkins, *American Indian Sovereignty*.
36. Vine Deloria, Jr., "Indian Law and the Reach of History," *Journal of Contemporary Law* 4 (1977–1978): 1 (quoted in Wilkins, *American Indian Sovereignty*, 1).
37. Ibid.
38. Wilkins, *American Indian Sovereignty*, 2. As Wilkins sees it, federal Indian law "includes a potpourri of western and indigenous actors, historical and current events, ad hoc federal Indian policies and tribal responses, myriad regulations on all levels, and an inconsistent assortment of case law, also on multiple levels. Ibid., 307.
39. Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995), 51.
40. As legal scholar Judith Resnik notes, "Theories of sovereignty have long rested on the primacy of territory, of a government's control of and physical power over a specific area of land." Judith Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts," *University of Chicago Law Review* 56 (1989): 700. See also George P. Castile, "Native North Americans and the National Question," in John H. Moore, ed., *The Political Economy of North American Indians* (Norman: University of Oklahoma Press, 1993), 280 ("The 'purpose' of federal Indian policy, its benefit to the ruling order, lies precisely in its contribution to strengthening the hegemony of the state through a manipulation of political symbols").

41. Wilkins and Lomawaima, *Uneven Ground*, 20.
42. Immediately following the Treaty of Paris and the end of the Revolutionary War, the United States attempted to make peace with the tribes, particularly those who had sided with the British. On September 17, 1778, the United States entered into a treaty with the Delaware Nation at Fort Pitt, the federal government's first treaty with a tribe. The treaty allowed American troops to travel through Delaware land to attack British outposts in the Great Lakes region. Angie Debo, *A History of the Indians of the United States* (Norman: University of Oklahoma Press, 1970), 86–87. Early documents, including the Fort Pitt treaty, indicate that some policymakers considered creating an Indian state, with representation in Congress. Ibid., 87.
43. Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790–1834* (Cambridge, MA: Harvard University Press, 1962), 30; Articles of Confederation, art. 9.
44. Prucha, *American Indian Policy*, 41.
45. The Constitution also delegates to Congress the power to regulate commerce "with foreign Nations" and "among the several States" (U.S. Constitution, art. 1, sec. 8). As Prucha notes, the Indian Commerce Clause "would seem to be scant foundation upon which to build the structure of federal legislation regulating trade and intercourse with the Indian tribes. Yet through [it], plus the treaty-making and other powers, Congress has ever since exercised what amounts to plenary power over the Indian tribes" (Prucha, *American Indian Policy*, 43).
46. U.S. Constitution, art. 6, cl. 2.
47. Prucha, *American Indian Policy*, 42–45; Debo, *History of the Indians*, 90–91.
48. Secretary of War John C. Calhoun, acting without the authorization of Congress, established what he called the "Bureau of Indian Affairs" within the War Department in 1824. This new office was referred to as the "Indian Office" or the "Office of Indian Affairs" despite Calhoun's designation. Prucha, *American Indian Policy*, 57–58.
49. Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830).
50. Cohen, 1982 *Handbook*, 81, 91.
51. The Choctaw, in a treaty with the United States, agreed to cede their land in Mississippi and move to Oklahoma, in exchange for the guarantees that the federal government would protect Choctaw tribal authority from state interference and that land allotments would be made available to individual Indians. Other eastern tribes followed suit (Debo, *History of the Indians*, 117–18).
52. Herman J. Viola, *After Columbus: The Smithsonian Chronicle of the North American Indians* (New York: Crown, 1990), 144. "The term 'removal' has come to be associated with the forced migration of the Five Civilized Tribes from the Southeast to the Indian Territory (now the State of Oklahoma). Actually, the practice of transferring tribes from ancestral lands to reservations in other areas was far more widespread: removals occurred in most parts of the country during the entire 19th century" (Getches, Wilkinson, and Williams, *Cases and Materials on Federal Indian Law*, 154).
53. The Marshall Trilogy, both despite and because it provides the foundation for modern federal Indian law, has been criticized roundly in both substance and procedure. See, for example, Philip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," *Harvard Law Review* 107 (1993): 381; Robert A. Williams, Jr., "The Algebra of Federal Indian

Law: The Hard Trial of Decolonization and Americanizing the White Man's Indian Jurisprudence," *Wisconsin Law Review* (1986): 219; Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope and Limitations," *University of Pennsylvania Law Review* 132 (1984): 195; see also Krakoff, "Undoing Indian Law One Case at a Time," 1193 ("The Marshall trilogy . . . accomplished by judicial fiat what otherwise would have remained a contested political matter: who has the power to negotiate and legislate with respect to Indian tribes?").

54. 21 U.S. (8 Wheat.) 543 (1823). Legal scholar Eric Kades has traced in painstaking detail the complicated terrain of the land disputes leading to the *M'Intosh* decision, convincingly revising prior accounts. See generally Eric Kades, "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Tribal Lands," *University of Pennsylvania Law Review* 148 (2000): 1098–1190; Eric Kades, "History and Interpretation of the Great Case of *Johnson v. M'Intosh*," *Law and History Review* 19 (2001): 70–116.
55. Under this version of the doctrine of discovery, a legal rule that grew out of European colonization, only the discoverer has the right to acquire aboriginal lands, indicating the Court's use of an expansive definition that granted the United States more than a right of first refusal. See Johnson v. M'Intosh, 573. In adopting this interpretation, the Court rejected the argument that aboriginal inhabitants' ownership rights could be extinguished only by a "just war" or voluntary consent. See ibid., 589, 595; see also Cohen, 1982 *Handbook*, 50–54; Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1989), 312–17. Kades noted that the discovery rule had been used to resolve potential disputes among European nations only. Thus although Marshall's opinion mistakenly has been read to the contrary, the discovery doctrine did not directly govern European-tribal relations. See Kades, "History and Interpretation," 70–71.
56. Johnson v. M'Intosh, 592, 603. Kades argues that Marshall rooted his opinion in longstanding European and American customary law precluding private purchases of tribal land. See Kades, "The Dark Side," 1098–1103.
57. Kades, "The Dark Side," 590. In Kades's view, the "implicit but overarching purpose of the *M'Intosh* rule against private purchases of Indian land was cheap acquisition of Indian lands." Kades, "History and Interpretation," 113.
58. Wilkins and Lomawaima, *Uneven Ground*, 19–25, 53–58.
59. 30 U.S. (5 Pet.) 1 (1831). The Georgia Guard, empowered by the state to enforce its laws against the tribe, was brutal: they "terrorized the Cherokees—putting them in chains, tying them to trees and whipping them, throwing them into filthy jails" (Debo, *History of the Indians*, 121).
60. Cherokee Nation v. Georgia, 16, 19, 20. The Court thus held that it did not have jurisdiction to hear the case under the constitutional provision establishing the Court's original jurisdiction over disputes between states and foreign nations (U.S. Constitution, art. 3, sec. 2).
61. Cherokee Nation v. Georgia, 17.
62. See, for example, Wilkins and Lomawaima, *Uneven Ground*, 65–67. The federal government's trust responsibilities have been treated at various times as an unenforceable moral obligation, a legally enforceable tribal right, and a basis for congressional abrogation of tribal sovereignty. See Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 497–500. As law

professor Nell Jessup Newton notes, "Asserting the existence of the trust relationship between Indian tribes and the federal government is far easier than defining its contours" (Nell Jessup Newton, "Introduction to Symposium: The Indian Trust Doctrine after the 2002–2003 Supreme Court Term," *Tulsa Law Review* 39 [2003]:237). Frank Pommersheim has criticized the trust doctrine as an extension of colonization: "In many ways the trust relationship is a classical colonizing doctrine that seeks, advertently or inadvertently, to enshrine a relationship of superiority and inferiority. It wears a mask of benevolence, but ultimately it represents a doctrine of hierarchy and control" (Pommersheim, *Braid of Feathers*, 45–46). Wilkins and Lomawaima have called for "an indigenous vision of trust, one that appropriately conforms to native understandings and political realities" (Wilkins and Lomawaima, *Uneven Ground*, 67). For an analysis of the trust relationship in the context of gaming revenue, see Kathleen M. O'Sullivan, "What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?" *Georgetown Law Journal* 84 (1995): 123.

63. 31 U.S. (6 Pet.) 515 (1831). For a detailed discussion and analysis of the political context of the Court's decision, see Gerard N. Magliocca, "Preemptive Opinions: The Secret History of *Worcester v. Georgia* and *Dred Scott*," *University of Pittsburgh Law Review* 63 (2002): 510–53.
64. Worcester v. Georgia, 543. *Worcester's* preemptive formulation of the doctrine appeared to disavow *Johnson v. M'Intosh*. The expansive definition, which privileged the federal government at tribes' expense, continues to influence federal Indian law and policy despite its questionable legality. See Wilkins and Lomawaima, *Uneven Ground*, 19–25, 53–58.
65. Worcester v. Georgia, 561.
66. Ibid., 559. The Court stated: "The settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Ibid., 560–61.
67. Newton, "Federal Power Over Indians," 202.
68. Debo, *History of the Indians*, 122 (quoting John Ridge).
69. Ibid.
70. In Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), the U.S. Supreme Court recognized Congress's plenary power over the tribes and held that it was not subject to judicial review (565). The Court also held that Congress's plenary power included the authority to unilaterally abrogate treaties with Indian tribes (565–66).
71. "By definition, no unlimited and absolute power should exist in the United States, since the Constitution limits the powers of both the federal and state governments" (Wilkins and Lomawaima, *Uneven Ground*, 106). See also Newton, "Federal Power Over Indians"; Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985). In a discussion of Congress's plenary power, Pommersheim emphasizes that in the field of federal Indian law the legality of a policy often follows its practice: "The power is denominated as one *without limitation*, and . . . is beyond judicial review. Such *absolute* notions of power are contrary to any understanding of a constitutional republic grounded in specified and limited powers. It is noteworthy that the

Court in *Lone Wolf* did not cite (nor could it cite) any authority for this astounding proposition. The Court simply converted its perception of *congressional practice* into a valid *constitutional doctrine* without any legal support or analysis" (Pommersheim, *Braid of Feathers*, 47). See also Leeds, "The More Things Stay the Same" (equating *Lone Wolf* to *Dred Scott*).

72. For example, the Supreme Court has described tribal sovereignty as "exist[ing] only at the sufferance of Congress" and "subject to complete defeasance" by Congress (United States v. Wheeler, 435 U.S. 313, 323 [1979]). As recently as 1998, the Court has invoked plenary power to support the federal doctrine of tribal sovereignty, reiterating that "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights" (South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 [1998]). As Deloria and Lytle have acknowledged, Congress's plenary power exists as a political reality: "Indians and Indian Country are virtually at the mercy of Congress" (Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* [Austin: University of Texas Press, 1983], 40).
73. The federal government's promise of tribal autonomy after removal did not prevent white settlers from conniving to obtain land from the tribes. Land grifters misrepresented and forged the content of legal documents, plied Indians with alcohol, forged signatures, and exploited corrupt state court probate procedures. Debo, *History of the Indians*, 118.
74. Act of March 3, 1871, ch. 120 § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 [2000]). After 1871, tribes continued to enter into agreements with the federal government that were sometimes interpreted as "treaties" by Congress and the Supreme Court. See generally Vine Deloria, Jr., and Raymond DeMallie, *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979* (Norman: University of Oklahoma Press, 1999).
75. Cohen, 1982 *Handbook*, 128.
76. Act of February 8, 1887, ch. 119, 24 Stat. 388. Congress also passed individual allotment acts for specific tribes. See generally Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (discussing specific allotment acts).
77. Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 31–32.
78. Theodore Roosevelt, "First Annual Message" (December 3, 1901) (quoted in Charles F. Wilkinson, *American Indians, Time, and the Law* [New Haven, CT: Yale University Press, 1987], 19).
79. Wilkinson, *American Indians, Time, and the Law*, 20.
80. Under a later allotment act, the Burke Act of 1906, land patents "were issued immediately to graduates of government schools and adult Indians of less than one-half blood." Adult Indians of "one-half or more Indian blood" were granted patents only after an investigation found them competent (Cohen, 1982 *Handbook*, 137). This period of assimilation also inspired the creation of the infamous Indian boarding schools, founded on the idea that "tribal traditions were the enemy of progress" (Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 35). Felix Cohen quotes anthropologist Peter Farb on the boarding school experience: "The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian—dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited.

Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign." Cohen, 1982 *Handbook*, 140 (quoting Peter Farb, *Man's Rise to Civilization as Shown by the Indians of North America from Primeval Times to the Coming of the Industrial State* [New York: E. P. Dutton, 1968], 257–59). Other assimilationist policies included formation of federal Indian police and courts of Indian offenses, which created a federalized power structure that diminished tribal governmental authority. See Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 35.

81. Lewis Meriam, *The Problem of Indian Administration* (Baltimore: Johns Hopkins Press, 1928), excerpted in Francis Paul Prucha, ed., *Documents of United States Indian Policy*, 3d ed. (Lincoln: University of Nebraska Press, 2000), 219–22. For a detailed discussion of the Meriam Report and its impact on federal Indian policy, see Elmer R. Ruscoe, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* (Reno: University of Nevada Press, 2000), 71–82.
82. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 [2000]). For a thorough treatment of the Indian Reorganization Act, see generally Ruscoe, *A Fateful Time*.
83. 25 U.S.C. §§ 461–63 (2000).
84. See William C. Canby, Jr., *American Indian Law in a Nutshell*, 3d ed. (St. Paul: West, 1998), 58–59. Most tribes today maintain westernized governing structures.
85. L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millennium," *Columbia Law Review* 96 (1996): 832–33.
86. See generally Cohen, 1982 *Handbook*, 152–80. Federal termination policy was spearheaded by Dillon S. Myer, who was named commissioner of Indian affairs in 1950. Ironically, Myer was the former director of the War Relocation Authority, which had established and administered the Japanese internment camps during World War II (158).
87. The Indian Reorganization Act was perceived by many at the time as diminishing property rights and discouraging individual initiative. See, for example, Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 39; Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988), 121.
88. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).
89. See, for example, Charles F. Wilkinson and Eric R. Biggs, "The Evolution of the Termination Policy," *American Indian Law Review* 5 (1977): 151–54.
90. Act of August 15, 1953, ch. 505, 67 Stat. 558 (§ 7 repealed and reenacted as amended in 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360). The statute in its current form gives Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—often called "Public Law 280" states—civil and criminal jurisdiction over tribes within their borders. See 18 U.S.C. § 1162, 28 U.S.C. § 1360.
91. This portion of Public Law 280 was amended in 1968 to require tribal consent. See 25 U.S.C. §§ 1321 and 1322.
92. See Getches, Wilkinson, and Williams, *Cases and Materials on Federal Indian Law*, 208; Cornell, *Return of the Native*, 123–24; Cohen, 1982 *Handbook*, 152.

93. Cohen, 1982 *Handbook*, 185 (quoting Lyndon B. Johnson, *Public Papers, 1968–1969, Part I* (Washington, DC: U.S. Government Printing Office, 335). The repudiation of termination policy, however, was premised on a revival of the trust relationship between the federal government and the tribes, as evidenced by Interior Secretary Fred Seaton's remarks: "To me it would be incredible, even criminal, to send any Indian tribe out into the stream of American life until and unless the educational level of that tribe was one which was equal to the responsibilities which it was shouldering. Ibid., 182, quoting 105 Cong. Rec. 3105 (1959) (broadcast address by Secretary of the Interior Fred Seaton, September 18, 1958).
94. 25 U.S.C. §§ 1301–1341 (2000).
95. Cohen, 1982 *Handbook*, 185–86.
96. Richard M. Nixon, "Special Message on Indian Affairs" (July 8, 1970) (excerpted in Prucha, *Documents of United States Indian Policy*, 256–58). According to Clinton, Goldberg, and Tsosie, this is the "single strongest statement to date by the federal government supporting the strengthening of tribal sovereignty and control" (Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 43).
97. 25 U.S.C. §§ 450 et seq. (2000).
98. Pub. L. No. 95–608, 92 Stat. 3069 (codified at 25 U.S.C. § 1901 et seq.).
99. Paul H. Stuart, "Organizing for Self-Determination: Federal and Tribal Bureaucracies in an Era of Social and Policy Change," in Green and Tonnesen, eds., *American Indians*, 95.
100. See Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 45.
101. For an overview of federal Indian policy during the Reagan era, see Samuel R. Cook, "Ronald Reagan's Indian Policy in Retrospect: Economic Crisis and Political Irony," *Policy Studies Journal* 24 (1) (1996): 11–27. In Cook's view, Reagan's "perception of self-determination was a matter of economic self-sufficiency and competitiveness in the private sector. . . . Essentially, he expected private-sector activities to compensate immediately for budget cuts, without considering how tribal values might play into this scheme." Reagan's faith in the market also influenced his views on tribal sovereignty. Cook asserts that the Reagan administration "did not respect the historical implications of the sovereign political status of tribes. . . . The disturbing aspect of [Reagan's economic approach] is that it seemed to imply that tribes were inferior to state and local governments."
102. Ronald Reagan, "Statement on Indian Policy" (January 24, 1983) (excerpted in Prucha, *Documents of United States Indian Policy*, 302–4). As one legislator candidly acknowledged, "By having their budgets squeezed by the Federal government, Indian tribes in the 1980s deliberately have been forced to become more and more independent, to generate their own economic future, to do things themselves, to develop their own businesses. Stewart L. Udall, Commentary, "The Indian Gaming Act and the Political Process," in William R. Eadington, ed., *Indian Gaming and the Law*, 2d ed. (Reno: Institute for the Study of Gambling and Commercial Gaming, 1998), 25. By the mid-1980s, challenges to tribal rights found traction in the federal courts, following an era of landmark litigation successes for tribes. See generally Wilkins, *American Indian Sovereignty*. A number of recent Supreme Court decisions "do not bode well for the continuation of tribal treaty rights or for retained tribal sovereignty" (305).

103. See Cohen, 1982 *Handbook*, 188–89 (describing federal programs to combat poverty on reservations). One commentator at the time offered several suggestions for improving tribal economic conditions: the federal government should maintain policies of self-determination while providing support for basic social welfare programs, continue with affirmative action, and commit resources to public sector job creation for infrastructural improvements on reservations. Gary D. Sandefur, "Economic Development and Employment Opportunities for American Indians," in Green and Tonnesen, eds., *American Indians*, 208.
104. William J. Clinton, "Remarks to Native American and Alaska Native Tribal Leaders" (April 29, 1994) (excerpted in Prucha, *Documents of United States Indian Policy*, 343–45).
105. William R. Eadington, Preface to Eadington, *Indian Gaming and the Law*, vii.
106. Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 48. In his first term, George W. Bush, while not fundamentally deviating from the general approach of encouraging tribal economic self-sufficiency, has not taken any significant steps to expand tribal sovereignty. On the campaign trail in August 2004, Bush raised eyebrows with his response to a question posed by *Seattle Post-Intelligencer* editorial page editor Mark Trahant, a Shoshone-Bannock Indian, at a conference of reporters of color. Asked what he thought tribal sovereignty meant in the twenty-first century and how best to resolve conflicts between tribes and the federal and state governments, Bush responded: "Tribal sovereignty means that; it's sovereign. You're a—you've been given sovereignty, and you're viewed as a sovereign entity. And, therefore, the relationship between the federal government and tribes is one between sovereign entities." Although Native bloggers in particular expressed bemusement at the seemingly simplistic nature of the president's response, tribal leaders and some in Native-run media quickly honed in on Bush's reference to tribal sovereignty as "given"—presumably by the federal government—and hence, something that can be taken away. Said Jacqueline Johnson, executive director of the National Congress of American Indians, tribal sovereignty is "the nearest and dearest, No. 1 issue in Indian country. It's not something that was given to us. . . . we see sovereignty as something we've always had." Ron Allen, chair of the Jamestown S'Klallam Tribe and a longtime Republican, said, "It was disappointing to hear his statements. It was clear to us that he didn't know what he was talking about." Lewis Kamb, "Bush's Comment on Tribal Sovereignty Creates a Buzz," *Seattle Post-Intelligencer*, August 13, 2004. Shortly thereafter, the Bush administration expressed its commitment to a government-to-government relationship with tribes and its respect for tribal sovereignty and tribal self-determination in a memorandum encouraging the heads of executive departments and agencies to respect both. See George W. Bush, "Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments" (September 23, 2004), http://www.whitehouse.gov/news/releases/2004/09/ 20040923-4.html.
107. Clinton, Goldberg, and Tsosie, *American Indian Law: Native Nations and the Federal System*, 11–14.
108. Cabazon 480 U.S. 202 (1987).
109. 25 U.S.C. §§ 2710–21 (2000).
110. Cabazon 480 U.S. 202 (1987) 207 (quotation marks and citations omitted).
111. We initially developed this argument in Light and Rand, "Reconciling the Paradox.

**CHAPTER 2. INDIAN GAMING AS LEGAL COMPROMISE**

1. Harry Reid, Commentary, "The Indian Gaming Act and the Political Process," in William R. Eadington, ed., *Indian Gaming and the Law*, 2d ed. (Reno: Institute for the Study of Gambling and Commercial Gaming, 1998), 19.
2. See, for example, Robert L. Gips, "Current Trends in Tribal Economic Development," *New England Law Review* 37 (2003): 517–18; Kathryn R.L. Rand and Steven A. Light, "Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota," *Gaming Law Review* 5 (4) (2001): 334.
3. See, for example, Matthew L. M. Fletcher, "In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue," *North Dakota Law Review* 80 (2005) (forthcoming). As Fletcher notes, many tribal businesses fail due to barriers to economic development created by the federal government.
4. Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995), 7. The 1990 Census found that 31 percent of self-identified Native Americans, living both on and off the reservation, earned incomes below the poverty line, the largest percentage of the five identified racial groups in the United States. The Oglala Sioux on the Pine Ridge Reservation in South Dakota, one of the poorest locales in the country, had an unemployment rate of 75 percent. See Kathryn R.L. Rand and Steven A. Light, "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity," *Virginia Journal of Social Policy and Law* 4 (1997): 394n71.
5. Pommersheim, *Braid of Feathers*, 7.
6. See generally Kathryn Gabriel, *Gambler Way: Indian Gaming in Mythology, History and Archaeology in North America* (Boulder, CO: Johnson Books, 1996); Stewart Culin, *Games of the North American Indians*, Report of the Bureau of American Ethnology, no. 24, 1902–1903 (Washington, D.C.: Smithsonian Institution, 1907), reprint, 2 vols., introduction by Dennis Tedlock (Lincoln: University of Nebraska Press, 1992); see also Paul Pasquaretta, *Gambling and Survival in Native North America* (Tucson: University of Arizona Press, 2003), 119–23; Paul Pasquaretta, *Contesting the Evil Gambler: Gambling, Choice, and Survival in American Indian Texts*, in Angela Mullis and David Kamper, eds., *Indian Gaming: Who Wins?* (Los Angeles: UCLA American Indian Studies Center, 2000), 131–51. Not all tribal cultures embrace gambling, however, as we discuss in Chapter 4.
7. Gabriel, *Gambler Way*, 1–29.
8. For an overview of federal Indian policy during the Reagan era, see Samuel R. Cook, "Ronald Reagan's Indian Policy in Retrospect: Economic Crisis and Political Irony," *Policy Studies Journal* 24 (1) (1996): 11–27.
9. Eduardo E. Cordeiro, "The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations," in Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles: UCLA American Indian Studies Center, 1992), 234.
10. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 314–15 (5th Cir. 1981).
11. Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982).
12. I. Nelson Rose, Commentary, "The Indian Gaming Act and the Political Process," in Eadington, *Indian Gaming and the Law*, 4; Sioux Harvey, "Winning the Sovereignty

Jackpot: The Indian Gaming Regulatory Act and the Struggle for Sovereignty," in Mullis and Kamper, *Indian Gaming: Who Wins?* 16–17.

13. Cabazon 480 U.S. 202 (1987).
14. Public Law 280, enacted in 1953, gave certain states, including Florida and California, a broad grant of criminal jurisdiction and a limited grant of civil jurisdiction over tribes within their borders. Act of August 15, 1953, ch. 505, 67 Stat. 588–590 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and other scattered sections in Titles 18 and 28, United States Code [2000]). In Public Law 280 states, state governments exercise some power over tribes; in non–Public Law 280 states, the state has less authority over tribes within its borders.
15. Instead, Public Law 280's grant of civil jurisdiction applied only to private civil litigation in state court. See Bryan v. Itasca County, 426 U.S. 373 (1976).
16. The *Cabazon* Court's interpretation of Public Law 280 was based on its reading of congressional intent not to grant states broad regulatory authority over tribes, as that "would result in the destruction of tribal institutions and values." Cabazon 480 U.S. 202 (1987), 208. Thus, the Court distinguished between state laws that are "criminal/prohibitory" and "civil/regulatory": "If the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. Ibid., 209. According to the *Cabazon* Court, the doctrine's "shorthand test" is whether state public policy condones the conduct. Ibid., 209.
17. Ibid., 210–11.
18. Ibid., 216.
19. Ibid.
20. Ibid., 218–19.
21. Ibid., 221.
22. Harvey, "Winning the Sovereignty Jackpot," 18.
23. Rose, Commentary, 4–5.
24. Harvey, "Winning the Sovereignty Jackpot," 17.
25. Alexander Tallchief Skibine, "*Cabazon* and Its Implications for Indian Gaming," in Mullis and Kamper, *Indian Gaming: Who Wins?* 68.
26. Rose, Commentary, 3.
27. Skibine, "*Cabazon* and Its Implications," 68.
28. Reid, Commentary, 17.
29. Rose, Commentary, 5.
30. Reid, Commentary, 18. *Cabazon* did not necessarily authorize casino-style gaming on reservations. Instead, presumably the federal Johnson Act would continue to prohibit slot machines and other electronic gambling devices. See 15 U.S.C. § 1175(a). The compromise embodied in the bill gave states a role in regulating casino-style gaming on reservations through the tribal-state compact requirement and opened the door to tribes' operation of lucrative slot machines and other casino-style games through a statutory exception to the Johnson Act. See 25 U.S.C. § 2710(d)(6) (providing that the Johnson Act's prohibitions will not apply to gaming conducted on reservations under a tribal-state compact in "a state in which gambling devices are legal").
31. Ibid., 19. We describe the tribal-state compact requirement below.

32. Pub. L. 100–497 (codified at 25 U.S.C. §§ 2701–21 [2001]).
33. Skibine, "*Cabazon* and Its Implications," 68; William N. Thompson, Commentary, "The Indian Gaming Act and the Political Process," in Eadington, *Indian Gaming and the Law*, 33–34.
34. 25 U.S.C. § 2701.
35. 25 U.S.C. § 2702.
36. 25 U.S.C. §§ 2703(5), 2703(4).
37. See, for example, American Gaming Association, "Gaming Revenue: Current-Year Data," http://www.americangaming.org/industry/factsheets/statistics_detail.cfv?id=7 (citing estimates of 2003 total gambling industry revenue at nearly $73 billion, with commercial casino revenues contributing more than $28 billion).
38. 25 U.S.C. § 2703(8).
39. 25 C.F.R. § 502.4.
40. 25 U.S.C. § 2710(d)(1)(B).
41. 25 U.S.C. §§ 2710(d)(2)(A), 2710(d)(1)(A). The tribal ordinance must include provisions that require (1) the tribe's sole proprietary interest and responsibility in the gaming operation; (2) the tribe's use of net revenues from the casino for only the purposes specified; (3) annual outside audits of the gaming operation to the NIGC; (4) independent audits of all contracts for supplies, services (other than legal or accounting services), or concessions that exceed $25,000 annually; (5) adequate protection of the environment and public health and safety in the construction, maintenance, and operation of the gaming establishment; and (6) an adequate system to conduct background investigations and ongoing oversight of the casino's primary management officials and key employees. 25 U.S.C. §§ 2710(d)(2)(A), 2710(b)(2).
42. 25 U.S.C. §§ 2710(b)(2)(B), 2710(d)(2)(A). Net revenues are defined by federal regulation as a casino's gross revenues less prizes paid out and operating expenses (excluding management fees). 25 C.F.R. § 502.16. Before distributing per capita payments to tribal members, a tribe must prepare a general plan for use of net revenues in accordance with the five approved expenditures set forth in IGRA. The tribe's plan must be approved by the secretary of the interior as adequately affording for tribal government operations and tribal economic development. Only after the secretary is satisfied that these areas are adequately funded may the tribe distribute per capita payments to members. 25 U.S.C. § 2710(b)(3).
43. 25 U.S.C. § 2710(d)(7)(A)(ii).
44. 25 U.S.C. § 2710(d)(3)(A).
45. 25 U.S.C. § 2710(d)(3)(C). Despite these limitations, some states have sought to include in tribal-state compacts provisions not expressly authorized by IGRA, such as restrictions on tribal hunting and fishing treaty rights. See generally Steven A. Light and Kathryn R.L. Rand, "Do 'Fish and Chips' Mix? The Politics of Indian Gaming in Wisconsin," *Gaming Law Review* 2 (1998): 129–42. Other states have included, with tribal approval, provisions authorizing direct payments to or revenue sharing with the states. See Steven Andrew Light, Kathryn R.L. Rand, and Alan P. Meister, "Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements," *North Dakota Law Review* 80 (2005) (forthcoming).
46. Additionally, "no State may refuse to enter into the negotiations . . . based upon the lack of authority . . . to impose such a tax, fee, charge, or other assessment." 25 U.S.C. § 2710(d)(4). Although IGRA does not dictate that a tribal-state compact

must provide for state regulation of Class III gaming, compacts typically have done so. Carole E. Goldberg et al., "Amici Curiae Brief of Indian Law Professors in the Case of *Hotel Employees and Restaurant Employees International Union v. Wilson*," in Mullis and Kamper, *Indian Gaming: Who Wins?* 62. The tribe retains the right to concurrent regulation of its Class III gaming, so long as tribal regulation is not inconsistent with or less stringent than the state's regulation as provided in the compact. 25 U.S.C. § 2710(d)(5).

47. The Supreme Court invalidated this cause of action in *Seminole Tribe v. Florida*, which we discuss in detail below. Nevertheless, the statutory cause of action remains relevant for at least two reasons: first, even after *Seminole Tribe*, a state may consent to suit under IGRA, and second, federal regulations promulgated subsequent to *Seminole Tribe* mimic IGRA's original procedures in an effort to rebalance state and tribal interests and to effectuate Congress's original compromise. See 25 C.F.R. pt. 291.
48. 25 U.S.C. § 2710(d)(7)(B)(i).
49. 25 U.S.C. § 2710(d)(7)(B)(iii).
50. 25 U.S.C. § 2710(d)(7)(B)(iv).
51. 25 U.S.C. § 2710(d)(7)(B)(vi).
52. 25 U.S.C. § 2710(d)(7)(B)(vii).
53. 25 U.S.C. § 2710(d)(8).
54. 517 U.S. 44 (1996). The Eleventh Amendment to the Constitution provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."
55. See Ex parte Young, 209 U.S. 123 (1908).
56. The Fourteenth Amendment includes the Privileges and Immunities, Due Process, and Equal Protection Clauses and expressly gives Congress the authority to "enforce, by appropriate legislation, the provisions of this article." The Interstate Commerce Clause states: "The Congress shall have Power . . . to regulate commerce . . . among the several States." U.S. Constitution, art. 1, sec. 8, cl. 3. The Indian Commerce Clause states: "The Congress shall have Power . . . to regulate commerce . . . with the Indian tribes." Ibid.
57. 491 U.S. 1 (1989).
58. Most commentators agree that IGRA's severability clause protects IGRA's remaining provisions, so that *Seminole Tribe* invalidates only the tribe's cause of action against the state rather than the entire act. See 25 U.S.C. § 2721 ("In the event that any section or provision of this chapter, or amendment, made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect"). But see United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998) (reasoning that because Congress would not have enacted IGRA without the tribal cause of action against the state for failing to negotiate in good faith, the Supreme Court's invalidation of that provision calls into question the entire statute).

## CHAPTER 3. INDIAN GAMING AS POLITICAL COMPROMISE

1. Stewart L. Udall, Commentary, "The Indian Gaming Act and the Political Process," in William R. Eadington, ed., *Indian Gaming and the Law*, 2d ed. (Reno: Institute for the Study of Gambling and Commercial Gaming, 1998), 28.
2. Louis Sahagun, "State Point Man for Gaming Tribes Is Bold Leader," *Los Angeles Times*, January 18, 2004, A1 (quoting Michael Lombardi).
3. 25 U.S.C. § 2704. The commission consists of three members appointed by the president and the secretary of the interior. At least two commissioners must be enrolled tribal members. Commissioners serve three-year terms, and no more than two commissioners may be members of the same political party. The NIGC is staffed by a general counsel, as well as a chief of staff and an Office of Self Regulation chief. The commission's chief of staff heads the directors of Enforcement, Congressional and Public Affairs, Audits, Contracts, and Administration. The director of Enforcement presides over investigators in six regional enforcement offices, located in Portland, Sacramento, Phoenix, Tulsa, St. Paul, and Washington, DC. See National Indian Gaming Commission (NIGC), "Organizational Chart," http://www.nigc.gov/nigc/about/org-chart.jsp. The commission is funded by fees assessed against tribal gaming operations but also may request appropriations from Congress. 25 U.S.C. § 2717; 25 C.F.R. pt. 514. The commission's current members, appointed in December 2002, are chair Philip N. Hogen and commissioners Cloyce V. Choney and Nelson W. Westrin. Hogen, formerly U.S. attorney for the District of South Dakota and associate solicitor for the Department of Interior's Division of Indian Affairs, is an enrolled member of the Oglala Sioux Tribe of the Pine Ridge Reservation in South Dakota. Choney served as the FBI's chief executive officer for Indian Territory Investigations and is a member of the Comanche Nation of Oklahoma. Westrin was the executive director of the Michigan Gaming Control Board. See NIGC, "Commissioners," http://www.nigc.gov/nigc/nigcControl?option=ABOUT_COM.
4. 25 U.S.C. § 2706(b)(10). NIGC regulations are scattered throughout Title 25 of the Code of Federal Regulations, located roughly in Parts 501 to 580. An easily accessible source for many key regulations is located at NIGC, "Commission Regulations," http://www.nigc.gov/nigc/laws/regulations.jsp.
5. 25 C.F.R. pt. 542. The MICS cover the operation of specific games offered at tribal casinos, as well as cage and credit, internal audits, surveillance, electronic data processing, and complimentary services and items.
6. 25 U.S.C. § 2713(a)(3). The commission also has authority to conduct inspections of tribal gaming operations and to "demand access to . . . all papers, books, and records respecting . . . any . . . matter necessary to carry out the duties of the Commission under" IGRA, as well as the power to subpoena witnesses, hold hearings, and receive testimony and evidence. 25 U.S.C. §§ 2706(b)(4), (8), 2715. Regulations further detail the execution of the commission's investigative and enforcement powers. See 25 C.F.R. pts. 571, 573.
7. 25 U.S.C. §§ 2705(3), 2710; 25 C.F.R. pts. 522, 523, 524.
8. Although tribal casinos generally must be owned and operated by a tribe, a tribe may enter into limited management contracts for the operation of its casino. 25 U.S.C. §§ 2711, 2710(d)(a). Generally speaking, IGRA requires the chair to exercise the "skill and diligence" of a trustee in approving proposed management

contracts. 25 U.S.C. § 2711(e); 25 C.F.R. § 533.6(b). Management contracts are defined by 25 C.F.R. § 502.15.

9. 25 U.S.C. § 2710(b)(2), (c), (d)(1)(A).
10. Donald L. Barlett and James B. Steele, "Wheel of Misfortune," *Time*, December 16, 2002, 47–48.
11. "The Big Gamble" (editorial), *Arizona Daily Star*, March 17, 2001, B6.
12. See National Indian Gaming Association (NIGA), "Indian Gaming Facts," http://www.indiangaming.org/library/index.html#facts.
13. See, for example, H.R. 5291, 103d Congress (November 20, 1994); H.R. 462, 104th Congress (January 11, 1995) (proposing establishment of a commission to conduct a comprehensive study of the prevalence of gambling activities in the United States, their social and economic impacts, and existing federal, state, and local practices with regard to legal prohibition and taxation, particularly in relation to IGRA).
14. Pub. Law 104–169, 104th Congress (August 3, 1996), § 4(a)(1).
15. Pub. Law 104–169, 104th Congress (August 3, 1996), § 3(a)(1), (3)(b)(1), (3)(b)(3).
16. Pub. Law 104–169, 104th Congress (August 3, 1996), § 4(a)(2)(A)-(F).
17. Pub. Law 104–169, 104th Congress (August 3, 1996), § 4(b). Although the NGISC's official Web site closed in July 2001, the University of North Texas Libraries and the U.S. Government Printing Office maintain a mirror of the site as it last appeared. See University of North Texas Libraries, *CyberCemetery; National Gambling Impact Study Commission*, http://govinfo.library.unt.edu/ngisc/index.html.
18. See, for example, I. Nelson Rose, "The National Gambling Impact Study Commission?" *Casino City Times* (June 24, 1999), http://rose.casinocitytimes.com/articles/1024.html (criticizing NGISC as a "political joke"). Rose is a law professor and a nationally recognized expert on gambling law and policy.
19. Ibid.
20. National Gambling Impact Study Commission (NGISC), *Final Report* (1999), 6–23, http://govinfo.library.unt.edu/ngisc/reports/finrpt.html.
21. H.R. 2287, 103d Congress (May 26, 1993); S. 1035, 103d Congress (May 26, 1993); H.R. 1512, 104th Congress (April 7, 1995) (imposing a two-year moratorium on new Class III Indian gaming operations).
22. See H.R. 2323, 103d Congress (May 27, 1993) (establishing conditions for determining whether newly acquired trust land can be used for Indian gaming).
23. S. 952, 104th Congress (June 21, 1995); S.1329, 105th Congress (October 29, 1997).
24. See, for example, S. 487, 104th Congress (March 2, 1995) (amending IGRA to give states the ability to ban without federal interference certain types of Class III gaming on tribal lands).
25. H.R. 1670, 102d Congress (April 9, 1991).
26. For instance, H.R. 6172, 102d Congress (October 5, 1992) (requiring consideration of localities in determining whether tribal gaming on newly acquired Indian lands will be allowed); H.R. 5262, 103d Congress (October 7, 1994) (requiring community approval of tribal-state gaming compacts); H.R. 1512, 104th Congress (April 7, 1995) (requiring community approval of tribal-state gaming compacts); H.R. 140, 104th Congress (January 4, 1995) (requiring community consideration of gaming on newly acquired trust lands); H.R. 1364, 104th Congress (March 30, 1995) (requiring community approval for Class III gaming); H.R. 334, 105th Congress (January 7, 1997) (requiring consideration of affected community and consultation with community officials).

27. H.R. 3745, 108th Congress (January 28, 2004).
28. For regulatory burdens, see, for example, H.R. 1512, 104th Congress (April 7, 1995) (providing that Class II and III tribal gaming would be subject to the same laws, terms, and conditions as any nontribal gaming conducted in the state). For fee rates, see S. 1529, 108th Congress (July 31, 2003). For taxation, see, for example, H.R. 325, 105th Congress (January 7, 1997) (applying income tax to gaming operations). But see H.R. 103, 107th Congress (January 3, 2001) (amending IGRA to prohibit tribal-state compacts from including or being conditioned upon any provision relating to employment practices of tribally owned businesses on Indian lands).
29. See, for example, H.R. 1075, 101st Congress (February 22, 1989) (classifying certain electronic facsimiles of games of chance as Class II gaming); and H.R. 6172, 102d Congress (October 5, 1992) (reclassifying video bingo from Class II to Class III gaming).
30. H.R. 2323, 103d Congress (May 27, 1993).
31. S. 1529, 108th Congress (July 31, 2003).
32. *Native American Report* (Silver Spring, MD: Business Publishers, April 2, 2004), 63.
33. S. Rep. 100–446, reprinted in 1988 U.S.C.C.A.N. 3071, 3083–84.
34. 134 Cong. Rec. S12643 (daily edition, September 15, 1988) (statement of Sen. Daniel Evans [R-Wash.]).
35. But see our discussion below of current strained compact renegotiations in Minnesota.
36. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1031 (2d Cir. 1990).
37. William C. Canby, Jr., *American Indian Law in a Nutshell*, 3d ed. (St. Paul: West, 1998), 306; see also Kevin K. Washburn, "Recurring Problems in Indian Gaming," *Wyoming Law Review* 1 (2001): 430. In 1999, the secretary of the interior promulgated federal regulations meant to curtail states' abilities to stonewall tribal casinos after *Seminole Tribe*. The regulations allow a tribe to invoke the secretary's power to issue a "compact" governing Class III gaming when a state fails to negotiate in good faith and refuses to consent to suit in federal court. See 25 C.F.R. pt. 291. Some commentators have questioned the legality of the new regulations. See Rebecca S. Lindner-Cornelius, "The Secretary of the Interior as Referee: The States, the Indian Nations, and How Gambling Led to the Illegality of the Secretary of the Interior's Regulations in 25 C.F.R. § 291" (comment), *Marquette Law Review* 84 (2001): 685; Joe Laxague, "Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?" (note), *Journal of Legislation* 25 (1999): 77. But see Alex Tallchief Skibine, "Scope of Gaming, Good Faith Negotiations and the Secretary of the Interior's Class III Gaming Procedures: Is IGRA Still a Workable Framework after *Seminole*?" *Gaming Law Review* 5 (2001): 401 (arguing that the secretary's regulations are constitutional).
38. Kathryn R.L. Rand and Steven A. Light, "Do 'Fish and Chips' Mix? The Politics of Indian Gaming in Wisconsin," *Gaming Law Review* 2 (1998): 129.
39. Amy Rinard, "State's Delaying Talks, Tribes Say," *Milwaukee Journal Sentinel*, August 1, 1997, 16.
40. Ashley Grant, "Tribal Casino Compacts Go under Microscope," *Grand Forks Herald* (ND), February 15, 2004, 4A. IGRA enumerates categories of provisions that may be included in a tribal-state compact. On the face of the statute, payments to the state are limited to the cost of state regulation. See 25 U.S.C. § 2710(d)(3)(C).

41. Congress sometimes exercises its power to recognize tribes through federal legislation but also has delegated power to the Department of Interior to promulgate and implement administrative regulations and procedures governing Indian affairs, including tribal recognition. See 25 U.S.C. §§ 2, 9 (2000).
42. The group petitioning for recognition must demonstrate that (1) it has been identified as an American Indian entity on what is considered a "substantially continuous basis" since 1900; (2) a predominant portion of the group is made up of a distinct community that has existed since historical times to the present; (3) it has maintained political influence or authority over its members from historical time to the present; (4) it has adopted a governing document, such as a constitution, and criteria for membership; (5) its membership consists of individuals who are descendants of a historical Indian tribe; (6) its members are not members of any acknowledged North American Indian tribe; and (7) there is no congressional legislation terminating or forbidding federal recognition of the group or any of its members. 25 C.F.R. § 83.7 (2003).
43. Under IGRA, only an "Indian tribe," defined as one that "is recognized as eligible . . . for the special programs and services provided by the United States to Indians because of their status as Indians, and is recognized as possessing powers of self-government," may operate Class II or Class III gaming. 25 U.S.C. §§ 2703(5), 2710.
44. See William Yardley, "A Split Tribe, Casino Plans and One Little Indian Boy in the Middle," *New York Times*, February 15, 2004, 29; Stacey Stowe, "Fourth Tribe Is Recognized in Connecticut, Casino Feared," *New York Times*, January 30, 2004, B1.
45. See "Ailing Cities at Odds with Suburbs," *New Haven Register*, February 29, 2004.
46. Rick Green, "Tribe's Backer Wants Bridgeport Casino," *Hartford Courant*, February 13, 2004, A1.
47. Rick Green, "A Nation Once Again," *Hartford Courant*, January 30, 2004, A1; Andy Bromage, "Subway Founder Banking on Tribe, Casino to Reverse Bridgeport's Fortunes," *New Haven Register*, March 4, 2004. In December 2003, the BIA issued a preliminary finding that the Schaghticokes had failed to satisfy two of the seven criteria for federal recognition, as there were gaps in the group's historical record of its existence as a distinct community and its exercise of tribal government authority. See Rick Green, "Schaghticoke Bid Denied," *Hartford Courant*, December 6, 2002, A1. The BIA's January 2004 grant of the Schaghticokes' petition was perceived by Blumenthal and other state leaders as an unwarranted reversal of the earlier agency position. Ibid.
48. Yardley, "A Split Tribe" (quoting University of Connecticut anthropology professor and Mashantucket Pequot Museum and research director Kevin A. McBride).
49. Rick Green, "Are State's Indians in the Crosshairs?" *Hartford Courant*, February 17, 2003, A1. We discuss Benedict's controversial and influential exposé of the Pequots in Chapter 5.
50. Iver Peterson, "Despite Promise of Easy Money, Indian Casinos Meet Resistance," *New York Times*, February 1, 2004, 29.
51. Green, "Are State's Indians in the Crosshairs?"
52. Iver Peterson, "Would-Be Tribes Entice Investors," *New York Times*, March 29, 2004. For example, California has 53 groups seeking recognition; Virginia has 13;

Connecticut has 12; North Carolina has 12; South Carolina has 10; New York has 7; and New Jersey has 3. Most groups have initiated the recognition process in the last fifteen years. Ibid.

53. Raymond Hernandez, "Trump among Those Named in Inquiry into Bankrolling of Would-Be Tribes," *New York Times*, May 5, 2004; Peterson, "Would-Be Tribes Entice Investors." Trump promptly sued the Eastern Pequots. Peterson, "Would-Be Tribes Entice Investors."
54. Peterson, "Would-Be Tribes Entice Investors."
55. Barry T. Hill, Statement before the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, House of Representatives (February 7, 2002), 8.
56. Peterson, "Would-Be Tribes Entice Investors."
57. Ibid. Katherine Hutt Scott, "BIA Denies Nipmucs Recognition," *Norwich Bulletin*, June 20, 2004.
58. In his testimony before the committee, Jeff Benedict admitted, "Do we have direct evidence that [lobbyists] influenced the process? No." "Critics Take BIA to Task over Federal Recognition," *Indianz.com*, May 6, 2004, http://www.indianz.com/News/archive/002101.asp.
59. At the time of this writing, Connecticut leaders had been successful in instigating a congressional investigation of the Schaghticokes' federal recognition. Tribal leaders refused to participate in hearings before the House Government Reform Committee, and committee member Representative Christopher Shays threatened to use Congress's subpoena power to force their appearance. An independent investigator within the Department of the Interior said BIA staff "seem to be caught up in this perfect storm of emotion, politics and big money," suggesting that the federal recognition process had been improperly influenced by outside pressures. Representative Shays called the recognition process "adrift in a sea of guilt, paternalism and greed." Countered Eastern Pequot tribal chair Marcia Jones Flowers, "Political influence is at work here, but it is not being exercised by our tribe. Rather, incredible influence is being brought to bear by a small group of people whose real goal is to stop Indian gaming in Connecticut." Rick Green, "Pressure on Schaghticokes," *Hartford Courant*, May 6, 2004, B1. The final affirmation of the Schaghticokes' federal recognition could be further delayed by a federal brief filed in late 2004 with the Interior Department's Board of Indian Appeals stating that departmental staff members "inadvertently" inflated the reported marriage rate within the tribe beyond the threshold criterion for recognition. William Yardley, "Overstated Tribal Marriage Rate Could Derail Connecticut Casino," *New York Times*, December 9, 2004. Although this error was not necessarily definitive in the recognition process, Connecticut Attorney General Richard Blumenthal called for President George Bush to fire Assistant Secretary of the Interior David Anderson, accusing him of running a "dysfunctional agency." Responding to Blumenthal's ongoing campaign for Interior Secretary Gale Norton to rescind the group's preliminary recognition, Schaghticoke chief Velky asserted, "The actions and words of the attorney general show no regard for the duty of the government to make a decision based on the facts and the law governing the federal relationship with Indian tribes," continuing, "[Blumenthal's] legal conclusions, factual assertions and biased method of analyzing the tribe's history

will not stand the light of day." Susan Haigh, "Blumenthal Calls for BIA Director's Ouster," *Newsday*, December 15, 2004.

60. 25 U.S.C. § 2719. In addition to the "best interest" exception, there are a number of general and state-specific and tribe-specific exceptions. For example, a tribe may conduct gaming on newly acquired lands that are located within the tribe's existing reservation or are contiguous to the reservation's boundaries, and, for tribes without reservations as of October 17, 1988, gaming is not prohibited on newly acquired lands if the lands are within the tribe's last recognized reservation and within the state in which the tribe currently resides. 25 U.S.C. § 2719(a).
61. See generally Steven A. Light and Kathryn R.L. Rand, "Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin," *Gaming Law Review* 5 (4) (2001): 351; Heidi McNeil Staudenmaier, "Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles," *Nevada Law Journal* 4 (2004): 301.
62. In 1992, federal officials ruled that the Potawatomi Tribe possessed trust ownership of the land on which its Greater Milwaukee bingo hall was built prior to IGRA's passage, giving the tribe the option to offer Class III gaming off the reservation. Richard P. Jones, "Tribes Push Casinos on Many Fronts," *Milwaukee Journal Sentinel*, September 18, 2000.
63. See Light and Rand, "Are All Bets Off?"
64. Juliet Williams, "Wisconsin Gambling on Casinos," *Chicago Tribune*, March 25, 2001.
65. Jo Napolitano, "Plan for Indian Casino Splits Illinois Town," *New York Times*, June 19, 2004.
66. "Oneida Seeking Casino Deal in Settlement Offer to New York," *Milwaukee Journal Sentinel*, December 13, 2001, 3B; Erik Kriss, "Wisconsin Oneidas Inch Closer to Albany," *Post Standard/Herald Journal* (Syracuse, NY), January 11, 2004, A1.
67. Oneida County, N.Y. v. Oneida Indian Nation, 470 U.S. 226 (1985).
68. "Wisconsin's Oneida Indians to Announce Purchase of Tracts in New York," *Milwaukee Journal-Sentinel*, November 19, 2003, 8A; Glen Coin, "State, Oneidas Clash over Casino," *Post Standard/Herald Journal* (Syracuse, NY), February 16, 2004, B1.
69. "Wisconsin's Oneida Indians."
70. Glen Coin, "Tribe: Land Claim Deal Doable," *Post Standard/Herald-Journal* (Syracuse, NY), April 2, 2004, B1.
71. David Melmer, "Wisconsin, New York Oneida Tribes Dispute Land Claim," *Chicago Tribune*, February 15, 2004, 5G. Wisconsin's Stockbridge Munsee Band of Mohicans also are in talks with the New York officials concerning the Catskills sites as part of efforts to resolve the tribe's claim to 23,000 acres near the Oneida Tribes' claim. James M. Odato, "Tribes Aren't Likely to Unite for Catskills Casino," *Times Union* (Albany, NY), April 7, 2004, B3.
72. Odato, "Tribes Aren't Likely to Unite"; Coin, "State, Oneidas Clash over Casino."
73. Odato, "Tribes Aren't Likely to Unite."
74. Hart Seely, "Wisconsin Tribe Wants a Piece of Action in Verona," *Post-Standard/Herald-Journal* (Syracuse, NY), November 23, 2003, A1. In December 2004, Pataki announced that he had reached an agreement with the Oneida Nation of Wisconsin to allow the tribe to develop a casino in the Catskills. Kirk Semple, "2 More Tribes Drop Claims in Exchange for Casinos," *New York Times*, December 8, 2004.
75. Pat Doyle, "Ex-BIA Chief's New Job Raises Revolving-Door Question," *Minneapolis Star-Tribune*, January 21, 2001.

76. For detailed case studies of tribal political strategies in New Mexico and Oklahoma in the 1980s and 1990s, see W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* (Norman: University of Oklahoma Press, 2000).
77. David Wilkins, "An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty," *Kansas Journal of Law and Public Policy* 9 (2000): 733. An additional avenue of political participation and clout, of course, is the vote. Although in most national elections Native American voting clout has been largely ignored, the National Congress of American Indians sought to influence local, state, and national races in the November 2004 election by bringing one million new Native American voters to the polls. Robert Gehrke, "Indians Launch Get-Out-Vote Drive," *Grand Forks Herald* (ND), April 18, 2004, 1B. But see Adam Cohen, "Indians Face Obstacles between the Reservation and the Ballot Box" (editorial), *New York Times*, June 21, 2004 (describing "anti-Indian voting rights violations"). Wilkins wondered whether increased tribal participation in nontribal politics may undermine tribes' extraconstitutional status and precipitate a backlash against tribal sovereignty. Wilkins, "Indigenous Political Participation," 748.
78. See Jerry Reynolds, "Lobbying Money Raises Hard Questions" (editorial), *Indian Country Today*, April 16, 2004 (arguing that all large political contributions and lobbying efforts—not just tribes'—call into question the integrity of the American political system).
79. Carla Marinucci, "Casino Profits Pit 'Brother vs. Brother,'" *San Francisco Chronicle*, February 9, 2003, A1.
80. Glenn F. Bunting and Dan Morain, "Tribes Take a Wait-and-See Recall Stance," *Los Angeles Times*, August 17, 2003, B1. Sometimes the results of tribal lobbying seem antithetical to those who assume tribal interests are monolithic. For example, two tribes in San Diego County, California, lobbied state officials in direct opposition to each other's interests. Looking to the enormous success of the Viejas Band of Kumeyaay Indians' $210 million-a-year casino, the Ewiiaapaayp Band of Kumeyaay also sought to open a casino on land that currently houses a local health center. Though the Ewiiaapaayp plans included building a new and better-funded health center and were supported by six of the seven tribes the clinic serves, the Viejas, who have contributed some $19.1 million to various California politicians since 1998, have successfully lobbied the California legislature to oppose the Ewiiaapaayp plan. Marinucci, "Casino Profits."
81. 64 F.3d 1250, 1255 (9th Cir. 1994).
82. Western Telcon, Inc. v. California State Lottery, 53 Cal. Rptr.2d 812, 917 P.2d 651 (1996) (interpreting "lottery" under state law).
83. Posited as a "win-win" for Native Americans and nontribal members alike, Proposition 5 required gaming tribes to share revenue with nongaming tribes, reimburse the state for the regulatory costs of gaming, and fund the establishment of statewide emergency services.
84. Chad M. Gordon, "From Hope to Realization of Dreams: Proposition 5 and California Indian Gaming," in Mullis and Kamper, *Indian Gaming: Who Wins?* 7–8.
85. Hotel Employees and Restaurant Employees Int'l Union v. Davis, 88 Cal. Rptr.2d 56, 981 P.2d 990 (1999).
86. See generally In re Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) (describing history of compact negotiations in California).

87. Eric Bailey and Jeffrey L. Rabin, "The Recall Campaign: Casinos Bet on Busta mante and McClintock," *Los Angeles Times*, September 29, 2003, A17.
88. Through political action committees set up prior to new California campaign finance laws in 2000, Bustamante received between $3 and $5 million in campaign contributions from the state's tribes, of which approximately $2 million came from the Sycuan Band of the Kumeyaay and $500,000 from the Pechanga Band of Mission Indians. These contributions generated their own controversy. In 2003, a California state judge ruled that Bustamante's expenditure of the tribes' contributions was in violation of current state campaign finance law. During the campaign, Bustamante had pledged that, if elected governor, he would renegotiate the tribal compacts to increase the number of slot machines tribes could operate. The fact that Bustamante's brother was the manager of a small tribal casino had what his opponents portrayed as the appearance of impropriety, although that tribe did not contribute to his campaign. See William Booth, "California Tribes' Clout Carries Political Risk," *Washington Post*, October 1, 2003, A1. Bustamante was not the only candidate to receive aid from gaming tribes. Republican Tom McClintock who similarly supported an increase in the number of slot machines allowed in tribal casinos, received both campaign contributions and advertising support from the tribes. As the election neared, the Morongo Band of Mission Indians ran ads asserting that "independent polls show that McClintock has the momentum to win." At the time, most polls showed McClintock's support at between 14 and 18 percent. Observers suggested that Morongo backing for McClintock was, in reality, a tribal gambit to peel away votes from recall front-runner Schwarzenegger: "The tribes figure that by pumping up McClintock, who has little chance of actually being elected, they can split the Republican vote, ensuring Bustamante's victory." Joseph Perkins, "Gaming Tribes Have Gone Too Far" (op-ed), *San Diego Union-Tribune*, September 19, 2003, B7.
89. Louis Sahagun, "The State Point Man for Gaming Tribes Is Bold Leader," *Los Angeles Times*, January 18, 2004, A1; Booth, "California Tribes' Clout."
90. See Richard Witmer and Frederick J. Boehmke, "American Indian Political Incorporation: Interest Groups and Public Policy, 1998–2002," unpublished manuscript presented at the Annual Meeting of the Midwest Political Science Association in Chicago, Illinois, April 2004 (discussing how Arizona tribes successfully framed a pro-gaming voter initiative as promoting tribal self-sufficiency).
91. Sahagun, "State Point Man."
92. Chet Barfield, "Indian Casinos Raising Stakes," *San Diego Union-Tribune*, May 22, 2004.
93. Emily Heffter, "Tribes Becoming Political Players with Casino Cash," *Seattle Times*, November 17, 2003, A1.
94. When the Pequots first approached Connecticut to negotiate a compact, the state took the position that although it allowed charities to operate casino-style gaming for "Las Vegas Nights" fundraisers, Class III games, and especially slot machines, were contrary to state public policy, and so Connecticut refused to negotiate a compact to allow the tribe to operate such games. The Pequots sued under IGRA's then-valid cause of action and the federal court, after examining the Las Vegas Nights law, determined that casino-style gaming was not against Connecticut's public policy, thus obligating the state to negotiate a compact with the tribe. See Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990). Because slot machines were

not allowed under the state's Las Vegas Nights law and were not specifically addressed by the court's decision, Connecticut and the Pequots reached the revenue-sharing compromise to allow the tribe to operate slot machines.

95. See generally Alan Meister, *Indian Gaming Industry Report, 2004–2005 Ed.* (Newton, MA: Casino City Press, 2004).
96. IGRA specifically provides that nothing in the statute should be interpreted "as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity." 25 U.S.C. § 2710(d)(4).
97. Meister, *Indian Gaming Industry Report*, 10, 17. Said one casino market researcher of the potential gaming revenue in California, "Nobody can count that high. There is a huge, gargantuan, unprecedented, unmet demand for gaming in California." Barfield, "Indian Casinos Raising Stakes" (quoting Michael Meczka).
98. See our discussion above of the Wilson and Davis administrations, Propositions 5 and 1A, the Ninth Circuit's decision in Rumsey Indian Rancheria v. Wilson, 64 F.3d 1250 (9th Cir. 1994), and the California Supreme Court's decision in Hotel Employees and Restaurant Employees Int'l Union v. Davis, 88 Cal. Rptr.2d 56, 981 P.2d 990 (1999).
99. The Special Distribution Fund may be used for "(a) grants for programs designed to address gambling addiction; (b) grants for the support of state and local government agencies impacted by tribal gaming; (c) compensation for regulating costs incurred by the State Gambling Agency and the state Department of Justice in connection with the implementation and administration of the compact; (d) payment of shortfalls that may occur in the [Revenue Sharing Trust Fund, discussed below]; and (e) any other purposes specified by the legislature." In re Gaming Related Cases, 1106. As construed by the federal court, the last provision is limited to any other purposes "directly related to gaming." Ibid.
100. Ibid., 1115. Earlier in the protracted litigation over Indian gaming in California, the state had consented to suit, waiving its Eleventh Amendment immunity under *Seminole Tribe* and thus allowing the federal court to hear the issue. See Rumsey Indian Rancheria v. Wilson, 1255 n.3.
101. Each tribe operating slot machines must purchase a license to operate more than 350 machines. For the first 400 machines (on top of the first 350), the license fee is $900 per year per machine; for the next 500 machines, the fee is $1,950 per year per machine; for the next 750 machines, the fee is $4,350 per year per machine. A tribe may operate a maximum of 2,000 machines. See In re Gaming Related Cases, 1105.
102. Ibid., 1111. As to the wide variation in tribal casino profitability, former NIGA chair Rick Hill asked, "Would it be any surprise that the Massachusetts Lottery generates more revenue than the New Mexico Lottery?" Rick Hill, Letter to the Editor (of the *Boston Globe*), December 20, 2000, http://www.indiangaming.org/info/bostonglobe.shtml.
103. See Sahagun, "State Point Man."
104. See Dan Morain, "Tribe's Measure Offers Tax Deal," *Los Angeles Times*, January 22, 2004, A1. At the time of this writing it appeared likely that Schwarzenegger and five tribes had reached a new model compact that would remove the existing limit on the number of slot machines and would require the tribes to pay the state $1 billion up front and annual revenue payments of several hundred million dollars for the next twenty-five years. "We want to protect the Indian gaming, we want to

have the Indian gaming tribes pay their fair share to the state," said Schwarzenegger. John M. Broder, "Deal Is Near on Casinos in California," *New York Times*, June 17, 2004. Schwarzenegger's announcement that he would pursue California tribes' "fair share" of gambling revenues generated the sponsorship of wildly divergent ballot initiatives in fall 2004. The Agua Caliente Band of Cahuilla Indians qualified a ballot initiative that would have expanded tribal gaming in exchange for an annual tribal payment to the state of 8.8 percent of net casino revenues, identical to the state's corporate income tax. The initiative was intended to undercut the agreement negotiated by Schwarzenegger and five gaming tribes. California commercial gaming interests introduced a competing ballot initiative that would have taxed tribal gaming revenue at a rate of 25 percent and required tribes to submit to state law and state court jurisdiction concerning gambling. If any one of the state's gaming tribes refused to comply, the initiative would have ended tribal exclusivity and allowed sixteen racetracks and cardrooms to operate some 30,000 slot machines, with one-third of the revenues allocated to state and local programs. The governor responded by forming the "Committee for Fair Share Gaming Agreements" to raise funds to defeat both ballot initiatives. "Governor Bets on His Plan for Indian Gaming," *Desert Sun* (Palm Springs, CA), June 17, 2004. California voters defeated each proposition by a wide margin. A. J. Naff, "What Passed, What Failed," *Indian Gaming* (December 2004), 20.

105. Sahagun, "State Point Man" (quoting Michael Lombardi).
106. Patricia Lopez and Dane Smith, "Lure of Gambling Riches Is Strong," *Minneapolis Star-Tribune*, February 8, 2004, 1B. Indian gaming revenue in Minnesota was estimated at more than $1.3 billion in 2003, behind only California and Connecticut. The Minnesota Indian Gaming Association, however, estimated tribal casino revenue in the state at only $700 to $800 million. See Mark Brunswick, "Minnesota's Indian Casinos Had Third-Highest Take in U.S.," *Minneapolis Star-Tribune*, July 8, 2004.
107. Patrick Howe, "Pawlenty Looks for Bargaining Leverage with Tribes," *Minneapolis Star-Tribune*, February 6, 2004.
108. Brian Bakst, "Casino Fight Adds Up to Big-Money Battle," *Grand Forks Herald* (ND), June 24, 2004, 6B; Mark Brunswick, "Gambling in Minnesota: A New Deal?" *Minneapolis Star-Tribune*, March 28, 2004, 1A.
109. Shira Kantor, "Tribes, State at Odds over Slots," *Minneapolis Star-Tribune*, March 21, 2004, 1S. Said Hardacker, "They don't understand that sovereignty isn't an economic issue." The executive director of the Minnesota Indian Gaming Association labeled Governor Pawlenty's and Governor Schwarzenegger's demands as "extorting Indian tribes" and complained that "neither governor has given any credit to tribal gaming as a positive economic factor within their respective states or acknowledged the fact that tribes in this country have already more than paid their fair share." John McCarthy, "Indian Gaming Under Fire," *Indian Gaming* (May 2004), 14.
110. Tom Wanamaker, "Let the Games Begin," *Indian Country Today*, April 6, 2004.

### CHAPTER 4. IS ANYONE WINNING?

1. "Wolf Measure Would Allow State Legislatures to Have Voice in Creation of Gambling Operations on Indian Reservations," Press Release, June 19, 2001, http://www.house.gov/wolf/news/2001/06-20-Gambling_Indians.html.

2. Indian Gaming: Oversight Hearing on the Indian Gaming Regulatory Act before the Senate Committee on Indian Affairs (July 25, 2001) (statement of Ernest L. Stevens, Jr.).
3. See Paul H. Brietzke and Teresa L. Kline, "The Law and Economics of Native American Casinos," *Nebraska Law Review* 78 (1999): 268 (quoting economist Jack Van Der Slick).
4. See ibid., 269.
5. See, for example, Alan Meister, *Indian Gaming Industry Report, 2004–2005 Ed.* (Newton, MA: Casino City Press, 2004); Steven Peterson and Michael DiNoto, *The Economic Impacts of Indian Gaming and Tribal Operations in Idaho* (August 8, 2002), http://www.indiangaming.org/cgi-bin/store4/commerce.cgi?product=study (employing IMPLAN). To estimate the economic and fiscal impacts of tribal gaming, Meister and others use IMPLAN (IMpact Analysis for PLANning), an input-output framework originally developed for use by various federal agencies. Meister also accounts for tribal revenue sharing with nontribal jurisdictions as well as tribes' charitable and civic contributions. Meister, *Indian Gaming Industry Report*, 4–5.
6. Meister, *Indian Gaming Industry Report*, 4–5. Despite the widespread perception among non-Native people that tribes and tribal members do not pay any federal, state, or local taxes, there are only three circumstances in which exemption occurs: tribes do not pay corporate income taxes on gaming revenues, tribal members who live and work on a reservation are exempt from state income or property taxes, and tribal members do not pay state or local sales or excise taxes for purchases made on reservations. Ibid.
7. See, for example, Katherine A. Spilde, Jonathan B. Taylor, and Kenneth W. Grant II, *Social and Economic Analysis of Tribal Government Gaming in Oklahoma* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2002), http://www.ksg.harvard.edu/hpaied/pubs/pub_008.htm. Spilde, Taylor, and Grant employ the REMI modeling framework, widely used by state revenue departments and other policy analysts. Ibid., 26. See also Jonathan B. Taylor, Matthew B. Krepps, and Patrick Wang, *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities* (Cambridge, MA: Harvard Project on American Indian Economic Development, April 2000), http://www.ksg.harvard.edu/hpaied/pubs/pub_010.htm.
8. Spilde, Taylor, and Grant, *Tribal Government Gaming in Oklahoma*, 25–27.
9. Historically, data collected by the Bureau of Indian Affairs, Census Bureau, and other federal agencies on tribes and tribal members has been incomplete and of inconsistent quality. See Taylor, Krepps, and Wang, *National Evidence*, 4. Further, tribes are not subject to federal and state public information disclosure requirements because of their status as political sovereigns. Reliable data on economic impacts thus may be difficult for researchers and policymakers to obtain. Accordingly, some have called for Congress to remove IGRA's exemption from the federal Freedom of Information Act. See, for example, William N. Thompson, "Economic Issues and Native American Gaming," *Wisconsin Interest* (Fall/Winter 1998): 5–11.
10. NGISC, for instance, decried the lack of "impartial, objective research" on legalized gambling, calling for further research by various federal agencies. National Gambling Impact Study Commission (NGISC), *Final Report* (1999), 8–1 to 8–5, http//:govinfo.library.unt.edu/ngisc/reports/finrpt.html.

11. Taylor, Krepps, and Wang, *National Evidence*, 9.
12. See, for example, William N. Thompson, Ricardo Gazel, and Dan Rickman, *The Economic Impact of Native American Gaming in Wisconsin* (Milwaukee: Wisconsin Policy Research Institute, 1995).
13. Dean Gerstein et al., *Gambling Impact and Behavior Study: Report to the National Gambling Impact Study Commission* (Chicago: National Opinion Research Center [NORC] at University of Chicago, April 1, 1999), 65 (hereinafter NORC Report).
14. Ibid., 65.
15. Taylor, Krepps, and Wang, *National Evidence*, 10; see also Kathryn R.L. Rand, "There Are No Pequots on the Plains: Assessing the Success of Indian Gaming," *Chapman Law Review* 5 (2002): 47–86; Kathryn R.L. Rand and Steven A. Light, "Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota," *Gaming Law Review* 5 (2001): 329–40.
16. Taylor, Krepps, and Wang, *National Evidence*, 4.
17. See, for example, Stephen Cornell et al., *American Indian Gaming Policy and Its Socio-Economic Effects: A Report to the National Gambling Impact Commission* (Cambridge, MA: Economics Resources Group, 1998); Spilde, Taylor, and Grant, *Tribal Government Gaming in Oklahoma;* Taylor, Krepps, and Wang, *National Evidence*.
18. Steven Andrew Light and Kathryn R.L. Rand, "Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy," *Nevada Law Review* 4 (2004): 262–84; Rand, "There Are No Pequots on the Plains," 47–86; Rand and Light, "Raising the Stakes," 329–40.
19. Each of these benefits in theory could accrue to all, or none, of the jurisdictions at any given time. In this table we identify what we believe are the most probable general outcomes in combination with the strongest likely effect.
20. Each of these costs in theory could accrue to all, or none, of the jurisdictions at any given time. In this table we identify what we believe are the most probable general outcomes in combination with the strongest likely effect.
21. National Indian Gaming Commission (NIGC), "NIGC Announces Indian Gaming Revenue for 2003," Press Release, July 13, 2004, http://www.nigc.gov/nigc/documents/releases/pr_revenue_2003.jsp; National Indian Gaming Association (NIGA), "An Analysis of the Economic Impact of Indian Gaming in 2004" (2005), 2, http://www.indiangaming.org.
22. Meister, *Indian Gaming Industry Report*, 9. Meister's aggregate national-level estimates are similar to those of the NIGC and NIGA; his studies, however, take the unprecedented step of attempting to isolate Indian gaming's economic impacts on a state-by-state basis. He relies on a number of data sources, including publicly available information and such confidential sources as tribes, casinos, and gaming associations, and uses a proprietary estimation model as well as other estimates. See ibid., 4–6. Although widely cited in the national media, Meister's state-specific estimates have been criticized as unreplicable and inaccurate by a few industry insiders. See, for example, Mark Brunswick, "Minnesota's Indian Casinos Had Third-Highest Take in U.S.," *Minneapolis Star-Tribune*, July 8, 2004.
23. Meister, *Indian Gaming Industry Report*, 21–22.
24. 25 U.S.C. § 2710(d)(4) states: "Nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a Class III activity."

25. See generally Steven Andrew Light, Kathryn R.L. Rand, and Alan P. Meister, "Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements," *North Dakota Law Review* 80 (2005) (forthcoming); Eric S. Lent, "Are States Beating the House? The Validity of Tribal-State Revenue Sharing under the Indian Gaming Regulatory Act" (note), *Georgetown Law Journal* 91 (2003): 451; Gatsby Contreras, "Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?" (note), *Journal of Gender, Race and Justice* 5 (2002): 487.
26. NGISC, *Final Report*, 6–20.
27. Ibid., 6–21. Under the terms of the agreement, the tribe could consent to abrogate exclusivity, as it did to allow the Mohegans to build the Mohegan Sun Casino.
28. See Meister, *Indian Gaming Industry Report*, 22.
29. Ibid., 23.
30. Ibid. Although unusual, direct payments to states also come in the form of fees and taxes. As part of the general requirements for all qualified entities wishing to conduct charitable gaming in Alaska, for example, tribes pay permit and licensing fees to the state. Alaska also presents a special case in terms of taxation. In addition to a fixed revenue payment to the state if annual revenues exceed $20,000, tribes pay a tax on the cost of pull-tabs, federal excise taxes, and local sales tax. Ibid., 22.
31. John Stearns, "Tribes Work to Stem Gambling Addictions," *Arizona Republic*, June 19, 2004.
32. Ashley Grant, "Tribal Casino Compacts Go under Microscope," *Grand Forks Herald* (ND), February 15, 2004, 4A. At the time of this writing, these compacts were under renegotiation because a portion of the compacts was deemed unconstitutional by the Wisconsin Supreme Court. See Patrick Marley, "Quarter of Casino Payments a Sure Bet," *Milwaukee Journal Sentinel*, June 7, 2004; see also Panzer v. Doyle, 680 N.W.2d. 666 (Wis. 2004) (holding that Governor James Doyle exceeded his authority under state law in negotiating the compacts).
33. Meister, *Indian Gaming Industry Report*, 22 (Table 15).
34. Ibid., 22.
35. Peterson and DiNoto, *Economic Impacts of Indian Gaming and Tribal Operations in Idaho*, 3–4, 20.
36. Spilde, Taylor, and Grant, *Tribal Government Gaming in Oklahoma*, 2–4, 46.
37. See, for example, Thompson, Gazel, and Rickman, *The Economic Impact of Native American Gaming in Wisconsin;* Center for Applied Research, *The Benefits and Costs of Indian Gaming in New Mexico* (Denver, CO: Center for Applied Research, January 1996); Center for Applied Research, *Indian Reservation Gaming in New Mexico: An Analysis of Its Impact on the State Economy and Revenue System* (Denver, CO: Center for Applied Research, 1995); John M. Clapp et al., *The Economic Impacts of the Foxwoods High Stakes Bingo and Casino on New London County and Surrounding Areas* (Arthur W. Wright and Associates, September 1993); Coopers and Lybrand, LLP, *Analysis of the Economic Impact of the Oneida Nation's Presence in Oneida and Madison Counties* (February 1995); Gerald I. Eyrich, *Economic Impact Analysis: Cabazon Band of Mission Indians* (Constituent Strategies, Inc.); Stephan A. Hoenack and Gary Renz, *Effects of the Indian-Owned Casinos on Self-Generating Economic Development in Non-Urban Areas of Minnesota* (Plymouth, MN: Stephen A. Hoenack and Associates, May 1995); James M. Klas and Matthew S. Robinson, *Economic Benefits of Indian*

*Gaming in the State of Minnesota* (Minneapolis: Marquette Advisors, January 1997); James M. Klas and Matthew S. Robinson, *Economic Benefits of Indian Gaming in the State of Oregon* (Minneapolis: Marquette Advisors, June 1996); Minnesota Indian Gaming Association and KPMG Peat Marwick, *Economic Benefits of Tribal Gaming in Minnesota, 1992* (Minnesota Indian Gaming Association, April 1992).

38. See generally NORC Report.
39. Ibid., 70–71.
40. Taylor, Krepps, and Wang, *National Evidence*, 1, 22–30. We discuss the study's findings concerning Indian gaming's social impacts below.
41. Ibid., 29.
42. Ibid., 5–8.
43. NIGA and First Nations Development Institute, "The National Survey of Indian Gaming Nation Charitable Giving" (2001), http://www.indiangaming.org/info/survey.shtml.
44. Meister, *Indian Gaming Industry Report*, 10–13.
45. Ibid. Although not broken down by state, NIGC data similarly show that 78 tribal casinos earn $50 million or more annually and 252 tribal casinos earn less than $50 million each year. In other words, about a quarter of tribal casinos earn nearly 80 percent of Indian gaming revenue. NIGC, "Tribal Gaming Revenues," http://www.nigc.gov/nigc/nigcControl?option=TRIBAL_REVENUE.
46. Each of these benefits and costs in theory could accrue to all, or none, of the jurisdictions at any given time. In these tables we identify what we believe are the most probable general outcomes in combination with the strongest likely effect.
47. Many studies seeking to measure the impacts of problem and pathological gambling use small samples within the treatment population (that is, among those people seeking treatment for problem or pathological gambling) and often lack statistical controls. Thus, although there seems to be little doubt that pathological gamblers experience negative social impacts, some researchers urge caution in interpreting existing studies. See National Research Council, *Pathological Gambling: A Critical Review* (April 1, 1999), 5–2.
48. See NGISC, *Final Report*, 4–1; Henry R. Lesieur, "Costs and Treatment of Pathological Gambling," in James H. Frey, ed., *Gambling: Socioeconomic Impacts and Public Policy* (New York: Sage, 1998), 154. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) describes the diagnostic criteria as (1) preoccupation with gambling; (2) a need to gamble with increasing amounts of money to achieve the desired excitement; (3) restlessness or irritability associated with abstinence from gambling; (4) use of gambling as a means of escape from problems; (5) "chasing" losses with more gambling; (6) dishonesty to conceal gambling; (7) repeated unsuccessful attempts to stop gambling; (8) committing crimes to finance gambling; (9) placing a significant relationship, or a career or educational opportunity, in jeopardy because of gambling; and (10) reliance on others to provide a financial "bail out" necessitated by gambling (cited in NGISC, *Final Report*, 4–2 [Table 4–1]). In its study commissioned by the NGISC, NORC used five terms to describe varying degrees of the prevalence of gambling among Americans: "non-gamblers," or those who have never gambled; "low-risk gamblers," or those who have gambled but never lost more than $100 in a single day or year; "at-risk gamblers," or those who have lost more than $100 in a single day or year and meet one or two of the DSM-IV criteria; "problem gamblers," or those

who have lost more than $100 in a single day or year and meet three or four of the DSM-IV criteria; and "pathological gamblers," or those who have lost more than $100 in a single day or year and meet five or more of the DSM-IV criteria. NORC Report, 21 (Table 3).

49. NGISC, *Final Report*, 4-1. The commission noted that "it is possible that the numbers [from the two reports cited in the NGISC final report] may understate the extent of the problem," as one aspect of problem and pathological gambling is concealing the extent of one's gambling (pp. 4-9). The commission further categorized problem and pathological gamblers as either "lifetime" (those who have met the criteria at any point in their lifetime) or "past year" (those who have met the criteria in the past twelve months) gamblers (pp. 4-4). Because pathological gambling is characterized as a chronic disorder, the "lifetime" prevalence rates seem to be most relevant as measures, as the diagnostic criteria do not require that a person meet the criteria within a specific timeframe, such as one year. See NORC Report, 21.
50. NORC Report, 30-31, 56-57; NGISC, *Final Report*, 7-16 (reporting that over 20 percent of Gamblers Anonymous members have filed for bankruptcy at least once). See also "Riches to Rags: Debt among Iowa Gambling Treatment Program Participants," *Wager* 7 (45) (November 6, 2002) (reporting high rates of bankruptcy filings among participants in the Iowa Gambling Treatment Program).
51. NGISC, *Final Report*, 7-21.
52. NORC Report, 29-31; Lesieur, "Costs and Treatment of Pathological Gambling," 155-56; NGISC, *Final Report*, 7-21 (stating that 31 percent of lifetime pathological gamblers and 30 percent of past-year pathological gamblers reported their health to be poor or fair within the last year). A recent study indicated that problem gamblers may face a heightened risk of cardiac arrest due to increased stress and hypertension. See "The Hearty Gambler: How Gambling Affects Health," *Wager* 8 (4) (January 22, 2003).
53. NGISC, *Final Report*, 7-25. According to the council, "the suicide rate among pathological gamblers is higher than for any other addictive disorder." The correlation between problem or pathological gambling and suicide rates may be less than clear, however. Other factors, such as a person's race or a community's economic vitality, may have a greater impact on suicide rates than does the presence of casinos. See NORC Report, 54 (noting the difficulty in establishing a causal relationship between problem or pathological gambling and perceived consequences). Yet individuals with gambling problems and suicidal tendencies often report gambling as the cause of suicidal ideation, and some studies have found a correlation between gambling problems and suicide rates. See "Gambling: A Life or Death Issue?" *Wager* 8 (24) (June 11, 2003).
54. NGISC, *Final Report*, 7-21; see also Lesieur, "Costs and Treatment of Pathological Gambling," 155-56. NORC Report, 59-60.
55. See National Research Council, *Pathological Gambling*, 5-2 (summarizing studies of the social costs of problem and pathological gambling); "Problem Gambling and Intimate Partner Violence," *Wager* 8 (7) (February 12, 2003). Nearly one-quarter of women reporting they were the victims of intimate partner violence stated that their abusers were problem gamblers. The study found that women with intimate partners who were problem gamblers were ten times more likely to suffer violence at the hands of their partner. "Problem Gambling and Intimate Partner Violence."

56. A problem gambler costs society $5,130 over the course of his or her lifetime. NORC Report, 52–53; see also Lesieur, "Costs and Treatment of Pathological Gambling," 155–56.
57. NORC Report, 53–54. Several studies of state-by-state impacts employ a similar approach. For example, in a 1995 study of the economic impacts of Indian gaming in Wisconsin, researchers used three levels of estimation of the economic costs of "compulsive" or "problem" gamblers: for the "low estimate," a cost of $6,500 for each problem gambler; for the "medium range," a cost of $13,000; and for the "high range," a cost of $18,500. Multiplied by approximately 25,000 (based on the assumption that tribal casinos in Wisconsin have led 0.7 percent of the state's adult population, or about 25,000 people, to become problem gamblers), the study estimated that Indian gaming caused social costs ranging from the "low" estimate of $160 million to the "high" estimate of $450 million each year. See Thompson, Gazel, and Rickman, *Economic Impact of Native American Gaming in Wisconsin.*
58. NGISC, *Final Report,* 4–4; Lesieur, "Costs and Treatment of Pathological Gambling," 155; Earl L. Grinols, "Casino Gambling Causes Crime," *Policy Forum* 13 (2) (2000) ("The latent propensity [toward pathological gambling] becomes overt when the opportunity to gamble is provided and sufficient time has elapsed for the problem to manifest").
59. NORC Report, 3, 6. At the same time, though, the percentage of Americans gambling in the past year increased only slightly, from 61 percent in 1975 to 63 percent in 1998. Ibid., 7. As the Harvard Project on American Indian Economic Development pointed out, "together, these findings suggest that while people are experimenting with gambling, this experimentation has not turned people into habitual or problem gamblers." Spilde, Taylor, and Grant, *Tribal Government Gaming in Oklahoma,* 48.
60. In 1975, although there was concern about "compulsive gambling," little research had been conducted on its prevalence. In 1980, the American Psychiatric Association published its third edition of the *Diagnostic and Statistical Manual* (DSM-III), which included a systematic approach to diagnosing pathological gambling. In the 1980s, researchers developed the South Oaks Gambling Screen, a twenty-item scale based on the DSM-III's new criteria, meant to screen for gambling problems in clinical populations. See NORC Report, 12–13. As the growth in legalized gambling led to questions about gambling problems in the general population rather than clinical populations, measures of pathological gambling changed as well. For its 1999 report to the NGISC, the NORC developed a new screening tool based on the DSM-IV criteria: the NORC DSM Screen for Gambling Problems, or NODS. The NORC study used this seventeen-question screen to measure the prevalence of problem and pathological gambling in the nation's general population. Ibid., 15–22.
61. NGISC, *Final Report,* 4–17. This may not be as straightforward a causal factor as it first appears. As the NORC study notes, the "medicalization" of pathological gambling in recent years has spurred increasing awareness of and attention to gambling-related problems. NORC Report, 12. This fact may account for part of any increase in the number of people diagnosed or self-identifying as problem or pathological gamblers. As the NORC noted, further research is required for a meaningful comparison of the 1975 and 1998 measures of problem and pathological gambling. Ibid., 6.

62. Spilde, Taylor, and Grant, *Tribal Government Gaming in Oklahoma,* 48. As one study put it, "in light of the large extent to which gambling has been legalized in America over the past few decades, the failure to find an obvious pattern of increasing prevalence of pathological gambling should raise serious doubts about just how likely the disorder is to be triggered by increasing opportunities to gamble." Public Sector Gaming Study Commission, *Gambling Policy and the Role of the State: An Assessment of America's Gambling Industry and the Rights and Responsibilities of State Governments* (Tallahassee: Florida Institute of Government, Florida State University, March 2000), 48 (cited in Spilde, Taylor, and Grant, *Tribal Government Gaming in Oklahoma,* 47).
63. See John Warren Kindt, "Increased Crime and Legalizing Gambling Operations: The Impact on the Socio-Economics of Business and Government," *Criminal Law Bulletin* 43 (1994): 538–55. Relying both on studies linking problem and pathological gambling to crime and on studies linking casinos to crime, one researcher unequivocally concluded that "casino gambling causes significant increases in crime." Grinols, "Casino Gambling Causes Crime" (discussing his own research concluding that, in 1996, "casinos accounted for 10.3 percent of the observed violent crime and 7.7 percent of the observed property crime in casino counties").
64. See William N. Thompson, Ricardo Gazel, and Dan Rickman, *Casinos and Crime in Wisconsin* (Milwaukee: Wisconsin Policy Research Institute, 1996), 2–6 (describing inconsistent results of empirical studies of crime and legalized gambling); Ronald George Ochrym, "Street Crimes, Tourism, and Casinos: An Empirical Comparison," *Journal of Gambling Studies* 6 (2) (1990): 127; Kindt, "Increased Crime and Legalizing Gambling Operations." In 1996, an influential study conducted in Wisconsin, comparing crime rates in counties with and without casinos, indicated a 13 percent increase in burglaries in counties with casinos but no significant relation between casinos and other "major crimes," including murder, rape, robbery, aggravated assault, and larceny. The study's authors nevertheless concluded that "the introduction of casinos has had a pronounced effect upon the safety and security of Wisconsin residents" and recommended that Wisconsin policymakers accordingly limit legalized gambling within the state. See Thompson, Gazel, and Rickman, *Casinos and Crime in Wisconsin,* 18.
65. Rand, "There Are No Pequots;" Rand and Light, "Raising the Stakes." See also William J. Miller and Martin D. Schwartz, "Casino Gambling and Street Crime," in Frey, *Gambling: Socioeconomic Impacts and Public Policy,* 126 ("Only rarely is any evidence offered to support the claim that casino gambling increases street crime").
66. NGISC, *Final Report,* 7–13; Miller and Schwartz, "Casino Gambling and Street Crime," 126 ("Simply, any event that brings together large numbers of people in one spot offers the potential to increase both the crime level and the infrastructure costs to the local taxpayers").
67. Miller and Schwartz, "Casino Gambling and Street Crime."
68. Taylor, Krepps, and Wang, *National Evidence,* 26–28.
69. To control for changes in crime rates that would have occurred anyway, the four models attempt to identify changes that occurred in specific years in both communities with and without casinos. Thus, Model 0 included only the variable of community; Model 1 included the variables of community and casino; Model 2, community and year; and Model 3, community, year, and casino. "In effect, the

sequence of the model development series serves to control for changes that occur in communities independently of whether casinos are becoming more accessible to them." NORC Report, 69.

70. Ibid., 71. The study found small changes in the rates of crimes such as burglary and assault, ranging from a 7 percent decrease (in burglaries) to a 3 percent increase (in robberies). The NORC study cautioned, however, that "this is not to say that there is no casino-related crime or the like; rather, these effects are either small enough as not to be noticeable in the general wash of the statistics, or whatever problems that are created along these lines when a casino is built may be countered by other effects." Ibid., 70.
71. Taylor, Krepps, and Wang, *National Evidence*, 26–27. The authors found no discernible effects for larcenies, burglaries, assaults, and FBI crime indexes. As did the NORC study, Taylor, Krepps, and Wang cautioned that further research is required to fully test this hypothesis.
72. NGISC, *Final Report*, 7–12.
73. See U.S. Census Bureau, *Social and Economic Characteristics, American Indians and Native Alaska Areas* (1990) (hereinafter cited as 1990 U.S. Census, *American Indians*). Of the twenty-five largest Indian tribes in the United States, the Tohono O'odham Tribe in Arizona had the highest individual poverty rate at 55.8 percent, while the Tlingit Tribe in Alaska had the lowest at 15.8 percent. Twenty-seven percent of Native American families fell below the poverty level, roughly three times the average rate.
74. The median U.S. family income was approximately $35,000 in 1990, compared to approximately $21,000 for Native American families. As with poverty rates, the variation between tribes can be considerable. For example, the Tohono O'odham Tribe's median family income was approximately $10,000, while the Osage Tribe's was three times greater. 1990 U.S. Census, *American Indians*. According to the 1990 Census, Native populations trailed the general U.S. population in terms of high school and post-secondary degrees.
75. Center for Disease Control Office of Minority Health, "American Indian and Alaska Native Populations," http://www.cdc.gov/omh/populations/AIAN/AIAN.htm.
76. Lawrence A. Greenfield and Steven K. Smith, *American Indians and Crime* (Washington, DC: U.S. Department of Justice, 1999).
77. U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (Washington, DC, July 2003), 34–35.
78. U.S. Census Bureau, *Social and Economic Characteristics, American Indians and Native Alaska Areas* (2000) (hereinafter cited as 2000 U.S. Census, *American Indians*). See also Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses* (Cambridge: Harvard Project on American Indian Economic Development, January 5, 2005), http://www.ksg.harvard.edu/hpaied/pubs/pub-151.htm. In 1998, President Bill Clinton decried continuing poverty and unemployment on reservations: "While some tribes have found new success in our economy, too many more remain caught in a cycle of poverty, unemployment, and disease. . . . More than a third of all Native Americans still live in poverty. With unemployment at a 28-year low, still on some reservations more than 70 percent of all adults do not have regular work." Bill Clinton, "Remarks by the President to White House Conference on

Building Economic Self-Determination in Indian Communities" (Washington, DC, August 10, 1998).

79. "American Indian/Alaska Native Heritage Month," Press Release, October 22, 2001, http://www.census.gov/Press-Release/www/2001/db01fff15/html.
80. NGISC, *Final Report*, 6-2.
81. "Indian Gaming's Economic Muscle to Be Tested," *KTVU News* (CA), May 21, 2004, http://www.ktuv.com/station/3333526/detail.html (quoting Paula Lorenzo, tribal chair, Rumsey Band of Wintun Indians).
82. Maria Napoli, "Native Wellness for the New Millennium: The Impact of Gaming," *Journal of Sociology and Social Welfare* 29 (1) (March 2002).
83. James Doran, "Casinos Deal a Winning Hand to Native Tribe Members," *Times* (London), September 6, 2003, 52 (quoting Olivia McMahon, a croupier at the tribe's casino).
84. Kristen A. Carpenter and Ray Halbritter, "Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming," *Gaming Law Review* 5 (2001): 323. In 1999, the tribe returned $2.6 million in federal funds to the BIA. Brian Patterson, "Preserving the Oneida Nation Culture," *St. Thomas Law Review* 13 (2000): 121.
85. Dennis McAuliffe, Jr., "Casinos Deal Indians a Winning Hand," *Washington Post*, March 5, 1996, A1 (quoting Ruby Collett).
86. Daniel J. Alesch, *The Impact of Indian Casino Gambling on Metropolitan Green Bay* (Milwaukee: Wisconsin Research Policy Institute, September 1997), 1, http://www.wpri.org/Reports/Volume10/Vol10no6.pdf. The study notes that tribal gaming has not been a panacea for all issues facing the tribe, however, and reports that the tribes' relations with state and local officials at times have been strained.
87. Chuck Nowlen, "Casinos Bring Benefits," *Capitol Times* (Madison, WI), January 20, 2004.
88. NGISC, *Final Report*, 6-15 (quoting Carrel Campbell, secretary of the Prairie Island Indian Community).
89. Indian Gaming: Oversight Hearing on the Indian Gaming Regulatory Act before the Senate Committee on Indian Affairs (July 25, 2001) (statement of David LaSarte), http://indian.senate.gov/107_hrg.htm.
90. NGISC, *Final Report*, 6-15 (quoting Anthony R. Pico, chairman of the Viejas Band of Kumeyaay Indians). Across California, Indian gaming has created jobs for both Natives and non-Natives. See Lou Hirsh and Jim Sams, "Tribal Employment Is Growing," *Desert Sun* (Palm Springs, CA), June 2, 2004 (reporting that tribes in California employ more than 44,000 employees). "It means fewer people on welfare and ultimately more people paying taxes," said Jacob Cain, the executive director of the California Nations Indian Gaming Association. Ibid.
91. Nowlen, "Casinos Bring Benefits" (quoting Lisa Pugh of the Coalition for the Fair Indian Gaming and Revenue Sharing Agreements).
92. Jacob LoneTree, Testimony before the Subcommittee on Indian Gambling, National Gambling Impact Study Commission, Las Vegas, NV (November 9, 1998).
93. Napoli, "The Impact of Gaming." See also Rand, "There Are No Pequots."
94. See Patterson, "Preserving the Oneida Nation Culture."
95. Spilde, Taylor, and Grant, *Tribal Government Gaming in Oklahoma*, 41.
96. Brett Pulley, "Tribes Weighing Tradition vs. Casino Growth," *New York Times*, March 16, 1999, A1 (quoting Roy Montoya, chief administrator, Santa Ana Pueblo).

97. Indian Gaming: Oversight Hearing (statement of Ernest L. Stevens, Jr.).
98. Doran, "Casinos Deal a Winning Hand to Native Tribe Members," 52.
99. See Kathryn R.L. Rand and Steven A. Light, "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity," *Virginia Journal of Social Policy and the Law* 4 (1997): 419–24 (discussing intratribal disputes related to gaming).
100. James May, "California: To Be Indian, or Not To Be," *Indian Country Today*, August 9, 2000.
101. Michelle DeArmond, "Man Sues to Gain Admission to Inland Tribe," *Press-Enterprise* (Riverside, CA), January 15, 2004.
102. Louis Sahagun, "Gaming Tribe Seeks to Expel Tenth of Its Own," *Los Angeles Times*, February 1, 2004.
103. James M. Odato, "Order Imperils Proposed Casino," *Times Union* (Albany, NY), February 14, 2004.
104. See Mark Siebert, "Casino Reopening Begins Tribe's Healing," *Des Moines Register*, January 1, 2004; Mark Siebert, "Welcome Mat Is Out at Meskwaki Casino," *Des Moines Register*, December 31, 2003; William Petroski, "Casino Closure Troubles Midwest's Indian Leaders," *Des Moines Register*, June 6, 2003.
105. Pulley, "Tribes Weighing Tradition;" see also Tim Giago, "New Gaming Culture Rises in Indian Country" (op-ed), *Grand Forks Herald* (ND), June 30, 2004, 3B.
106. Washington Matthews, "Noqoilpi, the Gambler: A Navajo Myth," *Journal of American Folklore* 2 (5) (1889).
107. Roberta John, "No Gambling on Navajo Myths," *Navajo Times*, August 14, 1997. Said Navajo psychologist Wilson Aronlith about the conflict between gambling and traditional Navajo spirituality: "It was told that if you own sacred items, such as a medicine bundle, prayer feathers, and corn pollen, and you gamble [while you possess such objects], you will pay negative consequences for it. It's a pleasure to win, but when you reach old age, you will suffer for it because you carried ceremonial objects. My grandmother told me it can make you go blind so that's why I don't go to casinos."
108. Tim Vanderpool, "Ridin' the Rez: The Trials of Indian Tourism," *Christian Science Monitor*, February 23, 2004 (quoting Ned Norris, Jr., Tohono O'odham vice chairman).
109. Pulley, "Tribes Weighing Tradition."
110. See, for example, "Seminole Casino Plan Inspires Hope and Fear," *New York Times*, December 29, 2003 (describing tribal members' concerns that plans for the Seminole Hard Rock Hotel and Casino carry too great a financial risk).
111. Associated Press, "Tribes Look Beyond Casinos to Diversify Revenues," March 29, 2003, http://www.foxnews.com/story/0,3566,82498,00.html. The number of Native-owned businesses increased by more than 80 percent during the 1990s. See Tim Vanderpool, "Tribes Move beyond Casinos to Malls and Concert Halls," *Christian Science Monitor*, October 22, 2002.
112. See Associated Press, "Tribes Look beyond Casinos to Diversify Revenues"; Mississippi Band of Choctaw Indians, "Overview of Tribal Business," http://www.Choctaw.org/economics/tribal_business_overview.htm. See Oneida Nation of Wisconsin, "Development and Enterprises," http://www.oneidanation.org/enterprises/enterprises.shtml; Richard J. Ansson, Jr., and Ladine Oravetz, "Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They

Continue to Strive for Economic Diversity?" *Kansas Journal of Law and Public Policy* 11 (2002): 448.

113. See Matt Krantz, "Indian Tribe Bets on Diversification for Longevity," *USA Today*, January 30, 2004, 5B.
114. The Honorable Wayne Taylor, Jr., Testimony before the National Gambling Impact Study Commission, Tempe, AZ (July 30, 1998) (chair of the Hopi Tribe); see also Giago, "New Gaming Culture."
115. A 2000 Associated Press analysis of federal unemployment, poverty, and public assistance records showed that although tribal gaming operations had varied success, the unemployment rates on many reservations remained far above the national average. David Pace, "Casino Revenue Does Little to Improve Lives of Many Indians, Study Shows," *Milwaukee Journal Sentinel*, September 1, 2000, 8A. For example, the Seminole Tribe's Hollywood Gaming Center near Miami generates more than $100 million per year, but the reservation unemployment rate was still 45 percent in 1997. "Snake Eyes for Tribes: Indians See Little from $8 Billion in Gambling Revenue," *ABC News.com*, August 31, 2000, http://abcnews.go.com/sections/us/DailyNews/casinos000831.html. For similar criticisms of Indian gaming, see Donald L. Barlett and James B. Steele, "Wheel of Misfortune," *Time*, December 16, 2002, 47–49; Michael Rezendes, "Few Tribes Share in Casino Windfall," *Boston Globe*, December 11, 2000, A1.
116. Bill Lueders, "Buffaloed: Casino Cowboys Take Indians for a Ride," *Progressive* (August 1, 1994) (quoting Clyde Bellecourt, a founding member of the American Indian Movement).{\Rear}

## CHAPTER 5. STORIES OF COMPROMISE

1. Joseph M. Kelly, "Indian Gaming Law," *Drake Law Review* 43 (1994): 521 (quoting "Federal Officials Refute Trump Allegations," PR Newswire, October 5, 1993); see also Kim Isaac Eisler, *Revenge of the Pequots: How a Small Native American Tribe Created the World's Most Profitable Casino* (New York: Simon & Schuster, 2001), 207.
2. David Melmer, "Great Plains Leaders Flex Muscle, Insist That NCAI Include Their Agenda," *Indian Country Today*, November 22, 2000, http://www.indiancountry.com/articles/lakota-2000-11-22-01.html.
3. Elsewhere, we introduced the Plains Model of Indian gaming and presented tribal sovereignty as a measure of success of tribal gaming. See Kathryn R. L. Rand and Steven A. Light, "Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota," *Gaming Law Review* 5 (2001): 336–39. Rand further developed the model in Kathryn R. L. Rand, "There Are No Pequots on the Plains: Assessing the Success of Indian Gaming," *Chapman Law Review* 5 (2002): 47–86. "There Are No Pequots" contrasted the Pequot Model and the Plains Model to highlight the wide variation among gaming tribes and further developed the idea that tribal sovereignty should be used to assess the success of tribal gaming as public policy. In Part III, we demonstrate how the experiences of the Pequots and Plains Tribes evidence a specific proposal for developing effective Indian gaming law and policy.
4. H.R. Rep. No. 98–43, 98th Congress (1983), 2. For a detailed account of the tribe's history, see Paul Pasquaretta, *Gambling and Survival in Native North America*

(Tucson: University of Arizona Press, 2003), 3–108. For a brief and easily accessible history of the tribe, see Mashantucket Pequots, "Tribal Nation History," http://www.foxwoods.com/pequots/mptn_history.html. For a straightforward discussion of tribes in Connecticut, including the Pequots, see Stephen L. Pevar, *Rights of Indians and Tribes*, 3d ed. (Carbondale: Southern Illinois University Press, 2002), 292–97.

5. See Laurence M. Hauptman, "The Pequot War and Its Legacies," in Laurence M. Hauptman and James D. Wherry, eds., *The Pequots in Southern New England* (Norman: University of Oklahoma Press, 1990), 71–73. The Pequot War lasted from 1634 to 1637. It consisted of a series of skirmishes between the settlers and the Pequots, culminating in a final battle on May 26, 1637, in which English soldiers and their Native American allies attacked a Pequot fort while many of the Pequot warriors were away. The infamous final battle resulted in a massacre of between three hundred and seven hundred children, women, and elderly.
6. H.R. Rep. No. 98–43, 2; Hauptman, "The Pequot War," 76. As a result of this split, the Pequots became known as members of either the Eastern Pequots or the Western Pequots, depending upon the location of their captor tribes.
7. H.R. Rep. No. 98–43, 2.
8. Jack Campisi, "The Emergence of the Mashantucket Pequot Tribe, 1637–1975," in Hauptman and Wherry, *The Pequots in Southern New England*, 132–33. The Pequots' land sold for $8,091.17.
9. Ibid. In 1935, a state survey reported nine tribal members living on the Ledyard reservation and another thirty-three tribal members living off the reservation.
10. Ibid., 135.
11. Ibid., 137–38.
12. Ibid., 138.
13. Ibid., 139.
14. Ibid., 132, 140; see also Mashantucket Pequots, "Tribal Nation History."
15. 25 U.S.C. § 177 (2001). See Campisi, "Emergence," 140. The federal approval must come in the form of treaty or convention entered into pursuant to the Constitution. 25 U.S.C. § 177.
16. Pasquaretta, *Gambling and Survival*, 94.
17. See Mashantucket Pequot Indian Claims Settlement Act of 1983, 25 U.S.C. §§ 1751–60 (2001); see also H.R. Rep. No. 98–43, 11 (noting that extension of federal recognition to a tribe through a statute was unusual but desirable when settling claims such as the Pequots'). Pasquaretta, *Gambling and Survival*, 97–98.
18. Brett D. Fromson, *Hitting the Jackpot: The Inside Story of the Richest Indian Tribe in History* (New York: Atlantic Monthly Press, 2003), 88–89.
19. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1029 (2d Cir. 1990).
20. Fromson, *Hitting the Jackpot*, 121–27.
21. Micah Morrison, "Casino Royale: The Foxwoods Story," *Wall Street Journal*, August 21, 2001, A18; see also Mashantucket Pequots, *Gaming at Foxwoods*, http://www.foxwoods.com/Gaming/GamingatFoxwoods/.
22. Fred Carstensen et al., *The Economic Impact of the Mashantucket Pequot Tribal Nation Operations on Connecticut* (Storrs: Connecticut Center for Economic Analysis, 2000), 1. In 2003, the combined revenue of Foxwoods and the Mohegan Sun, Connecticut's second tribal casino, was about $2 billion. Alan Meister, *Indian Gaming Industry Report, 2004–2005 Ed.* (Newton, MA: Casino City Press, 2004),

11. Together, the Pequots and the Mohegans paid the state $387.2 million in the 2002–2003 fiscal year. See, for example, "Casinos Report Slot Revenues," *Hartford Courant,* July 18, 2003, B5.

23. Fromson, *Hitting the Jackpot,* 150–52, 206; Jules Wagman, "Indian Tribe Strikes Gold in Casino World," *Milwaukee Journal Sentinel,* February 25, 2001, 6E. On the Foxwoods Web site, a young tribal member is quoted as saying, "[The tribal elders] said, 'Just pursue your education, and you'll have a career already set up for you.' I'm going straight through college to get every kind of degree I can. And I want to be a lawyer." Mashantucket Pequots, "Tribal Members Reflect on the Dream," http://www.foxwoods.com/pequots/mptn_history_dream.html (alteration in original).

24. See Carstensen et al., *Economic Impact* ("With its diverse business enterprises and reinvestments of capital in Connecticut, the Mashantucket Pequot Tribal Nation has become an economic growth marvel for the State and the immediate region"), 2, 4. Nearly three-quarters of Foxwoods' patrons come from outside of Connecticut. Ibid., 2. State revenue, received in the form of direct payments from the Pequots' and the Mohegans' casinos, has made money raised from legalized gambling the third-largest source of revenue in Connecticut's budget. Lyn Bixby, "Gambling Now State's 3rd-Best Bet," *Hartford Courant,* March 11, 2001, A1.

25. Although the plaintiffs were successful in district court, they lost on appeal. Connecticut v. United States Department of Interior, 228 F.3d 82, 84 (2d Cir. 2000), cert. denied, 532 U.S. 1007 (2001). The plaintiffs argued that if the land were placed in trust, and thus, out of the reach of state and local taxation, they would lose tens of the thousands of dollars in tax revenues. Ibid., 85.

26. Kelly, "Indian Gaming Law," 521 (quoting "Federal Officials Refute Trump Allegations").

27. Pasquaretta, *Gambling and Survival,* 101.

28. Jeff Benedict, *Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino* (New York: Harper Collins, 2000). Benedict's book reportedly has been optioned for a Hollywood film. Joel Lang, "Reading Jeff Benedict; Should You Believe His Revelations about the Pequots and the Making of the World's Largest Casino?" *Hartford Courant,* December 3, 2000, 5.

29. Benedict, *Without Reservation,* 144–50. Benedict's book opens with the story of future Pequot tribal chair Richard Hayward filing for a marriage license in 1969 and choosing to identify himself as "white" rather than "Indian" (pp. 1–4). But see Pasquaretta, *Gambling and Survival,* 104 (describing three subgroups within the Pequots based on past intermarriage, including "black" and "white" Pequots); Brent Staples, "The Black Seminole Indians Keep Fighting for Equality in the American West" (op-ed), *New York Times,* November 18, 2003 ("Black Americans are as likely to be descended from Native Americans as from Africans and Europeans"); David E. Wilkins, "Red, Black, and Bruised," *Indian Country Today,* October 21, 2003, http://www.fourdirectionsmedia.com/?1066749827 ("I hope that tribal membership deliberations on this crucial and complicated issue [of recognizing "black" Indians] will take full stock of the wide range of historical and social developments and interpersonal relationships that have shaped and determined each First Nation's unique population and social character today").

30. Lang, "Reading Jeff Benedict."
31. Benedict, *Without Reservation*, 353; see also Jeff Benedict, "This Land Is Not Your Land," *Hartford Courant*, December 10, 2000, 4.
32. Lang, "Reading Jeff Benedict." For example, Lang noted Benedict's conceit of re-creating past events in unlikely detail. "Most incredibly, he claimed in the book's bibliography to have done some 650 interviews and obtained 50,000 pages of documents from town halls, libraries, archives and courts. He had begun his research in June 1998 and finished writing his 358-page book 21 months later. He had done all this work while enrolled in the New England School of Law."
33. Ellen Barry, "A War of Genealogies Rages," *Boston Globe*, December 12, 2000, A1. Ellen Barry, "Lineage Questions Linger as Gaming Wealth Grows," *Boston Globe*, December 12, 2000.
34. Eisler, *Revenge of the Pequots*.
35. As one reviewer put it, Eisler's book "lacks some of the gratuitous detail (and the sensationalism) of [Benedict's book]. . . . Mr. Eisler retains a healthy skepticism about the Mashantucket quest for tribal recognition, while sympathizing with the desire of a group of perennial have-nots to strike it rich when the law gave them an opening." Philip Burnham, "The Enterprising Pequots and How Their Casinos Enraged, Grew," *Washington Times*, February 11, 2001, B8. The *Washington Post* called Eisler "a thorough reporter." Jonathan Yardley, "A Game of Three-Card Monte?" *Washington Post*, February 8, 2001, C2. Additionally, the *Boston Globe* proclaimed Eisler's book "free of such dirt. . . . Unlike the case with Benedict's work, one need not ponder the sources or veracity of material contained in Eisler's work." Sean P. Murphy, "Well-Told Tale of a Battle against the Odds," *Boston Globe*, March 12, 2001, B8.
36. Kim Isaac Eisler, "Why I Wrote a Book about a Tribe That Hit the Jackpot," *Hartford Courant*, February 25, 2001, C1. To Eisler himself, it seemed "slightly unlikely" that there were Native Americans in Connecticut at the turn of the twenty-first century. Eisler refers to the Pequots as a "tribe"—in quotation marks—explaining that "whether or not you accept their genealogy, the 'tribe' had been lost."
37. Eisler, *Revenge of the Pequots*, 242.
38. Eisler, "Why I Wrote a Book." Eisler explained: "Gale Norton, the new secretary of the interior [for the Bush Administration], is a protégé and disciple of James Watt. It was Watt who successfully urged President Reagan to veto the Pequot recognition bill in 1983. Watt not only believed that no new federal reservations should be created, he would have been delighted to close down the existing ones and to integrate American Indians into mainstream American society. I suspect Norton shares that view."
39. A *Wall Street Journal* review of Eisler's *Revenge of the Pequots* concluded, "Bet by bet, the Indians are scalping customers for millions." Allan T. Demaree, "Betting on a Casino, and Winning Big," *Wall Street Journal*, February 8, 2001, A20. An editorial in the *Providence Journal* asserted that the Mashantucket Pequot Tribe "is essentially a creation of the casino, rather than the other way around, insofar as the tribe had only a few active members until it hit the political lottery with its casino privilege." Chris Powell, "Pequot Museum May Feed Mistaken Guilt" (op-ed), *Providence Journal*, January 2, 2001, B4; see also Bill Bell, "Against All Odds: How Connecticut's Pequot Tribe Hit the Jackpot," *New York Daily News*, February 11, 2001, 20 (calling Eisler's book "a terrific story, with dramatic twists, political intrigues, hints

of major mischief, shadowy manipulators, an unlikely rescuer and barrels and barrels of tax-free cash"); Bob Dowling, "The Making of a Casino Nation," *Business Week*, March 12, 2001, 22E4; Wagman, "Indian Tribe Strikes Gold" ("The impoverished, nearly extinct Pequots became a tribe that can stand up, dollar for dollar, to any Arab oil sheikdom"); Jonathan Yardley, "Success Story or a Scam?" *Chicago Sun-Times*, February 18, 2001, 15.

In their briefs accompanying a federal lawsuit, the State of Connecticut and the towns of Ledyard, North Stonington, and Preston similarly juxtaposed the Pequots' wealth with their "Indianness" in arguing that the tribe should be barred from acquiring further trust lands. As the Second Circuit explained, "The Connecticut plaintiffs contend that the Indian canon of construction has no application in this case—not to these Indians—because of the Mashantucket Pequots' tremendous wealth." The court went on to reject the argument, reasoning that tribal disadvantage was not a prerequisite to application of familiar doctrines of federal Indian law, and, even if it were, the Pequots were sufficiently disadvantaged at the time the statute in question was enacted. Connecticut v. United States Department of Interior, 228 F.3d at 92–93.

40. Barry, "Lineage Questions Linger."
41. Lang, "Reading Jeff Benedict." Indeed, Benedict characterized the tribe as a "Goliath," with the nearby towns and Connecticut being "David." "They all were inferior in terms of power and ability to the Mashantucket tribe." Ibid.
42. Eisler, "Why I Wrote a Book." A third book-length exposé, Brett Fromson's *Hitting the Jackpot*, was published in 2003. A former financial reporter for the *Washington Post* and *Fortune* magazine, Fromson's account largely refrained from Eisler's editorializing and Benedict's muckraking. Reviewers called *Hitting the Jackpot* "deftly documented" (John P. Mello, Jr., "Pequots' Rise to Foxwoods Fortune Started Humbly," *Boston Globe*, October 5, 2003, D2) and "well-researched and tightly written" (Rick Green, "'Money Is What This Tribe Is About,'" *Hartford Courant*, September 21, 2003). As to the Pequot's authenticity, Fromson wrote, "There has been considerable public skepticism about the genealogical authenticity of today's Pequots. Writers have alleged that none of them descend from the original Pequots. This question cannot be answered with complete certainty without an independent genealogical investigation, and today's tribe will not allow such an inquiry for both political and privacy reasons. It is undeniable, however, that today's Pequots have only the most attenuated genealogical connections to the Pequots of yore" (p. 220). Despite the relative circumspection of this writing, however, in interviews following the book's release, Fromson's comments mimicked Benedict's and Eisler's unequivocal takes on the Pequots. "This is so bogus. This is complete nonsense," said Fromson. "The Pequots were not a tribe" (Mello, "Pequots' Rise to Foxwoods Fortune"). Some reviewers questioned the "spin" of Fromson's account, even while acknowledging the book's documentation. "One wouldn't know from reading this book whether the rags-to-riches success is common in Indian country (it's not, contrary to public myth)," said one (Philip Burnham, "How One 'Tribe' Struck it Rich," *Washington Times*, December 21, 2003, BO6). In reference to Fromson's charges that some Pequot leaders have questionable or even criminal histories, another reviewer asked, "This is unique? Maybe Fromson should look at some of Connecticut's elected leaders and politicians" (Green, "Money").

43. *60 Minutes II*, "Are Pequots Really Pequots?" CBS television broadcast, May 23, 2000. The National Indian Gaming Association published two reviews of Benedict's book, both highly critical of his research and conclusions. See "A Novel Attack on Indian Gaming," *NIGA Newsletter*, May 2000, http://www.indiangaming.org/library/newsletters/newsletter_5-00.html.
44. Mary Jane Schneider, *North Dakota Indians: An Introduction* (Dubuque, IA: Kendall/Hunt, 1994), 55, 69.
45. Although North Dakota has five reservations within the state's borders, technically there are only four North Dakota tribes: the Spirit Lake Nation Sioux, Standing Rock Sioux, Three Affiliated Tribes, and Turtle Mountain Band of Chippewa. The fifth reservation, that of the Sisseton-Wahpeton Sioux, straddles the North Dakota–South Dakota border, but the tribe is considered a South Dakota tribe because its tribal government offices are located in that state. Schneider, *North Dakota Indians*, 137. We include the Sisseton-Wahpeton Sioux Tribe because it operates a casino in North Dakota.
46. Conrad W. Leifur, *Our State North Dakota* (New York: American Book Co., 1953), 139–40; *Encyclopedia of North Dakota Indians: Tribes, Nations, Treaties of the Plains and West* (St. Clair Shores, MI: Somerset Publishers, 2001), 96. Although tribes occupying three of North Dakota's five reservations are commonly referred to as Sioux, this is something of a misnomer. The "Seven Council Fires" tribes—the Dakota, Lakota, and Yankton-Yanktonai (sometimes referred to as Nakota)—made up the Great Dakota Nation. Schneider, *North Dakota Indians*, 78–79. The tribes called themselves "kota" or allies. Clair Jacobson, "A History of the Yanktonai and Hunkpatina Sioux," *North Dakota History* (Winter 1980): 4. "Sioux" is a French derivation of a Chippewa word used to refer to the Dakota word "Natowesiwok," which means "enemies" or "snakes." The French, who encountered the Chippewa before the Dakota, heard the word as "Nadouessioux," which they shortened to "Sioux." Ibid.
47. Edward H. Spicer, *A Short History of the Indians of the United States* (Melbourne, FL: Krieger, 1969), 82–84.
48. Ibid., 84–85.
49. Elwyn B. Robinson, *History of North Dakota* (Fargo: North Dakota Institute for Regional Studies, 1966), 104.
50. Spicer, *Short History*, 85.
51. Robinson, *History of North Dakota*, 178.
52. Schneider, *North Dakota Indians*, 139. For a brief description of the tribe's reservation, see Mni Sose Intertribal Water Rights Coalition, "Spirit Lake Tribe Community Environmental Profile," http://www.mnisose.org/profiles/splake.htm.
53. Spirit Lake Nation, http://www.spiritlakenation.com/about.htm. The tribe owns 26,283 acres; allotted trust lands make up 34,026 acres; fee land makes up 184,451 acres; and 375 acres are owned by either the state or federal government. Ibid.
54. Schneider, *North Dakota Indians*, 147. For a brief description of the tribe, its history, and its reservation, see Mni Sose Intertribal Water Rights Coalition, "Standing Rock Sioux Tribe Community Environmental Profile," http://www.mnisose.org/profiles/strock.htm.
55. Mni Sose Intertribal Water Rights Coalition, "Sisseton-Wahpeton Sioux Tribe Community Environmental Profile," http://www.mnisose.org/profiles/sisseton.htm.

56. Leifur, *Our State North Dakota*, 111. Pierre Verendrye (1665–1749), a French-Canadian fur trader, arrived in North Dakota in 1738 and was the first known white man to visit the area. Ibid., 147; *Encyclopedia of North Dakota Indians*, 6.
57. Robinson, *History of North Dakota*, 20, 23.
58. Leifur, *Our State North Dakota*, 133.
59. Schneider, *North Dakota Indians*, 142.
60. Ibid., 143; see also MHA Nation, "Garrison Dam," http://www.mhanation.com/history/garrison_dam.shtml. For a discussion of the legal issues raised by the building of the Garrison Dam, see Raymond Cross, "Tribes as Rich Nations," *Oregon Law Review* 79 (2000): 962–80.
61. Schneider, *North Dakota Indians*, 142–43. For a brief description of the tribe, its history, and its reservation, see Mni Sose Intertribal Water Rights Coalition, "Three Affiliated Tribes of Fort Berthold Community Environmental Profile," http://www.mnisose.org/profiles/3affl.htm.
62. Robinson, *History of North Dakota*, 26.
63. Leifur, *Our State North Dakota*, 140.
64. Robinson, *History of North Dakota*, 26.
65. *Encyclopedia of North Dakota Tribes*, 143–44.
66. Schneider, *North Dakota Tribes*, 151–52. This notorious agreement is sometimes called the "Ten Cent Treaty" because the federal government's payment to the tribe was the equivalent of ten cents per acre of illegally taken land. Federal Emergency Management Agency (FEMA), "Turtle Mountain Band of Chippewa Indians," http://www.fema.gov/reg-viii/tribal/turtlebg.htm. In the 1980s, the federal government formally acknowledged the unfairness of the agreement. I
67. See FEMA, "Turtle Mountain Band."
68. Robert Lattergrass, Guest Lecture in Indian Gaming Law at the University of North Dakota School of Law (March 20, 2001).
69. Schneider, *North Dakota Indians*, 154. For a brief description of the tribe's reservation, see Mni Sose Intertribal Water Rights Coalition, "Turtle Mountain Band of Chippewa Indians Community Environmental Profile," http://www.mnisose.org/profiles/turtlemt.htm.
70. Schneider, *North Dakota Tribes*, 155.
71. North Dakota Indian Gaming Association (NDIGA), *Opportunities and Benefits of North Dakota Tribally Owned Casinos* (2000), 3. In the first half of the 1990s, state unemployment ranged from 3 to 6 percent. See Bureau of Labor Statistics, "Local Area Unemployment Statistics, North Dakota," http://data.bls.gov/cgi-bin/surveymost.
72. Lattergrass, Guest Lecture.
73. The 1992 compacts were scheduled to expire in 2002, but in 1999 the state's five gaming tribes negotiated uniform ten-year compacts with the state. David Melmer, "North Dakota Tribes Score a Coup with Gaming Compacts," *Indian Country Today*, December 20, 1999. Under the terms of the compacts, 10 percent of the tribes' Class III gaming revenue is directed toward diversified tribal economic development. Ibid. The new compacts, signed by Governor Ed Schafer, took effect in 2002. Under the new compacts, tribes could raise betting limits and offer roulette and slot machine tournaments. Dale Wetzel, "Tribes Reach Gambling Pact: Feds Must Approve Deal before It's Final," *Grand Forks Herald* (ND), September 4, 1999, 4. Aside from maintaining tribal gaming's recognized positive

economic impacts on the state, the impetus behind the negotiation of the new compacts was to allow the tribes to obtain long-term financing necessary to diversify tribal economic enterprises, particularly through tourism. Ibid. See also Brian Witte, "Tribal Chairmen Say Compacts Helped Casinos," *Grand Forks Herald* (ND), November 21, 2000, 8A.

74. See the Four Bears Casino & Lodge Web site, http://www.4bearscasino.com; Sky Dancer Hotel and Casino Web site, http://www.skydancercasino.com; Spirit Lake Casino and Resort Web site, http://www.spiritlakecasino.com; Prairie Knights Casino and Resort Web site, http://www.prairieknights.com; NDIGA, *Opportunities and Benefits* (2000), 1. At the time of this writing, the Turtle Mountain Band was exploring the possibility of opening an off-reservation casino in Grand Forks. The proposed casino would cost $15 million and house 1,000 slot machines and is expected to create 750 jobs, most of which would be filled by non-Native employees. See Tu-Uyen Tran, "Casino Campaign," *Grand Forks Herald* (ND), November 9, 2004, 1A.
75. NDIGA, *Opportunities and Benefits of North Dakota Tribally Owned Casinos* (1998), 3. Each of the state's gaming tribes belongs to the North Dakota Indian Gaming Association, as well as the regional Great Plains Indian Gaming Association. See generally Great Plains Indian Gaming Association, http://gpiga.org/home.htm. Both associations work with the National Indian Gaming Association to influence tribal gaming policy on state and federal levels, as well as to share information and expertise among tribes. See generally National Indian Gaming Association, http://www.indiangaming.org.
76. See, generally, NDIGA, *Opportunities and Benefits* (1998), 13.
77. Eduardo E. Cordeiro, "The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations," in Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles: UCLA American Indian Studies Center, 1993), 234. If the population density surrounding a tribal casino is low, there is little chance that the casino will bring significant "new" income for the tribe. The proximity of competing casinos and the regional propensity to gambling also influence casino success.
78. Mark Fox, Guest Lecture in Indian Gaming Law at the University of North Dakota School of Law (April 24, 2001), 4.
79. Ibid. With jobs come other economic and social benefits, Fox explained. "We have young people [for] the first time in their lives learning about work ethic[;] [l]earning . . . what even . . . a basic checking account is all about. We have people [who] are financing homes and cars. For the first time they have been able to do these positive things."
80. Stephen Cornell et al., *American Indian Gaming Policy and Its Socio-Economic Effects: A Report to the National Gambling Impact Study Commission* (Cambridge, MA: Economic Resource Group, 1998), 32–33, 49 (reporting that in 1995, one year after the tribe opened its casino, reservation unemployment dropped to less than 30 percent but noting that the degree of reduction may have been due in part to different tribal data collection procedures). See also Timothy Egan, "As Others Abandon Plains, Indians and Bison Come Back," *New York Times*, May 27, 2001. The tribe's casino also created another 123 jobs for non-Native employees in 1997. Cornell et al., *American Indian Gaming Policy*, 32.

81. Lattergrass, Guest Lecture.
82. NDIGA, *Opportunities and Benefits* (1998), 5. The Prairie Knights Casino employs 470 full-time workers, while the Four Bears, Sky Dancer, and Spirit Lake Casinos each employ 400 full-time workers. The Dakota Magic Casino employs 375 full-time workers. Dorreen Yellow Bird, "Researcher Says Gambling Is a Net Plus on Reservations," *Grand Forks Herald* (ND), September 3, 2000, 2C.
83. Cornell et al., *American Indian Gaming Policy*, 39.
84. Fox, Guest Lecture.
85. Lattergrass, Guest Lecture. Recently, as part of a long-term strategic plan, the Turtle Mountain Band invited a number of out-of-state businesses to partner with the tribe on such ventures as homebuilding, trucking, and automotive manufacturing. Susanne Nadeau, "Tribe Looks to Take Care of Business," *Grand Forks Herald* (ND), November 18, 2004, 2A.
86. NDIGA, *Opportunities and Benefits* (1998), 5; NDIGA, *Opportunities and Benefits* (2000), 3–9. The NDIGA estimates that 30 to 40 percent of new hires at the tribal casinos previously were either unemployed or receiving public assistance. Dorreen Yellow Bird, "How Gaming Pays Off," *Grand Forks Herald* (ND), April 1, 2001, 1D (quoting Alan Austad, consultant to the NDIGA). Other states, such as Wisconsin, have experienced similar reductions in public entitlements payments as a direct result of tribal gaming. See, for example, "Casinos Cut Welfare Rolls in Some Tribes," *Grand Forks Herald* (ND), September 2, 2000, 3A. Like similar studies we discuss in Chapter 4, the 2000 NDIGA report categorizes the economic impacts of tribal gaming in the state according to direct and secondary impacts. Direct impacts "are those changes in output, employment, or income that represent the initial or direct effects" of gaming. NDIGA, *Opportunities and Benefits* (2000), 11. Secondary impacts "result from subsequent rounds of spending and respending within the economy." For example, an employee may use a dollar of wages to buy a loaf of bread at a local grocer. The grocer then may use part of that dollar to buy more bread, while the bread supplier may in turn use part of that dollar to purchase wheat, and so on.
87. For example, the Three Affiliated Tribes use casino revenue to provide members with day-care services and educational scholarships, as well as to improve the tribe's waste disposal system and other conservation efforts. Rand and Light, "Raising the Stakes," 338. As Mark Fox explains, the Three Affiliated Tribes' annual casino profits of approximately $3 million would result in a per capita payment for each of the tribe's 10,000 or so members of about $300. Thus, the tribe has decided that the casino revenue is best spent providing public services to its members.
88. Rand and Light, "Raising the Stakes," 338 ("More people are coming back from urban areas partially because of the casinos. There are new job and educational opportunities, better health benefits, and fresh ideas out there [on the reservations]") (quoting Cornelius Grant, executive director of North Dakota's Rural Development Council and a member of the Turtle Mountain Band of Chippewa) (alterations in original). Other states, too, have seen Native Americans returning to live on the reservation due in part to increased employment opportunities created by tribal casinos. See, for example, Mike Johnson, "Casinos, Jobs Lure Indians Back to Better Lives on Reservations," *Milwaukee Journal Sentinel*, April 20, 2001, 1A (reporting that in Wisconsin, reservation populations increased by over 20 percent between 1990 and 2000).

89. Discover ND, "Census: Population by Race 1990 & 2000," http://www.state.nd.us/jsnd/Bin/lmidata.pl. During the 1990s, North Dakota's Native American population increased from 25,917 to 31,329, while its white population decreased from 604,142 to 593,181. Only six counties in North Dakota gained residents during the 1990s; three of those counties are populated primarily by Native Americans. Egan, "As Others Abandon Plains." See also Carson Walker, "Culture, New Wealth Lure Indians Home," *Grand Forks Herald* (ND), April 11, 2001, 3A.
90. Sean Murphy, "A Big Roll at Mohegan Sun," *Boston Globe*, December 10, 2000, A1; Michael Rezendes, "Few Tribes Share in Casino Windfall," *Boston Globe*, December 11, 2000, A1; Barry, "A War of Genealogies Rages"; Michael Rezendes, "Tribal Casino Operations Make Easy Criminal Targets," *Boston Globe*, December 13, 2000, A1.
91. Murphy, "Big Roll at Mohegan Sun."
92. Rezendes, "Few Tribes Share in Casino Windfall."
93. Barlett and Steele, "Wheel of Misfortune," 49.
94. Rick Hill, "Some Home Truths about Indian Gaming," *Indian Country Today*, December 27, 2000.
95. Ernest L. Stevens, Jr., "Letter to the Editor of Time Magazine," Press Release, December 10, 2002, http://www.indiangaming.org/info/pr/press-releases-2002/time-magazine.shtml.
96. Tex G. Hall, "Letter to the Editors of Time Magazine," December 13, 2002, http://www.americanindian.ucr.edu/discussions/gaming/letters/ncai.html. A number of Native media outlets published editorials lambasting the *Boston Globe* and *Time* articles. See, for example, "Time Keeps Strafing Indian Gaming" (editorial), *Indian Country Today*, December 20, 2002 (decrying the "breathless, would-be exposé" as part of the "nasty and sensational little media games" facing Native people); Harold A. Monteau, "That Wasn't Reporting, That Was Vandalism" (op-ed), http://www.pechanga.net/press_release/that_wasn't_reporting_that_was_vandalism.htm (calling the *Time* articles "repackaged, stale, outdated, and previously reported news from the . . . *Boston Globe*").

## CHAPTER 6. INDIAN GAMING IN CONTEXT

1. Ellen Barry, "Lineage Questions Linger as Gaming Wealth Grows," *Boston Globe*, December 12, 2000. Upstate Citizens for Equality is a grassroots organization of non-Indian homeowners in upstate New York opposed to tribal land claims.
2. See "'Crying Indian' Iron Eyes Cody Dies," *CNN.com*, January 4, 1999, http://www.cnn.com/US/9901/04/obit.cody/.
3. James W. Brosnan, "Indian Gaming Surges," *Scripps Howard News Service*, April 4, 2004.
4. Richard B. Williams, "The Casino Myth" (editorial), *Denver Post*, May 2, 2001, B07. For an account of Indian gaming that focuses on prevailing stereotypes of Native Americans, see Eve Darian-Smith, *New Capitalists: Law, Politics, and Identity Surrounding Casino Gaming on Native American Land* (Belmont, CA: Wadsworth/Thomson Learning, 2004).

5. Philip Burnham, "How One 'Tribe' Struck it Rich," *Washington Times*, December 21, 2003, B06; Iver Peterson, "Would-Be Tribes Entice Investors," *New York Times*, March 29, 2004; Ellen Barry, "Lineage Questions Linger"; Tom Condon, "Time for Feds to Recognize the Harm of Casino Tribes" (op-ed), *Hartford Courant*, February 8, 2004, C4; Chris Powell, "Pequot Museum May Feed Mistaken Guilt" (op-ed), *Providence Journal* (RI), January 2, 2001, B04.
6. Mike Adams, "Banking on Indian Identity," *Baltimore Sun*, April 18, 2004, 2A.
7. "Slowing the Casino Indians" (editorial), *Providence Journal* (RI), January 21, 2001, C08.
8. Jill Stewart, "New 'Tribes' Shopping for Casino Sites" (op-ed), *Los Angeles Daily News*, June 12, 2004. Stewart further criticized "the arrogance of rich tribes . . . wiping out th[e] enormous goodwill" of California voters who had passed ballot initiatives expanding Indian gaming in that state.
9. M. D. Harmon, "Visit to Foxwoods" (editorial), *Portland Press Herald* (ME), October 6, 2003, 9A.
10. Ellen Barry, "It's a War of Genealogies," *Boston Globe*, December 12, 2000.
11. Condon, "Time for Feds to Recognize the Harm of Casino Tribes."
12. Laura Crimaldi, "Nipmuc Nation to Launch Appeal: Tribal Leaders Call Federal Ruling 'Illegal,'" *MetroWest Daily News* (Framingham, MA), June 20, 2004.
13. Walter Vickers, "Tribal Status Is Not Just about Casinos" (op-ed), *Boston Globe*, June 28, 2004.
14. Philip Burnham, "The Enterprising Pequots and How Their Casinos Enraged, Grew," *Washington Times*, February 11, 2001; Jonathan Yardley, "Success Story or a Scam?" *Chicago Sun Times*, February 18, 2001 (quoting Kim Isaac Eisler on the Pequots' critics).
15. "The Evolution of Native Artifacts" (cartoon), *Grand Forks Herald* (ND), September 10, 2000, 2B. Yet, asks one commentator, "what would long-ago chiefs . . . have thought of Foxwoods and its buckskin-fringed waitresses? Probably the same that Abe Lincoln would have thought of the one-armed bandits lining the Strip in Las Vegas. Tradition does not fare well in this world." Burnham, "The Enterprising Pequots."
16. Rich Lowry, "Indian Scam," *National Review*, August 25, 2003, http://www.nationalreview.com/lowry/lowry082503.asp. Victor Rocha, a member of the Pechanga Band and the founder of a noted Web site dedicated to Indian gaming news and information, explained why he posted Lowry's editorial on his site: "It's important for the Indians to see what's being said. . . . Some of these guys are just a bunch of foaming-at-the-mouth conservative attack dogs. . . . [B]ut it's just as important that you watch them, too." Thomas J. Walsh, "Pechanga Tribe Member Details Indian Gaming," *Reno Gazette-Journal*, October 19, 2003.
17. Allan T. Demaree, "Betting on a Casino, and Winning Big," *Wall Street Journal*, February 8, 2001.
18. Pam Belluck, "Casino Proposal Splinters a State Used to Consensus," *New York Times*, November 3, 2003.
19. Charlie LeDuff, "In Scorched Hills, Tribes Feel Bereft and Forgotten," *New York Times*, November 5, 2003 (quoting Michele Nelson, council member of the Rincon Indian Nation).
20. "AdWatch: Schwarzenegger on Indian Donations, Casino Money," *KCRA News* (Sacramento), May 3, 2004, http://www.thekcrachannel.com/politics/2512570/detail.html.

21. *Money & Markets*, CNN television broadcast, February 24, 2004 (quoting Brett Fromson, author of *Hitting the Jackpot*).
22. See, for example, "Group Wants Local Concerns Addressed in Indian Gaming Talks," *KXTV News* (Sacramento, CA), March 10, 2004, http://www.kxtv10.com/storyfull.asp?id=6601.
23. Steve Moore, "Building Symbolizes Tribe's Rising Fortune," *Press-Enterprise* (Riverside, CA), April 1, 2004.
24. Jay Goetting, "Area Counties Band Together to Impact Indian Gaming Sites," *Napa Valley Register* (CA), March 27, 2004, http://www.napanews.com.
25. "AdWatch: Indian Gaming 'Monopoly,'" *KCRA News* (Sacramento), May 3, 2004, http://www.thekcrachannel.com/politics/3265369/detail.html.
26. Lowry, "Indian Scam."
27. Eleanor Randolph, "New York's Native American Casino Contributes, But Not to Tax Rolls" (op-ed), *New York Times*, October 18, 2003.
28. Moore, "Building Symbolizes Tribe's Rising Fortune."
29. Sam Lewin, "Stevens Touts Gaming Benefits," *Native American Times*, April 6, 2004.
30. "Chippewa Strife Argues for Limiting Casinos" (editorial), *Detroit News*, August 8, 2001.
31. Brett D. Fromson, "California Must Hedge Its Bet" (editorial), *Los Angeles Times*, November 25, 2003, B15.
32. Carey Goldberg, "The Richest Indians," *New York Times*, February 18, 2001. In an episode of Fox's *Wanda at Large*, comedian Wanda Sykes, during a tongue-in-cheek riff on slavery reparations, answers a question about whether Native Americans similarly deserve reparations. "Screw the Indians! They've got casinos. I'm the one paying their reparations," she asserts, pulling on the handle of an imaginary slot machine. *Wanda at Large*, "Wanda and Bradley," Fox television broadcast, August 22, 2003.
33. David Lazarus, "Greed Tars Indian Casinos" (editorial), *San Francisco Chronicle*, July 31, 2002.
34. Richard Reeb, "Gambling Undermines Self Government," *Desert Dispatch* (Barstow, CA), June 17, 2004.
35. Ada Deer, "Tribal Sovereignty in the Twenty-First Century," *St. Thomas Law Review* 10 (1997): 17.
36. Carla Marinucci, "Casino Profits Pit 'Brother vs. Brother,'" *San Francisco Chronicle*, February 9, 2003, A1.
37. Michael Rezendes, "Few Tribes Share in Casino Windfall," *Boston Globe*, December 11, 2000; Donald L. Barlett and James B. Steele, "Wheel of Misfortune," *Time*, December 16, 2002, 44–49.
38. Ernest L. Stevens, "Letter to the Editor of *Time* Magazine," Press Release, December 10, 2002, http://www.indiangaming.org/info/pr/press-releases-2002/time-magazine.shtml.
39. "Shameful Report Distorts Tribal Gaming" (editorial), *Native American Times*, December 17, 2002.
40. Micah Morrison, "El Dorado at Last: The Casino Boom," *Wall Street Journal*, July 18, 2001, A18.
41. Burnham, "The Enterprising Pequots."

42. "Revisiting Indian Casinos" (editorial), *Providence Journal* (RI), August 2, 2001, B06; Sean P. Murphy, "Mohegan Sun Buyout Deal Remains Mystery," *Boston Globe*, January 31, 2001; Bill Lueders, "Buffaloed: Casino Cowboys Take Indians for a Ride," *Progressive*, August 1994, 30.
43. Donald L. Barlett and James B. Steele, "Playing the Political Slots," *Time*, December 23, 2002, 59.
44. Barlett and Steele, "Wheel of Misfortune," 48.
45. Stewart, "New 'Tribes' Shopping for Casino Sites."
46. "Chippewa Strife."
47. Joseph Honig, "Arnold Could Have Played Cards Better" (op-ed), *L.A. Daily News*, June 5, 2004. Honig's qualifications to comment on Indian gaming policy were not readily apparent.
48. Neil Swidey, "Trump Plays Both Sides in Casino Bids," *Boston Globe*, December 13, 2000.
49. See, for example, James P. Sweeney, "High Stakes Showdown," *San Diego Union-Tribune*, July 22, 2001.
50. Michael Rezendes, "Tribes Make Easy Criminal Targets," *Boston Globe*, December 13, 2000 ("Is there larcenous intent in the hearts of tribal leaders to the same extent that there is in the larger society? The answer is probably yes").
51. Sweeney, "High Stakes Showdown." Like commercial casinos, however, tribal casinos are not impervious to theft. Said Minnesota attorney general Thomas Heffelfinger, "We know that Indian gaming is no more or any less vulnerable to white-collar crime than casinos in Nevada and New Jersey. And in those states, predictably six percent of their gaming revenues walk out the door." Carson Walker, "Feds to Probe Indian Casino Crime," Associated Press, July 2, 2004.
52. "Indians v. State" (editorial), *San Diego Union-Tribune*, July 25, 2001; Lazarus, "Greed Tars Indian Casinos."
53. Joel Lang, "Reading Jeff Benedict," *Hartford Courant*, December 3, 2000 (quoting Jeff Benedict, author of *Without Reservation*) ("They [state and local governments] all were inferior in terms of power and ability to the Mashantucket Tribe").
54. Ernest L. Stevens, Jr., "Dealing with Hypocrisy," Press Release, December 16, 2002, http://www.indiangaming.org/info/pr/press-releases-2002/time-magazine2.shtml.
55. Marinucci, "Casino Profits." As Stevens noted, "Tribal spirit is not a legal requirement." Nevertheless, "tribes help other Tribes." Stevens, "Dealing With Hypocrisy."
56. Lowry, "Indian Scam."
57. Barlett and Steele, "Playing the Political Slots," 52.
58. *South Park*, "Red Man's Greed," Comedy Central television broadcast, April 28, 2003.
59. Goldberg, "The Richest Indians."
60. Iver Peterson, "Resistance to Indian Casinos Grows Across U.S.," *New York Times*, February 1, 2004.
61. Fromson, "California Must Hedge Its Bet"; Matt Krantz, "Indian Tribe Bets on Diversification for Longevity," *USA Today*, January 30, 2004, 5B.
62. Barlett and Steele, "Playing the Political Slots," 58.
63. Jan Golab, "The Festering Problem of Indian 'Sovereignty,'" in *One America* (Washington DC: American Enterprise Institute, 2003).

64. Rick Hill, "Some Home Truths about Indian Gaming," *Indian Country Today*, December 27, 2000.
65. Carol Ann Alaimo, "Race-Based Monopoly?" (op-ed), *Arizona Daily Star*, April 14, 2001, B7.
66. *60 Minutes II*, "Are Pequots Really Pequots?" CBS television broadcast, May 23, 2000 (quoting Preston, Connecticut, selectman Bob Congdon).
67. Golab, "The Festering Problem of Indian 'Sovereignty.'"
68. See Kevin K. Washburn, "Federal Law, State Policy, and Indian Gaming," *Nevada Law Journal* 4 (2003): 85 (discussing the role of state law and policy in the legality and profitability of tribal casinos).
69. Rezendes, "Tribes Make Easy Criminal Targets."
70. Lowry, "Indian Scam."
71. Jim Adams, "Attempts to Remove Indian Sovereignty Continue to Fail," *Indian Country Today*, April 7, 2004 (quoting Bernie Conklin, founding vice president of Upstate Citizens for Equality). A member of Upstate Citizens for Equality questioned the necessity of tribal sovereignty: "The Amish, Quakers, and Mennonites preserve their culture better than any Indian tribe, and they do it while paying taxes." Golab, "The Festering Problem of Indian 'Sovereignty'" (quoting Scott Peterman).
72. "Revisiting Indian Casinos." See also Powell, "Pequot Museum May Feed Mistaken Guilt"; "Slowing the Casino Indians."
73. Although there are numerous state-level proposals and initiatives concerning Indian gaming, some of which we discuss in Chapter 3, we focus here on Congress due to the widespread potential impact of proposed amendments to IGRA.
74. Sean P. Murphy, "Indian Gaming Act Revision Sought," *Boston Globe*, December 20, 2000, A8; Sean P. Murphy, "Congressmen Seeking Probe on Indian Casinos," *Boston Globe*, December 16, 2000.
75. Frank R. Wolf, "Gambling Doesn't Serve Native Americans Well," *The Hill*, August 1, 2001.
76. "Wolf Measure Would Allow State Legislatures to Have Voice in Creation of Gambling Operations on Indian Reservations," Press Release, June 19, 2001, http://www.house.gov/wolf/news/2001/06-20-Gambling_Indians.html. The proposed legislation would have expanded a state's role in approving casino-style tribal gaming by requiring approval of all tribal-state compacts by the state's governor and legislature. It also would have prohibited tribes from offering Class III gaming on more than one parcel of tribal land and would have established a Commission on Native American Policy to study reservation living standards. See H.R. 2244, 107th Cong. (June 19, 2001).
77. The bill was reintroduced in 2004. See H.R. 3745, 108th Cong. (January 28, 2004); Wolf, "Gambling Doesn't Serve Native Americans Well."
78. Mark Arsenault, "Congressman Suggests Tribes Should Share Gaming Wealth," *Providence Journal* (RI), September 20, 2003, A3.
79. Jim Barnett, "Indians' Sovereign Status in Jeopardy," *Times-Picayune* (New Orleans, LA), January 30, 2000, A28 (quoting Wayne Shammel, Cow Creek Band attorney). Senator Gorton's call for means-testing is an example of the type of thinking that has permeated perceptions of federal assistance for tribes throughout the modern era, leading some to criticize "wealthy" tribes for continuing to receive federal benefits. Tribal sovereignty has less meaning under the welfare

concept, because tribes simply are needy charities or undeserving welfare cheats rather than independent governments and communities with a particular relationship to state and federal governments.

80. Micah Morrison, "El Dorado at Last."
81. H.R. 4213, 108th Cong. (April 22, 2004); "Statement from Rep. Rob Simmons on Today's Schaghticoke News," Press Release, March 12, 2004, http://www.house.gov/simmons/news/marcho4/3.12.04_Schaghticoke.html; "Connecticut House Delegation Introduces Bill to Improve Bureau of Indian Affairs," Press Release, April 22, 2004, http://www.house.gov/simmons/news/aprilo4/4.22.04_BIAbill.html.
82. "Boehlert Announces Congressional Support for Local Input on Gaming Issues," Press Release, July 18, 2003, http://www.house.gov/boehlert/sencayInterior.htm.
83. Erica Wener, "Indian Tribes Looking beyond Reservation Borders for Casinos," Associated Press, March 15, 2004.
84. James Schlett, "BIA's Call for Cap Criticized," *Westerly Sun* (Westerly, RI), March 26, 2004.
85. Golab, "The Festering Problem of Indian 'Sovereignty.'"
86. Burnham, "How One 'Tribe' Struck it Rich."
87. Alex Tallchief Skibine, "The Cautionary Tale of the Osage Indian Nation Attempt to Survive Its Wealth," *Kansas Journal of Law and Public Policy* 9 (2000): 815.
88. Joseph P. Kalt, Statement before the National Gambling Impact Study Commission (March 16, 1998), 3.
89. The reasons for this extend beyond the rural nature of tribal communities, shared by non-Native localities throughout states like North Dakota: "Tribal governments cope with two challenges that non-Indian governments do not face. First, they must operate between the institutions of Indian culture and those of the larger society, balancing competing values while being constrained by differing norms. Second, tribal governments contend with staggering social conditions the likes of which are found in few other places in America." Stephen Cornell et al., *American Indian Gaming Policy and Its Socio-Economic Effects: A Report to the National Gambling Impact Study Commission* (Cambridge, MA: Economics Resource Group, 1998), 3.
90. See Dorreen Yellow Bird, "Researcher Says Gambling Is a Net Plus on Reservations," *Grand Forks Herald* (ND), September 3, 2000, 2C (explaining that as the tribal population increases, it becomes more difficult for the tribal government to provide adequate employment for tribal members).
91. Robert Lattergrass, Guest Lecture in Indian Gaming Law at the University of North Dakota School of Law (March 20, 2001). The tribe's poverty rate remains high at 40 percent, while unemployment continues to exceed 50 percent. Ibid.
92. Telephone interview with J. Kurt Luger, executive director, North Dakota Indian Gaming Association (NDIGA), November 23, 2001.
93. Hill, "Some Home Truths about Indian Gaming."
94. Cornell et al., *American Indian Gaming Policy*, 60 (enumerating several factors that limit tribes' ability to quickly reverse social conditions). "The fundamental point is that because economic conditions were so dire on those reservations that subsequently introduced casino gaming, even small amounts of economic activity have proven a tremendous boon to many gaming tribes. While the backlog of socio-economic deficits left by decades of deprivation remains a daunting challenge,

gaming has had a profound economic development impact on many tribes that have introduced it" (p. 31).

95. David Melmer, "Great Plains Leaders Flex Muscle," *Indian Country Today,* November 22, 2000.
96. David E. Wilkins, *American Indian Politics and the American Political System* (Lanham, MD: Rowman & Littlefield, 2002), 48.
97. Wilkins, *American Indian Politics,* 48; Wallace Coffey and Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," *Stanford Law and Policy Review* 12 (2001): 191.
98. Kalt, Statement, 2.
99. Cornell et al., *American Indian Gaming Policy,* 32–35, 57. "Unemployment has an adverse effect on mortality, particularly from suicide and lung cancer. It is also associated with higher incidences of suicide attempts, depression, and anxiety. The onset of unemployment is associated with greater tobacco and alcohol use. In addition, a higher proportion of families with unemployed adults are reported as having greater risk of domestic violence and divorce." Ibid. See also NDIGA, *Opportunities and Benefits of North Dakota Tribally Owned Casinos* (2000), 3.
100. Kalt, Statement, 2.
101. Lewin, "Stevens Touts Gaming Benefits."
102. Kristen A. Carpenter and Ray Halbritter, "Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming," *Gaming Law Review* 5 (2001): 323 (quoting Oneida Nation representative Ray Halbritter)

### CONCLUSION: COMPROMISE AMONG SOVEREIGNS

1. John M. Broder, "More Slot Machines for Tribes, and $1 Billion for California," *New York Times,* June 22, 2004.
2. Alex Tallchief Skibine, "Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida," Arizona State Law Journal 29 (1997): 167–68.
3. Frank R. Pommersheim, "Tribal-State Relations: Hope for the Future?" *South Dakota Law Review* 36 (1991): 276.
4. We recognize that since IGRA's inception and the 1996 *Seminole Tribe* decision by the U.S. Supreme Court, many tribes have shared an ongoing concern that opening up IGRA to amendment would create a congressional free-for-all that could erode their political position vis-‡-vis the states while even further encroaching upon tribal sovereignty. See, for example, James P. Sweeney, "Governor Fights Gaming Bill," *San Diego Union-Tribune,* March 24, 2004 ("Tribes have been very clear. Even with [IGRA's] imperfections, they don't want to touch it"), quoting Nikki Symington, spokesperson for the Viejas Band in California. We believe, however, that increasing political pressure reduces the likelihood that Congress will opt not to act as well as the benefits of maintaining the current status quo.
5. David Wilkins, "An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty," *Kansas Journal of Law and Public Policy* 9 (2000): 748.
6. Additionally, beyond revenue sharing, states may continue to exploit the compacting requirement to coerce tribes into abrogating treaty and other sovereign rights. See, for example, Kathryn R.L. Rand and Steven A. Light, "Do 'Fish and

Chips' Mix? The Politics of Indian Gaming in Wisconsin," *Gaming Law Review* 2 (1998): 129.

7. See generally Timothy J. Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Washington, DC: Brookings Institution, 1998).
8. See Skibine, "Gaming on Indian Reservations," 130–31. IGRA reflects Congress's "decision to allow the tribes and the states to negotiate among themselves a solution to their jurisdictional disputes. In this respect, the requirement of a tribal-state compact . . . represented a major step in the evolution of the trust relationship existing between the federal government and the tribes."
9. United States v. Kagama, 118 U.S. 375, 384 (1886).
10. Rebecca Tsosie, "Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts under the Indian Gaming Regulatory Act," *Arizona State Law Journal* 29 (1997): 88.
11. W. Dale Mason, "Tribes and States: A New Era in Intergovernmental Affairs," *Publius* 28 (1) (1998): 129.
12. As law professor and former National Indian Gaming Commission general counsel Kevin Washburn observed, the current legal and political landscape of Indian gaming has resulted in an unprecedented emphasis on "direct dialogue" between states and tribes: "the federal-tribal relationship has given way to a state-tribal relationship that has had far greater economic importance to Indian tribes." Kevin K. Washburn, "Federal Law, State Policy, and Indian Gaming," *Nevada Law Journal* 4 (2004): 298.
13. Alex Tallchief Skibine, "Scope of Gaming, Good Faith Negotiations and the Secretary of Interior's Class III Gaming Procedures: Is IGRA Still a Workable Framework after *Seminole?*" *Gaming Law Review* 5 (2001): 413.
14. See generally "Intergovernmental Compacts in Native American Law: Models for Expanded Usage" (note), *Harvard Law Review* 112 (1999): 922. Tribal-state agreements have become more common as tribes assert their sovereignty in the context of each tribe's particular circumstances and as litigation becomes a riskier and costlier option for both parties. Ibid., 922–23, 929–31. See also Pommersheim, "Tribal-State Relations," 264–67 (describing character and subject matter of existing tribal-state agreements).
15. "Intergovernmental Contracts," 932 ("Perhaps the most widely cited concern is that states wield dramatically greater political and economic bargaining power, which invariably compels Native Americans to surrender more rights than they would if bargaining power were equal"). At a fundamental level, as Rebecca Tsosie observed, "Indian tribes are politically the least powerful of [the three] sovereigns, primarily because, unlike the states, they have no formal representation in Congress." Tsosie, "Negotiating Economic Survival," 39.
16. See Vine Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," *Arizona Law Review* 31 (1989): 204; Tsosie, "Negotiating Economic Survival," 37.
17. Mason, "Tribes and States," 129; see also Pommersheim, "Tribal-State Relations," 275 ("It is . . . true that there are manifold problems that exist between tribes and states, but they are not intractable").
18. See, for example, Mason, "Tribes and States;" Pommersheim, "Tribal-State Relations."
19. See generally Pommersheim, "Tribal-State Relations," 268–75.

20. "Gambling Helping Indians Achieve Voice in Politics," Associated Press, April 8, 2004.
21. As Tsosie observed, "States and their representatives have often shown an amazing unwillingness to acknowledge the positive economic effects on the state economy." Further, "if the tribe is barred from engaging in gaming, the state has only the indirect worry that it will be forced to supply financial assistance to tribal members who become economically destitute." Tsosie, "Negotiating Economic Survival," 77.
22. Ibid., 84–85.
23. The NGISC's recommendations for Indian gaming law and policy include the following:"6.7. The Commission recommends that tribal and state sovereignty should be recognized, protected, and preserved. 6.8. The Commission recommends that all relevant governmental gambling regulatory agencies should take the rapid growth of commercial gambling, state lotteries, charitable gambling, and Indian gambling into account as they formulate policies, laws, and regulations pertaining to legalized gambling in their jurisdictions. Further, the Commission recommends that all relevant governmental gambling regulatory agencies should recognize the long overdue economic development Indian gambling can generate. 6.9. The Commission has heard substantial testimony from tribal and state officials that uncompacted tribal gambling has resulted in substantial litigation. Federal enforcement has, until lately, been mixed. The Commission recommends that the federal government fully and consistently enforce all provisions of the IGRA. 6.10. The Commission recommends that tribes, states, and local governments should continue to work together to resolve issues of mutual concern rather than relying on federal law to solve problems for them. 6.11. The Commission recommends that gambling tribes, states, and local governments should recognize the mutual benefits that may flow to communities from Indian gambling. Further, the Commission recommends that tribes should enter into reciprocal agreements with state and local governments to mitigate the negative effects of the activities that may occur in other communities and to balance the rights of tribal, state and local governments, tribal members, and other citizens. 6.12. IGRA allows tribes and states to negotiate any issues related to gambling. Nothing precludes voluntary agreements to deal with issues unrelated to gambling either within or without compacts. Many tribes and states have agreements for any number of issues (e.g., taxes, zoning, environmental issues, natural resources management, hunting and fishing, etc.). The Commission recommends that the federal government should leave these issues to the states and tribes for resolution. 6.13. The Commission recommends that Congress should specify a constitutionally sound means of resolving disputes between states and tribes regarding Class III gambling. Further, the Commission recommends that all parties to Class III negotiations should be subject to an independent, impartial decisionmaker who is empowered to approve compacts in the event a state refuses to enter into a Class III compact, but only if the decisionmaker does not permit any Class III games that are not available to other persons, entities, or organizations of the state and only if an effective regulatory structure is created." National Gambling Impact Study Commission (NGISC), *Final Report* (1999), 6-23 to 6-24, http://govinfo.library.unt/ngisc/reports/finrpt.html.
24. The NGISC called for further and extensive research by federal agencies, including the National Institutes of Health, the National Science Foundation, and the Department of Justice. NGISC, *Final Report*, 8-1 to 8-5.

25. See Jonathan B. Taylor, Matthew B. Krepps, and Patrick Wang, *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities* (Cambridge, MA: Harvard Project on American Indian Development, April 2000), http://www.ksg.harvard.edu/hpaid/pubs/pub_010.htm.
26. See Iver Peterson, "Resistance to Indian Casinos Grows across U.S.," *New York Times*, February 1, 2004 (reporting that polls appear to indicate stronger support for commercial casino ventures than for tribal casinos).
27. For example, the new commission should ensure that its study focuses on socioeconomic impacts of Indian gaming and does not merely become a vehicle for states to discover gaming tribes' profits and demand even more of a "fair share." Again, tribal self-determination must both underlie and inform the commission's study, and tribes are entitled to assurances of the same.
28. Richard N. Velotta, "Reid Considers Bid for Indian Committee Seat," *Las Vegas Sun*, May 28, 2004.
29. Another example is U.S. representative Ernest J. Istook's (R-Okla.) 1998 proposal to require tribes to pay state taxes on newly acquired trust lands. Istook called his proposal "a fair play amendment." Stating that "all people should be equal in the eyes of the law," Istook insisted that his proposal did not violate tribal sovereignty but "merely reinstat[ed] fair play" between states and tribes. See Mason, "Tribes and States," 128.
30. See 25 U.S.C. § 2710(d)(1)(B) (restricting Class III gaming to states that permit such gaming for any purpose by any person). Conversely, states may remove the "monopoly" of tribal gaming within their borders by expanding legalized commercial gambling. See Washburn, "Federal Law, State Policy, and Indian Gaming," 286–87. The point here is that states have more control over Indian gaming within their borders than is usually recognized by the public and policymakers alike.
31. See Tsosie, "Negotiating Economic Survival," 60–62.
32. See "Intergovernmental Compacts," 935 ("Litigation can be a first step in affirming and quantifying rights, correcting a disparity in the balance of power, and creating the leverage necessary to force parties to the bargaining table"). See also Ron M. Rosenberg, "When Sovereigns Negotiate in the Shadow of the Law: The 1998 Arizona–Pima Maricopa Gaming Compact," *Harvard Negotiation Law Review* 4 (1999): 283; Tsosie, "Negotiating Economic Survival," 70.
33. For detailed discussions of this possible alternative, see Skibine, "Gaming on Indian Reservations," 162–67; Joe Laxague, "Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?" (note), *Journal of Legislation* 25 (1999): 91–93.
34. William C. Canby, Jr., *American Indian Law in a Nutshell*, 3d ed. (St. Paul: West, 1998), 310.
35. See Skibine, "Scope of Gaming"; Skibine, "Gaming on Indian Reservations." A few commentators have questioned the constitutionality of the secretary's regulations, as well as the "fairness" of the secretary's role in deciding a dispute between a state and a tribe, given the secretary's obligation to "favor" tribes under the federal trust doctrine. See Rebecca S. Lindner-Cornelius, "The Secretary of the Interior as Referee: The States, the Indian Nations, and How Gambling Led to the Illegality of the Secretary of the Interior's Regulations in 25 C.F.R. § 291" (comment), *Marquette Law Review* 84 (2001): 685; Laxague, "Indian Gaming and Tribal-State

Negotiations." For law professor Alex Tallchief Skibine's persuasive defense of the secretary's regulations, see Skibine, "Scope of Gaming."

36. In addition to familiarity with Indian gaming generally, the mediators should have knowledge of and experience in federal Indian law, as well as appropriate understanding of state and tribal sovereignty. See Mark E. Stabile, "The Effect of the Federally Imposed Mediation Requirement of the Indian Gaming Regulatory Act on the Tribal-State Compacting Process" (comment), *Seton Hall Journal of Sport Law* 7 (1997): 315 (proposing congressional adoption of alternative dispute resolution tools, including appropriately knowledgeable and trained mediators).
37. IGRA currently lists allowable provisions to be included in a tribal-state compact. See 25 U.S.C. § 2710(d)(3)(C). These have not been applied to limit the scope of tribal-state negotiations, however. Some commentators have cautioned against limiting the scope of negotiations to ensure that the parties have discretion to address issues of mutual concern. See, for example, Rosenberg, "When Sovereigns Negotiate," 291; Tsosie, "Negotiating Economic Survival," 76.
38. See 25 U.S.C. § 2710(b)(3)(A).
39. In 2003, U.S. senator Ben Nighthorse Campbell (R-Colo.) introduced legislation that would set parameters on tribal-state revenue-sharing agreements, including measures to ensure tribal needs are given priority over payments to states. See S. 1529, 108th Cong. (July 31, 2003). The Interior Department's acting deputy assistant secretary for policy and economic development, George Skibine, advocated a set cap of no more than 10 percent on tribal-state revenue sharing. Both the proposed legislation and Skibine's call for a cap drew strong criticism from state leaders, including California governor Arnold Schwarzenegger and Connecticut attorney general Richard Blumenthal. See James Schlett, "BIA's Call for Cap Criticized," *Westerly Sun* (Westerly, RI), March 26, 2004.
40. See 25 U.S.C. § 2710(d)(8)(B).
41. Taylor, Krepps, and Wang, *National Evidence*, 28, 29.
42. Pommersheim, "Tribal-State Relations," 269, 271.
43. See ibid.: "Tribal-state relations are often caught in a history . . . that is perceived (rightly or wrongly) by many tribes as having as its main objective the undermining of the tribe's very existence."
44. Mason, "Tribes and States," 130 (quoting Chickasaw Nation governor Bill Anoatubby).
45. Skibine, "Gaming on Indian Reservations," 131–32.
46. National Indian Gaming Commission, "Government-to-Government Tribal Consultation Policy" (March 26, 2004) (reprinted in 69 *Federal Register* 16,973 [2004]).
47. Pommersheim, "Tribal-State Relations," 276.

# Oversight Hearing Before the Senate Committee on Indian Affairs on Regulation of Indian Gaming

**Wednesday, April 27, 2005**
**9:30 a.m.**
**Room 485 Russell Senate Office Building**

**Testimony of:**
Calvin R. Rose
Strawberry Valley Rancheria / California
Tribal chairman

Good morning Chairman McCain, Senator Dorgan, and members of the Committee. My name is Calvin Rose and I represent our northern California tribe of Strawberry Valley Rancheria. Let me first say thank you for having this hearing today on regulation of Indian gaming. Certainly this important subject has led to a recent tendency in our society to view all of Indian country strictly through an economic lens. The overriding purpose of my testimony today, on behalf of our tribe, is to broaden this perspective for the benefit of the Committee. In doing so I believe that the Committee will take away from my testimony new, fresh ideas on how to fairly approach regulation of Indian gaming.

Strawberry Valley Rancheria comes before the Committee today because we have been treated unfairly in the past. Historically the 1851 Camp Union Treaty with the U.S. government recognized Strawberry Valley Rancheria's historic roots in Yuba and Sutter Counties of California, promising land for tribal members. In the late 1800s, many tribal members were subsequently displaced to Butte County due to economic development unrelated to the tribe. The U.S government ultimately granted in the early 1900s a small tract of land in Strawberry Valley Rancheria's aboriginal territory to compensate for the vast tract of land once promised under the 1851 Camp Union Treaty. This reservation land was ultimately purchased in 1918 for the benefit of the tribe. Strawberry Valley Rancheria has maintained a substantially continuous tribal community and tribal political authority throughout the history of our tribe, from 1851 treaty to the present date, including voting in the 1935 Indian Reorganization Act vote.

The U.S. Congress terminated and withdrew the protected trust status of the land of many tribes by authorization of the 1958 Rancheria Act. Strawberry Valley Rancheria was among over forty California tribes whose federally recognized tribal status was *terminated* under the Act. The crux of the Rancheria Act involved distributing federally held reservation land to individual tribal members in lieu of discontinued federal social and health support. Tribal members still maintain contact, culture and internal governance, despite the inability of the Bureau of Indian Affairs to provide much assistance during our prior recognition and no assistance at the present time. Our tribal government meets at least monthly while awaiting our proper restoration.

Since the legislative terminations, the U.S. government has been involved in a number of judicial decisions seeking to set aside the termination of tribes per the Rancheria Act of 1958, and to subsequently restore their prior recognition. In a key California case, *Tillie Hardwick et al. v. United States*, Civil No. C-79-1910-SW (N.D. Cal. 1983), the courts ruled that the United States government

had unfairly terminated seventeen tribes. The stipulated judgment provided that *"individual members of the Rancherias would be restored to their status as Indians and the U.S. would recognize the Indian Tribes, Bands, Communities or groups of the seventeen Rancherias as Indian entities with the same status as they possessed prior to distribution of these Rancherias"*. The inability of many other California tribes, including Strawberry Valley Rancheria, to participate in the benefits of the *Tillie Hardwick* decision was directly related to financial hardship due to discontinued federal assistance. Additionally distribution lists of dependent tribal members, those lists often compiled by U.S. government officials, were lacking in completeness, exacerbated by the government's decision a century earlier to move entire tribes from their aboriginal territory, to benefit economic development by others, as was Strawberry Valley Rancheria's case. It is worth reiterating that prior to the Rancheria Act of 1958, Strawberry Valley Rancheria had a clear history with the U.S. government as a recognized tribe dating back to 19th century treaties.

In November 1994, Public Law 103-454 codified a single U.S. Congressional remedy for unfair tribal termination. P.L. 103-454, Title I specifically states that *"Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated"*. Every restoration of a terminated tribe since 1994 has been subsequently accomplished through U.S. Congressional legislation. P.L. 103-454 additionally enacted the Federally Recognized Indian Tribes List Act of 1994, the official list now used by the federal government to recognize all Indian tribes. The Federal Acknowledgment Process per 25 CFR 83.7, and as administered by the Office of Federal Acknowledgment within the Department of Interior, *has never applied* to terminated tribes, because terminated tribes have already been *previously recognized*. In fact the Official Guidelines to the Federal Acknowledgment Regulations, specifically recommends contacting members of Congress and *"seeking legislation to restore your tribe"*. By law there is but one avenue available to resolve our unfair termination and that avenue begins with this Committee.

Many of those present in this hearing, and familiar with Indian history in our country, likely recognize a recurring theme of historic injustice towards tribes in our circumstances. Yet Strawberry Valley Rancheria chooses to look to the future with no anger about the past. History cannot be rewritten. However history can be examined and understood in order to build a better future for all of us. It is in this proactive vein that Strawberry Valley Rancheria continues to develop the tribal infrastructure to work with all other governments and to obtain our fair and just restoration. This task has not been an easy one. Many of the current issues facing this Committee have clouded the waters, particularly those issues surrounding Indian gaming. Our constant efforts to request that fair attention is paid to our meritorious request for restoration has gone largely unnoticed. Our voice has been drowned out by the financial powers that represent the off-reservation casino faction and the pay-to-be-recognized-as-a-tribe faction of the Indian gaming industry. At one juncture over the past six years, Strawberry Valley Rancheria has been passed over for administrative support in our restoration efforts, by a non-profit organization assisting other tribes, because we did not endorse gaming. That same organization shamelessly helped gaming tribes.

More recently, Strawberry Valley Rancheria's voice speaks to the current issues as loudly as we are able. Strawberry Valley Rancheria echoes the priorities outlined by Congressman Pombo and the House Committee on Resources. These key priorities include tribal recognition legislation, fair settlement of Cobell litigation, Indian health care reauthorization, and legislation pertaining to off-reservation gaming abuses. The latter issue is the mainstay of today's hearing. On a regional basis, and as pertains to tribal recognition and off-reservation gaming abuse legislation, the House Resources Committee said they intend to and should simultaneously support tribal self-governance, wealth creation and economic development initiatives. These very guidelines, to be enacted to restore order to the process of tribal recognition and to the process of preventing reservation hopping, absolutely

underpin the merits of Strawberry Valley Rancheria. Our Rancheria should be restored as a demonstration of a meritorious tribe, playing within the rules on the restoration process and playing within the rules on proper use of reservation land per federal law. We believe that this Committee will concur and we respectfully request this Committee's full support in helping our meritorious voice be heard over the din of other current issues.

Strawberry Valley Rancheria humbly suggests that we offer this Committee a tribal model against which future Indian gaming legislation can be benchmarked. Strawberry Valley Rancheria operates from a mission and vision statement completely in synch with Indian affairs principles as endorsed by California Governor Schwarzenegger and U.S. congressional principles as referenced previously. Strawberry Valley Rancheria has implemented a long-term economic development strategy that employs an entire toolbox of options. Strawberry Valley Rancheria has always considered gaming as only one tool in the economic development toolbox, within a much broader context. In keeping with our tribal mission and vision Strawberry Valley Rancheria has previously rejected outside investment offers that focus solely on gaming. *Gaming will be a tool in the box, never the entire workshop.* On the other side of the coin, our tribal members are employed to implement our tribal economic development model, work within the resulting enterprises and manage the enterprises. Our enterprises will be in our aboriginal territory with no reservation hopping involved. Just as our Strawberry Valley Rancheria tribal ancestors currently can be seen in the halls of the California State Indian Museum, our tribal restoration request is meritorious as borne out by one hundred and fifty years of U.S. history.

Simultaneously we believe that a common ground must be sought on Indian gaming regulation. At this time the National Indian Gaming Commission employs our tribal chairman as a compliance officer, effecting better control over the industry about which this hearing has been convened. With our comprehensive governance strategy, with our intended working relationship with other businesses and governments within the U.S. Second Congressional District of California, and with our general business expertise, we intend to operate a completely transparent economic development entity that sets standards of accountability for all tribes within California and across the nation. An example of our tribal approach is our current efforts to form a venture partnership with a Midwestern U.S. biotechnology firm, in order to bring them to northern California to open their initial California office. We believe that our overall approach provides multi-dimensional value to our state governor's office, to our distinguished Senators from California and to this honorable Committee and it's members. We believe that our approach embodies a model use and application of such diverse legislation as the Indian Gaming Regulatory Act of 1988 and the Sarbanes-Oxley Act of 2002. In short we are a team player offering a win-win tribal model, that has valued added ramifications for this Committee as they assess the future of Indian gaming regulation.

*We have accomplished all of the infrastructure development that I have discussed today without the benefit yet of being meritoriously and rightfully restored as a tribe.* We have accomplished this through leadership, through governmental cooperation, and through ethical decision-making. Indian gaming inherently is not a bad industry. Indian gaming without ethical industry leadership is not wise however. We respectfully offer our key leadership skills to this Committee, in the form of a sovereign tribal entity worthy of your praises for leading the way. In closing we simply and respectfully ask for a fair trade off with the distinguished Senate Committee on Indian Affairs. We request *your* immediate support for our just and fair restoration as a tribe, through the only avenue available to us. In return we wish to offer you *our* immediate support in providing a nationally applicable, tribal business model that will underpin the intent of your future legislation and resulting regulation of Indian gaming. I would like to genuinely thank all in attendance today for their valuable time.

**National Indian Gaming Association**

224 Second Street SE • Washington DC 20003
(202) 546-7711 • FAX (202) 546-1755 • www.indiangaming.org

**Testimony of Ernest L. Stevens, Jr.**
**Chairman, National Indian Gaming Association, Washington, DC**

**Concerning**

**Oversight Hearing on**
**the Regulation of Indian Gaming**

**Before**

**The Senate Committee on Indian Affairs**
**Wednesday, April 27, 2005**
**9:30 a.m.**
**Room 485 Russell Senate Building**

Chairman McCain, Senator Dorgan, and Members of the Committee, thank you for the opportunity to testify today. My name is Ernest L. Stevens, Jr. I am Chairman of the National Indian Gaming Association ("NIGA") and a member of the Oneida Tribe of Wisconsin. NIGA, with 184 Member Tribes, is a tribal government association dedicated to supporting Indian gaming and defending Indian sovereignty.

Let me begin by saying, the Indian Gaming Regulatory Act is working to achieve its purposes of promoting economic development, fostering tribal self-sufficiency, and building strong tribal governments. Indian gaming is well regulated. At the tribal, state, and Federal level, more than 3,350 expert regulators and staff protect Indian gaming:

- Tribal governments employ former FBI agents, BIA, tribal and state police, New Jersey, Nevada, and other state regulators, military officers, accountants, auditors, attorneys and bank surveillance officers;
- Tribal governments employ more than 2,800 gaming regulators and staff;

- State regulatory agencies assist tribal governments with regulation, including California and North Dakota Attorney Generals, the Arizona Department of Gaming and the New York Racing and Wagering Commission;
- State governments employ more than 500 state gaming regulators, staff and law enforcement officers to help tribes regulate Indian gaming;

- The National Indian Gaming Commission is chaired by Philip Hogen, former U.S. Attorney, Associate Solicitor for Indian Affairs, and the past Vice Chairman of NIGC; Vice Chairman Nelson Westrin, former Executive Director of Michigan Gaming Control Board and State Deputy Attorney General; and Chuck Choney, Commissioner and former FBI Agent; and
- At the Federal level, the NIGC employs 80 Regulators.

Tribal governments also employ state-of-the-art surveillance and security equipment. For example, the Mashantucket Pequot Tribal Nation uses the most technologically advanced facial recognition, high resolution digital cameras and picture enhancing technology. The digital storage for the system has more capacity than the IRS or the Library of Congress computer storage system. The Nation assisted Rhode Island state police after the tragic nightclub fire by enhancing a videotape of the occurrence, so the police could study the events in greater detail.

Tribal governments have dedicated tremendous resources to the regulation of Indian gaming: Tribes spent over $290 million last year nationwide on tribal, state, and Federal regulation. Indian gaming is also protected by the oversight of the FBI and the U.S. Attorneys. Tribal governments work with the Department of Treasury Financial Crimes Enforcement Network to prevent money laundering, the IRS to ensure Federal tax compliance, and the Secret Service to prevent counterfeiting. Tribal governments have stringent regulatory systems in place that compare favorably with any Federal or state regulatory systems.

Naturally, tribal governments are dedicated to building and maintaining strong regulatory systems because our sovereign authority, government operations and resources are at stake. If the Senate Indian Affairs Committee, the NIGC or other witnesses have advice on how to improve tribal regulatory systems, we will take that back and review it with our Member Tribes.

**Indian Tribes Are Governments**

Since the formation of the Republic, the United States has acknowledged Indian tribes as sovereign governments. Through treaties, the United States sought recognition that Indian lands were within the territory of the United States and that Indian tribes were under the protection of the United States and no foreign power. In return, Indian tribes secured guarantees of tribal territory and our original rights of self-government.

Generations of our people fought to protect tribal self-government and Indian tribes are exercising the original sovereign authority and rights of self-government that our ancestors gave their lives to protect. Today, for many tribes, Indian gaming is vital to self-government because it funds basic government functions and services.

**Indian Gaming is the Native American Success Story**

Indian gaming is the Native American success story. In 2004, we estimate that Indian gaming generated $18.5 billion in gross revenues. That means that Indian tribes paid out approximately $6 billion in payroll and billions more for operations, goods and services, cost of capital, etc. Through those expenditures and the economic activity that they generate, Indian gaming generated 553,000 jobs nationwide.

In terms of Federal revenue, Indian gaming generated $5.5 billion in Federal revenue and $1.4 billion in revenue savings. Combined, Indian gaming generated more in Federal revenue and revenue savings than the entire budget for the Bureau of Indian Affairs and the Indian Health Service. Indian gaming also generated $1.8 billion in state government revenue and $100 million in local government revenue.

Indian gaming is funding essential government services, including new schools, preschools, and youth centers, hospitals and health clinics, elderly nutrition and child care, police and fire protection, water and sewer services, transportation, and cultural preservation. Frequently, Federal funds are unavailable or simply in too short supply to build these facilities. No state funding is available for these projects. Without Indian gaming, these facilities would never be built.

Yet, we always remember that because of remote geographic locations or policy choice based on cultural traditions, only about 60% of Indian tribes in the lower 48 states can use Indian gaming. And, for most tribal governments, gaming revenues supplement but cannot replace the basic Federal programs provided under treaties and the Federal trust responsibility. Thus, we support full funding for the Bureau of Indian Affairs, the Indian Health Service, HUD, and other essential Federal government programs.

**Indian Gaming Regulation: More Than $290 Million Annually For Regulation**

American Indians traditionally used gaming as a past time, betting on sports, skill games, horse racing and games of chance. Exercising tribal sovereign authority, Indian tribes began to use gaming extensively in the 1970s to generate government revenue, just as states were turning to lotteries. In 1987, the Supreme Court acknowledged that Indian tribes have authority as governments to use gaming to generate governmental revenue in *California v. Cabazon and Morongo Band of Mission Indians*, 480 U.S. 202, 220 (1987).

In 1988, Congress enacted the Indian Gaming Regulatory Act to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 USC § 2703. Recognizing tribal rights to self-government, IGRA established a strong cooperative regulatory framework for Indian gaming, utilizing tribal, Federal, and state regulatory systems to protect Indian gaming.

Under IGRA, Congress intended for three sovereigns to work in cooperation on the regulation of Indian gaming. Each regulatory body has a distinct, supporting role in regulating Indian gaming. This system provides oversight in a comprehensive and independent manner. In 2004, tribal governments spent over $290 million to regulate Indian gaming:

- $228 million for tribal government gaming regulatory agencies;
- $55 million for state gaming regulation; and
- $12 million for Federal regulation of Indian gaming.

More than 3,350 regulators and law enforcement officers are dedicated to protecting Indian gaming from fraud, theft, and other crime:

- Tribal governments employ more than 2,800 tribal gaming commissioners and regulatory staff;
- States employ more than 500 state gaming regulators and law enforcement officers; and
- The National Indian Gaming Commission employs 80 Federal regulators to protect Indian gaming.

Tribal gaming regulators often outnumber state regulators for commercial gaming. For example, in South Dakota the Rosebud Sioux Tribe with 250 slot machines has more regulators than the entire City of Deadwood, with 2,400 slot machines run by multiple commercial gaming enterprises.

**Class I, Class II, and Class III Indian Gaming.**

IGRA divides gaming into three classes: Class I gaming is traditional Indian gaming conducted at tribal gatherings; Class II gaming is bingo, pull-tabs and related games, and non-banked card games; and Class III gaming is a catch-all category that includes lotteries, casino games, pari-mutuel racing, and all other games. Class I gaming is regulated by tribal governments. Class II gaming is regulated by tribal governments and monitored by the National Indian Gaming Commission (NIGC). Pursuant to Tribal-State Compacts, Class III gaming is regulated by tribal governments and state governments with background oversight by NIGC.

**Tribal Gaming Ordinances and Tribal Gaming Regulatory Agencies.**

IGRA requires that tribal governments enact tribal gaming regulatory ordinances that meet minimum statutory requirements, including:

- The Tribal Government must have the sole proprietary interest and responsibility for the conduct of any gaming activity (with a limited exception for Class II gaming);
- Net tribal government gaming revenues must be used to:
    - Fund tribal government operations/programs;
    - Provide for tribal general welfare;
    - Promote tribal economic development;
    - Donate to charities; and
    - Aid local governments.
- Annual outside audits must be conducted, including independent audits of any contracts in excess of $25,000 annually, and reported to the NIGC;
- Facilities are constructed a maintained in a manner that protects public health and safety and the environment; and
- A system for background checks and licenses for primary management and key employees of the gaming enterprise is established and results of background checks are sent to NIGC for review prior to the issuance of licenses.

In January 2005, NIGC issued a bulletin to provide guidance on the development of a draft tribal gaming ordinance. Section 200 of the model tribal gaming ordinance provides Tribes with a detailed outline on key regulatory issues such as:

- Licensing procedures for management officials and key employees;
- Procedures for fingerprints and background checks;
- Procedures for forwarding reports to NIGC;
- Procedures for granting and suspending gaming licenses;
- Guidelines for establishing a board of review for gaming and employment disputes; and
- Procedures for background checks for vendors.

Tribal ordinances are reviewed and approved by the NIGC only if they meet these minimum statutory requirements.

Tribal government regulatory agencies (TGRAs) are the primary regulators of Indian gaming. The National Indian Gaming Commission (NIGC) explains:

> Tribes are responsible for the primary, day-to-day regulation of [Indian gaming] operations.... A vast majority of Tribes have implemented independent tribal gaming commissions, which in most cases the Commission believes to be the most effective way of ensuring the proper regulation of gaming operations....[i]

As the primary regulators of Indian gaming, TGRAs carry out the following functions:

- Conduct background investigations on primary management officials and key tribal gaming employees in accordance with IGRA and NIGC regulations and forward them for NIGC or state review;
- Issue, deny, review, suspend, or revoke tribal gaming licenses for management officials and key tribal gaming employees, in cooperation with state regulatory agencies and the NIGC, 25 C.F.R. Parts 556 and 558;
- Conduct background investigations of vendors;
- Issue, deny, review, suspend, or revoke tribal gaming licenses for vendors, often in cooperation with state regulatory agencies;
- Issue, deny, suspend, or revoke licenses for each Indian gaming facility under the jurisdiction of the Indian Tribe and ensure that each Indian gaming facility is built, maintained, and operated in a manner that protects the environment, public health, and safety, 25 C.F.R. sec. 522.4;
- Promulgate tribal gaming regulations in accordance with tribal and Federal law and Tribal-State compact requirements for class III gaming;
- Establish minimum standards for the operation of the Indian gaming facility, including rules for cage and vault, credit, table games, gaming devices, and surveillance and security standards;
- Continuously monitor Indian gaming operations to ensure compliance with tribal and Federal law and Tribal-State compact requirements for class III gaming;
- Oversee audits of the Indian gaming facility, including audits of contract and supply contracts;
- Conduct investigations of any alleged misconduct, take appropriate enforcement action, and make appropriate referrals to tribal, state, and federal law enforcement agencies;
- Conduct hearings, take testimony, take disciplinary actions, levy fines, and issue closure orders and resolve patron disputes;
- Work cooperatively with state regulatory agencies, the NIGC, and tribal, state, and Federal law enforcement agencies; and
- Report to the governing body of the Indian Tribe.

Tribal gaming regulatory agencies are well staffed, with highly qualified employees who work in close cooperation with their Federal and state counterparts. For

example, TGRAs employ former tribal and state police officers, FBI agents, state regulators from New Jersey, Nevada, and other states, military officers, accountants, attorneys and bank surveillance officers.

Tribal governments use state of the art surveillance and security systems. For example, the Mashantucket Pequot Tribal Nation uses digital cameras, facial recognition technology, and frequently shares information with the FBI, state law enforcement and other gaming facilities to prevent crime. The Pequot system enables tribal security and surveillance personnel to read the face of cards, monitor every aspect of game play, and even read serial numbers on currency. The Pequot system is a technologically enhanced system, the FBI, CIA, and state law enforcement have visited the facility to study facial recognition technology and use their picture enhancing technology to fight crime. The Nation also works with the Secret Service to prevent counterfeiting.

For example, the Mohegan Tribal Gaming Commission ("MTGC") is a strong, effective regulatory agency directed by John Meskill, former Executive Director of the State of Connecticut Division of Special Revenue. MTGC is as the primary regulator of the Mohegan Sun Casino, the second largest in the Nation. MTGC has a staff of 55, including 40 inspectors, an investigation staff of 7, an auditor (CPA) and compliance officer, as well as an administration and licensing staff of 6. MTGC's annual budget is $3.66 million. Management officials, key tribal gaming employees, and all vendors, gaming and non-gaming must be licensed to do business with Mohegan Sun. In accordance with Mohegan's Tribal-State compact, the State Division of Special Revenue licenses gaming vendors for MTGC. Gaming vendors, such as card, dice, table game, and slot machine manufacturers and progressive jackpot providers, are investigated by the State Police and licensed by the Division of Special Revenue. For FY 2005, the Mohegan Tribe will reimburse the State of Connecticut $1.9 million for services provided by state gaming and liquor regulators and an additional $2.4 million for State Police services.

Similarly, the Mississippi Band of Choctaw spends $2.9 million annually for Indian gaming regulation. The Chairman of the Gaming Commission is the former Chief of Police. The Choctaw Gaming Commission has 36 staff members, including 24 full-time investigators. At least one investigator is on the gaming floor at all times and the state gaming commission has full access to the facility. The Choctaw gaming facility is fully equipped with digital surveillance technology. In addition, to deal with increased traffic flow, the Choctaw have increased their tribal law enforcement budget and aid to state law enforcement by a total of $325,000 per year.

**The National Indian Gaming Commission**

As do most Federal agencies, the National Indian Gaming Commission shares the responsibility with for regulating with other government agencies and NIGC recognizes that it tribal gaming regulatory agencies should be recognized as the primary, day-to-day regulators of Indian gaming. NIGC defers to state gaming agencies on background check and licensing decisions and compact enforcement for Class III gaming.

NIGC works in partnership with tribal gaming regulatory agencies on Class II gaming regulation and as background oversight for Class III gaming regulation. NIGC performs the following oversight functions:

- Reviews and approves tribal gaming regulatory ordinances;
- Reviews tribal background checks and licensing decisions;
- Reviews and approves tribal gaming management contracts;
- Reviews independent audits of Indian gaming operations, including audits of contracts for goods and services in excess of $25,000;
- Ensures that tribal ordinances provisions to protect the environment, public health, and safety are implemented;
- Continuously monitors Class II gaming, in cooperation with tribal gaming regulatory agencies.

In 1999, the NIGC issued Minimum Internal Control Standard Regulations for Class II and Class III gaming ("MICS") to guide cash and credit transactions, cage and vault operations, minimum rules for the conduct of games, operation of gaming devices, accounting standards, and security and surveillance. These regulations were derived from minimum standards developed by Nevada, New Jersey, and other jurisdictions.

In 2002, NIGC revised the MICS to take into account new developments in the gaming industry. NIGC explained:

> Internal controls are the primary procedures used to protect the integrity of casino funds and games, and are a vitally important part of properly regulating gaming. Inherent in gaming operations are problems of customer and employee access to cash. . . . Internal control standards are therefore commonplace in the industry and the Commission recognizes that many Tribes has sophisticated internal control standards in place prior to the Commission's original promulgation of the MICS.

67 Fed. Reg. 43391 (June 27, 2002).

Today, the NIGC is again moving forward with revisions to the MICS. Currently, NIGC is considering revisions that would:

- Strengthen minimum internal control standards for bingo, pull tabs, card games, and keno;
- Establishing new minimum internal control standards for gaming machines; and
- Revise and strengthen the minimum internal control standards for the cash cage, applications of credit complimentary services or items.

As the MICS revision process moves forward, NIGA and our Member Tribes have asked that the NIGC work closely with our tribal gaming regulatory commission because as the primary, day-to-day regulators of Indian gaming, they know what works.

While the MICS promulgated by the NIGC mirror some of the legislative proposals developed by this Committee in the mid-1990s, tribal governments have questioned if it is appropriate for NIGC to issue the MICS as mandatory rules, especially with regard to Class III gaming because IGRA contemplates that Tribal-State compacts will provide the ground rules for regulation. Nevertheless, as the Commission notes Indian Tribes have adopted the NIGC Minimum Internal Control Standards pursuant to tribal ordinances and regulations.

Executive Director Joseph Carlini, Agua Caliente Gaming Commission, served as the Assistant Chief Inspector with the State of New Jersey Casino Control Commission, with the Philadelphia Police Department for 17 years and graduated from Philadelphia Police Academy. Concerning the MICS, Director Carlini explains:

> The biggest problem facing most casino operations is the protection of assets from both external and internal sources. In Indian gaming, the response to these threats is continually evolving and is proactive, not reactive. The assets and the integrity of Indian gaming are protected through the implementation of the comprehensive and effective internal controls standards that exceed most conventional industry standards to detect and neutralize fraud and theft.

In short, tribal gaming regulatory agencies have implemented Minimum Internal Control Standards, and are working to revise tribal regulations to appropriately incorporate the NIGC's revisions and policy recommendations.

**State Regulatory Agencies**

In regard to Class III Indian gaming, Congress granted the state governments a role in the regulatory framework for Indian gaming -- a role which the Constitution had denied in the absence of congressional delegation -- through the establishment of a Tribal-State Compact requirement. Congress provided that Indian Tribes may engage in Class III gaming, if they enter into a Tribal-State Compact to set forth a regulatory framework for such gaming.

When an Indian Tribe requests to enter compact negotiations, the State must negotiate in good faith to enter into a compact. If not, the Tribe may sue the State, and if the Tribe prevails on its claim, the district court may order mediation. If mediation fails, the Secretary of the Interior may promulgate procedures for Class III gaming in lieu of a compact. The IGRA outlines the subjects for Tribal-State Compact negotiation:

(i) the application of the criminal and civil laws of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in such amounts comparable to amounts assessed by the State for comparable activities;
(v) remedies for breach of contract;
(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
(vii) any other subjects that are directly related to the operation of gaming activities.[ii]

Except for provisions to defray the cost of state regulatory fees, the IGRA makes clear that the State has no authority to tax the Indian Tribe or its gaming operation.[iii] The IGRA also makes clear that, after a Tribal-State Compact is entered into, Indian Tribes retain their inherent authority to regulate Class III gaming consistent with the compact.[iv]

Through Tribal-State Compacts, state government agencies assist tribal government regulatory provide an additional level of regulation for Class III Indian gaming (casino, pari-mutuel, lottery) by monitoring the enforcement of Compact regulatory standards, reviewing or conducting background checks and gaming licenses, reviewing audits and security and surveillance systems, and reviewing emergency management systems.

For example, North Dakota has 5 Indian casinos that and North Dakota Tribes spend over $7 million annually for Indian gaming regulation and employ 368 full-time regulators and staff. The North Dakota State Attorney General's Office regulates 900 organizations that conduct some form of charitable gaming. So, under the Tribal-State compacts, the Attorney General's Office was delegated authority to work with Indian Tribes to regulate Indian gaming. Through the State Bureau of Criminal Investigation (under the Attorney General), the State performs background checks for the Tribes for management officials, key tribal gaming employees, and vendors.[v] The State provides reciprocity for the vendor licensing decisions of other states, such as New Jersey and Nevada. The State conducts compliance audits and inspections of the Indian gaming facilities to ensure compliance with compact, ensure that games are fair and honest and assists in investigations and prosecutes any violators found at Indian casinos. North Dakota Tribes reimbursed the Attorney General's offices for over $90,000 in regulatory expenses.

In Arizona, the Tribes spend roughly $20 million for tribal regulation and also reimburse the Arizona Department of Gaming ("ADOG") about $8 million annually for its regulatory services. ADOG assists tribal gaming regulatory agencies with background checks and licensing of management officials and key tribal gaming employees. ADOG also inspects Indian gaming facilities to review cash and credit transactions, the integrity of games, and vendor payments. In preparation for this hearing, we requested Joseph Eve and Co., which audits numerous to prepare the attached cash flow and licensing charts to reflect the relationship between the tribal, state, and federal regulators. These flow charts show that state gaming regulatory agencies are involved in every step of the regulatory process for Class III gaming.

California and New York both have over 100 full time state employees working on Indian gaming regulation. In 2004, California's 54 gaming tribes paid the state's gambling control commission over $14,000,000 to fund 105 full time state employees dedicated to the regulation of Indian gaming. The California gaming compacts require Tribal and State regulatory agencies to work collaboratively in the regulation of Indian gaming. The agencies both have regulatory authority over the following areas:

- licensing of financial entities dealing with a casino operation
- licensing and inspection of gaming machines
- resolution of patron disputes

In New York there are 119 state employees working on Indian gaming regulation and the 3 New York gaming tribes reimburse the state over $13,000,000 to cover these regulatory expenses. New York State and the Tribes have compacted to have the New York State Racing and Wagering Board (the "Board") employees maintain a constant twenty-four hour presence within the gaming facilities of the Oneida Nation's Turning Stone Casino, the Seneca Niagara Casino and the St. Regis Mohawk's Akwesasne Mohawk Casino, which are twenty-four hour per day operations. Board Gaming Inspectors work jointly with Tribal Gaming Inspectors to monitor and ensure that gaming operations, such as dealing procedures, internal accounting and other controls, strictly conform to the applicable provisions of the Compact and their appendices. Casino patrons may seek State Gaming Operations Inspectors to clarify rules of a game and for recourse after filing a complaint.

The New York State Certification and Registration Unit is responsible for the review and subsequent approval or denial of the applications submitted by all persons involved with Class III gaming in the State. No employee or manager may be employed by the casino operator unless the individual has been previously approved by the Board. All applicants are fingerprinted and must undergo a background investigation by the Federal Bureau of Investigation, the New York State Division of Criminal Justice Services and the New York State Police - Casino Detail. All of the State's regulatory expenses, for both personnel and equipment, are paid for or reimbursed by the regulated Indian Nation or Tribe as required under federal law.

In 2004, the Oklahoma Governor and Legislature asked state citizens to vote on whether to approve a new Tribal-State gaming compact, which codify the regulations, rules and minimum requirements for Indian casino gaming in Oklahoma. The voters approved the compacts, which direct the state compliance agency to work with tribal gaming commissions to cooperatively regulate and review:

- All gaming equipment records, including machine payouts and maintenance performed;
- All security logs kept in the normal course of business, including surveillance monitors;
- All accounting books and records on all game activities;
- Use of net revenues by the Tribes;

- A list of all persons barred from the gaming facility;
- Selection of auditing firms to conduct annual independent audits of gaming facilities;
- Background investigations and fingerprinting for all key casino employees; and
- Maintenance of public liability insurance by tribal governments.

The budget for the new state agency will be in excess of $600,000 generated through fees assessed upon the tribal governments conducting gaming.

**The FBI, U.S. Attorneys, and Department of Justice**

In contrast to State lotteries, horse racing and other commercial gaming, which are only protected by state law, Congress provided for FBI investigation and Department of Justice prosecution of any theft, cheating, fraud or embezzlement from Indian gaming facilities. Title 18 U.S.C. section 1167 prohibits theft from gaming establishments on Indian lands:

> Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment operated by ... an Indian tribe ... shall be fined not more than $250,000, or imprisoned for not more than ten years, or both.

Section 1167 makes it a misdemeanor crime to steal less than $1,000 from an Indian gaming facility. In addition, it is also a Federal crime to steal from an Indian tribe under 18 U.S.C. section 1163. These provisions fulfill the Federal trust responsibility to protect Indian tribes.

**The Department of Treasury: Financial Crimes Enforcement Network**

Treasury's Financial Crimes Enforcement Network (FinCEN) is charged with preventing money-laundering under the Bank Secrecy Act (BSA). Indian gaming facilities (and other gaming establishments) generating in over $1 million in gross revenues annually are subject to the BSA. Treasury explains:

> There are extensive requirements for financial institutions, and additional ones for casinos. For casinos, important requirements concern deposit of funds, accounts opened, or credit extended. The casino must secure and maintain the name, permanent address, and social security number of each person having a financial interest in an account.

To comply with the BSA, Indian gaming facilities are required to have a plan to enforce BSA requirements, including:

- A system of internal controls to assure ongoing compliance.
- Training of casino personnel in BSA requirements.
- An individual or individuals to assure day-to-day compliance.

- Procedures for using all available information to determine, when required; accurate customer identity, suspicious or unusual activity; and whether recordkeeping requirements are met.

Federal involvement in Indian gaming regulation continues to grow. Under the USA – Patriot Act, enacted in response to the terrorist attacks of September 11, 2001, Congress strengthened money-laundering prevention laws to curb terrorism. As a result, tribal gaming operations have strengthened internal controls and computer tracking systems to assure ongoing compliance with these new requirements. In addition, tribal governments work with the Secret Service to prevent the passage of counterfeit currency.

**Federal Indian Gaming Working Group**

Because there are several Federal agencies that protect Indian gaming from crime, money laundering, etc., the Federal Government has formed a Federal Indian Gaming Working Group composed of:

- The National Indian Gaming Commission;
- The Federal Bureau of Investigation;
- The Attorney General's Native American Subcommittee of the U.S. Attorney's Advisory Committee;
- Treasury FinCEN;
- Internal Revenue Service; and
- Department of Interior Inspector General.

The Federal Working Group meets periodically to discuss important cases and coordinate efforts to protect Indian gaming from crime.

**Intergovernmental Information Sharing**

Through our Federalist system, tribal governments have a strong government-to-government relationship with the Federal Government and strong working relationships with state governments. Under the Indian Self-Determination and Education Assistance Act (ISDEA), for example, tribal governments contract with the Federal government to perform governmental services that the United States has historically provided pursuant to treaties. The ISDEA requires tribal governments to provide audits to the Department of the Interior on an annual basis. Similarly, tribal governments work with many other Federal agencies, including Agriculture, Commerce, EPA, Energy, HHS, HUD, Justice, and Transportation, and tribal governments provide these agencies with program reports and financial audits as well.

The Indian Law Enforcement Improvement Act authorizes agreements between the Department of the Interior, Department of Justice, tribal law enforcement agencies and state law enforcement. Pursuant to these agreements and other less formal working

relationships, tribal law enforcement agencies frequently share information with Federal and state counterparts.

Under the Indian Gaming Regulatory Act, tribal governments provide NIGC with annual audits, including independent reviews of gaming contracts in excess of $25,000. In addition, through Tribal-State compacts, many tribal governments also provide audits and access to financial records to state government regulatory agencies.

As noted above, through the Bank Secrecy Act, the Money Laundering Suppression Act, and the Patriot Act, tribal governments maintain computer systems to track financial transactions in excess of $10,000 and suspicious activities. Tribes then report those transactions to Treasury FinCEN. Tribal gaming facilities also track large prize payouts and report those to the IRS to ensure compliance with the Federal tax code.

When tribal governments issue bonds covered by the Securities Exchange Act, tribal governments make the required financial disclosures under the Act to the SEC and the public. As tribal governments get better access to the capital markets, we expect that more tribes will be utilizing the bond market and making the requisite filings.

Accordingly, there is a strong flow of information from tribal governments to the Federal government and through Tribal-State compacts and other intergovernmental agreements to the state governments.

**National Indian Gaming Intelligence Network**

For approximately ten years, tribal gaming regulatory agencies have networked within certain regions to share information about frauds, cheats, and scams. For example, two years ago, one of the North Dakota tribes was concerned that a group of visitors were perpetrating a fraud through cheating at their casino. The tribe contacted other tribes in North Dakota and the State Attorney General's Office, which regulates all gaming in the state. The next day, the BIA police, who were on alert at another reservation, arrested the group when they tried the scam again at another casino. North Dakota prosecutors then successfully prosecuted the criminals. Similar networking initiatives exist in New York and Connecticut, Wisconsin, Minnesota, Michigan, and New Mexico, to name a few.

For the past two years, at the request of our Member Tribes, the National Indian Gaming Association has been developing a network that can become the conduit for all regional networks. The Indian Gaming National Intelligence Network (EagleIntel) is a project spearheaded by Jerry Danforth, former Chairman of the Oneida Indian Nation of Wisconsin, and retired Navy Master Chief. He, along with Rocky Papasodora, Director of Investigations, Leech Lake Band of Objibwe Gaming Regulatory Board, and Oscar Schuyler, Commissioner, Oneida Gaming Commission, has developed an Internet based network that can facilitate accurate, reliable and timely information management 24/7. The network will be established as a nonprofit LLC, with membership open to tribal government owned gaming facilities. NIGA's general counsel is in the process of filing corporate documents for EagleIntel.

The purpose of this new network is to expand the ability to protect Indian tribes and tribal gaming facilities. The specific focus of the network is to develop and implement strategic and cooperative efforts that strengthen and enhance security techniques and resources, particularly with regard to the sharing of information on persons and their methods used to conduct wrongful or illegal activity at tribal gaming facilities. The sharing of intelligence information will assist Indian tribes and the federal government in protecting the security of tribal gaming. Furthermore the network will be able to share intelligence with other authorized investigators and law enforcement agencies thereby strengthening the integrity and security of Indian gaming nationwide.

**Secretarial Procedures In Lieu of Compacts**

For several years now, the NIGC has been seeking an amendment that will correct the Supreme Court's decision in Seminole Tribe v. Florida. 116 S.Ct. 1114 (1996). It continues to be NIGA's position that any legislation amending IGRA should include an amendment to correct the Seminole case. The Seminole case disrupted the carefully crafted balance between Tribes and States when negotiating compacts.

Prior to Seminole, IGRA required State governments to negotiate Class III gaming compacts with Tribes in good faith, and Tribes were permitted to sue States in federal court for failure to meet that obligation. The Seminole decision frustrated Congress' intent by permitting States to raise a sovereign immunity defense to such suits. This in effect gives States a veto power over the compacting process—an outcome clearly not intended by Congress. The Interior Department has promulgated regulations for alternative procedures for Class III gaming in lieu of a compact where States fail to negotiate in good faith and where they raise sovereign immunity as a defense.

NIGA and its member tribes firmly believe that the Interiors proposed alternative compacting regulations fully reflect the original intent of Congress in enacting IGRA and would restore the balance of power between Tribes and States.

**Class II Indian Gaming**

After the Supreme Court's decision in the Seminole case, many of our Member Tribes have struggled to secure Class III Tribal-State compacts. Recently, the Oklahoma Tribes have had a breakthrough in this area by placing the issue before state voters. In November 2004, with the support of the Governor and State Legislature, Oklahoma state voters approved Tribal-State compacts through a ballot initiative.

Yet, in the intervening years, Oklahoma tribes and others have continued to maintain economically viable operations using technologic aids to class II games. For some time, the Justice Department (DOJ) has disputed the interplay of technologic aids to class II games and the federal Johnson Act. In 2002, DOJ reversed a prior Office of Legal Counsel opinion in a footnote to a legal brief, stating that class II technologic aids are Johnson Act gambling devices, so therefore, a Tribe must have a Tribal-State Class

III compact to use the technologic aids. Five federal courts of appeal have rejected this argument, and ruled that technologic aids to class II games are not subject to the Johnson Act or even if they are, they are permissible under IGRA. As a result, class II gaming remains an important economic tool for tribal governments – as Congress intended. Tribal governments have invested significant resources in the regulation of Class II gaming.

The NIGC is considering regulations concerning Class II technologic aids, and it is important for the NIGC to work closely with tribal governments because our Member Tribes are the experts in this area. Two Tribes have filed a lawsuit against the NIGC based on alleged violations of Federal Advisory Committee Act. Accordingly, if the NIGC proceeds with its work in this area, we hope that NIGC will work directly with tribal governments and make adjustments to its proposals based upon legitimate tribal government concerns.

**Training and Technical Assistance**

Part of the mission of the National Indian Gaming Association is to provide training and technical assistance to our Member Tribes. We do so by bringing together the top experts in the field for seminars and roundtable discussions. For example, during our Annual Trade Show that we held earlier this month from April 10-13, we had roundtable discussions with the NIGC, the Department of Justice, and a seminar by the Department of Treasury's Financial Crimes Enforcement Network. In total, we held over 85 seminars and roundtable discussions during our Trade Show. Throughout the year, we held gaming commissioner training workshops, and both current and former NIGC Commissioners frequently make presentations at our seminars. Accordingly, NIGA is aware that, with the constant developments in the industry, tribal government officials and operators are always interested in further training and technical assistance.

Naturally, there is a variation in resources available to our Member Tribes. For example, while the Mashantucket Pequot Tribe may be training regulatory staff and surveillance personnel on facial recognition techniques other tribal governments may need training on internal auditing. The National Indian Gaming Commission does meet with tribal governments on regular occasions, and has also recently held seminars on internal auditing. We believe that it is appropriate and helpful for the NIGC to provide more training and technical assistance, especially for tribes in remote rural areas, and NIGC training and technical assistance on an individual tribal government basis would be helpful as well.

**Conclusion**

Tribal governments have developed Indian gaming as a significant source of tribal government revenue. Today, Indian gaming is rebuilding many areas of Indian country. Schools, hospitals, health clinics, police and fire stations, elderly nutrition centers, child development centers, community wellness centers, and cultural centers are monuments to the success of Indian gaming. After 200 years of genocide, deprivation, and poverty, we are just now beginning to rebuild. Accordingly, tribal governments have an important stake in protecting Indian gaming.

Tribal governments invested over $290 million last year for Federal, state and tribal regulation of Indian gaming, employing 2800 tribal regulators and staff and funding almost 500 Federal and state regulators and law enforcement agents. We have a strong system and good people working to protect Indian gaming from crime. Are we perfect? No. What is important is that we have a strong regulatory system, so that we prevent most crime, and if someone is foolish enough to commit a crime, the Indian gaming regulatory system catches them. Then our tribal governments work with the Federal or state authorities to ensure their prosecution. We believe that our record matches up well when measured against state lotteries, commercial gaming, horse-racing, or charitable gaming and experts agree. Harlan Goodson, former Director of California's Division of Gambling Control, explains, "The comprehensive regulatory system for Indian gaming in California meets or exceeds industry standards."

As the Committee reviews the Indian Gaming Regulatory System, NIGA is ready to provide assistance in this area and indeed, we are currently in a process of discussion with tribal leaders through the NIGA/NCAI Task Force on Indian gaming and we will discuss this hearing with our tribal leaders.

As the Committee proceeds, we ask you to recall that IGRA embodies a delicate balance of tribal, federal, and state sovereign interests. Tribal governments are more than happy to work with the NIGC on a government-to-government basis to ensure that we have the best, most productive working relationship. We want the strongest regulation for Indian gaming and we also ask for a fair recognition of our own efforts as sovereign tribal governments.

Thank you for the opportunity to testify today.

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[i] 67 Fed. Reg. 43392 (NIGC revised Minimum Internal Control Standard Regulations).

[ii] 25 U.S.C. sec. 2710(d)(3)(C).

[iii] 25 U.S.C. sec. 2710(d)(4).

[iv] 25 U.S.C. sec. 2710(d)(5).

[v] When state gaming regulatory agencies conduct background checks and issue licenses to tribal gaming management officials and key tribal gaming employees pursuant to Tribal-State compact provisions, the NIGC does not duplicate that work

UNIVERSITY OF MINNESOTA

Twin Cities Campus

Kevin K Washburn
Associate Professor of Law
N226 Mondale Hall
229-19th Avenue South
Minneapolis, MN 55455

612.624.3869
Fax: 612.625.2011
E-mail: kkw@umn.edu

**PREPARED STATEMENT OF KEVIN K. WASHBURN**
**ASSOCIATE PROFESSOR, UNIVERSITY OF MINNESOTA LAW SCHOOL**

**BEFORE THE COMMITTEE ON INDIAN AFFAIRS**
**UNITED STATES SENATE**

**WEDNESDAY, APRIL 27, 2005**

Thank you for inviting me to appear before the Committee. In the seventeen years since enactment of the Indian Gaming Regulatory Act, the scope and size of the industry has grown dramatically. Our understanding of good gaming regulatory policy has developed substantially. And experience has brought to light serious flaws in IGRA that must be addressed if Indian gaming is to remain a well-regulated industry and a useful resource to tribal governments.

There is a striking divergence between the expectations of the Congressional authors of the Indian Gaming Regulatory Act and the actual practice that has developed during the last seventeen years. I will address, first, the unexpected distribution of regulatory responsibilities between the federal, state and tribal governments, and discuss the ways that IGRA ought to be amended to deal with the current reality of gaming regulation. Second, I will explain why I believe that one of IGRA's most glaring failures is the well intentioned but unworkable and ultimately harmful scheme addressing review of gaming management contracts. I will offer a suggestion as to how to improve the effectiveness of NIGC contract review and simultaneously lower the costs of gaming related services to tribes by eliminating unnecessary uncertainty in the business climate created by these provisions. Finally, in keeping with the uncertainty theme discussed in critiquing the NIGC contract review provisions, I will address the problem created by uncertainty as the legality of Class II technological aids in light of the ambiguity of the application of the Johnson Act.

## I. THE NEED TO SHORE UP NIGC AUTHORITY AND TO GUARD AGAINST THE THREAT OF REGULATORY CAPTURE OF TRIBAL REGULATORS.

Because of its unsavory past and its questionable moral pedigree, gaming has correctly been subject to tremendous regulatory scrutiny. As one former federal prosecutor from Nevada testified in 1987 in the early Senate hearings on Indian gaming regulation, "the respectability of gaming is hard won and easily lost . . . the smallest scandal has ripple effects throughout

the industry."[1] Even more than in other industries, proper regulation is fundamental to the survival of the gaming industry.

Because of the tremendous value of gaming to Indian tribes, Congress and Indian tribes have an even greater interest in insuring that gaming on Indian reservations, in particular, is well regulated. As a result, providing for the proper regulation of Indian gaming was a primary focus of the Indian Gaming Regulatory Act.

When IGRA was enacted, it was anticipated that tribes and the federal government would regulate Class II gaming (that is, bingo, pull tabs and similar games) and that states and tribes would regulate Class III casino-style gaming through relationships worked out through tribal-state compacts. In many respects, the division of authority anticipated by Congress in 1988 never materialized.

### A. The Role of States

IGRA was enacted at least partially at the behest of states that asserted legitimate regulatory concerns about Indian gaming. In preparation for my testimony, I reviewed some of the hearing testimony from 1987. At that time, numerous witnesses testified that states would make better primary regulators of Class III casino-style gaming, primarily because state governments were performing such regulatory functions well in Nevada and New Jersey. Moreover, since state governments are physically closer to tribal casinos, commentators argued that they would provide a stronger regulatory presence. The compromise that was ultimately hammered out and that became law allowed states to take a regulatory role over Class III casino style gaming if they negotiated such a role in tribal-state compacts. Indeed, IGRA expressly anticipated that states would negotiate for robust regulatory roles.

By and large, however, the states have been no-shows in Indian gaming regulation. With a couple of notable exceptions, such as Chairman McCain's home state of Arizona, state governments never took up the mantle of tribal gaming regulation. This is curious in hindsight. One of the most persistent positions taken by state officials during the debate over federal Indian gaming legislation was the concern that Indian gaming be well regulated and the subtext was that states needed substantial regulatory authority over such gaming to insure that it was. Yet, when IGRA gave states an opportunity to address this problem head on in tribal state-compacts (by regulating tribal gaming and assessing tribes lawful regulatory fees to cover the costs), states widely declined to assert the powers that they had most aggressively sought.

### B. The Ambiguous Role of the NIGC

Because of the vacuum in state regulatory leadership in Indian gaming, the NIGC and the tribes sought to meet this important responsibility themselves. By and large, the federal-tribal partnership has been adequate. The divergence between Congressional expectations and regulatory reality, however, has created a couple of problems. First, the scope of the NIGC's authority over Class III casino style gaming is unclear. NIGC authority was greatest over Class II gaming; NIGC authority was thought to be more circumscribed over Class III

[1] Testimony of Stanley Hunterton, Testimony before the Select Committee on Indian Affairs, United States Senate, Hearing on S. 555 and S. 1303, 100th Cong., 1st Sess. (June 18, 1987).

gaming because the states were expected to fulfill that role. According to this theory, the Congress that created the NIGC likely anticipated that it was creating a National Indian *Bingo* Commission and not really a National Indian *Gaming* Commission. Thus, while the NIGC has stepped into the breach created when the state governments failed to show up, the tribes have often questioned the legitimacy of the NIGC authority over Class III gaming. As a practical matter, NIGC authority has usually been adequate to confer authority over Class III gaming because most tribes that conduct Class II gaming also conduct Class III gaming. While Class II gaming thus gives the NIGC an adequate regulatory hook, this explanation has not been unsatisfactory to the regulated industry, which views the NIGC as over-reaching.

To explain the importance of the legitimacy question, let me offer one fundamental truth about regulated industries. Regulated communities rarely like to be regulated. No one likes Big Brother looking over his or her shoulder. AT&T does not like the FCC looking over its shoulder; used car dealers do not like the state attorneys general looking over their shoulders; and Goldman Sachs likely does not like the SEC looking over its shoulder. It is a natural reaction.

Tribal lambasting of the NIGC sounds different because it often takes on the language of tribal sovereignty. If one strips away the sovereignty rhetoric, however, the complaints are little different than those raised in any regulated industry. Consider, for example, the controversy in the financial industry regarding Sarbanes-Oxley. One of the key areas of dispute regarding Sarbanes-Oxley is Section 404 of that law which provides for mandatory auditing of internal controls for financial reporting of publicly traded companies. This issue bears a striking resemblance to the substance of the dispute over NIGC authority to apply the Minimum Internal Control Standards to Class III gaming. Neither tribal casinos nor corporations wish to endure the expense or the trouble of reporting their internal control failings to a regulatory body, or to the constituents to whom they ought to be accountable, whether they are stockholders of a corporation or members of the Indian tribe. As sovereign nations, tribes are entitled perhaps to a greater level of clarity than ordinary businesses when they are subjected to federal legal requirements. The bottom line, however, is that no business likes to be regulated.

Given the natural skepticism by any regulated community, it is imperative that regulators have a clear mandate. Because it is in the best interest of tribal gaming for an objective regulatory agent to oversee all significant Indian gaming, Congress should strengthen the NIGC's mandate in this area. **Recommendation: Congress should clarify that NIGC authority over Class III gaming is as broad as it is over Class II gaming.**

In sum, states, by and large, have been no-shows in the regulation of Indian gaming; the NIGC has worked hard, but its authority related to Class III casino-style gaming has been challenged as uncertain and illegitimate. There is, however, another key player in the regulation of Indian gaming: tribal gaming regulators.

### C. The Potential Obstacles to Successful Tribal Regulation

In the Indian Gaming Regulatory Act, Congress presumably did not anticipate that the utter absence of state regulatory authority, or the ambiguity of federal authority, would require

tribal regulators to take such a pervasive role in regulating Indian gaming. Indeed, while Congress imposed on Indian tribes numerous responsibilities, IGRA did not call for – and did not require – that Indian tribes have tribal gaming commissions. To be sure, Congress contemplated that Indian tribes would exercise some sort of regulatory authority over Indian casinos, but it was left to the tribes themselves to figure out how best to go about exercising that authority. The heavy reliance on tribal gaming regulators was not only unexpected by Congress, it poses serious risks from the standpoint of sound regulatory policy that are not addressed in the existing language of IGRA.

Indeed, the uneasy relationship between the regulator and the regulated community mentioned above is true for tribal gaming regulators as well. Tribal casinos may not appreciate being regulated, even by tribal regulators. And one of the problems, of course, is that a regulated community can sometimes get upset at the manner in which a gaming commission regulates. One potential problem, which this Committee has heard about before, is that tribal gaming regulators often lack the legal separation that allow them to act independently of the casino itself or the tribal government.

To be effective, tribal gaming regulators must focus with singular clarity, like a laser beam, on their responsibility to maintain the integrity of Indian gaming. A tribal regulator who lacks independence may be influenced by the tribal government to take action that is politically expedient but inappropriate from a regulatory perspective. It may be influenced by casino managers to take action that helps the short-term financial interest of the casino managers, but is inconsistent with sound regulatory policy. To provide a concrete example, consider a tribal council member who leans on the regulator to approve a license application for someone who lacks the character traits that would make him suitable to be involved in a cash intensive gaming operation. Or consider also a casino manager that cuts regulatory corners to save money and asks the tribal gaming regulator to turn a blind eye to such actions. Such risks may be avoided if the regulators act independently and objectively, but not if they fear for their jobs. In a sound regulatory scheme, regulators must not be concerned with pleasing those who are responsible for tribal economic or political interests, but must act solely pursuant to legitimate regulatory interests.

While this may sound like a criticism of Indian tribes or Indian gaming, it seeks only to recognize that the Indian gaming industry is not fundamentally different than other industries with regard to the dynamics of regulation. We can expect as a structural matter that Indian casinos will chafe at regulation like all businesses do. We must therefore create regulatory structures that protect the independence of tribal regulators.

Here, the academic literature on "regulatory capture" is relevant. "Regulatory capture" is the term used to define a regulatory agency's tendency to collude with the firms it is ostensibly regulating, to the detriment of the public interest. The academic literature on this subject is rich and diverse. It tends to support the notion that a regulated community will attempt influence the regulator to prevent the regulator from enforcing vigorously the regulatory regime with which he is entrusted. Some scholars say "capture" is unavoidable: regulators will become instruments of the regulated community and will inevitably act in favor of the regulated community even when it is against the public interest. Others take a pragmatic view that "capture" will exist to a greater or lesser degree depending on the legal structures

that are used to guard against it, but that the threat of capture can be managed with prudent laws and sound regulatory structures.

Upon reviewing the literature on regulatory capture, one can conclude that the structure of Indian gaming markets renders tribal gaming regulators tremendously vulnerable to capture. One risk factor for capture is a high degree of discretion by regulators. Broad discretion not only creates the opportunity for regulators to rule in favor of the regulated community, but also provides cover for doing so because the essence of discretion is power unconstrained by enforceable legal authority. The regulation of gaming almost always involves a high degree of discretion by regulators. Consider that many gaming regulators assert as a legal matter that their discretion to grant or deny gaming licenses is unfettered by requirements of providing due process because involvement in gaming is not a right, but a privilege. Though such a legal argument is less compelling under modern notions of due process, it is widely held among gaming regulators and it serves to justify enormous unchecked discretion in the hands of the gaming regulator. Such discretion is deemed to increase the risk of capture.

Another risk factor relates to the number of groups interested in the regulator's performance. A regulatory agency that has many regulatory entities within its jurisdiction and many other interested groups interested in its work is less likely to succumb to capture by any one group, because it will be held accountable to some degree by each of the entities and interested groups and each will scrutinize agency action. So, for example, when the FCC makes a decision related to a communications license, AT&T, MCI and Sprint may cry foul if Qwest gets favorable treatment that the others perceive as unfair. Such competition within the regulated industry makes the regulator more accountable and thus serves as an important check on regulatory capture. In contrast, many tribal regulatory agencies have authority over only a single entity. Such regulators will not face the same kind of scrutiny that other regulators will face; they will face less scrutiny and will hear only one voice, rather than many, when they make regulatory decisions. Likewise, while outside interest groups can sometimes have an impact in preventing capture, there are few independent interest groups looking out for tribal members or casino patrons in the Indian gaming industry.

As a result, regulatory capture is a serious risk within the Indian gaming industry. To combat some of these dangers, the NIGC has developed a bulletin that urges tribes to create independent gaming commissions that will insure the proper regulation of Indian casinos. The bulletin sets forth some of the best practices in the industry and the modern thinking as to sound regulatory policy, but the bulletin does not carry the force of law. I would encourage the Committee to consider enacting laws to address the independence of tribal gaming regulators.

I would note that even a fully independent tribal gaming commissions may not remain free of the risk of capture if it works in a closed system in which a commission regulates only one entity. Thus, it is important to have an independent authority, outside of the influence of the tribal government, that independently evaluates and perhaps oversees tribal regulatory policy-making and decisions. The obvious candidate for such a role is the NIGC, though an autonomous quasi-governmental body or a multi-tribal organization might be able to provide some independent oversight of decisions by tribal gaming commissions to discourage regulators from engaging in questionable behavior.

While one might wish to see such an argument justified by a lengthy catalogue of serious problems that have occurred because of the lack of an effective regulatory structure, a "parade of horribles" has not materialized. With a few exceptions, the Indian gaming industry has had few serious regulatory problems. Tribal gaming regulators have generally shown that they are up to the task of being primary regulators and have implicitly demonstrated that state regulators are unnecessary. However, the industry has grown explosively, and such rapid growth is bound to come with growing pains and strains on a regulatory structure that has serious flaws. Congress should not wait for serious problems to develop before correcting these flaws and shoring up the regulatory structure. **Recommendation: Congress should require independent tribal gaming commissions and should expand NIGC oversight authority and capability, especially over those tribal casinos that decline to create effective and independent tribal gaming commissions.**

The changes I advocate, clarifying NIGC authority and creating a positive legal requirement for independent tribal gaming commissions and additional independent oversight, are sound as a matter of regulatory policy and would safeguard the regulation of this rapidly growing industry.

## II. ADDRESSING THE NIGC'S TRUST RESPONSIBILITY

The management contract review process provides another example of reality diverging from Congressional expectations expressed in 1988. These provisions may represent IGRA's most spectacular failure.

IGRA's management contract provisions recognized that Indian tribes would contract with outsiders to run casinos. Given that the commercial gaming industry in Nevada and elsewhere had been largely successful in ridding this cash-intensive industry of the influence of organized crime, Congress enacted the management contract review provisions to insure that a federal agency, not the tribe, would scrutinize the outside parties who contract with tribes to run Indian casinos. In other words, Congress did not want organized crime figures that had been banished from commercial gaming (or other bad actors) to target Indian gaming operations.

Congress also sought to insure that outside parties did not take advantage of tribes and walk away with the lion's share of gaming revenues. To insure that Indian tribes were the primary beneficiaries of Indian gaming, Congress capped revenue participation by outside investors at a maximum rate of 30 percent of net gaming revenues over a maximum five year term (it allowed a revenue participation of up to 40 percent and up to a seven year term in extraordinary circumstances).

Seventeen years later, it is patently obvious that these provisions did not have the intended effect. Though more than 200 tribes currently engaging in Indian gaming, the NIGC has approved only about 45 management contracts between tribes and outside parties. The low number of approved management contracts is not a sign that Indian tribes are constructing and operating gaming operations alone and independent of outside assistance. Rather, most outsiders that do business with Indian tribes have found vehicles other than management contracts to become involved in Indian gaming. Parties have worked to avoid the

management contract review process and have been creative in drafting arrangements that give the outsiders tremendous revenue participation in Indian casinos, yet without any federal regulatory scrutiny.

I would argue that the management contract review process was a failed experiment and that the underlying issue presents a serious problem that ought to be more closely examined. Solving this problem requires, first, examining the reasons that parties seek to avoid the NIGC management contract review process.

Parties may wish to avoid NIGC scrutiny for a variety of reasons. Some may wish to hide checkered backgrounds or criminal records that would prevent them from being involved in Indian gaming if they were subject to a suitability determination. Other parties may seek to evade the NIGC review process for more legitimate reasons, such as the inordinate length of time for NIGC review and the uncertainty of the outcome, as well as the uncertainty of the legality of the contract pending review. The review process is difficult for the outsiders who subject themselves to it. During the review process, these outside contractors must tie up millions of dollars that could be invested elsewhere, all the while facing substantial uncertainty as to the outcome of the process. Often, they must renegotiate contracts in mid-stream to satisfy the NIGC. The result is that many potential participants in Indian gaming decide to leave Indian gaming and pursue less risky ventures. Because of the smaller pool of parties willing to bid on tribal gaming business, tribes face a less competitive market from which to draw talent and they pay higher prices for that talent. In other words, the lengthy and uncertain review process obstructs the free market that otherwise would have developed for the provision of gaming-related services. As a result, tribes pay a premium created by the risks and delay created by the regulatory structure.

The NIGC has also been frustrated by its inability to scrutinize contracts other than management contracts. Because it has a legitimate concern about its obligation to maintain the integrity of Indian gaming and to protect Indian gaming against outsiders who pose a threat to the industry, it has searched for means of addressing the problem. It has recently asserted a new legal theory to invalidate such contracts. In the last three years, the NIGC has begun to argue that contracts that provide a substantial revenue share to an outside party other than a management contractor violate the provision of IGRA that requires tribes to insure that Indian tribes have the "sole proprietary interest" in Indian casinos. In other words, the NIGC argues that substantial participation in casino revenues amounts to ownership. One problem with this approach is that the NIGC has not adopted clear standards to determine which kinds of provisions do – and which do not – violate the "sole proprietary interest" principle. The lack of clear standards exacerbates the existing problem of uncertainty that outside parties face related to regulatory approval and thus further increases the risk premium for doing business with Indian casinos. As a result, the fees for the services the tribes require – even under contracts subsequently found lawful – are higher than the tribes otherwise might have had to pay.

Rationale actors in the business community appreciate clear legal standards as to regulatory requirements. Clear standards allow business entities to appraise the value of a business opportunity and determine how much to bid for that work. In the absence of clear standards, outside parties to tribal contracts face uncertainty and will charge tribes a premium related to the perceived risk. If the risk is unquantifiable, outside parties may

refuse to bid at all, reducing the competition that otherwise might contribute to a favorable economic environment for tribes. Currently, the uncertain regulatory climate related to certain kinds of contracts creates a perception of high risk in entering gaming-related contracts with Indian tribes. This uncertainty drives out some of the mature and sophisticated gaming companies that would otherwise be willing to invest in Indian gaming and creates opportunities in the industry for those who are comfortable with a high degree of risk, such as the foreign investors that have had a high profile in several Indian gaming operations.

NIGC scrutiny of management contracts and other gaming-related contracts has been justified as an exercise of the federal government's trust responsibility. However, the NIGC lacks clear standards as to how to exercise such authority. Moreover, one major development in the past seventeen years is the increasing sophistication of Indian tribes. Congress recognized this sophistication in 2000 when it amended Section 81 (25 U.S.C. § 81) to remove the requirement for Secretarial approval of tribal attorneys and their fees. Indeed, there is a real question whether regulation of the fees charged by outside contractors and paid by tribes ought to be regulated by the federal government at all. For several reasons, the answer is likely to be negative.

First, the theory behind such regulation is based on dubious and out-dated economic principles. The fee caps in IGRA's management contract provisions are essentially price caps imposed on the seller rather than the buyer. Price caps have fallen out of favor with economists and government policy-makers as inefficient. Indeed, Chicago School price theorists tell us that parties will generally sign contracts only when it makes both parties better off. Any attempt by the government to regulate contracting with Indian tribes bears the burden of explaining why this fundamental economic truth does not apply to Indian tribes. If the argument is that tribes cannot make rational decisions, then the obvious question is whether the federal government can make decisions better than tribes can. Since it is tribes that must bear the costs of such contracts, it is likely that they are much better at evaluating the costs and benefits than a disinterested federal decision-maker. Moreover, because of the size of the Indian gaming industry, tribes now have access to a broader spectrum of legal counsel and business advice. Most gaming tribes are able to obtain substantial expertise that rivals or even exceeds the talent of government analysts. For run-of-the-mill business decisions involving contracts for gaming services, the federal government likely cannot make better decisions than tribes. In the main, federal regulators should trust tribes to strike deals that are advantageous to them.

Second, in a legal environment shaped by the Indian trust fund debacle and numerous other actions by federal officials, such as the unseemly acts documented in the Supreme Court's Navajo Nation case of 2003, the federal government's legitimacy is in serious doubt when it purports to make economic decisions on behalf of tribes. Even setting aside the question of federal legitimacy when it purports to act on behalf of tribes, the tribes might be better off making their own decisions with private counsel. If the tribe's counsel commits malpractice in advising the tribe as to matters related to tribal economic concerns, the tribe may be able to sue the advisor. On the other hand, if the government errs in regulating tribal economic decisions, the tribe may have difficulty obtaining any redress.

Third, it is inevitable that insertion of federal regulators into tribal economic decisions will slow economic development because it takes additional time after a deal is struck between the parties for the government to perform its review. For reasons discussed above, this dynamic may also increase the cost to tribes.

That is not to say that there ought not be a substantial role for federal regulators related to such contracts. Rather than scrutinizing economic decisions, however, the federal government can assist tribes best by independently scrutinizing the outside parties involved in such deals.

Because of its nationwide and worldwide reach and its access to federal law enforcement, the federal government has a tremendous comparative advantage over tribal regulators in performing background investigations. One can easily imagine that a federal background investigator, with federal credentials, will have greater access to information than a tribal investigator who travels outside his jurisdiction. Moreover, with clear federal standards for suitability, a person entering such contracts has a greater ability to evaluate the likelihood of successfully completing the suitability review. Finally, the NIGC provides a greater safeguard to Indian gaming because it is much less likely to suffer from capture-related myopia that might afflict tribal gaming regulators.

To sum up, under the current regulatory regime, the NIGC's authority is far too circumscribed over licensure of outside people involved in Indian gaming contracts and yet NIGC authority is far too broad over tribal economic decision-making. I would thus encourage Congress to expand the NIGC's role in the background investigation and suitability context by extending the NIGC's authority to conduct background investigations and issue licenses to outside parties involved in Indian gaming. In sharpening the focus of NIGC authority, Congress should also eliminate the role NIGC is currently playing in regulating tribal economic decisions. **Recommendation: Congress should give the NIGC licensure authority over a wide range of persons involved in substantial contracts related to the development and operation of Indian casinos and expand the NIGC's capability for conducting background investigations so as to minimize delay in that proceess. At the same time, Congress should eliminate NIGC review of the economic aspects of those agreements.**

## III. THE HIGH COSTS OF UNCERTAINTY

The NIGC contract review process is not the only area in which uncertainty plagues Indian gaming and imposes tremendous costs on Indian tribes. The Department of Justice's persistent, unsuccessful attempts to apply the Johnson Act to Class II "technological aids" also creates an atmosphere of uncertainty. Despite the Department of Justice's repeated losses in the federal courts of appeal, the threat of federal prosecution causes prudent gaming companies to stay out of that market. In other words, the Department of Justice has succeeded in driving out of the market only those companies that respect the Department of Justice's role in interpreting the rule of law, leaving the market dominated by a few companies that are willing to operate in this legally gray area. As a result, the companies with the largest involvement in Class II tribal gaming are those that are willing to tread close to the thin line separating lawful and unlawful gaming. This approach has rewarded these companies with extraordinary profits that would not be available in a market

with full and open competition. These profits have come at the expense of Indian tribes whose choices of business partners are constrained by the Department of Justice's actions and threatened actions.

Indian tribes and the entire Class II Indian gaming market are ill-served when reputable companies refuse to enter the market. Tribes engaged in lawful behavior should be able to work with reputable companies. In short, the Department of Justice interpretation of the law has created a transfer of wealth from many relatively poor Class II gaming tribes to those particular companies willing to operate in the shadow of the law.

The rule of law in Indian country is undermined by the ongoing dispute related to the lack of clarity of the application of the Johnson Act to Class II technological aids. The Department of Justice's legal position is tenable only because Congress was not crystal clear when it drafted IGRA. Congress should give the Department of Justice the clarity it craves with regard to the applicability of the Johnson Act to Class II gaming involving technological aids. Congress should indicate clearly that the Johnson Act does not apply to Class II technological aids. This is a sensible solution to a problem that has festered for a decade and has consumed hundreds of thousands of federal and tribal dollars in litigation costs that could be better spent elsewhere. **Recommendation: Congress should explicitly indicate that all forms of Class II gaming recognized in IGRA are exempt from the Johnson Act.**

Thank you for inviting me to testify today.

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Appendix - Publications by Professor Washburn on Indian Gaming:

*The Mechanics of the Indian Gaming Management Contract Approval Process*, 9 GAMING LAW REVIEW 333 (2004) (explaining the lengthy process involved in the NIGC's review of gaming management contracts and discussing the relevance of "collateral agreements" in this process).

*Federal Law, State Policy and Indian Gaming*, 4 NEVADA LAW JOURNAL 285 (2004) (Essay in Symposium on Cross-Border Issues in Gaming) (describing the ultimate dependence of tribal gaming on state law and state political processes).

*Recurring Problems in Indian Gaming*, 1 WYOMING LAW REVIEW 427 (2001) (describing problems related to compacts, revenue-sharing, the *Seminole Tribe* decision, and the scope of lawful gaming).

June 3, 2005

Honorable John McCain
United States Senate
Committee on Indian Affairs
836 Hart Senate Office Bldg.
Washington, D.C. 20510

Re: Response to May 19 letter with questions following April 27 oversight hearing.

Dear Chairman McCain:

Thank you for giving me another opportunity to address the important questions facing the Committee on Indian Affairs related to the regulation of Indian gaming. Below I have set forth each of the Committee's post-hearing questions and my responses.

**Committee Question 1**. You note that by and large, the states have not lived up to the regulatory role they sought in IGRA. We also hear daily now, how states are demanding ever larger "fair shares" of Indian gaming revenues. In your opinion, have some states lost any concern over the regulatory aspects of Indian gaming, and become solely concerned about the money?

**Response**: In 1987 and 1988, state governments expressed concerns primarily about the regulatory aspects of Indian gaming. They asserted fears that gaming would be a source of crime and corruption and other societal ills.[1] The Indian Gaming Regulatory Act took up this concern explicitly by giving states the opportunity to have their legitimate regulatory concerns addressed in tribal-state compacts. IGRA gave states authority to negotiate strong regulatory roles over Indian gaming and allowed states to charge regulatory fees to tribal governments to support state regulatory activity. Despite their stated concerns in strong regulation and despite the fact that all the costs of such efforts would be borne by tribal governments, relatively few states exercised this opportunity; instead, they have generally left the regulation of Indian gaming to the tribes and the NIGC (the notable exceptions being Arizona and Wisconsin and only very recently California).

In the seventeen years since Congress created the compact scheme in IGRA, Indian gaming has grown tremendously. States now covet the revenues that Indian gaming produces. At the same time, the states' concerns about the proper regulation of gaming seem to have disappeared. As a result,

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[1]See, e.g., Letter from John K. Van de Kamp, Attorney General of California, June 24, 1987, set forth in Hearing Report, Hearing before the Select Committee On Indian Affairs, Gaming Activities on Indian Reservations and Lands, United States Senate, 100th Cong., 1st Sess. June 18, 1987.

states seem far less concerned about having a regulatory role and yet far more interested in having economic participation in Indian gaming. Since the Supreme Court's Seminole Tribe decision, state governments have had the ability to use the federal law requirement of a gaming compact as a lever to force tribes to share gaming revenues with them, even though they do not seem to care much about the original purpose of the compact requirement, that is, allowing states to address legitimate regulatory issues.

State efforts to use the federal compact requirement to extort revenues from Indian gaming fly in the face of traditional rules governing tribal economic activity, which generally protects such activity from state taxation. These efforts also fly in the face of Congressional intent in IGRA to insure that *tribes* are the primary beneficiaries of Indian gaming. To the extent that states wish to obtain the economic benefits of gaming, states have the right to change their laws to authorize and tax commercial gaming or to conduct state-sponsored gaming, just as many states do with lotteries, race tracks or riverboat gambling. In the absence of a compact requirement, states and tribes might nevertheless agree to revenue-sharing agreements which would preserve tribal exclusivity in exchange for a share of tribal gaming revenue, but tribes ought not be forced into such negotiations through a federally-mandated compact requirement.

In summary, Congress anticipated in IGRA that the compact requirement would give states a means of addressing legitimate regulatory concerns, not that it would serve as a lever for states to obtain a share of Indian gaming revenues. The past seventeen years have shown that states are less concerned about regulation and more concerned about their economic interests. Given the widespread lack of regulatory interest by states, the compact requirement has served only to give states an illegitimate and unintended lever to exact tribal revenues. Compacts have not been reliable vehicles for strong regulation of Class III tribal gaming. Given the lack of widespread state concern for regulation of Indian gaming, I would argue for diminishing the compact requirement and consolidating regulatory authority over Class III gaming with tribes and the NIGC.

**Committee Question 2**. Independent tribal gaming regulators are very important. How would the NIGC determine when and if a tribal regulatory body is "independent"? Is it a matter of knowing it when you see it, or is there some objective criteria you can suggest? Should tribal gaming regulators be subject to background checks?

**Response**: In the Indian gaming industry, most tribes operate only one or two gaming facilities. As a result, tribal regulators are destined – by the structure of the industry – to have a close relationship with those whom they regulate. In the parlance of academics, the risk of "regulatory capture" is high in such a regulatory structure.

I have seen the unfortunate effects of regulatory capture in a couple of different contexts in Indian gaming. In one instance, I saw a tribal regulatory commission deny a license to a financier who had

ties to organized crime only to later reverse itself and improvidently grant a license after apparent pressure from the tribal leadership. While the tribal gaming commission's reversal of its decision was unfortunate, denial of the license would have derailed the tribe's development of a major gaming operation that would have been the tribe's principal casino. In such a context, the pressure on a tribal gaming regulator to approve a license is simply overwhelming. In another instance, a tribal gaming commission *denied* a license to persons who appeared suitable to be involved in gaming after apparent pressure from a tribal leader who realized that substantial economic benefit might accrue to the tribe if the applicants, who had already provided substantial investment in the operation, could be removed for putatively legitimate regulatory reasons.

Both of these scenarios represent dysfunctional exercises of regulatory power and both cast doubt on the integrity of Indian gaming and its regulation. While most tribal regulators likely are able to resist such pressures, the structure of the industry naturally gives rise to the occasional temptation to misuse regulatory authority. In other words, the structure is such that such pressures are routine.

Requiring gaming regulators to be "independent" can minimize these risks to some degree. Independence is served when regulators are part of a multi-member regulatory commission that has a direct avenue of communication to the tribal citizenry, and that is staffed with commissioners who have fixed and lengthy terms of office and are removable only for cause. An independent commission needs an adequate and secure funding stream that will enable it to hire competent professional staff. I believe that the best commissioners are also those who have no financial stake in the venture. Part-time commissioners, such as retired state gaming regulators or judges, or others who have earned independent reputations outside of the narrow confines of the tribal economic environment can be effective in providing independence and objectivity to tribal gaming regulation. In my opinion, independence is maximized by regulators who are independent of the tribal leadership and casino management, such as state or federal regulators, and those whose livelihood is secure no matter the decision they make.

It is important to note that state and federal regulators are also subject to capture, however. Thus, it is important to maintain strong Congressional oversight and other safeguards, such as sensible restrictions on post-government employment.

As for background checks of tribal gaming regulators, I believe that tribal gaming regulators should be subject to routine background investigations. Background investigations of regulators would insure that unsuitable persons do not gain access to Indian gaming through the regulatory path and can help to safeguard the perceived integrity of the regulation of tribal gaming. It would also create a sense of fairness for those gaming employees and managers and others who must undergo invasive background investigations.

I would note, however, that regulators are generally not directly involved in the operation of gaming.

Regulators are not routinely involved in handling cash or "cash-equivalent." In that sense, they do not present the same *type* of risk to gaming that gaming operation employees present. The method of suitability investigation should be consistent with the risks presented and appropriate to the purpose. It therefore need not be identical to the investigations conducted of gaming employees or others involved in the gaming enterprise.

**Committee Question 3**. Your point is well taken on the need for background and "suitability" checks on a broader range of persons. It does seem incongruous that casino employees have background checks, but the individuals building casinos or lending them money may not have similar reviews. Would you recommend the background checks be performed by tribal gaming regulators, with NIGC oversight? Or let the NIGC have the sole authority to conduct the background checks? Should the NIGC also have approval authority over a broader range of agreements?

**Response**: I would recommend that Congress authorize the NIGC to conduct suitability investigations of outside vendors or others with substantial involvement in Indian gaming development or operations.

For several reasons, I believe that federal regulators are best suited to this task. Background investigations often require extensive travel and careful coordination among a team of persons with various kinds of expertise. Federal investigators have greater access to international resources and are likely to be better able to develop a high and uniform degree of professional expertise. Moreover, federal investigators are likely to be viewed as more objective by outsiders and the public in general. More vendors would likely be willing to engage a regulatory process that is governed by federal law and regulations and performed by federal officials. And Indian gaming would be a healthier industry if larger numbers of vendors were willing to compete for the work. Federal regulators are also likely to be less susceptible to the improper influences that tribal investigators might face, such as those set forth above.

The problem is that suitability work is often more important that any one tribe. If a tribal investigator improvidently grants a gaming license to an unsuitable person or entity, it can give a black-eye to the whole Indian gaming industry. It is thus better to locate this responsibility with federal officials who have the explicit responsibility to the whole industry and not just to one small fraction of that industry.

The NIGC should have suitability investigation authority over a wider range of agreements based primarily on the magnitude of the compensation called for in the contracts. However, I would reiterate my objection to NIGC review of the *economic* terms of those contracts; such review may provide a false sense of security and inappropriate and unintended cover to those who would defraud tribes. As an illustration, I would offer a contrast between the recent Navajo Nation case in the Supreme Court and the unfolding scandal involving Jack Abramoff and Greenberg Traurig. Both

cases involve circumstances in which tribes were defrauded in unscrupulous commercial arrangements.

The Navajo Nation case presents the sorry spectacle of the then-Secretary of the Interior James Watt inappropriately exercising governmental authority to frustrate tribal negotiations over a coal lease with Peabody Coal Company, ultimately leaving the tribe hundreds of millions of dollars poorer than it would have been absent improper action by a federal official. Yet, despite the clearly inappropriate exercise of government power, the tribe was unable to obtain relief. See United States v. Navajo Nation, 537 U.S. 488 (2003). In that sense, the governmental review served to authorize and legitimize the economic transaction and to insulate the wrongdoers from liability. The real tragedy is that the exercise of economic review was nominally in accordance with the government's broad trust responsibility to Indian tribes, but the trust responsibility not only provided no protection, it effectively accomplished the opposite. It provided cover to a commercial entity in taking advantage of an Indian tribe.

Now consider the Jack Abramoff scandal which also involves the misappropriation by outsiders contractors of substantial tribal financial resources. In contrast to the coal lease at issue in Navajo Nation, tribal agreements with outside contractors for representation in Washington lie outside the approval authority of the federal government. If the Navajo Nation case is any guide, the lack of federal scrutiny may inure to the long term benefit of the tribes involved in the Abramoff scandal. Though several Indian tribes have been seriously defrauded and manipulated, tribes have access to the courts for redress. As a result, the tribes in the Abramoff scandal are likely to obtain a substantial financial recovery. Such redress might not be available if the activities in question had occurred under a "federally-approved" contract.

Congress should not create a system in which underpaid and overworked government bureaucrats are reviewing multi-million dollar contracts and effectively conferring an official federal stamp of approval. In the Abramoff scandal, the attention provided by the Senate Committee on Indian Affairs is far more effective than any review by federal bureaucrats might have been. While routine governmental review of contracts may occasionally prevent a tribe from entering into a bad contract, tribes also have their own incentives from avoiding bad contracts and, in the absence of governmental review, courts can address most of the serious problems that might arise. The governmental stamp of approval that comes from governmental review will often insulate the outside contractor from liability when tribes enter bad agreements, even if federal officials acted improperly or incompetently in approving the contract. Federal review of tribal contracts thus promises much more than it can realistically deliver and it may ultimately cause more harm than good. Instead of federal review of the economic terms of contracts, I would give the NIGC the authority to insure that bad actors are kept out of all aspects of the industry. I would then expect that, among the approved vendors, the market can determine which of them will get contracts and for how much return on their investment.

I appreciate the opportunity to provide these additional thoughts and stand ready to offer any other assistance the Committee may want.

Very truly yours,

Arizona Department of Gaming

202 E. [illegible] Drive, Suite 200
Phoenix, Arizona [illegible]
Tel 602.[illegible]
Fax 602.[illegible]
www.azga[illegible]

Janet Napolitano
Governor

Paul A. Bullis
Director

June 27, 2005

The Honorable John McCain, Chairman
Committee on Indian Affairs
838 Hart Senate Office Bldg.
Washington, DC 20510

Dear Chairman McCain:

My name is Paul Bullis, and I am Director of the Arizona Department of Gaming. This Department is the State agency which, along with Arizona's Indian tribes and the National Indian Gaming Commission, oversees Indian gaming in Arizona.

I am writing to you today to convey a simple message: the State of Arizona and Tribal governments are working together as partners to provide effective oversight of Indian gaming.

Professor Washburn had it almost right when he testified before you in April of this year, stating that "with a couple of notable exceptions, such as Chairman McCain's home state of Arizona, state governments never took up the mantle of tribal gaming regulation." What is missing from Professor Washburn's statement is an acknowledgment that a state government cannot, simply by itself, "take up the mantle of tribal gaming regulation." It takes a recognition by *both* state and tribal governments that a significant role for the state is proper for effective regulation, and a commitment by *both* state and tribal governments to make regulation succeed. This is what has happened in Arizona.

I believe there are four keys to the successful Tribal-State partnership in Arizona: Commitment, Communication, Resources and Respect. Each of these keys is necessary, and they build upon each other to create and maintain a strong partnership for effective regulation.

Commitment

The existing Tribal-State Gaming Compacts in Arizona are the result of negotiations between the State and a group of tribal representatives, and approval by the voters of the State. The parties always recognized that strong regulation in order to



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protect the public was a necessary component of the Compacts. The fact that the Compacts provide for strong regulation, and indeed strengthen regulation from the previous Compacts, was a significant factor in the approval by the voters.

The commitment to protect the public is clearly set forth in the Compacts and forms a crucial part of the Policy and Purpose of the Compacts. The Tribes and State declared that the Compacts "provide a regulatory framework . . . to ensure the *fair and honest operation* of [] Gaming Activities, . . . maintain the *integrity of all activities* conducted in regard to [] Gaming activities; and . . . *protect the public health, welfare and safety*." The Tribes and State agreed that the Compacts are "intended to *enhance the regulation and integrity* of gaming."

The Compacts establish a dual regulatory scheme whereby Tribal and State regulators each have critical roles in the regulation of gaming and protecting the public. The Compacts establish Tribal regulators as the primary regulators, with the responsibility for the regulation of all gaming activities and for the enforcement of the Compacts. State regulators have the authority to monitor the Tribes' gaming operations to ensure they are conducted in compliance with the Compact, and to investigate suspected Compact violations. More specific responsibilities for State regulators are discussed below.

It is essential that the roles of State and Tribal regulators are embodied in the Compacts. This ensures that the commitment to strong oversight, and to the role that the State will play in this oversight, will remain in place despite inevitable changes in government leadership.

Communication

Communication is, of course, fundamental to building and maintaining any successful relationship. Even though communication will not guarantee that a relationship is successful or eliminate issues, hopefully surprises are reduced and the intensity of issues is modulated. More importantly, in areas of common interests and common responsibilities, communication allows the parties to more effectively achieve common goals.

Communication between the State and Tribes, both as individual Tribes and collectively, is on-going and has become institutionalized. The communication takes place on many levels and in many ways.

On the ground level, at the casinos, Tribal and State regulators maintain regular, often daily, communication. When State regulators are at casinos performing any of their many responsibilities, we check in with the Tribal regulators when we arrive, and we check out with the Tribal regulators when we leave. The Tribal regulators know why we are there, and what we are doing, and we make them aware of any issues or concerns that we observe. When incidents require investigation, the State and Tribe will often work

together to determine the facts. The results of investigations of Compact issues are shared between regulators.

In addition, the State and representatives from all gaming Tribes meet regularly as a group to discuss regulatory issues. This is the process that was utilized in negotiating the existing Tribal-State Gaming Compacts. Even though the Compacts were signed two and a half years ago, the process of meeting as a group has continued as new issues need to be addressed. What began as a process designed to accomplish a particular objective, the creation of new Compacts, has now become institutionalized as a means to address common issues. The result has been an increase in familiarity and trust. Issues and misunderstandings are identified and addressed quickly. Common understandings of regulatory requirements are achieved.

There are other examples of the State and Tribes sharing with each other. For example, the State has been invited to address groups of Tribal leaders and casino executives. The State has dealt directly with casino operations on particular issues. The State also has regular contact with Tribal police departments. Our Special Agents have attended training provided to Tribal regulators at the casinos. Casino managers and Tribal regulators have provided training to the State

Each of these situations provides an opportunity for the Tribes and State to strengthen our partnership and to achieve our common goals of protecting the public and ensuring the integrity of Indian gaming in Arizona.

Resources

The commitments contained in the Compacts and made at meetings are not simply empty words. They are backed by the Tribes and State devoting time, energy and most importantly significant resources to the regulation and oversight of gaming.

Each Tribe has its own Tribal Gaming Office, which acts as the primary regulator and enforcement authority under the Compacts. Tribal Gaming Offices have other responsibilities as well, such as licensing casino employees and vendors, and approving slot machines and card tables.

But even beyond the resources in terms of personnel and expenses in operating Tribal Gaming Offices, Arizona's Tribes also provide a minimum of $8 million per year to fund the enforcement activities of the Arizona Department of Gaming. The Department's total budget is $11.3 million.

The Department was established in 1995. We currently have 105 employees, including 33 certified peace officers, 4 Certified Public Accountants, 4 Certified Fraud Examiners, 3 financial investigators, 6 auditors, and 8 slot machine compliance technicians. We work in partnership with the 15 gaming tribes in the State to oversee Class III gaming in 22 casinos.

The Department must certify casino employees, must certify vendors of goods and services to the casinos, must approve slot machines and table games, and conducts annual reviews at each casino to ensure compliance with the Compacts. The Department has Special Agents assigned to all of the casinos, who work with tribal regulators to protect the public and tribal assets, and to ensure the integrity of gaming.

Our Special Agents conduct background investigations, including criminal history and credit checks, on all applicants for certification as casino employees. Employees in sensitive positions receive an even more in-depth financial review.

The Department uses Special Agents, financial investigators, accountants and Certified Fraud Examiners to conduct certification investigations of vendors of goods and services to casinos. These investigations include site visits to the headquarters of slot machine manufacturers and other critical suppliers.

Certification to participate in the gaming industry is a privilege and not a right. Casino employees and vendors who cannot establish that they are suitable are not certified.

The Department's slot machine technicians certify all new and upgraded slot machines, and randomly inspect slot machines. Our slot machine technicians will inspect or certify all of the State's 12,000 slot machines during the course of a year.

Our auditors and accountants conduct annual reviews of the casinos to ensure that all provisions of the Compacts are being met. A separate audit of the casinos' internal controls is also conducted annually.

As another component of good regulation, the six urban tribes have agreed that the Department will have access to their on-line slot accounting systems, to monitor in real-time what is occurring at all of the slot machines in those casinos.

The resources of the Arizona Department of Gaming, coupled with the resources of the Tribal Gaming Offices, provide many pairs of regulatory eyes to oversee gaming.

Respect

A Tribal spokesperson recently stated that there is a "healthy respect" between the Tribes and the Arizona Department of Gaming. This is critical, because the partnership between the State and Tribes will ultimately fail unless there is respect.

Respect means many things from the State's perspective. It means respecting the fact that the Compacts form a relationship between governments, between the State and sovereign Tribes. It means respecting the roles and responsibilities that the State and Tribes each has under the Compacts. It means respecting the fact that casinos are a business, and that effective regulation can be achieved without unduly interfering with the normal operations of that business.

Finally, it means respecting and honoring the commitment made to protect the public and ensure the integrity of gaming.

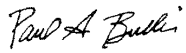
I agree that a healthy respect exists in Arizona. We at the Arizona Department of Gaming continue to work hard to earn that respect and to ensure that we provide due respect to the Tribes and to our commitments.

Conclusion

Regulation of Indian gaming works in Arizona because the Tribes and the State share a commitment to protect the public and ensure the integrity of gaming. That commitment is backed up by the resources necessary to do the job effectively.

Thank you for the opportunity to provide these comments. Please feel free to contact me if you have any questions or would like additional information.

Sincerely,



Paul A. Bullis
Director



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