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INDIAN GAMING REGULATORY ACT AMENDMENTS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

S. 2078

TO AMEND THE INDIAN GAMING REGULATORY ACT TO CLARIFY THE AUTHORITY OF THE NATIONAL INDIAN GAMING COMMISSION TO REGULATE CLASS III GAMING, TO LIMIT THE LANDS ELIGIBLE FOR GAMING

MARCH 8, 2006
WASHINGTON, DC

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INDIAN GAMING REGULATORY ACT AMENDMENTS

WEDNESDAY, MARCH 8, 2006

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

The committee met, pursuant to notice, at 9:30 a.m. in room 485 Senate Russell Office Building, Hon. John McCain (chairman of the committee) presiding.

Present: Senators McCain, Akaka, and Dorgan.

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

The CHAIRMAN. Good morning.

In April 2006, the Committee on Indian Affairs began a series of hearing that have taken an in-depth look at the Indian Gaming Regulatory Act. IGRA was enacted in 1988, following the decision of the Supreme Court in the *Cabazon* case. Following the dictates of that case, Congress established a regulatory structure for tribes that conduct gaming on their lands.

The intervening 17 years has seen an astronomical growth in Indian gaming, both in the amount of revenues generated and in the number of gaming operations established. Yet the act has not been amended to keep up with these changes.

Regulators have scrambled to keep up and lessons have been learned about what is needed to create and maintain a fair and well-regulated industry. In response to the growth of the industry, on November 18, 2005, I introduced S. 2078, the Indian Gaming Regulatory Act Amendments of 2005. Essentially, this bill addresses three areas that I believe are in need of reform.

First, the bill clarifies that the National Indian Gaming Commission has authority to promulgate and enforce minimum internal control standards as to class III gaming, a topic on which this committee held a hearing last year.

Second, the bill tightens restrictions on off-reservation gaming. Several committee hearings have focused on this problem and the committee has received testimony from numerous parties on all sides of these issues.

Last, the bill expands the NIGC chairman's authority over contract approvals to include not only management contracts, but also consulting, development and other significant contracts. Unfortunately, when IGRA was drafted we unwittingly tied the hands of the NIGC by requiring approval only for management contracts.

Among the lessons learned over the past 17 years is that in order to avoid NIGC review, some unscrupulous contractors have fashioned agreements as consulting or development contracts. That is, something other than management contracts that require NIGC review.

In these cases, tribes run a risk that contractors will enforce unfair contract terms and tribes and patrons run the risk that the tribe will contact with unsuitable partners. S. 2078 extends NIGC approval to all significant gaming operations related contracts, so that Indian tribes remain the primary beneficiaries of their gaming operations, which was and remains among the fundamental purposes for which IGRA was enacted.

I am aware that some tribes are concerned that the bill language may overburden the NIGC and duplicate activities already performed by their tribal and State regulatory authorities. Amending IGRA to address concerns about these consulting contracts and contractors, while maintaining an efficient Federal regulatory agency, is a goal shared by all.

I look forward to hearing from the witnesses today, anticipating that they will provide us a real world view of how to achieve this goal.

I just want to reiterate a point. There are many Native Americans, particularly gaming tribes, who have approached me and said, we don't even need this issue reviewed, much less changed. Any act, any legislation that is 18 years old clearly needs review. And second of all, any operation that has gone from $500 million to $20 billion a year and continues to go up obviously needs to be scrutinized and looked at. Things have changed since 1988.

So I steadfastly reject, steadfastly reject some kind of allegation that we should not be reviewing and making necessary changes to the Indian Gaming Regulatory Act. So this committee will mark up on March 29 a bill, and it will be subject to amendment, and we will try to move it to the floor of the Senate.

[Text of S. 2078 follows:]

II

109TH CONGRESS
1ST SESSION

S. 2078

To amend the Indian Gaming Regulatory Act to clarify the authority of the National Indian Gaming Commission to regulate class III gaming, to limit the lands eligible for gaming, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 18, 2005

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

---

A BILL

To amend the Indian Gaming Regulatory Act to clarify the authority of the National Indian Gaming Commission to regulate class III gaming, to limit the lands eligible for gaming, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Indian Gaming Regulatory Act Amendments of 2005''.

SEC. 2. DEFINITIONS.

Section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703) is amended—

(1) in paragraph (7)(E), by striking ''of the Indian Gaming Regulatory Act (25 U.S.C. 2710(d)(3))''; and

(2) by adding at the end the following:

''(11) GAMING-RELATED CONTRACT.—The term 'gaming-related contract' means—

''(A) a contract or other agreement relating to the management and operation of an Indian tribal gaming activity, including a contract for services under which the gaming-related contractor—

''(i) exercises material control over the gaming activity (or any part of the gaming activity); or

''(ii) advises or consults with a person that exercises material control over the gaming activity (or any part of the gaming activity);

''(B) an agreement relating to the development or construction of a facility to be used for an Indian tribal gaming activity (including a facility that is ancillary to such an activity) the cost of which is greater than $250,000; or

''(C) an agreement that provides for compensation or fees based on a percentage of the

net revenues of an Indian tribal gaming activity.

"(12) GAMING-RELATED CONTRACTOR.—The term 'gaming-related contractor' means an entity or an individual, including an individual who is an officer, or who serves on the board of directors, of an entity, or a stockholder that directly or indirectly holds at least 5 percent of the issued and outstanding stock of an entity, that enters into a gaming-related contract with—

"(A) an Indian tribe; or

"(B) an agent of an Indian tribe.

"(13) MATERIAL CONTROL.—The term 'material control', with respect to a gaming activity, means the exercise of authority or supervision over a matter that substantially affects a financial or management aspect of an Indian tribal gaming activity.".

SEC. 3. NATIONAL INDIAN GAMING COMMISSION.

Section 5 of the Indian Gaming Regulatory Act (25 U.S.C. 2704) is amended—

(1) in subsection (c)—

(A) by striking "(c) Vacancies" and inserting the following:

"(c) VACANCIES.—

"(1) IN GENERAL.—Except as provided in paragraph (2), a vacancy";

(B) by striking the second sentence and inserting the following:

"(3) EXPIRATION OF TERM.—Unless a member has been removed for cause under subsection (b)(6), the member may—

"(A) serve after the expiration of the term of office of the member until a successor is appointed; or

"(B) be reappointed to serve on the Commission."; and

(C) by inserting after paragraph (1) (as designated by subparagraph (A)) the following:

"(2) VICE CHAIRMAN.—The Vice Chairman shall act as Chairman in the absence or disability of the Chairman."; and

(2) in subsection (e), in the second sentence, by inserting "or disability" after "in the absence".

SEC. 4. POWERS OF THE CHAIRMAN.

Section 6 of the Indian Gaming Regulatory Act (25 U.S.C. 2705) is amended—

(1) in subsection (a)—

(A) in paragraph (3), by striking "and" at the end;

(B) by striking paragraph (4) and inserting the following:

"(4) approve gaming-related contracts for class II gaming and class III gaming under section 12; and"; and

(C) by adding at the end the following:

"(5) conduct a background investigation and make a determination with respect to the suitability of a gaming-related contractor, as the Chairman determines to be appropriate."; and

(2) by adding at the end the following:

"(c) DELEGATION OF AUTHORITY.—

"(1) IN GENERAL.—The Chairman may delegate any authority under this section to any member of the Commission, as the Chairman determines to be appropriate.

"(2) REQUIREMENT.—In carrying out an activity pursuant to a delegation under paragraph (1), a member of the Commission shall be subject to, and act in accordance with—

"(A) the general policies formally adopted by the Commission; and

"(B) the regulatory decisions, findings, and determinations of the Commission pursuant to Federal law.".

SEC. 5. POWERS OF THE COMMISSION.

Section 7(b) of the Indian Gaming Regulatory Act (25 U.S.C. 2706(b)) is amended—

(1) in paragraphs (1) and (4), by inserting ''and class III gaming'' after ''class II gaming'' each place it appears;

(2) in paragraph (2), by inserting ''or class III gaming'' after ''class II gaming''; and

(3) in paragraph (10), by inserting '', including regulations addressing minimum internal control standards for class II gaming and class III gaming activities'' before the period at the end.

SEC. 6. COMMISSION STAFFING.

(a) GENERAL COUNSEL.—Section 8(a) of the Indian Gaming Regulatory Act (25 U.S.C. 2707(a)) is amended by striking ''basic'' and all that follows through the end of the subsection and inserting the following: ''pay payable for level IV of the Executive Schedule under chapter 11 of title 2, United States Code, as adjusted by section 5318 of title 5, United States Code.''.

(b) OTHER STAFF.—Section 8(b) of the Indian Gaming Regulatory Act (25 U.S.C. 2707(b)) is amended by striking ''basic'' and all that follows through the end of the subsection and inserting the following: ''pay payable for level IV of the Executive Schedule under chapter 11

of title 2, United States Code, as adjusted by section 5318 of title 5, United States Code.''.

(c) TEMPORARY AND INTERMITTENT SERVICES.—Section 8(c) of the Indian Gaming Regulatory Act (25 U.S.C. 2707(c)) is amended by striking ''basic'' and all that follows through the end of the subsection and inserting the following: ''pay payable for level IV of the Executive Schedule under chapter 11 of title 2, United States Code, as adjusted by section 5318 of title 5, United States Code.''.

SEC. 7. TRIBAL GAMING ORDINANCES.

Section 11 of the Indian Gaming Regulatory Act (25 U.S.C. 2710) is amended—

(1) in subsection (b)—

(A) in paragraph (1)(A), by striking '', and'' and inserting ''; and'';

(B) in paragraph (2)(F)—

(i) by striking clause (i) and inserting the following:

''(i) ensures that background investigations and ongoing oversight activities are conducted with respect to—

''(I) tribal gaming commissioners and key tribal gaming commission employees, as determined by the Chairman;

"(II) primary management officials and other key employees of the gaming enterprise, as determined by the Chairman; and

"(III) any person that is a party to a gaming-related contract; and"; and

(ii) in clause (ii)(I), by striking "primary" and all that follows through "with" and inserting "the individuals and entities described in clause (i), including";

(C) in paragraph (3)—

(i) by redesignating subparagraphs (C) and (D) as subparagraphs (D) and (E), respectively; and

(ii) by striking subparagraph (B) and inserting the following:

"(B) the plan is approved by the Secretary after the Secretary determines that—

"(i) the plan is consistent with the uses described in paragraph (2)(B);

"(ii) the plan adequately addresses the purposes described in clauses (i) and (iii) of paragraph (2)(B); and

"(iii) a per capita payment is a reasonable method of providing for the general welfare of

the Indian tribe and the members of the Indian tribe;

''(C) the Secretary determines that the plan provides an adequate mechanism for the monitoring and enforcement, by the Secretary and the Chairman, of the compliance of the plan (including any amendment, revision, or rescission of any part of the plan);''; and

(D) in paragraph (4)(B)(i)—

(i) in subclause (I), by striking ''of the Act,'' and inserting a semicolon;

(ii) in subclause (II), by striking ''of this subsection'' and inserting a semicolon;

(iii) in subclause (III), by striking '', and'' and inserting ''; and''; and

(iv) in subclause (IV), by striking ''National Indian Gaming'';

(2) in subsection (d)—

(A) in paragraph (1)—

(i) in subparagraph (A)—

(I) in clause (i), by striking ''lands,'' and inserting ''lands;'';

(II) in clause (ii), by striking '', and'' and inserting ''; and''; and

(III) in clause (iii), by striking the comma at the end and inserting a semicolon; and

(ii) in subparagraph (B), by striking ‘‘, and’’ and inserting ‘‘; and’’;

(B) in paragraph (2)—

(i) in subparagraph (B)(i), by striking ‘‘, or’’ and inserting ‘‘; or’’; and

(ii) in subparagraph (D)(iii)(I), by striking ‘‘, and’’ and inserting ‘‘; and’’;

(C) in paragraph (7)(B)—

(i) in clause (ii)(I), by striking ‘‘, and’’ and inserting ‘‘; and’’;

(ii) in clause (iii)(I), by striking ‘‘, and’’ and inserting ‘‘; and’’; and

(iii) in clause (vii)(I), by striking ‘‘, and’’ and inserting ‘‘; and’’;

(D) in paragraph (8)(B)—

(i) in clause (i), by striking the comma at the end and inserting a semicolon; and

(ii) in clause (ii), by striking ‘‘, or’’ and inserting ‘‘; or’’; and

(E) by striking paragraph (9); and

(3) by adding at the end the following:

"(f) PROVISION OF INFORMATION TO CHAIRMAN.—Immediately after approving a plan (including any amendment, revision, or recision of any part of a plan) under subsection (b)(3), the Secretary shall provide to the Chairman—

"(1) a notice of the approval; and

"(2) any information used by the Secretary in approving the plan.".

SEC. 8. GAMING-RELATED CONTRACTS.

Section 12 of the Indian Gaming Regulatory Act (25 U.S.C. 2711) is amended to read as follows:

"SEC. 12. GAMING-RELATED CONTRACTS.

"(a) IN GENERAL.—To be enforceable under this Act, a gaming-related contract shall be—

"(1) in writing; and

"(2) approved by the Chairman under subsection (c).

"(b) CONTRACT REQUIREMENTS.—

"(1) IN GENERAL.—A gaming-related contract under this Act shall provide for the Indian tribe, at a minimum, provisions relating to—

"(A) accounting and reporting procedures, including, as appropriate, provisions relating to verifiable financial reports;

"(B) the access required to ensure proper performance of the gaming-related contract, including access to, with respect to a gaming activity—

"(i) daily operations;

"(ii) real property;

"(iii) equipment; and

"(iv) any other tangible or intangible property used to carry out the activity;

"(C) assurance of performance of each party to the gaming-related contract, including the provision of bonds under subsection (d), as the Chairman determines to be necessary; and

"(D) the reasons for, and method of, terminating the gaming-related contract.

"(2) TERM.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the term of a gaming-related contract shall not exceed 5 years.

"(B) EXCEPTION.—Notwithstanding subparagraph (A), a gaming-related contract may have a term of not to exceed 7 years if—

"(i) the Indian tribal party to the gaming-related contract submits to the Chairman a request for such a term; and

"(ii) the Chairman determines that the term is appropriate, taking into consideration the circumstances of the gaming-related contract.

"(3) FEES.—

"(A) IN GENERAL.—Notwithstanding the payment terms of a gaming-related contract, and except as provided in subparagraph (B), the fee of a gaming-related contractor or beneficiary of a gaming-related contract shall not exceed an amount equal to 30 percent of the net revenues of the gaming operation that is the subject of the gaming-related contract.

"(B) EXCEPTION.—The fee of a gaming-related contractor or beneficiary of a gaming-related contract may be in an amount equal to not more than 40 percent of the net revenues of the gaming operation that is the subject of the gaming-related contract if the Chairman determines that such a fee is appropriate, taking into consideration the circumstances of the gaming-related contract.

"(c) APPROVAL BY CHAIRMAN.—

"(1) GAMING-RELATED CONTRACTS.—

"(A) IN GENERAL.—An Indian tribe shall submit each gaming-related contract of the tribe to the Chairman for approval by not later than the earlier of—

"(i) the date that is 90 days after the date on which the gaming-related contract is executed; or

"(ii) the date that is 90 days before the date on which the gaming-related contract is scheduled to be completed.

"(B) FACTORS FOR CONSIDERATION.—In determining whether to approve a gaming-related contract under this subsection, the Chairman may take into consideration any information relating to the terms, parties, and beneficiaries of—

"(i) the gaming-related contract; and

"(ii) any other agreement relating to the Indian gaming activity, as determined by the Chairman.

"(C) DEADLINE FOR DETERMINATION.—

"(i) IN GENERAL.—The Chairman shall approve or disapprove a gaming-related contract under this subsection by not later than 90 days after the date on which

the Chairman makes a determination regarding the suitability of each gaming-related contractor under paragraph (2).

"(ii) EXPEDITED REVIEW.—

"(I) IN GENERAL.—If each gaming-related contractor has been determined by the Chairman to be suitable under paragraph (2) on or before the date on which the gaming-related contract is submitted to the Chairman, the Chairman shall approve or disapprove the gaming-related contract by not later than 30 days after the date on which the gaming-related contract is submitted.

"(II) FAILURE TO DETERMINE.—If the Chairman fails to make a determination by the date described in subclause (I), a gaming-related contract described in that subclause shall be considered to be approved.

"(III) AMENDMENTS.—The Chairman may require the parties to a gaming-related contract considered to be approved under subclause (II) to

amend the gaming-related contract, as the Chairman considers to be appropriate to meet the requirements under subsection (b).

''(iii) EARLY OPERATION.—

''(I) IN GENERAL.—On approval of the Chairman under subclause (II), a gaming-related contract may be carried out before the date on which the gaming-related contract is approved by the Chairman under clause (i).

''(II) APPROVAL BY CHAIRMAN.—The Chairman may approve the early operation of a gaming-related contract under subclause (I) if the Chairman determines that—

''(aa) adequate bonds have been provided under paragraph (2)(G)(iii) and subsection (d); and

''(bb) the gaming-related contract will be amended as the Chairman considers to be appropriate to meet the requirements under subsection (b).

"(D) REQUIREMENTS FOR DISAPPROVAL.—The Chairman shall disapprove a gaming-related contract under this subsection if the Chairman determines that—

"(i) the gaming-related contract fails to meet any requirement under subsection (b);

"(ii) a gaming-related contractor is unsuitable under paragraph (2);

"(iii) a gaming-related contractor or beneficiary of the gaming-related contract—

"(I) unduly interfered with or influenced, or attempted to interfere with or influence, a decision or process of an Indian tribal government relating to the gaming activity for the benefit of the gaming-related contractor or beneficiary; or

"(II) deliberately or substantially failed to comply with—

"(aa) the gaming-related contract; or

"(bb) a tribal gaming ordinance or resolution adopted and approved pursuant to this Act;

"(iv) the Indian tribe with jurisdiction over the Indian lands on which the gaming activity is located will not receive the primary benefit as sole proprietor of the gaming activity, taking into consideration any agreement relating to the gaming activity;

"(v) a trustee would disapprove the gaming-related contract, in accordance with the duties of skill and diligence of the trustee, because the compensation or fees under the gaming-related contract do not bear a reasonable relationship to the cost of the goods or the benefit of the services provided under the gaming-related contract; or

"(vi) a person or an Indian tribe would violate this Act—

"(I) on approval of the gaming-related contract; or

"(II) in carrying out the gaming-related contract.

"(2) GAMING-RELATED CONTRACTORS.—

"(A) IN GENERAL.—Not later than 90 days after the date on which the Chairman receives a gaming-related contract, the Chairman shall make a determination regarding the suitability of each gaming-related contractor to carry out any gaming activity that is the subject of the gaming-related contract.

"(B) REQUIREMENTS.—The Chairman shall make a determination under subparagraph (A) that a gaming-related contractor is unsuitable if, as determined by the Chairman—

"(i) the gaming-related contractor—

"(I) is an elected member of the governing body of an Indian tribe that is a party to the gaming-related contract;

"(II) has been convicted of—

"(aa) a felony; or

"(bb) any offense relating to gaming;

"(III)(aa) knowingly and willfully provided any materially important false statement or other information to the Commission or an Indian tribe

that is a party to the gaming-related contract; or

"(bb) failed to respond to a request for information under this Act;

"(IV) poses a threat to the public interest or the effective regulation or conduct of gaming under this Act, taking into consideration the behavior, criminal record, reputation, habits, and associations of the gaming-related contractor;

"(V) unduly interfered, or attempted to unduly interfere, with any determination or governing process of the governing body of an Indian tribe relating to a gaming activity, for the benefit of the gaming-related contractor; or

"(VI) deliberately or substantially failed to comply with the terms of—

"(aa) the gaming-related contract; or

"(bb) a tribal gaming ordinance or resolution approved and adopted under this Act; or

"(ii) a trustee would determine that the gaming-related contractor is unsuitable, in accordance with the duties of skill and diligence of the trustee.

"(C) FAILURE TO DETERMINE.—If the Chairman fails to make a suitability determination with respect to a gaming-related contractor by the date described in subparagraph (A), each gaming-related contractor shall be considered to be suitable to carry out the gaming activity that is the subject of the applicable gaming-related contract.

"(D) REVOCATION.—At any time, based on a showing of good cause, the Chairman may—

"(i) make a determination that a gaming-related contractor is unsuitable under this subsection; or

"(ii) revoke a suitability determination under this subsection.

"(E) TEMPORARY SUITABILITY.—

"(i) IN GENERAL.—For purposes of meeting a deadline under paragraph (1)(C), the Chairman may determine that a gaming-related contractor is temporarily suitable if—

"(I) the Chairman determined the gaming-related contractor to be suitable with respect to another gaming-related contract being carried out on the date on which the Chairman makes a determination under this paragraph; and

"(II) the gaming-related contractor has not otherwise been determined to be unsuitable by the Chairman.

"(ii) FINAL DETERMINATION.—The Chairman shall make a suitability determination with respect to a gaming-related contractor that is the subject of a temporary suitability determination under clause (i) by the date described in subparagraph (A), in accordance with subparagraph (F).

"(F) UPDATING DETERMINATIONS.—The Chairman, as the Chairman determines to be

appropriate, may limit an investigation of the suitability of a gaming-related contractor that—

"(i) has been determined to be suitable by the Chairman with respect to another gaming-related contract being carried out on the date on which the Chairman makes a determination under this paragraph; and

"(ii) certifies to the Chairman that the information provided during a preceding suitability determination has not materially changed.

"(G) RESPONSIBILITY OF GAMING-RELATED CONTRACTOR.—A gaming-related contractor shall—

"(i) pay the costs of any investigation activity of the Chairman in carrying out this paragraph;

"(ii) provide to the Chairman a notice of any change in information provided during a preceding investigation on discovery of the change; and

"(iii) during an investigation of suitability under this paragraph, provide to the

Chairman such bonds under subsection (d) as the Chairman determines to be appropriate to shield an Indian tribe from liability resulting from an action of the gaming-related contractor.

"(H) REGISTRY.—The Chairman shall establish and maintain a registry of each suitability determination made under this paragraph.

"(3) ADDITIONAL REVIEWS.—Notwithstanding an approval under paragraph (1), or a determination of suitability under paragraph (2), if the Chairman determines that a gaming-related contract, or any party to such a contract, is in violation of this Act, the Chairman may—

"(A) suspend performance under the gaming-related contract;

"(B) require the parties to amend the gaming-related contract; or

"(C) revoke a determination of suitability under paragraph (2)(D).

"(4) TERMINATION.—Termination of a gaming-related contract shall not require the approval of the Chairman.

"(d) BONDS.—

"(1) IN GENERAL.—The Chairman may require a gaming-related contractor to provide to the Chairman a bond to ensure the performance of the gaming-related contractor under a gaming-related contract.

"(2) REGULATIONS.—The Chairman, by regulation, shall establish the amount of a bond required under this subsection.

"(3) METHOD OF PAYMENT.—A bond under this subsection may be provided—

"(A) in cash or negotiable securities;

"(B) through a surety bond guaranteed by a guarantor acceptable to the Chairman; or

"(C) through an irrevocable letter of credit issued by a banking institution acceptable to the Chairman.

"(4) USE OF BONDS.—The Chairman shall use a bond provided under this subsection to pay the costs of a failure of the gaming-related contractor that provided the bond to perform under a gaming-related contract.

"(e) APPEAL OF DETERMINATION.—

"(1) IN GENERAL.—An Indian tribe or a gaming-related contractor may submit to the Commis-

sion a request for an appeal of a determination of the Chairman under subsection (c) or (d).

"(2) DETERMINATION OF COMMISSION.—

"(A) HEARINGS.—The Commission shall schedule a hearing relating to an appeal under paragraph (1) by not later than 30 days after the date on which a request for the appeal is received.

"(B) DEADLINE FOR DETERMINATION.—The Commission shall make a determination, by majority vote of the Commission, relating to an appeal under this subsection by not later than 5 days after the date of the hearing relating to the appeal under subparagraph (A).

"(C) CONCURRENCE.—If the Commission concurs with a determination of the Chairman under this subsection, the determination shall be considered to be a final agency action.

"(D) DISSENT.—

"(i) IN GENERAL.—If the Commission dissents from a determination of the Chairman under this subsection, the Chairman may—

"(I) rescind the determination of the Chairman; or

"(II) on a finding of immediate and irreparable harm to the Indian tribe that is the subject of the determination, maintain the determination.

"(ii) FINAL AGENCY ACTION.—A decision by the Chairman to maintain a determination under clause (i)(II) shall be considered to be a final agency action.

"(3) APPEAL OF COMMISSION DETERMINATION.—An Indian tribe, a gaming-related contractor, or a beneficiary of a gaming-related contract may appeal a determination of the Commission under paragraph (2) to the United States District Court for the District of Columbia.

"(f) CONVEYANCE OF REAL PROPERTY.—No gaming-related contract under this Act shall transfer or otherwise convey any interest in land or other real property unless the transfer or conveyance—

"(1) is authorized under law; and

"(2) is specifically described in the gaming-related contract.

"(g) CONTRACT AUTHORITY.—The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81) relating to contracts under this Act is transferred to the Commission.

"(h) NO EFFECT ON TRIBAL AUTHORITY.—This section does not expand, limit, or otherwise affect the authority of any Indian tribe or any party to a Tribal-State compact to investigate, license, or impose a fee on a gaming-related contractor.".

SEC. 9. CIVIL PENALTIES.

Section 14 of the Indian Gaming Regulatory Act (25 U.S.C. 2713) is amended—

(1) by striking the section designation and heading and all that follows through subsection (a) and inserting the following:

"SEC. 14. CIVIL PENALTIES.

"(a) PENALTIES.—

"(1) VIOLATION OF ACT.—

"(A) IN GENERAL.—An Indian tribe, individual, or entity that violates any provision of this Act (including any regulation of the Commission and any Indian tribal regulation, ordinance, or resolution approved under section 11 or 13) in carrying out a gaming-related contract may be subject to, as the Chairman determines to be appropriate—

"(i) an appropriate civil fine, in an amount not to exceed $25,000 per violation per day; or

"(ii) an order of the Chairman for an accounting and disgorgement, including interest.

"(B) APPLICATION TO INDIAN TRIBES.—An Indian tribe shall not be subject to disgorgement under subparagraph (A)(ii) unless the Chairman determines that the Indian tribe grossly violated a provision of this Act.

"(2) APPEALS.—The Chairman shall provide, by regulation, an opportunity to appeal a determination relating to a violation under paragraph (1).

"(3) WRITTEN COMPLAINTS.—

"(A) IN GENERAL.—If the Commission has reason to believe that an Indian tribe or a party to a gaming-related contract may be subject to a penalty under paragraph (1), the final closure of an Indian gaming activity, or a modification or termination order relating to the gaming-related contract, the Chairman shall provide to the Indian tribe or party a written complaint, including—

"(i) a description of any act or omission that is the basis of the belief of the Commission; and

"(ii) a description of any action being considered by the Commission relating to the act or omission.

"(B) REQUIREMENTS.—A written complaint under subparagraph (A)—

"(i) shall be written in common and concise language;

"(ii) shall identify any statutory or regulatory provision relating to an alleged violation by the Indian tribe or party; and

"(iii) shall not be written only in statutory or regulatory language.";

(2) in subsection (b)—

(A) by striking "(b)(1) The Chairman" and inserting the following:

"(b) TEMPORARY CLOSURES.—

"(1) IN GENERAL.—The Chairman";

(B) in paragraph (1)—

(i) by striking "Indian game" and inserting "Indian gaming activity, or any part of such a gaming activity,"; and

(ii) by striking "section 11 or 13 of this Act" and inserting "section 11 or 13"; and

(C) in paragraph (2)—

(i) by striking ''(2) Not later than thirty'' and inserting the following:

''(2) HEARINGS.—

''(A) IN GENERAL.—Not later than 30'';

(ii) in subparagraph (A) (as designating by clause (i))—

(I) by striking ''management contractor'' and inserting ''party to a gaming-related contract''; and

(II) by striking ''permanent'' and inserting ''final''; and

(iii) in the second sentence—

(I) by striking ''Not later than sixty'' and inserting the following:

''(B) DETERMINATION OF COMMISSION.—Not later than 60''; and

(II) by striking ''permanent'' and inserting ''final'';

(3) in subsection (c), by striking ''(c) A decision'' and inserting the following:

''(c) APPEAL OF FINAL DETERMINATIONS.—A determination''; and

(4) in subsection (d), by striking ''(d) Nothing'' and inserting the following:

"(d) EFFECT ON REGULATORY AUTHORITY OF INDIAN TRIBES.—Nothing".

SEC. 10. GAMING ON LATER-ACQUIRED LAND.

Section 20(b) of the Indian Gaming Regulatory Act (25 U.S.C. 2719(b)) is amended—

(1) in paragraph (1)—

(A) in subparagraph (A), by striking " (A) the Secretary, after consultation" and inserting the following:

"(A)(i) before November 18, 2005, the Secretary reviewed, or was in the process of reviewing, at the Central Office of the Bureau of Indian Affairs, Washington, DC, the petition of an Indian tribe to have land taken into trust for purposes of gaming under this Act; and

"(ii) the Secretary, after consultation"; and

(B) in subparagraph (B)—

(i) in clause (i), by striking the comma at the end and inserting the following: "under Federal statutory law, if the land is within a State in which is located—

"(I) the reservation of such Indian tribe; or

"(II) the last recognized reservation of such Indian tribe;";

(ii) in clause (ii), by striking ", or" and inserting "if, as determined by the Secretary, the Indian tribe has a temporal, cultural, and geographic nexus to the land; or"; and

(iii) in clause (iii), by inserting before the period at the end the following: "if, as determined by the Secretary, the Indian tribe has a temporal, cultural, and geographic nexus to the land"; and

(2) by adding at the end the following:

"(4) EFFECT OF SUBSECTION.—Notwithstanding any other provision of this subsection, land that, before the date of enactment of the Indian Gaming Regulatory Act Amendments of 2005, was determined by the Secretary or the Chairman to be eligible to be used for purposes of gaming shall continue to be eligible for those purposes.".

SEC. 11. CONFORMING AMENDMENT.

(a) IN GENERAL.—Section 123(a)(2) of the Department of the Interior and Related Agencies Appropriations Act, 1998 (Public Law 105–83; 111 Stat. 1566) is amended—

(1) in subparagraph (A), by adding "and" at the end;

(2) in subparagraph (B), by striking ''; and'' and inserting a period; and

(3) by striking subparagraph (C).

(b) APPLICABILITY.—Notwithstanding any other provision of law, section 18(a) of the Indian Gaming Regulatory Act (25 U.S.C. 2717(a)) shall apply to all Indian tribes.

○

The CHAIRMAN. Senator Dorgan, welcome.

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.

As you have indicated, this is a hearing, one of several where we have reviewed various provisions of the Indian Gaming Regulatory Act to determine whether the act needs to be adjusted or changed or amended in any way. Part of the stimulus for this comes from the *Colorado River Indian Tribes* decision. I think it raises reasonable questions.

I have been helped enormously by these hearings because I have been forced to go back and take a look at what the original thinking was, what the history was with respect to the construction of these laws. Your legislation is a starting point. Some say that it goes too far in some areas. I share that view.

On the other hand, I think to suggest that there is nothing going on here that needs any Federal legislation is being oblivious to the obvious. We do need, it seems to me, to take a good look at what we have and what we should do. I commend the chairman for stimulating this discussion. I think these hearings are necessary, not just worthy, but necessary.

We have an Indian gaming industry now of nearly $20 billion a year. It provides needed revenue to be helpful to the tribes to meet their obligations and funding for some critical services. I want to make certain that Indian gaming is as well regulated as can be, to make certain that it continues to be able to be a generator of revenue for the tribes with which to do good things.

One way to do that is for us to have these kinds of reviews and these hearings. So Mr. Chairman, I commend you for that. I look forward to working with you as we proceed to a markup in this matter.

The CHAIRMAN. Thank you very much.

Philip Hogen is the chairman of the National Indian Gaming Commission. Welcome back, Mr. Chairman.

STATEMENT OF PHILIP HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Mr. HOGEN. Good morning, Chairman McCain and Vice Chairman Dorgan. I am delighted to be here on behalf of the National Indian Gaming Commission. My fellow commissioner, Chuck Choney from Oklahoma, is present here as well. So the full commission as it stands today is here.

Indian country owes this committee a great debt of gratitude for the work you did to create the Indian Gaming Regulatory Act. That, of course, did not create Indian gaming, but it created the structure that has permitted the development of a very powerful industry that has brought economic development to Indian country that languished in poverty for generations. It has not solved all the problems, but it has solved a lot of them.

So somebody in my position, who chairs the Federal regulatory body that has oversight has a heavy responsibility to make sure,

as things go forward, they go in an orderly fashion and they complement what is happening, not complicate it.

But I certainly agree with the sentiments that have just been expressed that given the passage of time, the growth, the development of the industry, it is appropriate to look at the Act and to see if there are things that might be improved or revised.

The two areas I want to comment on this morning are the clarification of NIGC's class III authority. I testified in September of last year about this and want to associate these remarks with that testimony because all of that is still true.

The CHAIRMAN. I think we will see it is not a fine line between class II and class III.

Mr. HOGEN. Well, that is a significant challenge, but in my testimony in September I attempted to point out how we got into the regulation of class III to begin with. I think at the time IGRA was designed, many thought it will always be bingo. Well, it wasn't, and 80 percent of it is not bingo; 80 percent of it is class III gaming. That is where the money, that is where the action is. So to that end——

The CHAIRMAN. These are slot machines that look——

Mr. HOGEN. Slot machines and house banked games, blackjack and so forth. Yes.

So recognizing this in 1999, starting in 1998, the National Indian Gaming Commission developed minimum internal control standards. We did not invent the concept. We just adopted it and tried to improve it and applied it to all of Indian gaming, class II and class III. We said these are the rules you have to follow at a minimum to track the dollars as they flow through the gaming operation and they go to the tribe. These are the things you have to do to ensure that the game is fair.

So for the first time, we had a rulebook, we had a yardstick, and we were able to go out and measure the performance of tribes' gaming operations and regulation. I think it worked splendidly. Most tribes probably were ahead of the game, were already there, but there were a lot of tribes that were not. So we were able to bring them up to that standard.

Of course, since that time, we have gone out to look periodically at how those performances measure up. We have done nearly 40 audits of individual facilities since we adopted those regulations. We found a lot of violations. We found over 2,300 violations of minimum internal control standards. That probably sounds like a lot. It is a lot, but it is not a lot compared to all of the compliance that occurs. But to say that nothing is wrong out there would be a misstatement.

The average number that we would find in these approximately 40 MICS audits would be about 64 relatively serious violations at each facility. The kinds of things we would find is a failure of the tribe to regularly do an analysis of the statistical performance of their gaming. They should monitor each slot machine to see if it is performing as the specs say it should. If it is not, there are questions to raise, and either somebody is taking the money or something is wrong with the machine.

We found ineffective key control. That is, all these machines and cages and so forth are locked, and not everybody is following the

rules with respect to that. The jackpot fill and drop process is not always tracked the way it should be. Occasionally, cash variances occur and they are not always investigated as the controls say that they ought to be. Sometimes there is not the appropriate segregation of duties within the facilities, if the same guy is counting and doing the approval, and that sort of thing.

Internal audits have not been satisfactory, they are getting a lot better, but there was a time when there just was not an appropriate internal audit effort at the facilities. One of these situations will not necessarily mean a disaster, but let me just share with you an incident that we currently are working with where a couple of these things combined to result in a significant tribal loss.

The tribe was not monitoring the statistical analysis of its machines. When we did our audit, we observed this. When they got around to doing that, they found that there were some significant shortages or inconsistencies with what the dollars that they were counting were compared to what was projected.

It was also discovered that there was a blind spot with respect to their surveillance system. When they finally put all of this together, it was discovered that some of the drop team was taking the money before it got to the cage. We do not know for sure how much was taken, but maybe over $250,000. Had the MICS been followed from day one, I think that would have been avoided.

Now, does this mean that there has to be a Federal rule and a Federal agency to do this? Not necessarily. The tribes could do this on their own, but obviously they do not always do that. So without the ability to promulgate these rules and to apply them to class III gaming, instances like this are going to occur.

The CHAIRMAN. And to oversight.

Mr. HOGEN. Say again?

The CHAIRMAN. And to oversight.

Mr. HOGEN. Absolutely, yes.

The regulation sometimes is the stepchild of the system. That is, it is not a revenue generating part of the business. So there are temptations to shortcut it. But if you have somebody looking over your shoulder and saying these are the rules you have to play by, there is less of a temptation to do that.

We have an all Indian system here. That is, we have the National Indian Gaming Commission, the law you wrote says you have to have two members on that commission that are tribal members. Of course, they oversee, then, what the tribes who do the heavy lifting, who do all the day to day stuff, do. So if we continue to have the authority that we started with back in 1999, as I say, I think it has worked beautifully, I think we can continue to ensure the integrity that the industry needs.

People come to the tribal gaming facilities in droves and part of the reason they do that is they have a good reputation for having a fair game, for having integrity, and of course the fruits of the operation, building tribal communities and so forth. But if that starts to erode, starts to disintegrate, I think it bodes ill for the future of this industry.

So I refer the committee to my testimony where I attempt to track the history of how we got into this, where we went, and why

it is effective, but if we are handcuffed, if we cannot look over 80 percent of these revenues, I think that the industry will suffer.

Also attached to my testimony is a chart, and this was also submitted to the committee in September, that looks at the tribal-State compacts that tribes enter into for class III gaming. Those compacts vary greatly, but many of them adopt the NIGC minimum internal control standards. Some unfortunately have no reference to internal control standards, and so if we are not out there, we are afraid what needs to be done will not get done.

So if there is one thing we would ask for at the top of the list with respect to any revision of the Indian Gaming Regulatory Act it would be clarification of that authority. We, of course, have the *Colorado River Indian Tribes* v. *NIGC* case or decision on appeal, but we cannot predict how that will come out, and I think it would be better if, rather than doing that in a judicial forum, if Congress would say, this is what we intended: A Federal oversight role with respect to the dominant form of gaming.

The CHAIRMAN. Mr. Chairman, when do you expect the Court of Appeals to rule on that case?

Mr. HOGEN. The briefing schedule is just being implemented, later this month, the first briefs will be filed, and then of course it is a 60- or 90-day schedule. You cannot predict when the argument will be or how long.

The CHAIRMAN. We are talking about a minimum of 3 or 4 months, at a bare minimum.

Mr. HOGEN. Absolutely.

The CHAIRMAN. More likely 1 year.

Mr. HOGEN. It could well be. Of course, that is not necessarily the end of the line. The Supreme Court might want to visit the issue.

With respect to the contracting provision, NIGC has complained for years that there are contracts out there that under the relatively narrow definition of management contracts, that IGRA now provides we could not adequately provide the oversight we think Congress intended. The committee has been responsive. S. 2078 expands the scope of what we might do. As we have studied this, we are asking ourselves, maybe we have asked for a little too much, or maybe now that we are better informed, we could be a little more articulate with respect to just how best to address the situation.

I think it is important first of all to distinguish what NIGC does, as opposed to other gaming jurisdictions with respect to contracts and contractors. Many established gaming jurisdictions are concerned about contractors, those folks that do business with the casinos and the bingo halls. To that end, they license the people that do that business. They do suitability determinations, background investigations, but thereafter they kind of let the parties do as they wish. If the casino wants to make a bad deal with the contractor, they are free to do that.

Well, at NIGC we have an additional mandate. Not only do we want to make sure the folks that deal with tribes are suitable to do so, but that in our role as the trustee, we want to make sure that tribes are not taken undue advantage of. To that extent, we go over those management contracts that IGRA tasked us with

with a fine-toothed comb, and we make sure that what IGRA says, the manager cannot get more than 30 percent of the proceeds, it cannot last for more than 5 years, is adhered to.

Where we found it problematic was, as you mentioned in your opening statement, Mr. Chairman, agreements were written that were not called management contracts, but actually did get the third party into the management, and we were not there scrutinizing that. We were not making suitability determinations. So we asked that we have an expanded authority.

Tribal gaming operations enter into literally thousands of contracts. They buy paper towels. They buy poker chips. They enter into consulting agreements, things like that. I think there is a risk that if NIGC were tasked with looking at each and every contract, that would be overkill. We might become a bureaucratic bottleneck and tribes probably know a whole lot more about buying paper towels than the NIGC would.

The CHAIRMAN. Well, suggest language to us on how we can differentiate between what you think is correcting an abuse, and not installing micromanagement. Okay? Have you got an idea there?

Mr. HOGEN. We do, and my staff has been working with the committee staff to try and put together language that would narrow the category of gaming contracts wherein we would have a role. But there are instances where nefarious people have gotten into casinos kind of through the back door we think that maybe there should be a permissive category there where we could reach out and identify, and say we would like to look at this garbage disposal contract and background that firm to make sure organized crime is not trying to come in from another direction.

So I think we can get there without becoming this bottleneck that I am concerned about, but clarity is required. We have some specifics in that connection in our testimony and we will continue to work with the committee staff and the committee to try and achieve that.

So that fairly well summarizes what is contained in my statement. I ask that it be included in the record and I stand ready to respond to questions that might arise.

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

The CHAIRMAN. I thank you very much for coming back, Mr. Chairman. I think we need to correct the *Colorado River* decision. I don't know if we can or not, but I think it is obvious. Many times, I do not understand judicial decisions, but I certainly do not understand that one because IGRA was framed with having in mind oversight of a commission. To deny them that necessity, in my view, is hard to understand. That is why I have some confidence in the appeals process, but we probably, at least in my view, have to fix it legislatively.

I thank you, Mr. Chairman, you were very clear and straightforward as always.

Senator Dorgan.

Senator DORGAN. Mr. Chairman, could you introduce the other commission members? You said all of the commission members are here with you.

Mr. HOGEN. Both of us are here. Our three-member commission group is down to two.

Senator DORGAN. Okay.

Mr. HOGEN. Commissioner Chuck Choney from the Comanche Tribe, a retired FBI agent, is our other commissioner.

Senator DORGAN. Thank you very much.

And what is the prospect of filling the third?

Mr. HOGEN. Well, I know that that is on the desk of the folks at the Secretary of the Interior's office and White House Personnel, but we have not been told more about that.

The CHAIRMAN. How long has it been empty?

Mr. HOGEN. Nelson Westrin went home to Michigan on December 31, so it is just a little over 1½ months.

Senator DORGAN. I do not want to ask a lot of questions here. I will send you a good number of questions that relate to the kind of thing that Senator McCain just asked you about, how to tailor some of the provisions that I think might be broader than is advisable.

Let me ask about the audit activity of the commission and the commission staff. Can you give me some sense of what kind of auditing goes on during the year and what those audits are finding?

Mr. HOGEN. Okay. We have a staff of auditors. One of the main things they do all day every day is go in a group, we will take several auditors to an individual facility. They will say we want to look at the records to see, (a), what your rules are; and (b) did you follow them?; and is there a paper trail there to document this? They will spend a couple of weeks, maybe longer depending on the size of the operation, review those kinds of things.

They will work with the staff at the gaming facility, with the tribal gaming regulators to ask questions and make sure they understand what happens. At the end of that exercise, they will prepare a report and they will list the exceptions, the deficiencies that they have identified. They are auditors. That is their business. They go nitpicking. They look for that stuff, and they almost always find.

After that is done and they send the report to the gaming facility, they say, will you please address each of these exceptions that we have identified, and give us a report. We are going to come back and see if those have been solved.

Now, in some instances they will say you misunderstood; we were not doing that wrong; here is why we are doing it right. In other instances, they will say we will fix it.

Senator DORGAN. Mr. Hogen, I would understand that to be the approach, but I am talking about what quantity of work is done relative to the number of gaming facilities across the country?

Mr. HOGEN. I wrote some of those numbers down.

Senator DORGAN. You can submit that for the record if you wish.

Mr. HOGEN. There are nearly 400 operations and we have only done about 40 audits.

Senator DORGAN. So about 10 percent.

Mr. HOGEN. Let me add that one of the things our minimum internal control standards require is that when this annual independent financial audit is done, that auditor, that CPA firm must also look at the tribe's compliance with the MICS, prepare a report, and send that to us. That, of course, helps us select where we are going to go with our next audit.

Senator DORGAN. If you would, you could submit this to us. Do you believe that the commission should be given expanded authority to monitor and enforce tribal revenue allocation plans? Give us examples of why you believe the commission would need that expanded authority.

Mr. HOGEN. Okay. NIGC is responsible for taking enforcement action if there are violations of the Indian Gaming Regulatory Act, our regulations in the CFR, and that tribal gaming ordinance that the tribe adopts to get into gaming. If they are going to do per capita payments, they have to adopt a revenue allocation plan that is approved by the Secretary of the Interior.

After the Secretary approves that plan, she has no further responsibility or authority to monitor its compliance or to take action if it is not complied with. But because it is a creature of the Indian Gaming Regulatory Act, I think NIGC has the responsibility to inquire, is it being complied with. It is not crystal clear in the act that that is one of our duties, but I think by reasonable implication that we should look there.

It would be useful to know if we should do that with greater specificity. There have been instances where a plan has been approved by the Secretary of the Interior, and the tribe is actually distributing, and that plan typically will limit the percentage that can be made, for example, for per capita payments.

But there have been instances where they are doing a whole lot more per capita payment than is set forth in the plan, and because of competition in the area, their revenues go down, and it becomes politically unpopular at the local level to say let's cut that per capita, and tribal programs that otherwise would be funded by tribal gaming revenue suffer. Nobody is watching the store if NIGC does not come out there and inquire into that.

Senator DORGAN. All right. I will submit some additional questions. Mr. Hogen, it is helpful for us and for our staffs as well to be able to have access to you and to receive your recommendations and suggestions as we think through the range of opportunities for legislation and what we should be considering.

So thank you very much for appearing.

Mr. HOGEN. Thank you.

The CHAIRMAN. Senator Akaka.

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

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

I want to thank you, Chairman McCain and Vice Chairman Dorgan, for holding this hearing.

After hearing your testimony, I share the concern that you have and also the concern of many here with regard to considering oversight and ensuring accountability of not only gaming tribes, but also the contractors that they do business with. Although S. 2078 will have a substantial regulatory impact on tribal gaming, we cannot ignore that this legislation may impact the ability of Indian nations to exercise their sovereignty. That is a personal concern.

Tribal governments have established gaming regulatory systems and have demonstrated their vested commitment to comply with the IGRA. As we move forward to address the regulatory authority

of your group, the NIGC, I am hopeful that we can proceed in a manner that acknowledges and strengthens the government-to-government relationship between the United States and tribal governments.

My question to you is one that has to do with oversight. Is there a schedule that you have of oversights?

Mr. HOGEN. We do not have a strict schedule, for example, that says every third Tuesday we will be visiting a particular facility, but we have five regional offices plus our region here on the East Coast out of the Washington, DC office, with a team of investigators and auditors at each of those regions.

They visit all of the facilities in their region, hopefully several times a year. Of course, there will be facilities that have some problems that will be visited more often than that, but every year we will visit the facility, hopefully several times, and then we select a number of tribes or a number of operations each year to do a comprehensive minimum internal control standard audit.

We will be able to do more of those more recently than we were able to before because we have more auditors now, and we are still hiring auditors. Ideally, we would get to maybe 20 a year, as opposed to the 10 or so that we have been able to do up to this point. But at each facility not only do we receive their records, their audits, and do we look at it that way, but we actually walk in the door, talk to the people, and discuss the operation at the site.

Senator AKAKA. I look forward to members of this committee having the opportunity to fully review any proposed changes in the future to this bill. Also again, my interest in having the tribal governments, giving them the opportunity to look at this legislation as well, and what impact it may have on them.

Mr. Chairman, I would like to just place my statement in the record. Thank you very much.

The CHAIRMAN. Without objection.

Thank you very much, Mr. Chairman. We will appreciate your continued fine work, and thanks for coming back.

The next panel is Ron His Horse Is Thunder, chairman, Standing Rock Sioux Tribe; Norman DesRosiers, who is the commissioner of the Viejas Tribal Government Gaming Commission; Paul Bullis, who is the Director of the Arizona Department of Gaming.

Welcome.

We will begin with you, Chairman His Horse Is Thunder.

STATEMENT OF RON HIS HORSE IS THUNDER, CHAIRMAN, STANDING ROCK SIOUX TRIBE

Mr. HIS HORSE IS THUNDER. Mr. Chairman and honorable members of this committee, my name is Ron His Horse Is Thunder. I am the great-great-great-grandson of Chief Sitting Bull. I am the chairman of the Standing Rock Sioux Tribe in North and South Dakota.

I appreciate the opportunity to testify before the committee on this legislation. I have a longer written statement which I wish to submit for the record, and I will summarize our position on this legislation.

The CHAIRMAN. All the written statements will be made part of the record. Please proceed.

Mr. HIS HORSE IS THUNDER. Thank you.

Mr. Chairman, while I appear as a representative of my tribe and our position, it is shared by 32 members of the Great Plains Indian Gaming Association covering the States of North Dakota, South Dakota, Nebraska, Iowa, and Kansas, as well as the member tribes of the Minnesota Indian Gaming Association and the six member tribes of the Montana Indian Gaming Association.

These tribes are strongly opposed to the provisions of S. 2078 and in particular to the provisions conferring power on the National Indian Gaming Commission to adopt and enforce minimum control standards and other regulations on class III Indian gaming.

It is important to understand that the Indian Gaming Regulatory Act did not empower tribes to engage in gaming activities. That right arises from the status of Indian tribes as sovereign nations under Federal Indian law. That right was made clear in the 1987 decision of the Supreme Court in the *Cabazon* case. This was, of course, before Congress passed the Indian Gaming Regulatory Act.

The fact of the matter is that IGRA was a limitation imposed by Congress on that right. Most tribes were opposed to the enactment of the legislation restricting their rights to get involved in gaming activities, but the anti-Indian forces of the day were strong enough for Congress to force it to act.

The few friends the tribes had in Congress had to make several compromises with anti-Indian forces. One of these compromises involved tribal class III gaming. Against the wishes of tribes, IGRA provides that class III gaming on Indian lands will be illegal without tribal-State class III compacts. This was because the States insisted that they have the right to be involved in the regulation of all class III gaming. We did not like it, but that was what we were stuck with.

Even after the Supreme Court decision in the *Seminole* case that prohibits tribes from suing States as provided in IGRA, most Indian tribes involved in class III gaming have been able to reach some kind of compact with the States. As intended by IGRA, these compacts make provision for the regulation of tribal gaming. These compacts provide for the sharing of regulatory power between the tribe and the State. Some compacts provide for a lot of State regulation and some don't. That is a decision made by the State and the tribes.

In the 1990's, NIGC, over the strong opposition of tribes, promulgated its MICS. These MICS imposed the most detailed kind of regulation on class II and class III gaming. Even though most tribes already had their own regulatory schemes under the compacts, they had to conform to the NIGC MICS by the year 2000.

Finally, one tribe challenge the right of the commission to enforce its MICS. Last year, the Federal court here in Washington, DC found that the Indian Gaming Regulatory Act did not confer that power on the National Indian Gaming Commission. Now, we are faced with legislation that would overturn this Federal court victory for tribal rights, and specifically confer that right to regulate class III gaming on the commission.

Mr. Chairman, we do not understand why the legislation is necessary. In the State of North Dakota, the leading Indian and non-Indian officials are satisfied with the State-tribal compact, that the

compacts make adequate provisions for effective regulation of our gaming. We thought that that was what IGRA intended.

In 2004, approximately $7 million was spent on regulation of tribal gaming in North Dakota alone. Over 300 personnel were assigned to this very function. For the five tribes in North Dakota, approximately 15 percent of the total gaming personnel are involved in regulatory activities.

The North Dakota tribal-State compact requires that the five tribal nations, Governor and the attorney general must meet every 2 years to review and adjust any problems concerning regulatory and policy issues. These biennial reviews have taken place with both Democratic and Republican attorneys general and two different governors.

There has been no major problem that has been reported concerning our tribal governmental gaming regulatory activities to date. In fact, the Attorney General on several occasions has commented on his outstanding working relations with the tribal nations of North Dakota concerning his oversight responsibilities in regards to the tribal-State gaming compact regulatory requirements.

There is no scandal in North Dakota regarding our gaming. The rights of participants in our gaming activities are being effectively and adequately protected through regulations under our compact. Nor are we aware of any significant scandal in the regulation of Indian gaming in other States. We have followed the hearings this committee has had on this issue in the last year. We have not seen any record made that would justify the further erosion of our tribal sovereignty and the right of self-government.

Mr. Chairman, we know that some have compared the amount of money the State of Nevada spends on regulations of its gaming industry with a budget of the National Indian Gaming Commission. I have been told that Nevada spends $80 million a year, while the commission spends $8 million a year. If that is the measure, of course it looks like Indian class III gaming is not being adequately regulated. However, it totally ignores the fact that Indian tribes spend over $200 million a year on their own regulatory efforts. This does not even include the millions that we pay to State agencies under the compacts for their regulatory efforts.

To discount and disregard the millions of dollars that tribes spend for their own regulatory efforts is to show a regrettable disrespect for the ability of Indian people to govern their own affairs. It is to say to my Indian people that the non-Indian world believes that we as Indians cannot be trusted to regulate ourselves and to protect our participation in our gaming enterprises.

Mr. Chairman, I know the hearing was to be limited to the class III provisions of S. 2078. However, as I noted, my tribe and many of the other tribes are very much opposed to the other provisions of the bill. These include the provisions to subject our day to day contracting to NIGC's control, to permit the Secretary of the Interior to decide if our tribal decision to make per capita payments is a reasonable method of providing for the general welfare of our members, and to eliminate the ability of tribal and State governments to decide if an off-reservation land transfer to Indian gaming is okay.

Mr. Chairman, the tribes I represent are opposed to the MICS provision of S. 2078 and all of the other burdensome provisions. I would close my statement with a comment that this legislation, which is supposed to be for the benefit of Indian tribes, does not contain a provision fixing the problem created by the Seminole decision. When Congress made class III gaming on Indian land illegal unless done under State-tribal compact, it was putting tribes at the mercy of States. That is why Congress authorized the tribes to sue the States if they refused to negotiate or negotiated in bad faith.

When the Supreme Court struck that provision down, it opened up Indian tribes to coercion by the States. They now tax us when this was prohibited by the Indian gaming regulatory practices.

The CHAIRMAN. Mr. Chairman, your time has expired.

Mr. HIS HORSE IS THUNDER. Thank you, Mr. Chairman.

[Prepared statement of Mr. His Horse Is Thunder appears in appendix.]

The CHAIRMAN. Commissioner DesRosiers, welcome.

STATEMENT OF NORMAN DESROSIERS, COMMISSIONER, VIEJAS TRIBAL GOVERNMENT GAMING COMMISSION

Mr. DESROSIERS. Thank you, Mr. Chairman, Mr. Vice Chairman.

It is an honor and privilege to have been invited here to speak to you again today on behalf of my regulatory colleagues and myself. As you know, we are the ones that are going to be ultimately responsible for implementing and enforcing whatever our elected leaders enact. Based on that, first, we would like to really express our appreciation and compliment the committee on their willingness to hear from us regulators.

We have commented on a number of areas that have been submitted for change in IGRA, but my comments here will focus on gaming-related contracts and contractors. Forgive me for reading those comments, but I think time constraints dictate that.

We fully understand and recognize that there have been abuses in the past where unscrupulous contractors have taken advantage of tribes. We understand the desire to address this issue in amending the act. Section 2703, paragraph 11 attempts to define gaming-related contracts.

Throughout that definition, there are numerous references to gaming activity. Without a very clear definition of gaming activity, this section is open to very broad interpretations which would virtually be all-inclusive of any contract that the tribes' casinos entered into, such as training or IT assistance, marketing studies, et cetera.

We also believe that the tribes should be free to develop economic enterprises such as hotels, golf courses, shopping centers, et cetera, without NIGC involvement in contracts. However, a broad interpretation of the word "ancillary" in paragraph (b) could be argued to include all other such tribal economic enterprises.

Paragraph (a)(2) of this section suggests that any contract which includes a contractor advising or consulting with a person that exercises material control over gaming activity will require NIGC approval, with suitability findings of the contractor. This is very broad and all-inclusive, and as a matter of practicality, we really feel NIGC is going to be unable to manage this.

As drafted, the language would require NIGC to review and approve hundreds of contracts every year for every tribal gaming facility in the country, bringing business to a halt in many instances. The broad definition of gaming-related contracts in section 11 would encompass numerous contracts for services by contractors with no ability to significantly affect the management of the facility.

Because there is no threshold, no dollar threshold mentioned in the provisions that would trigger review by NIGC of every contract, and section 11 encompasses any contract related to the operation or management of gaming activity, even a contractor or a contract for $500 worth of chairs carved by a local woodcarver for purchase in a local casino poker room would require that small vendor at his own expense to submit his contract to NIGC. Established small vendors in rural areas where many tribal gaming facilities are located, providing service such as electrical work or catering work, would be unable to afford the cost of doing business with tribes and unable to compete.

Paragraph (b) of the gaming-related contract definitions suggests that development or construction contracts of $250,000 or more would require NIGC approval. We believe this dollar threshold is unreasonably low. Most gaming facilities are in constant motion with remodeling, expansion, or improvement projects that involve contracts of $250,000 or more. To require every one of these contracts to have NIGC approval and every contractor to be found suitable would be overly burdensome and impose major delays to projects which would negatively affect tribal gaming operations.

Tribal casinos need to be able to quickly and immediately respond to catastrophic failures of infrastructure, structures or equipment. They would be unable to do that and go out and immediately fix things and buy the necessary equipment under contracts if they required prior NIGC review.

The scope of contracts related to the construction of gaming and ancillary facilities would capture such vendors as waste water consultants, architects and environmental engineers who are critical components for keeping a casino functioning in an environmentally sound manner, but who have absolutely no control over any gaming activity.

This next area, which I can personally attest to, being caught in this quagmire, I think is important. If these contracts should happen to be with publicly traded companies, an entirely new set of complexities come into play. Very often these publicly traded companies are wholly-owned subsidiaries of other publicly traded companies, and in many of these, five percent or more of the stock is held by other publicly traded investment companies. So it is easy to see how NIGC could get bogged down in backgrounding officers and directors of a myriad of different companies just for one contract with a tribe by one of those companies.

I see my red light is on, so I will jump toward the end.

For these reasons, we believe any Federal approval of gaming-related contracts should be submitted only that affect tribes and companies that have entered into management or consulting agreements, or finance agreements, that have their fees based on a per-

centage of net revenues. I think that is where most of the abuses have been in the past.

Also, any contractors, of course, which exercise significant material control over the gaming facility.

Again, I would like to emphasize, we understand the desire to address the issues of the contracts and contractors. It is neither our intent nor desire to appear as overly critical or as obstructionist. However, this is a highly complex area requiring a great deal of thought to make it workable. We share the same goals as the committee, to keep undesirables out of Indian gaming and for tribes to be the primary beneficiaries of their tribal gaming revenues. At the same time, we must endeavor not to stifle or inhibit economic progress.

I want to thank you again for the opportunity to speak here and I would be happy to answer any questions.

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

The CHAIRMAN. Thank you very much.

Mr. Bullis, welcome.

STATEMENT OF PAUL BULLIS, DIRECTOR, ARIZONA DEPARTMENT OF GAMING

Mr. BULLIS. Thank you, Mr. Chairman. Good morning, Mr. Vice Chairman.

My name is Paul Bullis. I am director of the Arizona Department of Gaming. We are the State agency which, along with Arizona's Indian tribes and the National Indian Gaming Commission, oversees Indian gaming in Arizona. Thank you for the opportunity to speak today.

I would like to address some of the provisions of S. 2078 from the perspective of a State regulator. More importantly, I speak from the perspective of a State regulator where the State and tribes have developed a successful partnership for the effective oversight of Indian gaming. That partnership between sovereign governments has as its cornerstone our tribal-State compact. Although the compact is the cornerstone of our partnership, what makes that partnership work is communication, discussion, engagement and a process for resolving issues.

My overall message is that when considering amendment to the Indian Gaming Regulatory Act, the committee should take into consideration success stories such as Arizona.

Senator DORGAN. Mr. Bullis, can you pull that microphone a bit closer?

Mr. BULLIS. Yes; I am sorry, Senator Dorgan.

I would hope and request that any amendments would be crafted to not disrupt those successes.

I will first address those provisions of S. 2078 that deal with the National Indian Gaming Commission's role in approving gaming-related contracts and determining suitability of gaming-related contractors. These provisions would create overlap between the activities of the Arizona Department of Gaming and the NIGC. Let me discuss the role of the Arizona Department of Gaming in this area.

Under our tribal-State gaming compact, the Arizona Department of Gaming certifies all persons other than regulated lending institutions that provide financing to tribes for gaming facilities, all

management contractors engaged by a tribe to assist in the management or operation of the gaming facility, all manufacturers and distributors of gaming devices, and all persons providing gaming services in excess of $10,000 in any 1 month.

Our certification process involves a determination of suitability. Each company, each principal of a company, and each individual providing gaming services must undergo a thorough background investigation. This includes a criminal history, credit history, financial background, regulatory history, and other pertinent information.

Manufacturers and distributors of gaming devices and other items used in the play of class III games undergo a particularly rigorous investigation, including site visits and face to face interviews. Tribal regulators are also required to license each of these persons and companies.

The universe of persons required to be certified by the Arizona Department of Gaming I believe is larger than and includes the universe of gaming-related contractors defined by S. 2078, which would also have to be approved by the NIGC. This is the area of overlap where both the Arizona Department of Gaming and the NIGC would be approving the same gaming-related contractors.

There is, though, a role laid out for the NIGC under S. 2078 in this area where there is no overlap. That is the area of review and approval of gaming-related contracts. The Arizona Department of Gaming reviews only the suitability of the vendors. We do not review the terms of the agreements themselves, nor do we approve those agreements. That would be solely within the purview of the NIGC.

In that area of overlap where the Department of Gaming does play a role, we would hope that the intent of Congress would not be to preempt our role, especially where we have performed it effectively, nor to preempt the efforts of other States that are also performing effectively.

I would also like to address the proposal contained in S. 2078 to clarify the NIGC's authority to promulgate minimum internal control standards. Governor Janet Napolitano has previously addressed this issue in her letter of October 4, 2005 to this committee. Let me summarize Governor Napolitano's position. When the State and tribes were negotiating the current compact, the NIGC's minimum internal control standards applying to class III gaming were in effect.

The State and tribes recognized the importance of internal controls in the operation and regulation of casinos, and so incorporated the NIGC's MICS in one of the appendices to the compact. If the NIGC had not issued its minimum internal control standards, which had to be complied with by the tribes in any event, I am quite certain that our compact would not contain comparable controls.

The point to be made is that the existence of the NIGC's MICS issued under the NIGC's presumed authority at the time was instrumental in making Arizona's compact as strong as it is in terms of protecting the integrity of gaming. We therefore support language in S. 2078 clarifying that the NIGC has authority to issue minimum internal control standards governing Class III gaming.

Thank you.

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

The CHAIRMAN. Thank you very much.

I want to thank the witnesses for being here.

Mr. DesRosiers, I am somewhat unclear on your testimony regarding so-called participation agreements between tribes and slot machine manufacturers. You indicate that requiring the slot machine manufacturers to have background checks would change the way the industry does business. Is that correct, in your testimony?

Mr. DESROSIERS. That is not what I intended. We already background all the machine manufacturing companies and license them. Every contract, though, there are contracts, hundreds of them, with participation agreements which require a percentage of each machine in these wide area progressive banks to be paid. For every one of those contracts, which I personally review, but to have to go to NIGC would be overly cumbersome.

The CHAIRMAN. Do you acknowledge there may be a need for an expanded NIGC authority? If you were making changes, what area would you address, perhaps expanded authority for the NIGC?

Mr. DESROSIERS. I am not sure where I would put that. We support the notion of, and I do not speak for all tribes and tribal regulators, our tribe supports the notion that they should have authority over Class III minimum internal controls, to preserve the public perception of the integrity of Indian gaming. As Chairman Hogen already testified, virtually all the tribes are there anyway. I mean, we are already complying with those MICS.

In the past, in years past, not in this testimony, I would have liked to have had NIGC to have the authority to help me on my request, not to be mandated to be in charge of it, but to assist me in backgrounding some contracts and contractors. There are occasions where companies that are so large think that they do not need my tribe's business and don't want to be bothered with the attempts that we make to background and license them.

The CHAIRMAN. And do you agree that there have been cases of unscrupulous individuals or companies coming in and signing these contracts and basically exploiting the Native American tribes by taking too much money from them. Would you agree with that?

Mr. DESROSIERS. I would have to agree. I have seen that first hand.

The CHAIRMAN. Mr. Bullis, would you agree with that?

Mr. BULLIS. Yes; Senator McCain.

The CHAIRMAN. Mr. Bullis, this legislation calls for the NIGC to perform background investigations and make suitability determinations on a wide range of persons. Your background and your experience is pretty important. Can you share your experience with us? For example, how long a process is it for your agency to do a background investigation and make a determination?

Mr. BULLIS. Certainly. It is important to recognize that our agency divides up the different kinds of vendors and contractors. The most significant types are those vendors that provide equipment that is used in the play of Class III games. In Arizona, there are about 70 in that category right now. We have about 460 vendors that provide goods and services that are otherwise used in casinos. They do not receive the same depth and degree of scrutiny. Clearly,

those vendors that are providing equipment used in the play of class III games get the much more in-depth level of scrutiny.

In terms of the time period that it takes us to do those types of investigations, it certainly varies in terms of any issues we find and the type of provider. What we do have in place, though, to kind of mitigate those concerns are, first of all, within 20 days if we have identified within the first 20 days no concerns about the vendor and upon request of the tribal gaming office, we will issue a temporary certification allowing that vendor to do business with the tribe. That allows us whatever time is necessary to continue our in-depth investigation.

The CHAIRMAN. But things are going well in Arizona?

Mr. BULLIS. I believe so. I believe so.

The CHAIRMAN. Thanks to the compact that was entered into between the State and the tribes.

Mr. BULLIS. The strength of the compact, as well as the communication and the partnership that we have developed with the tribes. I will tell you, when I first got on the job about three years ago, I thought the most important thing was getting together, reaching agreement on issues, and moving on. I have learned that the most important thing is not that we reach agreement on items, on issues, but how we go about doing that, how we interact with each other, how we communicate regularly.

The CHAIRMAN. Mr. Chairman His Horse Is Thunder, since your statement said that this legislation is based on anecdotal anti-Indian press reports on Indian gaming, the overblown issue of off-reservation gaming, and pin the blame on the victim reaction to the Abramoff scandal, I have no questions. We are too far apart in our views of what this committee is trying to do in the 20 some years that I have been involved on behalf of Native Americans.

Senator Dorgan.

Senator DORGAN. Chairman His Horse Is Thunder, on the issue of class III gaming, let me say I share the chairman's thoughts about that. That is a statement that does not at all compare to the facts. This committee has worked very hard to receive comments and opinions and suggestions from a wide range of interests, including many Indian tribes from across the country.

While I think the chairman's bill is broader than it should be, for example, in the area of contracts and so on, I also, as you know, having visited with you and the other tribal chairmen in our region, I also believe that class III gaming ought to be subject to regulation by the National Indian Gaming Commission.

So we have approached this very carefully, very thoughtfully, and I do not share the sentiments in your testimony that were expressed. They should not certainly be attributed to any actions or any attitudes by the current chairman or the members of this committee. I think we have approached this very carefully.

Now, let me say this as well. My view, and let me just take class III for a moment, my view of class III is this. It is not believable to me that the construct of establishing a commission for the purpose of providing both investigatory capabilities and enforcement capabilities would have anticipated that we would not do that for class III gaming. I mean, it is just not believable to me. The *Colorado* decision I think needs to be addressed. I believe this commit-

tee will address it. I do not know whether the full House or the full Senate will address it, but I believe this committee should address it.

There are other portions of the legislation that the chairman has offered that we will I believe change and alter and amend as we get additional testimony and thoughts from tribes and the commission and so on.

This is a $20-billion industry. In North Dakota, for example, the only State for which I have a great deal of information, although I have some about Arizona and some other States, in North Dakota, the State enforcement is by two part-time people working at the attorney general's office. That is not, with all due respect, enforcement.

I am not suggesting the attorney general is not doing his job. That is not my suggestion at all. I am just suggesting there is not an aggressive enforcement mechanism at the State level. They have not funded it and it just does not exist.

I believe with a $20-billion industry, the way to preserve and protect this industry to be able to provide the resources and the income stream in the long term for the tribes that have gaming, is to make sure that we do not have scandals, and that we have adequate management, and that we have enforcement of standards.

One final point I wanted to make. My understanding of the North Dakota compact is that the North Dakota compact on gaming includes the minimum internal control standards that were established by the National Indian Gaming Commission. Is that true, Mr. Chairman?

Mr. HIS HORSE IS THUNDER. I believe so.

Senator DORGAN. And if that is the case, why on earth would we not have the National Commission be enforcing that standard and auditing that standard? If we have in fact adopted that standard, would we want to fall short of the enforcement of that standard?

Mr. HIS HORSE IS THUNDER. No; we would not, sir.

Senator DORGAN. And so, I guess, that makes my point. I know there is strong feeling out there about a lot of things. Some of it I think stems, Mr. Chairman, from anger and concern about the lack of resources for health care, the lack of resources for housing, and education. There is a lot of strong feeling.

But that ought not replace good commonsense when we try to evaluate what to do about gaming and what to do to make sure that we have enforcement that is adequate. As I understand it, we have several levels of enforcement at the present time: the tribe, and Mr. DesRosiers, you are a compliance officer for a tribe. You have worked there for, is it 14 years, I believe? Right?

Mr. DESROSIERS. Yes, sir.

Senator DORGAN. You have an enforcement mechanism for the tribe itself.

Mr. Bullis, you represent a State. I think that perhaps Arizona has the most aggressive, if you simply measure it by people, you probably have more people and are spending more money on enforcement than most other States, so you have a legitimate mechanism at the State level. And some of the tribal chairs will say, well, if we have the tribal enforcement, you have State enforcement, you do not need triplicate levels of enforcement. But the honest fact is,

most States do not have an aggressive State enforcement mechanism and they are not funding it. That is just the honest facts.

That is why I come to a conclusion different than you, Mr. Chairman, and the other chairmen of the tribes in the Northern Great Plains. I really believe it is in the interests of Indian tribes, as the other two witnesses have suggested, for this Congress to proceed with some legislation.

Now, having done that, or preparing to do that, at least, let me make a couple of other observations. Contracts, I think, Mr. DesRosiers, you and Mr. Bullis have both pointed out that the contracting provision in the proposed legislation probably should be altered. And I think also the commission chairman suggested the same thing. I happen to feel the same. My guess is that the offering of the chairman, well I know this to be the case, was an attempt to put something out there and then let's evaluate how you make some changes to it in a way that makes some sense.

Obviously we do not need to have some sort of national scrutiny for somebody providing linens for a gaming facility in Northern South Dakota, for example. So I think the testimony you have given today about that is very helpful. I think not only that, but in three or four other areas, background checks and other things, are helpful.

One thing that I would like to ask about is the number of vendors. You indicated there are some 400 vendors, Mr. DesRosiers, providing gaming machines. Are those national or is that just in Arizona?

Mr. DESROSIERS. No; I am sorry. I don't know where you came up with that.

Senator DORGAN. How many different vendors, let's assume that you want to buy new slot machines. How many vendors would you look to and how many vendors exist in this country from which you might make that purchase? And you are going to want to know about suitability?

Mr. DESROSIERS. Right. I would say typically, just slot machine type vendors, and I think Paul would agree, there are 40 to 50 of those. And then other gaming equipment vendors, whether it be bingo or card games and that kind of thing, there are probably another 30 or so vendors.

In our facility, we have 260 backgrounded and licensed vendors, but those include anybody that is doing any business with the casino of $25,000 or more. But just if you limit it to machine manufacturers and suppliers and gaming equipment, I think as Paul said, they have somewhere in the neighborhood of 80 such vendors. That is about right.

Senator DORGAN. Mr. Bullis, you could probably have been expected to come here and suggest that there is no need for the NIGC to take a look at class III because you probably have the resources and you feel like you have the capability. So why have you not come to tell us that? Why do you believe that class III enforcement is appropriate for the commission?

Mr. BULLIS. Senator Dorgan, as I mentioned 1 moment ago, I know that the fact that the NIGC had issued its MICS allowed the State of Arizona in its compact to incorporate that MICS into our

compact and make it stronger. I think it benefits Indian gaming, certainly in Arizona and nationally as well.

I think the importance is to strike the proper balance in each particular State between the State, the Federal and the tribal regulators, and to allow each of those regulatory legs of the stool to devote resources and to apply resources as necessary. I think in Arizona we have struck a proper balance among all the different jurisdictions.

Senator DORGAN. Chairman His Horse Is Thunder, how important is gaming to your tribe? Your tribe is a North Dakota and South Dakota tribe. You are a former college president. You have just been elected as a new tribal chair. You inherit a tribe that has enormous challenges, as do most of our tribes in the Northern Great Plains. You have a gaming facility. I believe one facility, is that correct?

Mr. HIS HORSE IS THUNDER. We have two, one in North Dakota and one in South Dakota.

Senator DORGAN. And tell me how important is that gaming facility and the revenue from it for the social services and other revenue needs that the tribe has?

Mr. HIS HORSE IS THUNDER. It is absolutely imperative, given the budget constraints that we are under today. It provides necessary services that otherwise would go unmet.

Senator DORGAN. If this committee and this Congress proceeds to enact legislation that addresses the *Colorado* decision, and gives the commission authority over class III gaming, along with some other issues, what is your response to that?

Mr. HIS HORSE IS THUNDER. I would agree with you, Senator, that the MICS are important. They are. We do believe that the rest of the provisions go too far in constraining tribes.

Senator DORGAN. Do you see any risk at all in us doing nothing, a risk that would attend to circumstances where there is not sufficient tribal regulation, there is virtually no State regulation, and we have dealt the commission out of class III gaming, which is the one that would attract probably the greatest area of abuse, if there were to be abuse by some? Do you see any risk at all?

Mr. HIS HORSE IS THUNDER. Senator, given your hypothetical that there is lack of tribal regulation, lack of State regulation, then I think at that point in time there needs to be some oversight, but again, that is where I think the MICS are appropriate, but the rest of it goes too far.

Senator DORGAN. Mr. Chairman, I think we are getting a lot of good information from people. One of the things that you and I have both talked a lot about is consultation. I think we should, as we proceed to a markup, we should keep open a record and seek to receive consultation from any tribal leaders that wish to offer that consultation in the form of written statements, so that we can have as broad a consultation as is possible from the tribes.

I think that is needed on the contracts and background checks, and a whole range of things. But I do want to say that consultation to me includes a strong feeling on my part that we as a committee should proceed to address the issue of class III gaming and the jurisdiction of the National Indian Gaming Commission. That is not anti-tribe. That is, in my judgment, in the long term the very best

interests of Indian tribes in this country, and the maintaining of the economic opportunity that exists with gaming facilities in the long term.

So I hope we will perhaps write to tribes, invite them to provide us information, and then use that information, because there are a number of variances of how we do three or four areas of this bill, that we can, should and perhaps will change as a result of this consultation.

So I think this hearing has been very important. I appreciate all three witnesses. Let me also say that Chairman His Horse Is Thunder is a new chairman. He has inherited the leadership of a tribe with a lot of challenges. I look forward to working with him on those challenges as well, in dealing with housing, health care and education.

Thank you very much to all three witnesses.

The CHAIRMAN. Thank you.

I want to thank the witnesses. We have gotten some good advice and recommendations on narrowing the definition of gaming-related contract. We certainly do not want to create bottlenecks, Mr. DesRosiers. I think we can put some parameters around it. Obviously, we are trying to eliminate an obvious evil that was a loophole in the original bill. I think most people acknowledge that, that there have been contracts where management or something entered into by the tribes which have really caused them to suffer enormous financial burdens which they never should have. It certainly was not the intent of the legislation.

So I think that is very helpful, and your other recommendations are.

Mr. Bullis, I do not often tout what we do in our State. It is kind of a waste of time sometimes. Everybody knows what kind of a wonderful place we live in. But the process that we went through in Arizona of proposing a compact, negotiating with the tribes, and then submitting it to the voters of our State for ratification was an open process.

I meet quite frequently with Arizona tribal chairmen, both gaming and those who have difficulty in gaming because of the remoteness of their location. I think this sharing revenue, sharing the slot machines has been a marvelous thing for tribes that have not been able to take advantage of the large population areas.

Everything I can see is that things work very well. Is that your view?

Mr. BULLIS. Absolutely, Senator McCain. I think things are working well. I think the relationship, I hope, between the State and the tribes in the area of gaming is a successful partnership, and we strive to make it that way.

The CHAIRMAN. That might serve as a model in the future because the people of Arizona were allowed to vote, to decide whether we wanted to enter this compact or not, both Indians and non-Indians. And a majority of them, a significant majority, decided they wanted that. I think that that has been a beneficial part of the process.

Senator DORGAN. Mr. Chairman, might I just observe that part of your population this time of the year are Dakotans. [Laughter.]

If you would like to take some credit, we would like to receive some of the credit for all those Dakotans that bring some commonsense to the Southwest.

The CHAIRMAN. And we are very, very grateful for them coming and spending the winter with us. They are notoriously cheap, but other than that we are always pleased to have those wonderful people come down and spend time with us, as many of us enjoy in the summer months to come and visit your beautiful State, and its Indian reservations. [Laughter.]

So it is a nice reciprocal relationship we have.

I thank the witnesses.

The hearing is adjourned.

[Whereupon, at 10:45 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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

Thank you Mr. Chairman and Mr. Vice Chairman for holding this important legislative hearing. I share the concern of many present here today, with regard to ensuring accountability of not only gaming tribes, but also the contractors they do business with.

Although, S. 2078 will have a substantial regulatory impact on tribal gaming, we cannot ignore that this legislation may impact the ability of Indian nations to exercise their sovereignty. Tribal governments have established gaming regulatory systems and have demonstrated their vested commitment to comply with the Indian Gaming Regulatory Act [IGRA]. As we move forward to address the regulatory authority of the National Indian Gaming Commission, I am hopeful that we proceed in a manner that acknowledges and strengthens the government-to-government relationship between the United States and tribal governments.

Due to the complex nature of the issues raised in this committee, there has been a long tradition of operating in an inclusive and bipartisan manner. I look forward to members of this committee having the opportunity to fully review proposed changes to this bill. I also firmly believe that it is in the best interest of the committee to consider the concerns raised by some tribal governments that this legislation may adversely impact them.

I thank the witnesses here today and look forward to their testimony.

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Director

PREPARED STATEMENT OF PAUL A. BULLIS
DIRECTOR, ARIZONA DEPARTMENT OF GAMING

BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS

March 8, 2006

Good morning Chairman McCain, Vice-Chairman Dorgan, Members of the Committee and Staff. My name is Paul Bullis. I am the Director of the Arizona Department of Gaming. This Department is the State agency which, along with Arizona's Indian tribes and the National Indian Gaming Commission, oversees Indian gaming in Arizona. Thank you for the opportunity to speak today.

I would like to address some of the provisions of S.2078 from the perspective of a state regulator. More importantly, I speak from the perspective of a state regulator where the State and Tribes have developed a successful partnership for the effective oversight of Indian gaming. That partnership between sovereign governments has as its cornerstone a Tribal-State Compact which is intended to "ensure the fair and honest operation of . . . Gaming Activities; maintain the integrity of all activities conducted in regard to . . . Gaming Activities; and protect the public health, welfare and safety." The Compact clarifies the responsibilities of the Tribes and State in accomplishing those goals, and ensures that the State has the resources to carry out our end of the agreement. Although the Compact is the cornerstone of our partnership, what makes the

partnership work is communication, discussion, engagement, and a process for resolving issues. In many respects the Compact and our processes for dealing with each other have themselves become institutions which help ensure a healthy and successful relationship, effective oversight of gaming, and the accomplishment of the goals of the Compact.

Let me also add that the Arizona Department of Gaming maintains a strong relationship with the National Indian Gaming Commission. We meet monthly to share information and ideas, and have occasionally shared a podium addressing different groups.

My overall message is that when considering amendments to the Indian Gaming Regulatory Act, the Committee should take into consideration success stories such as Arizona. I would hope and request that any amendments would be crafted to not disrupt those successes.

I will first address those provisions of S.2078 that deal with the National Indian Gaming Commission's role in approving gaming-related contracts and determining suitability of gaming-related contractors. These provisions would create some overlap between the activities of the Arizona Department of Gaming and the NIGC. My hope is that it would not be the intention of this Committee to pre-empt state authority in this area, especially where that state authority has been exercised effectively. I believe that language clarifying the intent of the Committee would be helpful.

Let me discuss the role of the Arizona Department of Gaming in this area. Under our Tribal-State Gaming Compacts, the Arizona Department of Gaming certifies all persons (other than regulated lending institutions) providing financing to Tribes for gaming facilities, all management contractors engaged by a Tribe to assist in the management or operation of a gaming facility, all manufacturers and distributors of gaming devices, and all persons providing

gaming services in excess of $10,000 in any one month. We look at the type of activity or product or service to determine whether the person or company must be certified.

Our certification process involves a determination of suitability. Each company, each principal of a company, and each individual providing gaming services must undergo a thorough background investigation. This includes criminal history, credit history, financial background, regulatory history and other pertinent information. Manufacturers and distributors of gaming devices, playing cards, card tables, and other items used in the play of Class III games, undergo a particularly rigorous investigation. This includes on-site visits to company headquarters and manufacturing facilities, reviews of company documents including Board of Directors minutes and financial audits, and face-to-face interviews with key personnel. Our investigators have traveled to Australia, Japan, Spain, Slovenia, and other locations to conduct their reviews. Tribal regulators are also required to license each of these persons and companies.

The universe of persons required to be certified by the Arizona Department of Gaming is much larger than, and includes, the universe of gaming-related contractors defined by S.2078. Moreover, I believe that we conduct a thorough investigation sufficient to protect the public and ensure the integrity of Indian gaming. We also recognize our responsibility to Indian gaming nationally. In other words, if a person is unsuitable to be in Indian gaming in Arizona, they are most likely to be unsuitable everywhere. We therefore try to share information with fellow regulators around the country to ensure that bad actors are not allowed to simply go forum shopping until they can slip through the cracks somewhere.

There is, though, a role laid out for the NIGC under S.2078 in this area where there is no overlap. That is the area of review and apporoval of gaming-related contracts. The Arizona Department of Gaming reviews only the suitability of the vendors, we do not review the terms of

the agreements themselves, nor do we approve those agreements. That would be within the purview of the NIGC. In this area, there is no overlap between the NIGC and the Arizona Department of Gaming because we do not perform the same function.

However, in that area of contract review where the Arizona Department of Gaming does play a role, i.e., in the suitability determination for the contractors and vendors themselves, we would hope that the intent of Congress would not be to pre-empt the role of states such as Arizona in this area where we have performed effectively, but rather to encourage states who are already performing that role. The Arizona Department of Gaming does an effective job of protecting the public and the integrity of Indian gaming in this area, and we have the resources to perform that job effectively.

I would also like to address the proposal contained in S.2078 to clarify the NIGC's authority to promulgate Minimum Internal Control Standards. Governor Janet Napolitano has previously addressed this issue in her letter of October 4, 2005 to this Committee. I have attached a copy of that letter to this testimony for your convenience. Let me summarize Gov. Napolitano's position. When the State and Tribes were negotiating the current Compact, the NIGC's Minimum Internal Control Standards applying to Class III gaming were in effect. The State and Tribes recognized the importance of internal controls in the operation and regulation of casinos, and so incorporated the NIGC's MICS in one of the appendices to the Compact. In fact, in many instances the State and Tribes agreed to make those controls stronger than what the NIGC required. If the NIGC had not issued its Minimum Internal Control Standards, which had to be complied with in any event, I am quite certain that our Compact would not contain comparable controls. The point to be made is that the existence of the NIGC's MICS, issued under the NIGC's presumed authority at the time, was instrumental in making Arizona's

Compact as strong as it is in terms of protecting the integrity of gaming. We therefore support language in S.2078 clarifying that the NIGC has authority to issue Minimum Internal Control Standards governing Class III gaming.

In conclusion, I believe that there is effective oversight of Class III gaming in our state, and that the NIGC's Minimum Internal Control Standards have played a role in achieving that. I reiterate my request that any amendments to IGRA be crafted to avoid upsetting successful Tribal-State partnerships such as that in Arizona. Thank you.

STATE OF ARIZONA

JANET NAPOLITANO
GOVERNOR

OFFICE OF THE GOVERNOR
1700 WEST WASHINGTON STREET, PHOENIX, AZ 85007

MAIN PHONE: 602-542-4331
FACSIMILE: 602-542-7601

October 4, 2005

The Honorable John McCain
United States Senate
241 Russell Senate Office Building
Washington, DC 20510

Dear Chairman McCain, Senator Dorgan, and Members of the Senate Committee on Indian Affairs:

I write concerning the Federal District Court's recent decision in *Colorado River Indian Tribes v. National Indian Gaming Commission*, 2005 WL 2035946 (D. D.C. Aug. 24, 2005) ("CRIT decision"), and the Committee's recent hearings concerning the regulation of Indian gaming.

In the *CRIT* decision, the Court concluded that Congress intended Indian tribes to work cooperatively with states to develop the framework for regulating Class III Indian gaming through the Tribal-State Compact Process. The Minimum Internal Control Standards regulations ("MICS") issued by the National Indian Gaming Commission ("NIGC") were held to be beyond the agency's statutory authority. In light of the *CRIT* decision, the NIGC is seeking legislation to authorize it to issue Minimum Internal Control Standards regulations.

In Arizona, both the State and Tribes recognize the critical role that strong internal controls play in the operation and regulation of casinos. As part of our compact process, the State and Tribes agreed to a set of Minimum Internal Control Standards that are patterned after, and in many areas exceed the requirements of, the NIGC's MICS.

I believe that the oversight of Indian gaming in Arizona reflects the proper balance of the roles of Tribal, State and federal regulators. This balance was achieved through the compact process, approved by the voters, and is consistent with NIGC's role in adopting and enforcing its MICS.

If the NIGC's role or authority had been different when our current compacts were negotiated, we likely would not have achieved the proper balance of the roles of the Tribal, State and federal regulators. Likewise, if Congress amends the Indian Gaming Regulatory Act ("IGRA") to change the role and authority of the NIGC from what it was when our compacts were negotiated, the roles of the three regulatory arms may no longer be in the proper balance in Arizona today.

I would encourage the Committee to give serious thought and deliberation before undertaking any amendment to IGRA that would alter the role or authority of the NIGC. At a minimum, I would strongly encourage the Committee to provide ample opportunity for consultation with Indian tribes and affected State governments.

Yours very truly,

Janet Napolitano
Governor

PREPARED STATEMENT

OF

STANLEY CROOKS, CHAIRMAN
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

FOR THE

SENATE COMMITTEE ON INDIAN AFFAIRS

HEARING

ON S. 2078

MARCH 8, 2006

Mr. Chairman and Committee Members, I appreciate the opportunity to provide this statement to the Committee for the record of the hearing on S. 2078, a bill to amend the Indian Gaming Regulatory Act.

The Shakopee Mdewakanton Sioux Community opposes S. 2078 and believes this legislation, if enacted, would represent a significant step backward for Indian gaming and for Indian self-determination. Attached is a statement of the reasons why we believe the Senate Committee on Indian Affairs should reject specific sections of S. 2078. The bill is flawed both for what it does and what it does not do.

To recap the enclosure, the bill does not contain any provisions to address the concerns of Tribes about the continuing pressure on the part of state governments to force revenue sharing on tribal gaming operations. It does not address the need to clarify the Secretary's role in issuing class III procedures when a state refuses to negotiate a class III compact in good faith. Finally, the bill does not clarify that class II aids are exempt from the Johnson Act.

What the bill would do is subject tribal gaming to yet another layer of regulation by having the National Indian Gaming Commission regulate class III gaming. This undermines the very structure of IGRA – namely that, in order for Tribes to conduct class III gaming and thus be exempt from the Johnson Act, a tribal/state compact for the regulation of class III gaming must be negotiated and approved by the Secretary of the Interior. S. 2078 does not say how the existing structure would integrate with a new "super NIGC" system of regulation. Nor does it describe how such a new regulatory system would be funded. Tribes engaged in class III gaming are subject to some NIGC regulations and already pay hefty fees for approval of ordinances, receipt of audit reports and similar housekeeping tasks.

The IGRA does not grant NIGC regulatory authority over class III gaming. If the Congress wants to change that, it should abandon the tribal/state compacting process altogether. We believe that Tribes are more capable than the NIGC of regulating gaming operations. SMSC

has been regulating our successful gaming operations for over 20 years, starting with our bingo gaming before IGRA. It is insulting and patronizing to our tribal government – with an unblemished history of regulation – to give NIGC unnecessary authority to regulate all of our class III activities. As a government, we are far more qualified to regulate these activities. For the record, we follow the MICS that have been published as regulations by the NIGC (ours are even stronger) but I would also point out to the Committee that these very same MICS were first drafted by a group of *tribal regulators* for all gaming tribes to follow on a voluntary basis. We expected NIGC to issue the MICS as guidelines. In our view, they overstepped their authority when they issued the MICS as regulations.

We urge that new class III authority to NIGC be withdrawn from the bill. If necessary, a requirement for MICS could be included as part of the tribal gaming ordinance provisions of IGRA.

S. 2078 would also require the NIGC to enter into the Revenue Allocation Plan (RAP) structure and "monitor and enforce" tribal decision making on how it spends its gaming *and non-gaming* revenues. While IGRA proscribes the uses to which gaming revenues may be put, it also requires the Secretary of the Interior, the trustee, to approve any RAP that provides for per capita payments. It would be very overreaching for the NIGC to now enter into this process and step into the shoes of tribal governments to enforce a tribal ordinance. This would be outside the bounds of the government-to-government relationship that is the guiding principle of our democracy under the U.S. Constitution. Tribes expect the Secretary of the Interior to provide guidance, if sought, and some oversight (because of IGRA) but they do not expect a federal criminal regulatory agency to enforce a tribe's own ordinance with respect to the spending of both gaming and non-gaming revenues.

We urge this section be stricken or significantly rewritten.

The Tribe cannot understand the provisions covering "gaming-related" contracts. This section of the bill, if retained, needs to be significantly rewritten. Otherwise, the NIGC will be inundated with thousands of contracts that they cannot possibly process in a timely manner and most contracts would have little to do with the actual gaming activities.

The Committee should determine exactly what contracts between tribes and outsiders it deems most susceptible to abuse and focus on granting NIGC authority to oversee such contracts. For example, if the Committee believes it is necessary for NIGC to review the financial terms of contracts for lending, development, consulting and management of gaming activities (rather than having tribes work with banks, lending institutions or investment firms for review of such contracts), that would be a narrower and more focused activity.

Finally, we address the troublesome issue of section 20. To deny an economic opportunity to a tribe with few natural or other resources, even when a welcoming host community desires to partner with such a tribe, is puzzling and does not seem to be the American way. No other sector of the economy has ever been constrained in the manner S. 2078 proposes to constrain tribes. Under current law, if a local community does not want a tribal casino, it will not have one. But, if the community does want one, the opportunity is there. Under S. 2078, if a

local community wanted a tribal casino, it would not happen. There is simply no evidence that this makes sense from a public policy standpoint.

We suggest that this section be revisited. For the record, SMSC opposes gaming off reservations but we do not wish to preclude other tribes from pursuing opportunities.

Thank you for your consideration of SMSC views on S. 2078.

Why the Senate Committee on Indian Affairs Should Reject S. 2078

- **The bill, S. 2078, which is now pending before the Senate Committee on Indian Affairs ("SCIA"), poses a great threat to Indian tribal sovereignty and represents a radical shift in federal Indian policy. The rationales advanced in support of S. 2078 are simply not supported by the facts.**

- **The underlying principles and policies of federal Indian law that Congress very carefully considered during passage of the Indian Gaming Regulatory Act ("IGRA") in 1988 still pertain today.**

- **A simple desire to revisit the federal Indian gaming law should not be the basis for amending the law in a way that undermines Indian sovereignty and federal Indian law and policy.**

- **The SCIA should also reject S. 2078 for what it does <u>not</u> do:**

  <u>Revenue Sharing</u>: S. 2078 does not address the issue of pressure from states for revenue sharing from tribes in return for negotiating tribal/state class III gaming compacts. While IGRA precludes any tax or assessment by states on tribal gaming (except amounts required to perform regulatory functions), the states persist in requiring tribes to make "voluntary" payments on a percentage of gaming revenue in return for compacts. These are in addition to agreements with local communities for mitigation of impacts.

  <u>Seminole</u>: S. 2078 does not address the right of tribes to conduct class III gaming when a state allows such gaming for other persons or entities but then refuses to negotiate with the tribes in good faith as required by federal law. Tribes cannot sue because of the 11th Amendment (the *Seminole* case) even though IGRA provided for such suits.

  <u>Class II Aids (the Johnson Act)</u>: S. 2078 does not affirm that class II aids to the games of bingo, lotto and pull tabs are not Johnson Act gambling devices. Despite at least five federal court decisions, the Department of Justice continues to insist that the aids are Johnson Act devices, even those same aids that have been approved as class II aids by the NIGC or have been approved by courts as class II aids.

I. NIGC Regulation of Class III Gaming

The SCIA Should Soundly Reject NIGC Regulation of Class III Gaming Because:

- **The provisions of S. 2078 would overturn the carefully constructed tribal/state compact provisions of IGRA by providing for additional, unnecessary and potentially conflicting regulation of class III gaming by the National Indian Gaming Commission ("NIGC").** In his August 24, 2005 decision in *Colorado River Indian Tribes v. National Indian Gaming Commission*, Judge Bates of the Federal District Court for the District of Columbia said that the division of responsibility between the federal, tribal and state governments is the "backbone" of IGRA and that it "reflects a compromise achieved only after years of negotiations." S. 2078 would completely undermine this compromise and produce a regulatory chaos that is in no one's interest.

- **Under IGRA's structure, tribal/state compacts are required for the operation of class III casino-type gaming. Over 200 such compacts are now in effect.** These compacts have been negotiated by tribes and states and approved by the Secretary of the Interior. S. 2078 does not address how these state and tribal compacts will fit into a new regulatory scheme where the NIGC is given virtually complete regulatory authority over class III gaming.

- **The factual record shows no basis for changing the current structure under which tribes and states regulate class III gaming.** From 1992 to 2005, Congress conducted 36 hearings on Indian gaming: 21 in the Senate and 15 in the House (see attached list). There were no reports that NIGC regulation of class III is needed in cases where tribal/state compacts are in place. While many officials from the Department of Justice, the FBI, the NIGC, the Treasury Department, and the Department of the Interior testified at these hearings, there is nothing in any of the hearing records to suggest that Indian gaming is not properly regulated. In fact, the records of those hearings show the opposite: Indian tribal gaming is the most regulated gaming in the country.

- **States oppose the grant of jurisdiction over class III to the NIGC.** The States of Arizona and Wisconsin have weighed in on this issue and oppose NIGC interference in tribal/state regulatory systems. Other states have also indicated opposition.

- **The notion that tribes need more regulation is a serious insult to tribal governments that have sophisticated regulatory systems in place to comply with tribal law, tribal/state compacts and IGRA.**

- **Another large, costly and burgeoning federal bureaucracy should not be authorized when the need is simply not there.** Gaming tribes now pay for the regulatory activities of their own commissions, they pay the fees for state regulators, and they also pay fees to the NIGC based on a percentage of class III revenues. To ask them to foot the bill for an unnecessary addition to the federal bureaucracy is totally unreasonable. With the added duties (duplicative), the costs for NIGC regulation of class III gaming would probably

increase from the current $18 million to $50 million or more. Tribes already expend nearly $300 million annually for regulation at the tribal, state and federal levels.

- **At the very least, if Congress gives the NIGC unnecessary and conflicting authority over class III, Congress should appropriate federal funds to support the additional activities.**

- **NIGC has asked for this new authority. That is not reason enough to grant it.**

II. Section 20 Land into Trust Acquisitions for Gaming

The SCIA Should Soundly Reject the Proposed Changes to Section 20 Because:

- **S. 2078 would make drastic changes to section 20 of IGRA which bans gaming activities on land acquired in trust after October 17, 1988 unless one of several exceptions is present.** Currently, there are four exceptions to the section 20 ban: (1) First, an "economic" exception that only applies after a Secretarial "best interest determination" that gaming on the land is in the tribe's best interest and would not be detrimental to the local community ***("the two-part test")***. Under current law, the Governor of the State where the land is located has an absolute veto over the Secretary's best interest determination. Second, the exceptions apply to tribes that are (2) ***recognized*** through the Federal Acknowledgement Process (FAP); or (3) that are ***restored*** to federal recognition by Congress, administrative action or the courts. Finally, there is also an exception for (4) land taken into trust as part of the ***settlement of a land claim***.

--For the two-part best interest determination

- **The bill proposes to eliminate this exception even though *only three tribes* have successfully used this process in 18 years**. The exception is available but it is very difficult to achieve. It has worked well because it balances tribal, federal and state interests in the determinations and adverse impacts on local communities are weighted very heavily.

- **Tribes with remote reservations and few opportunities for economic development should not be denied the opportunity to team up with a *welcoming* nearby host community to explore and hopefully conduct economically beneficial class III gaming. From any point of view, it makes no economic sense to preclude tribes from exploring opportunities to conduct business.** It is akin to Congress forbidding a company like WalMart the opportunity to do business anywhere in the United States because some communities are opposed to large retail stores. Why would Congress want to do that? The two-part determination will not be successful if it is detrimental to the surrounding community.

- **Congress should not be closing the door to continued growth of the Indian gaming industry.** Indian gaming has become a successful business nationwide, employing hundreds of thousands of people, Indian and non-Indian alike. It does not comport with principles of capitalism and free enterprise to shut the door to further growth, whether on or off a tribe's current reservation.

- **Local politics determine the outcome when a tribe seeks to open a casino off its reservation. Current IGRA law requires acceptance by the local community for off-reservation gaming to occur.**

--For Initial Reservations of Newly Recognized Tribes and Land Restored to Restored Tribes

- **S. 2078 would require that newly recognized tribes and restored tribes must have a "temporal, cultural, and geographic nexus to the land" that is subject to the exception.** While the meaning of "temporal" is vague and uncertain, this provision is not otherwise objectionable. SCIA staff has indicated that additional burdens may be placed on the acquisition of land for new tribes and restored lands. By comparison, Chairman Pombo of the House Resources Committee is considering a bill that would require newly recognized and restored tribes exceptions to go through the two-part determination in order to conduct gaming on their new reservation lands.

- **Additional burdens are not warranted because IGRA's exceptions are designed to make these tribes whole – to put them in the position where they would have been but for accidents of history or official misdeeds by the United States or the states.**

--For Land Claim Settlements

- **IGRA provides that land taken into trust as part of the settlement of a land claim is exempt from the ban on gaming in section 20. The bill, S. 2078 would, astonishingly, require that the settlement land must be in the same state as the tribe's current or last recognized reservation.** Since many tribes in the eastern United States were forcibly removed by the government from their ancestral states to other states farther west, especially to Oklahoma, the settlement land must necessarily be in the former state, not in the state where the tribe is now located.

- **To deprive states and tribes of the opportunity to use settlement land for gaming would mean the loss of an important potential tool in settlement agreements.**

- **There has been no abuse of the land settlement exception -- it has been used only once since 1988.**

- **Because only Congress can extinguish underlying Indian title, Congress must approve all land claim settlement agreements. Thus, there is already an absolute final check against any potential misuse of this section.**

- **To further guard against potential misuse of the land claim exception, the Department of the Interior and the Department of Justice could be required to certify to the states and to the Congress the legitimacy of the underlying claim.**

III. Revenue Allocation Plans

The SCIA Should Soundly Reject the Proposed Changes to RAPs Because:

- **IGRA provides a variety of uses for which a tribe's gaming revenue may be used.** It allows for per capita payments to members when income is sufficient to provide for most tribal needs. However, if a tribe makes per capita payments, it must first adopt a revenue allocation plan (RAP or Plan) that must be approved by the Secretary of the Interior.

- **Under current law, only the Secretary of the Interior, as trustee, has a role in a tribe's use of its gaming revenues.** While the right of tribal governments to determine the use of tribal income was circumscribed by IGRA, Congress was also sensitive about putting parameters on tribal decision-making and this is evidenced by the fact that it deliberately gave the Secretary the authority to approve RAPs, not the NIGC.

- **S. 2078 requires the Secretary to make a determination that the RAP is consistent with IGRA's prescribed uses for gaming revenues and whether per capita payments are reasonable. The Secretary must also determine that the Plan contains an adequate mechanism for monitoring and enforcement of the Plan by the Secretary <u>and</u> the Chairman of the NIGC.**

- **For the first time in 18 years, the NIGC would be authorized to *monitor and enforce* a tribe's compliance with its own plan.** There is no factual evidence to support that granting this authority to the NIGC is justified or warranted.

- **A federal regulatory agency such NIGC should not have any role in tribal decision making on tribal revenues.** At the least, this would be an affront to tribal sovereignty and, at the worst, paternalistic and intrusive.

- **S. 2078 does not address the validity of existing RAPs.**

IV. Gaming Related Contracts

The SCIA Should Soundly Reject the Proposed Changes to Gaming Contracts Because:

- **A 17-page section of the bill would make radical changes to section 12 of IGRA (25 USC 2711), the section that provides for NIGC approval of management contracts. Again, there is no factual basis for this complex, unwieldy and unnecessary expansion of NIGC authority to review and approve or disapprove any contract of $250,000 or more entered into in connection with the development or construction of any Indian gaming facility.**

- **Both NIGC and tribal gaming commissions would be required to investigate and license all owners with more than 5 percent interest in the contract and all gaming related contractors.**

- **Instead of focusing on discrete areas of the law that need attention, S. 2078 creates a system that would actually provide a disincentive to lending institutions because of the uncertainty of approval/disapproval requirements. In fact, months or even years after a contract has been "deemed" approved, the NIGC would have full authority to require amendments, suspend performance or even void the contract.**

- **Similarly, the NIGC would have 90 days to determine if a contractor is suitable. If the Chairman fails to make a determination in that time, suitability would be presumed to exist. However, at any time – even years later, based on a showing of "good cause" – the Chairman could revoke that suitability. As such, there is no incentive to make the determination sooner rather than later.**

CONGRESSIONAL OVERSIGHT HEARINGS ON IGRA 1992-2006

SENATE

102nd Congress

2/5/92 - Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act, Pt. 1

3/18/92 - Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act, Pt. 2

5/6/92 - Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act, Pt. 3

103rd Congress

4/20/94 - Oversight Hearing: Indian Gaming Regulatory Act, Pt. 1.

4/26/94 - Oversight Hearing: Indian Gaming Regulatory Act, Pt. 2.

5/17/94 - Oversight Hearing: Indian Gaming Regulatory Act, Pt. 3.

7/19/04 -- Legislative Hearing on S. 2230, "The Indian Gaming Regulatory Act Amendments of 1994." Pt. 1

7/25/94 -- Legislative Hearing on S. 2230, "The Indian Gaming Regulatory Act Amendments of 1994." Pt. 2

104th Congress

6/22/95 -- Joint Legislative Hearing on S. 487, "The Indian Gaming Regulatory Act Amendments Act of 1995"

7/25/95 -- Legislative Hearing on S. 487, "The Indian Gaming Regulatory Act Amendments Act of 1995"

5/9/96 -- Oversight Hearing on the Impact of the U.S. Supreme Court's Recent Decision in Seminole v. Florida on the Indian Gaming Regulatory Act of 1988

105th Congress

10/29/97 -- Legislative Hearing on S. 1077, "The Indian Gaming Regulatory Act Amendments Act of 1997"

4/01/98 - Oversight Hearing on S. 1870, "The Indian Gaming Regulatory Improvement Act of 1998"

106th Congress

3/24/99 - Legislative Hearing on S. 399, "The Indian Gaming Regulatory Improvement Act of 1999"

107th Congress

7/25/01 - Oversight Hearing on the Indian Gaming Regulatory Act

108th Congress

5/14/03 - Oversight Hearing on the Role and Funding of the Federal National Indian Gaming Commission (NIGC)

7/9/03 - Oversight Hearing on the Indian Gaming Regulatory Act

3/24/04 - Legislative Hearing on S.1529, "The Indian Gaming Regulatory Act Amendments of 2003"

109th Congress

4/27/05 - Oversight Hearing on Regulatory of Indian Gaming

6/28/05 - Oversight Hearing on the Regulatory of Indian Gaming

9/21/05 - Oversight Hearing on Indian Gaming: Regulatory of Class III Gaming

HOUSE

102nd Congress

1/9/92 - Hearing to examine implementation of the Indian Gaming Regulatory Act

2/4/92 - Hearing to examine implementation of the Indian Gaming Regulatory Act

103rd Congress

4/2/93 - Oversight Hearing on the Indian Gaming Regulatory Act, Part 1
6/7/93 - Oversight Hearing on the Indian Gaming Regulatory Act, Part 2
6/25/93 - Oversight Hearing on the Indian Gaming Regulatory Act, Part 3
6/27/93 - Oversight Hearing on the Indian Gaming Regulatory Act, Part 4
10/5/93 - Oversight Hearing on the Indian Gaming Regulatory Act, Part 5

104th Congress

6/22/95 -- Joint Legislative Hearing on S. 487, "The Indian Gaming Regulatory Act Amendments Act of 1995"

2/26/96 - Legislative Hearing on H.R. 497**, "The National Gambling Impact Policy Commission"

**Became Public Law No: 104-169

105th Congress

5/1/97 - Oversight Hearing on the provision that removed the Narragansett Indian Tribe of Rhode Island from the coverage of the Indian Gaming Regulatory Act.

106th Congress

107th Congress

4/17/02 - Legislative Hearing on H.R. 103, "Tribal Sovereignty Protection Act."

108th Congress

7/13/04 - Oversight Hearing on Gaming on off-reservation restored and newly-acquired lands

10/8/03 - Oversight Hearing on "Tribal Self Governance Issues"

109th Congress

11/09/05 - Oversight Hearing on "The Second Discussion Draft of Legislation Regarding Off-Reservation Indian Gaming"

3/17/05 - Oversight Hearing on HR ____ (Pombo), to amend the Indian Gaming Regulatory Act to restrict off-reservation gaming, and for other purposes

DC01/ 501174.1

March 3, 2006

The Honorable John McCain, Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, D.C. 20510

Re: Testimony before the Committee on March 8, 2006 regarding S.2078 (IGRA Amendments)

Dear Mr. Chairman and Committee Members,

First let me express my sincere appreciation for the honor and privilege of having been invited to testify on proposed amendments to the Indian Gaming Regulatory Act.

I have been serving Tribal governments as a full time gaming regulator for approximate fourteen (14) years. I am currently the Gaming Commissioner for the Viejas Band of Kumeyaay Indians in Alpine, California. I also have the privilege of serving as the Chairman of the National Tribal Gaming Commissioners and Regulators (NTGCR) organization.

My role, and that of my regulatory colleagues, is that of a governmental servant. As such, we are continually challenged with the task of implementing and enforcing the gaming laws that our elected leaders enact both on a Tribal and Federal level. On many occasions, those laws have well intended provisions which seem simple and clear in the minds of the authors, however the actual written language often is found to be incredibly cumbersome or sometimes virtually impossible to implement or enforce in the practical regulatory environment. For this reason, I compliment the committee for its willingness to listen to those of us on the Tribal and Federal level who will be responsible for implementing changes to the Act.

We fully appreciate the perceived need to amend the Act and the rationale behind the proposed changes. It is important at this point to make it abundantly clear that my comments may not be, and in all likelihood are not, representative of the opinions of all gaming Tribes.

The primary focus of my comments will be concerning "gaming related contracts" and contractors. However, I would like to briefly address two other areas.

5000 Willows Road, Alpine, CA 91901 • 619.659.1703

March 3, 2006
Page Two

First. it is our Tribal position that it is in the best interest of protecting the real and/or perceived integrity of all Indian gaming to allow the National Indian Gaming Commission (NIGC) to have the authority to promulgate and monitor compliance with Minimum Internal Control Standards (MICS) for Class III gaming activities.

However. if this authority is granted, we feel strongly that § 2710 (c) (3) relative to "Certificates of Self Regulation" must also be amended to afford Tribes the same level of relief from NIGC compliance monitoring in the Class III area as is now given for the Class II exemption. Currently. to qualify for a certificate of self regulation. the NIGC audit examination already includes a thorough review for compliance with Class III MICS. This change would give real meaning to a "certificate" and legitimize the compliance already being enforced by Tribes and validated by NIGC. It is also worth remembering that in most cases Class III regulatory monitoring is still being done by the States pursuant to Compacts.

I would also like to briefly address the proposed changes to § 2710 (b) (2) (F) related to licenses and background investigations. Part of the proposed change is technically problematic and requires a language change.

First, I should make the point clear that existing NIGC regulations. and most (if not all) states, including California in our Compacts. recognized the Tribal Gaming Regulatory Agencies as the "ONLY" licensing authority.

In the proposed IGRA changes in the section dealing with what must be in Tribal Gaming Ordinances § 2710 (b) (2) (F) (i) suggests that now Ordinances must ensure that Tribal Gaming Commissioners and key Commission employees must be backgrounded along with enterprise management and key employees. and parties to gaming related contracts.

This section is manageable, in fact we already have that requirement in our Ordinance and in our Compact.

The problem arises with the next paragraph § 2710 (b) (2) (F) (ii) (i) which suggests that all of those identified in (i) above (including Gaming Commissioners and their employees) must be "LICENSED".

Since Tribal Gaming Commissions are the only recognized licensing authority. this provision would require us to "LICENSE OURSELVES". If we don't. who will license us? NIGC? Certainly we don't want to mandate that states now would be the licensing authority, this would be inconsistent with most, if not all, Compacts.

For us to license ourselves is not a practical requirement, not to mention the creation of a huge perception problem for a conflict of interest. I beg you not to have language requiring Commissioners and their key employees to be licensed. Our Ordinance currently states that Tribal Gaming Commission employees shall be subject to background investigations and suitability requirements for employment at least as stringent as those required for Primary Management Officials of the gaming operation. Please consider similar language in IGRA.

Now in the matter of gaming related contracts and contractors, we fully understand and recognize that there is a documented history of instances where Tribes have been inappropriately exploited to profit unscrupulous contractors. Consequently, we appreciate the desire to amend IGRA to involve NIGC approval of contracts and contractors for the "protection" of Tribes. However, we find the proposed language very problematic and realistically unworkable for the following reasons.

§ 2703 (11) attempts to define "Gaming-Related Contract". Throughout the definition there are numerous references to "gaming activity". Without a very clear definition of "gaming activity", the term is open to very broad interpretations which would be all inclusive of virtually any contract the Tribe's casino enters into i.e. training, IT assistance, food and beverage, marketing studies, etc. We also believe that the Tribe should be free to develop economic enterprises such as hotels, golf courses, shopping etc. without NIGC involvement in the contracts. However, a broad interpretation of the word "ancillary" in paragraph (B) of this section could be argued to include such other tribal economic enterprises.

Paragraph (A) (ii) of this Section suggests that ANY contract which includes the contractor advising or consulting with a person that exercises material control over gaming activity (or any part thereof), will require NIGC approval with a suitability finding of the contractor. This is incredibly broad and all inclusive and as a matter of practicality, impossible for NIGC to manage.

As drafted, the language would require NIGC review and approval of hundreds of contracts every year for every Tribal gaming facility in the country, bringing business to a halt in many instances. The broad definition of "gaming-related contract" in Section 11 would encompass numerous contracts for services by contractors with no ability to significantly affect gaming activities and with no management role. Most decisions of a casino manager to contract for services are for the sole purpose of maintaining, increasing or enhancing gaming activity would, for this reason, include the casino's lease with an ice cream store like Ben & Jerry's to serve the gaming patrons and enhance the gaming experience and activity. The sheer volume of contracts requiring NIGC approval (of both business terms and contractor suitability) would be staggering and would introduce delay and uncertainty in all areas of the operations. This federal gaming regulatory agency would be in the unworkable position of second guessing the business terms of thousands of contracts and speculating on the type of bond to impose to ensure performance.

Because there is no threshold amount that triggers review by the NIGC and because Section 11 encompasses any contract related to the operation or management of gaming activity, even a contract for $500 worth of chairs by a local wood carver purchased for a poker table would require a background investigation at the vendor's expense and submission to the NIGC. Established small vendors in rural areas, where many Tribal gaming facilities are located, providing services such as electrical work and catering, would be unable to afford the cost of doing business with Tribes and unable to compete. Companies willing to do business with tribes will be in a position to corner the market by having previously approved form contracts for services and completed background investigations.

Typically a casino general manager is going to enter into numerous small contracts in a year for such things as training, customer service evaluations, marketing studies and countless other activities where outside expertise is sought for "advising and consulting" to enhance the business. Typically these contracts range in value from $10,000.00 to $100,000.00. The proposed language would require every such contract to go through NIGC. One possible remedy for avoiding this dilemma would be to set a dollar limit on such contracts of perhaps $150,000.00.

Paragraph (B) of the "Gaming-Related Contract" definition suggests that any development or construction contract of $250,000.00 or more would require NIGC approval. We believe that this dollar threshold is unreasonably low. Many, if not most, gaming facilities are in constant motion with remodeling, expansion, or improvement projects that involve contracts of $250,000.00 or more. To require every one of these contracts to have NIGC approval, and every contractor to be found suitable for NIGC, would be overly burdensome and impose major delays in projects which would negatively effect Tribal gaming operations.

As drafted, the language would include approval of contracts with vendors whose prompt and immediate services are crucial in unforeseen or catastrophic events. For instance, the sprinkler system at one Tribe's casino malfunctioned and damaged equipment necessary to run a large percentage of its slot machines. In these situations, the operation must respond immediately by quickly securing replacement parts and services which may only be available from new vendors. Likewise, during a power outage at a casino located in a remote area, a back-up generator failed. The Tribe's ability to keep its casino doors open depended upon the immediate purchase and delivery of another generator. The value of this service could not be easily judged by a regulatory agent in Washington, D.C. reviewing that contract.

The scope of contracts related to the construction of gaming and ancillary facilities would capture such vendors as wastewater consultants, architects, and environmental engineers, who are critical components for keeping a casino functioning in an environmentally sound manner, but who have absolutely no control over any gaming activity. The cream of the crop who can chose their projects will have little incentive to undergo extensive background investigations unrelated to any requirement in their profession. The diminutive threshold of $250,000 would encompass most construction and development contracts at large gaming operations. Delays for projects dependent upon starting before the rainy or winter season likewise will hinder improvements to roads, sewer systems, and facilities.

We are also concerned that if a gaming related contract is with a publicly traded company, an entirely new set of complexities come into play. Very often these publicly traded companies are wholly owned subsidiaries of other publicly traded companies. In many cases 5% or more of the stock of these companies is owned by other publicly traded institutional investment companies or banks. It is easy to see how the NIGC could easily get bogged down in backgrounding officers and directors of a myriad of companies related to one contract with a tribe which could be either gaming related or construction.

Additionally, it would seem that it would be appropriate to include contracts for private investors or financiers in this paragraph, and not limit it to development and construction contracts. Having said that, we would caution that institutional investors such as banks, mutual funds, insurance companies etc. should be exempted due to the fact that they are already regulated by other State and Federal Regulatory agencies.

As drafted, the language would require officers and stockholders of 5% or more shares in a company extending financing to undergo background investigations and suitability determinations. Most State and Federally-regulated institutional lenders, including major banks, are publicly traded companies with numerous stockholders for whom it would be impracticable and infeasible to undergo background investigations as well as to enter into agreements without final terms. Public bond issuances would similarly be infeasible. The five-year term limit (with seven only upon special consideration) will negatively impact interest rates and financing terms. The overall result will be that institutional lenders will choose not to finance Tribal gaming operations, and Tribes will be forced to go to unsavory lenders and accept less than competitive rates.

Paragraph (c) of the definition of "Gaming Related Contract" suggests that any agreement that provides for compensation fees based on a percentage of the net revenues of an Indian Tribal "gaming activity" would be a contract requiring NIGC approval. Please consider this. Virtually every Indian casino in America has "lease" and/or "Participation" agreements (contracts) with virtually every major manufacturer of slot machines for literally thousands of slot machines whereby "compensation" or "fees" are based on a percentage of revenues of the activity" of those games. Sometimes as much as 30% or

40%. This would suggest that perhaps NIGC must look at every one of those participation contracts and approve them and require background investigations and suitability determinations of all of the principals of the gaming machine manufacturers in this country and other countries. This would definitely change the commonly accepted way the industry does business.

For all these reasons, we believe that any Federal approval of gaming – related contracts should be limited to contracts between Tribes and: (i) companies that have entered into a management, consulting, or development finance (private) agreements for a gaming facility with a fee based on net revenue (including other contracts that same company or its affiliates may have with the Tribe); and (ii) contractors exercising significant material control over the gaming activity. The major institutional lenders, such as Federally regulated banks, lending institutions, and term loan lenders, and other types of regulated financing should be exempted. It would also seem imperative that to provide clarity and reasonable boundaries to the scope of what will require NIGC review, that concise and limiting definitions of "gaming activities" and "ancillary activities" must be included.

In addition, we would like to recommend that some reasonable threshold be placed on contracts before requiring NIGC review. Perhaps $50,000.00 for small operations and $150,000.00 for large operations. Likewise, the thresholds for construction contractors be tiered from $1,000,000.00 to $5,000,000.00.

For those circumstances in which the NIGC has reasonable suspicion of malfeasance, the NIGC could be provided discretion to examine the gaming contracts related thereto. Such discretion could be triggered under existing law, for instance, by NIGC review of the annual audited financial statements and MICS compliance reports submitted by every gaming facility (and conducted by outside independent auditors) and by audits and inspections conducted by NIGC agents.

It is also worth remembering that many State-Tribal Compacts have considerable provisions relative to gaming related contractors, and many Tribal Gaming Commissions have comprehensive vendor licensing programs in place.

Again, we would like to emphasize that we understand the desire to address the issue of contracts and contractors. It is neither our intent nor desire to appear as overly critical or as obstructionists. However, this is a highly complex area requiring a great deal of thought to make it reasonably workable. We share the same goals, to keep undesirables out of Indian gaming and for Tribes to be the primary beneficiaries of Tribal gaming. At the same time we must endeavor not to stifle or inhibit economic success.

Thank you again for the opportunity to present this testimony and we hope that some of our suggestions are worthy of your consideration

Sincerely,

Norman H. DesRosiers
Commissioner

STATEMENT OF RON HIS HORSE IS THUNDER, CHAIRMAN, STANDING ROCK SIOUX TRIBE FOR THE RECORD OF THE HEARINGS OF THE SENATE COMMITTEE ON INDIAN AFFAIRS ON S. 2078

MARCH 8, 2006

Mr. Chairman, my name is Ron His Horse Is Thunder. I am the Chairman of the Standing Rock Sioux Tribe of North Dakota and South Dakota. This statement on S. 2078 is being submitted for the record as a part of my oral presentation. While I am representing my own tribe before the Committee, our position reflects the views of most of the Indian tribes in the states of North Dakota, South Dakota, Minnesota, Montana, Nebraska, Iowa, and Kansas.

These tribes strongly oppose the provisions of S. 2078 as being destructive of our tribal sovereignty and our right of tribal self-government. The McCain legislation was put together with little or no consultation with, or input from, Indian tribes. In our view, we believe that it grows out of anecdotal, anti-Indian press reports on Indian gaming, the over-blown issue of off-reservation gaming, and a 'pin-the-blame-on-the-victim' reaction to the Abramoff Scandal. The committee legislative and oversight hearings on Indian gaming in 2005 and 2006 have not included testimony from major Indian tribes, but have been limited to college intellectuals, government officials and a few Indian organizational witnesses. This statement sets out in detail the grounds for our opposition to this legislation.

GAMING RELATED CONTRACTS

Section 12 of IGRA requires that any contract of an Indian tribe with an outside entity to manage a class II tribal gaming activity, and any collateral agreement relating to the activity, must be approved by the Chairman of NIGA. The section sets out standards for that approval. Most of the section 12 provisions are made applicable to class III management contracts by section 11(d)(9) of IGRA. These provisions are limitations on tribal rights. While tribes opposed these provisions, they were accepted as part of the over-all compromises of IGRA.

The bill, S. 2078, greatly expands on the powers of the Commission over the contractual authority of Indian tribes in carrying out their gaming activities. The amendments, contained in sections 2, 4, 7, and 8 of the S. 2078, would significantly erode our tribal sovereignty.

While the language of these amendments is complex and difficult to understand, their implications for Indian tribes are clear.

These amendments basically strip from tribal governments and their officials the power to enter freely into contracts relating to their gaming efforts. In any case where a proposed contract is determined by the NIGC to be 'gaming-related' in which the contractor will exercise 'material control' with respect to the gaming activity, it must first be approved by the Chairman of the Commission.

The definition of "gaming-related contract" goes well beyond contractors having material control. It includes someone who merely advises or consults with a "person exercising material

control". Does this mean a lobbyist, a lawyer, a financial advisor, or an astrologer? It includes any contract touching on the construction of a gaming facility. Does this include an architect, an artist, or a landscaper?

Not only will the Chairman have power, under the McCain amendments, to approve or disapprove the broad range of contracts entered into by Indian tribes, the Chairman is also given the power to determine if the contractor is 'suitable'. The loose language of the amendment, permitting the Chairman to decide if an entity with whom the tribe wishes to enter into a gaming-related contract is "suitable", emasculates any power Indian tribes have to decide with whom, and under what terms, they will do business. While somewhat similar to the existing language relating to management contracts, its extension to any "gaming-related contract" is excessive.

Years ago, there were many Federal laws that limited the power of Indian tribes and their members to enter into transactions with the outside world. These laws prohibited us from dealing with our property and our resources as we determined best. Indians were deemed incompetent and of limited intellectual powers as compared with the white race. It has taken the tribes many years, with the help of enlightened members of Congress, to eradicate those laws and that mentality. The Indian Self-Determination Act is a good example of that effort.

The McCain bill, by subjecting our tribal governments and administrators to the second-guessing and veto of non-tribal authorities, will return us to that era. We strongly oppose this provision.

MICS PROVISION OF S. 2078

Indian tribes reluctantly supported enactment of the Indian Gaming Regulatory Act. In spite of the comments of the uninformed media and politicians, IGRA did not give Indian tribes the right to engage in gaming. That right comes from the inherent sovereign power of Indian tribes under Federal laws and cases. The decision of the Supreme Court in the *Cabazon* case established that right in 1987. In 1988, the enactment of IGRA limited that right and subjected tribes to Federal and State controls that the tribes did not want.

Indian country fought very hard when IGRA legislation was being considered in the Congress. We sought to preserve to the greatest extent possible our sovereign right of self-government and our right to regulate our own affairs, including our gaming activities. We had strong supporters of Indian rights in Congress then, including Senator Inouye and Congressman Mo Udall.

The language and legislative history of IGRA make clear that these authors of the law intended that tribal regulatory authority over their gaming activities would be protected. Class I gaming is left solely to tribes and excluded from IGRA entirely.

With respect to class II, the Act states "Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of

this Act." IGRA only confers a limited power on NIGC to regulated gaming and gives its general monitoring powers to implement those regulations.

However, it is with respect to class III gaming that IGRA is clear that the NIGC will have no authority to regulate Indian gaming. Nevertheless, the Commission promulgated detailed minimum internal control standards for class III gaming and began to enforce them as early as 2000. These MICS are extremely onerous on tribal gaming. In commenting on this, the Federal judge in the *CRIT* decision said, "The MICS regulate the day-to-day operations of an Indian casino. They run to more than seventy pages in the Federal Register, and touch on almost every aspect of casino gaming, including cage and credit operations, game play and integrity, surveillance, and internal audits."

It was never intended by Congress that NIGC have this kind of power over class III gaming. The power of NIGC to enforce the MICS was challenged by the Colorado River Indian Tribes in Federal court. In August of last year, the Court firmly held that Congress had not empowered NIGC to promulgate and enforce its MICS against Indian class III gaming.

The McCain bill would rob the tribes of this victory for tribal sovereignty and tribal self-government. We have followed the hearings of the Indian Affairs Committee in the last year. We have not seen any record established that shows that Indian tribes are incapable of regulating their own affairs. We have seen no record established that there is a crisis or scandal in Indian gaming operations.

It is hurtful for Indian people to be told that the State of Nevada expends more than $80,000,000 a year to regulate gaming in that state while NIGC only expends $8,000,000 a year to regulate tribal gaming. Indian tribes spend over $200,000,000 a year in their self-regulation efforts.

In the state of North Dakota, the leading Indian and non-Indian officials are satisfied that the Tribal-State compacts make adequate provision for effective regulation of our gaming. We thought that this was what IGRA intended. In 2004, approximately 7 million was spent on regulation of tribal gaming in North Dakota. Over 300 personnel were assigned of this function. For the five tribes, approximately 15% of the total gaming personnel are involved in regulatory activities.

The North Dakota Tribal/State Gaming Compact requires that the five Tribal Nations, Governor, and the Attorney General must meet every two years to review and adjust any problems concerning regulatory and policy issues. These biennial reviews have taken place with both Democratic and Republican Attorney Generals and two different Governors There has been no major problem that has been reported concerning our tribal governmental gaming regulatory activities, to date. In fact, the Attorney General, on several occasions, has commented on his outstanding working relations with the Tribal Nations of North Dakota concerning his oversight responsibilities, in regards to the Tribal/State Gaming Compact Regulatory Requirements.

There is no scandal in North Dakota regarding our gaming. The rights of the participants in our gaming activities are being effectively and adequately protected through regulation under the compact.

Yet, the press and members of Congress disregard or discount these tribal expenditures. What this says to Indian people across the country is that White America does not believe that Indians people can be trusted to regulate their own affairs and protect the general public in their gaming activities. Once again, the inferior race must have the firm, guiding hand of the superior race.

We reject that attitude. We will strongly oppose it. Chairman McCain has not shown us or the general public in his hearings that we are incapable of regulating our gaming enterprises. We recognize the need for strong internal controls in our gaming establishments. The Indian tribes and people have the skills and ability to ensure that those controls are in place. We do not need the McCain bill's heavy hand on our shoulders.

NIGC CONTROL OF TRIBAL GAMING COMMISSIONS

I have stated that the Indian tribes of North Dakota feel that S. 2078 is generally destructive of Indian rights. There is one provision that is kind of the hallmark of this legislation.

IGRA currently provides that a tribal gaming ordinance, required by section 11(b)(2), must include a provision ensuring that the tribe will conduct background checks on, and license, primary management officials and key employees of the gaming enterprise. While this provision is somewhat of an intrusion into tribal self-government, it does take place through the tribe's own ordinance.

The McCain bill amends that provision to include tribal gaming commissioners and key tribal commission employees, as determined by the Chairman of the NIGC.
It is one thing for IGRA to impose a requirement on tribes, in enacting a gaming ordinance, that they do background checks on management officials and on gamine employees. It is a huge step, an unacceptable step, for the McCain bill to impose a Federal restriction on tribal government employees who are hired by the tribe to carry out governmental functions. Tribal gaming commissioners are government employees, not commercial enterprise employees.

This may seem like a small point, but it is important to maintaining the right of tribal government to make their own governmental decisions and choices. The Indian tribes oppose this provision along with the rest of S. 2078.

FURTHER RESTRICTIONS ON TRIBAL PER CAPITA PAYMENTS

Per capita payments are nothing new to Indians. Many treaties with the United States called for rations or other individual distributions to the members of a tribe. Federal legislation authorizing the distribution of money from a land claim settlement or a land claim judgment would often provide that some of the award would be paid out per capita to the members of the

tribe. In fact, a few tribes that had steady, annual tribal revenue from oil or timber or other sources would make small per capita payments.

While Indian tribes are governmental entities, they are, to some extent, like a corporation with stockholders. Tribal members are shareholders in the tribe and its resources. Just as some non-Indians own stock or bonds in corporations and receive dividend or interest payments annually, a few Indian tribes have enough revenue that they can make similar payments, called per capita payments.

IGRA imposes a restriction on the uses that tribes can make of their net gaming revenues. They have to be used to fund tribal government operations or programs, provide for the general welfare of the tribe and its members, promote tribal economic development, donate to charitable organizations, or help fund local government agencies. This is a paternalistic provision, but we recognize that it had to be included because of non-Indian concerns at the time.

We are advised that there was some sentiment to prohibit tribes from making per capita payments from that revenue. While this was rejected, IGRA does impose some limits on tribes making per capita payments from gaming revenues. The Secretary of the Interior first has to approve a plan submitted by the tribe setting out how it plans to allocate its revenue to the permitted uses.

A very few tribes engaged in gaming activities have generated revenues that permit them to fully fund all of their needs and yet have revenue left over out of which they make very significant per capita payments. Most tribes do not have that kind of revenue, although many do make small per capita payments.

These payments are apparently resented among some non-Indians and this resentment and envy is being reflected in Congress. It is amazing that, while Indian tribes and people are still at the bottom of every social indicator, this is an issue.

The McCain amendment would involve the NIGC in this matter. The NIGC has no business or concern about whether or not Indian tribes make payments from their gaming revenues.

It would also require the Secretary of the Interior, before approving a tribal resource allocation plan, to make a determination that a per capita payment is a "reasonable" method of providing for the general welfare of the tribe and its members. IGRA permits the Secretary to require tribes to show how they allocate their revenue to the authorized uses. That is enough. After that, a per capita from the remaining revenues should be solely a decision of tribal government. We strongly oppose this new instance of non-Indian paternalism and erosion of tribal sovereignty.

The McCain bill would impose a new Federal restriction on per capita payments from gaming revenues. IGRA already requires that a tribe must submit a plan to the Secretary allocating revenues to uses permitted under section 11(b)(2)(B) of IGRA before the Secretary may approve a per capita payment. The bill provides that, in addition, the Secretary must make

a determination that per capita payments are a "reasonable method of providing for the general welfare of the Indian tribe and the members of the Indian tribes". People who believe that Indian people are as competent to manage their own affairs as non-Indians should be outraged by this provision.

OFF-RESERVATION LAND TRANSFERS

The land that on which the Capitol Building sits was once Indian land. The same can be said of every acre of land in the United States. In the 500 years of European occupation, most of it was forcibly taken from us and we were left with only fragments of our former land holdings. We have been pushed back onto small reservations. In the case of tribes like Sisseton-Wahpeton, even the reservation boundaries have been disestablished by Federal law and they are left with scattered tracts of trust land. In some cases, the United States simply took all of a tribe's land and forced-marched their members—men, women, and children— thousands of miles from their homes to a strange land.

When the Congress decided to limit our right to engage in gaming by the enactment of the Indian Gaming Regulatory Act, there was an outcry by anti-Indian forces against proposals to take land into trust outside of reservations for gaming purposes. As a result, IGRA severely restricts the opportunity to do so.

In section 4, IGRA defines the term "Indian lands', for purposes of Indian gaming, to mean (1) all land inside the boundaries of a reservation and (2) any land outside of a reservation that is held in trust for a tribe or individual and over which the tribe exercises jurisdiction. The second part of the definition frightened the anti-Indian forces with the result that IGRA includes section 20.

Section 20 first provides that gaming may not be conducted on lands acquired by the Secretary of the Interior in trust for a tribe after October 17, 1988, the date of enactment of IGRA. The section includes three exceptions to this general ban.

First, the ban does not apply if the land to be taken into trust is within or contiguous to an existing reservation;

Second, the ban does not apply if the tribe in question had no reservation on the date of enactment and the land is either (1) located within, or contiguous, to the former reservations of tribes in Oklahoma, or (2) located within the boundaries of a tribe's last recognized reservation in other states.

There are many tribes in Oklahoma whose reservations were terminated and who were left essentially landless. Some tribes, such as the Sisseton-Wahpeton, had their reservation boundaries erased. The exception attempts to do fairness to these tribes.

The third exception to the ban is somewhat more complicated. It provides that land can be taken into trust off-reservation for any other tribe if (1) the Secretary of the Interior determines it is in the best interests of the tribe and not detrimental to the surrounding

community and (2) if the Governor of the State concurs with this determination. This is the so-called two-step test. Many requests have been made to the Secretary for such transfers, in many cases initiated or urged by local non-Indian governments and forces. In the nearly 18 years since IGRA enactment, only three such requests have been granted. How the press and the Congress can make a scandal out of this is beyond the understanding of the tribes.

There are three additional exceptions that have none of the requirements of the two part test. First, the findings by the Secretary and Governor are not required in the case of a land claim settlement. The Federal and State governments attempted to give their theft of Indian land a veneer of legality. We are now finding out that, in some cases, they violated Federal law, which has given rise to tribal claims to land. The exception recognizes that, in some cases, settlement of these land claims may include a transfer of land into trust for the tribe. It was thought fair to permit them to use this land for gaming. What the public, the press, and members of Congress do not understand about this exception is that any settlement of a tribal claim to land must be approved by an Act of Congress. The Congress would have complete control over what use can be made of such land.

The second exception is made for Indian groups that are newly recognized as Indian tribes through BIA's Federal acknowledgment process. If the new tribe is provided a reservation or other land base, those lands are not subject to the two-stop test. What could be fairer? In any case, it is next to impossible for these groups to receive favorable consideration in the BIA process.

The last exception is the restoration of land to tribes who have been restored to Federal recognition. During the 1950's and 60's, Congress carried out a terrible Indian policy by terminating the Federal recognition of many tribes as self-governing entities. This termination was accomplished by an Act of Congress. Beginning in 1973, this policy was reversed and Congress began a process of restoring these tribes to Federal recognition. As in the case of newly recognized tribes, these restored tribes needed a land base. It was only fair that the trust lands made available could be used for gaming. However, as in the case of land settlements, restoration can only be accomplished by a new Act of Congress and Congress has complete control over the use of such restored lands.

It is the policy of the North Dakota tribes that they do not favor off-reservation trust land acquisitions for gaming purposes. However, we strongly oppose the provision of S. 2078 that would impose new, unfair restrictions on such transfers. We view it as a part of legislation that, over-all, is destructive of tribal rights.

SEMNOLE FIX

Ever since the enactment of the Indian Gaming Regulatory Act, Indian tribes have resisted any attempt to amend IGRA. This is not because tribes are rigidly opposed to legitimate efforts to correct confirmed defects in the law. Tribes have opposed amendments to IGRA for two reasons. First, past legislation has been opposed because the amendments would have brought about further destruction of tribal rights, such as S. 2078. Secondly, however, we have

opposed amendments because we know that such legislation brought to the Senate or House floor would become vehicles for further amendments, which would destroy our gaming rights.

Senator McCain has said that tribes should not view his introduction of S. 2078 as the act of an enemy of tribal sovereignty. We have tried to view it in that light, because we are aware of the past support he has shown for the right of tribal self-government.

However, even though we view the provisions of his bill to be destructive of our rights, there is another aspect of S. 2078 that bears that viewpoint out. Every provision of the McCain bill is punitive with respect to Indian tribes. There is not one provision in it that is for the benefit of the tribes.

While the tribes have always opposed amendments to IGRA for the reasons I have said, they have also always taken a strong position that, if amendments are inevitable, the legislation must include at least one pro-Indian provision. We insist that any such legislation include a remedy to the problem created by the decision in the *Seminole* case.

When IGRA was being considered, the tribes strongly opposed any regulation or involvement of the states in tribal gaming. The states insisted upon either a prohibition of Indian gaming or the imposition of state regulation. A compromise was reached. Class III gaming was made illegal on Indian lands unless conducted pursuant to a Tribal-State compact. But, the authors of IGRA knew that leaving the matter at that point would result in states simply refusing to negotiate a compact or to negotiate in 'bad faith'. The Senate Indian Affairs Committee report on S. 555 states—

> "Under this Act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how to best encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealing with tribes in class III gaming negotiations."

This was a reasonable solution to the problem. The tribes would not have accepted IGRA if this compromise had not been reach and, I am told, former Chairman Mo Udall would not have permitted the bill to be enacted if the tribes did not find it acceptable.

That compromise was destroyed by the Supreme Court when it handed down its decision in the *Seminole* case. The Court held that Congress did not have the power to waive the States' immunity from suit in Federal court as established in the 11th Amendment to the Constitution. That decision left the tribes at the full mercy of the states in class III compact negotiations. States could now simply reject any tribal request for negotiations or, as many have done, impose the most burdensome requirements on the tribes as a price for a compact.

Take, for example the so-called revenue sharing provisions that many states have extorted from the tribes as a price for a compact. While the states call these "revenue-sharing" provisions, they are taxes by one sovereign entity upon another sovereign entity. And they are,

in fact, a violation of IGRA. IGRA makes clear that the compacting process cannot be used by the states to impose any tax or other fee upon the tribes that is not directly related to its regulatory expenses under the compact. In section 11(d)(4), the Act states—

> "No State may refuse to enter into negotiations described in paragraph (3)(A) based upon a lack of authority to impose such a tax, fee, charge, or other assessment."

Yet that is exactly what the so-called revenue sharing provisions are. But tribes have no recourse against this illegal demand because of the Court's decision.

Mr. Chairman, the provisions of S. 2078 are an insult to Indian tribes and are unacceptable. Yet, we might we willing to work with you and others on some more acceptable language to deal with the perceived problems they address if the language is consistent with our sovereignty and right of self-government. But even then, we would insist upon the inclusion of language that would address our concerns with IGRA, particularly the *Seminole* fix.

Tribes do not want IGRA opened for amendment. However, if it is opened to amendment, there is only one major provision that tribes will insist upon, and that is a legislative fix to the *Seminole* decision. IGRA was a law of compromises. Class III gaming was made illegal unless done pursuant to a compact negotiated with a State. Knowing that states would not deal fairly with tribes, it included a provision permitting tribes to sue states for failing to negotiate or negotiating in bad faith. The Supreme Court, in the *Seminole* decision, struck down that provision as unconstitutional. Now, we are being subject to hijacking by the states of our revenue and rights for a compact. We oppose the McCain bill, but, if it is to move, it must move with a *Seminole* fix.

Respectfully submitted,

Ron His Horse Is Thunder, Chairman
Standing Rock Sioux Tribe

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Testimony of Chairman Philip N. Hogen
National Indian Gaming Commission
Senate Indian Affairs Oversight Hearing
March 8, 2006

Good morning Chairman McCain, Vice-Chairman Dorgan and members of the Committee.

I am Philip Hogen, an Oglala Sioux from South Dakota, and I have had the privilege of Chairing the National Indian Gaming Commission (NIGC) since December of 2002. I commend the Committee for observing that the diversity and dramatic growth of Indian gaming since the passage of the Indian Gaming Regulatory Act in 1988 makes it timely to revisit that legislation, to address concerns that were not anticipated when it was enacted, and to attempt to further perfect something that fostered an economic miracle in Indian country. I want to direct my comments today primarily toward two issues addressed by S. 2078: the NIGC's authority over Class III gaming and gaming-related contracts.

S. 2078 – SECTION 5 - POWERS OF THE COMMISSION – CLARIFICATION OF NIGC'S CLASS III AUTHORITY

Under the Indian Gaming Regulatory Act (IGRA), gross gaming revenues have grown from approximately $200 million in 1988 to over $20 billion in 2005. Indian gaming is being conducted at over 400 locations by more than 225 gaming tribes, and this gaming is as diverse as the tribes themselves and their rich cultures.

A point that must be emphasized is that Indian gaming has not been an economic development solution for a majority of tribes, particularly those that are the most rural and remote. The economic success tribal gaming enjoys is directly proportionate to location and market opportunities, complemented by the tribes' skillful management.

With IGRA, Congress recognized that the primary regulators of tribal gaming would be the tribes themselves. Regulation of traditional and ceremonial gaming, Class I gaming, was left exclusively to the tribes to regulate. This is non-commercial gaming and plays no significant part in the revenues tribal gaming generates.

At the time of IGRA's passage, the primary Indian gaming activity was bingo generally and high stakes bingo in particular. Congress grouped into Class II gaming bingo and other games such as poker where players play against one another. Congress tasked tribes with regulating Class II gaming, requiring the adoption of tribal gaming ordinances that have to meet requirements in IGRA and be approved by the Chairman of the NIGC. Congress tasked the NIGC, which IGRA created, with an oversight role of this area. Given the primary position bingo occupied in the area of tribal gaming at the time of IGRA's passage, it would not be surprising if those in Congress that supported IGRA envisioned such Class II gaming to remain the dominant activity that would be conducted under IGRA.

IGRA grouped into Class III all remaining gambling games – those most often associated with casinos, such as slot machines and house banked card and table games. Tribes may conduct Class III gaming only in states where such activity is permissible under state law, and where the tribes enter into compacts with states relating to this activity, which compacts require approval of the Secretary of the Interior. Compacts might include specific regulatory structures and give regulatory responsibility to the tribe, to the state, or to both in some combination of responsibilities.

Since the passage of IGRA, 232 tribes have executed 249 Class III compacts with 22 states, and the allocation of regulatory responsibility, if addressed at all, is as diverse as the states that have negotiated them. Typically, the regulatory role a particular state undertook in its compact was taken from and modeled on that state's experience with the regulation of its own legalized gaming at the time the compact was negotiated. Thus, a state like Nevada, which had the most experience with the regulation of legalized gaming

and the most elaborate state regulatory structure, negotiated compacts where the state was extensively involved in compacted Class III tribal gaming. States like Michigan, which at the time it compacted had little commercial gaming and a nominal state gaming regulatory structure, opted for a minimal role in the regulation of Class III tribal gaming.

Technically created on October 17, 1988, when President Reagan signed IGRA into law, the NIGC didn't get off to a running start. It was not until 1990 that the first members of the first Commission were appointed, and after the first Commission was in place, it did not publish its first substantive regulations until 1993. In the meantime, Indian gaming was growing rapidly, and the trend that was developing was the growing dominance of Class III gaming as the primary source of tribal gaming revenues. I have attached as Exhibits 1 and 2 a timeline and growth chart depicting the growth of tribal gaming operations and revenues, the growth of the National Indian Gaming Commission's staff, and some of the benchmark developments that have occurred during this history.

IGRA declares as a purpose the establishment of the NIGC as an independent federal regulatory authority for gaming on Indian lands in order to address Congressional concerns about gaming and to advance IGRA's overriding purposes. These are to ensure that tribal gaming would be employed to promote tribal economic development, self-sufficiency and strong tribal governments; to shield gaming from organized crime and other corrupting influences; to ensure that the tribes were the primary beneficiary of their gaming operations; and to ensure that the gaming would be conducted fairly and honestly by both the tribal gaming operations and its customers. With respect to NIGC's regulatory oversight responsibilities, IGRA authorized the Commission to penalize violations of the Act, the Commission's own regulations, and the Commission-approved tribal gaming ordinances by the way of imposition of civil fines and orders for closure of tribal gaming facilities.

The diversity of tribal gaming operations is great. Both rural weekly bingo games and the largest casinos in the world are operated by Indian tribes under IGRA. As the industry grew, NIGC needed the appropriate tools to implement its oversight responsibilities.

What the Commission lacked was a rule book for the conduct of professional gaming operations and a yardstick by which the operation and regulation of tribal gaming could be measured. At that time, some in Congress expressed concerns that uniform minimum internal control standards, which were common in other established gaming jurisdictions, were lacking in tribal gaming. The industry itself was sensitive and responsive to those concerns, and a joint National Indian Gaming Association – National Congress of American Indians task force recommended a model set of internal control standards.

Subsequently, the NIGC assembled a tribal advisory committee to assist us in drafting minimum internal control standards applicable to Class II and Class III gaming. These were first proposed on August 11, 1998, and eventually became effective on February 4, 1999. With the adoption of the NIGC's MICS, all tribes were required to meet or exceed the standards therein, and the vast majority of the tribes acted to do so. NIGC's approach during that time was to assist and educate tribes in this regard, not to find fault and penalize. When shortcomings were encountered by NIGC at tribal operations, NIGC's assistance was offered and grace periods were established to permit compliance.

From the NIGC's perspective, the MICS were an unqualified success. NIGC had the rule book and measuring stick it needed to perform effective regulatory oversight, and tribal gaming regulators had guidance to assist them in achieving first-rate regulatory processes. The NIGC MICS were embraced by state regulators, several of whom adopted or incorporated NIGC MICS, or compliance therewith, in their compacts.

For six years, NIGC oversight of Class II and Class III gaming with the use of minimum internal control standards went quite smoothly. When necessary, NIGC revised its MICS, and it employed the assistance of tribal advisory committees in doing so. Each time, though, there were expressions of concern by tribes that NIGC was reaching beyond its jurisdiction under IGRA. As it did when the MICS were adopted initially, NIGC considered those arguments, but rejected them, based on the various mandates from Congress.

NIGC employed three methods of monitoring tribal compliance with its MICS. First, the MICS require that the annual independent audit of a tribal gaming operation include a review of tribal compliance with the MICS, and the results of that review, together with the balance of the audit itself, must be provided to the NIGC. Next, on a regular basis, NIGC investigators and auditors make site visits to tribal gaming facilities and spot check tribal compliance. Finally, NIGC auditors conduct a comprehensive MICS audit of a number of tribal facilities each year. Typically those audits will identify instances wherein tribes are not in compliance with specific minimum internal control standards. Almost always, the non-compliance is then successfully resolved by the tribe. NIGC is pleased that the tribe has a stronger regulatory structure, and the tribe is pleased that it has plugged a gap that might have permitted a drain on tribal assets and revenues. Although there have been instances where the non-compliance with the MICS was not resolved, in those instances the tribes were persuaded to voluntarily close their facilities until the shortcomings were rectified. NIGC has never yet issued a closure order or taken an enforcement action resulting in a fine for tribal non-compliance with NIGC MICS.

When NIGC initiated a MICS audit at the Blue Water Resort and Casino of the Colorado River Indian Tribes on its reservation in Parker, Arizona, in January 2001, the issue of NIGC's jurisdiction over Class III gaming arose. The NIGC concluded it was being denied access to perform its audit, took enforcement action, and imposed a penalty. While an arrangement was eventually negotiated that permitted the audit to be completed, the Tribe reserved its right to challenge NIGC's Class III MICS authority in court and eventually filed such an action in U.S. District Court for the District of Columbia. On August 24, 2005, the Honorable John Bates, U.S.D.J., rendered an opinion concurring with the tribe's position and finding that NIGC had exceeded its authority in issuing MICS for Class III gaming. The court wrote:

> A careful review of the text, the structure, the legislative history and the purpose of the IGRA ... 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.

Colo. River Indian Tribes v. NIGC, 383 F. Supp. 2d 123, 132 (D.D.C. 2005). While the opinion is broad, the order entered in the action is narrow. It applies only to NIGC and its relationship with the Colorado River Indian Tribes. The Court entered no injunction and did not strike down the MICS. The case is now on appeal to the U.S. Court of Appeals for the District of Columbia Circuit. The entire Indian gaming community is watching this case with interest, and it is watching S. 2078. Your bill would clarify NIGC's authority over Class III gaming generally, and in particular, it would make clear NIGC's authority to issue MICS and to require Class III operations to comply with them.

While tribes are required to report their annual gaming revenues to the NIGC, they do not necessarily break down the split between Class II and Class III revenues. Consequently, there is no exact determination of what portion of the $20 billion plus of Indian gaming revenue comes from Class II gaming and what portion comes from Class III. Nevertheless, NIGC has estimated that over 80% of total revenue is generated by Class III gaming.

It is NIGC's belief that in IGRA, Congress intended that the federal entity established to provide oversight of Indian gaming would have an oversight role with respect to the dominant form of gaming in the industry, whether bingo in 1988 or Class III gaming now. To that end, NIGC is pursuing its appeal from the ruling in the Colorado River Indian Tribes case and strongly supports the language in Section 5 of the bill which clarifies its authority.

If the NIGC role with respect to its minimum internal control standards and Class III gaming is not clarified by the courts or legislation such as S. 2078, most tribes will continue to operate first-rate, well-regulated facilities, and their tribal gaming regulatory entities will perform effectively. Others will likely not. There will be temptations, generated by demands for per capita payments or other tribal needs, to pare down tribal regulatory efforts and bring more dollars to the bottom line. There will be no federal standard that will stand in tribes' way should this occur. For the most part, NIGC will become an advisory commission rather than a regulatory commission for the vast

majority of tribal gaming. The very integrity of the now-smoothly-operating regulatory system, shared by tribal, state and federal regulators, will be disrupted. If there is one imperative change that needs to be made in the Indian Gaming Regulatory Act, in the view of this NIGC Commissioner and consistent with the legislative proposal that the NIGC sent to this Congress in March 2005, it is the clarification that NIGC has the authority to regulate Class III gaming.

SECTION 8 – GAMING-RELATED CONTRACTS

Before IGRA was enacted, 25 U.S.C. § 81 provided that those who entered into contracts with Indian tribes relating to tribal lands needed to secure federal review and approval before the contracts were valid. This requirement stemmed from historical instances of unscrupulous dealings third parties had with tribes, and inserted the federal government, as the trustee of Indian nations, into such contractual arrangements so that there would be a review to ensure that tribes were not unduly disadvantaged in those arrangements.

Recognizing that contracting for the construction and operation of gaming facilities was a complex and specialized area, IGRA took the responsibility for reviewing and approving such contracts away from the Bureau of Indian Affairs and gave it to the NIGC. Congress contemplated that tribes might find it useful to contract with experienced gaming developers and operators for the construction and operation of tribal gaming operations. Specifically, at 25 U.S.C. § 2711, Congress authorized tribes to enter into management contracts for the operation and management of their gaming activities and provided that such agreements would require the review and approval of the NIGC Chairman. Approval could only be obtained if the contract met a strict set of criteria set out in IGRA and if the contractor's principals could, after a background investigation, be deemed suitable, again in accordance with statutory criteria. I have attached as Exhibit 3 a chart reflecting some of NIGC's experience with the review and approval of management contracts.

NIGC has learned that not all contracts that involve the management of tribal gaming operations are denominated "management contracts," nor are they submitted to NIGC for review and approval. Some of these agreements are called "consulting agreements," "development contracts," or "leases." NIGC has discovered that not only did some of these agreements provide for outsiders' management, but they provided compensation well in excess of what IGRA permits for management contracts.

Further, by employing agreements purportedly not subject to NIGC review and approval, the contractors escaped the thorough background investigation and suitability determination required for management contracts. In a number of instances, tribes have been victimized by paying more under such arrangements than was conscionable, and they found themselves in business with individuals and entities that would not have secured gaming licenses had the NIGC management contract review process been employed.

Another shortcoming of the existing arrangement under IGRA for the review of management contracts is that a thorough background investigation and suitability determination is not required for contracts dealing solely with Class III gaming. As mentioned above, as the most lucrative area of tribal gaming, more than 80% of annual tribal gaming revenues comes from Class III gaming.

Finally, NIGC's enforcement ability is limited to penalizing the tribes themselves or contractors that are managing. Other nefarious individuals and entities can be out of NIGC's reach. To be effective, the scope of those subject to NIGC enforcement needs to be broader.

Also, when IGRA is reviewed, it is appropriate to focus on a means to bring greater scrutiny to the area of gaming-related contracts. As would be expected, any industry generating $20 billion in gross gaming revenues will involve a plethora of contractual arrangements. Most gaming tribes have become quite sophisticated about contracting. They do first-rate jobs of evaluating and entering into contracts for the goods and services

required to operate complex gaming operations, and they often employ thorough vendor-licensing programs.

Of the multitude of contracts tribal gaming operations enter into for their day-to-day operations, only a small minority are directly related to the conduct of the gaming activity. Most of the contracts relate to the provision of goods and services that support the gaming operation (food, beverage, non-gaming supplies, etc.). Thus, the NIGC has a concern that if it is tasked, as S. 2078 is presently drafted, to review and approve all "gaming-related contracts," broadly defined, it could become a bureaucratic bottleneck that would threaten to stifle the day-to-day operations of tribal gaming facilities. I have attached as Exhibit 4 a table listing the kinds of contracts now subject to NIGC review and approval and those "gaming-related contracts" that are reviewable under S. 2078, broadly defined.

Based upon legislative and regulatory models in tribal and other jurisdictions, one could more narrowly define the "gaming-related contracts" subject to NIGC review and approval and to define those other contracts tribal gaming operations may enter into for the goods and services they need to operate their facilities as "ancillary contracts" whose review would be discretionary. This would permit NIGC to identify and review selected contracts as needed and for cause. History has shown that corruption, including organized crime–related interests, has accessed gaming operations in a number of ways, employing service agreements relating to trash removal, food and beverage, construction, and the like. Thus, if background investigations and suitability determinations for such "ancillary contracts" were discretionary, problematic situations might be addressed while smooth and efficient operation of the vast majority of tribal gaming operations' contracts for goods and services would go unimpeded.

OTHER SECTIONS IN S. 2078

In addition to NIGC authority and gaming-related contracts, S. 2078 makes a number of other amendments to IGRA, some "housekeeping" and some more substantive. NIGC

supports the proposed amendments that are consistent with the legislative proposal that it sent to Congress in March 2005:

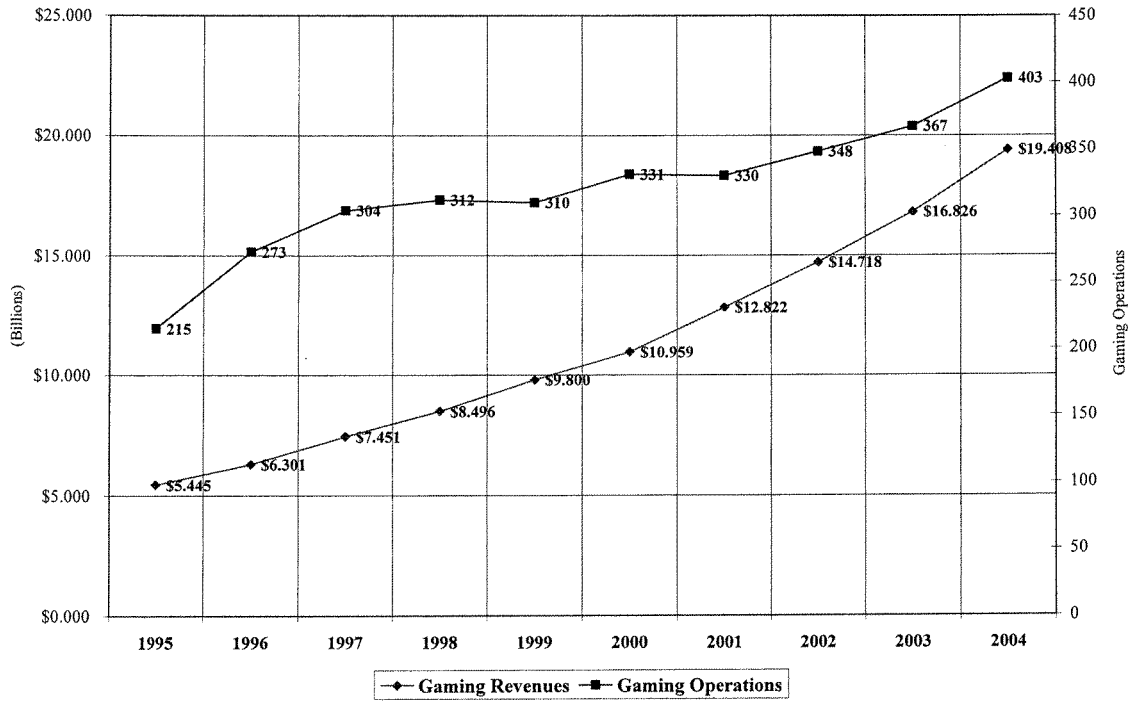
- Section 5 [25 U.S.C. § 2704] would resolve an ambiguity in IGRA. Section 2704(c) makes clear that in the absence or disability of the Chairman, or if the office is vacant, the Vice-Chairman may act in the Chairman's place and exercise the Chairman's full authority.
- Section 6 [25 U.S.C. § 2705] is closely related. Section 2705(c) explicitly authorizes the Chairman to delegate any part of his or her authority to another member of the Commission.
- Section 8 would amend IGRA to conform its various pay provisions to changes in the United States Code that came later than IGRA's adoption.
- Section 11 [25 U.S.C. § 2710] deals generally with Tribal gaming ordinances. Proposed amendments in that section would require tribal gaming commissioners to be subject to license requirements, background investigations, and suitability determinations.

As observed earlier, gaming has been an economic miracle in Indian country for many tribes who for generations languished in poverty. Whether their gaming successes have been fostered or inhibited by the Indian Gaming Regulatory Act has been hotly debated, but my experience suggests that the structure IGRA established significantly contributed to the integrity now associated with the operation and regulation of tribal gaming and is vital to its continuation and growth. Having so prospered under the existing structure, it is understandable that tribes are reluctant to make changes in this framework. But experience and the passage of time have shown that some changes are desirable, if not necessary. Thus, I believe that the limited, thoughtful amendments to IGRA proposed in S. 2078, as modified as I have suggested, will further strengthen the Indian gaming industry and the integrity it depends upon. I urge the Committee to give its favorable consideration to these changes.

I thank the Committee for the opportunity to present the views of the National Indian Gaming Commission and stand ready to respond to any questions the Committee may have for me.

Ex...oit 1

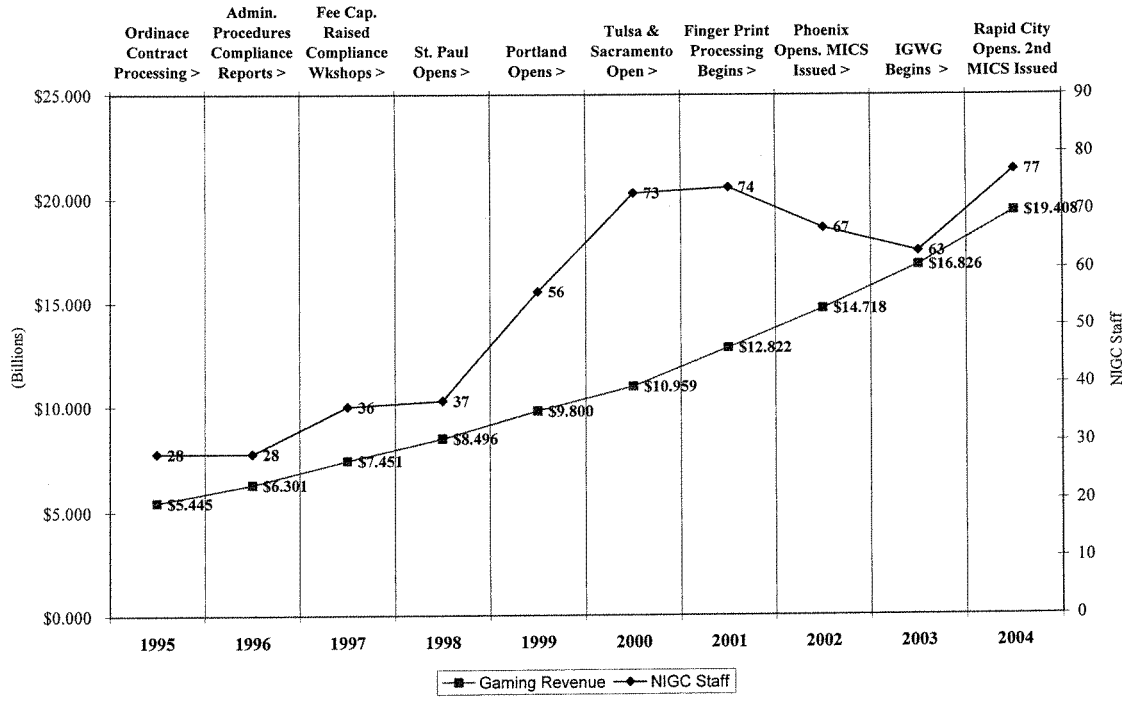
Growth in Tribal Gaming



NIGC – Senate Testimony 03/08/2006

Ex. .it 2

NIGC Staff/Growth in Gaming Revenue



NIGC – Senate Testimony 03/08/2006

Exhibit 3

Tribal-State Compact MICS Dispute Resolution Provisions

(September 2005)

State	MICS Provisions
Arizona	All Arizona compacts adopt NIGC MICS
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.
California 2004 amended Compacts	Requires testing of gaming devices.
Colorado	Tribal TICS with State review.
Connecticut	Extensive, comprehensive MICS
Idaho	Three of the four compacts include fairly general MICS. One of the compacts (Shoshone Bannock) includes only very general control language.

Exhibit 3

Tribal-State Compact MICS Dispute Resolution Provisions

(September 2005)

State	MICS Provisions
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.
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.
Louisiana	Minimal MICS; limited surveillance procedures for cashier's cash and cash control management in Appendix.
Michigan	None.
Minnesota	Some compacts have none. Others have minimal surveillance regulations for blackjack tables.
Mississippi	No MICS in Compact, but limited MICS for slot machines in gaming ordinance.

Exhibit 3

Tribal-State Compact MICS Dispute Resolution Provisions

(September 2005)

State	MICS Provisions
Montana	None
Nevada	Two compacts require following Nevada MICS, four compacts require adopting MICS at least as stringent as Nevada MICS.
New Mexico	None
New York	Comprehensive MICS, similar to NIGC's.
North Carolina	Very limited MICS. Transactions in machines recorded and stored with software; rules of play displayed.

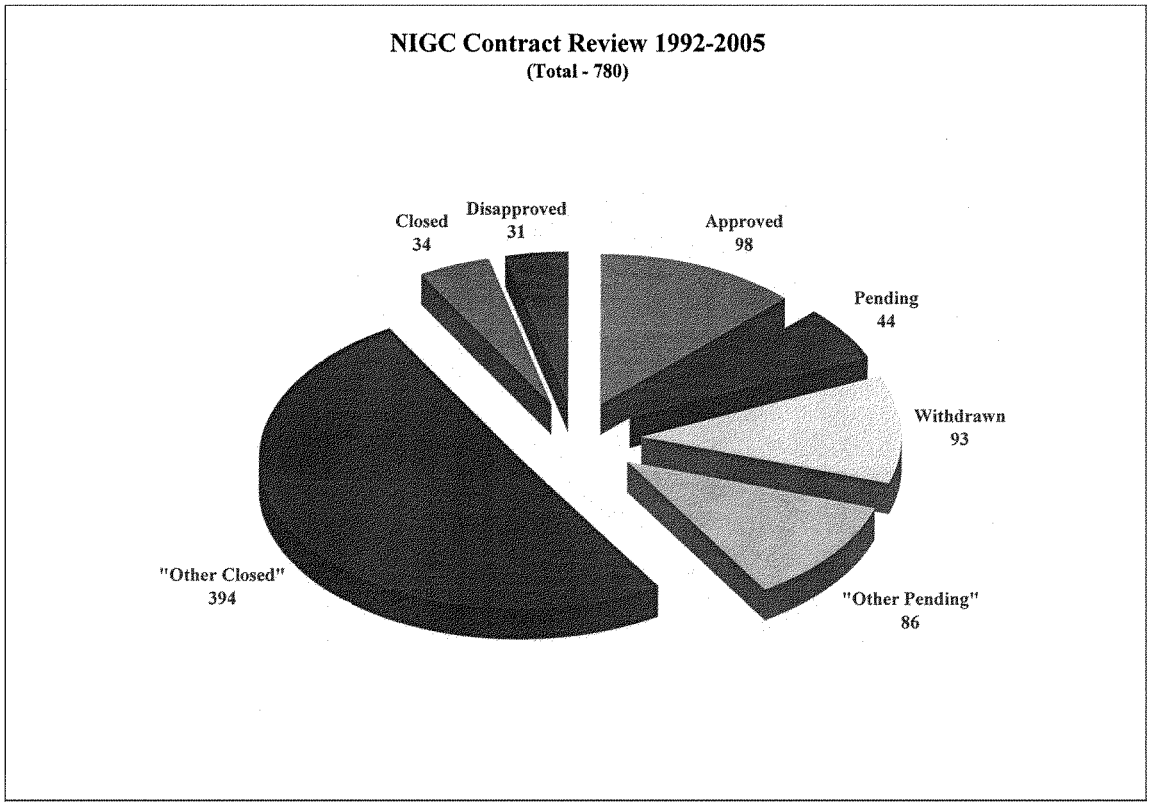
Exhibit 3

Tribal-State Compact MICS Dispute Resolution Provisions

(September 2005)

State	MICS Provisions
North Dakota	MICS are NIGC's MICS.
Oklahoma	Model compact: Tribal internal control standards must equal or exceed NIGC MICS.
Oregon	Comprehensive Tribal/State MICS (set forth in compacts)
South Dakota	South Dakota State MICS incorporated by reference.
Washington	Comprehensive MICS (set forth in compact)
Wisconsin	Tribe to use MICS at least as restrictive as NIGC's.

Exhibit 4



NIGC – Senate Testimony 03/08/2006

Exhibit 5a

Agreements Requiring NIGC Approval

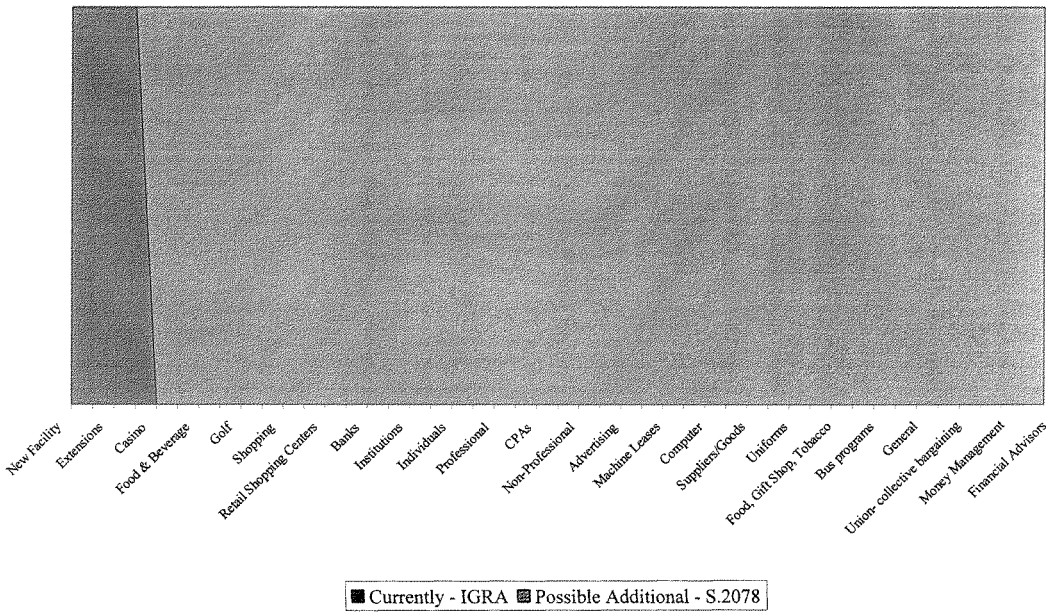


Exhibit 5b

Agreement Requiring NIGC Approval

	Current	S.2078
• **Management**		
o New Contracts- New Facility	X	X
o New Contracts- Existing Facility	X	X
o Extensions	X	X
o Revisions	X	X
o Terminated		
o Cancelled		
• **Development**		
o Casino		X
o Hotel		X
o Food & Beverage		X
o Entertainment		X
▪ Golf		X
▪ Theater		X
▪ Shopping		X
o RV Parks		X
o Retail Shopping Centers		X
• **Finance**		
o Management/Development Companies		X
o Banks		X
o Investment Bankers		X
o Institutions		X
o Hedge Funds		X
o Individuals		X
• **Consulting**		X

Exhibit 5b

Agreement Requiring NIGC Approval

• **Services**		
o Professional		X
▪ Attorney Contracts		X
▪ CPAs		X
▪ Training		X
o Non-Professional		X
o Marketing/PR		X
o Advertising		X
• **Equipment**		X
o Machine Leases		X
o Machine purchase		X
o Computer		X
o Security		X
• **Suppliers/Goods**		X
o Gaming – Chips, cards, bingo paper		X
o Uniforms		X
o Carpet, chairs		X
o Food, Gift Shop, Tobacco		X
o Utilities		X
o Bus programs		X
• **Employment**		X
o General		X
o Bonus –Participation		X
o Union- collective bargaining		X
o Temporary		X
• **Money Management**		X
o Banks		X
o Financial Advisors		X

SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON AMENDMENTS TO
THE INDIAN GAMING REGULATORY ACT
TESTIMONY OF LAURA SPURR, CHAIRWOMAN
NOTTAWASEPPI HURON BAND OF POTAWATOMI
MARCH, 2006

My name is Laura Spurr, I am the Chairwoman of the Nottawaseppi Huron Band of Potawatomi Indians. We are located in central Michigan, close to America's Cereal City, Battle Creek, Michigan. The Huron Band of Potawatomi's relationship with the Federal Government was reestablished on December, 1995. 60 Fed. Reg. 66315. Ever since that date, the Tribe has been actively seeking to strengthen our government and enhance the services that we are able to provide our tribal membership. One of the primary focal points of this effort has been to have land placed into federal trust so that we can meet the social and economic needs of our members. Having land in federal trust is vital to this effort as without the "trust status" we are unable to carry out the activities authorized by federal law, including those governed by the Indian Gaming Regulatory Act and the Native American Housing Assistance and Self-Determination Act. It is within the context of our struggle to have some of our original homeland in federal trust status that we offer testimony regarding S. 2078.

First, while we have some concerns with the legislation, the Huron Potawatomi Tribe greatly appreciates your desire to protect tribal sovereignty and in particular Indian gaming from attack.

As we stated, in 1995 after almost 150 years of struggle our government-to-government relationship with the federal government was reestablished. The work to restore my Tribe's federal recognition was done through the dedicated labor of tribal members, many of them elders, with minimal funding from the Administration on Native Americans. We did not have any other outside resources to fund our efforts and it was long underway before the advent of commercial tribal gaming in the 1980s. Once our federal recognition was restored, we diligently began the process to have some of our vast homeland restored. This effort culminated in 1999 when we filed to have 365 acres of land placed into trust. All of the land included within our application is within our ceded territory. See, e.g., Treaty of Greeneville, August 3, 1795, Stat. L., VII, 49, Eighteenth Annual Report of the Bureau of Ethnology (1899), 654-656; Treaty of November 17, 1807 (Detroit, Michigan), Stat. L., VII, 105, Eighteenth Annual Report of the Bureau of Ethnology (1899), 674-676 (Royce Area 66); Treaty of August 29, 1821 (Chicago, Illinois), Stat. L., VII, 218, Eighteenth Annual Report of the Bureau of Ethnology (1899), 702-704 (Royce Area 117); and Treaty of September 27, 1833 (Articles Supplementary) (Chicago, Illinois), Stat. L., VIII, 442, Eighteenth Annual Report of the Bureau of Ethnology (1899) (Royce Area 188).

Of the 365 acres of land, 77 acres was designated as land that we intended to operate a gaming operation on. In our application, we clearly designated this land for this purpose and sought an opinion from the Secretary of the Interior that this land met the

qualification of the "initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. 2719 (b)(B) (ii).

We have held four public meetings where we heard comments and testimony from the public regarding our proposed gaming land into trust application.. These public meetings are all part of the record in our land into trust application. In addition, our compact with the State of Michigan requires that we share 10% of our revenues with the state and local governments. Finally, we have entered into several government-to-government agreements with Emmett Township and the State of Michigan to address specific areas, including Police and First Responders, Sewer and Water and Road Improvements. These agreements not only ensure that our facility will not have any negative impacts on the local communities, but they also solidify our partnership with the local governments to revitalize this struggling region of Michigan.

In 2002, after almost three years, the Secretary issued a decision to take this land into trust for gaming. Unfortunately, this decision was placed on hold when a local anti-gaming group filed a lawsuit challenging the Secretary's decision. We joined the lawsuit supporting the Secretary's decision, as did the State of Michigan and Calhoun County. We are now in the midst of this lawsuit. In 2004, the District Court dismissed all of the legal challenges to the Interior Department's decision to take the land into trust, including that this land would meet the requirements of the Initial Reservation under the Indian Gaming Regulatory Act, but also ordered additional environmental studies to be completed. *CETAC v. Norton*, ___F.Supp. 2d ___(D.D.C. 2004). The BIA is now in the process of completing these environmental studies.

We are certain that the Secretary's decision will be upheld by the Courts and we will soon be able to enjoy the full panoply of benefits that Congress intended for tribes when it enacted the Indian Gaming Regulatory Act. In the meantime, the application for the remaining 288 acres is on hold. From our experience, you can see that a tribe that has federal recognition for almost a decade can not have any land in trust.

Thus, we appreciate S. 2078's provisions that appear to grand father applications like ours. However, we would urge the Committee to consider this provision carefully and ensure that it does not leave any discretion in the Interior Department not to move forward with applications like ours; where we have had a final affirmative decision from the Agency and are now only awaiting final action in the Courts.

We would like to thank you for the opportunity to present this testimony and would be pleased to answer any questions that you may have regarding our experiences. We look forward to working with you as you continue to consider this proposal.

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