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**Written Statement on the
National Indian Gaming Commission**

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Good morning. We thank Senator Dorgan and the Committee for this opportunity to appear before you today to discuss the role of the National Indian Gaming Commission (NIGC) in effective and appropriate regulation of Indian gaming.

We co-direct the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota, which provides legal and policy assistance related to tribal gaming enterprises to all interested governments and organizations, assists tribes with gaming enterprises in pursuing reservation economic development and building strong tribal governments, and contributes to the scholarly and practical research and literature in the area of tribal gaming. Our testimony today is informed by our research and scholarship in the area of Indian gaming over the past twelve years.

In the last two decades, the tribal gaming industry has seen rapid expansion under the regulatory framework of the Indian Gaming Regulatory Act of 1988 (IGRA). Some 400 tribal gaming establishments in as many as 30 states are operated by 230 tribes that have decided to pursue gaming to create jobs, facilitate economic development, and provide public services to their members. The Indian gaming industry generated \$25 billion in 2006. As a peculiar intersection of federal Indian law and gambling law, Indian gaming is a particularly complicated and highly specialized topic, giving rise to numerous legal questions fraught with political and policy implications. A regulatory official must respond to a phenomenal array of such questions, from concepts related to abstract theoretical principles or preconstitutional history to those with

highly technical answers grounded in the interpretation of current federal law and regulations. Given the growth of the industry and the myriad and recurring legal and political issues concerning Indian gaming, it perhaps should come as no surprise that many, including members of Congress, see Indian gaming as meriting vigorous federal oversight.

The congressional goals reflected in IGRA and its legislative history contemplated both federal Indian law and policy and Congress's expectations for the tribal gaming industry. Although federal Indian policy may not have significantly changed since 1988, the Indian gaming industry certainly has. The predominant view, at least of non-tribal policymakers and the general public, is that the rapid growth of the industry has created significant problems that should be solved through more stringent regulation. Congress's goal in providing sufficient regulation of tribal gaming to ensure legality and protect the financial interests of gaming tribes remains critically important. At the same time, we believe the success of the industry has created opportunities to achieve two additional goals of at least equal importance in the long term. Together, the three goals of sound regulation, tribal institution building, and improving tribal-state relations, each of which is based on Congress's original intent in enacting IGRA, should serve as lodestars for Congress's policymaking for Indian gaming. See Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396 (2006).

Today we have been asked to provide our opinions related to Congress's legislative oversight of the NIGC, the independent federal regulatory agency charged with regulating Indian gaming. Indian gaming presents complexities unlike most other industries subject to federal regulation. We believe that the NIGC has been largely successful in its efforts to work with tribes in regulating a complex and changing industry. The members of this Committee undoubtedly are familiar with the NIGC's authority and many of the issues swirling around its implementation and enforcement of IGRA and federal Indian law and policy. As the NIGC itself has acknowledged, there is a strong perception among tribes that the NIGC does not adequately consult with tribal leaders regarding proposed regulations, a criticism raised repeatedly during the NIGC's protracted process of issuing proposed regulations related to Class II gaming. Recently, the NIGC requested assistance from the National Indian Gaming Association (NIGA) in developing and implementing procedures and practices for government-to-government consultation with tribes.

We welcome this opportunity to contribute our views on how best to ensure appropriate congressional oversight and efficient and accountable governance through the NIGC's meaningful consultation and cooperation with tribal governments. In this statement, we focus on three issues related to the NIGC's role that we believe may be helpful to the Committee: communication and consultation policies and practices, accountability, and agency capture.

I. Scope of NIGC Powers

In IGRA, Congress specified several goals related to the overarching tenets of federal Indian policy. Congress intended IGRA to codify tribes' right to conduct gaming on Indian lands as a means of promoting tribal economic development, self-sufficiency, and strong tribal

governments, while providing sufficient regulation to ensure legality and to protect the financial interest of gaming tribes. Congress also enacted IGRA to establish an independent federal regulatory authority in the form of the NIGC.

IGRA situates the NIGC within the U.S. Department of the Interior. At least two of the NIGC's three members must be enrolled members of a tribe. IGRA also requires the Commission to submit a report, with minority views, to Congress every two years. The NIGC's mission is "to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences; to ensure that Indian tribes are the primary beneficiaries of gaming revenue; and to assure that gaming is conducted fairly and honestly by both operators and players." IGRA assigns some powers to the NIGC Chair, and others to the full Commission. The powers of the Chair include authority to issue temporary closure orders, to levy and collect civil fines, to approve tribal ordinances and resolutions, and to approve management contracts. The Chair's decisions in these areas may be appealed to the full Commission. The Commission also may delegate additional authority to the Chair. The Commission's powers include authority to order permanent closure, to monitor and inspect Class II gaming, to conduct background investigations, to issue self-regulation certificates, and to issue subpoenas, order testimony, take depositions, and hold hearings. The NIGC also exercises broad authority to "promulgate such regulations and guidelines as it deems appropriate to implement [IGRA's] provisions." 25 U.S.C. § 2706(b)(10). In addition to promulgating formal regulations, the NIGC also issues opinion letters and other informal interpretations of IGRA.

In 2000, President Clinton issued Executive Order 13175, titled "Consultation and Coordination with Indian Tribal Governments." The Executive Order sets forth three "fundamental principles" to guide regulations, legislative proposals or recommendations, and other policy statements or actions that have "substantial direct effects on one or more Indian tribes":

- The unique nature of the tribal-federal relationship
- Federal law's recognition of tribal sovereignty
- Federal Indian policy recognizing tribal self-government and supporting tribal sovereignty and self-determination

The Executive Order further specifies "policymaking criteria," directing federal agencies to

- Respect tribal self-government and sovereignty
- Grant tribal governments the maximum administrative discretion possible
- Encourage tribes to develop their own policies to achieve federal program objectives, defer to tribes to establish standards, and consult with tribes as to the need for federal standards

In a 2004 memorandum, President Bush directed federal agencies to adhere to the principles reflected in the Executive Order and to "work with tribal governments in a manner that cultivates mutual respect and fosters greater understanding." Accordingly, the NIGC adopted a Government-to-Government Tribal Consultation Policy. In addition to incorporating the fundamental principles set out in the Executive Order, the NIGC policy references IGRA's

recognition of tribal sovereignty, its policy goals, and its regulatory framework, including the primary authority and responsibility of tribes over Indian gaming. The policy provides that

to the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with Federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines, or preparing legislative proposals or comments for Congress, which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA.

The NIGC policy also sets forth “policymaking principles and guidelines,” including:

- Reasonable consideration of variations among tribes, gaming operations, and tribal-state compacts
- Qualified deference to tribal regulations and standards for Indian gaming
- Provision of technical assistance to tribes in complying with federal law and in implementing their own policies and standards
- Restraint from enacting policies that will impose substantial direct compliance or enforcement costs on tribes, if the policies are not required by IGRA or necessary to further IGRA’s goals
- Granting tribes the maximum administrative and regulatory discretion possible in operating and regulating Indian gaming, and elimination of unnecessary and redundant federal regulation “in order to conserve limited tribal resources, preserve the prerogatives and sovereign authority of tribes over their own internal affairs, and promote strong tribal government and self-determination”

The policy’s procedures and guidelines have as the primary focus consultation and collaboration with individual tribes. The consultation procedures promise “early notification” to tribes of proposed policies, “adequate opportunity” for discussion, and “meaningful input regarding the legality, need, nature, form, content, scope and application of such proposed regulations, including opportunity to recommend other alternative solutions or approaches.” As part of the consultation process and before issuing a final decision, the NIGC will “answer tribal questions and carefully consider all tribal positions and recommendations.” The NIGC also will “consult with affected tribes to select and establish fairly representative intertribal work groups, task forces, or advisory committees” in developing administrative regulations or legislative proposals. Finally, the policy provides that “[t]he NIGC will, to the extent it deems practicable, appropriate, and permitted by law, explore and consider the use of consensual policy making mechanisms, including negotiated rulemaking.”

One of the more pressing issues with which the NIGC has grappled is game classification. If a particular game falls within Class II, then it may be operated by a tribe without a tribal-state compact; if the game falls within Class III, however, legal operation requires a compact. IGRA’s definitions do not offer much in the way of technical guidance. Class II gaming is defined as “bingo (whether or not electronic, computer or other technologic aids are used in connection therewith),” as well as some card games. Class II gaming

specifically excludes house-banked card games and “electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.” Games excluded from Class II fall within Class III, a residual category that includes all other forms of gaming (excepting, of course, Class I’s traditional games). In addition to the statutory definitions, the NIGC promulgated regulations meant to clarify the distinctions between Class II and Class III gaming. The current regulations in large part mimic the statutory language, but also provide “plain English” definitions and additional guidance. The NIGC also issues advisory opinions on whether a specific game is Class II or Class III.

Whether a game falls within the catch-all of Class III or qualifies as a Class II game has significant impact. The legality of Class II games depends only on whether “such gaming” is permitted in the state and the tribe retains exclusive regulatory jurisdiction (with limited federal oversight) over the games. Class III games, on the other hand, are allowed only under the terms of a valid tribal-state compact.

As reflected in IGRA’s legislative history, Congress included the Class II “technologic aid” provision to ensure that tribes “have maximum flexibility to utilize games such as bingo and lotto for tribal economic development.” Tribes’ Class II games should not be limited to “existing game sizes, levels of participation, or current technology,” but should “take advantage of modern methods” of conducting games. See S. Rep. 100-446, 100th Cong. 2d Sess., 1988 U.S.C.C.A.N. 3071. Although Congress’s intent in authorizing Class II technologic aids may have been clear, the line between a Class II technologic aid and a Class III electronic facsimile was not. IGRA did not define either term, and until it amended its regulations in 2002, the NIGC offered little additional guidance. The 2002 amendments provided more detailed definitions, as well as illustrative examples of Class II technologic aids. The 2002 amendments were applied by the federal courts in *United States v. Santee Sioux Tribe*, 324 F.3d 607 (8th Cir. 2003), and *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (10th Cir. 2003), to conclude that the machines at issue in each case fell within Class II.

In both *Santee Sioux Tribe* and *Seneca-Cayuga Tribe*, the U.S. Department of Justice took a position contrary to that of the NIGC, contending that both games at issue were Class III electronic facsimiles or, alternatively, even if Class II technologic aids, the games violated the Johnson Act’s criminal prohibition against gambling devices in Indian country. Because the Johnson Act is a federal criminal statute separate from IGRA and enforced by the Justice Department, the NIGC’s interpretation of the Johnson Act is not entitled to the same deference as its interpretation of IGRA. Though agency officials were not uniform in their reading of the statutes, generally speaking the NIGC and the Justice Department disagreed over the Johnson Act’s applicability to Class II aids. In 2005, the Justice Department sought legislation that would include Class II gambling devices within the scope of the Johnson Act. The Justice Department’s proposal was met with tribal opposition, and failed to find a sponsor in Congress.

In the meantime, though, the NIGC was in the protracted process of issuing new, highly technical regulations governing Class II electronic aids, sometimes called the “bright line” rules. In 2004, the NIGC formed a Class II Game Classifications Standards Advisory Committee, charged with assisting the NIGC in developing definitive classification and technical standards for distinguishing Class II aids from Class III facsimiles. In May 2006, the NIGC published its

first set of proposed regulations. During the public comment period, it collected comments from over 80 tribes, as well as state and local governments, game manufacturers, citizen groups, and others, and conducted multiple hearings. See <http://www.nigc.gov/LawsRegulations/ProposedAmendmentsandRegulations/ClassIIGameClassificationStandardsWithdrawn/tabid/705/Default.aspx>.

The 2006 proposed “bright line” regulations were criticized by tribes on two grounds. First, in requiring slower play, the rules would undermine the Class II market. An economic impact study concerning the 2006 proposed regulations commissioned by the NIGC found the rules would have “a significant negative impact” on Class II gaming revenue, and therefore on the tribes that operate such games. The study concluded that the proposed changes would reduce gaming revenue by \$142.7 million, with an accompanying loss of \$9.6 million in non-gaming revenue and a \$17.4 million reduction in tribal government revenue. Second, the regulations would trigger IGRA’s tribal-state compacting requirement. In drawing a bright line between Class II and Class III games, the proposed regulations would shift some Class II games into the Class III category. Tribes in states that allow Class III gaming would need to convince the state to negotiate a new compact, opening up the process to the whims and vagaries of state politics and the possibility of state-mandated revenue sharing.

Interagency contestation with the Department of Justice and continued criticism from tribes and game manufacturers considerably slowed the NIGC’s promulgation of the new Class II regulations. Following the initial announcement of the 2006 proposed standards, a group of prominent manufacturers formed the Technical Standards Work Group (TSWG) to draft an alternative regulatory scheme to submit to the NIGC. Together with the Technical Standards Tribal Advisory Committee, a group of tribal operators and experts that had been advising the NIGC, the TSWG submitted alternative Technical Standards to the Commission in early 2007. In February 2007, the NIGC formally withdrew the 2006 proposed regulations. The NIGC published its new set of proposed regulations in October 2007, eventually extending the public comment period until March 9, 2008. On February 1, 2008, the NIGC released a second economic impact study, which estimated that under the 2007 proposed regulations tribes could lose up to \$2.8 billion in revenues and face expenses of almost \$350 million in redeveloping Class II machines. Both tribal and industry leaders have complimented Chairman Hogen’s efforts and acknowledged some improvements over the 2006 proposed regulations, but also have expressed frustration and disappointment in both the process and the substance of the 2007 proposed regulations.

II. Concerns Expressed About the NIGC: The Goldilocks Gamut

Indian gaming is a product of the confluence of law and public policy that sanction and regulate the industry at the tribal, state, and federal levels. With so much at stake for so many stakeholders, it is no surprise that the resultant regulatory politics of tribal gaming is complex and controversial. The NIGC is charged with the complex task of monitoring and enforcing IGRA in relation to a host of ever-changing issues. The Commission interfaces with 230 sovereign tribal governments, as many as 30 sovereign state governments, and a powerful industry lobby that increasingly resembles that of the commercial gaming industry—in part because it includes identical players with a global reach, from game manufacturers to the

commercial conglomerates that operate the majority of the casinos in Reno, Atlantic City, and on the Las Vegas Strip, and in part because of the growing clout of tribal advocacy associations like NIGA and its state and regional partners, such as the California Nations Indian Gaming Association (CNIGA).

Despite its broad authority under IGRA and its generally successful efforts to regulate a complex industry, the NIGC variously has been accused of being underfunded, understaffed, and underempowered to regulate tribal gaming, overly solicitous of tribal, state, or industry interests, and overzealous and overreaching in exercising its statutory grant of authority.

In the last 20 years, the NIGC has faced a number of “hot-button” issues across the U.S. with which the agency is involved through direct regulation or advisory opinions or in conjunction with decision making by other federal agencies. These highly controversial, sometimes rapidly developing, and often technically complex issues include:

- Promulgation of rules defining Class II technologic aids and Class III electronic facsimiles, as detailed above
- Gaming on newly acquired lands, including land-into-trust and “Indian land” determinations
- Enforcement actions and closure of gaming operations
- Tribal-state compacting and a “*Seminole Tribe*” fix to address perceived political imbalances between tribal and state governments
- Management contracts and consulting agreements with non-tribal parties
- Tribal use of gaming revenue, including transparency and accountability
- Employment issues, including unionization of tribal casino employees
- Tribal acknowledgment determinations
- Differences of opinion across and within federal agencies
- Calls to amend IGRA and other federal statutes to address the above issues and more

A critical feature unifying the issues the NIGC faces is that they vary by tribe, by state, and even by gaming establishment, creating a tension between the need for uniform industry regulatory standards to effectuate IGRA’s overarching policy goals, and the highly localized and particularized nature of issues that might compel highly tailored and even tribe-specific regulation. Elsewhere we have written in detail about the very different issues faced by tribes across the U.S., and the governmental challenges they create. See, e.g., STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* (2005); Rand & Light, *How Congress Can and Should “Fix” the Indian Gaming Regulatory Act*.

Depending on the issue and the interests involved, concerns expressed about the NIGC’s authority, resources (including funding and personnel), and decisions have run a Goldilocks gamut, ranging from “far too much” to “nowhere near enough.” Rarely is the agency seen as having or exercising “just the right amount” of regulatory authority—although admittedly few agencies are.

We turn to three prominent critiques of NIGC authority that the above issues illustrate, and which may be of the greatest concern to this Committee as we sit before you in today’s

oversight hearing: the NIGC's communication and consultation policies and practices, its accountability to various stakeholders, including Congress and tribal governments, and the possibility of agency capture.

A. Communication and consultation policies and practices

Under the NIGC's own government-to-government consultation policy, the NIGC routinely communicates with tribes through "Dear Tribal Leader" letters, attends tribal gaming association and other trade conferences and meetings, and conducts consultation sessions with individual tribal leaders. It also has convened working groups and advisory committees to assist in policy formulation.

Nevertheless, some tribal leaders and others have criticized the NIGC's consultation process as being pro forma; that is, the letters are sent and the meetings and sessions for the most part occur, but the consultation efforts are too little, too late (for instance, key information is released just before relevant deadlines, or consultation comes only after regulations are fully drafted and formally proposed), or tribal input does not have a significant or substantive impact on the NIGC's decision making. For example, the NIGC's protracted efforts to promulgate Class II "bright line" regulations have been subject to extensive criticism regarding both the process and substance of the NIGC's consultation with affected tribes. Recently, NIGA and a number of tribal leaders have criticized the fact that the NIGC closed the formal notice-and-comment period on the proposed regulations just over a month after releasing an economic impact study it commissioned that estimated the proposed regulations would cost tribes as much as \$2.8 billion in lost revenues.

Succinctly put, the question is whether the NIGC in fact conducts timely and meaningful communication and consultation with the parties it regulates, which include sovereign tribal governments. The answer, though, depends upon the nature of government-to-government consultation—an area where tribes and the federal government may not agree.

B. Accountability

Like all administrative agencies, the NIGC is subject to concerns about accountability, whether to its enabling legislation (and therefore to congressional intent), its own internal policies, or appropriate stakeholders. Previous congressional hearings, including a Senate Indian Affairs Committee oversight hearing at which we testified in April 2005, have aired concerns about the NIGC's resources and capacity to adequately carry out its regulatory authority under IGRA. Despite its formal tribal consultation policy, the NIGC is one of three federal agencies singled out in a recent House bill (H.R. 5608, 110th Congress, 2d Session) meant to ensure an "accountable consultation process" between the agencies and tribal governments, including "meaningful and timely input by tribal officials in the formulating, amending, implementing, or rescinding [of] policies that have tribal implications." The broad and varied range of stakeholders to which the NIGC must at some level answer, including Congress, tribes, states, industry, and the public, further complicates the issue of agency accountability.

The attempt to promulgate Class II regulations illustrates several additional issues related

to accountability. Some have suggested that, given the NIGC's 2002 amendments and subsequent application of the same in the federal courts, the proposed regulations were the result of pressure from the Justice Department and some members of Congress rather than any real need for new standards. From that perspective, the NIGC's accountability to Congress and other federal agencies trumped accountability to tribes. The distinction between a Class II technologic aid and a Class III electronic facsimile is, in many ways, a technical one. Game manufacturers and tribal regulators complained that the proposed standards lacked cognizance of game technology and were too rigid to accommodate innovation, therefore hamstringing the manufacture of games that would allow tribes to maintain and further develop the Class II market through the use of "modern methods" of conducting games. Some tribes have been critical of what they saw as continual NIGC lip service to tribal sovereignty and self-government, while perhaps embodying the stereotype of a federal agency that purports to be "here to help" but in reality simply assumes control. Others pointed out that with an estimated impact of \$1 billion to \$2.8 billion in lost revenues, the proposed regulations would undermine IGRA's goals of tribal economic development, tribal self-sufficiency, and strong tribal governments.

The NIGC frequently must deal with and resolve highly controversial and technically complicated issues in which the varied nature of stakeholders and their interests make it difficult to assess the outcomes. The question here is how best to assess whether the NIGC is "doing its job" while appropriately balancing relevant imperatives.

C. Agency capture

A frequently expressed concern in regulatory administration is the evolution of a capture effect. Agency capture occurs as regulator and industry develop an iterated relationship in which industry views come to govern how regulation occurs. Without sufficient and appropriate legislative oversight, the agency becomes a tool of those it seeks to regulate. The conditions under which this model prevails are found in the relationship between the public and private sectors. The profit motive is best served by a favorable regulatory environment, and agency independence is sacrificed at the altar of private gain. Ultimately, the agency fails to promote the public interest. One need only look at recent headlines concerning American Airlines and the FAA to find evidence of agency capture—and calls for more and better legislative oversight in the future.

In the context of the regulation of Indian gaming by the NIGC, the capture criticism stems from two oft-made assertions: the NIGC is a "toothless tiger," and tribal government gaming commissions are akin to "the fox guarding the henhouse." See, e.g., Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME (Dec. 16, 2002), 48, 59. The charge is that the NIGC is unwilling or lacks the resources to guard against capture by the numerous gaming tribes it regulates or that tribal and industry interests may align in such a way as to exacerbate the risk. For instance, in the context of the development of the proposed Class II "bright line" regulations, both tribes and game manufacturers have vested interests in a competitive and lucrative Class II market. Both groups possess valuable and relevant knowledge and technical expertise that the NIGC has taken into account through what has ended up being a protracted and iterated process of consultation with working groups comprised of tribal officials and game manufacturers.

As we explained to this Committee in our 2005 testimony, our views on agency capture are based on our sense of at least three key differences between the Indian gaming and commercial gambling industries: regulatory structures, policy impetus, and who benefits. At the structural level, capture theory focuses on the capture of an entire agency by the industry. However, in contrast to commercial gaming, we note that tribal gaming operations are subject to extensive tribal, state, and federal regulations. Simply put, there are too many regulatory authorities involved to allow one (or the capture of one) to dominate. The policy impetus behind Indian gaming revolves around the goals stated in IGRA: tribal economic development, self-sufficiency, and self-governance. Tribal gaming commissions have a clear stake in promoting these goals, which are quite different than the profit motivation in the private sector. The vast majority of gaming tribes see Indian gaming as the first viable means of economic development in generations, and tribal regulatory authorities are less likely to lose sight of effective regulation and compliance with policy goals than if they were regulating private industry. These policy motivations relate to the third key difference between the private and public sectors: who benefits. Agency capture subverts a public interest. But Indian gaming directly supports tribal governments and underwrites their ability to provide essential government services—a clear public interest.

Here, then, the question is how to balance appropriate government-to-government tribal consultation and accountability to stakeholders with the risk of agency capture.

III. Recommendations

In exercising oversight of the NIGC and its role in regulating the Indian gaming industry, Congress should be guided by the best available data and analysis. The same definitely is true for the NIGC in exercising its authority as an independent regulatory agency. In our prior work, we have identified three lodestar policy goals for Indian gaming law and policy. The three goals—sound regulation, tribal institution building, and improving tribal-state relations, each of which is based on Congress’s original intent in enacting IGRA—should serve to guide this Committee in its consideration of the issues raised in today’s hearing. See Rand & Light, *How Congress Can and Should “Fix” the Indian Regulatory Act*.

We wish to offer a few preliminary concrete recommendations that may be useful to the Committee in exercising its oversight function.

A. Communication and consultation policies and practices

1. *Compare other agency consultation and communication practices.* We recommend gathering information about how other federal agencies interact with sovereign tribal governments, including assessment of the success of these practices, as measured in large part through the degree to which they align with and serve the articulated goals of federal Indian policy with regard to tribal self-government and self-determination.
2. *Clarify the nature of government-to-government communication and consultation.* As

both Executive Order 13175 and the NIGC's tribal consultation policy acknowledge, tribal sovereignty and the federal government's trust obligation shape tribes' unique status in the American political system. Accordingly, the NIGC's consultation policy should be uniquely geared to tribes' governmental status and relationship with the federal government, both in theory and in practice. The challenge, of course, is ensuring that the promises of both the Executive Order and the NIGC policy are kept in their implementation. Along with willpower and oversight, truly meaningful consultation requires resources, concretely realized in NIGC funding and personnel.

3. *Consider requiring consent-based policymaking in the form of negotiated or hybrid rulemaking.* Further, *government-to-government* consultation with tribes may require more than notice-and-comment periods and consultation sessions in which tribes may be listened to, but which do not provide tribes a direct role in setting priorities or shaping policy outcomes. Government-to-government consultation perhaps should include a defined role for affected tribes in the decision-making process. This may be appropriate, given not only tribes' unique status, but also the fact that unlike state governments, tribes have not delegated authority to the federal government. On a practical level, our point here is that the NIGC's consultation policy promises to "explore and consider the use of consensual policy making mechanisms, including negotiated rulemaking," but the criteria for the NIGC's decision on whether and when to use that process appear to be at the sole discretion of the agency. Clear criteria, along with a mechanism to trigger negotiated or hybrid rulemaking, should be established.

4. *Define and implement meaningful consultation and communication policies and practices.* Perhaps taking a cue from the impetus behind H.B. 5608, Congress's intent and expectations regarding government-to-government consultation in the NIGC's exercise of its statutory authority should be made clear. In addition to the points made above, this should include timeliness of notice and appropriate opportunity for input, guidelines for expanding or adjusting the usual formal notice-and-comment requirements, and guidelines and outcome measures for adherence to the goals of both IGRA and federal Indian policy.

B. Accountability

1. *Further IGRA's goal of tribal economic development.* The NIGC's regulatory role is distinct from that of other federal agencies, such as the BIA or the IHS, that implement or provide programmatic services to tribes and American Indian people. Indian gaming is neither a public entitlement program nor a federal obligation, but an aspect of tribal governmental authority, as Congress recognized in IGRA. One of IGRA's goals is to foster tribal economic development, a point to keep in mind in balancing the NIGC's relevant imperatives created by its varied stakeholders. Elsewhere we have discussed the social and economic impacts of tribal gaming, and we note that these considerations are relevant to both Congress's and the NIGC's decisions. As the economic impact studies connected to the Class II "bright line" rules clearly illustrate, the NIGC's decisions have a very real impact on tribes and tribal members, and the future of tribal communities.

2. *Preserve the NIGC's role in tribal institution building.* The NIGC is in the difficult position of both facilitating and overseeing tribal regulation of an industry that, in the private

sector, traditionally has merited stringent governmental control. The NIGC has a dual role with regard to tribal regulation, as it provides technical assistance to tribes and encourages tribal institution building necessary for effective tribal regulation of gaming enterprises. As the NIGC's consultation policy promises, tribes should be given the maximum administrative and regulatory discretion possible. The NIGC should resort to federal policy or regulation only where required by IGRA or necessary to meet IGRA's policy goals. Thus, accountability measures must take into account the NIGC's effective facilitation of tribal regulation, and not merely its direct regulatory role.

3. *Account for effective gaming regulation.* Another challenge faced by the NIGC is the effective regulation of gambling itself. In enacting IGRA, Congress was well aware of the challenges of gaming regulation, particularly for casino-style gaming. IGRA's regulatory framework, which involves tribal, state, and federal regulation, balances federal standards with the need for regulation tailored to local concerns and needs. In assigning Class II regulation primarily to tribes, and Class III regulation primarily to tribal-state compacts, Congress recognized the need to tailor regulation to specific jurisdictional circumstances. Accountability, then, must not be measured solely by uniformity imposed by the NIGC through federal standards and regulations. Here, too, we emphasize the need for information gathering to build federal expertise in gaming regulation and to tailor general gaming policy to the specific goals and challenges of the Indian gaming industry.

4. *Increase transparency.* The NIGC should be applauded for its efforts to maintain an accessible and informative Web site. As with nearly any government agency, however, more could be done to make information readily available to stakeholders, including Congress, tribes, states, industry, and the public. We note that increased transparency also serves the constituents of the governments charged with tribal gaming regulation at the tribal, state, and federal levels.

C. Agency capture

1. *Ensure sufficient funding and personnel.* Both the NIGC and tribes need sufficient resources to fulfill their obligations under IGRA. The NIGC's current levels of funding and personnel may constrain its ability to engage in meaningful government-to-government consultation with tribes, and also subject the NIGC to criticisms concerning its investigative and enforcement responsibilities as well as to charges of secrecy and behind-the-scenes decision making.

2. *Balance accountable consultation and agency capture.* Perceptions of the risk of agency capture must take into account the goals of IGRA and federal Indian policy, as well as the NIGC's role in facilitating effective tribal regulation. A perceived threat of agency capture must not be allowed to undermine the primacy of tribal regulation under IGRA or the NIGC's responsibility to consult with tribes on a government-to-government basis. Additionally, as the Class II "bright line" regulations illustrate, there is a need for industry and technical expertise to inform the NIGC's decisions. The work groups and advisory committees convened as part of the NIGC's process in promulgating the proposed Class II regulations should serve as a model for instituting a more formal and less ad hoc process. Guidelines and mechanisms concerning the formation of and input by such groups should be developed.

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At the Committee's request, we would be glad to elaborate further on the points made in this written statement or other issues related to the NIGC that the Committee deems pertinent.

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About the Institute

Co-Directors Kathryn R.L. Rand (Law) and Steven Andrew Light (Political Science) founded the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota in 2002 as the first university-affiliated institute in the U.S. dedicated to the study of Indian gaming. The Institute provides legal and policy assistance and analysis to all interested individuals, governments, and organizations, and conducting scholarly and practical research in the area of tribal gaming.

The Institute adopts a unique “team-based” interdisciplinary approach to legal and policy analysis of the complicated and technical issues related to Indian gaming, including regulation and agency authority, policy and socioeconomic impact analysis, tribal-state compacting, Class II vs. Class III gaming, tribal law and sovereignty, federal Indian law, labor relations, state referenda and voter initiatives, the federal acknowledgment process, land-into-trust applications, and “off-reservation” gaming.

About the Co-Directors

Kathryn R.L. Rand (J.D., University of Michigan School of Law; B.A., University of North Dakota) is Floyd B. Sperry Professor of Law and Associate Dean for Academic Affairs and Research at the University of North Dakota School of Law. Steven Andrew Light (Ph.D., Northwestern University; B.A., Yale University) is Associate Professor of Political Science and Public Administration at the University of North Dakota College of Business and Public Administration.

Rand and Light are internationally recognized experts on Indian gaming, with over 30 publications and three books: [*Indian Gaming Law: Cases and Materials*](#) (Carolina Academic Press, 2008), [*Indian Gaming Law and Policy*](#) (Carolina Academic Press, 2006), and [*Indian Gaming and Tribal Sovereignty: The Casino Compromise*](#) (University Press of Kansas, 2005). They have [testified on Indian gaming regulation](#) before the U.S. Senate Committee on Indian Affairs in Washington, D.C., and were featured on C-SPAN’s [Book TV](#). They frequently present their research and perspectives on Indian gaming before diverse audiences, including professional and trade groups, tribal and non-tribal civic associations, academic conferences, and university endowed lectures. Rand and Light have been quoted extensively by media throughout the world, including the [New York Times](#), [Boston Globe](#), [Miami Herald](#), [Sydney \(Australia\)](#)

[Morning Herald](#), [International Herald Tribune](#), [San Diego Union-Tribune](#), and [Bloomberg Media](#). Both are members of the International Masters of Gaming Law, and Rand is on the Editorial Board of the *Gaming Law Review*. Rand and Light write a column, “Indian Gaming Today,” that appears regularly in *Casino Lawyer* magazine, and have written for *Casino Enterprise Management* and *Indian Gaming* magazines. They blog on Indian gaming and the legal, political, and public policy issues raised by the tribal gaming industry at their website, *Indian Gaming Today*, at indiangamingtoday.com.

Selected Publications Related to Indian Gaming

Books

Kathryn R.L. Rand & Steven Andrew Light. 2008. INDIAN GAMING LAW: CASES AND MATERIALS (Durham, NC: Carolina Academic Press)

Kathryn R.L. Rand & Steven Andrew Light. 2006. INDIAN GAMING LAW AND POLICY (Durham, NC: Carolina Academic Press)

Steven Andrew Light & Kathryn R.L. Rand. 2005. INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (Lawrence, KS: University Press of Kansas)

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Steven Andrew Light, Kathryn R.L. Rand, & Alan P. Meister. 2004. *Spreading the Wealth: Indian Gaming and Tribal-State Revenue-Sharing Agreements*. NORTH DAKOTA LAW REVIEW 80(4): 657-79

Steven Andrew Light & Kathryn R.L. Rand. 2004. *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*. NEVADA LAW JOURNAL 4(2): 262-84

Steven Andrew Light. 2004. *The Third Sovereign: Indian Gaming as a Teaching Case in Intergovernmental Relations and Public Administration*. JOURNAL OF PUBLIC AFFAIRS EDUCATION 10(4): 311-27

Steven A. Light & Kathryn R.L. Rand. 2001. *Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin*. GAMING LAW REVIEW 5: 351-63

Kathryn R.L. Rand & Steven A. Light. 2001. *Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota*. GAMING LAW REVIEW 5: 329-40

Kathryn R.L. Rand & Steven A. Light. 1998. *Do "Fish and Chips" Mix? The Politics of Indian Gaming in Wisconsin*. GAMING LAW REVIEW 2: 129-42

Kathryn R.L. Rand and Steven A. Light. 1997. *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*. VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW 4: 381-437

Prior Congressional Testimony

Kathryn R.L. Rand and Steven Andrew Light. *Prepared Statement and Oral Testimony*, Oversight Hearing on the Regulation of Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chair), 109th Congress, 1st Session (April 27, 2005).