

**Testimony of
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**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.