



**Testimony of J. Kurt Luger, Executive Director  
North Dakota Indian Gaming Association &  
Great Plains Indian Gaming Association**

**Before the Senate Committee on Indian Affairs  
April 17, 2008  
Hearing Concerning Oversight of  
the National Indian Gaming Commission**

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Good Morning, Chairman Dorgan and Members of the Committee. Thank you for inviting me to testify this morning.

My name is Kurt Luger and I am a member of the Cheyenne River Sioux Tribe. I grew up on the Standing Rock Sioux reservation in North Dakota on my family ranch and my family operates a grocery store and small business in Fort Yates, North Dakota.

I serve as the Executive Director of the North Dakota Indian Gaming Association, which includes the Spirit Lake Sioux Tribe, Standing Rock Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, the Three Affiliated Tribes of Fort Berthold, and the Turtle Mountain Chippewa Tribe.

I also serve as the Executive Director of the Great Plains Indian Gaming Association, which covers North Dakota, South Dakota, Nebraska, Iowa, Kansas, Wyoming, and Montana. GPIGA was founded in 1997, and we have 28 Tribes as Members. This year we will hold our 16<sup>th</sup> Annual Gaming Conference & Trade Show together with the Minnesota Indian Gaming Association on May 18-21, 2008 at the Mystic Lake Casino & Hotel. Senator Dorgan, I respectfully extend to you an invitation to be our keynote speaker on Monday, May 19, 2008, so our tribal leaders can hear from you directly about the Committee's policies and priorities.

At GPIGA, our mission is to bring together the federally recognized Indian Nations in the Great Plains Region who are operating gaming enterprises in a spirit of cooperation to develop common strategies and positions concerning issues affecting all gaming tribes; to promote tribal economic development and its positive impacts within the Great Plains; to provide pertinent and contemporary information for the benefit of the GPIGA member nations; to draw upon the unique status of those Great Plains Indian Nations which have treaties between themselves and the United States; and to provide our Member Tribes with information about national legislation and issues affecting tribal economic development.

Naturally, we are concerned about the manner in which the NIGC approaches its mission to assist tribes in regulating Indian gaming. Rather than a cooperative environment where the NIGC and Indian tribes work together to ensure the highest standards of regulation, Tribes are left with the impression that the NIGC has chosen to write regulations without tribal input or concern for the affect those regulations will have on tribal sovereignty and the Indian gaming industry. Similarly, we are concerned by the lack of training and technical assistance on those regulations to Indian tribes and tribal regulators despite a mandate to do so in the NIGC Accountability Act of 2006.

## **Background: Federal-Tribal Government-to-Government Relations**

Before the United States, Indian tribes were independent sovereigns with sustainable economies, strong agricultural traditions, vast natural resources and extensive trade networks. Early United States' treaties sought to foster "a firm and lasting peace" with the North Dakota tribes, to build a trade network between the United States and North Dakota tribes, and to extend Federal protection to the tribes. See Treaty with the Mandan (1825); Treaty with the Arikara (1825); Treaty with the Hunkpapa Sioux (1825). Later, the United States sought cessions of land from North Dakota tribes through war, treaty, or statutory agreement, and these cessions left the tribes destitute.

Through these treaties the United States acknowledged the status of Indian tribes as sovereigns and established the principle of government-to-government relations between the United States and Indian tribes. In fact, these principles are part of the very fabric of the Constitution, as set forth in the Indian Commerce and Treaty Clauses. The United States never withdrew its treaty pledges of peace, friendship, and protection for North Dakota's Indian tribes, and accordingly, we seek to hold the United States to its Federal trust responsibility. Part of the Federal trust responsibility is a duty to protect tribal self-government, which means that to the greatest extent possible, the United States, its officers and agencies should work with Indian tribes on a basis of mutual respect and mutual consent.

## **Indian Gaming in North Dakota**

The Indian Gaming Regulatory Act's purpose is to build strong tribal governments, promote tribal economic development and foster tribal self-sufficiency. Indian gaming has been an important economic development activity for Indian tribes in North Dakota and the Great Plains region. 25 U.S.C. section 2701(4).

After almost 20 years of experience under the Indian Gaming Regulatory Act, we can say definitively that Indian gaming is working in rural areas of America. Indian tribes that faced 50, 60, and even 70% unemployment are now generating jobs not only for their own tribal members, but for neighboring non-Indians as well. I live and work in North Dakota so I will use the North Dakota Tribes as a representative example.

In North Dakota, Indian gaming has a significant economic impact. Our tribal government gaming operations provide employment, essential tribal government revenue that funds essential services and community infrastructure, and generates much needed revenue for communities statewide through the economic multiplier effect. Our Tribes have created 2,400 direct, full-time jobs with pension and health care benefits. The payroll from the gaming operations exceeds \$55 million, and approximately \$39 million of that payroll goes to tribal members who live in rural North Dakota. More than 70% of our gaming employees are Native Americans and 40% of our employees were formerly unemployed and survived on welfare.

Our tribal government payroll contributes \$156 million annually to the total economy of the state. Tribal government gaming operations purchased over \$45 million in goods and services within North Dakota. Purchases were made in 93 communities throughout the State.

Without these sales, the state would lose \$100 million of economic activity in cities throughout the State. We have estimated our total economic impact in the State since 1997 to have exceeded \$1.3 billion.

## **Indian Tribes in North Dakota**

In North Dakota, 5 tribal governments operate Indian gaming facilities: the Three Affiliated Tribes of Fort Berthold – Mandan, Hidatsa, and Arikara; the Spirit Lake Sioux Tribe, the Turtle Mountain Chippewa Tribe, the Standing Rock Sioux Tribe and the Sisseton-Wahpeton Sioux Tribe. Both the Standing Rock Sioux Tribe’s reservation and the Sisseton-Wahpeton Sioux Tribe’s reservation straddle the border with South Dakota.

**Three Affiliated Tribes.** The Three Affiliated Tribes, Mandan, Hidatsa, and Arikara, operate as a unified tribal government. These Tribes have occupied the Missouri valley for hundreds and thousands of years, planted corn, squash, and beans on the fertile flood plains, and hunted buffalo and wild game. Living in stockaded villages, the Three Affiliated Tribes were devastated by smallpox epidemics in 1792, 1836, and 1837.

The traditional lands of the Mandan, Hidatsa, and Arikara encompassed an area of 12 million acres from eastern North Dakota to Montana and as far south as Nebraska and Wyoming. Early on, the Three Affiliated Tribes established friendly relationships with the United States. They welcomed the Lewis and Clark expedition into their villages and assisted them on their journey. The Fort Laramie Treaty of 1851, congressional acts and executive orders reduced the Tribes’ lands to 1,000,000 acres in western North Dakota.

In the 1950s, the Three Affiliated Tribes were asked to undertake a tremendous sacrifice by allowing the United States to dam the Missouri River and flood their reservation. The original tribal headquarters were flooded and families were moved away from the fertile Missouri River flood plain up on to the high prairie. When Lake Sakakawea was formed by the dam, the new lake divided the reservation into three parts.

Due to the flooding, the Tribes suffered an enormous loss of natural resources, including the most fertile land on the reservation, their community was divided and the small village life that many had known along the Missouri River was gone. The tribal headquarters were relocated four miles away in New Town, North Dakota. Today, the tribal population is about 10,000 with about 5,000 living on the reservation.

**Spirit Lake Sioux Tribe.** The Spirit Lake Sioux Tribe is composed of the Sisseton-Wahpeton and Yankton bands of the Dakota or Sioux Nation. Originally residing in Minnesota and eastern North Dakota, the Spirit Lake Sioux Reservation was established by the Treaty of 1867 with the United States. The Treaty of 1867 provides that: “The ... Sioux Indians, represented in council, will continue ... friendly relations with the Government and people of the United States....” The Treaty recognizes the Spirit Lake Sioux Reservation as the “permanent” reservation of the Tribe.

The Tribe has worked to develop jobs through manufacturing, providing Kevlar helmets and military vests to the Pentagon through Sioux Manufacturing Corporation, yet with a reservation population of over 6,000 people, the Tribe has struggled with 59% unemployment as the Defense Department budget was cut in the 1990s. The Spirit Lake Reservation encompasses 405 square miles north of the Sheyenne River in northeastern North Dakota.

**Turtle Mountain Chippewa Tribe.** The Chippewa or Ojibwe people originally inhabited the Great Lakes Region and began to hunt and trade in North Dakota in the late 18<sup>th</sup> and early 19<sup>th</sup> Centuries. Historically, the Chippewa and the Dakota fought wars with each other, but they settled their differences through the Treaty of Sweet Corn in 1858.

In 1882, Congress set aside a 32 mile tract in Northeastern North Dakota for the Turtle Mountain Band of Chippewa 11 miles from the Canadian border. With the passing of the great buffalo herds, the Chippewa turned to agriculture and ranching, and faced many difficulties due to encroachment by settlers.

Today, almost 20,000 tribal members live on the 6 x 12 mile Turtle Mountain reservation. Belcourt, North Dakota, the tribal headquarters, has become the 5<sup>th</sup> largest city in the state.

**Standing Rock Sioux Tribe.** The Standing Rock Sioux Tribe is composed of Sitting Bull's Band, the Hunkpapa, and the Yanktonai, with some Black Foot Sioux on the South Dakota side. In the Fort Laramie Treaty of 1868, the United States pledged that: "The Government of the United States desires peace and its honor is hereby pledged to keep it." The Treaty also provides that the Great Sioux Reservation was to serve as the "permanent home" of the Sioux Nation.

Yet, in 1876, General Custer and the 7<sup>th</sup> Cavalry came out to Sioux country to force the Sioux tribes on to diminished reservations. In 1889, the Federal Government once again called on the Sioux Nation to cede millions more acres of reservation lands, and the Standing Rock Sioux Reservation was established by the Act of March 2, 1889. Sitting Bull had opposed the land cession and in 1890, he was murdered by United States officers – that is, the BIA police acting in concert with the U.S. Cavalry and under the direction of the Indian Agent.

The Standing Rock Sioux Reservation is composed of 2.3 million acres of land lying across the North and South Dakota border in the central area of the State. Like the Three Affiliated Tribes, the Standing Rock Sioux Tribe was asked to make a substantial sacrifice for flood control and ceded almost 56,000 acres of the best reservation land for Lake Sakakawea. Tribal members were removed from their traditional homes along the Missouri River flood plain and relocated well up above the river. Today, the population of resident tribal members is almost 10,000.

**Sisseton-Wahpeton Sioux Tribe.** Located in Southeastern North Dakota and Northeastern South Dakota, the Sisseton-Wahpeton Sioux Tribe has a total enrollment of over 10,000 tribal members and a resident population of about 5,000 tribal members. The Tribe was originally located in Minnesota, but pressure from white settlers pushed the Tribe westward. The

Treaty of 1858 with the United States established the Sisseton-Wahpeton Sioux Reservation, which today has approximately 250,000 acres in North and South Dakota.

### **The Tribal-State Compact Process in North Dakota**

Since the beginning of tribal gaming in North Dakota, its primary function has been to provide employment and economic development opportunities. Indian gaming has also provided vital funding for tribal government infrastructure, essential services including police and fire protection, education, and water and sewer services, and tribal programs, such as health care, elderly nutrition, and child care.

There are five Indian gaming facilities in the state—Four Bears Casino & Lodge (Three Affiliated Tribes), Sky Dancer Casino & Lodge (Turtle Mountain), Spirit Lake Casino (Spirit Lake Sioux), Dakota Magic Casino (Sisseton-Wahpeton), and Prairie Knights Casino & Lodge (Standing Rock).

In North Dakota, tribal governments have worked hard to maintain our sovereign authority and territorial integrity, so that we can provide a life for our people on our own homelands. The Indian Gaming Regulatory Act acknowledges the governmental status of Indian tribes and seeks to promote “tribal economic development, self-sufficiency, and strong tribal governments.”

Historically, state law does not apply to Indian tribes or Indians on Indian lands in the absence of an express congressional delegation of authority. That means that under general principles of Indian sovereignty, Indian tribes are able to conduct gaming under tribal law, not state law. Yet, through the Indian Gaming Regulatory Act, Congress made a compromise between tribal interests and state interests and established the Tribal-State Compact process for the regulation of Class III gaming. The Senate Committee Report explains:

It is a long and well-established principle of Federal Indian law as expressed in the United States Constitution ... that unless authorized by act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands.... [U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities. The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the ... application of state laws ... is a Tribal-State Compact.

The Administration expressly rejected a primary Federal regulatory role:

Recognizing that the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests, some have suggested the creation of a Federal regulatory agency to regulate class II and class III gaming activities on Indian lands. Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies, and thus there was no need to duplicate those mechanisms on a Federal level.

Senate Report No. 100-497 at 5-7 (1988).

Accordingly, when tribal governments conduct Class III gaming, IGRA first requires three things: 1) a tribal gaming regulatory ordinance that meets minimum statutory standards, approved by the NIGC; 2) the Tribe is located in a state where Class III gaming is allowed for any purpose by any person, entity or organization; and 3) a Tribal-State Compact. The Tribal-State Compact provides the rules for Class III gaming:

- (i) 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;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in such amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies for breach of contract;
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
- (vii) other subjects that are directly related to the operation of gaming activities.

25 U.S.C. sec. 2710(d)(3).

Tribal gaming regulatory ordinances support the Tribal-State Compact provisions. Tribal gaming ordinances must include: 1) the tribe has sole ownership of the gaming facility; 2) net revenues are used first and foremost for essential government purposes and tribal infrastructure; 3) annual audits are provided to NIGC (including independent review of contracts in excess of \$25,000); 4) standards for construction and maintenance of the facility; and 5) a background check and licensing system for management and key employees. The tribal ordinance process is intended to provide a measure of respect for tribal law-making authority, so the NIGC can only disapprove of a tribal ordinance if it does not meet the statutory criteria.

#### **North Dakota Tribal-State Relations**

In North Dakota, both our Tribes and the States have taken the Tribal-State Compact very seriously. Our first Tribal-State Compacts were approved in 1992 and they were renewed in 1999. We follow a broad, inclusive process of negotiation where all 5 Tribes work together and we negotiate with the Executive Branch, including the Governor's office and the Attorney General. The State Senate Majority and Minority Leaders and the State House Majority and Minority Leaders are invited to sit in on our compact negotiation meetings. The Tribes participate in six public hearings throughout the State to gather public input. Then our Tribal-State Compacts are approved through the normal legislative process, including committee hearings and approval by a vote of the State Legislature.

All of the North Dakota tribes have worked to maintain positive government-to-government relationships with the State of North Dakota. We meet every two years with the same group of state officials that negotiate Tribal-State Compacts to review tribal progress and any regulatory or implementation issues that may arise.

Our Tribes expressly adopted Minimum Internal Control Standards through our Tribal-State Compacts – which incorporate the NIGC MICS by reference:

Minimum Internal Control Standards

“Tribes shall abide with such Minimum Internal Control Standards as are adopted, published, and finalized by the National Indian Gaming Commission and as may be in current effect.”

The State Attorney General is vested with authority to regulate gaming under state law, so Attorney General has expertise in this area:

The State Attorney General regulates the State Lottery, horse-racing and charitable gaming, alcoholic beverages, and tobacco retailers, enforces consumer protection laws, and operates the Bureau of Criminal Investigations. The Attorney General’s Gaming Division regulates, enforces and administers charitable gaming in North Dakota. The division provides training, performs audits and investigations of gaming organizations; reviews gaming tax returns; issues administrative complaints; conducts criminal history record checks of gaming employees and Indian casino employees; and ensures compliance with tribal-state casino gaming compacts.

The Attorney General’s office works with our tribal gaming commissions to address any significant issues that arise in Class III gaming conducted pursuant to our compacts. Our compacts provide: 1) GAAP and IGRA standards for accounting; 2) regulation, testing and reporting for electronic machines to the state; 3) regulation for table games; 4) background checks conducted by the State Attorney General’s office and licensing standards for our tribal gaming commissions; and 5) random inspections by the State Attorney General’s office and tribal gaming commissions. The Tribes in North Dakota have worked very hard to preserve a strong relationship with the State, and the State for, its part, has worked in good faith with the Tribes.

In North Dakota, tribal governments employ more than 325 tribal regulators and staff. In 2006, tribal governments spent \$7.4 million on tribal and state regulation of Indian gaming in North Dakota. That’s \$1.48 million per tribal government and we run relatively modest operations. We just had our biennial meeting with state officials and no regulatory issues or deficiencies were identified by any party. The Attorney General has said that his office is comfortable that we have achieved our original intention to create a safe, secure and effective tribal-state regulatory system.

Attorney General Stenjhem has complimented the tribal governments on our record of strong regulation and has cooperated with the tribal regulatory agencies to apprehend and

prosecute those who attempt to cheat our casinos. The Attorney General has recognized that Indian gaming has created important jobs and generated vital revenue for tribal self-government. He made it clear that he is proud that the State has not asked for revenue sharing. State officials in North Dakota know that tribal governments have many unmet needs and it helps the whole state, when tribal governments have a way to create jobs and generate essential governmental revenue.

### **The Role of the NIGC – Background Oversight/Training and Technical Assistance**

The National Indian Gaming Commission was established to assist Indian tribes with the regulation of Indian gaming. Under IGRA, tribal gaming regulators are the primary day-to-day regulators of Indian gaming and they regulate Indian gaming under tribal gaming ordinances, which are approved by the NIGC provided that they conform to minimum federal statutory standards.

For Class II gaming, tribal regulators are supported by continuous monitoring of the NIGC. For Class III gaming, tribal regulators are supported by State regulators in accordance with Tribal-State compacts and the NIGC has a specialized role. Specifically, the NIGC:

- NIGC reviews and approves tribal gaming regulatory laws;
- NIGC reviews tribal background checks and gaming licenses;
- NIGC receives independent annual audits of tribal gaming facilities;
- As part of the annual audits, NIGC receives audits of gaming contractors over \$25,000; and
- NIGC approves management contracts.

In addition to the Tribal-State Compact system, IGRA specifically provides that NIGC authority to work with tribal governments to ensure the enforcement of NIGC approved tribal ordinances under 25 U.S.C. sec. 2713:

Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed \$25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

Thus, the NIGC has authority to assist the tribes in ensuring proper enforcement of those tribal minimum internal control standards. This role continues and was not interrupted by the Federal Court decision in *Colorado River Indian Tribes v. NIGC*.<sup>1</sup>

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<sup>1</sup> In essence, the Federal Court ruling simply held that the NIGC may not draw up new Federal standards for the operation of Class III Indian gaming over and above Tribal-State Compacts. The Federal Court left in place the original understanding of IGRA.

## **Top Down/Inside the Beltway Approach to Regulation**

Our concern with the NIGC is that they have adopted a top-down, inside the beltway approach to the regulation of Indian gaming. Rather, than coming out to the field to assist tribal governments in ensuring that tribal regulatory systems are running appropriately, the NIGC constantly wants to write new Federal rules.

To strengthen the United States' government-to-government relationships with Indian tribes, President Clinton issued Executive Order No. 13175 (2000), which directs Federal agencies to consult and coordinate with Indian tribes on Federal rulemaking and agency actions that have substantial direct impacts on tribal self-government, tribal lands and treaty rights. In considering Federal rulemaking that so impact tribal interests, the Executive Order provides that agencies shall adhere to the following criteria:

- Respect for tribal self-government and sovereignty, treaty and other rights that arise from the Federal trust relationship;
- Provide tribes with the maximum administrative discretion possible; and
- Encourage tribes to develop their own policies to achieve objectives, defer to tribal standards where possible, and otherwise preserve the prerogatives and authority of Indian tribes.

The Executive Order also directs Federal agencies to consider the need for the regulation in light of tribal interests, take tribal concerns into account, and use consensual mechanisms for decision-making, including negotiated rulemaking, where appropriate. On September 23, 2004, President Bush issued an Executive Memorandum directing Federal agencies to adhere to Executive Order 13175.

We acknowledge that the NIGC is willing to sit down with tribal leaders and is willing to attend tribal meetings. Unfortunately, tribal leaders often come away with the feeling that NIGC had a pre-determined decision and that despite tribal concerns, NIGC will not move off its own bureaucratic agenda to find a way to respect tribal sovereignty and self-government. We are sometimes told that consultation does not mean agreement but consultation is supposed to be meaningful and it should require consideration of tribal points of view and accommodation of those perspectives to the greatest extent possible.

For example, when the NIGC was developing its Class II regulatory proposals it was very reluctant to consider tribal government points of view, yet when the gaming manufacturers made a point, the NIGC would listen to them. The other thing that happens is when we sometimes appear to make some headway in promoting tribal government concerns, the Chairman and Commissioners go back and talk to NIGC lawyers and any sign of accommodation is later dropped. There is simply too much inside the beltway counseling and not enough field experience.

**Recommendation: Make the Federal-Tribal Government-to-Government Relationship Meaningful!** The NIGC should be directed by statute to follow Executive Order No. 13175 and we call upon the Senate Committee to consider a bill similar to H.R. 5608. If

possible, we would ask the Committee to pass that bill with an expanded scope to cover other Federal agencies.

### **Training and Technical Assistance**

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.

**Recommendation: NIGC Must Hire a Training/Technical Assistance Director with Indian Gaming Experience!** We urge the Senate Committee to ensure that the NIGC hires a training and technical assistance director to begin providing training and technical assistance programs to tribal governments and tribal gaming regulators. We strongly believe that the NIGC training and technical assistance director should be someone who has actual Indian gaming field experience (meaning that they have worked for an Indian tribe).

**Recommendation: NIGC Must Provide Training/Technical Assistance that Meets or Exceeds Industry Standards!** If Washington lawyers who have never worked in the field sit around a conference table at the agency headquarters and dream up training subjects, the NIGC is headed for failure in this area. We need practical training and useful technical assistance that can really help tribal regulators to establish and maintain top-notch systems that meet or exceed industry standards. If lawyers who do not know the industry standards are assigned to the task of training and technical assistance, it is a waste of time.

### **The NIGC Should Apply Indian Preference in Hiring**

**Recommendation: NIGC Must Use Indian Preference in Hiring!** Under existing law, NIGC should provide for Indian preference in hiring. On March 31, 2008, the U.S. District Court for the District of Columbia ruled that Indian preference in hiring applies to all “positions in the Department of the Interior, whether within or without the Bureau of Indian Affairs, that directly and primarily relate to providing services to Indians....” *Indian Educators Federation v. Dirk Kempthorne*, \_\_\_ F.3d \_\_\_ (Civ. No. 04-01215) (March 31, 2008). IGRA expressly places the NIGC within the Department of the Interior and it is without question that NIGC is engaged in providing regulatory services for Indian gaming, which is a tribal government activity. Hence, NIGC is directly and primarily providing regulatory services to Indians within the meaning of

Indian preference. Yet, NIGC has a poor track record of hiring Indians: only 3 out of 17 supervisory personnel at the NIGC Washington headquarters are Indian. This must change.

### **Federal Advisory Committees**

In general, the Federal Advisory Committee Act (FACA) frowns on the use of Federal Advisory Committees because they are composed of unelected experts who may have an unknown impact on Federal policy while the public is excluded. There is an exception for consultation with state, local and tribal government representatives because such consultation is appropriate to promote federalism, comity, and respect for tribal self-government. Normally, when a Federal Advisory Committee is formed a plan must be filed with GSA.

NIGC simply claims exemption from FACA and constitutes and disbands Tribal Advisory Committees at will. **Recommendation: Tribal Advisory Committees Should be Formed Only After Consultation with Tribal Governments** about their uses and purposes. They should be staffed with tribal government representatives freely nominated by sovereign tribal governments. Instead, NIGC calls for experts and puts qualifications on its Tribal Advisory Committees that fly in the face of FACA. For example, NIGC just disbanded a MICS Tribal Advisory Committee and Technical Standards Tribal Advisory Committee and shortly thereafter, announced the formation of a new Tribal Advisory Committee that would limit its membership to tribal regulators with 5 or more years of experience. That means that no elected tribal government leaders will be on the committee and no gaming operators will be on the committee. That seems to subvert the FACA exception that NIGC is relying upon by cherry-picking committee members who are amenable to the NIGC viewpoint.

**Recommendation: NIGC Should Submit Its Claimed FACA Exception to GSA for Review.** NIGC should submit its Tribal Advisory Committee plans to GSA for approval as an exception to FACA to ensure that it is not end-running the statute.

### **Conclusion: NIGC Must Respect Tribal Governments as Day-to-Day Regulators**

NIGC should embrace Congress' direction to provide training and technical assistance to tribal governments and tribal gaming regulators. Moreover, NIGC should meaningfully consult with tribal governments concerning the need for new regulations. For example, where NIGC just issued regulations in 2002 on Class II Technologic Aids, NIGC should truly consider the importance of simply maintaining those regulations as an alternative to new regulations. Especially, where those 2002 regulations were approved by the Federal Court of Appeals!

In short, NIGC needs to become a more user friendly agency, and stop the top/down inside the beltway regulatory directive approach to its mission. Tribal governments invest hundreds of millions of dollars for regulation and NIGC is not happy unless it is duplicating tribal government regulation.