VIEJAS

TRIBAL GOVERNMENT
GAMING COMMISSION

March 3, 2006

The Honorable John McCain, Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, D.C. 20510

Re: Testimony before the Committee on March 8, 2006 regarding S.2078 (IGRA Amendments)

Dear Mr. Chairman and Committee Members,

First let me express my sincere appreciation for the honor and privilege of having been invited to testify on proposed amendments to the Indian Gaming Regulatory Act.

I have been serving Tribal governments as a full time gaming regulator for approximate fourteen (14) years. I am currently the Gaming Commissioner for the Viejas Band of Kumeyaay Indians in Alpine, California. I also have the privilege of serving as the Chairman of the National Tribal Gaming Commissioners and Regulators (NTGCR) organization.

My role, and that of my regulatory colleagues, is that of a governmental servant. As such, we are continually challenged with the task of implementing and enforcing the gaming laws that our elected leaders enact both on a Tribal and Federal level. On many occasions, those laws have well intended provisions which seem simple and clear in the minds of the authors, however the actual written language often is found to be incredibly cumbersome or sometimes virtually impossible to implement or enforce in the practical regulatory environment. For this reason, I compliment the committee for its willingness to listen to those of us on the Tribal and Federal level who will be responsible for implementing changes to the Act.

We fully appreciate the perceived need to amend the Act and the rationale behind the proposed changes. It is important at this point to make it abundantly clear that my comments may not be, and in all likelihood are not, representative of the opinions of all gaming Tribes.

The primary focus of my comments will be concerning "gaming related contracts" and contractors. However, I would like to briefly address two other areas.

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First, it is our Tribal position that it is in the best interest of protecting the real and/or perceived integrity of all Indian gaming to allow the National Indian Gaming Commission (NIGC) to have the authority to promulgate and monitor compliance with Minimum Internal Control Standards (MICS) for Class III gaming activities.

However, if this authority is granted, we feel strongly that § 2710 (c) (3) relative to "Certificates of Self Regulation" must also be amended to afford Tribes the same level of relief from NIGC compliance monitoring in the Class III area as is now given for the Class II exemption. Currently, to qualify for a certificate of self regulation, the NIGC audit examination already includes a thorough review for compliance with Class III MICS. This change would give real meaning to a "certificate" and legitimize the compliance already being enforced by Tribes and validated by NIGC. It is also worth remembering that in most cases Class III regulatory monitoring is still being done by the States pursuant to Compacts.

I would also like to briefly address the proposed changes to § 2710 (b) (2) (F) related to licenses and background investigations. Part of the proposed change is technically problematic and requires a language change.

First, I should make the point clear that existing NIGC regulations, and most (if not all) states, including California in our Compacts, recognized the Tribal Gaming Regulatory Agencies as the "ONLY" licensing authority.

In the proposed IGRA changes in the section dealing with what must be in Tribal Gaming Ordinances § 2710 (b) (2) (F) (i) suggests that now Ordinances must ensure that Tribal Gaming Commissioners and key Commission employees must be backgrounded along with enterprise management and key employees, and parties to gaming related contracts.

This section is manageable, in fact we already have that requirement in our Ordinance and in our Compact.

The problem arises with the next paragraph § 2710 (b) (2) (F) (ii) (i) which suggests that all of those identified in (i) above (including Gaming Commissioners and their employees) must be "LICENSED".

Since Tribal Gaming Commissions are the only recognized licensing authority, this provision would require us to "LICENSE OURSELVES". If we don't, who will license us? NIGC? Certainly we don't want to mandate that states now would be the licensing authority, this would be inconsistent with most, if not all, Compacts.

For us to license ourselves is not a practical requirement, not to mention the creation of a huge perception problem for a conflict of interest. I beg you not to have language requiring Commissioners and their key employees to be licensed. Our Ordinance currently states that Tribal Gaming Commission employees shall be subject to background investigations and suitability requirements for employment at least as stringent as those required for Primary Management Officials of the gaming operation. Please consider similar language in IGRA.

Now in the matter of gaming related contracts and contractors, we fully understand and recognize that there is a documented history of instances where Tribes have been inappropriately exploited to profit unscrupulous contractors. Consequently, we appreciate the desire to amend IGRA to involve NIGC approval of contracts and contractors for the "protection" of Tribes. However, we find the proposed language very problematic and realistically unworkable for the following reasons.

§ 2703 (11) attempts to define "Gaming-Related Contract". Throughout the definition there are numerous references to "gaming activity". Without a very clear definition of "gaming activity", the term is open to very broad interpretations which would be all inclusive of virtually any contract the Tribe's casino enters into i.e. training, IT assistance, food and beverage, marketing studies, etc. We also believe that the Tribe should be free to develop economic enterprises such as hotels, golf courses, shopping etc. without NIGC involvement in the contracts. However, a broad interpretation of the word "ancillary" in paragraph (B) of this section could be argued to include such other tribal economic enterprises.

Paragraph (A) (ii) of this Section suggests that ANY contract which includes the contractor advising or consulting with a person that exercises material control over gaming activity (or any part thereof), will require NIGC approval with a suitability finding of the contractor. This is incredibly broad and all inclusive and as a matter of practicality, impossible for NIGC to manage.

As drafted, the language would require NIGC review and approval of hundreds of contracts every year for every Tribal gaming facility in the country, bringing business to a halt in many instances. The broad definition of "gaming-related contract" in Section 11 would encompass numerous contracts for services by contractors with no ability to significantly affect gaming activities and with no management role. Most decisions of a casino manager to contract for services are for the sole purpose of maintaining, increasing or enhancing gaming activity would, for this reason, include the casino's lease with an ice cream store like Ben & Jerry's to serve the gaming patrons and enhance the gaming experience and activity. The sheer volume of contracts requiring NIGC approval (of both business terms and contractor suitability) would be staggering and would introduce delay and uncertainty in all areas of the operations. This federal gaming regulatory agency would be in the unworkable position of second guessing the business terms of thousands of contracts and speculating on the type of bond to impose to ensure performance.

Because there is no threshold amount that triggers review by the NIGC and because Section 11 encompasses any contract related to the operation or management of gaming activity, even a contract for $500 worth of chairs by a local wood carver purchased for a poker table would require a background investigation at the vendor's expense and submission to the NIGC. Established small vendors in rural areas, where many Tribal gaming facilities are located, providing services such as electrical work and catering, would be unable to afford the cost of doing business with Tribes and unable to compete. Companies willing to do business with tribes will be in a position to corner the market by having previously approved form contracts for services and completed background investigations.

Typically a casino general manager is going to enter into numerous small contracts in a year for such things as training, customer service evaluations, marketing studies and countless other activities where outside expertise is sought for "advising and consulting" to enhance the business. Typically these contracts range in value from $10,000.00 to $100,000.00. The proposed language would require every such contract to go through NIGC. One possible remedy for avoiding this dilemma would be to set a dollar limit on such contracts of perhaps $150,000.00.

Paragraph (B) of the "Gaming-Related Contract" definition suggests that any development or construction contract of $250,000.00 or more would require NIGC approval. We believe that this dollar threshold is unreasonably low. Many, if not most, gaming facilities are in constant motion with remodeling, expansion, or improvement projects that involve contracts of $250,000.00 or more. To require every one of these contracts to have NIGC approval, and every contractor to be found suitable for NIGC, would be overly burdensome and impose major delays in projects which would negatively effect Tribal gaming operations.

As drafted, the language would include approval of contracts with vendors whose prompt and immediate services are crucial in unforeseen or catastrophic events. For instance, the sprinkler system at one Tribe's casino malfunctioned and damaged equipment necessary to run a large percentage of its slot machines. In these situations, the operation must respond immediately by quickly securing replacement parts and services which may only be available from new vendors. Likewise, during a power outage at a casino located in a remote area, a back-up generator failed. The Tribe's ability to keep its casino doors open depended upon the immediate purchase and delivery of another generator. The value of this service could not be easily judged by a regulatory agent in Washington, D.C. reviewing that contract.

The scope of contracts related to the construction of gaming and ancillary facilities would capture such vendors as wastewater consultants, architects, and environmental engineers, who are critical components for keeping a casino functioning in an environmentally sound manner, but who have absolutely no control over any gaming activity. The cream of the crop who can chose their projects will have little incentive to undergo extensive background investigations unrelated to any requirement in their profession. The diminutive threshold of $250,000 would encompass most construction and development contracts at large gaming operations. Delays for projects dependent upon starting before the rainy or winter season likewise will hinder improvements to roads, sewer systems, and facilities.

We are also concerned that if a gaming related contract is with a publicly traded company, an entirely new set of complexities come into play. Very often these publicly traded companies are wholly owned subsidiaries of other publicly traded companies. In many cases 5% or more of the stock of these companies is owned by other publicly traded institutional investment companies or banks. It is easy to see how the NIGC could easily get bogged down in backgrounding officers and directors of a myriad of companies related to one contract with a tribe which could be either gaming related or construction.

Additionally, it would seem that it would be appropriate to include contracts for private investors or financiers in this paragraph, and not limit it to development and construction contracts. Having said that, we would caution that institutional investors such as banks, mutual funds, insurance companies etc. should be exempted due to the fact that they are already regulated by other State and Federal Regulatory agencies.

As drafted, the language would require officers and stockholders of 5% or more shares in a company extending financing to undergo background investigations and suitability determinations. Most State and Federally-regulated institutional lenders, including major banks, are publicly traded companies with numerous stockholders for whom it would be impracticable and infeasible to undergo background investigations as well as to enter into agreements without final terms. Public bond issuances would similarly be infeasible. The five-year term limit (with seven only upon special consideration) will negatively impact interest rates and financing terms. The overall result will be that institutional lenders will choose not to finance Tribal gaming operations, and Tribes will be forced to go to unsavory lenders and accept less than competitive rates.

Paragraph (c) of the definition of "Gaming Related Contract" suggests that any agreement that provides for compensation fees based on a percentage of the net revenues of an Indian Tribal "gaming activity" would be a contract requiring NIGC approval. Please consider this. Virtually every Indian casino in America has "lease" and/or "Participation" agreements (contracts) with virtually every major manufacturer of slot machines for literally thousands of slot machines whereby "compensation" or "fees" are based on a percentage of revenues of the activity" of those games. Sometimes as much as 30% or

40%. This would suggest that perhaps NIGC must look at every one of those participation contracts and approve them and require background investigations and suitability determinations of all of the principals of the gaming machine manufacturers in this country and other countries. This would definitely change the commonly accepted way the industry does business.

For all these reasons, we believe that any Federal approval of gaming – related contracts should be limited to contracts between Tribes and: (i) companies that have entered into a management, consulting, or development finance (private) agreements for a gaming facility with a fee based on net revenue (including other contracts that same company or its affiliates may have with the Tribe); and (ii) contractors exercising significant material control over the gaming activity. The major institutional lenders, such as Federally regulated banks, lending institutions, and term loan lenders, and other types of regulated financing should be exempted. It would also seem imperative that to provide clarity and reasonable boundaries to the scope of what will require NIGC review, that concise and limiting definitions of "gaming activities" and "ancillary activities" must be included.

In addition, we would like to recommend that some reasonable threshold be placed on contracts before requiring NIGC review. Perhaps $50,000.00 for small operations and $150,000.00 for large operations. Likewise, the thresholds for construction contractors be tiered from $1,000,000.00 to $5,000,000.00.

For those circumstances in which the NIGC has reasonable suspicion of malfeasance, the NIGC could be provided discretion to examine the gaming contracts related thereto. Such discretion could be triggered under existing law, for instance, by NIGC review of the annual audited financial statements and MICS compliance reports submitted by every gaming facility (and conducted by outside independent auditors) and by audits and inspections conducted by NIGC agents.

It is also worth remembering that many State-Tribal Compacts have considerable provisions relative to gaming related contractors, and many Tribal Gaming Commissions have comprehensive vendor licensing programs in place.

Again, we would like to emphasize that we understand the desire to address the issue of contracts and contractors. It is neither our intent nor desire to appear as overly critical or as obstructionists. However, this is a highly complex area requiring a great deal of thought to make it reasonably workable. We share the same goals, to keep undesirables out of Indian gaming and for Tribes to be the primary beneficiaries of Tribal gaming. At the same time we must endeavor not to stifle or inhibit economic success.

Thank you again for the opportunity to present this testimony and we hope that some of our suggestions are worthy of your consideration

Sincerely,

Norman H. DesRosiers
Commissioner