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TESTIMONY OF ERNEST L. STEVENS, JR., CHAIRMAN OF THE NATIONAL INDIAN GAMING ASSOCIATION

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BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS ON S. 1529, AMENDMENTS TO THE INDIAN GAMING REGULATORY ACT

INTRODUCTION

Good morning Chairman Campbell, Vice Chairman Inouye, and Members of the Committee. Thank you all for providing me the opportunity to testify before you this morning. My name is Ernest Stevens, Jr., and I am a member of the Oneida Nation of Wisconsin and Chairman of the National Indian Gaming Association or NIGA. I am honored to be here this morning to share with you NIGA's views on S. 1529, the Amendments to the Indian Gaming Regulatory Act.

It's been a little more than 15 years since Congress enacted IGRA. As you know – contrary to some popular belief – Congress did not establish Indian gaming by enacting IGRA. Instead, Indian gaming is a tool that tribal governments have used to generate governmental revenue for more than 30 years now. IGRA, on the other hand, is the result of lobbying efforts by State governments and the commercial gaming industry in response to the Supreme Court's holding in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which found that State governments have no authority to infringe on the retained inherent rights of Indian Tribes, as governments, to conduct gaming to generate governmental revenue.

Despite some difficulties, IGRA has worked for a great number of tribal governments. I have attached an appendix analyzing the economic impacts of Indian gaming in 2003, which shows that Indian gaming revenue is truly working to rebuild Native communities and strengthen tribal governments, while at the same time aiding nearby Indian and non-Indian communities.

Indian Tribes use gaming in the same manner that State governments use lotteries – to rebuild community and government infrastructure and provide essential services for their citizens. In rebuilding their economies, tribal communities were placed at a significant disadvantage, and tribal governmental gaming revenues today are especially tasked to make up for hundreds of years of community neglect.

This Committee is particularly aware of the past federal policies of Removal, Allotment, Assimilation, and Termination, and their resulting effects on Tribes and their people. These policies cost tribal communities millions of lives, hundreds of millions of acres of tribal homelands, caused significant cultural damage, and devastated many tribal economies. These results continued to worsen through the 1960's, when Indian communities faced the highest national rates of poverty, crime, poor health care access, dropouts, and countless other social and economic problems.

At this time (the 1960's), the Federal policy on Indian affairs changed from Termination of the Federal-Tribal relationship to support for Tribal self-determination and economic self-sufficiency. The federal government began to make available to tribal governments a number of the programs that were used to help state and local governments. These programs provide many Tribes with the ability to rebuild their communities, and provide new economic opportunities throughout Indian country.

In addition, Tribes began to look for a steady stream of tribal governmental revenue.[1] After learning from the model that State governments were using through lottery systems, many Tribes looked to gaming as the answer for their budgetary concerns. Today, approximately 65% of the federally recognized Indian Tribes in the lower 48 states have chosen to use gaming to aid their communities.

In just 30 years, Indian gaming has helped many Tribes begin to rebuild communities that were all but forgotten. Because of Indian gaming, our Tribal governments are stronger, our people are healthier and our economies are beginning to grow. Indian country still has a long way to go. Too many of our people continue to live with disease and poverty. But Indian gaming has proven to be the best available tool for Tribal economic development.[2] For the sake of our ancestors, our children and the generations to come, we must make certain this progress continues. For all of these reasons, many Tribes approach attempts to amend the Indian Gaming Regulatory Act with great caution.

S. 1529 – POSITIVE CLARIFICATIONS

NIGA appreciates the Senate Indian Affairs Committee's efforts through S. 1529, which would clarify several important issues.

JOHNSON ACT CLARIFICATION

First, NIGA supports the provision in section 2(a), which would reaffirm that the Johnson Act does not bar the use of technologic aids to class II gaming. Just 3 weeks ago, the U.S. Supreme Court brought stability to this area of law by rejecting the Department of Justice's request to review two Appellate Court opinions,[3] which both found that the Johnson Act does not apply to IGRA class II technologic aids. We believe that the Supreme Court's action together with the National Indian Gaming Commission's revised definition regulations, 67 Fed. Reg. 41166-74 (June 17, 2002), have provided a clear statement of the law in this area, and section 2(a) would be helpful in providing legislative affirmation of these decisions.

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[1] The sovereign attributes of Tribal governments are similar to those of State governments. However, Tribal governments have a limited tax base, because the federal government holds title over most Indian lands "in trust" for the Tribe. As a result, tribal governments cannot raise revenue through real estate taxes in the same manner as state governments. In addition, tribal communities with unemployment rates sometimes higher than 60% can not generate enough in income taxes to justify the levy. As economies develop on reservations throughout the nation, a number of Tribes today are, however, turning to taxation (income, sales, and other) as an additional form of governmental revenue.

[2] The U.S. National Gambling Impact Study Commission (NGISC) found that "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." NGISC Final Report, Chapter 6 Native American Tribal Gambling, Page 6-6 (1999).

[3] United States v. Santee Sioux Tribe of NE, 324 F.3d 607 (8th Cir. 2003), cert. denied, 2004 WL 368474 (Order No. 03-762, Mar. 1, 2004); Seneca-Cayuga Tribe of OK v. NIGC, 327 F.3d 1019 (10th Cir. 2003), cert. denied, Ashcroft v. Seneca-Cayuga Tribe of OK, 2004 WL 368118 (Order No. 03-740, Mar. 1, 2004).

NATIONAL INDIAN GAMING COMMISSION ACCOUNTABILITY

NIGA also supports the provision in Section 2(d), which proposes to amend IGRA at 25 U.S.C. § 2706 by adding a new paragraph (c) that will require the National Indian Gaming Commission (NIGC or Commission) to be more accountable to tribal governments and to Congress by requiring the Commission to adopt a 5 year "Strategic Plan". We also support the new proposed section 20 of S. 1529, which would require the Commission to "involve and consult with Indian tribes" before making final determinations that affect tribal governmental interests.

NIGA is concerned, however, that the NIGC may stray beyond its existing statutory mandate in developing its strategic plan. For that reason, we hope that you will consider requiring the NIGC to develop its Plan in accord with the limited powers conferred to it pursuant to the Indian Gaming Regulatory Act. This will ensure that the Commission's Strategic Plan doesn't result in bureaucratic "mission creep" beyond the authority Congress envisioned when enacting IGRA. Thus, NIGA asks that you consider amending proposed subsection (c)(2) by adding a new subparagraph (G) as follows:

> "(G) The strategic plan shall be developed in accord with the limited powers listed in the Indian Gaming Regulatory Act."

With the exception of the current Commission, the NIGC has not provided tribal governments or Congress with a budget of how they planned to spend fees collected from tribal governments – or an accounting of how those fees were spent. In addition, past Commissions lost focus of their primary mission of providing technical assistance to tribal regulators and background oversight of class II gaming, and instead sought to regulate environmental, public health and safety matters, which duplicated existing efforts by the EPA, HHS, CDC, and FEMA. As a result, we hope that you will consider adding the above requested language to S. 1529, which would ensure that the current and future NIGC will abide by its mission of regulating Indian gaming in accord with Congress' intent.

REVENUE SHARING PROVISION

S. 1529 proposes to amend IGRA at 25 U.S.C. § 2710(d)(4) to make certain clarifications regarding revenue sharing agreements in tribal-state compacts. NIGA supports this concept.

Last summer, the Committee held a hearing on this issue, and it was made clear that a number of state governments have attempted to shift the responsibility of their budget crises onto the shoulders of tribal governments. The additional burdens of homeland security, the economic downturn nationwide, the loss of jobs, and very poor financial planning are all reasons for state budget shortfalls. Tribal governments did not create these state budget problems, and they should not be looked to as a way out.

Shifting the responsibility to cover state budget shortfalls to Indian Tribes is not a reasonable alternative for several additional reasons: (1) it would improperly burden the only activity that is producing American jobs and generating economic development in many regions of the Nation; (2) it ignores the significant benefits that Indian gaming operations currently provide to state and local communities; and (3) most of these proposals violate federal law and ignore the status of Indian Tribes as governments – not corporations subject to state regulation or taxation.

Before even considering placing such a great burden on only the successful means of job creation and economic development in a state, state officials must first look at what Indian gaming is already doing for state and local economies. Once this evaluation is completed, most Governors will realize that Indian Tribes are already doing much for tribal communities, and for state and local communities.

Of the approximately 500,000 American jobs created by Indian gaming, about three-fourths are held by non-Indians. Indian gaming helps state and local communities recover lost jobs where companies are forced to leave, reduce state welfare and unemployment payments, and provide hundreds of thousands of families with well-paying careers with substantial benefit packages.

Indian gaming also creates substantial revenue streams for state and local units of government. In 2003 alone, Indian gaming will generate approximately $7.6 billion in added revenue to federal, state, and local governments. See Appendix. Despite the fact that Indian Tribes are governments, not subject to taxation, individual Indians pay taxes. People who work at casinos, those who do business with casinos, and those who get paid by casinos pay taxes. As employers, Tribes also pay employment taxes to fund social security and participate as governments in the federal unemployment system. At the State level, Indian gaming generates revenue through payroll and income taxes, and vendors and consumers pay sales and excise taxes on goods and services procured off-reservation to supply tribal operations. State governments must first take a hard economic look at these substantial benefits, and realize that many of them will be lost if they move forward with these misguided proposals.

In addition to not making good financial sense, most of these proposals would violate federal law. Indian Tribes conduct gaming for the same purpose that state governments operate lottery programs: to generate revenue to fund infrastructure and essential government programs. Congress enacted the Indian Gaming Regulatory Act to promote tribal economies, and strengthen tribal governments. As a result, IGRA requires that Indian gaming revenues be used first and foremost to address the financial and social problems in Indian country.

Despite recent gains due to gaming revenues, many tribal communities are just beginning to address the results of past federal policies by rebuilding their infrastructure. Because of gaming, many Tribes are finally able to implement viable programs to address severe social and health-related problems. Until these needs are fully addressed, federal law

prohibits the use of gaming revenues for any other purpose. S. 1529 makes this point perfectly clear.

The first principle that should govern any compact negotiation is the recognition that Indian Tribes are governments. The U.S. Constitution, treaties, hundreds of Supreme Court decisions and federal laws all acknowledge the status of Indian Tribes as governments. Through IGRA, Congress again acknowledged that Tribes are governments, and made crystal clear that the Act did not permit a State to impose a tax upon an Indian tribe, and that no State may refuse to enter into compact negotiations based upon the lack of authority to impose such a tax. S. 1529 again makes this point clear.

I understand that an amended version of S. 1529 includes a savings clause to protect the effect of existing tribal-state compacts, and that the provision limiting the use of gaming revenues received by non-gaming Tribes has been amended. NIGA supports this provision, and hopes to work with the Committee to ensure that this concept is enacted.

VALIDITY OF TRIBAL-STATE COMPACTS

As discussed above, some State Governors are attempting to fix their budget shortfalls through the IGRA tribal-state compacting process. The provisions in S. 1529 adequately address the concerns of Tribes without compacts – or Tribes that are re-negotiating compacts that have expired. However, we ask that you consider another scenario. In some cases, States that have already reached compacts with Tribes are threatening to renege on or negate those compacts by amending State law to prohibit all forms of gaming in the State. These proposed changes to State law are not guided by public policy concerns against gambling in general, or even Indian gaming in particular, they instead seek only to force Tribal governments to agree to forgo compacts already in place, and force negotiations of new compacts that will seek only to drain Indian communities of precious revenue.

For this reason, we ask that you consider adding an additional amendment to section 11 of the Indian Gaming Regulatory Act (25 U.S.C. §2710) in the following manner:

> "(E). Gaming conducted pursuant to, and during the term of, a Tribal-State compact approved under this paragraph shall be lawful notwithstanding any change in State law subsequent to the approval."

S. 1529 – NIGA CONCERNS

Despite our strong support for these important clarifications, NIGA hopes to continue to work with the Committee on S. 1529 to address 3 concerns: (1) the provisions authorizing the NIGC to regulate class III gaming; (2) the provisions authorizing the NIGC to conduct additional background investigations of tribal gaming commission

personnel; and (3) the lack of a provision to correct the Supreme Court's error in Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

NIGC CLASS III AUTHORIZATION

First, NIGA is concerned with Section 2(d)(1), proposed new section 19 (Minimum Standards), and other provisions of S. 1529 that authorize the NIGC to regulate class III gaming. This authorization will unduly burden the already troublesome tribal-state compacting process, will create conflict with tribal-state compacts, and only serve to create confusion and duplication of effort in a regulatory system that is working well.

The Conference of Western Attorneys General has called the NIGC class III authorization "unwarranted and unworkable".[4] This may be the only time that a Native American organization has positively quoted CWAG in congressional testimony, but in this one case we have to agree.

Congress fully deliberated the regulatory roles of Tribes, States, and the federal government before enacting the IGRA. The Department of Justice testified in favor of no federal role in regulating class III gaming, and agreed that Tribes and States should work out regulatory concerns through the tribal-state compact negotiations. In addition, this Committee's Report on S. 555 stated in the "Purpose" that the NIGC "will have a regulatory role for class II gaming and an oversight role with respect to class III gaming." S. Rep. No. 446, 100th Cong., 2nd Sess. 1 (1988).[5]

As Congress and DOJ expected, Tribal-State compacts are very thorough regarding the regulation of class III Indian gaming operations, and repeated federal investigations and reports provide strong evidence that the regulatory scheme is working well. The NIGC itself noted in its preamble to the 2002 revisions to the MICS regulations that Indian gaming regulation is effective:

> Internal controls are the primary procedures used to protect the integrity of casino funds and games, and are a vitally important part of properly regulating gaming. Inherent in gaming operations are problems of customer and employee access to cash…. Internal control standards are therefore commonplace in the industry and the Commission recognizes that many Tribes has sophisticated internal control standards in place prior to the Commission's original promulgation of the MICS.

67 Fed. Reg. 43391 (June 27, 2002).

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[4] Letter from Conference of Western Attorneys General to Members of the Senate Committee on Indian Affairs, at 5-6 (Jan. 16, 2004).

[5] On the Senate floor during debate on S. 555, Committee Chairman Inouye, managing the bill stated that "class II games are regulated by tribal governments with the oversight of the National Indian Gaming Commission, a federal agency. Class III games are to be regulated jointly by State and tribal governments pursuant to a tribal-state compact." 139 Cong. Rec. S6797-01, 1993 WL 184341 (Cong. Rec.).

In total, Indian Tribes invest over $217 million dollars annually for the regulation of Indian gaming. That includes over $164 million for tribal self-regulation, over $40 million to reimburse state regulatory agencies for their role in Indian gaming regulation, and $12 million to fund the Nation Indian Gaming Commission. In addition, the Commission collects another $1 million dollars processing fingerprints and background checks – for a $13 million budget.

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 this Committee 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."

S. 1529 would alter the current regulatory regime governing Indian gaming by amending IGRA to permit the NIGC to apply its Minimum Internal Control Standards (MICS) to class III gaming. Many Indian Tribes have questioned whether it is appropriate for NIGC to issue the MICS as a mandatory rule, especially with regard to Class III gaming. As stated above, IGRA contemplates that Tribal-State compacts will provide the ground rules for regulation for class III gaming on a Tribe-by-Tribe and State-by-State basis. Chief Phillip Martin of the Mississippi Band of Choctaw Indians wrote this Committee in opposition to this provision, stating that "This is no minor change. It changes the entire framework of the regulation of Indian gaming…."

For all of these reasons, I hope that you will consider deleting these provisions – or amending them to authorize the NIGC to issue guidelines (as opposed to mandatory regulations) for Tribal and State governments to consider in the compacting process.

NIGC LICENSING AUTHORITY

Second, NIGA objects to section 2(f)(1), which would require Federal background checks for tribal government gaming commissioners. The selection of tribal government officials must be left to the authority of tribal governments. Unlike management and other key gaming personnel, tribal gaming commissioners act through authority delegated to them from the Tribal executive branches – usually the Tribal Chairman or the Tribal Council. Many times, these are elected positions of tribal government. The NIGC should not be permitted to infringe on tribal governmental authority in this manner, and we ask that you consider deleting this provision from the bill.

LACK OF A <u>SEMINOLE</u> FIX

For the past eight years, NIGA, NCAI and Tribal governments throughout the Nation have held the position that any amendment to the Indian Gaming Regulatory Act should first and foremost include a provision to restore balance to the tribal-state compacting process destroyed by the Supreme Court in <u>Seminole Tribe v. Florida</u>, 116 S. Ct. 1114

(1996). In fact, when I spoke before this Committee back in 1997 as First Vice President of the National Congress of American Indians to comment on S. 1077, which also sought to amend IGRA, I asked the Committee to include a provision to address the Seminole case. These resolutions stand firm today, and I must again ask that the Committee consider adding a provision to S. 1529 to address this long-standing wrong.

In Seminole, the Supreme Court explained that through IGRA, Congress granted the States an opportunity to work with tribal governments on regulating class III gaming. This is an opportunity generally withheld from States under the U.S. Constitution, which acknowledges an exclusive relationship between Indian tribes and the federal government. Seminole, 116 S. Ct. at 1126.[6] Congress, through IGRA, also placed upon States a concomitant obligation to negotiate tribal-state compacts in good faith. If States failed to negotiate in good faith, IGRA provides that Tribes may bring suit against States to enforce the State obligation. The Seminole Court held that Congress could not waive the States' 11th Amendment immunity to permit Indian Tribes to bring suit against states to enforce the good faith negotiation clause in IGRA. This case has left Indian Tribes with a right expect states to negotiate class III gaming compacts in good faith, but with no remedy to enforce such right.

In 1999, the Interior Department promulgated regulations for alternative procedures to class III gaming in lieu of a compact where States fail to negotiate in good faith, where they raise sovereign immunity as a defense, and where a number of other factors are met. See 25 C.F.R. Part 291. While these procedures have worked in some instances, it is safe to say that they are not being fully or evenly enforced in every instance.

Because of the Seminole case and the lack of effective enforcement of the Secretary's alternative procedures, a number of States are using the case to impose unreasonable demands on tribal governments through the compacting process. As a result, we hope that the Committee will consider adding a provision to S. 1529 that will legislatively affirm these regulations.

CONCLUSION

In closing, I again thank you for your dedication to the interests of tribal governments and protection of Indian sovereignty, including the inherent authority of Tribes to engage in gaming to generate governmental revenue. NIGA appreciates the hard work that you and your staff have done with regard to S. 1529, and we hope to continue working with you on this important legislation. Mr. Chairman and Members of the Committee this concludes my remarks. Once again thank you for providing me this opportunity to testify.

[6] The Seminole Court stated, "[T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."