S. HRG. 106–157

INTERGOVERNMENTAL GAMING AGREEMENT ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 985

TO AMEND THE INDIAN GAMING REGULATORY ACT

JULY 21, 1999
WASHINGTON, DC

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CONTENTS

APPENDIX

INTERGOVERNMENTAL GAMING AGREEMENT ACT

WEDNESDAY, JULY 21, 1999

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

The committee met, pursuant to notice, at 9:30 a.m. in room 106, Senate Dirksen Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell and Inouye.

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

The CHAIRMAN. Good morning. The committee will be in order.

Today we will receive testimony on the Intergovernmental Gaming Act of 1999, a bill I introduced on May 6, 1999. Some history is in order to provide the proper context for this bill.

In 1987, the Supreme Court decided the *Cabazon* case, holding a State lacked jurisdiction to enforce its State gaming laws on Indian lands. In 1988, the States clamored for action and Congress responded by enacting IGRA, a law which provides States an unprecedented role in regulating activities that are conducted entirely on Indian lands.

There should be no misunderstanding about IGRA. In agreeing to the IGRA, the tribes ceded a significant part of their sovereignty. For the first time, the States were authorized to play a significant role in deciding the kinds of activities Indians conduct on their own lands. And I would repeat, it's on Indian lands.

From 1988–96, the IGRA worked well, with over 200 class III tribal-State compacts being negotiated and entered. In 1996, the Supreme Court issued its decision in *Seminole Tribe of Indians* v. *the State of Florida,* and held that tribes cannot sue States under IGRA because of their 11th amendment immunity from lawsuits.

In the last 3 years, tribal-State negotiations have broken down, with some States refusing to negotiate at all with tribes. Most times, there is a disagreement between the tribe and the State over what gaming activities are allowed by State law. In this situation, there is no neutral party to break the log jam.

S. 985 will not affect the States' 11th amendment immunity, but will provide for direct tribal-State negotiations, provide for tribal-State mediation, and provide Secretarial facilitation of an agreement, and provide also for State and tribal lawsuits against the In-

terior Secretary if it believes the Secretary is acting illegally in intervening in a mediation or in approving a compact.

With this and every other Indian gaming bill we've introduced, I have attempted to honor the spirit of the Indian Gaming Regulatory Act and to ensure that the act's objectives are achieved. Despite many attempts, IGRA has been amended only once. In 1997, Vice Chairman Inouye and I successfully proposed an amendment to increase the amount of fees the NIGC can assess to fund its regulatory efforts in Indian country. I think it's fair to say the tribes did not support our efforts in this amendment, but it was the responsible and the right thing to do, and is working well.

To provide the tribes a remedy where now none exists is also responsible and the right thing to do, and I'm hopeful that my colleagues will support this effort with this bill.

[Text of S. 985 follows:]

II

106TH CONGRESS
1ST SESSION

S. 985

To amend the Indian Gaming Regulatory Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 6, 1999

Mr. CAMPBELL introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To amend the Indian Gaming Regulatory Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as "The Intergovernmental Gaming Agreement Act of 1999".

SEC. 2. AMENDMENTS TO THE INDIAN GAMING REGULATORY ACT.

The Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) is amended by striking section 11, subsection (d) and inserting the following:

"(d)(1) Class III gaming activities shall be lawful on Indian lands only if those activities are—

"(A) authorized by an ordinance or resolution that—

"(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

"(ii) meets the requirements of subsection (b), and

"(iii) is approved by the Chairman,

"(B) located in a State that permits such gaming for any purpose by any person, organization, or entity; and

"(C) authorized by a Compact that is approved pursuant to tribal law by the governing body of the Indian tribe having jurisdiction over those lands;

"(D) conducted in conformance with a compact that—

"(i) is in effect; and

"(ii) is—

"(I) entered into by an Indian tribe and a State and approved by the Secretary under paragraph (3); or

"(II) issued by the Secretary under paragraph (3).

"(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body shall adopt and submit to the chairman an ordinance or resolution that meets the requirements of subsection (b).

"(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

"(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

"(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D).

"(C) Upon approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

"(3) COMPACT NEGOTIATIONS; APPROVAL.—

"(A) IN GENERAL.—

"(i) COMPACT NEGOTIATIONS.—Any tribe having jurisdiction over lands upon which a class III gaming activity is to be conducted may request the State in which those lands are lo-

cated to enter into negotiations for the purpose of entering into a compact with that State governing conduct of Class III gaming activities.

"(ii) REQUIREMENTS FOR REQUEST FOR NEGOTIATIONS.—A request for negotiations under clause (i) shall be in writing and shall specify each gaming activity the Indian tribe proposes for inclusion in the compact. Not later than 30 days after receipt of the written request, the State shall respond to the Indian tribe.

"(iii) COMMENCEMENT OF COMPACT NEGOTIATIONS.—Compact negotiations conducted under this paragraph shall commence not later than 30 days after the date on which a response by a State is due to the Indian tribe, and shall be completed not later than 120 days after the initiation of compact negotiations, unless the State and the Indian tribe agree in writing to a different period of time for the completion of compact negotiations.

"(B) NEGOTIATIONS.—

"(i) IN GENERAL.—The Secretary shall, upon request of an Indian tribe described in subparagraph (A)(i) that has not reached an

agreement with a State concerning a compact referred to in that subparagraph (or with respect to an Indian tribe described in clause (ii)(I)(bb) a compact) during the applicable period under clause (ii) of this subparagraph, initiate a mediation process to—

"(I) conclude a compact referred to in subparagraph (A)(i); or

"(II) if necessary, provide for the issuance of procedures by the Secretary to govern the conduct of the gaming referred to in that subparagraph.

"(ii) APPLICABLE PERIOD.—

"(I) IN GENERAL.—Subject to subclause (II), the applicable period described in this paragraph is—

"(aa) in the case of an Indian tribe that makes a request for compact negotiations under subparagraph (A), the 180-day period beginning on the date on which that Indian tribe makes the request; and

"(bb) in the case of an Indian tribe that makes a request to renew a compact to govern class III gaming

activity on Indian lands of that Indian tribe within the State that the Indian tribe entered into prior to the date of enactment of the Indian Gaming Regulatory Act of 1988, during the 60-day period beginning on the date of that request.

"(II) EXTENSION.—An Indian tribe and a State may agree to extend an applicable period under this paragraph beyond the applicable termination date specified in item (aa) or (bb) of subclause (I).

"(iii) MEDIATION.—

"(I) IN GENERAL.—The Secretary shall initiate mediation to conclude a compact governing the conduct of class III gaming activities on Indian lands upon a clear showing by an Indian tribe that, within the applicable period specified in clause (ii), a state has failed—

"(aa) to respond to a request by an Indian tribe for negotiations under this subparagraph; or

"(bb) to negotiate in good faith.

"(II) EFFECT OF DECLINING NEGOTIATIONS.—The Secretary shall initiate mediation within 10 days after a State declines to enter into negotiations under this subparagraph, without regard to whether the otherwise applicable period specified in clause (ii) has expired.

"(III) COPY OF REQUEST.—An Indian tribe that requests mediation under this clause shall provide the State that is the subject of the mediation request a copy of the mediation request submitted to the Secretary within 5 days of receipt of the request.

"(IV) PANEL.—The Secretary, in consultation with the Indian tribes and States, shall establish a list of independent mediators, that the Secretary, in consultation with the Indian tribes and the States, shall periodically update. All mediators placed upon the list shall be certified by the American Arbitration Association as qualified to conduct arbitration in accordance with the American Arbitration Association rules and procedures.

"(V) NOTIFICATION BY STATE.—Not later than 10 days after an Indian tribe makes a request to the Secretary for mediation under subclause (I), the State that is the subject of the mediation request shall notify the Secretary whether the State elects to participate in the mediation process within 5 days of receipt of the request. If the State elects to participate in the mediation, the mediation shall be conducted in accordance with subclause (IV). If the State declines to participate in the mediation process, the Secretary shall issue procedures pursuant to clause (iv).

"(VI) MEDIATION PROCESS.—

"(aa) IN GENERAL.—Not later than 20 days after a State elects under subclause (V) to participate in a mediation, the Secretary shall submit to the Indian tribe and the State the names of 3 mediators randomly selected by the Secretary from the list of mediators established under subclause (IV).

"(bb) SELECTION OF MEDIATOR.—Not later than 10 days after the Secretary submits the mediators referred to in item (aa), the Indian tribe and the State may each peremptorily remove one mediator from the mediators submitted. If either the Indian tribe or the State declines to remove a mediator, the Secretary shall randomly remove names until only one mediator remains. The remaining mediator shall conduct the mediation.

"(cc) INITIAL PERIOD OF MEDIATION.—The mediator shall, during the 60-day period beginning on the date on which the mediator is selected under item (bb) (or a longer period upon the written agreement of the parties to the mediation for an extension of the period) attempt to achieve a compact.

"(dd) LAST BEST OFFER.—If by the termination of the period specified in item (cc), no agreement for concluding a compact is achieved by the

parties to the mediation, each such party may, not later than 10 days after that date, submit to the mediator an offer that represents the best offer that the party intends to make for achieving an agreement for concluding a compact (referred to hereinafter as a 'last-best-offer'). The mediator shall review a last-best-offer received pursuant to this item not later than 30 days after the date of submission of the offer.

"(ee) REPORT BY MEDIATOR.—Not later than the date specified for the completion of a review of a last-best-offer under item (dd), or in any case in which either party in a mediation fails to make such an offer, the date that is 10 days after the termination of the initial period of mediation under item (cc), the mediator shall prepare and submit to the Secretary a report that includes the contentions of the parties, the conclusions of the mediator concerning the per-

missible scope of gaming on the Indian lands involved, and recommendations for the operation and regulation of gaming on the Indian lands in accordance with this Act.

"(ff) FINAL DETERMINATIONS.—Not later than 60 days after receiving a report from a mediator under item (ee), the Secretary shall make a final determination concerning the operation and regulation of class III gaming that is the subject of the mediation.

"(VII) PROCEDURES.—Subject to clause (iii)(V), on the basis of a final determination described in clause (iii)(VI)(ff), the Secretary shall issue procedures for the operation and regulation of the class III gaming described in that item by the date that is 180 days after the date specified in clause (iii)(V) or upon the determination described in clause (iii)(VI)(ff).

"(VIII) JURISDICATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.—

"(aa) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the Secretary, the Commission, a State, or an Indian tribe to challenge the Secretary's decision to complete a compact or initiate mediation or to challenge specific provisions of procedures issued by the Secretary for the operation of class III gaming under clause (iii)(V) or (iii)(VII).

"(bb) The Secretary's decision to complete a compact or to initiate mediation pursuant to clause (iii)(V) or (iii)(VII) shall be immediately reviewable in the United States District Court.

"(cc) Upon receipt of a petition to review a decision of the Secretary to complete a compact or initiate mediation pursuant to clause (iii)(V) or

(iii)(VII), the United States District Court shall appoint a three judge panel to hear the proceedings and render a decision regarding whether the determination of the Secretary was valid as a matter of law.

"(IX) PROHIBITION.—No compact negotiated, or procedures issued, under this subparagraph shall require that a State undertake any regulation of gaming on Indian lands unless—

"(aa) the State affirmatively consents to regulate that gaming; and

"(bb) applicable Sate laws permit that regulatory function.

"(C) MANDATORY DISAPPROVAL.—Notwithstanding any other provision of this Act, the Secretary may not approve a compact if the compact requires State regulation of gaming absent the consent of the State or the Indian tribe.

"(D) EFFECTIVE DATE OF COMPACT OR PROCEDURES.—Any compact negotiated, or procedures issued, under this subsection shall become effective upon the publication of the compact or procedures in the Federal Register by the Secretary.

"(E) EFFECT OF PUBLICATION OF COMPACT.—Except for an appeal conducted under subchapter II of chapter 5 of title 5, United States Code, by an Indian tribe or a State associated with the compact, the publication of a compact pursuant to subparagraph (B) shall, for the purposes of this Act, be conclusive evidence that the class III gaming subject to the compact is an activity subject to negotiations under the laws of the State where the gaming is to be conducted, in any matter under consideration by the Commission or a Federal court.

"(F) DUTIES OF COMMISSION.—Consistent with minimum standards and as otherwise authorized by this Act, the Commission shall monitor and, if authorized by those standards and this Act, regulate and license class III gaming with respect to and in a manner consistent with any compact that is approved by the Secretary under this subsection and published in the Federal Register.

"(4) PROVISIONS OF COMPACTS.—

"(A) IN GENERAL.—A compact negotiated under this subsection may only include provisions relating to—

"(i) the application of the criminal and civil laws (including regulations) of the Indian

tribe or the State that are directly related to, and necessary for, the licensing and regulation of that gaming activity in a manner consistent with the requirements of the standards promulgated by the Commission.

"(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of those laws (including regulations);

"(iii) the assessment by the state of the costs associated with those activities in such amounts as are necessary to defray the costs of regulating that activity;

"(iv) taxation by the Indian tribe of that activity in amounts comparable to amounts assessed by the State for comparable activities;

"(v) remedies for breach of compact provisions;

"(vi) standards for the operation of that activity and maintenance of the gaming facility, including licensing, in a manner consistent with the requirements of the standards promulgated by the Commission.

"(vii) any other subject that is directly related to the operation of gaming activities.

"(B) STATUTORY CONSTRUCTION WITH RESPECT TO ASSESSMENTS; PROHIBITION.—

"(i) STATUTORY CONSTRUCTION.—Except for any assessments for services agreed to by an Indian tribe in compact negotiations, nothing in this section may construed as conferring upon a State, or any political subdivision thereof, the authority to impose any tax, fee, charge, or other assessment upon an Indian tribe, an Indian gaming operation or the value generated by the gaming operation, or any person or entity authorized by an Indian tribe to engage in class III gaming activity in conformance with this Act.

"(ii) ASSESSMENT BY STATES.—A State may assess the assessments agreed to by an Indian tribe referred to in clause (i) in a manner consistent with that clause.

"(5) STATUTORY CONSTRUCTION WITH RESPECT TO CERTAIN RIGHTS OF INDIAN TRIBES.—Nothing in this subsection impairs the right of an Indian tribe to regulate class III gaming on the indian lands of the indian tribe concurrently with a State and the Commission, except to the extent that such regulation is inconsistent with or less stringent than, this Act or any laws (including regula-

tions) made applicable by any compact entered into by the Indian tribe under this subsection that is in effect.

"(6) EXEMPTION.—The provisions of section 2 of the Act of January 2, 1951 (commonly referred to as the 'Gambling Devices Transportation Act') (64 Stat. 1134, chapter 1194; 15 U.S.C. 1175) shall not apply to any class II gaming activity or any gaming activity conducted pursuant to a compact entered into after the date of enactment of this Act, but in no event shall this paragraph be constructed as invalidating any exemption from the provisions of section 2 of the Act of January 2, 1951 for any compact entered into prior to the date of enactment of this Act.".

(b) JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.—The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the Secretary, the Commission, a State, or an Indian tribe to enforce any provision of a compact entered into under subsection (a) or to enjoin a class III gaming activity located on Indian lands and conducted in violation of any compact that is in effect and that was entered into under subsection (a).

(c) APPROVAL OF COMPACTS.—

(1) IN GENERAL.—The Secretary may approve any compact between an Indian tribe and a State governing the conduct of class III gaming on Indian lands of that indian tribe entered into under subsection (a).

(2) REASONS FOR DISAPPROVAL BY SECRETARY.—The Secretary may disapprove a compact entered into under subsection (a) only if that compact violates any—

(A) provision of this Act or any regulation promulgated by the Commission pursuant to this Act;

(B) other provision of Federal law; or

(C) trust obligation of the United States to Indians.

(3) EFFECT OF FAILURE TO ACT ON COMPACT.—If the Secretary fails to approve or disapprove a compact entered into under subsection (a) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to be approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act and the regulations promulgated by the Commission pursuant to this Act.

(4) NOTIFICATION.—The Secretary shall publish in the Federal Register notice of any compact that is approved, or considered to have been approved, under this subsection.

(d) REVOCATION OF ORDINANCE.—

(1) IN GENERAL.—The governing body of an Indian tribe in its sole discretion, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. That revocation shall render class III gaming illegal on the Indian lands of that Indian tribe.

(2) PUBLICATION OF REVOCATION.—An Indian tribe shall submit any revocation ordinance or resolution described in paragraph (1) to the Commission. The Commission shall publish that ordinance or resolution in the Federal Register. The revocation provided by that ordinance or resolution shall take effect on the date of that publication.

(3) CONDITIONAL OPERATION.—Notwithstanding any other provision of this subsection—

(A) any person or entity operating a class III gaming activity pursuant to this Act on the date on which an ordinance or resolution describe in paragraph (1) that revokes authoriza-

tion for that class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which that revocation, ordinance, or resolution is published under paragraph (2), continue to operate that activity in conformance with an applicable compact entered into under subsection (a) that is in effect; and

(B) any civil action that arises before, and any crime that is committed before, the termination of that 1-year period shall not be affected by that revocation, ordinance, or resolution.

(e) CERTAIN CLASS III GAMING ACTIVITIES.—

(1) COMPACTS ENTERED INTO BEFORE THE DATE OF ENACTMENT OF THE INTERGOVERNMENTAL GAMING AGREEMENT ACT OF 1999.—Class III gaming activities that are authorized under a compact approved or issued by the Secretary under the authority of this Act prior to the date of enactment of the intergovernmental gaming agreement act of 1999 shall, during such period as the compact is in effect, remain lawful for the purposes of this Act, notwithstanding the Intergovernmental Gaming

Agreement Act of 1999 and the amendments made by that Act or any change in State law.

(2) COMPACT ENTERED INTO AFTER THE DATE OF ENACTMENT OF THE INTERGOVERNMENTAL GAMING AGREEMENT ACT OF 1999.—Any compact entered into under subsection (a) after the date specified in paragraph (1) shall remain lawful for the purposes of the Intergovernmental Gaming Agreement Act of 1999, notwithstanding any change in state law, other than a change in state law that consistutes a change in the public policy of the State with respect to permitting or prohibiting class III gaming in the State.

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The CHAIRMAN. Senator Inouye, did you have a statement?

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Thank you very much, Mr. Chairman.

As you know, I have been involved in this issue for the past 12 years. I believe I have said too many thousands of words. But I concur with you, when this matter was enacted, we literally compelled Indian Nations to relinquish part of their sovereignty, which they did, reluctantly, but they did so hoping that this would resolve this matter. Now we find ourselves at square one again. I hope that this measure will in some way clarify the issue.

The CHAIRMAN. We will now start with the first panel of one, that's the Honorable Mike Enzi, our colleague from Wyoming.

STATEMENT OF HON. MIKE ENZI, U.S. SENATOR FROM WYOMING

Senator ENZI. Thank you, Mr. Chairman and Ranking Member.

I appreciate the opportunity to testify before your committee this morning on S. 985, the Intergovernmental Gaming Agreement Act of 1999. And I have been asking for some hearings virtually since I got here, and I appreciate your doing that.

While some of the witnesses who will testify this morning will spend more time discussing the specifics of the legislation in question, I will focus my brief remarks on why I have been involved in this debate over the past 2 years and why I think it's imperative that any changes that are made to the Indian Gaming Regulatory Act come from Congress, and that those changes respect the legitimate interests of the 50 State governments as well.

I will also offer a few observations on the legislation that's before the committee this morning by explaining why I believe S. 985 gives the Secretary of the Interior too much authority in the process of approving class III gambling agreements for the various Indian tribes.

At the outset, again, I'd like to thank the Chairman for holding this hearing. One of the points I've been trying to make on floor debates on the issue of Indian gambling is that Congress is the proper body to resolve any underlying disputes that exist between the States and the tribes following the *Seminole* decision in 1996.

It was Congress that passed the Indian Gaming Regulatory Act in 1988, and if the statute needs fixing, it's the duty of Congress and especially this committee on the Senate side to do the heavy lifting. It's not the role of an unselected Cabinet Secretary to usurp Congress' duty and legislation by regulation wherever he perceives and whenever he perceives a problem with the current system.

Mr. Chairman, I've offered four amendments over the past 2 years to appropriations bills on the floor of the Senate to prohibit the Secretary of the Interior from bypassing the role of States in casino gambling compacting process. While I have never claimed that these amendments would permanently fix problems that may still exist between the tribes and the States, I thought it was important to avoid changes if the changes could not be undone. That's a real important part of this. I wasn't trying to preserve the status

quo necessarily. I was trying to avoid changes that could later not be changed.

And sometimes, once an action is taken by us, we don't have the opportunity, because of decisions that happen subsequent to that, to go back and change it. I wanted Congress to have an opportunity to consider the problem and if necessary, take up legislation to resolve the current impasse.

I believe that the Secretary's recent action in finalizing his regulations demonstrates once again Secretary Babbitt's serious disregard for the rightful role of Congress and all 50 State governments. Under the Secretary's regulations, there is little incentive for the tribes who desire casino gambling to strongly pursue reasonable negotiations with the States. They can always turn to Secretary Babbitt to get a better deal.

My primary motivation for becoming involved in the debate over gambling on Indian lands was derived from my background in State and local government. I have a strong respect for the decisions of local lawmakers, and I do not believe that their decisions on questions such as whether a particular type of gambling should be allowed within their State should be easily disregarded.

As I've mentioned in the debate that we've had before, we had referendum in Wyoming on the gambling issue. And while the preliminary polls showed that it would pass by at least 60 percent, it failed by 60 percent in every, every county. And by every county, I am including the county that is primarily tribal land.

So I have strong respect for the decisions of local lawmakers and do not believe their decisions on questions such as whether a particular type of gambling should be allowed within their State should be easily disregarded. Not only do I object as a general matter to an unselected Cabinet official attempting to circumvent the rights of all 50 States, I have special concerns with the attempt by the current Secretary to delegate himself additional trust responsibilities.

If anyone has any doubts about the proclivity of Secretary Babbitt to disregard the rights of States, I suggest they ask the Senator from Utah about the Secretary's handling of the national monuments in Utah. During his tenure as Secretary of the Interior, Bruce Babbitt hasn't had a very good track record in carrying out the trust responsibilities for Indian tribes within his jurisdiction. There remain serious allegations that Secretary Babbitt may have allowed campaign donations to influence his decision in approving and denying compacts for class III gaming.

Moreover, his department has seriously mismanaged billions of dollars of trust moneys for the various Indian tribes. And the Secretary himself has personally been held in contempt of court for their failure to turn over documents. And their subsequent false statements regarding the production of these documents is part of a Federal lawsuit.

Judge Lambert went so far as to remark that he had "never seen more egregious misconduct by the Federal Government." I do not think this is the time to be giving Secretary Babbitt additional trust responsibilities.

Mr. Chairman, while I will leave the more detailed analysis of S. 985 to other witnesses, I would like to make a few observations

on some of the provisions in this legislation. First, I'm concerned over the degree of discretion the bill gives the Secretary of the Interior. Instead of requiring the States and tribes to negotiate a compact, as required under current law, this bill would allow the tribes to petition the Secretary for a gambling agreement right off the bat, thereby encouraging the various tribes to forego the initial tribal-State negotiations that were envisioned by IGRA.

Second, the bill tips the scales of power more in favor of the tribes and against the States by effectively allowing the Secretary the final word on the meaning of State law. While I believe that a mediation process would be helpful in certain circumstances to resolve real stalemates and negotiations, such a process should not serve as means of reinterpreting or rewriting State domestic law. I think that States should have the last word on the meaning of their own laws.

Third, this bill would require that all challenges to the compacts under IGRA be heard by the U.S. District Court for the District of Columbia. I think this requirement places an unfair burden on the States by making it more cumbersome and costly for the States to challenge decisions by the Secretary of the Interior.

While I appreciate your efforts, Mr. Chairman and Ranking Member, and the efforts of others on the committee, to provide a legislative fix to the conflicts that have arisen in negotiations between tribes and States, I believe the current version of S. 985 tips the scales too much away from the 50 State governments, and instead, places unwarranted new authority in the hands of the Secretary of the Interior.

I thank you for the opportunity to testify.

The CHAIRMAN. Thank you. First, I want to point out, as you probably know, all challenges to the Secretary in court have to take place in a Federal court anyway, under IGRA. Second, have you read page 12, lines 16 through 21 of the bill? Well, 16 through 21 basically give States recourse to the Secretary's decision so that they can be challenged in court. You just referred to the District Court and it does say District Court. But the bottomline is that there is recourse, so that the Secretary can't just arbitrarily make the decision, where there is no recourse for the States.

And third, I want to tell you, I don't think anybody's fought more with Secretary Babbitt in this Senate than I have, on water, on Indian issues, like trust funds, on literally everything you can imagine, grazing rights and everything else. I come from a western State like you do, and we have great disagreements with this current Secretary. But I don't want to put him in the framework of all future Secretaries, too, because I fight with him so much.

But the concept of this in the first place was to try to set up a way that there could be negotiated agreements between States and tribes without just simply fighting it out in court every time as they're doing now, and have been doing since *Florida* v. *Seminole.* But if you have some amendments that you think would make this a better bill, that would do the right thing to both parties, that is, the States and the tribes, I would appreciate your input, and I would appreciate working with you and consider anything you have to make this a better bill.

Senator ENZI. Well, I thank you for all the thought and concern that's gone into it. You've definitely gotten at the various issues that have arisen.

And you'll hear more as the Governors testify here shortly. I would be happy to work with you on it.

The CHAIRMAN. I'll tell you, one of the problems this committee has faced, literally all this year and last year, is that both tribes and States, nobody wants to moderate their position and nobody wants to come to the bargaining table and nobody wants any kind of a compromise. They just seem to be locked out. And Senator Inouye and I and others on the committee, too, have just racked our brains trying to find a way we can get them to the bargaining table on things like taxation and any number of things.

Because gaming, too, we haven't been able to do it. They all come in and tell us what they don't want. But so far, very frankly, darned few of them have come in and told us how we can find a solution to the problem they both face. They just absolutely stonewall. The States have done it and tribes to some degree have done the same thing.

So we're still looking for an answer to try to get some agreement that protects the sovereignty of both. And we just simply haven't found it. So if you have a way that is better than this bill, I'd appreciate you telling us about it.

Senator ENZI. I can appreciate all the efforts that you've done on this, and I know what advocates you and Senator Inouye have been and how long you've been involved in this. And I'm a newcomer to the whole process. I can tell you that after I've done my amendment, before, I have gone back and visited with the tribes. It's one of the more difficult discussions that I've had, but one of the most important ones that I've had, too. And we've gotten into the issue of not only the gambling but also the issue of taxation, and some of the access to the reservation, some of the hunting problems, some of those things.

The CHAIRMAN. Well, they're complicated issues. But as long as the States feel they've won a couple of licks in court, they have no incentive to negotiate about anything, if they're on a roll and winning decisions against tribes in courts.

That's one of the problems we face since *Florida* v. *Seminoles,* they just don't feel they have to negotiate, that they can win it in court. But that's not the right thing to do, just to battle it out and you know, hammer your adversaries down through court decisions.

Senator ENZI. And that's why I was asking for the hearings that you're doing now and appreciate the progress of having an actual bill for people to do the input on. I think it's the right way to go, having Congress making the decisions. It's a little broader negotiation than putting that all on the shoulder of one person.

The CHAIRMAN. Well, as you know, these things go in as vehicles for a lot of amendments and a lot of discussion. So anything you have to add to it, we'd appreciate it.

Senator Inouye, did you have some comments?

Senator INOUYE. No; I just wish to join you in the expression of your concern. And as my colleague from Wyoming is well aware, that in 1987, when the Supreme Court rendered its decision on the *Cabazon* case, we began working with the Federal Government, be-

cause that is the proper agency to deal in a sovereign manner with the sovereign Indian Nations.

But when it became apparent that the States had a direct interest in gaming, some States had regulated gaming, others permitted gaming, it was then decided that the States should be involved in this process. We came up with the concept of a compact.

At that time it was well understood by the Governors that we were calling upon Indian Nations to give up part of their sovereignty, give up the traditional relationship they have had with the Government of the United States. It was felt at that time that the 11th amendment would not be implicated. That was not part of the discussions.

But then when the Supreme Court's ruled in the *Florida* case, everything came to a screeching halt. And I commend the Chairman for okay his best to try to resolve this matter, because if the intent of IGRA is to be carried out, something has to be done, something to address the 11th amendment matter.

Thank you, sir.

Senator ENZI. Just an additional response on that. Again, I do appreciate the work that you're doing on this, and I recognize the sovereignty of the tribes. One of the problems that we're experiencing worldwide is that the world is shrinking, and people in one area are having more of an effect in people of another area than they've had before. And where the world seems to work best is where the people of even different nations are communicating the most to work out the differences on the ways that they affect the people in each of the countries.

That's what we're trying to do on this, too, because obviously the Indian gambling isn't going to work unless they're able to entice some people from off the reservation as well. And then those people leave and go back to those areas, and sometimes create some problems there. So there is some interaction involved in it, and sometimes it's pretty dramatic. And so we've got to work out as many differences as we can between them. Hopefully, the best interests of both can be kept in mind at all time.

The CHAIRMAN. Well, you're clearly right, the world is shrinking. But in the case of the American Indians, their world has shrunk by about 99 percent in the last 200 years, as you're aware. And I think that's what really drives them, is not to lose that other 1 percent.

Senator ENZI. Right.

The CHAIRMAN. But we certainly appreciate your appearance this morning, and we look forward to your input on this bill.

Senator ENZI. Thank you.

The CHAIRMAN. And we will now go to Hilda Manuel, the Deputy Commissioner for Indian Affairs, from the Department of the Interior. Welcome to our committee, Hilda. As with all people who testify, your complete written testimony will be included in the record. If you'd like to abbreviate, that will be fine.

STATEMENT OF HILDA MANUEL, DEPUTY COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY DERRIL JORDAN, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS; AND GEORGE SCABINE, DIRECTOR, INDIAN GAMING MANAGEMENT OFFICE, BUREAU OF INDIAN AFFAIRS

Ms. MANUEL. Yes; thank you, Mr. Chairman. We have a rather brief statement in any case, and I've asked Derril Jordan, the Associate Solicitor for Indian Affairs, and George Scabine, who is the Director of the Bureau's Indian Gaming Management Office, to join me at the table, inasmuch as both of them are more familiar with the day to day details that they operate under involving Indian gaming.

Good morning, Mr. Chairman and members of the committee. I am pleased to present the administration's views on S. 985, the Intergovernmental Gaming Agreement Act of 1999. We strongly support this legislation.

As you may know, since the passage of the Indian Gaming Regulatory Act in 1988, the Department of the Interior has approved over 200 class III gaming compacts between States and tribes in over 26 States. These compacts have enabled Indian tribes to open class III gaming establishments that have generated much-needed revenue for tribes and thereby reducing their reliance on Federal dollars to implement a number of tribal initiatives.

As required by IGRA, gaming revenues are devoted primarily to providing essential governmental services, such as roads, schools, hospitals, and economic development. These gaming establishments have led to a direct increase in employment by providing jobs in the gaming and gaming related industries, such as food service, thereby rejuvenating often economically depressed communities through increased buying power.

One of the crucial aspects of the current compacting process in section 11 of IGRA is the ability of Indian tribes to initiate a lawsuit in Federal District Court arising from the failure of a State to enter into compact negotiations with the tribe, or to conduct such negotiations in good faith. The tribes' ability to sue under IGRA has been greatly compromised, as you've already indicated.

Following the U.S. Supreme Court's decision in *Seminole Tribe* v. *Florida,* which held that a State may assert an 11th amendment immunity defense to avoid a lawsuit brought by a tribe under IGRA, alleging that the State did not negotiate in good faith, dismissal of the good faith lawsuit on immunity grounds effectively permits the State, if no further action is taken, to veto class III gaming by a tribe, when other class III gaming would be permissible under IGRA.

In response to this stalemate created by the *Seminole* decision, the Department did publish in the Federal Register on April 12, 1999 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 11th amendment immunity defense to a lawsuit initiated by the tribe in Federal Court. The rule became effective on May 12, 1999, and to date, one-half dozen tribes have submitted applications for class III gaming procedures under this new rule.

S. 985 addresses the problems created by the *Seminole* decision by eliminating good faith lawsuits brought against States while preserving the opportunity of tribes to engage in class III gaming activities permitted under IGRA standards. We believe the Secretary of the Interior's legal authority to promulgate the class III procedures rule is supported by the statutory delegation currently contained in IGRA and the broad delegation of Federal authority of Indian affairs found in 25 U.S.C. sections 2 and 9.

We note, however, that the authority of the Secretary to promulgate the class III procedures regulation has been challenged in the lawsuit filed by the States of Florida and Alabama. While we believe that the Secretary's authority will be ultimately upheld in that action, we nonetheless support S. 985 as an opportunity to get past, once and for all, the impasse created by the *Seminole* decision.

We certainly look forward to working with you and your staff in any way that we can. As part of my testimony, we do offer several minor technical amendments that we hope you will consider as you finalize the bill. This concludes my prepared statements, and at this time, Mr. Chairman, if you have any questions, I or either one of my staff, George Scabine or Derril will answer. Thank you.

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

The CHAIRMAN. You stated that six tribes have applied to the Secretary for the issuance of procedures?

Ms. MANUEL. That is correct.

The CHAIRMAN. What is the status of those applications? Have they been in any way held up because of the ongoing lawsuit dealing with trust funds or anything? Are they in the process?

Ms. MANUEL. They are being processed, and I believe that we currently are processing five. There's one we've already disapproved.

The CHAIRMAN. One has been approved.

Ms. MANUEL. Disapproved.

The CHAIRMAN. Disapproved. The National Governors' Association has repeatedly stated that the secretarial procedures bypasses them, and you heard that, basically Senator Inouye alluded to that. Would you tell the committee, how many opportunities to the procedures, how many are offered to the States so that they do have some input into the process?

Ms. MANUEL. Under the existing proposed rule that we have published and are operating under, the criteria for a tribe to apply for secretarial procedures requires that they have initiated a lawsuit against the State for failure to negotiate in good faith, or failure to negotiate. And that lawsuit has been dismissed by court order, before they can even be eligible to see secretarial procedure.

So the tribes that have applied have been through that process, they've provided the States obviously the opportunity to negotiate with them, were not successful, initiated lawsuits against those particular States and now have——

The CHAIRMAN. And this bill then, in your view, does not bypass the current system.

Ms. MANUEL. It does not.

The CHAIRMAN. In fact, it just is another step, but it doesn't give anybody a by so that they don't have to negotiate?

Ms. MANUEL. That's right.

The CHAIRMAN. I see Senator Inouye has already left. I had no further questions, but he may have. Are you going to stay for a few minutes, in case Senator Inouye needed to ask you some questions?

Ms. MANUEL. I can stay.

The CHAIRMAN. Why don't you stay for a few minutes, and if you don't, we'll make sure he gets them to you in writing.

With that, we'll now go to our third witness, which will be James Billie, the chairman of the Seminole Tribe of Florida, from Hollywood, FL. Chairman Billie, your complete statement will be included in the record, and you may proceed.

STATEMENT OF JAMES E. BILLIE, CHAIRMAN, SEMINOLE TRIBE OF FLORIDA, ACCOMPANIED BY JERRY STRAUS

Mr. BILLIE. Sho Naa Bisha. Good to see you again. And this is Jerry Straus, with Hobbs, Straus. If anything gets too technical, I'll throw it to him.

Mr. Chairman, I'd like to thank you for inviting me over here today. And since about 1979, we fell upon a good fortune that has helped Seminole Tribe tremendously. Some people would say my tribe was poor back then, but I never really felt poor, because we always had the forest and the food and everything, but we just didn't have money to do things.

When this bingo came in, it has provided all kinds of avenues for us to start living in modern times. And then somewhere about 1988, I think it was, something called IGRA, they started implementing different regulations on us, and the different Indians throughout the United States were getting into the gaming situation here.

So IGRA was implemented, and several things took place at that time, we had to start following some sort of rules. One of the situations in 1988 was that we could not buy lands and create casinos, this type of mentality. Recently, I've seen in the newspapers where different Senators and different Congressmen in Florida are calling us liars, we're buying land to put further casinos. But they wrote the law in 1988, why are they calling me a liar when I buy new lands? I don't know.

But we are expanding our land base, so if 1988 can tell them anything, they should read their own law that they wrote, especially the congressional people down in Florida. I know they voted against me on several things.

We have worked very hard at trying to negotiate with the State, and at every turn, they have turned us down, or not even talked to us. I've tried several ways, they're talking about taxes, I told them they could come in and work with us and we'd figure out how to work these taxes out. Because I know that the parimutuels over there, they give a certain amount. And I said, we could do the same thing the parimutuels are doing. They denied that.

So if someone says from the State of Florida that we're not dealing in good faith, they are lying. Because I've been at their doorstep ever since we started. The things that I'm asking for down in Florida for the Florida Seminoles is nothing more and nothing less than what they're doing already. They have casinos already running offshore, or they have this charitable organization type thing.

They even had casino night in my place at the bingo hall that we had in Big Cypress. And then they turn around and tell me they don't have casinos. So who's got the two tongues? I don't know.

They have their parimutuels, they have their crap tables, they have their roulettes, they have their one-armed bandits, all this thing is taking place in Florida. So I have not gone in and tried to act like I'm trying to get something more than what they have. If I could have just what they have, it would be the same thing as what people in Vegas have.

Anyway, with the struggling effort that we're doing to get what we need, in the meantime, while it's still open, our livelihood has improved. If IHS, Indian Health Service, cannot provide a certain amount of funds, we offset it with our own funds, which it seems like that's the way you're supposed to do to the white man, so to speak, learn to do the white man's way. And we've done that and done it very well.

I would wear a silk suit, I guess, but I still like wearing my Indian jacket, it covers my body a little bit better.

But we've kept our customs and traditions at the same time living in this fine world we live in. It's kind of funny, some of the statements I saw up here says, somebody has a bigger stick than we do, but they're using our forests to get that stick. So I'm not sure what the mentality is of the State of Florida.

This new act that we're trying to get into, we support it. We hope that whatever you're doing here will help us out. So the bottomline is, the request when we're dealing with the State, we're asking for no more, no less than what the State is doing.

One of the things I heard the gentleman before me say, they had some sort of vote, it had nothing to do with the Indian gaming. It had to do with themselves. They're the ones that impose it on themselves. But when I ask the basic general public if they had a referendum vote for us, we'd probably have it.

So I guess political semantics, verbal semantics, can take place the way you want to. But we're doing fine down there with what we have, and we would like to go a little step further and get what the State has. Because they definitely have been taking what we have for many years.

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

The CHAIRMAN. Would you repeat, you mentioned about one-half dozen things the State does, like casino nights, things of that nature? Are these things you cannot do now in Florida?

Mr. STRAUS. Mr. Chairman, the State of Florida has a wide variety of gaming that they permit. Most of it is done through the State lottery. Florida's position apparently is that because the lottery is doing it, it doesn't count. But that's not what the law says, and that's not just in the IGRA. That goes before IGRA under the *Cabazon* case.

Some of the things they do, they have a television show in which they play craps on the television show. They've stopped broadcasting that show, but they could start it again any day. They have authority to do that. They have wheel of fortune type games on that television show.

They have slot machines and we had a court case against the, slot machines defined under Florida law. Florida law has a very

broad definition of slot machines. And we had a court case that I think has been furnished to the committee that holds, the lottery has used those slot machines, that would be illegal by anybody else in Florida. But the lottery is allowed to do it.

Our position is that if the lottery can do it, well, then, the tribes can do it.

The CHAIRMAN. My framework of reference for a slot machine is you've got to pull a handle or touch a button. How do you do that?

Mr. STRAUS. In this one, you insert a coin. You insert a coin in this machine and it dispenses a variety of lottery tickets. As a result of the application of an element of chance as to which ticket might be delivered, you're entitled to a prize of some kind. They can be very large prizes.

The State also permits the cruises to nowhere, the full scale casinos that operate on cruise ships that leave from Florida ports, sometimes on lands leased by the State itself, and then return to the port without going to any foreign port, any other destination. They're simply casinos. And the State permits those to occur. It has the authority under Federal law, Congress amended the Johnson Act to give the State the authority to prohibit that kind of activity, but they permit it.

The charity nights, these are full scale casinos that take place every night somewhere in Florida. The State has agreed that they do not enforce the law against those charity nights.

The CHAIRMAN. Correct me on the cruise ships. Do they actually have gaming while they're in the harbor?

Mr. STRAUS. No; they do not.

The CHAIRMAN. Do they go off into international waters?

Mr. STRAUS. They're out beyond the 3 mile limit. They don't actually conduct the gaming, but the State has the power to prohibit that gaming, and that's what the statute says, if the State permits the gaming, and they do, they have the power over this, and there's a very close nexus to the State, because of its involvement in those operations.

The CHAIRMAN. Chief Billie, you said your tribe is expanding its land base. Does that mean you're buying private land and putting it into trust, or going through the process to put it into trust?

Mr. BILLIE. Sometimes it's not advantageous to put them in trust, so we expand our land base, because back in 1979, what started this whole routine for me was there was a theory that somebody said that Indians, not a theory, but somebody was quoted as saying that Indians will not leave their reservation and yet they're in poverty. So I thought, well, maybe they're right.

So the first piece of land I bought was up in Tampa, moved people to there. Then we go to different locations where there is a larger town, where there is work capabilities there.

The CHAIRMAN. So you're buying land that is not contiguous, it's separated?

Mr. BILLIE. Right, different locations in Florida.

The CHAIRMAN. All right. Senator Inouye, did you have questions of Chairman Billie?

Senator INOUYE. Yes; if I may.

You've suggested that we should very carefully consider amendments suggested by the National Indian Gaming Association. Do

you have any specific amendment or amendments that you would want us to consider?

Mr. STRAUS. The one that the Seminole Tribe thought was most significant was the access to a three judge court and Supreme Court review. That seemed to us something that might not work very well, that would be better to let the ordinary judicial process operate. And that also, NIGA testimony suggested certain ways to tighten the time requirements so that the process will be slightly faster.

The other suggestion NIGA made that I think is worthy of note is that the burden of proof has been shifted to the tribe, in terms of, and this bill is really in some ways really tilts toward the States. On that one issue, it's somewhat uncomfortable for us to assume that burden, given this whole history. Those are some of the things that have seemed significant to the Seminole Tribe.

Senator INOUYE. Thank you very much.

Mr. Chairman, may I ask Ms. Manuel a question?

The CHAIRMAN. Yes; please do. That's why I asked her to stay, because you were on the phone.

Senator INOUYE. Ms. Manuel, in your testimony you state that this bill should provide

> A clear indication as to what standards should be followed to determine whether the State has failed to negotiate in good faith.

Do you have any recommendations as to what standards the Secretary should use in determining whether the States have negotiated in good faith? Do you have any suggestions?

Ms. MANUEL. I believe that as part of our, as we're looking at the applications that are currently pending before us, that is an area that we want to ensure we're adequately informed and addressed. It does involve legal implications, so I'll have Derril, the Associate Solicitor for Indian Affairs, answer your question, sir, if you don't mind.

Mr. JORDAN. With regard to our current regulations that we've recently published, we don't have to make a determination as to whether or not a State has negotiated in good faith. But under this bill, we do. What we would look to without further definition or clarification from Congress would be at least several things. One, is the State refusing to negotiate with regard to games that are permissible in the State. And then obviously, are they negotiating at all. That's the first thing.

Another factor would be, are they seeking to regulate an activity that is not directly related to gaming. We've heard instances where Governors have said, I'll renew your compact with you if you negotiate with me about your fishing rights, or your off-reservation hunting rights, or if you give up jurisdiction over other areas that have nothing to do with gaming. We would look at those kinds of things as evidence of bad faith.

We would look at whether or not the State is requiring that there be some kind of payment from the Tribe that is not related to the cost of gaming or offsetting a direct impact or at least revenue sharing, supported by exclusivity, if there's an attempt essentially to tax the tribe.

Those would be the kinds of things, off the top of my head, that we would look at. Those would be the most obvious things. There may be others that we could define.

Senator INOUYE. Do you have these suggestions in writing that you can share it with the committee?

Mr. JORDAN. We can put them in writing.

Senator INOUYE. I would appreciate it, Mr. Chairman.

The CHAIRMAN. Yes.

Senator INOUYE. You've also stated, Ms. Manuel, that the bill should clearly state that the Secretary is authorized to promulgate rules governing the issuance of class III gaming procedures if a State declines to participate. Do you have any language that you'd like to suggest to clarify the Secretary's authority?

Ms. MANUEL. I don't believe we've proposed any, but I believe we can do that, also. We've made some minor suggestions, as you can see in the testimony, but we are certainly willing to work with the committee.

Senator INOUYE. Because I believe these two questions I asked are the main issues involved: What is good faith, what are the standards in determining good faith; and when is the Secretary authorized to act. So if you could provide us with your suggestions, we would most certainly look them over.

Ms. MANUEL. We'd be happy to do so.

Senator INOUYE. Thank you very much.

The CHAIRMAN. Mr. Straus, let me ask you one last thing. You heard Senator Enzi's statement. He seemed to be worried that the Secretary, under the authority in this bill, would have carte blanche authority to approve all the compacts. It's my understanding that the Seminoles have petitioned the Secretary on their compact and that he, at least somebody in Interior, has decided that shouldn't go forward, shouldn't be issued until the litigation is over, Seminole litigation. Is that your understanding?

Mr. STRAUS. That is correct. And I wonder if I might respond a little more broadly to that question. Because I heard Senator Enzi's description of how the Secretary has operated and the Secretary's action, which he believes is just a power grab by the Secretary.

I have to respectfully disagree with Senator Enzi on that. This must be placed in context. The issuance of procedures, the issuance of these regulations, is not something that Secretary Babbitt has just done out of the air. He is responding to court decisions. The Court of Appeals for the Eleventh Circuit in the *Seminole* case, ruled that in order for the statute to remain constitutional, in order for there to be something left of the statute, after the court struck down the tribe's remedy, that there had to be a remedy, and the court found that remedy in the procedures section of the statute.

The 9th Circuit Court of Appeals in the *Spokane* case, the second *Spokane* case, reached the same conclusion. Secretary Babbitt didn't make this up. If procedures fail, and if your effort to get legislation fails, IGRA is unconstitutional because of what has already been struck down. In order for the statute to be constitutional, the tribes must have a remedy. Those who speak against the Secretary and those who speak against your bill ignore that basic reality.

The CHAIRMAN. I thank you.

Senator did you have any further questions?

Senator INOUYE. No.

The CHAIRMAN. I do not have any, either. But if you have any further suggestions on how we might improve this bill, make it more acceptable, we certainly would appreciate it. Thank you for your appearance today. Thank you, Chairman Billie.

The last panel will be Ray Scheppach, the executive director of the National Governors' Association, and Richard Hill, chairman, National Indian Gaming Association. As with other panels, your complete written testimony will be included in the record, and you may abbreviate. We'll start with you, Mr. Scheppach.

STATEMENT OF RAYMOND C. SCHEPPACH, EXECUTIVE DIRECTOR, NATIONAL GOVERNORS' ASSOCIATION

Mr. SCHEPPACH. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you today to convey the Governors' position on S. 985, proposed legislation entitled the Intergovernmental Gaming Agreement Act of 1999.

The first point I'd like to make is that I think IGRA to date has been a relatively successful piece of legislation. As of today, approximately 155 tribes have concluded more than 195 compacts with 24 States. This track record demonstrates that States have implemented IGRA in good faith. Difficulties do remain in a few States where tribes and States differ with respect to the scope of gaming activities, and the devices subject to compact negotiations.

Most IGRA court cases have arisen because of the tribe's insistence on negotiating for gaming activities or devices that are otherwise illegal in the State. The record of States negotiating in good faith is strong. However, the breadth of current Indian gaming that is un-compacted raises serious questions about the enforcement of IGRA by the Federal Government.

Essentially, there are two major issues that are important to Governors. The first is the scope of gaming and the second, of course, is the compacting process. With respect to the scope of gaming, activities and devices that are subject to negotiation under IGRA has always been the Governors' major concern. However, the Governors' problems with the interpretation of IGRA with respect to the scope of gaming seem to have been resolved by the courts. The U.S. Court of Appeals Ninth Circuit reached a decision consistent with NGA policy in the so-called *Rumsey* case. In *Rumsey,* the court found that it would neither compel the State to negotiate for gaming activities or devices that are prohibited by State law, not require the court to refer to the Supreme Court's previous decision on *Cabazon.*

With respect to the compacting process, I think any changes to the compact negotiation process should increase the incentives for active negotiation between States and tribal governments. The Governors oppose any efforts by Congress or the administration that would allow a tribe to avoid negotiation with a willing State in favor of a compact negotiation with another entity, such as the Secretary of the Department of the Interior.

With respect to this legislation, Governors would strongly oppose S. 985 as written. The cumulative nature of the changes this proposed legislation makes in IGRA would tip the balance between State and tribal sovereignty that has made IGRA successful. There

would no longer be any incentive for tribes to undertake serious negotiation with States.

Without that incentive, the entire process of negotiating becomes meaningless. As written, S. 985 would actually centralize the process of negotiating compacts and regulating casino gaming in the Federal Government, a situation the States find totally unacceptable. The Governors would strongly oppose this legislation.

I have essentially laid out in my testimony eight major points in going through the amendments. I would say that all eight of those amendments essentially change the balance significantly in favor of the tribes, that there will be essentially very little role for State governments as tribes would come to the Secretary with a list of their proposed gaming activities in order to trigger the mediation process.

These changes go all the way from a bypass provision, all the way to having the U.S. District Court be the court of record. The States' position is that we've now extended from one size fits all, we're now talking about one court fits all.

A few concluding comments, Mr. Chairman. What we have witnessed from the State perspective over the last 4 to 5 years is a major movement toward devolvement of responsibilities from the Federal Government to the States. We've seen it in welfare reform, we've seen it in children's health, employment and training has gone to a block grant, we've seen additional funding in the highway bill. Just this year, we've seen major changes in education flexibility, the tobacco recoupment where States could design their own programs, a bigger State role in safe drinking water a few years ago, and unfunded mandates.

So I would argue that over the last 4 or 5 years, we have seen a major devolvement of responsibilities to State governments. And I think the results have been good. There has been increased innovation at States, case loads of welfare are down 40 percent. We have an additional 1 million children covered with the CHIPS program.

What essentially the Congress has done is allow States to tailor programs to meet the needs of their citizens. Poll after poll says that citizens have more faith in local government and State government and less in Federal Government.

Mr. Chairman, this bill does exactly the opposite. It goes against that road of devolvement in allowing States to tailor programs. What it does it takes the current IGRA, which allows a compacting process of tribes and State government to work out their details, and essentially Federalizes the entire process. We don't think the average citizen in States would essentially approve of such an approach, given the other trends toward devolvement and State responsibility.

Mr. Chairman, that concludes my comments. I'll be happy to answer any questions.

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

The CHAIRMAN. Thank you, Mr. Scheppach. I represent a State as a U.S. Senator. But I want to tell you, sometimes I get sick of hearing what the Governors want, very frankly, as the Chairman of this committee. And I'd like to ask the rhetorical question, which you don't have to answer, where the heck were they 200 years ago,

when Indians had already been governing themselves for 10,000 years before the Governors got here? I'll tell you where most of them were, they were killing Indians.

And if you want to know something about polls, if you would have taken a poll in those days, about a good Indian being a dead Indian, you would have found that was a very popular, up-beat poll, probably with 90 percent positive response to it. Didn't make it right then.

And the Governors, the position they take on a lot of Indian affairs is not right now. When they don't want to give Indians equal opportunity to do exactly what they have the authority to do, as authorized by IGRA in this Congress and signed by the President of the United States. I take exception with the Governors. They are pretty self-serving and only concerned with what's good for them and not what is good for the Indians that are inhabitants within those States, that were here a lot sooner and a lot earlier than those Governors were, let me tell you that.

Let me ask you a couple of questions I would like an answer to. When you appeared before us in June regarding the National Gaming Impact Study Commission report, you testified that the process to facilitate compacts as laid out in S. 985 is really a bypass of the State. And that is a quotation. The definition of bypass, according to a dictionary I looked at, is to neglect or ignore, usually intentionally, to circumvent, to ignore, to fail to consult.

Do you believe S. 985 does that?

Mr. SCHEPPACH. Well, I think if the Secretary's rule becomes an enacted procedure, I think you will see that happen, yes. I think already you've got how many, six tribes, that have lined up to come to the Secretary as opposed to staying at the negotiating table. I think that to all practical purposes, that will work out to be a bypass of gubernatorial authority, yes.

The CHAIRMAN. Of the six tribes, only one has been issued, though, isn't that correct?

Mr. SCHEPPACH. As far as I know. But I mean, you've had six that are ready.

The CHAIRMAN. The charts that are over here, I can't read them very well from over here, but I'm sure you can, but they're posted on the easels. To me, it looks like the states have at least four different opportunities to negotiate or take their concerns to a higher level. My question would be, can you tell me exactly where in this process the States are bypassed, if we have four different levels of appeals and a higher level?

Mr. SCHEPPACH. I just think that the current compacting process creates tension for the tribes and State government to essentially stay at the table and work it out. You have almost 200 compacts through this process to show that it's essentially working.

Under the process in the bill, you're allowed to go to a mediator and from a mediator directly to the Secretary. In fact, even the language in the bill has been changed from IGRA from shall negotiate with the States to may negotiate with the States. I suspect that language was very intentional.

The CHAIRMAN. Aside from S. 985 or other legislation that we've talked about, is it the position of the Governors, if the State refuses to negotiate, then the tribe should have any remedy? Do you think

they should have any remedy, other than going to court? If you do, what's the remedy?

Mr. SCHEPPACH. I think our position is States have, if something is legal in the States, I think the States have been willing to negotiate with the tribes with respect to that. It all goes back to the scope of gaming. I think the problem is when a tribe wants an activity which is not allowed under State law. That's when we get into the particular problem.

I don't know why a State would refuse to negotiate if other people, residents of the State, have the same opportunities.

The CHAIRMAN. Do you believe the Seminoles have asked to do something that the State of Florida does not in gaming?

Mr. SCHEPPACH. I don't know the details on the State of Florida.

The CHAIRMAN. You've testified in the past that bills like S. 985 are unnecessary because it is only where tribes insist on an expanded scope of gaming that States refuse to negotiate. As I understand it, Seminoles haven't done that, they haven't asked to do any expanded gaming. They've asked only to do what the State of Florida has done.

It appears that Florida, for one, allows just about every type of gaming. At least I heard about six different things mentioned when Chairman Billie was there. And yet the State refuses to negotiate with the Seminole Tribe. Do you have any thoughts on that?

Mr. SCHEPPACH. Again, I don't know the details of the *Florida* decision. But looking across, I suspect that if you get into some of the details, you'll find that the tribes want games that aren't currently available to others in the State. Again, I think the track record is pretty good, 200 compacts during this period of time. I don't know that we've got a long list of tribes that haven't been able to compact. We certainly have an increasing list that are doing un-compacted gaming in the States that the Federal Government has refused to shut down.

The CHAIRMAN. What is your alternative, if we can't get this bill passed, what would the Governors offer as an alternative to try to reach some negotiating agreement so we don't have to fight everything out in court? Do they have any?

Mr. SCHEPPACH. Well, we don't see a big problem right now. I think essentially you're trying to fix a problem that doesn't exist. I think if we get four or five stalemates, we need to look at the details of those particular processes and see whether the States have been acting in bad faith. If there is a feeling that they have been—that the tribes have been wanting to just negotiate for things that are legal, then I think we would be willing to entertain some mechanisms.

The CHAIRMAN. Have you ever been to Pine Ridge, SD, Ray?

Mr. SCHEPPACH. I have been to South Dakota, but not to that particular reservation.

The CHAIRMAN. They have an unemployment rate of about 70 percent, suicide rate that's probably 10 times higher than the national average. More than one-half the youngsters don't even get out of high school. Fetal alcohol syndrome of probably 150 times worse than the national average. And you don't think there's a problem out there with Indians?

Mr. SCHEPPACH. No; I do agree with that, Mr. Chairman. I realize that there are fairly significant problems.

The CHAIRMAN. And when gaming is one of the few things that can provide jobs and resources to correct all those problems?

Mr. SCHEPPACH. Mr. Chairman, if you look at the statistics, I think you will find that the rate of increase in Indian gaming over the last 8 to 10 years has been significantly above that of average of gaming in the United States. So I don't think that there's been a movement to restrict it.

The CHAIRMAN. Let me ask you this. Since the Governors obviously don't support this legislation, how do you suppose they would feel if we just repealed IGRA altogether and let the Federal courts resolve all the disputes? Would they be satisfied then?

Mr. SCHEPPACH. I don't think so, Mr. Chairman. I think that IGRA has worked. I think the legislation was written quit well in terms of creating the tension. I think there's been a lot of success in IGRA. The question is now, how big are our problems. It's not clear to me that we have significant problems yet.

The CHAIRMAN. Okay, I thank you. I just suggest then you visit Pine Ridge, SD, if you don't see the bigger problem that Indians face every day on a daily basis.

Would you go ahead, Mr. Hill? Before you do, I apologize, I wanted to ask the Vice Chairman if he had any questions for Mr. Scheppach before we go on.

Senator INOUYE. I have. We've had many exchanges and the dialog has been continuing for many years.

What is your definition of negotiating in good faith?

Mr. SCHEPPACH. I guess that both sides would come and try to reach a conclusion around the particular issue, that many of those things, if you can agree first on the scope of gaming, that's consistent with State law, then I think there's a lot of flexibility with respect to hours of operation and stakes and a number of tax and other issues.

But I think again the problem gets to be, we start declaring bad faith on both sides when we get into this issue of what is the scope that's on the table. I think that's where we differ.

Senator INOUYE. Is it possible for the courts to determine what the scope should be and interpret the laws of the State?

Mr. SCHEPPACH. Well, Mr. Chairman, I think we've had, if you trace the courts' decisions with respect to IGRA, they have been all over the place with respect to scope of gaming. We happen to agree that the final decision that was made by the Circuit Court is consistent with our interpretation.

But I don't know that you want to leave it open to every court to interpret that. I think if you look historically, we've had a lot of poor interpretations of IGRA with respect to the courts.

Senator INOUYE. You have argued that this measure before us tilts the playing field in favor of the Indians, that you wish to continue this level playing field. When the 11th amendment was imposed, what did it do to the level playing field? Did it still remain level?

Mr. SCHEPPACH. Well, again, it goes back to when have the States raised the 11th amendment around what issues. I think we have to look at those. My contention is most of them were raised

with respect to scope of gaming, that the tribes wanted to expand that scope of gaming and the States did not want to go there, so they raised the 11th amendment.

Now, I don't think even there, there was a huge number of States that raised the 11th amendment. I think the States do it very selectively. In the future, I don't think you're going to find every State running to raise the 11th amendment just because there's a precedent.

Senator INOUYE. I'm certain you know that I follow the compact negotiations much more closely than most members of the Senate or the House, because of my interest in this committee. I have noted that the negotiators for the Governors would oftentimes say, this is our definition of scope of gaming, you'd better take this, otherwise, we've got the 11th amendment in the back of us.

What do you expect the Indians to do under those circumstances?

Mr. SCHEPPACH. Well, again, it goes back to the question, you know——

Senator INOUYE. Is that a level playing field?

Mr. SCHEPPACH. Well, you've also got an IGRA, a one-sided bad faith. The States can be held in bad faith, but the tribes can't. Is that a level playing field? I think the possibility of us raising the 11th amendment maybe offsets their bad faith inconsistency.

Senator INOUYE. Won't this measure before us determine whether there is bad faith or good faith?

Mr. SCHEPPACH. This process is just going to bypass the States. I mean, you know, you look at the legislation, may negotiate with the States. It's a whole streamlined process to Federalize this issue.

Senator INOUYE. Well, as you would agree, that it should have been Federalized to begin with. But we——

Mr. SCHEPPACH. Mr. Chairman, you and I got into this issue, and you said, constitutionally could you do that. And I said probably you could constitutionally. I think we have to remember that a very high percentage of the people that are going to casinos on Indian lands are non-Indians. Therefore I think the States do have a role in that.

Senator INOUYE. That's why we acceded to the demands on the part of the States. But we did not anticipate and neither did the States suggest that they would ever use the 11th amendment. And when the 11th Amendment was imposed, what recourse do the tribes have?

Mr. SCHEPPACH. Well, again, it goes back to, I mean, I think our position is, we need to wait a little while and see whether we really do have stalemates and if there is a belief that States are just willy-nilly raising the 11th amendment. I'll be happy to work to modify that.

But I don't think that's the case right now. And I don't think we'll probably know for a couple of years what the track record is. I don't know the exact numbers, but there have been a number of compacts since the *Seminole* decision. I don't think this has come to a screeching halt.

Senator INOUYE. Well, Mr. Scheppach, I'm certain you know that there are only two States in our Union that prohibit all forms of gaming with criminal sanctions, Utah and Hawaii. And as such, I

have always been against gaming. But in the case of gaming in Indian country, I have supported the tribes. Because we have failed miserably to carryout the provisions of our treaty agreements. We have failed miserably in carrying out the intent of the laws.

Therefore, the only alternative course was to have gaming. And we did so within the context of State laws.

But now you are speaking of a level playing field, but the States have their 11th amendment immunity defense to get out of negotiations altogether. That is not level playing field, in my book. Something has to be done to level this playing field.

Mr. SCHEPPACH. Again, Mr. Chairman, I don't. If you look at the statistics in terms of the growth in revenues on tribal lands, it has been significantly more rapid than gaming in this country. So I don't think it is true that Governors have tried to shut this down. And I don't think the negotiation process has stopped. I don't see a significant number of States running to the courts and raising an 11th amendment defense. They don't like to do that.

Senator INOUYE. Are you suggesting that if the tribes were going broke you would not mind it?

Mr. SCHEPPACH. Well, Mr. Chairman, I clearly agree that there are significant problems in Indian Land in terms of unemployment and poverty statistics and so on. We don't disagree on that.

The question is, how do you provide assistance. And all I'm saying is, I think the gaming compact process in IGRA has worked up to this point. And I think it will continue to work. But I don't think that federalizing this process and reducing the State role is the appropriate way to go.

Senator INOUYE. Thank you.

The CHAIRMAN. Thank you, Mr. Scheppach. We appreciate your being here.

We now go to Mr. Hill.

STATEMENT OF RICHARD G. HILL, CHAIRMAN, NATIONAL INDIAN GAMING ASSOCIATION

Mr. HILL. Thank you, and good morning, Mr. Chairman, Mr. Vice Chairman. I want to say at the outset, we are here today to tell you what we are for, and we have been, and we stand ready today genuinely to bargain in terms of bringing some remedy to this. I was hoping the Governors would do the same.

There's a biblical saying that I've been reminded of, and it is that you shall be known by your deeds. I think that's to be applauded by your deed today. I'm really disappointed in the testimony by the States this morning.

Further, I'd like to say that I'm glad the committee drafted S. 985, because I think it does bring some clarity to the authority that Secretary does have, and brings a closure to some of these compacting procedures for class III gaming.

I remember back in 1988 when the bill was passed and our tribe was pretty skeptical about, will the States really bargain in good faith with us, will this work. And we raised the question with Senator McCain. And he said, well, if it doesn't work, we're going to have to revisit the act. So in my mind's eye, we're back 10 years now, back on the issue that we perceived to be a problem a long time ago.

The other thing is, the States can't continue to have it both ways every day. It's just ridiculous that they can have it both ways every day. They can't remain a judge, jury and executioner on this whole particular issue. As has been stated this morning clearly, and I much appreciate it, the tribes have rights, too. And this committee and the Senate and Congress has been trying to make sure that those rights will be protected and advanced.

But it's really easy to say that, and clear to say that the tribes have been stonewalled for 10 years. I think there's a number of tribes, the Spokane, the Shoshone Bannock, the Porch Creek, the Seminoles, the Wampanaugs, the Narragansetts, the Chickasaw, Cherokee, the Delaware, the Kiowa, the Comanche, and the list goes on and on in terms of those nations that have been denied this right to exercise their rights under IGRA.

IGRA was created to provide economic development, self-sufficiency and to build strong tribal government. But they have been denied class III gaming compacts by some States for 10 years. The tribes have spent valuable resources, and in a lot of cases, limited resources, that could have been better spent on children, health care, day care, land governance and infrastructure for tribal governments, and the quality of life of those members could have been greatly improved.

There's been no economic development that has worked successfully for Indian government for Indian governments. Keep in mind that gaming does not work for all tribes. Only one-third of the 557 federally-recognized tribes are actually engaged in class II or class III gaming of some type. If the State has a public policy to do gaming, then the tribes have a right and a legal ability and a legal right to negotiate class III gaming compacts under the law.

IGRA wasn't meant to give States veto power. The original intent of IGRA was to help tribes overcome 200 years of poverty. It is also the intent to give tribes a competitive advantage, I say a competitive advantage, because of the high unemployment rates, health care needs, lack of governmental structure, high social ills, high suicide rates, mortality rates, and to create economic development where it does not exist.

The States originally negotiated a limited role in IGRA. The States, this was a Federal trust responsibility delegated to the States, something the States negotiated for in IGRA over the objection of the tribes, because the States historically have not dealt with Indian nations in good faith.

Although IGRA was well-intended to bring the State sovereign and the tribal sovereign together, it hasn't completely worked, because the ideologies have inherently clashed. This has made negotiations in some instances very difficult or impossible. In places like Oklahoma, California, Florida, Alabama, Rhode Island, Massachusetts, Washington State, and Texas, are still outstanding. There are 26 States who have negotiated compacts in good faith with Indian nations. One hundred ninety-eight compacts have been realized.

S. 985 would also give tribes some continuity in their gaming operations if States choose to be unreasonable in the renewal process. This was a Federal trust responsibility that was delegated to the States under IGRA, a unique authority that has been abused in

some instances. Remember the Supreme Court in *Cabazon* stated, the States have no authority.

Our nations have exhausted every remedy to conclude class III gaming compacts. The tribes have tried to negotiate fairly with the States and the Federal Government through the Inouye-McCain process a few years ago. And also last fall, the tribes negotiated again with the States to achieve a positive amendment to IGRA, but failed.

In our last attempt to resolve difficult issues, the tribes tried to bring a mediator on board. After 6 months of deliberation by the States, this was rejected.

A recent survey of the general counsel, deputy counsel and the chief litigators from 528 of the largest 1,000 corporations in America indicated that 85 percent had used mediation in the last 3 years and 84 percent said they were likely or very likely to use mediation in the future. The survey also indicates that 81 percent of the respondents felt mediation provides a more satisfactory process than litigation. Sixty-six percent said mediation provides more satisfactory settlements and 59 percent said it preserves good relationships.

Before dismissing mediation as just one more hoop to jump through, skeptics should remind themselves of the potential benefits of this hoop, which has a settlement rate of in excess of 85 percent. That's a quote from the Dispute Resolution Journal of August 1998.

By your deeds you shall be known. The only other remedy available to the tribes was to have the U.S. Justice Department exercise its trust responsibility and file a suit on behalf of the tribes. The Justice Department has never seemed to find the right case of controversy. There is no legal remedy for tribes.

The States always use this term, bypass. Bypass is defined to neglect or to ignore, usually intentionally, to circumvent, to ignore, fail to consult. And I haven't really seen the bypass. It has been used and abused, been sloganized time and time again. I don't see that in the secretarial procedures, nor do I see a bypass in S. 985.

Mr. Chairman, we have some specific concerns relative to S. 985. We'll get into this discussion today about what should trigger a mediation process, and we feel from NIGA that you should really lessen the burden. You know, we have these impasses from time to time, and the good faith requirement or the bad faith requirement doesn't seem to work. So we think the threshold should be lower.

I think in terms of just an impasse, it should really trigger the mediation. We should get out of avoiding and this thing I call the blame game and pointing the fingers at one another. But we should just lessen the burden.

We also believe from NIGA that the timeframe is too lengthy. The 370 days, if it's concluded, and then in terms of the States having another bite at the apple, they get to go and still challenge the Secretary's decisions in Federal court, which we think is fair, and we think that it brings some closure to these issues. But we'd just like to see, if the States are truly committed to compacting, then they should be able to make a decision in a 30-day timeframe. That's what we believe should happen.

As a minor technical thing, in terms of the Secretary appointing a mediator, we think that the person should be well-versed in United States Indian tribal relations to make more informed decisions. Maybe that could be part of the legislative history of this particular bill.

I just want to add also that in terms of the National Gambling Impact Study, their finding was that there was no evidence presented to the Commission suggesting any viable approach to economic development across the broad spectrum of Indian country in the absence of gaming. So I think we can underline and underline again the magnificent benefits that derive from gaming.

We can't understand why our good friends, the Governors, will not engage in this process. They have many opportunities, they've had opportunities for 10 years to try to negotiate this. We're very thankful for this committee wrestling with this very tough issue. We thought you were very mindful and very thoughtful to include everyone's interest in this particular document. And we look forward to working with the committee to try to resolve any problems that you may have.

But I want to say again that we're disappointed by the response from the Governors, because all of us have been trying to work very hard to bring some economic development to some pockets of poverty in our Indian communities where this gaming has proven to work and where it's desperately needed. So we want to thank you again for your efforts, and stand ready to respond to any questions.

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

The CHAIRMAN. Thank you, Mr. Hill. We're told that very few, if any, States ever refuse to negotiate with the tribes, and that the only case where negotiations have broken down is in relation to the scope of gaming arguments. But you mentioned about six or seven tribes, as I heard you testify, where it has broken down, where they have had problems. Is that correct?

Mr. HILL. By jurisdictions and specific States where these tribes reside, where they haven't been able to achieve compacts. There's a long list of nations in Oklahoma, California, Washington State, a couple down in Texas, you know what happened to the Narragansetts. Look at the Wampanaugs, you can look at those lists and I'm sure they have a long track record for the last at least 10 years of trying to get some form of serious negotiations on board and have failed at every step of the road, or hoops been thrown in their way, or log jams have been created, or they've been stonewalled.

I think that this remedy is very constructive and we wholeheartedly support it.

The CHAIRMAN. The purpose of requiring a review by a three-judge panel was to sort of speed up the conclusion of the proceedings involving compacts and procedures. What type of resolution would you propose in place of the three-judge panel?

Mr. HILL. We would, what Attorney Straus had indicated, maybe to be left alone, you know, as it's presently linked with the appellate review. But I think that maybe could be looked at further in terms of what are the pros and cons to leave it specifically in one district. But it leaves absent the appellate review.

Maybe a suggestion may work. But maybe to be left intact is, because you know, the different appellates have different views on it. And maybe they could be reconciled at a higher level later on.

The CHAIRMAN. One of the concepts, of course, was to try to keep it out of the courts altogether.

Mr. HILL. That's why I appreciated your statement about the mediator, because we really believe that there is a proven success track record and methodology, and we wholeheartedly support that.

The CHAIRMAN. You mentioned the number of corporations that had success with it.

Mr. HILL. Yes, sir.

The CHAIRMAN. Senator Inouye, did you have any questions of Mr. Hill?

Senator INOUYE. I just want to make an observation. Because it's been suggested that Indian tribes are doing great in gaming and making a lot of money. I believe the numbers today would suggest that approximately 200 compacts have been entered into, maybe 198 or something like that, with about half the States of this Union.

That sounds pretty good. But when you consider that most banks of the United States would not even consider having a loan arrangement with tribes, because trust lands cannot be alienated for purposes of collateral.

As a result, Indian tribes have had to pay outrageous interest rates on their loans. And oftentimes, they have had to go offshore to borrow money. As a result of the 200 or so compacts, at lease 130 tribes are now operating gaming. Of that 130, it is suggested that no more than 18 are profitable enterprises.

And in fact, it is suggested that the bulk of them will eventually fail. We are speaking of a level playing field but the States seem to be saying that the tribes are seeking to do things that the States allow others to do but do not want the tribes to do, when most of the people who participate in gaming are from out of State. Thank God the patrons are from out of State. Indians cannot afford to game, unless you have penny machines. And even at penny machines, I don't think too many can afford that.

So I would hope that the record will show that gaming is not a bonanza as of this moment. And if we are not able to come up with legislation that would provide this level playing field, then this bonanza that you speak of will fail.

Thank you.

The CHAIRMAN. Also, Senator, many people talk about Indian gaming as if the Indians are benefiting and nobody else is. Well, I live about 100 yards from a tribal casino, the Southern Ute casino. I know that the Southern Ute casino, like most of them, half the jobs that the gaming has provided have gone to non-Indians. The tax revenue in the local communities has gone up, the discretionary income of the people that work in the casinos has gone up, which revolves through the economy in the purchases of new cars or whatever in the marketplace.

So when we talk about the benefits to Indians, there have been benefits to the whole communities in which the casinos are located. I think that's common knowledge with everybody. So it's not like they're taking something at the expense of the State, or at the det-

riment of the Governors. They've provided a lot, and they've certainly done their share in providing the kinds of infrastructure and job creation that goes with any casino, whether it's Indian-owned or not.

Senator INOUYE. May I ask a question of the Chairman?

The CHAIRMAN. Yes.

Senator INOUYE. When do we have a markup of this bill?

The CHAIRMAN. We haven't scheduled it yet, but we will shortly.

Senator INOUYE. I am ready.

The CHAIRMAN. You're ready, okay. We won't do it today, but we'll do it very shortly.

Mr. Hill, did you have a last comment?

Mr. HILL. I just wanted to echo what Senator Inouye was saying. I was given information that only 91 mortgage housing applications were approved last year in Indian country.

The CHAIRMAN. Nationwide, 91? There were more than that, in fact, four times more than that, approved in the little county in which I live in Colorado. That gives you a relative value, how difficult it is to move ahead in Indian country.

Senator McCain couldn't be with us today, but he is going to submit some questions for all the witnesses, and if you could respond to those in writing, we would appreciate it.

I have no further questions, we appreciate the appearance of everyone who testified today. With that, the committee is adjourned. The record will stay open for two weeks if you have any additional comments or suggestions to make this bill a little better.

[Whereupon, at 10:55 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HILDA MANUEL, DEPUTY COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Good morning Mr. Chairman and members of the committee. I am pleased to present the administration's views on S. 985, the Intergovernmental Gaming Agreement Act of 1999. We strongly support this legislation and will offer some technical amendments. Accompanying me today is Derril Jordan, Associate Solicitor for Indian Affairs.

As you well know, since the Indian Gaming Regulatory Act [IGRA] was passed in 1988, the Department of the Interior has approved over 200 class III gaming compacts between States and Indian tribes in 25 States. These compacts have enabled Indian tribes to establish class III gaming establishments that have generated much needed revenue for the tribes, and thus reduce their reliance on Federal dollars to implement a variety of tribal initiatives. As required by IGRA, gaming revenues are being devoted primarily to providing essential Government services such as roads, schools, hospitals and economic development. See Proposed Rules, 63 FR 3289. These gaming establishments have led to a direct increase in employment by providing jobs in the gaming and gaming-related, such as food service, industries, thereby rejuvenating economically depressed communities through increased employee buying power.

One of the crucial aspects of the compacting process in section 11 of IGRA is the ability of Indian tribes to initiate a lawsuit in Federal district court arising from the failure of a State to enter into compact negotiations with the tribe, or to conduct such negotiations in good faith. The tribes' ability to sue the States Under IGRA has been greatly compromised following the U.S. Supreme Court's 1996 decision in *Seminole Tribe* v. *State of Florida,* that a State may assert an 11th amendment immunity defense to avoid a lawsuit brought by a tribe under IGRA alleging that the State did not negotiate in good faith. Dismissal of the good faith lawsuit on immunity grounds effectively permits the State, if no further action is taken, to veto class III gaming by a tribe when other class III gaming would be permissible under IGRA.

In response to the stalemate created by the *Seminole* decision, the Department published a rule in the Federal Register on April 12, 1999, to enable Indian tribes to obtain Secretarial "procedures for class III gaining when a tribe has been unable to negotiate a compact with the State, and the State has raised an 11th amendment immunity defense to a lawsuit initiated by the tribe in the Federal court. The rule became effective on May 12, 1999. To date, one-half dozen tribes have submitted applications for class III gaming procedures under the rule.

S. 985 addresses the problems created by the *Seminole* decision by eliminating good faith lawsuits brought against States, while preserving the opportunity of tribes to engage in class III gaming activities permitted under IGRA's standards. We believe that the Secretary of the Interior's legal authority to promulgate the class III procedures rule is supported by the statutory delegation of powers contained in IGRA and the broad delegation of Federal authority over Indian affairs

found in 25 U.S.C. sections 2 and 9. We note, however, that the authority of the Secretary to promulgate the class III procedures regulation has been challenged in a lawsuit filed by the States of Florida and Alabama. While we believe that the Secretary's authority will be upheld in that action, we nonetheless support S. 985 as a way of getting past, once and for all, the impasse created by *Seminole*.

We look forward to working with you and the committee staff and offer the following technical amendments to S. 985:

First, in section 11(d)(3)(B)(iii)(I)(bb), we believe that, although standards are specified in IGRA, the bill should provide a clear indication whether other standards should be included or some of those currently existing should not be followed in determining when a State has failed to negotiate in good faith, especially since the bill elsewhere subjects the Secretary's determination to judicial review by the U.S. District Court for the District of Columbia.

Second, in section 11(d)(3)(B)(iii)(III), we believe that the bill should specify the appropriate State official or officials to whom the Indian tribe must provide a copy of the mediation request.

Third, in section 11(d)(3)(B)(iii)(V), we believe that the words "subclause (IV)" on line 11 should read "subclause (VI), and the words "clause (iv)" on line 14 should read "subclause (VII)".

Fourth, we believe the legislation should more clearly state that the Secretary is authorized to promulgate rules governing the issuance of class III gaming procedures if the State declines to participate in the mediation process pursuant to section 11(d)(3)(B)(iii)(V). Although the authority exists within IGRA and Federal statutes cited previously, the Secretary's authority has still been challenged and we believe an express statement will obviate questions regarding the Secretary's authority to promulgate the rules.

Finally, we believe that in section 11(d)(3)(C), line 20, the word "or" should be replaced by the word "and", to clarify that both the State and the Indian tribe must consent to state regulation of gaming.

This concludes my prepared statement. I will be happy to answer any questions the committee may have.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, DC.

Hon. BEN NIGHTHORSE CAMPBELL,
Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR SENATOR CAMPBELL: During the course of the hearing on S. 985, the Intergovernmental Gaming Agreement Act of 1999, held on July 21, 1999, Senator Inouye requested that we more fully address some points raised by Deputy Commissioner of Indian Affairs Hilda Manuel during her testimony. Specifically, we were asked to address the following issues: (1) What standards should govern good faith determinations under proposed section 11 (d)(3)(B)(iii)(I)(bb); and (2) How should S. 985 address the authority of the Secretary to promulgate regulations governing the issuance of class III gaming procedures. We offer the following two amendments addressing these issues.

Proposed section 11(d)(3)(B)(iii) should be amended to read as follows:

(iii) MEDIATION-

(I) In General-The Secretary shall initiate mediation to conclude a compact governing the conduct of class III gaming activities on Indian lands upon a clear showing by an Indian tribe that, within the applicable period specified in clause (ii), a State has failed——

(aa) to respond to a request by an Indian tribe for negotiations under this subparagraph; or

(bb) to negotiate in good faith. *In determining whether the State has negotiated in good faith, the Secretary may take into account the State's public policy and interest, public safety, and impacts on the State's regulatory system. The following shall be considered evidence that the State has not negotiated in good faith:*

(1) *any attempt by the State to impose a tax, fee, charge, or other assessment upon the Indian tribe or other person or entity authorized by the tribe to engage in class III gaming activities;*

(2) *any demand by the State to negotiate for any subjects not directly related to the operation of gaming activities;*

(3) *any attempt by the State to condition its willingness to enter into class III gaming negotiations on the tribe's willingness to negotiate separate agreements unrelated to gaming;*

(4) *any refusal by the State to negotiate for gaming activities which are lawful under subsection (d)(1)(B) of this section;*

(5) *any demand by the State for regulatory costs in excess of those costs authorized under subsection (d)(4)(A)(iii).*

Proposed section 11(d)(3)(B)(iii)(VII) should be amended to read as follows:

(VII) PROCEDURES.-Subject to clause (iii)(V), on the basis of a final determination described in clause (iii)(VI)(ff), the Secretary is authorized to issue procedures for the operation and regulation of the class III gaming described in that item by the date that is 180 days after the date specified in clause (iii)(V) or upon the determination described in clause (iii)(VI)(ff). The Secretary is authorized to issue regulations to implement this authority.

We hope that these recommendations will be helpful in responding to your request.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report to Congress.

Sincerely,

KEVIN GOVER, *Assistant Secretary—Indian Affairs*

PREPARED STATEMENT OF JAMES E. BILLIE, CHAIRMAN, SEMINOLE TRIBE OF FLORIDA

Mr. Chairman, members of the committee, my name is James E. Billie. I have served as Chairman of The Seminole Tribe of Florida for 20 years and recently was elected to a sixth 4-year term. I appreciate the opportunity to be here today to talk about The Seminole Tribe of Florida's experience with the Indian Gaming Regulatory Act, and why the changes you propose in your bill, S. 958, are needed. I want to thank you for introducing this piece of legislation, and I urge the committee—and the Congress—to move it through the legislative process as quickly as possible.

I am proud to say that I brought gaming to The Seminole Tribe of Florida in 1979 as a way to generate some income for our tribe. Back then, the tribe was poor—to put it mildly. Many of our tribal members lived in open chickees with no electricity or running water. Our tribal government offices were housed in a mobile home. Council chambers were small, cramped and unable to accommodate the broad participation of tribal members in council meetings. Our tribal lands were isolated and inappropriate for most kinds of economic development. And because our lands are held in trust by the Federal Government, we had no tax base by which to fund our government and provide for our people.

That all began to change in 1979 when we opened a small bingo hall on our Hollywood reservation. When the State of Florida threatened to close the bingo hall soon after it opened, we sued in Federal court. Ultimately the Federal courts upheld our right to operate bingo halls on our reservation without being subject to State regulations governing bingo operations elsewhere in the State.

The next 10 years brought dramatic change to our five reservations. For the first time in our history, we had the resources to improve the quality of life for our people. We used gaming income to build houses, to create infrastructure like roads, electric lines and water systems. When we opened a grade school on our Big Cypress reservation, our youngest children could walk to school. Before that, children as young as 5 were being bused 40 miles each way to the nearest public school. Things were definitely looking up for the Seminole Tribe of Florida.

Then came the Indian Gaming Regulatory Act. As other tribes followed our lead and opened gaming facilities on their reservations, tribal governments all over the country were increasingly able to use their own revenues to provide for their people what the U.S. Federal Government had promised as part of its trust responsibility, but never delivered. But this new-found independence didn't sit well with some folks. State governments, in particular, wanted to regulate what tribes could and couldn't do in terms of gaming on their reservation lands.

In 1988, State Governors were pushing to get Congress to give States authority over tribal gaming. IGRA, tribal leaders were told by our friends in Congress, would be a compromise we could live with. Our rights to conduct the kinds of games available to any person for any person in the State in which our reservations were located would not be compromised. The so-called *Cabazon* standard would continue to govern what kinds of games we could offer. In return, however, Congress said we would have to agree to negotiate a compact with our State outlining the terms

under which we would operate class III, or casino-style, games that met the *Cabazon* public-policy test. States would have to negotiate and complete these compacts, Congress said. If they failed to do so, tribes could ask the Federal courts to direct them to do so within 60 days. If there was no compact within 60 days, we would have the right to mediation and then a process that, if the State refused to sign a compact, would allow us to negotiate procedures for class III gaming directly with the Secretary of the Interior, without the State's participation. That was the promise made in IGRA.

Mr. Chairman, members of the committee, we did our part to comply with the new Federal law. On January 29, 1991, we formally requested that the State of Florida enter into negotiations for a compact for class III gaming on tribal lands. Although the State met and corresponded with the tribe concerning a compact, no satisfactory progress was made. Accordingly, on September 19, 1991, more than 180 days after the formal compact request, the tribe filed suit in the U.S. District Court for the Southern District of Florida in accordance with the IGRA, alleging that the State had not negotiated in good faith.

On June 18, 1992, the District Court denied Florida's motion to dismiss on 11th amendment grounds, concluding that Congress had the power under the Indian Commerce Clause to abrogate the State's 11th amendment immunity, and had, in fact, abrogated such immunity in enacting the IGRA.

On January 18, 1994, the U.S. Court of Appeals for the 11th Circuit reversed the District Court's decision holding that Congress lacked the power to abrogate the State's 11th amendment immunity under the Indian Commerce Clause. In part V of its opinion, the court noted that, as a result of its holding on the 11th amendment, the procedures for involving the Federal courts in the compact process "necessarily fail" unless the State consents to suit. It held, however, that all other provisions of the IGRA remain in effect because of IGRA's explicit severability clause, and went on to discuss the remedy "left for an Indian tribe faced with a State that not only will not negotiate in good faith, but also will not consent to suit." The court said "the answer, gleaned from the statute, is simple," and is found in section 2710(d)(7)(B)(vii). The tribe's recourse is to notify the Secretary of the Interior of the State's failure to negotiate a compact and assertion of 11th amendment immunity, whereupon the Secretary "may prescribe regulations governing class III gaming on the tribe's land." On February 4, 1994, Florida filed a petition with the Court of Appeals for rehearing, seeking withdrawal by the court of that part of its opinion directing the Secretary to issue procedures. That petition was denied on April 6, 1994. On April 15, 1994, viewing the matter as ripe for secretarial action at that time, the tribe submitted a detailed legal memorandum outlining the Secretary's duty to prescribe class III procedures for a tribe when a State, such as Florida, asserts its 11th amendment immunity.

Over the course of the next few months, administration officials were unable to advise the tribe on when the Secretary would act on its request for Procedures. As a result, the Seminole Tribe had no option but to preserve its rights to challenge the 11th Circuit's decision by filing a petition for certiorari with the Supreme Court. The Supreme Court granted certiorari and, on March 27, 1996, affirmed the decision of the Court of Appeals that the State of Florida was immune from suit pursuant to the 11th amendment. In its affirmance, the Supreme Court noted the 11th Circuit's severability analysis, but expressly declined to rule on that analysis, leaving it undisturbed.

On April 15, 1996, the Supreme Court denied the petitions for certiorari from the States of Alabama and Florida urging the Court to reject the 11th Circuit's severability analysis.

Following the Supreme Court decision, the tribe renewed its efforts to obtain Secretarial Procedures. As the administrative process languished, the tribe continued to seek a compact with the State of Florida. Negotiations were underway with former Governor Chiles until the end of his administration. The tribe has sought to reopen negotiations with the newly elected Governor Bush, as well. And yet, more than 8 years after requesting compact negotiations with the State of Florida, we have no class III gaming compact.

We are pleased that the Secretary of the Interior is moving forward in developing secretarial procedures for class III gaming for The Seminole Tribe, pursuant to the directive of the 11th Circuit Court. However, we realize that this process is unlikely to result in authority to conduct class III gaming on our reservation lands in the near future. As you know, the States of Florida and Alabama have filed suit in U.S. District Court in Florida challenging the Secretary's authority to issue procedures. We expect this case to go all the way to the Supreme Court in a process that may take several years to resolve. Meanwhile, in response to congressional concern that the Secretary may be exceeding his authority in issuing class III procedures, Sec-

retary Babbitt has repeatedly stated in writing that the Department will refrain from allowing any procedures it may prescribe to be implemented until the Federal court has resolved the authority question.

Therefore, as a direct result of the State's assertion of 11th amendment immunity, upheld by the Supreme Court in *Seminole Tribe,* the Federal courts are precluded from providing the Seminole Tribe with the relief contemplated by Congress in its enactment of the IGRA. Administrative relief is not likely to be forthcoming for several years, if at all. And The Seminole Tribe of Florida continues to be denied what Congress promised when it enacted the IGRA: access to those class III games that are available to others in the State of Florida.

In short, the IGRA is broken. It hasn't worked for my tribe for than a decade, and the problem is unlikely to be resolved administratively. Therefore, I am here today before this committee to ask for a legislative remedy. And I would point out that, if the problem cannot be fixed administratively or legislatively, our position will be that the IGRA should be struck down in its entirety.

I want to make clear to the committee that this is not a matter of an Indian tribe wanting to bring new and unwanted forms of gambling to a State for whom such activities are anathema and whose public policy clearly reflects the desire to ban such gaming within its boundaries. This is a matter of the State of Florida denying The Seminole Tribe the right to do what is done all over the State every day of the year.

A vast gaming industry flourishes in the State of Florida, despite the State's claim that it prohibits gaming. Much of this gaming is conducted by the State Lottery, from which the State profits directly. The rest is merely permitted by the State, which benefits indirectly [but substantially] from the proceeds. Taken together, the State permits almost every conceivable form of gaming.

In fact, the scope of gaming permitted by the State entitles the Seminole Tribe to operate the following distinct forms of gaming: (1) card games [including house-banked games] and casino games such as roulette and craps; (2) slot machines and electronic facsimiles of games of chance; (3) electronic games of skill; (4) pari-mutuel wagering; and (5) lottery games (including lotto/keno).

1. Card and Casino Games.

The State Lottery Department has statutory authority to operate an almost unlimited range of gaming activities, including card and casino games. The scope of this authority is demonstrated by the games conducted, until recently, on the Lottery's weekly television show referred to as the "Florida Lottery's Million Dollar Flamingo Fortune." All games on the show are pure games of chance, needing no particular skill or knowledge to participate, and several of the games mimic traditional card and casino gaming. Specifically, the games on this show include a house-banked hi-low card game, a wheel game similar to roulette, and a dice game similar to craps.

As a result of a declaratory action brought by the Seminole Tribe, these games have been adjudged by the Broward County Circuit Court to "constitute games which, if conducted by any person, organization or entity, other than the [Florida Lottery], would constitute gambling in violation of Florida Statute section 849.01." In other words, the card and casino games operated by the State Lottery constitute gambling activities under Florida law. This judgment, to which the State of Florida consented, makes it clear that such gambling activities [house-banked card and casino games] are permitted by the State. Thus, the tribe is entitled under the IGRA to a compact or procedures to also operate house-banked card and casino games.

2. Slot Machines and Electronic Facsimiles of Games of Chance

The State Lottery currently operates devices that were adjudged in the State court action noted above to constitute "slot machines" under Florida law. These devices, known as "Instant Ticket Vending Machines" or "ITVM's," are utilized at up to 500 locations around the State. These devices were held to fall within the State's definition of "slot machine" since they: (1) operate upon the insertion of money or other object, (2) may deliver to the player something of value, and (3) operate based upon an element of chance or other unpredictable outcome. Based upon this ruling, the Tribe is entitled to a compact or procedures to operate all devices that satisfy the State's statutory definition of "slot machine."

3. Electronic Games of Skill

Florida law expressly authorizes coin-operated games of skill. While these games are generally characterized as "amusement" devices, a similar statutory provision in North Carolina entitled the Eastern Band of Cherokee to its class III compact for games of skill. The Seminole Tribe is similarly entitled to a compact or procedures to permit it to operate such games.

4. Pari-Mutuel Wagering and Card-Room Gaming

The State of Florida also permits and regulates a broad range of pari-mutuel and simulcast activity, including among other things, horse racing, dog racing, and jai alai. In order to sustain the viability of the pari-mutuel facilities, the State expressly authorizes and promotes card room gaming, including games such as pinochle, bridge, rummy, canasta, hearts, dominoes, mah-jong, and poker (including five card stud, seven card stud, five card draw, low ball, Texas hold-em, pineapple, and Omaha). Thus, the Tribe is entitled to a compact or procedures for pari-mutuel and card room gaming.

5. Lotteries

Article X, section 15 of Florida's Constitution expressly permits the operation of lotteries by the State, which are broadly defined as involving the elements of prize, chance, and consideration. In addition to the card and casino games discussed above, the State Lottery employs this broad authority to operate certain "on line" lottery games—Cash 3, Play 4, Fantasy 5 and Lotto—that utilize machine terminals widely installed at retail sites. The tribe is similarly entitled to a compact or procedures to operate games that satisfy the State's definition of "lottery," including games that utilize machine terminals.

6. Other Games

Finally, to the extent that there is any question about the Tribe's right to a compact or procedures for a broad scope of gaming, the State also permits and profits from a vast gaming cruise industry through "cruises to nowhere," which operate out of many Florida ports. Such cruises offer the full range of casino games—slot machines, table games, roulette, etc. The State also condones charitable casino nights that use blackjack tables, roulette wheels, crap tables and other casino equipment. These further examples demonstrate that Florida permits almost every form of gaming imaginable.

Under the IGRA, the Seminole Tribe is entitled to operate all forms of gaming permitted by the State of Florida. Even under a narrow reading of the IGRA, the tribe is entitled to a compact or procedures for the forms of gaming noted above due to the vast scope of gaming conducted by the State or permitted to others under Florida law.

The Seminole Tribe of Florida presently operates a limited variety of class II games on our tribal lands including bingo, low-stakes poker, pull-tabs and lotto. Seminole gaming is a government-sponsored activity whose proceeds are used exclusively for the benefit of the Seminole Tribe. Income from the gaming operations will account for 87 percent of all Seminole tribal income in fiscal year 1999. In turn, gaming proceeds will fund the vast majority of the Seminole Tribe's expenditures this year. Gaming income funds the administration of the tribal government, per capita distributions to tribal members, tribal parks and recreational facilities and services, tribal member services, education programs and economic development on the reservations that otherwise would not exist.

The Federal Government has a trust responsibility to provide many of these things, but has not fulfilled that agreement. Gaming has allowed the Tribe to meet its own needs, rather than relying on handouts from the Federal Government. The tribe has used gaming revenues to develop a "safety net," in the form of a monthly stipend for tribal members, to assure that no Seminole need draw on State or Federal welfare funds for support. Seminole gaming provides significant benefits to surrounding, non-Indian communities, as well.

The Seminole Tribe of Florida currently employs more than 2,000 non-Indians and purchases more than $24 million dollars in goods and services from more than 850 Florida vendors a year. In addition, the Tribe pays $3.5 million in Federal payroll taxes. Security companies, office supply stores, photocopying companies, insurance companies, banks, and maintenance companies in surrounding local communities provide goods and services to Seminole gaming facilities, as well as other tribal enterprises established with seed money from gaming revenues.

We have come a long way since the opening of our first bingo hall in 1979, but much remains to be done. Class III gaming pursuant to a tribal-State compact or secretarial procedures would allow the tribe the economic stability to make long-term economic decisions for the benefit of the Tribe and its members. Expanded rehabilitation services and on-reservation treatment for chronically ill tribal members, improved surface-water control systems, road improvements, expanded cultural programs and increased investment in non-gaming economic development activities would all be made possible by a class III gaming compact or secretarial procedures.

The Seminole Tribe has a right, granted by the IGRA, to class III games. We are prepared to vigorously defend that right, not just because of the economic implications (which are significant), but also to preserve the integrity of our tribal government and our status as a sovereign nation possessing a government-to-government relationship with the United States.

As detailed above, The Seminole Tribe of Florida's right to conduct class III gaming otherwise available in the State of Florida is unenforceable, due to the State's assertion of 11th amendment immunity to a good-faith lawsuit pursuant to IGRA. Thus, the State has bypassed both the tribe and the Congress, defeating the expressed intent of the act. The Seminole Tribe has been demonstrably harmed as a result, as we have been denied access to class III gaming activities readily available to others in the State.

Congress has an obligation to right this injustice. It is our analysis that Chairman Campbell's bill, S. 985, seeks to accomplish that goal. Mr. Chairman, we commend you and thank you for developing and introducing a bill that truly seeks to solve the "Seminole problem" as it is known (although we see it as the "State of Florida problem") in a way that is fair to all parties. In terms of specific provisions of the bill, we do have some concerns about giving the States the right to go to a three-judge court for review of the Secretary's actions, which we understand would result in an automatic right to Supreme Court review. We think it would be more appropriate to have any challenges handled through the ordinary processes of the Federal district court. We also are aware of testimony submitted by the National Indian Gaming Association suggesting technical changes in the bill. We believe these suggestions should be give careful consideration by the committee.

We look forward to working with you and your staff to refine the details of the bill, and urge the committee—and the Congress—to make redressing the injustice that my tribe has suffered as a result of the State's assertion of sovereign immunity to a judicial finding pursuant to IGRA a top priority. We look forward to the day when The Seminole Tribe of Florida has access to the same kinds of class III gaming now enjoyed by non-Indians in the State for Florida.

Sho Naa Bisha.

PREPARED STATEMENT OF RAY SCHEPPACH, EXECUTIVE DIRECTOR, NATIONAL GOVERNORS' ASSOCIATION

Good morning, Mr. Chairman and distinguished members of the committee. I am Ray Scheppach, executive director of the National Governors' Association [NGA]. Thank you for the opportunity to appear before you today to convey the Governors' position on S. 985, proposed legislation entitled the "The Intergovernmental Gaming Agreement Act of 1999." In the years since the enactment of the Indian Gaming Regulatory Act of 1988 [IGRA], the vast majority of negotiations between states and tribal governments have resulted in successfully completed compacts. As of today, approximately 155 tribes have concluded more than 195 compacts with 24 States. This track record demonstrates that States have implemented IGRA in good faith. Difficulties do remain in a few States where tribes and States differ with respect to the scope of gambling activities and the devices subject to compact negotiations. Most IGRA court cases have arisen because of a tribe's insistence on negotiating for gambling activities or devices that are otherwise illegal in the State. The record of states negotiating in good faith is strong. However, the breadth of current Indian gaming that is uncompacted raises serious questions about the enforcement of IGRA by the Federal Government.

The scope of gambling activities and devices subject to negotiation under IGRA has always been the Governors' key concern. However, the Governors' problems with the interpretation of IGRA with respect to the scope of gaming seem to have been resolved by the courts. The U.S. Court of Appeals for the Ninth Circuit reached a 2-decision consistent with NGA policy in the case of *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson.* In *Rumsey,* the court found that IGRA neither compels a State to negotiate for gaming activities or devices that are prohibited by State law, nor requires a court to refer to the Supreme Court's decision in *California* v. *Cabazon Band of Mission Indians* to interpret the law. The Supreme Court denied the tribe's request for review of the decision, effectively endorsing the Ninth Circuit's interpretation of IGRA.

Not all forms of class III gaming are the same. States have a fundamental public policy interest and responsibility to distinguish among different gambling activities and devices, choosing to legalize some and prohibit others. The Governors agree with *Rumsey* that "a State need only allow Indian tribes to operate games that others [in that State] can operate, but need not give tribes what others cannot have." Moreover, they believe that the *Rumsey* decision reflects what States believe to be the original intent of Congress. The Governors cannot support amendments to IGRA that would erode the *Rumsey* interpretation of the scope of gaming under IGRA.

The Governors firmly believe that it is an inappropriate breach of State sovereignty for the Federal Government to compel States to negotiate tribal operations

of gambling activities that are prohibited by state law. The *Rumsey* decision now clearly articulates this principle, and the Governors urge your support for this interpretation of current law that has been upheld by the U.S. Supreme Court.

Any changes to the compact negotiation process should increase the incentive for active negotiation between States and tribal governments. The Governors oppose any efforts by Congress or the administration that would allow a tribe to avoid negotiation with a willing State in favor of compact negotiation with another entity, such as the secretary of the U.S. Department of the Interior. The relationship between tribes and States is complex and broad, covering land rights; hunting and fishing rights; land use and zoning matters; health care, education, and job training programs; taxation; and many other issues besides gaming. Governors entered into discussions with tribes in mid–1998 to explore the possibility of negotiations on the most pressing issues. Persistent efforts by the secretary to change the relationship between states and tribes with respect to the compact negotiations process could affect many of these necessarily related issues, as well as bias the process toward increased gambling activities.

As the National Gambling Impact Study Commission pointed out only a few weeks ago, gambling has significant social impacts that require effective public policy and regulation. If Congress were now to give the Secretary of the Interior the ability to create gaming compacts, it would seriously undermine State efforts at regulation.

The cumulative nature of the changes S. 985 makes in IGRA would tip the balance between state and tribal sovereignty that has made IGRA successful. There would no longer be any incentive for tribes to undertake serious negotiations with States. Without that incentive, the entire process of negotiating becomes meaningless. As written, S. 985 would actually centralize the process of negotiating compacts and regulating casino gaming in the Federal Government, a situation the States find totally unacceptable. The Governors strongly oppose this legislation.

I'd like to take a few minutes to list specific provisions in the bill that the Governors oppose.

1. S. 985 literally removes the obligation on tribes to seek negotiations with States in order to conduct casino-type gaming. S. 985 says that tribes "may" negotiate with States rather than the phrase in IGRA, which states that tribes seeking to engage in class III gaming "shall" negotiate with States.

2. S. 985 creates a bypass mechanism that would weaken the likelihood of successful tribal-State negotiations. First, S. 985 sets no threshold for invoking the bypass, merely that the tribe request these negotiations in writing and specify each gaming activity the tribe proposes for inclusion in the compact. Second, S. 985 gives the tribes' an incentive to use the bypass because of the secretary's statutory role as an advocate for tribal interests. Such an apparent conflict of interest can only undermine productive negotiations at the State level.

3. The bypass mechanism S. 985 creates is far more sweeping than what the secretary established in his final rule issued in April. Under the secretary's rule, the secretary would only commence negotiations when a court had held in favor of a state against a tribe seeking a compact, and then only if the court's finding was based on the State's 11th amendment immunity. As I just mentioned, S. 985 only requires that a tribe contact the secretary with a list of their proposed gaming activities in order to trigger the mediation process.

4. S. 985 would require that all decisions on challenges to compacts under IGRA be heard by the U.S. District Court for the District of Columbia. I understand why the committee and the Department of the Interior, both of which are located here in Washington, DC, would seek such a venue. But the vast majority of tribal-State compacts that have been negotiated are hundreds or thousands of miles away from that court. This appears to be some sort of new Federal "one-court-fits-all" solution.

5. S. 985 also specifically permits the secretary to determine the meaning of State law: "The publication of a compact [negotiated by the secretary] shall be conclusive evidence that the class III gaming subject to the compact is an activity subject to negotiations under the laws of the State." Under IGRA, when the courts oversaw mediation between a State and a tribe, the final compact had to be consistent with State law. S. 985 has reversed this, making the negotiated compact itself State law. The Governors oppose such a serious threat to our Federal system. But S. 985 deviates even further from IGRA, setting as the standard for the secretary's approval of a compact that it be consistent with regulations promulgated by the National Indian Gaming Commission, apparently more important that State constitutions, laws, and regulations. This is not at all consistent with IGRA, nor is it good public policy.

6. S. 985 retains the same one-sided requirement that States must negotiate in good faith while Indian tribes have no such responsibility, only here the Secretary

of the Interior is the judge and jury. Even the provisions of IGRA protecting States that raised concerns about gambling's impact on the community have been deleted. Accusations of a breach of good faith tend to arise when compact negotiations between States and tribes reach a stalemate over a tribe's demand to compact for gambling activities and devices that are prohibited by State law. The Governors believe that a State's refusal to negotiate for gambling that is not legal in the State is not an act of bad faith on the part of the State.

7. S. 985 calls on the National Indian Gaming Commission [NIGC] to regulate class III gaming when the secretary establishes a compact in the absence of a State-tribal compact. Again, this is outside the scope of IGRA. States and tribes are required to negotiate responsible and fair regulations and procedures for the regulation of casino gaming. NIGC was never intended to become the primary regulator of casino gaming on Indian lands.

8. S. 985 would limit what compacts may include, while IGRA was open-ended and permissive, leaving states and tribes to work out whatever terms and provisions were acceptable to both sides. The National Gambling Impact Study Commission specifically called on the Federal Government to permit States and tribes to work out their differences. S. 985 moves in the opposite direction. The Governors prefer the language of IGRA.

There is one new provision in S. 985 that does interest Governors. The final section of the bill would permit changes in state law that occur after the establishment of a tribal-State compact to change the terms and conditions of that compact. This would happen in the case where a new State law affects the public policy of the state with respect to permitting or prohibiting class III gaming. Governors have expressed concern that public policy on gaming, is up to the citizens of each State, and that just because a compact has been signed doesn't mean that citizens will not pressure their elected officials to restrict gambling further.

In fact, The National Gambling Impact Study Commission has called for a moratorium on any new gambling operations or expansion of existing operations. If that recommendation gains support, it is likely that many States will see bills introduced that go at least that far to lessen the harm that many citizens believe gambling causes. The Governors support the committee's examination of this issue. Any congressional action on this matter needs to consider whether it is possible to set a time period on existing compacts after which they too would be subject to changes in State law.

The Governors respect the committee members' continuing efforts to resolve the complex issues arising out of IGRA implementation. However, the Governors strongly oppose S. 985 as currently drafted, because it would substantially change the successful operation of IGRA, seriously upsetting the current balance between states and the tribes with respect to the compact negotiation process. Again, thank you for the opportunity to share the Governors' concerns on this legislation. I would be glad to respond to your questions.

PREPARED STATEMENT OF RICHARD G. HILL, CHAIRMAN, NATIONAL INDIAN GAMING ASSOCIATION

Chairman Ben Nighthorse Campbell, Vice Chairman Daniel Inouye, members of the Senate Committee on Indian Affairs, thank you for the opportunity to provide testimony today. I am Rick Hill, Chairman of the National Indian Gaming Association ("NIGA") based in Washington, DC. I am a member of the Oneida Indian Nation of Wisconsin currently serving my fifth term as Chairman of NIGA.

The National Indian Gaming Association is an organization of 168 Indian Nations with governmental gaming interests around the United States. NIGA's purpose is to protect and advance the sovereign rights and interests of our member Indian Nations with respect to tribal governmental gaming.

A. The Supreme Court's Seminole decision left the Indian tribes with a right, but no remedy.

Mr. Chairman, let me begin by saying "thank you" to the Committee for seeking to create a legislative solution to the continued stonewalling tactics which some states have used to prevent Indian tribes from exercising their sovereign rights to create economic development activities on their reservations through gaming. As you are aware in 1996 the Supreme Court, through its decision in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) ("Seminole"), effectively disrupted the carefully crafted legislative solution created by this Committee in the Indian Gaming Regulatory Act ("IGRA"). This carefully crafted solution envisioned a process, overseen by the Federal courts, whereby the two affected sovereigns, the tribes and the

states, would develop a mutually agreeable, bilateral regulatory structure that would protect the legitimate interests of both sovereigns.

In its decision in *Seminole,* the Supreme Court did nothing to alter the legal rights of sovereign Indian tribes to engage in gaming. What it did was emasculate the Federal solution created to address all interests concurrently. States can now evade their obligations under Federal law and thumb their noses at the tribes and the Federal Government. Basically the Court told Indian tribes that they had a legal, sovereign right but no remedy should a state interfere with that right.*B. Indian tribes in states refusing to negotiate compacts remain in a severe state of need for the financial ability to address the social welfare of their people.*

This Committee and the Congress clearly recognized the potential importance of gaming as an economic development tool for Indian tribes when it enacted IGRA. This potential has been validated as a number of reservations across the United States have been able, for the first time, to begin addressing the serious issues of unemployment, deficient housing, subpar schooling, inadequate medical care and other social ills. Just recently the National Gambling Impact Study Commission, which was critical of gaming in certain areas, found that when it came to Indian tribes:

"There was no evidence presented to the Commission suggesting any viable approach to economic development across the broad spectrum of Indian country, in the absence of gambling."

NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT, pg. 6–7 (June 1999).

The fallout of the *Seminole* case has been the near complete cessation of all negotiations between states and tribes on gaming compacts for nearly 3 years. Putting political gamesmanship aside, this has meant that a significant number of tribes have not been able to rise out of the economic depression created by years of dependency on the Federal Government and to work toward self-sufficiency. In those cases where compacts for tribal governmental gaming have been successfully negotiated, Indian gaming has produced arguably the most successful "welfare to work" program for Native Americans and their surrounding communities.

Several years ago, the leadership of this Committee called on tribal leaders to work with state governments to attempt to identify areas of common interests for amending IGRA. I note that while tribal governmental leaders have been willing participants in negotiations with state governments over possible IGRA amendments, representatives of state governments have been less willing to participate. And that unwilling posture of state governments seems to pervade in the latest round of negotiations called approximately 1 year ago by Secretary of the Interior Bruce Babbitt. The state's unwillingness to work with tribes not only further compounds the effects of *Seminole* but also frustrates some of the tribes in their attempts to exercise their right to engage in governmental gaming for economic development.

It is imperative that a solution be created to work around the stonewalling tactics of those states defying Federal law. We believe that S. 985 provides one such solution. Our reading of S. 985 indicates that it provides a politically neutral, workable process whereby legitimate tribal and state interests can be accommodated concurrently.

C. NIGA notes that the Secretary of the Interior has promulgated regulations providing "Secretarial Procedures " whereby Indian tribes can legally institute class III gaming.

1. The Secretarial Procedures effectively provide Indian tribes with a remedy to exercise their right to engage in gaming activities.

The sovereign right to conduct and regulate gaming activities is an inherent right of Indian tribes, as recognized by the Supreme Court in *Cabazon Band of Mission Indians* v. *California* 480 U.S. 202 (1987). This right, like most other sovereign tribal rights, is protected by Federal law—the IGRA. The Secretary of the Interior ("Secretary") has recently promulgated regulations, Fed. Reg. pg. 17535, April 12, 1999, which provide a legal solution to the problems created by the *Seminole* decision ("Secretarial Procedures"). The new Secretarial Procedures effectively provide tribes a remedy to protect their sovereign right to engage in gaming activities. Through these procedures, once a state proves that it is unwilling to abide by Federal law and negotiate with an Indian tribe, the Secretary and the tribe develop a regulatory framework for the operation of class III gaming activities.

At this point, I would like to draw the Committee's attention to the continuous misinformation campaign conducted by the National Governors Association regarding Secretarial procedures. The Governors representatives continue to state and highlight in their public remarks, that the states are being "bypassed" or somehow circumvented in this process. Let me provide the Committee and the Governors rep-

resentatives, a current definition of the word "bypass", which will hopefully serve to inform and illuminate further debate and discussion. The following definition is provided by Merriam Webster Dictionary and Webster's New World Dictionary. I quote as follows:

"BYPASS: To neglect or ignore usually intentionally; to circumvent; to ignore, fail to consult."

Throughout the process outlined by the Secretary, state governments have numerous opportunities to voluntarily agree to follow Federal law and negotiate with the tribe, or, failing that, to express its viewpoint on the various legal aspects of the framework being developed. At the conclusion of the process, the states still retain their legal right to challenge the Secretary's decisions on scope of gaming and other aspects of the regulatory framework. In accord with the spirit of IGRA, the new Secretarial Procedures seek to address the legitimate interests of both the state and the tribe, with the ultimate goal of protecting the tribes' sovereign right to engage in gaming activities. I once again note that under no strained definition are the states in any way, bypassed.

2. There is Legal Authority for the Secretarial Procedures within the IGRA.

While NIGA fully supports the Committee's desire to create a legislative solution, we would like to note for the record that NIGA firmly believes that the Secretary has the authority to promulgate the Secretarial Procedures. IGRA provides direct statutory authority for the Secretary, upon failure of the court-supervised mediation, to "prescribe, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted." 25 U.S.C. 2710(d)(7)(B)(vii). This provision clearly contemplates the situation wherein a state refuses to accept Federal Court-supervised mediation, as is its constitutional right under the 11th amendment, and provides that the Secretary insure that the tribe's sovereign right to engage in gaming is protected through the issuance of procedures. Only one time has a state chosen this path, and the Secretary issued procedures in that instance which enabled the affected tribe to engage in gaming. See *Mashantucket Pequot Tribe* v. *State of Conn.*, 737 F.Supp. 169 (D. Conn., 1990), affirmed 913 F.2d. 1024, cert. denied 499 U.S. 975. Now that state refusal to participate in the Federal Court process is the rule rather than the exception, the Secretary has appropriately chosen to exercise his authority and establish a formal process for issuing class III procedures.

I would also like to note for the record, the Chairman and ranking member's often-stated concern regarding good faith efforts by the involved parties. As a part of the renewed efforts to negotiate agreement on possible IGRA amendments, Indian Nations, in the fall of last year, proposed to representatives of the Governors that, given the intransigence on a number of issues, a mediator should be brought in to assist the parties to reframe the questions, remove emotion, and thus provide a more conducive atmosphere to genuine listening. The response by the Governors, almost a half a year later, I might add was NO.

A. S. 985 alters the evidentiary standard and reallocates the burden of proof set forth in IGRA.

The first major concern identified by NIGA in S. 985 is the alteration of the evidentiary standard and reallocation of the burden of proof established in IGRA. The evidentiary standard and resulting burden of proof established in IGRA was that "upon introduction of evidence" that the state failed to negotiate in good faith, the state had the burden of proof to show otherwise. Failure of the state to meet its burden of proof triggered commencement of the final 60-day negotiation period and subsequent mediation. S. 985 provides that, at the end of the "applicable period" (180 days), the tribe must make a "clear showing that the state was non-responsive or did not negotiate in good faith, with no mention of burden of proof, resulting in the burden of proof being shifted to the moving party—the tribe—before the Secretary can initiate the mediation process.

NIGA's suggestion would be to remove the "good faith requirement" and have the trigger for mediation merely be the inability to conclude a compact, in effect, an impasse which, I might add, mirrors the position of some members of this Committee. The effect of the burden of proof would then be lessened and the "clear showing" evidentiary standard more appropriate.

B. S. 985 provides for an extended timeframe, much longer than the timeframe contemplated in the Secretarial Procedures.

Another major concern that NIGA identified in S. 985 as drafted is the very lengthy timeframe contemplated by the mediation process. If a tribe and a state were to fully utilize each time period provided, the entire process of negotiation and mediation would require a minimum of 370 days-that is 1 year and 5 days. Then after all that time and energy, the state could still challenge the Secretary's deci-

sions in Federal Court—delaying the tribe even longer from exercising its sovereign right to engage in gaming.

A quick reading of the mediation process provided in S. 985 reveals that the primary cause for such an extensive timeframe is the numerous opportunities afforded states to enter, exit or delay the process. Of course NIGA appreciates that meaningful negotiations require that both parties be afforded the opportunity to extensively review proposals and issues. However, it would appear to be a simple matter of commitment to the process. If the states are committed to the process then there is no need to provide multiple opportunities to enter the process—they will already be engaged. If the states are not committed, then providing multiple opportunities to enter the process would inevitably lead to delay with little chance of achieving a solution. NIGA suggests that the Committee require the states to decide whether to commit to the compacting process or not by limiting their opportunities to enter the mediation process.

With regard to the current language, NIGA respectfully suggests that there are several places in the process where time saving alternatives could be implemented. The first would be at the very beginning of the negotiation process. Under subclause (3)(a)(ii) a state is required to respond to a tribe's request for negotiations within 30 days of receipt. However, whether the state responds or not, under subclause (3)(B)(iii)(I) the Secretary cannot initiate the mediation process until the expiration of the full 180 day period. A great deal of time could potentially be saved by allowing a tribe to request that the Secretary initiate the mediation process immediately upon expiration of the 30 day state response time period given the no response position of the state. A state that is truly committed to negotiating in good faith should be able to meet the simple minimum requirement of responding to the tribe's request within 30 days.

A second opportunity to save time can be found in subclause (3)(B)(iii)(VII). Under that subclause the Secretary is required to issue procedures for the operation and regulation of class III gaming within 180 days of a notification by a state that it will not participate in the mediation process, or upon the Secretary's final determination concerning a mediator's report. If a state has made a determination to not participate, there would appear to be no reason for the Secretary to delay in issuing procedures for the operation and regulation of class III gaming. Thus within 10 days following a tribal request for mediation and state declination to participate, the Secretary could issue procedures.

C. S. 985 requires the Secretary to establish a list of independent mediators.

A third concern raised by S. 985 regards the mediator list to be established by the Secretary. While it is important that the list of mediators established by the Secretary not be partisan or unduly influenced in their viewpoints, it is equally important that the mediators be well-versed in the history of United States-Indian Nations relations so as to make more informed decisions. The Secretary has a responsibility to follow Federal laws, including the Federal laws protecting the sovereign rights of Indian Nations. The only effective way to fulfill that responsibility is to require potential mediators to be generally experienced in the Federal laws that deal with Indian Nations. NIGA suggests that the Committee reference this concept in the legislative history that will accompany this bill. In that manner the Secretary is reminded of the need to have mediators who are both independent and knowledgeable, but his hand is not unduly restricted in establishing the list of mediators.

D. S. 985 provides for a three judge panel to review Secretarial decisions, potentially providing fast track Supreme Court review.

Providing jurisdiction over challenges to the Secretary's decisions in the U.S. District Court for the District of Columbia is a very good way to ensure that the ensuing court decisions are more consistent. Consistency in interpretation of the legality of the Secretary's decisions would be beneficial to all.

However, three judge panels are immediately reviewable by the Supreme Court, without first review in the U.S. Courts of Appeal. While this would speed the ultimate resolution of the issue on appeal, it would in all likelihood discourage actual appellate review. Since the most contentious legal issues often involve issues of state law, such as "scope of gaining," the cases arising out of each state would present novel issues of law to the court. With the Supreme Court actively trimming down its caseload, it surely would not want to revisit this specific area of law frequently. The result would probably be almost certain denial of certiorari, meaning that the particular case would not have the advantage of any appellate review.

In conclusion Mr. Chairman, NIGA views S. 985 very positively as providing a politically neutral solution to the current "right but no remedy" situation created by the Seminole decision. While the Secretarial Procedures offer one legitimate solution, the legislative solution proposed in S. 985 offers an even stronger alternative.

Mr. Chairman, Mr. Vice Chairman, you recently asked what Indian Nations were for in this long drawn out process. We have answered your call today. We hope the Governors' response will not only be timely, but that they will respond in kind.

Thank you again, Mr. Chairman, for this opportunity to offer testimony on behalf of the National Indian Gaming Association. I am pleased to answer any questions you or other members of the Committee might have regarding my testimony on this important matter.

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