



**NATIONAL INDIAN GAMING ASSOCIATION**

Rebuilding Communities Through Indian Self-Reliance

**Testimony of Ernest L. Stevens, Jr.  
Chairman, National Indian Gaming Association**

**Concerning**

**The Second Discussion Draft of Legislation Regarding  
Off-Reservation Indian Gaming**

**Before**

**The House Committee on Resources  
November 9, 2005**

Good Morning. Chairman Pombo, Congressman Rahall and Members of the House Resources Committee, thank you for the opportunity to testify on the second discussion draft of legislation regarding off-reservation Indian gaming.

My name is Ernest L. Stevens, Jr. and I am the Chairman of the National Indian Gaming Association (“NIGA”). NIGA is an inter-tribal association of 184 Indian tribes that use Indian gaming to generate essential tribal government revenue.

## **Introduction**

At the outset, I should note that 98 to 99% of Indian Gaming is conducted “on reservation.” Indian tribes generally oppose amending the Indian Gaming Regulatory Act (“IGRA”) because we are concerned that amendments will diminish tribal rights and that once lost, we would have great difficulty restoring our rights.

We ask the Committee to continue to consider any amendment to IGRA only through regular order, and if any amendments are marked out of Committee, we ask that they be considered under a closed rule. We also respectfully request that the Committee reject extraneous amendments that would undermine tribal rights to self-government. After all, for Indian nations tribal self-government is our original democracy. Finally, any amendment to IGRA should approve the Secretary’s procedures in lieu of compact to address the Supreme Court’s *Seminole* decision.

### **A. Indian Gaming: the Native American Success Story**

Indian gaming is the Native American success story. Where there were no jobs, now there are 553,000 jobs.

Where our people had only an eighth grade education on average, tribal governments are building schools and funding college scholarships.

Where the United States and boarding schools sought to suppress our languages, tribal schools are now teaching their native language.

Where our people suffer epidemic diabetes, heart disease, and premature death, our tribes are building hospitals, health clinics, and wellness centers.

Historically, the United States signed treaties guaranteeing Indian lands as permanent homes, and then a few years later, went to war to take our lands. This left our people to live in poverty, often on desolate lands, while others mine for gold or pumped oil from the lands that were taken from us.

Throughout all of those long years, Indian tribes always fought to maintain our inherent right to self-government and Indian gaming is an exercise of that right.

Today, for over 60% of Indian tribes in the lower 48 states, Indian gaming offers new hope and a chance for a better life for our children.

Two-thirds of American voters support Indian gaming, and when they are informed that Indian gaming is rebuilding our communities, 74% of American voters support Indian gaming.

## **B. Government-to-Government Consultation**

The Commerce Clause of the Constitution recognizes Indian tribes as pre-existing governments. The Constitution also acknowledges the status of tribal governments as sovereigns and the sanctity of our treaties in the Treaty Clause. As a result, the historical relations between the United States and Indian nations are built on a foundation of government-to-government relations.

Honoring the historical policy of government-to-government relations between the United States and Indian tribes, on September 23, 2004, President Bush issued an Executive Memorandum to the Heads of Executive Departments and Agencies explaining:

The United States has a unique legal and political relationship with Indian tribes and a special relationship with American Indian tribes and Alaska Native entities as provided in the Constitution of the United States, treaties, and Federal statutes. Presidents for decades have recognized this relationship.... My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States.

The House Committee on Resources also has a strong tradition of respect for tribal self-government and government-to-government consultation.

Chairman Pombo released the first discussion draft bill on off-reservation gaming in March and since then the Committee has held four hearings to give tribal governments, state officials and members of the public an opportunity to present views. On October 31, Chairman Pombo released a second draft bill.

We thank you, Chairman Pombo, Congressman Rahall, and the Committee, for working with tribal governments in a manner that respects the principle of government-to-government consultation.

## **NIGA/NCAI Tribal Leaders Task Force on Indian Gaming**

The National Indian Gaming Association and our sister organization, the National Congress of American Indians (“NCAI”), conducted several meetings around the country with tribal leaders to review the discussion draft: March 27 in Washington, D.C.; April

13 in San Diego, California; May 25 in Minneapolis, Minnesota; June 16 in Green Bay, Wisconsin; and October 30 in Tulsa, Oklahoma.

Our meetings included mostly tribal governments that use Indian gaming on their reservation lands, tribal governments that have used the Section 20 process to engage in gaming on after acquired lands, a few tribal governments that now seek to use the Section 20 process, and tribal governments opposing Section 20 applications by neighboring tribes. While tribal governments were not unanimous in their views, 95% or more of the tribal governments that participated in our meetings opposed amendments to the Indian Gaming Regulatory Act concerning off-reservation gaming.

Accordingly, NIGA and NCAI worked on a joint set of principles regarding this issue. First, in regard to newly recognized or landless tribes, there is no existing reservation, so reacquired lands are by definition “on reservation.”

Only 3 Indian tribes have used the Section 20 two part secretarial consultation process for Indian gaming on lands acquired after 1988: Forest County Potawatomi in Milwaukee, Wisconsin; Kalispel Tribe near Spokane, Washington; and Keweenaw Bay Indian Community in Marquette, Michigan. Only 3 Indian tribes in 17 years. All three had a determination by the Secretary of the Interior that gaming was in the best interest of the tribe and not detrimental to the surrounding community and Governor’s agreement. All three had local government support, and the Department of Interior staff explained that without local government support, an application under the two part process would not be approved by the Secretary.

Only one Indian tribe in 17 years – the Seneca Nation of New York – has been able to use land reacquired under a land claim settlement for gaming pursuant to Section 20. That is, in part, because the Secretary of the Interior requires that Congress approve any land claim settlement before an Indian tribe may use settlement lands for Indian gaming.

Tribal governments generally do not believe that the actual record under Section 20 justifies amendments to the Indian Gaming Regulatory Act. Thus, the NIGA/NCAI Tribal Leaders Task Force on Indian Gaming opposed legislative amendments to Section 20.

Tribal governments generally agree that in any Section 20 two-part process application for gaming on reacquired Indian lands:

- A tribal government should thoroughly consult with state and local officials;
- A tribal government should thoroughly consult with nearby Indian tribes; and
- The existing Section 20 process and the Tribal-State Compact process for Class III gaming provide important opportunities for consultation between tribal governments, Federal, state and local officials, and nearby Indian tribes about Indian Gaming.

The NIGA/NCAI Tribal Leaders Task force called upon the Secretary of the Interior to issue a new regulation under Section 20 that would clarify the existing process for reacquiring tribal lands for Indian gaming through negotiated rulemaking.

## **IGRA Section 20 and Chairman Pombo's Second Discussion Draft**

### **A. Section 20: Existing Law**

Through Section 20, the Indian Gaming Regulatory Act establishes a general policy that Indian tribes should conduct Indian gaming on lands held on October 17, 1988. Congress provided several exceptions to this general rule to take account of the historical mistreatment of Indian tribes, including:

- The fact that too many lands were taken from Indian tribes, leaving some tribes landless or with no useful lands;
- The fact that many Indian lands were unlawfully taken from Indian tribes in violation of Federal law; and
- The fact that after it was no longer militarily necessary to treat with some Indian tribes, the United States neglected and ignored those tribes.

Accordingly, Section 20 provides exceptions to the general rule for several reasons, including:

- **Land Claim Settlement:** Land is taken into trust as a result of a land claim settlement;
- **Initial Reservation:** Land is acquired in trust status as the initial reservation of an Indian tribe acknowledged by the Secretary of the Interior under the Federal Acknowledgement process; or
- **Restored Lands:** Land is restored to an Indian tribe in trust status when the Tribe is restored to Federal recognition;
- **Landless Tribes:** Land is put into trust for federally recognized tribes that did not have reservation land on the date IGRA was enacted; or
- **Two-Part Secretarial Process:** More generally, Section 20 provides for a two-part secretarial consultation process, whereby an Indian tribe may generally apply to the Secretary of the Interior for land to be taken into trust status for gaming purposes. Under the two-part process, upon application by the Indian tribe the Secretary of the Interior consults with state and local officials and nearby Indian tribes to determine whether an acquisition of land in trust for gaming would be in the tribe's "best interest" and "not detrimental to the surrounding community."

25 U.S.C. sec. 2719(b)(1).

## **B. Pombo Second Discussion Draft**

The Second Discussion Draft would amend Section 20(b)(1) significantly. First, the second draft would strike the existing Section 20 Two-Part Secretarial Consultation Process and nullify pending applications under Section 20(b)(1)(A). Several tribes have invested millions of dollars to perform environmental assessments to apply to have land taken in trust under this provision. Some of them have the support of both the Governor and the local government where the land acquisition is proposed. Where the State, local governments, and nearby Indian tribes support an application under the Section 20 Two-Part Secretarial Consultation Process, we do not believe that Congress should prohibit the trust land reacquisition. In sum, we do not believe that the actual record of Section 20's implementation justifies eliminating the Two-Part Secretarial Consultation Process.

Second, the new discussion draft would eliminate the land claim settlement provision. Only one Indian tribe has successfully utilized this process to date, and the proposal to eliminate this provision is tantamount to a 5<sup>th</sup> Amendment taking of vested property rights and the frustration of justifiable expectations.

Third, the second draft would require “newly recognized, restored, or landless tribes” to apply to have land taken in trust through a Five-Part Secretarial Consultation Process:

- **Newly Recognized, Restored, and Landless Tribes** would apply to the Secretary of the Interior to have land taken in trust for gaming;
- **Secretarial Determination:** The Secretary would consult with state, local officials, and nearby Indian tribes to determine that the reacquisition of land was in the best interest of the applicant tribe and not detrimental to the surrounding community;
- **Governor concurs in the Secretary's Determination;**
- **State Legislature concurs;**
- **Nearby Indian tribes concur;** and
- **County Government concurs.**

Subjecting “newly recognized, restored, or landless tribes” to this new and cumbersome process discounts the fact that the United States mistreated these tribes by ignoring and neglecting them, taking all of their lands or allowing their lands to be stolen by others. These Indian tribes had aboriginal and historical lands. We believe that Congress should restore these tribes to a portion of their aboriginal or historical lands and that these lands should be held on the same basis as other Indian lands.

It is not necessary to add the State Legislature to Gubernatorial concurrence authority. The question of state law authority and decision-making is reserved to the States under the 10<sup>th</sup> Amendment. In addition, subjecting Indian lands to a veto by local governments is a bad precedent for Indian tribes. We believe that local governments are

subdivisions of the state – not separate sovereigns. State governments have the power and authority to protect the interests of local governments.

The second draft also provides for the cooperative use of existing reservation lands, whereby an Indian tribe may invite another Indian tribe to conduct gaming on its reservation lands. We support this provision, yet we believe that this could be enacted on a more specific basis without amending IGRA.

The new draft again would prohibit Indian tribes from crossing state lines to engage in gaming. The reason why a few tribes are seeking to cross state lines has to do with the 19<sup>th</sup> Century Removal Policy, which was a historical wrong by the United States against American Indians. When an Indian tribe seeks to return to aboriginal lands, due consideration should be given to historical facts. Not all states reject a return by Indian tribes to ancestral lands. There are ways to promote respect for the interests of states and nearby tribes other than a prohibition. Colorado Governor Bill Owens, for example, told the Cheyenne-Arapaho Tribes that Colorado voters could approve their return from Oklahoma to Colorado.

### **Alternative to Legislation: A New Regulation Under Section 20**

Under Section 20 there are more proposals than actual gaming facilities. Only 3 new gaming facilities have gone forward under the Section 20 Two-Part Secretarial Consultation Process. Each facility had the support of the local government. A new regulation under Section 20 could clarify the rights of states, local governments, and nearby Indian tribes to consult with the Secretary *before* her decision on the potential impacts of a new gaming facility in the surrounding community. The Secretary now gives great weight to local government comments thereby protecting local interests. The Secretary should give the same weight to interests of nearby Indian tribes. Through the Governor, states have a right to agree or disagree – which is sufficient to protect state rights.

Concerning land claim settlement lands, a new regulation could simply spell out the fact that congressional ratification of a land claim settlement is necessary before such lands can be used for gaming. State, local governments, nearby Indian tribes and the public have an opportunity to fully participate in the legislative process for ratification. That should protect everyone's interest in ensuring a fair settlement process.

With regards to “newly recognized, restored, and landless tribes,” we agree that these tribes should seek to reacquire lands in their aboriginal or historic land areas to avoid any infringement on the aboriginal land rights of nearby Indian tribes. The Secretary now requires “significant historical, cultural, and geographic ties” to the land sought for tribal reacquisition. We believe that the Secretary of the Interior has authority to require an aboriginal or historical connection to the lands and that issue should be dealt with in a new regulation under Section 20.

We understand that the Department of the Interior is currently in the process of developing a new regulation under Section 20 that will clarify these issues.

## **Conclusion**

Chairman Pombo, Congressman Rahall, and Members of the Committee, we thank you for undertaking a process that is respectful of government-to-government relations. The underlying principle of government-to-government relations, similar to protection of states rights under the 10<sup>th</sup> Amendment, is idea that the least intrusive means to achieve a Federal goal is generally the best avenue to pursue. In this case, the least intrusive means of protecting the rights of state, local governments, and nearby Indian tribes is through a new regulation under Section 20 that will clarify the right to consult with the Secretary and the State's right to concur or not concur in the Secretary's determination. Accordingly, we respectfully request that the Committee give the Department of the Interior time to develop and promulgate its new regulation before amending Section 20 of the Indian Gaming Regulatory Act.