



NATIONAL INDIAN GAMING ASSOCIATION

Rebuilding Communities Through Indian Self-Reliance

**Testimony of J.R. Mathews
NIGA Executive Committee Member &
Vice-Chairman, Quapaw Tribe of Oklahoma**

Concerning

**Oversight Hearing on
the National Indian Gaming Commission**

Before

The Senate Committee on Indian Affairs

Thursday, April 17, 2008

10:30 a.m.

Room 562 Dirksen Senate Building

**Testimony of J.R. Mathews, NIGA Executive Committee & Vice-Chairman,
Quapaw Tribe before the Senate Committee on Indian Affairs– April 17, 2008**

Good Morning, Mr. Chairman and Members of the Committee. Thank you for inviting me to testify today.

My name is J.R. Mathews. I am the Vice Chairman of the Quapaw Tribe of Oklahoma and I serve on the Executive Committee of the National Indian Gaming Association.

I am speaking today on behalf of the National Indian Gaming Association and its 184 Member Tribes. NIGA is a tribal government association dedicated to supporting Indian gaming and defending Indian sovereignty. I am accompanied by Mark Van Norman, NIGA's Executive Director. Mark is a member of the Cheyenne River Sioux Tribe of South Dakota.

Indian Gaming: The Native American Success Story

The Indian Gaming Regulatory Act is a remarkable success. Nationwide there are 231 tribes in 28 states which are engaged in gaming. Tribes are using revenues to build or rebuild their communities, while putting tribal members to work and providing basic and essential tribal government services. Tribes are also generating significant taxes to Federal, state and local governments through Indian gaming and making significant charitable contributions to their communities and other Indian tribes. Last year, Indian gaming generated \$26.5 billion in gross revenues (before capital costs, salaries, expenses and depreciation, etc.) for tribal governments. That means tribal governments created more than 700,000 jobs through Indian gaming nationwide and generated almost \$12 billion in Federal, state and local revenue.

Here are some examples of the tribal community infrastructure and the essential government services that Indian gaming revenues provide:

- The Mescalero Apache Tribe of New Mexico built a new high school;
- The Choctaw Nation of Oklahoma built a new hospital;
- Gila River established a new police and emergency medical unit;
- The Pechanga Band established a new fire department;
- The Mohegan Tribe is building a water system for the Tribe and seven of its surrounding communities;
- The Rosebud Sioux Tribe established child care and provides new school clothes for impoverished students;
- The Fort Berthold Tribes established a new Headstart center;
- The Tohono O'odham Nation is funding the Tohono O'odham Community College and used \$30 million to fund a student scholarship program; and
- Several tribal governments provided major funding for the new Smithsonian Museum of the American Indian.

These positive developments are happening across Indian country.

The development of Indian lands is a benefit to surrounding communities. For example, Gila River EMTs serve as first responders to accidents in their stretch of I-10. The Pechanga Band's Fire Department responded to the California wildfires, working hard to save homes and lives in neighboring communities.

Indian gaming benefits neighboring Indian tribes as well. The Shakopee Mdewakanton Sioux Tribe, for example, has generously assisted many Indian tribes in Minnesota, the Dakotas, and Nebraska, including refinancing the Oglala Sioux Tribe's debt, providing a grant to help build a new nursing home for the Cheyenne River Sioux Tribe and an economic development grant for the Santee Sioux Tribe.

The public recognizes that Indian gaming is a success. A national poll of 1,000 voters conducted on March 14, 2008 for NIGA by the independent polling firm Fairbank, Maslin, Maullin & Associates found that American voters generally agree that Indian gaming has been a success:

- 81% agree that Indian tribes benefit from having casinos;
- 82% agree that Indian gaming provides revenues that tribes can use to provide essential services to their members;
- 79% agree that Indian gaming provides jobs for Indians;
- 65% agree that Indian gaming benefits state and local communities; and
- 68% agree that Indian gaming allows Indian tribes to break the cycle of poverty and welfare and become self-reliant.

Approximately, twenty-four million visitors annually travel to Indian country to visit Indian gaming facilities and on average, make 7 visits per year. Thus, many voters have now experienced Indian gaming personally and their first hand experience is reflected in the polling data.¹

The Existing Regulatory Framework for Indian Gaming

Tribal governments are dedicated to building and maintaining strong regulatory systems because tribal sovereign authority, government operations and resources are at stake. Under IGRA, tribal governments are the primary day-to-day regulators of Indian gaming and regulate Indian gaming through tribal gaming commissions. Tribal gaming regulators work with the NIGC to regulate Class II gaming, and through the Tribal-State Compact process, tribal gaming regulators work with state regulators to safeguard Class III gaming.

¹ At the outset of the poll, 59% of American voters support Indian gaming. After learning about the uses of Indian gaming revenue for essential tribal government purposes and economic development, 69% of voters support Indian gaming.

Tribal governments have dedicated tremendous resources to the regulation of Indian gaming: Tribes spent over \$345 million last year nationwide on tribal, state, and Federal regulation:

- \$260 million to fund tribal government gaming regulatory agencies;
- \$71 million to reimburse states for state regulatory work under the Tribal-State Compact process; and
- \$14.5 million for the NIGC's budget.

At the tribal, state, and Federal level, more than 3,350 expert regulators and staff protect Indian gaming:

- Tribal governments employ former FBI agents, BIA, tribal and state police, New Jersey, Nevada, and other state regulators, military officers, accountants, auditors, attorneys and bank surveillance officers;
- Tribal governments employ more than 2,800 gaming regulators and staff;
- 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 500 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 Commissioner Norm DesRosier is a former tribal gaming regulator and state law enforcement officer.
- At the Federal level, the NIGC employs more than 100 regulators and staff.

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 Pequot's digital storage for the system has more capacity than the IRS or the Library of Congress computer storage system. In fact, the Nation helped Rhode Island state police after the tragic nightclub fire by enhancing a videotape of the occurrence, so state police could study the events in great detail.

At the state level, more than 200 tribal governments have entered into 250 Tribal-State Compacts with 23 States. Typically, Tribal-State Compacts include rules on internal controls and regulation. For example, California 1999 Compacts require tribal governments to maintain accounting, machine and technical standards that meet or exceed industry standards. In California, tribal governments have incorporated MICS into their tribal gaming regulatory ordinances.² The Fairbanks Maslin poll found that 76% of American voters support the Tribal-State Compact system.

² Alturas Rancheria, for example, provides in its tribal gaming ordinance: "Tribal Gaming Commission regulations necessary to carry out the orderly performance of its duties and powers shall include ... the following: The Minimum Internal Control Standards ("MICS") as issued by the NIGC." This type of incorporation by reference is unaffected by the Federal Court decision in *Colorado River Indian Tribes*. In California, tribal governments spent approximately \$104 million to fund regulation of Indian gaming in

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. Tribal governments work with the Department of Treasury Financial Crimes Enforcement Network to prevent money laundering, the IRS to ensure Federal tax compliance, and the Secret Service to prevent counterfeiting. Tribal governments have stringent regulatory systems in place that compare favorably with Federal and state regulatory systems. 74% of American voters agree that IGRA provides enough or more than enough regulation, according to the Fairbank, Maslin poll. Only 15% of American voters believe that there should be more regulation.

Government-to-Government Consultation: Need for a Statutory Directive

Since 1960, when then Senator John F. Kennedy pledged to “[e]mphasize genuinely cooperative relations between Federal officials and Indians,” each succeeding Administration has pledged to promote tribal self-government. President Kennedy followed through on his pledge by ending the Termination Policy and establishing Federal programs to revitalize Indian country. President Johnson helped tribal governments build capacity to provide essential services to tribal citizens.

Building on the work of the Kennedy-Johnson Administrations, President Nixon promoted the Indian Self-Determination Act to empower tribal governments to provide the government services that the Bureau of Indian Affairs and the Indian Health Service previously provided. Nixon heralded the new Indian Self-Determination Policy in a special message to Congress, which explained:

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

President Nixon, Special Message on Indian Affairs, July 8, 1970.

Presidents Ford, Carter, Reagan and Bush used the Indian Self-Determination Policy as the baseline for American Indian policy. In their Administrations, Congress built upon Self-Determination Policy through the Indian Health Care Improvement Act,

2006. Of the \$100 million, Tribal governments spent \$80 million to fund tribal regulation of Indian gaming, \$20 million for state regulation, and \$4 million for Federal regulation. The State of California dedicates more than 100 regulators and staff to Indian gaming regulation while tribal governments maintain 800 tribal regulators and staff.

the American Indian Religious Freedom Act, the Tribal College Act, the Indian Self-Governance Act, and the Indian Gaming Regulatory Act, among others.

On January 24, 1983, President Reagan issued a Statement on American Indian Policy, explaining:

When European colonial powers began to explore and colonize this land, they entered into treaties with the sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national priorities, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold....

The administration intends to ... remove[e] the obstacles to self-government and ... creat[e] a more favorable environment for the development of healthy reservation economies.... Development will be charted by the tribes, not the Federal Government.... Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination....

President Clinton's Executive Memorandum and Executive Orders on Consultation and Coordination with Tribal Governments took President Reagan's announcement the next steps forward.

Executive Order 13175 on Consultation and Coordination with Tribal Governments, EO 13175, establishes the framework for Federal agencies to work with Indian tribes and elected tribal leaders. President Clinton issued it in 2000 and President Bush affirmed it in 2004. When Federal action will substantially and directly affect tribal self-government or tribal rights, the essential principles that guide agency action are:

- Respect for tribal sovereignty and self-government, treaty rights, lands and natural resources, and the Federal trust responsibility;
- Maximum administrative discretion for tribal governments; and
- Preserve the prerogatives of tribal law-making whenever possible.

The Executive Order recommends that consensual decision-making, such as negotiated rulemaking be used when possible.

Five years ago, the National Indian Gaming Association and our Member Tribes asked the Senate Committee on Indian Affairs to enact a statutory directive to the NIGC to consult with tribal governments on a government-to-government basis. The NIGC, for its part, said, "No, there is no need for a statutory directive because we will develop our own policy."

There is a firm belief among tribal leaders that, while the NIGC is willing to meet with tribal leaders, the NIGC does not accommodate tribal government concerns. Instead NIGC has a pre-determined decision made, they tell us that they are open to change, but they do not accommodate tribal leader concerns. Chairman Hogen says, "Consultation does not mean agreement." Well, we believe that is the wrong attitude. Tribal leaders believe that, to the maximum extent possible, Federal agencies should try to reasonably accommodate tribal government concerns – not just sit across the table for a little while and then go about with business as usual. One tribal representative explained to us that:

As long as they feel they that tribal governments do not need to be consulted in the rulemaking process until after the final rules are crafted by NIGC and published, then they are perpetuating a failed process. Tribes not only have the same responsibilities and goals to protect the integrity of Indian gaming, they have the primary responsibility, and they have created the governmental institutions in the tribal gaming commissions and have hired and trained staff in the areas of compliance, surveillance, security, co-jurisdictional law enforcement, etc.

Some tribal government leaders are reluctant to meet with the NIGC because they believe that informational meetings are wrongly being reported as Federal-tribal government-to-government consultation. A Northwest tribal representative has informed us that:

In my dealings with the NW tribes thru ATNI and WIGA, even as recently as yesterday, what I hear is that tribes are reluctant to sign up for the consultations offered at the trade show next week, or ANY consultation opportunity for that matter.

Many of the NW tribes' consultation meetings with NIGC over the past 2-3 years were mischaracterized by the NIGC in their October 2007 letters to Congressman Rahall and Senator Dorgan regarding the proposed Class II package, stating that the listed tribes were consulted regarding the proposed regulations. Most, if not all, tribes discussed (when the NIGC wasn't monopolizing the conversation) their own individual tribe's issues at those meetings. One tribe ... gave a tour of their surveillance department to the NIGC only to have their tribe show up on the list of tribes having been consulted with on the proposed regulations. What?!?

.... Also, the laundry list provided in the notice of consultation is huge. There are 7 bullets in the notice but if you read each one, it's really 13 topics plus your own tribe's issues. All done in 45 minutes should you have the full amount of time once NIGC is done with their spiel.

In sum, the tribes up here feel that they are damned if they do and damned if they don't. If they sign up, chances of misrepresentation of their meeting to benefit the NIGC's position is likely to occur. If they don't, then their absence will be misrepresented as not haven taken the opportunity to consult when offered (as

done with my tribe.) And finally, most believe that even if they could manage to have their meetings represented accurately, whatever they say about the proposed regulations will not be considered. That is, what difference will it make? They aren't listening anyway. Why bother? This is a good indicator that something is wrong with the NIGC's consultation process.

The Federal-tribal government-to-government relationship needs to work better than this, especially when the agency has "Indian" in its name!

The United States' government-to-government relationship with Indian tribes is as venerable as the American Republic. In 1796, President George Washington told the Cherokee Nation that:

The wise men of the United States meet together once a year to consider what will be for the good of all of their people.... I have thought that a meeting of your wise men once or twice a year would be alike useful to you.... The beloved agent of the United States would meet with them.... If it should be agreeable to you that your wise men should hold such meetings, you will speak your mind to my beloved man ... to be communicated to the President of the United States....

President George Washington Letter to the Cherokee Nation, August 29, 1796.

President Thomas Jefferson said, "The sacredness of [Native American] rights is felt by all thinking persons in America as well as Europe."³ Jefferson's view is embodied in the Louisiana Purchase Treaty, where the United States agreed to honor prior European treaties, until such time as it entered its own treaties with the Indian nations, based upon mutual consent:

The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other Suitable articles shall have been agreed upon.⁴

In total, the United States entered into more than 370 Indian treaties, and these treaties guaranteed tribal lands and tribal self-government. Those guarantees continue to protect tribal self-government and tribal lands today.

Given this background, the NIGC should do its utmost to accommodate tribal government views through consultation. We should not get a flippant response that consultation does not mean agreement. The United States should operate on a basis of mutual consent with Indian tribes, whenever possible – just as it does with United States

³ A. Josephy, The Patriot Chiefs (1961) at 178.

⁴ Louisiana Purchase Treaty (Treaty between U.S.A. and the French Republic), Article VI (1803). (Spain is referenced because France acquired Louisiana territory from Spain).

territories. A statutory directive to NIGC on government-to-government consultation is both appropriate and necessary. We encourage the Committee to introduce legislation along the lines of H.R. 5608, which seeks to codify Executive Order 13175.

NIGC Should Follow Basic Rules for Drafting Regulations: Executive Order 12866

Executive Order 12866, as modified by the Bush Administration to exempt the Vice President, provides the framework for Federal agency rule-making. The Executive Order provides:

The American people deserve a regulatory system that works for them, not against them.... [R]egulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable....

This Executive Order requires that agencies identify the problem the regulation is intended to address, examine whether there are alternatives to direct regulation, determine the costs and benefits of the regulation, consult with state, local and tribal governments and seek to minimize the burdens on those governments. In addition, regulations should be drafted in a manner that is simple and easy to understand.

NIGC has failed to comply with these standards. First of all, tribal governments have asked: What is the need for these regulations? NIGC has responded that it seeks clarity in terms of the definition of Class II technologic aids, yet its proposed definition is inherently ambiguous and does little or nothing to promote clarity. Indeed, Indian tribes have pointed out that its proposed definition of “electro-mechanical facsimile” may very well be contrary to IGRA’s statutory language and contrary to five Federal Court of Appeals cases on this subject. *See U.S. v. 162 Megamania Gambling Devices*, 231 F. 3d 713 (10th Cir. 2000); *U.S. v. 103 Electronic Gambling Devices*, 223 F. 3d 1091, 1093 (9th Cir. 2000); *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003); *United States v. Santee Sioux Tribe*, 324 F.3d 607, 615-617 (8th Cir. 2003); *Diamond Games v. Reno*, 230 F.3d 713 (D.C. Cir. 2000). Thus, the primary NIGC rationale for the regulation is baseless and leaves the regulation without foundation or merit.

The Oklahoma Indian Gaming Association makes the point a different way – where there is clear statutory guidance, why is the agency adding new legal requirements of its own making? OIGA states:

Assuming for arguments sake, that classification regulations were needed, another question that has been asked and not answered is why hasn’t the NIGC used the statute and the Federal court cases, both those won and lost, as guidelines for drafting regulations? Instead, the NIGC has chosen to draft extremely cumbersome language, which arbitrarily adds more than one legal element beyond the elements that IGRA uses to define the game of “bingo.” Given the strict construction given to IGRA in other cases like the *Colorado River Indian*

Tribes decision, and with three Federal Appeals Courts ruling that the statutory language of IGRA establishes the legal elements for bingo, the NIGC has no valid reason to go down a legally perilous path.

As Gerry Danforth, Chairman of the Oneida Tribe of Wisconsin testified before the House Natural Resources Committee last week, if NIGC took the time to really consult with tribal governments on a government-to-government basis, it would find workable, acceptable and durable solutions to regulatory issues that do not lead to litigation. So, the time invested in *consultation and coordination* with Indian tribes is well worth it.

NIGC's own economic impact analysis (conducted by an independent economist) found that its Class II regulatory proposal would cost Indian tribes between \$1.2 billion and \$2.8 billion annually. While the four proposed Class II regulations were published on October 24, 2007, the economic impact study was not published until February 1, 2008 and the comment period on the regulations closed on March 9, 2008. NIGC did not conduct a cost-benefit analysis of its regulatory proposals. That violated Executive Order 12866. A cost-benefit analysis should have considered the cost of alternative regulatory approaches, such as using existing statutory definitions or existing regulatory definitions. The existing regulatory Class II technologic aid definition would carry no additional cost because it has been in force since June, 2002, the industry has already accommodated the regulation, and the Federal Courts have approved the regulation.⁵

Clearly, the NIGC is failing to comply with the general rules for Federal regulatory proposals. Indeed, on the Class II regulations, the NIGC failed the very basic task of drafting the regulations in a simple manner: After months of work by the Class II gaming manufacturers group convened by NIGC, NIGC took a fairly reasonable rewrite of its Class II minimum internal control standards regulation and re-inserted its old Class II MICS rule by reference. That is not plain English – the incorporation by reference makes it almost impossible to understand the new regulatory proposal, or to point out potential conflicts between the old and new rule. This proposal needs to go back to the “drawing board” for a “plain English” lesson.

NIGC Should Comply with the Regulatory Flexibility Act

The Regulatory Flexibility Act requires Federal agencies to consider the economic impact of Federal regulations on small governments, communities, and entities. The RFA requires agencies to consider lower cost alternatives to expensive regulations. Experts explain the RFA as follows;

⁵ *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003) (10th Circuit relied on NIGC 2002 Class II regulations); *United States v. Santee Sioux Tribe*, 324 F.3d 607, 615-617 (8th Cir. 2003) (Relying on the NIGC 2002 Class II regulations, the Court found that “NIGC’s conclusion that Lucky Tab II is a permissible class II gaming device seems to be a reasonable interpretation of the IGRA”).

The Regulatory Flexibility Act created several new sections in the APA. The legislative history states that the intention of the Act is “to encourage individuals, small businesses, small organizations, and small government bodies that would otherwise be unnecessarily adversely affected by Federal regulations.... It is primarily aimed at forcing agencies to consider the problems of small businesses and local governments and to investigate least cost alternatives in regulation.

C.A. Wright & C.H. Koch, “Judicial Review of Administrative Action,” 32 Fed. Prac. & Proc. Judicial Review, Section 8187 (2008).

Yet, because the NIGC failed to conduct its economic impact analysis until the close of the comment period and it did not consider lower cost alternatives as required by the Regulatory Flexibility Act. Thus, with the comment period closed tribal governments are left to contemplate an economic impact of \$1.2 billion to \$2.8 billion in lost income, a loss of perhaps 35,000 jobs, and an additional compliance burden of \$347 million. Once again, the NIGC should re-open its regulation and consider lower cost alternatives to its proposed regulations.

NIGC Should Comply With Congress’s Directive to Provide Training

In 2006, Congress gave the NIGC new authority to work with tribal governments to provide technical assistance and training to tribal regulators. Public Law No. 109-221 (2006). Specifically, the NIGC Accountability Act is intended to do three things:

- Provide increased funding for NIGC by empowering NIGC to assess a fee up to the level of \$0.80 per \$1,000 of gross Indian gaming revenue;
- Require NIGC to follow the Government Performance and Results Act; and
- Require NIGC to include a training and technical assistance plan in its GPRA compliance plan.

NIGC is currently undertaking a paperwork shuffle of its GPRA compliance plan, but Indian tribes were not consulted in its development, there have been no national or regional meetings scheduled to consult with tribes on the GPRA plan, and no training or technical assistance programs have been undertaken pursuant to the plan. NIGC has increased its fees and is spending more money under the fee provisions.

NIGC Should Comply with the Federal Advisory Committee Act

Congress established a general rule to limit the use of Federal Advisory Committees by regulatory agencies because they are not democratic. Yet, it provided an exception for Federal agency consultation with state, local and tribal governments. That exception only applies to tribal governments when Federal agencies meet with authorized tribal government representatives. Under FACA, GSA provides oversight of Federal Advisory Committees.

The NIGC, however, has been regularly constituting and disbanding Tribal Advisory Committees for work regarding the development of the NIGC's regulatory proposals. It has several problems with this approach:

- No Tribal Advisory Committee (TAC) plan or proposal was presented to GSA to ensure that NIGC is actually complying with FACA;
- TAC Members were not initially requested to be authorized representatives of their tribal governments and some were not, putting them outside the FACA exception for consultation with tribal governments;
- While the NIGC established the TAC to assist in the development of its Class II regulations, this committee was limited to seven members expected to represent all of Indian country; and
- Although the TAC unanimously objected to unreasonable restrictions on Class II games, none of its significant objections were accepted by the NIGC.

Just last month, the NIGC disbanded its existing TAC and Minimum Internal Control Standards Tribal Advisory Committee (MICS TAC) and then asked for the formation of a new Tribal Advisory Committee, to be limited to tribal regulators with five or more years experience. This gives the impression that when the existing TACS objected to arbitrary NIGC policies, the NIGC abolished them and sought a new TAC that would be amenable to NIGC views. As a tribal representative explained to us:

NIGC's latest initiative to dissolve existing tribal advisory committees and to appoint new committees whose member's qualifications have been predetermined by NIGC is done without tribal consultation. The NIGC should be consult with the tribes concerning the purposes and functions of the committees, and the qualifications of committee members.

Tribes do have staff with the legal, technical and operational experience and skills to develop an effective regulatory environment, and they are willing and able to consult with NIGC to contribute their expertise to the process. It is clear from Chairman Hogen's letter of February 29, 2008, that NIGC intends to exclude many experienced and competent candidates, who have legal or operational experience, rather than "auditing" or "accounting" experience.

Indeed, the NIGC's new tribal regulatory experience requirement excludes elected tribal leaders while FACA expressly authorizes Federal consultation with elected tribal leaders as the primary exception to the general prohibition on "expert" advisory committees!

Miscellaneous Concerns

We have additional concerns with the NIGC. For example, NIGC does not have an audited financial statement available for review. The NIGC is just now implementing an accounting package that will give it the ability to produce financial statements. For the

past 5 years, the NIGC has collected more fees than needed for its operating budget over the past 5 years. At the end of last year, the amount was greater than \$10 million. While IGRA requires “excess” fees to be returned to the Tribes, these funds have been retained by NIGC from year to year.

Conclusion

Congress should act to ensure that the National Indian Gaming Commission is working with tribal governments to build up tribal government institutions rather than using a Washington-centered approach and relying primarily on rulemaking to solve perceived problems. We encourage the Senate Committee to consider legislation like H.R. 5608 to mandate an accountable government-to-government consultation process for the NIGC. In addition, the NIGC should begin to provide training and technical assistance to tribal governments and tribal gaming regulators as Congress mandated in 2006. NIGC has been collecting increased fees, but has yet to engage tribes under its new requirement to provide training and technical assistance. Perhaps if it did, NIGC would find a useful role, besides continually revising existing NIGC regulations.