STATEMENT OF FRANKLIN DUCHENEAUX

BEFORE THE COMMITTEE ON RESOURCES

OF THE U. S. HOUSE OF REPRESENTATIVES

FOR AN OVERSIGHT HEARINGS ON CLASS III MINIMUM INTERNAL CONTROL STANDARDS

MAY 12, 2006

Mr. Chairman, my name is Franklin Ducheneaux. I appear today at the request of, and representing, the Minnesota Indian Gaming Association and the Great Plains Indian Gaming Association. These two organizations represent over 20 Indian tribes in six states. In addition, the Montana Tribal Gaming Association, representing the 7 tribes of Montana, is supportive of the views expressed in this statement. On behalf of those tribes and organizations, I want to thank you and the Committee for this opportunity to present their views on proposals to amend the Indian Gaming Regulatory Act with respect to the application of NIGC minimum internal control standards to class III Indian gaming.

I also have a first-hand experience with the development and enactment of IGRA. From March 1983 to December 1990, I served as Counsel on Indian Affairs with the Committee; first with the Subcommittee on Indian Affairs under the chairmanship of our late friend, Lloyd Meeds, and, second, with the full Committee on Interior & Insular Affairs under the chairmanship of our late friend, Morris K. Udall. With particular relevance to this oversight hearing on the MICS issue, I served in that capacity in the 98 th, 99 th, and 100 th Congresses, the period during which this committee and the Congress considered legislation protecting and regulating Indian gaming.

Before getting to the specific issue of class III MICS regulation by NIGC, I would like to give the committee a brief overview of the consideration of Indian gaming legislation during those three congresses. At this point, Mr. Chairman, I would like to offer for the record a paper prepared by me and Peter S. Taylor for the Minnesota Indian Gaming Association entitled "Tribal Sovereignty and the Powers of the National Indian Gaming Association".

Seminole & Barona Decisions.--In 1981 and 1982, two Federal circuit courts of appeal decisions were handed down confirming the right of Indian tribes, under certain circumstances, to engage in, or license and regulate, gambling activities on Indian lands free of control by state laws. These decisions were *Seminole v. Butterworth* (658 F. 2d 310) and *Barona Group of Mission Indians v. Duffy* (694 F. 2d 1185). The Supreme Court declined to review the two decisions. As the holding in these cases percolated through Indian country, increasing numbers of tribes began to offer high stakes bingo as a means of generating badly needed tribal revenues.

98 th Congress and H. R. 4566.—As Indian Affairs Counsel, I was concerned about the probable non-Indian reaction to these decisions and tribal gaming activities. There was also concern among members of the Indian bar that the Supreme Court would take an appeal on such a case and reverse. With the approval of Chairman Udall, I drafted a bill that provided, among other things, for minimal Federal regulation of Indian gaming. Mr. Udall introduced the bill on November 18, 1983, as H. R. 4566. Hearings were held on the bill by this committee, but no further action was taken, primarily because the Indian tribes opposed the legislation, even with the minimal intrusion into tribal sovereignty through its provisions.

99th Congress and H. R. 1920.—By the time the 99 th Congress convened, more tribes had turned to high stakes bingo as an economic development and revenue-generating effort and there was a growing anti-Indian gaming backlash that was increasingly being reflected in the Congress. Again, at Chairman Udall's direction, I drafted another bill dealing with Indian gaming that Mr. Udall introduced on April 2, 1985, as H. R. 1920. Two other bills were introduced in the House and a bill was introduced in the Senate on the subject.

H. R. 1920 was a much more complex bill and more intrusive into tribal sovereignty than H. R. 4566. Nevertheless, it reflected Chairman Udall's continuing strong support for tribal sovereignty and tribal self-government and his reluctance to invade tribal sovereignty more than was strictly necessary to deal with the matter.

Extensive hearings were held on the bill. It was marked up in the Committee on December 4 and 11, 1985, and ordered reported with an amendment in the nature of a substitute. By then, the legislation had established the three classes of Indian gaming and, because of the strong and growing anti-Indian gaming forces, the substitute unfortunately included a 4-year moratorium on class III gaming. The bill passed the House under suspension of the rules on April 22, 1986. The Senate Indian Affairs Committee reported H. R. 1920 to the Senate on September 15, 1986, but a hold was placed on the bill and it died with the 99 th Congress.

Despite the growing pressure from those opposed to Indian gaming to impose either state or Federal regulations on Indian gaming, the leadership of both the House and the Senate committee still sought to protect the right of tribal sovereignty and self-government in the regulation of gaming on Indian lands.

The Supreme Court and the Cabazon Case.—An event occurred in 1986 that colored the remainder of the legislative actions in the 99 th Congress and action of similar legislation in the 100 th Congress. On June 10, 1986, the Supreme Court decided to hear an appeal from the State of California in the case of *California v. Cabazon Band of Mission Indians*. The circuit court decision in the *Cabazon* case, like the earlier decisions in the S*eminole* and *Barona Ranch* cases, held that the tribe involved was entitled to engage in bingo and other games permitted under state law free of state regulation. It was generally accepted in both camps that the Supreme Court, based on recent decisions in other Indian cases, would reverse the lower court and find for state regulation.

The 100 th Congress and IGRA.— When the 100 th Congress convened, I advised Chairman Udall that it might be the better part of valor, because of the expected reversal of the Supreme Court in the *Cabazon* case, to take a more conciliatory legislative position with the anti-Indian gaming forces, both on the Committee and in the House. I drafted for the Chairman a bill that he introduced as H. R. 1079 on February 2, 1987. This bill was designed to salvage as much as possible for tribal sovereignty over Indian gaming before the Court rendered its expected decision in the *Cabazon* case. This bill, which I now look back on with some shame, was offered to the other side by the Chairman, but, fortunately, it was soundly rejected.

On February 25, 1987, the Supreme Court handed down its decision in the *Cabazon* case that fully upheld the decision of the lower court in favor of the right of Indian tribes. With the Court decision, the legislative momentum and strength shifted away from the state-gaming industry position to the tribal government position. Even then, Chairman Udall sought to reach a compromise with the opposing forces. He sent a May 4, 1987, letter to Congressman Pepper, Chairman of the Rules Committee, in that vein. I would like to quote from it:

"One effect of the Court decision is that some tribes are now opposing enactment of any legislation imposing regulations on tribal gaming. This opposition extends to my own bill, H. R. 1079. While I can appreciate this change in attitude of the tribes, I still feel that some legislation is desirable to provide needed protection for the tribes, themselves, and the public. As a consequence, I have directed my staff to redraft a bill which recognizes the rights secured to the tribes by the Supreme Court decision and, yet, establishes some Federal standards and regulations to protect the tribes and the public interest. *However, I believe that this Federal regulation must be accomplished in a manner which is least intrusive upon the right of tribal self-government*.

I did draft the bill and Chairman introduced it on May 4, 1987, as H. R. 2507. Still, Chairman sought to reach out to the other side with a compromise, but it was again rejected. On July 6 th, Chairman Udall submitted a statement for the Congressional Record noting his offer and the rejection. Again, I would like to quote the closing part of the remarks:

"Mr. Speaker, I reluctantly take my compromise off the table and revert to my support for the language of my bill, H. R. 2507, which will provide effective regulation of Indian gaming within the context of our solemn promises to the Indian tribes. Still, I am willing to consider compromise if the non-Indian gaming industry is willing to respect Indian rights and are willing to leave a small piece of the pie for the Indian people.

"Until then, I must oppose legislation damaging to Indian self-government and Indian rights." Congressional Record, July 6, 1988, P. H5028.

The Committee held a hearing on H. R. 2507 on June 25, 1987, but no further action was taken. I think some may have wondered why.

The older members of the Committee will remember that Mo's abilities were being significantly affected by his Parkinson's disease about this time. He realized that his legislative strength was waning. Sometime after the hearing, he called me to his office. He advised me that, while he could probably get the bill out of committee in a form acceptable to the tribes, he probably could not hold it against floor amendments destructive of tribal sovereignty. He decided to cease action in the Committee. He directed me to go to the Senate Indian Affairs Committee staff and advise them that no further action would be taken in his Committee on H. R. 2507. He directed me to advise them that, if the Senate would pass a bill that was minimally acceptable to the tribe, he would hold it at the Speaker's table and try to pass in under suspension of the rules. If the Senate passed a bill that was not acceptable to the tribes, he would bring it into the Committee and kill it. He authorized me to try to negotiate with the Senate staff and other interested parties on language that would be acceptable to the tribes.

While negotiations on the compromise language began in late 1987, active efforts did not take place until the beginning of the

2 nd session of the 100 th Congress and final agreement was reached in late April of 1988. While the bill number of the eventual compromise was S. 555, the language that formed the basis of the negotiations was the text of H. R. 2507, that had been introduced in the Senate by Senator McCain as S. 1303.

Mr. Chairman, the compromise we reached was a delicate one and one that, in my view, would be only barely acceptable to the Indian tribes. Viewed from the perspective of the victory the tribes had won in the *Cabazon* decision, the compromise language resulted in further erosion of tribal sovereignty. However, viewed from the perspective of the political forces opposing tribal gaming, it was minimally acceptable. The Senate Indian Affairs Committee reported S. 555, with the compromise language, on August 3, 1988, and passed it by voice vote on September 15 th. It was received in the House and passed under suspension of the rules on September 27 th. It was signed into law by the President on October 17, 1988.

IGRA and the NIGC MICS.— Mr. Chairman, at issue in this0 oversight hearing of the Committee is the authority of the National Indian Gaming Association to promulgate and enforce its existing minimum internal control standards (MICS) against class III Indian gaming and, if it lacks such authority under IGRA, the need to amend IGRA to give it that authority. I would like first to address the existing authority of NIGC under IGRA to do so and the intent of Congress in that respect.

There are those in leadership positions who are now saying that Congress intended in IGRA to confer that authority on the Commission. This, of course, includes the current Chairman of the Commission, Mr. Phil Hogen.

As I have noted, I worked very closely with Chairman Udall in the development, consideration and enactment of IGRA. Mo made very clear that he was personally opposed to gambling and, in particular, to government gambling. He also made clear his position that, if states were going to engage in that activity or to license and regulate it, he strongly supported the right of Indian tribes to do so within the context of their tribal sovereignty. While Mo recognized the growing need for Congress to address concerns about tribal gaming, his consistent position was that any legislation addressing those concerns must be as consistent with tribal sovereignty and the right of tribal self-government as possible. Unlike some today, his support for tribal sovereignty and tribal self-government was not lip service only. It was the hallmark of his legislative position on Indian gaming.

By the beginning of the 100 th Congress, it was clear that the opponents of Indian gaming, including the states, had shifted their focus from class II gaming, including bingo, to the specter of class III or casino gaming. They were content to leave class II gaming to the regulation of the tribes, with some oversight and monitoring authority in the NIGC. They insisted, however, that class III Indian gaming either be banned or completely subject to state regulation. On the other side, the tribes and their supporters were equally insistent that the states play no role whatever in the regulation of class III gaming.

What came out of the negotiations between the House and the Senate in the 100 th Congress was a compromise. Class III gaming was made illegal on Indian lands unless done pursuant to a compact negotiated between a tribe and a state, subject to approval by the Secretary of the Interior. Realizing that this would put the tribes at the complete mercy of the states, we authorized the tribes to sue the states in Federal court for failure to negotiate or to negotiate in bad faith. We also included language setting out the parameters of such negotiation. However, the language clearly intended that whatever regulation of class III gaming was to occur was to occur as a result of the agreement between the tribe and the state. Except for the monitoring and oversight functions, the NIGC was to have no role whatsoever in such regulations.

Mr. Chairman, I cannot say what the understanding of those members of Congress who voted for IGRA was or what their intent was in voting for its passage. As the committee staff person charged by Chairman Udall with achieving compromise language that was minimally acceptable to the tribes, I can say what our intent and understanding was. The NIGC was not to have the power to promulgate and enforce detailed regulation of class III gaming. This would have usurped the power the states insisted on and destroyed the compromise the tribes accepted.

The NIGC MICS and CRIT.— In the early days of the Commission, the first Chairman, Anthony J. Hope, made clear his understanding that IGRA did not confer power to adopt and impose detailed regulation on Indian gaming. Hope, in his testimony before the Senate Indian Affairs Committee on April 20, 1994, noted that the “Commission lacks authority usually found in a comprehensive independent regulatory agency.”

In discussing the need for an amendment to IGRA conferring such regulation, Hope stated:

“The Congress should set minimum standards for the regulation and monitoring of class III gaming, or authorize the Commission to prescribe them by regulation.. . . . If it is given responsibility of regulation class III gaming, it should be empowered to regulate in the same manner as gaming commissions in the state”

While the Commission’s application of its MICS to class II gaming is not at issue in this hearing, I would parenthetically note

that Hope's statement then noted that "These powers should also be extended to class II operations."

As we know, Mr. Chairman, despite this early Commission position and over the strong objection of Indian tribes, the Commission later promulgated and begin enforcing its MICS over both class II and III Indian gaming. While tribes and other supporters of tribal sovereignty continued to assert the illegality of the Commission MICS, most complied with the MICS as a matter of economic necessity.

However, as the Committee may be aware, the Colorado Indian Tribes of Arizona finally stood up to the Commission. They challenged NIGC. They won a decision in an administrative appeal, which the NIGC ignored. They then sued in the Federal District court here in DC. On August 24, 2005, the court handed down its decision in *Colorado River Indian Tribes v. National Indian Gaming Commission*, 383 F. Supp. 2 nd 123. The court could not have been more clear in its decision that IGRA did not confer power on the Commission to impose its MICS on class III gaming.

IGRA Amendments and S. 2078.— Throughout the consideration of the Indian gaming legislation in the 98 th, 99 th, and 100 th Congresses, it was Chairman Udall's goal to achieve the purposes of the legislation in a manner that was most consistent with tribal sovereignty. This was true of the provisions providing for the regulation of class III gaming. As is made clear in the CRIT decision, IGRA gave the Commission no role in regulating class III. The Act left that matter to the negotiations between the state and the tribe.

Despite the favorable decision in the CRIT case and, at least in part, because of it, the tribes are now faced with proposals to amend IGRA to specifically confer that power on NIGC, including S. 2078 as reported from the Senate Indian Affairs Committee. With few exceptions, the Indian tribes and organizations representing Indian tribes oppose those proposals. If enacted, such legislation would completely destroy the tribal sovereignty and the right of self-government in the area of tribal gaming enterprises. The tribes cannot understand the justification for this proposal.

One justification put forward by the proponents is based upon a comparison of funding levels for the regulation of Indian gaming. The assertion is made that the State of Nevada spends over $80 million a year in regulation its gaming industry while the NIGC spends only $8 million. The statement is true, but it totally ignores and discounts the over $200,000,000 spent by Indian tribes in the regulation of Indian gaming activities, including funds provided to state agencies for regulation under compacts. The tribes are rightfully resentful of this attitude because it says to them that the non-Indian world believes that Indians, as Indians, cannot be trusted to regulate their own activities in an effective and fair manner.

Nevertheless, Mr. Chairman, I believe that some Indian tribal leaders would not be so opposed to such efforts if a record had been made that there was a pattern of abuse, corruption, fraud, and other misconduct in Indian gaming because of inadequate regulation. But there has been no such record made. The Senate Indian Affairs Committee has held several hearings in this Congress on Indian gaming. No witness has come forward to document a pattern of such misconduct. Lacking such evidence, the proponents assert that a scandal could happen in Indian gaming and, therefore, Federal regulation should be imposed for the Indian's own good.

Mr. Chairman, the Indian tribes and people do not need another Great White Father. They are strongly opposed to any return to a Federal policy of termination of tribal governing powers. They are equally strongly opposed to a reinstitution of a policy of paternalism by Federal bureaucracy.

I recently attended an event at the University of South Dakota that was a 50-year retrospective on Indian Self-determination Act. When I came to work for the Committee in the 93 rd Congress, the first major bill I worked on was S.1017, which was enacted into law as the Indian Self-Determination Act. It ended the era of termination and paternalism and established the over-all policy of the Congress and the Federal government that the right of Indian tribes to govern their own affairs would be protected and strengthened. Enactment of S. 2078 or similar legislation on class III gaming regulation would destroy tribal sovereignty and return this Nation to an Indian policy of termination and paternalism.

The majority of the Indian tribes across the country, including the tribes represented by MIGA, GPIGA and MTGA, are strongly opposed to S. 2078 or to any other legislation conferring power of NIGC to impose its MICS on class III gaming. However, Mr. Chairman, if this Committee in its wisdom feels the need to move such legislation, the tribes would like the opportunity to work with the Committee leadership to craft language that would be consistent with, and respectful of, tribal sovereignty and self-government as S. 2078 is not.

Again, Mr. Chairman, I want to express the appreciation of the member tribes of MIGA, GPIGA, and MTGA/ for the opportunity to put their views before this Committee. This completes my statement and I would be happy to respond to any questions.