**S. 399 - The Indian Gaming Regulatory Improvement Act of 1999**
**Testimony before the Senate Committee on Indian Affairs**

**Richard G. Hill, Chairman**
**National Indian Gaming Association**
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Chairman Campbell, Vice-Chairman Inouye, Members of the Senate Committee on Indian Affairs, I am Rick Hill, Chairman of the National Indian Gaming Association (NIGA). On behalf of the member Indian Nations of NIGA, I humbly thank you for inviting me to testify today on this important proposed legislation.

The National Indian Gaming Association (NIGA) is a non-profit organization established in 1985 by Indian Nations engaged in governmental gaming. NIGA membership is composed of 168 sovereign Indian Nations and 99 non-voting Associate (Corporate) members representing tribes, organizations and businesses engaged in Tribal gaming enterprises throughout the United States. NIGA was formed by Tribes to protect their sovereign governmental rights and to support their gaming and economic interests in Congress and elsewhere.

We are here today to discuss S. 399, the Indian Gaming Regulatory Improvement Act of 1999, a bill introduced by Senator Campbell. The bill is co-sponsored by Senator Inouye.

First, however, I would like to take this opportunity to thank Senators Campbell and Inouye and other members of the Committee for your continued courage and leadership in Indian affairs, and on the Indian Affairs Committee. Let me say to both the Chairman and Vice-Chairman, Indian Country is very much aware of the very difficult work you and this Committee have engaged in on behalf of Indian Nations.

Indian Country is particularly gratified that the leadership of this Committee has consistently been committed to working together, with all sides, to achieve solutions to the problems in Indian gaming. I pledge my continued personal support, the support of NIGA, as well as that of the NIGA-NCAI Task Force and Indian Country, to work together in the future with the leadership of this Committee for workable solutions to the serious challenges that continue to face Indian Country in the area of gaming.

**History of S.399**

Indian Country is aware that S. 399 is substantially similar to S. 1870, a bill introduced in the 105th Congress. The proposed mark-up changes to S. 1870, which occurred late in the 105th Congress, were never fully reviewed and considered by Indian Nations. We note for the record that the Senate Committee on Indian Affairs held no hearings during the 105th Congress to consider the changes from the original draft to the proposed markup version of S. 1870. Though this is a different Congress, we believe it is very appropriate that this similar proposed legislation, S. 399, now be the subject of a Senate Indian Affairs Committee hearing and that Indian Nations be offered the opportunity to comment.

Last year in the 105th Congress, the position of Indian Country, the NIGA/NCAI Task Force and NIGA on S. 1870 was to not oppose but, also, to not support this legislation. Instead, Indian Country indicated its willingness to work with the Senate Committee on Indian Affairs to craft a comprehensive solution to all the problems which exist in Indian gaming, not just the perceived regulatory problem.

As we will elaborate on later, Indian Country has consistently not been able to support legislation that does not contain a fix for the problem created by the U.S. Supreme Court in the *Seminole* case. Indian Country has made Congress well aware of this position. There has historically been no change in this position and there is no change today.

**S. 399: General Comments**

We make several general comments regarding concerns in with S. 399. The comments contained below are intended to be constructive and informative. In addition, NIGA and the NIGA/NCAI Task Force indicate their willingness to continue working with the Committee to further refine S. 399 and bring it to a level where it may be acceptable to all parties.

**1) Need for an Alternative Compacting Procedure**

Most importantly, Indian Country is concerned that no Alternative Compacting Procedure is included in S. 399. Massachusetts, Oklahoma, Nebraska, Michigan, Florida, California, Alabama and Texas are among the states that continue to ignore Federal law and refuse to negotiate in good faith with Indian Nations for Class III gaming compacts. New Mexico, Wisconsin, Montana, South Dakota, and Washington are among the states that have used or are using the *Seminole* hole in the Indian Gaming Regulatory Act to impose unreasonable demands on Indian Nations. Congress did not pass IGRA with the intent that several states would ignore Federal law and continue to abuse the process.

Unfortunately, we continue to have state Governors and legislatures insisting on as much as 16% of Indian gaming revenue as the price of a compact without much apparent concern to the Congress. This is absolutely wrong. Without a *Seminole* fix, states will continue to make unconscionable demands for the limited revenue generated from tribal

governmental gaming. Indian Nations are concerned that in spite of our limited revenue resources, some state governments continue to pursue these revenue enhancements voluntary payments, exclusivity payments, whatever the term may be. But this method of overreaching cannot possibly be consistent with IGRA's goal of promoting the TRIBES' economic welfare as expressed most appropriately by Congress.

The treatment of Indian Nations has been among the most appalling chapters of American history. The treatment of Indian Nations under IGRA is a continued sad and embarrassing aspect of the history of America's treatment of Indian Nations. I should not have to remind this Committee of the following passage which appeared in the President's Advisory Board on Race, One American in the 21st Century: Forging a New Future (1998):

> American Indians and Alaska Natives history is unique, their relationship with our state and federal governments is unique, and their current problems are unique. While not large in numbers, their situation tugs at the heart. I confess to being embarrassed this past year at my lack of knowledge of their overall situation, embarrassed because I actually grew up and worked much of my life in geographic areas populated by Indian tribes, and I was oblivious to all but the common stereotypes. I suspect that most Americans are as equally oblivious, and believe a focused "education" initiative [for] the American public is in order.
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> On virtually every indicator of social or economic progress, the indigenous people of this nation continue to suffer disproportionately in relation to any other group. They have the lowest family incomes, the lowest percentage of people ages 25-34 that receive a college degree, the highest unemployment rates, the highest percentage of people living below the poverty level, the highest accidental death rate, and the highest suicide rate.

Where is the shame among those states and Governors who fight Indian Nations over gaming because they see Indian gaming as competition to state tax and lottery dollars, while Indian Nation's view gaming as a fundamental means for survival? Where is the shame among those states and Governors who never took the opportunity to help Indian Nations before gaming and now claim their proximity to Indian Nations gives them basis to seek to impose their laws and policies on Indian Nations? Does the quest for dollars make inhumanity, injustice, and racism accepted public policy, so long as it is a state that makes the request?

The economic health of Indian Nations has not been completely restored by the limited success of gaming; however, gaming is the most successful Native American economic development effort on Indian reservations in the history of the United States. For the first time ever, many Indian Nations have a reason for economic hope. At the same time, many other Indian Nations are being denied a similar opportunity to pursue the American dream because states continue to ignore the legislative intent and the will of Congress by breaking Federal law and refusing to negotiate in good faith.

Indian Nations, the NIGA-NCAI Task Force on Tribal Gaming, NCAI and NIGA have been consistent in our position that legislation must include alternative compacting procedures or it will not be supported. Indeed, legislation without alternative compacting procedures, may be vigorously opposed by Indian Nations. We cannot leave Indian Nations in the affected states without the economic gaming opportunity, and without the hope that many Indian Nations have been fortunate to achieve. Furthermore, we cannot leave those Indian Nations with fixed-term compacts without a fair means to renegotiate them.

We respectfully request that Congress do what is right and fair, and that Congress follow *Cabazon* and IGRA, and include an alternative compacting procedure in S. 399 that is fair to both state governments AND Indian Nations.

We are informed that the Committee is considering a stand-alone bill that addresses alternative compacting procedures. A stand-alone bill would provide an opportunity for Congress to examine this specific issue. In the haste to support or defend other alternative compacting proposals (most prominently Secretarial Procedures), Congress has not examined this issue through the Committee process. The appropriate legislative process has been subverted.

Alternative compacting procedures, whatever form it may take, is an issue that must be examined closely, utilizing the appropriate and open Committee hearing process. This is also an issue that must be addressed in a timely and comprehensive manner. And, we believe that an open examination of the issue, within the appropriate Congressional process, is one that Indian Nations would support.

I state for the record, NIGA would be first in line to support a bill that includes alternative compacting procedures. However, as noted above, the idea of a prospective stand-alone bill does not decrease the necessity for alternative compacting procedures in S. 399, or any comprehensive Committee bill regarding Indian gaming.

**2) Indian Country is already successfully regulating Indian gaming.**

The primary focus of S. 399 is the development of Federal minimum internal control standards for Indian gaming. Many Indian Nations express concern that Federal standards are being contemplated. Indian Nations are already successfully regulating Indian gaming. Some Indian Nations spend several million dollars each year just to regulate a single facility.

To most Indian Nations, Federal standards do not mean better regulation. To most Indian Nations, which already have adequate regulatory systems in place, Federal standards mean increased regulatory costs, increased Federal compliance work and increased Tribal bureaucracy to regulate a gaming facility. It means paying twice, for the same regulatory activity; or paying a third time for the same work to be performed by the Indian Nation, the state government, and, now, the National Indian Gaming Commission (NIGC). Most importantly it means less dollars available to our tribes and tribal members to purchase the necessities of life - - food, housing, health care and education.

All Indian Nations already comply with IGRA regulatory requirements and these requirements are regularly reviewed by the NIGC. NIGA, through the NIGA MICS Task Force, developed standards for Indian Nations. These standards have been in place for two years. S. 399 may be addressing a problem that has already resolved itself due to the development of the industry.

The primary problem with Indian gaming regulation, today, is not Indian gaming regulation. It is those special interests which attack Indian gaming by making false claims that "Indian gaming is unregulated," and then seeking to reap the benefits of this misinformation and prey upon public fears and ignorance. State representatives have been the most guilty in spreading this fallacy. Whether to secure a better compact or to limit Indian gaming, claims of unregulated Indian gaming are made as if they were fact with no analysis, no context, and no substantiation. Such statements buy into stereotypes of Indians being incapable of regulating gaming, a belief widely held especially by nonIndian elected officials. Indian gaming and Indian Nations cannot possibly be capable of regulating themselves and therefore the Federal government must intercede.

Indian gaming is the most regulated gaming in the United States. For example, no Federal Commission oversees commercial gaming such as in Nevada or Atlantic City. No Federal Commission oversees riverboat gaming. And, most prominently, no Federal Commission oversees lotteries. Just as importantly, there are no Federal standards for commercial gaming, riverboat gaming or lotteries. (Although the need for Federal oversight may be much greater in those areas.)

**3) Federal regulations will deteriorate compacts and the compact process.**

Perhaps the most intrinsically damaging aspect of Federal standards is the potential for harming the compact process, and existing compacts. Tribal/state Compacts are difficult to achieve in the best of circumstances. Federal standards place the Federal government at the negotiating table as a Third party. The Federal government will now become responsible for a portion of the compact.

Compact negotiations will become hindered by the need to address Federal concerns and to answer the many questions created by the new Federal presence. Are the Federal standards being met? Who will decide? Is the state standard adequate? Is the Tribal standard adequate? At what point should the Federal government intercede? During Negotiations? During compact review? Can the Federal government invalidate a compact agreed on by the Indian Nation and state due to regulatory issues? What appeal avenues are available?

Federal standards raise many unanswered questions. The answers are not contained in the recently published NIGC standards. Many of the answers will have to be developed over time. An entire new subjective area of Federal decision-making will come into play, affecting the lives of Indian people and the livelihoods of Indian Nations. Indian Nations are very concerned about the impact and change Federal standards will have on Class III gaming compact negotiations.

**4) The NIGC has already achieved a proper role in Indian gaming regulation.**

The NIGC should not and cannot be the primary regulator in Indian gaming. Due to proximity, jurisdiction and other issues, Indian Nations must be the primary regulators of Indian gaming. As we have been told many times, the best decisions are those made locally.

While it can not be the primary regulator, the NIGC has, in its decade of existence, developed an oversight role in Indian gaming in which it plays a substantial role in the areas which are most appropriate, and a lesser role in areas where it cannot and need not have involvement. The NIGC has developed a flexibility to help the Indian Nations that need help the most and provide a level of freedom to Indian Nations which are obviously capable of conducting many regulatory activities themselves. This is right and proper.

Federal standards place the NIGC in an entirely different role. The NIGC becomes "big brother" and not having authority to distinguish among capable and less capable Indian Nations.

**5) The increase of the NIGC funding level means NIGC improvement.**

Indian Nations agree the previous NIGC funding levels were too low. Recent changes to the NIGC funding authority mean the NIGC will have their funding greatly increased.

Several claims have been made that the NIGC was not adequately completing its duties. With increased funding, the NIGC has the opportunity to address this criticism and address areas where increased funding is needed.

In fact the NIGC should be allowed the time to absorb these increased resources and a period of time for reassessment, reflection and measurement so that any calls for more resources can be based upon an informed process.

The NIGC and the current regulatory system may, in fact, be functional and adequate with the additional funding. Indian Nations believe they are.

**6) The NIGC has promulgated minimum internal control standards.**

The Indian Gaming Regulatory Act does not provide clear authority for the NIGC to promulgate minimum internal control standards, particularly for Class III gaming. We expect the NIGC standards will in all probability be challenged by an Indian Nation or Nations.

Indian Nations would appreciate the counsel of the Senate Committee on Indian Affairs regarding the concern that the NIGC does not currently have authority to promulgate those regulatory standards.

Most Indian Nations are currently expending funds to meet the NIGC regulations of questionable authority. If the NIGC does not, in fact, have the authority to promulgate standards, these funds are better spent elsewhere. Passage of after-the-fact legislation authorizing NIGC standards is perhaps not the most ideal way to proceed in developing Indian gaming regulation.

**Specific Comments**

We believe this bill is reflective of a dedicated effort to address perceived problems in Indian gaming. We thank Senator Campbell and the Indian Affairs Committee staff for their hard work and good efforts.

Below are specific comments with regard to S. 399.

Section #2. Findings. We note the presence of new findings, in particular (7), (8) and (9). The reference to the U.S. Constitution and Indian Commerce Clause adds to the basis and understanding of the purposes of IGRA and S. 399.

Section #3. Purposes. We note the references to the inherent sovereignty of Indian Nations and the *Cabazon* Case. We believe this may serve to assist several Courts and public policy makers which have made incorrect decisions, not recognizing IGRA as codifying *Cabazon.*

Section #4. Definitions. (1) Applicant. This is a new definition. We are somewhat concerned that there is no grandfather clause or other consideration of existing service clause under this provision. Although we agree each new license would have to comply with new standards, some consideration should be provided to renewal applicants to avoid unnecessary interruption of business activity.

Section #4. Definitions. (8) Compact. This definition should also include procedures issued by the Secretary; or, Johnson Act provisions may not be exempted.

Section #4. Definitions. (12) Management Contract. This definition is overly broad. Any contract for gaming may be considered to fall under this provision, including employee managers, hired by the Indian Nation. The intent is to increase the professional scrutiny of outside management contracts and non-Tribal managers, not to make it increasingly difficult for the Indian Nation to hire managers. Tribal management is already reviewed and checked under key employee requirements. "Outside" or "non-Tribal" contracts (or other similar language identifying a non-Tribal employee) should be specified.

Section #4. Definitions. (13) Management Contractor. See above. "Outside" or "nonTribal" contracts (or other similar language identifying a non-Tribal employee) should be specified.

Section #4. Definitions. (14) Net Revenues. (B). Management fees are considered Net Revenues and excluded from operating expenses. There is no reasonable basis to do this. The cost of management is an operating expense. This determination means the amount reported as revenue for Federal purposes is significantly higher than what is actually realized by the Indian Nation. If

the purpose for this is to discourage management contracts, there are other means to do so; such as limiting the length and decreasing the percentage of management contracts.

Section #4. Definitions. (14) Net Revenues. (B). The allowance for amortization of capital is long overdue. This is a necessary addition.

Section #5. NIGC. Adding "expertise in Indian affairs or policy" is generally an improvement. However, we urge that this requirement should be a requirement for all Commissioners, not just the prospective Indian Commissioners.

Section #1 1. Rulemaking. This provision should be clarified with respect to the January 4, 1999 NIGC MICS. Until this clarification is made, the authority of those NIGC MICS remains in question. If the intent of S. 399 is that the NIGC start all over again, the 180 days will likely be appropriate. If the intent of S. 399 is to authorize the January 4 NIGC MICS, there are several considerations Congress must make. (In addition to the comments made above about the potential for interference with compact negotiations) Several Indian Nations have commented that the NIGC MICS are overly comprehensive. They are not *minimum* standards, they are standards. This is not the intent of S. 399. The NIGC may very well have exceeded the authority of S. 399 in their January 4 MICS. As commented above, the NIGC cannot be, nor should it be, the primary regulating authority. There must be a process in place for appeal and removal of the January 4 MICS which exceed the authority granted by S. 399.

Section #1 1. Rulemaking. Factors for Consideration. In general, this is a good section. In terms of priority and process, we comment the item listed number (3), dealing with consideration of the sovereign rights of Indian Nations, should be the first consideration.

Section #1 1. Rulemaking. In regard to a licensing program for vendors, we realize this is an effort to provide the most innocuous of all the provisions in all the Indian gaming bills. However, this provision shifts the decision-making from Congress to the NIGC. The NIGC can then make this as odious as it chooses. Vendors, if they are eventually subject to Federal regulation, deserve consideration, and the right to be heard, by Congress *hefore* the fact. So that all parties can arrive at an informed solution.

There is a basis to consider licensing gaming equipment and supply vendors beyond a certain dollar amount. There is less basis to require licensing non-gaming service workers such as the plumber, the bus company, the cook and the custodian, who would also be considered vendors. The movement toward licensing vendors must be cautious. Many vendors, with smaller contracts, would rather not serve Indian gaming facilities than go through a time consuming and costly licensing process. We respectfully request this provision be removed and/or considered as a separate proposal so that vendors may comment.

Section #12. Tribal Gaming Ordinances. The increase of Contracts for Services Subject to Audit increase to $ 1 00,000 is reasonable.

Section #12. Tribal Gaming Ordinances. The requirement of a separate license for each place, facility or location is generally good. Temporary licenses for fairs, pow-wows and other gatherings should be permitted. These are best distinguished by other factors than place, facility or location. This consideration should be included in S. 399.

Section #12. Tribal Gaming Ordinances. The Section on Self-regulation must also be distinguished and/or coordinated with the NIGC's Self-regulation regulations. Until this clarification is made, the authority of those NIGC Self-regulation regulations remains in question. If the intent of S. 399 is that the NIGC start all over again, the 180 days will likely be appropriate. If the intent of S. 399 is to authorize the NIGC Self-regulation regulations, there are several considerations Congress must make. The NIGC may have exceeded the authority of S. 399 in their Self-regulation regulations. There must be a process in place for appeal and removal of the Self-regulation regulations which exceed the authority granted by S. 399.

Section #1 2. Tribal Gaming Ordinances. The requirement that all fees and assessments be paid prior to self-regulation status is good. The provision should also consider special circumstances, such as an Indian Nation on a payment schedule or an Indian Nation proceeding through an appeal process concerning fees.

Section 18. Commission Funding. Removing the floor on rate of fees will eliminate accounting problems for the NIGC. This is a needed change to IGRA.

Section 18. Commission Funding. Indian Country and NIGA have yet to see a coherent plan from the NIGC documenting an increased need, the level of need, a plan for growth or any other basis for an increase in funding authority to $8 million. Indian Country recognizes that a need for increased funding does exist. We just want to know, and we deserve to know, that our money is being spent in the best possible manner.

As evidenced by the Chairman's own bill S. 612, Indian Country would appreciate an inventory of the current resources and needs of the NIGC so that an informed decision could be made.

Indian Nations were promised when IGRA was enacted that the cost of the NIGC would be shared by the Federal government. Last year, Congress broke this promise and failed to appropriate any funding for the NIGC. This is not just one more broken promise to Indian Nations. It is unreasonable for Indian Nations to pay the entire cost of a Federal regulatory agency, which not only does not answer to Indian Nations, but fails to come up with a plan to explain why they need even more funding from Indian Nations. At the same time, in an era of unprecedented budget surplus, the Federal government continues to pursue spending policies as detailed by a March 20, 1998 Senate Budget Committee report, which and I quote is as follows:

> The data show that Indian-related spending, corrected for inflation, has been going down in almost all areas ...

> When one looks not only at overall Indian spending but also at its major components - BIA, IHS, Office of Indian Education in the Education Department, Indian Housing Development program in HUD, ANA and INAP - one sees that, in constant dollars, all major spending items except IHS have declined during the period FY 1975 - 1999. Moreover, a comparison in constant dollars of overall Indian budget items in the full federal budget, on the other, indicates that most Indian program spending areas have lagged behind their equivalent federal spending areas.

Indian Nations are not pleased with this situation and request the Federal promise of funding for the NIGC be restored.

Section 18. Commission Funding. Mississippi Band of Choctaw. We note the phase out on the prohibition of NIGC assessing fees against the Mississippi Choctaw. We support the Mississippi Choctaw comments regarding this provision.

In the previous section on Self-regulatory status, a provision for decreased fees was available to Indian Nations who met the criteria. The Mississippi Choctaw Selfregulation Provision, contained in a previous appropriations bill, caused NIGC attention to be drawn to self-regulation for the first time in the history of the Act. This attention to a legislative mandate was long overdue. If an Indian Nation meets all the standards of self-regulation, that Indian Nation should be assessed fewer fees given that Federal oversight will not be as necessary.

Section 18. Commission Funding. Commission Authorization. We are very pleased to see that fees must be "reasonably related to the costs of services." We hope Congress will be diligent in its oversight of the NIGC to ensure this provision is not ignored and forgotten as historically typified by the Self-regulatory status.

S. 399 might consider a separate NIGC fee schedule for "(i) the extent of regulation of the gaming activity by a State or Tribe (or both.)"

Section 18. Commission Funding. Trust Fund. We understand the Trust Fund provision is intended to preserve all fees collected by the NIGC for NIGC use. As is Congress, Indian Nations are cautious about Trust Funds established by the Federal Government. It must be safe and documentable. This is a new way of handling NIGC accounts. Indian Country has not fully explored all ramifications of a NIGC Trust Fund. We request a meeting in the future to explore all possibilities and potential pitfalls of a NIGC Trust Fund.

We request that interest earned by the Trust fund not be considered a NIGC bonus or excess. Interest should be used by the NIGC to lower the Fee assessments. We request S399 express this sentiment.

Section 18. Commission Funding. Investments. This is a new way of handling NIGC accounts. Indian Country has not fully explored all ramifications of a NIGC Investment Fund. We request a meeting in the future to explore all possibilities and potential pitfalls of a NIGC Investment Fund.

**Political Concerns**

In closing, we wish, again to address the unfortunate political aspect which has often driven the consideration of increased Federal regulation of Indian gaming.

There is a delicate balance which needs to be struck. Indian Country has never opposed Federal minimum control standards. Indian Nations do not believe though that increased Federal regulatory authority is necessary. After ten years of IGRA and NIGC, it is documentable that Indian Nations regulate Indian gaming effectively, adequately and sufficiently.

Increased Federal regulation proposals, such as the NIGC MICS and S. 399 are not opposed by Indian Nations because Indian Nations are very much aware that they serve as protection against false claims that Indian gaming is unregulated.

We ask, however, how much Federal oversight, intervention and regulation is too much? It is all a matter of degree and at some point, Indian Nations will draw a line. We do not draw that line today.

We thank Senators Campbell and Inouye, and all the co-sponsors and supporters of S. 399. Indian Nations, the NIGA/NCAI Task Force, NCAI and NIGA are very much aware of their honest concern for Indian Nations and their efforts to guard and protect Indian gaming through S. 399.

However, it is increasingly difficult to support increased Federal regulatory authority when Indian Nations still suffer from the *Seminole* decision and the lack of a remedy in the form of alternative compact procedures.

Indian Nations ask, if S. 399 passes, what more motivation will Congress have to revisit needed changes to IGRA? Is this the last opportunity for a *Seminole* remedy to be passed by Congress? In effect I ask the committee, in all honesty, will the train have left the station?

The many injustices caused by *Seminole* have not moved Congress to action. How very sad and unfortunate. As a result, Indian Nations have had to spend millions of dollars on ballot initiatives, Court cases in every Federal jurisdiction and endless unproductive meetings with state officials. This is money better spent on, and intended for, Indian Nations and Indian people.

If Congress is only moved by increased regulation, it is only fair and just to provide, along with that solace, the restoration of the intent of IGRA that all Indian Nations have an example of an opportunity to develop gaming and perhaps secure a better future for themselves and their children if they so choose. Afterall, isn't that the American dream?

Thank you for your kind consideration and I am available for questions.