Testimony of the Honorable John Berrey

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Committee on Natural Resources

Field Hearing on Oklahoma Tribal Economic Development

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Mr. Chairman, Distinguished Members of the Committee:

I would like to welcome you to Oklahoma and in particular Ottawa County the homeland of several proud Indian Nations including the Quapaw Tribe (O-Gah-Pah), the Tribe that I have proudly served for several years. Thank you for coming here to conduct this hearing on matters of great concern and importance to the economic well being of the Quapaw Tribe and other tribes throughout Oklahoma and other parts of Indian Country. It is a privilege to testify before the Committee today and I appreciate this opportunity. I would also like to invite you to return to Ottawa County and provide your valuable oversight on the federal management of the Tar Creek Superfund Site and the negative economic impacts suffered by our citizens as a result of that inadequate federal environmental management. The Tar Creek Superfund Site is an environmental disaster in Ottawa County that has wreaked havoc on the economy on the Quapaw Tribe's Reservation all the communities in Ottawa County.

Class II gaming has been the backbone of gaming activities here in Oklahoma and it remains critically important to all of us. Over the years, the Oklahoma tribal leadership has played a leadership role in defending Class II gaming technology and ensuring that tribal governments are accorded the full benefit of the Indian Gaming Regulatory Act. After a decade of litigation, the tribal views in relation to the legitimacy of electronically aided Class II gaming were vindicated by not less than four federal circuit courts, defeating time and again the government's theory that IGRA limits Class II gaming to the game of bingo as played by children. In fact, the circuit court holdings in these cases are so closely aligned that the Supreme Court refused to grant the government's petition for review in March, 2004, thus, we thought at the time, bringing closure to a long period of debate and conflict and clarifying the legitimacy of electronically aided Class II games.

In fact, most of Indian Country was under the impression that the National Indian Gaming Commission had resolved the matter in 2002 through the promulgation of revised definitions of certain key Class II definitions, specifically, the definitions of the terms "electro-mechanical facsimile," "electronic aid," and "other games similar to bingo." In the 2002 notice of final rule, the NIGC inserted a long explanation of why the new definitions were needed, noting that the main reason was to bring the NIGC's definitions into alignment with the courts' interpretation of IGRA. In its explanation for the 2002 revisions, the NIGC wrote:

> In addition to the lack of deference…, two United States circuit courts have reached decisions that can be construed to be at odds with the Commission's definition of facsimile, though at least one of them gave deference to the Commission's findings as to the devices in question. The uncomfortable result is that the Commission cannot faithfully apply its own regulations and reach decisions that conform with the decisions of the courts.

In the spring of 2003, the two remaining classification cases were decided in the Eighth and Tenth Circuits. The NIGC's revised definitions were referenced favorably in both of these decisions and the Tenth Circuit, in particular, based its holding in large part on the NIGC's 2002 revised definitions. The court stated that "at least six factors support the reasonableness of the NIGC's construction as consistent with IGRA." The court then went on to describe each of these factors, including the fact that the definitions represent a plausible reading of IGRA; they are supported by IGRA's legislative history; and, as the court stated, "perhaps the best evidence of the reasonableness of the NIGC's construction is the favorable reception it has already received in the federal courts."

In spite of the foregoing, the NIGC now seeks to revise two of its key definitions, the "facsimile" and "game similar to bingo" definitions. Additionally it has proposed a set of classification standards that will render unlawful even those games which the courts have specifically ruled as coming within Class II gaming. There are also proposed technical standards and minimum internal control standards. According to the agency's own expert this regulatory package will produce a negative economic impact of as much as one to two billion dollars ($1 to 2 billion) annually if, as most manufacturers believe, some or all existing Class II games are rendered unlawful.

One need not be an expert to understand the implications of losses of this magnitude. Yet, more is at stake than the bottom line. Class II gaming is within the exclusive authority of tribal governments and may be offered independently of a tribal-state gaming compact. While we are pleased that we were able to work out a Class III gaming compact with the State of Oklahoma, there was a time when our requests to enter into compact negotiations were rebuffed. Were it not for Class II gaming, Oklahoma tribes would still be mired in poverty with little hope of change. We would still be largely dependent on federal aid for essential governmental programs and services. Many, if not most, of our children would continue to find the doors to higher education firmly shut. And, we would not stand before this Committee today with the kind of optimism and excitement we now have about our futures.

The Commission's proposed regulations represent a step backward toward where we once were, and we have no choice but to object as loudly and as strongly as possible. The law, as has been determined time and again, is on our side of this debate. This does not mean that we lack respect for the NIGC or for reasonable and legally sound regulations. We understand the importance of a strong and effective regulatory structure. We support a strong federal regulatory presence, and I speak from experience in asserting that Chairman Hogen and Commissioner Des Rosier are motivated by the best of intentions and bring much experience and knowledge to the table. We respectfully differ, however, in our views concerning the definitional revisions and the classification standards. While we might quibble with regard to the technical standards and

the Class II MICS, none of us have rescinded our tribal internal control standards on the basis of the Colorado River decision, which held that the NIGC lacks the authority to promulgate Class III MICS and most, if not all of us, see the benefit of sound technical standards for Class II gaming systems regardless of whether the NIGC has authority to promulgate them as binding regulations or simply as guidance.

The Quapaw Tribe has invested a great deal of time and money in participating in the activities of the NIGC's MICS and Class II Advisory Committees over the past few years in relation to the development of Class II MICS and technical standards. This has been something of a hardship given the limitations on our resources, but these regulations are so important to us that we had no choice but to proceed. This effort included the participation of the gaming industry, lawyers, operators, auditors, and other experts, who together with tribal leaders and the Advisory Committees worked hard to draft workable Class II technical standards and MICS. Members of the Commission and their staff attended most of the drafting sessions. Ultimately, the working group produced recommended MICS and technical standards. The working group, however, was not accorded the opportunity to address the proposed classification standards and definitions and no tribal consultations were conducted after the initial proposed regulations were withdrawn in February 2006.

I do not know if the NIGC's working group process or direct government-to-government consultation could have produced an acceptable compromise. But it is disappointing that that the proposals went forward in the absence of such an effort. The government-to-government relationship is a fundamental aspect of the federal-Indian relationship. IGRA was intended to serve as a comprehensive regulatory scheme in which tribal governments assume the primary role in conjunction with NIGC's oversight. Given the day-to-day experience of tribal gaming regulators, meaningful consultation is the best mechanism the NIGC has to make sound regulatory decisions. It is crucial to the regulatory framework that the NIGC and tribal governments work together on the basis of parity and in the knowledge that our interests in the regulation of gaming are mutual.

The proposed classification standards contain restrictions and limitations that are inconsistent with statutory terms. In 1998, a federal court in California held that the fact that the electronically enhanced bingo game at issue in the case "was designed to look like a slot machine, the odds involved, the gambling motivators the game was designed to tap into, and psychological analysis of the effect of [the game] … [are not] factors ... relevant to the determination of whether a game is bingo or similar to bingo. In affirming this decision, the Ninth Circuit added, "[a]ll told … the definition of bingo is broader than the government would have us read it. We decline the invitation to impose restrictions on its meaning besides those Congress explicitly set forth in the Statute. Class II bingo under IGRA is not limited to the game we played as children."

In sum, we view the proposed definitional revisions and classification standards as particularly unacceptable both on legal grounds and in terms of the severe economic harm they will produce. It is important also to recognize that as severe as the economic impact is projected to be, the analysis did not factor in the economic impact to our communities or tribal, state, or local governments. Tribal governments are often the largest employers in their regions.

Significant layoffs, decreased spending, and reduced employment, sales, and/or other tax revenues may well produce a massive downward spiral in local and regional economies where tribal gaming operations and tribal governments may be the largest employers. Demand for unemployment compensation, social services, and other assistance will rise.

Tribal governments have already challenged the interpretation of the law upon which these proposed rules are based, and the courts have rejected the government's theories. The proposed classification standards reintroduce issues that have been settled and will likely spur additional litigation. If the NIGC's interpretation should again be rejected by the courts, the decision will come at some point after the harm is done.

Thank you for this opportunity and for your service to Indian Country.

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(Thank You)

John L. Berrey
Chairman
Quapaw Tribal (O-Gah-Pah) Business Committee