AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 109–50, Pt. 4

GAMING

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON THE REGULATION OF INDIAN GAMING

SEPTEMBER 21, 2005
WASHINGTON, DC

PART 4

U.S. GOVERNMENT PRINTING OFFICE

23–704 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON INDIAN AFFAIRS

JOHN McCAIN, Arizona, *Chairman*
BYRON L. DORGAN, North Dakota, *Vice Chairman*

PETE V. DOMENICI, New Mexico
CRAIG THOMAS, Wyoming
GORDON SMITH, Oregon
LISA MURKOWSKI, Alaska
MICHAEL D. CRAPO, Idaho
RICHARD BURR, North Carolina
TOM COBURN, M.D., Oklahoma

DANIEL K. INOUYE, Hawaii
KENT CONRAD, North Dakota
DANIEL K. AKAKA, Hawaii
TIM JOHNSON, South Dakota
MARIA CANTWELL, Washington

JEANNE BUMPUS, *Majority Staff Director*
SARA G. GARLAND, *Minority Staff Director*

CONTENTS

	Page
Statements:	
Akaka, Hon. Daniel K., U.S. Senator from Hawaii	2
Conrad, Hon. Kent, U.S. Senator from North Dakota	2
Dorgan, Hon. Byron L., U.S. Senator from North Dakota, vice chairman, Committee on Indian Affairs	1
Hogen, Phil, chairman, National Indian Gaming Commission	3
McCain, Hon. John, U.S. Senator from Arizona, chairman, Committee on Indian Affairs	1
Van Norman, Mark, executive director, National Indian Gaming Commission	11
Washburn, Kevin, associate professor of law, University of Minnesota	13

APPENDIX

Prepared statements:	
Hogen, Phil (with attachment)	23
Van Norman, Mark	29
Washburn, Kevin	38
Additional material submitted for the record:	
Allen, W. Ron, chairman, Washington Indian Gaming Association and tribal chairman, Jamestown S'Klallam Tribe, letter	43
Eddy, Jr., Daniel, tribal council chairman, Colorado River Indian Tribes, letter	45

GAMING

WEDNESDAY, SEPTEMBER 21, 2005

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

The committee met, pursuant to notice, at 9:30 a.m. in room 325 Senate Russell Office Building, Hon. John McCain (chairman of the committee), presiding.

Present: Senators McCain, Akaka, Conrad, Dorgan, and Inouye.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. T1LAST MONTH, A FEDERAL DISTRICT COURT ISSUED A RULING WITH POTENTIALLY FAR-REACHING EFFECTS ON THE REGULATION OF INDIAN GAMING. IN *Colorado River Indian Tribes* v. *the National Indian Gaming Commission,* the court held that the Indian Gaming Regulatory Act as it is now written does not give the NIGC authority to issue or enforce regulations which address the day to day operations of class III gaming facilities, the so-called minimum internal control standards, or MICS.

Class III gaming represents the lion's share of revenue created by Indian gaming. The focus of today's hearing is not whether or not the court's decision was correct. Instead, the question before us today is, among tribes, States, and the Federal Government, how do we make sure that there is adequate regulation of class III gaming?

Before we begin the hearing, I have a comment on another regulatory matter. In April, I requested that the Department of Justice [DOJ] and NIGC put their heads together to see if they could come up with a proposal to address the ongoing litigation and controversy surrounding class II bingo machines. I understand that the DOJ and NIGC have concluded their discussions regarding a potential statutory fix. While the department has not shared this proposal with the committee, I look forward to seeing it in the near future.

Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator DORGAN. Mr. Chairman, thank you very much.

Today, we are going to hear testimony from Federal and tribal advocates, along with an independent analysis of what roles each

government are playing and should be playing with respect to class III gaming. I hope this testimony today will inform this committee in a significant way as to the practical impact of the recent court decision on this matter.

I think you posed the question implicitly with your opening statement with respect to the integrity of Indian gaming. It would necessitate a change in Federal law, whether such a change should be immediate, whether such a change should in fact be made. It is an important issue, and I look forward very much to hearing the testimony of the witnesses that have come before us today.

The CHAIRMAN. Senator Akaka.

STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Thank you very much, Mr. Chairman. Thank you for holding this hearing. It is very, very important to our country.

Today's oversight hearing on the regulation of class III gaming under the Indian Gaming Regulatory Act follows a recent decision by the U.S. District Court for the District of Columbia regarding the case of *Colorado River Indian Tribes* v. *National Indian Gaming Commission.*

As we address the regulatory authority of NIGC, I believe that it is important that we preserve the sovereignty of Indian nations and provide them with the necessary support in the exercise of their sovereignty. They can help themselves economically, politically and governmentally.

I look forward to the testimony in the hearing, and I thank the witnesses here today. I thank the Chairman for holding this hearing. Thank you very much.

The CHAIRMAN. Senator Conrad.

STATEMENT OF HON. KENT CONRAD, U.S. SENATOR FROM NORTH DAKOTA

Senator CONRAD. Thank you, Mr. Chairman. Thank you for holding this hearing.

The court determination obviously raises a whole series of issues. I think it is important that this committee attempt to address them. At the same time, I think it is important that while there is a reaction, there is not an over-reaction. The history of regulation throughout Indian country in gaming has been quite strong. As I have looked across regulation in my State, they really have done a sound job of regulating gaming.

Now, we may find that there are other places where that is not the case. To the extent we find abuses, obviously they need to be addressed. But I do hope that we do not have an over-reaction to this one court's decision.

Again Mr. Chairman and Senator Dorgan, as ranking member, we appreciate the leadership that you are providing to this committee.

The CHAIRMAN. Thank you very much, Senator Conrad.

Mr. Hogen, welcome.

STATEMENT OF PHIL HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Mr. HOGEN. Good morning, Chairman McCain, Vice Chairman Dorgan, and members of the committee. I am Phil Hogen, chairman of the National Indian Gaming Commission. I am an Oglala Sioux from South Dakota. I am very delighted to appear here on behalf of the commission and appreciative that the committee chose to quickly convene this hearing in the wake of the court decision that has been mentioned.

I bring you greetings from my fellow commissioners, Nelson Westrin and Chuck Choney. They are on the Coeur d'Alene Reservation in Idaho today meeting with the Affiliated Tribes of Northwest Indians at a long-scheduled consultation session. That is where I would be but for this hearing.

I expect the committee is familiar with the history of how we got to where we are, but let me try and quickly review that. Indian gaming is not a Federal program. Indians invented Indian gaming. They do it very well.

The CHAIRMAN. Mr. Hogen, could I ask you to take us back one step further? The *Cabazon* decision triggered what action? In other words, basically the *Cabazon* decision by the U.S. Supreme Court triggered the Indian Gaming Regulatory Act. Right?

Mr. HOGEN. That is correct, Senator.

The CHAIRMAN. Okay.

And then that gave your commission the authority to regulate what classes of gaming under what circumstance? I would like to have this for the record. Go ahead.

Mr. HOGEN. Okay. IGRA divided Indian gaming into three categories. Class I is traditional or ceremonial gaming. It is basically not commercial gaming. That was left exclusively within the domain of the tribes. Then there was created class II gaming, which was bingo and pull-tabs and games of that nature such as poker where you do not play against the house. Then the third category was basically everything else, but primarily house-bank games and casino-type gaming.

The CHAIRMAN. And there is some gray area concerning, because of technology, between class II and class III. Right?

Mr. HOGEN. That is correct. Class II was permitted to use computers and electronic and other technologic aids, but there was not a real clear definition of where that ended and where slot machines and electronic facsimiles of games of chance began. So that is a troublesome area that we are dealing with.

The CHAIRMAN. So then the Colorado River Indian Tribe decided not to allow the National Indian Gaming Commission auditors to look at their books. Is that correct?

Mr. HOGEN. That is correct. That occurred in the context of NIGC attempting to conduct an audit of their Colorado River Indian Tribe's compliance with the minimum internal control standards that NIGC had promulgated.

The CHAIRMAN. Over class III or class II?

Mr. HOGEN. Over all of the gaming operations.

The CHAIRMAN. Okay.

Mr. HOGEN. A reason that we have to look at the whole gaming operation is gaming facilities integrate their operations. The dollars

may come from the bingo hall or they may come from the slot machines, but they go into the same cage, the same bank, and it is very difficult to look at one without looking at the other.

In any event, we looked at class II at Colorado River and we went to go look at class III and they said wait a minute, you do not have the jurisdiction to do this. The reason they argued we did not, is that IGRA provides for a tribal-State compact to frame the class III gaming that will be permissible and permits the States and the tribes to negotiate with respect to the regulatory structure.

The CHAIRMAN. Arguing that, once the State and the tribes have reached this compact, the regulation or oversight of that gaming responsibilities now left the NIGC.

Mr. HOGEN. That is what they argued and we disagreed. As a result of that disagreement, we found them in violation of not giving us access. On account of that violation, we assessed a fine. We eventually negotiated an arrangement whereby we could, and we did conduct an audit, but the tribe reserved the right to challenge that principle: Did we have this jurisdiction.

The CHAIRMAN. And the court's decision said?

Mr. HOGEN. It said NIGC, you have gone too far; you entered into an area that was left to the tribes and the States and you cannot do what you are doing with respect to class III.

The CHAIRMAN. In other words, right now at this moment if you went to any Indian tribe in America that has concluded a compact with a State, they could bar you from looking at their books?

Mr. HOGEN. We do not view the decision that broadly, but the ultimate consequence certainly could be that.

The CHAIRMAN. In other words, you would go out of business then?

Mr. HOGEN. Yes; well, we would be out of most of the business because 80 percent of the gaming is class III gaming. That is where the money is. That is where the action is.

The CHAIRMAN. Do you expect other tribes in light of this to challenge your oversight authority?

Mr. HOGEN. We certainly do. We have already had, you might call it push-back from tribes; tribes saying we know you have an audit scheduled to come out and look at our compliance, but do not bother coming because you do not have that authority under the Colorado River Indian Tribe's decision. We argue that, well, that is still a work in progress. We are trying to sort that out. We are going to continue business as usual.

The CHAIRMAN. Does the Administration plan to appeal this decision?

Mr. HOGEN. We are in negotiations or we are working with our lawyers in the Department of Justice. I expect that we will. We will be asking them to appeal. That decision has not been finalized yet.

The CHAIRMAN. What was the logic behind this judge's decision? Clearly in the law, it is stated that there would be a National Indian Gaming Commission to conduct oversight responsibilities. What was the judge's logic to say that somehow even though NIGC was created in the law, you would have no ability to carry out your investigative or oversight responsibilities?

Mr. HOGEN. The Indian Gaming Regulatory Act has been a very positive piece of legislation, but in some respects it is not a model

of clarity. For example, it says in terms of findings that the tribes have the exclusive right to regulate gaming, and then it goes on to assign other roles, a role to the Federal Government, a role to States and so forth.

I think the paradigm at the time it was written, and of course you were one of the authors, Senator, Indian gaming then was high-stakes bingo. So it was written, okay, this is how we are going to class II gaming and then, not necessarily an after-thought, but okay, then if you are going to do class III, some of these other things apply. Therein, some confusion arose, I believe.

It did give the States the right to negotiate with tribes with respect to regulations and we have attached to our testimony, which we ask to be included in the record, a chart that tries to characterize what States have done and what they have not done with respect to getting involved. In many cases, there is literally no State involvement. Our audit teams that have gone out to do these minimum internal control standards audits have never bumped heads with State folks who are out there doing what we do. We find that if we are not out there doing this, for the most part nobody is going to be playing that oversight role.

The CHAIRMAN. I thought it was important for the record to establish that history. I thank you. Please proceed.

Mr. HOGEN. You have established it very well, Senator.

I have a couple of charts here that I think just emphasize what you mentioned. The one chart shows the growth of Indian gaming. Our minimum internal control standards were written in 1999 and went into effect in 2000. What this chart demonstrates, of course, is how strong the Indian gaming industry is and the fact that this system that was developed that has not been challenged until just now, has not significantly inhibited the growth of Indian gaming. Rather, I think it has fostered it.

The other chart over here, the pie chart, shows that 80 percent of that $19.4 billion in 2004 was class III revenue. That is where the money is. The other 20 percent is divided between class II gaming and that other gaming that is using the player stations that may be class II or may be class III that we are trying to sort out. Where the money is is in class III.

In connection with the development of these minimum internal control standards, NIGC embarked on a very thorough consultation process. We formed a tribal advisory committee and even at that time, this concern about NIGC's getting beyond its jurisdiction was voiced, but the commission then said no, this is the right thing to do. We were directed to promulgate Federal standards and we are doing that.

The minimum internal control standards were thoroughly reviewed and revisited in 2002. Again, this issue was addressed. You will find in the Federal Register a reflection of that consultation and that process in the preamble to that 2002 enactment.

This is a copy of the minimum internal control standards. They are thorough. They are patterned after established gaming jurisdiction controls. Tribes have been for the most part very accepting of them. When we set out these standards, one of the things they require is that when the tribe does their annual independent audit of their gaming operation, their auditor look at their compliance

with their internal control standards and do those internal control standards meet what NIGC has specified as minimums. We get a copy of that report. After screening all of those reports, we select some of those where a number of exceptions are noted, and we go out and conduct a minimum internal control standards audit.

This is not a "gotcha" deal. That is, we put on our website the checklist that we use to identify all of those areas we are going to look at. We send the tribe a letter saying in 30 days we are going to be out there; we select four dates, a date during each quarter of the preceding year, and our team of from four to eight auditors will go out and look at everything that occurred in that casino on that date to see if it complied with the controls.

When we are done, we then prepare a report and issue that report after it is reviewed by our head auditor, Joe Smith, who is seated back here. And then we set up an arrangement to meet with the tribal leadership, the tribal management of a facility, the tribal gaming commission, and we go over that list.

In the Colorado River Tribe situation, the list of exceptions was 23 pages long. There were 40 specific exceptions. Now, I am not saying they have a terrible operation. They do not, but it was not a perfect operation. We identified areas where it was deficient.

One of those areas was the lack of compliance of their surveillance system. When we went out there to conduct this exit interview, both the management and the gaming commission said, well, I will bet you are going to gig us on shortcomings on our surveillance system, aren't you? And we said yes, yes, we are. And they said, well, that is good because we have been trying to get the tribe to spend money to upgrade the system and they have not seen fit to do that.

As a result of our mics audit, they spent $2 million and now they have a state of the art surveillance system and they solved that problem. Notwithstanding State regulation, tribal regulation, they were not moving in that direction. I believe that that is the kind of worthwhile service that we perform with respect to those audits.

So that is what we do and generally how we do it. Now we are at the point where tribes are pushing back and saying because of this District Court decision in the District of Columbia, you cannot do this anymore. I think that will be a great disservice to this strong, but perhaps fragile structure that has been developed since the MICS were put in place in 1999.

In a number of instances, Arizona I think being one of them, California being another, tribes have pointed with pride as a badge of honor, we are the most regulated gaming there is. We have tribal regulations. We have State regulations. We have Federal oversight. And to now say for 80 percent of that gaming we no longer have that arrangement, I think that is a risk.

Tribes rightfully defend sovereignty. Sovereignty has several manifestations. I think the main way you are strong and sovereign is by being self-sufficient, being able to provide for yourself and your people. I think that if we put at risk this structure of strong regulation that involves States, tribes and the Federal Government, we put that sovereignty at risk.

With respect to these audits that we go out and do, there are some horror stories out there. There are places where we found de-

ficiencies and they have not been corrected and we have had to in some cases get the tribes to voluntarily close their facility. We are considering closing others because they have not come around. But by and large for the most part, they are success stories. We identify weaknesses. They solve those problems. At the end of the day, they have a stronger operation and we are happy that we have been able to help that.

We have conducted 41 audits. Only in one instance, I think, did we duplicate what somebody else did. That was at the Avi Casino in Nevada. Nevada is an unusual jurisdiction to do Indian gaming in because there is really no advantage to the Indians. Nevada lets anybody who can get a license do that. Their compact provides for integral involvement by the State of Nevada. So Nevada does an audit there. Every three years they do an audit of everybody and they cover the whole period of time.

There is a little difference in what we require and what Nevada requires, so there was some overlap with respect to that audit. But in those other 40 audits, nobody else did what we did, and as I say, by and large they were success stories. The problems identified were solved.

Again, the nature of the operations is the commingling, the intertwining of class II and class III revenues makes it almost impossible to say, well, we will go look at one and not the other. If in fact we are ejected from this area, we may awaken a sleeping giant. That is, States may say, oh, we were asleep at the switch; we are going to come back and we want a stronger, larger role in the regulation on a day to day basis of tribal gaming.

I do not think that would be good for the tribes. I think they would rather deal with the Federal Government than the States. And I do not think it would be good for the States either because they would be creating another mechanism. The tribes would end up paying that bill, too. I do not think that would have any advantage over the strong system that we have right now.

So we think we have a vehicle to solve this problem. In March of this year we sent a letter to the President of the Senate and the Speaker of the House saying this is a legislative package that would fix some of the problems we perceive with respect to the Indian Gaming Regulatory Act. They dealt with our fees and the chairman's power and so forth, but the narrow issue here was to add in section 7 with respect to the commission's power a clarification that we have authority over class II and class III gaming.

We do not want to expand our powers. We do not want to grow a bit. I appreciate Senator Conrad's concern, let's not do overkill here if in fact we have to fix this. We just want to keep doing what we have been doing successfully, not do more. We think with the enactment of the amendment proposed relating to clarification of NIGC's authority in class III gaming, that problem would be solved.

We address a number of other things in our written testimony, but I think I will conclude here with respect to what I have to say and I would be happy to try and respond to any questions.

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

The CHAIRMAN. Thank you very much, Mr. Hogen.

If IGRA is amended to clarify that the NIGC has authority to issue class III MICS, will that impact the role that tribal governments have as regulators?

Mr. HOGEN. It would not change what has happened for the past 5 years.

The CHAIRMAN. Would it impact the roles that States play as spelled out in their tribal-State compacts?

Mr. HOGEN. No; they would keep doing what they are doing.

The CHAIRMAN. Are the MICS consistent "industry standards"?

Mr. HOGEN. We attempt to keep them as current as we possibly can. Next week, our advisory committee will be meeting in Rapid City to again review the MICS and make changes to comply with tehnologic advances and technology advances and so forth.

The CHAIRMAN. NIGA states in its testimony there is no need for a quick fix to the CRIT decision. Do you agree?

Mr. HOGEN. No; I think it is urgent that we have a remedy to this problem.

The CHAIRMAN. Because you are already getting pushed back from some tribes.

Mr. HOGEN. Yes, Senator; we are.

The CHAIRMAN. The Department of Justice announced last week its proposed change to the Johnson Act that would affect Indian gaming. Why wasn't it a joint announcement with NIGC?

Mr. HOGEN. They kind of do things their own way there at the Department of Justice.

The CHAIRMAN. Did you have any role in developing this language?

Mr. HOGEN. We did. We went to many, many negotiating sessions with the Department of Justice.

The CHAIRMAN. Do you know when we will get the language?

Mr. HOGEN. Pardon me?

The CHAIRMAN. Do you know when we are supposed to get this language?

Mr. HOGEN. Tom Heffelfinger, U.S. Attorney for Minnesota, indicated last week in Las Vegas that within 10 days or two weeks they would be sending draft language to tribal leadership, so I expect it will be arriving at other offices here in Washington, DC any day now.

The CHAIRMAN. Thank you. I thank you for your good work and I thank you for your very clear and coherent testimony. I thank you for the continued good job that you do under very difficult circumstances.

Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you very much.

Mr. Hogen, thank you for being with us once again.

The court's decision cited a number of facts. Let me just run through a couple of them with you. The court says the legislative history of IGRA states explicitly that Congress did not intend the NIGC to regulate Class III gaming. Any response to that?

Mr. HOGEN. We do not read it the same way the court did. Our brief submitted to the court by the Justice Department states that in greater detail, and points to areas in the legislative history where we think this was addressed, and clearly indicates as it states in the purpose of IGRA, that NIGC was being established in

part to establish or to promulgate Federal standards. That is what we have done there.

Senator DORGAN. Over the years, your compliance enforcement efforts and audits have routinely included class II and class III gaming issues, right?

Mr. HOGEN. Yes; both areas.

Senator DORGAN. When was this issue first raised? I think you stated in your testimony that back some long while ago there were discussions about whether you had the authority or not. The first court challenge was this particular challenge, is that correct?

Mr. HOGEN. That is correct, but from day one when we started talking about minimum internal control standards to apply to class II and class III, some tribes said you are stepping into an area where you do not have any authority, and we had that discussion. We decided we did.

Senator DORGAN. Describe to me a future for your commission if as of tomorrow, for example, you have no authority under any condition to be involved with respect to class III issues enforcement, compliance, auditing and so on. Describe for me that future. Is there much left for the commission? Is there much of a reason for the commission to exist?

Mr. HOGEN. Well, I think we would need to still exist. We would be a toothless tiger. That is, we could go out and look things over to the extent tribes would voluntarily show us their class III information, and we could point to what we perceived as shortcomings, but all we could do is a "please fix this" and there would be no incentive. Tribes would probably cease to have their external auditors analyze the minimum internal control standards because that costs a little more money, things like that. It would be a very less effective role.

Senator DORGAN. You had indicated that 80 percent of the gaming revenue is now class III. Is that correct?

Mr. HOGEN. That is our guess. Nobody knows exactly because tribes do not have to designate it, but that is our best guess, yes, Senator.

Senator DORGAN. By far the bulk of the gaming would be outside of the purview of the commission's activities for enforcement compliance auditing and so on, if that were the case.

Mr. HOGEN. The act says that the tribes have to adopt a tribal gaming ordinance, and they do. That has to be reviewed and approved by the chairman of the commission. Now, that ordinance embraces a lot of things such as this is how we are going to do our gaming. The chairman of the National Indian Gaming Commission has the authority to take enforcement action for a violation of that NIGC-approved ordinance.

So there may be a way we could go in the back door and say, well, maybe we do not have class III MICS authority, but your ordinance says you have minimum internal control standards; you violated those, and consequently we are going to take enforcement action. A challenge to such an arrangement would be we then have 225 systems out there, rather than one system. I think the quality that IGRA sought would be diminished.

Senator DORGAN. The absence of the Commission being involved in class III issues means that the States would be involved through

the compact and also the tribal regulations would be involved. So tell us from your perspective how that relates to your enforcement and your audits. Are they up to that or are they up to your standards? Do you do a better job? Do they do a lesser job? Tell me your assessment of all that.

Mr. HOGEN. There are over 20 States that have compacts with tribes, and they are very diverse. Minnesota, for example, got in early; cut some perpetual compacts with the tribes, and give a very minimal role to the State with respect to regulation. Some of the more recent compacts, Oklahoma for example, have a more participatory role for the State. The problem with Oklahoma is it looks good on paper, but they only have three people in their office and they have 30 gaming tribes out there. They are, at least not yet, up to that task.

Senator DORGAN. Sorry for interrupting you, Mr. Hogen. My point it, we are going to have others testify that say the commission is unnecessary. It is unneeded. With or without the question of whether you have the authority to deal with class III, it is duplicative and unneeded and the States and the tribes will do just fine, thank you. Respond to that.

Mr. HOGEN. Okay. I think one of the most important things we bring to the table is we give validity to what the tribes and what the States do. As we come along objectively from the outside, look at it, and say these are the rules. They either are playing by the rules, which we find in most cases, or they were not playing by those rules, but they fixed that.

So we validate that good job that they do, and we have that national perspective that gives us the tools to do what needs to be done in diverse circumstances.

Senator DORGAN. Mr. Hogen, thank you for your testimony. As always, thanks for your assistance when you appear before the committee.

Mr. HOGEN. Thank you, Senator.

The CHAIRMAN. Mr. Hogen, I just want to reiterate, when we contemplated the Indian Gaming Regulatory Act, we clearly contemplated an Indian Gaming Commission. That is why it was created. Perhaps the language is somewhat murky, but I find it very difficult to accept the proposition that now that Indian gaming has gone from $500 million a year to $19.5 billion, and no sign of slowing, that somehow now we do not need a regulatory agency. It defies logic. In consultation with Senator Dorgan and other members of the committee, I think we are going to have to come up with some fix for this.

I have said a thousand times, and I will say it again, when we wrote the act, Senator Inouye and I and others wrote the act, if you had told us that by this time it would be a $19.5 billion a year business, we would have been astonished, to say the least.

I continue to point out to my Native American friends who assert this is simply an issue of tribal sovereignty, issues of tribal sovereignty not only entails activities on Indian lands, that are conducted by Indians; 99 percent of the patrons of these Indian gaming activities are non-Indians. So we have an obligation to non-Indians as well as Indians to make sure that these gaming activities are honest, straightforward and adequately regulated.

I think you and the commission overall over time have done a good job at that. To wit, there have been a minimum, an absolute minimum of allegations of corruption in Indian gaming activities. So it seems to me to want to abandon what has been a successful regulatory scheme, I would take some convincing before agreeing to that.

Thank you, Mr. Hogen.

Mr. HOGEN. Thank you, Senator.

The CHAIRMAN. Our next witnesses are Mark Van Norman, executive director of the National Indian Gaming Association and Kevin Washburn, who is the associate professor of law at the University of Minnesota. Welcome to the witnesses.

We will begin with you, Mr. Van Norman.

STATEMENT OF MARK VAN NORMAN, EXECUTIVE DIRECTOR, NATIONAL INDIAN GAMING COMMISSION

Mr. VAN NORMAN. Thank you, Mr. Chairman.

Thank you, Senator Dorgan.

NIGA appreciates the opportunity to testify here today. I am Mark Van Norman, the executive director of NIGA. Previously, I worked for the Justice Department and as an attorney for my tribe.

As you know, tribes generally oppose amending the Indian Gaming Regulatory Act because we are concerned about undermining Indian sovereignty. We believe that amendments to the act should be considered in consultation with tribal governments. If after consultation the committee determines to move forward, we ask that you move forward in regular order and protect IGRA from negative amendments.

We also ask that you include timely access to secretarial procedures in lieu of compacts once States raise an 11th Amendment defense to the tribal-State compact process.

Indian gaming has been a tremendous success story for tribes. Historically, the United States signed treaties guaranteeing Indian lands as permanent homes, and a few years later went to war to take those lands. This left Indian tribes in poverty on desolate lands, while others mined for gold or pumped oil from taken lands. Throughout this period, tribes always fought to preserve tribal self-government.

Indian gaming has provided us new hope; 20 million people visit Indian tribes each year. Indian gaming has created 550,000 jobs, where unemployment was 5 or 10 times higher than the national average. It funds essential services. Where diabetes is an epidemic, it funds clinics and wellness centers. Where people had only eighth-grade educations, it funds college scholarships.

We have a long way to go, but Indian gaming is rebuilding our communities. No one has more interest in maintaining a strong regulatory system for Indian gaming than Indian tribes. Tribes are dedicated to this because tribal sovereign authority, government operations and resources are at stake. Last year, tribes invested over $290 million to regulate Indian gaming. More than 3,350 expert tribal, State and Federal regulators watch over Indian gaming.

Class III gaming is regulated by tribal governments and States through the tribal-State compact process. NIGC has a role. It supports that regulation by approving tribal gaming ordinances, re-

viewing tribal background checks and licenses, receiving audits and approving management contracts. Congress established the unique tribal-State compact process at least in part because the Federal Government turned down that regulatory role. Under the tribal-State compact process, tribes and States have established strong working relationships over the past 17 years. Tribes have also invested heavily in reliance on the tribal-State compact process.

In 1999, NIGC issued a mandatory Federal rule on minimum internal control standards. Tribal governments adopted the rule through tribal law and regulation, while reserving the question of NIGC's authority. Last month in the *Colorado River Indian Tribe* case, the Federal court held NIGC may not issue mandatory Federal regulations that duplicate tribal-State compacts. NIGC asks you to over turn that court decision. From our perspective, a cornerstone of Federal Indian policy is government-to-government relations. Under the President's directives, we believe NIGC should consult with tribes now and seek the least intrusive alternative to address this issue. Yet, NIGC's request is for new Federal authority over and above the tribal-State compact process, without an effort to harmonize it with existing tribal and State regulatory activities.

If NIGC were working directly with States, the proposal would violate the 10th Amendment. The proposal also undermines tribal lawmaking authority. If enacted, it would upset the existing balance of tribal, State and Federal sovereign authority. NIGC should consult with tribes to find a less-intrusive alternative.

For example, NIGC could simply ask tribes to maintain existing MICS in their tribal ordinances and regulations. In fact, NIGC included the MICS in its model tribal gaming ordinance. Alternatively, NIGC could consult with tribes about including a MICS provision in IGRA's tribal gaming ordinance requirements. NIGC now has authority to approve tribal ordinances and IGRA provisions harmonize tribal law with tribal-State compacts. Seventeen years of experience under IGRA has shown we have a strong regulatory system for Indian gaming, and that regulation can be done consistent with tribal self-government.

We do not think there is any need for a rush to judgment. We think that NIGC has issued guidance to tribes that they should continue to follow the MICS. We have also advised tribes that they should continue to follow their own laws and regulations that incorporate the MICS while this matter is pending. We believe that the NIGC could work within the existing framework of the statute. Look at the tribal ordinance section. They have authority to come out and if there is a violation of tribal ordinances, they have authority to take action already. That approach would preserve tribal lawmaking authority.

So we respectfully ask the committee to defer action on this until the NIGC goes out to consult with tribes. We have a meeting coming up in October in Tulsa with the National Congress of American Indians and the National Indian Gaming Association. We have invited them to come out and sit down with tribal leaders. We have another meeting in November. We would like to sit down and talk with them about this issue and find a solution that is in keeping with tribal sovereignty.

Thank you very much for the opportunity to testify.

[Prepared statement of Mr. Van Norman appears in appendix.]

The CHAIRMAN. Thank you very much.

Professor Washburn.

STATEMENT OF KEVIN WASHBURN, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA

Mr. WASHBURN. Thank you, Mr. Chairman and Mr. Vice Chairman, for inviting me to be here today. This is a very important subject and I applaud you for calling an early hearing on it.

My sense is that following *Cabazon,* the Senate and the Congress decided to take action, and they thought that gaming ought to be very well regulated, Indian gaming.

The CHAIRMAN. Actually, Professor Washburn, we felt that there had to be some kind of structure in light of that decision that would somehow establish a relationship between States and the tribes because of the wording of the decision.

Mr. WASHBURN. I believe that is right, yes, sir. I do think that is right. At the time, bingo was the thing that was mainly going on around the country. So I think you all focused on bingo, primarily, class II gaming. That is where you really focused on NIGC authority.

As the charts indicate, that is irrelevant. Bingo to a great degree is much less important now than class III gaming. But what we have, to a large degree, is not a National Indian Gaming Commission. We have a National Indian Bingo Commission nowadays, especially after the CRIT decision of a couple of weeks ago. The question is: Is that what you want? Is that what Congress wants out there? My sense is that the public has great confidence in Indian gaming largely because they believe that there is a strong Federal regulatory presence. I think that Federal regulatory presence is very important.

So it is really a question for Congress. Do you want that Federal presence or not? I think that tribal regulators do a lot better with the Federal presence. I think tribal regulators do a fantastic job, by and large, but I think they do a far better job when they have Federal oversight. I think Federal regulators standing behind their back gives them a great deal of cover when they are negotiating with tribal leaders and casino managers about how to regulate well.

Regulating well is expensive. It is hard to do it. It costs a lot of money, but Indian gaming is extremely important and it must be done. You all have the power to ensure the integrity of the resource for Indian tribes by ensuring that it is well regulated. My sense is that is what you should be doing.

I have heard several insightful questions already. I think that this really is the answer to them. I think that the NIGC is needed. It ought to be the NIGC and not the NIBC. That is, it ought to be regulating the bulk of Indian gaming, the important parts of Indian gaming, and that they should have that role.

I think having national Federal standards creates a common set of information for the entire industry so that regulators can leave one casino and go to another, and still know what the rules are. That gives them greater independence. It also creates this national

community of tribal regulators that can talk to one another. I think that that is important. I think, again, it makes the tribal regulator's job a lot easier and it puts them in touch with the national community.

So I think it is crucial that at a minimum that the IGRA be amended to ensure that the NIGC has authority to promulgate the minimum internal control standards.

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

The CHAIRMAN. Thank you, Professor Washburn. Thank you. I know you spent a long time on this issue, and we appreciate your expertise.

This court decision in some respects brought to a head what Senator Dorgan and I were already concerned about, and that is that we needed to review the IGRA in light of the chart that was just taken down of the dramatic increase in Indian gaming to a $19.5-billion a year business, and what it was when we passed the law. As you said, it was bingo.

Although we all anticipated growth of Indian gaming, we certainly did not to the level that it has. So with retrospect of now 17 years, that we thought we ought to look at it anyway, and that is why we had hearings before this latest court decision because it needed review.

So maybe this court decision may bring our deliberations to some kind of conclusion sooner rather than later. Part of our process will be determined as to whether this case is appealed or not. I do not know if they have made that decision.

Mr. Van Norman, I think that consultation ought to be held. I am glad you have invited the Indian Gaming Regulatory Commission out to your meetings. But isn't it true that before these regulations were ever issued, there was extensive consultation with the tribes. Is that true?

Mr. VAN NORMAN. There was consultation with tribes as the regulations were developed, but the tribes consistently said, we have a tribal-State compact process and a tribal ordinance process. Those are the processes you should work with. Tribes cooperated with NIGC, but they reserved that question because they felt it was important to tribal lawmaking authority.

I will just give you an example. This is the Viejas Band of Kumeyaay Indians tribal ordinance. This is the Seneca Nation's tribal compact. Substantial work goes into these things and we think there is a way to address this without creating new Federal rulemaking authority, but working within the existing structure. We would like NIGC to consult with us about that because it is a less-intrusive alternative to what they are seeking to accomplish.

The CHAIRMAN. As you know, Congress has a special responsibility for Native Americans under the Constitution of the United States. I have a responsibility as a Federal official, but also as a representative of the people of my State. The Colorado River Indian Tribes reject investigators from the Indian Gaming Regulatory Commission to look at their books and their operations. Then I am supposed to meet with my constituents who patronize that gaming establishment, and say to them, I am sure everything is okay; go on out there and gamble and I can assure you that everything is on the up-and-up, even though this tribe has said that the gaming

commission that was put into being by the legislation is not allowed to have a look at their books. How do I do that, Mr. Van Norman?

Mr. VAN NORMAN. Well, I think one thing to bear in mind is that the State, the Governor's office and others, work with the tribes to develop a compact that was put forward for a vote of the people. Under that compact, the Arizona Department of Gaming has an important regulatory role. The tribes in Arizona fund Arizona Department of Gaming at over $8 million a year. They have over 100 State regulators and law enforcement officers assigned to Indian gaming.

In addition, I think it is a little bit of a straw man to say that there is no role for the NIGC.

The CHAIRMAN. Is there a role for them to play if the tribe says you cannot come on the reservation? And by the way, I think my State regulatory folks would say that they welcome the involvement of the National Indian Gaming Commission as a valuable tool in helping them oversight.

Mr. VAN NORMAN. Frankly, I think that what happened at Colorado River was some of the NIGC folks sat down with the tribes. They started to work on the issues, and things got to a situation where they said, we are here to enforce the MICS. And the Colorado River Tribe said, do you have authority to do that? And so a question was raised.

The CHAIRMAN. No; they did not say, do you have authority to do that. They said, sorry, you cannot look at our books.

Mr. VAN NORMAN. Okay.

The CHAIRMAN. That is a little different.

Mr. VAN NORMAN. I have been involved in discussions with them. I have attended some of the hearings. We feel like it was a tribal sovereignty question. Now, there is authority, we feel, under section 2713 of title 25 for the NIGC to go in and work with tribes and ensure that tribal ordinances are enforced. It provides for civil fines for violations of the tribal ordinances, among other things. So we think that there is a workable system there in place.

The problem was that the NIGC was taking on a rulemaking authority that was outside the tribal ordinance process. Tribes felt that that intruded on tribal lawmaking authority.

The CHAIRMAN. Well, I think the NIGC believed that they were carrying out their responsibilities as mandated by the law. Again, I respect tribal sovereignty and have a clear record of support for tribal sovereignty, sometimes to the dismay perhaps of some of my constituents.

But when an operation is in being where all the patrons are non-Indians, whether it is on a reservation or off a reservation, and we now have movements to have Indian casinos that are off-reservation, then the issue of tribal sovereignty is overridden to some degree by my obligation to protect all citizens. That obligation is to protect them from being involved in a gaming operation that is operated in the most honest and corruption-free activities.

We know from experience with non-Indian gaming that if there is not sufficient regulation, then corruption creeps in. That is the history of gaming. So to assert tribal sovereignty over an operation that does not involve Indians, but non-Indians, to me is not a valid

enough argument because I have an obligation under the Constitution, Congress does, to a special obligation as far as Native Americans are concerned, but we also have an obligation to all of our citizens, and that is to engage in a corruption-free operation.

You and I have had this conversation several times before, Mr. Van Norman. I would be glad to listen to your response again.

Mr. VAN NORMAN. Thank you, Mr. Chairman. I appreciate the opportunity to respond.

From our point of view, you are right. There already has been some inroad on Indian sovereignty by requiring tribes to work with States through the tribal-State compact process by having a Federal regulatory authority. There is no Federal regulatory authority for State gaming or for commercial gaming in the States. As you know, they fight that vociferously.

We feel that there is an existing balance of sovereignty that protects Indian gaming. There is a provision in the act already, a criminal provision that says anyone that steals from an Indian gaming facility is guilty of a Federal felony. The FBI and U.S. attorneys have authority to prosecute that.

Tribes work with Treasury's Financial Crimes Enforcement Network on money laundering prevention. We work with the IRS on tax compliance. We work with the Secret Service to prevent counterfeiting. And we work with the NIGC. But the NIGC has a particular role that is consistent with the tribal-State compact. They have a specialized role and it is not ubiquitous and duplicative of the rest of the system. They have a role that they can come in and be supportive, but they do not duplicate all that the tribes do.

One of the things that is preserved to the tribes, we feel, is tribal lawmaking under the tribal ordinance. It is not a meaningless thing to have a tribal ordinance. We feel NIGC could come back and work with us and get that done. In fact in the area of environment, public health and safety standards, that is exactly the approach they are taking. They said, under your ordinance you have to have these provisions and we will come out periodically and check and make sure that you are enforcing your own law.

So we think that same system could work in relationship to the MICS.

The CHAIRMAN. Mr. Hogen testifies that after review of the compacts, in some States it is evident that many compacts have internal control provisions not up to the standards required by the NIGC MICS or States such as New Jersey or Nevada.

Professor Washburn.

Mr. WASHBURN. I think that the processes for developing the minimum internal control standards have been very good ones. The NIGC has worked very carefully with tribal leaders in developing those MICS. I think that is a good model.

To be quite honest with you, the problems sometimes arise because NIGC regulators when they are out there in the casino can be a little heavy-handed. That is the problem with power. Power sometimes gets abused, and that happens now and then.

The CHAIRMAN. It never happens around here. (Laughter.]

Mr. WASHBURN. Not all the NIGC regulators, Mr. Chairman, are quite as diplomatic and sensitive as U.S. Senators. But that is one of the problems. I think that the NIGC regulators need to be very

cognizant of the fact that it is tribes that they are regulating. It is not individual persons. It is not businesses. It is tribes. I think that they can certainly be very sensitive to that. Frankly, in the development of the minimum internal control standards they have been very sensitive to that, and that should be very well applauded.

I think Indian gaming really is an exercise of sovereignty. Every tribe is out there exercising its sovereignty, and what the NIGC is interested in, certainly it intrudes on tribal sovereignty to say we are going to regulate that activity. But the problem is, tribes cannot really protect themselves well here, because if one tribe makes a mistake, all tribes will pay. That is just a function of the political nature of the gaming industry. Not all of the public is totally on board with the notion of gaming, so if one tribe makes a serious mistake, other tribes will pay for that mistake.

So one tribe's exercise of sovereignty can take away the sovereignty of another tribe. I think we have to recognize that. The entity that can address that problem best is the Federal entity, the National Indian Gaming Commission.

The CHAIRMAN. Thank you, Professor Washburn.

Mr. Van Norman, I want to repeat again that I am one who supports Indian gaming. I believe that the *Cabazon* decision made it very clear that the Supreme Court correctly reached the conclusion that Indian gaming could take place under certain circumstances. I have done everything that I can to make sure that that right is enshrined in IGRA. But I also have recurring fear that there is going to be some scandal out there, as there is from time to time in non–Indian gaming. It is not that I am worried about Indian gaming. I worry about a scandal out there in Indian gaming, and non-Indian gaming in Nevada is not under this committee's jurisdiction, but Indian gaming is.

I do not want to go to my constituents and say there is a scandal and Senator Dorgan and I did not exercise proper oversight. In light of this recent court decision, it seems to me for us to do nothing because that was not envisioned in the original legislation. In the original legislation, the National Indian Gaming Commission had certain responsibilities and we wanted them to carry them out, then I think we would not be carrying out our responsibilities appropriately.

Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you very much.

I suppose it is important to say as well that I believe Indian sovereignty is very, very important. I have always spoken strongly in opposition to those that would erode that sovereignty. The President in fact at one point said the Indians were given sovereignty. The Indians were not given sovereignty. Sovereignty is theirs. It is theirs. It is a very important concept.

I, too, believe that Indian gaming has been extraordinarily beneficial to some folks in this Country who have lived in the shadow of poverty and who now have an economic activity that provides jobs and opportunity and a revenue stream to address the crisis of health care, education and housing. So I think it is very important to say that.

I think it is also, with respect to gaming, gaming is different than most other activities in this country. We have plenty of history in this Country where almost every opportunity for unsavory characters to find a way through the crack or through the crevice to get their hands on money. We have been down this road in lots of ways in this country.

My guess is that there is no disagreement in this room about this proposition, that all of us want good government with respect to Indian gaming, good governing. The question is, what government, which government. Tribal government? State government? Federal Government? We all should want the same thing, that is good government.

I think the quickest way to ruin or dramatically injure Indian gaming is for us to in some way be lax, relaxed, back away a little, and then have some huge scandal erupt because we did not have good government, good regulatory enforcement capabilities. I refer to the Time magazine big splashy feature story about Indian gaming. There are people who will take great pleasure in pointing out the mistakes and the problems, and especially take great pleasure in piling on a scandal.

So Senator McCain made a correct point here. We have to make certain we know what works and then employ what works to this issue.

Now, let me ask a couple of questions. Mr. Van Norman, 2 years ago, 4 years ago, 7 years ago, 8 years ago, I assume that the National Indian Gaming Commission was going out around the country doing audits and enforcement visits and so on and looking at class II and class III gaming. Is that correct?

Mr. VAN NORMAN. Originally, the National Indian Gaming Commission said very clearly, we are primarily focused on class II and we have a background role on class III. We do not get involved in the tribal-State compact process. I think the Senate committee proposed minimum internal control standards in various bills. The National Indian Gaming Association actually went through a process with a number of experts to develop industry minimum internal control standards. At a certain point, the NIGC came forward, took those standards, ran them past Arthur Andersen, and put them into a mandatory Federal regulation.

Senator DORGAN. At what point was that?

Mr. VAN NORMAN. That was about 1999.

Throughout this time since them, tribes have said, we have tribal lawmaking authority through the tribal ordinance process under the act, and that that should be respected. Tribes are willing to work with the NIGC and frequently collaborate with the NIGC. In S. 1295, we had asked for the NIGC to provide technical assistance to tribes. We are going out next month to South Dakota and doing programs jointly with them on internal auditing. So we have an ongoing working relationship with them.

What we want to do is have a relationship that is structured that protects tribal self-governance so that tribes have a distinct role, the State governments have their role, and the Federal Government has a role that is consistent with tribal lawmaking.

Senator DORGAN. What does that mean, consistent with tribal lawmaking?

Mr. VAN NORMAN. That this could be a section in tribal ordinances, rather than a new Federal regulatory standard. What tribes say is, we know the industry and we are able to develop our MICS, and we are able to do so in a way that reflects our tribal-State compact, reflects our actual operation. We are often more technologically advanced than the National Indian Gaming Commission, so they have to go in and seek a variance to add a new technical standard.

Senator DORGAN. Mr. Van Norman, I frankly have not decided what we should do here at this point. That is why I was very interested in this hearing. But you heard the testimony previous to yours. I served in State government for some while. I knew no only what our State government did with respect to enforcement issues in a range of areas, whether it was railroad rates or other things. And I knew what other States did. I knew there were great differences, some aggressive, some not, some highly efficient, some not, some worthwhile, some worthless.

So I understand that there are some States that will do a remarkable job and other States that will do a miserable job. You heard some testimony this morning to that effect. What is your response to that?

Mr. VAN NORMAN. I think that the act envisioned that the tribes and the States would work together as sovereigns. The legislative history expressly says there is going to be an allocation of responsibility through a sovereign compacting process. So there was a recognition that there would be some variability.

Now, tribal governments have detailed ordinances in place, have minimum internal control standards in place. They will keep those in place. So what we can have is a situation where there may be some variability that accommodates particular tribal government interests, but that they can meet an industry standard for effective regulation.

Senator DORGAN. Mr. Van Norman, you heard the anecdote about the commission coming into a gaming facility and saying, you need a new surveillance system. And they said, oh man, thanks for making that a part of the recommendation because that will force the tribe then to pony up the money for a new surveillance system. What if there is not a commission around to make that recommendation and the gaming facility knows they need it, but they cannot get the money out of the tribe.

How do you respond to that kind of anecdote? I assume it happens. This is not a perfect system, but that kind of anecdote is the kind of anecdote that I think is also important in this discussion.

Mr. VAN NORMAN. We are not saying that the NIGC should not have a role. They have a background supportive role. It is already clear in the statute.

Senator DORGAN. With respect to class III as well?

Mr. VAN NORMAN. They have a supportive role with respect to class III. They do not establish the regulatory framework because that is the tribal-State compact process and that is the tribal ordinance process. But they can come out and review its enforcement under section 2713 of title 25.

So we do not say that there is no role for the NIGC to play, but they should play a role that is consistent with what the tribal gov-

ernments are already doing. You have 2,800 tribal regulators out there. They are former FBI. They are former Nevada, New Jersey State regulators. There are tribal law enforcement officers with 17 years of experience.

Senator DORGAN. Is it your testimony that there is a standardization and a pretty consistent level out there that does not have weaknesses, tribe-by-tribe, State-by-State?

Mr. VAN NORMAN. In general, we believe that there is a very strong system.

Senator DORGAN. That was not my question, though. I was asking a different question.

Mr. VAN NORMAN. I think in fairness, I have worked for the Federal Government. I have worked for State government. I have worked for tribal government. Governments have similar foibles. I would say that the tribal governments have worked very hard to put in place a good system. We have very accomplished people. Where there is a problem, the tribal governments have often reached out and been the ones to reach out to the Federal Government and say, we have a problem here and help identify those problems.

Senator DORGAN. I must say, it would be hard for me to make the case, especially with the last several weeks, that the Federal Government does not have its weaknesses. All governments have weaknesses. I expect that that is the case.

First of all, Mr. Van Norman, your testimony is helpful to us. You come to this committee and testify and work with us. We appreciate your input and your thoughts about this. You have obviously spent a lot of time thinking about it. You work in the field and know a lot about what is happening in the country. So I appreciate your being here and the thoughts you have expressed today.

Mr. Washburn, in your testimony on page 2, I think you make the case, I guess, with respect to the question I was trying to ask Mr. Van Norman about the different kinds of regulatory or the different kinds of enforcement strategies that exist with a State system in which the National Commission would not have much of a role. Can you expand on that just for 1 moment?

Mr. WASHBURN. I think that there needs to be a clear Federal role. I think it cannot be just an advisory role. There needs to be an opportunity to enforce in the worst-case scenario. I think Mr. Van Norman is right that by and large we get good regulation from tribal gaming commissions.

The problem is the stakes are so high that when we get irresponsible action by one commission at some small tribe in some location, it hurts all the rest of the tribes in the country, or it could potentially. It is that big scandal that is the thing that we are all worried about. The best way to keep the big scandal from rising up is to keep a strong Federal oversight role overall.

To be quite honest, most of the NIGC resources do not go toward the well-regulated tribes. They end up getting expended on the least well-regulated tribes. So the NIGC is serving an advisory role in helping them get their regulatory structures in better operation.

Senator DORGAN. Mr. Washburn, excuse me for interrupting you, but can you just expand on, you say "least well regulated tribes."

Are there least well regulated tribes? If so, describe the prevalence of that.

Mr. WASHBURN. Again, it is not something that happens every day, but now and then you get a problem. I do not want to stand up here and give you a parade of horribles, but now and then. It is expensive to do internal controls. It is expensive to do regulation. Tribal leaders and casino managers often chafe at that. Every regulated industry chafes at being regulated. What they would like is usually to reduce the regulations.

Well, sometimes it happens. Sometimes those people win that argument and the regulators have to back off. If we have strong Federal structure in place, they will not be able to back off. They will have to enforce this strong regulation nationwide. I think that that is the problem.

In my last testimony in April, I used the word "regulatory capture." That is the problem. Some regulators are captured by the entities they regulate. If you buy all the academic literature on regulatory capture, Indian tribes are particularly at risk for it because typically you have one casino and one regulator. There are repeat players working every day together. So you have a significant risk for that.

So again, it does not happen every day. It does not happen often, but the stakes are so high and Indian gaming is so important that it makes sense to get the best insurance we can that we get to keep it around for a long time and it is well regulated.

Senator DORGAN. Thank you as well. I think the goal for all of us in this room, to the extent there has been some disagreement perhaps here and there, the goal for all of us is to preserve the opportunity for Indian gaming to exist and to do that through good government. The question is, what is good government and which levels of government can work best to accomplish that.

Mr. Van Norman made a very important point about consultation. I think that issue of consultation is a very important part of what this committee is about as well. This is a special committee in the U.S. Senate that understands and believes strongly in the responsibility to work with and consult with the first Americans and the tribes that we work with.

So I think this testimony has been really interesting. This court case causes some concerns. The question is now what do we do about those concerns. Mr Chairman, I think holding a hearing rather rapidly on this is the right thing to do as well in order for us to begin to understand all of the consequences of this, and what we do in the end to try to protect and preserve the opportunities that Indian gaming offers to Native Americans. That is the end goal for all of us, I believe.

Mr. Chairman, thank you.

Mr. VAN NORMAN. Mr. Chairman.

The CHAIRMAN. Go ahead please.

Mr. VAN NORMAN. Thank you.

I would just say it is probably in many circumstances easier to have a Federal rule. There is one rule. But we live in a country that is divided into 50 States, and there is some genius to the Constitution that says the folks that are closer to the people have an ability to make rules that fit them better.

The CHAIRMAN. You sound like a good Republican, Mr. Van Norman. [Laughter.]

Mr. VAN NORMAN. Thank you. I feel I am in good company.

We think that preserving the tribal lawmaking authority gives the tribes the flexibility to meet their needs, while still meeting some level of Federal approval because the NIGC has the authority to approve those ordinances.

So we hope that you will give that consideration, and we certainly appreciate the opportunity to come here and testify.

The CHAIRMAN. We will, Mr. Van Norman. I think you represent your organization quite well. We appreciate the continued dialog with you and with other members.

Professor, thank you very much for traveling all this way.

Mr. WASHBURN. Thank you.

The CHAIRMAN. We appreciate your continued in-depth examination of these issues.

This hearing is adjourned.

[Whereupon, at 10:47 a.m., the committee was adjourned, to reconvene at the call of the chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF PHILIP N. HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Good morning Chairman McCain, Vice Chairman Dorgan, members of the committee and staff. My name is Philip Hogen. I am the chairman of the National Indian Gaming Commission [NIGC or Commission] and a member of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation in South Dakota.

Thank you for the opportunity to discuss a matter of grave concern to the NIGC. As you are aware, a decision recently issued by the Washington, DC. District Court found unlawful the NIGC's Minimum Internal Control Standards [MICS] regulations as applied to class III gaming. Although the decision applies solely to the Colorado River Indian Tribes, the language of the decision is broadly worded and could be used in other forums to argue for the elimination of the NIGC's entire regulatory role in class III gaming. While the challenge was with respect to the MICS regulations specifically, the District Court opinion contains language that appears to apply to all regulation of class III gaming. One particularly troubling quotation from the opinion bears mention. The court stated, "[t]he [Indian Gaming Regulatory Act] not only lacks language giving the NIGC a role in the regulation of class III gaming, but it contains several provisions that are inconsistent with such a role." *Colorado River Indian Tribes* v. *Nat'l Indian Gaming Comm'n,* No. 1:04–cv–00010–JDB, 2005 U.S. Dist. LEXIS 17722, at *34 (D.D.C. August 24, 2005). This statement by the court is troubling because it rejects the very clear "Declaration of Policy" that this committee and Congress provided in IGRA. In particular, IGRA's policy provision found that existing Federal law in 1988 did not provide clear standards or regulations for Indian gaming, 25 U.S.C. §2701. To address this and other congressional concerns regarding tribal gaming and to protect such gaming as a means of generating revenue to promote tribal economic development, self-sufficiency, and strong tribal government, this committee and Congress went on to expressly declare in IGRA that it was necessary to establish both Federal standards and the NIGC as an independent Federal regulatory authority for Indian gaming, 25 U.S.C. §2702. Needless to say, the Colorado River Indian Tribes decision has the potential to seriously compromise our ability to effectively regulate Indian gaming in the manner Congress expected and expressed in its "Declaration of Policy" in IGRA.

The NIGC considers the MICS to be one of the most effective regulatory tools available to protect Indian gaming. We appear before the committee today to seek congressional action clarifying the NIGC's authority to regulate class III gaming generally, and to promulgate and enforce our MICS regulations for class III gaming specifically. The NIGC has submitted to Congress on March 23, 2005, a draft bill that, among other things, would amend IGRA to clarify the NIGC's authority to regulate class III gaming generally, and to promulgate and enforce its MICS regulations for class III gaming specifically. Although the NIGC and the Department of Justice are considering an appeal in this case, we believe the best way to resolve this question and prevent a potentially serious lapse in regulatory authority created

by this court decision is by way of a legislative fix—language that makes absolutely clear the NIGC's authority with respect to class III gaming.

In this connection, let me be crystal-clear. We are not asking Congress to expand the role NIGC has played in the past regarding class III gaming. We merely ask that the law be clarified so that we may continue what has proved to be a very successful coordination of tribal, State, and Federal participation in the oversight of class III gaming. This gaming produces four-fifths of overall tribal gaming revenue.

i. A HISTORY AND EXPLANATION OF MINIMUM INTERNAL CONTROL STANDARDS

In the years since the Indian Gaming Regulatory Act [IGRA], 25 U.S.C. §2701 et seq., was passed, Indian gaming has grown exponentially from $100 million in revenue to over $19.4 billion in 2004. Approximately 80 percent of this revenue comes from the higher stakes class III gaming. Revenues from Indian gaming have built roads, schools, and health centers on reservations across the country, and greatly reduced reservation unemployment in many areas.

As knowledge and expertise of gaming regulation grew, tribes recognized the need for internal controls. The National Indian Gaming Association [NIGA] and the National Congress of American Indians formed a task force which evaluated the minimum internal control standards of established gaming jurisdictions such as Nevada and New Jersey. The task force then created a set of internal control standards which tribes could choose to adopt. These standards became known as the "NIGA MICS."

Throughout the country, tribal gaming operations and tribal gaining commissions benefited from this effort, but it was a voluntary arrangement. Many tribes either did not adopt or enact the NIGA MICS or equivalent internal controls, or if they did, did not require strict adherence to them.

Of course, even before the NIGA MICS, there were a number of tribal gaming operations that had utilized and enforced very sophisticated minimum internal control standards which likely were more stringent than and exceeded those promulgated by the associations. However, as the NIGC monitored tribal gaming operations and observed the imposition of standards by States and tribes, it became apparent that, for many tribes, actual operation did not always comport with the internal control standards adopted by the tribe. The NIGC noted there were a number of places in Indian country where not only were these standards not being met, but such good practices were plainly ignored. In addition, even for the tribes gaming pursuant to tribal-State compacts, the NIGC observed that details of the operations of tribal gaming and its regulation was often absent from the negotiated compacts; that in many instances the States' assigned role was minimal; and that in even more instances the actual participation of the States in regulatory oversight of tribal gaming operations was even less significant. This is not to say that an arrangement whereby a tribe has the sole responsibility for the regulation of its own gaming is unworkable. However, when no other entity has any significant oversight role, there develops the perception that the fox is watching the hen house. This perception can lead to a public distrust of the integrity of Indian gaming. In every other gaining jurisdiction, there is an oversight role for an entity that is separate from management of the gaining, and we believe that is what was intended and required under IGRA, and what has worked remarkably well since the implementation of the NIGC MICS. It is human nature to tend to do a better job when one knows that independent eyes occasionally fall on one's work. This is true in Indian gaming as well.

In response to its observations, the NIGC embarked on an effort to promulgate a comprehensive set of internal control standards for tribal gaming operations in accordance with accepted gaming industry good practices and pursuant to the authority vested in the Commission by the IGRA. In close consultation with tribes and with the assistance of a Tribal Advisory Committee, in 1999 the NIGC promulgated the MICS.

The MICS provide a comprehensive system of checks and balances to ensure control of all gaming revenues and gaming resources. The MICS are detailed internal procedures that tribes must meet both for the games offered for play and for support activities of the gaming. The internal controls thus cover cash handling and counting; internal audits; camera surveillance; the offering of credit; and information technology as well as the games themselves. They offer uniformity and consistency on an industry-wide basis while allowing variances to meet the specific needs of each tribe. In this way, the MICS protect the integrity of the gaming operation and ensure that gaining revenue is not lost through theft or embezzlement.

Many tribes have adopted NIGC's MICS verbatim and others have adopted even more stringent standards. However, while development and adoption of these standards is vital to protecting the assets of a gaming operation, MICS are only truly ef-

fective if the employees and management of a gaining operation properly implement and consistently follow them. Therefore, it is necessary for each tribal gaming operation to have proper auditing procedures as this ensures that the internal controls are properly implemented and allows the tribe to discover methods of improving them. In addition to the internal audit requirements, the NIGC also conducts periodic "MICS compliance audits" of Indian gaming operations. The MICS audit ensures that the tribe has developed internal controls at least as stringent as the NIGC's MICS, and that the gaming operation complies with them. Exceptions are noted and communicated to both management and the tribe. A subsequent visit to the audited gaming facility is then scheduled, and the NIGC returns to verify that the requested corrections were made. In most cases, both the NIGC and tribe are pleased with the progress made because of the improved protection for tribal gaming revenues and assets.

Recent NIGC MICS audits have revealed significant internal control weaknesses at a number of tribal casinos. At a facility in the Great Plains, we discovered that the tribe was not performing statistical analysis of actual to expected results; that access keys and information technology were not adequately protected; and that the people handling the money were accountable only to themselves. Another facility in the Southern Plains had failed to segregate duties such that the same individuals were both counting funds removed from the gaming machines and maintaining the accountability and physical possession of these funds. This serious lapse in security of the tribal gaming revenues was compounded by the lack of an internal audit system. At some operations we have discovered so many internal control deficiencies that we have convinced the tribes to voluntarily close the facilities until the problems can be corrected. In other instances we are prepared to close facilities without the tribe's cooperation due to the seriousness of the situation.

The closing of a tribal gaming facility is, fortunately, a final option we have had to invoke only rarely. We always begin by working with the tribe to correct the weaknesses found, usually with great success. NIGC auditors found problems at a facility in the Southwest that included an ineffective internal audit department, surveillance problems, lack of statistical game analysis, and missing documentation for cashier cage accountability. This tribe submitted a plan outlining how it intended to fix the deficiencies within a 6-month period and the NIGC confirmed through follow-up testing that the tribe had successfully remedied the deficiencies in its internal controls. Similarly, the NIGC and a tribe in the West used the same method to remedy NIGC audit findings that included surveillance problems; computer network security lapses; cashier cage documentation lacking employee signatures and independent verification of transactions; and soft count sheets filled out and signed prior to the count of funds. Comparable success stories exist throughout the Nation which illustrate the extent to which the NIGC MICS regulatory program has benefited tribal gaming.

II. THE CRIT DECISION AND ITS THREAT TO THE EFFECTIVE REGULATION OF CLASS III GAMING

The reason I am here today is that a tribe engaged in class III gaming pursuant to a compact challenged the NIGC's regulatory authority to impose the MICS on class III gaming operations and received a district court decision in its favor.

The *CRIT* decision resulted from an appeal of an NIGC Final Commission Decision and Order, issued in July 2003, which concluded that the Colorado River Indian Tribes [tribe or CRIT] violated NIGC regulations when it denied Commission representatives access to the tribe's gaming facility to conduct a MICS audit of the tribe's class III gaming activities. The tribe filed suit in Washington, DC District Court in January 2004, alleging that the NIGC exceeded its statutory authority under the IGRA. Recently, on August 24, 2005, the District Court issued an order finding that the NIGC exceeded its statutory powers in promulgating and enforcing the MICS for class III gaming. In issuing its decision, the court reviewed the text, structure, purpose, and legislative history of the IGRA.

Despite our belief that the MICS are fundamental to the integrity of Indian gaming, tribes have long questioned our authority to regulate the class III gaming that accounts for most of the revenue in the industry. As the NIGC continues to attempt to enforce class III MICS on all but the CRIT, it will face the threat of multiple lawsuits. The NIGC has many ongoing MICS compliance efforts that are already hindered by the threat of litigation. For instance, there are at present 14 ongoing NIGC MICS compliance audits that are at various stages of completion. The gaming operations in question range from an operation conducting less than $5 million in gross gaming revenue to one producing over $1 billion in gross gaming revenue. Several of the tribes in question have already expressed their position that, because of the District Court's opinion, completed audits are now moot and those tribes do not

need to remedy any non-compliance with class III MICS. Also, several other tribes are questioning the NIGC's authority to conduct MICS audits at their operations. Yet other tribes have already indicated their intent to forego some MICS requirements, such as the independent annual audit of internal controls.

The District Court opinion addressed only our authority with respect to class III gaming, not class II gaming. However, the MICS are not class specific, and from a practical standpoint it is impossible to separate class II from class III revenues for the entire movement of money through the gaming operation. The MICS dictate procedures, not only for each game, but for cash handling, surveillance, and accounting. Most tribal gaming operations offer both class II and class III games in their facilities. Once the revenues have been collected from each game, they are necessarily commingled. It is not possible or practical to segregate and maintain class II gaming revenues separately. Thus, because the MICS relating to cash handling and accounting would necessarily infringe on the class III activities of the gaming operation, strict adherence to the District Court decision could force a total removal of the MICS from most gaming operations.

Although the IGRA is replete with examples of NIGC's clear statutory authority over class III gaming, the District Court interpreted other sections of IGRA to mean that class II gaming is to be regulated by tribes and the NIGC and that class III gaming is to be regulated solely by tribes and States. Even if this were a proper interpretation, however, the reality is that, by and large, States have not taken an active role in the regulation of Indian gaming.

As illustrated by the chart attached to my written testimony, there are 22 States that have entered into compacts with tribes for class III gaming. Of these compacts, four do not address internal control requirements at all. Six of them require very limited controls, such as the display of rules of play, maintenance of lists of barred persons, or minimal surveillance. A compact in one State provides for tribal internal controls reviewed by that State, and in one other State, compacts specify different levels of internal controls. Compacts in two States require the adoption of State standards or their equivalent, and compacts in four States set forth thorough, comprehensive internal controls. Additionally, in several States, the compact terms detailing casino controls would be eviscerated without the NIGC's MICS: compacts in four States expressly adopt the NIGC MICS or standards at least as stringent. From this review it is evident that many compacts have internal control provisions not up to the standards required by the NIGC MICS or States such as New Jersey or Nevada. As is clear from the chart, strict application of the District Court decision would remove internal control requirements, where a party independent from the ownership and management of the tribal gaming plays a role, in several States.

Further, even when compacts contain adequate internal control provisions, not all States make enforcement of violations a priority. In fact, there are several States with compacts that take no appreciable role in the regulation of class III tribal gaming within their borders. Thus, without NIGC MICS and their supporting audits, there will effectively be no oversight regulation in those States.

Some tribes have asserted that the NIGC's authority to promulgate and monitor compliance with standards for class III gaming intrudes upon tribal sovereignty. The act recognizes and balances tribal, Federal, and State interests. The IGRA as written requires tribes to debate whether they wish to cede a small portion of their sovereignty in order to game and thereby increase tribal funding to carryout other sovereign tasks. If a tribe opts to invest in gaming it must protect itself and its assets. The Federal Government also seeks to protect this investment in tribal sovereignty by ensuring tribal gaming succeeds, for a scandal at one gaming facility has the ability to negatively affect all operations. The vast majority of visitors to the gaming facilities are non-Indian and these visitors will only continue to patronize tribal gaming operations if the hard-won reputation for integrity and well-regulated gaming is maintained. The most effective measure of any nation's sovereignty is its ability to provide for its needs and the needs of its people. Self-sufficiency for tribal nations is a stated goal of the IGRA. Weakening the strong regulation of class III gaming thus works against tribal sovereignty and self-sufficiency.

III. CONCLUSION

As I have previously noted, there is a long history of tribal challenges to our class III authority. These challenges have prompted us to appear before this committee in the past to ask for legislation clarifying our authority. Now that a court has spoken to the issue we must again, and with renewed vigor, ask this committee to support legislation that eliminates any question regarding our legal authority to monitor and regulate class III gaming and that clarifies that NIGC authority over class III gaming is as broad as it is over class II gaming.

Tribal-State Compact MICS and Dispute Resolution Provisions
as of 9/21/05

State	MICS Provisions	Remedy for Compact Violation	Expiration Date
Arizona	All Arizona compacts adopt NIGC MICS	Non-binding mediation; binding arbitration; injunctive relief.	2013, 2014, and 2018
California 1999 Compacts	1) Tribes must record all incidents in a special log; 2) Tribes must maintain a list of barred persons; 3) Tribes must post the rules and regulations of table games. Gaming devices transported off Tribe's land subject to seizure.	Tribal gaming agency investigates, requires correction; if none, fines or sanctions. Disputes: Tribe and State meet and confer, then arbitration with judicial review. No Class III gaming if Tribe 2 quarterly contributions overdue.	2020
California 2004 amended Compacts	Requires testing of gaming devices.	No change.	2025, 2030
Colorado	Tribal TICS with State review.	Arbitration for breach of contract provisions.	None. In effect until termination by both parties.
Connecticut	Extensive, comprehensive MICS	Mashantucket Pequot - procedure for appeal by Tribe to State Sup. Ct. of assessments levied by State. If non-compliance with Compact, US Dist. Ct. or petition NIGC. Mohegan - none.	None. Termination by written agreement of parties.
Idaho	Three of the four compacts include fairly general MICS. One of the compacts (Shoshone Bannock) includes only very general control language.	Three of the four compacts provide for meet-and-confer, then binding arbitration with no judicial review. One of the compacts (Shoshone Bannock) allows actions in federal district court after the arbitration	Until renegotiated or replaced.
Iowa	NIGC MICS adopted for accounting and cash control. Equivalent surveillance standards adopted in compacts. Semi-annual audit required to determine compliance with compact and all applicable laws.	If Tribe fails to comply, Compact may be suspended. If State fails to comply, Tribe may seek any remedy.	2006, 2012, 2019
Kansas	All Kansas compacts have MICS that cover cage operations, drop and count, fill and credit, and surveillance, but are not as comprehensive as NIGC minimums. Other areas not covered.	State and Tribe will report violations to each other. Arbitration and/or judicial resolution in federal court. Limited to equitable remedies and costs for state oversight.	None
Louisiana	Minimal MICS; limited surveillance procedures for cashier's cash and cash control management in Appendix.	Informal resolution for at least 45 days. If none, then formal mediation. If no resolution, then binding arbitration.	2007 and 2008
Michigan	None.	Tribe and State to meet. State has right to notify Tribe to stop playing game. Tribe can stop or go to arbitration.	2013 and 2019
Minnesota	Some compacts have none. Others have minimal surveillance regulations for blackjack tables.	Tribe may contest allegation of non-compliant game through inspection by independent gaming laboratory or in Federal court, before NIGC, or in State court, respectively, if prior forum declines jurisdiction.	None
Mississippi	No MICS in Compact, but limited MICS for slot machines in gaming ordinance.	1) informal dispute resolution; 2) If no resolution, then arbitration, with decision of arbitrator final and non-reviewable.	None. Termination by mutual consent of the parties.

State	MICS Provisions	Remedy for Compact Violation	Expiration Date
Montana	None	State or Tribe can terminate compact on 90 days notice if violation not cured. Efficacy of cure may be adjudicated in Federal Court.	Variously none, 2006, 2007, 2008 and until another compact signed.
Nevada	Two compacts require following Nevada MICS, four compacts require adopting MICS at least as stringent as Nevada MICS.	Four have dispute resolution with judicial remedies thereafter. Two have none.	Varied - either "until gaming ceases on property" or 4-year terms and can be terminated by mutual consent.
New Mexico	None	Compact provides an arbitration provision for dispute resolutions or compact compliance. The result of the arbitration is final and binding, and may be enforceable by any court of competent jurisdiction.	2015
New York	Comprehensive MICS, similar to NIGC's.	Informal dispute resolution. If no resolution, then binding arbitration. Cessation of tribal payments to state if breach of exclusivity provisions (two of three tribes).	None & 2016
North Carolina	Very limited MICS. Transactions in machines recorded and stored with software; rules of play displayed.	Internal dispute resolution process (notice, 30 days to try to resolve). If not resolved, any legal remedy available or by mutual agreement, mediation, arbitration or other alternative method.	2031 with authomatic 5 year extensions if no non-renewal notice from either party.
North Dakota	MICS are NIGC's MICS.	Meet to discuss. Subsequently, Tribe may go to arbitration over State violation. State may go to arbitration or Federal Court over Tribe violation. Issues of non-compliant Class III games are to be resolved through examination by independent testing laboratory.	2008, 2012 and subsequent renewals.
Oklahoma	Model compact: Tribal internal control standards must equal or exceed NIGC MICS.	Model compact: Arbitration for enforcement of compact provisions. Federal court de novo review of arbitration award, subject to appeal to Circuit Court.	2020, automatic 15 year renewals.
Oregon	Comprehensive Tribal/State MICS (set forth in compacts)	Meet-and-confer, then federal district court or state court if the federal court lacks jurisdiction.	None
South Dakota	South Dakota State MICS incorporated by reference.	Termination on breach, action in Federal Court available for interpretation of compact. For non-compliant machines, arbitration.	2005, 2006, 2007, 2008, and subsequent renewals.
Washington	Comprehensive MICS (set forth in compact)	Some slight variation among the 27 compacts, but State may always seek injunctions in federal district court. Either binding or non-binding arbitration provisions also incorporated.	Termination by written agreement of the parties.
Wisconsin	Tribe to use MICS at least as restrictive as NIGC's.	In order, negotiation, mediation, arbitration, action in Federal court (certain provisions may be sued upon immediately).	None or 2009

TESTIMONY OF MARK C. VAN NORMAN, EXECUTIVE DIRECTOR
NATIONAL INDIAN GAMING ASSOCIATION

SEPTEMBER 21, 2005

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON INDIAN GAMING

Introduction

Good morning Mr. Chairman, Vice-Chairman Dorgan, and Members of the Committee. Thank you for providing the National Indian Gaming Association with the opportunity to testify this morning. My name is Mark Van Norman, I am a member of the Cheyenne River Sioux Tribe of South Dakota.

The National Indian Gaming Association ("NIGA") is an association of 184 tribal governments that use Indian gaming to generate essential government revenue. For the past five years, I have served as Executive Director of NIGA. Previously, I served as the Director of the Office of Tribal Justice in the U.S. Department of Justice and as attorney for my tribal government. I have also worked for a state government and in the private sector.

For NIGA and its Member Tribes, our foremost concern is to preserve Indian sovereignty and to protect Indian gaming as a means of generating essential tribal government revenue. We are committed to effective regulation for Indian gaming and our experience has demonstrated that the highest standard of regulation can be achieved in a manner consistent with Indian sovereignty and self-determination.

Concerning amendments to the Indian Gaming Regulatory Act, in prior years, NIGA has asked Congress to address the Supreme Court's *Seminole* decision, which permitted states to raise an 11th Amendment defense to litigation to enforce the Tribal-State Compact process. We have asked for provisions allowing timely access to the Secretary's procedures in lieu of a compact when an 11th Amendment defense is raised because the Tribal-State Compact process is critical to the proper functioning of IGRA. We oppose amendments to the Indian Gaming Regulatory Act that do not include provisions on secretarial procedures.

In *Colorado River Indian Tribes (CRIT) v. NIGC (2005 WL 2035946),* the U.S. District Court in Washington, D.C. ruled on August 24, 2005 that the NIGC does not have authority to issue rules for Class III gaming, i.e., MICS, outside of the Tribal-State compact process. The NIGC is seeking new rulemaking authority to issue Minimum Internal Control Standards ("MICS") over and above the existing Tribal-State Compact process. In short, NIGC is seeking a legislative "quick fix" to the CRIT decision.

There is no need for a quick fix to the CRIT decision, which remains in litigation. Because the NIGC has not first consulted with tribal governments about this issue and attempted to work out an approach to the MICS issue that imposes the least burden on tribal governments, we oppose NIGC's efforts to secure general Federal regulatory authority for its MICS over and above the Tribal-State Compact process.

We believe that through consultation with tribal governments, NIGC can work out an approach that uses its existing statutory authority to approve tribal gaming regulatory ordinances to address this problem. In short, without creating a duplicative new Federal regulatory regime, the NIGC might simply seek to have *tribal* MICS included in tribal ordinances. After all, its current Federal regulation asked tribal governments to adopt MICS through their tribal regulations. Accordingly, we ask the Senate Committee to defer action on this issue to give NIGC time to consult with tribal governments.

Indian Gaming is the Native American Success Story

In the 18th and 19th Centuries, the United States alternated between negotiating treaties with tribal governments and a few years later, engaging in warfare to take treaty protected lands. The legacy of genocide and deprivation left Indian tribes destitute and suffering from lack of education, poor health care, and premature death.

Gaming has always been a traditional Native American past time, from hand games and athletic contests to horse-racing. In the late 1960s and '70s, as states were developing state lotteries, tribal governments turned to high stake bingo to raise essential tribal government revenue.

Only the most visionary tribal leaders could have forseen the success of tribal governments through Indian gaming. Last year, Indian gaming generated over $19 billion in gross revenues – before salaries, goods and services, capitol costs, and debt repayment. Nationwide, directly and indirectly, Indian gaming generates over 550,000 jobs. Considering the economic multiplier effect, Indian gaming generates over $5.5 billion annually in Federal Government revenue and reduces Federal payments by $1.4 billion. In addition, Indian gaming generates $1.8 billion in state government revenue and over $100 million in local government revenue.

About 60% of Indian tribes (229 out of 335) use Indian gaming to generate essential government services, and for these tribes, Indian gaming is transforming the reservation landscape and providing a brighter future. First and foremost, Indian gaming funds essential government services, including education, health care, police and fire protection, water and sewer service, elderly and child care, and cultural preservation. For example, using Indian gaming revenue:

- The Mescalero Apache Tribe of New Mexico built a new high school;
- The Choctaw Nation of Oklahoma built a new hospital;
- Gila River Indian Community established a new police and emergency medical unit;

- The Pechanga Band of Luiseno Indians established a new fire department;
- The Mohegan Tribe is building a water system for the Tribe and seven of its surrounding communities;
- The Rosebud Sioux Tribe established child care and provides new school clothes for impoverished students;
- The Fort Berthold Tribes established a new headstart center;
- The Tohono O'dham Nation is funding the Tohono O'odham Community College and used $30 million to fund a student scholarship program; and
- Several tribal governments provided major funding for the new Smithsonian Museum of the American Indian.

These types of positive developments are happening across Indian country, for the 60% of Indian tribes in the lower 48 states that have access to Indian gaming.

Naturally, the development of Indian lands is a benefit to surrounding communities. For example, Gila River EMTs serve as first responders to accidents in their stretch of I-10. The Pechanga Band's Fire Department responded to the California wildfires, working hard to save homes and lives in neighboring communities. Indian gaming is also benefiting neighboring Indian tribes. The Shakopee Sioux Tribe, for example, has generously assisted many Indian tribes in Minnesota, the Dakotas, and Nebraska, including refinancing the Oglala Sioux Tribe's debt, a grant to assist with a new nursing home for the Cheyenne River Sioux Tribe and an economic development grant for the Santee Sioux Tribe.

Tribal Governments Work Hard to Provide Strong Regulation

No one has a greater interest in the integrity of Indian gaming than Indian tribes. Naturally, tribal governments are dedicated to building and maintaining strong regulatory systems because our sovereign authority, government operations and resources are at stake. Under IGRA, tribal governments are the primary day-to-day regulators of Indian gaming and regulate Indian gaming through tribal gaming commissions. Tribal gaming regulators work with the NIGC to regulate Class II gaming, and through the Tribal-State Compact process, tribal gaming regulators work with state regulators to safeguard Class III gaming.

Indian gaming is also protected by the oversight of the FBI and the U.S. Attorneys. The FBI and the U.S. Justice Department have authority to prosecute anyone who would cheat, embezzle, or defraud an Indian gaming facility – this applies to management, employees, and patrons. 18 U.S.C. 1163.

Tribal governments work with the Department of Treasury Financial Crimes Enforcement Network to prevent money laundering, the IRS to ensure Federal tax compliance, and the Secret Service to prevent counterfeiting. Tribal governments have stringent regulatory systems in place that compare favorably with any Federal or state regulatory systems.

Tribal governments have dedicated tremendous resources to the regulation of Indian gaming: Tribes spent over $290 million last year nationwide on tribal, state, and Federal regulation:

- $228 million to fund tribal government gaming regulatory agencies;
- $55 million to reimburse states for state regulatory work under the Tribal-State Compact process; and
- $12 million for the NIGC's budget.

At the tribal, state, and Federal level, more than 3,350 expert regulators and staff protect Indian gaming:

- Tribal governments employ former FBI agents, BIA, tribal and state police, New Jersey, Nevada, and other state regulators, military officers, accountants, auditors, attorneys and bank surveillance officers;
- Tribal governments employ more than 2,800 gaming regulators and staff;
- State regulatory agencies assist tribal governments with regulation, including California and North Dakota Attorney Generals, the Arizona Department of Gaming and the New York Racing and Wagering Commission;
- State governments employ more than 500 state gaming regulators, staff and law enforcement officers to help tribes regulate Indian gaming;
- The National Indian Gaming Commission is chaired by Philip Hogen, former U.S. Attorney, Associate Solicitor for Indian Affairs, and the past Vice Chairman of NIGC; Vice Chairman Nelson Westrin, former Executive Director of Michigan Gaming Control Commission and State Deputy Attorney General; and Chuck Choney, Commissioner and former FBI Agent; and
- At the Federal level, the NIGC employs 80 Regulators.

Tribal governments also employ state-of-the-art surveillance and security equipment. For example, the Mashantucket Pequot Tribal Nation uses the most technologically advanced facial recognition, high resolution digital cameras and picture enhancing technology. The digital storage for the system has more capacity than the IRS or the Library of Congress computer storage system. The Nation assisted Rhode Island state police after the tragic nightclub fire by enhancing a videotape of the occurrence, so the police could study the events in greater detail.

IGRA Established the Tribal-State Compact Process as the Regulatory Framework for Class III Gaming

IGRA divides Indian gaming into three classes: Indian Tribes retain exclusive authority to regulate Class I gaming, defined as traditional gaming, such as horse-racing, stick games, or hand games at tribal celebrations.

Class II gaming is defined as bingo, lotto and similar games, pull-tabs, and non-banked card games, whether or not electronic, computer, or other technologic aids are

used in connection therewith. Class II gaming is regulated by tribal gaming regulatory agencies, under NIGC approved ordinances, in cooperation with NIGC.

Class III is all other forms of gaming, including lotteries, casino gaming, banked card games, and pari-mutuel racing. For Class III gaming, Congress established a Tribal-State Compact requirement. Congress provided that Indian Tribes may engage in Class III gaming, if they enter into a Tribal-State Compact to set forth a regulatory framework for such gaming. The IGRA outlines the subjects for Tribal-State Compact negotiation:

(i) the application of the criminal and civil laws of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
(iv) taxation by the Indian tribe of such activity in such amounts comparable to amounts assessed by the State for comparable activities;
(v) remedies for breach of contract;
(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. sec. 2710(d)(7).

The Senate Committee Report to IGRA explains that Congress established the Tribal-State Compact process because:

> [T]here is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments have no role to play in the regulation of class III gaming – many can and will
>
> The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc.... A compact may allocated most or all jurisdictional responsibility to the tribe, to the State or any variation in between. The Committee does not intend that compact be used as a subterfuge for imposing State jurisdiction on tribal lands.

Senate Report 100-446, 100th Cong. 2nd Sess. at 13-14 (1988).

Given the comprehensive framework established by the Tribal-State Compact process, the NIGC has a background role in supporting tribal and state regulation under the compacts:

- NIGC reviews and approves tribal gaming regulatory laws;
- NIGC reviews tribal background checks and gaming licenses;
- NIGC receives independent annual audits of tribal gaming facilities;
- NIGC approves management contracts; and
- NIGC works with tribal gaming regulatory agencies to promote tribal implementation of tribal gaming regulatory ordinances.

NIGC does not have authority to issue Federal regulations over and above the Tribal-State Compact process.

In *Colorado River Indian Tribes v. NIGC*, 2005 WL 2035946 (August 24, 2005), the Federal district court held that NIGC did not have statutory authority to promulgate new Federal Minimum Internal Control Standards over and above Tribal-State Compacts. The Court explained:

> "A careful review of the text, the structure, the legislative history and the purpose of the IGRA, as well as each of the arguments advanced by the NIGC, leads the Court to the inescapable conclusion that Congress plainly did not intend to give the NIGC the authority to issue MICS for Class III gaming."

2005 WL 2035946, *8. The district court correctly decided the issue.

It is noteworthy that NIGA and our Member Tribes developed the first Minimum Internal Control Standards, and we encouraged our Member Tribes to adopt the MICS as a matter of tribal law. Many tribal governments were in the process of enacting tribal law MICS, when NIGC embarked on its Federal rule-making process. As discussed below, it makes sense to consider whether tribal governments may maintain minimum internal control standards as a matter of tribal law.

The Federal-Tribal Government-to-Government Relationship is the Cornerstone of Federal Indian Policy

The Constitution enshrines a basic principle of Federal Indian law: Indian tribes are prior sovereigns, with whom the United States deals on a government-to-government basis. Through treaties, the United States recognized the rights of Indian tribes to self-government and our grandfathers fought to protect that right.

In modern times, Congress has sought to promote Indian Self-Determination and Self-Government. Hence, IGRA explains, "[t]he purpose of the chapter is … 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." 25 U.S.C. sec. 2702. Accordingly, tribal governments retained their original rights to "regulate gaming

activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. sec. 2701(5).

On September 23, 2004, President Bush issued an Executive Memorandum to the Executive Departments and Agencies on the Government-to-Government Relationship with Tribal Governments, which explains:

> My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respect tribal sovereignty and self-determination for tribal governments in the United States.

President Bush has affirmed Executive Order 13175 (2000) on Consultation and Coordination with Tribal Governments.

In our view, the first step for the National Indian Gaming Commission is to consult with tribal governments. We note that the NIGC has issued a consultation schedule, but it is not enough to consult after the fact – the NIGC should engage in government-to-government consultation before forwarding a legislative proposal to Congress. The NIGC has not complied with its own internal agency policy or the President's Executive Memorandum on Government-to-Government Relationships with Tribal Governments (September 23, 2004). The NIGC must consult with tribal governments in a manner that respects the right of Indian tribes as sovereigns to address this issue through tribal law before it advocates for a change in Federal law.

Tribal governments currently have tribal law standards in place that meet or exceed the requirements of the NIGC MICS, so there is no need for a legislative rush to supplant the federal court's judgment. Indeed, the NIGC itself recently wrote to tribal governments to say that it will not change its current MICS policy while it appeals the *CRIT v. NIGC* decision to the higher courts. This case was decided less than one month ago, and remains subject to appeal. The NIGC's press release after the decision states as follows:

> U.S. District Court Judge John D. Bates expressly cautioned that 'this opinion should not be read to hold that the NIGC will never be able to audit a Class III gaming operation, or that the NIGC may not penalize a tribe that resists a valid audit....' '[I]t is important to focus on what the court did and did not do in this case. What it *did* do was hold that the NIGC couldn't penalize the Colorado River Indian Tribes for resisting the NIGC's attempt to conduct an audit of its Class III gaming. What it *did not* do was to enjoin the NIGC from applying its MICS on Class III gaming elsewhere, or from conducting audits to monitor tribal compliance with the MICS.' The NIGC disagrees with the CRIT decision. Accordingly, beyond its dealings with the Colorado River Indian Tribes, and until the Commission revises its regulations or a court of competent

> jurisdiction orders changes in the scope of its MICS regulations, it will continue to conduct business as usual with current MICS audits and enforcement actions.

NIGC Press Release (Aug. 30, 2005); http://www.nigc.gov/nigc/documents/releases/PR-8-05-3.jsp. The NIGC's request for *immediate action* to amend IGRA is premature.

The NIGC's legislative proposal for Federal rulemaking authority over and above Tribal-State Compacts intrudes upon Indian sovereignty and disturbs the balance of authority between tribal governments, the states and the Federal Government. While IGRA was under consideration in Congress, the U.S. Departments of Justice and the Interior disclaimed any interest in assisting tribal governments with a federal regulatory process. Against this background, Congress established the Tribal-State compact process to set forth the framework for the operation of Class III gaming.

Through the Tribal-State compact process, tribal governments negotiate with states to develop a framework for "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are ... necessary for ... the licensing and regulation" of Class III gaming. In essence, the National Indian Gaming Commission is seeking a sweeping amendment, which would put in place a Federal regulatory regime over and above the existing Tribal-State Compact process. The NIGC proposal totally restructures the existing balance of tribal, state and Federal sovereignty under the Act. By adding a comprehensive NIGC role for Class III gaming with no effort to harmonize that role with tribal and state governments, NIGC would fully duplicate existing tribal and state regulatory roles. This proposal must be rejected, unless Congress strikes the existing Tribal-State Compact process.[1]

After consultation with tribal governments, if the NIGC is determined to continue to seek an amendment to IGRA regarding minimum internal control standards, its proposal should be consistent with IGRA's existing structure. IGRA requires tribal governments to maintain basic tribal law provisions concerning the regulation of Indian gaming and, as noted above, the NIGC approves these tribal ordinances. The NIGC might simply seek to add a new section to tribal gaming regulatory ordinances concerning *tribal* minimum internal control standards as follows:

---

[1] After the Supreme Court's *Seminole* decision, discussed above, the tribal-state compacting process expends great tribal governmental manpower, is time consuming, and with the recent surge for demands for revenue sharing and sovereignty concessions – is costly and burdensome to tribal self-government. As a result, we believe that it would be patently unfair to "fix" the *CRIT v. NIGC* case, *which is less than one month old and remains in litigation* and add the burden of conflicting and duplicative federal regulations to class III gaming, without at the same time restoring balance and Congress' true intent to the compacting process, *which has been broken for nearly 10 years*.

Title 25 U.S.C. sec. 2710(b)(1):

Requirements for Approval of Ordinance....

(G) Minimum Internal Control Standards. Consistent with general industry guidelines and tribal-state compact provisions, there are effective minimum internal control standards in place to: (i) effectively regulate the play of games; (ii) ensure the accuracy and accountability of cash and credit transactions; (iii) provide effective security and surveillance; and (iv) provide for effective internal auditing of the gaming operation.

President Bush's Executive Memorandum on consultation with tribal governments directs agencies to find the least intrusive means to achieve agency goals. The NIGC does not need duplicative federal rule-making authority over matters already addressed by tribal law and the Tribal-State compact process. In fact, because there is such a strong system of minimum internal control standards currently in place, this principle could be put into place on a "best practices" basis in the NIGC's model tribal ordinance without requiring a change in existing federal or tribal law.

The NIGC must acknowledge the hard work that tribal governments have undertaken to ensure that Indian gaming is regulated by the highest standards of the gaming industry. After 17 years under IGRA, tribal governments have established strong tribal government gaming commissions and working relationships with the NIGC and state regulatory agencies. Congress should not create a new duplicative Federal bureaucratic regime, when there are options that are less intrusive on state and tribal sovereignty.

Conclusion

In closing, Indian tribes are committed to both the highest standards of regulation for Indian gaming and respect for Indian sovereignty. We respectfully ask Congress to defer action on the NIGC's request for additional federal regulatory authority, and tell the NIGC to consult with tribal governments to develop an approach to Minimum Internal Control Standards consistent with both the existing structure of IGRA and the President's Executive Memorandum on Government-to-Government Relationships with Tribal Governments.

If we can be of assistance to the Committee, we would be pleased to answer any questions or provide additional documentation. Thank you again for the opportunity to testify on this important matter.

UNIVERSITY OF MINNESOTA

Twin Cities Campus

Kevin K Washburn
Associate Professor of Law
N226 Mondale Hall
229-19th Avenue South
Minneapolis, MN 55455

612.624.3869
Fax: 612.625.2011
E-mail: kkw@umn.edu

PREPARED STATEMENT OF KEVIN K. WASHBURN
ASSOCIATE PROFESSOR, UNIVERSITY OF MINNESOTA LAW SCHOOL

BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
(JOHN MCCAIN, CHAIRMAN)

WEDNESDAY, SEPTEMBER 21, 2005

The Indian gaming industry is one of the most important sources of governmental revenues for Indian tribes, but it will remain a healthy revenue source only as long as it is well regulated by tribal and federal officials..

Casino gaming is unlike any other lawful industry in that large amounts of cash are spent and returned each day in millions of transactions by thousands of people all across the country. In an age in which transactions in most other areas of commerce are dominated by less fungible and more secure financial instruments, such as credit cards, debit cards and checks, casinos still predominantly operate with cash. The cash intensive nature of the gaming industry makes it particularly attractive – and particularly vulnerable – to crime and corruption.

Crime and corruption has, for the most part, been carefully kept in check in Indian gaming through vigilant adherence by gaming regulators to two primary regulatory strategies: careful background investigations of the key actors in Indian gaming, and strong internal control procedures for casino operations. It is widely agreed within the industry that background investigations and internal controls are crucial to effective regulation and no reasonable commentator could seriously deny their importance and effectiveness in protecting the industry. Thus, the key question is not whether these regulatory strategies are valuable and important, but which governments (tribal, federal, or state) should bear the ultimate responsibility for implementing these regulatory strategies.

The regulation of gaming has been plagued by a lack of clarity in the roles of the respective regulatory entities. Now is an appropriate time for Congress to clarify those roles to provide better guidance to the industry and to regulators.

I. IN GENERAL, STATE GOVERNMENTS SHOULD NOT BE EXPECTED TO REGULATE INDIAN GAMING.

When IGRA was enacted in 1988, most observers likely anticipated that states would use the compacting process to obtain a strong regulatory presence over Class III gaming. Indeed, some state governments have strong, reliable and effective Indian gaming regulatory bodies that provide vital assistance in insuring the integrity of Indian gaming. However, states have not consistently undertaken regulatory efforts. Congress should not count on states to handle these important tasks, for three main reasons. First, while tribal and federal regulators view Indian gaming as an important tribal asset that they have a special obligation to protect, state regulators may not feel any particular responsibility to insure its long-term vitality. Instead, they may view Indian gaming activity as simply another economic activity that must be regulated, reflecting less of a commitment to the integrity of the industry. Second, through tribal gaming revenue sharing with state governments, states may have an interest in maximizing gaming revenues, an interest that often overshadows any interest in strong gaming regulation. This sets up a potential conflict of interest. Meeting regulatory requirements does, after all, affect the bottom line and can reduce gaming profits. Finally, the lack of a clear focus and strong state interest in the integrity of Indian gaming leaves the industry vulnerable. The quality of regulation of Indian casinos ought not exist at the mercy of state budgetary cycles.

Through the compact process in IGRA, states had the opportunity to become heavily involved in Indian gaming regulation. While most states have shown a strong interest in tribal gaming revenues, few have shown significant interest in the actual regulation of gaming. By and large, states have been "no-shows" in the important area of regulation. Congress should respect their decision to "opt out" of Indian gaming regulation.

II A TRIBAL/FEDERAL REGULATORY MODEL IS LIKELY TO BE MOST RELIABLE.

In my judgment, **the primary responsibility for insuring that Indian casinos adopt and adhere to adequate internal controls ought to lie with tribal gaming regulators who already exercise a variety of regulatory functions within Indian gaming operations.** In the past ten years, a large and sophisticated community of professional tribal gaming regulators has taken root across the country. Tribal gaming regulators have proven themselves, in the main, as effective regulators. In most circumstances, tribal regulators work conscientiously, competently and independently in providing strong regulation of Indian casinos. Recognizing their primacy in undertaking these sovereign responsibilities is likely to produce the most effective regulation. **However, tribal regulatory structures have some obvious regulatory weaknesses and vulnerabilities that justify a strong oversight role for federal regulators, including the ability to take independent enforcement action where a tribal gaming commission fails to meet its sovereign responsibilities.**

While, in most areas of policy, the important moral and legal principle of tribal sovereignty ought to protect the right of a tribal government to make regulatory decisions without federal oversight, Indian gaming is an exception to this principle. I justify exceptionalism on

this basis: one of the practical ramifications of tribal sovereignty is that no tribe can be held accountable to any other tribe. Yet, despite their legal insulation from one another and their lack of mutual accountability, Indian tribes most certainly can take individual actions that harm other tribes. In the highly politicized world of Indian gaming, no tribe is an island unto itself. Indeed, the political fallout from incompetent or corrupt actions of one tribe may well impact hundreds of other tribes across the country. Indian gaming exists at the sufferance of Congress and state legislatures and the public whom those bodies represent. If one Indian casino succumbs to corruption, then the entire Indian gaming industry may well be tainted. The integrity of the industry – and even the *perception* of integrity – must be guarded with vigilance.

In Indian gaming, tribes are linked inextricably to one another. Yet tribal sovereignty means that each tribe is independent of one another and insulated from any legal responsibility to other tribes for its actions. Because no tribe has the ability to regulate other sovereign tribes, this problem is one that tribes cannot solve themselves. In my view, this lack of accountability of one tribe to another justifies federal oversight to accomplish what tribes cannot achieve through collective action. In other words, the federal government's own sovereign authority in this area can offer sound regulatory coverage that tribes could never achieve on their own.

Because of the tremendous value of gaming to Indian tribes, Congress and Indian tribes share a responsibility to ensure the continued health of the Indian gaming industry. While ninety-nine percent of tribes may regulate responsibly ninety-nine percent of the time, the occasional lapse affects not only the tribe that behaves irresponsibly, but also taints the regulatory efforts of the hundreds of tribes that exercise consistent and rigorous gaming regulation. In this case, the stakes are sufficiently high to justify strong federal regulatory involvement.

The risk of occasional irresponsible behavior is quite real, for a couple of reasons.[1] First, the Indian Gaming Regulatory Act does not currently require that Indian tribes have independent tribal gaming commissions. Many tribes have created gaming commissions, but the relative independence of these commissions varies. Tribal commissioners are sometimes directly accountable to tribal leaders and/or tribal voters. While, in most circumstances, the tribal interest in the long term health of the gaming operation will give each tribal regulator a strong incentive to regulate responsibly, there may occasionally be overwhelming temptation to cut regulatory corners for short term gains.

In the licensure context, for example, I am aware of one tribal gaming commission that denied a gaming license to persons with ties to organized crime and then reversed itself and granted the license apparently after feeling pressure from tribal leaders. While such circumstances are troubling, the dynamics that cause such action are entirely understandable. Where a lucrative opportunity is available to the tribe, the pressure on the tribal gaming commission to find a way to facilitate that opportunity may simply be overwhelming, even

[1] I addressed these issues in greater detail in my testimony before this Committee on April 27, 2005. A link to this testimony can be found at http://www.law.umn.edu/facultyprofiles/washburnk.htm.

though it poses serious risks. In some circumstances, there may be a clear conflict of interest for tribal regulators. For those tribes that make per capita payments of gaming revenues to individual members, tribal regulators may have a direct financial interest in seeing a gaming development happen. Such pressures, which are not unique to tribal governments, can undermine the quality of regulation at the tribal level.

Because of these pressures and the natural conflicts of interest of tribal regulators, federal regulators have a comparative advantage. Federal regulators are largely disinterested and objective; they have no significant conflicts of interest because they achieve no direct or significant benefit from the development of any particular Indian gaming facility. Thus, having federal regulators serve an oversight role can help protect Indian gaming from the occasional lapses that might occur when tribal regulators succumb to pressures to cut corners. Federal regulations can also serve another valuable function.

Unlike individual tribal or state rules, uniform federal standards can assure the integrity of gaming on a national scope and indirectly increase the quality and independence of tribal regulators. In the context of internal controls, for example, the adoption of uniform federal standards creates a baseline for quality of regulation nationwide. Creation of such standards not only helps the consumer, it facilitates the independence of tribal gaming commissioners by insuring that knowledge and expertise is portable from one reservation to another. Nationwide standards assure a national network of training and job opportunities that collectively serve to improve the professionalism of tribal gaming regulators. If a tribal regulator is fired from one reservation for applying the rules too rigorously, for example, he may well be able to find work with a gaming commission at another reservation.

Admittedly, federal regulators cannot be as responsive to the unique needs and circumstances of each individual tribe. Moreover, technology and other relevant circumstances will change much more quickly than regulators can update a complex and comprehensive regulatory regime, such as the federal minimum internal controls standards. To address these disadvantages, tribal gaming commissions and federal regulators should be open-minded and sensible about allowing reasonable variances to the federal standards. **Federal regulators should adopt standards that allow adequate flexibility at the tribal level.**

III. CLARIFYING FEDERAL REGULATORY AUTHORITY AND IMPROVING FEDERAL REGULATION.

While all businesses chafe at regulation, Indian tribes are different than other regulated entities. This difference is the source of some key problems in Indian gaming and counsels in favor of a unique approach. First, as sovereign nations, Indian tribes are entitled to a greater level of clarity than ordinary businesses when Congress mandates legal requirements. And the NIGC needs a clear Congressional mandate to establish its legitimacy. Because it is in the best interest of Indian gaming for an independent and objective regulator to oversee all significant gaming activity, Congress should strengthen the NIGC's mandate over Class III gaming. **Congress should recognize that NIGC's authority to assure the integrity**

of Indian gaming extends to Class III gaming activity for all purposes, including background investigations of management contractors, minimum internal control standards, and health and safety regulations.

Second, federal Indian gaming regulators must be cognizant of the fact that it is sovereign *governments* they are regulating. In my experience, many disputes between Indian tribes and the NIGC have arisen when federal regulators have behaved in a heavy-handed fashion. While such heavy-handedness is the norm within the commercial gaming industry in Nevada and New Jersey and other jurisdictions, the circumstances are far different in Indian gaming. Regulators in Nevada and New Jersey are regulating private actors, not sovereign nations. Federal regulators must behave much more carefully and much more respectfully toward the regulated industry. **To be effective, NIGC regulators must not merely be regulators, but also educators and diplomats.** While federal regulators must utilize a variety of skills to achieve tribal compliance, over-reliance on aggressive regulatory tactics sometimes simply masks ineffectiveness. Federal regulators should treat tribal regulators and tribal officials with the same respect and deference that they would show to state officials.

CONCLUSION

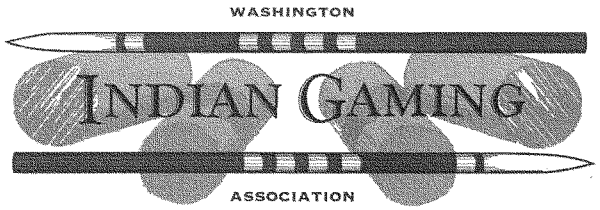
While each tribe has a moral right to the exclusive regulation of its own affairs, this moral right clashes with political reality in the field of Indian gaming where the actions of one tribe can harm many other tribes.

To protect the value of Indian gaming as a resource for all tribes, Congress should recognize a clear and strong role for federal regulators. For most tribes, which engage in responsible regulation of Indian gaming, the NIGC role will be nearly invisible. While a strong role for the NIGC clearly treads on tribal sovereignty, it is a pragmatic and necessary step to insure the long-term viability of gaming as a resource for all tribes.

Thank you for asking for my views on this important subject.[2]

Kevin K. Washburn
Associate Professor
University of Minnesota Law School
229 19th Avenue South
N226 Walter Mondale Hall
Minneapolis, MN 55455
email: kkw@umn.edu
phone: 612-624-3869
fax: 612-625-2011
http://www.law.umn.edu/facultyprofiles/washburnk.htm

[2] I offer the views set forth above solely as an individual academic and do not purport to speak for the University of Minnesota, the State of Minnesota, or any other entity or person.



September 21, 2005

Hon. John McCain, Chairman
Senate Committee on Indian Affairs
Hart Senate Office Building, Room 838
Washington, DC 20510

Hon. Byron Dorgan, Vice Chairman
Senate Committee on Indian Affairs
Hart Senate Office Building, Room 838
Washington, DC 20510

Dear Chairman McCain and Senator Dorgan:

On August 24, 2005, the U.S. District Court in Washington, D.C. ruled that the National Indian Gaming Commission (NIGC) does not have statutory authority to develop a new set of rules for Class III gaming (MICS). We do not disagree with NIGC over the importance of gaming control standards or regulations. We simply agree with the court—that Congress intended that the state-tribal compact process would govern the operation of Class III gaming and that is how the Indian Gaming Regulatory Act ("IGRA") was constructed.

There is support for this construction of IGRA—tribes are permitted to negotiate those types of gaming already lawful and regulated within the state and existing state regulatory mechanisms could be included in state-tribal gaming compacts. That is the regulatory system in place for the 24 tribal casinos in Washington.

Under state law, the Washington State Gambling Commission regulates gaming, including private, for-profit cardrooms, charitable gaming, and, through state-tribal compacts, Indian gaming.

Under the compacts, all gaming employees, management contracts, and manufacturers and suppliers of gaming services must be approved and licensed by a tribal gaming agency and certified by the state. The Washington State Gambling Commission conducts the necessary background investigation to ensure each applicant is qualified for state certification. The state Commission also maintains a testing lab for tribal gaming machines and systems which is paid for through fees.

The subject before your committee is promulgating federal Minimum Internal Control Standards (MICS) for tribal casinos, in addition to those already in place.

Washington's state-tribal compacts mandate that the tribal gaming operations have a system of internal control that includes:

- administrative control,
- accounting control,

- segregation of incompatible functions,
- security, and
- clandestine surveillance.

Each tribal gaming operation is subject to an annual audit by an independent certified public accountant, in accordance with the auditing and accounting standards for audits of casinos of the American Institute of Certified Public Accountants.

Electronic accounting systems are required for each gaming facility. A revenue report for each player terminal is kept on a daily and monthly basis. For auditing and security purposes, a secure software tool to audit each game is available for the state gaming agency and the tribal gaming agency.

Data necessary to audit compliance with the standards set forth in the compacts must be maintained for a minimum of two years.

We estimate that tribes spent $12.75 million last year on tribal government regulation of gaming in Washington. The state gambling commission employs 22 FTE's in the tribal gaming unit and additional four FTE's in the gaming lab. Under the compacts, the tribes reimburse the state for actual regulatory costs- estimated at an additional $3 million every two years.

In light of the *CRIT v. NIGC* decision, the need for a legislative "quick fix" is nowhere apparent.

NIGC has substantial existing authority: IGRA authorizes the NIGC to review and approve tribal gaming regulatory laws, review tribal background checks and gaming licenses, receive independent annual audits of tribal gaming facilities, approve management contracts, and work with tribal gaming regulatory agencies to promote tribal implementation of tribal gaming regulatory ordinances.

New rulemaking authority for a federal agency (NIGC) in addition to the existing state-tribal regulatory system would duplicate and complicate the state and tribal efforts without creating additional protections for either the tribal governments or for the public.

It also represents a significant incursion on tribal sovereignty.

Thank you for your consideration.

W. Ron Allen, Chairman, Washington Indian Gaming Association
and Tribal Chairman, Jamestown S'Klallam Tribe

COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

ROUTE 1, BOX 23-B
PARKER, ARIZONA 85344
TELEPHONE (928) 669-1280
FAX (928) 669-1391

October 14, 2005

Senator John McCain, Chairman
Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, D.C. 20510

Dear Senator McCain:

As the Chairman of the Tribal Council of the Colorado River Indian Tribes (CRIT), I am writing in the hope of clarifying some of the points and statements made during the September 21, 2005 oversight hearing of the Senate Indian Affairs Committee on the regulation of Indian gaming. To that end, we would ask that this letter be made part of the official record of that hearing.

We appreciate the fact that the Committee decided to hold this hearing in an effort to comprehensively examine the issue of the National Indian Gaming Commission's (NIGC) jurisdictional authority over Class III gaming. As we all know, the position we originally presented to the Administrative Law Judge on this issue was reaffirmed by the Federal District Court in our suit against the NIGC.

I want to assure you and the other members of the Senate Indian Affairs Committee that CRIT was never eager to engage in this lawsuit. We had hoped to resolve these issues amicably and cooperatively with the NIGC. It was only when these

efforts failed and we were inappropriately sanctioned by the NIGC that we believed assertive but appropriate action had to be taken. I am sure that no member of Congress would support the actions of a Federal agency that overstepped its statutory and regulatory authority.

As correctly noted at the hearing by Senator Dorgan, tribes across the country have questioned from the beginning the Commission's authority under IGRA to impose and enforce Minimum Internal Control Standards (MICS) on Class III activity. CRIT is the only tribe to have litigated the issue, but, again, it did so only because it was forced to defend itself against a Notice of Violation and fine. The question of statutory authority has been openly debated since 1998, and the court's decision should not have caught the Commission by surprise.

The testimony and colloquies at the hearing incorporated a number of inaccurate statements of fact, which we would like to correct. First, you expressed your understanding that when the NIGC sought to conduct its MICS audit in January of 2001, the Tribe would not permit the audit team to enter the Reservation. In fact, the audit team was welcomed to the Reservation and was given a conference room and technical support to conduct what was expected to be a three week audit. Its members were given access and escorted cordially throughout the gaming facility and supporting offices without restriction. Only on the second day of the audit did a dispute arise, when tribal representatives asked the audit team to point them to a statutory provision in IGRA that authorized the imposition and enforcement of MICS on the Tribe's Class III activity.

The audit team was unable to do so. Tempers flared and a stalemate ensued. The audit team left the Reservation and did not resume the interrupted audit until after the litigation was commenced. That audit, once resumed in 2003, was conducted with the full, complete, and voluntary cooperation of the Tribe.

With respect to the report the audit team ultimately issued in 2004 after conclusion of the audit, Chairman Hogen stated before your Committee at the September 21st hearing that the report was forty pages long and contained twenty-three items. Chairman Hogen got his numbers transposed, but that is a minor point. We do not suggest that the forty items noted in that report is an acceptable result. It is not, and we took the necessary steps to bring all items into compliance, as recognized by the NIGC in a subsequent letter. Nonetheless, those forty items do not reflect an unregulated gaming operation run amok. We seriously doubt that any gaming operation in the country – tribal or otherwise – could emerge from a comprehensive internal controls audit with a perfect slate.

Chairman Hogen expressed particular concern about the audit report on surveillance capability. Only four items in the entire report related to surveillance. Three of those four addressed a technical capability issue, specifically, that three particular surveillance cameras (out of a total of 208 cameras in the entire casino) did not transmit images of "sufficient clarity." Casino management had already ordered enhanced capability equipment several months prior to the audit, and that equipment has been fully

incorporated into the Tribe's surveillance system. If a tribal employee told the audit team otherwise, s/he was uninformed on the accurate status of the equipment.

We are also aware that statements were made at the hearing that CRIT flatly denied the NIGC access to any financial information on its tribal gaming operation. That is not correct. The NIGC continues to have full access to all of the Tribe's Class II books and records, as it continues to receive the Tribe's annual independent audit report on all of its gaming activities, Class III and Class II alike. The Tribe properly challenged the NIGC for exceeding the Commission's statutory authority. No proceeding has ever been brought against the Tribe for denial of proper NIGC access to tribal gaming financial records.

I would like to address another issue raised during the oversight hearing about the possible "chaos" and "regulatory void" that will ensue if the NIGC cannot impose Class III MICS and audit tribes for compliance. This expression of alarm simply does not reflect reality. CRIT has required mandatory internal control standards since it enacted its first Gaming Code in 1994. In its most recent Compact with the State of Arizona, the Tribe negotiated an agreement to apply the NIGC's Minimum Internal Control Standards as the applicable tribal/state compact law, regardless of the court's ultimate determination of the NIGC's authority under federal law.

During the September 21st hearing, the Indian Affairs Committee was told that the NIGC has conducted forty-one MICS audits since 1999. Ironically, the number of times that CRIT's BlueWater Casino has been audited, visited, monitored, and regulated by the

Arizona Department of Gaming since our casino opened far exceeds forty-one. In Arizona, there is no lack of vigorous regulation.

We understand that the Committee is concerned by the court's decision on the CRIT case and its possible implications throughout Indian country. CRIT has no wish to be obstructionist. To the contrary, we would like to work with the Committee on any "fix" to address any and all concerns the Committee has. We believe that the Arizona model of compacts and tribal-state regulation – the model used by CRIT and your other constituent tribes – is a paradigm of stringent regulation that should be taken into consideration in meeting any perceived need for greater federal involvement.

I want to thank you for this opportunity to set the record straight. We reiterate our commitment to ensuring the highest standards of oversight and financial transparency. We look forward to working with you in a cooperative and comprehensive manner.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Daniel Eddy, Jr.
Tribal Council Chairman

Cc: Senate Committee on Indian Affairs

○