

TESTIMONY OF PHILIP N. HOGEN, FORMER CHAIR OF THE NATIONAL
INDIAN GAMING COMMISSION BEFORE THE SENATE COMMITTEE ON
INDIAN AFFAIRS, JULY 29, 2010

Good morning Chairman Dorgan and Vice Chairman Barrasso. I am Phil Hogen, an Oglala Sioux from the Black Hills of South Dakota, and recently chaired the National Indian Gaming Commission (NIGC.) Thank you for the invitation to share some of my insights about Indian gaming, which I've picked up along the way, during my tenure as an Indian Country United States Attorney, and a member, and then Chairman of the National Indian Gaming Commission, over the past 20-plus years.

It's a privilege to appear on the same panel as newly appointed NIGC Chair, Tracie Stevens. While I served on the Commission, Tracie was a careful observer of challenges to the Indian gaming industry and the critical role of its regulators at the Tribal, State and national levels, and often contributed to the dialogue we held with Indian leadership. She will bring a strong and refreshing point of view to the NIGC, and I wish her, and Commissioners Cochran and Little the very best as they undertake the challenge of federal oversight of the economic engine of so many Indian nations throughout the country. I expect that if this strong new team has not already learned, they soon will, that while you always try to do your best, and try do what you think would most enhance the economic development gaming offers to Indian country, there will be times when the strictures of the Indian Gaming Regulatory Act will limit and define some of those opportunities, and that fidelity to that law is of critical importance to the real and perceived integrity of the Indian gaming industry. And as they encounter such limitations, I encourage them, as the Commissioners I served with and I did, to offer suggestions for improvement to this Committee. It is sometimes said in tribal circles that we "mustn't open IGRA." But during my tenure, it was amended twice, primarily with regard to NIGC's funding, and disaster did not befall us, and I think the industry is stronger for that. Any consideration of IGRA amendments, of course, should be done in consultation with the tribes that are served by it, and I know that even now, NIGC is working to strengthen its consultation policy and practice.

My comments today will be rather wide ranging, but I do want to mention several areas where I think changes in law, policy and practice might result in a stronger Indian gaming industry. There will be no particular order or priority to my list, but I think they are worthy of consideration.

Assistance with Criminal Background Checks

As recently interpreted, the laws and regulations relating to how NIGC provides FBI criminal history information to tribes regarding applicants for tribal gaming licenses has not permitted the submission of fingerprint cards for those who are vendors of gaming supplies and services to tribal gaming operations. This limits tribes' ability to fully investigate the suitability of a critical sector of their business, and makes them vulnerable to those who may have unsavory backgrounds and connections, and exposes the tribes and their gaming revenues and assets to unnecessary risks. If this can be

changed, by way of FBI, NIGC or other regulations, or legislation if necessary, this gap could be closed, and the industry would be safer. I don't think the law should say the NIGC must be involved in the backgrounding of gaming vendors, but if asked by tribes for access to the FBI database for this purpose, it should be permissible. It might also be useful to design an optional "standardized" vendor application that NIGC could administer, so that vendors might avoid confronting dozens of individual and different application forms and processes, resulting in savings to tribes and vendors.

Review of Contracts other than Management Contracts

Along the lines of NIGC's review of arrangements for services to Indian gaming operations, IGRA, of course, dictates that management contracts be reviewed and approved to valid. This Committee not long ago considered an expansion of that authority to extend to all gaming contracts. Valid concerns were raised that NIGC could become a bottleneck that would slow down the industry, and those measures were not enacted. While tribes most often look after themselves quite well, while serving on the Commission I observed a number of arrangements, often with tribes with smaller facilities, where contracts for gaming machines extracted what appeared to be unduly high rates for what they received, and there was no mechanism for NIGC to, as they do with management contracts, examine those rates or apply standards, as Congress has set forth with management contracts. A device to permit review or examination of those arrangements when appropriate might be a useful service, particular to smaller tribes.

Background Investigations of Outside Managers of Class III Casinos

With respect to NIGC's review of management contracts, the law presently limits the background investigations NIGC conducts for such contracts when they only relate to Class III, or casino gaming. NIGC must, and it does, conduct thorough background investigations for management contractors providing Class II or bingo-type service, but not for those that relate exclusively to casino gaming. This distinction doesn't seem to make any sense, and it would be very useful to the Commission and gaming tribes if the thorough background investigation requirement for management contractors were the same, regardless of the type of gaming to be conducted.

Minimum Internal Control Standards

During my ten years on the Commission, I concluded that the best tool that we developed and utilized to strengthen the Indian gaming industry and its integrity, were the Minimum Internal Control Standards (MICS), which, with the assistance of a tribal advisory committee, were put together in the late 1990's.

MICS are rules that say things like the same guy who takes the money out of the slot machine won't be the guy who counts it and takes it to the vault—and that someone will be watching while that's done. Documentation, separation of functions, etc.

It was my opinion, and that of some of the NIGC staff, that before the MICS were adopted and compliance was required, about two thirds of the industry faced serious risks and losses, on account of gaps in their control systems. After the MICS were implemented and accepted, that share of the industry was dramatically reduced. It's not perfect out there now, but it's much improved. The industry was young and growing rapidly, of course, and the requirement of the MICS brought most of it to maturity much faster than otherwise would have been the case. If the National Association of Fraud Examiners estimates are to be believed, I would estimate that tribal compliance with the NIGC MICS has saved tribes well over \$1 billion since their implementation. This is not to say, of course, that tribes would not have taken these important safety and security measures without the NIGC MICS, but it is true that before the MICS many had not, and having a standard rulebook to adhere to made this process easier and more thorough.

Given the dynamic nature of the gaming industry, with its heavy reliance on rapidly evolving electronic technology, these standards are always trying to keep up, and likely will always be somewhat obsolete. Nevertheless, it is imperative that there be a continual effort to update them and to keep pace with developments in the industry. On the NIGC website are a set of MICS updates that were thoroughly vetted by the NIGC staff and its tribal advisory committee, and if implemented would bring greater clarity to the MICS system and increased security to tribal gaming operations. With two types of commercial gaming in Indian country—Class II and Class III—each somewhat unique in their nature, but also sharing many common processes, it is important to address each in a set of standards. The most recent effort would bring clarity to these distinctions, and address newer technologies that earlier drafts had not addressed. I expect they are not perfect, and likely even now are dated in some respects, but if they need improvement, that can occur in a subsequent review. I would urge prompt implementation of those revised standards.

NIGC Regulation of Class III Gaming

As stated, the MICS address both Classes of gaming. IGRA clearly directs NIGC to have a direct regulatory role in Class II (bingo, etc.) regulation, and standards in this area are imperative. While the original MICS were mandatorily applied to all Indian gaming—II and III—the court in *Colorado River Indian Tribes v. NIGC* held that NIGC could not require compliance in the Class III area, as under IGRA, that was to be left to the tribes and the states in their Class III compacts. So, since that decision several years ago, NIGC has stepped back in many instances. Nevertheless, many Tribal-State compacts reference the NIGC MICS and dictate compliance. Class III regulation by NIGC for tribal operations have been required under Secretarial Procedures in the absence of a compact, and a number of tribes, notably in California, have acted to adopt and recognize the NIGC MICS in their tribal ordinances, even though it is not Federally required. Thus, there must be an on-going effort to update and keep current the Class III MICS, in spite of the holding in the *CRIT* case. I continue to believe that the IGRA amendment which this committee considered following the *CRIT* case which would have clarified that NIGC had authority in this area would have been useful, and that as in the past, that NIGC would not be too intrusive under such an arrangement, but would

continue, in a cooperative way, to help protect tribal gaming revenues and assets. In the pre-*CRIT* era, no NIGC enforcement actions were taken for MICS violations, yet many problems were addressed to bring tribal operations in compliance with the safe, secure processes required by the NIGC MICS in the Class III area.

I believe that since *CRIT*, NIGC's auditors have been as busy as they always were, but I'm not sure they have been able to focus their efforts where they were most needed. With the pre-*CRIT* responsibility and perspective, NIGC attempted to prioritize its work where the most tribal dollars appeared to be at risk. Now audits of the tribal casino gaming—Class III—where most of the money is, is by invitation only, and sometimes those requests come in only after losses have been discovered.

Impacts of the Economic Downturn

In this recent era of economic downturn, tribal gaming operations have not been immune. While tribal gaming perhaps has weathered this storm better than other sectors of the gaming industry, in many places Indian gaming revenues are down. At such times, gaming operations have to make choices as where to make cuts, or where not to fill vacancies. Too often the regulatory sector—viewed by some as not being revenue centers—get neglected or under funded. If a decision has to be made to buy a new neon sign, or fill an open internal auditor position for the tribal gaming operation, it can be tempting to short-cut the regulatory area, but tribes do so at their peril. When times are tough, perhaps, is when tribes need to be most watchful to assure that their dollars don't walk out the back door.

Also, in terms of economic downturn observations, while we see some declines in revenues, we do not always see declines in the amounts tribes are taking from their gaming operations to fund their programs. This can result in seriously low working capital in tribal gaming operations that put those operations on fragile footing. It is easy to understand that tribes will want to meet the needs of their tribal members and tribal programs when times are tough, but they must safeguard their economic base in the process.

Strong Oversight Regard Misuse of Tribal Gaming Revenues

Along the lines of NIGC economic oversight, we are seeing a number of cases where the Commission has investigated instances of abuse of the use of tribal gaming revenues—often by members of tribal leadership. These instances seem to be seen where accountability at the *tribal* level is most lax. IGRA specifically identifies the purposes for which tribal gaming may be used, including the requirement for Revenue Allocation Plans for *per capita* payments. These are very important cases, as those who suffer and lose in these instances are the tribal members—children, elders, those infirm—who rely on integrity at their governmental level to assure fair dealing, but sometimes don't get it. This was one of the important reasons IGRA created the NIGC, and it is important that emphasis continue in this area, and that nothing gets swept under the rug. Tribal memberships are counting on NIGC to do its job in this area. Tribal leaders work hard to

make their tribal gaming operations successful, and they should be adequately compensated for those efforts. But the process must be properly authorized and transparent, and comply with tribal processes, and when it isn't NIGC has an important role to play to bring things into account.

Indian Lands Issues and NIGC Independence

An important project which was underway during my tenure as NIGC Chair was the building of a data base of Indian lands for which tribes use, or may use for gaming. Where gaming is permissible under IGRA can raise some very complicated and technical issues, and to the extent that clarity and agreement can be fostered by a solid, reliable source of records and information in this regard, distractions and disagreements can be minimized, and I am hopeful that this effort will continue.

In terms of the determinations of which lands constitute those Indian lands which IGRA deemed eligible for gaming, during my tenure, there were a number of instances when NIGC's office of general counsel and the Department of the Interior's Solicitor did not agree, and those were regrettable. To the extent that clarity has come, or can be brought to this area, that will be useful. NIGC needs to always appreciate that a ruling which may apply to a gaming instance may be extended to all of Indian country, and that consistency and fidelity to settled law and Federal Indian policy is essential. The Solicitor's office needs to be aware of the urgency which often attends determination of such Indian lands questions, and having served as the Associate Solicitor for Indian Affairs, I know how over-taxed that division is. To the extent that adequate resources can be provided to serve these needs, I would urge this Committee to address this concern.

And while the determination of Indian Lands may be on its way to settlement, the NIGC and the Department of the Interior need to be mindful of the independence for the Commission which IGRA's authors intended. NIGC is not a partisan operation—it's bi-partisan by statute—and it's dominated by Indian leadership. Gambling is a risky business, financially and socially, and that's why it's always been heavily regulated where legalized. And it's a sophisticated and specialized area. The Federal Family's role in the regulation of Indian gaming needs to rest with the NIGC, and to the extent that there are temptations in the Department to reach into that area, those ought to be resisted, and NIGC needs to defend the independence which was intended for it and which this Committee has recognized. Indian gaming will be stronger for this, and the Department will have plenty of other things to do anyway.

Commissioner Salaries

Among those things in IGRA which may be appropriate for review would be the salary levels for the Commission. I know it will be easy for this comment to be misinterpreted, and I think Indian gaming has been very fortunate in most of the choices that have been made for these important posts. But when responsibility for the oversight of a \$27 billion+ industry at stake, the country and the tribes ought not risk that some of

those best qualified to serve in that role, decline to consider it because of compensation. When dealing with multi-national corporations and arrangements dealing with millions of dollars—often the tribes’ dollars—it will be important to have in positions of authority those to whom such amounts are not unfamiliar. In the long run, the government will get what it pays for, and the Indian gaming industry cannot afford to be regulated on the cheap.

Conclusion

Finally, I would say to the new Commission don’t lose perspective as you do your important jobs. There is a good, strong, honorable staff at the NIGC, show them strong leadership, and rely on their hard work and advice. Work closely with tribal leaders, as well as those organizations formed to advance their cause. But keep an appropriate distance, and never forget that you are sworn regulators, not cheerleaders, and that tribal communities throughout the country, as well as those patrons who spend their dollars to make the industry work are depending on you.

Good luck.

I stand ready to respond to any questions the Committee may have for me, Mr. Chairman. I thank you for this opportunity. For purposes of future communication, I can be reached at:

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