House Resource Committee Oversight Hearing
April 9, 2008
H.R. 5608

Chairman Rahall and members of the Committee: Thank you for allowing me to speak with you today. I am Phil Hogen, Chairman of the National Indian Gaming Commission. I am here to comment on H.R. 5608, a bill to establish regular and meaningful consultation and collaboration with tribal officials.

H.R. 5608 identifies NIGC, the Department of the Interior and the Indian Health Service as agencies requiring an accountable consultation process. Without a doubt, the need for tribal consultation applies to many federal agencies and programs, and certainly—and prominently—t o the work of the National Indian Gaming Commission (NIGC).

NIGC is firmly committed to the consultation process. The agency is strongly opposed to this bill, however.

In keeping with the obligation to consult, NIGC adopted its consultation policy in early 2004 and published it in the Federal Register. A copy is attached. This policy was itself a product of the Commission's consultation with tribes as it was formulated. In the course of formulating this policy, NIGC also gathered and examined the consultation policies of other federal agencies, and discussed the utility of those policies with those agencies.

The question that the bill seeks to answer, I believe, is what kind of consultation constitutes adequate, accountable consultation. This bill does not answer that question, and it certainly does not answer the question as to how the NIGC, a regulatory agency, can meet these new consultation responsibilities while at the same time effectively fulfilling its statutory obligations under the Indian Gaming Regulatory Act. In fact, it is our firm belief that enactment of this legislation would eviscerate the agency's good faith ability to regulate.

We continue to seek consultation in the most effective ways. While there are 562 recognized tribes in the United States, only about 230 are engaged in Indian gaming, and so it is that group to whom the NIGC has most often turned for consultation. The great breadth of tribal diversity is reflected in their varying cultures, economies, and geography. They vary from having large land bases to small, large tribal membership to small, urban settings to rural. Some are found in jurisdictions where there is much non-tribal commercial gaming and others where gambling opportunities are almost exclusively tribal. Thus, the Commission quickly learned that a position or policy favored by tribes with small land bases and memberships, located where huge urban populations make for great market opportunities, will not necessarily be favored by tribes with large tribal memberships and large, remote, rural reservations near no large population centers.

It is not possible, of course, for the Commission to visit every tribe on its reservation each time an issue or policy might affect tribes. Gaming tribes have formed regional gaming associations, such as the Great Plains Indian Gaming Association (GPIGA), the

Oklahoma Indian Gaming Association (OIGA), the Washington Indian Gaming Association (WIGA), the California Nations Indian Gaming Association (CNIGA), the Midwest Alliance of Sovereign Tribes (MAST), and the New Mexico Indian Gaming Association (NMIGA), among others, as well as national organizations such as National Indian Gaming Association (NIGA), National Congress of American Indians (NCAI) and United South and Eastern Tribes (USET). Those organizations meet annually or more often, and NIGC has taken those opportunities to invite tribal leadership to attend consultation meetings on a NIGC-to-individual-tribe basis. Consulting at gaming association meetings maximizes the use of the Commission's time and minimizes the travel expenses that tribes, who ordinarily attend those meetings anyway, must expend for consultation.

Many tribes accept these invitations, many do not. Some tribes send their tribal chair, president or governor, and members of their tribal council, while others send representatives of their tribal gaming commissions, or in some instances staff members of the gaming commissions or of the tribal gaming operations. The consultation sessions are always most effective when tribal leadership, by way of tribal chair or council, is present. The letters of invitation, samples of which are attached, identify issues on which NIGC is currently focusing and about which the agency is seeking tribal input. The letters always include an invitation to discuss any other topics that might be of particular interest to an individual tribe. Some tribes have limited their consultations to a single issue, such as NIGC's proposals to better distinguish gaming equipment permissible for uncompacted Class II gaming from that permitted for compacted Class III gaming.

We do not only make ourselves available for numerous consultations, but we also listen seriously to what we hear at those consultations. The regulations NIGC adopts are published with thorough preambles, which attempt to summarize all of the issues raised in the government-to-government consultation sessions the Commission has held with tribes, as well as those raised by all other commenter's providing written comment, during the comment period on the regulation. I have attached the preamble from the Commission's recently adopted facility license regulation as an example.

The NIGC does not believe its current consultation practices are perfect, but we do believe that they are effective. We also believe that consultation should not mean agreement and that the parties consulting should not measure the good faith or effectiveness of the consultation by whether agreement is reached. Experience has shown that there is little or no clamor for consultation if the action being considered is favorably received throughout the Indian gaming industry. NIGC's recent reduction in the fees it imposes on gross gaming revenues to fund NIGC operations provides such an example.

On the other hand, if the issue the agency is considering is viewed as problematic, often there are concerns expressed that consultation has been inadequate. A further challenge the NIGC has observed is that consultation is most often criticized by tribes when the eventual policy that the agency settles on is at odds with the position expressed by tribes during consultations. That is, the NIGC's failure, from the tribal point of view, was not in the consultation per se but rather that the Commission did not agree with tribal points of

view. It does not seem fair or just that the only consultation deemed adequate is that in which the Commission always fully comports with tribal points of view. NIGC often finds itself sympathetic to tribal points of view, but it is also bound by statutory constraints. For example the Indian Gaming Regulatory Act's characterization of a number of gambling practices as Class III requires the sanction of tribal-state compacts.

I am fearful that if legislation such as H.R. 5608 is enacted, nearly every policy adopted by the National Indian Gaming Commission will be subject to challenge in court by one of the 230 gaming tribes on the basis that the regulation was not supported by consultation. I am also fearful that the Commission's mission of providing the gaming regulation mandated in IGRA will be overwhelmed by such litigation.

A problem created by the proposed legislation is distinguishing "policies that have tribal implications" from those that do not. In the legislation, the former are defined as:

> any measure by the agency that has or is likely to have a direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, such as regulations, legislative comments or proposed legislation, and other policy statements or actions, guidance, clarification, standards, or sets of principles.

It would seem that this would leave precious little for a regulatory agency such as the NIGC to do without first engaging in consultation. Determining the extent of the consultation that would be adequate likely would be problematic too.

An example of this would be the agency's position on this legislation. The Office of Management and Budget coordinates the views of the federal family on legislation that impacts the administration. On March 25, 2008, OMB asked the NIGC to provide its views on H.R. 5608 within the remainder of that week. Needless to say, if H.R. 5608 were the law of the land, doing so would have been impossible given the requirement that consultations must first occur. Questions that the proposed bill also leaves unanswered are: How long would such consultation take? How many tribes would have to be consulted? Where would that consultation best occur? How would that consultation be best documented?

Next, with respect to the application of consultation requirements, I think it is appropriate to draw distinctions between federal agencies and their functions. If a federal program will build homes on Indian lands for Indian people, certainly extensive consultation ought to occur with respect to the implementation of such meritorious programs. That federal activity, however, I believe, can be qualitatively distinguished from the regulation or oversight that an agency such as the National Indian Gaming Commission is mandated to provide.

While the following example is perhaps too stark, it may have some application here. To require that before the basketball referee calls a foul or charges a player with "traveling," it would probably be impractical and of questionable fairness if on each occasion he or she had to first hear the point of view of the player on whom the foul or the traveling was called, and of course, in fairness, to hear from the opposition, and then the coaches of both teams. As the rules of the game are written, those who participate ought to be invited to the table to discuss them. However, in the application of those rules, consultation is inappropriate and certainly impracticable, and I am concerned that similar constraints on regulatory agencies, which might be imposed by H.R. 5608, ought to be avoided. The definition found in section 2(4), "POLICIES THAT HAVE TRIBAL IMPLICATIONS," would require clarity and need to clearly distinguish the adjudicative functions of regulatory agencies from the rulemaking they conduct.

Similarly, section 6, addressing unfunded mandates, would pose great challenges to those who make rules that relate to commercial enterprises, such as tribal bingo halls and casinos. If the National Indian Gaming Commission imposed a regulation that required surveillance cameras to be placed over the counter of the cashiers that count the money at the gaming facility, under an enacted H.R. 5608, a tribe might argue that such surveillance could not be so required, unless the federal government paid for the cameras. First, NIGC does not use federal taxpayers' dollars. Instead, the agency's activities are supported by fees on the tribes; as a result, requiring federal payment of a regulatory cost does not work in the context of NIGC's budgetary status. Furthermore, it is not appropriate with respect to regulatory requirements for commercial activities such as gaming, which the NIGC helps regulate under IGRA.

Finally, administrative agencies are peculiar in that they exercise quasi-executive, quasi-legislative (rulemaking) and quasi-judicial (adjudication) functions. Reduced to essentials, rulemaking is the adoption of regulations that have the force and effect of law, adjudication is the application and further interpretation of those rules in particular cases in dispute. Fair process is required for each of the processes, but nowhere in the Administrative Procedure Act, which is a remarkable and proven body of law by which our federal government has successfully operated for over 40 years, are there any constraints similar to those which would be imposed by H.R. 5608.

There is a history to the development of consultation. That the United States has trust obligations to Indian tribes is recognized explicitly in many treaties. Chief Justice John Marshall, in his famous trilogy of opinions written in the 1830s, characterized the relationship generally as that of a guardian and ward. While the United States is not a common law trustee, the federal-tribal relationship is in fact a government-to-government relationship, and as the United States fulfills its role in that relationship, it needs to bear its obligations in mind. The world has changed much since Chief Justice Marshall's time, and not the least of these changes is the positive movement by tribes toward self-determination and self sufficiency. In recent decades, federal Indian policy has fostered that evolution.

The United States, of course, needs to consider the needs and desires of tribes, and as tribes attain greater political and economic stability, the greater the deference the United States ought to afford their expressions of need and desire. What this means, of course, is that the federal government ought to consult with tribes as it formulates and executes policies that impact those tribes.

President Bush reiterated the Administration's adherence to a government-to-government relationship in his Memorandum for the Heads of Executive Department and Agencies in September 2004. E.O. 13175 directs federal agencies to conduct meaningful government-to-government consultation with tribes when policies that affect them are formulated. Challenges to such policies cannot legally be founded on perceived or alleged shortcomings of the consultation process attending those policies. This legislation, however, would require a degree of collaboration with the regulated community (Indian gaming tribes) that is wholly inconsistent with a robust and healthy regulatory mission such as NIGC's.

Thank you for the opportunity to present the Commission's view on H.R. 5608. We stand ready to answer any questions.