

Testimony of the Hon. James R. Gray
Principal Chief
Osage Nation of Oklahoma
Before the U.S. House of Representatives
Committee on Natural Resources
Field Hearing on Oklahoma Tribal Economic Development
February 20, 2008

Mr. Chairman, Distinguished Member of the Committee:

Thank you so much for taking the time to travel to Oklahoma to take testimony in relation to economic development issues in Oklahoma. On behalf of the Osage Nation, I am deeply appreciative of the invitation to appear before you today to testify on these matters of extreme importance to the Osage Nation and all of Indian Country.

As I reflect upon the state of tribal affairs in Oklahoma, I cannot help but be struck by how much progress has been made in the past decade. Institutionally, tribal governments have achieved a level of sophistication impossible to imagine even ten years ago, delivering essential governmental services and administering programs at a level unprecedented in the past century. Economically, we have made enormous progress. Our economic and business growth is fueling an economic resurgence in areas of this state that have suffered from high unemployment, low productivity, and impoverished conditions for generations. We have entered into new relationships with local, state, and county governments, and have found common ground through which to work through many of our old differences.

As with our forebears, the Osage are a forward-looking people grounded in the present; imbued with a deep appreciation for our history; and sustained by the richness of our culture, heritage, and tradition. Recently, we adopted a new Constitution and through it a governmental structure designed to advance our social and economic goals to sustain new generations of Osages. Our endurance as a people is in no small part attributable to the depth of our caring for one another and our commitment to improving the quality of our lives and fostering prosperity both for ourselves and those who now share our beautiful homeland.

At the core of the economic recovery underway within the Osage Nation and throughout Oklahoma Indian Country is Class II gaming. Unlike tribal governments in other parts of the country, we were unable to achieve a tribal-state gaming compact until just three years ago, so we well understand the critical importance of Class II gaming. Oklahoma tribes have played a leadership role in defending Class II gaming technology at great risk and at significant cost. Several were on the front lines of the legal battles that raged for nearly a decade and all of us owe a debt of gratitude to those who had the courage and fortitude to defend our right to the full benefit of the law as set forth in the

Indian Gaming Regulatory Act and we are grateful to the federal courts which vindicated the correctness of our interpretation of the law.

Notwithstanding the favorable ruling of the federal courts, the stability of the current legal regime, the plain language of IGRA, and its own regulatory language, the NIGC has proposed a regulatory package that that will render obsolete and unlawful Class II gaming as it exists today. According to the NIGC's own expert, these regulations will produce a direct negative economic impact ranging from one to more than two **billion** dollars annually depending on whether all or only some of the Class II games on the market today are rendered unlawful. According to information contained in the report, the Commission has pre-determined that about 57% of the games in play today will be unlawful and most experts agree that all would be rendered unlawful if the NIGC's classification and definitional proposals are adopted. Thus, we can only conclude that the direct losses will be at the upper range of the projection. Even more extraordinary, these figures do not include all of the impacts that these losses will produce.

Gaming revenues are to tribal governments what tax revenues are to states: the means to operate; provide essential government functions, services, and programs; and build and maintain physical infrastructure. Once can only imagine the outcry if a federal agency through administrative rulemaking were to adopt rules that would permanently eliminate a major source of state tax revenue. This is precisely what we face and to those of us who continue to rely on Class II gaming for a significant portion of our gaming activities, it would mean massive lay-offs not only of gaming employees, but tribal employees, including police officers, emergency service providers, social workers, health care providers and the list goes on and on.

We are not mollified by claims that the impact is mitigated by the fact that we can retreat to Class III gaming due to the Oklahoma gaming compact. Though pleased that we were able to achieve a compact, we are not prepared to forfeit that which the law accords tribal governments specifically and exclusively. The economic viability of Class II gaming is crucial in maintaining a fair and proper balance in the bargaining position between state and tribal governments and such consideration was very much a factor in the balance Congress struck in crafting IGRA.

Neither do we agree that the proposed classification standards and the proposed revised definitions are needed to "clarify the distinction" between technical aids to Class II games and Class III slot machines and facsimiles. In 2002, following a series of federal court decisions, the NIGC revised its original definitions of "Electro-mechanical Facsimile," "electronic aid," and "games similar to bingo" to comport with the holdings in these decisions. This action provided great clarity as to the permissible scope of Class II gaming and produced the stable legal environment which exists today. In the proposed regulations, the NIGC proposes to revise two of the three 2002 definitions as well as a set of classification standards that, in addition to wreaking economic havoc, will reinstate an environment of legal uncertainty and instability.

At the same time, the NIGC proposes a set of technical standards for Class II gaming technology, and concedes in the preamble to the proposed rule that the differences in Class II and Class III gaming are sufficient to warrant special technical standards for electronically aided Class II games. In the preamble to the classification standards, the NIGC states just the opposite: that the similarities have blurred the distinction and thus the additional requirements and limitations set forth in the classification standards are necessary. A fair question, thus, is what additional measure of clarity is provided by the proposed classification standards? One, Class II games must operate significantly slower than Class III gaming equipment. Two, there will be limits on prize payouts. Three, they will be subject to certain mandatory display on the terminals; plus restrictions on game math and mandatory delays in play. In sum, the distinction is that Class II games will be less lucrative, less competitive, less attractive and less enjoyable to players.

We know that this effect cannot constitute the proper distinction between Class II and Class III gaming because these arguments have already been made, argued before federal courts, and rejected as a matter of law. The courts have expressly stated that the fact that the electronically aided bingo game “was designed to look like a slot machine is not a relevant factor in the classification analysis. They have also rejected as factors the odds involved, the gambling motivators the game was designed to tap into, and psychological analysis of the effect of the game. They have also specifically rejected the government’s arguments that Class II games must be slower and less lucrative than Class III gaming. The 9th Circuit, in affirming a lower court decision stated, “All 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.”

Class II gaming has evolved and our bingo patrons are able to compete against one another on electronic terminals housed in cabinets thanks to modern computer technology. The video and audio features enhance the fun and enjoyment of our players, but the game is still bingo as the game is defined in IGRA. The fact that Congress was alert to the potential for technological innovation in Class II gaming is undeniable. In fact, the Senate report provides a clear expression of Congress’ intent. It states, “The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility to utilize games such as bingo and lotto for tribal economic development.” S. Rep. No. 100-446, at 9 (1988)

I would emphasize that it is not our desire to be at odds with the NIGC. We recognize the importance of the NIGC’s role and the importance of a strong regulatory framework. We have great respect for Chairman Hogen, Commissioner Des Rosier, and the NIGC staff and nothing in our testimony is intended to disparage the Commission. At the same time, we cannot quietly acquiesce to regulations that will destroy Class II gaming and render it obsolete. We are entitled to the full benefit of the law and, no

matter how well-intended, a regulatory agency does not have the authority to re-write laws enacted by the Congress nor ignore case law directly on point.

Finally, we are concerned that the NIGC has not fully considered the difficulty facing tribal regulators in implementing so many regulations at one time. By proposing five new sets of regulations at essentially the same time, the NIGC, perhaps inadvertently, has increased the burden on tribal gaming regulatory agencies and made it extremely difficult to achieve compliance in the timeframe provided. The Osage Nation did not repeal or lower the Nation's internal control standards after the Colorado River decision. We do not need a mandatory federal regulation to recognize the need for quality internal control standards. We well understand the importance of such standards in protecting our revenues.

We deeply appreciate the Committee's interest in these matters and hope that you find the Nation's testimony enlightening. Thank you, again, for this opportunity to bring these critical matters to your attention.