

**“MINIMUM INTERNAL CONTROL
STANDARDS” (MICS) FOR
INDIAN GAMING**

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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OVERSIGHT HEARING ON THE “MINIMUM INTERNAL CONTROL STANDARDS” (MICS) FOR INDIAN GAMING.

**Thursday, May 11, 2006
U.S. House of Representatives
Committee on Resources
Washington, D.C.**

The Committee met, pursuant to call, at 10:07 a.m. in Room 1324, Longworth House Office Building, Hon. Richard W. Pombo [Chairman of the Committee] presiding.

Present: Representatives Pombo, Boren, Faleomavaega, Kildee, Fortuño.

STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The Committee on Resources will come to order. The Committee is meeting today to hear testimony on the issue of Minimum Internal Control Standards for Indian Gaming. Under Rule 4(g) of the Committee Rules, any oral opening statements at hearings are limited to the Chairman and the Ranking Minority Member. This will allow us to hear from our witnesses sooner, and help Members keep to their schedules. Therefore, if other Members have statements, they can be included in the hearing record under unanimous consent.

The purpose of today’s hearing is to examine the status of Minimum Internal Control Standards for Indian Gaming. In 1999, the National Indian Gaming Commission crafted a final rule providing for an objective set of detailed standards that all tribes with Class II or Class III casinos must meet or exceed running their day-to-day gaming operations.

These standards, also known by the acronym MICS, cover everything from security surveillance to the handling of coins by cashiers. The Commission has argued that the purpose of MICS is to protect and preserve the integrity of Indian gaming both for the benefit of tribal members and for a casino’s patrons. The Commission conducts audits and investigations of gaming facilities to ensure compliance and penalizes violations.

A number of tribes, however, question the legality of MICS as applied to Class III casinos. They argue that the Indian Gaming Regulatory Act of 1988 did not vest the National Indian Gaming Commission with powers to implement and enforce standards for

Class III casinos. They also said that Congress intended such matters to be handled by tribes and states through their negotiated compacts.

In arguing their case, tribes point to a large amount of money they spend on protecting the integrity of their operations. They recognize that secure and clean operations are critical to the economic future of their members. Last summer in a case filed by the Colorado River Indian Tribes, the U.S. District Court for the District of Columbia declared the Commission's regulations to be unlawful as applied to Class III gaming. This brings us to today's hearing.

It is important for members of the Committee to understand why the Commission believed it had the statutory authority for implementing MICS, to hear the tribal point of view, and to obtain an update on what tribes are doing to maintain secure gaming operations. Today's witnesses should cover all perspectives, and I look forward to hearing from them. I would like at this time to recognize Mr. Kildee for his opening statement.

[The prepared statement of Mr. Pombo follows:]

**Statement of The Honorable Richard W. Pombo, Chairman,
Committee on Resources**

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**STATEMENT OF THE HON. DALE E. KILDEE, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN**

Mr. KILDEE. Thank you very much, Mr. Chairman. I will be very brief. I would just like to welcome all the witnesses. I think I know all of you. Of course everyone knows Ernie Stevens. I see him regularly, but I also would like to call attention to Frank Ducheneaux, who used to work for this committee, and Frank helped to write IGRA when I was on the Committee. I helped in that writing, but Frank, it is good to see you back. I think you are out in Montana

now with the Great Plains Gaming Association, but always good to see all of you, and I look forward to your testimony.

The CHAIRMAN. Thank you. I would like to call up our panel of witnesses. Although I do not often have panels with six witnesses, members have very busy schedules today and having everyone at the table may allow for some interaction and responses between the witnesses.

Today's witnesses are Mr. Phil Hogen, Chairman of the National Indian Gaming Commission; Mr. Ernie Stevens, Chairman of the National Indian Gaming Association; Mr. Raymond Aspa, Sr., Member of the Tribal Council of the Colorado River Indian Tribes; Mr. Norm DesRosiers, a Viejas Tribal Gaming Commissioner; Professor Kevin Washburn of the University of Minnesota; Mr. Frank Ducheneaux, a Consultant for Gaming Associations in the Great Plains in Minnesota and a former Counsel on Indian Affairs under former Chairman of the Committee, Mo Udall. If you would all join us at the witness table. If I could just have you stand and raise your right hands.

[Witnesses sworn.]

The CHAIRMAN. Thank you very much. Let the record show they all answered in the affirmative. Welcome to the Committee. Welcome back to most of you. Mr. Hogen, we are going to begin with you. When you are ready, you can begin. I would like to remind all of our witnesses that your oral testimony is limited to five minutes, but your entire written testimony will appear in the record. Mr. Hogen, when you are ready you can begin.

**STATEMENT OF PHIL HOGEN, CHAIRMAN,
THE NATIONAL INDIAN GAMING COMMISSION**

Mr. HOGEN. Good morning, Mr. Chairman, Ranking Member Rahall and members of the Committee. My name is Phil Hogen, and I am a member of the Oglala Sioux Tribe from South Dakota, chairing the National Indian Gaming Commission. With me today is Commissioner Choney. Commissioner Choney is a full blood. He is half Kiowa, half Comanche, enrolled as Comanche. Currently we are the full commission. That is that there are just two of us at the present time.

I am pleased to be part of this panel, and I think all members of this panel would certainly agree that tribal sovereignty is vitally important, and Congress and the tribes themselves can never lose sight of that. I think they might all agree with me that Indian gaming perhaps has done more than anything else in recent decades to promote sovereignty. It has given tribes the resources to be a player, politically to be a player, economically to have a presence in their community that prior to having these resources they were not able to achieve.

Probably where we do not agree is what is the role of the Federal government with respect to oversight of this economic miracle, Indian gaming, that has come to pass since the 1980s? I think we are on the cusp of a change in the way things have worked since 1988 when the Indian Gaming Regulatory Act was enacted.

A couple of things were true in 1988. One, Indian gaming was bingo, and two there was really limited experience in the whole United States with respect to regulation of large scale commercial

gaming. Nevada had been doing it for awhile, took their lumps, but finally got there. New Jersey had been doing it for a little while, and what was learned in those experiences was that it was important to separate, to keep independent the regulation from the management from the operation of the gaming.

The nature of gambling is such that it is a cash-intensive business. There are lots of undocumented transactions. You have to scrutinize it. You have to regulate it very intensely.

They also said in the Indian Gaming Regulatory Act that the purpose was to promote economic development in Indian country so tribes could become strong, they could become self-sufficient, and they also created my agency, the National Indian Gaming Commission. It said that we were to promulgate some Federal standards for gaming. It said that we were to provide some oversight. It said that we were to enforce, take enforcement action when there were violations of that Indian Gaming Regulatory Act, the regulations that NIGC promulgated, as well as violations of the tribe's own tribal gaming ordinance that NIGC had to review and approve.

It took awhile for NIGC to get up and running. It was not until the early 1990s that it was going, and it was soon discovered that there was great diversity out there in Indian gaming. There was a lack of common standards to apply to what was happening. Some in Congress urged the creation of some internal control standards that the performance could be measured against, and quickly to respond to that the National Indian Gaming Association, the National Congress of American Indians put together a task force, came up with some recommended minimum internal control standards.

NIGC followed that by assembling a tribal advisory committee in 1998 and in 1999, and formulated what had become the NIGC minimum internal control standards. In your opening statement, Mr. Chairman, you described well what those cover.

Finally, NIGC had a rule book that we could take out to Indian country to measure the performance against, and we found that most of that performance was pretty good but there were places where it was not very good. With this standard, with these minimum standards that had to be met or exceeded, we were able to help tribes come up to that professional standard.

When the Indian Gaming Act was passed, it was about a \$200 million bingo industry. In 1999, when we finally did this, it was a \$10 billion industry. It had changed dramatically. Today it is a \$20 billion industry, and over 80 percent of that \$20 billion is class III gaming. That is where the action is. That is where the lion's share of Indian gaming revenues are generated.

At the time we adopted the minimum internal control standards, tribes argued you are overstepping your authority. You do not have the right to do this because that Class III is going to be governed by the tribal-state compact. We said, well no. We have the right to take this enforcement if there is a violation of IGRA, our regs and so forth so we are going to do it this way.

In addition to coming up with the regs, we went out and did audits to see how this performance measured up against those standards, and we found quite a number of violations. We did not say

close the door, stop, aha we got you. We said, let us help you fix it, and in almost all cases that worked.

We have never taken enforcement action to close a facility for failure to comply with the standards. We have agreed with some tribes that they would close their doors until they got up to speed, and that has worked great. But it is human nature to do a better job when you know that somebody is going to be looking at your work. That is what we do.

We are not big enough to be all present like tribes who are the primary regulators are or the states when they have compacts but we come along, take a look at it, and literally we never stumble across state regulators who are there doing what we are doing. They are a great diversity with respect to what happens in the states pursuant to their compacts and we tailor our presence in accordance with that.

When Colorado River brought their suit against us, we argued we have a right to do this. The Court agreed with the tribes, and so now we are threatened to change this structure that has helped develop the Indian gaming industry, and I think that is a real threat. I think that the Indian gaming industry will be much better served if we continue to provide this oversight.

We spend about \$11 million doing what we do. The tribes themselves spend \$300 million or something like that, and so you can see we do not have much of a presence, but I think it is a significant presence, and we think the law needs to be clarified so that we can keep doing what has worked so well since 1999. Thank you.

[The prepared statement of Mr. Hogen follows:]

**Statement of Philip N. Hogen, Chairman,
National Indian Gaming Commission**

Good morning Chairman Pombo, Ranking Member Rahall and members of the Committee.

My name is Philip Hogen, and I am a member of the Oglala Sioux Tribe from South Dakota. I have had the privilege of Chairing the National Indian Gaming Commission (NIGC) since December of 2002. Currently the NIGC consists of two members, myself and Associate Commissioner Cloyce Choney, who is here with me today.

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 IGRA 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 the NIGC's authority over Class III gaming.

In 1987, when the Supreme Court decided the Cabazon case and clarified that tribes had the right to regulate gambling on their reservations, provided that the states wherein they were located did not criminally prohibit that activity, large-scale casino gaming operations existed only in Nevada and New Jersey. The Indian Gaming Regulatory Act was passed in 1988 and established the framework for the regulation of Tribal gaming. That same year, Florida became the first state in the southern United States, and the 25th overall, to create a state lottery. In 1989, South Dakota legalized gambling in the historic gold mining town of Deadwood and Iowa and Illinois legalized riverboat gambling. The following year, Colorado legalized gambling in some of its old mining towns, and in 1991, Missouri legalized riverboat gambling. By that time, 32 states operated lotteries, while tribes ran 58 gaming operations. Thus, not just in Indian country but throughout the United States there was at that time a manifest social and political acceptance of gambling as a source of governmental revenue. What is also evident is that very few states had experience in the regulation of casino gaming.

When IGRA was enacted, those tribes then engaged in gaming were primarily offering bingo. While there may have been an expectation in Congress that there

would be a dramatic change in the games tribes would offer, I think it is reasonable to assume many expected Tribal gaming would continue to be primarily Class II, or uncompacted, gaming. After 1988, when tribes began negotiating compacts for casinos with slot machines and banked games, most of the states they negotiated with had little or no experience in regulating full-time casino operations. Michigan, for example, first compacted with Tribes in 1993 but didn't create its own Gaming Control Board or authorize commercial gaming until the end of 1996. Minnesota began compacting with Tribes in 1990 and to this day has no non-Indian casinos within its borders.

A review of compacts approved since 1989 shows that the more recent compacts often address the mechanics of the oversight and regulation of the gaming quite specifically, but that earlier compacts, many of which were entered into in perpetuity, do not. Further, the dispute resolution provisions in the compacts often employ cumbersome and time-consuming procedures like mediation or arbitration that do not necessarily foster effective regulation. For example, in the 22 states with Class III gaming, 12 provide for some form of mediation or arbitration with varying degrees of specificity and enforceability. Attached as Exhibit 1 is a chart summarizing the internal control and dispute resolution provisions of the compacts in these 22 states.

When the NIGC came on the scene, actually getting up and running in the early 1990s, it believed—and still believes—that its mission was to provide effective oversight of Tribal gaming. IGRA—states that it established the NIGC as an independent Federal regulatory authority over Indian gaming in order to address Congressional concerns and to advance IGRA's overriding purposes. These are to ensure that Tribal gaming would 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 beneficiaries of their gaming operations; and to ensure that gaming would be conducted fairly and honestly by both the Tribal gaming operations and its customers. IGRA therefore authorizes the Chairman to penalize, by fine or closure, violations of the Act, the NIGC's own regulations, and approved Tribal gaming ordinances.

Of course, the dramatic growth of Indian gaming was in the direction of Class III, or casino-style gaming, to the point where today it represents more than 80% of gross gaming revenue. While in 1988, the Indian gaming industry's gross gaming revenue was \$200 million, we estimate that it was \$22.5 billion in 2005. Class III gaming, therefore, accounts for at least \$18 billion of this revenue. Attached as Exhibit 2 are charts showing the growth and diversity of Indian gaming.

There is a vast diversity among Class III Tribal gaming operations, not only in size and revenues, but in the effort and resources devoted to regulation and oversight. Historically, casino gaming has been a target for illicit influences. Nevada's experience provides a classic case study of the evolution of strong, effective regulation. It was not until Nevada established a strong regulatory structure—independent from the ownership and operation of the casinos themselves—and developed techniques such as full-time surveillance of the gaming operations that most criminal elements were eliminated from the gaming industry there. All jurisdictions that have subsequently legalized gaming have looked to Nevada's experience to help guide their own regulation and oversight.

In the major non-Indian gaming jurisdictions in the United States, casino gaming is owned and operated by the private sector, and the regulation is provided by the state—the public sector. Indian gaming is different, for the most part, in that the gaming operations are owned and regulated by the public sector—the tribe. A similar situation exists with respect to most state lotteries. They are owned, operated and regulated by the state itself, but of course with a very few exceptions, state governments are much larger political units, and the separation of regulation from operation—the independence of the regulation—is more apparent.

With Tribal gaming, the diversity of operations is great. Both rural weekly bingo games and the largest casinos in the world are operated by Indian tribes under IGRA, and as the industry grew, it appeared that large numbers of Tribal operations, particularly smaller ones, were not operated or regulated comparably with the operation and regulation of commercial casinos in gaming states. NIGC needed tools appropriate to its oversight responsibilities. What it 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.

By the late 1990's, 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. Ultimately, NIGC adopted its Minimum Internal Control

Standards (MICS) and applied them to all Tribal Class II and Class III Tribal gaming operations.

The MICS provide, in considerable detail, minimum standards that Tribes must follow when conducting Class II and III gaming. To choose a few of many possible examples, the MICS prescribe a method for removing money from games and counting it so as best to prevent theft; they prescribe a method for the storage and use of playing cards so as best to prevent fraud and cheating; and they prescribe minimum resolutions and floor area coverage for casino surveillance cameras. Attached as Exhibit 3 is a copy of the MICS table of contents, which provides a more details overview of their comprehensive scope.

At the time of adoption, of course, many Tribal gaming operations and Tribal regulatory units were already far ahead of the minimums set forth in the MICS. Other tribes, however, had no such standards, and for the first time they had the necessary rule book by which to operate, and NIGC had a yardstick with which to measure their performance.

I served as an Associate Commissioner on the NIGC from 1995 through mid-1999, and I participated in the decision to adopt and implement the MICS. I have now served as the Chairman since December of 2002. It is my confirmed view that the Minimum Internal Control Standards—given the tribes' strong effort to meet and exceed them and the inspections and audits that NIGC conducts to ensure compliance—have been the single most effective tool that our Federal oversight body has had to utilize to ensure professionalism and integrity in Tribal gaming.

The NIGC employs three methods of monitoring Tribal compliance with the MICS. First, the MICS require that when tribes have their annual independent audit conducted, their auditors make a thorough review of tribes' MICS compliance, and the auditors' reports are sent not only to the Tribal government but to the NIGC. In other words, the tribes themselves must monitor how effectively they comply with the MICS and their own internal control standards. Prior to NIGC's adoption of its MICS, reports of this nature were seldom generated, and in my opinion, this serious scrutiny of Tribal gaming operations was sorely lacking.

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. In fact, we find, on average, anywhere between 35 and 90 MICS violations per audit. These include both minor items of non-compliance, such as recordkeeping failures, and major items of non-compliance—such things as the failure to investigate cash variances and the failure to perform proper cash cage accounting. Attached as Exhibit 4 is a table summarizing the number and kinds of MICS violations found from January 2001 through February 2006.

All of that said, the non-compliance is then almost always successfully resolved by the tribe. The result is that the 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 fine for Tribal non-compliance with the MICS.

For six years, NIGC oversight of Class II and Class III gaming with the use of minimum internal control standards went quite smoothly. The MICS were, for the most part, well accepted by Tribal operators and regulators and by state regulators who played roles in the regulation of Tribal gaming where Tribal-state compacts so provided. NIGC has not attempted to be, and in my opinion has not been, too intrusive in the manner in which the MICS were applied and enforced.

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.

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 again 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 court 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. The entire Indian gaming community is watching this case with interest, and it is watching the Congress. Some of the provisions contained in S. 2078, now out of the Committee on Indian Affairs and before the full Senate, seek to clarify NIGC's authority over Class III gaming generally, and in particular, the bill would make clear NIGC's authority to issue MICS and to require Class III operations to comply with them.

If the NIGC's role with respect to its minimum internal control standards and Class III gaming is not clarified by the courts or legislation, most tribes will continue to operate first-rate, well-regulated facilities, and their Tribal gaming regulatory entities will perform effectively. Others will likely not. NIGC has been advised by a number of tribes that if IGRA is not amended to clarify NIGC's role in the Class III area, or if the Colorado River Indian Tribes decision is not reversed, they will discontinue the practice of having these reviews conducted by their auditors. 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, the 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 Chairman 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.

In conclusion, let me again say that while it may not have been anticipated initially, the lion's share of Tribal gaming activity is casino gaming conducted pursuant to Tribal-state compacts. Without the NIGC's oversight role, much of that gaming would lack effective oversight from an entity independent from the gaming operation itself. NIGC does not seek to expand its limited oversight role over Class III gaming but rather to continue the effective role that it has been playing since 1999.

Exhibit #1 – Tribal/State Compacts

1/3

State	MICS/Provisions	Remedy for Compact Violation
Arizona	All Arizona compacts adopt NIGC MICS	Non-binding mediation; binding arbitration; injunctive relief.
California 1999 Compacts	1) Tribes must record all incidents in a special log; 2) Tribes must maintain a list of barred persons; 3) Tribes must post the rules and regulations of table games. Gaming devices transported off Tribe's land subject to seizure.	Tribal gaming agency investigates, requires correction; if none, fines or sanctions. Disputes: Tribe and State meet and confer, then arbitration with judicial review. No Class III gaming if Tribe 2 quarterly contributions overdue.
California 2004 amended Compacts	Requires testing of gaming devices.	No change.
Colorado	Tribal TICS with State review.	Arbitration for breach of contract provisions.
Connecticut	Extensive, comprehensive MICS	Mashantucket Pequot - procedure for appeal by Tribe to State Sup. Ct. of assessments levied by State. If non-compliance with Compact, US Dist. Ct. or petition NIGC. Mohegan - none.
Idaho	Three of the four compacts include fairly general MICS. One of the compacts (Shoshone Bannock) includes only very general control language.	Three of the four compacts provide for meet-and-confer, then binding arbitration with no judicial review. One of the compacts (Shoshone Bannock) allows actions in federal district court after the arbitration.
Iowa	NIGC MICS adopted for accounting and cash control. Equivalent surveillance standards adopted in compacts. Semi-annual audit required to determine compliance with compact and all applicable laws.	If Tribe fails to comply, Compact may be suspended. If State fails to comply, Tribe may seek any remedy.
Kansas	All Kansas compacts have MICS that cover cage operations, drop and count, fill and credit, and surveillance, but are not as comprehensive as NIGC minimums. Other areas not covered.	State and Tribe will report violations to each other. Arbitration and/or judicial resolution in federal court. Limited to equitable remedies and costs for state oversight.

Exhibit #1 – Tribal/State Compacts

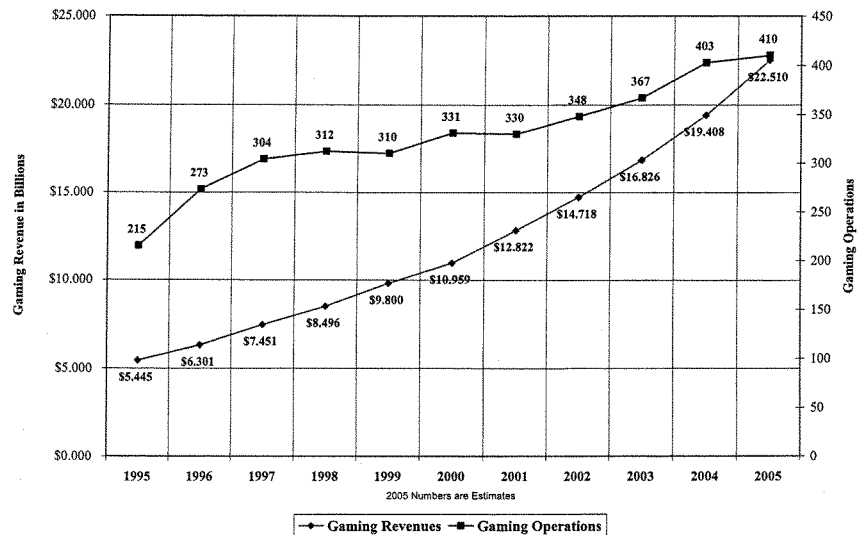
2/3

State	MICS Provisions	Remedy for Compact Violation
Louisiana	Minimal MICS; limited surveillance procedures for cashier's cash and cash control management in Appendix.	Informal resolution for at least 45 days. If none, then formal mediation. If no resolution, then binding arbitration.
Michigan	None.	Tribe and State to meet. State has right to notify Tribe to stop playing game. Tribe can stop or go to arbitration.
Minnesota	Some compacts have none. Others have minimal surveillance regulations for blackjack tables.	Tribe may contest allegation of non-compliant game through inspection by independent gaming laboratory or in Federal court, before NIGC, or in State court, respectively, if prior forum declines jurisdiction.
Mississippi	No MICS in Compact, but limited MICS for slot machines in gaming ordinance.	1) informal dispute resolution; 2) if no resolution, then arbitration, with decision of arbitrator final and non-reviewable.
Montana	None	State or Tribe can terminate compact on 90 days notice if violation not cured. Efficacy of cure may be adjudicated in Federal Court.
Nevada	Two compacts require following Nevada MICS, four compacts require adopting MICS at least as stringent as Nevada MICS.	Four have dispute resolution with judicial remedies thereafter. Two have none.
New Mexico	None	Compact provides an arbitration provision for dispute resolutions or compact compliance. The result of the arbitration is final and binding, and may be enforceable by any court of competent jurisdiction.

Exhibit #1 – Tribal/State Compacts

3/3

State	MICS Provisions	Remedy for Compact Violation
New York	Comprehensive MICS, similar to NIGC's.	Informal dispute resolution. If no resolution, then binding arbitration. Cessation of tribal payments to state if breach of exclusivity provisions (two of three tribes).
North Carolina	Very limited MICS. Transactions in machines recorded and stored with software, rules of play displayed.	Internal dispute resolution process (notice, 30 days to try to resolve). If not resolved, any legal remedy available or by mutual agreement, mediation, arbitration or other alternative method.
North Dakota	MICS are NIGC's MICS.	Meet to discuss. Subsequently, Tribe may go to arbitration over State violation. State may go to arbitration or Federal Court over Tribe violation. Issues of non-compliant Class III games are to be resolved through examination by independent testing laboratory.
Oklahoma	Model compact: Tribal internal control standards must equal or exceed NIGC MICS.	Model compact: Arbitration for enforcement of compact provisions. Federal court de novo review of arbitration award, subject to appeal to Circuit Court.
Oregon	Comprehensive Tribal/State MICS (set forth in compacts)	Meet-and-confer, then federal district court or state court if the federal court lacks jurisdiction.
South Dakota	South Dakota State MICS incorporated by reference.	Termination on breach, action in Federal Court available for interpretation of compact. For non-compliant machines, arbitration.
Washington	Comprehensive MICS (set forth in compact)	Some slight variation among the 27 compacts, but State may always seek injunctions in federal district court. Either binding or non-binding arbitration provisions also incorporated.
Wisconsin	Tribe to use MICS at least as restrictive as NIGC's.	In order, negotiation, mediation, arbitration, action in Federal court (certain provisions may be sued upon immediately). <u>New</u> – Arbitration unless other dispute resolution means chosen.

Growth in Tribal Gaming**Tribal Gaming Revenue
2005**

Gross Gaming Revenue Ranges	Number of Operations	% of Total Operations	Gross Gaming Revenues	% of Total Gross Gaming Revenues	Median Gross Gaming Revenues
Over \$100 million	60	15.50%	\$15.83 billion	70.32%	\$263.8 million
\$25 - \$100 million	101	26.10%	\$ 4.91 billion	21.81%	\$ 48.6 million
\$5 - \$25 million	114	29.46%	\$ 1.57 billion	6.97%	\$ 13.8 million
Under \$5 million	112	28.94%	\$ 0.20 billion	0.90%	\$ 1.7 million
Total	368	100.00%	\$22.51 billion	100.00%	

Information from financial reports filed with the NIGC – 2005 numbers are estimates

EXHIBIT #3—PART 542—MINIMUM INTERNAL CONTROL STANDARDS**Section Contents**

- §542.1 What does this part cover?
- §542.2 What are the definitions for this part?
- §542.3 How do I comply with this part?
- §542.4 How do these regulations affect minimum internal control standards established in a Tribal-State compact?
- §542.5 How do these regulations affect state jurisdiction?

- §542.6 Does this part apply to small and charitable gaming operations?
- §542.7 What are the minimum internal control standards for bingo?
- §542.8 What are the minimum internal control standards for pull tabs?
- §542.9 What are the minimum internal control standards for card games?
- §542.10 What are the minimum internal control standards for keno?
- §542.11 What are the minimum internal control standards for pari-mutuel wagering?
- §542.12 What are the minimum internal control standards for table games?
- §542.13 What are the minimum internal control standards for gaming machines?
- §542.14 What are the minimum internal control standards for the cage?
- §542.15 What are the minimum internal control standards for credit?
- §542.16 What are the minimum internal control standards for information technology?
- §542.17 What are the minimum internal control standards for complimentary services or items?
- §542.18 How does a gaming operation apply for a variance from the standards of the part?
- §542.20 What is a Tier A gaming operation?
- §542.21 What are the minimum internal control standards for drop and count for Tier A gaming operations?
- §542.22 What are the minimum internal control standards for internal audit for Tier A gaming operations?
- §542.23 What are the minimum internal control standards for surveillance for Tier A gaming operations?
- §542.30 What is a Tier B gaming operation?
- §542.31 What are the minimum internal control standards for drop and count for Tier B gaming operations?
- §542.32 What are the minimum internal control standards for internal audit for Tier B gaming operations?
- §542.33 What are the minimum internal control standards for surveillance for Tier B gaming operations?
- §542.40 What is a Tier C gaming operation?
- §542.41 What are the minimum internal control standards for drop and count for Tier C gaming operations?
- §542.42 What are the minimum internal control standards for internal audit for Tier C gaming operations?
- §542.43 What are the minimum internal control standards for surveillance for a Tier C gaming operation?

Exhibit #4 – MICS Compliance
1/2

MICS Compliance Audits – January 2001 to February 2006

Region	Gaming Operations	Number of Audits	Total MICS Violations	Average MICS Violations
1 – Portland	44	10	635	64
2 – Sacramento	52	6	410	68
3 – Phoenix	43	8	297	37
4 – St. Paul	117	7	546	78
5 – Tulsa	84	4	356	89
6 – DC	27	2	111	56
Totals	367*	37	2,355	64

* - number from audited financials

* 7 MICS Compliance audits per year on average

* In the past year 11 MICS Audits delivered with 559 Violations

EXHIBIT #4 MICS COMPLIANCE

2/2

- Findings common to most MICS compliance audits:
 - Lack of statistical game analysis;
 - Ineffective key control procedures;
 - Failure to secure gaming machine jackpot/fill system;
 - Failure to effectively investigate cash variances/missing supporting documentation for the cage accountability/failure to reconcile cage accountability to general ledger on a monthly basis;
 - Inadequate segregation of duties and authorization of players tracking system account adjustments;
 - Ineffective internal audit department audit programs, testing procedures, report writing and/or follow-up;
 - Deficient surveillance coverage and recordings;
 - Noncompliance with Internal Revenue Service Regulation 31 CFR Part 103;
 - Failure to exercise technical oversight or control over the computerized gaming machine systems, including the maintenance requirements for personnel access;
 - Failure to properly document receipt and withdrawal transactions involving pari-mutuel patrons' funds and a lack of a comprehensive audit procedures of all pari-mutuel transactions;
 - Failure to adequately secure and account for sensitive inventory items, including playing cards, dice, bingo paper and keno/bingo balls; and
 - Failure to adopt appropriate overall information technology controls specific to hardware and software access to ensure gambling games and related functions are adequately protected.

JUNE 6, 2005

The Honorable Richard Pombo, Chairman
 House Appropriations Committee
 Longworth House Office Building
 Washington, DC 20515

Chairman Pombo:

The National Indian Gaming Commission (NIGC) would like to thank you for your continued leadership as Chairman of the House Resource Committee. We are especially thankful for your commitment to ensure the Indian gaming industry continues to provide much needed economic opportunities for Indian communities throughout the country.

As a result of the House Resource Committee oversight hearing on May 11, 2006, several questions from Members of the Committee were referred to the NIGC. Following are the questions asked and answers from the NIGC.

The Honorable Nick J. Rahall

1. *In your testimony, you reference that many expected Tribal gaming to continue mainly as Class II bingo. Can you elaborate on why you came to that conclusion?*

It is my personal recollection that testimony in the 99th and 100th sessions of Congress presented to the Senate Indian Affairs Committee primarily centered on bingo and the electronic aids being offered by Tribes to bingo players. In addition, at the time the Cabazon case was decided by the U.S. Supreme Court in 1987, the preeminent form of gaming in Indian Country was bingo generally and high stakes bingo in particular. At that time, the only two states with full casino gaming were Nevada and New Jersey and the prospect of other states authorizing casino gaming was fairly narrow. Many States had forms of bingo and pull-tab games. It was upon this foundation that the Cabazon and Seminole Tribes built their cases in Federal Court. IGRA was enacted in this context and it is from this that the expectation about the direction and growth of Tribal gaming is drawn.

2. *You testified that non-Indian gaming is regulated by the states—isn't that exactly the situation Congress set up by requiring Tribes to enter into State compacts? Do you feel the states are incapable of regulating Indian gaming?*

As to the first part of the question, the answer is “no.” IGRA set up a mechanism under which Tribes may conduct Class III gaming only in states where such activity is permissible under state law, where the Tribes enter into compacts with states relating to this activity, and where the compacts are approved by 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. In fact, 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 and Tribes that have negotiated them.

Typically, the regulatory role a particular state undertakes in its compact is dependant upon that state's experience with the regulation of its own legalized gaming at the time the compact was negotiated. Some states developed effective regulatory programs, and the compacts these states negotiated require regular state oversight of Indian gaming, technical standards and testing protocols for gaming machines, and internal control requirements. Other states, however, have only limited gaming and limited experience regulating gaming. Their compacts provide them a minimal regulatory role. In some cases, compacts are little more than revenue-sharing agreements between the state and the Tribe.

As to the second part of your question, states certainly are capable of regulating gaming of any kind—Indian gaming, commercial gaming, charitable gaming—if they so choose. Some states have made a conscious effort to develop well-funded and well-staffed regulatory bodies to work in collaboration with the Indian Tribes. Some states have not.

3. *You testify as to how hard the Commission works with Tribes to mutual benefit. Given the strong opposition by Tribes to opening IGRA in order to give the Commission this regulatory authority over Class III games, do you see a more agreeable way to reach the goal of all Tribes having the same MICS?*

As a preliminary matter, the NIGC's view is that it has—because Congress intended it to have—regulatory oversight authority over Class III gaming. Given the district court's decision in the Colorado River Indian Tribes (CRIT) case, the NIGC is seeking clarification of the point from Congress.

That said, without authority to publish, implement and enforce MICS, it would be very difficult to envision a uniform way of reaching the goal of nationwide, uniform MICS. Just as importantly, without Class III oversight authority, it is difficult to envision a uniform way to monitor and enforce MICS. It is important to point out that merely having MICS does not assure that they will be applied in a consistent and effective manner. Effective MICS require the expenditure of resources to ensure the security of Tribal assets and the flow of funds into, within, and out of the casino. It is the experience of the NIGC that diligent oversight and enforcement are necessary in order to assure that the MICS receive the priority and resources necessary to maintain the integrity of a given operation.

Inherent to gaining an understanding of the regulator—operator relationship is the recognition that the overseers are motivated by a mission to safeguard the reputation of an industry, whereas the operator is driven by a desire to maximize profits. These two objectives are not necessarily in sync, particularly in the short term.

Generally accepted gaming regulatory practices would dictate that the oversight function has certain key elements. For example, relevant to the operation of a gaming enterprise, a regulatory authority will require internal controls be implemented to ensure the accurate recognition and recordation of financial data. The regulator will also require monitoring and surveillance to protect games from compromise. Obviously, such effective control systems have a cost, and history has clearly revealed that, left to the discretion of the gaming operator, such costs will, when practical, be saved and the money taken out of the operation on the bottom line. Moreover, if this kind of decision making becomes common across the industry, it will damage the industry's credibility, with the further consequence that reputable, operators, managers, and vendors will curtail their involvement.

It is, of course, clear that Tribes have a very strong interest in assuring that their operations are adequately regulated. Consequently, some Tribes have gaming commissions supported by multimillion dollar budgets. These commissions, as well as many smaller commissions with very small budgets, have identified scams and cheats, refused to license unsuitable vendors and job applicants, removed vulnerable machines from play, and perform a multitude of other regulatory functions. The integrity and reputation of the Tribal gaming industry is adversely affected if one Tribe has a problem or is identified as running a less than reputable operation.

Nonetheless, some gaming commissions are not sufficiently independent of the Tribal governments or the managers that operate the gaming operation. In this connection something may be learned from the history of the established gaming jurisdictions, particularly Nevada. The effectiveness of a gaming regulatory authority in Nevada was realized in a process that evolved over a forty-year period and is continuing to improve and respond to change today. Only after creation of a separate regulatory authority solely devoted to the regulation of gaming did the industry have effective oversight and enforcement.

4. *Should Tribes that don't have outside oversight of MICS included in their compacts be handled differently from those that do?*

If the Tribal-state compact provides for comprehensive MICS that meet or exceed the NIGC MICS, and if those MICS are independently monitored, then it may be possible to view those situations as unique. As pointed out in the answer to question #2, though, MICS in and of themselves are not enough to insure their implementation and enforcement. It is also not enough to say that the Tribes will be solely responsible for oversight as the answer in #3 indicates.

Further, a review of compacts approved since 1989 shows that the more recent compacts often address the mechanics of the oversight and regulation of the gaming quite specifically but that earlier compacts, many of which were entered into in perpetuity, do not. The staff necessary to effectively oversee and enforce is often lacking. For example, Oklahoma has 94 Tribal gaming operations and three full-time gaming employees; Michigan has 17 Tribal gaming operations and three full-time gaming employees; Arizona has 22 Tribal gaming operations but 66 full-time gaming employees; and nine states have no full-time oversight at all. As you can see, the range is large.

The Honorable Dale Kildee

At the hearing you stated that a Tribe recently cited the Colorado River Tribes case, as refused NIGC auditors entry to their class III facility.

- *Please provide the Committee with more detail about this encounter, for example, under what authority of law did the investigators claim seeking entry?*

On April 3, 2006, NIGC field investigators contacted the Confederated Salish and Kootenai Tribes in Montana, attempting to arrange a routine visit for April 24—a tour of gaming operations and follow up on audit results and some compliance issues cited in an earlier inspection. On April 12, 2006, one field investigator received an e-mail asking for additional details, including the NIGC's authority for the visit. On April 17, 2006, our regional director responded, informing the Tribe that the visit was routine and the items to be inspected would be determined by the field investigators upon their arrival using Tribal and NIGC regulations as guidelines. Our regional director also informed the Tribe that the visit would be made was pursuant to the authority granted NIGC by IGRA. When the field investigators arrived for their visit, they were told that they were being denied entry pursuant to the ruling in the CRIT case. We requested a written verification of this denial. A copy of the letter from the Tribe is attached. At this point the NIGC has taken no other action.

Since my testimony we have received another challenge from the Siletz Tribe in Oregon. The NIGC regional office in Portland issued a warning to the Tribe for refusing access to financial information required by the NIGC approved gaming ordinance. A copy of the response from the Tribe's attorney is attached.

- *IGRA clearly provides the NIGC with authority to approve Tribal gaming ordinances. Does the NIGC have authority to enforce such ordinances?*

Yes. IGRA authorizes the Commission to penalize violations of the Act, of the Commission's own regulations, and of approved Tribal gaming ordinances.

- *If so, what enforcement actions can be taken?*

IGRA gives enforcement authority to the NIGC Chairman. He or she may penalize violations by imposition of civil fines up to \$25,000 per day and closure of Tribal gaming facilities.

- *Is it possible for the NIGC to require Tribes to establish minimum internal control standards in their gaming ordinances prior to approval?*

As indicated above, it is imperative to not only have the MICS in place, but that they are enforced in a consistent and effective manner. Given the district court's decision in the CRIT case, however, and some Tribes' subsequent refusal to recognize the NIGC's Class III enforcement authority, any possible assertion of such a requirement would doubtless invite further opposition and litigation.

Over the past 18 years, the Indian gaming industry has experienced a tremendous growth and it appears this trend will continue for years to come. It is my goal as NIGC Chairman to ensure the Indian Gaming Regulatory Act is being properly adhered to and clarification is the most important issue facing the Indian gaming industry.

Again, thank you for your leadership as Chairman of the House Resource Committee. Please feel free to contact Shawn Pensoneau at (202) 418-9808 if you have further questions.

SINCERELY,

PHILIP N. HOGEN
CHAIRMAN

The CHAIRMAN. Thank you. Mr. Stevens.

**STATEMENT OF ERNIE STEVENS, CHAIRMAN,
THE NATIONAL INDIAN GAMING ASSOCIATION**

Mr. STEVENS. Good morning, Mr. Chairman and members of the Committee. It is a great honor to be here this morning. I just wanted to mention that in the last five years I have had the great honor to serve as Chairman of the National Indian Gaming Association working for the tribal leadership. I would like to thank you for inviting NIGA to share our concerns regarding Indian gaming regulation and the minimum internal control standards.

With your permission, I would like to submit my written testimony for the record. I will summarize it for you today, Mr. Chairman.

Tribal government gaming has proven to be the most successful tool for economic development for tribes in over 200 years. We are very proud of our industry. We feel that it has grown into this very successful economic development for Indian country. We feel like it has grown in a very, very responsible manner, and we are proud of that.

Through gaming many tribal governments are now rebuilding their community infrastructure, and are now providing basic programs to their citizens that many Americans have enjoyed for generations. While gaming does not benefit every tribe, it does provide crucial employment opportunities and hope for a better future for the over 200 tribes that do conduct gaming.

For these reasons, tribal leaders have generally opposed to amending IGRA because of the great risk that tribal self-government could be compromised. Tribes throughout the Nation also realize that great benefits of tribal government gaming would not be possible without solid regulation.

Tribes understand that strong regulations are needed to protect governmental revenue that gaming helps to generate. Over the years, tribes with Federal and state governments have developed a comprehensive web of regulation. In 2005 alone tribes spent \$320 million on tribal government gaming regulation. This investment funds over 3,400 Federal, state and tribal regulatory personnel with the credentials as former FBI agents, state and tribal law enforcement officers, military officers, accountants, auditors, bank officials and state regulators, and it funds state-of-the-art surveillance and security equipment.

We are very proud of our industry to that extent. We feel like our industry provides for a very safe and well regulated place for our customers to spend their recreational dollars. We have also worked with surrounding municipalities. I personally—in my previous capacity as a tribal councilman for the United Nation of Wisconsin—have worked with surrounding law enforcement to negotiate mutual service agreements that have assisted our operations, and we have been a great asset to their operations as well.

IGRA requires tribes to work with the NIGC to regulate Class II gaming, and it mandates the tribes to regulate Class III gaming pursuant to tribal-state compacts. Over the past 17 years under IGRA, tribes and states have become strong partners in protecting the integrity of Indian gaming.

At the Federal level, all tribes work with the FBI, the U.S. Attorneys office, the Treasury Department's financial crimes enforcement network, the IRS, the Interior's Bureau of Indian Affairs. Against the backdrop of comprehensive regulation, the FBI and the United States Justice Department have testified repeatedly that this regulatory system is working well to prevent the infiltration of organized crime and protect the integrity of the games played at our tribal operations.

We understand that the National Indian Gaming Commission has concerns with the recent Court decision in *Colorado River Indian Tribes v. the NIGC*. The District Court in the *CRIT v. NIGC* held that IGRA does not authorize the Commission to apply its minimum internal control standards or MICS to Class III gaming. The Court instead found that the Congress intended tribes and states to regulate Class III gaming under tribal-state compacts.

The Court also found that NIGC retains oversight authority over Class III gaming that permits the Commission to approve and enforce violations of Class III tribal gaming ordinances, conduct annual audits of Class III gaming operations, and review management contracts, background checks and licensing determinations. We fully agree with the District Court. We also believe that there is no need to rush to amend IGRA.

NIGA opposed the provisions in Senate bill S. 2078 that would grant NIGC new Class III authority. The NIGC proposal reflected in the bill goes far beyond the minimum internal control standards and overreaches into all facets of Class III gaming. The proposal treads on states' rights and tribal sovereignty by ignoring the regulatory agreements reached through tribal-state compacts.

Finally, we believe that it has the potential to create yet another unmanageable bureaucracy for Indian country to deal with at the Federal level. NIGA member tribes strongly oppose this proposal. The NIGC goals can all be achieved by working with tribes under existing laws. Generally tribal governments have enacted MICS through tribal ordinances, regulations or compact provisions.

The NIGC ordinance approval authority enables it to work with tribes to make sure that tribal MICS are enforced. Instead of fighting in court or seeking additional legislative authority, the NIGC should provide deference to tribal-state compacts as the Court directed and dedicate its resources to developing a cooperative regulatory framework with tribes and states under existing laws.

Again, this is not necessary legislation. The CRIT case remains in litigation. The Court made it clear that NIGC retains sufficient oversight authority over Class III gaming, and the tribes already employ their own minimum internal control standards through compacts and tribal laws.

Congress should defer action on the NIGC proposal and direct the NIGC to consult with tribal governments. We believe that through consultation NIGC and the tribes can solve the agency's concerns under existing laws while respecting states' rights and tribal sovereignty reflected in the compact provisions.

In conclusion, Mr. Chairman, the NIGC is asking for a blank check to determine its own jurisdiction. Congress clearly recognized that the joint authority of states and tribes over Class III gaming. The NIGC proposal would tread on states' rights and tribal sovereignty. The only assurance that we have that the NIGC will not create conflict, duplicate efforts and interfere with tribal economic development is the agency's own statement that it will not infringe on state and tribal rights. That is not enough protection for tribal self-government.

Instead of risking our tribal government resources, we ask Congress to direct NIGC to work with tribes and states under existing law. Thank you, Mr. Chairman, for your time this morning.

[The prepared statement of Mr. Stevens follows:]

**Statement of Ernest L. Stevens, Jr., Chairman,
National Indian Gaming Association**

Introduction

Good morning Chairman Pombo, Congressman Rahall, and Members of the Committee. Thank you for inviting the National Indian Gaming Association ("NIGA") to testify this morning. My name is Ernest Stevens, Jr. and I serve as Chairman of the National Indian Gaming Association. I am a member of the Oneida Tribe of Wisconsin. NIGA is an association of 184 tribal governments that use Indian gaming to generate essential government revenue.

Indian gaming is our Native American success story. After decades of poverty and economic devastation, about 60% of Indian tribes in the lower 48 states use gaming revenues to rebuild community infrastructure, provide basic health, education, and social programs for their citizens, and provide hope and opportunity for an entire generation of Indian youth.

Does Indian gaming solve all of Indian country's problems? No. Many tribes cannot use gaming because of their remote locations, and we call upon Congress to fulfill its trust responsibility to provide funding for education, health care, essential government services and basic community infrastructure, like water systems and police and fire protection. For many others in rural areas with high unemployment, Indian gaming provides its greatest benefit through jobs. Indeed, in many rural areas, Indian gaming provides the catalyst for regional job growth for both Indians and non-Indians.

Even with these challenges, Indian gaming has proven to be the best tool for economic development in Indian country and our best opportunity for tribal self-sufficiency and self-determination.

For NIGA and its Member Tribes, our primary mission is to preserve tribal sovereignty and to protect Indian gaming as a means of generating essential tribal government revenue. Tribes are committed to effective regulation of Indian gaming. Experience demonstrates that the highest standard of regulation can be achieved while promoting tribal sovereignty and self-determination.

Tribes are generally opposed to amending the Indian Gaming Regulatory Act, because even well intentioned amendments carry a great risk of undermining Indian gaming and tribal sovereignty. Our attached resolution on S. 2078, the Senate's Indian Gaming Regulatory Act Amendments, passed unanimously at our annual meeting last month. NIGA applauds the significant process that this Committee continues to provide tribal governments as it considers amendments to Section 20

of IGRA. We hope that you will undertake a similar process as if you contemplate any regulatory amendments to IGRA.

The focus of this hearing is minimum internal control standards for class III Indian gaming. The National Indian Gaming Commission (NIGC) has called upon Congress to address, through legislation, the recent decision in *Colorado River Indian Tribes (CRIT) v. NIGC*, 383 F. Supp.2d 123 (D. D.C. 2005). In *CRIT*, the MICS Court simply held that NIGC may not issue regulations to establish the framework for regulating Class III Indian gaming because that is the job of the states and tribal governments through Tribal-State Compacts. That does not mean that the NIGC has no role concerning the regulation of Class III gaming. The court acknowledged that Congress contemplated a background role for the NIGC over class III gaming, including the approval and review of enforcement of tribal class III gaming ordinances, the authority to receive and review annual audits of Class III gaming facilities, and the authority to review management contracts, background checks, and licensing determinations. The NIGC has appealed the district court's ruling to the Federal court of appeals. Thus, there is no immediate need to legislatively fix this issue.

Government-to-government consultation is the cornerstone of the Federal-Tribal relationship. In our view, amendments to the Act should only be considered in consultation with tribal governments. As part of the Committee's consultation with tribal governments, we urge you to hold a series of hearings, including field hearings, which will demonstrate the strength and effectiveness of the Tribal-State Compact system and the comprehensive web of Indian gaming regulation. Many Tribal-State Compacts required years of work to develop and a few required statewide initiatives or referenda. All have built stronger tribal-state government partnerships. In fact, building upon the experience gained through the Tribal-State Compact process, tribal governments have become leaders in regional cooperation and communication.

In addition, we ask that Congress direct the NIGC to consult with Tribes. We believe that through consultation with tribal governments, the NIGC can develop an approach that uses its existing statutory authority to approve tribal gaming regulatory ordinances, without creating a duplicative new Federal regulatory regime. The Commission's current Federal regulation asks tribal governments to adopt MICS through tribal regulations. Accordingly, we ask Congress to defer action on this issue while the NIGC consults with tribal governments to find a less intrusive alternative to its current over the top of Tribal-State Compacts proposal.

Finally, if any amendments to IGRA are considered, we ask you to also address the decade-old concern of tribal governments: the broken compacting process and the resulting unreasonable demands for revenue sharing by some State governments. To address these issues, we ask that you include provisions that afford tribal governments' timely access to secretarial procedures in lieu of a compact, when a State raises an 11th Amendment defense to enforcement of the Tribal-State compact process. For many years, NIGA has asked Congress to address the Supreme Court's *Seminole* decision, which negated the ability of Tribes to enforce the obligation of States to negotiate in good faith, and destroyed the balance that Congress crafted in the compacting process. The Tribal-State compact process is critical to the proper functioning of IGRA.

Indian Gaming Regulation Today

No one has a greater interest in maintaining the integrity of Indian gaming than tribal governments. For the past 30 years, Tribes have been dedicated to building and maintaining strong regulatory systems, realizing the need to protect government revenue. Under IGRA, Congress envisioned that tribal governments would be the primary day-to-day regulators of Indian gaming. This vision is a reality, as Tribes today regulate Indian gaming through tribal gaming commissions. Tribal gaming regulators work with the NIGC to regulate Class II gaming. Through the Tribal-State Compact process, tribal gaming regulators work with state regulators to safeguard Class III gaming.

Indian gaming is also protected by the oversight of the FBI and the U.S. Attorneys. The FBI and the U.S. Justice Department have authority to prosecute anyone who would cheat, embezzle, or defraud an Indian gaming facility—this applies to management, employees, and patrons. 18 U.S.C. § 1163. In addition, Tribal governments work with the Department of Treasury's Financial Crimes Enforcement Network (FinCEN) to prevent money laundering, with the IRS to ensure Federal tax compliance, and with the Secret Service to prevent counterfeiting. Tribal governments have stringent regulatory systems in place that compare favorably with any Federal or State regulatory systems.

Tribal governments have dedicated tremendous resources to the regulation of Indian gaming. In 2005 alone, Tribes spent over \$320 million nationwide on tribal, state, and Federal regulation:

- \$245 million to fund tribal government gaming regulatory agencies;
- \$66 million to reimburse States for State regulatory work under the Tribal-State Compact process; and
- \$12 million for the NIGC's budget.

At the tribal, state, and Federal level, more than 3,430 expert regulators and staff protect Indian gaming:

- Tribal governments employ more than 2,800 tribal gaming regulators and staff, with credentials as former FBI agents, BIA, tribal and state police, New Jersey, Nevada, and other state regulators, military officers, accountants, auditors, attorneys and bank surveillance officers;
- State regulatory agencies assist tribal governments with regulation, including California and North Dakota Attorney Generals, the Arizona Department of Gaming and the New York Racing and Wagering Commission;
- State governments employ more than 532 state gaming regulators, staff and law enforcement officers to help tribes regulate Indian gaming;
- The National Indian Gaming Commission is led by Philip Hogen, former U.S. Attorney and past Associate Solicitor for Indian Affairs, and Chuck Choney, Commissioner and former FBI Agent; and
- At the Federal level, the NIGC employs 98 Regulators.

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

IGRA's Comprehensive Framework of Regulation

IGRA divides Indian gaming into three classes: Tribes retain exclusive authority to regulate class I gaming, defined as traditional gaming, such as horse-racing, stick games, or hand games at tribal celebrations. 25 U.S.C. § 2710(a)(1).

Class II gaming is defined as bingo, lotto and similar games, pull-tabs, and non-banked card games, which may be used in connection with technologic aids. Class II gaming is regulated by tribal gaming regulatory agencies, under NIGC approved ordinances, in cooperation with the NIGC. 25 U.S.C. § 2710(a)(2).

While IGRA was under consideration in Congress, the U.S. Departments of Justice and Interior disclaimed any interest in assisting tribal governments with a federal regulatory process for Class III gaming. Against this background, Congress established the Tribal-State compact process to set forth the framework for the operation of Class III gaming. Class III gaming encompasses all other forms of gaming, including lotteries, casino gaming, banked card games, and pari-mutuel racing. IGRA outlines subjects for Tribal-State compact negotiation:

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

25 U.S.C. § 2710(d)(3)(C).¹ The Senate Committee Report to IGRA explains that Congress established the Tribal-State Compact process because:

[T]here is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount

¹ However, "[n]o State may refuse to enter into [compact] negotiations—based on the lack of authority—to impose a tax, fee, charge, or other assessment. Id. § 2710(d)(4).

to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments have no role to play in the regulation of class III gaming—many can and will.

The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc”.

A compact may allocate most or all jurisdictional responsibility to the tribe, to the State or any variation in between.

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

Given the comprehensive framework established by the Tribal-State Compact process, Congress limited the NIGC’s role to oversight and support of compact-regulated class III gaming. IGRA provides the NIGC with the following authority over class III gaming:

- NIGC reviews and approves class III tribal gaming regulatory laws;
- NIGC reviews class III tribal background checks and gaming licenses;
- NIGC receives independent annual audits of tribal gaming facilities, including class III gaming and all contracts for supplies and services over \$25,000 annually are subject to those audits;
- NIGC approves management contracts; and
- NIGC works with tribal gaming regulatory agencies to ensure proper implementation of tribal gaming regulatory ordinances.

Congress clearly delineated these roles for the comprehensive regulation of Indian gaming. Against this backdrop of comprehensive regulation, the FBI and the United States Justice Department have testified repeatedly that this regulatory scheme is working well to prevent the infiltration of crime and protect the integrity of the games played at tribal operations. In fact, the last time the Chief of DOJ’s Organized Crime division testified before the Senate he stated that “Indian gaming has proven to be a useful economic development tool for a number of tribes who have utilized gaming revenues to support a variety of essential services.”

The Colorado River Indian Tribes Decision and the Federal MICS

A recent decision by the Federal District Court of Washington, D.C. upheld the above-stated views of IGRA’s regulatory scheme. On August 24, 2005, the Court in *Colorado River Indian Tribes v. NIGC*, 383 F. Supp.2d 123 (D. D.C. 2005), held that the NIGC did not have statutory authority to promulgate and apply federal Minimum Internal Control Standards over and above Tribal-State Compacts. The Court explained:

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

Id. at 132. The Court quoted the Senate Report:

[IGRA] provides for a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming. The bill establishes a National Indian Gaming Commission as an independent agency within the Department of the Interior. The Commission will have a regulatory role for class II gaming and an oversight role with respect to class III.

Id. at 139, *quoting* 1, U.S.C.C.A.N. 1988, p. 3071. The Court found this legislative history, in addition to the clear statutory language as convincing evidence that Congress did not intend the NIGC to issue MICS regulations for Class III gaming.

However, the CRIT decision made clear that the Commission retains the authority to approve and enforce compliance with tribal gaming ordinances, conduct annual audits, approve management contracts, and review background checks and licensing determinations. *Id.* at 147-48. IGRA, at 25 U.S.C. § 2713(a), provides that the Commission has “authority to levy and collect appropriate civil fines—against the tribal operator of an Indian game or a management contractor—for any violation of—tribal regulations, ordinances, or resolutions approved under section 2710.” If necessary, the Commission may also issue a notice of violation, and if the violation is not addressed, a closure order. 25 U.S.C. § 2713(b).

NIGA and our Member Tribes developed the first Minimum Internal Control Standards, and we encouraged our Member Tribes to adopt the MICS as a matter of tribal law. Today, the majority of tribal governments maintain minimum internal control standards as a matter of tribal law, and pursuant to tribal-state compacts. Tribal governments currently have tribal law standards in place that meet or exceed

the requirements of the NIGC's MICS. There is no need for a legislative rush to supplant the federal court's judgment at this time.

Indeed, the NIGC itself wrote to tribal governments, stating that it will not change its current MICS policy while it appeals the CRIT v. NIGC decision to the higher courts. The NIGC's press release after the decision states as follows:

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

NIGC Press Release (Aug. 30, 2005); h. The NIGC's request for immediate action to amend IGRA is premature.

S. 2078—Proposal to Reverse the CRIT Decision

On November 11, 2005, Senate Indian Affairs Committee Chairman John McCain introduced S. 2078, the IGRA Amendments Act of 2005. S. 2078 seeks to reverse the CRIT decision by granting the NIGC broad new authority to regulate class III gaming. The provision simply adds the term "and class III gaming" after "class II gaming" each place that it appears in the Act.

This sweeping amendment would put in place a Federal regulatory regime that would duplicate and often conflict with the existing Tribal-State compact process. The proposal completely restructures the existing balance of tribal, state and federal sovereignty under the Act—undermining existing Tribal-State Compacts with unlimited Federal regulatory control. The NIGC proposal fails to harmonize the new federal role with the current roles of tribal and state governments. It reaches far beyond the agency's concerns of implementing its minimum internal control standards into complete regulatory authority over Class III Indian gaming, without adequate statutory parameters to protect tribal self-government. In essence, it has the potential to create another unmanageable bureaucracy because it gives the Federal agency authority a blank check to determine its own authority through new Federal rulemaking.

Upon enactment of IGRA, Tribes for the first time in history were forced to negotiate with State governments about on-reservation activities. The tribal-state compacting process has proven difficult for many tribal governments and impossible for some. S. 2078 completely ignores the hard work that those Tribes that have successfully negotiated compacts have accomplished and the strong working relationships that tribal governments now have with state governments. This proposal must be rejected, unless Congress strikes the existing Tribal-State Compact process.²

S. 2078 is not limited to granting the NIGC authority to promulgate and enforce it MICS, but instead grants the NIGC broad new authority to regulate all aspects of class III gaming, i.e., "continuously monitor Class II and Class III gaming." Without any protection for tribal self-government, the NIGC would have authority to issue new Federal regulations that impose unfunded mandates to tribal governments concerning any and every aspect of Class III gaming. The NIGC could also promulgate rules that would conflict with Tribal-State Compacts and infringe on existing tribal-state regulatory relationships. The NIGC proposal is clearly overreaching and undermines the existing framework of IGRA.

Moreover, several years ago, the NIGC attempted to stray from its statutory authority to regulate class II Indian gaming and sought to promulgate and enforce "Environment, Health, and Public Safety" regulations that would have duplicated work of the Indian Health Service and the Environmental Protection Agency. Tribes

² After the Supreme Court's Seminole decision, discussed above, the tribal-state compacting process expends great tribal governmental manpower, is time consuming, and with the recent surge for demands for revenue sharing and sovereignty concessions—is costly and burdensome to tribal self-government. As a result, we believe that it would be patently unfair to "fix" the CRIT v. NIGC case, which is less than one month old and remains in litigation and add the burden of conflicting and duplicative federal regulations to class III gaming, without at the same time restoring balance and Congress' true intent to the compacting process, which has been broken for nearly 10 years.

across the Nation expressed their opposition to this action, citing the NIGC's lack of authority under IGRA. The NIGC properly withdrew the proposal, and instead offered the proposition as guidance for tribal governments to look as a model. We believe that if Congress grants unfettered authority to the NIGC, that it will again stray from its core mission to regulate Indian gaming.

As a result of the above-referenced concerns, NIGA remains opposed to the provisions of S. 2078 that grant the NIGC broad new authority to regulate class III gaming.

Alternative Proposal: Preserve the Existing Statutory Framework

As noted above, this is not emergency legislation. The case remains in litigation, and the NIGC retains sufficient authority to oversee and if need be enforce violations of tribal class III gaming regulations. Thus, we ask Congress to defer acting on this issue, and instead direct the NIGC to consult with tribal governments pursuant to its own Consultation document and pursuant to President Bush's Executive Memorandum to the Executive Departments and Agencies on the Government-to-Government Relationship with Tribal Governments, which explains:

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

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

After consultation with tribal governments, if the NIGC is determined to continue to seek an amendment to IGRA regarding minimum internal control standards, its proposal should be consistent with IGRA's existing structure. IGRA requires tribal governments to maintain basic tribal law provisions concerning the regulation of Indian gaming. NIGC already has existing power to approve these tribal ordinances to ensure that these ordinance appropriately protect the integrity of Indian gaming.

President Bush's Executive Memorandum on consultation with tribal governments directs agencies to find the least intrusive means to achieve agency goals. The NIGC does not need duplicative federal rule-making authority over matters already addressed by tribal law and the Tribal-State compact process. In fact, because there is such a strong system of minimum internal control standards currently in place, this principle could be put into place on a "best practices" basis in the NIGC's model tribal ordinance without requiring a change in existing federal or tribal law. NIGC already has statutory authority to review and ensure the proper enforcement of tribal ordinances and regulations. Title 25 U.S.C. section 2713 provides: "the Chairman shall have authority to levy and collect appropriate civil fines—against the tribal operator of an Indian game or a management contractor—for any violation of—tribal regulations, ordinances, or resolutions approved under section 2710".

Alternatively, the Senate has already passed S. 1295, the National Indian Gaming Commission Accountability Act, and it may be enacted into law as part of a technical amendments bill. That bill authorizes the NIGC to provide technical assistance to tribal governments, and under S. 1295, NIGC could simply draft a model tribal ordinance that includes MICS provisions for tribal government consideration. Perhaps after issuing a model ordinance, NIGC could report back one year later on how many tribal governments have put MICS in place through tribal ordinance, regulation, or maintain MICS in the Tribal-State Compacts.

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

S. 2078—"Gaming-Related" Contracts

I would like to take this opportunity to briefly express NIGA's strong opposition to S. 2078's "gaming-related" contracts provisions. These provisions would grant the NIGC new authority to review and approve a broad array of tribal business decisions:

- Consultant Contracts;
- Construction Contracts;
- Development Contracts and subcontracts;
- Financing Contracts;
- Goods and Services Contracts;
- Gaming Related Contracts (to be defined by NIGC);

- Management Contracts; and
- Participation Contracts.

The NIGC currently approves only management contracts and collateral agreements related to such management contracts. Many Tribes have complained that the NIGC takes longer than one-year to decide on a management contract. S. 2078 would require Tribes to gain NIGC approval of not only management, but also development, consulting, financing, and participation contracts. Under S. 2078, the NIGC would have 30 days to approve financing contracts and 90 days to approve other gaming-related contracts.

We believe that S. 2078's gaming-related contracts provisions will create a bottleneck in the federal government that will only serve to fatten federal bureaucracy at the expense of tribal economic development. In addition to the delay, many smaller Tribes are concerned of the great added expense that this provision will cost their operations. Many other Tribes are also concerned with the associated costs of complying with the National Environmental Policy Act (NEPA).

We believe that these provisions could overwhelm the NIGC with the required NEPA reviews. Currently, the NIGC approval of a management contract triggers a NEPA review. Although there are over 200 Tribes that conduct gaming as listed on NIGC's website, Tribes do not generally enter into and submit management contracts on a regular basis and, thus, NIGC is not handling an overwhelming number of NEPA reviews on an annual basis. However, each of the over 200 Tribes listed on the NIGC's website would likely submit numerous contracts every year to NIGC for approval if S. 2078 is adopted. Although the need for NEPA review is determined on a case by case basis, it appears that the approval of many of the above contracts would trigger NEPA. NEPA review of such contracts could be a lengthy and burdensome process. The NIGC has stated that it takes about six to twelve months to complete the EA process and twelve to eighteen months to complete the EIS process. However, both processes can take substantially longer. Accordingly, without a mechanism to avoid NEPA review of the approvals under Section 12, NIGC could potentially be overwhelmed by the sheer volume of NEPA reviews required.

Finally, S. 2078 fails to narrowly define each of the types of contracts that the NIGC will have authority to review. Instead, the bill grants the agency unfettered authority to determine on its own the types of contracts for which it will require approval. Once again, S. 2078 grants the agency power to determine the scope of its own jurisdiction—we believe that is an abdication of congressional responsibility. We are concerned that this provision—read together with the broad new authority over class III gaming—will unreasonably grow the federal government at the expense of tribal sovereignty. As a result, NIGA strongly opposes the gaming-related contract provisions to S. 2078 in their current form.

CONCLUSION

S. 2078's proposal to address the CRIT court decision intrudes upon Indian sovereignty, overreaches beyond the concerns of the federal agency requesting the amendment, disturbs the balance of authority between tribal, state, and federal governments, and has the potential to create a new unmanageable bureaucracy for Indian country to deal with on the federal level.

As a result, we respectfully ask Congress to defer action on this provision, and instead require the NIGC to consult with tribal governments to develop an approach to Minimum Internal Control Standards that is consistent with both the existing structure of IGRA and the President's Executive Memorandum on Government-to-Government Relationships with Tribal Governments. We believe that consistent with tribal self-government, the NIGC can support Indian tribes through technical assistance and model ordinance provisions under S. 1295, and then report back to the Committee.

In closing, Indian Tribes are committed to both the highest standards of regulation for Indian gaming and respect for Indian sovereignty. If we can be of assistance to the Committee, we would be pleased to answer any questions or provide additional documentation. Thank you again for the opportunity to testify on this important matter.

The CHAIRMAN. Thank you. Mr. Aspa.

**STATEMENT OF RAYMOND ASPA, SR., MEMBER OF
TRIBAL COUNCIL, COLORADO RIVER INDIAN TRIBES**

Mr. ASPA. Good morning, Mr. Chairman, Ranking Member Rahall and the members of the Committee. Thank you for providing the Colorado River Indian Tribes with this opportunity to testify this morning. My name is Raymond Aspa, Sr. I am a member of the tribal council of the Colorado River Indian Tribes.

CRIT has never taken the position that Class III gaming should not be regulated nor has CRIT ever denied that the MICS are not a valuable tool to ensure the integrity of our gaming operation. No one has a greater interest than we do in making sure that the games we offer are fair and honest, and that the public has confidence in the fairness and honesty.

For that reason, our tribal gaming code required internal control standards many years before the NIGC first promulgated its MICS. Our only argument with the NIGC these past five years has been over which government had statutory authority to require and enforce those standards.

The Federal District Court agreed with us. It is the tribes and the states, through their tribal-state compacts, that they have that authority. It is not the NIGC. Class III gaming certainly in our case is strictly regulated. Our tribal gaming office has a staff of over 30 employees and an annual budget over \$1.2 million. Moreover, our tribal-state compact is probably the most rigorous in the country. Most importantly in the context of this hearing our compact with the State of Arizona has adopted the MICS as the baseline for governing internal control standards in our casinos.

Given this intense regulatory environment, a third Federal layer of direct regulation is unnecessary. In addition to the \$1.2 million we budget for tribal regulation, we also pay almost one-quarter of a million dollars annually to the state to cover the costs of the state's oversight responsibility under our compact.

Strict regulation is necessary. Unnecessary regulation would divert funds that are desperately needed for the very purposes IGRA was enacted, to fund vital tribal government programs, encourage self-government and to seed nongaming economic development. IGRA represents a legislative compromise among three levels of sovereign governments, each of which has a legitimate interest in the fair and honest conduct of tribal gaming.

The tribes were rightfully viewed as the primary regulator of all three classes of gaming activity. The compromise balance struck was to give the NIGC a participatory role in regulating Class II, and the states are participatory role in Class III through the means of negotiated compacts.

If Congress rushes to fix the CRIT litigation by simply giving the NIGC broad regulatory authority over Class III gaming, the entire statutory scheme would be thrown out of balance and rendered essentially meaningless. If Congress believes it is necessary for IGRA to address the MICS, it should do so in a way that is differential to the regulatory scheme negotiated between the tribes and the states in their compacts and that recognize the core framework of the statute.

If Congress must amend IGRA to address the MICS, our preferred alternative is to incorporate the requirement through a

tribal gaming ordinance. The statute currently sets forth a list of specific subject matters that must be included in tribal gaming ordinances such as a background investigation, annual audits and permissible uses of gaming revenues. It would be a simple matter to add the requirement that every gaming ordinance must provide for the tribal enactment of internal control standards. This approach would be faithful to the principles that tribes through their own laws are the primary regulators of tribal government gaming.

It bears repeating that CRIT has never suggested that Class III gaming go unregulated. We firmly believe internal control standards are essential to the integrity of our gaming operation. We respectfully ask that this committee and Congress not to upset the balance so masterfully achieved 18 years ago by giving the NIGC regulatory authority to directly impose and enforce minimal internal control standards on Class III gaming activities.

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

[The prepared statement of Mr. Aspa follows:]

**Statement of Raymond Aspa, Sr., Colorado River Indian Tribes,
Member, CRIT Tribal Council**

Good morning Mr. Chairman, Vice-Chairman Rahall, and Members of the Committee. Thank you for providing the Colorado River Indian Tribes with the opportunity to testify this morning. My name is Raymond Aspa, Sr. and I am a member of the Tribal Council of the Colorado River Indian Tribes (CRIT).

Our Tribe has more experience with the NIGC's Minimum Internal Control Standards ("MICS") than we might like. As you know, the Tribe has successfully challenged the Commission's mandatory imposition of its MICS on the Class III gaming conducted at our BlueWater Casino in Parker, Arizona.

The very first thing I would like to share with the Committee is that CRIT did not seek this challenge; it came to us. Like every other tribe in the country, we questioned the Commission's statutory authority to mandate Class III MICS. In January of 2001, the NIGC began an audit of our compliance with its MICS. We attempted to discuss with the audit team the statutory basis for its audit. Tempers flared, the audit team left with its audit unfinished, and the NIGC issued a notice of violation and assessed a fine against us.

At that point, we had no choice but to defend ourselves. Our defense was the simple legal position that we shared with most other tribes: the Commission does not have the authority under the Indian Gaming Regulatory Act to mandate Class III MICS. An administrative law judge agreed with us, and then, last August, the federal district court agreed with us as well.

CRIT has never taken the position that Class III gaming should not be regulated. Nor has CRIT ever denied that the MICS are not a valuable tool to ensure the integrity of our gaming operation. To the contrary, we believe they are essential. No one has a greater interest than we do in making sure that the games we offer are fair and honest, and that the public has confidence in that fairness and honesty. For that reason, our tribal Gaming Code required internal control standards many years before the NIGC first promulgated its MICS.

Our only argument with the NIGC these past five years has been over which government has the statutory authority to require and enforce those standards. The federal district court agreed with us that under the statute as it is now written, it is the tribes and the states—through their tribal-state compact—that have that authority. It is not the NIGC.

Class III gaming, certainly in our case, is strictly regulated. Our Tribal Gaming Office has a staff of over 30 employees and an annual budget of over \$ 1.2 million dollars. Moreover, our tribal-state compact with the State of Arizona is probably the most rigorous in the country. The state shares broad authority with our tribal regulatory agency, with what we frankly sometimes view as intrusive rights to monitor, certify, and inspect. Most importantly in the context of this hearing, our compact

with the State of Arizona has adopted the MICS as the baseline for the governing internal control standards in our casino.

Given this intense regulatory environment, a third, federal layer of direct regulation is unnecessary. It would also add an unnecessary layer of expense to an already costly regulatory scheme. In addition to the \$ 1.2 million we budget for tribal regulation, we also pay almost one-quarter of a million dollars annually to the state to cover the cost of the state's oversight responsibility under our compact. Were the NIGC to assume direct responsibility for imposing and enforcing Class III MICS, its budget would explode, and the tribes would be the source of its funding. Strict regulation is necessary. Unnecessary regulation would divert funds that are desperately needed for the very purposes IGRA was enacted—to fund vital tribal governmental programs, encourage self-government, and seed non-gaming economic development.

Direct federal regulation through the mandatory imposition of internal control standards would eviscerate the compacting system that was the centerpiece of IGRA when it was enacted eighteen years ago. IGRA represents a legislative compromise among three levels of sovereign governments, each of which has a legitimate interest in the fair and honest conduct of tribal gaming. The tribes were rightfully viewed as the primary regulator of all three classes of gaming activity. The compromise balance struck was to give the NIGC a participatory role in regulating Class II, and the states a participatory role in Class III, through means of negotiated compacts. If Congress rushes willy-nilly to “fix” the CRIT litigation by simply giving the NIGC broad regulatory authority over Class III gaming, the entire statutory scheme would be thrown out of balance and rendered essentially meaningless.

If Congress believes it is necessary for IGRA to address the MICS, it should do so in a way that is deferential to the regulatory scheme negotiated between tribes and states in their compacts, and that recognizes the core framework of the statute.

Senator McCain has proposed to “fix” the statutory MICS “problem” by expressly giving the NIGC the authority to impose and enforce mandatory MICS for both Class II and Class III gaming. There are other ways to ensure that every gaming tribe imposes meaningful internal control standards on its gaming operation, and those other ways intrude far less on tribal sovereignty and the carefully balanced statutory scheme.

If Congress must amend IGRA to address the MICS, our preferred alternative is to incorporate the requirement through the tribal gaming ordinances. The statute currently sets forth a list of specific subject matters that must be included in a tribal gaming ordinance, such as background investigations, annual audits, and the permissible uses of gaming revenues. It would be a simple matter to add the requirement that every tribal gaming ordinance must provide for the tribal enactment of internal control standards. This approach would be faithful to the principle that tribes, through their own laws, are the primary regulators of tribal governmental gaming.

A second alternative would be to require all tribal-state compacts to address the subject of internal control standards, and to permit the Secretary of the Interior to reject a compact that did not address the standards adequately. This approach would eliminate the complaint so often heard about the inconsistency of regulatory rigor from state to state.

Of these two approaches we frankly prefer the first. Tribal governmental gaming should be governed first and foremost by tribal law. Mandating the terms of the compacts would undoubtedly give the states even more leverage to hold the tribes hostage to unreasonable—and unprecedented—state regulatory intrusion. Nonetheless, either of these suggestions is infinitely preferable to direct, heavy handed regulation by the NIGC, which would essentially preempt both tribal and state authority on the subject.

It bears repeating that CRIT has never suggested that Class III gaming go unregulated. Only the willfully uninformed accuse us of that. We firmly believe that internal control standards are essential to the integrity of our gaming operation. We respectfully ask this Committee and Congress not to upset the balance so masterfully achieved eighteen years ago by giving the NIGC regulatory authority to directly impose and enforce Minimum Internal Control Standards on Class III tribal gaming activities.

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

MAY 25, 2006

Hon. Nick J. Rahall, II, Vice Chairman
House Committee on Natural Resources
United States House of Representatives
Washington, D.C. 20515

Re: Oversight Hearing on Minimum Internal Control Standards Request for
Additional Responses

Dear Vice Chairman Rahall:

I am pleased to provide the following responses to the additional questions you have asked as a follow-up to my testimony before the Committee on May 11.

1. I noticed in your testimony that you mentioned when the NIGC auditor was at your facility, "tempers flared." Can you elaborate on the problems with the auditor?

In January 2001, the NIGC sent a five-person audit team to the Tribe's BlueWater Casino. The audit team intended to conduct an approximately two-week audit of the Tribe's compliance with the MICS. On the second day of the audit, tribal representatives met with the audit team to discuss the Tribe's concern about the statutory basis for the audit. Four of the five NIGC auditors were polite, respectful, and responsive to the Tribe's questions and were willing to engage in a dialogue. The fifth was rude and disrespectful. He refused to respond to the Tribe's questions other than to insist generally that IGRA gave the NIGC the authority to regulate Class III activity, and he gave the tribal representatives an ultimatum: grant the NIGC total access immediately or receive a notice of violation. The Tribe offered to permit the audit team to continue its Class II audit while the parties further explored the Class III authority issue, including giving the audit team the opportunity to meet with the Tribal Council, which was then in session. This offer was refused. After raising his voice to the Tribe's then-Acting Attorney General, the individual causing the problem ordered the rest of the audit team to leave the Reservation with him, which they did. (For the record, the individual who created the problem was not the head of the audit team.)

2. In your compact, the State of Arizona has broad authority to monitor, certify, and inspect your facilities. Please tell the Committee how often you see people from the state and how is your relationship with them? Do you feel they adequately inspect your facility?

We receive two distinct types of "inspection visits" from the state. Annually the state conducts a Compact Compliance Review ("CCR"). Ordinarily, the CCR takes place over the course of approximately one week, and involves a relatively large number of state personnel visiting our gaming facility to review a broad array of practices. The 2006 CCR, which is occurring as we respond to these questions, has involved the presence of eight different state employees performing different tasks over the course of a full week. During this extensive review, the state examines the Tribe's compliance with employee and vendor licensing provisions, internal controls, policies and procedures, worksheets, various reports, and so forth. While there is a fair amount of overlap with a technical MICS compliance review, the CCR is broader, covering virtually every aspect of the Tribe's Class III operation. At the conclusion of the week, we sit down with the state personnel for an exit interview, in which we are orally informed of the findings. Frequently we are able at that meeting to provide explanations for specific findings that immediately satisfy the state. Approximately two weeks later, the state sends us a written draft report of any findings not resolved during the exit interview. We then provide a written response, indicating what we have done or are doing to address any problems that may be identified. Approximately three months after the CCR, the state issues a final written report, incorporating its findings and our responses.

The second type of state monitoring consists of usually scheduled visits, occurring approximately once a month. The state generally sends two enforcement employees from its Flagstaff office, and each visit tends to focus on a specific issue, such as employee or vendor licensing, table game monitoring, and so forth. These monthly visits usually last no more than one day.

Our relationship with the Arizona Department of Gaming personnel is often cordial, always professional.

As to your question about whether we believe the state adequately inspects the facility, our candid response is that the state's inspection is more than adequate. Indeed, in virtually all respects it is duplicative of our own tribal regulatory regime and system of external audits. We are grateful for the second set of eyes, because

no one can catch everything, no matter how vigilant. However, we hope that the very intensity of the state's review—eight people over the course of one week, plus monthly inspections—on top of the daily tribal regulatory regime, demonstrates the unnecessary burden that would be placed on our operational and regulatory personnel by adding yet a third layer of such intense inspection and monitoring.

3. Do I understand your testimony correctly to say that the same MICS that the NIGC put out are included in your compact with Arizona? If true, then am I correct in understanding that if the NIGC has statutory authority over MICS in your Class III casino, you would have the tribe, the state, and the NIGC all inspecting the same standards? If so, what problems do you see coming from this situation?

Section 3(b)(3)(B) of the Tribe's Compact with the State of Arizona provides that the Tribe's "Gaming Facility Operation shall conduct its gaming activities under an internal control system that implements the minimum internal control standards of the [NIGC], as may be amended from time to time, without regard to the Commission's authority to promulgate the standards." Section 11 of the Compact identifies specific components and other requirements of the internal control standards.

In practice, the NIGC's MICS represent the baseline from which we in Arizona start. The tribes and the state have jointly negotiated numerous changes to the NIGC's MICS to address individual issues and practices that have arisen within the state. All of those changes have resulted in standards at least as stringent as those adopted by the NIGC. The Arizona compact MICS also deal with some matters not currently addressed by the federal MICS, such as standards mandating the required frames/second for surveillance cameras.

If the NIGC were to have the statutory authority to impose its MICS on our Class III operations, we would be subject to three levels of intensive regulatory investigation. We of course endorse the need for an active regulatory scheme. Nonetheless, it is also true that every time the state or NIGC conducts a scheduled or unscheduled inspection, tribal regulatory and tribal operational personnel are diverted from their ordinary duties. Duplicative regulation is unnecessary, intrusive, and expensive. More importantly, NIGC jurisdiction over the MICS would run the very real risk of inconsistent regulatory interpretation. There is no assurance that the NIGC would agree that a "different" tribal-state negotiated standard was necessarily equally or more "stringent."

4. How do you feel the NIGC having the authority to promulgate, change, and enforce new standards would interfere with your compact?

As noted above, direct NIGC authority over Class III MICS would pose a real danger of inconsistent regulatory interpretation. It would also unnecessarily divert human and financial resources that are more appropriately spent regulating and operating our gaming activities, and financing a better life for our people.

An additional potential interference lies in the manner in which the NIGC has been amending the MICS. The NIGC takes the position that it is necessary to review the MICS continually and amend them in small incremental changes as the need arises. The Tribe agrees that internal control standards need to be responsive to actual conditions and needs. Indeed, that is why there are frequent meetings between the Arizona Department of Gaming and the Arizona gaming tribes to review ever evolving drafts of new standards under the Compact. This sort of on-going review is much more efficiently handled on a local level under a compact. The federal regulatory process is cumbersome and time consuming; by the time a standard has gone through the initial and final notice and comment periods and is published as a final rule, the technology has changed yet again and the standards must be revised to meet new conditions.

5. You suggest you might support requiring the MICS included in gaming ordinances. Is this correct? And if so, who would enforce those standards?

The Tribe would strongly support incorporating mandatory internal control standards through the mechanism of the tribal gaming ordinance. At present, IGRA identifies a number of subjects that must be included within a tribal gaming ordinance, such as licensing safeguards and public health and safety requirements. If a tribe submits an ordinance to the Chairman of the NIGC for approval that lacks any one of these elements, the Chairman must reject the ordinance. In practice, the NIGC customarily informs a tribe of what is lacking in the ordinance, and the tribe submits an amended ordinance for a second review and approval.

As with all the other mandatory subject matters that currently must be included in a tribal gaming ordinance under §2710, the tribe itself would have primary responsibility to enforce internal control standards, because such standards would

be tribal law. Moreover, where, as is currently the case with CRIT and the other tribes in Arizona, the compact imposes minimum internal control standards, the tribe and state would share enforcement responsibility. Finally, the NIGC would continue to have the authority it now has under §2713, to “enforce” that tribal law if the tribe is not doing so. The operative principle is that the tribe would legislate the tribal law (internal control standards) governing the tribe’s own gaming activities (and, for Class III gaming, with input from the state); those standards would be enforced primarily by the tribe, with greater or lesser state involvement for Class III depending on the terms of the applicable compact. Only if both the tribe and the state failed to enforce the Class III MICS adequately would the NIGC have the ability under §2713 to take enforcement action.

6. Are you supportive of the way the current MICS were established? Was there enough tribal input?

Yes. CRIT obviously does not always agree with the NIGC’s interpretation of its own statutory authority. However, giving credit where it is due, the Commission has been conscientious about consulting with tribes and obtaining tribal input. Our only complaint on this score is that the Commission does not always follow through on the input it receives.

I wish to thank the Committee again for the opportunity to present the Tribe’s views, and you in particular for your thoughtful questions.

RESPECTFULLY,
 COLORADO RIVER INDIAN TRIBES
 RAYMOND ASPA, SR.
 MEMBER, CRIT TRIBAL COUNCIL

The CHAIRMAN. Thank you very much. We have been called to a vote on the Floor. I believe there is only one vote. We are going to temporarily recess the Committee, and finish with our testimony as soon as we get back. I will encourage the members to return as soon as possible. The Committee stands in recess.

[Recess.]

The CHAIRMAN. The Committee will come back to order. We left off Mr. Aspa had just testified, and now it is Mr. DesRosiers.

**STATEMENT OF NORM DES ROSIERS, COMMISSIONER,
 VIEJAS BAND OF KUMEYAAY TRIBAL GAMING COMMISSION**

Mr. DESROSIERS. Thank you, Mr. Chairman. Good morning committee members. It truly is an honor to have been invited here to speak to you today. At this point, forgive me, much of my prepared testimony will probably sound a little redundant.

I would first like to make it clear that I am here as a representative of the Viejas tribal government only, and that our expressed opinions and views may not be the same or in line with all of those of other tribes and tribal regulatory agencies.

I would also like to first point out that collectively nationally tribal gaming agencies employ over 2,800 regulatory agents and staff, and they provide over \$245 million toward their budgets for their regulation only at the tribal level. We, as tribal regulators, are responsible for the primary compliance enforcement of all applicable Federal, state and tribal laws and regulations, including the MICS or the minimum internal control standards.

Due to the cash-intensive nature of the gaming industry, a sophisticated system of checks and balances, that is people watching people, is unfortunately necessary to help discourage the temptation for some to misappropriate some tribal revenues. The MICS can be somewhat cumbersome, and oftentimes would not support process efficiency. However, it is critical that a clear separation of

functions, duties and responsibilities be maintained. This separation limits the scope of transactions authorized by one position without having to be overseen by another position.

For example, if the same person was authorized to order supplies, receive and inventory those supplies and authorize the payment for those supplies there would be little assurance that the operation was getting all that was paid for. A total lack of controls in this area could allow for eventual collusion with suppliers, kickbacks, fraud or embezzlement.

By separating these functions into say three different departments, for example a purchasing department that does the ordering and a receiving department to receive and verify the invoices and bills of lading and then an accounts payable department to authorize and issue final payment, then we significantly reduce the risk of collusion and improprieties. That is the theory behind internal controls.

Over the course of the last eight or so years, the National Indian Gaming Commission has promulgated a series of regulatory MICS requirements covering most areas where the safeguarding of tribal assets is at stake in the gaming operations. These MICS were a product of combining applicable and desirable provisions of other existing MICS models such as those developed by the National Indian Gaming Association and the Nevada-New Jersey Gaming Control Agencies.

The existing MICS today, the existing NIGC MICS, are a product of continued revision to accommodate new technology and obsolescence and have been formulated with the assistance of a tribal advisory committee over the last few years. Parallel to this we must recognize that many, if not most, tribal-state compacts authorizing the scope of allowable Class III gaming in a given state also address how that gaming will be regulated. Inevitably the agreed upon scope of the regulatory requirements calls for provisions that meet or exceed industry standards and internal controls.

We do not believe that any gaming operation or any tribal, state or Federal regulatory agency disputes the wisdom of requiring strong and effective internal controls. However, the question of who should design, implement and enforce those controls has created a bit of a dilemma. As previously mentioned, historically the NIGC with the help of the advisory committee has drafted internal controls for both Class II and Class III gaming.

Then they required tribal regulators to ensure the implementation and primary compliance enforcement with the NIGC field agents monitoring compliance through periodic field audits. This all changed several years ago when our friends, the Colorado River, challenged NIGC's authority to monitor regulatory compliance over Class III gaming activity. The tribes contended that under the Indian Game Regulatory Act the regulation of Class III gaming was strictly to be within the jurisdiction of tribes and states via their compacts, and that NIGC's regulatory authority was limited to Class II only.

Subsequently, the Federal Court in the District of Columbia has upheld the position of the Colorado River Indian Tribes ruling that NIGC does not have the authority to impose or enforce Class III regulatory MICS.

At this time, we believe that the vast majority of tribal gaming operations are currently in compliance with all NIGC MICS. Consequently, we believe that to maintain continued compliance with the NIGC MICS in effect poses no significant new impact. However, we are also aware that for various reasons some tribes still have not achieved full compliance.

It is also our position that it is in the best interest of Indian gaming to allow NIGC to have Class III MICS oversight thereby bolstering public confidence that Indian gaming is effectively regulated. Now having said this, should the NIGC be given that authority statutorily, we strongly suggest that they consider giving deference to tribes and states for MICS compliance enforcement in cases where the compacts adequately address the scope of required internal controls.

In addition, we firmly believe that when tribes have demonstrated full compliance for a period of three years that they should be eligible for a certificate of self-regulation in Class III gaming activities similarly to those provisions that already exist in IGRA for Class II gaming activity.

Once again, thank you for the privilege of being here today, and I will be happy to answer any questions.

[The prepared statement of Mr. DesRosiers follows:]

**Statement of Norman H. DesRosiers, Commissioner,
Viejas Tribal Gaming Commission**

Thank you for the opportunity to speak to you today. It is an honor to have been invited here before your Committee.

I should first make it clear that I am here as a representative of the Viejas Tribal Government only and our expressed opinions are not meant to be and likely are not, representative of the views of all Tribal Governments and/or Tribal Regulators.

I've been asked to address Class III Gaming Regulation in general, and specifically the need and value of Minimum Internal Control Standards, and the appropriate enforcement authority.

Generally speaking we take great pride in our Tribal Governmental Gaming Regulatory Agency. We have over fifty (50) full time agents and a budget of approximately four million dollars (\$4,000,000.00) to regulate a single Tribal gaming facility. Our agency is composed of auditors, background investigations and licensing personnel (both for vendors and key gaming employees), a compliance department, inspectors/investigators on the floor 24/7, and the surveillance department.

Our professional staff is composed of numerous former city, county and federal law enforcement personnel with a combined total of 230 years of law enforcement experience with an additional 219 years of combined regulatory experience.

This is noteworthy and not unique to Viejas. Collectively, nationally, Tribal gaming agencies employ thousands of regulatory agents, with many millions of dollars budgeted for regulation at the Tribal level. We are responsible for the primary compliance enforcement of all applicable Federal, State (Compact), and Tribal laws and regulations.

Despite all of this, Tribal regulatory authorities are the least recognized. Unfortunately, there is still a prevalent notion among the media, the public, and many legislators that "if it isn't State or federally regulated, then it isn't regulated." This misperception needs correction.

Now to specifically address the role of Minimum Internal Control Standards (MICS) in Class III Gaming.

Due to the cash-intensive nature of the gaming industry, a sophisticated system of checks and balances (people watching people) is unfortunately necessary to help discourage the temptation for some to misappropriate some of the Tribal revenues.

MICS can be somewhat cumbersome and often times would not qualify as supporting "process efficiency", however it is critical that a clear separation of functions, duties and responsibilities be maintained. This separation limits the scope of transactions authorized by one position, without being completed or monitored by another position.

For example, if the same person was authorized to order supplies, receive and inventory the supplies, and authorize payment for the supplies, there would be little assurance that the operation is getting all that it is paying for. A total lack of MICS in this area would allow for eventual collusion with suppliers, kick backs, fraud or embezzlement. By separating these functions into three (3) different departments, (i.e., a purchasing department to order, a receiving department to receive and verify the invoice and bill of lading, and an accounts payable department to authorize and issue final payment), we significantly reduce the risk of collusion and improprieties.

Over the course of the last ten (10) or more years, the National Indian Gaming Commission has promulgated a series of regulatory MICS requirements covering most areas where the safeguarding of Tribal assets is at stake in a gaming operation.

These MICS were a product of combining applicable and desirable provisions of other existing MICS models such as those developed by the National Indian Gaming Association (NIGA) and the Nevada and New Jersey Gaming Control Boards. The existing NIGC MICS are a product of continued revision to accommodate new technology and obsolescence, and have been formulated with the assistance of a Tribal Advisory Committee over the last few years.

Parallel to this, we must recognize that many, if not most, Tribal-State Compacts authorizing the scope of allowable Class III Gaming in a given State, also address how that gaming will be regulated. Inevitably, the agreed upon scope of regulatory requirements calls for provisions that meet or exceed industry standards for MICS.

We don't believe that any gaming operation or any Tribal, State, or Federal regulatory agency disputes the wisdom of requiring strong and effective internal controls. However, the questions of who should design, implement and enforce the controls, has created a bit of a dilemma.

As previously mentioned, historically the NIGC with the help of a Tribal Advisory Committee has drafted the internal controls for Class II and Class III Gaming. Then they required Tribal regulators to ensure implementation and primary compliance enforcement, with the NIGC field agents monitoring compliance through periodic field audits.

This all changed several years ago when the Colorado River Indian Tribes challenged the NIGC's authority to monitor regulatory compliance over Class III Gaming activity. The Tribes contended that under the Indian Gaming Regulatory Act the regulation of Class III gaming was strictly to be within the jurisdiction of Tribes and States via their Compacts, and that the NIGC's regulatory authority was limited to Class II gaming only. Subsequently, the Federal Court in the District of Columbia has upheld the position of the Colorado River Indian Tribes, ruling that the NIGC does not have authority to impose or enforce Class III regulatory MICS.

At this point in time we believe that the vast majority of Tribal operations are currently in compliance with all existing NIGC MICS. Consequently, we believe that to maintain continued compliance with the NIGC MICS in effect poses no significant new impact. However, we are also aware that for various reasons, some tribes still have not achieved full compliance.

It is also our position that it is in the best interest of Indian gaming to allow NIGC to have Class III MICS oversight thereby bolstering public confidence that Indian gaming is effectively regulated.

Having said this, should the NIGC be given that authority statutorily, we would strongly suggest that the NIGC consider giving deference to Tribes and States for MICS compliance enforcement in cases where their Compacts adequately address the scope of required internal controls. This would minimize unnecessary duplication of efforts and resources.

In addition, we also firmly believe that when Tribes have demonstrated full compliance for a period of three (3) years that they should be eligible for a certificate of Self Regulation in the Class III activity under the same conditions that the Indian Gaming Regulatory Act provide for in Class II gaming.

Once again, thank you for the privilege of being here today. I will be happy to answer any of the Committee's questions.

MAY 26, 2006

The Honorable Richard W. Pombo, Chairman
House Committee on Resources
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter dated May 15, 2006, which requested additional written comment to three questions submitted by Congressman Nick Rahall, II, from your

committee. These follow up inquiries are related to my testimony at your oversight hearing on May 11, 2006, regarding Minimum Internal Control Standards for Indian Gaming. Congressman Rahall has submitted three excellent questions and I shall attempt to address each one in the order presented.

- 1. Due to my assertion that there is a perception among the media, the public, and many legislators that Indian Gaming is unregulated, and that it would be in the best interest of Indian Gaming to allow NIGC to exercise authority over Class III MICS, thereby bolstering public confidence that Indian Gaming is effectively regulated; I am asked if I feel that commercial gaming has an advantage over Indian Gaming in public perception of gaming integrity.**

It is my opinion that, regretfully, commercial gaming does have an advantage over Indian Gaming with a more favorable public perception relative to its regulatory integrity. I say "regretfully" due to several factors.

First, there is a solid tolerance and expectation among the citizens that the institutionalized State government has credibility in its ability to regulate virtually everything, i.e., utilities, banks, transportation, commerce, etc. So it is expected that they can and will effectively regulate gaming and protect the interests of the citizenry. This has some affirmation by the publicity garnered by Nevada and New Jersey Gambling Control Boards. I view it as incredibly ironic that it took Nevada Gambling Regulators approximately 50 years to get to the point where they were confident enough to publicly announce that they had finally cleansed the Nevada Gambling industry of all organized crime.

Secondly, unfortunately there is a pervasive ignorance and widespread lack of understanding relative to Tribes, Tribal sovereignty and Tribal government. Because so few non Indians are exposed to reservations and the functions of federally recognized Tribal governments, those governments have been virtually invisible and non-existent in the minds of the general public. It is nearly impossible for them to understand or accept the concept that "the Indians" could have competent and credible government capacities. There is an apparent broad based disbelief that Indians could effectively regulate their own governmental gaming.

Also, we often hear the old adage of "The fox watching the hen house" relative to Tribal governmental regulatory agencies regulating Tribal governmentally owned casinos. This public perception suggests a pervasive double standard in that there is an inherent conflict of interest for Tribal governmental regulators to regulate Tribal gaming; however, it is perfectly acceptable for State regulators to regulate State owned gaming. Consequently, public opinion, fueled by media commentary and editorials, consistently decries that if Indian gaming is not State and/or Federally regulated, then it is not regulated at all.

For these reasons, again, I would opine that commercial gaming does indeed have an advantage over Indian gaming relative to the public perception of its regulatory integrity. I do not envision this perception changing unless and until the public ever achieves the level of exposure and education in Indian governments to understand and accept their existence and capabilities.

- 2. I am asked if I believe that the NIGC, working with the Tribal Advisory Committee, has done an effective job in producing internal controls for Class II and III gaming.**

Generally speaking I would have to agree that the NIGC and the committee have done a very credible job in producing MICS. I am personally acquainted with many of the committee members and they are a group of the industry's best in knowledge and experience in the area of internal controls.

I am only aware of one frequent complaint from committee members which suggests that occasionally NIGC personnel may be attempting to go a bit too far in the promulgation of controls. It is perceived that NIGC proposals can be "over kill" in being unreasonably cumbersome, burdensome, complicated and stringent.

- 3. I am asked to elaborate on my desire for Tribes to be able to apply for Certificates of Self Regulation in Class III Gaming after full compliance for three (3) years. I am very pleased that you asked this particular question for I am passionate about the issue and have feared that it is falling on deaf ears.**

I commented to the Senate Indian Affairs Committee when I reviewed the first draft of S2078. At the time I thought it was simply an oversight that they had not included this revision. Since that time I am increasingly convinced that for political and economic reasons it has intentionally been ignored.

The existing IGRA, § 2710 (c) (3), (4), and (5) states in essence that a Tribe engaged in Class II Gaming activity which has demonstrated full regulatory

compliance and conducted the gaming safely, fairly and free from crime and corruption for a period of 3 consecutive years, may obtain a "Certificate of Self Regulation" from NIGC for its Class II gaming activities. This certificate entitles the Tribe to exemptions from NIGC oversight specified in §2706 (b) (1), (2), (3) and (4) of the Act. In addition, the Tribe is eligible for a reduction in the fees assessed by NIGC against Class II Gaming revenues.

These provisions were relevant in the reasoning used in the District Court's ruling in favor of the Colorado River Indian Tribes (CRIT) in their assertion that NIGC does not have authority to impose and enforce regulatory MICS over Class III Gaming activities.

It is our opinion that if the Act is amended to specifically grant NIGC authority over imposing and enforcing regulations over Class III Gaming, that it is only reasonable and correct for §2710 (c) (3) to be revised to read "(3) any Indian Tribe which operates Class II and/or Class III gaming activity and which".

This simple inclusion of "Class III Gaming" then appropriately affords Tribes to be eligible for the same Certificate of Self Regulation under the same conditions and with the same benefits of those that would be experienced under Class II only gaming.

This would give much more meaning and substance to a Certificate of Self Regulation.

It is worth noting, that under the current existing process for applying for a Certificate of Self Regulation for Class II gaming, that the NIGC sends a team of auditors to the applying Tribe's property for a period of two or more weeks. During that time the audit team conducts an in depth compliance review verifying compliance with everything, including Class III MICS and "Compact" compliance. One must be fully compliant with all relevant Class III Compact requirements and regulations to be found eligible for a Certificate of Self Regulation in Class II Gaming activity only. This strikes us as illogical.

It is also worth noting that to date, only two Tribes in the entire United States have applied for and obtained Certificates of Self Regulation. In my interaction with Tribes nationwide, it is typically the sentiment that a Certificate of Self Regulation in Class II gaming only is not worth the effort of the application and review process and provides meaningless benefits.

This sentiment would most certainly change if a Certificate of Self Regulation included Class III Gaming.

We greatly appreciate the opportunity to submit this additional written commentary in response to your questions. We sincerely hope that you find this commentary helpful.

SINCERELY,
NORMAN H. DESROSIERS
COMMISSIONER

The CHAIRMAN. Thank you. Mr. Washburn.

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

Mr. WASHBURN. Thank you, Mr. Chairman. I am honored to be here, and as sort of the token academic I guess on the panel. When I look around, what I hear is that everyone seems to agree that internal controls are crucially important here, and everybody thinks that we need to have internal controls. The question is: Who ought to impose those internal controls? Should they be imposed by tribal governments by the Federal government or by state governments perhaps?

I think we all agree probably that generally at this stage it ought not be state governments. In 1988, I believe that Congress thought that state governments would be the ones that imposed internal controls through the compact process. Senator McCain does not like when I say this. He disagrees to some degree, but I really think in 1988 that Congress thought that the states would take this mantle on and would impose internal controls.

I think that the states have not necessarily lived up to that. Some of the states have adopted very aggressive regulatory models but other states have not. So what happens if we leave it up to the states and tribal-state compacts is we get spotty regulation. We get good regulation in some states and bad regulations in others or less focus in other states.

I think it is appropriate this is before the Resources Committee because this is one of the most important resources that tribes have these days, gaming. Many of the tribes would be nowhere without the very successful gaming operations they have, and so this is an appropriate place to be thinking about this.

I think that that also suggests that perhaps it is a Federal responsibility to protect this very, very important resource, and so that is largely why I think the Federal government should have this role. Really what we should probably do is say given the agreement that everybody believes that we ought to have internal controls, we should look around and figure out which government has the comparative advantage here.

Tribal governments have strong advantages. They are very close to the gaming. They have lots of people with boots on the ground that are regulating gaming, and they by and large do an excellent job, and we have not had very many serious problems. The NIGC has very rarely had to step in and take action, and what that says is the tribal governments by and large do an excellent job regulating Indian gaming.

Having said that, the NIGC has had to close down some tribal operations over the last 10 years or so. Maybe a half dozen. It has not been very many, but that threat of potential closure by the NIGC ensures that the tribal regulators do a good job by and large every day, and that really is an important role that the NIGC plays.

Query whether those tribes would have shut down their operations if they were merely tribally regulated. It is doubtful frankly. They have had too much investment to be able to do that. They are too close to the gaming.

The academic principle here is regulatory capture. The concern is that tribal regulators might be captured by those they are supposed to regulate. Regulator capture happens to some degree in every industry. It happens perhaps a little bit less in Indian gaming when the feds are involved and when there is a Federal presence that can oversee those tribal regulators. That is again why I think that the comparative advantage is really in favor of the Federal government.

Anybody that knows anything about Indian gaming knows that there is always a strong tension at the tribal level between the tribal regulators and the managers of the casino. They tend to fight oftentimes. That is a very healthy relationship frankly. The regulators and the managers of the casino ought to have tension between them. They ought to be fighting now and then. That is a signal that the regulators are doing their job.

Where we need to be concerned is when the regulators do not have that tension with the casino managers. Again, having the tribal regulators having the NIGC standing behind them will

ensure that they do their job, and they do it very carefully and very well.

Now, the notion of the minimum internal control standards one notion also is who ought to impose them? Who ought to define the substance of them? Currently the statute allows the tribes to determine the substance to some degree, but there is an overarching Federal framework. Each tribe has to have minimum internal control standards.

The notion of nationwide uniform standards is a good one. In fact, NIGA proposed it before the NIGC adopted them. NIGA proposed that there be sort of a general model the tribes use, and that was an excellent idea. The question is: Do we want the feds to go ahead and put that model in place and make it mandatory?

I think that we really do. I think we make better regulatory regime when we do that. Thank you for asking me to testify today.

[The prepared statement of Mr. Washburn follows:]

**Statement of Kevin K. Washburn, Associate Professor,
University of Minnesota Law School¹**

INTRODUCTION

Because Indian gaming is one of the most important sources of revenue for many Indian tribes, it is crucial that the industry remain well regulated. Strong regulation serves several practical functions. First, it protects Indian gaming from crime, ranging from petty theft by low-level employees to complex money laundering activities by members of organized crime. Second, strong regulation provides comfort to the gaming patron and the public in general that gaming is being done in a fair and honest manner and is free of criminal influence.

The particular vulnerability of gaming is that casino gaming involves large sums of cash changing hands in millions of transactions each day by thousands of people across the country. In an age in which transactions in most other areas of commerce are dominated by less fungible and more secure financial instruments, such as credit cards, debit cards and checks, casinos still predominantly operate with cash. The cash-intensive nature of the gaming industry makes it particularly attractive—and particularly vulnerable—to crime and corruption.

Despite this vulnerability, crime and corruption has, for the most part, been controlled in Indian gaming through vigilant adherence by gaming regulators to two primary regulatory strategies: careful background investigations of the key actors in Indian gaming, and strong internal control procedures for casino operations. It is widely agreed within the gaming industry in general that background investigations and internal controls are crucial to effective regulation. Today, no reasonable commentator could seriously deny the importance and effectiveness of these regulatory strategies in protecting the industry.

Thus, the key question today is not whether these regulatory strategies are valuable and important, but which governments, tribal, federal, or state, should bear the ultimate responsibility for implementing these regulatory strategies. The regulation of gaming has been plagued by a lack of clarity in the roles of the respective regulatory entities. It is an appropriate time for Congress to clarify those roles to provide better guidance to the industry and to gaming regulators.

A. THE ROLE OF STATE GOVERNMENTS IN REGULATING INDIAN GAMING.

When IGRA was enacted in 1988, most observers anticipated that states would take the opportunity afforded by the tribal-state compacting process to develop a strong regulatory presence over Class III Indian gaming. Some states took that opportunity and developed strong, reliable, and effective gaming regulatory agencies that provide vital assistance in insuring the integrity of Indian gaming. Other states, however, expressed little interest in regulating Indian gaming and failed to negotiate a significant regulatory role in tribal-state gaming compacts. These states have been “no-shows” in the important area of regulation. While substantially all of the states have shown a strong interest in tribal gaming revenues, fewer have

¹ The title and institution are provided for purposes of identification only. The views set forth herein reflect the views of an individual member of the legal academy and do not purport to reflect the official views of the University of Minnesota, its Law School, the State of Minnesota, or any other entity or person.

shown significant interest in the actual regulation of Indian gaming. In other words, state gaming regulation has been inconsistent: strong in some states, weak in others.

Even in the states that have undertaken a significant regulatory role in Class III Indian gaming, their efforts are vulnerable to criticism. Some of these criticisms are in the nature of conflicts of interest. On one hand, a state may feel ambivalent or even somewhat hostile to Indian gaming activity. For the Indian tribes that have gaming operations, gaming revenues help them maximize the exercise of their tribal governmental power and authority, that is, their tribal sovereignty. American history is littered with clashes between states and tribes; American legal history is a reflection of these battles. A leading Supreme Court case once described the people of the states as “the deadliest enemies” of American Indian tribes. While today these clashes are less often “deadly” in the most immediate sense, the clashes between tribal and state authority continue. Indeed, in recent years, one such clash or another has gone all the way up to the Supreme Court nearly every Term. In this context, it is easy to see why state governments may feel conflicted about preserving the integrity of Indian gaming to help tribes maximize tribal sovereignty.

On the other hand, where a state government does have an interest in maximizing Indian gaming revenues, which occurs when tribes have entered gaming revenue-sharing arrangements with state governments, states may have a different sort of conflict of interest. States that share Indian gaming revenues have an interest in maximizing gaming revenues. Meeting strict regulatory requirements can sometimes be expensive; compliance can therefore affect the bottom line and reduce gaming profits. A state’s short-term interest in maximizing revenues may therefore overshadow its interest in the integrity of Indian gaming. This can also create a potential conflict of interest for state regulators.

As a result of these conflicts of interest at the state level, state regulation leaves the Indian gaming industry vulnerable. The quality of regulation of Indian casinos ought not be subject to the mercy of state budgetary cycles or vary because of a potential conflict of interest. Congress should respect the decision of some states to “opt out” of Indian gaming regulation. That does not mean, however, that Indian gaming should be left unregulated if a state refuses to undertake this important responsibility. The federal and tribal governments must exercise appropriate roles over Class III gaming, and Congress should clearly recognize those roles. The integrity of Indian gaming must be carefully protected if Indian gaming is to remain an important tribal asset in the future.

B. THE PROPER ROLE OF TRIBAL AND FEDERAL REGULATORS IN INDIAN GAMING.

1. Tribes should have the primary responsibility, though not the exclusive responsibility for regulating Indian gaming. The primary responsibility for insuring that Indian casinos adopt and adhere to adequate internal controls ought to lie with tribal gaming regulators who have the advantage of physical proximity and already exercise a variety of regulatory functions within Indian gaming operations. During the past fifteen years, a large and sophisticated community of professional tribal gaming regulators has taken root across the country. Tribal gaming regulators have proven themselves, in the main, as effective regulators. In most circumstances, tribal regulators work conscientiously, competently and independently in providing strong regulation of Indian casinos. Recognizing their primacy in undertaking these sovereign responsibilities is likely to produce the most effective regulation. However, tribal regulatory structures have some obvious regulatory weaknesses and vulnerabilities that justify a strong oversight role for federal regulators, including the need for federal regulators to take independent enforcement action where tribal gaming regulators fail to meet their sovereign responsibilities.

2. Each tribal regulator has a responsibility to his own tribe that makes him myopic as to the national interest of all Indian tribes. Federal regulators, on the other hand, can protect the integrity of the entire industry. Although it is true that fundamental notions of tribal sovereignty and self-determination ought to protect the right of each tribal government to make regulatory decisions without federal oversight, Indian gaming is an exception to this principle. I justify exceptionalism on this basis: one of the practical ramifications of tribal sovereignty is that no tribe can be held accountable to any other tribe. Yet, despite their legal insulation from one another and their lack of mutual accountability, Indian tribal decisions can harm other tribes. In the highly politicized world of Indian gaming, no tribe is an island unto itself. Indeed, the political fallout from incompetent or corrupt actions of one tribe may well impact hundreds of other tribes across the country. Indian gaming exists at the sufferance of Congress and State Legislatures and the public whom those bodies represent. If one tribe’s casino

succumbs to corruption or otherwise earns infamy, then the entire Indian gaming industry may well be tainted. The integrity of the industry—and even the perception of integrity—must be guarded with vigilance. In Indian gaming, tribes are linked inextricably to one another. Because no tribe has the ability to regulate other sovereign tribes, this problem is one that tribes cannot solve themselves. In my view, this lack of accountability of one tribe to another justifies federal oversight to accomplish what tribes cannot achieve through collective action. In other words, the federal government's own sovereign authority in this area can offer sound regulatory coverage that tribes could never achieve on their own.

3. Federal regulators can provide oversight to tribal regulators, who may have conflicts of interest, and may need external support to buttress their authority within the tribal government. The risk of occasional irresponsible behavior by tribal regulators is quite real, for a couple of reasons.² First, the Indian Gaming Regulatory Act does not currently require that Indian tribes have independent tribal gaming commissions. Many tribes have created gaming commissions, but the relative independence of these commissions varies. Tribal commissioners are sometimes directly accountable to tribal leaders and/or tribal voters. While, in most circumstances, the tribal interest in the long term health of the gaming operation will give each tribal regulator a strong incentive to regulate responsibly, there may occasionally be overwhelming temptation to cut regulatory corners for short term gains. In other words, tribal regulators have the same type of conflict of interest that state regulators have. And, in some cases, the conflict will be even more severe. Federal regulators can minimize the damage caused by such conflicts of interest by subjecting tribal regulators to independent oversight.

4. Tribal regulators will sometimes lack the will to close an Indian casino that has engaged in gross irregularities. Because most tribal governments operate only a single Indian casino, and thus the tribal gaming regulatory agency has authority only over one casino, there is a serious risk that the tribal regulator will occasionally “pull his punches.” In circumstances where one tribe operates one casino, the tribal regulator's job is dependent on the existence of the Indian casino. Such a regulator will not be inclined to shut down the casino even for gross misconduct. Hopefully, the need for closure of an entire casino will be rare, but it is precisely in the most egregious circumstances when it ought to be done. The NIGC must have clear authority to take appropriate action over Class III casinos, including closure, especially in cases in which tribal regulators fail to act.

5. Tribal regulators are also more likely to succumb to “regulatory capture.” “Regulatory capture” is the term used to define a regulatory agency's tendency to align its interests and collude with the firms it is ostensibly regulating, to the detriment of the public interest. The rich and diverse academic literature on capture reflects the notion that a regulated industry will attempt influence the regulator to prevent vigorous enforcement of the regulatory regime. Some scholars say “capture” is unavoidable: regulators will become instruments of the regulated community and will inevitably act in favor of the regulated community. Others take a pragmatic view that “capture” will exist to a greater or lesser degree depending on the legal structures that are used to guard against it, but that the threat of capture can be managed with prudent laws and sound regulatory structures. One risk factor for capture is a high degree of discretion by regulators. Wide discretion not only creates the opportunity for regulators to rule in favor of the regulated community, but also provides cover for doing so because the essence of discretion is power unconstrained by enforceable legal authority. The regulation of gaming almost always involves a high degree of discretion by regulators. Many regulators assert as a matter of law that their discretion to grant or deny gaming licenses is unfettered by due process requirements because involvement in gaming is not a right, but a privilege. Though this argument is less compelling under modern notions of due process, it reflects a widely held view among gaming regulators and it creates enormous unchecked discretion in the hands of the gaming regulator. Such broad discretion can increase the risk of capture.

6. Federal regulatory oversight can minimize “capture” of tribal regulators. Another risk factor relates to the number of groups interested in the regulator's performance. A regulatory agency that has many regulatory entities within its jurisdiction and many other interested groups interested in its work is less likely to succumb to capture by any one group, because it will be held accountable to some degree by each of the entities and interested groups and each will scrutinize agency action. So, for example, when the FCC makes a decision related to the

²I addressed some of the same issues in detail in testimony before the United States Senate Committee on Indian Affairs on April 27, 2005, and September 21, 2005. A link to this testimony can be found at <http://www.law.umn.edu/facultyprofiles/washburnk.htm>.

regulation of communications, AT&T or Verizon may cry foul if Qwest gets favorable treatment that the others perceive as unfair. Such competition within the regulated industry makes the regulator more accountable and thus serves as an important check on regulatory capture. In contrast, many tribal regulatory agencies have authority over only a single entity. In this “one tribe, one casino” model, tribal regulators work repeatedly with the same Indian casino officials. Thus, the structure of Indian gaming markets renders tribal gaming regulators tremendously vulnerable to capture. Tribal regulators will thus face less scrutiny than other regulators; they will hear only one voice, rather than many, when they make regulatory decisions. While outside interest groups can sometimes have an impact in preventing capture, there are few independent interest groups looking out for tribal members or casino patrons in the Indian gaming industry. Federal regulators can serve the role of overseeing tribal regulators, pushing them to be vigilant and requiring them to resist capture.

7. Federal regulators have a comparative advantage in protecting all Indian gaming. Because of internal tribal pressures and the natural conflicts of interest of tribal regulators, federal regulators have a comparative advantage. Federal regulators are largely disinterested and objective; they have no significant conflicts of interest because they obtain no direct or significant benefit from the development of any particular Indian gaming facility.

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

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

C. RECOMMENDATION

Indian tribes deserve clarity on the gaming regulatory structure. Likewise, the NIGC will be able to operate with greater confidence and legitimacy if it has a clear Congressional mandate on its authority to regulate. Because it is in the best interest of Indian gaming for an independent and objective regulator to oversee all significant gaming activity, Congress should strengthen the NIGC’s mandate over Class III gaming. **Congress should recognize the NIGC’s authority to assure the integrity of Indian gaming extends to Class III gaming activity for all purposes, including background investigations of management contractors, minimum internal control standards, and health and safety.**

Second, federal Indian gaming regulators must be cognizant of the fact that it is sovereign governments they are regulating. Many disputes between Indian tribes and the NIGC have arisen when federal regulators have behaved in a heavy-handed fashion. While such heavy-handedness is the norm among regulators within the commercial gaming industry in Nevada and New Jersey and other jurisdictions, the circumstances are far different in Indian gaming. Regulators in Nevada and New Jersey are regulating private actors, not sovereign nations.

Federal regulators must behave much more carefully and respectfully toward the regulated industry. **To be effective, NIGC regulators must not be merely regulators, but also educators and diplomats.** While federal regulators must utilize a variety of skills to achieve tribal compliance, reliance on aggressive regulatory tactics sometimes simply masks ineffectiveness. Federal regulators should treat tribal regulators and tribal officials with the same respect and deference that they would use toward state officials. To some degree, this means that the NIGC requires adequate financial resources to recruit, hire, and retain the best regulatory professionals in the country. Given the context, the task for federal regulators is simply much more difficult than for state regulators.

CONCLUSION

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

Thank you for seeking for my views on this important subject.

**Response to questions submitted for the record by Kevin K. Washburn,
Associate Professor, University of Minnesota Law School**

Responses to Congressman Rahall's Questions

Below are answers to questions following the May 11 hearing on the Minimum Internal Control Standards for Indian Gaming submitted by Congressman Nick Rahall II. I greatly appreciate the questions and this opportunity to respond.

Question 1: You make the point that the appearance of Indian gaming being thoroughly regulated and free of criminal influence is most important. In addition to your regulatory suggestions, is there a way to convey to the public that Indian gaming is well-regulated and resistant to crime?

Answer: In recent years, public perception has lagged behind reality in the gaming industry generally and Indian gaming in particular. To some degree, the gap is created by the public memory of early involvement by organized crime in the gambling industry. The public may not be willing to support an enterprise that it believes creates an opportunity for crime to flourish. The reality is that there simply are not very many modern instances of organized crime or other criminal enterprises infiltrating gaming establishments. Though there have occasionally been attempts by such groups to reach Indian gaming, gaming regulators have been effective in foiling their efforts. One of the most telling pieces of evidence is that the Department of Justice, our nation's chief law enforcement office, consistently testifies that it has not been able to identify any serious problems with criminal enterprises and Indian gaming.

Perhaps the best way to address the gap between perception and reality is to shine sunlight on the issue through Congressional oversight hearings. When the Department of Justice is asked to testify about crime in Indian casinos, it generally responds that it has concerns about the risks of such activity, but that it has found no significant or widespread problems. Such testimony helps to alleviate the concerns by the public and build the public's confidence in the industry. The relative crime-free nature of Indian gaming is a testament to the quality of the regulatory efforts directed toward the risks of criminal influences. Regulation has, by and large, been highly effective in this industry.

Question 2: You also reference a "lack of clarity in the roles of the respective regulatory entities." How can this be fixed?

Answer: The National Indian Gaming Commission (NIGC) has clear and indisputable authority to regulate Class II gaming (bingo and simile games), but some tribes have challenged the NIGC's authority over Class III gaming (casino style games such as blackjack, roulette, craps and slot machines). Because Class III casino-style gaming represents, by far, the biggest part of the Indian gaming industry, the NIGC should have clear authority to regulate it. Otherwise, it would be more honest to label the NIGC the National Indian Bingo Commission. Congress seems to have anticipated in 1988 when it enacted the Indian Gaming Regulatory Act that states would regulate Class III gaming. The reality is that this expectation was not entirely met. Some states did take up the mantle, but other states failed to do so. This authority should rest with the NIGC so that there is even coverage across the nation, even in those states that failed to undertake regulatory responsibilities. While the NIGC may have authority over Class III gaming, the NIGC clearly has less authority over Class II gaming than it has over Class III gaming.

The lack of clarity can be corrected by clearly granting the National Indian Gaming Commission the same authority over Class III gaming as it already has over Class II gaming. This would insure that the only federal agency with gaming regulatory responsibilities has adequate and clear authority to regulate all Indian gaming appropriately.

The NIGC is the only regulator that can provide oversight, supervision, and guidance to the hundreds of tribal regulatory agencies, which vary in quality. The NIGC will have greater prestige if Congress will make clear that it intends the agency to have authority over Class II and Class III Indian gaming.

Thank you for giving me a chance to respond to these important questions.

The CHAIRMAN. Mr. Ducheneaux.

**STATEMENT OF FRANK DUCHENEAUX, CONSULTANT,
REPRESENTING MINNESOTA INDIAN GAMING ASSOCIATION
AND GREAT PLAINS INDIAN GAMING ASSOCIATION**

Mr. DUCHENEAUX. Thank you, Mr. Chairman. I appear here today as the sign indicates at the request of the Minnesota Indian Gaming Association and the Great Plains Indian Gaming Association. Mr. Chairman, Mr. Kurt Luger, who is Executive Director of the Great Plains organization, asked me to present his regrets on not being here and express his appreciation to you for your past assistance to him in the tribes in North Dakota. I also am authorized to present this testimony on behalf of the Montana Tribal Gaming Association.

A lot of the testimony here already presented and statements made duplicate what I am going to say. I would like to say here that the tribes of the organizations I represent here today would endorse wholeheartedly the NIGA position and the statements made by Mr. Aspa on behalf of the Colorado River Tribe.

I have a lengthy statement of which you have already admitted to the record. I would also like, Mr. Chairman, if it is OK to submit for the record a paper that I and Pete Taylor, former Chief Counsel of the Indian Affairs Committee, developed for the NIGA entitled Tribal Sovereignty and Powers of the National Indian Gaming Commission, if that is OK.

The CHAIRMAN. Without objection.

[NOTE: The paper submitted for the record has been retained in the Committee's official files.]

Mr. DUCHENEAUX. My statement goes into the experience I had as Counsel of Indian Affairs with this committee from 1973 to 1990, including the years when the legislation was being considered here, and I will not go into that. I would want to say in the 100th Congress when we were considering legislation in this committee, Chairman Udall made his decision at that time to cease action in this committee not to mark the bill up, his bill up, but rather he directed me to go over to the Senate Indian Affairs Committee and work with the Senate Indian Affairs Committee staff to develop a bill, a compromise bill which would be minimally acceptable to the Indian tribes.

His direction to me was to advise that committee staff that if the Senate could pass a bill that was minimally acceptable to the tribes that he would have it held at the speaker's table and would bring it up under suspension of the rules. Conversely, if a bill was passed which was not acceptable to the tribes, he indicated that he would have it brought back to the committee and would in effect kill it here.

He gave me pretty wide latitude in developing the compromise. We worked several months in the closing months of 1987 and the early months of 1988, and finally a bill as you know was enacted and the law is IGRA. Throughout that process, throughout the six years of legislation in this committee and the negotiations, it was a central part of Mr. Udall's position that tribal sovereignty and the right of tribal self-government be protected to the greatest extent possible while yet achieving the goals of the legislation.

Despite what all of the comments being made today about what the intent of Congress, particularly with respect to Class III, clearly it was the intent of the Congress, of the Committee leadership including Senator Inouye and the staff that negotiated on it that the Commission was not to have the authority to develop and impose these kinds of detailed, day-to-day regulations on Class III gaming, and I say nothing about Class II. I want to make that clear to the Committee, Mr. Chairman.

Then I want to get into the proposals that are being made today. We have S. 2078 on the Senate side proposing to, despite the decision in the CRIT case—and again I think the tribes I represent would fully endorse the statement of Mr. Aspa on that regard.

S. 2078 proposes to impose upon the tribes that kind of detailed regulations. I cannot say what the understanding of the Committee's Members of Congress when they voted on it in that regard, but clearly it was not the intent that they have that responsibility. Early leadership of the Commission recognized that. Anthony Hope, who was the first chairman, clearly recognized that the Commission did not have the power to do that. Nevertheless, they have gone ahead and done it.

As mentioned in the NIGA statement, Indian tribes expend—I thought it was over \$200 million. They are saying Indian tribes spend over \$300 million a year in regulating their own activities, and yet those who are proposing this new amendment seem to ignore and discount that effort. That says to Indian tribes, at least to tribes that I represent, that the Congress, those in the Congress and other people in leadership seem to feel that Indian tribes do not have the capability as Indian people to regulate their own activities, and we have to rely on outside people to come in and tell us what is in our best interest. The Indian tribes that I represent reject that.

I am not saying, Mr. Chairman, that there have not been cases in Indian gaming where there has been misconduct, abuses but I think as the Professor has said, those have been isolated, and I do not think a record has been made that there has been a pattern of abuse which would warrant the kind of proposal that is being made.

Mr. Chairman, I would just like to say in conclusion that the tribes of Minnesota, North Dakota, South Dakota, Nebraska, Iowa and Kansas and Montana are strongly opposed to the proposal. Having said that however, Mr. Chairman, if in the wisdom of this committee that something ought to be done in this area, they concur in the thought that hopefully the Committee would work with them to try to address these problems, real or perceived, in a way that is as much consistent with tribal sovereignty as possible. Thank you, Mr. Chairman.

[The prepared statement of Mr. Ducheneaux follows:]

Statement of Franklin Ducheneaux, representing, the Minnesota Indian Gaming Association and the Great Plains Indian Gaming Association

Mr. Chairman, my name is Franklin Ducheneaux. I appear today at the request of, and representing, the Minnesota Indian Gaming Association and the Great Plains Indian Gaming Association. These two organizations represent over 20 Indian tribes in six states. In addition, the Montana Tribal Gaming Association, representing the 7 tribes of Montana, is supportive of the views expressed in this state-

ment. On behalf of those tribes and organizations, I want to thank you and the Committee for this opportunity to present their views on proposals to amend the Indian Gaming Regulatory Act with respect to the application of NIGC minimum internal control standards to class III Indian gaming.

I also have a first-hand experience with the development and enactment of IGRA. From March 1983 to December 1990, I served as Counsel on Indian Affairs with the Committee; first with the Subcommittee on Indian Affairs under the chairmanship of our late friend, Lloyd Meeds, and, second, with the full Committee on Interior & Insular Affairs under the chairmanship of our late friend, Morris K. Udall. With particular relevance to this oversight hearing on the MICS issue, I served in that capacity in the 98th, 99th, and 100th Congresses, the period during which this committee and the Congress considered legislation protecting and regulating Indian gaming.

Before getting to the specific issue of class III MICS regulation by NIGC, I would like to give the committee a brief overview of the consideration of Indian gaming legislation during those three congresses. At this point, Mr. Chairman, I would like to offer for the record a paper prepared by me and Peter S. Taylor for the Minnesota Indian Gaming Association entitled "Tribal Sovereignty and the Powers of the National Indian Gaming Commission".

Seminole & Barona Decisions.—In 1981 and 1982, two Federal circuit courts of appeal decisions were handed down confirming the right of Indian tribes, under certain circumstances, to engage in, or license and regulate, gambling activities on Indian lands free of control by state laws. These decisions were *Seminole v. Butterworth* (658 F. 2d 310) and *Barona Group of Mission Indians v. Duffy* (694 F. 2d 1185). The Supreme Court declined to review the two decisions. As the holding in these cases percolated through Indian country, increasing numbers of tribes began to offer high stakes bingo as a means of generating badly needed tribal revenues.

98th Congress and H.R. 4566.—As Indian Affairs Counsel, I was concerned about the probable non-Indian reaction to these decisions and tribal gaming activities. There was also concern among members of the Indian bar that the Supreme Court would take an appeal on such a case and reverse. With the approval of Chairman Udall, I drafted a bill that provided, among other things, for minimal Federal regulation of Indian gaming. Mr. Udall introduced the bill on November 18, 1983, as H.R. 4566. Hearings were held on the bill by this committee, but no further action was taken, primarily because the Indian tribes opposed the legislation, even with the minimal intrusion into tribal sovereignty through its provisions.

99th Congress and H.R. 1920.—By the time the 99th Congress convened, more tribes had turned to high stakes bingo as an economic development and revenue-generating effort and there was a growing anti-Indian gaming backlash that was increasingly being reflected in the Congress. Again, at Chairman Udall's direction, I drafted another bill dealing with Indian gaming that Mr. Udall introduced on April 2, 1985, as H.R. 1920. Two other bills were introduced in the House and a bill was introduced in the Senate on the subject.

H.R. 1920 was a much more complex bill and more intrusive into tribal sovereignty than H.R. 4566. Nevertheless, it reflected Chairman Udall's continuing strong support for tribal sovereignty and tribal self-government and his reluctance to invade tribal sovereignty more than was strictly necessary to deal with the matter.

Extensive hearings were held on the bill. It was marked up in the Committee on December 4 and 11, 1985, and ordered reported with an amendment in the nature of a substitute. By then, the legislation had established the three classes of Indian gaming and, because of the strong and growing anti-Indian gaming forces, the substitute unfortunately included a 4-year moratorium on class III gaming. The bill passed the House under suspension of the rules on April 22, 1986. The Senate Indian Affairs Committee reported H.R. 1920 to the Senate on September 15, 1986, but a hold was placed on the bill and it died with the 99th Congress.

Despite the growing pressure from those opposed to Indian gaming to impose either state or Federal regulations on Indian gaming, the leadership of both the House and the Senate committee still sought to protect the right of tribal sovereignty and self-government in the regulation of gaming on Indian lands.

The Supreme Court and the Cabazon Case.—An event occurred in 1986 that colored the remainder of the legislative actions in the 99th Congress and action of similar legislation in the 100th Congress. On June 10, 1986, the Supreme Court decided to hear an appeal from the State of California in the case of *California v. Cabazon Band of Mission Indians*. The circuit court decision in the Cabazon case, like the earlier decisions in the Seminole and Barona Ranch cases, held that the tribe involved was entitled to engage in bingo and other games permitted under

state law free of state regulation. It was generally accepted in both camps that the Supreme Court, based on recent decisions in other Indian cases, would reverse the lower court and find for state regulation.

The 100th Congress and IGRA.—When the 100th Congress convened, I advised Chairman Udall that it might be the better part of valor, because of the expected reversal of the Supreme Court in the Cabazon case, to take a more conciliatory legislative position with the anti-Indian gaming forces, both on the Committee and in the House. I drafted for the Chairman a bill that he introduced as H.R. 1079 on February 2, 1987. This bill was designed to salvage as much as possible for tribal sovereignty over Indian gaming before the Court rendered its expected decision in the Cabazon case. This bill, which I now look back on with some shame, was offered to the other side by the Chairman, but, fortunately, it was soundly rejected.

On February 25, 1987, the Supreme Court handed down its decision in the Cabazon case that fully upheld the decision of the lower court in favor of the right of Indian tribes. With the Court decision, the legislative momentum and strength shifted away from the state-gaming industry position to the tribal government position. Even then, Chairman Udall sought to reach a compromise with the opposing forces. He sent a May 4, 1987, letter to Congressman Pepper, Chairman of the Rules Committee, in that vein. I would like to quote from it:

“One effect of the Court decision is that some tribes are now opposing enactment of any legislation imposing regulations on tribal gaming. This opposition extends to my own bill, H.R. 1079. While I can appreciate this change in attitude of the tribes, I still feel that some legislation is desirable to provide needed protection for the tribes, themselves, and the public. As a consequence, I have directed my staff to redraft a bill which recognizes the rights secured to the tribes by the Supreme Court decision and, yet, establishes some Federal standards and regulations to protect the tribes and the public interest. However, I believe that this Federal regulation must be accomplished in a manner which is least intrusive upon the right of tribal self-government.

I did draft the bill and Chairman introduced it on May 4, 1987, as H.R. 2507. Still, Chairman sought to reach out to the other side with a compromise, but it was again rejected. On July 6th, Chairman Udall submitted a statement for the Congressional Record noting his offer and the rejection. Again, I would like to quote the closing part of the remarks:

“Mr. Speaker, I reluctantly take my compromise off the table and revert to my support for the language of my bill, H.R. 2507, which will provide effective regulation of Indian gaming within the context of our solemn promises to the Indian tribes. Still, I am willing to consider compromise if the non-Indian gaming industry is willing to respect Indian rights and are willing to leave a small piece of the pie for the Indian people.

“Until then, I must oppose legislation damaging to Indian self-government and Indian rights.” Congressional Record, July 6, 1988, P. H5028.

The Committee held a hearing on H.R. 2507 on June 25, 1987, but no further action was taken. I think some may have wondered why.

The older members of the Committee will remember that Mo’s abilities were being significantly affected by his Parkinson’s disease about this time. He realized that his legislative strength was waning. Sometime after the hearing, he called me to his office. He advised me that, while he could probably get the bill out of committee in a form acceptable to the tribes, he probably could not hold it against Floor amendments destructive of tribal sovereignty. He decided to cease action in the Committee. He directed me to go to the Senate Indian Affairs Committee staff and advise them that no further action would be taken in his Committee on H.R. 2507. He directed me to advise them that, if the Senate would pass a bill that was minimally acceptable to the tribe, he would hold it at the Speaker’s table and try to pass in under suspension of the rules. If the Senate passed a bill that was not acceptable to the tribes, he would bring it into the Committee and kill it. He authorized me to try to negotiate with the Senate staff and other interested parties on language that would be acceptable to the tribes.

While negotiations on the compromise language began in late 1987, active efforts did not take place until the beginning of the 2nd session of the 100th Congress and final agreement was reached in late April of 1988. While the bill number of the eventual compromise was S. 555, the language that formed the basis of the negotiations was the text of H.R. 2507, that had been introduced in the Senate by Senator McCain as S. 1303.

Mr. Chairman, the compromise we reached was a delicate one and one that, in my view, would be only barely acceptable to the Indian tribes. Viewed from the perspective of the victory the tribes had won in the Cabazon decision, the compromise

language resulted in further erosion of tribal sovereignty. However, viewed from the perspective of the political forces opposing tribal gaming, it was minimally acceptable. The Senate Indian Affairs Committee reported S. 555, with the compromise language, on August 3, 1988, and passed it by voice vote on September 15th. It was received in the House and passed under suspension of the rules on September 27th. It was signed into law by the President on October 17, 1988.

IGRA and the NIGC MICS.—Mr. Chairman, at issue in this oversight hearing of the Committee is the authority of the National Indian Gaming Commission to promulgate and enforce its existing minimum internal control standards (MICS) against class III Indian gaming and, if it lacks such authority under IGRA, the need to amend IGRA to give it that authority. I would like first to address the existing authority of NIGC under IGRA to do so and the intent of Congress in that respect.

There are those in leadership positions who are now saying that Congress intended in IGRA to confer that authority on the Commission. This, of course, includes the current Chairman of the Commission, Mr. Phil Hogen.

As I have noted, I worked very closely with Chairman Udall in the development, consideration and enactment of IGRA. Mo made very clear that he was personally opposed to gambling and, in particular, to government gambling. He also made clear his position that, if states were going to engage in that activity or to license and regulate it, he strongly supported the right of Indian tribes to do so within the context of their tribal sovereignty. While Mo recognized the growing need for Congress to address concerns about tribal gaming, his consistent position was that any legislation addressing those concerns must be as consistent with tribal sovereignty and the right of tribal self-government as possible. Unlike some today, his support for tribal sovereignty and tribal self-government was not lip service only. It was the hallmark of his legislative position on Indian gaming.

By the beginning of the 100th Congress, it was clear that the opponents of Indian gaming, including the states, had shifted their focus from class II gaming, including bingo, to the specter of class III or casino gaming. They were content to leave class II gaming to the regulation of the tribes, with some oversight and monitoring authority in the NIGC. They insisted, however, that class III Indian gaming either be banned or completely subject to state regulation. On the other side, the tribes and their supporters were equally insistent that the states play no role whatever in the regulation of class III gaming.

What came out of the negotiations between the House and the Senate in the 100th Congress was a compromise. Class III gaming was made illegal on Indian lands unless done pursuant to a compact negotiated between a tribe and a state, subject to approval by the Secretary of the Interior. Realizing that this would put the tribes at the complete mercy of the states, we authorized the tribes to sue the states in Federal court for failure to negotiate or to negotiate in bad faith. We also included language setting out the parameters of such negotiation. However, the language clearly intended that whatever regulation of class III gaming was to occur was to occur as a result of the agreement between the tribe and the state. Except for the monitoring and oversight functions, the NIGC was to have no role whatsoever in such regulations.

Mr. Chairman, I cannot say what the understanding of those Members of Congress who voted for IGRA was or what their intent was in voting for its passage. As the committee staff person charged by Chairman Udall with achieving compromise language that was minimally acceptable to the tribes, I can say what our intent and understanding was. The NIGC was not to have the power to promulgate and enforce detailed regulation of class III gaming. This would have usurped the power the states insisted on and destroyed the compromise the tribes accepted.

The NIGC MICS and CRIT.—In the early days of the Commission, the first Chairman, Anthony J. Hope, made clear his understanding that IGRA did not confer power to adopt and impose detailed regulation on Indian gaming. Hope, in his testimony before the Senate Indian Affairs Committee on April 20, 1994, noted that the "Commission lacks authority usually found in a comprehensive independent regulatory agency."

In discussing the need for an amendment to IGRA conferring such regulation, Hope stated:

"The Congress should set minimum standards for the regulation and monitoring of class III gaming, or authorize the Commission to prescribe them by regulation....If it is given responsibility of regulation class III gaming, it should be empowered to regulate in the same manner as gaming commissions in the state."

While the Commission's application of its MICS to class II gaming is not at issue in this hearing, I would parenthetically note that Hope's statement then noted that "These powers should also be extended to class II operations."

As we know, Mr. Chairman, despite this early Commission position and over the strong objection of Indian tribes, the Commission later promulgated and began enforcing its MICS over both class II and III Indian gaming. While tribes and other supporters of tribal sovereignty continued to assert the illegality of the Commission MICS, most complied with the MICS as a matter of economic necessity.

However, as the Committee may be aware, the Colorado Indian Tribes of Arizona finally stood up to the Commission. They challenged NIGC. They won a decision in an administrative appeal, which the NIGC ignored. They then sued in the Federal District court here in DC. On August 24, 2005, the court handed down its decision in *Colorado River Indian Tribes v. National Indian Gaming Commission*, 383 F. Supp. 2d 123. The court could not have been more clear in its decision that IGRA did not confer power on the Commission to impose its MICS on class III gaming.

IGRA Amendments and S. 2078.—Throughout the consideration of the Indian gaming legislation in the 98th, 99th, and 100th Congresses, it was Chairman Udall's goal to achieve the purposes of the legislation in a manner that was most consistent with tribal sovereignty. This was true of the provisions providing for the regulation of class III gaming. As is made clear in the CRIT decision, IGRA gave the Commission no role in regulating class III. The Act left that matter to the negotiations between the state and the tribe.

Despite the favorable decision in the CRIT case and, at least in part, because of it, the tribes are now faced with proposals to amend IGRA to specifically confer that power on NIGC, including S. 2078 as reported from the Senate Indian Affairs Committee. With few exceptions, the Indian tribes and organizations representing Indian tribes oppose those proposals. If enacted, such legislation would completely destroy the tribal sovereignty and the right of self-government in the area of tribal gaming enterprises. The tribes cannot understand the justification for this proposal.

One justification put forward by the proponents is based upon a comparison of funding levels for the regulation of Indian gaming. The assertion is made that the State of Nevada spends over \$80 million a year in regulation its gaming industry while the NIGC spends only \$8 million. The statement is true, but it totally ignores and discounts the over \$200,000,000 spent by Indian tribes in the regulation of Indian gaming activities, including funds provided to state agencies for regulation under compacts. The tribes are rightfully resentful of this attitude because it says to them that the non-Indian world believes that Indians, as Indians, cannot be trusted to regulate their own activities in an effective and fair manner.

Nevertheless, Mr. Chairman, I believe that some Indian tribal leaders would not be so opposed to such efforts if a record had been made that there was a pattern of abuse, corruption, fraud, and other misconduct in Indian gaming because of inadequate regulation. But there has been no such record made. The Senate Indian Affairs Committee has held several hearings in this Congress on Indian gaming. No witness has come forward to document a pattern of such misconduct. Lacking such evidence, the proponents assert that a scandal could happen in Indian gaming and, therefore, Federal regulation should be imposed for the Indian's own good.

Mr. Chairman, the Indian tribes and people do not need another Great White Father. They are strongly opposed to any return to a Federal policy of termination of tribal governing powers. They are equally strongly opposed to a reinstitution of a policy of paternalism by Federal bureaucracy.

I recently attended an event at the University of South Dakota that was a 50-year retrospective on Indian Self-determination Act. When I came to work for the Committee in the 93rd Congress, the first major bill I worked on was S.1017, which was enacted into law as the Indian Self-Determination Act. It ended the era of termination and paternalism and established the over-all policy of the Congress and the Federal government that the right of Indian tribes to govern their own affairs would be protected and strengthened. Enactment of S. 2078 or similar legislation on class III gaming regulation would destroy tribal sovereignty and return this Nation to an Indian policy of termination and paternalism.

The majority of the Indian tribes across the country, including the tribes represented by MIGA, GPIGA and MTGA, are strongly opposed to S. 2078 or to any other legislation conferring power of NIGC to impose its MICS on class III gaming. However, Mr. Chairman, if this Committee in its wisdom feels the need to move such legislation, the tribes would like the opportunity to work with the Committee leadership to craft language that would be consistent with, and respectful of, tribal sovereignty and self-government as S. 2078 is not.

Again, Mr. Chairman, I want to express the appreciation of the member tribes of MIGA, GPIGA, and MTGA/ for the opportunity to put their views before this Committee. This completes my statement and I would be happy to respond to any questions.

The CHAIRMAN. Thank you. Thank all of you for your testimony. Mr. Stevens, can you describe the degree of independence that tribal gaming commissioners generally have with respect to tribal councils? Are there potentials for conflict of interest, and if so, how are those dealt with?

Mr. STEVENS. No, I do not believe so. I believe that our tribal governments have taken that job very seriously, and I think like my friend here says that we end up having more opportunities where we might have some concerns and a little bit of intense dialogue between them because of their respective roles. I think that almost all of these governments have accepted their role. At the same time, the gaming commissioners in our tribes have accepted a very professional role in their responsibility to regulate this industry that means so much to their community, to their children and to their future.

The CHAIRMAN. How are the potential conflicts dealt with though, Mr. Stevens? When you are self-regulated, obviously it brings questions, and other members have asked me about this, and I know that the Senate has talked about this. How do you ensure that those internal control standards that you have adopted, that the individual tribes have, how do you ensure that those are followed, and that there is independence on those that are regulating gaming within the tribes?

Mr. STEVENS. We hold ourselves to a high degree of standard in Indian country. Chairman Hogen talked about how in Vegas and Atlantic City they got there. We believe that not only have we got there we have been there, and we have taken on those kinds of challenges that have confronted us.

We have again a high degree of ethical standard within Indian country that is pretty much handed down through our elders and our culture, but at the same time in order to be the best in these challenges we brought on—as I said in my testimony—ex-FBI, ex-police department, different kinds of folks that ensure the integrity of our operations.

Now, in my tribe specifically we have an internal audit department that exists with I believe at least three auditors on the tribal side, and then we have auditors that come within the gaming side. The gaming commissioners also have their own auditors. They also have their own investigators.

We have a tremendous amount of checks and balances in our tribal operations, and we are very proud of that, and we work so hard in our group to ensure that because we know that it has always been kind of the myth that these kind of occurrences take place. In our review and the statistics and our history, very, very small percentage of major occurrences have happened, and these occurrences have been detected by our professionals, by our commissioners and our investigators, and taken care of in accordance with the laws and regulations within our tribe and our operations.

The CHAIRMAN. It is my understanding that it is looked at as the compacts lay out the regulatory regime state-by-state. Has the Secretary ever rejected a compact on the basis that it did not provide adequate regulation of gaming operations?

Mr. STEVENS. Not to my knowledge.

The CHAIRMAN. Mr. Hogen, do you know if that has ever happened?

Mr. HOGEN. No, Mr. Chairman, I do not believe that that has ever been identified as a cause to disapprove a proposed compact.

The CHAIRMAN. Mr. Hogen, what is your response to Chairman Stevens' argument that the NIGC already has ample authority over Class III gaming?

Mr. HOGEN. For six years we thought we did. That is until the Court ruled in the Colorado River Indian Tribes case. These minimum internal control standards, our promulgation of them, the tribes compliance with them, our auditing of that performance worked beautifully, but now we are finding doors slammed in our face.

We sent two of our investigators from Rapid City out to western Montana this week. When they got there, they were denied access, and the tribe pointed to the ruling in the Colorado River Tribe to keep us out of looking at the Class III gaming. We had been out there before in October. We had noticed some deficiencies. We wanted to go back and see if they had been resolved.

Now, the Court's order in the Colorado River Indian Tribes case is a narrow order. It applies to us in Colorado River. It did not enjoin us from doing this generally, but we are going to find these things arising around the country if this is not clarified. This is an urgent concern to the National Indian Gaming Commission, and while we presumably would still have some role to play, we would become more of an advisory commission rather than a regulatory commission if this is not clarified.

Mr. STEVENS. Mr. Chairman?

The CHAIRMAN. Yes.

Mr. STEVENS. Could I add something on that point? I think it is important to recognize that the tribal ordinances pursuant to the Act also contain important regulatory features, and one of the authorities that is referenced in NIGA's testimony is the authority to issue a notice of violation and have a hearing on potential violations of tribal ordinances.

I think there is a difference between minimum internal control standards that are issued independently of tribal-state compacts or tribal ordinances and coming out to enforce the tribal ordinance which I think is clearly a power of NIGC that is reflected in the statute.

The CHAIRMAN. Thank you. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman, and thank you for calling this hearing this morning. I would be remiss if I did not offer my personal welcome to my dear friend Mr. Frank Ducheneaux for being here this morning. You are getting younger, Frank. Probably no other person that I know of, Mr. Chairman, that understands every aspect of how this legislation was crafted, and I certainly want to pay a special tribute to you, Frank, for the tremendous work that you have done not only with this legislation but the years that you served as Chief Counsel of this committee dealing with Indian issues. Good to see you.

I just have a couple of questions also to Mr. Stevens. What is the total number of tribes that are members of NIGA right now?

Mr. STEVENS. It fluctuates yearly based on membership. We have had probably a total of about 184. It just depends on membership dues coming in, but we have always used the number 184, but again the accurate number reflects on memberships coming in. Anywhere from 150 to 184.

Mr. FALEOMAVAEGA. This is out of 200 that are in currently—

Mr. STEVENS. Yes, approximately 215.

Mr. FALEOMAVAEGA. 215 that are currently having gaming operations?

Mr. STEVENS. Yes, sir.

Mr. FALEOMAVAEGA. Within the NIGA organization, do you have rules and everything in terms of the standards that have been set for these tribes to be up to par with whatever that they are supposed to be doing?

Mr. STEVENS. Just like the MICS, we have worked with those in advocacy but we left those for regional associations and the tribes themselves. We do have a National Tribal Regulators Association that work very closely and directly with the regulators. We do not work so closely with them because again in their respect to maintain an autonomous dialogue in working together, NIGA does not really have an ongoing relationship other than informational and keeping each other up to speed.

Mr. FALEOMAVAEGA. I would like to ask Mr. Ducheneaux I guess the issue that is hot right now in the Congress of this committee is certainly Senator McCain's pending legislation. I wanted to ask your honest opinion. Given all that has been written, the regulatory aspects of how the tribes are to not control but the conduct of their activities as gaming operations, do you believe that Senator McCain's legislation is going in the right direction or too much intrusion into this compact relationship that currently exists among the tribes and the various states that they have done?

Mr. DUCHENEAUX. As NIGA's statement and my statement indicate and other testimony and statements made around the country, the tribes are very concerned about S. 2078, and in general I think are opposed to it. I think the tribes recognize that there is a perception that there may be some problems in Indian gaming.

I do not think they agree that it has gotten to the extent where it warrants that kind of action but what they regret most of all I think about that legislation is that there was not an attempt to work with them to try to understand where they were coming from and understand if the Congress, as I mentioned in my statement, felt a need to go forward in the MICS areas and some of these other areas to work closely with the tribes to see whether there is a way to achieve the solution to these real or perceived needs in a way that was more consistent with, more in the context of tribal sovereignty and the right of tribal self-government.

As I indicated when IGRA was being considered in this committee and other committees, the central focus of many of the leaders at that time was to try to achieve the goals then sought in a way that was most consistent with tribal sovereignty, and they just feel that S. 2078 does not really do that.

Mr. FALEOMAVAEGA. I am sure that Senator McCain is very sensitive to the situation of the sovereignty of the tribes in what he is trying to achieve here but do you think that there is a way that

we can make improvements on the proposed bill that is satisfactory to our tribal gaming community out in country?

Mr. DUCHENEAUX. I think you put us in a difficult position but I think as the NIGA statement indicates and the tribes in my region feel they are generally opposed to the opening of IGRA to amendments because of their concern about devastating amendments. However, having said that if legislation is going to move in any of these areas, I think the tribes would like the opportunity to sit down with those who are moving it to try to again fashion it in a way that addresses the issue realistically but still within the context of tribal sovereignty.

Mr. FALEOMAVEGA. I think the gist of the whole problem coming out of the problems of political contributions are just one question, Mr. Chairman, that has come out questioning the sovereignty of the tribes as a government-to-government situation on political contributions that tribes have made not only to candidates in the state and Federal election offices that are running for office, and the recent situation with Mr. Abramoff. How this is all carried into it.

I have to commend Senator McCain for his initiative in looking into this whole situation. What I wanted to find out is that how can we strike a balance to make sure that we maintain the sovereignty of the tribes but at the same time not disallow their freedom of expression I suppose in terms of whatever issue that they want to make contributions, whether it be the state or Federal level for those who run for office because that seems to be where all of these problems we are faced with right now and why perhaps it prompted Mr. McCain to introduce this legislation.

That goes back to I guess can the tribes control themselves in terms of making sure the corruption and all of this that we are concerned about does not come to a head?

Mr. DUCHENEAUX. Perhaps Mr. Aspa would be better to respond. I think this Abramoff thing was a limited thing in terms of the tribes. There were very few tribes—you can count them on that hand—who were involved in it. Most tribes do not have that capability. Indian tribes have been shut out of this system. Were shut out of this system for over 200 years during a time which their resources were taken from them by acts of Congress, and they did not know what the process was going on, and they finally get the ability to have some influence on this process either through—and I know the word is a bad word but I never felt it was.

When I was Counsel here, I would often recommend to tribes that they go find a lobbyist to help them find their way around the halls. Now, the tribes have some ability to have that capability. They have some ability to influence elections at the state and local, Federal level through contributions, through get out to vote, and now they are being squelched or people are talking about it.

There are problems, but I do not think a sledgehammer is the way to solve them. I think if you sit down with the tribes they would be glad to work with you to try to resolve these things.

Mr. FALEOMAVEGA. Thank you, Mr. Chairman. I know my time is over but I would like to ask unanimous consent, and I do have a list of additional questions I would like to submit to Mr. Ducheneaux to respond for the record. Again, thank you for—

The CHAIRMAN. Without objection. Mr. Boren.

Mr. BOREN. Thank you, Mr. Chairman. I recognize Kevin Washburn there. He has got the University of Minnesota on his name plate but he is actually a graduate of the University of Oklahoma as well. His credibility goes way up with the OU connotation.

I have a couple of questions for some of our panel. Mr. Hogen, being a new Member of Congress I am pretty familiar with being in the State Legislature, knowing what happens in Oklahoma with the compacts that the tribes in my district have with the state. Could you elaborate on the differences in what happens in Oklahoma and what happens in Louisiana or Texas or other states? With Class III gaming, are there a lot of differences? Because you are talking about more Federal regulation, is it better? Do you think that there are broad differences or these are smaller differences?

Mr. HOGEN. I would characterize the differences, Congressman, as being quite significant. That is we have a huge diversity among the 20-plus states that have Class III compacts with tribes. I asked my field folks to try and identify how many people were employed by the states full-time to play their role in the regulation of their compacted tribal gaming, and they indicated that there were about 306 people that worked for states doing this.

Arizona has 66. California has 66. Oklahoma has 3. North Dakota has 2. Quite a number of the states have none. These are full-time people. So in some places it is real up close and personal. They are directly involved. In other places, there is really nobody minding the store perhaps because there was nothing put in those compacts regarding this regulatory aspect, and in other cases it was put in there but it just was not funded by the state.

Now, those bills get paid by the tribes. The states bill the tribes for that effort but as you can see by those numbers it is very diverse.

Mr. BOREN. Let me ask a question also and Ernie might be able to answer this as well. As was mentioned before, we have seen huge growth. In the State of Oklahoma, the gaming industry is the fastest growing industry next to oil and gas. It is growing faster than oil and gas. As we know, with the price of oil they are trying to find people all the time especially our smaller independents.

Have tribes had trouble because it has grown so fast—and we are talking about millions of dollars if not billions of dollars. Have our tribes had problems establishing their own internal regulations because of this fast growth?

Mr. STEVENS. Congressman, I think that maybe on the early onset that we were just learning the industry but you know with the almost 20 years of working in the industry and the kind of professionalism and training, it used to be we used to bring people in but now Indian country are becoming the experts in this industry. We have a lot of good professionals who have grown in this industry. I believe that again as I stated earlier the checks and balances in those systems really have required us to really step up to the plate.

Not only do we have to answer to all the bodies that I mentioned in my testimony but most important to the tribes you have to go before their general membership, and they have to report out these

types of compliances. We feel like again as I stated previously we have grown responsibly in this industry and not without challenges, Congressman. I will not sit here and tell you that there is not but I think that Indian country through their constituency, through the professionals we have hired to work in our industry and through working nationally together, I think we really accepted those challenges.

Mr. BOREN. What we have seen in Oklahoma has been amazing. The investment not only obviously in gaming facilities but health care. The University of Oklahoma for instance is building a new comprehensive diabetes center. The Chickasaws, the Choctaws and others have stepped up to the plate and are endowing chairs to bring doctors in. That is because of gaming revenues. It is going to be amazing for the country. It is going to be the MD Anderson frankly of diabetes research.

A couple of other questions I had in regards to Class II—and anyone might just pick this up—has the growth of gaming impacted tribes level of MICS compliance for Class II gaming operations? Has that been affected? Anyone can take that up. Kevin, do you want to? You have a look on your face there.

Mr. WASHBURN. Yes. I think that Class II gaming has grown tremendously as Class III gaming has grown, and I think that the tribes by and large have really come along. They have come along in many ways and have really improved. They have been really right up on the step with New Jersey and Nevada.

The problem is many tribes it is one tribe regulating one casino, and the danger of regulatory capture is just so great in that kind of environment. That is where the problem is. That spans from Class II to Class III. Although the Class II facilities tribes tend to run several Class II facilities, and that is a difference that each regulator is covering numerous facilities that are in some ways competing with one another.

Mr. HOGAN. If I might respond to that as well. One of the problems with segregating Class II from Class III for purposes of regulation is the gaming is not segregated on the floor. That is you will have a gaming facility, and there will be pull tabs, and there will be bingo, and there will be blackjack tables and slot machines, and all of that money comes into the same cage. You cannot just watch the Class II dollars for example. It becomes so integrated that you are going to look at part of it. You kind of need to look at all of it. That is a challenge.

In Oklahoma, for example, where the compacts came on board here relatively recently, I think about 20, 25 percent of the machines—some 30,000 plus gaming machines in Oklahoma—are compacted Class III machines. The other 75, 80 percent are Class II. They are sitting on the same floor in many cases.

You cannot just say well we will close our eyes when we walk by the compacted machine, and we will look when there is a bingo machine there. It really is challenging in that kind of an environment.

Mr. BOREN. One final question, Mr. Chairman, and I will turn it back. I am a strong supporter of tribal sovereignty. That is where my concern is here. With a lot of tribes, particularly in Oklahoma—let us take the example of the Seminole nation which I used to

represent that area when I was in the State Legislature—we had some bad actors come in and do some things.

What specifically are you all doing, Mr. Hogen, to suggest criteria for good partnerships? I am not only talking about what to do to prevent the bad actors. What are you all doing to go in proactively and saying this is how you make good partnerships? Our larger tribes are doing well. The Chickasaws. The Choctaws. The Cherokees. They have much more of an infrastructure base but some of our smaller tribes in the northern part of our district I worry about. I wonder what you would say to them as far as being proactive.

Mr. HOGEN. The Seminole of Oklahoma case study is extremely interesting. They did get in with some bad actors. NIGC eventually issued an order to close that facility. We then entered into a pre-opening agreement with the tribe saying you can reopen. We will lift the closure order if you do these certain things. If you meet these certain standards including minimum internal control standards. The tribe is moving forward in that connection.

This gets into this contract area. That is what contracts must or can NIGC review and approve? We did not review and approve the contract that the Seminoles had with the group that put the wrong kind of machines in their facility because it was not characterized as a management contract. We, in fact, think it was a management contract, should have been presented to us, and I think we would have disapproved it if we had done some of that review.

So we are trying to reach out and ask tribes look before you leap. Please send us that contract so that we can see if it is a management contract will require our review and approval. Under this S. 2078 the universe of contracts that we would be required to review and approve and do background investigations for would be expanded. So, I think that would in part address that.

If we go there, we will need to be able to do it in a way so we do not become the bureaucratic bottleneck to progress but I think we can safeguard some situations and avoid those kind of tragedies that occurred at Seminole.

Mr. VAN NORMAN. Congressman, I would just like to mention there is another Senate bill, S. 1295, which is now part of a technical amendments bill, and that provides for a significant increase in NIGC authority to impose fees to increase their budget. It also provides for technical assistance. It gives the NIGC an opportunity to be proactive, and where they see some of these issues to go out and take care of them.

Under the existing system, these folks should have come through for licensing through the tribal licenses that should have been submitted to the NIGC as well, and there should be an opportunity under the gaming ordinances to take a look at some of those actors.

Mr. BOREN. Great. Thank you for your answers. Mr. Chairman, I yield back. I do want to say, Mr. Hogen, the Seminoles are doing a great job now. Chief Haney is really working. I know he and I are good friends, and we both served in the legislature but they are doing a great job. I also would like to say we need to make sure that we do protect sovereignty during this process, and make sure that it is not so much a hammer. That it is a help. As you men-

tioned, the assistance factor, and that is something that I would support. I yield back, Mr. Chairman.

The CHAIRMAN. Mr. Fortuño.

Mr. FORTUÑO. Mr. Chairman, I apologize for not being here earlier. I have a keen interest in this topic. You probably do not know but in my district in Puerto Rico we have gaming, and I was head of a tourism company, and part of my job was to supervise gaming. So, I do have an interest in the topic.

If I may and perhaps there will be some repetition here but if you do not mind, Mr. Hogen, I would like to understand better the overlapping of any Federal, state and tribal jurisdiction over this, and your feelings on it if you may.

Mr. HOGEN. Thank you. The Indian Gaming Regulatory Act divided gambling into three classes. Class I is traditional ceremonial gambling that the tribes do exclusively. It is basically not commercial. Then Class II was identified as bingo, pull tabs, non bank card games and that is conducted by tribes in states that permit somebody else to do it someplace. For example, in Utah nobody can play bingo so the tribes cannot play bingo either but in other states if states say it is OK tribes can play bingo. They do not have to go to the state to do their deal.

The tribes will create their own gaming regulatory entity, and they will be there all day everyday, do the heavy lifting, and then the National Indian Gaming Commission provides oversight of that. We play a role with respect to that Class II gaming.

If tribes want to do casino gaming, slot machines, bank card games and so forth, they have to enter into a compact with their state, and the state law will have to permit somebody else to do something like that then they can have a compact if the state will come to the table and negotiate. In that compact, they can agree on whatever they want to with regard to who does the regulation—maybe it will be all the tribe, maybe it will be all the state or maybe it will be a combination of the two.

It has been the view and the experience of the National Indian Gaming Commission that we also had an oversight role with respect to that.

Mr. FORTUÑO. Until this case.

Mr. HOGEN. Right. Then this case was decided, and it said you have overstepped your bounds NIGC, and of course it is that Class III gaming that constitutes 80 percent of this \$20 billion.

Mr. FORTUÑO. Yes.

Mr. HOGEN. We feel to do our job it would be useful for us to continue to do that oversight. The tribes spend \$300 million regulating. We have an \$11 million budget. We really can hardly be dangerous out there but having that oversight role we validate the good job that tribes do. We give credit, great credit to that, and we are hoping we can continue to do it.

Mr. FORTUÑO. When you refer to oversight job, for example are you talking about going as far as betting limits, types of games that are played and what have you under the Class III category or what are you talking about?

Mr. HOGEN. No. The actual games that are played will be decided by the tribes and the states in the case of Class III, and IGRA kind of defines what Class II gaming is. We do not say

anything about that or bet limits or whatever but we say follow the money. Have somebody watching who takes the money out of the slot machine. Make sure somebody else is there when they sign for it. Take it to the cage, and make sure the dollars get to the place they are supposed to go. Have surveillance systems. Things like that.

That is what our standards address is how that procedure works, and so we do audits. We do inspections, and we just say this is the minimum, tribe. You can write a lot stricter set of code if you would like to, and most of them have. We just make sure that the minimums are adhered to.

Mr. FORTUÑO. Thank you. I am sure there are different views on this. I would like to hear if anybody else on the panel has a view that feels that, and again I apologize for not being here before but anyone feels that I should hear a different opinion.

Mr. STEVENS. Yes. Congressman, what I tried to emphasize is that aside from the decision that the Court also found that NIGC retains oversight authority of Class III gaming that permits the Commission to approve and enforce violations of Class III tribal gaming ordinances, to conduct annual audits of Class III gaming operations and review management contracts, background checks and licensing determinations.

In addition to their closure capabilities and they are able to fine, we feel that they do not need a new law to enforce the necessary elements to do their job. To that extent, that is the part that we really wanted to emphasize.

Mr. FORTUÑO. OK. Anybody else?

Mr. WASHBURN. Yes. Congressman, if that legal principle that is in the decision, Colorado River Indian Tribes' decision is allowed to stand, then Chairman Hogen over there is really Chairman of the National Indian Bingo Commission, not the National Indian Gaming Commission because he dramatically loses authority over the biggest and most important part of the industry frankly.

Mr. FORTUÑO. I understand. Thank you again to all the panel, and thank you, Mr. Chairman.

Mr. VAN NORMAN. Congressman, could I just add one thing to the National Indian Bingo comment? We believe that it takes a lot of effort for the tribes as sovereigns to sit down with the states as sovereigns and work out compacts for Class III gaming, and they are important agreements. They have built relationships between the tribes and the states.

One of our serious questions about the National Indian Gaming Commission proposal is that it is not just directed to minimum internal control standards. It is to add Class III authority anywhere where it has Class II authority, and there is no provision to provide harmony or a way to work together to respect the tribal-state compacts other than a statement from the Commission that they would do so. We think that that is the wrong kind of proposal. The tribal-state compacts should continue to have primacy because all this effort has gone into them, including several state initiatives where the voters of the state have put these compacts into place. Thank you.

The CHAIRMAN. Mr. Kildee.

Mr. KILDEE. Thank you, and I apologize for being absent for awhile. Mr. Hogen, you mentioned that the NIGC, which IGRA created, has oversight over the law IGRA. It has oversight over your own rules to see that they are being observed, and you said also they have oversight over the tribes own gaming ordinances. Is that a correct summary?

Mr. HOGEN. Yes, that is accurate.

Mr. KILDEE. What do you fear will happen if you do not have minimum internal control standards over Class III?

Mr. HOGEN. The same thing that happened Tuesday out in Montana. We will go and ask to look at what we observed to be some shortcomings in the Class III area, and they will say no, you do not have authority there. You cannot have access to that sort of thing. I think that will tend to spread nationally if we do not get clarification to do that. As Professor Washburn said, yes, we can do the bingo without people telling us no but where the real money is we will not have access to do that. That is a great concern to me.

Mr. KILDEE. With all the other controls built into the system, the state compacting and all these things, after the *Cabazon* decision we actually put some restrictions giving the states some authority there with the compacting power with the tribes. Do you expect a proliferation of problems if you do not have minimum internal control standards over Class III? Do you expect a proliferation of problems out there?

Mr. HOGEN. I hope that would not occur, but I am concerned that it might. I can tell you this: That since we adopted and required compliance with minimum internal control standards in 1999, the level of professionalism at tribal gaming facilities has increased dramatically. Prior to those regulations, almost no tribes had an independent auditor look specifically at their compliance with their internal control standard. Our MICS say the auditors, the independent auditors have to do that, give the tribe a report, send us a copy of that report.

Almost no tribes had a very beefed up internal audit function like you find in other gaming jurisdictions as required by statutes. Internal auditors. Now, because of those MICS they have those. We have been told by tribes that if Colorado River becomes the law of the land, they are no longer going to have those external auditors look at those processes. They are probably not going to fill some of those positions with respect to internal audit functions.

Most of the tribes are doing a great job. Those are not the ones I am worried about. It is those that maybe are marginal, maybe are new, maybe are rural. They need some fostering, and if we have the rule book here it is easier for them to do the job right. If that is just advice, I do not think it will necessarily work.

Mr. KILDEE. I have no tribes in my own district but in Michigan from time-to-time I will go up and observe the Saginaw Chippewa operation which is a fairly large one, a very successful one. I have been visiting them for 41 years, and they really have internally a very, very high concern about everything being done right, and they have their own internal checks. Is that true of most tribes where most of them would have high standards?

Mr. HOGEN. Absolutely. Most tribes have high standards. Most tribes spend a lot of money wisely to do regulation. As the

Chairman inquired here earlier this morning, are there some problems with the independence of tribal gaming regulation? There are some problems. Some of those tribes are small memberships, and it is hard to get separation and independence of the Commission.

In some cases the tribal council serves as the tribal gaming commission. In some instances the chair of the tribal gaming commission is the mother of the tribal chairman or some other relative. Certainly there is the appearance that maybe it is not independent, and in many cases it is not as independent as it ought to be. We need to have somebody that is independent from management insisting on the regulation.

Mr. KILDEE. One final question, Mr. Chairman. Mr. Van Norman, can you provide instances where minimal internal control standards conflict with tribal-state compacts? Could you provide that now or provide it to the Committee later?

Mr. VAN NORMAN. I could mention a couple now, and then we can follow up with that.

Mr. KILDEE. Very good.

Mr. VAN NORMAN. In New York, they have a very detailed compact, and so they do the backgrounding and licensing. If the NIGC has complete authority but there is no reference to deference to tribal-state compact, it provides for a potential conflict, and we have an assurance from the chairman that under his watch that he would not allow such a conflict to occur but there is nothing in the proposal that would prevent that type of a conflict. You have the same situation in Arizona.

We think that there is an existing framework of the statute, and that must be respected because we have 17 years of experience and billions of dollars of investment that are relying on that situation. Any change should be consistent with the existing framework of the statute.

Mr. KILDEE. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I appreciate the testimony of this panel and answering the questions. I know that this is an issue that we are going to continue to struggle with, and continue to find out more as we move forward but I do believe it is an issue that this committee does need to have on its agenda and pay attention to because of the Senate bill and because of everything. I think it is something we do need to continue to monitor and pay attention to as we move forward.

I appreciate all of you being here and sharing your thoughts and your testimony with us. If there are further questions from other members of the Committee, those will be submitted to you in writing. If you can answer those in writing so that they can be included as part of the hearing record, I would appreciate it. Thank you again for being here. If there is no further business before the Committee, the Committee is adjourned.

[Whereupon, at 11:45 a.m., the Committee was adjourned.]