July 29, 2003

Honorable Ben Nighthorse Campbell
Chairman
United States Senate Committee on Indian Affairs
Washington, DC 20510-6450

Chairman Campbell:

Thank you for the opportunity to participate in the July 9, 2003 hearings on the Indian Gaming Regulatory Act and for the opportunity to provide a written response to the following questions posed in your July 15, 2003 letter. Below I restate the issue and the question and provide a response.

1. From your testimony, it appears that many of the member tribes in your organization have agreed to the 2001 compacts. You state that, under these compacts, the tribes enjoy "substantial market exclusivity."

    Q. Is this "substantial exclusivity" guaranteed in your compacts?
    R. The term "substantial exclusivity" is not contained in 2001 Compacts but is a term used to describe the guarantee provided by the State in exchange for revenue sharing. The 2001 Tribal-State Compacts contain an agreement by which the tribal governments guaranteed revenue sharing payments to the State in exchange for the State's guarantee that it will not pass, amend or repeal any law or take action that would directly or indirectly attempt to restrict or has the effect of restricting the scope or extent of Indian gaming. Under these terms, the State cannot license or permit the operation of Gaming Machines for any person or entity other than horse racetracks and veterans and fraternal organizations as described by State statute. The State may not license, permit or otherwise allow any non-Indian person or entity to engage in any other form of Class III gaming other than a state-sponsored lottery, pari-mutuel betting on horse racing and bicycle racing, operation of Gaming Machines, and limited fundraising by non-profit organizations.

Q. Can the state legislature increase the number of slot machines that horse racetracks can offer? Has it increased the number since your compacts were negotiated in 2001?
R. As a matter of State law, the State could increase the number of slot machines that horse racetracks can offer. However, it is the tribes' view that any increase in the number operating under State law as of 2001, when the tribes agreed to and the Secretary of Interior approved the Compacts, would require a negotiated settlement. In addition, any action by the State that has a detrimental effect on the tribes' market share would require negotiations. This position is based on: (a) the agreement to make revenue sharing payments to the State in exchange for market exclusivity; (b) the "substantial exclusivity" provisions contained in the Compact, interpreted in accordance with applicable law; (c) the terms of the Secretary's approval of the Compact, and most importantly (d) the principles of comity, good faith, and fair dealing which apply to relations between the State and tribes. The State has not changed the laws on horse racetrack operations that affect competition since 2001. To the credit of the Governor and the legislative leadership, when a proposal to extend track hours of slot operation was introduced in the 2003 legislative session, it was deferred to a future session to allow the matter to be discussed with tribes and amendments to the Compacts to be negotiated.

Q. What are the consequences to the State if your "substantial exclusivity" is lost?
R. If substantial exclusivity is lost, under the terms of the Compact revenue sharing ceases.

2. I noted in your testimony that New Mexico tribes are building $350 million in gaming and hospitality-related development.

Q. When calculating your revenue sharing, are those capital improvements costs deducted before calculating the State's share?
R. No, tribal government capital improvements costs are not deducted before calculating the State's revenue share.

3. As I understand the situation, the New Mexico tribes were forced to pay the 16% revenue share before the State would agree to the 2001 Compacts, even if that amount was illegal under the IGRA.

Q. Did the Department of Interior give you any guidance about the provision, and whether it violated IGRA?
R. The Secretary allowed the 1997 Compacts to go into effect by operation of law without affirmative approval. That action resulted in approval by the Secretary "but only to the extent that Compact is consistent with [IGRA]".

25 U.S.C. §2710(d)(8)(C). In letters to the tribes explaining the basis of this action, the Secretary questioned the legality of the 16% payment under IGRA based on the limited scope of exclusivity provided under the Compacts, particularly in light of the size of the payment, and the fact that the payment was effectively imposed on the tribes rather than agreed upon as the result of bi-lateral negotiations. The question of whether the 1997 Compact revenue sharing provision was consistent with IGRA led to tribal payments stopping and litigation between the tribes and State. As part of the negotiations that resulted in the 2001 Compact, the tribes agreed to a complete settlement of issues in dispute in that litigation as a condition precedent to the Compact. While questions regarding the linkage of the 2001 Compact and the litigation were raised, the Secretary recognized that the issue before her was the terms of the 2001 Compact and not the terms of settlement of litigation over the 1997 Compact. Although Interior had provided guidance regarding the legality of the 16% provision in 1997, the issue of how the tribes and State chose to resolve litigation over that issue was outside the review and approval process to for the 2001 Compact. Therefore, the Department of the Interior did not provide guidance with respect to that settlement.

4. Without a doubt the 1996 Supreme Court decision in the Seminole case placed tribes in a very bad negotiating position.

   Q. Do you believe the New Mexico tribes would have had to “share” their revenues, if they could still sue the State for “bad faith” as they could before the Seminole decision?
   R. No, I do not believe the New Mexico tribes would have had to share their revenues if they could sue the State for bad faith. In 1995, prior to the Seminole case, the New Mexico tribes chose, in a separate agreement from the Compact, to share their revenues in exchange for the significant benefits the State would provide in return. In 1995, at one of the final negotiation sessions, the Governor spoke directly to tribal leaders about the reasons he felt the tribal leaders should consider revenue sharing with the State. Initially, the tribal leadership resisted the concept but ultimately came to the conclusion that the reasons were convincing. In a post-Seminole environment, Seminole does significantly and adversely affect the tribes’ bargaining leverage in the Compacting process. As seen in the complex and divisive history of New Mexico Compact negotiations, the tribal leaders are left to their own devices in a largely political process to the detriment of tribes. In this post-Seminole environment there is increased pressure to agree to revenue sharing amounts and other terms that tribal governments might not otherwise agree to.

Thank you again for the opportunity to respond to Committee's questions. Should you need anything further, I would be pleased to respond.

Sincerely,

Frank Chaves
Chairman
New Mexico Indian Gaming Association