TESTIMONY OF CHAIRMAN KEVIN LEECY
OF THE BOIS FORTE BAND OF CHIPPEWA INDIANS OF MINNESOTA
BEFORE THE HOUSE COMMITTEE ON RESOURCES

OVERSIGHT HEARING ON HR____ (POMBO), TO AMEND THE INDIAN GAMING REGULATORY ACT TORESTRICT OFF-RESERVATION GAMING, AND FOR OTHER PURPOSES.

MARCH 17, 2005

Good afternoon Mr. Chairman and the Honorable Committee members. I wish to extend my appreciation to the Chairman for providing me with the opportunity to testify before you today. I respectfully ask that the Chairman accept my written testimony and make it a part of the record of this Hearing.

Mr. Chairman it is my understanding that the Indian Gaming Regulatory Act of 1988 (IGRA) 25 USC §§2701 et seq. had as its fundamental purpose the protection of Tribal government gaming to create, develop and promote on-reservation economies. Congress intended would strengthen tribal self-government. Congress wanted to ensure, and properly so, that the Tribal governments were the primary beneficiaries of the gaming revenues, that the Tribal governments would retain the sole proprietary interest in the gaming enterprises, and that the Tribal governments would be the primary regulatory authority over the gaming activities.

The ever increasing proposals to create off-reservation gaming threaten to undermine the fundamental purposes of the IGRA. In my home state of Minnesota, for example, such proposals are being used to divide tribes and to extort money from tribes with successful gaming operations. I would like to explain to the committee what is happening in my state.

Mr. Chairman, the eleven federally recognized tribes located in Minnesota were the first to complete negotiations under the IGRA when in 1989 the Tribes and the State of Minnesota entered into a Class III Compact authorizing and regulating the use of video games of chance. Subsequent to the conclusion of the 89 Compacts the Lower Sioux Indian Community requested that the State of Minnesota negotiate a second Class III Compact that would authorize and regulate the play of blackjack. The State of Minnesota refused arguing that the play of blackjack was not within the scope of gaming authorized under state law. The Lower Sioux Indian Community, with the support of the other ten Tribal governments, sued the State in federal court pursuant to the IGRA asserting that the states refusal to negotiate blackjack was per se bad faith and that Minnesota law clearly supported the Tribes request. The matter was ultimately resolved by a consent judgment in federal court in the favor of the Tribe. As a result of that judgment, the State agreed to negotiate and the eleven tribal governments entered into Compacts authorizing and regulating the play of blackjack in 1991.

I wish to point out several important facts involving the negotiation of these Class III Compacts. First, while negotiating the 89 Compact it was imperative for the tribes to achieve several objectives. That there were to be no artificial restrictions placed on the video gaming activities under the Compact. The State sought restrictions in the form of limits on the number of machines, limits on the hours of operation and limits on the age of players to name a few. Second, the Tribal governments understood that they would need to make substantial investments in their infrastructures to take complete advantage of the Class III Compact. Neither the federal government nor the state government would finance this development and the Tribes knew that they would need to turn to the marketplace for the financing. What the Tribal governments wanted to avoid was the high priced financing offered by individuals and groups who preyed upon the Tribes in the ten years prior to the adoption of the IGRA. Third, the Tribal governments wanted to enforce the principle that the Tribes were to be the primary regulators of these activities. Fourth, the Tribal governments wanted to ensure that the Tribes were to be the primary beneficiaries of the revenues from these activities. The Tribes fought hard to avoid state imposition of taxes on the activities and the IGRA clearly states such a prohibition. Lastly, the Tribal governments had been operating gaming on its reservations since the late 70's and knew very well the positive impacts that gaming revenue had on their governments, and on their communities both on and near the reservation.

In order to maximize the opportunities presented by the IGRA the Tribes sought and received Class III Video Compacts that had no term and came without the artificial restrictions proposed by the State. The State received in return the ability to participate in oversight of the regulatory aspects of the Compact and the ability to track the movements of machines within the State. The State also received assurances that facilities in which the activities would take place will be safe and that procedures would be implemented to protect the public from unscrupulous operators. Also important to the State was the fact that all of these activities would take place on-reservation which would impact the decision on the part of the State's citizens whether or not to engage in the gaming. Bluntly, that tribal gaming would not be that accessible. The State also understood the positive impacts of the gaming activity including the reduction of unemployment in those reservation areas for Indians and non-Indians, the development of the infrastructures necessary to serve the gaming facilities, the use of gaming revenues to support and establish programs and services to tribal members such as housing, medical clinics, dental services, public safety, courts and education to name a few. The State also knew that these monies would be spent

in areas that are often the hardest hit in the downturns of the State's economy. Given the status of the State's economy in the early 90's it was also seen as an economic stimulus for these rural communities.

The negotiation of the blackjack Compact of 91 introduced the idea of reimbursing the State for its expenses incurred in the carrying out of certain oversight duties under both Compacts. It also reflected the Tribe's acceptance of a limitation of its right to request the negotiation of Compacts for other activities in light of the federal courts' broad recognition of the extent of activities that were authorized under state law. In return for this foregoing of the right to request Compacts on additional activities the Tribes reserved such right if the State were to explicitly authorize any expansion of gaming in the future. To this day, the Tribes continue to limit their activities to the two authorized activities, video games, and blackjack. The State however did authorize an expansion when five years ago the State allowed private for-profit horse track operators to open a card club. Last year that card club earned in excess of 29 million dollars. The private for-profit operators of the track do not pay any state taxes on the card room income.

Since 1991 the Tribes have invested well over 200 million dollars into building their gaming facilities and supporting facilities and other amenities. They have also spent millions on each of their reservations building structures that support Tribal communities. The tribes in the face of diminishing federal and state grant support did all this. They have established on-reservation economies where none existed before and they are reaching out to their neighbors. They have become the new economic engines within their communities.

We have also seen over the last ten years proposal after proposal to expand gaming in the State. In the last three years we have seen two, and this year three tribes are promoting off-reservation gaming proposals under state law. These proposals did not go anywhere until this past year when the current Governor decided that he wanted revenue sharing from the Tribes and the Tribes did not capitulate.

The Governor's approach was to meet with the tribal leaders in early January of 04 and inform them of his new policy to expand gaming in the state unless the Tribes would revenue share. He gave the Tribal leaders a couple of days to mull over his request and when the Tribal leaders politely responded to his demand he responded by informing the public and the Tribal leaders in his State of the State address that he wanted the Tribes gaming money and if he did not get it he would expand gaming in Minnesota.

OFF-RESERVATION GAMING IS BAD PUBLIC POLICY

The Bois Forte Band of Chippewa is located in Northeastern Minnesota. (Attachment 1) It is approximately 230 miles from the Twin Cities of Minneapolis and Saint Paul. We have an on-reservation population of 1000. We are part of the Minnesota Chippewa Tribe, which was established in 1934 as an umbrella organization representing five other Chippewa Bands in northern Minnesota. We have engaged in gaming since 1986. We offer both Class II and Class III activities in a facility that was built in 1988 and has approximately 25,000 feet of gaming space. We are geographically isolated and depend on our gaming to fund a large part of the operations of our government and its programs. We do not provide per capita distributions to our enrolled members. Due to our geographic isolation, we have come to understand the limitations of our market. Most of our customers come from within 90 miles of the reservation. It has become very important to be conservative in our decision-making when it comes to our gaming enterprise. We however believe that we are maximizing our opportunities within the nature of our market and have added some amenities, including a marina and golf course, which we opened last year. A segment of our market includes people from the Twin Cities of Minneapolis and Saint Paul. We have been engaged in providing gaming for over 16 years and we feel that the statewide market for gaming has matured. Apart from all of our location disadvantages, we have nonetheless created a successful business that provides an important source of jobs and revenue for the operation of our tribal government. The non-Indian community surrounding us also benefits from our gaming. Over the years, we have been welcomed into our rightful place as a government among the other governments in our state.

Over the years we have observed from a distance the various proposals promoting off-reservation gaming by Indian tribes. These have included the earliest proposals involving tribes seeking off reservation locations to enhance their opportunities, private developers seeking both historic tribes or federally recognized tribes willing to re-locate to off-reservation locations and now, States who are pitching off-reservation locations. The latter two are linked by a common objective—how do we raid the tribal treasury.

Most recently, the Governor of Minnesota, having failed to bully the tribes into submitting to his demands for revenue sharing, has now set on a new course. He is seeking to divide the tribes on the issue of gaming by embracing an off-reservation gaming proposal that had been languishing in the state legislature for the last two years. This proposal originated within the urban Indian community and was picked up by the White Earth and Red Lake Bands of Chippewa. This year the Leech Lake Chippewa have also joined the proposal. The proposed Minnesota legislation HF 1817 establishes a metro area

casino operated jointly by the tribes with a new twist. The new wrinkle is that the activities will be authorized solely under State law.

This is not the first time that such a venture has been proposed. The Minnesota Governor's Chie aide, Dan McElroy had actually pitched this as the Kansas Model in early discussions with the tribes in Minnesota. The point is that the States are now shopping tribes much as the private gaming developers have shopped tribes to entice them into these off-reservation projects. As we know from experience the end result will be simply another example of tribes being separated from their resources.

It is our concern that this is not an isolated incident. The original demands for Minnesota tribal revenue began with the Governor suggesting that he wanted a "better deal for Minnesotans" claiming that the tribes had not contributed anything to the state irrespective of the 15,000 direct jobs created by Minnesota tribal gaming and the over 80 million dollars a year that flows into state coffers from non-Indian employees. In reference to the terms of the existing Compacts, he said that they were old and not consistent with current realities. He claimed that the tribes held a monopoly over gaming within the state and there must be competition. His idea of competition was to enrich the private for-profit owners of the local horse track by giving them gaming machines and creating a racino. The state legislature gave the local track a card club five years ago and to this day exempts the revenues from corporate taxes. The private operation thus made a cool 29 million dollars last year without providing any direct benefit to the State.

The Governor demanded that the tribes fork over 25% of their revenues—why, he was asked. His answer was, "That is what Conneticut and California get and I want the same". He justified his demand by suggesting that Minnesota produces the third largest gaming revenues behind Connecticut and California when in fact it is the region, which includes Michigan, Wisconsin, Iowa, Nebraska, North and South Dakota, and Wyoming that is the third largest among the National Indian Gaming Commission regions.

Finally, he pushed the Kansas Model as the one that he prefers and asked the tribes to consider the Kansas model. We looked at the Kansas Model and we were not impressed with what we found. The Kansas Model is an off-reservation proposal in which two of the resident tribes have agreed to participate in a facility that will be located in Kansas City. The facility will be operated by an entity the majority of which may be non-tribal. This proposal will require revenue sharing with the state and local governments. If the tribes close their existing facilities the state will make payments to the counties where these facilities were located in order to ease the burden created by the loss of jobs and other impacts related to the closure. Interestingly the Model does not include funding to make up for the loss of revenues that the two remaining resident non-participating tribes may incur. However, under the Model the state of Kansas takes care of the horse tracks by authorizing the distribution of 600 machines to each of three tracks in the state. The State takes care to make the tracks whole and than some. The one redeeming feature of this Model is that it at least anticipates federal review under the IGRA § 2719. The Minnesota proposal does not anticipate any federal review.

If the Kansas model, and others similar to it are subjected to IGRA standards, they will not pass federal muster for several reasons: the tribes do not retain the sole propriety interest in the gaming, the tribes are not the primary regulators of the activities, and the tribes are not the primary beneficiaries of the revenues raised by the gaming activities.

The Minnesota proposal not only seeks to avoid any connection to the IGRA, but it also operates to actually exclude tribes from participating in an off-reservation gaming facility. The legislation creates a State-administered means test to determine eligibility for tribal participation as follows:

"(2) to be eligible to participate in the tribal entity (operating entity), the tribal government must demonstrate to the director (of the State Lottery) that the revenues available to the tribal government from currently available revenue sources are insufficient to adequately meet the basic needs of tribal members including, but not limited to, housing, medical care, education, or other governmental services to members;"

The Minnesota proposal creates an alleged "partnership" between the participating tribes and the state that can only be described as a one sided deal where the tribes assume all the liability and risk in financing and operating the enterprise while the State takes its 200 million dollar license fee and one third of the revenues off of the top. The State Lottery Director and the Director of Public Safety can make decisions that will become operating expense costs to the participating Tribes with respect to regulatory functions, some of the more expensive operating activities in a casino, without tribal review. The Tribe is required to waive its immunity with respect to disputes between the parties and these disputes will be heard within the State's administrative law process. If a State official decides the Tribes have violated any of their responsibilities, he sends the matter to the State Lottery Director who can penalize the tribes or end the partnership. The State will also control the licensing process and State decisions made with respect to licensing are not reviewable.

I am not a lawyer but this “partnership” as currently proposed is so one sided that it cannot be viewed as a legitimate contract. The problem is that this over-reaching is not something new to tribal governments. In the early days of tribal gaming, it was common to find contracts that tribes executed with management groups that were as unfair as the Minnesota proposal. It was common for the tribe to pay the manager anywhere from 60-90% of the revenue of the gaming activities. There were instances where this manager would also be leasing gaming devices to the tribe with the lease fee also being as much as 30% of the machine take, on top of the management fee. The IGRA stopped this by putting in place the NIGC management contract review process and established ceilings on the fees and the term of management agreements. The Minnesota “partnership” will be exempt from any such oversight or regulation.

Mr. Chairman and Committee members I share this information with you so that you will understand the never-ending permutations that tribes have encountered since gaming began that are designed to separate tribes from their revenue. This understanding will be valuable as you consider policy issues relating to off-reservation gaming. The Minnesota proposal is not home grown or isolated to Minnesota. It is the product of deliberate actions that have evolved from the early deals in Connecticut to Wisconsin to California to Kansas and now to Minnesota. It has been advocated by State officials in spite of the clear prohibition against state taxation of tribal gaming activities found in the IGRA, a prohibition that the BIA and the NIGC seem to ignore. It is apparent that states have now declared an open season on tribal gaming revenues. The Minnesota proposal represents yet another evolution of the strategy to circumvent the protections established in the IGRA. The worst part is that it attacks tribes’ on-reservation developments and economies. The Bois Forte Band is not the only tribe concerned by this development in Minnesota. The Chairman of the Fond du Lac Band of Chippewa issued a news release (attachment 3) after the Governor held a press conference announcing the “partnership” a couple of weeks ago and in the release the Chairman declares to the Governor that “Fond du Lac (is) not for sale at any price”. The Bois Forte Band and seven other tribes in Minnesota share the sentiment of the Fond du Lac Chair that indeed our Sovereignty is not for sale.

We understand that this hearing is the first of several the Committee intends to hold. Although we do not have specific recommendations for amending the Bill to address the concerns that we raise today we hope to provide those recommendations after further consultations with the other tribes in Minnesota. I thank the Chair and the Committee members for this opportunity to appear and testify on this very important subject.