

**Testimony of  
Richard G. Hill  
Chairman  
National Indian Gaming Association  
before the  
Senate Committee on Indian Affairs  
July 21, 1999  
S.985 - Intergovernmental Gaming Agreement Act of 1999**

**I. Introduction.**

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

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

**II. Need for a Process to Allow Indian Tribes to Legally Institute Class III Gaming.**

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

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

In its decision in Seminole, the Supreme Court did nothing to alter the legal rights of sovereign Indian tribes to engage in gaming. What it did was emasculate the federal solution created to address all interests concurrently. States can now evade their obligations under federal law and thumb their noses at the tribes and the federal government. Basically the Court told Indian tribes that they had a legal, sovereign right but no remedy should a state interfere with that right.

***B. Indian tribes in states refusing to negotiate compacts remain in a severe state of need for the financial ability to address the social welfare of their people.***

This Committee and the Congress clearly recognized the potential importance of gaming as an economic development tool for Indian tribes when it enacted IGRA. This potential has been

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

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

National Gambling Impact Study Commission Final Report,  
pg. 6-7 (June 1999).

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

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

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

***C. NIGA notes that the Secretary of the Interior has promulgated regulations providing “Secretarial Procedures” whereby Indian tribes can legally institute Class III gaming.***

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

The sovereign right to conduct and regulate gaming activities is an inherent right of Indian tribes, as recognized by the Supreme Court in Cabazon Band of Mission Indians v. California, 480 U.S. 202 (1987). This right, like most other sovereign tribal rights, is protected by federal law-the IGRA. The Secretary of the Interior (“Secretary”) has recently promulgated regulations, Fed. Reg. pg. 17535, April 12, 1999, which provide a legal solution to the problems created by the Seminole decision (“Secretarial Procedures”). The new Secretarial Procedures effectively provide tribes a remedy to protect their sovereign right to engage in gaming activities. Through these procedures,

once a state proves that it is unwilling to abide by federal law and negotiate with an Indian tribe, the Secretary and the tribe develop a regulatory framework for the operation of class III gaming activities.

At this point, I would like to draw the Committee's attention to the continuous misinformation campaign conducted by the National Governors Association regarding Secretarial procedures. The governors representatives continue to state and highlight in their public remarks, that the states are being "bypassed" or somehow circumvented in this process. Let me provide the Committee and the governors representatives, a current definition of the word "bypass", which will hopefully serve to inform and illuminate further debate and discussion. The following definition is provided by Merriam Webster Dictionary and Webster's New World Dictionary. I quote as follows:

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

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

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

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

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

### **III. Concerns with Particular Provisions of S.985.**

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

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

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

#### ***B. S.985 provides for an extended time frame, much longer than the time frame contemplated in the Secretarial Procedures.***

Another major concern that NIGA identified in S.985 as drafted is the very lengthy time frame contemplated by the mediation process. If a tribe and a state were to fully utilize each time period provided, the entire process of negotiation and mediation would require a minimum of 370 days-that is one year and five days. Then after all that time and energy, the state could still challenge the Secretary’s decisions in federal court-delaying the tribe even longer from exercising its sovereign right to engage in gaming.

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

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

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

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

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

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

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

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

#### **IV. Conclusion.**

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

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

Thank you again, Mr. Chairman, for this opportunity to offer testimony on behalf of the

National Indian Gaming Association. I am pleased to answer any questions you or other members of the Committee might have regarding my testimony on this important matter.