STATEMENT OF RON HIS HORSE IS THUNDER, CHAIRMAN, STANDING ROCK SIOUX TRIBE FOR THE RECORD OF THE HEARINGS OF THE SENATE COMMITTEE ON INDIAN AFFAIRS ON S. 2078

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Mr. Chairman, my name is Ron His Horse Is Thunder. I am the Chairman of the Standing Rock Sioux Tribe of North Dakota and South Dakota. This statement on S. 2078 is being submitted for the record as a part of my oral presentation. While I am representing my own tribe before the Committee, our position reflects the views of most of the Indian tribes in the states of North Dakota, South Dakota, Minnesota, Montana, Nebraska, Iowa, and Kansas.

These tribes strongly oppose the provisions of S. 2078 as being destructive of our tribal sovereignty and our right of tribal self-government. The McCain legislation was put together with little or no consultation with, or input from, Indian tribes. In our view, we believe that it grows out of anecdotal, anti-Indian press reports on Indian gaming, the over-blown issue of off-reservation gaming, and a 'pin-the-blame-on-the-victim' reaction to the Abramoff Scandal. The committee legislative and oversight hearings on Indian gaming in 2005 and 2006 have not included testimony from major Indian tribes, but have been limited to college intellectuals, government officials and a few Indian organizational witnesses. This statement sets out in detail the grounds for our opposition to this legislation.

GAMING RELATED CONTRACTS

Section 12 of IGRA requires that any contract of an Indian tribe with an outside entity to manage a class II tribal gaming activity, and any collateral agreement relating to the activity, must be approved by the Chairman of NIGA. The section sets out standards for that approval. Most of the section 12 provisions are made applicable to class III management contracts by section 11(d)(9) of IGRA. These provisions are limitations on tribal rights. While tribes opposed these provisions, they were accepted as part of the over-all compromises of IGRA.

The bill, S. 2078, greatly expands on the powers of the Commission over the contractual authority of Indian tribes in carrying out their gaming activities. The amendments, contained in sections 2, 4, 7, and 8 of the S. 2078, would significantly erode our tribal sovereignty.

While the language of these amendments is complex and difficult to understand, their implications for Indian tribes are clear.

These amendments basically strip from tribal governments and their officials the power to enter freely into contracts relating to their gaming efforts. In any case where a proposed contract is determined by the NIGC to be 'gaming-related' in which the contractor will exercise 'material control' with respect to the gaming activity, it must first be approved by the Chairman of the Commission.

The definition of "gaming-related contract" goes well beyond contractors having material control. It includes someone who merely advises or consults with a "person exercising material

control". Does this mean a lobbyist, a lawyer, a financial advisor, or an astrologer? It includes any contract touching on the construction of a gaming facility. Does this include an architect, an artist, or a landscaper?

Not only will the Chairman have power, under the McCain amendments, to approve or disapprove the broad range of contracts entered into by Indian tribes, the Chairman is also given the power to determine if the contractor is 'suitable'. The loose language of the amendment, permitting the Chairman to decide if an entity with whom the tribe wishes to enter into a gaming-related contract is "suitable", emasculates any power Indian tribes have to decide with whom, and under what terms, they will do business. While somewhat similar to the existing language relating to management contracts, its extension to any "gaming-related contract" is excessive.

Years ago, there were many Federal laws that limited the power of Indian tribes and their members to enter into transactions with the outside world. These laws prohibited us from dealing with our property and our resources as we determined best. Indians were deemed incompetent and of limited intellectual powers as compared with the white race. It has taken the tribes many years, with the help of enlightened members of Congress, to eradicate those laws and that mentality. The Indian Self-Determination Act is a good example of that effort.

The McCain bill, by subjecting our tribal governments and administrators to the second-guessing and veto of non-tribal authorities, will return us to that era. We strongly oppose this provision.

MICS PROVISION OF S. 2078

Indian tribes reluctantly supported enactment of the Indian Gaming Regulatory Act. In spite of the comments of the uninformed media and politicians, IGRA did not give Indian tribes the right to engage in gaming. That right comes from the inherent sovereign power of Indian tribes under Federal laws and cases. The decision of the Supreme Court in the *Cabazon* case established that right in 1987. In 1988, the enactment of IGRA limited that right and subjected tribes to Federal and State controls that the tribes did not want.

Indian country fought very hard when IGRA legislation was being considered in the Congress. We sought to preserve to the greatest extent possible our sovereign right of self-government and our right to regulate our own affairs, including our gaming activities. We had strong supporters of Indian rights in Congress then, including Senator Inouye and Congressman Mo Udall.

The language and legislative history of IGRA make clear that these authors of the law intended that tribal regulatory authority over their gaming activities would be protected. Class I gaming is left solely to tribes and excluded from IGRA entirely.

With respect to class II, the Act states "Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of

this Act." IGRA only confers a limited power on NIGC to regulated gaming and gives its general monitoring powers to implement those regulations.

However, it is with respect to class III gaming that IGRA is clear that the NIGC will have no authority to regulate Indian gaming. Nevertheless, the Commission promulgated detailed minimum internal control standards for class III gaming and began to enforce them as early as 2000. These MICS are extremely onerous on tribal gaming. In commenting on this, the Federal judge in the *CRIT* decision said, "The MICS regulate the day-to-day operations of an Indian casino. They run to more than seventy pages in the Federal Register, and touch on almost every aspect of casino gaming, including cage and credit operations, game play and integrity, surveillance, and internal audits."

It was never intended by Congress that NIGC have this kind of power over class III gaming. The power of NIGC to enforce the MICS was challenged by the Colorado River Indian Tribes in Federal court. In August of last year, the Court firmly held that Congress had not empowered NIGC to promulgate and enforce its MICS against Indian class III gaming.

The McCain bill would rob the tribes of this victory for tribal sovereignty and tribal self-government. We have followed the hearings of the Indian Affairs Committee in the last year. We have not seen any record established that shows that Indian tribes are incapable of regulating their own affairs. We have seen no record established that there is a crisis or scandal in Indian gaming operations.

It is hurtful for Indian people to be told that the State of Nevada expends more than $80,000,000 a year to regulate gaming in that state while NIGC only expends $8,000,000 a year to regulate tribal gaming. Indian tribes spend over $200,000,000 a year in their self-regulation efforts.

In the state of North Dakota, the leading Indian and non-Indian officials are satisfied that the Tribal-State compacts make adequate provision for effective regulation of our gaming. We thought that this was what IGRA intended. In 2004, approximately 7 million was spent on regulation of tribal gaming in North Dakota. Over 300 personnel were assigned of this function. For the five tribes, approximately 15% of the total gaming personnel are involved in regulatory activities.

The North Dakota Tribal/State Gaming Compact requires that the five Tribal Nations, Governor, and the Attorney General must meet every two years to review and adjust any problems concerning regulatory and policy issues. These biennial reviews have taken place with both Democratic and Republican Attorney Generals and two different Governors There has been no major problem that has been reported concerning our tribal governmental gaming regulatory activities, to date. In fact, the Attorney General, on several occasions, has commented on his outstanding working relations with the Tribal Nations of North Dakota concerning his oversight responsibilities, in regards to the Tribal/State Gaming Compact Regulatory Requirements.

There is no scandal in North Dakota regarding our gaming. The rights of the participants in our gaming activities are being effectively and adequately protected through regulation under the compact.

Yet, the press and members of Congress disregard or discount these tribal expenditures. What this says to Indian people across the country is that White America does not believe that Indians people can be trusted to regulate their own affairs and protect the general public in their gaming activities. Once again, the inferior race must have the firm, guiding hand of the superior race.

We reject that attitude. We will strongly oppose it. Chairman McCain has not shown us or the general public in his hearings that we are incapable of regulating our gaming enterprises. We recognize the need for strong internal controls in our gaming establishments. The Indian tribes and people have the skills and ability to ensure that those controls are in place. We do not need the McCain bill's heavy hand on our shoulders.

NIGC CONTROL OF TRIBAL GAMING COMMISSIONS

I have stated that the Indian tribes of North Dakota feel that S. 2078 is generally destructive of Indian rights. There is one provision that is kind of the hallmark of this legislation.

IGRA currently provides that a tribal gaming ordinance, required by section 11(b)(2), must include a provision ensuring that the tribe will conduct background checks on, and license, primary management officials and key employees of the gaming enterprise. While this provision is somewhat of an intrusion into tribal self-government, it does take place through the tribe's own ordinance.

The McCain bill amends that provision to include tribal gaming commissioners and key tribal commission employees, as determined by the Chairman of the NIGC.
It is one thing for IGRA to impose a requirement on tribes, in enacting a gaming ordinance, that they do background checks on management officials and on gamine employees. It is a huge step, an unacceptable step, for the McCain bill to impose a Federal restriction on tribal government employees who are hired by the tribe to carry out governmental functions. Tribal gaming commissioners are government employees, not commercial enterprise employees.

This may seem like a small point, but it is important to maintaining the right of tribal government to make their own governmental decisions and choices. The Indian tribes oppose this provision along with the rest of S. 2078.

FURTHER RESTRICTIONS ON TRIBAL PER CAPITA PAYMENTS

Per capita payments are nothing new to Indians. Many treaties with the United States called for rations or other individual distributions to the members of a tribe. Federal legislation authorizing the distribution of money from a land claim settlement or a land claim judgment would often provide that some of the award would be paid out per capita to the members of the

tribe. In fact, a few tribes that had steady, annual tribal revenue from oil or timber or other sources would make small per capita payments.

While Indian tribes are governmental entities, they are, to some extent, like a corporation with stockholders. Tribal members are shareholders in the tribe and its resources. Just as some non-Indians own stock or bonds in corporations and receive dividend or interest payments annually, a few Indian tribes have enough revenue that they can make similar payments, called per capita payments.

IGRA imposes a restriction on the uses that tribes can make of their net gaming revenues. They have to be used to fund tribal government operations or programs, provide for the general welfare of the tribe and its members, promote tribal economic development, donate to charitable organizations, or help fund local government agencies. This is a paternalistic provision, but we recognize that it had to be included because of non-Indian concerns at the time.

We are advised that there was some sentiment to prohibit tribes from making per capita payments from that revenue. While this was rejected, IGRA does impose some limits on tribes making per capita payments from gaming revenues. The Secretary of the Interior first has to approve a plan submitted by the tribe setting out how it plans to allocate its revenue to the permitted uses.

A very few tribes engaged in gaming activities have generated revenues that permit them to fully fund all of their needs and yet have revenue left over out of which they make very significant per capita payments. Most tribes do not have that kind of revenue, although many do make small per capita payments.

These payments are apparently resented among some non-Indians and this resentment and envy is being reflected in Congress. It is amazing that, while Indian tribes and people are still at the bottom of every social indicator, this is an issue.

The McCain amendment would involve the NIGC in this matter. The NIGC has no business or concern about whether or not Indian tribes make payments from their gaming revenues.

It would also require the Secretary of the Interior, before approving a tribal resource allocation plan, to make a determination that a per capita payment is a "reasonable" method of providing for the general welfare of the tribe and its members. IGRA permits the Secretary to require tribes to show how they allocate their revenue to the authorized uses. That is enough. After that, a per capita from the remaining revenues should be solely a decision of tribal government. We strongly oppose this new instance of non-Indian paternalism and erosion of tribal sovereignty.

The McCain bill would impose a new Federal restriction on per capita payments from gaming revenues. IGRA already requires that a tribe must submit a plan to the Secretary allocating revenues to uses permitted under section 11(b)(2)(B) of IGRA before the Secretary may approve a per capita payment. The bill provides that, in addition, the Secretary must make

a determination that per capita payments are a "reasonable method of providing for the general welfare of the Indian tribe and the members of the Indian tribes". People who believe that Indian people are as competent to manage their own affairs as non-Indians should be outraged by this provision.

OFF-RESERVATION LAND TRANSFERS

The land that on which the Capitol Building sits was once Indian land. The same can be said of every acre of land in the United States. In the 500 years of European occupation, most of it was forcibly taken from us and we were left with only fragments of our former land holdings. We have been pushed back onto small reservations. In the case of tribes like Sisseton-Wahpeton, even the reservation boundaries have been disestablished by Federal law and they are left with scattered tracts of trust land. In some cases, the United States simply took all of a tribe's land and forced-marched their members—men, women, and children— thousands of miles from their homes to a strange land.

When the Congress decided to limit our right to engage in gaming by the enactment of the Indian Gaming Regulatory Act, there was an outcry by anti-Indian forces against proposals to take land into trust outside of reservations for gaming purposes. As a result, IGRA severely restricts the opportunity to do so.

In section 4, IGRA defines the term "Indian lands', for purposes of Indian gaming, to mean (1) all land inside the boundaries of a reservation and (2) any land outside of a reservation that is held in trust for a tribe or individual and over which the tribe exercises jurisdiction. The second part of the definition frightened the anti-Indian forces with the result that IGRA includes section 20.

Section 20 first provides that gaming may not be conducted on lands acquired by the Secretary of the Interior in trust for a tribe after October 17, 1988, the date of enactment of IGRA. The section includes three exceptions to this general ban.

First, the ban does not apply if the land to be taken into trust is within or contiguous to an existing reservation;

Second, the ban does not apply if the tribe in question had no reservation on the date of enactment and the land is either (1) located within, or contiguous, to the former reservations of tribes in Oklahoma, or (2) located within the boundaries of a tribe's last recognized reservation in other states.

There are many tribes in Oklahoma whose reservations were terminated and who were left essentially landless. Some tribes, such as the Sisseton-Wahpeton, had their reservation boundaries erased. The exception attempts to do fairness to these tribes.

The third exception to the ban is somewhat more complicated. It provides that land can be taken into trust off-reservation for any other tribe if (1) the Secretary of the Interior determines it is in the best interests of the tribe and not detrimental to the surrounding

community and (2) if the Governor of the State concurs with this determination. This is the so-called two-step test. Many requests have been made to the Secretary for such transfers, in many cases initiated or urged by local non-Indian governments and forces. In the nearly 18 years since IGRA enactment, only three such requests have been granted. How the press and the Congress can make a scandal out of this is beyond the understanding of the tribes.

There are three additional exceptions that have none of the requirements of the two part test. First, the findings by the Secretary and Governor are not required in the case of a land claim settlement. The Federal and State governments attempted to give their theft of Indian land a veneer of legality. We are now finding out that, in some cases, they violated Federal law, which has given rise to tribal claims to land. The exception recognizes that, in some cases, settlement of these land claims may include a transfer of land into trust for the tribe. It was thought fair to permit them to use this land for gaming. What the public, the press, and members of Congress do not understand about this exception is that any settlement of a tribal claim to land must be approved by an Act of Congress. The Congress would have complete control over what use can be made of such land.

The second exception is made for Indian groups that are newly recognized as Indian tribes through BIA's Federal acknowledgment process. If the new tribe is provided a reservation or other land base, those lands are not subject to the two-stop test. What could be fairer? In any case, it is next to impossible for these groups to receive favorable consideration in the BIA process.

The last exception is the restoration of land to tribes who have been restored to Federal recognition. During the 1950's and 60's, Congress carried out a terrible Indian policy by terminating the Federal recognition of many tribes as self-governing entities. This termination was accomplished by an Act of Congress. Beginning in 1973, this policy was reversed and Congress began a process of restoring these tribes to Federal recognition. As in the case of newly recognized tribes, these restored tribes needed a land base. It was only fair that the trust lands made available could be used for gaming. However, as in the case of land settlements, restoration can only be accomplished by a new Act of Congress and Congress has complete control over the use of such restored lands.

It is the policy of the North Dakota tribes that they do not favor off-reservation trust land acquisitions for gaming purposes. However, we strongly oppose the provision of S. 2078 that would impose new, unfair restrictions on such transfers. We view it as a part of legislation that, over-all, is destructive of tribal rights.

SEMNOLE FIX

Ever since the enactment of the Indian Gaming Regulatory Act, Indian tribes have resisted any attempt to amend IGRA. This is not because tribes are rigidly opposed to legitimate efforts to correct confirmed defects in the law. Tribes have opposed amendments to IGRA for two reasons. First, past legislation has been opposed because the amendments would have brought about further destruction of tribal rights, such as S. 2078. Secondly, however, we have

opposed amendments because we know that such legislation brought to the Senate or House floor would become vehicles for further amendments, which would destroy our gaming rights.

Senator McCain has said that tribes should not view his introduction of S. 2078 as the act of an enemy of tribal sovereignty. We have tried to view it in that light, because we are aware of the past support he has shown for the right of tribal self-government.

However, even though we view the provisions of his bill to be destructive of our rights, there is another aspect of S. 2078 that bears that viewpoint out. Every provision of the McCain bill is punitive with respect to Indian tribes. There is not one provision in it that is for the benefit of the tribes.

While the tribes have always opposed amendments to IGRA for the reasons I have said, they have also always taken a strong position that, if amendments are inevitable, the legislation must include at least one pro-Indian provision. We insist that any such legislation include a remedy to the problem created by the decision in the *Seminole* case.

When IGRA was being considered, the tribes strongly opposed any regulation or involvement of the states in tribal gaming. The states insisted upon either a prohibition of Indian gaming or the imposition of state regulation. A compromise was reached. Class III gaming was made illegal on Indian lands unless conducted pursuant to a Tribal-State compact. But, the authors of IGRA knew that leaving the matter at that point would result in states simply refusing to negotiate a compact or to negotiate in 'bad faith'. The Senate Indian Affairs Committee report on S. 555 states—

> "Under this Act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how to best encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealing with tribes in class III gaming negotiations."

This was a reasonable solution to the problem. The tribes would not have accepted IGRA if this compromise had not been reach and, I am told, former Chairman Mo Udall would not have permitted the bill to be enacted if the tribes did not find it acceptable.

That compromise was destroyed by the Supreme Court when it handed down its decision in the *Seminole* case. The Court held that Congress did not have the power to waive the States' immunity from suit in Federal court as established in the 11th Amendment to the Constitution. That decision left the tribes at the full mercy of the states in class III compact negotiations. States could now simply reject any tribal request for negotiations or, as many have done, impose the most burdensome requirements on the tribes as a price for a compact.

Take, for example the so-called revenue sharing provisions that many states have extorted from the tribes as a price for a compact. While the states call these "revenue-sharing" provisions, they are taxes by one sovereign entity upon another sovereign entity. And they are,

in fact, a violation of IGRA. IGRA makes clear that the compacting process cannot be used by the states to impose any tax or other fee upon the tribes that is not directly related to its regulatory expenses under the compact. In section 11(d)(4), the Act states—

"No State may refuse to enter into negotiations described in paragraph (3)(A) based upon a lack of authority to impose such a tax, fee, charge, or other assessment."

Yet that is exactly what the so-called revenue sharing provisions are. But tribes have no recourse against this illegal demand because of the Court's decision.

Mr. Chairman, the provisions of S. 2078 are an insult to Indian tribes and are unacceptable. Yet, we might we willing to work with you and others on some more acceptable language to deal with the perceived problems they address if the language is consistent with our sovereignty and right of self-government. But even then, we would insist upon the inclusion of language that would address our concerns with IGRA, particularly the *Seminole* fix.

Tribes do not want IGRA opened for amendment. However, if it is opened to amendment, there is only one major provision that tribes will insist upon, and that is a legislative fix to the *Seminole* decision. IGRA was a law of compromises. Class III gaming was made illegal unless done pursuant to a compact negotiated with a State. Knowing that states would not deal fairly with tribes, it included a provision permitting tribes to sue states for failing to negotiate or negotiating in bad faith. The Supreme Court, in the *Seminole* decision, struck down that provision as unconstitutional. Now, we are being subject to hijacking by the states of our revenue and rights for a compact. We oppose the McCain bill, but, if it is to move, it must move with a *Seminole* fix.

Respectfully submitted,

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