

The Reluctant Watchdog: How National Indian Gaming Commission Inaction Helps Tribes Disenroll Members for Profit, and Jeopardizes Indian Gaming as We Know It

Gabriel S. Galanda

I. INTRODUCTION

MARY MARTINEZ DID NOT REALIZE she was a player in a high-stakes game—until she lost big.

Martinez, a former vice chairwoman of the Picayune Rancheria of Chukchansi Indians, was one of roughly 600 Picayune Chukchansi Indians stripped of tribal membership in 2007.¹ Soon after, the tribe removed her from tribal housing, and her husband lost his job at the tribe's Gold Resort and Casino.² Martinez, 77, blames the tragic turn of events on greed tied to casino profits doled out as “per capita” payments to tribal citizens.³ “They

kicked me to the curb so they could keep more money for themselves,” Martinez told a local news outlet in 2012.⁴ “Our ancestors would roll over in their graves if they knew.”⁵

The Picayune Rancheria is not the only tribe overcome with gaming-revenue-per-capita greed. Soon after the passage of the Indian Gaming Regulatory Act (IGRA) in 1988, and the resulting Indian gaming boom, dozens of tribes began distributing gaming per capita payments to their citizens.⁶ Today 130 tribal governments are making those payments.⁷ Now, an increasing number of those tribes have been jettisoning their members,

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¹Kevin Fagan, *Tribes Toss Out Members in High-Stakes Quarrel*, SFGATE, Apr. 20, 2008, available at <<http://www.sfgate.com/news/article/Tribes-toss-out-members-in-high-stakes-quarrel-3287315.php>>.

²*Id.*

³*Id.* While the terms “members” and “citizens” are used interchangeably herein, it must be appreciated that correlating federal Indian legal notions of tribal “membership” or “enrollment” in federal Indian law are distinguishable from normative, indigenous American Indian tenets of tribal “belonging” or “kinship.” Gabriel S. Galanda and Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 52 ARIZ. L. REV., 383, 390 (2015) (explaining how “these concepts are conflated, and such critical distinction is lost, in the federal-tribal lexicon.”).

⁴*Id.*

⁵*Id.* Even worse, some tribal politicians are disenrolling Indian ancestors, i.e., deceased tribal members, so they can disenroll those ancestors’ direct lineal descendants and keep more gaming per capita money for the remaining tribal membership. David Wilkins, *We Must Stop Gruesome Postmortem Dismemberment*, INDIAN COUNTRY TODAY (Mar. 20, 2015), available at <<http://indiancountrytodaymedianetwork.com/2015/03/20/we-must-stop-gruesome-postmortem-dismemberment>> (“[T]ribal officials who violate the sacred dead so that they can more easily destroy the political and legal rights of living tribal citizens have undertaken a repulsive, spiritually perverted practice that should outrage all Native peoples.”); *Dead or Alive—Grand Ronde Tribe Terminates Tribal Citizenship*, NATIVE NEWS ONLINE (July 26, 2014), available at <<http://nativenewsonline.net/currents/dead-alive-grand-ronde-terminates-tribal-citizenship/>> (“The Confederated Tribes of the Grand Ronde Community of Oregon ... stripped 86 Grand Ronde Indians of their tribal citizenship [and] remove[d] deceased Grand Ronde members from the Tribe’s membership rolls.”).

⁶Ted Jojola and Paul Ong, *Indian Gaming as Community Economic Development*, JOBS AND ECONOMIC DEVELOPMENT IN MINORITY COMMUNITIES 213, 219 (Paul M. Ong and Anastasia Loukaitou-Sideris eds., 2006).

⁷E-mail from Nedra Darling, Director of Public Affairs, Bureau of Indian Affairs, to Dave Palermo, writer for *Global Gaming Business* (Dec. 23, 2015, 7:13 AM PST) (on file with the author).

including entire families or clans, as a means to concentrate gaming revenue wealth among the remaining members.⁸

Disenrollment tied to gaming per capita payments is now epidemic.⁹ Indeed, the Ninth Circuit Court of Appeals took occasion to remark that the corresponding proliferation of disenrollment controversy results from “the advent of Indian gaming, the revenues from which are distributed among tribal members.”¹⁰ Yet in the face of very public gaming per capita abuses,¹¹ the National Indian Gaming Commission (NIGC or “Commission”) has for the last several years refused to enforce IGRA to deter or remedy those abuses.¹²

The result of the NIGC’s *de facto* deregulation of the misuse of gaming per capita payments is the belief among some tribal leaders, aided by tribal lawyers,¹³ that they are free to convert tribal citizenships into profit and political gain. The NIGC’s failure to intervene despite both its statutory mandate to eradicate corrupting influences from the Indian gaming space, and its trust fidu-

ciary responsibility to serve and protect all American Indians¹⁴ is woeful, and threatens the tribal gaming industry at large.

In particular, the Commission’s refusal to take investigatory or enforcement action fails to deter the next tribe from disenrolling members for casino profit and misusing gaming per capita monies in the process. In that vein, NIGC deterrence is crucial—in fact pivotal—and required by IGRA.¹⁵

The NIGC’s inaction is also helping members of the United States Congress, in particular Sen. John McCain (R-Ariz.), build a case for greater federal oversight of Indian gaming, particularly over tribal use of net gaming revenues.¹⁶ While the NIGC very recently professed a new focus—to “[p]rotect against anything that amounts to gamesmanship on the back of Tribes”¹⁷—the NIGC’s failure to tackle gaming per capita abuses during the Obama administration has doomed thousands of disenrollees to termination, and jeopardized the integrity of Indian gaming as we know it.

Fundamentally, “tribal governments are responsible for the disenrollment epidemic. It is tribal

⁸Compare *id.*, with David Wilkins, *Two Possible Paths Forward for Native Disenrollees and the Federal Government?*, INDIAN COUNTRY TODAY (Jun. 4, 2013), available at <<http://indiancountrytodaymedianetwork.com/2013/06/04/two-possible-paths-forward-native-disenrollees-and-federal-government>> (“Disenrollment is expanding throughout Native America, with Native nations in at least seventeen states engaging in the practice.”); Cedric Sunray, *Disenrollment Clubs*, INDIAN COUNTRY TODAY (Oct. 14, 2011), <<http://indiancountrytodaymedianetwork.com/opinion/disenrollment-clubs-58494>> (“more than 60 tribes... have disenrolled their tribal members in the last 20 years,” and “there exists a significantly larger number who have done so outside of the watchful eye of news reporters.”); see also *infra* note 71. Based on additional anecdotal evidence, the author believes that more than 15 percent of today’s 567 federally recognized tribes have disenrolled their kin. See generally Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942 (Jan. 14, 2015), available at <<http://www.bia.gov/cs/groups/webteam/documents/document/idc1-029026.pdf>>.

⁹Gosia Wozniacka, *Natives Fight Disenrollment Effort: Tribes Have Kicked out Thousands in Recent Years*, CHARLESTON DAILY MAIL, Jan. 21, 2014, at B11 (noting that disenrollment has reached epidemic proportion in the United States) (quoting Professor David Wilkins).

¹⁰*Alto v. Black*, 738 F.3d 1111, 1116 n.2 (9th Cir. 2013).

¹¹Gabriel S. Galanda, *Tribal Lawyer Ethics: Gaming Per Capita Disputes*, 13th Annual Gaming Law Summit (Dec. 10, 2015), at 1 (discussing “plainly obvious per capita-related IGRA violations by the likes of Picayune Rancheria of Chukchansi Indians, Paskenta Band of Nomlaki Indians and Nooksack Tribe—or factions thereof.”).

¹²See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-355, INDIAN GAMING: REGULATION AND OVERSIGHT BY THE FEDERAL GOVERNMENT, STATES, AND TRIBES (2015) [hereinafter *GAO Indian Gaming Report*].

¹³See generally Galanda, *supra* note 11 at 2, 5–9; National Native American Bar Association, *Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals Targeted for Disenrollment*, Formal Ethics Opinion No. 1 (June 26, 2015), available at <<http://www.nativeamericanbar.org/wp-content/uploads/2014/01/Formal-Opinion-No.-1.pdf>>.

¹⁴Harold A. Monteau, former National Indian Gaming Commission (NIGC) chairman, *Monteau: Class II Regulations: NIGC Violates Trust Responsibility*, INDIAN COUNTRY TODAY (Nov. 16, 2007), available at <<http://indiancountrytodaymedianetwork.com/2007/11/16/monteau-class-ii-regulations-nigc-violates-trust-responsibility-91771>> (noting that the NIGC has a “direct trust (fiduciary) responsibility to American Indians”).

¹⁵*Oversight Hearing on Indian Gaming: Hearing Before the Senate Committee on Indian Affairs*, 111th Cong. 2 (July 29, 2010) (statement of Mark Brnovich, Director, Arizona Dep’t of Gaming), available at <<https://www.gpo.gov/fdsys/pkg/CHRG-111shrg63142/html/CHRG-111shrg63142.htm>> (“successful investigations and prosecutions... serve as a deterrent.”).

¹⁶*Infra* text accompanying notes 149–160.

¹⁷*Oversight Hearing on Safeguarding the Integrity of Indian Gaming: Hearing Before the Senate Indian Affairs Comm.*, 113th Cong. 1 (2015) (statement of Jonodev Osceola Chaudhuri, Chairman, Nat’l Indian Gaming Comm’n) [hereinafter *Senate Hearing on Safeguarding the Integrity of Indian Gaming*], available at <<http://www.indian.senate.gov/sites/default/files/upload/files/NIGC%20Testimony%20-%207.22.15%20Gaming%20Hearing.pdf>>; Nat’l Indian Gaming Comm’n, *Work to Prevent Gamesmanship on the Backs of Tribes*, Washington Gaming Law Summit (Dec. 10–11, 2015) (on file with the author).

peoples who must find the cure, and it is the federal government that has a trust obligation to help them do so.”¹⁸ To those ends, the NIGC must take immediate corrective action and once again deter the misuse of gaming per capita payments that furthers tribal member disenrollment.

The consequences of continued NIGC recalcitrance could very well include congressional intervention and enactment of IGRA amendments, and will certainly include continued mass tribal disenrollment.

If the NIGC’s status quo prevails, the biggest losers will be Indian tribes.

II. BACKGROUND

A. *The Indian Gaming Regulatory Act permits per capita payments*

When Congress adopted IGRA in 1988, it did so in order “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”¹⁹

Congress set limits, for example, on: the type of gaming that tribal governments might provide;

where Indian gaming may occur; and the uses of gaming revenues. As to the latter, IGRA mandates that revenues from Indian gaming be used only for: (1) funding tribal government services; (2) providing for the tribe’s general welfare; (3) promoting economic and community development; (4) donating to charitable organizations; and (5) aiding local governments.²⁰

IGRA also permits tribes to pay net gaming revenues to tribal members in the form of “per capita” payments.²¹ While tribes are not required to distribute those revenues to the tribal membership,²² those tribes that do must have an approved revenue distribution plan—or what is more commonly known as a revenue allocation plan, or RAP.²³ IGRA requires that a RAP “be approved by the Secretary of the U.S. Department of the Interior (“Interior”) before a tribe can make per capita payments to its members.”²⁴

Since 1999, Interior’s Office of Indian Gaming (OIGM) has followed a process whereby a tribe submits a RAP for secretarial review through Bureau of Indian Affairs (BIA) agency superintendents or regional directors. In turn, OIGM analyzes the plan, obtains a legal review by the Interior

¹⁸Galanda and Dreveskracht, *supra* note 3, at 389. It is the federal government that, over the last 90 years, foisted both “pro rata” or “per capita” tribal wealth distribution regimes, and the tribal membership and disenrollment scheme, upon tribal governments. *Id.* (“highlight[ing] the close correlation between federally prescribed distributions of tribal governmental assets and monies to tribal members on a per-capita basis and tribal governmental mass disenrollment of tribal members,” the latter being “a relic of the federal government’s Indian assimilation and termination policies of the late nineteenth and early twentieth centuries”). Having created and perpetuated both modes of Indian assimilation and termination, the United States must help fix the problems associated with per capita-fueled disenrollment, or at least minimize the repercussions. While modern tribal self-determination is vital to eradicating those problems, the United States remains obliged to ensure that there is “strong, indigenous [nation] capacity” that will allow self-determination to succeed in strengthening and sustaining tribes—rather than causing tribal self-termination. See Minxin Pei and Sara Kasper, “Lessons from the Past: The American Record on Nation Building,” Policy Brief, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (May 24, 2003), at 5–6, available at <<http://carnegieendowment.org/files/Policybrief24.pdf>>; Gabriel S. Galanda, *Tribal Per Capitas and Self-Termination*, INDIAN COUNTRY TODAY (Aug. 13, 2014), available at <<http://indiancountrytodaymedianetwork.com/2014/08/13/tribal-capitas-and-self-termination>> (“Per capita payments are catalyzing the snowballing trend of mass Indian disenrollment—

i.e., self-termination.”). If that capacity is lacking, the federal government—including its tribal member political appointees and civil servants—cannot be allowed to simply “remove their hands and say, ‘My God, what are these people doing to themselves? They’re killing each other.’” Aaron Huey, *America’s Native Prisoners of War*, TED (Sept. 2010), available at <http://www.ted.com/talks/aaron_huey?language=en>. See also *infra* text accompanying notes 93–121 (citing examples of intra-tribal violence catalyzed by per capita monies and disenrollment).

¹⁹25 U.S.C. § 2702(1).

²⁰25 U.S.C. § 2710(b)(2)(B).

²¹*Id.* § 2710(b)(3). Some scholars have insinuated that IGRA’s allowance of per capita payments was intended to negatively impact tribal membership criteria. See, e.g., Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 *HAMLIN L. REV.* 97, 101 (2007) (“Although the federal government may not have enacted express terms of disenrollment, it is undeniable that Congress has influenced tribal membership criteria through the enactment of the IGRA.”).

²²25 C.F.R. § 290.7.

²³*Id.* § 290.6.

²⁴25 U.S.C. §§ 2710(b)(3)(A)–(C); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 746 (D.S.D. 1992) (the IGRA “requires that a distribution plan be approved by the Secretary of the Interior before the Tribe can make per capita payments to all members”).

solicitor and forwards it to Interior's assistant secretary for Indian Affairs for approval.²⁵

Of the approximately 400 Indian gaming operations,²⁶ 130 have Interior Department-approved RAPs.²⁷

1. Interior-approved RAPs cannot discriminate

Federal regulations allow tribes to develop their own criteria for distributing gaming per capita payments,²⁸ provided tribes include protections in their RAPs for minor and legally incompetent tribal members.²⁹ In addition, “[i]f tribes choose to make per capita payments to individual members, they must be made to *all* enrolled members, unless there is reasonable justification for limiting payments to a group of enrolled members and excluding the remaining enrolled members.”³⁰

As a U.S. district court in South Dakota succinctly explained, in a lawsuit filed against a South Dakota tribe by tribal members excluded from per capita payments: “As tribal members, plaintiffs have a right to share in per capita payments made to members generally . . . [A]ll per capita payments must be distributed to *all* enrolled members.”³¹ Likewise, a Minnesota federal district court made clear, in a similar lawsuit against a Minnesota tribe, that “IGRA provides for per capita payments to members of an Indian tribe generally and without language limiting payments to *any* class of members.”³²

Tribes must justify in their RAP any distinction between members,³³ which distinction must (1) be “reasonable” and “not arbitrary,”³⁴ (2) not discriminate or otherwise violate the federal Indian Civil Rights Act,³⁵ and (3) comply with tribal law.³⁶

In other words, discrimination against any class of tribal members is not allowed; equal protection is required for all tribal members under IGRA.³⁷

2. RAP enforcement is left to the NIGC and DOJ

Once Interior approves a tribe's RAP, it does not play any enforcement role for violations of IGRA or the RAP. As the U.S. Department of the Interior inspector general took occasion to explain in 2003: “IGRA does not specifically provide the BIA a mechanism to ensure that tribes making per capita payments . . . make payments in compliance with approved plans.”³⁸ Instead, IGRA provides “the NIGC authority to enforce Indian tribal compliance with the requirements of the Act,” along with the U.S. Department of Justice (DOJ), as discussed

below.³⁹ The NIGC has always agreed that it has the primary duty to enforce IGRA's per capita requirements.⁴⁰

In all, IGRA was designed to include a set of statutory and regulatory checks and balances on Indian gaming per capita distributions, including interdependence by Interior, the NIGC, and DOJ, in order “to prevent political favoritism or corruption.”⁴¹ As recently suggested by the United States Government Accountability Office (GAO), however, improper per capita payments are being “made without an approved revenue allocation plan or payments that are not authorized by the approved plan.”⁴²

Tribal political favoritism or corruption through per capita abuse and misuse is occurring very publicly.⁴³ Yet the NIGC and DOJ sit idle.⁴⁴ Neither federal law enforcement agency has taken *any* per

²⁵Office of Inspector General, U.S. Department of the Interior, No. 2003-I-0055, *Evaluation of the Bureau of Indian Affairs' Process to Approve Tribal Gaming Revenue Allocation Plans* (June 11, 2003) 3, available at <<https://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-2003-i-0055/pdf/GPO-DOI-IGREPORTS-2003-i-0055.pdf>>.

²⁶*Id.* at 1.

²⁷E-mail from Nedra Darling, *supra* note 7. As of 2003, Interior had “no assurance that it [knew] the actual number of tribes making per capita payments.” *Supra* note 25, at 4.

²⁸25 C.F.R. § 290.12(5); § 290.14.

²⁹*Id.* at §§ 290.12(3)(i)–(ii).

³⁰Nat'l Indian Gaming Comm'n, *Use of Net Gaming Revenues Bulletin*, NO. 2005-1, (Jan. 18, 2005), available at <<http://www.nigc.gov/compliance/detail/use-of-net-gaming-revenues-bulletin>>, citing 25 C.F.R. § 290.14.

³¹*Ross*, 809 F. Supp. at 744 (emphasis added).

³²*Maxam v. Lower Sioux Indian Community of Minnesota*, 829 F. Supp. 277 (1993) (emphasis added).

³³25 C.F.R. § 290.14(b).

³⁴*Id.* § 290.14(b)(1).

³⁵*Id.* § 290.14(b)(2); 25 U.S.C. §§ 1301 *et seq.*

³⁶*Id.* § 290.14(b)(3); *see also* 47 IAM 3, Office of Indian Gaming: Internal Affairs Manual, Indian Gaming Tribal Revenue Allocation Plans (Mar. 11, 2011), available at <<http://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc013360.pdf>>. If the tribe seeking Revenue Allocation Plan (RAP) approval from Interior is known for disenrollment or other human rights abuses, heightened scrutiny should be given to its proposed RAP. *See generally* 25 C.F.R. § 290.14(b).

³⁷*Id.*

³⁸Office of Inspector General, *supra* note 25, at 7.

³⁹*Id.*

⁴⁰*Id.* at 8.

⁴¹Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 95 (2011).

⁴²GAO Indian Gaming Report, *supra* note 12 at 53.

⁴³*See generally id.*

⁴⁴*Id.*

capita-related enforcement action in recent years, despite obvious opportunities to do so.⁴⁵

B. The federal IGRA enforcement regime

The NIGC was created by IGRA; it is an independent agency within the Interior Department that exists to “help ensure the integrity of the Indian gaming industry”⁴⁶ One of the NIGC’s principal statutory mandates is to shield Indian gaming from organized crime and “other corrupting influences.”⁴⁷ Per capita abuses by tribal politicians and casino operators fall into the category of “other corrupting influences.”

IGRA arms the NIGC with powerful tools to deter per capita-related corruption.⁴⁸ As the GAO felt compelled to remind the NIGC, “IGRA authorizes the Commission Chair to take enforcement actions for violations of IGRA and applicable Commission regulations for both class II and class III gaming.”⁴⁹ Specifically, the commission chair may issue a notice of violation or a civil fine assessment for violations of IGRA, NIGC regulations, or tribal ordinances; for any substantial violation of those laws, the chair may issue a temporary closure order.⁵⁰

Likewise, as IGRA’s regulations instruct, DOJ “may enforce the per capita requirements of IGRA.”⁵¹ Indeed, the DOJ plays a deterring civil regulatory enforcement role over Indian gaming.⁵²

However, since at least 2010, both the NIGC and DOJ have curtailed federal IGRA enforcement ef-

forts and, in the instance of gaming per capita distributions, they have essentially deregulated that activity.⁵³ The dire consequences of such federal inaction and non-deterrence include mass tribal disenrollment and violent intra-tribal insurrection, as discussed below.

C. NIGC scales back IGRA and RAP enforcement efforts

The number of NIGC enforcement actions has tumbled during the Obama administration, chiefly in the last five years.⁵⁴ The numbers—revealed by the GAO in June 2015 do not lie. In 2009, the NIGC pursued 46 enforcement actions.⁵⁵ In 2010 and 2011, the number plummeted to four and five, respectively.⁵⁶ In 2012, the NIGC issued a single enforcement action.⁵⁷ It took no enforcement action whatsoever in 2013.⁵⁸ The number rebounded to four in 2014.⁵⁹

During that five-year period, the GAO reported that the NIGC failed to take a single enforcement action for improper gaming per capita payments; be they payments made without an approved RAP or payments that are not authorized by the approved RAP.⁶⁰

Those enforcement statistics—again, in the face of clear violations that were reported and publicized to the Commission⁶¹—are a far cry from the average 21 enforcement actions undertaken each year from 2005 to 2009.⁶² The GAO’s enforcement findings

⁴⁵25 C.F.R. § 502.24 (“Enforcement action means any action taken by the Chair under 25 U.S.C. 2713 against any person engaged in gaming, for a violation of any provision of IGRA, the regulations of this chapter, or tribal regulations, ordinances, or resolutions approved under 25 U.S.C. 2710 or 2712 of IGRA, including, but not limited to, the following: A notice of violation; a civil fine assessment; or an order for temporary closure.”) (emphasis in original).

⁴⁶GAO *Indian Gaming Report*, *supra* note 12, at 52.

⁴⁷25 U.S.C. § 2702(2); *see also* NIGC Statement of Regulatory Priorities, 74 Fed. Reg. 64,372 (Dec. 7, 2009).

⁴⁸*See* 25 C.F.R. § 290.10; GAO *Indian Gaming Report*, *supra* note 12, at 51.

⁴⁹*Id.*

⁵⁰*Id.*; 25 U.S.C. § 2713; 25 C.F.R. § 573.4.

⁵¹25 C.F.R. § 290.10.

⁵²*Hearing on Law Enforcement in Indian Gaming, before the Senate Indian Affairs Comm.*, 109th Cong. 1 (2005) (statement of Thomas B. Heffelfinger, U.S. Atty. for the Dist. Of Minn.), available at <http://www.justice.gov/archive/otj/Congressional_Testimony/heffelfingerlawenforcement.pdf> (“Cases which have a ‘significant impact’ on tribal organizations and enter-

prises . . . should be considered for prosecution . . . in order to facilitate prosecution and deterrence”); Letter from Glenn A. Fine, United States Inspector General, Frank R. Wolf, Congressman, U.S. House of Rep. (July 3, 2001), available at <<https://www.oig.justice.gov/reports/plus/e0106/results.htm>>; *see also* Office of Inspector General, *supra* note 25, at 8 (“IGRA provides NIGC and DOJ the authority to enforce the requirements pertaining to revenue allocation plans.”).

⁵³*See generally* Gabriel S. Galanda and Ryan Dreveskracht, *The Bay Mills Buck Stops With NIGC*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 6, 2013), available at <<http://indiancountrytodaymedianetwork.com/2013/11/06/bay-mills-buck-stops-nigc>>.

⁵⁴*See* GAO *Indian Gaming Report*, *supra* note 12, at 52.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.* at 52.

⁶¹*Id.* at 49; *see also* Galanda, *supra* note 11, at 1.

⁶²GAO *Indian Gaming Report*, *supra* note 12, at 52.

seemingly support the allegations made by various state amici curiae to the U.S. Supreme Court in *Michigan v. Bay Mills Indian Community*,⁶³ that the “Commission only rarely invokes its authority to enforce the law against Indian tribes.”⁶⁴ Indian Country should be worried about the ramifications of such a proclamation.

1. The Hogen era

A major reason for the drop in enforcement actions appears to be a wholesale shift in NIGC enforcement philosophy.⁶⁵ Under former Commission Chairman Philip Hogen, the NIGC investigated tribes for spending gaming revenue in ways that did not benefit the tribal membership.⁶⁶ Chairman Hogen understood, like scholars, researchers, and even federal court judges, that gaming per capita abuses were inextricably connected to disenrollment,⁶⁷ and he deterred those abuses.⁶⁸

On Chairman Hogen’s watch, from 2002 to 2009, the stated “standard underlying the NIGC’s approach to [per capita] expenditures is that where gaming revenues are spent in a manner that does not benefit the tribal government or tribal membership as a whole, the NIGC will investigate.”⁶⁹ Thus, under Chairman Hogen, the NIGC investigated or threatened to investigate allegations that “per capita paybacks, or the lack thereof, were inextricably tied up with tribal membership disputes” or allegations that such payments were made “for the benefit of certain tribal officials or tribal factions rather than the benefit of the whole.”⁷⁰

Chairman Hogen’s assertive enforcement approach may have been informed by a harsh June 2003 Interior inspector general report that, right around the time he took office, criticized both Interior and the NIGC because “no one monitors tribal compliance with or systematically enforces against non-compliance with approved [RAPs].”⁷¹

⁶³134 S. Ct. 2024 (2014).

⁶⁴Brief for Alabama et al. as Amici Curiae Supporting Petitioner, *Michigan v. Bay Mills Indian Community et al.*, 134 S.Ct. 2024 (2014) (No. 12-515). The NIGC dodged a bullet in *Bay Mills*.

⁶⁵GAO *Indian Gaming Report*, *supra* note 12, at 53. In short, the NIGC over-regulated the Indian gaming industry via its enforcement efforts from 2005 and 2009, before essentially deregulating the industry with little to no enforcement action from 2010 to 2015. *Id.* As discussed below, the Commission needs to strike a balance between the regulatory approaches exhibited during those two time periods; it needs to re-center itself.

⁶⁶*Oversight Hearing on Indian Tribes and the Federal Election Campaign Act: Hearing Before the Senate Indian Affairs Comm.*, 109th Cong. 6 (Feb. 8, 2006) (statement of Philip Hogen, Chairman, Nat’l Indian Gaming Comm’n) [hereinafter *Statement of NIGC Chairman Hogen*], available at <http://www.nigc.gov/images/uploads/testimony/senatetestimony/Philip_N_Hogen_020806.pdf>.

⁶⁷Alto, *supra* note 10; Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes’ Sovereign Power Over Membership*, 92 VA. L. REV. 793, 825 (2006) (“Because only tribe members may receive per capita distributions, questions of citizenship are inextricably linked to disputes over the per capita allocation regime.”); Randall K.Q. Akee, Katherine A. Spilde, Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSP. 158, 199 (2015) (citing Angela A. Gonzales, *Gaming and Displacement: Winners and Losers in American Indian Casino Development*, 55 INT’L. SOC. SCI. J. 123–33 (2003) (“Indian casinos have been associated with controversial and even deleterious effects in some communities One controversial outcome has been the disenrollment of tribal citizens, which has resulted in significant conflicts in a number of American Indian communities.”); Elliot Green, *Urbanization and Identity Change Among Native Americans*, Am. Pol. Sci. Ass’n 2014 Annual Meeting Paper, 24 (2014),

available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2454871> (“There are numerous cases of groups of people being disenrolled or suspended as members of tribes in relation to revenues from casinos or other windfalls, such as among the Pala Band of Mission Indians in California, the Isleta Pueblo in New Mexico, the Paiute in Nevada or the Narragansett in Rhode Island.”); Jojola and Ong, *supra* note 6, at 219; see Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS AND CLARK L. REV. 311, 319 (2010) (“[P]er capita payments . . . many critics allege . . . are the root of tribal enrollment disputes.”); Jana Berger and Paula Fisher, NAVIGATING TRIBAL MEMBERSHIP ISSUES, EMERGING ISSUES IN TRIBAL-STATE RELATIONS 61, 70 (2013) (“This [disenrollment] has played the largest part in the current disenrollment crisis.”); STEPHEN CORNELL ET AL., PER CAPITA DISTRIBUTIONS OF AMERICAN INDIAN TRIBAL REVENUES: A PRELIMINARY DISCUSSION OF POLICY CONSIDERATIONS 4 (2007) (observing that gaming per capita distributions have played a significant part in the IGRA-era disenrollment disputes).

⁶⁸*See id.*

⁶⁹*See Statement of NIGC Chairman Hogen*, *supra* note 66, at 6; Letter from Richard B. Schiff, Acting Chief of Staff, Nat’l Indian Gaming Comm’n, to Roger La Roche, Assistant Inspector General for Audits, U.S. Dep’t of the Interior (Mar. 10, 2003), at 23–24, available at <<https://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-2003-i-0055/pdf/GPO-DOI-IGREPORTS-2003-i-0055.pdf>>.

⁷⁰*Id.* at 7.

⁷¹Memorandum from the Office of Inspector General, *supra* note 25, at 1. In self-defense, the NIGC wrote to the Interior Inspector General in March 2013, proclaiming that “the Commission has on occasion taken action to address improper distribution of gaming revenue [T]he National Indian Gaming Commission has the means to take action when a violation has occurred” *Id.*, app. 4, at 23–24.

Chairman Hogen was also motivated to prevent DOJ encroachment into tribal gaming operations or congressional meddling with IGRA.⁷² As time passes, Chairman Hogen's efforts to protect Indian gaming are becoming more appreciated.⁷³

2. The Stevens era

The NIGC made a sharp, regulatory about-face starting in 2010, as Chairman Hogen left the Commission and the Obama administration took hold.⁷⁴ That change began with an early promise by President Barack Obama to Indian Country; he pledged to tribes: "my staff and I are eager to engage with Indian Country on your priorities—to listen to you and learn from you."⁷⁵

By early 2009, President Obama's transition team was actively consulting with Indian Country about the tribes' choice for "key agency and White House staff positions," including the NIGC chair position.⁷⁶ Meanwhile, in April 2009, the National Indian Gaming Association (NIGA) passed a resolution calling for the immediate resignation of Chairman Hogen, generally "disliking the direction in which Hogen had led the commission."⁷⁷

Tracie Stevens, who had served as the northwest delegate on the NIGA executive board from 2003 to 2009, was chosen by the president to fill that position. To her credit, Chairwoman Stevens immediately "began by asking tribes for feedback on basic issues, like how best to consult with tribes. Then, we asked tribes where we could improve our regulations from a practical standpoint in today's evolving industry. And we listened to what tribes said"⁷⁸

What Chairwoman Stevens and her staff heard from NIGA and its member tribes was that the NIGC, on Chairman Hogen's watch, had generally exceeded its authority under IGRA by regulating or proposing to regulate aspects of the Indian gaming industry not allowed by federal law.⁷⁹ The Commission also heard tribal criticisms of Chairman Hogen for being over-zealous with his investigation and enforcement power, most notably by issuing Notices of Violations (NOVs) against gaming tribes that were merely late in making fee payments or submitting audit reports to the NIGC.⁸⁰

True to the Obama administration's promises, the NIGC listened to and heeded the tribal gaming industry's concerns. By 2011, the Commission instituted a kinder, gentler enforcement regime known

as the Assistance, Compliance, and Enforcement initiative (ACE).⁸¹ ACE encourages tribes to voluntarily comply with NIGC rules,⁸² which, according to the NIGC, "prevents foreseeable problems through effective communication, training and technical assistance, and compliance efforts."⁸³

⁷²See *Statement of NIGC Chairman Hogen*, *supra* note 66, at 11.

⁷³Marc Benjamin, *Latest on Chukchansi Casino: Former U.S. Gaming Chief to Assist Tribe*, FRESNO BEE (Sept. 24, 2015), available at <<http://www.fresnobee.com/news/local/article/36409914.html>> (Hogen's "credentials and professionalism are unmatched in the industry."); Gabriel S. Galanda, *Inside the Dirty-Tricks Playbook of Jack Abramoff*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 20, 2014), available at <<http://indiancountrytodaymedianetwork.com/2014/10/20/inside-dirty-tricks-playbook-jack-abramoff>> ("Indian country could use Phil Hogen . . . right about now.")

⁷⁴See *GAO Indian Gaming Report*, *supra* note 12, at 54.

⁷⁵Press Release, The White House, President Obama Announces Kimberly Teehee as Senior Policy Advisor for Native American Affairs (June 15, 2009), available at <<https://www.whitehouse.gov/the-press-office/president-obama-announces-kimberly-teehee-senior-policy-advisor-native-american-aff>>.

⁷⁶Jodi Rave, *Tribal Group Prepares Recommendations of Native Staff for Obama Administration*, MISSOULIAN (Nov. 10, 2008), available at <http://missoulian.com/news/local/tribal-group-prepares-recommendations-of-native-staff-for-obama-administration/article_6ab33331-cb17-5458-ab48-f67fa0620efe.html>.

⁷⁷Gale Courey Toensing, *NIGC: Hogen's out, Skibine's in*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 31, 2009), available at <<http://indiancountrytodaymedianetwork.com/2009/12/31/nigc-hogens-out-skibines-82784>>.

⁷⁸Tracie Stevens, *A Term in Review: Reflecting on the Past, Looking Toward the Future*, NIGC.GOV (2013) <<http://www.nigc.gov/images/uploads/NIGC%20Uploads/media/A%20Term%20In%20Review-Reflecting%20on%20the%20Past,%20Looking%20Toward%20the%20Future.pdf>>.

⁷⁹Toensing, *supra* note 77; see generally *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 136 (D.C. Cir. 2006); Gale Courey Toensing, *New and Improved: NIGC's Inclusive Approach Wins Approval*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 31, 2011), available at <<http://indiancountrytodaymedianetwork.com/2011/10/13/new-and-improved-nigcs-inclusive-approach-wins-approval-58164>>.

⁸⁰See Gale Courey Toensing, *NIGA Calls for Hogen's Resignation*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 29, 2009), <<http://indiancountrytodaymedianetwork.com/2009/04/21/niga-calls-hogens-resignation-82719>>; *GAO Indian Gaming Report*, *supra* note 12, at 52 (showing that former NIGC Chairman Hogen issued (NOVs) at a much higher rate than Commissioner Stevens). In fairness to the Stevens Commission, the number of NOVs dropped starting in 2010 because Chairwoman Stevens stopped the NIGC's issuance of NOVs for late fee payments or audit reports to the NIGC. See *supra* note 12, at 52.

⁸¹*GAO Indian Gaming Report*, *supra* note 12, at 54.

⁸²*Id.*

⁸³NAT'L INDIAN GAMING COMM'N, U.S. DEPT. OF THE INTERIOR, STRATEGIC PLAN FOR FISCAL YEARS 2014–2018 4 (2013).

“While the NIGC has an important regulatory role,” explained now immediate-past NIGC Chairwoman Stevens, “Tribes are on the ground regulators of gaming, and, through our focus on technical assistance, training, coordination and the A.C.E. Initiative, this strategic plan will enhance the capability of the NIGC to provide greater support to tribal regulators.”⁸⁴

In other words, Chairwoman Stevens and her fellow commissioners admirably viewed the NIGC as playing an auxiliary role to tribal regulators, who they trusted to do the right thing.⁸⁵ But that proved to be an overcorrection.⁸⁶ Certain tribes breached that trust, and neither tribal regulators nor the NIGC responded.⁸⁷

Four years later, the NIGC’s new approach caused the GAO to seriously question the effectiveness of ACE and, more generally, whether the Commission was still enforcing IGRA’s mandate in any meaningful way:⁸⁸

[T]he effectiveness of [ACE] is unclear. Most of the Commission’s performance measures

do not demonstrate the effectiveness of the agency’s training and technical assistance efforts. Most of the measures are not outcome-oriented, inconsistent with the Office of Management and Budget guidance, and those that are focused on tribes’ compliance largely do not correlate with the Commission’s training and technical assistance efforts.⁸⁹

The GAO applied these criticisms to, inter alia, known “[i]mproper per capita payments” by tribes, highlighting that the NIGC failed to take a single enforcement action for such IGRA or RAP violations since ACE was launched.⁹⁰

Despite Chairwoman Stevens’ most well-intentioned ACE efforts, the NIGC’s provision of technical assistance, training, and coordination to tribes has thus far proven ineffective in deterring Indian gaming per capita misuse.⁹¹ In turn, gaming per capita abuses have gone undeterred and are thus fueling the firestorm of tribal disenrollment sweeping Indian Country.⁹²

⁸⁴NIGC Releases Five Year Strategic Plan, PR NEWSWIRE (July 18, 2013), <<http://www.prnewswire.com/news-releases/nigc-releases-five-year-strategic-plan-216040611.html>>.

⁸⁵The regulatory framework that IGRA established does anticipate that tribes would be the primary day-to-day regulators of the gaming activity, but IGRA also includes a system of checks and balances that are administered by the NIGC and the states to ensure that the regulatory regime is robust and free from corruption. See S. Report No. 100-446, at 11–13 (1988).

⁸⁶In a telling moment during Chairwoman Stevens’ tenure, in 2011 she received two standing ovations from the National Indian Gaming Association (NIGA) body. Toensing, *supra* note 77. A well-respected Indian gaming journalist described the ovations as “an unusual response to an industry regulator” to say the least. Dave Palermo, *Is the NIGC Relevant?*, TRIBAL GOVERNMENT GAMING (Mar. 17, 2015), available at <<http://tribalgovernmentgaming.com/issue/tribal-government-gaming-2015/article/is-the-nigc-relevant>>. Yet NIGA deliberately sits on its hands when it comes to mass tribal disenrollment. So does its sister association, the National Congress of American Indians (NCAI). Joseph Hamilton, *Tribal Leaders Must Talk About Disenrollment*, INDIAN COUNTRY TODAY (Oct. 5, 2015), available at <<http://indiancountrytodaymedianetwork.com/2015/10/05/tribal-leaders-must-talk-about-disenrollment>> (“[N]obody in tribal leader circles is willing to talk about [disenrollment]. Not at NCAI, not at NIGA, not among Southern California tribal leaders, not anywhere.”). In October 2015, at NCAI’s annual convention in San Diego, Michelle Stanley, then a councilperson for the Saginaw Chippewa Tribe (a disenrolling tribe (see *infra* notes 166–168)), broke the silence amongst national Indian leadership by making a floor statement:

We are having a crisis of disenrollment... I ask people to look into their hearts and look around—historical members are being hurt by disenrollment. ... We are limited to consensus decisions to set [NCAI] policy directions but are willing

to tackle challenging dialogue. ... [I] encourage good [national inter-tribal] conversations on protective measures [against disenrollment].

See Dave Palermo, *Tribal Gaming’s Dirty Secret: Casino “per caps” prompt “epidemic” of tribal disenrollments*, GLOBAL GAMING BUS. MAGAZINE (Feb. 25, 2016), available at <http://ggbmagazine.com/issue/vol-15-no-3-march-2016/article/tribal-gamings-dirty-secret>. Ms. Stanley was disenrolled soon thereafter. *Id.* Like Ms. Stanley, last year, Ramona Band of Cahuilla Chairman Joseph Hamilton issued a clarion call that Indian Country’s leaders “better start talking about disenrollment and finding solutions before it’s too late.” *Id.* Indeed, “that silence among tribal leaders—and the resulting void of peer-to-peer Indian shame” emboldens more tribal politicians to engage in disenrollment. Gabriel S. Galanda, *The Anti-Disenrollment Chorus Sings: Part 2*, INDIAN COUNTRY TODAY (Nov. 11, 2015), available at <<http://indiancountrytodaymedianetwork.com/2015/11/16/anti-disenrollment-chorus-sings-part-2>>. That national intertribal silence also paralyzes the likes of NIGC Chairman and other Indian federal officials. Galanda, *supra* note 73 (“With their most powerful potential critics—other Tribes’ leaders—hushed, it becomes even easier for the bad guys to persuade federal officials to either do nothing or tread slowly.”).

⁸⁷See Galanda, *supra* note 11; GAO Indian Gaming Report, *supra* note 12, at 52. But see *infra* note 133. The author is unaware of any tribal gaming regulatory agency that has taken enforcement action against disenrollment-related per capita misuse, as RAP violation.

⁸⁸GAO Indian Gaming Report, *supra* note 12, at 45.

⁸⁹*Id.*

⁹⁰*Id.* at 52.

⁹¹In fairness to Chairwoman Stevens, she also inherited a system in which “NIGC does not have a mechanism for monitoring revenue distributions.” Office of Inspector General, *supra* note 25, at 8.

⁹²Galanda and Drevskracht, *supra* note 3, at 413.

D. NIGC inaction results in violent insurrection

Perhaps most troubling of all, the spike in gaming per capita-fueled disenrollment controversies over the last several years have “brought out the worst in human nature” amongst Indian people, “resulting in clan and family feuds even violence.”⁹³ Such violence has centered on Indian gaming facilities, and threatened both Indian and non-Indian lives.⁹⁴

To give but one example, in grave detail: in 2014, the Paskenta Band of Nomlaki Indians experienced a crisis at its lucrative 70,000 square-foot casino in Northern California.⁹⁵ The dispute began on April 12, 2014, at the tribe’s annual meeting, when the Band’s chairman diverged from the scheduled agenda and summarily suspended one member of the tribal council from participation in her elected position and began reading a prepared statement announcing that certain families were not legally on the Paskenta rolls.⁹⁶ In that moment, the chairman, practically speaking, stripped more than eighty tribal citizens (hereinafter “the outgroup”) of their tribal memberships, insofar as they were forever after exiled from Paskenta tribal lands, denied monthly gaming per capita payments, and otherwise disenfranchised, as outlined below. As a result of the chairman’s *ultra vires* action, chaos ensued,⁹⁷ the annual meeting was adjourned, and local police were called to maintain the peace.⁹⁸

In turn, the tribal chairman and his faction, lead by a new casino management team, seized control of the Band’s casino using armed guards, and targeted the outgroup for official disenrollment.⁹⁹ The Paskenta police chief, a retired Tehama County sheriff, described the situation as follows:

It’s become very clear that laws are being broken and money is being mishandled at the Rolling Hills Casino, leaving the tribe in jeopardy of being robbed of millions of dollars, and potentially being forced to shut down their casino But frankly I’m even more concerned about the seriousness of the situation with regard to the safety of tribal members, the public, and employees. Weapons violations, millions of dollars at stake, and regulators being systematically and physically removed from their posts is a recipe for a violent altercation. What has become clear is that the Paskenta Tribe is under siege,

completely out of control of its casino, and unless a federal agency steps in, this could truly turn violent.¹⁰⁰

On April 21, 2014, the NIGC’s director of compliance wrote to the chairman’s faction, expressing concern “that the tribal government . . . is not in control of the Band’s gaming operation and remains excluded from the premises” and “that the gaming at the Casino is not being conducted by the Band—that is, by the governmental authority recognized by the Secretary of the Interior—or by an entity licensed by the tribal government pursuant to NIGC regulations.”¹⁰¹ However, according to local state officials and other interested parties, the Commission’s letter was insufficient to resolve the dispute.¹⁰² Yet the NIGC refused to do more, despite

⁹³Phillip Parker, *Reconciling Tribal History with the Future: The Impact of John Marshall and John Collier* 25 (Aug. 18, 2014) (unpublished manuscript), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482413>.

⁹⁴Stephen Magagnini, *Tribal Dispute Prompts Judge to Temporarily Ban Firearms at Rolling Hills Casino*, SACRAMENTO BEE (Jun. 20, 2014), available at <<http://www.sacbee.com/news/business/article2601838.html#storylink=cpyhttp://www.sacbee.com/news/business/article2601838.html#storylink=cpy>>.

⁹⁵*Id.* This section is reprised from Galanda and Dreveskracht, *supra* note 3, at 369–409.

⁹⁶First Amended Complaint at 4, *Freeman v. Freeman*, No. PTCV-14-001 (Paskenta Tribal Ct. May 7, 2014).

⁹⁷Gale Toensing, *Epic Paskenta Dispute Continues, Despite BIA Cease and Desist Letter*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jun. 13, 2014), <<http://indiancountrytodaymedianetwork.com/2014/06/13/epic-paskenta-dispute-continues-despite-bia-cease-and-desist-letter-155285>> (“[S]ecurity officers from the casino and law enforcement officers from the sheriff’s office ‘swarmed’ the place and took up positions behind the tribal council.”).

⁹⁸Complaint ECF No. 2 at 4, *State of California v. Paskenta Band of Nomlaki Indians* (E.D. Cal. Jun. 18, 2014) (No. 14-1449).

⁹⁹Colin Steiner, *Tribal Tensions Escalate in Rolling Hills Dispute*, KRCR NEWS (Jun. 9, 2014), available at <<http://www.krcrtv.com/news/local/tribal-tensions-escalate-in-rolling-hills-dispute/26410206>>.

¹⁰⁰*Tribe’s Police Chief Says Federal, State Laws Violated at Corning Casino*, RED BLUFF DAILY NEWS, (May 27, 2014), available at <http://www.redbluffdailynews.com/news/ci_25845129/tribes-police-chief-says-federal-state-laws-violated#>.

¹⁰¹Toensing, *supra* note 97 (quotation omitted).

¹⁰²*See, e.g.,* Julie R. Johnson, *Tribal Conflict Escalates, Casino Shutdown Attempted*, CORNING OBSERVER (June 9, 2014), available at <http://www.appeal-democrat.com/corning_observer/tribal-conflict-escalates-casino-shutdown-attempted/article_7aed8b94-f056-11e3-80dd-0017a43b2370.html> (“The sheriff’s office said in a press release, ‘the Tehama County Sheriff’s Office is dedicated to preserving public safety and has elected not to align itself with any particular group in this situation.’”).

its responsibility to ensure peace at the casino through IGRA enforcement.¹⁰³

By late May 2014, Ken Many Wounds, a former NIGC regional director, issued an investigatory report based on an independent investigation he had conducted at Rolling Hills, which concluded:

In all, based on what I witnessed and learned... I am surprised that the NIGC has not taken swift action to shut down the Rolling Hills Casino, or at least issued a Notice of Violation by now. I know the past NIGC Chairman who issued closure orders based on a much lesser degree of gaming law violation than what I saw during my visit. I am also surprised by the rather nonchalant pace of the NIGC's investigation, and the wholly improper lines of questioning; especially given the federal, state and tribal gaming law violations I saw from the casino floor and the potential for many more. I remain particularly astonished by the unprecedented show of force by armed guards currently on display at Rolling Hills Casino, and the palpable potential for violence, and the fact that this endangerment to the public has been allowed to continue by federal gaming regulators and other authorities for nearly nine weeks.¹⁰⁴

Mr. Many Wounds' opinions were corroborated by the retired Tehama County sheriff, whose own report confirmed that "since April 12, 2014, armed guards were brought in... [T]hey carried pepper spray, Tasers, handguns, knives in boots and holsters, the K-9 unit had an AR-15 and the guards at the back of the building had AR-15s... [T]he people in possession of the casino are willing to resort to violence to maintain the possession of the casino."¹⁰⁵

Meanwhile, upon the sheriff's inquiry regarding whether the Paskenta Band, through at least the chairperson, "was running the casino," a witness "stated that 'he's not in charge of anything and that [a non-Paskenta casino general manager] is running everything.'"¹⁰⁶ In other words, several weeks later, the Band was, as the NIGC feared on April 15, 2014, still neither in control of the casino, nor conducting the gaming at Rolling Hills, in violation of IGRA.¹⁰⁷ Yet the NIGC did nothing to remedy that problem.

On June 9, 2014—almost two entire months after the dispute began—emotions boiled over into an

armed standoff at the casino between the two factions, involving roughly thirty "police" from the chairman's faction and the outgroup, some "bearing masks with rifles... extended magazines, and a canine."¹⁰⁸ During the standoff, one of the chairman faction's employees was arrested when he pulled a baton on a member of the previous tribal council.¹⁰⁹ Other employees reportedly "pointed rifles at Sheriff's deputies and threatened to 'send the dog' on them."¹¹⁰ Still, the NIGC sat idle.

On June 17, 2014, the State of California filed suit against the tribe in the United States District Court for the Eastern District of California, alleging that that the Band was in breach of its gaming compact, and therefore IGRA, by failing to ensure the "physical safety of Gaming Operation patrons and employees, and any other person while in the Gaming Facility," and conducting "Class III gaming in a manner that endangers the public health, safety, or welfare."¹¹¹ The next day, the district court issued a temporary restraining order, enjoining both groups from, inter alia, "[d]eploying any armed personnel of any nature within 100 yards from the Casino" and "[p]ossessing, carrying, displaying, or otherwise having firearms on the Tribal Properties."¹¹²

While the State of California and the federal court's intervention brought immediate peace to the violent unrest at the casino, and the Paskenta

¹⁰³Sandra J. Ashton, *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 *NEW ENG. L. REV.* 545, 549–50 (2003).

¹⁰⁴Third Party Complaint ECF No. 22 at 12, *State of California v. Paskenta Band of Nomlaki Indians* (E.D. Cal. Jun. 26, 2014) (No. 14-1449).

¹⁰⁵*Id.* at 11.

¹⁰⁶*Id.*

¹⁰⁷Declaration of Vice Chairman David Swearinger ECF No. 8-2 at 6–7, *State of California v. Paskenta Band of Nomlaki Indians* (E.D. Cal. June 18, 2014) (No. 14-1449).

¹⁰⁸Declaration of Joginder Dhillon in Support of Motion for Temporary Restraining Order ECF No. 3-3 at 3, *State of California v. Paskenta Band of Nomlaki Indians* (E.D. Cal. June 17, 2014) (No. 14-1449).

¹⁰⁹*Id.* at 78.

¹¹⁰*Id.*

¹¹¹Complaint for Injunctive and Declaratory Relief ECF No. 2 at 2, *State of California v. Paskenta Band of Nomlaki Indians* (E.D. Cal. Jun. 17, 2014) (No. 14-1449).

¹¹²*State of California v. Paskenta Band of Nomlaki Indians*, ECF No. 18 (E.D. Cal. June 18, 2014) (No. 14-1449) (order granting plaintiff's motion for temporary restraining order). On July 7, the district court entered an Order Granting Preliminary Injunction that extended the temporary order. *State of California v. Paskenta Band of Nomlaki Indians*, ECF No. 30 (E.D. Cal. Jul. 7, 2014) (No. 14-1449).

parties in interest reached a truce in the form of a settlement agreement on July 7, 2014, the tribal chairman and his faction proceeded to strip the outgroup of its tribal membership anyway,¹¹³ in order to consolidate power and concentrate per capita dollars within their political base.¹¹⁴

During the entire time, dating back to April 2014, the chairperson's faction denied payment of gaming per capita monies to the outgroup and other perceived opponents, in clear violation of IGRA.¹¹⁵ The faction's motives were clear: "disallow gaming per capita money to members that have been proposed for disenrollment or provisionally disenrolled, making it harder for them to hire their own legal representation to fight the disenrollment" or related siege.¹¹⁶

The outgroup alerted the NIGC to the discriminatory per capita payments:

Since May 2014, those distributions have been made to only selected members of the Tribe, and not to us or our families, meaning discriminatorily, in clear violation of federal law About 80 Tribal members have each been denied \$3,300 in monthly per capita monies over the last six months¹¹⁷

But the NIGC also refused to take any enforcement action in that regard, feigning that "the tribal council is responsible for reviewing any disputes related to the distribution of gaming revenues."¹¹⁸

In all, as reported by third parties, "the rift" at Paskenta "was initiated by a handful of casino executive staff, who are not tribal members, who provided factually incorrect and incomplete information to the tribal chairman, which caused him to take actions based on the faulty information."¹¹⁹ And it was only those non-Indian casino managers, as well as tribal lawyers, who benefited from the violent saga at Paskenta's Rolling Hills Casino, to the tune of "millions in unrecoverable lost revenue and legal fees."¹²⁰

As the GAO alluded, the NIGC could have prevented the forceful insurrection at Paskenta, or at least nipped that chaos in the bud. But the Commission chose not to intervene. The NIGC's inaction at Paskenta later drew criticism from Senator McCain during a Senate Committee on Indian Affairs oversight hearing in 2015, which powerful criticism, as discussed below, threatens the longevity of Indian gaming as we know it.¹²¹

E. NIGC and new chairman professes to end gamesmanship on the back of tribes

In late 2015, current NIGC Chairman Jonodev Osceola Chaudhuri announced a new NIGC focus—to "[p]rotect against anything that amounts to gamesmanship on the back of Tribes."¹²² Chairman Chaudhuri identified "gamesmanship" as:

1. Non-tribal government interests in gaming
2. Manipulat[ion] of business, professional, and employment relationships associated with Indian gaming operations in furtherance of their own interests
3. Undue influence over the tribal decision-making process (as can be the case when the gamesmanship is facilitated by trusted tribal advisors)
4. [Harmful actions at] the expense of the tribal gaming operations and, therefore the tribe and its citizens
5. Violations of IGRA or NIGC regulations [or] tribal gaming ordinances¹²³

¹¹³First Amended Complaint, *Swearinger v. Paskenta Band of Nomlaki Indians*, No. 01-14-0001-5485 (Am. Arb. Ass'n Feb. 6, 2015).

¹¹⁴*See generally id.*

¹¹⁵25 C.F.R. § 290.14.

¹¹⁶Andrew Westney, *Lawyers Must Guard Against Disenrollment Abuses*, LAW360 (Apr. 27, 2015), available at <<http://www.law360.com/articles/644804/lawyers-must-guard-against-tribal-disenrollment-abuses>>.

¹¹⁷Letter from David Swearinger and Geraldine Freeman to Kevin K. Washburn, Assistant Secretary of Indian Affairs, and Jonodev Chaudhuri, Chairman, Nat'l Indian Gaming Comm'n (Oct. 2, 2014) (on file with author).

¹¹⁸Letter from Douglas Hatfield, Director of Compliance, Nat'l Indian Gaming Comm'n, to David Swearinger et al. (Oct. 6, 2014) (on file with author).

¹¹⁹Julie R. Johnson, *Paskenta Tribal Battle Continues, Escalates*, CORNING OBSERVER (May 13, 2014), available at <http://www.appeal-democrat.com/corning_observer/paskenta-tribal-battle-continues-escalates/article_fea7dcee-db09-11e3-a877-001a4bcf6878.html>.

¹²⁰Alan Wileman, *Chukchansi: Lewis Faction Agrees to 'Clean Slate Elections' in May, 2015*, SIERRA STAR (Aug. 26, 2014), available at <http://www.sierrastar.com/2014/08/26/69290_chukchansi-lewis-faction-agrees.html?rh=1>.

¹²¹*See generally Senate Hearing on Safeguarding the Integrity of Indian Gaming*, *supra* note 17.

¹²²Nat'l Indian Gaming Comm'n, *Work to Prevent Gamesmanship on the Backs of Tribes*, Washington Gaming Law Summit (Dec. 10–11, 2015) (on file with the author).

¹²³*Id.*

The NIGC and Chairman Chaudhuri's professed change in regulatory philosophy, which seemed to harken back to the days of Chairman Hogen and evoke regulatory middle ground, was welcome news; as such types of gamesmanship are nearly always associated with gaming per capita-fueled disenrollments and related intra-tribal strife.¹²⁴

However, the NIGC has since clarified that its new anti-gamesmanship regime is primarily focused on "non-tribal-governmental interests"—not internal tribal corrupting influences.¹²⁵

When asked in January 2016 by Indian gaming investigative reporter Dave Palermo why the Commission has not "done any enforcement on issues dealing with disenrollment and per capita," the NIGC deflected that it "has no jurisdiction to insert itself into a Tribe's enrollment decisions. Determination of tribal citizenship or membership is an inherent sovereign power not to be interfered with by the NIGC."¹²⁶ Without question, the NIGC does not have authority over any tribe's "enrollment decisions," but the agency does possess the statutory power—and indeed, the mandate—

to intercede in disenrollment-related gaming per capita misuse.¹²⁷

Time will tell whether the NIGC will return to its days of investigating or threatening to investigate allegations of per capita abuse—*i.e.*, instances when "gaming revenues are spent in a manner that does not benefit the tribal government or tribal membership as a whole"—and enforcing related violations of IGRA and tribal RAPs,¹²⁸ thereby deterring further per capita misuse. Although there is reason for doubt, hope springs internal.¹²⁹

III. ARGUMENT

For now, the NIGC gets away with slack policing and enforcement because, frankly, it can. IGRA and federal regulations fail to specify precisely how or when the NIGC must oversee or monitor Indian gaming.¹³⁰ Both Chairman Hogen's hands-on approach, and the laissez-faire ACE method are, at least arguably, legally acceptable.¹³¹ But the NIGC is playing a dangerous game if it continues on the path it walked from 2010 to 2015, with tribal governments

¹²⁴Fagan, *supra* note 1. On December 21, 2015, the NIGC announced an unprecedented settlement with the Picayune Rancheria, which disenrolled members for decades for the sake of larger Indian gaming revenue per capita distributions to remaining tribal members. Press Release, Nat'l Indian Gaming Comm'n, NIGC Enters Agreement with the Picayune Rancheria of Chukchansi Indians to Reopen Casino (Dec. 21, 2015), available at <<http://www.nigc.gov/news/detail/nigc-enters-agreement-with-the-picayune-rancheria-of-chukchansi-indians-to>>. In October 2014, the NIGC shuttered the Tribe's casino in Coursegold, California for "operating the gaming facility in a manner that threatened public health and safety." Alex Dobuzinkis, *Standoff Forces Closure of American Indian Casino in California*, LAS VEGAS REVIEW-JOURNAL (Oct. 16 2014), available at <<http://www.reviewjournal.com/news/nation-and-world/standoff-forces-closure-american-indian-casino-california>>. Chairman Hogen questioned what took the Commission so long and, more generally, the NIGC's current regulatory approach. Benjamin, *supra* note 73 ("Hogen said he's unsure why the NIGC now takes longer to file action against tribes not following gaming regulations than it did under his watch."). In any event, the settlement allowed the Tribe to reopen its casino under certain conditions, including a fine of \$19,845,000, a portion of which may be suspended. While the NIGC has never addressed known gaming per capita abuses at Picayune *vis-à-vis* the types of gamesmanship and bad actors that Chairman Chaudhuri now denounces (*supra* note 17), the settlement lends hope that the Commission will once again enforce IGRA as the law is intended.

¹²⁵E-mail from Christina Thomas, Deputy Chief of Staff, National Indian Gaming Commission, to Dave Palermo, writer for Global Gaming Business (Jan. 27, 2016, 1:29 PM PST) (on file with the author).

¹²⁶*Id.* The NIGC further explains: "The agency will investigate, and has investigated several complaints over the last two years,

where a Tribe has allegedly distributed gaming revenue without a Revenue Allocation Plan (RAP) formally approved by the Secretary; or, where there is a RAP, if a tribe makes distributions of gaming revenue in addition to what is permitted by the terms of that RAP." *Id.* But see *supra* text accompanying note 118.

¹²⁷See *supra* notes 47–48. Importantly, while "[d]etermination of tribal citizenship or membership is an inherent sovereign power" (e-mail from Thomas, *supra* note 125), disenrollment is *not* a power inherent to tribes. Galanda and Dreveskracht, *supra* note 3, at 389–390. To be sure:

[A] tribal government's ability to determine, define, and limit the criteria for tribal membership [via enrollment], is distinct from its ability to retract a previous determination that an individual has satisfied existing criteria for tribal membership. While the former is properly defined as an aspect of inherent tribal sovereignty, the latter—disenrollment—is not. Disenrollment is entirely a construct of federal law, not of American indigenous norms.

Id. Notwithstanding, to justify United States inaction, federal officials adeptly conflate "enrollment" and "disenrollment," and espouse "inherent tribal sovereignty." See, e.g., e-mail from Thomas, *supra* note 125. More accurate conversation is needed.

¹²⁸See *Statement of NIGC Chairman Hogen*, *supra* note 66, at 6.

¹²⁹See Nat'l Indian Gaming Comm'n, *supra* note 124.

¹³⁰*Id.*, at 8; GAO *Indian Gaming Report*, *supra* note 12, at 53 ("Enforcement actions since fiscal year 2010 may have been taken less often because the Commission Chair has discretion in determining when to pursue an enforcement action, and recent Commission chairs have emphasized seeking voluntary compliance with IGRA.").

¹³¹See *id.*

and Indian people already paying a steep price for its inaction.

A. The NIGC must re-regulate gaming per capita activity and enforce IGRA

A regulator that is all carrot and no stick is destined to fail. The NIGC's ACE program is probably sufficient to correct *de minimis* mistakes by tribes, or even some minor infractions. But it is naïve for the NIGC to believe that additional "communication, training and technical assistance" will curb gaming per capita abuses linked to mass purging of membership rolls. No one can train or technically assist tribal leaders and casino managers to stop arbitrarily or discriminatorily denying gaming per capita payments to tribal citizens who are proposed for disenrollment¹³² or who are politically unpopular. Federal enforcement and its strong deterrent effect are needed and required.

That is not to say that the NIGC must be in the business of policing disenrollment *per se*.¹³³ But, like Chairman Hogen appreciated, the Commission needs to take seriously its duty to protect against per capita abuses, which would in turn curb disenrollment in a major way. The federal regulator's failure to do so for at least the last five years has engendered an arrogance within tribal electeds who are willing to disenroll members for profit.¹³⁴ In the tribes spearheaded by those politicians, the "absolute right" that is tribal citizenship or membership¹³⁵ has become a commodity, in violation of basic indigenous human rights.¹³⁶ The NIGC can, and should, do something to deter further violations of indigenous human rights vis-à-vis Indian casino corruption and gaming per capita misuse.

B. The NIGC is obligated to tackle disenrollment linked to per capita abuses

Nothing is stopping the NIGC from directly targeting disenrollment linked to gaming per capita abuse—except itself.

The Commission has a clear mandate to assure that per capita distributions are "reasonable and not arbitrary,"¹³⁷ and do not "discriminate or otherwise violate the Indian Civil Rights Act."¹³⁸ By the admission of former NIGC Chairman Harold Monteau, the NIGC also owes a "direct trust (fiduciary) responsibility" to the individual Indians who face disenrollment.¹³⁹ Insofar as the NIGC is obliged to push back against and deter those influences

that are corrupting Indian gaming, it is obliged to help quell disenrollment vis-à-vis per capita abuses. It has the mandate.¹⁴⁰ It has the tools.¹⁴¹ It just needs the will.

¹³²In addition to Paskenta, the Nooksack Tribe and Confederated Tribes of the Grand Ronde Reservation recently "denied gaming per capita payments to droves of tribal members who were "proposed for disenrollment" or "provisionally disenrolled," respectively. See generally Galanda, *supra* note 11; Westney, *supra* note 116 (tribes have been "able to disallow gaming per capita money to members that have been proposed for disenrollment or provisionally disenrolled . . ."); Galanda and Dreveskracht, note 3, at 458–459 (discussing how "tribal lawyers have been clever enough to avoid disenrollment-related castigations" that create federal or tribal court redress for such discrimination or illegality, but to nonetheless accomplish their goals of disenfranchising and in turn disenrolling targeted tribal members). Although, insofar as a tribal member is illegally denied a gaming per capita payment (25 C.F.R. § 290.14(b)), it should at least be redressable in tribal court as a due process violation. 25 U.S.C. § 1302(a)(8); *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970); *Westberry v. Fisher*, 297 F. Supp. 1109, 1116 (D. Me. 1969) ("Unquestionably, there has historically been no vested right to public welfare. However, once a state elects to establish a program of public assistance, it must meet constitutional standards; it cannot arbitrarily deny to a portion of its citizens the benefits of such a program.").

¹³³Interior and BIA, however, are in fact obliged to intervene in tribal disenrollments. Galanda and Dreveskracht, *supra* note 3, at 408, 457–459. See also Gabriel S. Galanda, *Disenrollment IS a Federal Action*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 10, 2015), available at <<http://indiancountrytodaymedia.network.com/2015/03/10/disenrollment-federal-action>> ("[I]t is still federal law and policy that the Interior Secretary must be involved in any tribal disenrollment action. But Interior and BIA officials simply ignore those federal dictates.") (emphasis in original).

¹³⁴See text accompanying notes 85–113.

¹³⁵*Terry-Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01, 01-02, 10 (Las Vegas Paiute Ct. App. 2003).

¹³⁶G.A. Res. 61/295, Art. 1, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

¹³⁷25 C.F.R. § 290.14(1).

¹³⁸*Id.* § 290.14(2); Clinton, *supra* note 41, at 95; *GAO Indian Gaming Report*, *supra* note 12, at 6; Ross, 809 F. Supp. 746 (citing U.S. Department of the Interior, Guidelines to Govern the Review and Approval of Per Capita Payments (Dec. 21, 1992) ("When the Revenue Allocation Plan calls for distribution of per capita payments to an identified group of members rather than all members, the tribe shall provide a justification for limiting such payments to the identified group of members. The justification must establish a rational basis . . .").

¹³⁹*Monteau*, *supra* note 14. Cf. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) ("Under a humane and self-imposed policy . . . [the United States] has charged itself [specifically Interior] with moral obligations of the highest responsibility and trust" to American Indians).

¹⁴⁰*GAO Indian Gaming Report*, *supra* note 12, at 6.

¹⁴¹*Id.* at 37.

Tribal politicians who seek to disenroll their kin for sake of per capita wealth concentration can and will be deterred by any NIGC enforcement threat against the golden goose that is the tribal casino. By failing to act, the NIGC becomes complicit in gaming per capita violations, and an abettor in disenrollments fueled by such violations. This kind of behavior is anathema not only to tribal traditional ways and to modern Indian self-determination; but also to IGRA, which was designed to help tribal economies thrive and improve the lives of Indian people, not destroy them.

If the NIGC under Chairman Hogen was enforcing IGRA too aggressively, as NIGA asserted, recent incarnations of the NIGC have overcorrected, essentially choosing to neuter themselves by their own passivity. A balanced approach includes staunch policing and deterrence, while also helping tribal governments meet their own regulatory and enforcement obligations. Insofar as tribal governments are responsible for the disenrollment epidemic, tribal self-governance is the best mode of finding a cure. Still, federal trust assistance is required, and mandated.

C. If the NIGC doesn't self-correct, Congress will eventually act

According to Drs. Stephen Cornell and Joseph Kalt, tribal foes in Congress, particularly members of the Republican Party, generally appear poised to move “away from the Indian self-government movement,” if not to put “an end to policies of self-determination.”¹⁴² More specifically, several such tribal opponents have long been angling for more aggressive federal Indian gaming regulation.¹⁴³

1. A Republican administration will act and urge Congress to act

In 2003, during the George W. Bush presidential administration, Interior Secretary Gale Norton requested that Interior’s inspector general evaluate RAP approval and compliance issues.¹⁴⁴ In that process, the inspector general recommended that Secretary Norton consider requesting an amendment to IGRA “to give her authority to oversee or enforce tribal compliance with approved [revenue allocation] plans”¹⁴⁵

That recommendation was then greeted favorably by others in Interior. The Interior associate solicitor advised then OIGM Director George Skibine that he “agree[d] that the Secretary might consider

an amendment to IGRA in order to clarify her authority to monitor compliance or enforce against non-compliance with RAPs [T]he regulations could be amended to require tribes to submit proof of actual distribution of gaming profits”¹⁴⁶

Secretary Norton ultimately disagreed with the inspector general and associate solicitor that an IGRA amendment or new regulations were necessary, prudentially explaining that “it is best if enforcement is concentrated in one regulatory agency, the NIGC.”¹⁴⁷ Still, the Interior inspector general concluded its report with a recommendation to the secretary that “all gaming tribes . . . submit an annual independent audit report to the [Interior] Secretary. The audit would determine whether a tribe made per capita payments and, if so, complied with an approved revenue allocation plan.”¹⁴⁸ That recommendation was never implemented.

Nevertheless, the Interior inspector general’s report and related communications within the Interior Department in 2003, go to show that a Republican presidential administration is not afraid to meddle with IGRA, or ask Congress to do so.

2. A Republican Congress is poised to act

In 2006, Sen. John McCain proposed an amendment to IGRA that would have required federal oversight of a “reasonable method of providing

¹⁴²Stephen Cornell and Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* (John F. Kennedy School of Government, Harvard University, HKS Faculty Research Working Paper Series RWP10-043, 2010), available at <<http://dash.harvard.edu/handle/1/4553307>>; see also Gabriel S. Galanda, *Back to the Future: The GOP and Tribal Termination*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 9, 2015), <<http://indiancountrytodaymedianetwork.com/2015/09/09/back-future-gop-and-tribal-termination>>; Gale Toensing, *Rep. Don Young is Leading an Assault on Native Rights*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 27, 2015), available at <<http://indiancountrytodaymedianetwork.com/2015/05/27/rep-don-young-leading-assault-native-rights-160494>>.

¹⁴³See S. 2078, 109th Cong. §7 (2006).

¹⁴⁴Office of the Inspector General, *supra* note 25, at 1.

¹⁴⁵Memorandum from the Assistant Sec’y of Indian Affairs U.S. Dep’t of Interior, to the Assistant Inspector General for Audits, U.S. Dep’t of Interior (Mar. 25, 2003), available at <<https://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-2003-i-0055/pdf/GPO-DOI-IGREPORTS-2003-i-0055.pdf>>.

¹⁴⁶E-mail from John Jasper, Associate Solicitor, U.S. Dep’t of Interior, to George Skibine, Office of Indian Gaming Management Director, U.S. Dep’t of Interior (Jan. 20, 2013), available at <<https://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-2003-i-0055/pdf/GPO-DOI-IGREPORTS-2003-i-0055.pdf>>.

¹⁴⁷*Id.*

¹⁴⁸Office of the Inspector General, *supra* note 25, at 9.

for the general welfare of the Indian tribe and the members of the Indian tribes.”¹⁴⁹ That amendment, in much the same vein as what Interior’s inspector general and associate solicitor recommended three years prior, was catalyzed by news reports that a tribal lawyer was gaming two of his tribal casino clients—both of which, incidentally, engaged in casino-crazed disenrollment with his help¹⁵⁰—to the tune of tens of thousands of dollars in monthly retainer payments.¹⁵¹

While Indian Country was rightly outraged by Senator McCain’s proposed encroachment upon Indian sovereignty, tribes were also put on notice that federal decision makers *will* act upon the improper use of Indian gaming per capita dollars.¹⁵²

Nearly a decade later, Senator McCain is still watching. He recently stated that: “One of my primary concerns continues to be the performance and legal limitations of the National Indian Gaming Commission as the chief Federal regulator for Indian gaming.”¹⁵³

Just as concerning, it was Senator McCain and the chairman of the Senate Committee on Indian Affairs, Sen. John Barrasso (R-Wyo), who pushed for the 2015 GAO report.¹⁵⁴ After the report’s release, the two senators issued a joint statement in which they cited “troubling findings” in the report, and asserted that the NIGC should improve accountability measures.¹⁵⁵ “The primary role of NIGC is to maintain the health and integrity of Indian gaming for the benefit of Indian tribes,” Senator McCain said in the statement.¹⁵⁶ “If NIGC continues to rely on Indian casinos to voluntarily comply with federal guidelines, then the commission must at least improve its state and tribal training and consultation initiatives and develop metrics that assess their effectiveness.”¹⁵⁷

Could the writing on the wall be any clearer?

Others are taking notice: “[T]here is increasing fear in Indian Country that the regulatory pendulum is swinging too far in the wrong direction—that easing NIGC enforcement is generating a political backlash and eroding the regulatory integrity of the tribal casino industry.”¹⁵⁸

Chairman Hogen once warned against drawing such outside scrutiny of the Indian gaming industry and its regulatory integrity:

We should be careful, however, to ensure that any outside direction of the tribes’ expenditure of their own earned revenue is consistent with

IGRA’s stated [goals], tribal economic development, tribal self-sufficiency and strong tribal government.¹⁵⁹ [The current system will work] if tribes operate with a transparency that permits tribal members to be fully informed about tribal activities and that allows individuals and institutions such as Congress and this [Senate Indian Affairs] committee to have confidence that the economic development opportunity which IGRA fosters is not abused.¹⁶⁰

This is also true of the NIGC: IGRA can only work if the Commission does its part to maintain congressional confidence in IGRA’s regulatory regime. Unless the NIGC finds a balance of regulatory enforcement against bad actors, and technical trust support in aid of tribal self-government, Senator McCain and his brethren will “fix” IGRA—in a way that Indian Country almost certainly will not like.

¹⁴⁹*Id.*

¹⁵⁰See Peter Hecht, *Four Banished United Auburn Members File Claims Against Tribe* SACRAMENTO BEE (Oct. 11, 2013), available at <<http://www.sacbee.com/news/local/article2579472.html>>. A national Indian lawyers association recently denounced tribal lawyer behavior that contributes to disenrollment, including for sake of gaming revenue per capita dollars. National Native American Bar Association, *supra* note 13; Galanda, *supra* note 11, at 7 (“The lawyer’s duty is not to ‘win’ the matter of denying tribal members per capita distributions.”); see also WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 72 (2009) (“Because the tribal attorneys are often not tribal members or even Indians, they must to some degree be considered an outside influence affecting tribal self-government.”).

¹⁵¹Dale Kasler, *McCain Criticizes Thunder Valley Attorney’s Fees*, SACRAMENTO BEE, February 8, 2012, at B1.

¹⁵²*See id.*

¹⁵³*Hearing on Indian Gaming: The Next 25 Years, Hearing Before the Senate Comm. on Indian Affairs*, 113th Cong. 2 (2014) (statement of John McCain, U.S. Senator), available at <<https://www.gpo.gov/fdsys/pkg/CHRG-113shrg91664/html/CHRG-113shrg91664.htm>>.

¹⁵⁴Rob Capriccioso, *GAO Report on Indian Gaming Coming in 2015*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 28, 2014), <<http://indiancountrytodaymedianetwork.com/2014/07/28/gao-report-indian-gaming-coming-2015-156084>>.

¹⁵⁵Press Release, U.S. Sens. John Barrasso and John McCain, Senators McCain and Barrasso Highlight Troubling Findings in GAO Report On Indian Gaming (June 3, 2015), available at <<http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=4eae0481-f279-4445-b8c7-14559b4d8887>>.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸Palermo, *supra* note 86.

¹⁵⁹*Statement of NIGC Chairman Hogen, supra* note 66, at 9.

¹⁶⁰*Id.* at 11.

D. Don't forget the victims of the NIGC's failure to regulate

We must not lose sight of the victims of NIGC's failure to deter illegal Indian gaming per capita activity. Disenrollments based on gaming dollars continue to cause unnecessary suffering. Individuals who face per capita-driven termination can lose tribal housing, healthcare, and their sense of culture—their “everything”¹⁶¹—often ending in traumatic and tragic outcomes.

For example, Clayton Duncan, a former Robinson Rancheria of Pomo Indians enrolled member, was at a gathering to mourn a death in the family when tribal police notified him that he was no longer enrolled.¹⁶² The notice was timed to impart maximum emotional stress on Duncan and his family members who were also disenrolled.¹⁶³ Duncan and his family lost not only their per capita benefits, but their tribal housing and other benefits—much in the same way that the Rancheria's original chairperson, and the last fluent speaker of Eastern Pomo dialect, Bernadine Tripp, had lost hers, earlier in the year.¹⁶⁴ “Only hateful, inhuman beings would do things like this,” Duncan later wrote on his Facebook page.¹⁶⁵

Saginaw Chippewa tribal officers, meanwhile, stripped Malinda (Pontiac) Hinmon of her tribal citizenship in 2013—two decades after Hinmon died.¹⁶⁶ It did not matter to tribal politicians, apparently, that Hinmon's grandfather received a local land allotment in 1871, or that Hinmon was born on what would later become the Isabella Indian Reservation where the tribe is headquartered, or that she began attending the local Indian school in 1906.¹⁶⁷ What did matter, according to Hinmon's relatives, is the \$2.3 million in gaming per capita dollars that remaining tribal members stood to share—on top of the annual per capita rate in 2013 of \$58,000—after Hinmon, along with forty descendants whose claim to Indian ancestry is tied to Hinmon, were disenrolled.¹⁶⁸

“Obviously, disenrollment is about the money,” said Ben Hinmon, a grandson of Malinda Hinmon, and one of the forty disenrolled members.¹⁶⁹

Many thousands more Indians have been devastated financially, professionally, and culturally by disenrollment and other injuries tied to tribal casino greed.¹⁷⁰ Yet, while tribal disenrollment has very publicly reached an epidemic level during the same period of time when NIGC enforcement has waned, the Commission has done nothing to stop corrupt tribal regimes from termi-

nating their kin to grab a bigger piece of the per capita pie.¹⁷¹

Disenrollees have few or no means to protect their indigenesness. The obvious forums for redress—the BIA or the courts—usually fail to act.¹⁷² The BIA claims that it does not involve itself in internal tribal matters and feigns that it is not obliged to play any role in disenrollments.¹⁷³

Federal and state courts generally excuse themselves from per capita and disenrollment controversy based on jurisdictional reasons.¹⁷⁴

The NIGC claims that tribes can head off disenrollment linked to per capita abuses by creating “judicial or quasi-judicial mechanisms [to] serve as a check on improper distributions of gaming revenues.”¹⁷⁵ However, “tribal courts only provide a

¹⁶¹Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n, 2007 WL 6900788, at *2 (Little River Ct. App. June 24, 2007).

¹⁶²Will Parrish, *The Disenrollment Of Clayton Duncan*, ANDERSON VALLEY ADVERTISER (Aug. 28, 2012), available at <<http://theava.com/archives/17231>>.

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵*Id.*

¹⁶⁶Rick Mills, *Historical Quirks, Shrinking Revenue Fuel Tribe's Disenrollment Battles*, MORNING SUN NEWS (Nov. 9, 2013), available at <<http://www.themorningsun.com/article/MS/20131109/NEWS/131109439>>.

¹⁶⁷*Id.*

¹⁶⁸*Id.*

¹⁶⁹*Id.*

¹⁷⁰Wozniacka, *supra* note 9, at B11; Wilkins, *supra* note 8.

¹⁷¹*Id.*; see generally GAO Indian Gaming Report, *supra* note 12.

¹⁷²Galanda and Dreveskracht, *supra* note 3, at 412. See generally National Native American Bar Association, *Supporting Equal Protection and Due Process For Any Divestment of the American Indigenous Right of Tribal Citizenship*, Res. No. 2015-06 (Apr. 8, 2015), at 2, available at <<http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-04-09-2015-06-NNABA-Resolution-Due-Process.pdf>> (“Native Americans' right of tribal citizenship is being increasingly divested or restricted without equal protection at law or due process of law, or any effective remedy for the violation of such rights, most commonly through a tribal process known as ‘disenrollment.’”).

¹⁷³*Id.*; Galanda, *supra* note 133.

¹⁷⁴See Winnemucca Indian Colony v. United States *ex rel.* Dep't of the Interior, 2012 WL 4472144, at *2 (D. Nev. Sept. 25, 2012); Davids v. Coyhis, 869 F. Supp. 1401, 1410 (E.D. Wis. 1994); see also Courtney J.A. DaCosta, *When “Turn-about” Is Not “Fair Play”*: Tribal Immunity Under the Indian Gaming Regulatory Act, 97 GEORGETOWN L.J. 515, 533 (2009).

¹⁷⁵NATIONAL INDIAN GAMING COMMISSION, USE OF NET GAMING REVENUES BULLETIN (Dec. 18, 2005), available at <<http://www.nigc.gov/compliance/detail/use-of-net-gaming-revenues-bulletin>>.

solution to those tribes that are already acting as responsible governments.”¹⁷⁶ And to the extent disenrolling tribes even have courts—many tribes do not¹⁷⁷—their judges often rely on sovereign immunity arguments to stay out of the fray.¹⁷⁸

As discussed above, withholding per capita dollars from disenrollees is designed to keep disenrollment defense lawyer-advocates away, rendering any judicial or quasi-judicial process meaningless to the disenrollees.¹⁷⁹ In short, if the abuser is the judge, jury—and of course executioner¹⁸⁰—the NIGC’s deference to an intra-tribal system of check and balance is derelict.

Disenrollees are left to fight a lonely battle.

The NIGC should honor its regulatory mandate under IGRA vis-à-vis gaming revenue per capita monies, as well as its trust responsibility to all enrolled tribal members,¹⁸¹ by taking investigation and enforcement action that will deter against additional tribal members and disenrollees being treated unequally and discriminatorily in violation of IGRA.

IV. CONCLUSION

We take for granted that Indian gaming revenues will always be plentiful—this is foolhardy. Tribes are already working hard to stop plateauing gaming growth, to leverage casino brick-and-mortar operations to diversify tribal economies, and to attract next-generation gamers who prefer skill games to games of chance. Meanwhile, the NIGC stands by while greedy tribal leaders, casino operators, and lawyers abuse IGRA’s per capita scheme, generating embarrassing press, abetting violent tribal standoffs, and causing costly casino shutdowns and disenrollment,¹⁸² while also potentially exposing the industry to a federal crackdown.

The NIGC is *the* federal Indian gaming regulator,¹⁸³ and, again, owes a moral and trust responsibility to *all* American Indians.¹⁸⁴ The Commission must either do its job, or become dead letter. If the NIGC fails to step up, Congress could finally carry out its repeated threats of filling the regulatory void with paternalistic policies that impair Indian gaming and impede tribal self-determination. This is a backlash that Indian Country cannot afford.

NIGC regulatory reform must include candid acknowledgement that gaming per capita abuses are inextricably and increasingly linked to mass tribal

disenrollment efforts, and that enforcement power has been concentrated with the Commission as a matter of federal law and policy. The NIGC must acknowledge that it has the clear legal authority and duty and effective regulatory tools to deter that misbehavior.

Now is not the time for the NIGC to participate in any political avoidance contest in the Beltway or in Indian Country. Now is the time for the NIGC to step forward and do what is legally, regulatorily, and morally correct—by not allowing gaming per capita dollars to be further wielded as a weapon against tribal citizens.

The NIGC can make a difference.

¹⁷⁶Galanda and Dreveskracht, *supra* note 3, at 448.

¹⁷⁷See Matthew L.M. Fletcher, *California v. Cabazon Band: A Quarter-Century of Complex, Litigious Self-Determination*, FED. LAW. Apr. 2012, at 50, 53 (“[California gaming] tribes usually do not have a tribal court system, and federal courts generally do not have jurisdiction over tribal membership claims. Therefore, assuming these Indians have lost their membership in the tribe illegitimately, they have little recourse.”).

¹⁷⁸Galanda and Dreveskracht, *supra* note 3, at 447–48.

¹⁷⁹Westney, *supra* note 116; Goldberg, 397 U.S. 270 (“the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel”); *see also* Roberts v. Kelly, No. 2013-CI-CL-003, 12 NICS App. 33 (Nooksack Ct. App. Mar. 18, 2014) (prohibiting a member’s right to be “represented at the proceeding violates due process and that allowing representation will not unduly burden the Tribe”).

¹⁸⁰See Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 109 (2005) (noting that some “tribes have blended the executive and judicial arms, with the tribal council serving as the highest court of appeals”).

¹⁸¹Monteau, *supra* note 14.

¹⁸²Anthony Broadman and Jared Miller, *Disenrollment Is Bad For The Bottom Line: Redux*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 14, 2015), available at <<http://indiancountrytodaymedianetwork.com/2015/12/14/disenrollment-bad-bottom-line-redux>>.

¹⁸³GAO *Indian Gaming Report*, *supra* note 12, at 52.

¹⁸⁴Monteau, *supra* note 14.