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NATIONAL INDIAN GAMING COMMISSION SENATE INDIAN AFFAIRS CHANGING
INDIAN GAMING FEE ASSESSMENT OVERSIGHT HEARING

BODY:

Testimony of Associate Commissioner Philip N. Hogen before the
Senate Committee on Indian Affairs
Oversight Hearing of the National Indian Gaming Commission
July 10, 1997

I am Phil Hogen, an Oglala Sioux from South Dakota. I have been a member of the National Indian Gaming Commission (NIGC) since my appointment by Interior Secretary Babbitt on December 1, 1995. I concur with the statement Vice-Chairman Foley has presented on behalf of the

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Commission. Thank you for this opportunity to share some of the experiences, accomplishments and needs of the National Indian Gaming Commission (NIGC). Indian gaming has appropriately been in the spotlight a great deal in recent years. This is because it has proven to be an unparalleled success in the area of economic development in parts of Indian country where countless conventional economic development efforts have failed.

Tribal governmental revenues generated by gaming have helped fill widespread needs which might otherwise not be addressed. Of course, the economic success of gaming has not been uniform throughout Indian country, and your Committee, along with the rest of the Congress must constantly be aware of the limitations of this means of seeking tribal economic self-sufficiency. By this I mean that there must be a constant awareness that economic demographics will exclude many tribes from reaping significant benefits from gaming in many places; there are many important cultural and political reasons why many tribes will choose not to engage in gaming; and the longevity of gaming as a viable solution to some tribal economic challenges is by no means assured.

One of the things I am certain of, however, based on my experience as a member of NIGC, is that to succeed anywhere, tribal gaming must be well regulated.

While the scheme Congress created in the Indian Gaming Regulatory Act (IGRA) has many critics, I think that all would agree that it does afford a role in regulatory oversight from the Federal, Tribal and State perspectives. The extent and nature of Tribal and State regulatory oversight is necessarily as diverse as the extent and nature of the tribal gaming throughout the country. There are "strong State" models, where the level of State participation at the hands-on level of gaming regulation is pervasive (e.g. Arizona and Washington), and there are "strong Tribal" models, where the Tribal role is pervasive, and the State's role is minimal (e.g. Michigan), as well as many variations in between.

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What should be constant, however, is the level of Federal oversight. IGRA did not contemplate Federal regulators to ever be the primary, "on-the-ground" overseers of gaming activity, all day, every day, but it did contemplate thorough, uniform Federal monitoring. Further IGRA provided NIGC with tools, such as closure orders and fines, to take enforcement steps when enforcement became necessary to keep criminal elements out of tribal gaming, to protect tribal assets, to insure appropriate utilization of tribal gaming proceeds, and to assure that the public receives fair play at tribal facilities.

This Federal oversight, however, has not measured up to the mandate and expectations of the Act, because the industry has grown so much more rapidly than the regulatory body created to provide that oversight.

The history of NIGC is relatively short, but I would characterize its growth or evolution in at least three phases; after some delay, it was finally organized, and in accordance with IGRA, undertook the promulgation of the regulations it was directed to prepare, to flesh out the regulatory framework IGRA established. As it completed that phase, it embarked upon a second phase which included the review and approval of tribal ordinances which authorized tribal gaming, and commenced processing a huge inventory of Management Contracts proposed to initiate tribal gaming on many reservations. Finally, and most recently, it moved to a compliance mode, concentrating efforts on measuring the extent of the gaming activity, and its compliance with IGRA and the NIGC regulations. As it entered this third phase, it confronted an industry which had grown exponentially, while the Commission's resources had remained static. It couldn't provide the thorough oversight for which it had the responsibility.

Compliance by tribal gaming operations was measured by a number of means, but too many of them concentrated only on the form, rather than the substance of the gaming activity and its regula-

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tion at the tribal level, or, in the case of Class III gaming, at the level where tribal and State regulators, under the terms of Tribal/State compacts, were providing day-to-day regulation.

The nature of the industry, which in the case of Indian gaming in the United States is likely to be the most diverse anywhere, requires an on-site presence to be truly informed with respect to that gaming activity and how it conforms with IGRA, NIGC regulations and the tribal ordinances NIGC has reviewed and approved to authorize that gaming. A regulator cannot just receive paper or electronic reports about that gaming activity and fully and fairly appreciate its qualities and deficiencies.

IGRA dictated that NIGC inspect and examine all facilities where tribal gaming is conducted, and the Commission was given the authority to audit and review the files and records documenting the gaming activity conducted there. To fulfill this reasonable regulatory function, qualified staff needs time and resources. As reported, we have nearly 280 gaming sites in 28 states to oversee. The six field investigators we have on staff are obviously too few to permit them to spend much "quality time" at any one of the facilities, while attempting to have some presence at the others.

The gaming facilities under our supervision include those which are among the largest and most sophisticated and successful in the world. They employ state-of-the art technology, and generate huge amounts of data regarding their operations. While NIGC currently has no reason to suspect that things are amiss at these operations, the Commission cannot say, in good conscience, that it has been able to take the in-depth look at these facilities as is called for under IGRA.

On the other end of the spectrum are some of the smallest, more remote gaming operations- in the industry. Overseeing such operations requires a much different approach than that appropriate for the mega-operations in metropolitan settings. NIGC ought to be among the best resources those smaller facilities could look to in perfecting the tribal regulation of such operations, and the Commission attempts to provide assistance to the extent our resources allow. Under current circum-

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stances, however, providing the desired level of assistance and training is a luxury we cannot afford, and as a result, the Indian gaming industry suffers, and the goal of economic development is less successfully achieved.

As is true with most other aspects of Federal Indian policy, the diversity and breadth of the Indian nations and their far-flung geographical distribution has a constant bearing on the implementation of tribal gaming oversight. Commissioners and staff must devote much time to travel among reservations and gaming facilities. When comparisons are made, regulatory models such as New Jersey or Nevada must be adjusted to compensate for this significant travel-time factor, as staffing, budgets and regulatory plans are devised.

A key element in the Federal oversight of tribal gaming is the requirement that the tribal facilities furnish the Commission with information and reports, including reports of independent audits by certified public accountants. These audited financial statements and management letters do provide NIGC with a wealth of information about tribal gaming operations. But with the current staffing levels, it has not been possible to give those reports the required detailed scrutiny. To fully utilize the vast and valuable amount of information provided in the required audits, a competent, adequately sized and specialized audit staff is essential, but current funding levels prohibit this necessary measure.

Among the more critical functions NIGC is called upon to perform for tribal gaming endeavors is providing guidance with respect to the classification of proposed gaming devices or games as to whether they are permissible as Class II activities, or constitute Class III activities, which require Tribal/State compacts before they are utilized. Although current NIGC regulations do not require pre-approval or certification of Class II games or devices by NIGC, the Indian gaming industry may not be well served by the lack of such a procedure. Currently tribes and vendors introduce new

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games and devices into their Class II facilities at their peril. If such games or devices in fact constitute Class III gaming, or are violative of the Johnson Act regarding the prohibition of certain gaming devices in Indian Country in the absence of a Class III Tribal/State compact, NIGC violation notices, closure orders and/or fines may result, as well as criminal or civil prosecution by the Justice Department.

Current NIGC resources are not adequate to provide timely advice to tribes and vendors in this regard, let alone developing a pre-approval certification process used by most other gaming jurisdictions. As a result uncertainty often remains, uniform standards are difficult to achieve and individuals and firms which might find themselves unable to undergo regulatory scrutiny are attracted to Indian gaming.

The obvious conclusion from examining these and other shortcomings of NIGC's performance is that there is an immediate need for Commission resources more proportionate to the industry the Commission is to oversee.

The legislative proposal the Commission has submitted would generate much needed funds by expanding the base from which Commission fees are collected to include Class III gaming, which of late has required most of the time and attention of the Commission and its staff, and raising the limit on the amount of fees which may be assessed and collected to fund its regulatory operations. I support the concept of having the industry which is regulated underwrite the expense of that regulation through the payment of user fees, and believe that as the scope of the regulated activity grows, the funding for the regulatory body should expand accordingly. All funds generated by NIGC fee assessments need to be dedicated solely to the regulation of the Indian gaming industry.

If the fee structure and its limitations are changed, and I feel strongly that they must be if the Commission is expected to provide any meaningful regulation, it ought to be for the long term, and

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address concerns of the regulated tribes, as well as those in Congress who will want to maintain oversight of this Federal regulation. An objective of the legislative proposal the Commission submitted was to minimize amendments to the 1988 Act.

The current proposal would enable the Commission to fund a truly Indian-countrywide regulatory body, staffed with personnel with the necessary expertise to monitor and strengthen the Indian gaming industry, and to inspire confidence in the tribal owners of that gaming, the gaming public, and the Congress.

Fee assessments could indeed be modest if the base to which the fees apply were expanded to include Class III revenues. This would relieve the funding burden currently borne by Class 11 operations (which constitute many of the smaller, and in some cases marginal operations, and which can least afford the fee assessments). For example, if gross gaming revenues from all Class 11 and Class III tribal gaming operations are \$5.4 billion, a rate of .125 % on the first \$1.5 million of gross gaming revenues, and a rate of .2563% on the revenues in excess of that amount, under current revenue patterns, would generate \$13.5 million funding level, which likely would adequately permit the Commission to address the shortcomings mentioned above, and do the first rate job of regulatory oversight which is called for to maintain the highest levels of integrity in Indian gaming.

Tribes have not always fared well when too much discretion over their welfare has been left to the benevolence of others. To the extent that appropriate limitations need to be placed on the assessment or expenditure of these tribally generated funds, they ought to be considered.

Your Committee needs to be aware that without increased funding, the NIGC is faced with immediate drastic reductions in force, likely cutting our work force in half, or more, and the inadequacies described above will be greatly exacerbated. It goes without saying, even the prospect and dis-

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cussion of such reductions are devastating to a talented and already overworked staff, and the sooner a remedy is apparent, the better the Indian community and gaming industry will be served.

With these needs and concerns in mind I implore this Committee to expeditiously act to promote the Administration's legislative proposal as to provide adequate resources for the National Indian Gaming Commission. This will help us continue to assure the integrity of Indian gaming throughout the nation and to foster economic development. The Commission looks forward to working with this Committee to address any concerns you may have about the legislation.

Thank you.

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