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INDIAN GAMING REGULATORY ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON INDIAN GAMING REGULATORY ACT; ROLE AND FUNDING OF THE NATIONAL INDIAN GAMING COMMISSION

JULY 9, 2003
WASHINGTON, DC

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INDIAN GAMING REGULATORY ACT

WEDNESDAY, JULY 9, 2003

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

The committee met, pursuant to notice, at 10:05 a.m. in room 106, Senate Dirksen Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Thomas, and Dorgan.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning, and welcome to the committee's second oversight hearing in the 108th Congress on the Indian Gaming Regulatory Act of 1988, known by its acronym of IGRA. By the way, Senator Inouye will not be able to be with us this morning. He's in a markup on appropriations and unfortunately will not be here. But any statement he sends in we'll include in the record.

Congress enacted the IGRA in 1988 after the U.S. Supreme Court handed down the *Cabazon* case which confirmed that Indian tribes have inherent authority to conduct Indian gaming on their lands. I think it's fair to say that 15 years ago, no one could have seen that by 2002 Indian gaming revenues would grow to $14.5 billion, the most recent revenue data collected by the National Indian Gaming Commission.

The growth of Indian casinos continues at a very fast pace and has caused some concerns in some areas in dealing with zoning, local land use planning, and things of that nature. But I'm still convinced that many of those disagreements are often worked out and can be worked out with a dialogue between people on both sides of the issue if they have good intentions and good will.

What many didn't foresee back then was that States would try and exact their share of gaming revenues from the tribes. Anyone who reads the papers today realizes that with many States struggling to balance their own budgets, almost every one of them having a deficit, that day has come. In some cases, those same States that opposed IGRA in 1988 are now the most ardent supporters of Indian gaming, as long as they get their share.

The IGRA does make it clear that Congress views gaming as an economic activity that Indian tribes can develop and that they should be the primary beneficiary of the efforts. The drive by States to get shares of tribal gaming revenues has only increased

since the 1996 *Seminole* decision. Tribal leaders are informing this committee that many States will not even begin to negotiate without first getting an agreement on revenue sharing. We have asked the Department of the Interior to explain to the committee the authority and criteria it uses in approving compacts that contain revenue sharing components. We have also asked Indian tribes and tribal associations that conduct gaming to provide their experiences with the compacting process and demands for revenue sharing. They will also share with us the many good things that they have done with their gaming revenues.

And with that, Senator Thomas, did you have an opening statement?

Senator THOMAS. Thank you, Mr. Chairman. Not really. I just am very interested in what's happening here. It's a big dollar issue. It's important to the tribes, of course. The role of the State is an interesting issue. Wyoming is involved, as a matter of fact, right now with the Secretary. Also the type of land on which gambling is initiated is interesting. So I'm more here to listen than anything. Thank you.

The CHAIRMAN. Thank you. Then we'll start with Aurene Martin, deputy assistant secretary of Indian Affairs. Welcome, Ms. Martin. And by the way, thank you for attending the ceremony in Montana last week on commemorating the memorial for the American Indians who died at the Battle of the Little Big Horn. It was very well attended with, I understand, over 5,000 people. I had to leave somewhat early, but I was delighted to see such great, overwhelming support for it. Thank you for being here. Go ahead.

STATEMENT OF AURENE M. MARTIN, ACTING ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY GEORGE SKIBINE, DIRECTOR, BUREAU OF INDIAN AFFAIR'S OFFICE OF INDIAN GAMING MANAGEMENT

Ms. MARTIN. Thank you. I enjoyed the event as well. It was very moving.

First of all, I'd like to thank you for the opportunity to appear here today to testify on this issue. My name is Aurene Martin. I'm the acting assistant secretary for Indian Affairs at the Department of the Interior.

You've asked us to appear today to talk about the Department's role in reviewing revenue sharing provisions included in class III tribal-State gaming compacts. I'm here today to talk about that, and I'm accompanied by George Skibine, who is the director of our Office of Indian Gaming.

As you're aware, such compacts are submitted to the Department for approval pursuant to the requirements of the Indian Gaming Regulatory Act, otherwise known as IGRA. IGRA provides that class III gaming activities are lawful on Indian lands only if they are, among other things, conducted in conformance with tribal-State compacts entered into by an Indian tribe in a State and approved by the Secretary.

In reviewing a compact, the Secretary must ensure that three requirements are met. She must ensure that the compact does not violate any provision of IGRA. She must also ensure that the com-

pact does not violate any other provision of Federal law that is not related to jurisdiction over gaming on Indian lands. Finally, she must ensure that the compact does not violate the trust obligations of the United States to Indian tribes.

The secretary must approve or disapprove a compact within 44 days of its submission or the compact is considered to have been approved, but only to the extent the compact is consistent with the provisions of IGRA. A compact takes effect when the secretary publishes notice of its approval in the Federal Register.

Since IGRA was passed in 1988, the Department of the Interior has approved approximately 250 class III gaming compacts between States and Indian tribes which are located in 24 States throughout the country. Of those compacts, the Department has approved or deemed approved revenue sharing provisions between Indian tribes and the following States: Connecticut, New Mexico, Wisconsin, California, New York, and Arizona. In addition, several Michigan tribes are making revenue sharing payments to the State of Michigan under compacts that became effective by operation of law, and other Michigan tribes have made revenue sharing payments to the State under court approved consent decrees.

Section 11(d)(4) of IGRA specifically provides that the compacting provisions of IGRA shall not be interpreted as conferring upon a State or any of its political subdivisions the authority to impose a tax, fee, charge or other assessment upon an Indian tribe, and that no State may refuse to enter into compact negotiations based upon the lack of authority in such State. However, since the Supreme Court's 1996 decision in *Seminole* v. *Florida,* more States have sought to include revenue sharing provisions in class III gaming compacts, resulting in a discernible increase in such provisions over the past 7 years.

In general, the Department has attempted to apply the law to limit circumstances under which Indian tribes can make direct payments to a State for purposes other than deferring costs of regulating class III gaming activities. To date, the Department has only approved revenue sharing payments that call for tribal payments when the State has agreed to provide valuable economic benefit of what the Department has termed substantial exclusivity for Indian gaming in exchange for the payment. As a consequence, if the Department affirmatively approves a proposed compact, it has an obligation to ensure that the benefit received by the State is equal or appropriate in light of the benefit conferred on the tribe.

Accordingly, if a payment exceeds the benefit received by the tribe, it would violate IGRA because it would amount to an unlawful tax, fee, charge or other assessment. Though there has been substantial disagreement over what constitutes a tax, fee, charge or other assessment within this context, we believe that if the payments are made in exchange for the grant of a valuable economic benefit that the Governor has the discretion to provide, these payments do not fall within the category of a prohibited tax, fee, charge or assessment.

Revenue sharing has undoubtedly been approved by the Department. It has emerged as a result of the Department's review of each individual compact over the past several years, and it is contained in the letters that we have sent to both the States and

tribes with regard to the results of our reviews. I have brought a copy of those letters and would like to submit them to the committee for inclusion in the record.

The CHAIRMAN. They will be in the record.

Ms. MARTIN. Thank you.

As I stated earlier, States and tribes have increasingly agreed to revenue sharing provisions. As part of this overall trend, the Department has observed a number of other issues that have arisen in the context of revenue sharing and which may have serious consequences for Indian gaming in the future. These issues include an increase in the number of provisions authorizing off-reservation establishments for gaming, sometimes out of State. And these are often accompanied by high percentage revenue sharing provisions.

There have also been some attempts by tribes to define zones of tribal exclusivity, most often around off-reservation sites. And again, these are often accompanied by high revenue sharing provisions as well.

Finally, there are increasing concessions by States on issues related to gaming, but upon which the State may not be obligated to bargain. These are also accompanied by high revenue sharing provisions. An example of this is an expanded scope of gaming in a State where there might be a limited class III authorization within the State for gaming, but the tribe is bargaining for an expanded scope of gaming.

IGRA doesn't give guidance on the legality of these issues in all cases, and the Department must determine how to address them as they are presented, which is most often within the context of a compact submitted by an individual tribe. Where these provisions appear to us to violate the purposes of IGRA or appear for other reasons contrary to basic issues of fairness, the Department feels limited in its ability to disapprove such compacts, given the charge of the Department to review compacts to determine only whether they violate Federal law; that is, whether they violate IGRA, other Federal law or they violate the trust obligation to Indian tribes.

This concludes my remarks. I'd be happy to answer any questions.

[Prepared statement of Ms. Martin appears in appendix.]

The CHAIRMAN. I'm interested in hearing your views on a couple of things. I visit a lot of reservations and a lot of casinos in the process. Some are very, very successful. And if they have reached some kind of a revenue sharing agreement with States, and it was done without duress, done of their own volition, that's fine. But I've also visited some that are just barely making it. And there are some casinos that are a way, a long way from any metropolitan area, and frankly, there's nobody in them except a few of the Indian people that live on the reservation and maybe a few non-Indians who happen to work there. But there is clearly very, very little money from those casinos.

Does the Department have a view on revenue sharing or the State's taking money from the casinos through revenue sharing when they're that desperate and destitute?

Ms. MARTIN. We do have such a concern. Whenever we receive an individual compact, we look at the provisions of the compact and if it has a revenue sharing provision, we review it to find out

if that particular tribe is able to make those payments. Oftentimes what we'll do is require or ask for financial statements from the tribe to find out if their projections and their operations support a revenue sharing payment and if in fact what they're getting in exchange for that payment is of substantial economic benefit to them.

The CHAIRMAN. Have you found that, what would you term a "substantial economic benefit"? I can't imagine any for a couple of casinos that I visited, what benefits they're getting from the State. I don't see any at all, in fact.

Ms. MARTIN. Up to now, the Department has only accepted one type of benefit as being sufficient to merit a revenue sharing payment, and that is substantial exclusivity. That is in a State where Class III gaming may be authorized but is not authorized for non–Indian persons to operate commercial enterprises, but the tribe is authorized to operate those enterprises. Then we would look at whether a revenue sharing payment is warranted and to what degree, given a particular tribe's circumstances.

In many of the cases you're talking about these facilities are employment vehicles but they don't raise a lot of money for the tribe.

The CHAIRMAN. And you said you've approved 250 compacts, and of that, 6 have been with revenue sharing compacts?

Ms. MARTIN. Within six States and all of the tribes located within those States.

The CHAIRMAN. What is the Department's role, in California now there's sort of an explosion of casinos, as you know. Are you dealing with them, tribe by tribe with the State? Because I know they're having some pretty fierce discussions with the State in California now about revenue sharing.

Ms. MARTIN. California, and I guess you could say this about every State, has its own unique circumstances. They have a constitutional amendment which deals with Indian gaming. They have an existing compact that most of the tribes have with the State. Unless and until we start to receive those compacts for review, we don't really have a role in their ongoing discussions.

The CHAIRMAN. How many compacts are being reviewed in California?

Ms. MARTIN. I'm not aware of a specific number. The information we get is anecdotal, really.

The CHAIRMAN. We've had some discussion, as you probably know, dealing with revenue sharing, that those tribes that are making a lot of money with tribal casinos should share with those tribes that are rather poor. In fact, in some cases they do this, they do it of their own volition. Would the Department favor some kind of tribal revenue sharing?

Ms. MARTIN. I think that we have supported that type of revenue sharing in the case of California. We haven't had a larger discussion of whether tribes who were not willing to participate in such a revenue sharing program should be coerced into such a program. Obviously, it could be of tremendous benefit to some of the poorer tribes.

The CHAIRMAN. Have you found that tribes that would see a benefit, for instance, if it went to the local communities or costs of police or fire or improving the roads to the casinos or something of that nature, have you found that there's less opposition to that?

Ms. MARTIN. I'm sorry, I guess I didn't understand the question.

The CHAIRMAN. I can see that if tribes were concerned about some of the funds going to something that they wouldn't see any benefits from, they would object. I guess what I'm trying to get to is if there was a way that if those funds were deposited in some kind of a development fund for the tribes, if they would see less opposition by the tribes.

Ms. MARTIN. I can't speak for the tribes themselves, but I would think that given a choice between participating in a fund or making payments to a State where they don't see an actual benefit or they can't track the benefit to their own communities and contributing to a fund that would definitely benefit other Indian tribes and Indian people, they would want to contribute to such a fund.

The CHAIRMAN. Your testimony said that the secretary may only disapprove a compact if it violates the provisions of IGRA or Federal law or trust obligations. Has a compact ever been disapproved for violating the trust obligations of the United States?

Ms. MARTIN. Not that I'm aware of, no.

The CHAIRMAN. Once dollars go into the State coffers, can they be used by the State for anything the State wants to use it for, or is there any provision in the agreements that you've seen that would allow that money to circulate and come back to help the communities around the casinos?

Ms. MARTIN. Well, it really depends on the particular tribe at issue. I know that in some States, tribes have attempted to make agreements with the State where they agree to use the funds that are given to the State for specific purposes, such as education or to be used in communities that the tribe is located. But in other cases, there is no such tie or requirement for the moneys to be spent that way.

The CHAIRMAN. I remember in the last oversight hearing, staff can remind me, but we had one tribe that told us of the millions of dollars they pay into the State, and then the State testified that that money was used for other things that had nothing to do with the area where the tribe was. Then there was some other testimony by local officials complaining of the need for road improvements and all the other stuff around the area where the tribe had built a casino. It was Connecticut, with the Pequots, as I'm reminded.

And I remember telling them at the time what that local community needed really was a better lobbyist in their State capitol. They didn't need to go after the Indians any more. If that money was being paid into the State coffers and they weren't getting part of it back to the local communities, that's the responsibility of that local community, it would seem to me, to go to the State and demand some of that money be circulated back to their local concerns.

The Department of the Interior policy on revenue sharing, concerning that, what basis is there in the law to approve compacts that allow revenue sharing for amounts far and above the cost of impacts on local infrastructure? Is there anything in the law now that allows them to demand excess money?

Ms. MARTIN. Well, there's no specific provision that authorizes revenue sharing per se. It's a policy that has developed over the

past several years in response to benefits that tribes have negotiated with States.

The CHAIRMAN. So there is no statutory basis for your revenue sharing policy. And apparently no broad regulations that guide the Department either. So what gives you the guidance to determine your conclusions for it?

Ms. MARTIN. Well, as I stated, over time the Department has reviewed these agreements on a case by case basis. In instances where a State has negotiated things that are within its discretion to negotiate and the tribes have been willing to pay for that, they come to us with an agreement that they've made through an arms length negotiation and they've asked us to approve that. Since the State is not obligated to negotiate those items and the tribe is not obligated to agree to them, we have approved those agreements.

The CHAIRMAN. I see. Well, this hearing basically, it's not about off-reservation acquisitions, but as you probably know, almost, at least every week and sometimes on succeeding days, tribes are here. In fact, I talked to one this morning that wanted to expand their holdings, wanted to take some land into trust and want, if they're not doing it to the satisfaction and through the Bureau, they want us to run a bill or help with a bill to take off-reservation lands into trust. It just seems to me that there is some disconnect between how it's being administered and what they want from us.

But as you said, it's tribe by tribe. I know with the advent of the casinos and the money that is flowing through the casinos now, there are many tribes who just a few years ago wouldn't have thought of gaming who see it as really an opportunity for jobs and to provide some benefits for their members. I generally am very supportive of that.

Well, thank you very much for your appearance this morning, Ms. Martin. And I appreciate your testimony.

Senator Thomas, did you have any questions for Ms. Martin?

Senator THOMAS. Just one, sort of a broad one.

You sort of described your role and what you do. What would you say, or would you suggest any changes in the system? Do you have any particular problems in the system?

Ms. MARTIN. Overall, the Indian Gaming Regulatory Act creates a delicate balance between tribes, States, and the Federal Government for the way that tribal gaming is operated. I think that there are some improvements we would make if we could, and we'd be happy to talk to you about what those might be.

Senator THOMAS. You can't share them with us now? We'd have to shoot you? [Laughter.]

Ms. MARTIN. The first thing that comes to mind is that 44 days, or 45 days, by 44 days we have to have a definitive answer on the approval or disapproval of a compact. And we would like to extend that amount of time.

Also, because of the *Seminole* v. *Florida Supreme Court* decision, there is an unequal situation that's developed with regard to the ability of States and tribes to negotiate. I think that we would support trying to fix that situation in some way. Off the top of my head, those are a few things.

Senator THOMAS. If that doesn't work, it's between the States and the tribes then it moves on to the Secretary, is that right?

Ms. MARTIN. The Secretary has promulgated regulations to address that situation and under those regulations, a tribe could come to the secretary and apply for procedures to operate class III gaming. But that regulation has been challenged by the States of Alabama and Florida. It's currently in litigation.

Senator THOMAS. I see. Thank you.

The CHAIRMAN. Mr. Skibine, before I go on, did you have any comments to add to Ms. Martin's?

Mr. SKIBINE. I just wanted to make one clarification, perhaps. With respect to the class III gaming procedures, we have those regulations in effect. But if a State does not raise an 11th Amendment defense to a good faith lawsuit by a tribe, then the process by which they develop procedures and those procedures end up with the secretary, like the case in Wyoming, not through our regulation but through the statutory process.

Our regulations were meant to address the case where a State does raise an 11th Amendment defense to a good faith lawsuit so that the tribe essentially is left without any recourse. We decided that the secretary had the authority to promulgate regulations to entertain applications from these tribes. We have a few pending now before us. That's it, thank you.

The CHAIRMAN. I thank you. Before you leave, I might tell you, Ms. Martin, I don't know how far away the Department is from picking a new assistant secretary, but you taking the reins in a rather sudden and unexpected turn when the last assistant secretary left, I just wanted to tell you, I think you're doing a very, very fine job in fulfilling a difficult job as acting assistant secretary. Thank you for being here.

Ms. MARTIN. Thank you very much.

The CHAIRMAN. We'll now move to the second panel, which will be Zach Pahmahmie, chairman of the Prairie Band of Potawatomis; and Herman Williams, chairman of the Tulalip Tribes; Jacob Viarrial, Governor of the Pueblo Pojoaque, Santa Fe, and they will be accompanied by George Rivera, the Lieutenant Governor of the Pueblo Pojoaque in Santa Fe, and Frank Demolli, the general counsel for the Pueblo. With that, your complete testimony will be included in the record. If you'd like to abbreviate, just speak your conscience rather than a written statement, that will be fine.

We'll start with Chairman Pahmahmie.

STATEMENT OF ZACHARIAH PAHMAHMIE, CHAIRMAN, PRAIRIE BAND OF POTAWATOMI NATION

Mr. PAHMAHMIE. Good morning, Mr. Chairman and members of the committee. Again, my name is Zachariah Pahmahmie. I have the pleasure of serving as the chairman of the Prairie Band Potawatomi Nation.

I want to first begin and express a point that I'd like to make, the ability of gaming to transform peoples' lives and create opportunity. I think personally I can speak of the fact that gaming has been a part of my presence before you here today. Gaming revenues have helped to finance our education department and helped pay for the cost of education, of attending Stanford University and in 2000 when I graduated from the University of Kansas School of Law. And at 28, I was elected the youngest chairman in the entire

history of the Prairie Band Potawatomi, and I'm sure I'm one of the youngest tribal chairmen in the entire Nation.

I want to thank you for the opportunity to testify today about the use and sharing of gaming revenues. I will discuss how our Nation has used gaming revenues to strengthen our well-being, and how we have, in the absence of a formal revenue sharing agreement, shared the benefits of our gaming operation with Kansas and surrounding communities. I have submitted written testimony, which I request be included in the record. I also have a resource directory that I would like to be included in the committee file on today's hearing.

The CHAIRMAN. It will be included in the record.

Mr. PAHMAHMIE. Briefly, our reservation is an approximately 76,000 acre reservation located 20 miles north of Topeka, KS, and our membership is approximately 4,900 people. In January 1998, in partnership with Harrah's, we opened our current Harrah's Prairie Band Casino, which offers class III gaming with approximately 950 machines, a bingo operation, a hotel and soon we'll be adding a convention center.

We do not have a formal revenue sharing provision as part of our compact. Revenue sharing, however, was not a make or break issue for the simple reason Kansas recognized that it would enjoy significant benefits from the increased economic activity of our nation's gaming enterprise. The compact itself states, the economic benefits from tribal gaming, including increased tourism and related economic development activities, would generally benefit all northeastern Kansas. And this prediction has proven to be true. Positive impacts of the casino for our nation, the State of Kansas and for local governments cannot be overstated.

Our gaming enterprise has made significant contributions to the State and surrounding communities by creating hundreds of new jobs, generating millions of dollars in tax revenue and creating and unprecedented level of secondary economic activity. Our casino is the largest employer in Jackson County, with 916 employees, 91 percent of whom are non-tribal members. The current hotel and events expansion will be constructed by a Kansas owned and operated company, and will ultimately add roughly 150 new jobs.

Job creation has also occurred in the areas of our nation such as in our roads and fire department and accounting and administrative offices that have positions held by non-members. Our progress has also spurred job creation off-reservation in Jackson County as well. In addition to the creation of jobs, from 1998 when we first opened our casino through 2002, we have purchased approximately $29 million worth of products from over 500 Kansas vendors and suppliers, paid over $8.9 million to the State of Kansas in income taxes withheld from payroll of casino employees, paid $600,000 to the State of Kansas in unemployment taxes withheld from the payroll of casino employees, paid over $156,000 in State liquor taxes, paid over $856,000 to the State gaming agency.

The casino has attracted more than 6 million visitors since its opening and has been the number one tourist destination in Kansas for the last 4 years. Our visitors, many of whom come from out of State, frequent local restaurants, shop at local businesses and stay at local hotels. We have helped revitalize the towns along the

Route 75 corridor, which is the main north-south route running from Kansas to Iowa. And this increased local activity has propelled Jackson County from the bottom half of Kansas' 105 counties when measured for economic performance to one of its top 10.

At a time when States are experiencing budgetary crises, the Prairie Band Potawatomi Nation continues to provide a strong economic stimulus. We generate and share millions of dollars in increased economic activity, and this is happening in the absence of a formal revenue sharing agreement with the State. The benefits to the State, surrounding communities and our nation have naturally evolved from the opening and operating of our facility.

I would next like to discuss what gaming has meant to the Prairie Band Potawatomi Nation itself. Our nation has used gaming revenues to exercise our sovereign rights of self-determination and strengthened three core ingredients of a strong economy: A sound physical infrastructure, stable government institutions and a healthy, educated work force. In terms of our physical infrastructure, and this has been one of our highest priorities, financed by gaming revenues, we now own 60 percent of our reservation land. Before, we only owned 18 percent. This expanded ownership has translated into greater sovereign control over the development of our resources and increased opportunities for economic development.

Until 1998, our nation lacked any paved roads. We now work under a 5-year road improvement plan and have 23 miles of blacktop and more to come. We also have been able to build seven new bridges to replace ones that were unsafe. Projects like these promote tourism, create jobs and enrich our business environment and quality of life. In addition, affordable housing has also been a priority for developing our infrastructure. Our people have long endured substandard housing conditions. Recently, by leveraging our gaming revenues, we have been able to provide new housing for our members and special housing for our elders. Our members can now move home to work and raise their families on the reservation.

In addition to a sound infrastructure, successful economic development depends on strong and stable government institutions. To this end, we supplement our court budgets with gaming revenues to ensure that they function at their most effective level. Soon, our court system will conduct its first jury trial.

Gaming revenues also support the education and well-being of our members. Thanks to gaming revenues, we expanded our early childhood education center so we can now serve 102 children, whereas before we could only serve 20.

In terms of education, we are now able to assist 140 of our students in pursuit of their college and graduate degrees. Previously, we could only afford to assist 30 to 40 per year.

The impact of gaming on our nation extends far beyond the bottom line. These improvements have transformed the morale of our members, both young and old, and have solidified our community. Gaming revenues have provided us with a stable base upon which to chart our own future. Our success has expanded our vision of what is possible and given our citizens, especially our youth, the confidence to turn these visions into reality.

In conclusion, even though no formal revenue sharing agreement exists between our nation and the State, we both, along with the surrounding communities, have benefitted from the substantial increase in jobs, business activity and tax revenues produced by our gaming enterprise. We are proud of our progress and we believe we are a good neighbor and a solid partner, and are confident that our strong relationship with the State and surrounding city and county governments will continue long into the future.

Thank you.

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

The CHAIRMAN. Thank you.

We will now go to Chairman Williams.

STATEMENT OF HERMAN A. WILLIAMS, JR., CHAIRMAN, TULALIP TRIBES OF WASHINGTON

Mr. WILLIAMS. Thank you, Chairman Nighthorse Campbell and other committee members, for being here today, and thank you for inviting me to make my short little brief comments.

Washington State is one of the most robustly competitive gaming markets in the United States. We have many tribal casinos and what they call mini-casinos, horse racing, punch boards, pull tabs, and a heavily promoted State lottery. Washington State does not have a tribal-State casino revenue sharing, per se. Should the tribes be giving the State a percentage off the top? The answer: Tribes already support their local communities generously.

Revenue sharing only makes sense if the tribes have an exclusivity. But with the wide variety of choices already in the market and constant pressure for more, it's hard to imagine how the clock could be turned back now, or at any point in the future. To be candid, Mr. Chairman, as you well know, Indians have quite enough experience in giving up things of value only to get little or nothing in return.

Gaming compacts already require that tribes share revenue with our communities. Other non-tribal gaming operators in the State have no such requirements. Horse racing is barely taxed by the State, and the mini-casinos are not taxed at all. Tribes are allowed not more than two locations, but the State lottery is in nearly every grocery store and marketplace. There are no limits as to how many mini-casinos one person can own.

But thanks to IGRA, tribes are now able to offer services to their members which simply did not exist prior to IGRA. And I'd like to thank everybody for the hard work that they did in getting IGRA passed. Education, housing, health care, elder care, child care, drug and alcohol treatment, as well as cultural restoration, law enforcement, fire suppression, emergency medical and many others are now funded with our gaming revenues. Not only do we fund services for tribal members and other Native Americans, we have also extended the benefit of our success to the surrounding communities and to the State itself. Nearly 60 percent of all Tulalip tribal employees are non–Indian, non-tribal. Last year, we paid nearly $45 million in salaries. Our gaming facility alone paid over $100 million for goods and services to vendors, which 75 percent come from the State of Washington.

Over the last few years, Tulalip has donated over $1 million for charitable purposes. In 2003 alone, we will make another million dollars in payments to local city and county governments for community impacts. We also operate one of the most successful boys and girls clubs in the Nation and in our region. If you ever want to see America's melting pot in action, come to Tulalip and visit our facility. Children of every race and color are playing together in the gym, working together in the computer labs and eating together in the cafeteria, all built with tribal revenue.

If you come to Tulalip, you will take an overpass from Interstate 5 which the tribe paid the majority of the cost to build—as we all know, overpasses are not cheap—despite the fact that over 70 percent of the traffic goes not into Tulalip but into the surrounding, into the neighboring community. Tulalip has also invested into much-needed infrastructure for our reservation, bringing services to our people and beginning to take steps necessary to establish a true economy by attracting business investment. I believe this was the true intent of IGRA.

We have used lands adjacent to Interstate 5 to develop a tribal city, Quil Ceda Village. Quil Ceda contains many retailers, we have Home Depot, Wal-Mart and we just constructed a new casino as another anchor tenant for our Quil Ceda Village, as well as offices of the regional chamber of commerce. In the future, the Village will include a hotel, a convention center, more retail stores, office space, tribal administration buildings, manufacturing and distribution and hopefully, a university. We will need our gaming revenue dollars, because we've created a city but we have yet to gain any of the taxes that we generate. All those taxes still go to the State. We've been 5 years, we've been working down in the State legislature to get a tax bill passed. We haven't been successful to this date.

Isn't the purpose of IGRA promoting economic opportunity or diversity for Indian tribes? After centuries of failed Federal policy toward Indian nations, gaming has finally provided a path to self-sufficiency. You gave us the opportunity and we, the Tulalip tribes, have endeavored to make the most of it. A large part of making the most of it has been to recognize that we must give back to the land and all of its people. We are doing this by investing in resources, creating good jobs and jobs that are environmentally friendly and supporting our local community's needs.

So I've come here today, Senators, to tell you that in Washington State, Tulalip tribes and other tribes already share our revenue. In doing so, our tribes have lived up to the spirit of IGRA and then some.

Thank you, Mr. Chairman, for this opportunity. If there are any questions, I hope I'm prepared to answer them.

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

The CHAIRMAN. We'll have some right after the conclusion of all the panelists.

Chairman Viarrial, why don't you proceed.

STATEMENT OF JACOB VIARRIAL, GOVERNOR, PUEBLO OF POJOAQUE, ACCOMPANIED BY GEORGE RIVERA, LIEUTENANT GOVERNOR, PUEBLO OF POJOAQUE FRANK DEMOLLI, GENERAL COUNSEL, PUEBLO OF POJOAQUE

Mr. VIARRIAL. Mr. Chairman and Senators, thank you for allowing us to come here and give testimony in front of this committee.

When this Senate Committee on Indian Affairs, the entire U.S. Senate, the House of Representatives and the President all agreed on the terms of this Indian Gaming Regulatory Act of 1988, there was and still remains a strict prohibition against State taxation authority on Indian gaming. In fact, IGRA reads,

> Nothing in this section shall be interpreted as conferring upon a State authority to impose any tax, fee, charge or other assessments upon an Indian tribe to engage in a class III activity.

Today, Senators we face the exact opposite of this national law. New Mexico and dozens of others States are in fact charging taxes, fees and other assessments under the guise of exclusivity or revenue sharing. Compact negotiations have become a smoke screen for extortion. This transparent guise of the Indian Gaming Act costs gaming tribes millions upon millions of dollars every year. The Indian gaming law you wrote has no mention of exclusivity or revenue sharing. Yet, there is a mechanism to theoretically make these tribal taxes legal, they do this in spite of your legal mandate to the contrary.

In other words, Mr. Chairman, Congress told the States in the IGRA law that they could not impose any kind of assessment other than regulatory fees. What are the States doing? With the blessing of the Departmnet of the Interior officials, they are imposing new taxes on tribes. In New Mexico, it was 16 percent and now it's 8 percent.

These taxes did not exist before 1988. The States have been imposing these taxes since 1988. And they plan to continue on violating IGRA by imposing multimillion dollar assessments across the country. I am here today, as my detailed testimony states, to object to this continuing and costly injustice against the tribes. I also believe, Mr. Chairman, that the interpretations of IGRA by the Department of the Interior go against the good wishes of Congress when IGRA was passed in 1988.

Despite these Department of the Interior obstacles, IGRA has become the only major successful economic engine for Indian tribes across this country. This has happened, Mr. Chairman, despite the good efforts of Congress to encourage other economic activity on Indian reservations. For their efforts to promote tribal economies, I offer a special thanks to Senators Domenici, Inouye, Campbell, McCain, Daschle, Dorgan, and Johnson. Pojoaque Pueblo will pursue this illegal revenue sharing in Federal courts.

I only ask, Mr. Chairman, that you stand behind the original law Congress passed for Indian gaming. I hope you stand behind this law just as you passed it.

Only you, Mr. chairman, the people here in Washington, DC, can protect us from the States'—I won't say inhumane treatment—the atrocities that the States are doing to the tribes across the Nation. And I'm again asking you to please, please support us. I think if

there's going to be cure, I think that because we're so tied up in courts, almost every provision in IGRA has been violated and is being taken to court by State Governors, by State legislators, by individuals, and now we can't do anything because we're tied up in court. We just can't move forward.

I think that a real quick cure is to get the States out of IGRA. In 1988, the tribes were against the States being part of IGRA. But the States managed to be part of the regulatory act at least. So they've done nothing, the States have done nothing but create lawsuits for us to tie us up, which cost us millions and millions of dollars. And in addition to those millions of dollars, they want the compacts to where they can charge us again hundreds of millions of dollars.

We need your help and your support, Mr. Chairman. Thank you.

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

The CHAIRMAN. Thank you.

Now we'll go to Mr. Johnson.

STATEMENT OF PEDRO JOHNSON, EXECUTIVE DIRECTOR OF PUBLIC AFFAIRS, MASHANTUCKET PEQUOT TRIBAL NATION

Mr. JOHNSON. Good morning, Mr. Chairman and members of the committee. My name is Pedro Johnson, executive director of Public Affairs for the Mashantucket Pequot Tribal Nation of Mashantucket, Connecticut.

I am here representing our tribal nation at the request of our chairman, Michael Thomas. I am a former three term member of tribal council, a retired police officer and a proud veteran of this country's military services, as are thousands of other Native Americans.

I appreciate the work you have done on behalf of all Indian nations, and would like to thank you for giving me the opportunity to address a very important issue. At this time, I would like to submit my written remarks as part of the record. I would also like to focus on a few key points in my testimony.

The CHAIRMAN. Your complete written testimony will be included.

Mr. JOHNSON. Thank you.

Mr. Chairman, in 1992, the State of Connecticut and the tribal nation worked out an historic government to government agreement which is known as the Slots Agreement. The tribal nation added slot machines to the casino and agreed to share 25 percent of the slot revenues with the State. Since our slot agreement went into effect in January 1993, the Mashantucket Pequot Tribal Nation has sent more than $1.6 billion to the State of Connecticut.

Today the revenue derived from the two Indian casinos make up 3 percent of the State's $13 billion budget. It's also very important to note that our agreement with the State allows for an extensive regulatory role of the State of Connecticut. The cost of this State regulation is paid entirely by the tribal nation, which is nearly $5 million per year. That covers the salaries of State police officers and liquor control agents stationed at the casino, as well as special revenue agents who license our management employees and vendors.

Because this was one of the first agreements between the tribal government and the State government, and because of our success, the agreement has been scrutinized by many governments, tribal, State and Federal.

Now I would like to discuss two important points about our revenue sharing arrangement with the State. The first point, how did we come up with 25 percent. The answer has many facets. We should look at the context in which this government to government agreement took shape. To begin with, Connecticut was in the midst of a deep economic recession which began in 1989. The State wanted revenue, a limit on casino gaming and a significant role in the regulation of tribal gaming facilities. The tribal nation wanted something that was going to be fair and honest for both governments. We wanted something that could hold up over time, exclusive slot gaming rights and no expiration date for the agreement.

The second point about the 25 percent rate, this was dictated by our individual government to government relationship with the State. Just because 25 percent was appropriate for the tribal nation in Connecticut back in 1992 doesn't mean it should be the norm for other State and tribal agreements today. In 2003, many States are again facing budget deficits. Connecticut is, too. But it's not turning to tribal nations to help balance the State deficit. And this is perhaps a lesson for other States. States should not balance their budgets on the backs of Indian governments. It's patently unfair. This goes against the entire history of Indian government sovereignty and our strive for self-sufficiency.

If States wanted to derive more revenue from gaming, they have their own gaming to turn to, including lotteries and parimutuels. When my tribal nation was raising hogs and tapping maple trees for syrup, nobody else cared about our revenue stream. And then as now, we had to balance our government's budget, just like any other government. We are going to stand by our government to government relationships and agreements, as we always have, because we are proud of the respect and fairness they now afford us.

Thank you. I'll be happy to answer of your questions.

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

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN [ASSUMING CHAIR]. Thank you very much. The Chairman will return in just a moment.

I was unable to be here for all of your presentations, but I've had a chance to read the presentations and appreciate your testimony. I'm the Ranking Democrat on the Interior Subcommittee for Appropriations, and we're going to mark up our bill in 5 minutes, so I also am going to be leaving, and the chairman, as I indicated, will return.

Let me, if I might, just make a comment about the last piece of testimony that we heard. We know that there is a shortfall in funding for State governments. We know that this economy has provided significant problems for our Federal fiscal policy, but also for State governments. They face some very significant shortfalls.

And during the go-go, turbo-charged 1990's, we saw State governments permanently reduce their tax base by tens of billions of

dollars. And Governors and State legislators, quite predictably, enjoyed the opportunity to reduce taxes. But a permanent reduction in your tax base can cause some real problems. When the economy turns a bit south or a bit sour. So State governments have some very significant problems of their own to confront.

When you talk about shortfalls in revenue, it seems to me that there is no shortfall quite as significant as the shortfall that exists on virtually all of our Indian reservations. We have, in my judgment, bona fide crises in housing, health care and education among Native American populations in most of our country. Because of that shortfall, we ought not, in my judgment, interrupt the first new stream of income that's been available to tribes to begin to amass some revenues with which to address these issues.

I have often, Mr. Chairman, told the story of Tamara Demaris, the young 3 year old girl put in a foster home. The caseworker who put her in a foster home was handling 150 cases and did not, as a result, check out that foster home very carefully. Young Tamara at age 3 had her nose broken, her arm broken, her hair pulled out by the roots in a drunken party by the folks who were in custody of her. And why did that happen? It happened because the money wasn't available to provide the social workers to check out the places where they were putting children.

That was on the Standing Rock Sioux Reservation. That problem is fixed. That young girl will perhaps be scarred for life from that experience, but that problem is fixed. We don't have one person handling 150 cases with respect to these significant issues affecting children.

But whether it's children on that reservation or one dentist working in a trailer serving 5,000 people on that reservation, or I could describe all of the other issues of housing, health care and education, that represent the crisis. We have a serious shortfall of funding. Part of that we can resolve, in my judgment, through more appropriations here, by paying attention to the priorities, and we certainly should do that. And I'll be dealing with part of that in a couple minutes as we mark up the Interior Appropriations bill.

But another part of it, it seems to me, can be addressed with this new source of revenue that in the last 10 or 15 years has become available through Indian gaming. And I would not want the States to very quickly try to grab a portion of that revenue to make up a shortfall that comes at least in part because they permanently reduced their tax base in the last 10 to 15 years. The promise to begin to address these significant issues in health care, education and housing on reservations can come from the stream of income from Indian gaming.

I know there are a lot of people out there who want to grab a portion of that stream of revenue. I for one believe, Mr. Chairman, that we ought to be very, very concerned about those who want to take that money away from what I think is the greatest shortfall in social progress in this country, and that is addressing the critical needs on Indian reservations.

So I just wanted to make that comment. Again, I'm not able to stay for the rest of the hearing. But I think all of you at the witness table understand that the chairman of this committee, Senator Campbell, has probably unique and unusual insight to under-

stand these issues. And the ranking member, Senator Inouye, has similar interests and background. We couldn't have in my judgment, two more appropriate people leading this committee than the chairman, Mr. Campbell, and the ranking member, Senator Inouye.

And I look forward, along with many of my colleagues on this committee, to work through these issues that you have raised with respect to the Indian Gaming Regulatory Act. Mr. Viarrial, I appreciated your comments and Chairman Williams and Chairman Pahmahmie. I really appreciate your coming to Washington testify. I think it's very helpful and very important to us, Mr. Johnson.

Mr. Chairman, I'm going to go run to the Appropriations Subcommittee. But these are important issues and thank you for letting me sit in for you.

Senator CAMPBELL [RESUMING CHAIR]. Thank you for your interest and your leadership on trying to make the lives of Indian people just a little better, too. Thank you, Senator Dorgan.

I have to tell you that I wish that the Time Magazine that did a rather uncomplimentary series of articles a few months ago about Indian gaming, I wish they could have heard this panel. Because clearly you are some of the real success stories in Indian Country and have been willing to share those successes, too. I think we have to really recognize that those success stories still do not alleviate the problems we have with most Indian people that still face poverty and unemployment and many other problems.

A friend of mine who's the chairman of the Southern Utes who, in fact, when he was born had only a dirt floor in his cabin and is now the chairman of a very, very successful tribe because of natural resources and a casino and business interests and so on, he once said in a committee, I can still remember him, he said, they liked us better when we were poor, when he was speaking about the opposition that seems to arise when Indians finally get up off their knees, as I call it, and make a living, find some opportunities. I remember somebody else telling me one time that "now they are forcing us to share. What did they share with us except poverty and disease?"

So there's some pretty strong feelings by some Indian people that if there's an opposition to some success among Indian people, maybe they ought to look at it from an historic standpoint and see what we lost. Because what Indian people lost in this country is still a great deal more than anything they've gained from economic development or casinos or any form of successes they've had.

I was particularly interested in some of the comments, Zach, Mr. Chairman, you said that 91 percent of the casino workers are non–Indians with your casino. Is that correct, 91 percent?

Mr. PAHMAHMIE. That's correct.

The CHAIRMAN. That's the largest number I have heard. Also you said that Harrah's was the major financial partner when you started?

Mr. PAHMAHMIE. Yes; Harrah's. We initially sent out an RFP for three different companies to submit their bids and Harrah's was the final selection in that process. They've been our management company since.

The CHAIRMAN. It's interesting, because when we were working on IGRA, I was in the House in those days, but many of us on the

House and Senate side still can remember all the opposition we had from, in those days it was from the existing casinos and from the interests in Nevada, as you remember. Now some of the biggest supporters of Indian casinos are those very same people, because they are also becoming investors. They see the real potential with the growth of Indian casinos.

Did you also say that you're the largest employer in the county?

Mr. PAHMAHMIE. Yes; that's correct.

The CHAIRMAN. That is the same where I live, with the Southern Utes. They are also the largest employers in the county, larger than the school boards, larger than the hospitals, larger than the county government. Your tribe began gaming in 1996. What was the unemployment rate, or give me a couple of comparative numbers, unemployment, high school dropout and so on, before you had the casino and the successes you've had?

Mr. PAHMAHMIE. I'm not sure that I can give you exact numbers. But I think it would be comparable.

The CHAIRMAN. You were still a little boy. [Laugher.]

Mr. PAHMAHMIE. I was an undergraduate in 1996. But I would say that it's probably somewhere on the average, in terms of reservations in the country in terms of unemployment and dropout rate. It's something that we still struggle with today.

The CHAIRMAN. Yes; as most tribes do. By the way, I was somewhat teasing a little bit when I said 28. I'm delighted to see such a young person in Indian country take the leadership of a tribe. I think that really bodes well not only for your tribe, but the example you can set for many others, too. We need new, young Indian leaders on the way up to do great things. So congratulations.

Mr. PAHMAHMIE. Thank you.

The CHAIRMAN. You also said 43 percent of the revenues were dedicated to economic development. Do you have some kind of a development fund, or how do you carry out those development activities?

Mr. PAHMAHMIE. Currently our tribal council is the one that oversees much of that up to this point. We hope to have a CEO of economic development in place to take some of that workload off of us and devote full time efforts toward that end.

The CHAIRMAN. You also, as I understand, have no revenue sharing with the State, and is your State of Kansas also suffering a deficit like most States are now?

Mr. PAHMAHMIE. They are indeed.

The CHAIRMAN. Have they made overtures to the tribe about any kind of a revenue sharing agreement?

Mr. PAHMAHMIE. We've had casual conversations on that subject. But no substantial negotiations or discussion really to speak of.

The CHAIRMAN. North of you, some of your neighbors in States north of you are very, very poor tribes. Do you have any system of sharing or helping poor tribes that are near you?

Mr. PAHMAHMIE. We do not currently have that type of system in place, no.

The CHAIRMAN. Would you be in favor of some kind of a tribal development fund, a voluntary tribal development fund between those tribes who have had a great deal of successes and those who are very poor?

Mr. PAHMAHMIE. I think I would. I have witnessed some of the more isolated tribes, and I think it would be to the benefit of all Indian people certainly to have some sort of arrangement in place.

The CHAIRMAN. That's something that's been talked about. I think the big glitch is some people have talked about it in the past here in the Senate and have wanted some kind of a mandatory fund. Most of us resist that and don't support that at all. But if it was some kind of a voluntary thing, I think most Indian people would recognize the importance of being able to share this traditional way of Indian thinking.

Chairman Williams, as I understand your testimony, you're right off of I–5, is it?

Mr. WILLIAMS. Yes, sir.

The CHAIRMAN. That's a major thoroughfare, isn't it, between Los Angeles going up through California, Oregon and Washington?

Mr. WILLIAMS. We are in a very good location. We're right 40 miles north of Seattle and about 70 miles from the Canadian border.

The CHAIRMAN. How far are you off of the interstate itself?

Mr. WILLIAMS. A few hundred yards.

The CHAIRMAN. I noticed you've had great success with your casino. But some of the tribes I have visited on interstates like I–10 and 40 and 80 and so on have developed some terrific travel centers, too, to encourage the retired people that are now traveling in the summer in their RVs to also stop. Do you have something of that nature?

Mr. WILLIAMS. That is in the plan, sir. Right now we've cleared out about 40 acres behind the casino. And just a couple weeks ago, that had 175 fireworks stands in there. Those people are gone and that's where we're going to put our RV park.

The CHAIRMAN. There's another, the ones that have done that, I visited the Ute Mountain Tribe a few weeks ago. They developed a travel center and an RV park and also tapped into the Federal laws about hours of driving for over the road truck drivers. With that travel center they have a place to park trucks, because they have to stop a certain number of hours during the day, as you know.

Mr. WILLIAMS. Just about half a mile north of us, there is a truck stop. We get a lot of truckers that come in and use the casino.

The CHAIRMAN. Good. You mentioned that you do not have revenue sharing but that your compacts do require charitable and community giving.

Mr. WILLIAMS. Yes.

The CHAIRMAN. Do you do that on a case by case thing, or do you have some kind of a specific percentage of giving? And what counts as "charitable giving"?

Mr. WILLIAMS. We have, there's a couple of different methods. We have several different charity accounts. We give to the Red Cross, YMCA, of course the Boys and Girls Club. We just developed a four member committee that will be doing all the reviews of all the requests that we get. It's stacks.

The CHAIRMAN. I'll bet you get plenty.

Mr. WILLIAMS. They'll be going through that and making recommendations to the board as to who we should fund.

The CHAIRMAN. Very good. And you do that for Indian and non–Indian charities?

Mr. WILLIAMS. Yes, sir.

The CHAIRMAN. Very good.

Mr. WILLIAMS. And another thing that we've done in our State, each tribe is only allowed 675 machines. But can have a total of, I believe it is 3,000. So the tribes that are in the rural areas and don't have the traffic, they negotiate a compact with the State and then we lease their 675 machines. So we're working with five different tribes back at home. And they get casino moneys when they don't operate or own a casino.

The CHAIRMAN. I haven't heard that before in any of our hearings. I think it's a good idea.

You mentioned the non-Indian mini-casinos. What kinds of games or machines can you offer that they can't offer?

Mr. WILLIAMS. Right now, they have table games. As it stands today, they do not have any machines. But they are pushing the legislature very hard to get hold of the machines that we fought a long time to get.

The CHAIRMAN. I'll be they are. Has the State tried to raise the taxes on those mini-casinos?

Mr. WILLIAMS. We've met with one of the senators from the State a couple days before coming here, and I think they're going to try to push that issue.

The CHAIRMAN. Chairman Viarrial, you used the word "atrocity". That might have been a little stronger than I would have used. But I certainly understand your position and your feeling about it. In 1988, when we framed up IGRA, I think your concerns really were met in IGRA. But after the Seminole decision, it began to change, as you probably know. In 1988, between 1988 and 1996, most of the lawsuits were initiated by tribes against the States. After the Seminole decision it kind of went the other way, as you probably know.

In the 1997 compact, as I read your testimony, your Pueblo is still operating under a compact agreed to in 1997. Other tribes and other pueblos in your State of New Mexico are operating under the new compacts that were agreed in 2002 or 2001. That was brought about by an awful lot of pressure a couple years ago. I remember in fact a whole Governor's election hinged on that particular issue. I remember very distinctly how active the tribes were in that election.

Other than the revenue sharing provisions of the 1997 compact, which would have been a better deal for you, the 1997 compact or this new one?

Mr. VIARRIAL. The new one in 2001, because the past, the other one we would have had to pay 16. And off the top, before any expenses. So 8 percent would be a lot better.

The CHAIRMAN. But you still operate under the 1997 one?

Mr. VIARRIAL. Yes, sir.

The CHAIRMAN. You're paying a bigger percent than you would under the other?

Mr. VIARRIAL. We're still paying, a couple of years ago, about three years ago, mainly because for two reasons, because we knew

it was an illegal payment, and the other one, see I lost my train of thought here.

The CHAIRMAN. You stopped paying, you said?

Mr. VIARRIAL. Right. And there's no exclusivity. And so we haven't paid anything to the State in about three years. What I was going to say that is in addition, our tribal programs suffered. So it was either give our money to the State or continue our tribal projects, our social services, all those things that are helped by the gaming revenue.

The CHAIRMAN. Are you in some litigation now with the State?

Mr. VIARRIAL. Yes, sir; most of the other tribes signed the compact in 1987, I mean 2001. But Pojoaque Pueblo chose not to. And the Attorney General was given the authority to negotiate with us.

The CHAIRMAN. In that lawsuit, what has been the position of the Secretary of the Interior, the Department of the Interior? Have they helped your or interceded or taken a position in that lawsuit?

Mr. VIARRIAL. Maybe I can ask Mr. Rivera. George is our Lieutenant Governor.

The CHAIRMAN. Yes, Mr. Johnson.

Mr. RIVERA. Mr. Chairman, the Department of the Interior, we're trying to make the Department of the Interior part of the lawsuit for accepting the compacts and accepting the illegal provision. And it's all still it the process right now.

The CHAIRMAN. And let me correct that for the record, you're Mr. Rivera.

Mr. RIVERA. Yes; the lawsuit was brought on by the State against the tribe for not paying the revenue sharing.

The CHAIRMAN. When do you expect some final conclusion of that?

Mr. RIVERA. I don't have a date on that yet.

Mr. VIARRIAL. May I add, Mr. Chairman, that Governor Richardson is trying to resolve the problems. But it's very new and we don't know how it's going to go.

The CHAIRMAN. In that lawsuit, has the State been demanding back payments that you haven't paid?

Mr. VIARRIAL. Yes; they are saying that we owe them $21 million now. And if we continue until we negotiate with them, that's 16 percent, the clock on that continues. So let's say we're to settle next year or the year after that, we will owe them about $30 million.

The CHAIRMAN. If you had to pay that, wouldn't that do some devastating harm to the tribe?

Mr. VIARRIAL. Tremendous, tremendous harm.

The CHAIRMAN. Have any other Pueblos, the tribes had to stop gaming because of the size of the revenue sharing provisions?

Mr. VIARRIAL. I don't know, Mr. Chairman, I really haven't talked to them about it. But definitely, I'm sure everybody's suffering the way we are.

The CHAIRMAN. Okay. Well, thank you. I hope that will be resolved to the tribe's benefit.

Mr. Johnson, I think everybody is familiar with the success of the Pequots. And also familiar with the wonderful feeling of sharing. I'm well aware of the money that the Pequots have donated to the Museum of the American Indian, which is going to go a long way in helping them reach their goal of having their grand opening

next year, September the 10th if I'm not mistaken. I know the Pequots will be there and should be there.

You said, as I understood you, 3 percent of the whole State budget is now really made up with compact payments alone, is that correct?

Mr. JOHNSON. Yes.

The CHAIRMAN. And when you think in terms of the whole economic picture of the Pequots, the employment, the taxes the employees pay on income taxes and so on, do you have any kind of a ball park area of what that means to the State of Connecticut?

Mr. JOHNSON. There was a study that was conducted by the University of Connecticut in, I believe, 2000 that I think you'd find very interesting. One of the points that the study brought out was that directly or indirectly, the tribe has been responsible for 43,000 jobs in the State of Connecticut. I think that speaks for itself.

The CHAIRMAN. And 11,000 being with the——

Mr. JOHNSON. With the enterprise itself.

The CHAIRMAN. The ripple effect would be—43,000 jobs.

Mr. JOHNSON. Right.

The CHAIRMAN. Well, as I mentioned earlier in my opening statement, we've had some local elected officials come into this Committee and complain that you weren't doing enough. I told them they needed a better lobbyist in their State capital. I think you probably would agree with that, because it seems to me you're paying a lot.

Mr. JOHNSON. yes.

The CHAIRMAN. Your compact has no expiration date, is that correct?

Mr. JOHNSON. That's correct.

The CHAIRMAN. Is that one of the reasons the tribe felt that a 25 percent revenue sharing rate was appropriate? Because that's rather high compared to most of them.

Mr. JOHNSON. Yes; back then that was the case. As I stated in the oral testimony, this was one of the primary factors. We wanted something that was going to be lasting.

The CHAIRMAN. Sure. That wouldn't get jacked up at a later date as is being done in some States.

Mr. JOHNSON. Right.

The CHAIRMAN. Well, I have no further questions. We may have some questions in writing from some of the other members of the committee, and we'll send those to you if we do. But I want to thank this panel for appearing. You have some terrific success stories, and I wish you every continued success. Nice to see you.

We'll now go to the last panel, which will be Brenda Soulliere, chairperson of the California Nations Indian Gaming Association, from Sacramento, my old hometown; and Frank Chaves, the executive director of the New Mexico Indian Gaming Association, from the Pueblo of Sandia in Bernalillo.

Brenda, did I pronounce your last name correctly or wrong? It's pronounced like a French word?

Ms. SOULLIERE. The political answer is closer than most. It's Soulliere. [Laughter.]

The CHAIRMAN. Okay. Would you go ahead and proceed? Do you live in Sacramento, by the way?

Ms. SOULLIERE. No; I don't. I'm from Southern California, I'm a member of the Cabazon Band of Mission Indians. But it feels like I live in Sacramento.

The CHAIRMAN. Okay, the office is there. Go ahead and proceed.

STATEMENT OF BRENDA SOULLIERE, CHAIRPERSON, CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION

Ms. SOULLIERE. I just wanted to say thank you, Chairman Campbell, for the vision and insight, for having the panels and having this hearing.

The CHAIRMAN. And I need to tell you that we've been notified that we're going to have two consecutive votes in about 10 to 15 minutes. So if you don't want to wait here for like an hour until I get back——

Ms. SOULLIERE. In the interest of time I will summarize. And that's all I'm going to say on that. I've submitted written testimony.

The CHAIRMAN. That will be included in the record.

Ms. SOULLIERE. As I had said, I'm a member of the Cabazon Band of Mission Indians. I am the daughter of John James, who is the chairman of the Cabazon Band of Mission Indians. In a conversation we had the other day, I am about number six in generations of leadership in the Cabazon Band, just direct inheritance moving down the line.

Just a little background, I chair the California Nations Indian Gaming Association based out of Sacramento. We have had a lot of interesting times in California. I'm sure everyone's heard many things about what's going on in California. So I don't need to cover that.

But I think probably the biggest area or the biggest flag we can wave right now is that employment in California in tribal governments are the only double digit growth industry. And that's not just gaming, it's the tribal governments themselves, any kind of economic development the tribes have had in California, the only double digit growth. All the other industries are may 2 or 3 percent or completely even, or below. So we are already doing our fair share in trying to keep California's head above water.

A couple of the things that we just needed to talk about real quick, about the revenue sharing, the problem with the process really is that since Seminole, tribes do not have any leverage. They don't have leverage in being able to compact. One of the examples right now that's going on in California, one of the extremes, actually, because there's kind of three levels, there's one extreme, the other extreme and then somewhere in the middle.

The leverage, we have some tribes that cannot get the same compact that 62 tribes have signed. And there are some 10, 20 tribes that want the exact same compact with the exact same terms. And the Governor won't sign them, he's been putting them off for about two or three years. And no one can really figure out why it's a different, I guess, excuse, every time he's asked. But as of last week, he came to our membership meeting and he said within 3 weeks he will have definitive answers. So we're not sure what that means, but we will find out in a couple more weeks.

Recently, the Governor, I guess about 4 months ago, the Governor had requested $1.5 billion in renegotiations of the compacts which are due to happen some time this year. There were what I call horse laughs up and down the State when that number came out. It was just not possible. He was assuming that we were making $6 billion in California per year and he wanted the 25 percent of that which was the $1.5 billion. It was not going to happen, number one, that's not what we're making. The numbers came out for 2001 which was $2.9 billion. So that's rounded off to 3, he wants 1.5, he wants half of everything that we bring in. That's where the horse laughs came from.

The recent one about 1 month ago, he came out and said that he wants $680 million from the tribes. I don't think that's going to work either. There are already two funds that the California tribes pay into. One is a revenue sharing trust fund which is moneys that are shared with the non-gaming tribes. Only half of the tribes in California game. We have 107 tribes and there's only 53 that have gaming establishments. And through their licensing procedures they're sharing revenues with the non-gaming tribes to help them, to strengthen their governments. That is situation specific to California.

There's another fund which is a special distribution fund that has several different, what's the term I'm looking for, several different ways to use that fund. One of those ways is to backfill that fund. That is being considered in the State legislature right now. Another is for mitigation and those impacts. So we're waiting for that to be taken care of.

Some of the problems that we've had is no consultation. The Governor just comes out, the $1.5 billion number was a problem of no consultation. He just came out and said, well, actually we read it in the paper. And then if there's an issue that we have with another entity or something, he's just put out executive orders without talking to tribes, without taking any determinations on what the real issues are. And that's been a problem for us.

But what we have seen though, there are, we feel, ways to resolve these. We feel that the Federal Government has a fiduciary duty as a trustee and we believe that there should be some guidelines for approval or disapproval of the compacts. Things are just going around and around right now in California, and that has to do with the revenue sharing. Obviously that has to do with the budget deficit, which is approaching $40 billion in California. There's a big Governor recall issue going on in California. So everything is up in the air, the renegotiations basically have stalled. No one's talking right now, everybody's worried about the political climate.

What we need is to get a little more from Washington to the Governors to encourage them to come together with tribes. There are—it just really gets old being looked at as a cash cow. And that's how tribes are getting looked at. I believe the other gentleman used the word extortion. And that's what's happening.

Something I always like to say, we've gone from, and it's all stereotypical, we've gone from the drunken dumb Indian to the rich Indian. I don't think there's any other segment in society that's been able to do that. [Laughter.]

The other has to do with the use, the other concern is that there should be a direct causal connection between the State and the revenue sharing and the Indian gaming. Now, that relationship has to do with exclusivity. The State wants us to pay revenue sharing for exclusivity. There's one little part that they forgot. They did not bargain exclusivity at all. We fought for that. We ran two State initiatives and we spent time, we spent money, we changed the constitution of California and we got our own exclusivity, and now the State wants funding to keep that exclusivity.

If there's not that direct causal relationship, it creates cynicism. I myself have become cynical over some of the things that the State has done. For example, the California lottery, what they did is they are going to, they sold the lottery to the people and they're going to use that money to bolster education. And they did that. But underneath, they cut all the education and took it out of there.

So they're basically, even with the schools growing, but then they took the money out from underneath. And that's made the people of California very cynical. We do still have a very good set of numbers for California Indian gaming, up in the 65 percent approval rate. That's because the people of California feel that we've been responsible with our budgets, with our funding, with what we do with our tribal governments.

The CHAIRMAN. Brenda, I hate to interrupt you. That was the first call to vote, which means we have about 15 minutes to get there. So I'm going to have to ask you to wrap it up so that we can at least hear from Mr. Chaves and I don't know whether I'll have time to ask questions or not.

Ms. SOULLIERE. Okay, I will do that. Just real quickly, there are ways to make these things work without amending IGRA. One of my main points was why add to the law when the law is not being followed as it is. I think it needs a little bit more of a push toward the States. You need to be following what's going on here.

The recommendation is that the Federal Government step up to the plate and take seriously its fiduciary duty to the tribes. Let the States know that they're going to take a proactive approach when it comes to this fiduciary duty to the tribes in relation to IGRA.

Another recommendation is to adopt guidelines that demonstrate the revenue sharing and the mitigation demands and have a direct causal relationship toward that. And again, we can all do this without amending IGRA. If you look at the problems, this is something that we discovered, if you take a really good look at the problems and take time to analyze them, you will see the solutions of those problems within the problems themselves.

So I want to thank you for the opportunity to be able to speak to the committee and I'll be happy to answer any questions, either today or in written followup. Thank you.

[Prepared statement of Ms. Soulliere appears in appendix.]

The CHAIRMAN. Thank you.

Mr. CHAVES.

STATEMENT OF FRANK CHAVES, CHAIRMAN, NEW MEXICO INDIAN GAMING ASSOCIATION

Mr. CHAVES. Mr. Chairman, thank you for the opportunity to present testimony before you today. I appreciate this opportunity

to talk about the negotiation process and its relationship to revenue sharing and the use of revenues by tribal governments.

I have a written testimony that I'd like to make sure is submitted for the record.

The CHAIRMAN. It will be included.

Mr. CHAVES. It includes a memo that was written about the history of gaming in New Mexico. I think it speaks to a lot of the trials and tribulations the perseverance of tribal leaders in New Mexico to try and secure their people's economic future. And that struggle continues, as Governor Viarrial has so stated in the prior panel.

I am the Chair of the New Mexico Indian Gaming Association and have served with tribal leaders since 1986. So I've lived this history that you will read about in the attached statement. Compact negotiations that involve revenue sharing in New Mexico and across the Nation have obviously been very complex and controversial, sometimes very devisive. But our current position is that if we pay revenue sharing that it has to be in exchange for some consideration by the State. Currently, that consideration is exclusivity. The issue is, how exclusive is that "exclusivity". In New Mexico, that's the question which we still need to resolve.

In our view, our bargaining position in the negotiation process and in revenue sharing has been limited by the lack of judicial and administrative forums, both at the State level and at the Federal level. That is due to our inability to sue the State and due to the fact that the Department of the Interior's class III gaming procedures have been challenged and remain not a feasible forum for our issues.

As a result of this, this is a real problem, is that we are thrown into the political processes of the State, State political processes. And along with that, the influence of special interests. You will see in the compacts how this occurs. There are provisions in the compacts that were pushed very hard by special interest groups, trial lawyers, insurance agents, and so on.

In 1987, and prior, when Congress was debating the Indian Gaming Regulatory Act, the States really demanded a voice in Indian gaming. And with that demand, and with Congress giving them consideration in the compacting process, that means that States should have a responsibility to respond as well in terms of trying to define a way to approach tribes and negotiate with them.

In 1999, the State of New Mexico passed the Compact Negotiation Act. It was very helpful in defining a process and the authorities by which the State would negotiate with a tribe on a government-to-government basis. If it's carried out properly, the Compact Negotiation Act should provide an environment in which good faith, arms length negotiations should occur. However, it doesn't guarantee success. Part of it is again the political processes that we're thrown into, and sometimes with special interest groups.

We do have a new administration in New Mexico and there's much hope for greater advancements in government to government relations and better policy for our tribes in New Mexico. We have had quite a history of compact negotiations. Just summarizing very briefly, from the point that the Indian Gaming Regulatory Act was

passed in 1988, there simply no negotiations. We couldn't get any real responses to our negotiation requests.

In 1995, we did negotiate with then Governor Gary Johnson. We were able to obtain a very favorable compact. The highlights of that compact are as follows. We had a 5 percent revenue sharing, but it had a local share to local governments. And that local share could go to those governments with the tribes choosing.

There were limited numbers of slots at racetracks. Essentially that began the erosion of our exclusivity, so to speak. We thought it was reasonable at the time because the horse racing industry was really a dying industry and needed an injection of revenue and there were a lot of New Mexicans involved in support industries, agriculture and others. So the tribes, being somewhat generous, weren't really realizing the impact of that over the long term and how the race tracks would eventually really make inroads, gaining more and more gaming in the State.

A very ideal term that these compacts had was automatic extensions. And this was very key because it provided an ideal structure for long term financing. As we look at the need for financing for infrastructure and economic diversification, these types of terms were very, very useful toward that.

Immediately after these '95 compacts were actually approved by the Department of Interior, they were challenged first in the State courts and then ultimately defeated in Federal courts. This led then to a great deal of controversy and legal wrangling, until 1997, when we had 1997 compacts, which were essentially legislated, they were not negotiated. These are the compacts that contained the 16 percent revenue sharing demand. They had 9 year terms, therefore the potential for long term financing was lost. And there were no penalties for slot expansions at the race tracks.

So we were beginning to see an erosion of the benefits of the 1995 compacts. We were beginning to see less and less benefit in the ability to finance over the long term.

In addition to that, regulatory costs were added to the compacts. Again, as I say, they were legislated so the tribes were not at the table. They had to defend themselves through hearings and so forth. And one of the most onerous provisions, in addition to the 16 percent, was that regulatory costs were added to the revenue sharing, and this cost millions and millions of dollars to the tribes. Yet there was no relation to the actual cost to the State in the regulation process.

In 1999, as I previously stated, the Compact Negotiation Act was enacted by the State legislature. I think it would be helpful to have the Congress take a look at examples like this and encourage States to look to forums or ways, processes and means by which a tribe may approach a State and really understand how that negotiation process happens with the State. It's been a very, very looming and large issue prior to 1999 for tribal governments.

As I said, in 1997, these compacts were legislated. And that led to a series of attempts to negotiate. The State would not respond to those negotiation requests, primarily because they were receiving 16 percent revenue, they had no fear of being sued and there were no forums to take them to. We tried using the arbitration pro-

visions in the compacts themselves and the State supreme court basically quashed that effort.

So we stopped making revenue sharing payments. That led to the State suing us on June 13, 2000. They demanded payment or they said, stop your operations. Shortly thereafter, there was a lot of controversy and evolving out of that litigation were the 2001 tribal-State compacts. These were negotiated under the Compact Negotiation Act.

These current compacts have an 8-percent revenue sharing. There is a provision by which small casinos or operators making less than $12 million pay 3 percent of the first $4 million and 8 percent thereafter. So we did try and negotiate for the smaller gaming tribes some relief, even at the 8-percent level.

We do have what we term substantial exclusivity. It's a little soft in terms of what that means. But it is bargained for exclusivity. These compacts end on June 2015, which means that they're good in terms of trying to get some shorter term financing. But we still have the problem of trying to obtain long term financing, again, for that economic diversification and longstanding infrastructure needs and economic development.

The revenue sharing dollars that go to the State go into the general fund and we're not quite sure beyond that where they go.

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

The CHAIRMAN. My apology, I was just told that we only have 5 minutes to get to the Floor for that first vote. So I'm going to have to finish up and just read your testimony as I have the time. But I wanted to thank you.

I do have some questions for each of you. I'm going to submit those in writing to you, because I am interested in getting answers on it. Because the reason for these hearings really is to see if and how we can reform IGRA and whether we really want to open up the whole thing. Because there's always some kind of a backlash when you open it up. As you know, the States are going to have plenty to say, too.

But I do want to thank you for appearing and apologize that I'm going to have to leave. Sometimes when there's two or three of us here, we kind of spell each other so one can go vote while the other one comes back. In this case I'm all alone, so I'll just have to stop it there and tell the people in the audience and the panelists too that we're going to keep the record open for two weeks, if you have any additional comments, or anyone else has some comments you'd like to submit, please do.

With that, I will submit some questions in writing, and the Committee is adjourned. Thank you.

[Whereupon, at 11:42 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF FRANK CHAVES, CHAIRMAN, NEW MEXICO INDIAN GAMING ASSOCIATION

Chairman Campbell, honorable members of the committee with special acknowledgement to our own Senator Pete Domenici, thank you for the opportunity to testify before you today regarding the Indian Gaming Regulatory Act (IGRA) with a focus on the process by which States and Indian tribes negotiate agreements on revenue sharing and the use of gaming revenue by tribal governments. The topic of negotiation of revenue sharing agreements is timely for certain tribal governments in New Mexico as we are likely to have further discussions with the State concerning the compacts negotiated in 2001 in the near future. In addition, we have two tribal governments engaged in litigation over 1997 Compact revenue sharing terms.

In New Mexico there are 22 tribal governments. Tribal communities in New Mexico remain a stronghold of traditional and cultural systems and beliefs. There are 19 Pueblo governments, the Jicarilla and Mescalero Apache Nations and the Navajo Nation. Thirteen of these tribal governments operate class III Indian gaming, 2 under the 1997 Compacts and 11 under the 2001 Compacts.

Compact negotiations for class III Indian gaming in New Mexico have a complicated and divisive past. In 1988 and 1989 the State did not respond to our request for compact negotiations. From 1990 to 1994 negotiations failed to produce a compact. The 1995 compacts negotiated and approved in accordance with the IGRA were defeated in the courts first by the New Mexico Supreme Court and then by the Federal Courts. The 1997 compacts approved under the "no action" provisions of the IGRA were not negotiated but legislated by the New Mexico Legislature; the compacts remain subjects of litigation for two tribal governments and the state. Finally, the 2001 compacts evolved out of litigation initiated by the state to enforce revenue sharing payments; a fact that is acknowledged in the compact "Purpose and Objectives" Section H., "To settle and resolve certain disputes that have arisen between the Tribes and the State under the provisions of the Predecessor Agreements." Although they evolved out of litigation, they were the first compacts negotiated under the State's Compact Negotiation Act of 1999 and were government-to-government negotiations. This complex history and controversy over compact negotiations and revenue sharing are in part related to IGRA's failure to secure a level bargaining position for tribes with states as contemplated by Congress. As a result, we are thrown into the State's political systems in the negotiation process.

In our testimony we hope to impress upon the committee that in large part the IGRA and Indian gaming in New Mexico is working to provide a better quality of life for many Indian communities. Indian gaming is also making significant contributions to the larger New Mexico economy in the form of jobs, commerce and additional tax revenue. We are doing this without falling victim to the ills and accusations sensationalized in recent Time Magazine articles on Indian gaming.

We have made significant progress in economic development and tribal state relations, but there is much to be done. We have a new administration in New Mexico that has manifested a policy willingness to work with tribal governments on a gov-

ernment-to-government basis. I hope we can benefit from this in securing our economic development foundation, which in my opinion is currently a soft foundation based on gaming compact term limits and the potential for state policy changes that could challenge tribal tax and other revenue streams.

Compact Negotiations and Revenue Sharing

It is unlikely that anyone will ever be able to explain all the complexities and the incredible history of Indian gaming and compact negotiations in New Mexico. Since 1985 I have had the honor of working with many strong traditional tribal leaders, tribal councils, attorneys and consultants. I still cannot imagine the difficulty they have in taking all these complex issues and history and thoroughly relating them to a decision on a current gaining issue. But, just as Congress and state legislatures must keep abreast of issues so too must tribal leaders. I have included as an attachment to this written testimony, a memo written by a tribal attorney to a Pueblo Governor in just such an attempt to keep abreast of compact and revenue sharing issues in New Mexico. The memo is extensive but does not begin to exhaust all of the history or complex political, legal and policy questions tribal leaders had to face from 1995 to 2001. I hope it gives the committee a better understanding of the perseverance of New Mexico tribal leaders and what they continue to encounter in trying to secure their people's economic future.

Our experience in revenue sharing began in 1995 with the first compacts approved by the Department of the Interior. The revenue sharing rate approximated the state's gross receipts rate at the time and was inclusive of a local government share that would go to local non-tribal units of government of the tribe's choosing. In the latter stages of completing the negotiations of the compacts slot machines at racetracks were put on the table and market exclusivity for tribes began to erode. Then New Mexico Governor Johnson wanted to provide a limited number of slot machines at horse racetracks because the pari-mutual horse racing industry was dying and needed an injection of revenue to survive. This appeared reasonable to tribal leaders at the time since horse racing was associated with New Mexico agriculture and support industries. Tribes and the State agreed that revenue sharing would be reduced or eliminated if the limited slot machines at the racetracks were to increase. In addition, the compacts had in essence an automatic renewal provision giving them a near ideal structure for using gaming revenue for long term financing. Little was anticipated of the ability and the push in latter years by the racing industry to increase slot machine activities and compete with tribal government gaming operations and little was anticipated of the compromise of benefits found in the 1995 compacts.

The 1995 compacts were immediately challenged in the state courts and ultimately were defeated in the Federal courts. The lawsuits and political activity that took place between 1995 and 1997 made Indian gaining in New Mexico the single most reported issue of that time. Indian gaming was gaining overwhelming support from the public but not from the legislature.

In the 1997 compacts, the revenue sharing provisions were negotiated among legislators in a sort of bidding war and feeding frenzy among special interests with no place at the table for tribal leaders to negotiate on their people's behalf. It was only working through friendly and sympathetic legislators that the revenue sharing demands did not end up higher than the 16 percent of net win that the legislature eventually chose. While revenue sharing demands increased, gone were the market exclusivity provisions and gone was the potential to obtain long term financing for basic infrastructure and economic diversification. In addition the regulatory payments to the state, which had absolutely no relation to the State's cost of regulation, amounted to millions of dollars in added payment. Included in the compact was an arbitration provision that, to date has been ineffective in resolving revenue sharing issues. Tribal leaders and those representing tribal interests could only watch in anger and frustration as this process continued with no viable judicial or administrative forums available. The anger and frustration of this process was shared by many non-Indian employees, vendors, and many others who were opposed to the continuing assault on Indian rights and the economic discrimination that was taking place right before their very eyes.

After the 1997 compacts were approved under the no-action provisions of the IGRA, tribes continued their attempts to regain reasonable compact terms by requesting negotiations. In addition, efforts to use the arbitration provisions in the 1997 compacts to address the 16 percent revenue sharing provision have to date been fruitless and furthered suspicion that the state's judicial forums were not exactly blind or unbiased. In 1999 the State did pass a law that was to become a means by which tribal leaders could negotiate with the State on a government-to-government basis. The Compact Negotiation Act of 1999 established a process and

defined the authorities by which the State would address requests by tribes for negotiations of compacts. While it does not guarantee a successful negotiation it goes a long way in helping the tribal leaders understand just who the "State" is in negotiating a compact as required under the IGRA.

When properly carried out, the Compact Negotiation Act of 1999 should produce a compact negotiated in a bilateral good faith environment. Under the act, either the State or a tribe may initiate negotiations by providing notice. The Governor of the State can appoint a negotiator and the legislature must establish a joint committee on compacts. Negotiations are conducted with the Governor or the Governor's representative and taken to the joint committee on compacts for review and recommendations. The committee gives its recommendations to the full legislature and by joint resolution the full legislature may accept the proposed compact. There is a provision in the act that permits the Governor of the State to accept a compact or amendment to a compact from a tribe if the compact or amendment is the same as a compact or amendment that has been approved under the Compact Negotiation Act. What the 1999 Act did not do however was eliminate the involvement of special interests' influence which remains an unofficial part of the negotiation process.

Unfortunately the negotiations under the act did not bear fruit in 2000. As all of the attempts to negotiate were unsuccessful, and as the administrative and judicial forums simply became unavailable, the tribes decided that the only way to get the state to address the revenue sharing issue was to stop making revenue sharing payments. The Mescalero Apache Nation never made any payments under the 1997 compact and as frustrations mounted some Pueblos also decided to stop making payments. Finally in 2000 after negotiations failed under the Compact Negotiation Act, the remaining tribes that had been making payments stopped doing so. Shortly thereafter the Attorney General filed a lawsuit on June 13, 2000.

Pojoaque Pueblo and the Mescalero Apache Nation remain litigants in the still unresolved suit over the 1997 compacts. Mescalero's response to the lawsuit was to ask the Court to force the arbitration proceeding but the Court has yet to respond and the arbitration provision of the 1997 compact remains untested as a means to resolve revenue sharing questions. The lawsuit posed significant risk for both the State and tribes. These risks. were a factor in helping to move both the state and eleven tribes toward a successful negotiation in 2001.

The 2001 compacts were negotiated under the provisions of the Compact Negotiations Act. Under these compacts the tribes enjoy the unrestricted right to engage in all forms of class III gaming and substantial market exclusivity. For this substantial market exclusivity, the tribes pay the state 8 percent of their net win on slot machines. If a tribe has a smaller casino generating less than $12 million in net win annually, they pay 3 percent of their net win under $4 million. Under State statute limited operations of slot machines at horse racetracks and veteran/fraternal organizations is permitted, but these entities are not permitted to offer table games. The compacts terminate midnight, June 30, 2015.

The State required affirmative Federal approval of the 2001 compacts to ensure it would receive its future revenue sharing payments. First, the lawsuit filed by the State for payment of revenue sharing had to be settled and certified by the Attorney General. The certification requirement had to be met before the Governor of the State could send the compacts to the Secretary of the Interior for the Federal review process. Both of these requirements were met.

In the recent 2003 State legislative session, non-tribal gaming interests at horse racetracks proposed state legislation to increase their market share through expanded hours of operations. This legislation did not pass in 2003 because tribes again entered the political arena to defend their limited market exclusivity. With the support of the Governor and other state legislative leaders this effort was turned back in favor of continuing to work together to improve Tribal State relations under the compact. Continued assaults on our market exclusivity and other factors will likely lead to negotiations to amend the 2001 compacts.

There has been much controversy over the issue of revenue sharing. Questions and controversy still remain, yet it appears that revenue sharing is becoming a necessary ingredient in securing gaming compacts. And while the controversies remain, it is better to have controversy than poverty and neglect.

Indian Gaming is Working in New Mexico

While the political and legal history of Indian gaming in New Mexico is remarkable in itself so too is the history of job creation, commerce and a better quality of life for many Indian communities. Historically New Mexico has performed poorly in many areas of economic development and educational attainment. According to the U.S. Census 2000, New Mexico ranked 43d in the Nation average teacher salary, 3d in the Nation in violent crimes per 100,000 population, 47th in the Nation in

per capita personal income, and 4th in the Nation in unemployment. The Native American population in New Mexico as a group is poorer, less educated and more affected by many of the social ills that result from poverty.

In recent years tribal governments engaged in gaming have begun to move from the picturesque poverty so often seen in the cultural tourism promotions of the past toward prosperity and greater contributions to the state's economy. The level of success does vary from tribe to tribe as would be expected in different market areas, but progress large and small has made for a better quality of life. This progress is found in economic development and community development.

Our gaming operations are economic engines providing jobs to many New Mexicans, Indian and non-Indian alike. In Indian communities where populations are relatively large and unemployment is high, gaming operations have provided jobs close to home permitting many to enter the job market for the first time and provide basic necessities of life for their families in Indian communities with smaller populations, a larger percentage of employees are drawn from surrounding communities, both Indian and non-Indian. In a representative year, tribal gaming enterprises paid out an estimated $91.7 million in direct gaming employment wages and about $16.7 million in added employee benefits. In this largely service industry wages are supplemented by tips that further increase job earnings. Indian gaining has provided approximately 6,000 direct gaming jobs. If this number is combined with the approximately 6,000 additional jobs in other tribal enterprises and tribal governments, tribal governments provide over 12,000 jobs. This makes tribal governments with gaming operations the third largest employer in the State behind Kirtland Air Force Base and the University of New Mexico.

We have not estimated the economic spin-off effect in additional jobs and commerce created by our direct employment, but the contribution is significant. The gaming operations create additional commerce through the purchasing of goods, services and sponsorship of events in surrounding communities. In a representative year, more than $120 million was spent on the purchase of goods and services.

Gaming revenues that flow to the tribal governments are used, as intended by Congress, for governmental purposes. Gaming revenues help tribal governments function. Funds are used for educational programs and scholarships, public safety, water and waste water management, the preservation and protection of land, environmental programs, health and health education, housing repair and development, care for the elderly, tribal court systems, programs for drug and alcohol abuse, culture and language preservation programs and capital improvement programs that are just beginning to address long neglected infrastructure needs. I have noted below just a few examples of the use of gaming revenue by tribal governments in New Mexico.

At Tesuque Pueblo, the Bureau of Indian Affairs is responsible for a day school that teaches the elementary age students of that Pueblo. But the school, an aging adobe structure that is more than a century old, is in danger of falling apart, and only through continual maintenance provided by the Pueblo and the poorly funded BIA education department has the school stayed open. The BIA has a multi-billion dollar backlog on school repair and construction, and the Pueblo, tired of trying to wade through the bureaucratic backlog, decided to spend its own revenue on building a school that should have been provided by the Federal Government. Tesuque Pueblo also used gaining dollars to restore much of the historic and living central plaza area homes.

At Isleta Pueblo, where health problems have troubled the community for decades, the Tribal Council created a wellness center and a recreation center to teach healthy lifestyles and a state-of-the-art health center to treat many problems of its people. Isleta health and recreation centers offer the hope that the children of Isleta learn healthy lifestyles and life choices early in life, and give seniors options for a healthier, active lifestyle well into their older years. This recreation center includes a full Olympic size swimming pool, which is used not only by those on the Pueblo but by neighbors in the surrounding area.

At Sandia Pueblo, my Pueblo, we have also built a health center and a wellness center, but we are especially proud of our education program. Any family at Sandia Pueblo can send their children to any school, and the tribe pays for the cost of that education. This includes preschool through college. All that is required is that the students finish their schooling. We have used gaming revenue to establish education, health and housing trust funds for the long term; we also built a state-of-the-art wastewater treatment plant for our master planned development area and our residents. Just recently the Tribal Council approved the purchase of a computer for each household on the reservation for educational and communication enhancement.

At Acoma Pueblo, the tribe has used its revenue to expand its economic base in the tourism industry. The Pueblo replaced the museum and cultural center, built a hotel and first class travel center, and purchased culturally sensitive land. Acoma is the largest employer in Cibola County, which is among the poorest counties in the State.

At Laguna Pueblo, gaming revenues have been reinvested into a major expansion of the Pueblo's economic base, including two travel centers, a resort development project, and the revival of Laguna Industries. Laguna anticipates adding 1,000 jobs this by this fall. In addition, the Pueblo has spent funds on housing development sorely needed by its members.

At Santa Clara Pueblo, the Tribe has reinvested revenue from its small casino operation into a championship golf course that just opened this spring, and in land acquisition in an effort to regain areas of the Pueblo that have been lost over the years.

The Pueblo of San Juan has reinvested their gaming revenue into tourism, an expansion of their economic base, and much needed housing for their tribal members.

San Felipe Pueblo has also invested their revenues in housing for Tribal members, and an education program for their young. They have expanded their economic base through the creation of a travel center and a car racetrack that draws fans from across the Southwest.

Santa Ana Pueblo has reinvested their gaining revenues into a major expansion of the tourism industry. The Pueblo has created a world-class resort and golf center, and has spent millions of dollars on the environmental restoration of the bosque on their land. They have also reinvested their revenues by producing housing for their tribal members.

The Jicarilla Apache tribe has spent gaming revenues on the renewal of their tourism industry. Their focus is on tourists who want to enjoy the beauty of their remote reservation. They offer guest lodges, and hunting and fishing opportunities.

At the Mescalero Apache Tribe, gaming revenues have been used for tourism/hospitality expansion, housing, a school, a dialysis center, senior assisted living home, and reinvestment into the tribe's industrial base. Mescalero's tourism/hospitality expansion will add to its extensive workforce and make them the largest employer in Lincoln County.

Pojoaque Pueblo has used its gaining revenues to start a museum, develop housing, build a wellness center, and expand their economic base.

At Taos Pueblo, the casino operation has provided revenue for the tribe to protect its sacred Blue Lake. To stop encroachment or development of the area, the Tribe has purchased land surrounding their sacred area as a buffer zone. This goes directly toward retaining, and maintaining the history, culture, and traditions of this tribe as they move forward into this century.

In preparation for economic development and economic diversification; tribes have invested in new construction. From 1999 to 2001 we have estimated an investment in new construction of $350 million dollars in gaming and hospitality related development. I am pleased that many of the Pueblos and tribes in New Mexico are beginning to prosper through tribal government gaming enterprises and are diversifying their economies. New Mexico's Tribes are on the verge of creating a world-class hospitality and entertainment industry complete with high class resorts, casinos, golf courses, fine dining and some the best entertainment acts in the country.

I am proud that much progress has been made. This progress has been made without falling victim to the ills and sensationalized accusations of the recent Time Magazine articles. The Pueblos and tribes of New Mexico are among the most traditional communities in Indian country. We were never displaced from our land, and we have retained our culture, our languages, and our traditions. But we never could get a foothold into the economic world until Indian gaining. Our tribal leaders had to fight to get what we have, and we have continued to maintain our traditions and our culture even as we move forward economically. But this came about because of wise and careful decisions made by each of the tribal governments. Our governments have not issued per capita checks to members dividing up the proceeds from and to my knowledge there is no movement in that direction. We have chosen instead to use the gaming revenues to create programs that work for our people, and to continue to diversify our economies into other areas. There are no management companies taking huge cuts of the profits in New Mexico, and there are no lurking controversies over casino profits. Indian gaming is working in New Mexico, and this has created benefits for our tribes and our people that could not have been imagined before.

These efforts have not gone unnoticed by the new administration in New Mexico or the private sector. We are forming new public and private partnerships to expand New Mexico's tourism industry. The state's Tourism Department is actively promot-

ing Indian casinos and the world-class entertainment being offered. We have formed partnerships with old adversaries as they see the benefits of cooperation to expand the hospitality markets for New Mexico.

Yes; much progress has been made, but much must still be done to secure the economic future for tribes in New Mexico. A few years of success will not make up for the decades of neglect and not all tribes in New Mexico choose gaming or see gaming as a feasible undertaking for their circumstances. To secure our economic future tribal governments must find reliable sources of income upon which they may rely to finance development and operate tribal government over the long term.

In closing I want to thank the committee for the time you have given to hear our compact and revenue sharing negotiations story and to hear how we use gaming revenue in New Mexico.

FRANK CHAVES, CHAIRMAN, NEW MEXICO INDIAN GAMING ASSOCIATION, QUESTIONS WITH RESPONSES

Thank you for the opportunity to participate in the July 9, 2003 hearings on the Indian Gaming Regulatory Act and for the opportunity to provide a written response to the following questions posed in your July 15, 2003 letter. Below I restate the issue and the question and provide a response. 1. From your testimony, it appears that many of the member tribes in your organization have agreed to the 2001 compacts. You state that, under these compacts, the tribes enjoy "substantial market exclusivity."

Question. Is this "substantial exclusivity" guaranteed in your compacts?

Response. The term "substantial exclusivity" is not contained in 2001 Compacts but is a term used to describe the guarantee provided by the State in exchange for revenue sharing. The 2001 Tribal-State Compacts contain an agreement by which the tribal governments guaranteed revenue sharing payments to the State in exchange for the State's guarantee that it will not pass, amend or repeal any law or take action that would directly or indirectly attempt to restrict or has the effect of restricting the scope or extent of Indian gaming. Under these terms, the State cannot license or permit the operation of Gaming Machines for any person or entity other than horse racetracks and veterans and fraternal organizations as described by State statute. The State may not license, permit or otherwise allow any non-Indian person or entity to engage in any other form of class III gaming other than a state-sponsored lottery, pari-mutual betting on horse racing and bicycle racing, operation of Gaming Machines, and limited fundraising by non-profit organizations.

Question. Can the state legislature increase the number of slot machines that horse racetracks can offer? Has it increased the number since your compacts were negotiated in 2001?

Response. As a matter of State law, the State could increase the number of slot machines that horse racetracks can offer. However, it is the tribes' view that any increase in the number operating under State law as of 2001, when the tribes agreed to and the Secretary of the Interior approved the Compacts, would require a negotiated settlement. In addition, any action by the State that has a detrimental effect on the tribes' market share would require negotiations. This position is based on: (a) the agreement to make revenue sharing payments to the State in exchange for market exclusivity; (b) the "substantial exclusivity" provisions contained in the Compact, interpreted in accordance with applicable law; (c) the terms of the Secretary's approval of the Compact, and most importantly (d) the principles of comity, good faith, and fair dealing which apply to relations between the State and tribes. The State has not changed the laws on horse racetrack operations that affect competition since 2001. To the credit of the Governor and the legislative leadership, when a proposal to extend track hours of slot operation was introduced in the 2003 legislative session, it was deferred to a future session to allow the matter to be discussed with tribes and amendments to the Compacts to be negotiated.

Question. What are the consequences to the State if your "substantial exclusivity" is lost?

Response. If substantial exclusivity is lost, under the terms of the Compact revenue sharing ceases.

2. I noted in your testimony that New Mexico tribes are building $350 million in gaming and hospitality-related development.

Question. When calculating your revenue sharing, are those capital improvements costs deducted before calculating the State's share?

Response. No; tribal government capital improvements costs are not deducted before calculating the State's revenue share.

3. As I understand the situation, the New Mexico tribes were forced to pay the 16 percent revenue share before the State would agree to the 2001 Compacts, even if that amount was illegal under the IGRA.

Question. Did the Department of the Interior give you any guidance about the provision, and whether it violated IGRA?

Response. The Secretary allowed the 1997 Compacts to go into effect by operation of law without affirmative approval. That action resulted in approval by the Secretary "but only to the extent that Compact is consistent with [IGRA]".

25 U.S.C. §2710(d)(8)(C). In letters to the tribes explaining the basis of this action, the Secretary questioned the legality of the 16 percent payment under IGRA based on the limited scope of exclusivity provided under the Compacts, particularly in light of the size of the payment, and the fact that the payment was effectively imposed on the tribes rather than agreed upon as the result of bilateral negotiations. The question of whether the 1997 Compact revenue sharing provision was consistent with IGRA led to tribal payments stopping and litigation between the tribes and State. As part of the negotiations that resulted in the 2001 Compact, the tribes agreed to a complete settlement of issues in dispute in that litigation as a condition precedent to the Compact. While questions regarding the linkage of the 2001 Compact and the litigation were raised, the Secretary recognized that the issue before her was the terms of the 2001 Compact and not the terms of settlement of litigation over the 1997 Compact. Although Interior had provided guidance regarding the legality of the 16 percent provision in 1997, the issue of how the tribes and State chose to resolve litigation over that issue was outside the review and approval process to for the 2001 Compact. Therefore, the Department of the Interior did not provide guidance with respect to that settlement.

4. Without a doubt the 1996 Supreme Court decision in the *Seminole* case placed tribes in a very bad negotiating position.

Question. Do you believe the New Mexico tribes would have had to "share" their revenues, if they could still sue the State for "bad faith" as they could before the *Seminole* decision?

Response. No; I do not believe the New Mexico tribes would have had to share their revenues if they could sue the State for bad faith. In 1995, prior to the *Seminole* case, the New Mexico tribes chose, in a separate agreement from the Compact, to share their revenues in exchange for the significant benefits the State would provide in return. In 1995, at one of the final negotiation sessions, the Governor spoke directly to tribal leaders about the reasons he felt the tribal leaders should consider revenue sharing with the State. Initially, the tribal leadership resisted the concept but ultimately came to the conclusion that the reasons were convincing. In a post-*Seminole* environment, *Seminole* does significantly and adversely affect the tribes' bargaining leverage in the Compacting process. As seen in the complex and divisive history of New Mexico Compact negotiations, the tribal leaders are left to their own devices in a largely political process to the detriment of tribes. In this post-*Seminole* environment there is increased pressure to agree to revenue sharing amounts and other terms that tribal governments might not otherwise agree to.

Thank you again for the opportunity to respond to committee's questions. Should you need anything further, I would be pleased to respond.

My name is Priscilla Hunter; I am the chairwoman of the Coyote Valley Band of Pomo Indians. We appreciate this opportunity to present testimony to the U. S. Senate Indian Affairs Committee on the issue of the Indian Gaming Regulatory Act.

Indian gaming is working – for some tribes.....but for the Coyote Valley Band of Pomo Indians....it is not working as well as we want.

Coyote Valley has unsuccessful tried to get a tribal-state gaming compact since 1994. Pete Wilson, Governor of California at that time, would not negotiate with the Tribe.

Nearly 10 years ago, and two Governor's later, the Coyote Valley Tribal Council is still trying to get the Governor of California to enter into negotiations **for a fair and equitable tribal state class III gaming compact in accordance with IGRA.**

Twice the State has offered the tribe a compact; however, neither compact addressed or includes Coyote Valley's specific input or concerns. Both of these compacts included provisions that this Tribe feels are an infringement on our sovereignty and in violation of the IGRA.

In 1999, Governor Davis agreed to negotiate a class III tribal-state gaming compact with tribes, but not for individual compacts. The Governor wanted a "model" compact. Governor Davis encouraged the tribes to negotiate as one group, for one compact because it would be easier for him than for him to negotiate individual compacts with 60 individual tribes.

In contemplation of the compact issues, Coyote Valley looked long and hard at the long and contentious history between Indian tribes, the United States and the State of California. We also looked forward, toward the future of the Coyote Valley Band of Pomo Indians. Using this as a guide the Coyote Valley Tribal Council agreed to meet with the other tribes to discuss common issues but Coyote Valley never gave up its right to request individual negotiations for tribal specific issues. Coyote Valley never agreed to "automatically" accept a compact just because it is what other tribes agreed to accept.

To that end, the Coyote Valley Tribal Council adopted a resolution in support of tribal joint negotiations with the Governor but retained our legal right to negotiate as an individual sovereign.

However, the joint negotiation process was not followed in accordance with the agreement between the State and the United Tribes and instead it turned into a scramble for "whoever could get in the door first" to see the Governor's chief negotiator, Judge Norris, to make their arguments for their own individual tribes. Coyote Valley never saw the Judge again until the last day when he handed us a compact and said," take it or leave it". I remember this event clearly because we (the tribal council) had to leave the negotiations early and return to our reservation due to a death in our family; when we returned to the negotiation process we found that the agreed to negotiation process was totally abandoned.

During the joint tribal discussions, if Coyote Valley felt a provision was a violation of IGRA and/or an infringement on sovereignty, Coyote Valley voted "no" and asked that the vote be recorded so that the tribe could return to that issue during its own individual negotiations with the Governor.

When the joint negotiations ended Coyote Valley asserted that reserved right, and requested negotiations on the disputed items. However, Governor Davis refused to acknowledge or accept that Coyote Valley had differences on his model compact.

The Coyote Valley Tribe believes that as a federally recognized tribal government, we have a right to request individual compact negotiations with the State **ON GAMING ISSUES THAT ARE SPECIFIC TO THE COYOTE VALLEY TRIBE.**

For issues of this magnitude, the Tribal Council must seek approval from the General Council authorizing the waiver of our tribal sovereignty before we can sign this compact. The Tribal Council took the Governor's Model Compact to our tribal members and they voted to oppose Governor Davis' 1999 model compact because they felt it contained too many provisions which violated our tribal sovereignty.

Coyote Valley disagreed with the Governor's model compact. Coyote Valley knows all too well, and history has proven, that once you give up something of value (like when tribes lost their land) you can never get it back.

We have gone to the courts and are still in the courts, and so far the federal courts have agreed that the State can run over a tribe and tell the tribe to take his compact or leave it; exactly what Congress was concerned with when it enacted the IGRA in 1988. We are operating under a stay of the court while we exhaust our judicial options.

I. State Taxation

Governor Gray Davis' 1999 model compact includes taxation and revenue sharing provisions which the tribe disagrees with.

The tribe does not disagree with the concept of sharing, and in fact, Coyote Valley has a long history of sharing. We have longed shared our revenue and our resources with other tribes, organizations, individuals and local governments; but the tribe strongly disagrees that it should be mandated by a State government as to how, when, where and how much of the tribe's money or jurisdiction it should give away.

Governor Davis believes that the State has a right to a portion of the revenue generated by the tribes. In fact, earlier this year, Governor Davis spoke out publicly stating that he wants his "fair share" of Indian money. After years of mismanagement, the state is in a financial crisis and is looking for tribes to bail them out.

The State tells us to "pay our fair share". Coyote Valley is paying our fair share, but we are doing it within our own tribal and local community because the State has never paid this Tribe its "fair share of State revenue and resource protection".

As we have always done, Coyote Valley is still working toward our goal of providing essential services for our tribal members such as homes, employment, education, medical, dental, substance abuse programs, child protection services, cultural programs, tribal police, fire and other emergency services, water, electricity and other infrastructure, religious and cultural protections, new facilities for our tribal operations, the list goes on and on.

With the exception of compensating the State for regulatory costs, Coyote Valley questioned the compact provision establishing a Special Distribution Fund. The Governor's model compact could have taxed Coyote Valley nearly 33% of its net revenue on gaming machines for the first year.

In its response to Coyote Valley's version of the proposed compact, the Governor said:

> "*Changes to the 1999 compact* would be a significant modification that *would alter the fundamental understanding and agreement reached by the State and almost 60 Indian tribes*. For these reasons, Coyote Valley's proposal is unacceptable to the State."

The State's response to Coyote Valley's concern with the model compact on taxation was

> " These (referring to funding for gambling addiction, local government, shortfalls to the tribal distribution fund, and any other purpose), and other programs may be deemed by the Legislature as servicing the public interest in addressing some of the consequences of gaming (albeit unproven and unknown) in the State of California. **Accordingly, simply providing for the State's costs of regulating "specific activities at the facility" is inadequate and unacceptable**."

Again, the State's argument violates the simple language of the IGRA that says **taxation by the State is illegal. The IGRA only allows assessment by the State of such activities as are necessary *to reimburse* or to *defray the costs of regulating gaming***. So the State was saying that the provisions in the IGRA dealing with this issue were inadequate and unacceptable.

The IGRA says that a state cannot impose taxes on a tribe. The court agreed that the State cannot impose taxes on a tribe **UNLESS THE STATE OFFERS SOMETHING IN RETURN. I tried to research this but I cannot find this exception in any law! The Governor argued that the State gave tribes slot machines. The fact is the Governor did not have the authority to give tribes anything. The tribes had to go to the people of California and ask them to amend the California Constitution (Proposition 1A) to allow tribes to have slot machines on their Indian lands.**

The Governor argued that the tribes can have a monopoly on slot machines. Once again, the Governor does not have authority to give a monopoly, it is up to the people of the State of California to determine who else might have slot machines.

As I indicated earlier, Coyote Valley is concerned with the future of our tribe. We are concerned that once the State starts taking money away from the tribe and the courts and the United States Congress allow it, the State will keep coming back year after year and continue to take money and tribal jurisdiction; as its thirst and need for more money and power will continue to grow. Eventually, the tribes will not have the money to give so the people of the State will vote to allow non-Indian commercial gambling which will be located in large metropolitan areas so that the State can tax them at an even higher rate.

That will leave those poor tribes that were relegated to the furthest, remotest areas of California with no casino business. It will be even more devastating for those tribes in remote areas that have not only agreed to give the State millions of dollars for 20 years, but have also entered into a 20 year million dollar agreement with their local governments.

Once those tribes stop generating money for the State and the local government what is going to happen, how will they fulfill their legal responsibility? What will those tribes do, especially when most of those tribes have given away not only their money but their jurisdiction just to get the gaming they now have?

Coyote Valley does not want to be put in that situation and we are fighting hard to prevent that from happening to this Tribe.

II. Revenue Sharing with other Tribes

One of the purposes of IGRA is to provide a statutory basis for **a tribe** to use gaming as a form of economic development, to become self-sufficient, and **to build a strong tribal government**. The procedural process outlined in the IGRA is for **INDIVIDUAL tribes** to follow in pursuing gaming on its own Indian land.

Coyote Valley believes that the IGRA does not apply nor was it ever intended to provide benefits to tribes that were not interested and do not want to conduct gaming on its own Indian land.

Governor Gray Davis has determined the intent of IGRA is that those tribes that operate gaming *shall share* the tribe's revenue with those tribes that do not or can not operate gaming. Coyote Valley believes that the intent of the Governor's mandate and in fact the Governor told the tribes in his first meeting with the tribes that **revenue sharing with non-gaming tribes would be an incentive to keep those tribes out of gaming**, thereby successfully keeping those tribes from exercising their right to become independent, and economically self-sufficient. Instead now they are becoming more dependent on the revenue sharing money they received and on other tribes.

The response by the State to Coyote Valley's concerns about revenue sharing with other tribes was "these provisions provide some economic parity amongst the gaming and non-gaming tribes"; **It was a material deviation from the agreement reached by the other tribes in the state and therefore the State denied Coyote Valley's request.**

The Court read IGRA to mean that "all" tribes must benefit from an individual tribe's economic development and decided that

> "The State did not lack good faith when it insisted that Coyote Valley adopt it (revenue sharing with other tribes), as a precondition to entering a Tribal-State compact."

III. Labor Provisions

Another provision Coyote Valley disagreed to, is the 1999 compact's labor provision. Coyote Valley has an approved personnel police for the protection for all Coyote Valley employees. We believe in the protection of our employees and currently strive to provide employment benefits and protections equal to or greater than those benefits of existing employers in our area.

Governor Davis decided long before many of the tribes built their gaming casinos, that those tribes would not be fair to their employees, so the **Governor mandated** that the **tribes adopt tribal law to allow access and organizational rights for unions** to their gaming establishment and other related structures. THE GOVERNOR'S CONCERN WAS NOT FOR THE PROTECTION OF TRIBAL EMPLOYEES, IN FACT, PROTECTION OF EMPLOYEE RIGHTS WAS NEVER A CONCERN IN THE NEGOTIATIONS, THE ONLY DISCUSSION IN THE NEGOTIATIONS, WAS THE GOVERNOR'S POLICAL CONCERN THAT UNIONS GET A FOOTHOLD IN TRIBAL GAMING FACILITIES.

Worthy of note is that the tribes themselves, placed in the "model compact" provisions which includes issues dealing with public and workplace health, safety, and liability.

Once again Coyote Valley is not opposed to labor unions and in fact many of our tribal members are members of labor unions or were members at one time and the Tribe may be interested in working directly with individual unions in the future, but **ONCE AGAIN, WE DO NOT WANT THE STATE TO MANDATE THAT WE HAVE TO ALLOW UNIONS TO ORGANIZE ON OUR LAND, NOR DO WE WANT THIS PROVISION AS A *CONDITION* OF WHETHER OR NOT THE STATE WILL GIVE US A COMPACT. FURTHER, THE NATIONAL LABOR RELATIONS ACT DOES NOT APPLY TO TRIBES.**

The Governor's model compact states:

> "Notwithstanding any other provision of this Compact, this Compact shall be **null and void** if, on or before October 13, 1999, the **Tribe has not provided** an **agreement** or other procedure **acceptable to the State for addressing**

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

Coyote Valley proposed to adopt a Tribal Employment Rights Ordinance (TERO) as a tribal alternative for the protection of its gaming employees and the State said:

> "In order for any Tribal Labor Relations Ordinance to be acceptable to the State, any Ordinance to be adopted by Coyote Valley **MUST BE IDENTICAL TO THAT ORDINANCE NEGOTIATED AND AGREED UPON BY LABOR**, the tribe**(S)** and Senator **Burton's office**. Coyote Valley was not a part of those negotiations because we strongly opposed the provision.

IV. National Indian Gaming Commission

Which then begs the question? What is the purpose of the National Indian Gaming Commission? What good is the National Indian Gaming Commission? They take money from the tribes to build their bureaucracy. They don't help or protect tribes.

Instead of providing assistance to the very tribes for which it was established, from the very first appointee to this Commission have taken on an air of dominance over tribes. Not as a body established to promote and protect tribal economic development, self-sufficiency and strong tribal governments.

When the IGRA was passed members of Congress expressed a deep concern about the infiltration of organized crime into our Indian gaming. After many congressional hearings and reports this concern has been unfounded. However, in our opinion States and NIGC have taken the place of the organized crime and are no different than the mafia, "either do what we say and give us what we demand or we will put you out of business! And guess whose starting to mimic the States? Local governments are now trying to strong-arm tribes.

Payments to States and to the NIGC present accounting complications which we find hard to justify and still be in compliance with IGRA.

IGRA mandates that a gaming tribe cannot pay more than a set amount over a specific timeframe to management contractors. Tribes are mandated to carefully outline their intended use of gaming money into a congressionally approved distribution plan.

NIGC makes sure we have all our receipts in tack for everything we do, but they allow the States to demand an enormous amount of money from tribes for undocumented, unjustified regulatory costs which we believe is nothing more than illegal taxation.

According to IGRA, gaming tribes have to have an approved distribution plan we are given a notice of violation and penalized if we violate that approved plan. The State mandates that Tribes give money to other non-gaming tribes and those tribes can spend that money anyway they want, no distribution plan, no audits, nothing.

Gaming Tribes are also mandated to pay fees to the National Indian Gaming Commission; however, the NIGC does not have to justify its expenditures. How do we know that the NIGC is spending the money this Tribe gives to NIGC on the costs associated with regulating this Tribe?

First it's illegal taxation, secondly, no one person with authority has questioned why there is no cap on the amount of fees that a State can take from gaming tribes for the actual, specific regulation of each tribe's gaming enterprise. Each tribe should be treated as a sole contract not all lumped together for the convenience of a State or agency. Once again tribes are forced to pay into the pot but never receive the services that they pay for. No other business is treated so disrespectfully. There is no justification, no accounting and tribes are once again being "ripped off" by the governments they are forced to deal with.

Although the 1999 model compact included a special revenue sharing provision with the State it was not to take effect for two years after signing of the compact. However, without tribal approval, the State of California established the special distribution fund two (2) years early, before the tribes were required to pay into the fund. The State then borrowed money from the State general fund to fund the special distribution fund and changed the tribes' interest on the money they borrowed. Who would have such arrogance to do this to anyone other than to a tribe?

In addition, the State, the NIGC and management consultants get to take their "share" of the tribal pot "off of the top". Tribes are left with paying all the bills, all of the fees, paying everything, before we can even begin to allocate what's left into our distribution plan, before we can provide the necessary essential services and programs to our people.

Was the Commission making sure that tribes are the primary beneficiary of their gaming operation in California? Is the Commission helping Coyote Valley protect its sovereignty?

Even without the Commission, does any of this sound like "tribes are the primary beneficiaries of our gaming operations?" I think not.

Payment to the State and NIGC can become an accounting nightmare for tribes.

There is no budget category for States and the NIGC in a tribe's federally approved distribution plan. In which accounting category do the States and the NIGC fit? Coyote Valley feels they should be classified as vendors, along with management contractors, where the tribe can pay only a certain percentage. How does a tribe justify the money

given to a State and the NIGC's as "necessary to defray the costs of regulation of gambling when neither the State nor NIGC justify their expenditures to the tribe?

Coyote Valley has an approved financial policy. However, it seems that NIGC has their own financial policy that we don't know about until they come to the Tribe and tell us what they perceive in our accounting process as wrong. When we tried to help tribal members and non-tribal members with funeral costs, NIGC said these costs were not related and therefore these costs are prohibited.

But yet when tribes give money to states or local governments, they are allowed to spend the money at their discretion, without an approved distribution plan. The NIGC does not require justification or a spending plan for their expenditures.

Members of our Council dare not lose their luggage or extend a trip for any reason, emergency or not because if we find ourselves without clothes, we are not able to use our travel money for anything other than air fare, taxis, hotels and meals because it is not in our approved budget. The Tribe has been stripped of its authority by a federal agency. The NIGC would slap a violation on the tribe because that unforeseen emergency was not included in our budget. If NIGC thinks what a tribe has in its budget is inappropriate according to its standards they change the tribe's fiscal policy to prohibit those expenditures, then they tell you to agree to and adopt the new policy or face violations.

There is no "organized crime or other corrupting influences" for the Commission to shield tribes from, but what they are doing is harmful to the tribes.

The IGRA clearly states that the purpose of the establishment of the Commission was necessary to meet congressional concerns "regarding gaming" and to protect Indian gaming as a means of generating tribal revenue.

Yet, where's the Commission when we really need their help? The commission should be every bit as diligent in protecting tribes against state intrusion as they are in protecting tribes against the management companies. One minute they are strong and protect the tribes against management contractors and the next they just allow the states to walk all over the tribes. It doesn't appear to this tribe that the NIGC understands how to interpret the IGRA.

Instead of the Commission helping and protecting Coyote Valley and other tribes from State intrusion, the Commission concerns itself with micromanaging and oversteps its jurisdiction. The Commission concerns itself with trying to publicly embarrass tribes, posting violations or enforcements on the internet in violation of the IGRA provision. IGRA specifically exempts tribes from FOIA. The Commission is wasting its precious money harassing and filing lawsuits against the very tribes they are mandated to help develop and become strong tribal governments.

Coyote Valley feels that the NIGC should be standing up for the tribes and work in coordination with the Secretary of the Interior to disapprove of the State's demands

instead NIGC is holding a gun to our head, and giving us an ultimatum, telling us in essence, to "give the State what it wants or be closed."

Treatment by the Commission depends on who you know and how much money you have. The National Indian Gaming Commission can enter into a compliance agreement with one tribe without harassment and without publishing the tribe's name on the internet while another tribe is punished and put on the internet "to serve as a bad example" to other tribes. Is this how the federal government treats sovereign governments?

The Commission does not have a fair and equal process for enforcement or complaints. We have asked NIGC for a written policy on their violation and compliance procedure and they said they don't have one. They require tribes to put all of their processes in writing but they themselves refuse. Isn't it odd that the federal agency watch dog uses the old "do as I say, not as I do" policy.

Isn't it also odd that the NIGC complains to Congress annually that they do not have enough money or resources to monitor all of the gaming tribes that they are responsible for. However, they have investigated Coyote Valley twice in two (2) years, harassing the Tribe in their attempt to find violations for their witch hunt to close the Tribe's gaming facility.

In 2001, Coyote Valley entered into an agreement with NIGC which contained provisions which we were forced to accept to avoid a notice of violation. At the same time, a NIGC attorney said that another tribe with severe violations was given a compliance agreement after they had a "come-to-Jesus" meeting. This tribe was not given a violation nor was it placed on the internet on the NIGC's "tribal web page of shame".

In accordance with the compliance agreement signed in 2001, NIGC's field representative has monitored the Tribe on a regular basis. And in accordance with that agreement the Tribe has successful addressed NIGC's concerns. Never once did the representative complain that the Tribe was out of compliance.

Recently the Tribal Council started hearing that the NIGC was going to try to close our gaming facility even though they know we have a court's stay of proceedings while we are in court. Coyote Valley believes the NIGC is harassing the Tribe because we are the only tribe that refused to sign the Davis Model 1999 Compact.

During its visit last month, the NIGC set up interviews with tribal employees to try to "catch" the Tribal Council in a violation. NIGC did not share their concerns with the Tribal Council and the Council was unaware of why they were meeting with the employees. The NIGC rep called them in one by one; the employees were anxiously and nervously sitting outside the room awaiting their turn, not knowing why the NIGC wanted to speak with them.

We found out later that the NIGC asked the surveillance, pit and video managers and the machine techs asked them; "have you seen the Council receive comps"? "Does the

gaming commission play at the machines?" They brought in the construction crew and asked them "do you go and work on anyone's home off Indian land? Do you deliver material to their homes?"

The Tribe assumed that the NIGC was responding to individual tribal complaints. NIGC has a history of not following our tribal policy which requires all complaints to be filed in writing and submitted to the Tribal Gaming Commission. I informed the NIGC of tribal policy and still I was ignored.

However, we were wrong about the individual complaint. This week, we found out the intent of NIGC's action. Apparently they did not find what they were looking for during the July visit so the decided to challenge the Tribe on the grounds that the Tribe does not have an approved compact. **NIGC KNOWS THAT THE STATE HAS REFUSED TO ENTER INTO NEGOTIATIONS WITH COYOTE VALLEY. MORE IMPORTANTLY, NIGC KNOWS THAT COYOTE VALLEY IS OPERATING UNDER A COURT APPROVED STAY.**

Is this how the Commission uses the money it collects from the tribes, to harass tribes? Is this why tribal people have to give up the revenue that would have otherwise been used for their health, housing or other vital services?

V. Summary

The State won't enter into negotiations with Coyote Valley. Never once, did Governor Davis or his representative sit across the table from a representative of this Tribe in an honest good faith effort to negotiate or EXCHANGE any type of information. Instead, the State discards all of the tribe's concerns and shoves its compact in the face of the tribe then tells the tribe to take it or leave it. Is this negotiation? Is this an example of "good faith" negotiations?

Now, of course, the Governor is refusing to offer his "1999 model compact" to those other tribes that have been waiting since 1999 to negotiate with the Governor.

Even if, the Tribe is forced to sign the 1999 model compact, the Governor will refuse to allow Coyote Valley access to any gaming machines because "he is only allowing a certain number of machines in the State, and those machines have all been given out". The Governor will not go over that number unless you agree to pay what he considers the tribes' new "fair share" amount.

Who do the tribes go to when they need help? When states try to take advantage of a tribe or when they try to usurp a tribes' jurisdiction? When a state refuses to negotiate or to enter into a compact that is not fair and equitable? When a court makes political decisions against a tribe? Congress? We have two California Congressional Representatives that are against tribes using gaming to better themselves; even though it's been proven that everything else has failed to help tribes improve their quality of life.

The United Nations? The World Court? Again, who will help us to protect our sovereignty?

The courts? The courts have successfully removed all recourse for tribes whose governors refuse to negotiate a compact, or to negotiate fairly with a tribe. They use their laws, not tribal laws, their courts, not tribal courts, and their own attorneys to make decisions against tribes. Where is Justice? Someone once said that when tribes come into the room Justice takes her blind fold off, steps off the scales and walks out of the room.

The general canon of Indian construction holds that where there's ambiguity in statute it shall be interpreted in the light most favorable to Indian tribes. This policy has not been followed by the federal court system for many years and as a result the tribes have faced a constant erosion of tribal sovereignty and jurisdiction.

The State of California has said to this Tribe, that the other tribes have accepted the provisions in the compact so either you can take it or leave it.

It has always been the opinion of the Coyote Valley Tribe that the Tribe has a right to request a compact that is specific to its own needs. The Coyote Valley Tribe believes that every tribe that wants to, and qualifies, should be allowed to not only request negotiations but at the very least TO RECEIVE A COMPACT THAT IS THE SAME AS WHAT OTHER TRIBES IN ITS STATE HAS. However, if a tribe does not want the exact same provisions as what another tribe wants, THE TRIBE SHOULD NOT BE THREATENED OR FORCED TO TAKE THAT COMPACT.

About 150 years ago, California tribes signed 18 treaties and the treaties were sent to Congress for ratification. Because the California Senate opposed the treaties, and notified Congress of their opposition, those treaties were never signed and were in fact "purposefully lost". These un-ratified treaties were hid in the federal archives where they were kept until they were found a few years ago because the "public" outcry and greed for Indian land and resources out-weighed the balance of the United States' responsibility and trust relationship to tribes.

Once more we are seeing hostility from states and local government leadership against tribes. What is especially sad is that this hostility is beginning to surface from this very Congress, representatives representing the United States who have the special trust relationship with tribes are now working to undermine tribes and their efforts to become self-reliant.

The U.S. Supreme Court ruled in favor of State's rights concerning the 10th and 11th amendments. Various members of Congress passed amendments that successfully tied the hands of those tribes that had governors who were refusing to negotiate and the list goes on for the hardships endured by tribes in their attempt to obtain "the golden ring", the coveted tribal state gaming compact and self reliance.

The Coyote Valley Tribe does not believe that any other tribe in the United States has the right to tell Coyote Valley what Coyote Valley should include in its own compact. Coyote Valley would never tell another tribe what to put into its compact. Nor do we believe that a State or local government should tell a tribe what they think must be included in a compact as a condition of getting an approved compact from the State especially issues that would jeopardize our tribal sovereignty.

Tribes have no support.....if you are a tribe that refuses to give up all of its self governing rights.....if you are a tribe that will not willingly concede all of its revenue over to another jurisdiction ..... If you are a tribe that is the last tribe in the State to hold out in signing a bad compact, just hoping that someone will help you preserve your sovereign rights.

Then you are a tribe that is .....out of luck!

It is clear, that if you want to get into gaming you have to agree to give everyone a piece of the action. The Governor forces tribes to give up their money and sovereignty, then turns around and says that it is "sharing", that it is "the State's fair share."

But who has ever given tribes their "fair share"? The State of California has never provided for the indigenous people of this State. Instead, the tribes have barely survived all these years on small appropriations and grants from the federal governments in exchange for their land. Now when **some** of the tribes have broken loose from the hold poverty has had on them, the State and local governments who provided nothing in the past" wants its fair share". The rest of us are still struggling against the State to succeed.

First it was the land grab in the 1800's and now in 2003, it's the money grab.

WHO IS GOING TO HELP TRIBES PROTECT THEIR PRECIOUS SOVEREIGNTY FOR THE GENERATIONS TO COME – CERTAINLY NOT THE STATES, THE COURTS NOR THE COMMISSION?

Once again we come to Congress for your help and support. We do not want to amend the IGRA. We believe the federal government and Congress has a duty to exercise their trust responsibility and a constitutional mandate to provide the protections necessary to ensure the continued existence of tribal governments and tribal sovereignty.

This is a continuing obligation on behalf of congress, not to be used sparingly but to be used often and tenaciously.

In closing, the Coyote Valley Band of Pomo Indians makes the following recommendations:

1. If it is within their jurisdiction, the National Indian Gaming Commission shall develop a uniform written policy for the purposes of processing their findings for

tribal compliance agreements and the Freedom of Information Act which is fair and equal for all tribes.

2. If it is within their jurisdiction, the National Indian Gaming Commission shall develop a uniform written policy on allowable expenditures as it relates to tribal gaming operations.

3. Congress needs to clarify that where the tribe has specific tribal jurisdiction the federal, state or local governments, including the National Indian Gaming Commission, shall not conflict with that tribe's jurisdiction.

4. Congress needs to direct Interior to clarify that the intent of IGRA is that tribes are not to be taxed by a State or assessed for any thing other than such amounts as are necessary to defray the costs of regulating the **individual tribe's** gaming activity.

5. Congress needs to direct Interior to clarify that the intent of IGRA is that tribes have a **RIGHT** to individual compact negotiations and that joint negotiations are allowable only if each tribe participating in the joint negotiations has an opportunity to further negotiate for tribal specific issues prior to signing the compact.

6. Congress needs to direct Interior to clarify that the intent of IGRA is that that States cannot impose preconditions to compacting such as mandating labor provisions and taxation.

7. Congress needs to direct Interior to clarify that the intent of IGRA is that federal Indian law has supremacy over State Indian law.

8. Congress needs to clarify whether States and NIGC are considered a component of a tribe's distribution plan. If they are not, then Congress needs to define where these budget items are to be located in the tribe's budget to comply with IGRA.

9. Congress needs to place a cap on the amount a federal, State or local government can assess a tribe for regulation and that a federal, State or local government cannot collect revenue from a tribe unless it can document real and actual costs related to the specific tribe that provided the revenue.

10. Congress needs to enforce the IGRA provision that "tribes shall be the primary beneficiary".

Thank you again for your consideration of our issues. Please contact me if you have further information at (707) 489-2528.

Priscilla Hunter, Chairwoman
Coyote Valley Band of Pomo Indians

Testimony before the U.S. Senate Indian Affairs Committee
Pedro Johnson, Executive Director of Public Affairs
Mashantucket Pequot Tribal Nation, Mashantucket, Conn.
July 9, 2003

Good morning Mr. Chairman and Members of the Committee:

My name is Pedro Johnson, executive director of Public Affairs for the Mashantucket Pequot Tribal Nation of Mashantucket, Conn.

Thank you for your kind invitation to address this Committee. I am here representing our Tribal Nation at the request of our Chairman, Michael J. Thomas. I myself am a former three-term member of Tribal Council. I am a retired police officer, and a proud veteran of this country's military services, as are many of my cousins.

Your Committee has done unprecedented work on behalf of Indian country throughout this land. I am here in part out of respect for the attention and leadership you, and Congress, have demonstrated to protect Indian sovereignty throughout the United States. For those efforts, I thank you.

I am also here at your request to discuss the important government-to-government, revenue-sharing relationship we have with the State of Connecticut.

As you know, gaming was never the first business enterprise of choice for tribal governments, our First Nations. To date, it is simply the one that has worked the best. When my Tribal Nation was recognized in 1983, five years before the Indian Gaming Regulatory Act (IGRA) was passed, we had no plans for a Foxwoods. We just wanted to survive.

My own tribe tried many different business enterprises – hydroponic gardening, restaurant ownership, maple syrup-making, even raising hogs – before our Bingo Hall opened in 1986. In fact, our Chairman likes to say that nobody cared about Indians in southeastern Connecticut back when we were chasing hogs down the state road.

Today we are one of the largest employers in the State of Connecticut – and one of the most charitable. Our largest and most successful business enterprise, Foxwoods Resort Casino, employs 11,000 full- and part-time workers. We purchase goods and services totaling more than $300 million – every year.

Tribal citizens and our employees pay local, state and federal taxes, including local property taxes on land the tribal nation owns off the reservation in neighboring towns. We are one of the largest local taxpayers in several neighboring towns and cities.

In the year 2000, a University of Connecticut study found that the wages, goods, products and purchases of the Mashantucket Pequot Tribal Nation's enterprises account for about 1 percent of the gross state product – that's more than $1 billion annually. The UConn study found that directly and indirectly we account for 41,000 jobs in Connecticut – meaning we're also keeping a lot of real estate brokers, furniture salesman and gas station owners very, very happy.

And we've done this without the benefit of any state government grants or economic development assistance.

It's also important to note that the owners of this enterprise – we, the people of Mashantucket – are local residents and have been local residents for generations and generations. We are not about to pack up and leave the area, like some businesses have done in the state. In fact, just last week, we donated $41,000 – the net proceeds from a charity bingo event – to help pay for football field lights at

the local high school, where our children learn and play.

As you may know, my Tribal Nation has given back to the state and its communities in many ways. We are one of the largest contributors to the local United Way and to Special Olympics Connecticut. For the 1995 Special Olympics World Games in Connecticut, we donated $2 million. And of course, we are one of the first, major donors with our $10 million pledge to the Smithsonian's National Museum of the American Indian, and we look forward to its opening next year.

One component of our success has been our relationship with the State of Connecticut.

As you may know, the relationship with the state was at first rocky. A gaming agreement was negotiated over the terms of two governors and only went into effect after the U.S. 2nd Circuit Court of Appeals ruled in favor of our Tribal Nation's right to offer gaming in Connecticut.

The original casino opened in February 1992 with only table games and other games of chance – no slot machines and no revenue sharing with the state.

As I'm sure you remember, the early 1990s were tough

economic times for this country, and Connecticut was hit particularly hard. In fact, the state started to lose jobs in 1989, the state budget's "rainy day fund" of several hundred million was wiped out within a year or two, and the defense industry, a major employer in southeastern Connecticut, was undergoing severe belt-tightening and job losses.

We opened 11 ½ years ago with more than 2,000 jobs. We helped stabilize the regional and state economy. In its first few months, the casino was clearly a success.

And the state saw that. Based on our gaming agreement, state police and gaming and liquor officials were regulating the casino, along with our gaming commission.

We should note that the entire cost of state regulation of our casino is paid for by the Tribal Nation – more than $4 million per year. That covers the salaries of state police officers and liquor control agents stationed at the casino, as well as special revenue agents who license our management, employees and vendors.

In the subsequent months of 1992, the state and the Tribal Nation worked out an historic, government-to-government agreement, now known as the slots agreement. The Tribal Nation

added slot machines to the casino, and shared 25 percent of the slot revenues with the state.

Since the slot agreement went into effect in January 1993, the Mashantucket Pequot Tribal Nation has sent a total of more than $1.6 billion to the state.

Let me just add for the record that our gaming agreement, known as the compact, has stood the test of time. Because of its success, it has been scrutinized by many governments – tribal, state and federal. It has become the template for subsequent gaming agreements between Indian and state governments and, once again, we feel fortunate to be trail-blazers.

Now, I want to address some comments expressed trough the years about our revenue-sharing arrangement with the state.

First: How did you come up with 25 percent?

The answer has many facets. We wanted something that was going to be fair and honest for both governments. We wanted something that could hold up over time – keep in mind that our gaming agreement has no time limit and was exclusive to one, and now two, Indian nations. So we needed to demonstrate a revenue stream sustainable over a long period of time in what we thought

was going to be a very strong Northeast gaming market.

We should also look at the context in which this government-to-government agreement took shape. I already mentioned the recession. In addition, Connecticut had an independent governor and a former Senator whom you probably know: Lowell P. Weicker Jr. He had a small budget problem, about $100 million shortfall.

He saw that the casino was a success but very much wanted to limit casino gambling. Private Atlantic City and Las Vegas gambling interests were already knocking on the state's doors –trying to woo state opinion leaders. And part of their pitch was: "Your state isn't getting anything from the casino."

Well, that changed with the slot agreement.

Today, revenue from the two Indian casinos make up about 3 percent of the state's $13 billion budget. While this is still a small percentage, our current governor likes to say that it's the only revenue stream that hasn't gone down in the recent recession.

And that's the point: Revenue-sharing from Indian governments to the state is a steady but small percentage relative to the size of a state's budget. More importantly, IGRA was not

designed to benefit STATE governments but instead was designed to protect and regulate INDIAN governments.

One final point about the 25 percent rate. This was dictated by our individual government-to-government relationship with the state. Just because 25 percent was appropriate in Connecticut, doesn't mean that it should be the norm for other state and tribal agreements.

Today many states are again facing budget deficits. Connecticut is too, but it is not turning to tribal nations to help balance the state deficit.

And this is perhaps the lesson for other states too: States should not balance their budgets on the backs of Indian tribal governments and Indian gaming. It is patently unfair. This goes against the entire history of Indian government sovereignty and our strive for self-sufficiency. If states wanted to derive more revenue from gaming, they have their own gaming to turn to: lotteries, jai-alai, on-track and off-track betting.

When my Tribal Nation was raising hogs and tapping maple trees for syrup, nobody else cared about our revenue stream. And then as now, we had to balance our own government's budget, just

like any other government.

We are going to stand by our government-to-government relationships and agreements, as we always have, because we are proud of the respect and fairness they now afford us.

I'll be happy to answer any of your questions.

Thank you.

The Economic Impact of the Mashantucket Pequot Tribal Nation Operations on Connecticut

By

Fred Carstensen, Director
William Lott, Director of Research
Stan McMillen, Manager, Research Projects
Bobur Alimov, Research Assistant
Na Li Dawson, Research Assistant
Tapas Ray, Research Assistant

November 28, 2000

CONNECTICUT CENTER FOR ECONOMIC ANALYSIS©
University of Connecticut
341 Mansfield Road, U-63
Storrs, CT 06269-1063
Voice: 860-486-0485 Fax: 860-486-4463
http://www.lib.uconn.edu/ccea

EXECUTIVE SUMMARY

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.

Since the opening of its Foxwoods Resort Casino in 1992, the Nation has created almost 13,000 jobs and played a leading role in revitalizing the southeastern Connecticut economy of the early 1990s that absorbed large defense spending cutbacks.

However, the full economic impact of the Nation, its Foxwoods Resort Casino and other business enterprises is far greater than just direct employment effects.

Using a sophisticated computer model of the Connecticut economy and other economic analyses, the University of Connecticut's Center for Economic Analysis has found that the Tribal Nation's investments in people, goods and services, capital improvements and private land has had significant, positive economic impacts on the State. Regional Economic Models, Inc. (REMI) of Amherst, MA develops the computer model of the Connecticut economy.

The Center has found that:

- The Tribal Nation has raised real gross state product (GSP) by $1.2 billion dollars on average above the baseline forecast annually over the study period due to the presence of its operations. This represents a yearly average percentage increase of 8.5% for New London's gross regional product and 1% for the State's GSP.

- The Nation has increased total (direct, indirect and induced) employment statewide by 41,363 jobs on average yearly above the status quo forecast.

Table 1 below summarizes these findings.

Table 1. Summary Table for the Economic Impact of MPTN Operations.
Numbers represent annual average differences from the baseline forecast of the New London and Connecticut economies.

	New London County		*Connecticut*	
	Level change	*Percent change*	*Level change*	*Percent change*
GRP	805 Mil 92$	8.54%	1,228 Mil 92$	0.89%
Employment	31,358	17.83%	41,363	1.80%
Personal Income	1,145 Mil Nom $	10.15%	1,913 Mil Nom $	1.01%

Note: GRP is gross regional product, the region being either a county or the State.

In addition to these impressive numbers, the Mashantucket Pequot Tribal Nation (MPTN) operations:

- Have sustained positive residential property values in Ledyard, North Stonington and Preston relative to the Hartford Labor Market Area in a period when substantial cutbacks in employment in New London County occurred.

- Have seventy-three percent of visitors to Foxwoods Resort Casino from other states, whose spending is net new to the region. This spending stimulates the expansion of the lodging and restaurant business in the area.

- Have provided millions of dollars in property tax money to the Towns of Norwich, Preston, North Stonington and Ledyard.

- Have assumed a leadership role in welfare reform, including lifting families out of poverty through training and employment through its Work ETC program.

- Passed on revenues from slot operations to the State that topped $1 billion in January 2000. These revenues are distributed in turn to the 169 towns in Connecticut.

- Developed high-speed ferry operations that connect New London with Glen Cove, NY and Martha's Vineyard, and will intersect the nation's first high-speed train, Acela, in New London.

- Built a $193 million Native American Museum that is a leading cultural attraction in the area. The Tribal Nation also sponsors an annual tribal pow-wow, Schemitzun that brings cultural tourists to the area. Cultural tourists stay longer and spend more money than other tourists.

Any large economic development has positive and negative impacts. This report looks at traffic congestion and reported crimes in the area as negative impacts. We studied a 15-mile strip of Route 2 and examined crime statistics for the area towns and found that overall, traffic and crime associated with the business enterprises had small negative impacts on the economic growth of the region and the State.

This report describes in detail the economic and fiscal impacts of the Mashantucket Pequot Tribal Nation operations on Connecticut and New London County.

Introduction

The economic success of the Mashantucket Pequot Tribal Nation has helped both the immediate region of southeastern Connecticut and the entire State.

Before the opening of Foxwoods Resort Casino in 1992, eastern Connecticut was primarily a rural area with low economic activity with the exception of two or three major pockets of industry, including the defense industry. The needs of the Mashantucket Pequot Tribal members – the State's poorest group, according to the 1990 census – were persistently ignored by the State government (Bee, 1990).

In the early 1990s, the region faced a crisis with a contraction in the defense industry, as well as a downsizing in general manufacturing. From 1988 to 1993, the region lost approximately 10,000 jobs, including nearly 4,800 manufacturing jobs (Hsu, 1999). In 1993, projections for 1998 were even worse: 25 percent unemployment with 32,000 jobs lost (Dyer, 1997). Changes in laws, a unique geographical location between two major metropolitan areas, a heroic effort from the Tribal leadership, and greater acceptance by the American people toward gaming, created an excellent opportunity for the Mashantucket Pequots to run one of the most successful casinos in the U.S. (d'Hauteserre, 1998).

The opening of the Tribal Nation's Foxwoods Resort Casino brought in thousands of jobs much needed in the region. The resort alone employs 12,934 people, both full- and part-time, and 9,757 are Connecticut residents. In addition, since 1993, the State of Connecticut receives 25 percent of gross slot machine revenues, which amounted to $174 million in 1999. By January 2000, the cumulative slot machine revenue from the Tribal Nation to the state topped $1 billion.

In addition to the slot machine revenue, the Tribe pays directly to the state the costs for regulating its gaming enterprises by the state police, the Division of Special

Revenue and the Department of Consumer Protection. The Tribal Nation's regulatory fee payments to the state now total more than $5 million per year.

Impact on tourism

Foxwoods Resort Casino hosts nearly 41,000 people per day on average, with 73 percent of the customers coming from out-of-state.[1] This high tourism rate has a significant effect on the region's lodging and dining businesses because tourists buy gas, souvenirs, meals, and lodging in the region. Tourists are attracted not only by gaming opportunities but also by a variety of entertainment (concerts, nightclubs, boxing) and restaurants. The construction of modern hotel facilities on the reservation has also helped develop a growing conference and convention business in the area.

In addition, the Tribe in 1998 completed the Mashantucket Pequot Museum and Indian Research Center, which preserves tribal history and helps educate the general public about Indian history and culture. The Museum now attracts more than 250,000 people per year, making it one of the most popular museums in the State. The Museum's programs supplement K-12 art and history programs and preserve Native American culture for the general public. Coupled with other cultural and tourist attractions in the region, the Museum captures tourist dollars that otherwise would flow out of state.

The Tribal Nation every year sponsors the annual Schemitzun festival, a celebration of Native American music, dance and culture, which attracts from 20,000 to 60,000 people over a four-day weekend. The visitors include members of indigenous tribes from North and South America.

Understanding the broad, diverse impact of tourism, the Tribe has also purchased off-reservation tourism properties, including the Hilton Mystic in Mystic, the Spa at Norwich Inn in Norwich, and Randall's Ordinary in North Stonington. The spa is one of

[1] The data on tourism and spending patterns is from the survey prepared by the Impact Strategies, Inc. in 1999-2000 (see Appendix 4).

the most famous spas in the United States, and in purchasing the property the Tribe has restored it to financial success and expanded it with a recent capital project.

Beyond tourism

The Tribe's direct contribution to the region's economy is not limited to gaming- and tourism-related businesses. In 1990, the Tribal Nation created the nationwide pharmaceutical business, Pequot Pharmaceutical Network (PRxN), which in 1999 had total gross revenues of $18.9 million.

The Tribe's welfare-to-work program, Work ETC (Work, Education, Transportation and Childcare) is a unique program that addresses the vital needs of people on welfare who are seeing a new job or a return to the workforce. The Mashantucket Pequot Tribal Nation was the first employer in the state to play such an integral part in the support of a complete welfare-to-work program by offering financial support, administrative and government support and, most importantly, entry-level positions that were suitable to the participants. Since its inception in 1997, the program has trained and employed more than 150 people. These results reduce state transfer payments, generate tax revenue and induce new spending for consumer goods.

Finally, the total economic impact of the Tribal Nation goes far beyond the direct impact of its business operations. The study by Wright and Associates (1993), using economic base analysis, found that every Foxwoods job supports 1.107 additional non-casino jobs elsewhere in New London County, plus 0.74 new jobs in the rest of Connecticut. The Center for Economic Analysis' report employs an alternative economic model, which allows estimation of the dynamic economic impact of the Tribe's operations and is more detailed in its analysis of inter-industry linkages and population movement.

We considered direct impact economic variables described in this report (such as employment and procurement) and estimated their indirect and induced effects by using

the widely accepted REMI model. Considering that every economic activity imposes indirect costs or benefits on others, we capture amenity aspects (such as education, congestion, cultural preservation) of the Nation's enterprises in the model to calculate the total benefits and costs of MPTN operations.

The results of our analysis argue that the Mashantucket Pequot Tribal Nation plays a major role in the regional economy, contributing 41,000 jobs to the State, with 31,000 of those in New London County, generating $1.2 billion in Gross State Product, and adding $1.9 billion to the State's aggregate personal income. Of these amounts, New London County captures $800 million in GRP and $1.1 billion in personal income.

Economic Impact Analysis

The MPTN Foxwoods Resort Casino operations have not only had a direct impact on the economy of New London County and the State of Connecticut, but also significant indirect and induced economic effects. To get at the extent of these effects the Connecticut Center for Economic Analysis (CCEA) uses a microcomputer-based economic model of the Connecticut economy developed by Regional Economic Models, Inc. (REMI) of Amherst, MA. The REMI econometric model is a sophisticated 53-sector replication of the state's economic structure that can project economic impacts out to the year 2035.[2] We limit our analysis only to the State of Connecticut and, therefore, ignore the economic impact of the MPTN on the economies of Rhode Island and Massachusetts. Moreover, because the data from which the model is constructed are available only at the county level, the analysis can not directly separate out the economic impacts on town level. However, we used other alternative economic procedures to estimate the effects of MPTN operations on three neighboring towns of Ledyard, Preston and North Stonington (see Appendix 2).

Methodology and the Data

The analysis relies on a counterfactual approach to estimate the impact of the Mashantucket Pequot Tribal Nation's operations since the establishment of Foxwoods Resort Casino. The model considers only the expenditure side of all transactions in order to avoid double counting. The analysis presented here looks at the dynamic economic effects up to the year 2019 of the hypothetical removal of Foxwoods Resort Casino and consequent reductions in all related businesses starting in the year 2000. The objective is to determine the net benefits of the MPTN Foxwoods Resort Casino related operations to

[2] The detailed description of the REMI model can be found in Appendix 1 of this report.

New London County and the entire State, in terms of increased employment, population, gross regional product and personal income.

The Mashantucket Pequot Tribal Nation provided the data for employment and spending of the Casino and its related businesses, property taxes paid to neighboring towns and the description of the Work ETC program. The Division of Special Revenue regularly releases the data on transfers to the State of Connecticut. Finally, tourist visiting and spending patterns have been obtained through a comprehensive survey conducted by Impact Strategies, Inc. in 1999 - 2000.[3]

The basic data for MPTN operations are as follows:

Foxwoods Resort Casino data (fiscal year 1999 figures):

- Employs 12,934 people, of whom 9,757 are from Connecticut (7,845 from New London County).
- Purchases necessary for the operation of the Casino accounted for more than $252 million ($106.5 million from Connecticut, $44 million of which are from New London County).
- All employees of the MPTN are covered by comprehensive health insurance, with total gross payments to health care providers totaling $54 million for 1999.

Mashantucket Pequot Museum data (fiscal year 1999 figures):

- Attracted 256,217 visitors of whom 42% came exclusively to the museum.
- Total revenues were $844,000.
- Cost of goods sold accounted for $143,000.

Off-reservation hotels and tourism data (1999 figures):

- Pequot Hotel Group employs 797 people with 258 of them living in New London County.

[3] For details see Appendix 4.

- Purchases (intermediate demand for the hotel industry) accounted for $7.4 million with almost 60% being from New London County.
- Tourism expenditures were calculated based on an approximation of the average daily number of the MPTN visitors (41,000), 60% of whom are day-trippers with the rest staying in hotels and motels (survey results, see Appendix 4).

Transfers to state and local governments (fiscal year 1999 figures):

- $174 million in transfers to the State of Connecticut for gaming rights in 1999 (accumulated transfers reached $1 billion in January 2000).
- $2.3 million in property taxes paid to the neighboring towns.
- MPTN payments to the State of Connecticut for regulatory fees (State Police, Liquor Control Division and Division of Special Revenue) were $4.4 million.

Pequot Pharmaceutical Network (PRxN):

- Purchases of pharmaceuticals accounted for $15.4 million in fiscal year 1999.

Work ETC (education, transportation and childcare):

- Since 1997 the program trained and employed more than 150 Connecticut residents on welfare who were seeking a new job or return to the workforce.

Amenity values (crime, traffic and congestion costs) in the neighboring towns of Ledyard, Preston and North Stonington:[4]

- Non-casino crime is essentially unchanged since the introduction of Foxwoods Resort Casino.
- Traffic and congestion costs accounted for $53,394 in fiscal year 1999 (see Appendix 2).

Results

The operations of the Mashantucket Pequot Tribal Nation are not limited to the direct effect of the variables described earlier in this report. These effects in the model

economy lead to additional spillover effects throughout broader New London County and Connecticut. Tables 2 and 3 and Figures 1-4 show the combined direct and spillover effects on several key variables.

Table 2 and Figures 1 and 2 indicate the impact of the MPTN Foxwoods Resort Casino related operations on Gross Regional Product (GRP) and aggregate personal income of New London County and the State of Connecticut. Variables listed as annual averages indicate the amount on average we can expect that variable to change in a given year from the baseline or status quo REMI forecast. Expressed this way, these variables are useful in describing the overall impact. The time paths of these variables, illustrated in the figures below, indicate the expected changes in each specific year. Figures help to visualize the dynamics of the effects of the impact.

Table 2 shows that current MPTN operations on average annually contribute $805 million to the GRP of New London County, or 8.54 percent of the County's GRP. At the State level, MPTN operations annually account for $1.2 billion (almost 1%) of Gross State Product and $1.9 billion (1.01 percent) of Connecticut's personal income. Figures 1 and 2 present the dynamics of the impact. They suggest, for example, that by the year 2019, MPTN Foxwoods Resort Casino related operations could account for more than $2.6 billion in additional (above the baseline forecast) aggregate personal income in the State of Connecticut, of which $1.6 billion is in New London County.

[4] For details of estimation procedures see Appendix 2 of this report.

Table 2. The economic effects of MPTN Foxwoods Resort Casino related operations on GRP and personal income of New London County and the State of Connecticut (2000-2019). Numbers represent annual average changes from the baseline forecast of the New London and Connecticut economies.

	New London County		*Connecticut*	
	Level change	*Percent change*	*Level change*	*Percent change*
GRP	805 Mil 92$	8.54%	1,228 Mil 92$	0.89%
Personal Income	1,145 Mil Nom $	10.15%	1,913 Mil Nom $	1.01%

Note: GRP is gross regional product, the region being either a county or the State.

Figure 1. Economic Impact of MPTN Foxwoods Resort Casino operations on Gross State Product and Personal Income of the State of Connecticut

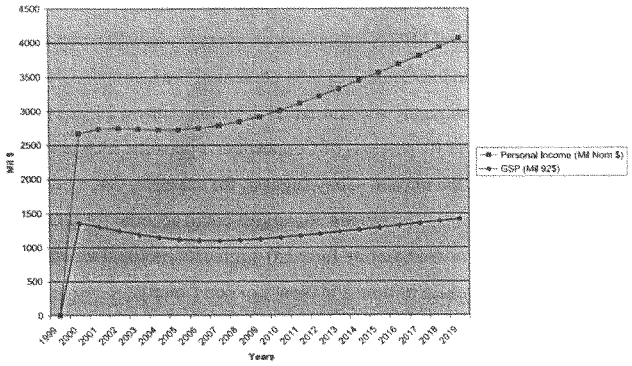


Figure 2. Economic Impact of MPTN Foxwoods Resort Casino operations on Gross Regional Product and Personal Income of New London County

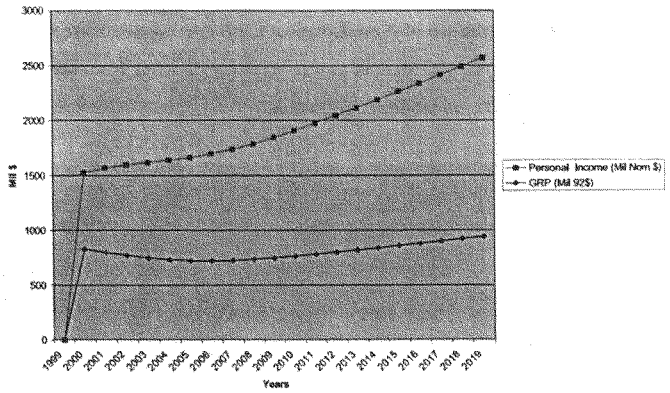


Table 3 and Figures 3 and 4 indicate the impact of the Foxwoods Resort Casino related operations on total employment and population of New London County and the State of Connecticut. Table 3 shows that MPTN operations on average annually contribute 41,363 jobs to the economy of the State of Connecticut, with 31,358 of these in New London County. The total employment impact of MPTN operations on New London County is significant, representing 17.83 percent of its total employment. Further, the employment effect on the towns of Ledyard, Preston and North Stonington is even greater, as 80.4 percent of the total number of employees of the MPTN in Connecticut live in those towns (see Appendix 2).

Population exhibits a similar trend to GSP, employment, and personal income. MPTN operations add an annual average increase in population of 49,991 to Connecticut, with 36,205 going to New London County. The availability of new jobs in New London County will not only induce migrants to move into the area, but also spillover relative

employment opportunities to the surrounding area and the entire State. Figures 3 and 4 show the dynamic pattern of population increase for both State and New London County.

Table 3. The economic effects of MPTN Foxwoods Resort Casino related operations on total employment and population of New London County and the State of Connecticut (2000-2019). Numbers represent annual average changes from the baseline forecast of the New London and Connecticut economies.

	New London County		*Connecticut*	
	Level change	*Percent change*	*Level change*	*Percent change*
Total Employment	31,358	17.83%	41,363	1.80%
Population	36,205	13.75%	49,991	1.46%

Figure 3. Economic Impact of MPTN Foxwoods Resort Casino operations on Employment and Population of the State of Connecticut

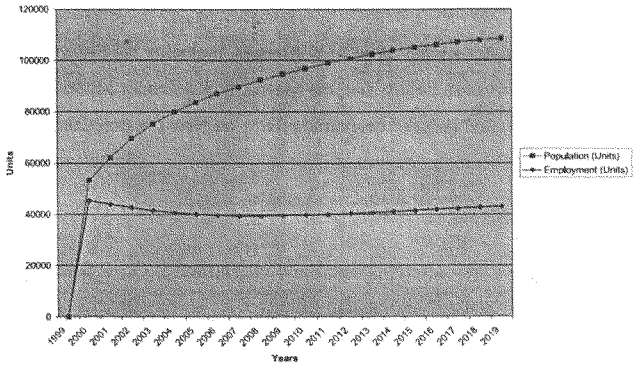
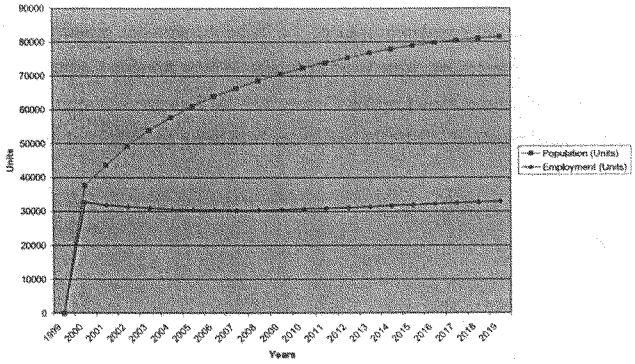


Figure 4. Economic Impact of MPTN Foxwoods Resort Casino operations on Employment and Population of New London County



The analysis of key economic variables shows that MPTN Foxwoods Resort Casino and related operations have substantial positive economic impacts on both New London County and the entire State, as measured by changes in GSP, employment, personal income, and population.

Conclusions

The MPTN operates a wide range of businesses, including the Foxwoods Resort Casino, several off-reservation hotels, and, the Mashantucket Pequot Museum. These operations have indirect and induced economic effects on New London County and the State of Connecticut. This report examines three key economic variables: the Gross Regional Product (GRP), personal income and employment.

GRP Impact: MPTN operations contribute $1.2 billion to Gross State Product, with $805 million attributed to New London County.

Personal Income Impact: Foxwoods Resort Casino and related operations result in an additional $1.9 billion in Connecticut's personal income with $1.1 billion credited to New London County.

Employment and Population Impact: the Tribe's operations generate 41,363 additional jobs in Connecticut, with 31,358 of these in New London County. The availability of new jobs in New London County and the State attracts migrants to the area, so the projected effect of MPTN operations is to bring an additional 49,991 people into Connecticut.

Appendix 1: Connecticut Economic Model

In 1992, with funding from the Connecticut Department of Economic and Community Development (DECD), the Department of Economics at the University of Connecticut acquired a microcomputer-based economic model of the Connecticut economy from Regional Economic Models, Inc. (REMI). A Massachusetts-based firm with historical ties to the University of Massachusetts, REMI has expertise in regional economic modeling and is a leading supplier and developer of such models. Following its acquisition of the model, the Department of Economics at the University of Connecticut began the formal process of creating the Connecticut Center for Economic Analysis (CCEA).

The REMI model includes all of the major inter-industry linkages among 466 private industries, which are aggregated into some 49 major industrial sectors. With the addition of farming and three public sectors (state & local government, civilian federal government, and military), there is a total of 53 sectors represented in the model.

At the core of the model are the results of extensive modeling efforts at the U.S. Department of Commerce (DoC). The DoC has developed, and continues to develop, an *input-output model (or I/O model)* for the United States. Modern input-output models are largely the result of groundbreaking research by Nobel laureate Wassily Leontief. They focus on the interrelationships between industries, and provide micro-level detail regarding factor markets (including the labor market), intermediate goods production, as well as final goods production and consumption. Conceptually, the model is constructed in the form of a table, a kind of cross-reference, in which each cell summarizes the sales-purchase relation between industries or sectors.

An example may help to make clear the value of this structure. Suppose that one cell changes; wages for labor rise in one specific sector. The labor cell in that sector would change. Then, the change would flow through the table, affecting inputs and outputs in other industries along the chain of production. At the same time, businesses

might substitute capital machinery (automation) or other inputs that appear more cost effective as a result of the change. This would offset, to some extent, the rising cost of labor. Workers may attempt to shift their employment to the sector with higher wages. That is, all of the elements of the model, just like the economy it represents, are related to all other elements of the model.

The REMI Connecticut model takes the U.S. I/O "table" results and scales them according to traditional regional relationships and current conditions, allowing the relationships to adapt at reasonable rates to changing conditions. Additionally:

- Consumption is determined on an industry-by-industry basis, from real disposable income in a Keynesian fashion, i.e. prices are fixed in the short run and gross domestic product (GDP) is determined entirely by aggregate demand.
- Wage income is related to sector employment and is factored by regional differences.
- Property income depends only on population and its distribution, adjusted for traditional regional differences, not on market conditions or building rates relative to business activity.
- Estimates of transfer payments depend upon unemployment details of the previous period. Moreover, government expenditures are proportional to the size of the population.
- Federal military and civilian employment is exogenous and maintained at a *fixed* share of the corresponding total U.S. values, unless specifically altered in the analysis.
- Migration into and out of the state is estimated and is based on relative wages and the "amenities" of life in Connecticut versus other states.
- "Imports" and "exports" from other states are related to relative prices and production costs in Connecticut versus elsewhere.

Depending on the analysis being performed, the nature of the chain of events cascading through the model economy can be as informative for the policymaker as the final aggregate results. Because the model generates such extensive sectoral detail, it is possible for experienced economists in this field to discern the dominant causal linkages involved in the results.

Appendix 2: Local Economic Impact Analysis

Introduction

Increased road congestion reduces trucking efficiency, increases automobile delay time, fuel costs, accidents and environmental damage. These in turn affect worker and firm location decisions. The following characterizes local economic impacts of congestion, crime, employment and residential values as consequences of MPTN operations.

Employment

Of the total number of employees of the MPTN operations in Connecticut, 80.4 percent comes from New London County and 13 percent comes from the towns of Ledyard, Preston and North Stonington. This shows the employment significance of Foxwoods Resorts Casino in these three towns, especially Ledyard. Based on the study by Wright and Associates (1993), which found that each Foxwoods Resort Casino job supports 1.107 additional non-casino jobs in New London County, we estimate the total number of jobs created per hundred jobs by the MPTN Foxwoods Resort Casino related operations in three towns of Ledyard, Preston and North Stonington.

Table 4. Local Employment Impact of MPTN operations.

Towns	*Total number Employed (1998)*	*Employed by the MPTN (1998)*	*Percentage of direct employment*	*Percentage of indirect employment based on 1993 study*	*Percentage of total employment based on 1993 study*
Ledyard	7759	779	10.03	10.7	20.7
Preston	2678	218	8.14	8.5	16.7
North Stonington	2762	218	7.89	8.4	16.3

Therefore approximately 21 percent of total employment in Ledyard is accountable to MPTN operations alone. Similarly, for Preston it is 17 percent and for

North Stonington it is 16.3 percent. Moreover, the importance of increasing employment becomes obvious when we observe the upward pressure in property values in this area. This of course was offset by the contraction of the private sector and military in the area during the early and mid 1990s.

Traffic and congestion costs

We consider traffic volume on Route 2 starting from its end of overlapping Route12 to the exit from I- 95 northbound to Route 281. According to the Connecticut Department of Transportation Traffic Logs of 1989 and 1998, traffic volume has increased by 81 percent. Given that that stretch of road is 14.79 miles long, the increased number of miles per 100 vehicles is 1198. To measure the cost of increased traffic, we used the *Federal Highway Cost Allocation Study* (1997) that gives estimates of marginal costs for the year 2000. Marginal cost captures the idea of the increase in cost due to a per mile increase in traffic volume. In order to calculate the cost due to increased traffic, we take pavement maintenance, congestion, accidents and noise into consideration and then aggregate to get the total. We take the weighted average of the vehicle mix (70 percent autos, 20 percent 40 kip 4 axle & 10 percent 60 kip 4 axle) to estimate the total cost. Table 2 shows the results.

Table 2. Estimates of marginal pavement, congestion, accident, and noise costs for selected vehicles in 2000.[5]

	Marginal Costs (cents per vehicle mile)				
Vehicle class	Pavement	Congestion	Crash	Noise	Total
Autos rural interstate	0	0.78	0.98	0.01	1.77
40 kip 4 axle s.u. truck	1.0	2.45	0.47	0.09	9.08
60 kip 4 axle s.u. truck	5.6	3.27	0.47	0.11	9.45

Note: s.u. = single unit

Source: CT Department of Transportation

[5] Congestion costs are measured in terms of the value of excess travel time due to traffic congestion; accident costs include medical costs, lost productivity, property damage, pain and suffering, and other costs related to accidents. Marginal cost represents the weighted average of marginal costs estimated for a broad cross section of highways.

The approximate total cost in the year 2000 thus is estimated to be $ 76,276 from the increased traffic volume on this section of Route 2 ***only***. We assume 70 % of this cost ($53,354) is due to Foxwoods Resort Casino. This cost is biased downwards, as we have not taken the cost due to pollution into consideration. These costs would be borne by the three Towns.

Crime Rates

Public opposition to the spread of casino gaming has been driven mainly by fears of adverse social impacts. Some examples are neighborhood crime issues linked to casinos, such as robberies, larceny, loan sharking, and drug dealing. A study covering 1990 to 1998 (The Connecticut Economy, Summer 1999) shows that over these years the crime rate decreased statewide by 29.7 percent. In the New London Labor Market Area alone it has declined by 10.8 percent. According to the study the crime rate in Ledyard has increased by more than 300 percent. However, if we disaggregate the total crime in the Town of Ledyard as 'in casino' and 'out of casino' crimes, then it is true that crime in Ledyard per thousand people has increased by only 70 percent. In North Stonington the crime rate has increased by 14 percent and in Preston it decreased by 31 percent measured as crimes per thousand people. Table 3 illustrates these conclusions.

Table 3. Crime per 1000 people and the percentage change (1990-1998).

Town	*1990*	*1998*	*Percent change*
Ledyard ('out of casino' crime only)	14.3	24.5	+70
Preston	18.0	12.3	-31.4
North Stonington	18.4	21.0	+14.1

Data Source: Connecticut Department of Public Safety

However, considering 'out of casino' crimes only, the effect of Foxwoods Resort Casino on crime in the area is minimal. The statistics for crimes (as shown in the data provided by the Department of Public Safety) in the years 1990 to 1992 does not take into account Part II crimes, such as 'disorderly conduct', 'driving under the influence', 'runaways' and 'vandalism', which contribute approximately 50 percent of the crimes

committed in the three towns from 1993 to 1998. In fact, the abrupt jump in number of crimes from the year 1992 to 1993 is mainly due to the addition of Part II crimes described above. Thus, crime estimates as given by the Department of Public Safety for these years are biased downwards. In fact, the total number of 'out of casino' crimes in Ledyard declined from 535 in 1993 to 364 in 1998. 'In casino' crimes also show a decline from 1,212 in 1994 to 989 in 1998 with 60 percent of them being larceny. Table 4 summarizes these numbers.

Table 4. Total Crimes in the Town of Ledyard

Year	*In Casino Crime*	*Out of Casino Crime*	*Total Crimes*
1990	-	-	214
1991	-	-	214
1992	-	-	283
1993	496	535	1031
1994	1212	573	1785
1995	1231	542	1773
1996	828	523	1351
1997	757	541	1298
1998	989	364	1353

Data Source: Division of State Police, Crimes & Data Analysis Unit, Department of Public Safety.
Note: Prior to 1993 we have only index crime data for Ledyard. From 1993 onwards crimes are separated into 'in casino' and 'out of casino' crimes.

Aggregating over these three Towns, we conclude that 'out of casino' crimes have increased only marginally. Moreover, the MPTN contributes regulatory fees to the Connecticut State Police and Liquor Control Division, which accounted for $4.4 million in the fiscal year 1999. The State Police prosecute crimes on the reservation.

Property Value Analysis

This part of the study analyzes the impact of the Foxwoods Resort Casino and related operations of the Mashantucket Pequot Tribal Nation on surrounding residential property values. Specifically, we analyze the annual growth rate of residential property values (proxied by the property sale price) in Ledyard, North Stonington, and Preston, and, compare this trend with the annual growth rate of residential property in the Hartford LMA.

When performing a study on residential properties, one needs to guarantee that the properties' characteristics do not change during the study period. There are different ways to arrive at a consistent calculation. One is the conventional method in the appraisal profession, that is, extract properties of constant quality that are sold more than once during the study period, and calculate the sales price change for these properties. An alternative method is to conduct an econometric analysis on the property sales prices controlling for the characteristics of the properties, and then use the estimates from the model to calculate the predicted property value growth rate for a specific menu of characteristics. Due to a limitation of the available data on property characteristics in the three towns (see the next section), we choose to use the first method, that is, matching properties that have been sold more than once.

In order to separate the Casino's impact on housing prices from the general trend in the housing market from 1981 to 1999, we separate the study period into two periods, 1981-1989 and 1990-1999. The reason we use 1990 as the break point instead of 1992, the year when the Casino opened its doors, is to take into consideration people's expectation of the Casino's future impact on housing price trends.

The impact of the Foxwoods Resort Casino on the adjacent three towns' property values can be found by comparing the housing price trend in these three towns with the trend in a broader or different geographical area. Due to the irregular behavior of

housing prices in the southwest area of Connecticut, for example, Fairfield County, we use the Hartford LMA as the basis for comparison.

The housing sales price data is extracted from two sources. We obtained housing sales data for 1990-1999, for the three towns from the home sales website of Dow Jones & Company, Inc.[6] Because this data does not provide the characteristics of the transacted properties, we were unable to perform the econometric analysis described above. Instead, we used the matching property method to conduct the analysis. The Center for Real Estate and Urban Studies at the University of Connecticut provided the housing sales data for 1981 through 1989.[7] The annual growth rate of the constant quality house price for the Hartford LMA was obtained from the Center for Real Estate as well.[8]

We obtained 683 sales records by matching properties that were sold more than once during 1981-1989 in the three towns. The mean annual growth rate of these house prices is 11.42%, compared to a 9.03% annual growth rate in the Hartford LMA. Note that these growth rates as well as the other growth rates used in this report are based on nominal prices. That is, the sales prices at each date are not adjusted for inflation. Therefore, part of the price increase is due to inflation rather than increased property value. Our conclusion is unaffected despite these nominal growth rates. For the second period, 1990-1999, we obtained 251 matched sales in the three towns adjacent to Foxwoods Resort Casino. These properties' sales price growth rate averages 0.57% annually, compared to a –1.16% annual growth rate for the Hartford LMA during the same time period. Table 5 summarizes the descriptive statistics for the housing sales trend for the three towns and the Hartford LMA during the two periods.

[6] The address is www.homes.wsj.com.

[7] This data was archived from OPM original records.

[8] These price indices are constructed through an econometric analysis by controlling the housing characteristics, and track the value of the standardized house over time. They are not the actual housing sales prices, but the prediction of the sales price if the standardized house is on sale at a certain time. For detailed methodology, see Clapp and Giaccotto (1994).

Table 5 demonstrates that during the first period, 1980-1989, the three towns enjoyed a much larger increase in property value relative to the Hartford LMA. This is partly due to the attractiveness of the (near) waterfront properties in these three towns. It can also be attributed partly to the increased demand for housing as people migrated to this area to fill the high paid jobs in the defense industry. Table 5 also shows that there is a sharp decline in the housing price growth rate for both geographical regions. The average annual housing price growth rate for Hartford LMA plunges from 9.03% in 1980-1989 to –1.16% in 1990-1999. This sharp decline in housing price trend during the 1990s is attributed to the recession in the early 1990s. For the three-town area, the hit was even harder. About the same time the housing market plunged due to a larger cycle, the defense industry began contracting its facilities in the New London region. If it were not for the Foxwoods Resort Casino that started its operation in 1992 and immediately pumped thousands of new jobs into the surrounding area, the decline in housing prices in this area would have been more dramatic than in the Hartford LMA. Although there is also a decline in the growth rate in housing prices in the three towns adjacent to the Casino relative to the 1980s, the decline is much less dramatic than in the Hartford LMA. As a result of Foxwoods Resort Casino and related operations, property value growth rates in the three adjacent towns were actually *positive* compared to the Hartford LMA. Instead of losing value over time, the properties in the three adjacent towns have slowly *increased* their value. Statistical tests show that the median annual growth rate of housing prices in the three towns is significantly higher than in the Hartford LMA in both periods (see Table 6). This result is consistent with the findings in another study on the Foxwoods Resort Casino in 1993 by Arthur Wright and Associates.

Table 5: Summary Statistics of Annual Housing Price Growth Rate

	Average Annual Growth Rate		Median Annual Growth Rate	
	1981-1989	1990-1999	1981-1989	1990-1999
Towns of Ledyard, North Stonington, Preston	11.42%	0.57%	12%	1%
Hartford LMA	9.03%	-1.16%	6.61%	-2.06%

Table 6:.....Statistical Tests of Median Annual Growth Rate

	z-statistics	Critical Value (95% confidence level)
1980-1989	18.48	2
1990-1999	7.51	2

We conclude that the development of the Foxwoods Resort Casino and other MPTN operations in New London County dampened the recession in employment and housing prices in the early 1990s and contributed substantially to the economic rebound of the region through the decade. This included a positive return to housing investment.

Appendix 3: REMI Output Tables

Appendix Table 1. Summary Table of the impact of Foxwoods Casino and related MPTN operations on New London County.

	2000	*2001*	*2002*	*2003*	*2004*	*2005*	*2006*	*2010*	*2015*	*2019*
Employment (Units)	32,600	31,840	31,370	30,910	30,590	30,420	30,410	30,670	31,900	32,970
Private Non-Farm Employment (Units)	32,080	30,940	30,130	29,400	28,840	28,480	28,310	28,130	29,090	30,130
GRP (Mil 92$)	831	801	774	751	734	725	725	766	863	945
Personal Income (Mil Nom $)	695	768	824	867	904	938	973	1,142	1,402	1,626
Disposable Personal Income (Mil Nom $)	513	576	627	668	703	735	768	918	1,140	1,329
PCE-Price Index 92$	2.448	3.087	3.313	3.342	3.244	3.072	2.879	2.13	1.539	1.079
Real Disposable Personal Income (Mil 92$)	317	336	358	379	399	419	440	523	616	679
Population (Units)	5,040	11,760	18,000	23,040	27,190	30,670	33,570	41,660	47,060	48,610

Appendix Table 2. Summary Table of the impact of Foxwoods Casino and related MPTN operations on Connecticut.

	2000	*2001*	*2002*	*2003*	*2004*	*2005*	*2006*	*2010*	*2015*	*2019*
Employment (Units)	45,470	44,000	42,820	41,650	40,730	40,110	39,800	39,790	41,560	43,190
Private Non-Farm Employment (Units)	42,590	40,550	38,900	37,360	36,150	35,290	34,800	34,300	35,830	37,470
GRP (Mil 92$)	1,353	1,299	1,241	1,188	1,145	1,116	1,103	1,145	1,291	1,420
Personal Income (Mil Nom $)	1,321	1,437	1,507	1,551	1,583	1,611	1,646	1,866	2,270	2,644
Disposable Personal Income (Mil Nom $)	983	1,085	1,151	1,195	1,230	1,260	1,295	1,493	1,836	2,148
PCE-Price Index 92$	0.2544	0.3207	0.344	0.346	0.335	0.317	0.2976	0.23	0.1875	0.1588
Real Disposable Personal Income (Mil 92$)	625	649	669	685	700	716	735	834	965	1,060
Population (Units)	7,984	18,220	26,850	33,690	39,180	43,640	47,260	57,080	63,520	65,260

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STATEMENT
OF
AURENE M. MARTIN
ACTING ASSISTANT SECRETARY – INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON THE
INDIAN GAMING REGULATORY ACT

JULY 9, 2003

Good morning, Mr. Chairman and members of the Committee. My name is Aurene Martin, Acting Assistant Secretary – Indian Affairs. I am pleased to be here today to discuss the role of the Department of the Interior in reviewing revenue-sharing provisions included in Class III tribal-state gaming compacts submitted to the Department for approval under Section 11(d) of the Indian Gaming Regulatory Act of 1988 (IGRA). I will also discuss the role of the Department in implementing Section 20 of IGRA dealing with acquiring trust land for gaming purposes. Accompanying me today is Mr. George Skibine, Director of the Bureau of Indian Affair's Office of Indian Gaming Management.

IGRA provides that Class III gaming activities are lawful on Indian lands only if they are, among other things, conducted in conformance with a tribal-state compact entered into by an Indian tribe and a state and approved by the Secretary. The Secretary may only disapprove a compact if the compact violates (1) any provision of IGRA; (2) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or (3) the trust obligations of the United States to Indians. Under this statutory scheme, the Secretary must approve or disapprove a compact within 44 days of its submission, or the compact is considered to have been approved, but only to the extent the compact is consistent with the provisions of IGRA. A compact takes effect when the Secretary publishes notice of its approval in the Federal Register.

Since IGRA was passed in 1988, nearly 15 years ago, the Department of the Interior has approved approximately 250 Class III gaming compacts between states and Indian tribes in 24 states. These compacts have enabled many Indian tribes to establish Class III gaming establishments. These establishments have helped reduce tribes reliance on Federal dollars and enabled them to implement a variety of tribal initiatives in furtherance of Congress' intent in IGRA "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." The Department supports lawful and regulated tribal gaming under IGRA because it has proved to be an effective tool for tribal economic development and self-sufficiency.

Section 11(d)(4) of IGRA specifically provides that the compacting provision of IGRA shall not be interpreted as conferring upon a state or any of its political subdivisions authority to impose any tax,

fee, charge, or other assessment upon an Indian tribe, and that no state may refuse to enter into compact negotiations based upon the lack of authority in such state or its political subdivisions to impose such a tax, fee, charge, or other assessment.

Section 11 of IGRA allows Indian tribes to initiate a lawsuit in Federal district court against a state arising from the failure of that state to enter into compact negotiations or to conduct such negotiations in good faith. In 1996, the U.S. Supreme Court ruled in *Seminole Tribe v. State of Florida*, that a state may assert an Eleventh Amendment immunity defense to avoid a lawsuit brought by a tribe under IGRA alleging that the state did not negotiate in good faith.

In response to the *Seminole* decision, the Department published a rule that became effective in 1999, to enable Indian tribes to obtain Secretarial "procedures" for Class III gaming when a tribe has been unable to negotiate a compact with the state, and the state has raised an Eleventh Amendment immunity defense to a lawsuit initiated by the tribe in Federal court. Applications for Secretarial procedures are currently pending for Indian tribes in Florida and Nebraska, but a legal challenge to the Secretary's authority to promulgate this rule has been filed by the states of Florida and Alabama.

Another consequence of the Supreme Court's 1996 decision is that more states have sought to include revenue-sharing provisions in Class III gaming compacts, resulting in a discernable increase in such provisions in the past seven years. In general, the Department has attempted to apply the law to limit the circumstances under which Indian tribes can make direct payments to a state for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has only approved revenue-sharing payments that call for tribal payments when the state has agreed to provide valuable economic benefit of what the Department has termed "substantial exclusivity" for Indian gaming in exchange for the payment. As a consequence, if the Department affirmatively approves a proposed compact, it has an obligation to ensure that the benefit received by the state under the proposed compact is appropriate in light of the benefit conferred on the tribe. Accordingly, if a payment exceeds the benefit received by the tribe, it would violate IGRA because it would amount to an unlawful tax, fee, charge, or assessment. While there has been substantial disagreement over what constitutes a tax, fee, charge or assessment within this context, we believe that if the payments are made in exchange for the grant of a valuable economic benefit that the governor has discretion to provide, these payments do not fall within the category of prohibited taxes, fees, charges, or other assessments.

Since 1988, the Department has approved, or deemed approved revenue-sharing provisions between Indian tribes and the following States: Connecticut, New Mexico, Wisconsin, California, New York, and Arizona. In addition, four Michigan Indian tribes are making revenue-sharing payments to the State of Michigan under compacts that became effective by operation of law. Other Michigan tribes have made revenue-sharing payments to the State of Michigan under a court-approved consent decree, but these tribes stopped making the payments when Michigan authorized non-Indian casinos in Detroit.

I will now turn to a discussion of the issues presented by the implementation of section 20 of IGRA.

The basis for the administrative decision to place land into trust for the benefit of an Indian tribe is established either by a specific statute applying to a tribe, or by section 5 of the Indian Reorganization Act of 1934 (IRA). Under these authorities, the Secretary applies her discretion after consideration of the criteria for trust acquisitions in our "151" regulations. (25 CFR Part 151). However, when the acquisition is intended for gaming, consideration of the requirements of section 20 also applies before the Tribe can engage in gaming on the trust parcel. Section 20 requires that if lands are acquired in trust after October 17, 1988 (the date IGRA took effect), they may not be used for gaming unless one of several statutory exceptions apply. One exception is lands acquired in trust within or contiguous to the boundaries of the tribe's reservation as it existed on October 17, 1988. However, there are additional exceptions for off-reservation trust lands. For instance, there is an exception for lands located within a tribe's last recognized reservation, if the tribe had no reservation on October 17, 1988. There is also an exception for trust lands of Oklahoma tribes. In addition, there are exceptions for lands taken into trust as part of either (1) the settlement of a land claim; (2) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or (3) the restoration of lands for an Indian tribe that is restored to Federal recognition by an act of Congress or by a judicial decree. Since 1988, the Secretary has approved approximately 20 applications that have qualified under the exceptions to section 20.

Finally, an Indian tribe may also conduct gaming activities on after-acquired trust land if it meets the requirements of section 20(b)(1)(A) of IGRA. Under section 20(b)(1)(A), gaming can occur on the land if the Secretary, after consultation with appropriate state and local officials, and officials of nearby tribes. determines that a gaming establishment on newly-acquired land will be in the best interest of the tribe and its members, and not detrimental to the surrounding community but only if the Governor of the state in which the gaming activities are to occur concurs in the Secretary's determination Since 1988, state governors have concurred in only three positive determinations for off-reservation gaming on trust lands: the Forest County Potawatomi gaming establishment in Milwaukee, Wisconsin; the Kalispel Tribe gaming establishment in Airway Heights, Washington; and the Keweenaw Bay Indian Community gaming establishment near Marquette, Michigan.

Since taking office, Secretary Norton has raised the question whether the law provides her with sufficient discretion to approve off-reservation Indian gaming acquisitions that are great distances from their reservations, so-called "far-flung lands." This is further framed by what appears to be the latest trend of states that are interested in the potential of revenue sharing with tribes encouraging tribes to focus on selecting gaming location on new lands based solely on market potential rather than exercising governmental jurisdiction on existing Indian lands. It is within the context of this emerging trend, that the Secretary has asked those of us who work on Indian gaming issues to review federal law with this concern in mind. While we have not yet concluded our work, we have spent substantial effort examining the overall statutory scheme that Congress has formulated in the area of Indian self-determination and economic development. This includes a careful examination of what Congress intended when it enacted Section 20 (b)(1)(A). Thus far, our preliminary review suggests that Congress sought to establish a unique balance of interests. The statute plainly delineates the discretion of the Secretary, limiting her focus to two statutory prongs. Also, by requiring that the Governor of the affected state concur in the Secretary's determination, the statute acknowledges that

in a difference of opinion between a sovereign tribe and an affected state, the state prevails.

Further, at least on its face, section 20(b)(1)(A) does not contain any express limitation on the distance between the proposed gaming establishment and the tribe's reservation, nor is the presence of state boundaries between the proposed gaming establishment and the tribe's reservation a factor. Currently, there are eight section 20(b)(1)(A) applications pending with the Bureau of Indian Affairs for sites in New York, Wisconsin, Michigan, Louisiana, and California. Many more are rumored, including potential applications from tribes located in one state to establish gaming facilities in another state. However, we need to keep in mind there have been only three section 20(b)(1)(A) off-reservation approvals in the last 15 years. We are conducting our review of the law with this in mind. Yet, our review must also acknowledge that the role of the Secretary under section 20(b)(1)(A) is limited to making *objective* findings of fact regarding the best interests of the tribe and its members, and any detriment to the surrounding community. Therefore, while the trust acquisition regulations provides broad discretion, section 20(b)(1)(A) does not authorize the Secretary to consider other criteria in making her determination, thus limiting her decision-making discretion to that degree. We look forward to concluding our review for the Secretary and to sharing those results with you as appropriate.

This concludes my remarks. I will be happy to answer any questions the Committee may have. Thank you.

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* are payments that were found not to be payments to the State

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

In reply, please address to:
Main Interior, Room 6456

BIA.IA.1128

NOV 1991

Memorandum

To: Assistant Secretary - Indian Affairs

From: Acting Associate Solicitor - Indian Affairs

Subject: Lower Brule and Sisseton-Wahpeton Video Lottery Compacts

You asked our office to review the video lottery gaming compacts between the Lower Brule Sioux and Sisseton-Wahpeton Tribes and the State of South Dakota. We have now completed our review. We have some serious concerns about section 11.1 of Part A. Sections 3.1 and 11.1 of Part A of each compact, read together, may violate the Indian Gaming Regulatory Act by imposing a State assessment on the Tribe which is unrelated to the costs of regulating the game. We also believe that section 1 of Part C may not have extended your authority to approve or disapprove the compact beyond the 45 day statutory deadline.

State Assessment

Although gaming operators are generally expected to make a profit from its gaming activities (See e.g., 25 U.S.C. § 2710(b)(4)(B)(i)(III)), the State profits contemplated in the compact may be an impermissible assessment in violation of the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. §§ 2701-2721. The Act provides:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to-
> ...(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity....
>
> * * * *
>
> (4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority

> to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(3)(C)(iii) and (4).

By providing specifically for negotiations on assessments to defray costs of regulating, Congress has implied that no other assessments can be the subject of negotiations.

Notwithstanding the language of the IGRA, the lottery compacts require the Tribe to pay a flat percentage of the profits received from the State lottery games played on the tribal reservation. In the compacts, Section 3.1 imposes all State gaming laws on the Tribe. Section 11.1 of the compacts provides that the State lottery will pay fifty percent of the State's share of "net machine income" to the Tribe. This provision results in the State receiving only half as much of the net machine income from the Tribe as it would normally receive in lotteries operated by private businesses. This lower rate of return for the State is established by State statute and by South Dakota administrative rule. (SDCL § 42-7A-19.1; SDAR § 48:02:06:02. See also, July 29, 1991, letter to Dr. Eddie Brown, Assistant Secretary - Indian Affairs from Grant Gormley, South Dakota Legal Counsel. Attached.) Consequently, the State actually receives a flat rate of 12 1/2 percent of the net machine income from tribes. The 12 1/2 percent is transferred to the State's general fund. SDCL § 42-7A-21.

Net machine income is defined as "money put into a video lottery machine minus credits paid out in cash...." SDCL § 42-7A-1(15). Therefore, net machine income constitutes gross income before expenses. Consequently, the State pays for its costs associated with the video lottery with its share of net machine income.

The State's share of the net machine income does not appear, however, to bear any relationship to the costs it incurs. Last year, the State of South Dakota received $25 million as its share of net machine income. Yet, the state budget appropriation for the state expenses associated with the lottery was only approximately $1 million for the year. With this broad difference between income and expenses, the State is making significant profits beyond its costs. Therefore, even if the State were to return half of its share of net machine income to the individual lottery operators, as it must to the Tribes, there would appear to be no relationship between the costs incurred and the State profits.

A lack of a relationship between the costs incurred and the profits is particularly significant in light of the appearance that the State functions as a regulator instead of an owner of the video lottery operation. The video lottery machines are owned and operated by the individual businesses or Tribes. Players insert cash into the machines and play games such as poker. The software for the actual games is in the machines. The machines dispense winning tickets which are turned in for cash to the individual businesses or Tribes. The businesses and Tribes also take care of and retain the cash put into the machines and simply pay the State a percentage of the take. The machines can also generate individual reports on their use.

The machine software is modified by State mandate so that the machines can be accessed by the State's central computer and are inoperable until linked to the State central computer. The State can thus monitor cash flow and changes in the machines' software, identify machines with which someone has tampered, and generate reports for the State, businesses, and Tribes on each machine. Therefore, the central computer system obviously generates a substantial amount of information and clearly helps to assure that the lottery machines are used fairly. Accordingly, the Governor's Legal Counsel indicated in a phone conversation with a member of my staff that the system is intended for auditing and preventing cheating. However, all of this State activity is regulatory in nature rather than indicative of any real intent by the State to own and operate a lottery. Therefore, this does not appear to be a State operated lottery. Rather, it may be heavily regulated gaming which is owned and operated by the local businesses and by the Tribes.

Section 2710, subsection (d)(4), of the IGRA prohibits the State from requiring any payments to the State in excess of the costs incurred by the State to regulate gaming on the Tribe's lands. The State is a government with a special relationship with the Tribe on gaming activities, not a business corporation hired by the Tribe. Therefore, Congress established special rules in Section 2710 with respect to States which it did not impose on businesses. The legislative history sheds no light on the reasons for precluding the states from profiting in their gaming deals with the tribes. However, considering the careful compromises which were employed in the Act to preserve tribal and state interests, we assume that the legislative prohibition against taxes, fees, charges and other assessments was included so that States would not attempt to impose fees on Tribes which already gave up, by passage of the IGRA, the right to make their own unilateral decisions on Class III gaming.

We therefore believe that there should be some relationship between the State's assessments and its costs of regulating. However, the flat rate allocated for the State of South Dakota,

which is established by State statute and administrative rule appears unrelated to actual expenses incurred to regulate the video machine lottery. The failure to establish any relationship between a flat percentage rate for the State coffers and the cost of regulating the lottery could lead to a determination that the tribal/state compact provision establishing the percentage rate constitutes an impermissible assessment under Section 2710 subsection (d)(4) of the IGRA. Consequently, Section 11.1 of the lottery gaming compact between the Lower Brule Sioux Tribe and Sisseton-Wahpeton Tribe and the State of South Dakota, which imposes the flat percentage rate, may violate the IGRA.

Authority to Disapprove

We also reviewed the issue of the Department's authority to disapprove these compacts now that the 45 day statutory deadline has passed. The proposed compacts as drafted are unlikely to serve as authority for Secretarial approval or disapproval beyond the deadline imposed by the IGRA.

The IGRA provides for Secretarial review and approval or disapproval within 45 days of submission of compacts to the Secretary. If no action is taken, a compact is "considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of the IGRA." 25 U.S.C. § 2710(d)(8)(B). Relying solely on this language, we could conclude that all of the two compacts are approved except for § 11.1 of Part A.

An argument could be made that a section of the compacts adds a condition precedent to making the compact effective. That section requires that the compacts shall become effective upon "approval by the Secretary of the Interior and publication of that approval in the Federal Register pursuant to the IGRA." Part C, Section 1. This language does not cite the specific deadlines of the IGRA. However, it does appear to track the language of the statute. Therefore, we believe that it was not intended to imply that the parties negotiating the compact sought an express approval from the Secretary regardless of the expiration of the 45 day deadline.

If you have any further questions, please contact us.

Charles B. Hughes

APR. -15' 99(THU) 08:03 TUNICA BILOXI TRIBEN TEL:1-318-253-9791 P. 002
FROM: JOHNSTON & ASSOC. FAX NO.: 2027370693 04-14-99 04:16P P.02

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

OCT 29 1992

Honorable Lovelin Poncho
Chairman, Coushatta Tribe of Louisiana
P.O. Box 818
Elton, Louisiana 70532

Dear Chairman Poncho:

On September 14, 1992, we received the Tribal-State Compact for the Conduct of Class III Gaming Between the Coushatta Tribe of Louisiana (Tribe) and the State of Louisiana (State) enacted on September 4, 1992. On October 29, 1992, we received the "Amendment to the Tribal-State Compact for the Conduct of Class III Gaming Between the Coushatta Tribe of Louisiana and the State of Louisiana," accompanied by Coushatta Tribal Council Resolution #92-12, dated October 28, 1992.

We have reviewed the Compact and conclude that the Compact, as amended, does not violate the Indian Gaming Regulatory Act (IGRA), Federal law, or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact, as amended. This Compact shall take effect when notice of our approval, pursuant to Section 11(d)(3)(B) of the IGRA, is published in the FEDERAL REGISTER.

In our initial review of the Compact, we noted that Section 12(C) requires the Tribe to make quarterly financial contributions to the State. These contributions are based on a percentage of net revenues received from Class III gaming less amounts paid for prizes and total operating expenses excluding management fees. The amount of net revenues contributed for the first year of operation is 0%; for the second, 2%; for the third, 4%; and for the fourth, and every year thereafter, 6%. The Compact, as originally submitted, stated that these contributions would impose no additional obligations or liabilities on the Tribe; however, no justification was given for the percentages, and no explanation was given concerning what expenses were to be defrayed. We were concerned that this provision could be construed as a tax, fee, charge or other assessment upon the Tribe which would violate Section 11(d)(4) of the IGRA.

However, the "Amendment to the Tribal-State Compact for the Conduct of Class III Gaming Between the Coushatta Tribe of Louisiana and the State of Louisiana" clarifies that the Section 12(C) contributions will be used "to offset and defray the expenses of Allen Parish, resulting from the conduct of Class III gaming." Because Section 11(a)(2)(b)(v) of the IGRA allows net revenues from tribal gaming to be used to help fund operations of local government agencies, we find that Section 12(C), as amended, does not violate the IGRA.

Section 10 (A)(2) of the Compact provides for the purchase, sale and serving of alcoholic beverages in any gaming facility. The possession or sale of liquor in Indian country is a violation of Federal criminal law unless the liquor is sold in compliance with a duly-adopted tribal ordinance authorizing such sale, certified by the Secretary of the Interior and published in the FEDERAL REGISTER (18 U.S.C. § 1161). The Area Director, Eastern Area Office, can provide the necessary technical assistance to develop a liquor ordinance.

Please be advised that Section 11(d) of the IGRA requires the Chairman of the National Indian Gaming Commission (NIGC) to approve tribal ordinances authorizing Class III gaming. On July 8, 1992, the NIGC's proposed regulations to govern approval of Class II and Class III gaming ordinances were published in the FEDERAL REGISTER. Once the regulations become final and are in effect, we expect the NIGC will request submission of existing ordinances for review and approval in accordance with the standards contained in the final regulations. It may be useful for the Tribe to review the proposed regulations to insure that the Tribe's ordinance(s) are consistent with or do not otherwise conflict with NIGC requirements.

We wish the Tribe and the State success in this economic venture.

Sincerely,

Assistant Secretary - Indian Affairs

Enclosures

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Honorable Ralph Sturges
Chief
Mohegan Tribe of Indians
of Connecticut
27 Church Lane
Uncasville, Connecticut 06382

DEC 5 1994

Dear Chief Sturges:

On November 8, 1994, we received the Compact between the Mohegan Tribe of Indians of Connecticut (Tribe) and the State of Connecticut (State), dated May 17, 1994. We have completed our review of this Compact and conclude that the Compact does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), Federal law, or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact. The Compact shall take effect when the notice of our approval, pursuant to Section 11 (d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B), is published in the FEDERAL REGISTER.

Submitted as part of the Compact was the Memorandum of Understanding which provides that the Tribe agrees to pay the State in exchange for the right to participate in the tribal monopoly on commercial slot machine gaming. We believe the money paid by the Tribe to the State constitutes an operating cost and as such would be paid from "gross revenue" and not "net revenues." While IGRA restricts Indian tribes' use of net revenues from tribal gaming,[1] it does not restrict Indian tribes' use of gross revenues from gaming if those revenues are used for operating costs.[2] Because IGRA does not prohibit or restrict use of gross revenues for operating expenses, we believe that the slot agreement conforms with IGRA.

In the past, we have concluded that tribal payments to states for non-regulatory purposes violated IGRA. Our conclusion that the Tribe's payments to the State do not violate IGRA is distinguishable from these opinions. Unlike other payment agreements

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[1] 25 U.S.C. § 2710(b)(2)(B) provides that net revenues from tribal gaming are not to be used for purposes other than (i) to fund tribal government operations or programs;(ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

[2] IGRA defines net revenues as "gross revenues of an Indian gaming activity <u>less amounts paid out as, or paid for</u>, prizes and <u>total operating expenses</u>, excluding management fees." 25 U.S.C. § 2703(9).

we have considered, in this case the federally recognized Indian tribes in Connecticut are purchasing a valuable right from the State.[3] As discussed above, the tribal payment for this right is an operating cost which does not violate IGRA.

Even if the money the Tribe plans to pay the State were considered net revenues from tribal gaming, the payment could be considered net revenues used to promote tribal economic development, a use that is clearly sanctioned by IGRA, 25 U.S.C. § 2710(b)(2)(B)(iii), because, as discussed above, the Tribe is exchanging the revenues for an exclusive right to commercial operation of slot machines within the State.

Notwithstanding our approval of the Compact, Section 11(d)(1) of the IGRA, 25 U.S.C. § 2710(d)(1), requires that tribal gaming ordinances be approved by the Chairman of the National Indian Gaming Commission (NIGC). Regulations governing approval of Class II and Class III gaming ordinances are found in 25 C.F.R. §§ 501.1-577.15 (1994). Pursuant to the IGRA and the regulations, even previously existing gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman. The Tribe may want to contact the NIGC at (202) 273-7003 for further information to determine when and how to submit the ordinance for approval by the NIGC.

In addition, if the Tribe enters into a management contract for the operation and management of the Tribe's gaming facility, the contract must likewise be submitted to, and approved by the Chairman of the NIGC pursuant to Section 11(d)(9) of the IGRA, 25 U.S.C. § 2710(d)(9) and the NIGC's regulations governing management contracts. The Tribe may want to contact the NIGC for information on submitting the ordinance and the management contract for approval by the NIGC.

We wish the Tribe and the State success in their economic venture.

Sincerely,

Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

Enclosures

Identical Letter Sent to: Honorable Lowell P. Weicker, Jr.
Governor of Connecticut
State Capitol
Hartford, CT 06106

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[3]The state has agreed that it will not allow commercial operation of slots by any other entity as long as the tribes continue to make the agreed payments.

United States Department of the Interior

OFFICE OF THE SOLICITOR

In reply, please address to:
Main Interior, Room 6456

JUL 8 1994

Memorandum

To: Director, Congressional and Legislative Affairs

From: Associate Solicitor, Division of Indian Affairs

Subject: H.R. 4653: "Mohegan Nation of Connecticut Land Claims Settlement Act of 1994"

We have completed our review of H.R. 4653, the "Mohegan Nation of Connecticut Land Claims Settlement Act of 1994." The following are our comments on this bill.

Section 3 of the bill provides that Section 5 (extinguishment of the tribe's land claims) will not take effect until the State of Connecticut and the Mohegan Tribe have an approved compact for Class III gaming and title to certain lands has vested in the United States in trust for the Mohegan Tribe. We are concerned that these two events may not occur for some time and that as a result the bill would not take effect for some time.

While the Connecticut-Mohegan Tribe compact has not been submitted to the Department for approval, a copy of the compact was provided to this office for review. It appears that the compact as written would be approved as it is nearly identical to the gaming procedures promulgated by the Secretary for class III gaming on the Mashantucket Pequot reservation. However, we are aware that the Mohegan Tribe and the Governor of Connecticut negotiated and entered into an agreement (slot agreement) that is not included in the compact. The slot agreement allows the Mohegan Tribe to share in a "tribal monopoly"[1] on commercial slot machines in exchange for a yearly payment or percentage of slot machine revenues to the State.

We believe that the slot agreement should be considered part of the compact. The slot agreement was negotiated simultaneously with the compact and represents a significant part of the Mohegan Tribe-State of Connecticut gaming regulatory scheme. As such, we

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[1] We understand that the Mashantucket Pequot Tribe has negotiated a similar agreement with the State of Connecticut, and that the Tribe has been paying the State for the exclusive right to operate slot machines commercially in the State of Connecticut.

believe that the agreement is part of the compact and must be submitted and approved by the Secretary before it can take effect under IGRA.

The next question raised by the slot agreement is whether it violates IGRA. In this specific instance, we believe that the tribe's agreement to pay the state in exchange for the right to participate in the tribal monopoly on commercial slot machine gaming does not violate IGRA because the money paid by the tribe to the state constitutes an operating cost and as such would be paid from "gross revenues," and not "net revenues." While IGRA restricts Indian tribes' use of net revenues from tribal gaming,[2] it does not restrict Indian tribes' use of gross revenues from gaming if those revenues are used for operating costs.[3] Because IGRA does not prohibit or restrict use of gross revenues for operating expenses, we believe that the slot agreement would conform with IGRA.

In the past, we have concluded that tribal payments to states for non-regulatory purposes violated IGRA. Our conclusion that the Mohegan Tribe's payments to the State of Connecticut do not violate IGRA is distinguishable from these opinions. Unlike other payment agreements we have considered, in this case the federally recognized Indian tribes in Connecticut are purchasing a valuable right from the state.[4] As discussed above, the tribal payment for this right is an operating cost which does not violate IGRA.

Even if the money the Mohegan Tribe plans to pay the state were considered net revenues from tribal gaming, the payment could be considered net revenues used to promote tribal economic development, a use that is clearly sanctioned by IGRA, 25 U.S.C. §2710(b)(2)(B)(iii), because, as discussed above, the tribe is exchanging the revenues for an exclusive right to commercial operation of slot machines within the state.

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[2] 25 U.S.C. § 2710(b)(2)(B) provides that net revenues from tribal gaming are not to be used for purposes other than (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

[3] IGRA defines net revenues as "gross revenues of an Indian gaming activity <u>less amounts paid out as, or paid for</u>, prizes and <u>total operating expenses</u>, excluding management fees." 25 U.S.C. § 2703(9).

[4] The state has agreed that it will not allow commercial operation of slots by any other entity as long as the tribes continue make the agreed payments.

Section 4(b)(1) extinguishes "[a]ll claims to lands within the State of Connecticut based upon aboriginal title by the Mohegan Tribe, or any predecessor or successor in interest." We are concerned that this language could have the effect of extinguishing the rights of other Indian groups located in the State of Connecticut that are not currently recognized by the Department of the Interior but are in the process of petitioning the Secretary for acknowledgment as Indian Tribes pursuant to 25 CFR Part 83, the Department's acknowledgment regulations. We suggest that this language be amended or deleted so that it is clear that the Mohegan Tribe is the only entity whose rights are extinguished by the bill.

Section 5(a) directs the Secretary to take certain lands into trust for the benefit of the Mohegan Tribe and states that the lands shall be the "Mohegan's Tribe's Initial Indian Reservation". This language should be amended so as to recognize not only what is DOI policy but that which is also the current status of federal law as it applies to acquisition of land into trust; lands which are encumbered and/or not in compliance with environmental standards (CERCLA, NEPA, etc.) simply are not taken into trust. This can be done by inserting language that states the land will be taken into trust provided it meets the Attorney General's guidelines for acquisition of land and that land is clear of environmental hazards or in the alternative, that the U.S. and the tribe are held harmless. Finally, it is not clear from the present language whether or not the land will simply be held in trust or whether it will designated as reservation. If the lands are to be designated as a reservation, the language should clearly state the same.

Section 5(b) provides for Secretarial consultation with the Town of Montville with respect to taking into trust certain lands "subject to Exhibit B...". It appears that the intent of this provision is to provide assurance that the Secretary will comply with 25 C.F.R. 151 when acquiring the subject lands into trust. If this is the intent, it would make the provision less ambiguous if it were amended to state that the Bureau's land acquisition regulations would be applicable.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

NOV 0 3 1995

Honorable Floyd E. Leonard
Chief, Miami Tribe of Oklahoma
202 South Eight Tribes Trail
P.O. Box 1326
Miami, Oklahoma 74355

Dear Chief Leonard:

We have completed our review of the Tribal-State Compact between the Miami and Modoc Tribes of Oklahoma and the State of Oklahoma (State), executed on September 5, 1995.

Section 11(a) of the Compact provides for a "one-time payment of five-thousand ($5,000) to reimburse the State for the expense to negotiate this Compact." We believe that this $5,000 payment required pursuant to Section 11(a) of the Compact is in violation of Section 11(d)(4) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(4), which provides as follows:

> Except for the assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

As stated in the above-referenced provision of the IGRA, the only assessments authorized are those agreed upon pursuant to Section 11(d)(3)(C)(iv) of the IGRA, 25 U.S.C. § 2710(d)(3)(C)(iv), which states that a compact may include provisions relating to "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity." We do not believe that a payment to reimburse the State for the cost or negotiating

the Compact can be characterized as an assessment to defray the actual costs of regulating a gaming activity authorized under the Compact. Therefore, it is our conclusion that this payment is prohibited under 25 U.S.C. § 2710(d)(4) of the IGRA.

For the foregoing reasons, this Compact is hereby disapproved. We regret that our decision could not be more favorable at this time.

Sincerely,

/S/ Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

Enclosures

Identical Letters Sent to: Honorable Frank Keating
Governor of Oklahoma
State Capitol
Oklahoma City, Oklahoma 73105
Miami, Oklahoma 74355

Honorable Floyd E. Leonard
Chief, Miami Tribe of Oklahoma
202 South Eight Tribes Trail
P.O. Box 1326
Miami, Oklahoma 74355

cc: Oklahoma U.S. Attorney General's Office

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Honorable Joe Garcia
Governor, Pueblo of San Juan
P.O. Box 1099
San Juan Pueblo, New Mexico 87566

MAR 1 5 1995

Dear Governor Garcia:

On February 14, 1995, we received the Compact between the Pueblo of San Juan (Tribe) and the State of New Mexico (State), dated February 13, 1995. We have completed our review of this Compact and conclude that it does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), Federal law, or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact. The Compact shall take effect when the notice of our approval, pursuant to Section 11 (d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B), is published in the FEDERAL REGISTER.

Submitted as part of the Compact is the Revenue Sharing Agreement which provides that the Tribe agrees to pay the State for the right to participate in a tribal monopoly on commercial gaming. We believe the money paid by the Tribe to the State constitutes an operating cost and as such would be paid from "gross revenues" and not "net revenues." While IGRA restricts Indian tribes' use of net revenues from tribal gaming,[1] it does not restrict Indian tribes' use of gross revenues from gaming if those revenues are used for operating costs.[2] Because IGRA does not prohibit or restrict use of gross revenues for operating expenses, we believe that the Revenue Sharing Agreement conforms with IGRA.

In the past, we have concluded that tribal payments to states for non-regulatory purposes violated IGRA. Our conclusion that the Tribe's payments to the State do not violate IGRA is distinguishable from these opinions. Unlike other payment agreements we have considered, in this case the federally recognized Indian tribes in New Mexico are purchasing a valuable right from the State.[3] As discussed above, the tribal payment for this right is an operating cost which does not violate IGRA.

Even if the money the Tribe plans to pay the State were considered net revenues from tribal gaming, the payment could be considered net revenues used to promote tribal economic

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[1] 25 U.S.C. § 2710(b)(2)(B) provides that net revenues from tribal gaming are not to be used for purposes other than (i) to fund tribal government operations or programs;(ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

[2] IGRA defines net revenues as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9).

[3] The State has agreed that it will not allow commercial operation of any other gaming entity as long as the Tribes continue to make the agreed payments.

development, a use that is clearly sanctioned by IGRA, 25 U.S.C. § 2710(b)(2)(B)(iii), because, as discussed above, the Tribe is exchanging the revenues for an exclusive right to commercial operation of gaming within the State.

Notwithstanding our approval of the Compact, Section 11(d)(1) of the IGRA, 25 U.S.C. § 2710(d)(1), requires that tribal gaming ordinances be approved by the Chairman of the National Indian Gaming Commission (NIGC). Regulations governing approval of Class II and Class III gaming ordinances are found in 25 C.F.R. §§ 501.1-577.15 (1994). Pursuant to the IGRA and the regulations, even previously existing gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman. The Tribe may want to contact the NIGC at (202) 632-7003 for further information to determine when and how to submit the ordinance for approval by the NIGC.

In addition, if the Tribe enters into a management contract for the operation and management of the Tribe's gaming facility, the contract must likewise be submitted to, and approved by the Chairman of the NIGC pursuant to Section 11(d)(9) of the IGRA, 25 U.S.C. § 2710(d)(9) and the NIGC's regulations governing management contracts. The Tribe may want to contact the NIGC for information on submitting the ordinance and the management contract for approval by the NIGC.

We wish the Tribe and the State success in their economic venture.

Sincerely,

Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

Enclosures

Identical Letter Sent to: Honorable Gary Johnson
Governor of New Mexico
State Capitol
Santa Fe, New Mexico 87501

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUL 23 1996

Honorable Beverly M. Wright
Chairperson
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road
Gay Head, Massachusetts 02535-9701

Dear Chairperson Wright:

As you know, on November 8, 1995, we disapproved the Tribal-State Compact (Compact) between the Wampanoag Tribe of Gay Head (Tribe) and the State of Massachusetts (State), executed on September 29, 1995, because we determined that it was inappropriate for us to approve the Compact before its enactment by the Massachusetts General Court and approval of such enactment by the Governor of the Commonwealth of Massachusetts, as required by Section 35 of the Compact.

Although we believe that the Compact was submitted prematurely, we have completed our initial review of the proposed Compact, and note the following areas of concern:

Subsection 2(j) and 5(c) of the Compact authorize the Tribe to conduct Class II and Class III gaming on off-reservation land which is neither held in trust nor otherwise owned by the Tribe. The Tribe's conduct of Class II and Class III gaming on lands that are neither trust nor restricted is not governed by the provisions of IGRA; and, therefore, we are not offering any opinion of the legality of such a facility under state law.

Subsection 3(z) of the Compact defines net gaming revenues as "the total sum wagered on all gaming conducted within the gaming facility less amounts paid out as winnings and prizes." This definition differs from the definition of "net revenues" in the IGRA, 25 U.S.C. § 2703(9). IGRA defines "net revenues" as gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees. We do not believe that it is appropriate for the Compact to redefine a term that has a precise meaning in the IGRA. We recommend that the term "net revenues" in the Compact be changed to "net win" to avoid a conflict with the definition of "net revenues" in the IGRA.

Subsection 4 (xxiii) of the Compact makes it automatic for the Tribe and the State to add games without Interior approval. The scope of permissible games is a term of the Compact and any amendment to this term should also be subject to the Secretary's approval. In exercising his trust responsibility, the Secretary could not sanction an automatic approval provision when there is a

possibility that an amendment will violate the IGRA, other federal laws or the Secretary's trust responsibility to the Tribe. Therefore, this provision of the Compact may violate Federal law.

Subsection 9(e) of the Compact contemplates that the National Indian Gaming Commission (NIGC) will have enforcement authority over provisions of the Compact. The NIGC has enforcement authority over Class II gaming and approval authority for management contracts and Class III tribal gaming ordinances. See 25 U.S.C. §§ 2705, 2706 and 2710. The NIGC is not an agency with the authority to regulate Class III gaming, a function specifically reserved to the tribes and the states. An agreement between the Tribe and the State cannot expand the authority of the NIGC. We do not think such a result was intended, and therefore recommend that, to fully clarify the matter, the Compact expressly state that no expansion of NIGC's role is contemplated. You should make the technical change to accomplish this result.

Subsection 27(h) of the Compact provides that if the Tribe loses the exclusivity described in paragraphs (d) and (e) of Section 27 of the Compact within six years of opening its gaming facility, the Tribe agrees to pay for the actual costs of regulation, licensing, and Compact oversight of the Tribe's gaming facility. If the Tribe loses exclusivity after six years, it agrees to make a cash contribution equal to the greater amount of a) the State's actual costs of regulation, licensing, and Compact oversight of its gaming facility, plus 15 percent of the amount the Tribe would have paid to the State under this Compact if the exclusivity had been maintained, or b) an amount calculated at the lowest rate which is paid to the State by any other casino in the Commonwealth of Massachusetts. This provision contemplates that if the Tribe loses exclusivity rights after the first six years, it will be required to continue to pay the State an amount in excess of actual costs to regulate gaming.

The Department has approved 146 Tribal/State compacts to date. Only a few have called for Tribal payments to States other than for direct expenses the States incur in regulation gaming authorized by the compacts. The Department has approved compacts containing such payments only when those payments are for the economic value of a scope of gaming that exceeds what a Tribe is already permitted in a State under IGRA. To date, the Department has approved payments to a State only when the State has agreed to total exclusivity, i.e., to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place.

As a matter of policy, the Department has determined that it will not approve compacts that call for tribal payments in exchange for less than substantial exclusivity for Indian gaming. Our rationale is that anything less than substantial exclusivity gives States an effective opportunity to leverage very large payments from the Tribes, in derogation of Congress' intent not to permit States to exact a tax, fee charge or other assessment upon an Indian tribe to engage in Class III gaming activities. In addition, the Department has a trust responsibility to Indian tribes to ensure that benefit received by the State in a compact -- in this case up to $90 million in annual fees -- is appropriate in light of the benefit conferred on the tribe.

Although the language of the Compact is unclear, we have been informed by the State and the Tribe that the intention of the parties to the Compact is to give the Tribe the exclusive right to conduct casino gaming in Massachusetts, except for a single casino in Hampden County,

Massachusetts and no more than 700 slot machines at each of the four race tracks now licensed in the State. We believe that this constitutes the minimum exclusivity that we could consider sufficient under our policy of substantial exclusivity, and under our trust responsibility to the Tribe, to justify the proposed payments in the Compact. We recommend that the language of the Compact be clarified to express this intent.

On this same point, we note that the Compact requires the Tribe to make payments to the State forever, over and above the cost of regulation and law enforcement, even if all restrictions on gambling by other entities are removed. We realize that the parties consider the removal of tribal exclusivity to be an extremely remote possibility, and deem it highly unlikely that all or even most of the above-references restraints on non-tribal gambling would be removed in the foreseeable future. This very unlikelihood, however, underlies the fact that this requirement is problematic. We strongly advise that the provision be rewritten because we believe that a requirement that the Tribe make indefinite payments to the State beyond the cost of regulation even if the State removes all restriction on competitive gambling renders the Compact legally vulnerable. We believe that it is very likely that, if litigated, a court would find that such payments are beyond the scope of the statute. Reasonable payments for a significant degree of exclusivity can be defended within the framework of the statute, and it is wholly legitimate for the State to be reimbursed for the cost of regulation and law enforcement. But precisely because we have an interest in seeing that tribes are able to take full advantage of the benefits offered to them by the IGRA, we believe it is our responsibility to point out that the inclusion of this provision, dealing as we acknowledge with what is a highly unlikely contingency, presents a serious legal obstacle to this Compact. Since the State legislature retains the right to amend this Compact, and since we have been advised that this appears a very remote contingency, and since as discussed above we have advised you that the level of payments proposed by the Compact for the amount of exclusivity provided for in the compact (once it is clarified as discussed above) would meet legal guidelines, we assume that this is a matter that those interested in allowing this Compact to go forward in its essentials will resolve.

We would be happy to meet with representatives from the Tribe to discuss our concerns with the Compact. Please do not hesitate to contact the Bureau of Indian Affairs' Indian Gaming Management Staff Office at (202) 219-4066 if you believe that such a meeting is desirable.

Sincerely

Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

THE SECRETARY OF THE INTERIOR

WASHINGTON

AUG 23 1997

Honorable Wendell Chino
President, Mescalero Apache Tribe
P.O. Box 176
Mescalero, New Mexico 88340

Dear President Chino:

On July 9, 1997, the Department received the two interrelated documents (the Gaming Compact and the Revenue Sharing Agreement) which together comprise the tribal-state compact (Compact) between the Mescalero Apache Tribe (Tribe) and the State of New Mexico (State). Under Section 11(d)(8)(C) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within 45 days of its submission. If the Secretary does not approve or disapprove a compact within 45 days, IGRA states that the compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." The Compact takes effect when notice is published in the *Federal Register* pursuant to Section 11 (d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

I have declined to approve or disapprove the Mescalero Apache Tribe's Compact within the 45 day period. As a result, the Compact is considered to have been approved, but only to the extent it is consistent with the provisions of IGRA. The Tribe and the State should be aware that the Department is particularly concerned about two provisions in the Compact that appear inconsistent with IGRA, *i.e.*, the revenue sharing provisions and the regulatory fee structure.

The Revenue Sharing Provisions

As a preliminary matter it should be noted that the Department has reviewed the Revenue-Sharing Agreement (Agreement) between the Tribe and the State in concert with the Compact because the New Mexico Gaming Control Act specifically prohibits execution of either document without execution of the other.

The Agreement requires the Tribe to pay the State 16% of "net win" (defined as the amount wagered on gaming machines less prizes, regulatory fees paid to the State, and $250,000 representing tribal regulatory fees) as long as the State does not take any action directly or indirectly to attempt to restrict the scope of Indian gaming permitted under the Compact, and does not permit any further expansion of non-tribal class III gaming in the State.

The Department of the Interior has approved 161 tribal-state compacts to date. Only a few have called for tribal payments to states other than for direct expenses that the states incur in regulating gaming authorized by the compacts. To date, the Department has approved payments to a State only when the State has agreed to provide substantial exclusivity, *i.e.*, to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place. The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State. Otherwise, States effectively would be able to leverage very large payments from the Tribes, in derogation of Congress' intent in 25 U.S.C. § 2710(d)(4) of IGRA not to permit States "to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in Class III gaming activities." In addition, because of the Department's trust responsibility, we seek to ensure that the cost to the Tribe -- in this case up to 16% of "net win" -- is appropriate in light of the benefit conferred on the Tribe.

In light of the large payments required under the Compact, the Department questions whether the limited exclusivity provided the Tribe meets the standards discussed in the previous paragraph. The Compact does not provide substantial exclusivity. Indeed, the Compact seems to expand non-Indian gaming by allowing for a state lottery, the operation of a large number of electronic gaming devices by fraternal, veterans, or other nonprofit membership organizations, gaming by nonprofit tax exempt organizations for fundraising purposes, and the operation of electronic gaming devices at horse tracks every day that live or simulcast horse racing occurs.

Furthermore, Section 11(d)(3)(A) of IGRA, 25 U.S.C. § 2710(d)(3)(A), calls for Indian tribes and States to conduct give-and-take negotiations regarding the potential terms of a tribal-state compact. Our concern is highlighted by our understanding that neither the Compact nor the Revenue-Sharing Agreement were the result of a true bi-lateral tribal-state negotiation process. This fact reinforces the Department's view that the payment required pursuant to the Revenue-Sharing Agreement resembles more a fee or assessment imposed by the State on the Tribe as a condition to engage in class III gaming activities rather than a bargained-for payment for a valuable privilege, and thus appears to violate Section 11(d)(4) of IGRA, 25 U.S.C. § 2710(d)(4).

The Regulatory Fee Structure

Section 4.E.5 of the Compact imposes a facility regulatory fee of $6,250 per quarter ($25,000 yearly), a slot machine regulatory fee of $300 per quarter per machine ($1,200 yearly), and a table regulatory fee of $750 per quarter per table ($3,000 yearly). These amounts increase by five percent (5%) each year for the term of the Compact. In addition, the Revenue-Sharing Agreement mandates that regulatory fees under the Compact automatically increase by 20% if the State takes any action that results in the cessation of the Tribe's obligation to pay 16% of net win under the Revenue-Sharing Agreement.

Section 11(d)(3)(C) of IGRA, 25 U.S.C. § 2710(d)(3)(C), provides that State regulatory fees must be no more than the "amounts as are necessary to defray the costs of regulating such [gaming] activity." Unlike other tribal-state compacts, this Compact does not require the State to provide an accounting of the regulatory fees in order to ensure that the payments actually match the cost of regulation, nor does it provide for the Tribe to be reimbursed if the tribal regulatory fees

exceed the actual cost of regulation by the State. As a result, the Department has serious questions about the permissibility of this regulatory fee structure under IGRA.

The Department believes that the decision to let the 45-day statutory deadline for approval or disapproval of the Compact expire without taking action is the most appropriate course of action given the unique history of state and federal court cases and legislative actions that have shaped the course of Indian gaming in New Mexico. The Department hopes that the foregoing explanation will encourage the State and the Tribe to enter into genuine negotiations to resolve these concerns.

Sincerely,

Identical Letter Sent to: Honorable Gary E. Johnson
Governor of New Mexico
State Capitol
Santa Fe, New Mexico 87503

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 0 9 1998

Honorable gaiashkibos
Chairman, Lac Courte Oreilles
Tribal Governing Board
Route 2, Box 2700
Hayward, Wisconsin 54843

Dear Chairman gaiashkibos:

On February 27, 1998 we received the Amendments to the Lac Courte Oreilles Band of Lake Superior Chippewa Indians and the State of Wisconsin Gaming Compact of 1991 (Amendment), dated February 13, 1998. We have completed our review of the Amendment and conclude that it does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), Federal law, or our trust responsibility. The payment to the State under the amendment appears to be reasonable compensation to preserve the exclusive (excepting other compacted facilities) right to conduct the forms of Class III gaming authorized by the Compact. Therefore, pursuant to Section 11(d)(8)(A) of IGRA, 25 U.S.C. §2710(d)(8)(A), and delegated authority in 209 DM 8.1, we approve the Amendment. The Amendment shall take effect when the notice of our approval, pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B), is published in the FEDERAL REGISTER.

We wish the Tribe and the State success in their economic venture.

Sincerely,

Kevin Gover
Assistant Secretary - Indian Affairs

Enclosure

Identical letter sent to: Honorable Tommy G. Thompson
Governor of Wisconsin
State Capitol
Madison, Wisconsin 53707

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 9 1999

Honorable Robert Guenthardt
Tribal Chairman
Little River Band of Ottawa Indians
P.O. Box 314
Manistee, Michigan 49660-0314

Dear Chairman Guenthardt:

On December 24, 1998, the Department received the Compact between the Little River Band of Ottawa Indians and the State of Michigan providing for the conduct of Tribal-Class III Gaming by the Little River Band of Ottawa Indians. Under Section 11 (d)(8)(C) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within 45 days of its submission. If the Secretary does not approve or disapprove the Compact within 45 days, IGRA states that the compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." The Compact takes effect when notice is published in the *Federal Register* pursuant to Section 11 (d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

We have declined to approve or disapprove the Little River Band's Compact within the 45 day period because we are particularly concerned with the legality under IGRA of the tribal payments to the State in Section 17 of the Compact. As a result, the Compact is considered to have been approved, but only to the extent it is consistent with the provisions of IGRA.

Section 17 of the Compact requires the Tribe to pay the State 8 percent of "net win" (defined as the total amounts wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at such machines) derived from all Class III electronic games of chance, so long as no change in State law is enacted to permit the operation of electronic games of chance or commercial casino games by any other person (except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996) and no other person (except a federally recognized Indian tribe operating pursuant to an IGRA compact or a person operating in the City of Detroit pursuant to the Initiated Law of 1996) within the State lawfully operates electronic games of chance or commercial casino games.

The Department of the Interior has approved 196 tribal-state compacts to date. Only a few have called for tribal payments to states other than for direct expenses that the states incur in regulating gaming authorized by the compacts. To date, the Department has approved payments to the State only when the State has agreed to provide substantial exclusivity, *i.e.*, to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place. The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State. Otherwise, States effectively would be able to leverage very large payments from the tribes, in derogation of Congress' intent in 25 U.S.C. § 2710(d)(4) of IGRA not to permit States "to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in Class III gaming activities." In addition, because of the Department's trust responsibility, we seek to ensure that the cost to the Tribe — in this case up to 8 percent of "net win" — is appropriate in light of the benefit conferred on the Tribe.

The Department questions whether Section 17 provides the tribe with any meaningful level of exclusivity. The Initiated Law of 1996, MCL 432.201 *et seq.*, has legalized non-Indian gaming in the largest market in the State of Michigan, thus allowing non-Indian gaming to compete with and draw customers from Indian gaming. When the law is implemented, it may make *de minimis* the promised exclusivity.

In addition, seven federally-recognized tribes in Michigan are each party to a federally-approved Tribal-State compact with the State of Michigan. These seven compacts were finalized only after protracted litigation with the State. *See Sault Ste Marie, et al v. Engler,* 800 F.Supp. 1484 (W.D. Mich. Mar. 26, 1992) *dismissed,* 5 F.3d 147 (1993); *see also* Stipulation for Entry of Consent Judgment, August 18, 1993; Consent judgment, August 20, 1993. The seven compacted tribes make payments to the State similar to those required under your Compact pursuant to court-ordered stipulation, not pursuant to any provision of their federally-approved compacts. In contrast to the payments required under your Compact, the seven compacted tribes in Michigan will no longer have to make any payments to the State when three commercial casinos in Detroit receive licenses. This is because the gaming "exclusivity" for which the original seven compacted tribes bargained in the Stipulation for Entry of Consent Judgment in *Sault Ste Marie, et al v. Engler, supra,* will end.

The Department believes that its decision to let the 45-day statutory deadline for approval or disapproval of the Compact expire without action is the most appropriate course of action. The 45-day statutory time frame for review of the Compact is insufficient for us to make an accurate assessment of whether the substantial payments required under Section 17 of the Compact for partial exclusivity are justified. In addition, gaming has enabled Indian tribes (including the seven Michigan tribes with existing compacts) to generate revenues to provide health, housing, education, and other governmental initiatives to their members. Tribal gaming revenues have also strengthened previously faltering tribal economies and have enabled tribal governments to address various social and

problems. Therefore, we believe that it is in the best interest of the Tribe, notwithstanding our concern with Section 17, to permit the Compact to become effective by operation of law, and enable the Tribe to have the opportunity to enjoy the economic benefits of Indian gaming.

Sincerely,

Kevin Gover

Assistant Secretary - Indian Affairs

Identical Letter sent to: Honorable John Engler
Governor of Michigan
Lansing, Michigan 48909

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 20 1999

Honorable Earl J. Barbry, Sr.
Chairman
Tunica-Biloxi Indians of Louisiana
P.O. Box 331
Marksville, Louisana 71351

Dear Chairman Barbry:

Thank you for your letter dated January 26, 1999, requesting our views on tribal-state revenue sharing and other tribal payments to states under Class III gaming compacts. In your letter you indicate that Governor Mike Foster is unwavering in his insistence that new compacts with the Coushatta and Tunica-Biloxi Indian Tribes of Louisiana provide for a payment to the State equivalent to the 18% tax applicable to privately-owned gaming operations in Louisiana.

The Department has approved more than 200 tribal-state compacts to date. Only a few have called for tribal payments to States other than for direct expenses to defray the costs of regulating a gaming activity under the compact. As you note in your letter, the Coushatta and Tunica-Biloxi compacts submitted in 1992 were amended to clarify that the Section 12(C) contributions will be used "to offset and defray the expenses of the Tribe's local Parish, resulting from the conduct of Class III gaming."

The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide substantial exclusivity for Indian gaming. The payment to the State must be appropriate in light of the benefit conferred on the Tribe. Otherwise, States effectively would be able to leverage large payments from Indian tribes, in derogation of Congress' intent set forth in Section 2710(d)(4) of the Indian Gaming Regulatory Act (IGRA). This section states that nothing in IGRA "shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in Class III gaming activities." 25 U.S.C. 2710(d)(4). For example, in the following two recent instances, the Secretary declined to approve compacts because they contained unacceptable payments to the State.

On August 23, 1997, the Secretary declined to approve the Mescalero Apache Tribe/State of New Mexico Compact which required the Mescalero Apache Tribe to pay to the State 16% of "net win" as long as the State does not take action to attempt to restrict the scope of Indian gaming permitted under the Compact, and does not permit any further expansion of non-tribal Class III gaming in the State. We determined that this 16% payment did not confer substantial exclusivity

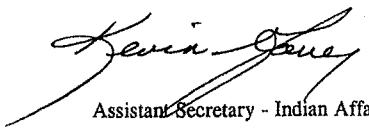
because the State of New Mexico also permits a state lottery, the operation of a large number of electronic gaming devices by fraternal, veterans, or other non-profit membership organizations, gaming by nonprofit tax exempt organizations for fundraising purposes, and the operation of electronic gaming devices at horse tracks every day that live or simulcast horse racing occurs. As a result, we concluded that the 16% payment more closely resembled a fee or an assessment imposed by the State on the Tribe as a condition to engage in Class III gaming activities than a bargained-for payment for a valuable privilege.

On February 9, 1999, we declined to approve the Little River Band of Ottawa Indians and the State of Michigan Tribal-State Compact. Section 17 of the Compact required the Tribe to pay the State 8% of "net win" derived from all Class III electronic games of chance, so long as no change in State law is enacted to permit the operation of electronic games of chance or commercial casino games by any other person (except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996) and no other person (except a federally recognized Indian tribe operating pursuant to an IGRA compact or a person operating in the City of Detroit pursuant to the Initiated Law of 1996) within the State lawfully operates electronic games of chance or commercial casino games.

We questioned whether Section 17 provided the Tribe with any meaningful level of exclusivity. The Initiated Law of 1996, MCL 432.201 *et seq.*, had legalized non-Indian gaming in the largest market in the State of Michigan, thus allowing non-Indian gaming to compete with and draw customers from Indian gaming. When the law is implemented, it may make *de minimis* the promised exclusivity.

We hope that the foregoing explanation is responsive to your request, and will encourage the State and the Tribes to negotiate toward the conclusion of Class III gaming compacts.

Sincerely,



Assistant Secretary - Indian Affairs

Identical Letter Sent To: Honorable Lovelin Poncho
Chairman, Coushatta Tribe of Louisiana
P.O. Box 818
Elton, Louisiana 70532

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAY 14 1999

Mr. Eric N. Dahlstrom, Esq.
Rothstein, Donatelli, Hughes,
Dahlstrom, Cron & Schoenburg
234 North Central Avenue, Suite 722
Phoenix, Arizona 85004

Dear Mr. Dahlstrom:

By letter dated March 26, 1999, you submitted to us for approval, on behalf of your client, the Forest County Potawatomi Community (Tribe), an Intergovernmental Cooperation Agreement (ICA) between the Tribe, the City of Milwaukee (City), and the County of Milwaukee (County). We have completed our review of the ICA, and have determined that it is an amendment to the Tribe's Class III Gaming Compact with the State of Wisconsin (State). For the following reasons, this amendment to the Compact is hereby disapproved.

The ICA, executed on March 2 and 3, 1999, by the parties, provides, *inter alia,* that the Tribe will make an annual payment to the City of 1.5 percent of Class III net win or $3.38 million, whichever is greater, and an annual payment to the County of 1.5 percent of Class III net win or $3.25 million, whichever is greater.

As you point out in your March 26 letter, the State is not a party to the ICA. However, on December 3, 1998, the Tribe and the State executed Compact Amendments which provide that the Tribe may operate 1,000 Class III electronic games of chance and 25 blackjack tables on its Indian trust land located within the City of Milwaukee (Menomonee Valley Land), if the Tribe is able to obtain Approval Resolutions from the City and the County. The Tribe entered into the ICA to induce the City and the County to adopt the required Approval Resolutions, and, as you explain in your March 26 letter, the Tribe has now submitted the City and County Approval Resolutions to the Governor of Wisconsin.

In our view, the ICA constitutes an amendment to the Class III Compact because it triggers the removal of limitations on Class III gaming activities and expansion of such gaming under the Compact Amendments. Although the Compact provides for the Tribe and State to negotiate in good faith if the Tribe was unable to execute an agreement with the City and County, the ICA as drafted creates a condition precedent to several compact provisions and supersedes other compact provisions. The ICA specifically provides that by its execution, the City and the County give the Tribe and the State the approvals needed under paragraph 1, 3, and 5 of the Compact Amendments to authorize the expansion of Class III gaming on the Menomonee Valley Land. We cannot approve the ICA because its payments provisions violate Section 11(d)(4) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(4), which provides, in part, that "nothing in this section shall be interpreted as conferring upon a state or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe..." We believe that the payments required under the ICA constitute an impermissible tax, fee, charge or assessment under IGRA.

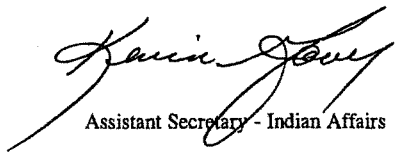
Section 6 of the ICA states that the City and the County agree to make available to the Tribe services normally provided to other users within the City of County "at the same cost or charge" that applies to other users. Thus, it appears the Tribe will be paying an additional amount for the services listed in section 6 above and beyond the 1.5 percent payment. This demonstrates that the agreed upon payments to the City and County are not in consideration of services, but are instead a quid pro quo in exchange for the agreement of the City and County to allow an expansion of gaming. As such, the payments constitute a tax, fee, charge or assessment.

It is possible to read section 6 of the ICA as requiring the 1.5 percent payment as consideration for services that are provided "without cost or charge to other users," such as police, fire, and road maintenance, and would therefore be in lieu of taxes which normally provide the funding for such services. However, section 8 of the ICA states that the payments to the City and County shall terminate if either the City or County "approve any Class III gaming which is then offered to the public within Milwaukee County..." It is unclear whether IGRA contemplates that a particular City or County may control a Tribe's scope of gaming. Nevertheless, because the payments cease irrespective of the City and County providing services, it demonstrates further that the payments are not consideration for City/County services, or for the funding the operation of local governments, or for defraying the costs of regulation, but are instead a quid pro quo in exchange for the right to expand the gaming operation. As such, the payments constitute a tax, fee, charge, or assessment.

As you know, under IGRA, net gaming revenues from any tribal gaming can be used to help fund operations of local government agencies. *See* 25 U.S.C. § 2710(b)(2)(B)(v). Therefore, if the payment of the fees provided for in the ICA to the City and the County were not tied to the expansion of Class III gaming activities under the Compact Amendments, they would not implicate IGRA, and the ICA would not be required to be approved by the Secretary as an amendment to the Tribe's Compact. We reserve judgment on whether the ICA would still need to be approved under 25 U.S.C. § 81.

We regret that our decision could not be more favorable at this time, and we hope that the Tribe, the City, the County, and the State, can restructure the ICA to eliminate our objections.

Sincerely,



Assistant Secretary - Indian Affairs

cc: Tommy G. Thompson, Governor of Wisconsin
Philip Shopodock, Chairman, Forest Co. Potawatomi Comm. of WI
Pat McDonnell, Special Assistant City Attorney, City of Milwaukee
Robert Ott, Corporation Counsel, County of Milwaukee

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUL 26 2000

Honorable George E. Pataki
Governor
State of New York
Albany, New York 12224

Dear Governor Pataki:

We have completed our review of the Amendment to the Tribal-State Compact (Compact Amendment) between the St. Regis Mohawk Tribe (Tribe) and the State of New York, executed on June 2, 2000. For the following reasons, the Compact Amendment is hereby disapproved.

The Compact Amendment authorizes the Tribe to operate Electronic Gaming Devices (EGDs) that can offer the following two games: electronic keno and electronic pull-tab tickets. In exchange for the "exclusive" right to operate these gaming devices, the Tribe agrees to a formula for revenue-sharing with the State, paying, on a graduated scale, from 10% of net revenues of EGDs to revenues under $30 million per year, to 25% of net revenues of EGDs for net revenues exceeding $72 million per year.

The State's July 14, 2000, letter states that the New York Lottery does currently operate an electronic keno game called "QuickDraw," but that the Compact Amendment permits the Tribe to operate a much more expansive and interactive electronic keno game, with none of the limits contained in the State Lottery's "QuickDraw" authorization. Thus, the Tribe derives a substantial economic benefit through its exclusive right to operate the electronic keno game through the EGDs. The Compact Amendment provides that in the event a change in State law is enacted to permit the operation of EGDs by any other person than an Indian tribe, the Tribe is relieved of its payment obligation. However, Section XXIX(B)(3) of the Compact Amendment specifically provides that the conduct of any lottery game by the New York State Lottery shall not affect contributions to the State by the Tribe for EGD authorization. We believe that this provision is unacceptable because revenue-sharing payments to the State would not decrease or disappear if the State Lottery is authorized to operate a version of electronic keno that is similar to the Tribe's electronic keno game played through its EGDs. In our view, any event that eliminates or reduces the exclusivity enjoyed by the Tribe must trigger the elimination of, or a reduction in, the Tribe's payment obligation. If it does not, the provision runs afoul of 25 U.S.C. § 2710(d)(3)(C)(4) of the Indian Gaming Regulatory Act (IGRA) which prohibits the imposition of any tax, fee, charge or other assessment upon an Indian tribe to engage in a class III activity.

In addition, we are very concerned, as trustee, that the Compact Amendment apparently requires the Tribe to make payments to the State even if the Tribe's EGDs are not profitable. To address this concern, we would recommend that the Compact Amendment either adopts the definition of "net revenues" contained in 25 U.S.C. § 2703(9) of IGRA, or be modified to include a provision exempting a certain amount of net revenues from revenue-sharing provisions of the Compact Amendment that ensures profitability.

We regret that our decision could not be more favorable at this time.

Sincerely,

Assistant Secretary - Indian Affairs

Similar Letter Sent To: Honorable Hilda Smoke
Honorable Alma Ransom
Honorable Paul Thompson
Chiefs, St. Regis Mohawk Tribe
Route 37, Box 8A
Hogansburg, New York 13655

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

AUG 2 4 2000

Honorable Alton D. LeBlanc, Jr.
Chairman
Chitimacha Tribe of Louisiana
Post Office Box 661
Charenton, Louisiana 70523

Dear Chairman LeBlanc:

We have completed our review of the Tribal-State Compact for the conduct of Class III Gaming between the Chitimacha Tribe of Louisiana (Tribe) and the State of Louisiana (State), executed on July 6, 2000. We are approving the Compact in its entirety, with the exception of Section 12(C). Section 12(C) provides that the "Tribe shall make quarterly financial contributions of six percent (6%) of the Tribe's net revenues from the conduct of Class III gaming to the local governmental authorities of St. Mary's Parish, Louisiana. These contributions shall be used to offset and defray the expenses of those local governmental authorities resulting from the conduct of Class III gaming."

In order for us to approve such a provision, the amount of payments must be based on either an accounting that establishes the local government's actual costs, or a reasonable estimate of the costs of the programs or services necessitated as a direct result of the Class III gaming activities under the Compact. The Compact does not include any information to enable us to determine that Section 12(C) is authorized under 25 U.S.C. §2710(d)(3)(C)(vii). On this date, we received some information from the Office of the Governor of the State of Louisiana, however, given the statute of limitations set forth in IGRA for our approval of the Compact, we have not been able to adequately review and verify the information. In the absence of an adequate review to determine justification for the 6% quarterly contributions, such payments to St. Mary's Parish may only be viewed as a tax, fee, charge, or other assessment that Congress has prohibited under 25 U.S.C. § 2710(d)(4). Our responsibility under the Indian Gaming Regulatory Act (IGRA) mandates disapproval of such a contribution.

Section 2(C) of the Compact makes it clear that if one provision of the compact violates IGRA, Federal law, or our trust responsibility, and therefore is

disapproved, the remainder of the compact shall remain in effect. Therefore, notwithstanding our determination that Section 12(C) is unlawful, the remainder of the Compact remains lawful by its terms upon approval.

We wish the Tribe and the State success in their economic venture.

Sincerely,

Loretta A. Tuell

ACTING Assistant Secretary - Indian Affairs

Enclosure

Similar Letter Sent to: Honorable M.J. Mike Foster, Jr.
Governor, State of Louisiana
Baton Rouge, Louisiana 70804

cc: Eastern Region Office w/copy of approved Compact
National Indian Gaming Commissioner w/copy of approved Compact
Louisiana US Attorney w/copy of approved Compact

bcc: Secy Surname, 101-A, Bureau RF, SOL-IA, Surname, Chron
BIA:PLHart:trw:8/24/00:219-4066 wp:a:chitapproval.wpd
corr per SBlackwell:PLH:trw:8/24/00

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:
Indian Gaming Management
MS 2070-MIB

AUG 1 1 2000

Honorable Mike Foster
Governor
State of Louisiana
Baton Rouge, Louisiana 70804-9004

Dear Governor Foster:

On July 11, 2000, we received the Tribal-State Compact for the Conduct of Class III Gaming between the Chitimacha Tribe of Louisiana (Tribe) and the State of Louisiana (State), executed on July 6, 2000. Before making a determination on whether to approve or disapprove the Compact, we seek additional documentation to clarify Section 12 (C) of the Compact.

Section 12 (C) of the Compact provides that the "Tribe shall make quarterly financial contributions of six percent (6%) of the Tribe's net revenues from the conduct of Class III gaming to the local governmental authorities of St. Mary's Parish, Louisiana. These contributions shall be used to offset and defray the expenses of those local governmental authorities resulting from the conduct of Class III gaming."

In order for us to approve such a provision, the amount of payments must be based on either an accounting establishing the local government's actual costs, or a reasonable estimate of the costs, of the programs or services necessitated as a direct result of the Class III gaming activities under the Compact. The Compact does not include any information, nor have you provided additional documentation, to enable us to determine that Section 12(C) is authorized under 25 U.S.C. § 2710(d)(3)(C)(vii). Without such information, we will have to disapprove the Compact because the 6% payment to St. Mary's Parish would constitute a payment as a tax, fee, charge, or other assessment that Congress has prohibited under 25 U.S.C. § 2710(d)(4).

We understand that the Chitimacha Compact approved in 1993 contained a provision similar to Section 12 (C) of the Compact under consideration. However, in the intervening years, our position has evolved, and we now believe that additional justification for payments to local governments are necessary as discussed above. The Department will consider, among other things, the following factors in determining whether payments to local governments are reasonable: The size of the proposed gaming operation called for in the compact; the level o

patronage expected and the amount of traffic it is likely to generate; the extent to which the infrastructure and services provided by local governments may be affected by the gaming operation; the existing capacity of community infrastructure, including roads and streets and water and sewer services; the existing level of police, fire and safety services available in the community; and the current availability of programs to combat compulsive gambling. If costs are estimated, then the extent to which the estimated costs are the result of a bilateral tribal-state negotiation process may also be considered.

An analysis discussing the factors above with respect to Section 12 (C) is needed in order for the Department to approve the Compact. Under IGRA, the Department has 45 days to approve or disapprove a compact. The action deadline for the Amendment is August 24, 2000. Please respond to this letter as soon as possible, but no later than August 18, 2000, to ensure that your response is taken into consideration in our decision making process.

Sincerely,

Paula L. Hart

Paula L. Hart
Acting Director
Office of Indian Gaming Management

Similar letter sent to: Honorable Alton D. Le Blanc, Jr.
Tribal Chairman
Chitimacha Tribe of Louisiana
Post Office Box 661
Charenton, Louisiana 70523

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR 30 2001

Honorable Murphy J. Foster, Jr.
Governor
State of Louisiana
Baton Rouge, Louisiana 70804

Dear Governor Foster:

On March 26, 2001, we received the Extension of the Tribal-State Compact for the conduct of Class III Gaming between the Tunica-Biloxi Indian Tribe (Tribe) and the State of Louisiana (State), executed on March 23, 2001. We have completed our review of this Compact and conclude that it does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), Federal law, or our trust responsibility.

Previously the Tribe submitted a Class III gaming compact with the State of Louisiana to the Department of the Interior for approval on December 1, 2000. Upon receipt of that compact, we informed the Tribe and the State that we needed additional documentation to justify a provision of the compact that required the Tribe to make a payment of six percent (6%) of net revenues from the conduct of Class III gaming activities to offset and defray the expenses of local governments resulting from the conduct of the Tribe's gaming activities. We are writing to inform you that we have determined that it will no longer be necessary for either the Tribe or the State, when submitting a Class III gaming compact that contains a provision for payments of net revenues to local governments for impact costs, to also submit additional documentation to justify such payments. We will however, continue to review all compacts to ensure they are in regulatory and statutory compliance with IGRA.

Therefore, pursuant to delegated authority and Section 11 of IGRA, we approve the Compact. The Compact shall take effect when the notice of our approval, pursuant to Section 11 (d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B), is published in the FEDERAL REGISTER. We wish the Tribe and the State success in their economic venture.

Sincerely,

James H. McDowell

Deputy Assistant Secretary - Indian Affairs
(Management)

Enclosure

Similar Letter Sent to: Honorable Earl Barbry, Sr.
Chairman, Tunica-Biloxi Tribe of Louisiana
Marksville, Louisiana 71351

THE SECRETARY OF THE INTERIOR

WASHINGTON

JUL 2 3 2001

Honorable John Breaux
United States Senate
Washington, DC 20510-1803

Dear Senator Breaux:

Thank you for your letter dated June 13, 2001, regarding the difficulties the State of Louisiana and the Coushatta Tribe have encountered in renegotiating a Class III gaming compact. A dispute over the terms of an impact costs provision in the compact has apparently stalled negotiations. In this respect, you request written guidance on the limited circumstances under which the Indian Gaming Regulatory Act (IGRA) would permit a Class III gaming compact to include provisions for tribal payments to a state to compensate local governments for impact costs associated with tribal gaming activities.

Section 11(d)(3)(C)(vii) of IGRA, 25 U.S.C. § 2710(d)(3)(C)(vii), provides that a Tribal-State compact may include, in addition to those set forth in subsections (i)-(vi), "any other subjects that are directly related to the operation of gaming activities." If state or local governments are required to undertake new or expand existing governmental programs and services as a direct result of the tribal Class III gaming activities approved under the compact, a compact that requires the tribe to make payments to the state or local governments that are responsible for paying for or providing those programs or services may be justified under Section 11(d)(3)(C)(vii). In addition, IGRA specifically provides that net gaming revenues may be used "to help fund operations of local government agencies." 25 U.S.C. § 2710(b)((2)(B)(v).

As you know, the State of Louisiana and the Tunica-Biloxi Tribe recently negotiated a new compact which contained a provision requiring a payment of six percent (6%) of net revenues to offset and defray the expenses of local governments resulting from the conduct of the Tribe's gaming activities. Please find enclosed our letter dated March 30, 2001, to the Chairman of the Tunica-Biloxi Tribe, approving the Class III gaming compact with the State of Louisiana. This letter explains the Department's position on impact costs payments. and may be of assistance to the Coushatta Tribe and the State of Louisiana in resolving their dispute regarding this matter.

If you have any additional questions, or if we can be of further assistance, please do not hesitate to contact the Bureau of Indian Affairs, Office of Indian Gaming Management at (202) 219-4066.

Sincerely,

Gale A. Norton

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN 25 2001

Honorable Mike Foster, Jr.
Governor
State of Louisiana
Baton Rouge, Louisiana 70804

Dear Governor Foster:

We have completed our review of the Tribal-State Compact for the conduct of Class III Gaming between the Coushatta Tribe of Louisiana (Tribe) and the State of Louisiana (State), executed on December 11, 2000. For the following reasons, we are approving the Compact in its entirety, with the exception of Section 12(C). Section 12(C) provides that the "Tribe shall make quarterly financial contributions of six percent (6%) of the Tribe's net revenues from the conduct of Class III gaming to the local governmental authorities of Allen Parish, Louisiana. These contributions shall be used to offset and defray the expenses of those local governmental authorities resulting from the conduct of Class III gaming."

As we indicated in our letter dated December 14, 2000, in order for us to approve such a provision, the amount of payments must be based on either an accounting that establishes the local government's actual costs, or a reasonable estimate of the costs of the programs or services necessitated as a direct result of the Class III gaming activities under the Compact. If costs are estimated, then the extent to which the estimated costs are the result of a bilateral tribal-state negotiation process may be considered.

The Allen Parish Gaming Revenue Distribution Commission (Commission) has submitted a Analysis of Allen Parish Cost Impacts (Report), dated January 17, 2001, as requested in our December 14, 2000 letter. The Report does not include an accounting, but includes an analysis of estimated impact costs. Although the Report provides documentation that meets the requirements of our December 14 letter, the Tribe, by letter dated January 19, 2001, (copy enclosed), has challenged the reliability of the information provided, and has questioned the credibility of the entire section of the Report on cost impacts.

Although we are not in a position to verify the accuracy of the Tribe's allegations in the time we have left to approve or disapprove the Compact under IGRA, it is clear to us that the estimated costs in the Commission's Report are not the result of a bilateral negotiation process.

For these reasons, we believe that the best course of action is to afford the parties the opportunity to mediate this issue in the next 180 days, as provided in Section 2(F) of the Compact. Section 2(F) of the Compact makes it clear that if one provision of the compact violates IGRA, Federal law, or our trust responsibility, and therefore is disapproved, the remainder of the compact shall remain in effect. Therefore, notwithstanding our determination that Section 12(C) is disapproved, the remainder of the Compact remains lawful by its terms upon approval.

We wish the Tribe and the State success in their economic venture.

Sincerely,

James H. McDivitt
Deputy Assistant Secretary - Indian Affairs
(Management)

Enclosures

Similar Letter Sent to: Honorable Lovelin Poncho
Chairman, Coushatta Tribe of Louisiana
Elton, Louisiana 70532

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

NOV 21 2001

Honorable Gary Johnson
Governor of New Mexico
State Capitol
Santa Fe, New Mexico 87503

Dear Governor Johnson:

On October 10, 2001, we received the Tribal-State Compacts between the State of New Mexico (State) and the Pueblos of Isleta, Laguna, Sandia, San Juan, Santa Ana, Santa Clara, and Acoma (Tribes). The compacts for the Pueblos of Isleta, Laguna, Sandia and San Juan, were executed on October 5, 2001, the compacts for the Pueblos of Santa Ana and Santa Clara were executed on October 2, 2001, and the compact for the Pueblo of Acoma was executed on October 3, 2001.

On October 25, 2001, we sent a letter to the Governor of the State of New Mexico and to the Governors of all seven Indian tribes, seeking clarification on several provisions of the compacts. The responses we have received from the State and the Indian tribes have resolved the questions we had with respect to the various issues raised.

We have completed our review of these compacts and conclude that they do not violate the Indian Gaming Regulatory Act of 1988 (IGRA), Federal law, or our trust obligation. Therefore, pursuant to delegated authority and Section 11 of IGRA, based on a full review of the record and the law we approve the compacts. The compacts will take effect when notice of our approval, pursuant to 25 U.S.C. § 2710(d)(3)(B), is published in the FEDERAL REGISTER. This approval is not intended to be an indication that the sixteen percent payment required under the 1997 compacts comport with the requirements of IGRA.

The Department has approved more than 200 tribal-state compacts to date. Only a few have called for tribal payments to States other than for direct expenses to defray the costs of regulating a gaming activity under the compact.

The Department has limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide substantial exclusivity for Indian gaming. As a matter of policy, the Department has determined that it will not approve compacts that call for tribal payments in exchange for less than substantial exclusivity for Indian gaming. In addition, the Department has a trust obligation to Indian tribes to ensure that the benefit received by the State under the proposed compact is appropriate in light of the benefit conferred on the tribe.

Section 11 of the compacts provides that the tribes shall pay to the State an amount equal to eight percent of the Net Win in return for which the State agrees that the tribes have the exclusive right within the State to conduct all types of Class III gaming, with the sole exception of the use of Gaming Machines permitted for racetracks and for veterans' and fraternal organizations.

Though there is no express cap on the number of gaming machines that could be authorized at racetracks and veterans and fraternal organizations within the compact, we are persuaded that the tribes have substantial exclusivity for the following reasons.

First, with the possible exception of table games at charity casino nights, Indian casinos are the only entities in the state that are entitled to table and card games. Even the exempted entities (racetracks, veterans and fraternal organizations) are limited to slot machines.

Second, the tribes are entitled to an unlimited number of slot machines and the ability of exempted entities to operate slot machines remains limited. Only four racetracks exist in the State with only two within 100 miles of any tribal gaming facility. Thus, geographic exclusivity supports the tribes' view that tracks are not a significant competitive force in the market. In addition, not every veterans and fraternal organization may offer slot machines to every consumer, only those organizations that were in existence on January 1, 1997, and then only for the members and the members' spouses. Moreover, the hours, days and number of slot machines that can be operated is subject to legislative approval and any increases will also require statutory amendments. Further, as the parties have implicitly acknowledged, the likelihood of opening new racetracks is very small given the significant barriers to operation such as licensing requirements, limitation on gaming machines and market conditions. Consequently, we believe the existence of substantial exclusivity remains in this market.

Moreover, it is important to note the present day gaming regime wherein, pursuant to state law, each racetrack is currently limited to a maximum of 600 slot machines (or a maximum of 750 pursuant to an allocation agreement between racetracks) and the veterans and fraternal organizations can only operate 15 per organization.

Finally, the tribes have repeatedly and unequivocally assured the Department that this compact, unlike the 1997 compact, is the product of fully voluntary arms-length bilateral negotiations between the State and the tribes. Therefore, notwithstanding our initial scrutiny of Section 11 of the compact, we believe that the tribes and the State have demonstrated that there is substantial exclusivity in exchange for the payments provided for in the compact.

We wish the tribes and the State success in their economic venture.

Sincerely,

Hearl A. McCabe

Assistant Secretary - Indian Affairs

Enclosure

Similar Letter Sent to:

Honorable Cyrus J. Chino
Governor
Pueblo of Acoma
P.O. Box 309
Acoma, New Mexico 87034

Honorable Alvino Lucero
Governor
Pueblo of Isleta
P.O. Box 1270
Isleta, New Mexico 87022

Honorable Harry D. Early
Governor
Pueblo of Laguna
P.O. Box 194
Laguna, New Mexico 87026

Honorable Wilfred Garcia
Governor
Pueblo of San Juan
P.O. Box 1099
San Juan Pueblo, New Mexico 87566

Honorable Stuwart Paisano
Governor
Pueblo of Sandia
P.O. Box 6008
Bernalillo, New Mexico 87004

Honorable Bruce Sanchez
Governor
Pueblo of Santa Ana
2 Dove Road
Bernalillo, New Mexico 87004

Honorable Denny Gutierrez
Governor
Pueblo of Santa Clara
P.O. Box 580
Espanola, New Mexico 87532

cc: Southwest Region Director w/copy of approved Compact
National Indian Gaming Commission w/copy of approved Compact
Southwest Regional Field Solicitor w/copy of approved Compact
New Mexico United States Attorney w/copy of approved Compact

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR 07 2002

Honorable Mike Foster
Governor of Louisiana
State Capitol
Baton Rouge, Louisiana 70804-9004

Dear Governor Foster:

On January 19, 2002, we received the Tribal-State Compact (Compact) between the State of Louisiana (State) and the Jena Band of Choctaw Indians (Band). The Compact was executed on January 17, 2002. For the following reasons, the Compact is hereby disapproved.

Section 12(C)(2) of the Compact requires the Band to make a 15.5% quarterly contribution of the Band's net revenues from the conduct of Class III gaming to the Support Education in Louisiana First fund (SELF) for the duration of the Compact (seven years) in express recognition and consideration of the substantial economic benefits accruing to the Band as a result of the State's agreement and effort to enable the Band to conduct Class III gaming activities on a property located in Vinton, Louisiana.

The Department has approved more than 200 tribal-state compacts to date. Only a few have called for tribal payments to States other than for direct expenses to defray the costs of regulating a gaming activity under the compact. The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide substantial exclusivity for Indian gaming, *i.e.*, where a compact provides a tribe with substantial economic benefits in the form of a right to conduct class III gaming activities in the State that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State. The payment to the State must be appropriate in light of the exclusivity rights conferred on the tribe. Otherwise, the payment would violate Congress' intent set forth in Section 2704(d)(4) of the Indian Gaming Regulatory Act (IGRA), which provides that nothing in IGRA "shall be interpreted as conferring upon the State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe..." 25 U.S.C. § 2710(d)(4).

In exchange for the Band's quarterly payments of 15.5% of net revenues, the State undertakes, under Section 13 of the Compact, to (a) support the Band's acquisition of the Vinton site in trust for gaming purposes; (b) support, in writing, the Band's request for designation and proclamation of the Vinton site as its initial reservation; (c) assist the Band in securing local government support for the trust application; (d) assist the Band in evaluating and responding to public comments regarding the Band's application; and (e) intervene in or participate as amicus curiae in any lawsuit challenging Federal and State required approvals for gaming to occur on the Vinton site.

It is true that the location of the Band's gaming establishment in Vinton, Louisiana, would likely yield substantial economic benefits to the Band. However, the State does not have the authority to either have the land taken into trust, or to have the land declared part of the Band's initial reservation. Both decisions are vested with the Secretary of the Interior. The State is merely offering its support to the Band in the process. In our view, the intangible value of the State's support for the Band's application to take land in trust in Vinton, Louisiana, and have the parcel declared part of the Band's initial reservation for purposes of Section 20 of IGRA, is not the type of quantifiable economic benefit that would justify our approval of the revenue-sharing payments proposed under this Compact.

The Band also argues, in the alternative, that the 15.5% quarterly revenue-sharing payments into the SELF fund are donations to a charitable organization permissible pursuant to 25 U.S.C. § 2710(b)(2)(B) of IGRA. The Band's argument focuses on an analysis of the Internal Revenue Service's treatment of contributions by individuals to the SELF fund, *i.e.*, the IRS allows deductions for contributions to State education cooperative(s) established by a State to serve school districts. *See* IRS Priv. Ltr. Rul. 93-40-038 (Oct. 8, 1993).

In a few instances, the Department has approved compact provisions requiring donations to charitable organizations. Generally, the provision includes a unilateral, benevolent, and gratuitous payment, and is not a condition for negotiation of the compact or bargained-for consideration. In these instances, the tribe maintained considerable discretion as to the charities to which it will make donations, establishing evidence that the donation is voluntary. Finally, the amount of the donation was usually a very small percentage of net revenue and did not threaten the profitability of the gaming establishment.

In our view, the 15.5% quarterly payment into the SELF fund is not a charitable donation, but a tax, fee, charge, or other assessment prohibited under IGRA. It is clear that Section 12(C)(2) of the Compact sets out what was intended to be only a revenue-sharing plan in exchange for some economic benefit to the Band, a clear indication that there is nothing unilateral, benevolent, or gratuitous in the Band's required payment.

Also, under Louisiana law, riverboat casino gaming operations are assessed certain fees. R.S. 27:91. Some of these fees are paid into the SELF fund. R.S. 17:421.7. The State of Louisiana considers the monies paid into the SELF fund to be "franchise fees." R.S. 27:92. We cannot accept an argument that money paid into the SELF fund by the riverboats are state-imposed franchise fees, whereas money paid into the same SELF fund by the Band are

"donations to a charitable organization." We are not persuaded that Congress intended "donations to charitable organizations" to include payments to a State under a compact, thus providing a potential loophole to IGRA's prohibition on the assessment of any tax, fee, charge, or assessment by the State.

These factors alone are sufficient to disapprove the Compact. It is for another day for the Department to consider the Band's request for an initial reservation proclamation. However, with the information before us, we have some concerns with an initial reservation located over 150 miles from the Band's traditional service area.

We regret that our decision could not be more favorable at this time.

Sincerely,

Hank A. McCord

Assistant Secretary - Indian Affairs

Enclosure

Similar Letter Sent to: Honorable B. Cheryl Smith
Tribal Chief
Jena Band of Choctaw Indians
P.O. Box 14
Jena, Louisiana 71342-0014

cc: Eastern Region Office
Office of the Field Solicitor - Tulsa

THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 12 2002

The Honorable Cyrus Schindler
Nation President
Seneca Nation of Indians
Route 438
Irving, New York 14081

Dear President Schindler:

We have completed our review of the Tribal-State Gaming Compact (Compact) for the conduct of Class III gaming activities between the Seneca Nation of Indians (Nation) and the State of New York (State), executed on August 18, 2002, and received by the Department on September 10, 2002. Generally, the Compact authorizes the Tribe to conduct Class III gaming at three sites: an identified area within the City of Niagara Falls, or an alternative site within the County of Niagara; an unidentified area within the County of Erie or the City of Buffalo; and an on-reservation site. The Compact requires that the Tribe pay the State a percentage of the Tribe's gaming revenue in exchange for several benefits including an exclusive 10,500 square-mile area in Western New York and start-up benefits, provided by the State. The Tribe agrees to purchase the gaming sites with funds from the Seneca Nation Settlement Act of 1990, 25 U.S.C. § 1774 (Settlement Act) reserving five million dollars for housing adjacent to the gaming sites.

Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within forty-five days of its submission. If the Secretary does not approve or disapprove the Compact within forty-five days, IGRA states that the Compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." Under IGRA the Department must determine whether the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

As part of the Department's review of the Compact, on September 30, 2002, we sent a letter to the parties seeking clarification of various provisions of the Compact. The responses we received from the State and the Nation have resolved most of our questions, as well as resolving some additional issues raised by non-compacting parties. We have also held several meetings and conference calls with the parties to discuss the Compact and our concerns.

I have decided to allow this Compact to take effect without Secretarial action. I use this approach reluctantly. In enacting IGRA, Congress provided limited reasons for Secretarial approval or disapproval. However, because I want to express my views on important policy

concerns regarding the Compact, concerns that fall outside of the limited reasons in IGRA for Secretarial disapproval, I must avail myself of the opportunity to do so. I believe the State and Nation negotiated in good faith, however, I could not affirmatively approve the Compact because of the effect it is likely to have on future compacts.[1]

General Observations

Since taking office, I have had the opportunity to review and decide a number of Indian gaming-related matters. I do not have the luxury of reviewing any compact without considering the trends that will emerge with each successive compact. As I have reviewed this and previous compacts, my concerns regarding IGRA and the interplay with other aspects of Indian policy have become sufficient to warrant this explanation.

I fully support Indian gaming as envisioned by the drafters of IGRA – that Indian tribes should have the full economic opportunity of gaming within the boundaries of reservations existing at the time of IGRA's passage. But I am also mindful that when tribes seek to game on off-reservation land, the State has a greater governmental interest in regulating tribal off-reservation gaming activities. Tribes 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. It is understandable that tribes who are geographically isolated may desire to look beyond the boundaries of their reservation to take advantage of the economic opportunities of Indian gaming. However, I believe that IGRA does not envision that off-reservation gaming would become pervasive.

Even with this concern in mind, I have concluded that this Compact appropriately permits gaming on the subject lands because Congress has expressly provided for the Nation to acquire certain lands pursuant to the Settlement Act. I am nevertheless concerned that elements of this Compact may be used by future parties to proliferate off-reservation gaming development on lands not identified as part of a Congressional settlement but instead on lands selected solely based on economic potential, wholly devoid of any other legitimate connection. Thus, to the extent that other states and tribes model future compacts after this one, and seek to have the United States take land into trust for these gaming ventures, they should understand that my

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[1] It seems to me that the Department and compacting parties could work more closely on an informal basis to improve the compact development and review process. While I do not want to intrude into the parties' arms-length negotiations, I am concerned that the Department receives a compact that is a fait accompli without much opportunity for the Department to express its policy views, except as part of the 45-day review process. Thus, as the process currently works, compacting parties have only the guidance of previous compacts as a starting point for the parameters of their negotiations. I believe that the process would be enhanced if both parties availed themselves of the Department's informal guidance prior to the delivery of their finalized compact to my desk for review. At times, parties have been able to make changes during the 45-day review process, however, the parties here informed the Department that it would be impossible to make changes to this Compact within the review period. Departmental input, prior to the compact being submitted, might have been extremely helpful here.

views regarding land acquired through a Congressional settlement are somewhat different from my views when a tribe is seeking a discretionary off-reservation trust acquisition or a two-part determination under IGRA. While I do not intend to signal an absolute bar on off-reservation gaming, I am extremely concerned that the principles underlying the enactment of IGRA are being stretched in ways Congress never imagined when enacting IGRA.

Revenue Sharing and Geographic Exclusivity

Section 12(a) of the Compact grants the Nation the exclusive right to operate specifically defined gaming devices within a 10,500 square-mile, geographic area in Western New York.[2] In exchange for this geographic exclusivity right, Section 12 requires the Nation to make graduated revenue-sharing payments to the State (from 18% to 25% of net drop, less a local share) over the course of the 14-year duration of the Compact. If the State violates the exclusivity provision in Section 12(a)(1), the payment to the State ceases as to the particular category of gaming device for which exclusivity no longer exists. If the State violates the exclusivity provision in Section 12(a)(2), the payment to the State ceases altogether.[3]

The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a state for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a state only when the state has agreed to provide the tribe with substantial exclusivity for Indian gaming, *i.e.*, where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the state. The payment to the state must be appropriate in light of the exclusivity right conferred on the tribe.

The Nation and the State have advanced arguments that the geographic exclusivity defined in Section 12(a)(1) of the Compact is substantial and meaningful, pointing out that this zone of exclusivity is a 10,500 square-mile area in Western New York that, based on professional analysis of the market from which the Nation's gaming facility would draw, includes primary (up to 50 miles), secondary (51-99 miles), and tertiary (100-150 miles) customer markets for any

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[2] Section 12(a)(1) of the Compact provides the following description of the geographic area: "(i)to the east, State Route 14 from Sodus Point to the Pennsylvania border with New York; (ii) to the north, the border between New York and Canada; (iii) to the south, the Pennsylvania border with New York; (iv) to the west, the border between Pennsylvania and New York."

[3] The Department asked if the Nation's exclusive right to operate slot machines within the zone of exclusivity was lost and the Nation therefore ceased making revenue payments, whether it would violate the provision of New York law permitting the possession of slot machines only pursuant to a gaming compact where the State receives a negotiated percentage of the net drop. The State has argued that by negotiating this Compact with the Nation that includes the receipt of a negotiated percentage of the net drop, it has met its obligation under the law, even if revenue payments decline to zero. We concur with the State's interpretation of the meaning of its law and conclude that the State has met its legal obligation.

established Buffalo and Niagara Falls gaming facility. According to the economic analysis provided by the Nation, the total revenues currently anticipated from the gaming operations over the term of the Compact, exceed five billion dollars, of which the State would receive less than one billion dollars, and a portion of those State funds would go to local governments. The Nation estimates its anticipated return after all expenses to significantly exceed two billion dollars over the fourteen-year term of the Compact.

The Nation argues that exclusivity in a gaming market of this size is extremely valuable and justifies on its own the average seventeen percent revenue share that the State will receive under the Compact after the local payment. However, the Nation and the State argue that the State is also providing the Nation with other substantial benefits in exchange for the revenue share. Section 11 of the Compact commits the State to transfer the Niagara Falls Convention Center for the sum of one dollar, which will enable the Nation to realize substantial savings, approximately forty million dollars, on otherwise significant development and start-up costs. Other forms of State assistance that the Nation bargained for and obtained are the State's agreement to use its sovereign power of eminent domain to acquire other parcels of land required for the project. Finally, Section 11 of the Compact secures for the Nation the opportunity to operate two off-reservation gaming facilities within the populous and well-visited geographic markets of Buffalo and Niagara Falls.

While I believe that the Nation is receiving a substantial economic benefit that justifies the revenue sharing, I am very troubled that the parties have chosen to exclude other tribes within the area of geographic exclusivity. The Compact creates two areas of exclusivity – one the entire Western portion of New York and another a twenty-five-mile radius of any gaming facility authorized under this Compact. Those provisions support my conclusion that the revenue sharing is justified. However, the drafters of this Compact have excluded Indian gaming from most of the area of exclusivity. The choice to specifically deny other tribes gaming opportunities is the primary reason I have chosen not to affirmatively approve this Compact.

It is worth noting, however, that the Compact does create an exception for two non-compacting tribes, the Tuscarora Indian Nation and the Tonawanda Band of Seneca Indians, in both of these areas of exclusivity. Without violating the terms of the Compact, the State may negotiate with these Tribes to establish a gaming facility either on federally-recognized Indian lands existing on the effective date of this Compact or outside of the twenty-five-mile radius within Western New York.

The Tonawanda Band and the Tuscarora Nation have notified us that they strongly object to approval of the Compact because, in their view, it violates the trust obligation of the United States to the two Nations by including provisions that explicitly restrict the economic opportunities that would otherwise be available to them under federal law, without their consent. There is no question that in approving the Compact, the Department would essentially ratify an agreement that has the effect of restricting the economic opportunities of the Tonawanda Band and the Tuscarora Nation because the State has a strong incentive not to permit these two Nations

to conduct gaming off-reservation within the twenty-five mile (exclusivity) radius, to avoid losing revenue-sharing payments to which it is otherwise entitled from the Nation.

I have reviewed whether this provision violates our trust obligation to Indians, and I conclude that it does not. Under the terms of the Compact, the State does not violate the exclusivity provision of the Compact if the Tonawanda Band and the Tuscarora Nation game on existing federally-recognized Indian lands. Thus, there is no disincentive to the State to negotiate for on-reservation gaming activities. The remaining question is, therefore, whether any tribe enjoys a legal right to off-reservation gaming under IGRA. I believe that Congress in enacting IGRA, struck a delicate balance between State and tribal interests that did not create an absolute right to off-reservation gaming.

Even though this provision does not violate my trust obligation to Indians, I am still troubled that parties in future compacts may pit tribe against tribe. While I believe that it was unintentional here, especially because both the Tonawanda Band and the Tuscarora Nation are regarded as traditionally opposed to gaming, I do not welcome the prospect of future compacts pitting tribes against one another. While I understand that the State is required to negotiate in good-faith with all Indian tribes and it has assured us that it understands its obligation under law, I still find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and, if pushed to its extreme by future compacts, inconsistent with the goals of IGRA.[4]

To summarize, this Compact provides for substantial geographic exclusivity coupled with other valuable consideration. It is for this reason that I believe this revenue-sharing arrangement is consistent with IGRA.

Lands Acquired through the Seneca Nation Settlement Act

Subsections 11(b)(4) and (c) of the Compact provide for the use of settlement funds derived from the Seneca Nation Settlement Act of 1990, 25 U.S.C. § 1774 (Settlement Act) to "acquire the parcels in the City of Niagara Falls and the City of Buffalo" for the purpose of gaming. Under the terms of the Settlement Act, the Nation may use settlement funds to acquire "land within the aboriginal area in State or situated within or near proximity to former reservations lands." The Settlement Act also provides that unless the Secretary determines that lands acquired pursuant to the Act should not be subject to 25 U.S.C. § 177, such lands shall be held in "restricted fee" as opposed to being held in trust by the United States.

In reviewing whether the proposed gaming parcels meet the Settlement Act's requirement that the lands are "situated within or near proximity to former reservations lands," the Nation has

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[4] Moreover, notwithstanding this or any other provision of this Compact, the Department will continue to entertain any Section 20 two-part determination applications submitted by an Indian tribe within the State of New York pursuant to IGRA.

provided sufficient documentation demonstrating that the exterior boundaries of the Nation's former Buffalo Creek Reservation overlap a portion of the present day boundary of the City of Buffalo and is within fourteen miles of the City of Niagara Falls exterior boundary. Moreover, the exterior boundary of the Nation's former Tonawanda Reservation is within fourteen miles of the City of Buffalo and within twenty-two miles of the City of Niagara Falls. While the Settlement Act does not define "within or near proximity" and there is no legislative history for guidance, it is our opinion that the two cities of Niagara Falls and Buffalo are "situated within or near proximity to" the Nation's former Buffalo Creek and Tonawanda reservations for purposes of the Settlement Act.

I want to emphasize, however, that the analysis regarding off-reservation land as part of a Congressionally-approved settlement greatly differs from the analysis the Department engages in when the issue is simply a trust acquisition for off-reservation gaming. Here, Congress tied the acquisition of lands through the Settlement Act to lands in "near proximity" to the Nation's former reservation. This decision rests squarely on a Congressionally-approved settlement of a land claim. Consequently, my analysis of "within or near proximity" should be understood as limited to the interpretation of the Settlement Act alone.

Indian Lands under IGRA

IGRA permits a tribe to conduct gaming activities on Indian lands if the tribe has jurisdiction over those lands, and only if the tribe uses that jurisdiction to exercise governmental power over the lands. There is no question that the Settlement Act requires the parcels to be placed in "restricted fee" status. As such, these parcels will come within the definition of "Indian lands" in IGRA if the Nation exercises governmental power over them. The Department assumes that the Nation will exercise governmental powers over these lands when they are acquired in restricted fee. It is our opinion that the Nation will have jurisdiction over these parcels because they meet the definition of "Indian country" under 18 U.S.C. § 1151. Historically, Indian country is land that, generally speaking, is subject to the primary jurisdiction of the Federal Government and the tribe inhabiting it. As interpreted by the courts, Indian country includes lands which have been set aside by the Federal Government for the use of Indians and subject to federal superintendence. In this regard, it is clear that lands placed in restricted status under the Settlement Act are set aside for the use of the Nation, and that such restricted status contemplated federal superintendence over these lands. Finally, the Settlement Act authorizes lands held in restricted status to expand the Nations' reservation boundaries, or become part of the Nation's reservation. Accordingly, we believe that the Settlement Act contemplates that lands placed in restricted status be held in the same legal manner as existing Nation's lands are held and thus, subject to the Nation's jurisdiction.

Application of Section 20 of IGRA

Section 20 of IGRA, 25 U.S.C. § 2719 contains a general prohibition on gaming on lands acquired in trust by the Secretary for the benefit of an Indian tribe after October 17, 1988, unless

one of several statutory exceptions is applicable to the land. Under the Compact, the Nation lans to use the provisions of the Settlement Act to acquire the land in restricted fee, rather than in trust. The Department has examined whether Section 20 of IGRA applies to the Compact. We have reviewed whether Congress intended, by using the words "in trust" in Section 20 of IGRA, to completely prohibit gaming on lands acquired in restricted fee status by an Indian tribe after October 17, 1988. I cannot conclude that Congress intended to limit the restriction to gaming on after-acquired land to only *per se* trust acquisitions. The Settlement Act clearly contemplates the acquisition of Indian lands which would otherwise constitute after-acquired lands. To conclude otherwise would arguably create unintended exceptions to the Section 20 prohibitions and undermine the regulatory regime prescribed by IGRA. I believe that lands held in restricted fee status pursuant to an Act of Congress such as is presented within this Compact must be subject to the requirements of Section 20 of IGRA.

The legislative history to the Settlement Act makes clear that one of its purposes was to settle some of the Nation's land claim issues. Thus, the Nation's parcels to be acquired pursuant to the Compact and the Settlement Act will be exempt from the prohibition on gaming contained in Section 20 because they are lands acquired as part of the settlement of a land claim, and thus fall within the exception in 25 U.S.C. § 2719(b)(1)(B)(i).

Use of Remaining Settlement Act Funds for Housing

Section 11(c) of the Compact provides for the "acquisition of parcels to meet the housing needs of the Nation's members." IGRA provides that a gaming compact will govern gaming activities on Indian lands of the Indian tribe and "may include provisions relating to . . . any other subjects that are directly related to the operation of gaming activities." It has been the policy of the Department that a Class III gaming compact can only include provisions that are "directly related" to the operation of gaming activities, and cannot include provisions that are not germane to gaming activities. The Department has taken this position because it represents a common sense approach to the interpretation of IGRA.

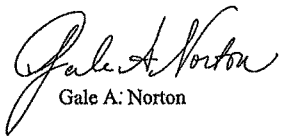
In response to our inquiry, the Nation has advised us that land acquired for housing under Section 11(c) of the Compact is directly related to the operation of gaming activities because the primary purpose in acquiring such parcels is to provide housing for tribal members next to the Nation's gaming facilities. However, because Section 11(c) of the Compact does not require any relation to the gaming activities, we believe that the Nation's argument that this provision is directly related to gaming is tenuous and strains the directly related criterion required by IGRA.

Conclusion

In conclusion, while I believe that the Nation and the State worked hard to negotiate a Compact that met the parties' immediate needs, I believe the policy considerations outlined above counsel against an affirmative-approval. Since I did not approve or disapprove the Compact within 45 days, the Compact is considered to have been approved, "but only to the

extent the compact is consistent with the provisions of [IGRA]." The Compact takes effect when notice is published in the *Federal Register* pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. § 22710(d)(3)(B).

Sincerely,



Gale A. Norton

Identical letter sent to:
The Honorable George E. Pataki

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN 24 2003

Honorable Janet Napolitano
Governor of Arizona
1700 West Washington
Phoenix, Arizona 85007

Dear Governor Napolitano:

On December 12, 2002, we received the Tribal-State Compacts between the State of Arizona (State) and the White Mountain Apache, Havasupai, San Carlos Apache, Quechan, Fort Mojave, Salt River Pima-Maricopa, Ak-Chin, Fort McDowell, Gila River, Hualapai, Tohono O'odham, and Cocopah Indian tribes. On January 7, 2003, we received the Tribal-State Compacts between the State and the Tonto Apache and Kaibab Band of Paiutes Indian tribes. On January 13, 2003, we received the Tribal-State Compacts between the State and the Yavapai-Apache and Pascua Yacqui Indian tribes; and on January 17, 2003, we received the Tribal-State Compact between the State and the Navajo Nation.

We have completed our review of these compacts and conclude that they do not violate the Indian Gaming Regulatory Act of 1988 (IGRA), federal law, or our trust obligation to Indians. Therefore, pursuant to delegated authority and Section 11 of IGRA, based on a full review of the record and the law, we approve the compacts. The compacts will take effect when notice of our approval, pursuant to 25 U.S.C. § 2710(d)(3)(B), is published in the *Federal Register*.

Revenue Sharing

Section 12(b) of the compacts requires the tribes to contribute a percentage of their Class III Net Win for each fiscal year as follows: One percent of the first $25 million, 3% of the next $50 million, 6% of the next $25 million, and 8% of Class III Net Win in excess of $100 million. Class III Net Win is defined in Section 2(qq) to mean "gross gaming revenue, which is the difference between gaming wins and losses, before deducting costs and expenses." The tribal contribution is made "in consideration for the substantial exclusivity covenants by the State in Section 3(h)" of the compacts. Section 3(a) of the compacts authorizes the tribes to operate (1) Class III Gaming Devices, (2) blackjack, (3) jackpot poker, (4) keno, (5) lottery, (6) off-track pari-mutuel wagering, (7) pari-mutuel wagering on horse racing, and (8) pari-mutuel wagering on dog racing. Section 3(h) provides that if State law changes to permit a person or entity other than an Indian tribe to operate Gaming Devices, any form of Class III gaming , including Video Lottery Terminals, that is not authorized under the compact (other than gambling that is lawful on May 1, 2002, pursuant to A.R.S. § 13-3302), the tribes' obligation to make contributions to the State under Section 12 is immediately reduced to quarterly contributions to the State equal to .75% of its Class III Net Win for the prior quarter. Specifically exempted from the provisions of Section 3(h) are casino nights operated by non-profit

charitable organizations, social gambling, paper product lottery games used by the Arizona lottery prior to May 1, 2002, and low-wager, non-banked recreational pools.

The Department of the Interior (Department) has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide the tribe with substantial exclusivity for Indian gaming, *i.e.*, where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State. The payment to the State must be appropriate in light of the exclusivity right conferred on the tribe. It is our determination that the revenue-sharing provisions described above are lawful under IGRA because the value of the exclusive gaming rights conferred on the tribes is significant, and thus cannot be characterized as a prohibited tax pursuant to 25 U.S.C. § 2710(d)(4). In addition, the percentage rate of Net Win that tribes are required to pay the State under Section 12(d) in exchange for exclusive gaming rights is overstated because it factors in payments of regulatory costs that are usually assessed separately and authorized under 25 U.S.C. § 2710(d)(3)(C)(iii). Finally, Section 12(d) of the compacts provides that 12% of the tribes' annual contribution shall be made in the form of either distribution to cities, towns or counties for government services or deposits to the Commerce and Economic Development Commission Local Communities Fund. We believe that this portion of the tribes' contribution is likewise independently authorized pursuant to 25 U.S.C. § 2710(b)(2)(B)(v) which authorizes the use of net revenues from any tribal gaming to be used to help fund operations of local government agencies, and would not be characterized as a tax even in the absence of exclusive gaming rights.

Section 16(b) of the compacts provides that "[n]othing in this Compact shall be deemed to authorize or permit the State or any political subdivision thereof to impose any tax, fee, charge or assessment upon the Tribe or any Gaming Operation of the Tribe, except for the payment of expenses as provided in Section 12 of this Compact." In a letter received by the Department on January 15, 2003, the Executive Director of the Arizona Indian Gaming Association and the Acting Director of the Arizona Department of Gaming clarify that it was not the intent of the tribes or the State to authorize the imposition of a tax with the adoption of this provision. This provision was intended to reflect the authorization to assess regulatory fees in 25 U.S.C. § 2710(d)(4). We view this interpretation as reasonable. Accordingly, we do not construe the clause "except for the payment of expenses as provided in Section 12 of this Compact" to authorize the imposition of any tax, fee, charge, or assessment forbidden under IGRA.

Effective Date of the Compacts

Section 2(vv) provides that the compact goes into effect after all of the following events have occurred: (1) Execution on behalf of the State and the Tribe; (2) approval by the Secretary of the Interior; (3) publication of approval notice in the *Federal Register*; and (4) approval of a new compact for each tribe with a gaming facility in Maricopa, Pima, or Pinal Counties, unless the Governor waives this specific requirement. It is the position of the Department that a compact becomes effective when notice of its approval is published in the *Federal Register* as required by 25 U.S.C. § 2710(d)(3)(B). There can be no subsequent event to the *Federal Register* notice that triggers the effective date of the compact. We have determined that approval in this case is appropriate

because Section 2(vv)(4) is now moot since all Indian tribes with a gaming facility in the listed three counties have entered into a new compact with the State.

Secretarial Review of Amendments

Section 17 of the compacts (Amendments) does not specifically provide that amendments are subject to review and approval by the Secretary of the Interior (Secretary) pursuant to IGRA. It is the position of the Department that compact amendments must be submitted to the Secretary for review and approval to become effective under IGRA. We believe that this is a common sense interpretation of the compact approval requirements of IGRA. Any other construction of IGRA would render the Secretary's approval authority meaningless because it would permit substantive and controversial provisions to escape Secretarial review through the amendment process. Failure of Section 17 of the compacts to specifically address the Secretary's role in the approval of amendments to the compact does not require us to reject the compacts as long as the parties understand that compliance with IGRA requires submission of compact amendments to the Department for review and approval.

Similarly, Section 3(b)(3)(C) provides that amending appendices, or the addition of additional appendices may be agreed upon by the Tribal Gaming Office and the State Gaming Agency, and are not considered amendments to the compacts under Section 17 of the compacts. Although the parties to the compacts can delegate the modification of appendices or addition of appendices to subordinate agencies, we consider that if these modifications are substantive, they are subject to the review and approval authority of the Secretary under IGRA. In our view, it is appropriate for a compact to provide that technical, non-substantive modifications can be agreed upon by the parties without requiring Secretarial approval under IGRA. However, substantive modifications of the terms of a compact must be approved by the Secretary. It is our view that a substantive modification is one that potentially implicates any of the three statutory reasons available to the Secretary to disapprove a compact in the first instance, *i.e.*, whether the provision violates IGRA, any other provision of Federal law, or the trust obligation of the United States to Indians, *See* 25 U.S.C. § 2710(d)(8)(B). For example, a proposed modification that requires the parties to operate under other Federal law, such as the Interstate Horseracing Act, would trigger Secretarial review and approval under IGRA.

We wish the tribes and the State success in their economic venture.

Sincerely,

Aurene M Martin

Acting Assistant Secretary - Indian Affairs

Enclosure

Similar Letter Sent to:

Honorable Terry Enos
Chairperson, Ak-Chin Community
42507 W. Peters & Nall Road
Maricopa, Arizona 85239

Honorable Sherry Cordova
Chairperson, Cocopah Indian Tribe
County 15th & Avenue G
Somerton, Arizona 85350

Honorable Clinton M. Pattea
President, Fort McDowell Yavapai Nation
P.O. Box 17779
Fountain Hills, Arizona 85268

Honorable Nora Helton
Chairperson, Fort Mojave Indian Tribe
500 West Merriman
Needles, California 92363

Honorable Donald Antone, Sr.
Governor, Gila River Indian Community
P.O. Box 97
Sacaton, Arizona 85247

Honorable Louise Benson
Chairwoman, Hualapai Indian Tribe
P.O. Box 179
Peach Springs, Arizona 86434

Honorable Agnes Chamberlaine
Chairperson, Havasupai Indian Tribe
P.O. Box 10
Supai, Arizona 86435

Honorable Carmen M. Bradley
Chairperson, Kaibab Band of Paiute Indians
HC65 Box 2
Pipe Spring, Arizona 86022

Honorable Joe Shirley
President, Navajo Nation
P.O. Box 9000
Window Rock, Arizona 86515

Honorable Robert Valencia
Chairman, Pascua Yacqui Tribe
7474 S. Camino De Oeste
Tucson, Arizona 85746

Honorable Mike Jackson, Sr.
President, Quechan Indian Tribe
P.O. Box 1899
Yuma, Arizona 85633

Honorable Ivan Makil
President, Salt River Pima-Maricopa
Indian Community
10005 East Osborn Road
Phoenix, Arizona 85256

Honorable Kathleen Wesley Kitcheyan
Chairperson, San Carlos Apache Tribe
P.O. Box 0
San Carlos, Arizona 85550

Honorable Edward D. Manuel
Chairperson, Tohono O'odham Nation
P.O. Box 837
Sells, Arizona 85634

Honorable Vivian L. Burdette
Chairperson, Tonto Apache Tribe
Tonto Apache Reservation #30
Payson, Arizona 85541

Honorable Dallas Massey, Sr.
Chairman, White Mountain Apache Tribe
P.O. Box 1150
Whiteriver, Arizona 85941

Honorable Aaron Russell
Chairman, Yavapai-Apache Nation
2400 West Datsi Street
Camp Verde, Arizona 86322

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 25 2003

Honorable Harold "Gus" Frank
Chairman, Forest County Potawatomi Community
P.O. Box 340
Crandon, Wisconsin 54520

Dear Chairman Frank:

On February 20, 2003, we received the 2003 Amendments (Amendments) to the Forest County Potawatomi Community of Wisconsin (Community) and State of Wisconsin Gaming Compact of 1992, as amended December 3, 1998, executed on February 19, 2003. On April 4, 2003, we received amendments to the original submission deleting a proposed 50-mile radius exclusivity zone aimed at other Class III Indian gaming facilities, and modifying proposed Section IV.A.8. of the Compact by deleting references to gaming facilities in neighboring states.

Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary of the Interior (Secretary) may approve or disapprove the Amendments within forty-five days of their submission. If the Secretary does not approve or disapprove the Amendments within forty-five days, IGRA provides that the Amendments are considered to have been approved, but only to the extent that they are consistent with the provisions of IGRA. Under IGRA, the Secretary can disapprove the Amendments if she determines that the Amendments violate IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

We have completed our review of the Amendments, along with the submission of additional documentation submitted by the parties and a number of third parties. Pursuant to Section 11 of IGRA, we have decided to allow the 2003 Amendments to take effect without Secretarial action for the following reasons.

Scope of Gaming

Under the 2003 Amendments, Section IV.A of the Compact is amended by adding, *inter alia*, electronic keno, roulette, craps, poker and similar non-house banked card games, and games played at blackjack style tables. We need to determine whether the inclusion of these gaming activities in the Compact complies with the requirements of Section 11(d)(1)(B) of IGRA. In our view, whether the addition of electronic keno and casino table games complies with Section 11(d)(1)(B) of IGRA, 25 U.S.C. § 2710(d)(1)(B), which requires that such gaming activities be permitted in the State of Wisconsin "for any purpose by any person, organization, or entity" is an unsettled issue. As you are

well aware, the scope of gaming question is one of the issues raised in the state court litigation in *Dairyland Greyhound Park v. Doyle,* No. 01-CV-2906. In addition, we understand that a petition has been filed with the Wisconsin Supreme Court on April 2, 2003, by the Majority Leader of the Wisconsin Senate and the Speaker of the Wisconsin Assembly seeking a declaratory judgment on several issues relating to the 2003 Amendments, including the permitted scope of gaming in the State. Although we are mindful that in the *Dairyland* case, the Dane County Circuit Court has ruled in favor of the Governor, the decision has been appealed to an intermediate court which is unlikely to be the final appeal of the case within the State court system. As a result, we believe that the best alternative available to the Department of the Interior (Department) under IGRA is to have the 2003 Amendments go into effect by operation of law.

Revenue-Sharing Provisions

As you may be aware, the Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide the tribe with substantial exclusivity for Indian gaming, *i.e.*, where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State.

The 2003 Amendments substantially modify Section XXXI of the Compact. When Section XXXI (Payment to the State) was added to the 1992 Compact as part of the 1998 Amendments, it provided for a payment of $6,375,000 per year for the duration of the term of the Compact (five years) in exchange for exclusive rights to conduct electronic games of chance (with mechanical or video displays), blackjack, and pull-tabs. Section XXXI.G. of the 2003 Amendments requires the Community to pay considerably more money to the State in exchange for the exclusivity agreement in proposed amended Section XXXI.B. of the Compact, *i.e.,* the addition of variations to the game of blackjack, pari-mutuel wagering on live simulcast of horse, harness, and dog racing events, electronic keno, and certain casino table games. We are uncertain whether the addition of these Class III gaming activities is worth the payment of $34,125,000 in 2004, $43,625,000 in 2005 (in addition to payments of $6,375,000 in 2003 and 2004). Starting in 2005, the Community is required to pay between 6% and 8% of net win, depending on the year, until 2011, when a permanent 6.5% payment of net win takes effect. The Community has reassured us that it will receive the benefit of the bargain, and has provided credible financial projections that indicate that it will be able to afford the payments.

The financial projections provided by the Community indicate that net revenues are expected to substantially increase under the 2003 Amendments. However, it is not clear to us that this increase is solely due to the exclusivity agreement in Section XXXI.B. of the Compact. We believe that it may also be due to the proposed modifications of other sections of the Compact, especially the elimination of the ceiling on the number of electronic gaming devices. In this context, we note that gaming revenues have tripled as a result of the increased number of machines and tables authorized

in the 1998 Amendments, which had no change in the scope of gaming. It is the position of the Department to permit revenue-sharing payments in exchange for *quantifiable* economic benefits over which the State is not required to negotiate under IGRA, such as substantial exclusive rights to engage in Class III gaming activities. We have not, nor are we disposed to, authorize revenue-sharing payments in exchange for compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities, such as duration, number of gaming devices, hours of operation, and wager limits.

We are pleased that the parties removed the proposed amendment to Section XXXI.B of the Compact which was designed to protect the Potawatomi Bingo and Casino on the Menomonee Valley Land from competition within a 50-mile radius, including competition from other Indian tribes. As we stated in our November 12, 2002, letter to Governor Pataki and President Schindler, refusing to affirmatively approve the proposed Class III gaming compact between the State of New York and the Seneca Nation of Indians, we find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA. We are also pleased that the parties engaged in a productive dialogue with us regarding this matter during consideration of the 2003 Amendments by the Department.

Conclusion

Our decision to neither approve nor disapprove the 2003 Amendments within 45 days means that the 2003 Amendments are considered to have been approved, "but only to the extent they are consistent with the provisions of [IGRA]." The 2003 Amendments will take effect when notice is published in the FEDERAL REGISTER pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

Sincerely,

Acting Aurene M Martin
Assistant Secretary - Indian Affairs

Similar letter sent to: Honorable Jim Doyle
Governor of Wisconsin
State Capitol
Madison, Wisconsin 53707

Prairie Band Potawatomi Nation
Government Center

Statement of

Zachariah "Zach" Pahmahmie
Chairman
Prairie Band Potawatomi Nation

Before the

Committee on Indian Affairs
United States Senate

July 9, 2003

Good Morning Chairman and members of the Committee. My name is Zachariah Pahmahmie and I have the pleasure of serving as the Chairman of the Prairie Band Potawatomi Nation. Thank you for the opportunity to speak to you today about an issue of tremendous importance in Indian Country – the use and sharing of gaming revenues. In my time allotted, I hope to share a brief glimpse into the many ways we have used gaming revenues to strengthen the economic and social health of our Nation. I will also discuss how our Nation – in the absence of a formal revenue sharing agreement – has shared the benefits of our gaming revenues with the State of Kansas, surrounding cities and counties, and local organizations.

BACKGROUND

Our reservation is located 20 miles north of Topeka, Kansas, and 80 miles northwest of Kansas City, Missouri. Our 4,500-member Nation is governed by a General Council – consisting of all eligible voters over the age of 18. Our General Council elects a seven member elected Tribal Council to oversee the daily governing and administration of our Nation. The General Council also elects a five-member gaming commission responsible for regulating all gaming activities under Title 12 of our Law and Order Code.

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In 1993, our Nation, along with the three other Kansas federally-recognized Indian nations, presented the State of Kansas with a proposed compact. During the 1995 legislative session, the Legislature approved a compact between the State and the Potawatomi Nation.

On October 25, 1996, we opened a temporary casino on our reservation, south of Mayetta, Kansas. Then, in January 13, 1998, in partnership with Harrah's Kansas Casino Corporation, we opened our current Harrah's Prairie Band Casino. The casino is located in the southeastern quadrant of the reservation at the junction of Highway 75 and Road 150, approximately 15 miles north of Topeka, Kansas.

WHAT GAMING HAS MEANT TO THE PRAIRIE BAND POTAWATOMI NATION

The impact of the casino on our Nation cannot be overstated – it has given us the very means with which to exercise our sovereign rights of self-government. Our General Council has mandated that 43 percent of all gaming revenues be applied toward the economic development of our Nation. Toward this end, we have used our gaming revenues to strengthen three core ingredients of a strong economy – a sound physical infrastructure, stable political institutions, and a healthy, educated workforce.

Physical Infrastructure

Prior to gaming, our Nation owned only 18 percent of the land within our reservation boundaries. With land purchases financed by gaming revenues, we now own 60 percent of our reservation land. This has translated into greater sovereign control over the development and management of our resources, new housing, increased opportunities for economic development, and the satisfaction that comes with providing a lasting gift to future generations of Potawatomi.

Our physical infrastructure improvements include upgrading our bridges, roads, building our first police and fire stations, and developing a new waste water treatment plant.

Pavement of nine miles of Road 158 marked the first paved road on the reservation. In 2001, the Nation completed $2 million worth of improvements to seven miles of roads. This work was part of our five-year Road Improvement Plan, a project that will blacktop, or chip and seal, a total of 35 miles of key roadways. Over the past six years, we have used gaming revenues to finance and build seven bridges to replace deficient and unsafe structures that did not meet BIA guidelines. Projects like these promote tourism, create jobs and enrich our business environment and quality of life. With these and other infrastructure improvements now in place, we are planning future economic activities that are not dependent on gaming.

We have also placed a priority on strengthening our stock of affordable housing. For years, our elders have lived in substandard conditions while our youth were forced to leave the reservation entirely. Gaming revenues and the leveraging of these monies have allowed us to construct apartment buildings and homes for our members and special housing for our elders. We have added 41 new housing units on the reservation for leasing to our members. In the next few months, we will provide 40 new units on a lease or lease-to-own basis. We have also replaced eight substandard homes for senior citizens with brand new manufactured homes. Beyond fulfilling a basic human need, this new housing provides a reason for young members to return to the reservation to live, work and raise their families. We are also able to assist our members who choose to live off the reservation by helping with down payments for home purchases and costs of renovations.

Stable Political Institutions

The leadership of the Prairie Band of Potawatomi recognizes that successful economic development depends on strong and stable government institutions. To this end, we have earmarked gaming revenues to strengthen the powers and jurisdiction of our tribal courts. We have supplemented our court budgets with gaming revenues to ensure that our courts function at their most effective level. Soon, our court system will conduct its first jury trial.

Education and Social Services

The benefits of our gaming revenues are reaching individual tribal members. Prior to gaming, there was financial aid to assist only 30 to 40 graduating students seeking college education. Today, thanks to gaming revenues, our Nation is able to assist 140 of its students in their pursuit of college and graduate degrees. By facilitating the education of our youth, gaming has strengthened the foundation for our Nation's future growth and development.

Finally, we have used gaming revenues to deepen our provision of social services. For example, our Early Childhood Education Center offers an array of comprehensive services, including child care, Head Start and early intervention programs. Unfortunately, space constraints prior to gaming limited us to serving only 20 children. Today, thanks to a gaming-financed Center expansion, we now serve 102 children. Gaming revenues also financed the construction of a new, state-of-the-art Elder Center. The Elder Center serves 60 to 70 meals five days a week and provides weekly transportation for seniors to do their grocery shopping. On a day-to-day level, gaming revenues promote continued quality programming, staff retention, and necessary equipment upgrading. These improvements have transformed in a fundamental way the morale of many of our members, both young and old alike, and have solidified our community.

We have even launched a language preservation program. The importance of this program is impossible to measure. Our language is interrelated with our culture and religion. Our gaming revenues help perpetuate the existence of the Prairie Band Potawatomi people by helping us continue the learning and use of our language and, hence, the practice of our culture and religion.

As I said earlier, the impact of gaming on our Nation extends beyond the bottom line. After years of scrambling to create jobs for our members or write grants to the federal government, gaming revenues have provided us with a stable base upon which to chart and plan our own future. The success of the casino has expanded our vision of what is possible

and given our citizens – especially our youth – the confidence to turn these visions into reality.

HOW THE PRAIRIE BAND POTAWATOMI NATION HAS CONTRIBUTED TO THE STATE OF KANSAS AND SURROUNDING COUNTIES

Background on Compact Process

I would like to talk for a moment about the impact of our Nation's gaming enterprise on the State of Kansas and surrounding local governments. As this committee is aware, our Nation does not have a formal revenue sharing provision as part of its compact with the State of Kansas. In light of much-publicized revenue sharing negotiations in other parts of the country and the hearing here today, some members of this Committee may be interested to learn why our compact with the State of Kansas does not include a revenue sharing provision. Although I was not involved in the actual compact negotiations, my understanding is that the State would not agree to provide the four federally-recognized Kansas tribes with exclusivity in return for revenue sharing.

I believe that revenue sharing was not a "make or break" issue because the State recognized that it would enjoy significant benefits from the increased economic activity of our Nation's gaming enterprise. Indeed, the Policy and Purpose section of our compact affirms that "the State's interests in Class III gaming include … its economic interest in raising revenue for its citizens. The economic benefits from tribal gaming include increased tourism and related economic development activities which would generally benefit all of northeastern Kansas and help foster mutual understanding and respect among Indians and non-Indians."

Job Creation

In the eight years since the signing of our compact, this prediction has proven to be true in practice. The State of Kansas as well as surrounding cities and counties have benefited in

significant fashion from the casino's growth. Our casino has 916 employees, which makes the casino the largest employer in Jackson County. The overwhelming majority of the casino's employees – 91 percent -- are non-tribal members. To put this in perspective, if an outside company were to come to the area with only 100 jobs, it would immediately become the second or third-largest employer in the county.[1] Our current $55 million hotel and event center expansion at our casino will add approximately an additional 150 new jobs. We have selected a Kansas owned and operated construction company, Manning Prosser Wilber, as the general contractor for the expansion. Because of our progress, job creation has occurred throughout our Nation in areas other than the gaming facility, such as with our roads and fire departments, child care and elder care programs, accounting and administrative offices, some of which are held by non-tribal members. Further, we believe our progress has spurred job creation off the reservation in Jackson County and neighboring areas.

Economic Contributions

Importantly, our contributions to the local and state economies extend far beyond the hundreds of jobs we have created. From 1998, when we first opened our temporary casino, through 2002, our casino has:

- Purchased approximately $29 million worth of products from over 500 Kansas vendors and suppliers
- Paid over $8.9 million to the State of Kansas in income taxes withheld from the payroll of casino employees
- Paid $600,000 to the State of Kansas in unemployment taxes withheld from the payroll of casino employees (1999-2002 only)
- Paid over $156,000 in state liquor taxes
- Paid over $856,000 to the Kansas State Gaming Agency.[2]

[1] From Jonathan Wimer, Executive Director of the Jackson County Development Corporation.
[2] Figures from the Casino Finance Department.

At the same time, our casino has attracted more than six million visitors since its opening, and has been the No. 1 tourist destination in the State of Kansas for the last four years.[3] Casino visitors – along with the hundreds of casino employees living in Jackson and Shawnee counties – stay at local hotels, frequent local restaurants, and purchase items from local businesses. Our facility has attracted out of state tourists and vacationers who contribute to the local economy. This increased local activity has propelled Jackson County from the bottom half of Kansas' 105 counties when measured for economic performance to one of its top ten. Further, the gaming facility has helped revitalize the towns along the Route 75 corridor, which runs from Kansas to Iowa. Where there once was economic decline, there is now growth.

To be sure, the State of Kansas has benefited from the additional and significant sales tax revenues generated by this increased economic activity. At a time when the State of Kansas, like many states, has been experiencing economic contraction and budgetary crises, the Prairie Band Potawatomi Nation continues to provide a strong economic stimulus. ***Again, our Nation is generating and sharing millions of dollars in increased economic activity in the absence of a formal revenue sharing agreement with the State of Kansas.***

Charitable Contributions

Although they are not here with us today, I would venture to say that surrounding counties would testify that the Prairie Band Potawatomi has been a good neighbor. In recent years, our Nation has contributed hundreds of thousands of dollars to local organizations, including $100,000 to the September 11th relief, $200,000 to the Royal Valley High School (which serves tribal and non-tribal youth), $100,000 to Let's Help Topeka, $50,000 to the Battered Women's Task Force, $50,000 to Hoisington, Kansas tornado relief efforts, and $50,000 to the Topeka School system. We have also made contributions to dozens of local charities, including the American Cancer Society, Topeka Habitat for Humanity, and Crime Stoppers of Topeka.

[3] From Kansas Department of Housing and Commerce.

Finally, I would like to emphasize that the Prairie Band of Potawatomi Nation enjoys a very good relationship with both the State of Kansas and Jackson and Shawnee Counties. We meet regularly with both the county tourism council and the Jackson County Commission to discuss issues of mutual concern. In many ways, gaming has opened invaluable lines of communication between our nation and surrounding governments. We believe that this type of dialogue will continue to produce mutually beneficial solutions to common concerns.

CONCLUSION

Even though no formal revenue sharing agreement exists between our Nation and the State of Kansas, both sides have benefited from the substantial increase in jobs, business activity and tax revenues produced by our gaming enterprise. We are proud of our progress. We believe the Nation to be a good neighbor and solid partner, and are confident that our strong relationship with the State of Kansas and surrounding city and county governments will continue long into the future.

Thank you.

Testimony of
Brenda Soulliere
Chairperson
California Nations Indian Gaming Association
1215 K Street, Suite 1020
Sacramento, CA

Hearing of the
United States Senate
Committee on Indian Affairs
on the
Indian Gaming Regulatory Act

July 9, 2003

Thank you, Chairman Campbell, for the opportunity to provide testimony before your distinguished Committee. I want to thank you on behalf of our CNIGA member Indian tribes for having the foresight and vision to hold this hearing on the Indian Gaming Regulatory Act (IGRA) and a number of important issues related to the Act.

Mr. Chairman, I am Brenda Soulliere, Chairperson of the California Nations Indian Gaming Association, or CNIGA. I am also an enrolled member of the Cabazon Band of Mission Indians near Indio, CA. I have served my tribe in a number of different positions over the past 25 years. From 1981 to 2001, I held the elected office of the First Vice Chairperson, and actively participated during the most trying times when Cabazon made a number of attempts at economic development in order to build its tribal government.

CNIGA is an intergovernmental association composed of 58 sovereign Indian tribal governments in California. Our CNIGA statement of purpose includes two principles that we believe to be critical to achieving the long-term goals of tribal governments and tribal government gaming. First, to protect and promote tribal government gaming; and second, to protect tribal sovereignty. To advance these principles, CNIGA works closely with our member tribal governments, the State of California as well as the federal government.

In 1987, the U. S. Supreme Court ruled in favor of Indian tribes in the Cabazon case, affirming the inherent right of Indian tribal governments to engage in gaming to stimulate economic development for their communities, and as a means to strengthen tribal governments. Since then, some 200 Indian tribal governments have pursued government gaming in some form to generate revenues that enable them to finally fulfill their governmental obligations.

We understand that your Committee has two primary areas of interest it seeks to have addressed in this hearing: first, the process by which states and tribes negotiate agreements to share Indian gaming revenues; and second the use of those revenues. I will address these issues in turn.

Tribal government gaming in California - A Background

Class III tribal government gaming in California has provided our Indian tribes with a unique experience and perspective. While Indian tribes in other states were able to negotiate their tribal/state gaming compacts in relatively rapid fashion, it was not an easy path that we took in California on the way to a compact agreement with the state in September 1999. Our compacts finally took effect upon its publication in the *Federal Register* in May 2000. But not before taking the tribes through two statewide elections, including one that amended the state constitution to allow for the conduct of casino-style, government gaming by Indian tribes on Indian lands.

There are 107 federally recognized Indian tribes in the State of California. Today, 61 of these tribes have entered into compacts with the state as required by IGRA. Of those that have compacts, 53 currently have government gaming operations.

Just as IGRA anticipated, the tribal/state gaming compact reflects the unique tribal environment that is in California. First, we have a revenue sharing provision in our compact that makes it possible for every federally recognized Indian tribe in the state to benefit from the conduct of Class III gaming, whether they chose to open a gaming facility or not. The compact provides for up to $1.1 million annually for each Indian tribe that qualifies for the benefits under the Revenue Sharing Trust Fund (RSTF) provision of the compact.

In addition, the Special Distribution Fund (SDF) was created in the compact to help local communities and governments mitigate impacts from tribal government gaming. It is projected that the SDF will generate some $100 million each year for the remaining 17 years of the current compact term.

Beginning in 2003, our gaming compact provides for certain provisions to be revisited under specific circumstances. There are two specific circumstances which would likely lead to renegotiation of compact terms. In one circumstance, if a tribe still has not resolved environmental issues in the development of a gaming facility, that tribe would likely be required to renegotiate that provision of the compact. In another circumstance, if a tribe wishes to operate more than the 2,000 gaming devices that is allowed under the existing compact, then that tribe would have to renegotiate that provision with the state. If an Indian tribe with a gaming compact has no outstanding environmental issues, or does not desire to operate more than 2,000 gaming devices, that tribe would not be legally obligated to renegotiate its gaming compact. On Wednesday, July 2, Governor Davis addressed our member Indian tribes and stated that no Indian tribe is compelled to renegotiate its gaming compact with the state. He stated that if a tribe is satisfied with its current gaming compact agreement, it may choose to keep its current compact.

Approximately four months ago, Governor Davis made an initial demand to the tribes for $1.5 billion in annual revenue sharing payments to help the state out of a deficit situation that some experts have estimated to be as high as $38 billion. Under this scenario, every Indian tribe with an existing compact, and every tribe requesting a new compact, would be required to negotiate a new revenue sharing agreement that would provide revenues for the state's general fund. The Governor has since reduced his initial $1.5 billion demand to some $680 million in new revenue sharing from the tribes.

Unfortunately, the extremely generous revenue sharing provision in the compact between the Mashantucket Pequots and the State of Connecticut set an unreasonable precedent from which other state governments have begun to shape their demands for revenue sharing from Indian tribes. As more and more state governments face budget deficits, they are looking to tribal government gaming as a source to close those deficits. In California, that precedent clearly guided Governor Davis' thinking, as he referred to the Connecticut revenue sharing provision as a model that he wanted to pursue as a part of his justification for the initial demand of $1.5 billion from Indian tribes.

Tribal-State Negotiations Regarding Sharing Indian Gaming Revenues

Congress provided that IGRA's primary purpose was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Congress also declared its intention that the tribe "is the primary beneficiary of the gaming operation ..." *Id.* at § 2702((2). "After lengthy hearings, negotiations and discussions," Congress "concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises ...." S. Rep. No. 446, 100th cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071. IGRA's legislative history noted, "the compact process is a viable mechanism for setting various matters between two equal sovereigns." *Id.*

In describing the types of provisions that could be included in tribal-state compacts, Congress expressly authorized "taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities." 25 U.S.C. sec 2710 (d)(3)(C)(iv). Many of the non-gaming issues included in existing compacts nationwide were added under duress, or made as a compromise between two governments. Each Indian nation and each state has unique circumstances and relationships. CNIGA believes that the current compacts its members have with the State of California reflects the unique circumstances and history of the California tribes.

Tribal-state gaming compacts should reflect the will of the citizens of the Indian Nation and the state, not the parameters of a cookie-cutter document. CNIGA believes that the trend of adding or increasing revenue sharing provisions to tribal-state compacts misreads IGRA. Today, it seems that revenue sharing has become simply the cost of doing business for Indian nations. This view is unacceptable to CNIGA's member tribes.

Revenue sharing was not contemplated in IGRA. While Congress did anticipate that states may want to benefit directly from Indian gaming, they made it clear that states could not use revenue sharing as a bargaining chip in compact negotiations when they wrote that, "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivision authority to impose any tax, fee, charge or other assessment upon an Indian tribe ...." *Id.* at § 2710(d)(4). Indeed, IGRA expressly provides that "No State may refuse to enter into [compact] negotiations ... based upon the lack of authority in such State, or its political subdivision, to impose such a tax, fee, charge, or other assessment." *Id.* Thus, Congress expressed its intent quite clearly in IGRA: the revenues from tribal government gaming were intended to benefit tribes and not the states or their political subdivisions.

Congress did allow compacts to provide for "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such [tribal government gaming] activity." 25 U.S.C. § 2710 (d)(3)(C)(iii). Of course, states do not always participate in Indian gaming regulation.

Congress also provided for revenue sharing payments to local governments directly impacted by tribal gaming activities.

While the Department of Interior has not issued a rule regarding these types of revenue sharing, there does seem to be a standard threshold that they use to determine whether or not a given compact will be approved. The informal guidelines established by the Department of Interior precedent are these:

1) There must be an obvious relationship between the revenue sharing payment and the state's regulatory costs. IGRA Sec. 11(d)(3)(C)(iii) provides that a tribal-state compact may include provisions requiring a tribe to "defray the costs of regulating such activity," i.e. Payments to the state intended to reimburse the state for some or all of the costs it incurs due to regulatory activities undertaken pursuant to the compact. Thus far, the BIA has taken a clear and simple position on the interpretation of this provision of IGRA: That the amounts of such regulatory fees must be based on an accounting which establishes the state's actual cost of regulating tribal gaming activities, or a reasonable estimate of the actual costs.

2) Revenue sharing payments for local governments must bear some relationship to actual costs directly related to class III gaming that accrue to local governments. IGRA Sec. 11(d)(3)(C)(iii) provides that a tribal-state compact may also include "any other subjects that are directly related to the operation of gaming activities." This provision has been the justification for compact provisions agreed to by some tribes wherein payments are made to states or local governments that have undertaken new or expanded governmental programs and services

> as a direct result of tribal class III gaming activities. Similar to regulatory fees, the BIA also takes a clear and simple position on the interpretation of this provision of IGRA: that the amount of such impact payments must be directly correlated to actual or estimated expenses borne by those governments.

In addressing revenue sharing provisions, the Department of Interior generally has only approved revenue sharing provisions when a compact provides "substantial economic benefits" to a tribe through "more favorable terms than any rights of non-Indians to conduct similar gaming activities in the state." In the opinion of the Department of Interior, without a corresponding economic benefit, a revenue sharing provision is merely a tax that is prohibited by IGRA Sec. 11 (d)(4). The clearest example of substantial economic benefits exists where, under a tribal-state compact, a tribe plainly has the exclusive right to conduct Class III gaming throughout the state on more favorable terms than any non-Indian persons or entities. The Department of Interior's informal precedents also imply that any revenue sharing provisions must be contingent upon the exclusivity or limitations providing the economic benefit, where it can be argued that tribal governments are "purchasing a valuable right from the state." **Thus a compact must provide that revenue sharing will cease if the state decides to authorize or expand non-Indian Class III type gaming that would compete with tribal Class III gaming, or the Secretary would not approve the compact.**

When Congress enacted IGRA, a tribe could sue a state for bad faith negotiations if the state insisted on, among other things, revenue sharing above and beyond the actual costs of state regulation. However, the Supreme Court upset Congress' plan in the case of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). There the Court struck down IGRA's provision allowing tribes to sue states for failure to negotiate in good faith, or complete failure to negotiate at all. As a result, state governments have violated Congress' will by demanding that tribes share their government gaming revenues – over and above the reimbursement of the actual cost of regulation permitted by IGRA. If tribes could sue states as Congress intended, a state's demand for revenue sharing would be evidence of bad faith negotiations. As matters now stand, a dozen or more states have extracted revenue sharing from tribes. The *Seminole* decision has placed tribes in a very difficult bargaining position.

For various reasons, including the *Seminole* decision and state budget shortfalls unrelated to tribal government activity, state governments now consider revenue sharing to be a right in their compact negotiations with tribal governments. However, this strategy overlooks the fact that regardless of what states and tribes want, the ultimate authority with regard to tribal-state compacting lies with the Secretary of the Interior, who must approve or disapprove all compacts after determining whether they violate IGRA. To date, the Secretary has used informal means and relied upon the legal opinions of the Solicitor's Office in determining whether revenue sharing, regulatory fees, or impact payments contained in tribal-state compacts exceed the legal limits of IGRA.

Perhaps it is now both necessary and appropriate to review the guidelines that the Department of Interior uses when it reviews these revenue sharing proposals in tribal/state gaming compacts. We believe that this review is important as it could serve to highlight the parameters that were contemplated in IGRA. Furthermore, a review could help us to reflect on the federal government's legal trust responsibility towards tribes as it affects the protection of tribal government gaming revenues under compact with state governments.

The Uses of Revenues From Tribal Government Gaming

There is little argument that revenues generated by tribal government gaming conducted on Indian lands have provided unprecedented opportunities for tribal governments to begin meeting their basic obligations. Congress mandated in IGRA that the revenues from tribal government gaming be used for the following purposes:

1. **Strengthen tribal government** – There is not a single Indian tribe conducting gaming on its lands that has not set as its first priority, direct efforts to develop or enhance its ability to govern within its jurisdiction. All over the country, Indian tribes are using their government revenues to bolster tribal judicial systems, elevating the capabilities of their tribal councils, establishing ordinances that outline tribal governmental powers and authorities to oversee economic development, and a host of other activities that enhance their governance capabilities.

2. **Develop a tribal economy** – Tribal governments recognize that the creation of jobs is among the most pressing needs of the tribal community. Tribal governments accept that the development of a diversified tribal economy is fundamental to that goal. However, in order to create that economy, the necessary physical infrastructure must be in place to support it, and that is where tribal governments are putting their emphasis now. The physical infrastructure will soon be followed by the creation of new businesses owned and operated by the tribe and individual Indian entrepreneurs. No one suggests that tribal economic development is anything other than a long-term task requiring a long-term commitment by the tribal government. This important task will require more time before we can judge how effective the effort is.

3. **Provide for the general welfare of its tribal members** – Indian tribes have finally been able to fulfill their governmental obligations to provide real programs and services that benefit tribal members and their families. It is gratifying to know that our tribal youth have better educational opportunities today than ever before, that our tribal elders can continue into old age without the uncertainties that have plagued them in the past, and tribal adults finally are able to have jobs with wages and benefits that are capable of supporting their families. Clearly, the future is just a little brighter because of tribal government gaming.

4. **Pay for intergovernmental agreements** – IGRA anticipated that tribal governments would pay for services that may be provided by state or local governments, including law enforcement, fire protection, public safety, and others. There are numerous

arrangements already in place for these purposes. There are also numerous examples of how these intergovernmental agreements have aided in bolstering the capabilities of such governmental units as police and fire departments by providing for new equipment, new personnel and others.

5. **Contribute to charitable organizations** – Following the September 11, 2001 attacks on our country, California Indian tribes, in a matter of 4 days, raised more than $1 million to help the Red Cross and other relief organizations with their work in New York City, Washington, DC and Pennsylvania. Financial assistance for local and national charitable groups has been an important commitment since the beginnings of tribal government gaming and will continue to be an important part of sharing for Indian tribes.

Thank you for the opportunity to give my statement. I would be happy to answer any questions you may have.

CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION

1215 K Street
Suite 1020
Sacramento, CA
95814

phone 916-448-8706
fax 916-448-8758
www.cniga.com

July 28, 2003

The Honorable Ben Nighthorse Campbell
Chairman
United States Senate - Committee on Indian Affairs
838 Senate Hart Office Building
Washington, DC 20510

Dear Chairman Campbell:

On behalf of the member Indian nations of the California Nations Indian Gaming Association (CNIGA), I am pleased to extend our appreciation for the opportunity I had to provide testimony at the July 9, 2003 Committee hearing on IGRA and issues relating to revenue sharing with state governments. As a follow-up to the hearing, you've requested additional, specific information on tribal government gaming in California and I am happy to provide you with our responses in the attached document to the questions you posed.

Please contact our CNIGA Executive Director Jacob Coin in Sacramento, CA at (916) 448-8706 if you should need additional information, or have any questions regarding the attached.

Kindest regards,

Brenda Soulliere
Chairperson
California Nations Indian Gaming Association

Jul-29-03 04:30pm From-1234 T-216 P.003/007 F-147

CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION

1215 K Street
Suite 1020
Sacramento, CA
95814

phone 916-448-8706
fax 916-448-8758
www.cniga.com

California Nations Indian Gaming Association's
Responses to Questions
from
The Honorable Ben Nighthorse Campbell
Chairman
U. S. Senate Committee on Indian Affairs
Washington, DC

Below are answers and related information to questions that were presented to CNIGA by the Honorable Chairman Campbell of the Senate Committee on Indian Affairs. The questions were a follow-up to the July 9, 2003 Committee hearing on IGRA and issues relating to revenue sharing with state governments. The responses below are specific to our situation in California.

1. **The California tribal compacts are rather complicated but I have been impressed with several of the provisions in them, particularly the revenue sharing for non-gaming tribes. I understand that provision was placed in the compacts by the gaming tribes.**

   QUESTION: What was the motivation to include that provision?
   CNIGA Response:
   The Indian tribes themselves offered the idea and commitment to share tribal government gaming revenues with federally-recognized, non-compacted Indian tribes in California. In fulfilling that commitment, the tribes made allowances for revenue sharing among the tribes in the compact at **Section 4.3.2. Revenue Sharing with Non-Gaming Tribes.** Moreover, the fund from which the eligible tribes receive the shares was established at **Section 4.3.2.1. Revenue Sharing Trust Fund**, of the compact.

   In order to be eligible to receive benefits from the Revenue Sharing Trust Fund, an Indian tribe must have no gaming, or have a Class III government gaming enterprise with fewer than 350 gaming devices in operation. The compact, at **Section 4.3.2. (i)**, specifies that an Indian tribe with fewer than 350 devices is a part of a group of "Non-Compact Tribes" for the purposes of the Revenue Sharing Trust Fund.

   The decision to share revenues was born out of the tribes' philosophy to share among the tribes. The underlying belief is that all tribes -- gaming, non-gaming, and tribes with small, financially marginal casino operations -- should benefit from tribal government gaming.

QUESTION: How many tribes receive the revenue sharing funds?
CNIGA Response:
The California Gambling Control Commission (CGCC) is the designated state government agency responsible for administering the Revenue Sharing Trust Fund as provided in **Section 4.3.2. (a) (ii)** of the compact. According to **Section 4.3.2.1. (b)** of the compact, the CGCC is to make distributions to eligible Indian tribes in equal shares on a quarterly basis.

A report issued by the CGCC for the most recent quarter, March 1 to June 31, 2003, for which a distribution from the Revenue Sharing Trust Fund was made to the tribes indicates that 71 tribes were eligible to receive benefits from the Fund for that quarter. The report indicates that each eligible tribe received $95,172.06 for the quarter ending June 30, 2003.

The tribes' eligibility to receive benefits from the Revenue Sharing Trust Fund is determined each quarter by the CGCC.

2. **I also noticed a pretty generous revenue sharing provision for local governments - $100 million each year. The Department of Interior has stated that revenue sharing with local governments should be related to actual costs borne by those communities.**

QUESTION: Is there any requirement for those governments to show actual costs or impacts, in order to receive the revenue sharing? If so, who makes that determination?
CNIGA Response:
The tribal/state gaming compact establishes the Special Distribution Fund at **Section 4.3.2. (iii)**. Furthermore, the compact determines at **Section 5.0 Revenue Distribution,** that an Indian tribe that was operating gaming devices on September 1, 1999 is obligated to pay into the Special Distribution Fund based on a established scale.

The compact, at **Section 5.2. Use of funds,** specifies that monies in the Special Distribution Fund is to be available to be appropriated by the state legislature for, among other purposes:

(b) grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming;

The compact is specific at **Section 5.2. (e)** that:

"It is the intent of the parties that Compact Tribes will be consulted in the process of identifying purposes for grants made to local governments."

It is estimated that upwards of $100 million will be paid each year by the obligated Indian tribes into the Special Distribution Fund over an 18-year period through 2020.

The process for determining revenue sharing under the Special Distribution Fund to local governments has yet to be determined. That process is currently being developed by the state legislature, with input from all stakeholders including local governments and Indian tribes. The tribes believe that involving all stakeholders in this historic endeavor will encourage the parties to work closely together to find solutions that benefit the larger community.

QUESTION: Do the California tribes reimburse the State for regulatory costs as well? Do you know approximately how much that is?

CNIGA Response:

Yes. The Special Distribution Fund will provide funds to the state's regulatory agencies – the Division of Gambling Control, and the Gambling Control Commission. The specific amounts to each state agency is to be determined by the state legislature, however, the compact specifies, **at Section 5.2. (c)** that the Special Distribution Fund is to provide:

"compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the compact;"

For the fiscal year beginning July 1, 2003 – June 30, 2004, the Division of Gambling Control has requested $9,971,000 in appropriations from the Special Distribution Fund while the Gambling Control Commission's request is $3,344,000. In sum, $13,315,000 is requested from the Special Distribution Fund for the state's regulatory costs for the upcoming fiscal year.

3. **I know from various news reports, that some interest groups are calling the "exclusivity" of the tribal casinos an unfair playing field, even though there are non-Indian "card rooms" already allowed under state law.**

QUESTION: What games and machines can the tribes offer that these card rooms cannot?
CNIGA Response:
The electorate in California voted by a 65 percent majority to amend the State Constitution in March 2000. The Constitution was amended to permit the Governor:

"...to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." Cal. Const. Art. 4, sec. 19 (f).

The card rooms are not permitted to offer Class III or casino style gaming under current state law.

QUESTION: What would be the consequences under your compacts if the State were to allow these card rooms to offer the games and machines that the tribes can offer?
CNIGA Response:
Addendum A to the tribal/state gaming compact (adopted by most if not all California tribes) provides the technical response to the question. **Section 12.4**, as amended, is listed as **Modification 5 in Addendum A** in the compact. It provides that:

"In the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision, or the conclusive and dispositive judicial construction of a statute or the state Constitution by a California appellate court after the effective date of this Compact, that Gaming Devices may lawfully be operated by another person, organization, or entity (other than an Indian tribe pursuant to a compact) within California, the Tribe shall have the right to: (i) termination of this Compact, in which case the Tribe will lose the right to operate Gaming Devices and other Class III gaming, or (ii) continue under the Compact with an entitlement to a reduction of the rates specified in Section 5.1 (a) following conclusion of negotiations, to provide for (a) compensation to

the State for actual and reasonable costs of regulation, as determined by the state Department of Finance; (b) reasonable payments to local governments impacted by tribal government gaming; (c) grants for programs designed to address gambling addiction; (d) and such assessments as may be permissible at such time under federal law."

As a practical matter, however, if the state government were to allow private, for-profit card rooms to offer slot machines, it would be devastating to tribes. Because the private card rooms are located in major metropolitan areas, including the Los Angeles and San Francisco areas, they enjoy an insurmountable geographical advantage over tribal governments. Tribal lands in California are typically located in rural, sparsely populated areas. Tribes are able to compete with privately held urban card rooms largely because of the exclusive right to offer slot machine gaming. Were the urban card rooms allowed to offer slot machines, it would undermine the federal policy purposes embodied in IGRA. For tribes in California, it would render the hope of tribal economic self-reliance to be yet another broken promise.

STATEMENT

OF

JACOB VIARRIAL

GOVERNOR OF THE PUEBLO OF POJOAQUE,

STATE OF NEW MEXICO

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

CONCERNING

DIFFICULTIES OF NEGOTIATING REVENUE SHARING AGREEMENTS

WITH THE STATE OF NEW MEXICO

AND

USE OF GAMING REVENUES BY THE PUEBLO

****

PRESENTED ON

JULY 9, 2003

DIRKSEN SENATE OFFICE BUILDING, ROOM 106

WASHINGTON, D.C.

Honorable Committee:

My name is Jacob Viarrial. I have been the Governor of the Pueblo of Pojoaque for 15 years. The Pueblo is located 20 miles north of Santa Fe, New Mexico.

Thank you for having this hearing. It is a Godsend. It gives the gaming Tribes a chance to explain to Congress all the atrocities that the States are doing to us. How the States are forcing us to give them the money which Congress intended for our Tribal needs.

The States are costing us millions of dollars in the courts and for gaming compacts. These millions of dollars should be used for Tribal needs.

Compact negotiations have become a smokescreen for extortion. At least one of the 13 gaming Tribes in New Mexico has been in contentious gaming negotiations or litigation with the State since 1988.

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Some States tend to use the Mashantucket Pequot-Connecticut compact as a gauge for all gaming compacts. This is wrong. The Pequots have a good location and an enormous population market. The 13 gaming Tribes in New Mexico are mostly in rural or small city areas.

Some States may argue that they have "given" exclusive gaming rights to the Tribes. This is not the case in New Mexico. New Mexico has legalized a wide variety of gaming. The smaller New Mexico population market is covered by a wide variety of Indian and non-Indian gaming establishments. Slot machines are allowed at over 40 fraternal, veteran and non-profit locations. There are 1,200 lottery retailers within the State. The Pueblo of Pojoaque has ten Tribal casino competitors and a State-licensed "racino" within a hundred-mile radius. Three other racinos are

open within the State. The racinos combine slot machines and horse racing.

A new racino is scheduled to open soon. The number of fraternal, veteran and non-profits with slot machine licenses grow annually.

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Essentially, the States have ignored the Indian Gaming Regulatory Act.

The Indian Gaming Regulatory Act says, "... 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."

Yet the States demand hundreds of millions of dollars for a compact.

The problem begins with Interior. Revenue sharing is not part of The Indian Gaming Regulatory Act. Yet, the Interior Department admits that it has a revenue sharing policy. The informal revenue sharing policy is at the root of the revenue sharing problem. The informal policy was not adopted according to the Administrative Procedure Act. No one really knows what the revenue sharing policy is. We have filed a lawsuit against Interior to make them follow the APA and explain the policy so that we all understand it.

Interior says that if the State can be paid for giving the Tribes exclusive rights to gaming. Yet, in 1997, Interior did not require any market studies to show that what New Mexico was demanding was worth what we were forced to pay. Without enforceable rules, the States have run amok. And Interior just stands by.

Please ask Interior about the revenue sharing policy. Maybe you can make heads or tails the way it is applied and the way it has changed over the years.

*****

It would be better if the States were written out of the Indian Gaming Regulatory Act.

The problems begin the day of negotiations. And, as we all know, the Indian Gaming Regulatory Act says that we must negotiate a gaming compact before we can have class III gaming.

In 1995, we negotiated a good-faith compact with the State Governor. Some New Mexico legislators filed a lawsuit challenging the Governor's authority to negotiate. The court agreed with the legislators. The court said that the legislature must be included in the negotiations.

We didn't get a new compact until we agreed to pay the State 16% of our slot machine revenue. The State demanded that their cut comes "off the top." We are not allowed to deduct the costs of making the money before we give the State their cut.

We were treated like a special interest group during the supposed negotiations. The negotiations amounted to us submitting bills to the New Mexico legislature. Then we watched as the different committees hiked the percentages, cut out provisions, and added provisions that didn't have anything to do with the IGRA. The State told us how many hours we could open, that we couldn't offer comps to our customers, we had to share jurisdiction, we couldn't make political donations, and put in many other prohibitions.

Then, the U.S. Attorney said he would close us down if we didn't have a compact after the 1997 legislative session. We signed the 1997 compact and reserved our rights to challenge issues that went against the IGRA.

We started to pay the 16%. Soon our Tribal programs suffered, so we stopped paying the

State. Eventually all of the gaming Tribes refused to pay the 16%. The State sued us in 2000 to make us pay. But the State saw the error of their greedy ways. In 2001, the State offered us a new half-price compact at 8%. But we could only get the new compact if we paid 16% up to the point that we signed the new compacts. The Pueblo of Pojoaque and the Mescalero Apache Tribes refused to pay the 16% backpayment.

The 1997 compacts expire in 2006. If we lose in court, we will have to pay almost $30 million dollars to the State in 2006. We don't have that kind of money.

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The Indian Gaming Regulatory Act says that if a State does not negotiate a compact in good faith, the Tribes can sue that State.

Florida and 25 State Attorney Generals challenged this provision of the IGRA. The lawsuit argued that the IGRA provision violated the 11th Amendment. The United States Supreme Court agreed with Florida's position. Now the Tribes cannot sue the States.

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The Indian Gaming Regulatory Act says if the States do not negotiate a compact, the Tribes can go to the Secretary of Interior and ask for procedures for a gaming compact. My Tribe has looked at not negotiating with New Mexico when they demand so much of our money.
We found out that the Secretary of Interior did issue procedures in 1999. Alabama and Florida challenged these procedures in court. Senator Michael Enzi from Wyoming and Senator Slade Gorton from Washington State offered amendments to prohibit the Secretary from implementing the procedures. So Interior will not implement the procedures while the court case is pending.

Now the Tribes cannot go to the Secretary of Interior when the State negotiates in bad faith.

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The Indian Gaming Regulatory Act says that the only assessment the State can charge is for regulatory activity.

Regulatory costs for the State are around $100,000 per year, but my Tribe is charged over a million dollars per year in addition to the 16%.

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My gaming Tribe will be the first victim to fail in Indian country. The State will have maneuvered us into failing. Without the State's interference, we could be very successful.

Our present compact ends in three years. By that time, we will owe the State almost 30 million dollars. If we don't pay, we cannot get a new compact. If we don't get a new compact, the U.S. Attorney or the national Indian Gaming Commission might want to close us down. And all because the State wants our money.

We would like Congress to set up a procedure to prohibit the U.S. Attorney and the National Indian Gaming Commission from shutting us down if we have not yet resolved our differences with the State.

Only Congress can save us from the inhumane treatment by the States.

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We have spent gaming money the way that Congress intended. We employ 450 people in gaming. We employ 150 minor and adult Pueblo members through gaming money. This year we spent: $280,000 in gaming money on our after-school programs, tutoring and youth activities;

$300,000 in gaming money on day-care programs; $50,000 on foster care; $350,000 in gaming money on scholarships, tuition and books for our post-high school students; $150,000 in gaming money on cultural preservation and expansion of our Tribal buffalo herd; $450,000 in gaming money on our law enforcement program that protects Indians and non-Indians in the Pueblo; $735,000 in gaming money on our cultural program and acquisitions for the museum; $370,000 in gaming money on cultural education programs to keep alive the traditions and arts of the Pueblos; $250,000 in gaming money on our Pueblo Tribal government services; and $1,200,000 in gaming money on utility improvements. We spend millions in gaming money on our economic expansion so that when gaming is gone, we will still prosper.

*****

But wherever we turn, the States have us boxed in because they want our money. Some States say that now that the Tribes are making money, the States deserve their share of that money. This is wrong. We deserve what we earn. We have suffered enough over the centuries. Let us prosper for awhile. Must our resources always be taken for the benefit of others?

The States have proven that they are a detriment to Indian gaming. Please get the States out of The Indian Gaming Regulatory Act.

GOVERNOR
Jacob Viarrial

LIEUTENANT GOVERNOR
George Rivera

SECRETARY
Linda Diaz

TREASURER
Jo Speer

PUEBLO OF POJOAQUE

GOVERNOR'S OFFICE
17746 US 84/285
SANTA FE, NEW MEXICO 87501
(505) 455-3901 • Fax: (505) 455-3363

July 24, 2003

The Honorable Senator Ben Nighthorse Campbell
Chairman, Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator:

Thank you for your allowing the Pueblo of Pojoaque to participate in the July 9, 2003 hearing on the Indian Gaming Regulatory Act. I submit the following written response to your July 15, 2003 questions.

QUESTION 1: Other than the revenue sharing provisions, are the 1997 compacts a "better deal" for you?

ANSWER 1: The 2001 compacts are a "mixed bag." We lost "exclusivity." We gained a better regulatory fee and a longer compact. The 1997 compacts contain language that protects "exclusivity." The 2001 compacts do not contain the same protections.

The 2001 compacts offer a longer term (14 years compared to 9 years). Yet without "exclusivity" the gaming machine market is shared with the State.

The 2001 compacts do change the regulatory fee so that the fees comport with IGRA. The 2001 compacts do not change the provisions prohibiting employment of 18-year-olds, allowing state inspections, prohibiting service of alcohol, prohibiting 24-hour operations, prohibiting "comps," promotions of free, or reduced lodging, food and beverages and prohibiting political contributions. The 2001 compacts do not mitigate the impacts of gaming on local communities; all revenue sharing goes directly to the New Mexico general fund.

Under th 2001 compacts, the Tribes have no exclusivity in exchange for revenue sharing. Use of gaming machines by veterans, fraternal organizations and racetracks was supposedly "limited" in both the 1997 and the 2001 compacts. Any increase terminated the revenue sharing provisions.
However, before the State would allow the 2001 compacts to go into effect, the Tribes were required to sign a Settlement Agreement. The Settlement Agreement stated that increasing the number of gaming machines at a licensed racetrack "does not and shall not" terminate the revenue sharing agreement. The State subsequently has increased the number of machines per track from 300 to a maximum of 750. The Settlement Agreement was not reviewed by the Department of Interior. The Settlement Agreement included a provision prohibiting the other gaming Tribes from benefitting from future favorable court decisions on revenue sharing.

To date, the State has granted 55 licenses to 250 nonprofit, fraternal and veterans organizations to operate up to 15 slot machines at locations throughout the State.

QUESTION 2a: As the Pueblo was negotiating the 1997 compact, did the Department of Interior provide any guidance on the issue of revenue sharing? How about on regulatory costs?

ANSWER 2a: There were no government-to-government gaming negotiations in 1997. A bill was introduced by a State legislator on behalf of the Tribes. The bill went through various committees where it was changed without the consent of the Tribes. Mr. Michael J. Anderson, Deputy Assistant Secretary of Indian Affairs, and Mr. George Skibine, Director, Indian Gaming Management Staff appeared before the New Mexico House of Representatives Joint Committee on Monday, February 10, 1997. Testimony was provided on revenue sharing. No testimony was provided on regulatory costs.

February 11, 1997 newspaper accounts of the hearing stated that "Federal officials said the State may not be able to get the 8 percent share of Indian gambling profits [Governor] Johnson is proposing without more restrictions on off reservation gambling. . . . Tribes agreed to share 5 percent with the state in the 1995 agreements. . . . An agreement with the same limits, but a higher revenue sharing provision, is going to require very careful analysis, said Michael Anderson."

Another article stated: "[Governor] Johnson and others wishing to expand

gambling have pointed to the revenue-sharing plan as a way to beef up State coffers.

"But, according to Anderson, the feds look askance at these kinds of payments. 'As a matter of policy, the department has said it will not approve compacts that call for tribal payments in exchange for less than substantial exclusivity for Indian gaming,' he said."

QUESTION 2b: Has the Department taken a position in your litigation?

ANSWER 2b: The Pueblo of Pojoaque is currently engaged in two gaming-related lawsuits. Both lawsuits involve the Department. The Department has provided no support in either lawsuit.

The first lawsuit was filed by the State against the New Mexico gaming Tribes in 2000, State of New Mexico v. Jicarilla Apache Tribe, et al., No. CIV 00-851, (D.N.M., June 13, 2000). The lawsuit seeks to enforce the 1997 revenue sharing provisions. If the revenue sharing agreement is held invalid, the State seeks to close the casinos. The Pueblo requested that the Department explicitly state that the 16% revenue sharing provision. The Pueblo also asked the Department to explicitly state that the regulatory fees were illegal under IGRA.

The Department has taken the position that they will take no further action in the gaming lawsuit beyond the Department's 1997 and 2001 letters published in the Federal Register. The Secretary's 1997 letter allowed the gaming compacts to go into effect by operation of law "to the extent the compact is consistent with the provisions of [IGRA]."

In the second lawsuit, the Pueblo of Pojoaque requested the Department to issue a revenue sharing rule that comports with the Administrative Procedure Act. Pueblo of Pojoaque v. Gale Norton, et al., No. CIV 03-713, (D.N.M., June 13, 2003). The Pueblo has requested negotiations with the Department for an interpretive rule that includes a market analysis to demonstrate that the exclusivity paid for is worth the price paid.

The Department has taken the position that the current administration does not support a revenue sharing rule. An interpretive rule was proposed under the last administration. The Department is concerned that an interpretive rule will take away some of the Department's flexibility in approving compacts. The Department is concerned that an interpretive rule will take away the State's flexibility in negotiating compacts. The Department feels that an interpretive rule would not provide sufficient

clarity on questions regarding exclusivity and revenue sharing.

Mr. George Skibine, Director, Office of Indian Gaming Management, met with the Pueblo of Pojoaque in Interior's D.C. offices on March 21, 2001, and on May 3, 2001. Mr. Michael Rossetti, Secretary of Interior's Office, met with the Pueblo of Pojoaque in Interior's D.C. offices on July 16, 2001. Mr. Neal McCaleb met with the Pueblo of Pojoaque in Interior's D.C. offices on July 16, 2001, and August 20, 2001. Mr. Phil Hogen, Office of the Solicitor, and Interior representatives met with the Pueblo of Pojoaque in Interior's D.C. offices on August 1, 2002. Mr. Thomas Sansonetti, Assistant Attorney General, Department of Justice, and Justice representatives met with the Pueblo of Pojoaque in Justice's D.C. offices on August 2, 2002. During all of these meetings, the Pueblo requested support or negotiations rather than litigation. The Department did not respond to our requests nor did they offer any support.

QUESTION 3: Have any of the pueblos or tribes in New Mexico had to stop gaming because of the size of the revenue sharing provisions?

ANSWER 3: Only one New Mexico gaming tribe ceased gaming – Jicarilla Apache in July 1999. The Jicarilla Apache did not re-open their casino until the revenue sharing rate was reduced from 16% to 8%.

The Pueblo of Taos faced closure due to revenue sharing. During the negotiations for the 2001 compacts, due to their small market, Taos stated that they would be unable to be profitable if forced to pay 8% revenue sharing. The 2001 compact accommodated Taos – as long as the net win was under $12 million, the State would be paid 3% of the first $4 million.

The Pueblo of Pojoaque will probably close its casino operations if it is forced to pay the 16% revenue sharing. The Pueblo estimates the 16% allegedly owed to the State through June 2003 would be approximately $23,000,000. In order to pay the 16%, the Pueblo would be forced to run the casino for the benefit of the State. During the repayment period, the Pueblo would be unable to operate any social or tribal government programs.

Other tribes have stopped gaming projects due to the revenue sharing. One year after agreeing to the 8% revenue sharing provision, the Santa Ana Star Casino laid off 240 employees in December 2002. Construction on a hotel located next to the casino has been abandoned.

Money paid to the State is unavailable for tribal programs and services.

The northern New Mexico Tribes are paying money to the State that would be better used for tribal programs and services. The northern New Mexico gaming market has not grown. Three of the five Tribes servicing the market have all reported substantial losses over the years. For instance, the Pueblo of Santa Clara paid $368,414.18 in revenue sharing to the State for 4th quarter 2002, but paid $162,695.70 for 1st quarter 2003. The Pueblo of Taos paid $120,971.00 in revenue sharing to the State for 4th quarter 2002; but paid $53,161.00 for 1st quarter 2003. The Pueblo of Tesuque reported a slight loss for 1st quarter 2003, while the Pueblo of San Juan reported a slight gain.

During the past 12 months, the Pueblo of Pojoaque has lost approximately 10% in net revenue. This loss has led to lay-offs and cutbacks in Tribal social service programs.

I hope that I have answered the committee's questions in full. Thank you for the opportunity.

Sincerely,

Jacob Viarrial

JACOB VIARRIAL
Governor

Chairman Herman A. Williams, Jr.
Tulalip Tribes of Washington
Written Testimony-Senate Committee on Indian Affairs
July 9, 2003

Thank you Chairman Nighthorse-Campbell , Vice Chairman Inouye and committee members. I am Herman Williams, Jr., chairman of the Tulalip Tribes of Washington. I thank you for the invitation to testify today about Indian gaming in Washington State.

Washington State has one of the most robustly competitive gaming environments in the United States. In addition to several successful tribal casinos, Washington citizens can choose from commercial gaming houses, thoroughbred horse racing, punchboard / pull tab operators, and an extensive and heavily promoted State lottery system.

The commercial gaming houses, locally referred to as "mini-casinos", greatly outnumber the tribal casinos and continue to open new locations. These establishments offer most of the same games as tribal casinos but they tend to be smaller in size and located much more conveniently in communities throughout the state.

In addition to these mini-casinos and a long-standing horse racing presence in the state, the State has been aggressively marketing its lottery games as well as expanding its range of options, including joining a multi-state lottery drawing last year.

Since Washington State does not have tribal-state revenue sharing per se, I am asked from time-to-time whether the tribes ought to be giving the State a percentage off the top from our casinos.

The Tulalip Tribes have always had a simple answer to this question; Tribes should share with their communities and we already do – quite generously I might add. Mandated revenue-sharing with the State only makes economic sense if the tribes have exclusivity in the gaming market.

The competition is tough in Washington. Horse racing is barely taxed by the State and mini-casinos are not taxed by the State at all. The State itself is a gaming vendor in nearly every grocery store and market with a stated plan to add another 2,000 outlets in the next two years.

While it is true that the tribal gaming compacts in Washington do not have a direct revenue-sharing component, these pacts do mandate charitable and community giving by the tribes. Needless to say, no equivalent mandate for charity is placed upon the non-tribal gambling establishments.

And, these non-tribal gaming opportunities account for a great deal of money in the State. In 2002:

- Over 2,000 punchboard and pull-tab operators, which are located in restaurants, bars, taverns, and bowling alleys, collectively grossed over $480,000,000.
- Thoroughbred horse racing grossed over $140,000,000.

- The over 300 bingo facilities in Washington State grossed in excess of $128,000,000.
- Over 70 commercial amusement operators together grossed more than $25,000,000.
- Over 500 raffle licensees grossed over $6,500,000

In addition to all that, the over 100 "mini-casinos" that engage in class III table games such as blackjack and pai gow poker grossed over $250,000,000 in 2002, up 8.3% from the previous year. Since its inception in 1997, the mini-casino industry in Washington State has increased its gross revenue over 700%.

Many owners of these commercial operations are out-of-state or even out-of-country investors with little incentive to reinvest in our communities. Nor are they satisfied with their good fortune. In the past 3 years, this industry lobbied the Washington State legislature to further expand their share of the gaming market, claiming it is time to "level the playing field" with Indian Tribes. In a cynical ploy, this coalition attempted to justify expanding of gaming as a revenue source for the cash-strapped State general fund.

Washington State is also a major player in gaming. With over 3,600 retailers, the State has 6 different lotteries, 2 of which are run daily. There are also over 60 types of scratch ticket games in play with millions of tickets within the various games. Last year, the State brought in over $435,000,000 in total lottery sales.

Clearly, tribal gaming represents only a fraction of the total market in Washington State. With a wide array of non-tribal gaming opportunities already in place and continuous press on policy makers to allow more, it is difficult to imagine how tribes in the State could be guaranteed anything approaching an exclusive market.

To be candid, Mr. Chairman, Indian nations have quite enough experience at giving up things of value only to get little or nothing in return. When people suggest that we give up a share of our revenues, it means something different to Indian tribes than it does to other gaming operators.

Thanks to the opportunities presented by IGRA, tribes are now able to offer services to their members which simply did not exist before tribal gaming. And, in my state, almost without exception, gaming tribes have also extended the benefits of their success to their surrounding communities and to the State itself.

There are 29 federally recognized Indian Tribes in the State of Washington, 27 of which have compacts with the state. Only 18 of those compacted engage in gaming with 22 facilities in operation. Compacted tribes in Washington can operate Class III games such as card games (blackjack, poker, and baccarat), roulette and craps as well as machines that are fashioned after the state run scratch tickets games. These are not slot machines.

Each tribal compact allows for 675 machines to be directly owned and operated by the tribe. However, in order to share the revenue opportunities between tribes with good casino locations and more rural tribes, the compacts allow tribes to lease their machines to another tribe, thereby sharing the benefits of IGRA with more rural tribes. This year alone, Tulalip will contribute over $1.1 million to other tribes through such arrangements.

In a broader sense, gaming tribes share their revenues through other means. Nearly 60% of all Tulalip tribal employees are non-Indian. Last year, Tulalip alone paid approximately $45,000,000 in salaries, the majority of which go off reservation and back into the surrounding communities. In 2002, our gaming facility alone paid out over $100,000,000 for goods and services to vendors, 75% of which are in the State of Washington.

From the year 2000 to the end of 2003, it is estimated that Tulalip will have donated over $1,000,000 in contributions for charitable purposes. In 2003 alone, Tulalip will make another $1,000,000 in payments to local city and county governments for community impacts. Tribes in the state of Washington truly already share their revenue.

Of the net proceeds that Washington State tribes generate, 100% goes back into investing in the tribal communities. Social and human services such as education, housing, health care, elder care, child care, drug and alcohol treatment as well as cultural restoration, law

enforcement, fire suppression, emergency medical and many other services which did not exist or barely existed prior to gaming are now funded by gaming revenues.

Nor do we only fund services for Indians. For several years, Tulalip has operated one of the most successful Boys & Girls Clubs in the region. Senators, if you ever want to see the "melting pot" in action, come to Tulalip and visit this facility. You'll see children of every race and color playing together in the gym, working together in the computer lab, and eating together in the cafeteria – all built with tribal revenues.

And if you come to Tulalip, you'll take an overpass from Interstate 5 which the tribe paid the majority of the costs to build – despite the fact that over 70% of the traffic using it goes not into Tulalip but our neighboring community.

Additionally, Tulalip has reinvested into much needed infrastructure for our reservation. Infrastructure such as the building, expansion and maintenance of roads and utilities that modernized our reservation to the level that most take for granted. Besides bringing modern services to our people, updating the local infrastructure is allowing Tulalip to diversity our economy by attracting business and industry to our lands.

Isn't this is the real purpose and spirit of IGRA – promoting economic opportunity and diversity for Indian tribes?

At Tulalip, we are taking the steps necessary to establish a true economy, beyond just a "revenue source." We have used lands adjacent to Interstate 5 to develop a tribal city – Quil Ceda village. Quil Ceda is home to our gaming facility but it also contains many retailers such as Home Depot and Wal-Mart. Perhaps in proof of our dedication to improving life for our entire community, Quil Ceda Village is also home to the offices of the regional Chamber of Commerce.

The future development of the Village will include a hotel, convention center, more retail stores, office space, tribal administration buildings, manufacturing and distribution, and possibly a university. Tulalip will develop this project while being good stewards of the land and being environmentally friendly to the surrounding eco-system.

All of this development, all of this growth, and all of this largesse is ultimately the legacy of the wisdom of Congress in passing IGRA. After centuries of failed federal policy toward Indian nations, gaming has finally provided tribes with a path to meaningful self-sufficiency. You gave us the opportunity and we have endeavored to make the most of it.

A large part of making the most it has been to recognize that we must give back to the land and ALL of its people. We are doing this by investing in resources, creating good jobs, and supporting our community's needs.

In Washington State, tribes already share revenue. Our tribes have lived up to the spirit of IGRA and then some. Thank you.

MEMORANDUM

To: **Gov. Bruce Sanchez**

From: **Richard W. Hughes**

Date: **10/25/01**

Subject: **A History of Indian Gaming in New Mexico: 1985-2001**

A full understanding of the circumstances underlying the 2001 New Mexico tribal-state class III gaming compact requires some appreciation of the history of the Indian gaming controversy in New Mexico. The following is an effort to recount the highlights in that tortuous history.

A. The Beginning: The Sandia/Mescalero Lawsuits

In the mid-1980s, the Pueblos of Acoma and Sandia, following a trend begun by tribes in Florida and elsewhere, opened high-stakes bingo parlors on their land. Litigation over similar facilities opened by the Florida tribes had resulted in rulings in favor of the tribes, and the State of New Mexico took no action to thwart the two pueblos' operations. When the Supreme Court decided the case of *California v. Cabazon Band of Indians,* 480 U.S. 202 (1987), holding that states had no authority to prohibit tribal high-stakes gaming operations so long as the type of gaming being offered was not totally prohibited by state policy, the pressure for high-stakes gaming operations by other tribes began to grow.

The following year, in response to that pressure and to growing demands on the part of the states that they be involved in the regulation of high-stakes gaming on Indian land, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), in which it essentially cleared the way for high-stakes bingo operations by tribes (which was denominated "class II gaming" in the act), subject to oversight by the newly created National Indian Gaming Commission, and allowed for casino-type gaming (referred to as "class III gaming") to be conducted by any tribe that entered into a tribal-state compact with the State, and provided that the State "permits such gaming for any purpose, by any person, organization or entity."

After the enactment of IGRA, the Pueblo of Sandia and the Mescalero Apache Tribe, among others, formally requested that the State enter into compact negotiations for limited class III gaming. Governor Garrey Carruthers refused to respond to those requests, but after Bruce King was reelected as Governor in 1990, he appointed a task force, consisting of the heads of various state agencies and chaired by Jerry Manzagol, to conduct negotiations with the two tribes. Those negotiations led to compacts that would have allowed the operation of a very limited number of video gaming devices (a primitive form of slot machine, in which a video

screen shows the game outcome). Those compacts were presented to Governor King for signature, and then-Attorney General Tom Udall advised the Governor in writing that he could sign the compacts as a matter of state law, and might even be obliged to do so as a matter of federal law. King, however, who was staunchly against gambling and believed that New Mexico law precluded the type of gaming that the proposed compacts would allow, refused to sign either document. The tribes thereupon filed separate suits in federal court, under the provision of IGRA, § 2710(d)(7)(A)(i), that purported to authorize a tribe to sue a state for the state's failure to negotiate for a class III compact in good faith.

Soon after that case was filed, a federal district court in Oklahoma, facing a similar tribal bad faith lawsuit, dismissed the suit on the ground that the state had immunity under the Eleventh Amendment of the Constitution, which immunity (the court held) could not be abrogated by Congress for purposes of IGRA. *Ponca Tribe of Oklahoma v. State of Oklahoma,* 834 F.Supp. 1341 (W.D.Okla. 1992). New Mexico District Judge John Conway, faced with a motion by the State of New Mexico to dismiss the Mescalero and Sandia cases on Eleventh Amendment immunity grounds, adopted the *Ponca Tribe* decision in its entirety, and dismissed the complaints. The tribes appealed to the 10th Circuit Court of Appeals.

B. <u>The Grand Jury Subpoena and the "Stand-Still" Agreement</u>

In the meantime, more and more New Mexico tribes had become frustrated by Governor King's refusal to sign compacts, even those negotiated by his own hand-picked task force. The tribes' position was that New Mexico law allowed charities to conduct "casino-night" fund-raising events (under a fairly vaguely worded charity lottery statute), and that that justified the tribes' demand that they be entitled to engage in casino-style gaming, as had been held in *Machantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). A growing number of tribes began to open their own class III gaming facilities, without compacts. Political pressure began to build on the United States Attorney to take action with respect to these uncompacted class III gaming operations. Finally, in mid-1993, then U.S. Attorney Don Svet convened a grand jury that issued subpoenas *duces tecum* to the tribes operating such facilities, commanding them to produce various categories of documents pertaining to their operations. The tribes went to court to contest the subpoenas on sovereign immunity and Fifth Amendment grounds, and U.S. Magistrate Judge William Deaton, following a hearing on July 6, 1993, granted their motion to quash the subpoenas. The United States appealed that decision to the district court, but District Judge James A. Parker, after several hearings, refused to rule on the appeal.

Then, in late 1993, John J. Kelly was confirmed as the new United States Attorney. Kelly immediately initiated contacts with the tribes, indicating a desire to negotiate a resolution of the problem of the uncompacted class III gaming operations, and negotiations commenced in early 1994. Those negotiations ultimately led, on May 31, 1994, to the issuance by the United States Attorney's Office of letters of non-prosecution to each of the tribes then engaged in class III gaming activities, under which each tribe agreed not to expand its operation beyond the number of gaming devices that were in use by such tribe on January 1, 1994, and to various other

conditions. (The agreements were referred to as "stand-still" agreements.) Kelly, who believed the tribes' arguments that they were being wrongfully denied compacts, endured substantial public criticism as a result of those agreements.

C. The Johnson Campaign and the 1995 Compacts

At the same time, a political newcomer, Gary Johnson, entered the political arena and won the Republican nomination for Governor, and he began running a strong campaign against Bruce King. Johnson, a true maverick, stated early on that if elected he would negotiate and sign gaming compacts with the tribes, and after the tribes (who have traditionally been strongly Democratic) had made several more futile efforts to get King to give in on his refusal to sign compacts, they swung their support behind Johnson, and eventually contributed nearly $250,000 to his campaign. In early September of 1994, as the campaign was in full swing, the 10th Circuit Court of Appeals issued its decision in the Sandia-Mescalero appeal (consolidated with several similar cases), reversing Judge Conway's decision dismissing the suit to compel compact negotiations. *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F. 3d 1422 (10th Cir. 1994). The decision was a further embarrassment to King but he was resolute in his refusal to sign compacts.

In November, the voters chose Gary Johnson as the new Governor of New Mexico. Within weeks, Johnson had named Fred Ragsdale, a flamboyant former Associate Solicitor for Indian Affairs, as his chief compact negotiator, and soon after Johnson's inauguration, negotiations between Ragsdale and the tribes were in full swing.

Ragsdale, and David McCumber, Johnson's new chief counsel, early on agreed to compact terms that essentially allowed for unlimited class III gaming, and that made the tribes the primary regulators of the gaming activity. Johnson's only significant condition was that the State get a cut of each tribe's revenues. This so-called "Revenue Sharing Agreement," which was negotiated as a side agreement, rather than part of the compact itself, required that the tribes pay the State up to 5% of their gross receipts (referred to somewhat ambiguously as "net win") from slot machines, but conditioned on the State not expanding non-Indian gaming, except for permitting gaming devices at race tracks and at certain non-profit organizations. The agreement had a fairly complex provision under which revenue-sharing would continue so long as the tracks operated gaming devices only on days on which live races were being run somewhere within the state, and it further provided for significant reductions in the revenue-sharing obligation of a tribe within 150 miles of a racetrack that was operating gaming machines, on days on which such machines were in operation. (That proviso basically covered every tribe in the state.)

The Johnson negotiations were carried on largely behind closed doors, and when the 1995 legislature convened, legislators, already deeply mistrustful of Johnson, begun to express indignation that they had been excluded from the process. Finally, in early February, Johnson released the negotiated agreement for review by legislators and the Attorney General's Office. Before there had been much opportunity for feedback on the document, however, at 9:00 a.m. on Monday, February 13, 1995, Johnson assembled with tribal leaders in his cabinet room, and

signed identical compacts and Revenue Sharing Agreements with each of 14 tribes. The compacts were approved by Assistant Secretary Ada Deer in less than 30 days after they were submitted for review.

The New Mexico compacts were apparently the first gaming compacts submitted for Secretarial approval that included revenue-sharing. The March 15, 1995 approval letter, therefore, went to some pains to justify the Revenue Sharing Agreement, which had been submitted with the compact. The letter found that the revenue sharing payments were either an "operating cost" of the gaming operation, and thus not prohibited by IGRA, or amounted to the purchase of an economic benefit, in the form of the State's forbearance in expanding competing non-Indian gaming activities, and therefore fell within the provisions of § 2710(b)(2)(B)(iii), which allows the use of net revenues from tribal gaming "to promote tribal economic development."

D. *Clark v. Johnson* and *Santa Ana v. Kelley*

Barely a month after the compacts were approved, several members of the state legislature who were opposed to gambling in any form, and others, filed a petition with the New Mexico Supreme Court seeking a ruling that the Governor had no authority to bind the State to a compact that had not received the approval of the legislature. The Court acted with extraordinary speed, issuing an opinion on July 13, 1995, in which it found that Governor Johnson had exceeded his authority by approving gaming activities in the compacts that were not otherwise allowed in the state, and that the compacts were, therefore, "null, void and of no effect" in New Mexico. *State ex rel. Clark v. Johnson,* 120 N.M. 562, 904 P.2d 11 (1995).

The tribes, not having been parties to the litigation, viewed themselves as technically not bound by the decision, but again, political pressure began to build, and the United States Attorney's Office once again became its object. In August, the tribes' position that under existing state law, the state essentially "permitted" class III gaming in that it allowed charity casino nights, was dealt a blow when the Supreme Court, in a footnote in the case of *Citation Bingo, Ltd. v. Otten,* 121 N.M. 205, 910 P.2d 281 (1995) (which footnote had nothing to do with the issues in the case) expressed the view that it was unaware of any statutory authority permitting the operation of slot machines or other casino-type gaming in the state. Despite the clear *dictum* quality of that observation, U.S. Attorney Kelly concluded that any state law basis for the gaming being operated by the tribes had evaporated, and he informed the tribes that he believed their operations violated federal law, notwithstanding the compacts. He threatened enforcement action unless the tribes agreed to terminate their class III gaming operations.

The tribes persuaded Kelly to postpone the initiation of any action against them until after the first of the year, but on January 3, 1996, the tribes themselves filed an action in federal court, seeking to enjoin Kelly from taking any enforcement action, on the ground that they had valid class III gaming compacts and were operating in accordance with the terms of those compacts.

The tribes' suit raised potentially difficult questions of federal sovereign immunity, prosecutorial immunity and other obstacles, but it was clear that whether the tribes' suit proceeded or Kelly initiated enforcement action against the tribes, the ultimate issue would be the validity of the compacts. Consequently, the tribes and Kelly reached an agreement that Kelly would not contest the tribes' suit on immunity or other procedural grounds, but the tribes agreed that if the ultimate decision in the case went against them, they would voluntarily cease their class III gaming operations. That agreement was embodied in a stipulation that was approved by the court, and the case of *Santa Ana v. Kelly* thereafter proceeded on an expedited schedule in the federal district court. The State intervened as an additional party defendant, and after extensive discovery, the filing of hundreds of pages of briefs and exhibits, and oral argument that lasted a full day, the district court issued its decision on July 12, 1996, holding that the Governor's lack of authority to execute the compact on behalf of the State, as determined by the state Supreme Court decision in *Clark*, meant that there was never a valid compact submitted to the Secretary for approval. *Pueblo of Santa Ana v. Kelly,* 932 F. Supp. 1284 (D.N.M. 1996). Mindful of the tribes' stipulation with the United States Attorney, however, and of the severe economic dislocations that would accompany closure of the nine Pueblos' gaming operations, the district court stayed its decision pending the tribes' appeal to the 10th Circuit.

The Mescalero Apache Tribe had not joined the nine Pueblos that filed the *Santa Ana* case, but in early 1996 the State filed a counterclaim in the still-pending bad faith lawsuit the tribe had filed in 1991, asking the court to declare the Mescalero's 1995 compact invalid. Chief Judge John Conway heard argument on the State's summary judgment motion on the claim on June 3, 1996, just two weeks before Judge Martha Vazquez was to hear arguments in *Santa Ana*, and ruled from the bench that the Mescalero compact was void. In late September, while their case was on appeal, but without any stay in effect, U.S. Attorney Kelly forced the Mescaleros to close their casino. It remained closed for more than two months, until the tribe agreed to the same terms the *Santa Ana* plaintiffs had reached with Kelly.

The appeal in *Santa Ana* was similarly expedited. Oral argument occurred in early December, and on January 10, 1997, just days before the New Mexico legislature reconvened, the Court of Appeals issued its decision affirming the district court. *Pueblo of Santa Ana v. Kelley,* 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997). The 10th Circuit also stayed its decision while the tribes sought review in the Supreme Court, but the handwriting was clearly on the wall. The tribes knew that the likelihood of Supreme Court review of the 10th Circuit decision was practically nil, and that if there were not a legislative fix in the 1997 legislative session, their gaming operations would have to be shut down sometime before the end of the year. Consequently, the tribes geared up for the most extraordinary lobbying effort they had ever undertaken.

E. <u>House Bill 399</u>

Importantly, while the *Santa Ana* litigation was pending, the Supreme Court decided the seminal case of *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), in which it held that the purported abrogation of state sovereign immunity in § 2710(d)(7)(A)(i) of IGRA was beyond

Congress' authority under the Indian Commerce Clause of the Constitution, and that, thus, the states possessed Eleventh Amendment immunity from suit by a tribe to compel good faith compact negotiations. (This decision effectively reversed the 10th Circuit's decision in *Ponca Tribe*). Consequently, the state legislature knew that regardless of what it did with respect to Indian gaming, it would be immune to any action by the tribes for alleged "bad faith."

The Indian gaming issue dominated the 1997 New Mexico legislative session in a way that no other issue has dominated any other session in recent memory. The numerous bills addressing the subject consumed literally hundreds of hours of committee hearing time and floor debate. The tribes had teams of lawyers, lobbyists and tribal representatives roaming the halls of the legislature from start to finish, urging legislative approval of a new compact to avoid the unimaginable consequence of shutting down the now sizeable tribal gaming establishments, with their complement of nearly 5000 employees statewide, and whose revenues now supported hundreds of other tribal employees and extensive tribal programs and infrastructure projects. But despite the substantial tribal presence, and the amount of attention showered on the gaming issue, this was not a "negotiation" in any sense. The legislators let tribal representatives be heard, but they put together a bill containing a form compact and a form revenue sharing agreement that was written the way they chose. And ultimately, the legislature approved that bill, but the decision went down to the wire. Only two days before the constitutionally mandated end of the session, the state House of Representatives, after seven hours of debate, voted 35-35 on House Bill 399, the lead bill that embodied the compact and revenue sharing agreement, with the result that the bill failed. The next day, after urgent lobbying of one member whose vote had changed at the last minute, a motion was made to reconsider the vote, and the House voted 35-34 to pass the bill. The bill was hurriedly rushed across the hall to the Senate, where it went through a single committee hearing lasting less than an hour, and was brought to the floor shortly after midnight that night. After about two hours of debate, the Senate voted to close debate and passed the bill by a comfortable margin. Just a few hours later, Republican members of the Senate commenced a filibuster on another controversial measure that essentially shut the Senate down for the rest of the session. Had the gaming bill not been acted on when it was, it would have died in the filibuster.

The form compact and form Revenue Sharing Agreement approved by the 1997 legislature in House Bill 399 was far from what the tribes had agreed to with Governor Johnson, and in some respects was deeply offensive to them. Although the tribes had agreed to pay up to 5% of their gross revenues in their negotiations with Governor Johnson, in exchange for substantial limits on non-Indian gaming, the 1997 enactment raised the revenue sharing requirement to 16%, more than three times what the tribes had agreed to, and it drastically expanded the extent of non-Indian gaming that could be allowed without affecting revenue sharing. Although it continued to preclude the State from permitting gaming machines anywhere but at racetracks and, to a limited extent, veteran and fraternal organizations, and it precluded any other type of class III gaming, it expressly omitted any limitation on the number of machines that could be allowed at the tracks. Moreover, it eliminated the provisions that had been contained in the Johnson compacts reducing the tribes' revenue sharing obligations when the tracks were

operating machines, and greatly expanded the numbers of days on which gaming machines could be operated, so that the tracks essentially could have machines operating year-round..

Adding insult to this injury, the compact also included a provision for so-called "regulatory fees," assessed against each tribe at the rate of $1,200 per gaming machine per year, $3000 per table game per year, and $25,000 per gaming facility per year, amounts that added up to well over $1 million per year in additional fees for some tribes (and which amounts would increase at the rate of 5% per year for the life of the compact). Although purportedly intended to cover the State's costs of "regulation" of tribal gaming, these fees were not tied to any actual expenditures by the State, and the State had no requirement to account for any costs it might incur in dealing with tribal gaming. Indeed, the chairman of the House Taxation and Revenue Committee, who authored the amendment that added these fees (over vigorous tribal objection), candidly admitted that the fees were just another way to raise additional money for the State without having the revenue sharing percentage go so high as to be even more objectionable to the Secretary. (Representatives of the Department of the Interior who appeared before legislative committees in the course of the session flatly told the members that the 16% revenue sharing requirement would not be approved by the Secretary.)

There were various other provisions of the 1997 compact that were objectionable to the tribes. The term (which, under the Johnson compact, was essentially perpetual) had been cut to 9 years. Numerous restrictions on gaming operations had been inserted into the document by the legislature, none of them as a result of any negotiations with the tribes. For example, the compact included: a prohibition on the use of tribal gaming revenues for political contributions to candidates for state office; a requirement that each tribe spend a quarter of a percent of its net win for treatment and assistance of compulsive gamblers; a requirement that the tribe maintain a liquor liability insurance policy, with coverage limits of up to $2 million per year; a prohibition on the cashing of any paycheck or government assistance check for any patron; a prohibition against employment of any person under the age of 21 by a gaming facility; and similar limitations. Additionally, there was a somewhat ambiguous provision dealing with whether or not documents provided by a tribal gaming enterprise to state officials would be kept confidential. This led to running battles with the State Treasurer's Office, and ultimately, to a virtual cessation of release of any documents by tribes to state regulators due to uncertainty over their confidentiality. The criminal jurisdiction provision (which transferred to the state jurisdiction over gaming crimes by non-Indians) had been rewritten to include a requirement, insisted on by the state's district attorneys, that before a DA's office would accept cases from the tribe the tribe would have to enter into an agreement with the DA's office that included provision for payment to that office of an amount sufficient to cover the cost of the additional work. And a provision of the Johnson compact that had been especially popular with the tribes, under which 40% of the revenue sharing payments went to local governments selected by the tribe, was deleted. All of the money had to be paid to the State.

Of particular concern was the provision dealing with tort claims by visitors to gaming facilities who suffer personal injuries. Such a provision had been negotiated by the tribes in the 1995 compact, and it provided that such claims could be brought in any "court of competent

jurisdiction." Where the accident occurred on tribal land, that would be tribal court, as a matter of federal law. The New Mexico Trial Lawyers' Association, however, managed to get the legislature to adopt an amendment to House Bill 399 that purported to provide jurisdiction over such cases in state courts, a forum that the tribes reasonably expected would be hostile to their gaming operations. The tribes' lawyers believed that this provision violated federal law, but it was approved despite their objections.

Importantly, House Bill 399 also included a lengthy provision entitled the "Gaming Control Act," which created a new state agency, the Gaming Control Board, and permitted licensed race tracks in the state to operate up to 300 slot machines each. (It also allowed certain veterans' and fraternal organizations to operate up to 15 machines each, for play by members and spouses only.) This feature of the bill, which assured its support by the state's horse racing industry, was probably critical to the bill's passage, as that industry, comprising both tracks and horse breeders, has always had substantial influence over several key legislators who would otherwise not have been friendly to Indian gaming. Horse racing in the state had been on the decline in the past decade, and the tracks were now blaming Indian gaming for their rapidly dropping handles. Allowing them to operate slots had for some time been seen as the solution to their problems, the theory being that slot revenues would increase purses, leading to more and better horses being raced, leading to higher handles, adding to the purses, and so forth. Additionally, several members of the legislature, including key leaders, understood IGRA to require that before the State could enter into class III compacts withe the tribes, it had to allow class III gaming by some other "person, organization or entity." The racetracks were the obvious candidates, and the tracks thus saw Indian gaming as the solution to their inability thus far to get the legislature to approve their operation of slot machines. The two groups had been wary of each other in the past, but in 1997 they were able to put aside their mutual suspicions long enough to secure passage of House Bill 399.

F. <u>Secretarial Action and the Revenue Sharing Dispute</u>

The 16% revenue sharing obligation was by far the most objectionable and controversial provision of the new form compact, and one that immediately created the greatest furor among the tribes. The tribes had no choice as to whether or not to sign the compacts: if they did not, their agreement with Kelly would force them to shut down as soon as the Supreme Court rejected their petition for review of the 10th Circuit decision in *Santa Ana*. But every tribe, in its resolution authorizing its leader to sign the compact, included a specific objection to that agreement, and an assertion that it violated IGRA. As soon as the compacts were signed by Governor Johnson and sent to the Secretary for review, the tribes began to let the Secretary know of their strident objections to this requirement, along with the so-called regulatory fees, and they communicated to the Secretary's office that while they very much needed these compacts to take effect (to avoid the tribes having to shut down their gaming operations), they would not be disappointed if the Secretary were to take no action on the compact during the 45-day period allowed by IGRA. Were that to occur (it had never before occurred in the history of the Secretary's consideration of gaming compacts under IGRA), according to the statute, the compact would go into affect, but only to the extent consistent with IGRA's provisions. 25

U.S.C. § 2710(d)(8)(C). The tribes believed that a unilaterally imposed 16% revenue sharing provision, as well as the regulatory fee provision of the compact, would be viewed as a "tax, fee, charge or other assessment" that is prohibited by § 2710(d)(4), and that those provisions would thus become void by virtue of a "no action" approval.

The Secretary seemed to agree. He took no action on any of the compacts or revenue sharing agreements before him, and in a lengthy letter he sent to each tribe and to the Governor of the state at the conclusion of the 45-day period he explained that he deliberately declined to act, because of his concern that the revenue sharing agreement and the regulatory fees provisions appeared to violate IGRA. The Secretary's action (or rather, inaction), took state officials by surprise, and it seemed that many legislators, at least, never understood the legal significance of what had happened. For the tribes, however, the Secretary's action was quite clear, and the tribes believed (and indeed, continue to believe) that as a result of the "no-action" approval, the revenue sharing agreement and the regulatory fees provision of the compacts should be found void by any court or arbitration panel that considered the question. As a result, compliance with those provisions, which was never unanimous, quickly declined until, by the beginning of the year 2000, only three tribes were still making the required payments. Tribal flouting of the Revenue Sharing Agreements became one of the sorest subjects in the history of the relations between the State and the Indian tribes of New Mexico.

G. The Mescalero Arbitration Proceeding

The Mescalero Apaches never paid the State any amount under the 1997 compact. After their first payment date came and went, in October, 1997, the State sent then-President Wendell Chino a letter notifying him of the apparent breach of the compact, and invoking the compact's dispute resolution provision. No resolution of the dispute was reached, and in March of 1998 the State formally invoked arbitration. Later that year, Taos and Acoma pueblos were joined in the arbitration, both having openly repudiated any payment obligation under the compact or Revenue Sharing Agreement.

That arbitration proceeding had a remarkable history of its own. The State's contention was that the tribes had breached the Revenue Sharing Agreement and the regulatory fees provision of the 1997 compact by failing to make the required payments. The tribes' position was that those provisions violated IGRA, and thus did not survive the Secretary's "no action" approval. Necessarily, it seemed, in order to decide the matter the arbitration panel would first have to decide what constituted the agreement between the parties, before it could determine whether that agreement had been breached. The proceeding, thus, presented the tribes with their first shot at a determination of the invalidity of the payment requirements that the legislature had attempted to impose on them.

The tribes picked as their arbitrator Glenn Feldman, a Phoenix lawyer who had argued the *Cabazon* case in the Supreme Court and who actively represented numerous tribes on gaming matters. The State (at this point, the Governor's office was still handling gaming matters, as the Gaming Control Board had not yet been formally constituted) picked Fred Ragsdale as its

arbitrator, and Ragsdale and Feldman selected Professor Paul Bender, a noted expert in constitutional law at Arizona State University Law School, as the neutral arbitrator. (Bender also had some experience in Indian gaming matters in Arizona.) This panel was widely viewed as being likely to be highly favorable to tribal interests, and the three tribes pushed ahead vigorously in hopes of a favorable decision. In late 1998, however, a task force that had been created at the request of the 1998 legislature to examine the Indian gaming issue, and in particular the growing dispute over the revenue sharing and regulatory fees provisions, requested an opinion from the Attorney General as to the scope of the arbitration panel's authority. In January of 1999 the Attorney General issued an opinion that, through a frankly bizarre bit of illogic, concluded that the arbitrators only had the authority to determine factual issues, not legal issues (this, even though the compact required that all three arbitrators be lawyers), and that therefore the arbitrators could not determine the validity or not of any particular compact provision (or, much less, of the separate revenue sharing agreement). This opinion, which obviously was a shot across the arbitration panel's bow, caused consternation among the tribes, and it led directly to Ragsdale's decision to resign from the arbitration panel, which he announced in a letter sent just days after the opinion was released. (In the letter, Ragsdale attributed the decision to his health, but he privately expressed the view that the Attorney General's opinion was a signal that the arbitrators were going to get sued, and he had decided he wanted out of this battle. As usual, he was remarkably prescient.)

The State took some time to find a new arbitrator, and in March, Prof. Bender, after speaking to the representative of the American Arbitration Association who was overseeing the process, called the head of the state Gaming Control Board (which was, by then, acting on behalf of the State in the proceeding), to suggest that the parties agree that the dispute would be sent to him alone, as a single arbitrator, rather than go through the process of the State finding a new arbitrator to represent its side. This made some sense, inasmuch as the neutral arbitrator normally ends up casting the deciding vote anyway, but the Board's director was reportedly non-committal on the idea. A few weeks later, however, the attorney representing the Board complained to the AAA that Bender should be disqualified, on the ground that he had made an *ex parte* contact with one of the parties. The tribes and Bender protested what appeared to be an obvious effort to use a bogus claim to get rid of a neutral who was suspected of being sympathetic to the tribes' position, but the AAA acceded to the State's demand and removed Bender from the panel. The State then selected William Riordan, a conservative former state Supreme Court justice, as its arbitrator.

Riordan and Feldman were predictably unable to agree on a new neutral arbitrator, so the AAA picked one. They selected Edward Kahn, a Denver lawyer with fairly impressive credentials as a civil rights litigator. The arbitration thereafter proceeded, but the State appeared still determined to do whatever it could to prevent the arbitrators from reaching the key issue of the validity of the Revenue Sharing Agreement.

On May 25, 1999, the State made a preemptive strike on the issue of the scope of arbitration. It filed a petition for writ of mandamus in the State Supreme Court against the three arbitrators and the AAA, claiming that the arbitrators, because they were deciding a manner

which involved the State, were effectively state officials for purposes of being subject to mandamus, and that they were threatening to exceed their authority by deciding the issue of the validity of provisions of the compact and the Revenue Sharing Agreement. The Supreme Court received extensive briefs, including briefs from the three tribes as amici, and held a lengthy oral argument. On July 28 it issued a decision denying the petition, but granting the Attorney General "leave to file a petition for a proper writ when the matter has matured." Apparently, in the Court's view, nothing had yet occurred in the proceeding that warranted any action.

A few months later, however, the arbitrators asked the parties to submit memoranda on questions related to the tribes' arguments as to the validity of the Revenue Sharing Agreement, and on December 28, 1999, the panel issued a decision stating that they (the arbitrators) had the authority to determine the scope of the arbitration. The State attempted to get the arbitration stayed, but that was denied, and on February 10, 2000, the Attorney General, apparently now viewing the matter as "mature," filed another petition against the arbitrators, essentially making the same contentions as before. The Supreme Court issued an Order of Stay, on February 17, 2000, staying all further proceedings in the arbitration, and set the matter for argument on March 1.

Extensive briefs were filed again, and the matter was extensively argued, but in the course of the oral argument (much of which bore on the question of whether the Court had any jurisdiction whatever to stay an arbitration proceeding, a point on which the State's position seemed extremely weak), one of the justices made the offhand suggestion that perhaps they could satisfy the State's concerns, and avoid having to deal with some very sticky legal issues, by simply leaving the stay in effect. It seemed like a joke, but it evidently blossomed into a plan. There has been no decision issued in that case since the oral argument on March 1, 2000, and the stay has remained in effect. Having initiated the arbitration itself, thus, the State has managed to avoid the adverse decision that seemed at least reasonably likely by completely shutting down the process, without having to establish any grounds for doing so.

The State took one last shot, asking, in March of 2000, just after the oral argument in the second Supreme Court proceeding, to have the second neutral arbitrator, Edward Kahn, removed, on the ground that another lawyer in his firm had at some time in the past worked for a consulting firm in Denver that had performed consulting work for some New Mexico gaming tribes. This tenuous claim was not responded to by the AAA, however.

H. *State ex rel. Coll v. Montoya*

The arbitration proceeding was not the only occasion for the State Supreme Court to become involved in gaming following enactment of the 1997 compacts, but in other proceedings, the Court was not quite so apparently adverse to the tribes as it seemed to be in the arbitration case and in *Clark*. One of them in particular seemed to raise an impassable barrier to any further attacks on the compacts.

In June, 1997, one day before House Bill 399 took effect (and, thus, before the Governor would have been able to execute compacts with the tribes), several state legislators and one lay

citizen filed suit in state district court in Santa Fe against the Governor, the State Treasurer, the Attorney General and other state officials, seeking to enjoin the Governor from executing a compact or a revenue sharing agreement, and seeking a judgment declaring that provisions of the compact and the Revenue Sharing Agreement enacted by House Bill 399 were in violation of state and federal laws, and therefore void. The suit was filed by Attorney Victor Marshall, whose office had litigated *Clark v. Johnson*. The district judge, James A. Hall, heard the plaintiffs' application for a temporary restraining order on the morning of June 20 (in the course of which Mr. Marshall referred to the gaming tribes as "a criminal cartel") and denied the application, viewing the claimed injury as either too speculative or unrelated to the claims of the complaint.

The Governor moved to dismiss the case on the ground of lack of standing and failure to join indispensable parties, that is, the tribes. The tribes appeared as *amici curiae* and argued the indispensable parties issue. Judge Hall denied the Governor's motion, but certified it for immediate appeal, and the Governor noticed an appeal to the state Court of Appeals. That court, however, certified the appeal to the state Supreme Court. The Supreme Court received briefs and heard lengthy argument, following which it issued a somewhat puzzling decision, remanding the case to the district court to allow the plaintiffs to file an amended complaint that might avoid some of the difficulties raised in response to their original complaint, and directing the district court to determine certain specific fact issues related to standing and indispensable parties. Following further proceedings in the district court, Judge Hall issued essentially the same decision as he had previously on the Governor's Motion to Dismiss, and the case went back to the state Supreme Court. In September, 1999, that Court issued a decision reversing Judge Hall on both issues. It found that the tribes were indispensable parties that could not be joined, and further found that none of the plaintiffs had standing to raise the issues that they sought to litigate, inasmuch as they were asserting only abstract rights claimed to held by the people of the state as a whole.

Other cases were initiated in the state courts following the 1997 compact legislation, but none of them ever posed any serious threat to the tribes' gaming operations, and after the decision in *Coll* there were no further such attempts.

I. The Compact Negotiation Act: Negotiations for a New Compact

The tribes returned to the state legislature in 1998, although their primary efforts during that "short" (30-day) session were aimed at the passage of a bill that was intended to create a new process for negotiation of compacts or compact amendments that would avoid the unilateral imposition of terms that had occurred in 1997. The bill, which came to be known as the Compact Negotiation Act, envisioned a negotiating process between the tribes and the Governor's office, that, once it yielded an agreed upon document, would be submitted to a joint legislative committee that could recommend changes in the document. There was a process of back and forth consideration between the committee and the tribes and the Governor's office, but after no more than three separate reviews by the committee, the resulting document had to be submitted to the legislature for an up-or-down vote, subject to no amendments and no committee referrals. The bill failed to pass the 1998 legislature, but in 1999, with tribal non-compliance

with revenue sharing continuing to spread, the legislature finally enacted the bill. (A separate bill, that would have amended the form compact adopted by the 1997 legislature so as to reduce revenue sharing to 10% and otherwise modify the 1997 compact terms, actually passed the House of Representatives, but was killed in the Senate in the last days of the session.)

Immediately after the 1999 Compact Negotiation Act took effect, essentially all of the gaming tribes requested the Governor to enter into negotiations for a new or amended compact under the terms of that Act, and those negotiations finally got under way in June, 1999. The negotiations were often contentious, although some of the toughest issues were disputes among the tribes, rather than between the tribes and the Governor's negotiator. Eventually, however, most of the tribes involved agreed to a proposed new compact with the Governor, that reduced revenue sharing to a maximum of 7.75% (with some discount for small operations), with an extremely complex "exclusivity" provision under which revenue sharing requirements would be reduced if additional machines were allowed at the tracks, depending on the tribes' distance from operating racetracks and the number of machines allowed at each track. This provision reflected a delicate effort that sought to avoid having the tracks oppose the compact, while keeping the Mescalero Apache Tribe, which was the most vehement in its insistence on limitations on numbers of machines, in support of the compact. Ultimately, however, that effort failed, in both respects.

The proposed new compact essentially eliminated regulatory fees, and improved several other compact provisions, but it included one provision that for a time threatened to bring the negotiations to a close: Gov. Johnson, sensing the political winds in the legislature, insisted that each tribe that owed any back revenue sharing or regulatory fee payments have paid them in full (or have paid half the amount due and have entered into an enforceable payment agreement for the rest), before he would sign the compact with that tribe. Most of the tribes recognized that no compact was likely to garner the legislature's approval without such a provision, and they eventually acceded to that demand, but Pojoaque Pueblo refused to concur.

Thus, by the time the proposed new compact reached the legislature, both Mescalero and Pojoaque Pueblo were aligned against it.

Before that occurred, however, the compact went through an excruciating process of review by the joint legislative committee. The committee, which the tribes viewed as having been stacked with opponents of Indian gaming, repeatedly insisted on provisions that were unfavorable to the tribes' interests. The process of committee review, which began on the first day of December, 1999, lasted until after the end of the regular legislative session. The legislature went into a special session to consider the gaming compact as it finally emerged from the joint committee review process, but the tribes were splintered. While two tribes were actually opposed to the new compact, others were at best lukewarm. The racetracks, although they had initially agreed to the complex exclusivity formula, had changed their minds and were strongly lobbying against the compact. The joint resolution to approve the compact was introduced in the Senate, and after a full day of debate the Senate rejected the compact by a vote

of 16-25. Nine months of intensive efforts by the tribes and their representatives had thus brought them nowhere.

J. The Attorney General's Lawsuit

The most immediate consequence of the legislature's rejection of the new agreement was that the three remaining tribes that were still making revenue sharing and regulatory fee payments, Santa Ana, Sandia and San Felipe, announced on April 25 (the next payment date) that they would make no such payments thereafter. The other direct consequence of the vote occurred in June. Attorney General Patricia Madrid had said that if the legislature did not approve the new compact, she would take the tribes to federal court to enforce the Revenue Sharing Agreement. On June 13, 2000, she filed such a lawsuit against all 12 gaming tribes, asking the court to enjoin the tribes' entire gaming operations on the ground of their failure to comply with the Revenue Sharing Agreement. (The suit did not raise the tribes' non-compliance with the regulatory fees provision of the compact.). In August, the tribes moved to dismiss the complaint, on the ground that it was not within the federal court's jurisdiction under the provisions of IGRA that allowed the states to sue to enjoin illegal gaming, 25 U.S.C. §2710(d)(7)(A)(ii), and that for the same reason it was barred by the tribes' sovereign immunity. The district court denied that motion in December, and the tribes took an immediate appeal to the 10th Circuit Court of Appeals.

K. The 2001 Legislature and Compact Approval

In the meantime, however, near the end of the year, the tribes approached the Governor's office once again to discuss the possibility of another effort to submit a negotiated compact to the 2001 legislature. The Governor agreed, provided that the negotiations would begin with the document that had been submitted to the previous legislature, but incorporating any changes from that document that the tribes wished to propose. The tribes (this time, however, without Pojoaque or Mescalero at the table) proposed several changes that they felt would make the compact acceptable. Most importantly, they agreed to increase the revenue sharing amount to 8%, and to basically eliminate the complex exclusivity formula that had been proposed the previous year, replacing it with language that was essentially identical to the language of the 1997 compact. The tribes believed that by doing this, they would avoid the opposition of the racetracks' lobbyists, who had cost them a number of key votes the previous year. (Additionally, the tribes also agreed not to oppose a bill introduced at the behest of the tracks, that increased the number of machines at each track to 600. That bill ultimately passed the legislature.)

Another significant change had to do with the settlement of the pending litigation with the Attorney General. Having previously agreed to full back payment of revenue sharing, the tribes this time agreed that before the new compact could be signed, they would have to reach a binding settlement with the Attorney General. It was understood by all that this would mean substantial back payments, though the exact figures would be subject to negotiation.

Outweighing the revenue sharing and back payment provisions, however, in the minds of most of the tribes, was the 14-year compact term, an extension of 9 years beyond the expiration date of the 1997 compact, together with other changes that improved several of the regulatory requirements from the tribes' standpoint.

Politically, the legislative landscape had changed significantly. The tribes had actively participated in the 2000 elections, in which the entire membership of the legislature faced reelection, and overall the tribes felt that the election had improved their prospects. Importantly, the long-time Speaker of the House of Representatives, who had never supported tribal gaming, had lost his seat, and his successor as Speaker was a longtime friend and supporter of the tribes. In the Senate, an equally long-tenured President pro tempore was unseated by another Democrat. These two new leaders managed to establish a reasonably productive relationship with the Governor's office–an unprecedented development for Gov. Johnson–and that proved to be critical in smoothing the way toward approval of the compact, as did the fact that the joint legislative committee that was appointed to consider the new compact was viewed as far more favorable to the tribes than had been the previous year's body.

The negotiations with the Governor took less than a month, and the process of review by the joint committee lasted only 3 weeks. It resulted in relatively few changes in the compact the tribes had proposed to the Governor, and the committee voted 11-4 to approve it. On March 8, 2001, the Senate approved the compact by a relatively astonishing 25-12 vote, and 4 days later the House concurred by a vote of 40-28. Compared with what the tribes had been through the previous year, it all seemed unbelievably easy.

The next step was negotiating a settlement with the Attorney General. That turned out to be more difficult than expected, primarily because the Attorney General attempted to include terms in the settlement agreement that had nothing to do with the pending litigation, and looked suspiciously like renegotiation of matters covered in the compacts themselves. Eventually, the Attorney General backed down on nearly all of these demands, and arriving at payment amounts with the individual tribes went surprisingly quickly, so that on August 9, 2001, settlements were finally executed in the form of proposed Consent Decrees to be entered by the district court in the revenue sharing litigation. As it turned out, however, there were a few more hurdles to be cleared.

The Attorney General's office presented the proposed Consent Decrees to district judge Bruce Black, but the Mescalero Apache Tribe and Pojoaque Pueblo immediately filed pleadings with the district court suggesting that it lacked jurisdiction to entertain them, in light of the pending appeal in the 10th Circuit on jurisdictional issues. Judge Black agreed, and at a brief hearing on August 15, 2001, declined to act without a green light from the Court of Appeals. The tribes and the State then filed a motion with the 10th Circuit for a limited remand of the case to the district court, for the purpose of approving the Consent Decrees. Mescalero and Pojoaque opposed the motion, and on September 18 the court denied it, viewing the relief the parties sought as inadequate to give the lower court authority to enter the Decrees. Thus stymied, the tribes and the State redrafted the Decrees and executed them as ordinary settlement agreements, contingent (as the Consent Decrees would have been) on Secretarial approval of the compacts. An escrow account was established at an Albuquerque bank, and the tribes deposited $89 million into the account, for payment to the State upon approval of the compacts, or to the tribes in the event they are not approved. In early October, the first batch of fully executed new compacts was finally sent to the Secretary.

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