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TESTIMONY
BEFORE THE COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON GAMING ON OFF-RESERVATION, RESTORED AND NEWLY-ACQUIRED LANDS

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INTRODUCTION

Good morning Chairman Pombo, Ranking Member Rahall, and Members of the Committee. My name is Ernest Stevens, Jr., and I am Chairman of the National Indian Gaming Association and a member of the Oneida Nation of Wisconsin. The National Indian Gaming Association (NIGA) is an intertribal association of 184 federally recognized Indian Tribes united with the mission of protecting and preserving tribal sovereignty and the ability of Tribes to attain economic self-sufficiency through gaming and other economic endeavors. I am honored to be here this morning to share NIGA's views on the issue of tribal land acquisitions for gaming purposes.

Indian Tribes as Governments

The complex issue of tribal land acquisitions for gaming purposes requires a historical overview of the status of Indian Tribes as governments and tribal landholdings to place the subject in proper perspective.

Before Columbus, Indian tribes were independent sovereigns vested with full ownership and authority over their lands. European nations acknowledged Indian nations as sovereigns and entered into treaties to acquire lands, establish commerce, and preserve the peace. When the United States was established, it too recognized the sovereign status of Tribes through treaties for these same reasons. The U.S. during the late 1700s and early 1800s was vulnerable to recurring attack from England. Thus, the United States sought to maintain peace with tribal governments and sought them as allies. The new government also sought to build its economy, and recognized that securing an exclusive trade relationship with tribal governments would further that goal.

The United States Constitution specifically acknowledges the importance of trade with tribal governments in the Commerce Clause, which states that "Congress shall have power to … regulate commerce with foreign nations, and among the several states, and with *the Indian tribes*." U.S. Const., Art. I, §8, cl. 3. For these reasons, the United States policy on Indian affairs in the formative years of the new Republic was one of respect and recognition that tribal governments were necessary allies to protecting the Union both politically and economically.

During the Revolutionary War, the United States adopted the legal principles and practice of European nations and acknowledged the sovereign status of Indian tribes, with full ownership and authority over their lands. The 1778 Treaty with the Delaware Nation was the United States' first Indian treaty, and it provided:

> [A] perpetual peace and friendship shall henceforth take place … through all succeeding generations: and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation….
>
> [W]hereas the United States are engaged in a just and necessary war, in defence of life, liberty and independence, against the King of England …

> the Delaware nation … stipulate[s] and agree[s] to give a free and safe passage through their country to the troops … affording to said troops … supplies of corn, meat, [and] horses…. And … engage to join the troops of the United States … with … a number of their best and most expert warriors….

My own tribe, the Oneida Nation, assisted General Washington and the United States by providing food for the troops during the cold winters in Valley Forge.

In the Northwest Ordinance of 1787, the Continental Congress pledged that the United States would pursue a just policy toward Indian nations:

> The utmost good faith shall always be observed towards the Indians, their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed….

For over two hundred years, the United States Constitution, treaties, hundreds of federal laws, and U.S. Supreme Court decisions all acknowledge that Indian Tribes are governments. The 2000 Executive Order on Consultation and Coordination with Indian Tribal Governments, issued by President Clinton and later affirmed by President Bush, provides:

> Our Nation, under the law of the United States … has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and their territory. The United States … work[s] with Indian tribes on a government-to-government basis concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

Consultation between sovereigns is still the cornerstone of Federal-Tribal government-to-government relations today.

Historic Loss of Indian Lands

Despite these promises of peace and friendship, federal policies throughout the 1800s caused significant damage to tribal communities and the Indian land base. The Indian population in the United States plunged from 15 million before Columbus to only 250,000 by the end of the Indian Wars in 1890. During this same time, Indian nations lost hundreds of millions of acres of their homelands and were pushed onto the most remote corners of the United States.

Removal Policy

During the late 1820s, the United States established the "Removal Policy" and forced the Cherokees and other Tribes to walk a number of Trails of Tears. Tens of thousands died on their way to remote lands west of the Mississippi River. Many others stayed behind, and today the Cherokee Nation is represented by both the Cherokee Nation of Oklahoma and the Eastern Band of Cherokees in North Carolina. Many other Tribes were divided

by the Removal Policy and are represented on both sides of the Mississippi. Today, the "Removal Policy" would be denounced as a form of ethnic cleansing. Indian nations continue to suffer from the damage and displacement caused by the Removal Policy.

Allotment and Assimilation

In 1868, the United States continued to enter into treaties with Tribes for land exchanges which proclaimed, "From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it." The treaties promised that the United States would acknowledge that the reserved lands would serve as the "permanent home" of the respective Indian nations.

However, the United States adopted a policy of Allotment and Assimilation, which violated each of these treaties. The Allotment Policy also ignored Tribal government laws on land use, and parceled out tribal lands in 160-acre units to heads of individual tribal households. After heads of households received their allotments, the Government sold the remaining reservation lands to non-Indians. As a direct result of the Allotment policy, Indian land holdings plunged from 138 million acres in 1887 to 48 million acres by 1934. All told, Removal and Allotment caused the taking of well over 300 million acres of Indian homelands.

Indian Reorganization

In 1934, in cooperation with Congress, President Roosevelt secured the enactment of the Indian Reorganization Act to promote "local self-government" for Indian Tribes. Recognizing that tribal communities had been devastated by the loss of almost 100 million acres of land, the Act gave the Secretary of the Interior authority to reacquire lands in trust for Tribes and individual Indians. The Act was very well intended and remains law today, but has never been adequately funded.

Termination Policy

In the 1950s, federal policy turned towards Termination. Termination essentially ended the federal government's recognition of certain Indian Tribes as governments and sought rapid assimilation of individual Indians, instructing them to disband and adopt a non-Indian way of life. These Tribes also lost their homelands – again passing Indian lands into the hands of non-Indians. Tribes not directly terminated faced severe program budget cuts, and reservation economies were completely ignored.

The cumulative effect of all of these policies destroyed tribal economies and the Indian land base. Indeed, in the 1960s, Indian communities faced the highest national rates of poverty, crime, poor health care access, education dropouts, and countless other social and economic problems. Reservation economies were in ruins.

<u>The Era of Self-Determination and the Indian Gaming Regulatory Act</u>

The federal government again recognized the failure of its Indian policy, and again shifted its views. In the 1960s, Presidents Kennedy and Johnson included Indian Tribes

in federal community development programs, in the War on Poverty, and in Civil Right legislation to strengthen tribal self-governance. In 1970, President Nixon formally announced the federal policy supporting Indian Self-Determination, and repudiated the Termination Policy. At the heart of the new policy was the federal government's commitment to foster reservation economic development and helping tribal governments to attain economic self-sufficiency. The federal government began to make available to tribal governments a number of the programs that were used to help state and local governments. These programs provide Tribes with the ability to rebuild their communities, and have created new economic opportunities throughout Indian country.

In addition, in the late 1960s, Tribes began to look for a steady stream of tribal governmental revenue – separate from federal program or appropriation funds. At the time, the recent rise in State government lottery systems caused a number of Tribes to consider gaming as the answer for their budgetary concerns.

State governments and commercial gaming operations challenged the rights of Tribes to conduct gaming on their lands. These challenges culminated in the Supreme Court case of California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The Court in Cabazon upheld the right of Tribes, as governments, to conduct gaming on their lands. The Court reasoned that Indian gaming is crucial to tribal self-determination and self-governance because it provides tribal governments with a means to generate governmental revenue for essential services and functions. The Supreme Court also recognized that California Tribes were left on reservations that "contain little or no natural resources which can be exploited," so the Court acknowledged that Indian gaming is also essential to provide tribal employment. In 1988, one year after the Cabazon decision, Congress enacted the Indian Gaming Regulatory Act to promote "tribal economic development, tribal self-sufficiency and strong tribal government." 25 U.S.C. § 2702.

In approximately 30 years (just over 15 years under IGRA), Indian gaming has become the Native American Success Story. Today, approximately 65% of the federally recognized Indian Tribes in the lower 48 states have chosen to use gaming to aid their communities. Indian gaming has helped many Tribes begin to rebuild communities that were all but forgotten. Because of Indian gaming, our Tribal governments are stronger, our people are healthier and our economies are beginning to grow. Indian country still has a long way to go. Too many of our people continue to live with disease and poverty. But Indian gaming has proven to be one of the best available tools for Tribal economic development.

In 2003, Indian gaming generated 500,000 jobs nationwide and $16 billion in gross tribal government revenues (net tribal gaming revenues are much smaller when accounting for payroll, operating costs, overhead, and debt service). Indian gaming is funding essential tribal government services, including schools, health clinics, police and fire protection, water and sewer services, and child and elderly care. And, Indian gaming generates over $7 billion in added revenue for the Federal, State and local governments. Despite the fact that Indian Tribes are governments, not subject to taxation, individual Indians pay federal income taxes, people who work at casinos pay taxes, those who do business with casinos pay taxes, and those who get paid by casinos pay taxes. As employers, Tribes also pay employment taxes to fund social security and participate as governments in the federal

unemployment system. In short, Indian gaming is not only helping rebuild Indian communities, but it is also revitalizing nearby communities.

Treatment of After Acquired Lands Pursuant to IGRA

IGRA establishes a general policy that Indian Tribes should only conduct gaming on lands held in trust by the United States prior to passage IGRA on October 17, 1988. 25 U.S.C. § 2719. Congress also accounted for historical circumstances such as diminished reservations, terminated Tribes, and Indian land claims, and established reasonable exceptions to provide for the use of "after acquired" lands when necessary.

In addition, Congress established a more general exception for the use of "after acquired" lands for gaming where the Secretary of the Interior – after consultation with local governments and neighboring Indian tribes – determines that Indian gaming on the lands is in the best interests of the Tribe and would not be detrimental to the surrounding community. The Governor of the State must then concur in the Secretary's decision. Of course, the Tribe must also successfully negotiate a compact with the State before conducting class III gaming on such lands.

Within Reservation and Contiguous Land

Recognizing the excessive loss of Indian lands and sporadic checker-board landholdings due to Removal and Allotment, Congress – through IGRA – permits Tribes to conduct gaming on lands within or contiguous to existing reservations. 25 U.S.C. § 2719(a)(1). These "contiguous" land acquisitions are generally without controversy. For example, the White Earth Ojibwe reservation was heavily checker-boarded by the loss of trust lands under the Allotment Policy, and without much fanfare, the White Earth Band reacquired a 61-acre parcel of land within its existing reservation area for gaming in 1995.

Land Claim Settlements

For similar reasons, IGRA permits gaming on Indian lands reaffirmed through a land settlement. 25 U.S.C. sec. 2719(b)(1)(B)(i). In our view, these trust acquisitions are simply a measure of justice for Tribes that have suffered historical wrongs. Where lands were wrongfully taken and are restored through land settlement, in essence, they relate back in time to the original holding of the lands by the Tribe.

Newly Acknowledged and Restored Tribes

In addition, the governmental status of a number of Tribes was wrongly terminated, either by Congress in direct acts of termination – or through wrongful Administrative termination by the Bureau of Indian Affairs and other agencies. As a result, IGRA also recognizes that newly acknowledged and restored Tribes can conduct gaming on their initial reservations and restored lands. Congress reasoned that these lands should be available for gaming because these Tribes have the same sovereign status as other federally recognized Indian Tribes. See 25 U.S.C. § 479a (Federally Recognized Indian Tribe List Act).

For example, the Mohegan Tribe's land was taken into trust under the exception for the initial reservation for newly recognized tribes. 25 U.S.C. § 2719(b)(1)(B)(ii). Of course, the residents of Uncasville were well aware of the Tribe's historical status as a State-recognized Indian tribe and the status of their lands as a state Indian reservation. The Grande Ronde Indian Community in Oregon was restored to recognition after termination, and in 1990, the Secretary acquired about five acres of land in trust pursuant to the exception for Tribes restored to recognition. 25 U.S.C. § 2719(b)(1)(B)(iii).

Section 20 Two-Part Consultation Process

Section 20 of the Indian Gaming Regulatory Act also provides that an Indian Tribe may apply to the Secretary to place land into trust for gaming purposes. This process has sometimes been criticized as divisive among tribal governments, and has led to media hype regarding the unbridled proliferation of tribal gaming operations. While the procedure is not without its difficulties, we feel that as long as the process in IGRA is followed and the necessary parties are consulted, that there is no need at this time to amend the Act.

The two-part determination process is significant. Upon application by a Tribe the Secretary of the Interior begins a review to make a determination of whether the acquisition of the land in trust for gaming purposes would be in the best interests of the Indian tribe. The Secretary must also consult with the local area government and neighboring Indian tribes to ensure that such acquisition "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A).

We believe it is important for the Secretary to consult with local governments and neighboring Indian Tribes because the local community and Tribes in the area have an interest in the development of new gaming venues in their area. Certainly, local governments may be impacted by additional calls on their resources. Generally, tribal governments have been generous in negotiating agreements with local governments to underwrite those services and mitigate the impacts of gaming.

Neighboring Indian Tribes may also be impacted by new gaming venues, either through a market impact or concerns about overlapping aboriginal areas. Consultation can help to identify and address such concerns. It is important to remember that the Secretary of the Interior has a trust responsibility to the neighboring Tribes as well as to the applicant Tribe.

If the Secretary makes a determination favorable to the applicant Tribe, then the process turns to the Governor of the State in which the land is located. The Governor is consulted to ensure that the overall interests the State are considered, and the process will not move forward unless the Governor concurs with the Secretary's determination. The Governor's concurrence serves as a condition precedent to the use of "after acquired" lands for Indian gaming. The Governor's concurrence authority should be exercised in "good faith," just as Congress provided for in the tribal-state compact process.

While we are aware of reports of a number of Tribes have applied for "after acquired" land to be placed in trust for gaming outside the historical exceptions, only three Indian Tribes have successfully navigated the Section 20 two-part process: the Forest County

Potawatomi Tribe in Milwaukee, Wisconsin, in 1990; the Kalispel Tribe in Spokane, Washington, in 1997; and the Keweenaw Bay Indian Community in Marquette, Michigan, in 2000. In our view, these Tribes have shown that, when the two-part determination process is properly applied, the use of "after acquired" lands for Indian gaming is positive for the Tribes involved, the local communities, and the State.

The Forest County Potawatomi Tribe, for example, invested $120 million in its gaming facility and has been a leader in creating jobs in Milwaukee, with 7,000 jobs. The Tribe also dedicates $14 million annually to fund the Milwaukee Indian School, a school that is dedicated to educating all Indian children in the Milwaukee area. In Forest County, the Tribe has created an additional 667 jobs and generates approximately $11.5 million payroll. With its gaming revenue, the Tribe has created new community infrastructure, including a new $10 million health and wellness center for both tribal members and tribal employees. The Forest County Potawatomi Tribe is also very generous with its resources, and has assisted both the Sokagon Chippewa Tribe and the Red Cliff Band of Chippewa in Wisconsin.

The Kalispel Tribe has also been a community leader in creating jobs, with 1,500 new jobs at its facility. The Tribe also contributes over $500,000 a year to the City of Airway Heights to aid the City in its governmental services, and makes a number of contributions to other local charities.

The Keweenaw Bay Indian Community ("KBIC") has also achieved important success at its Marquette, Michigan facility. KBIC's casino is responsible for about 300-400 local area jobs (about 65% of which are held by non-Indians). The Tribe is one of the largest employers in the local economy. KBIC assists the local government with revenue for many government projects, including a new truck for the fire department, a new drug enforcement dog for the police department, and construction of a radio tower for the community ambulance service. KBIC is also generous in funding the YMCA, the school hockey program, youth events and other special events in the community.

CONCLUSION

To summarize, the media attention is overblown – there is no explosion of off-reservation Indian gaming. IGRA includes narrow exceptions for gaming on after-acquired lands that address the wrongful land takings caused by the Removal, Allotment, and Termination policies. While the Section 20 two-part determination procedure is not without its difficulties, we feel that as long as the process is followed, and that local governments and affected Indian Tribes are fully consulted, that these difficulties will be addressed. In over 15 years, only three Tribes have successfully used the Section 20 two-part process. In our view, Section 20 should not be amended at this time. Mr. Chairman and Members of the Committee, this concludes my remarks. Once again, thank you for providing me this opportunity to testify.