

Testimony of Tracy Burris,
Gaming Commissioner of the Chickasaw Nation
Before the Senate Indian Affairs Committee

June 28, 2007

Good morning Chairman Dorgan and distinguished members of the Committee.

On behalf of the Chickasaw Nation, allow me to extend our deep appreciation for this opportunity to comment on this important legislative proposal. My name is Tracy Burris and I serve as the commissioner of gaming for the Chickasaw Nation, a post I have held for approximately 12 years. The Chickasaw Nation strives always to provide constructive comments, and I am honored to deliver the Chickasaw Nation's view in relation to the proposed amendment on the issue of the NIGC's authority over Class III gaming. We hope the committee finds our testimony today useful in its deliberations on this important issue.

Let me open with the observation that there is no debate in Indian Country about the need for sound internal control standards. Effective internal control standards represent a critical tool in safeguarding critical tribal gaming revenues and ensuring operational integrity. Neither is there a question as to the importance of regulatory oversight and the enforcement of regulations designed to serve these purposes. As a front line gaming regulator, the utility and necessity of internal control standards is clear and we work hard to ensure operational compliance at the Chickasaw Nation's gaming facilities.

In our view, the issue before us today is NOT whether regulatory oversight is important or whether internal control standards are necessary, but rather how best to allocate regulatory responsibilities essential to the fulfillment of the purposes for which IGRA was enacted. First and foremost, IGRA was enacted to establish a comprehensive regulatory framework for tribal government gaming. The act reflects a balance between the competing governmental interests by assigning regulatory roles to tribal, state and federal agencies based on a classification system dividing gaming activities into three classes with regulatory roles distributed among tribal, state and federal governments in accordance with the class of the gaming activity.

Class I gaming consists of traditional tribal social games. In light of the superior tribal governmental interest in matters of culture and tradition, tribal governments were accorded exclusive regulatory authority over Class I games. Class II games include bingo, lotto, pull-tabs, games similar to bingo and certain other enumerated games as well as certain non-banking card games. Though similar, Congress accorded greater weight to the tribal interest in Class II games, according tribal government primary regulatory

authority, though establishing a federal regulatory agency charged with regulatory oversight responsibilities.

With regard to Class III gaming, which includes slot machines, facsimiles, house banked card and table games and other wagering activities, Congress did something novel. It created a consensual mechanism, and then left tribal and state governments to work out their differences. If negotiations succeeded in producing a tribal-state gaming compact, and the compact met with the approval of the Secretary of the Interior, tribal governments could lawfully engage in Class III gaming activities.

In the beginning, there was considerable discontent on both sides. Over the years, however, tribal and state governments for the most part have succeeded in working through the compacting process. As a result, the Class III gaming industry comprises most of the tribal gaming industry. This fact underscores how effective IGRA has been in altering the course of the tribal-state relationship in a more positive direction. Given the tensions that once characterized the tribal-state relationship over gaming, it's almost surprising that the issue that brings us here today is the federal interest in Class III gaming.

The crux of the matter is a decision by the Federal Circuit Court of Appeals for the District of Columbia affirming the lower court's ruling that IGRA does not authorize the NIGC to regulate Class III gaming nor to promulgate and enforce its minimum internal control standards in relation to Class III gaming activities. The committee is now considering whether to amend IGRA to broaden its authority to encompass Class III gaming. Bill language to do so has been drafted and we thank Chairman Dorgan for the courtesy of circulating a discussion draft.

We note that the bill would also establish an alternative rulemaking process for the development of Class III minimum internal control standards. To some extent, the fact that language is drafted and a hearing convened would indicate that there is to some degree a sense that the amendment is warranted. The purpose of this hearing is to aid the committee in deciding if this is so and whether the proposed language is acceptable to tribal and federal governments.

We see the proposal as an effort to again strike a balance between competing governmental interests, yet it is important to recognize that the amendment will alter the regulatory framework and the balance reflected in it. We would prefer to avoid amending IGRA in this manner because IGRA represents a compromise that has finally been accepted after a very long and difficult period of time. Statutory amendments introduce complexities and create uncertainties, which is not conducive to a stable business environment. Moreover, it is not possible to foresee every ramification, particularly where the amendment effects such fundamental change. We know that where multiple jurisdictions have overlapping functions and responsibilities, inefficiencies inevitably result and costs increase. Redundancy is also conducive to conflict, which creates instability.

By all indications, the tribal gaming industry is healthy. It has enjoyed double digit growth in productivity each year for more than a decade. On the whole the industry enjoys a wholesome public image and maintains considerable public support. Tribal regulatory capacity and expertise have strengthened over the years and tribal regulatory agencies continue to achieve ever increasing levels of sophistication. In every respect IGRA represents one of the most successful and important pieces of Indian legislation ever enacted by the Congress. It has provided tribal governments a substitute for the tax base they lack, and in so doing, it has strengthened tribal governments economically and institutionally.

In light of the success and importance of gaming to tribal governments, it is only natural that tribal officials will have misgivings about amending IGRA. Tribal officials are equally apprehensive in relation to proposed rules, particularly regulations such as the MICS which are legislative in nature and highly detailed technically. In the first place, the responsibility for implementing, monitoring and enforcing such regulations falls most heavily on tribal gaming regulatory agencies. Yet, the NIGC's policies with regard to tribal participation in the drafting process have been erratic. There have been periods when the NIGC has welcomed participation and others where it has been unreceptive. We believe that the quality and workability of regulations suffers when those most directly affected by the regulations, particularly those responsible for on-the-ground implementation are not given a seat at the drafting table. The development of internal control standards requires an intimate working knowledge about the gaming environment as well as expertise in all aspects of gaming operations.

The MICS have been the subject of longstanding complaints from both the regulatory and the operational sides of the industry. In reviewing the draft bill, we appreciated that a provision was included to address these tribal concerns and felt that we might offer some insight that may aid the committee's deliberations on the subject.

The dissatisfaction with the MICS arose soon after they were first adopted. In implementing the MICS it soon became evident that the standards were flawed in several respects. First, they were largely borrowed from the Nevada Gaming Control Board's regulations at a time when the industry was undergoing a period of significant technological advancement. As a result, the MICS were already stale in several areas at the time of adoption. They were also poorly suited to the Class II gaming environment, though the NIGC resisted this premise based on its belief that electronically aided Class II games are indistinguishable from Class III gambling machines.

Another flaw was that the MICS initially reflected a one-size-fits-all approach. The same standards applied to all tribal gaming activities regardless of the size of the operation, which in Indian Country ranges from some of the world's largest gaming operations to some of its tiniest. The rigidity of the MICS was frustrating to regulators and operators. Moreover, compliance with the MICS presented so many practical difficulties that tribal governments were alarmed by the implications. Federal enforcement action, as a result of these difficult to implement provisions of the MICS

was the concern that prompted tribes to begin questioning the NIGC's authority to promulgate and enforce the standards.

In 2000, tribal leaders and regulators approached the NIGC about the problems. The commission agreed to review the MICS and consider revisions to address the practical problems tribal governments were experiencing. A tribal advisory committee was assembled and a significant revision resulted, but the issue of the NIGC's authority was not resolved until the decision in the Colorado River case.

We are aware of the NIGC's strong concerns about the court's decision and its desire for a legislative solution. We can also understand the committee's interest in discerning whether the court's decision creates a regulatory gap. At the same time we know that tribal governments are not so irresponsible as to abandon their internal control standards. To do so would deprive them of their most valuable regulatory tool and render operations vulnerable to panoply of harms. Tribal governments are competent to promulgate and enforce tribal standards without a statutory or regulatory mandate or the threat of enforcement. Tribal governments desire strong effective internal control standards because they are in the best interest of the tribe.

On the question of whether the rule making function should remain with the NIGC or be delegated to a specially created entity, we view this decision as less important from our perspective than ensuring that tribal officials have a seat at the drafting table. Unless the provision guarantees that a specially created entity would be more receptive to collaborative processes than the NIGC has been we cannot see its value. The draft does not mandates that tribal officials will be accorded meaningful participation or ensure that the committee members will have expertise and experience that will allow them to participate in meaningful discussion. We encourage the committee to consider a slightly different approach. As drafted, the proposed bill establishes a drafting committee, but offers very little procedural guidance. The Negotiated Rulemaking Act and the Federal Advisory Committee Act, on the other hand, each contains procedures that if applied would go far in alleviating our concerns.

We strongly believe that all rulemaking under IGRA should be subject to collaborative processes. Besides the expertise tribal gaming regulators can provide, they have important insights to offer as to the practical strengths and weaknesses of the regulations. They will also be better equipped to identify areas in need of attention. Moreover, it is illogical to exclude tribal gaming regulators from the drafting process, given that tribal regulatory agencies will have primary responsibility for implementing, monitoring and enforcing the regulation plus approving the necessary operating procedures. Providing oral or written feedback on draft regulations is of limited use. Once a draft is prepared, there is typically limited interest in exploring alternative approaches or effecting significant revision. Too much time and effort has been invested and important choices have already been made.

I will close where I began. Tribal officials well understand the importance of internal control standard and effective regulations. Tribal governments rely on gaming revenues

to fund essential governmental functions, services and programs. These revenues fuel the economic engine driving tribal economic growth and development. Gaming provides permanent jobs, fair wages and benefits. Thanks to gaming, there are business opportunities within the community. These jobs and opportunities stay right where they are and this knowledge increases confidence and stability in the economy which fosters continued growth.

These successes were not easily accomplished. Years of hard work have been invested, and years more will be needed to achieve the standard of living and quality of life our leaders envision for ourselves and our posterity. As Governor Bill Anoatubby has observed many times, we do not see the accumulation of wealth from gaming as an end in itself, but as a means of achieving the goals to which we aspire on behalf of the Chickasaw Nation.

Thank you.