

Testimony of Chairman Hogen  
May 14, 2003

1

**TESTIMONY OF  
PHILIP N. HOGEN  
CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION  
BEFORE  
THE SENATE COMMITTEE ON INDIAN AFFAIRS  
MAY 14, 2003**

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, thank you for this opportunity to report to you on the work of the National Indian Gaming Commission.

I am Philip Hogen, an Oglala Sioux from South Dakota. Since my appearance before this Committee last September, in connection with my nomination by President Bush to Chair the National Indian Gaming Commission, my nomination was confirmed by the full Senate, and I assumed that position late last year.

I would like to take a moment to introduce our associate commissioners. Seated with me are Commissioners Nelson Westrin and Cloyce "Chuck" Choney. Nelson comes to the Commission from his position as Executive Director of the Michigan Gaming Control Board. Chuck is a retired FBI agent whose career included significant work in Indian country. Chuck is a member of the Comanche Indian Tribe of Oklahoma.

My predecessor focused on financial resources in his testimony to this Committee, and, although I will address that issue in some detail, today I would also like to ask the Committee to consider the extent to which the Indian Gaming Regulatory Act may need to be rethought to improve the federal regulatory presence in Indian gaming.

It has been a year since the Committee has heard from the National Indian Gaming Commission at an oversight hearing, and while there have been some changes, much of what you have heard before is still true.

Let me first talk about the changes. The previous Commission reported to you that we were experiencing a budget shortfall and, to ensure the NIGC could continue to operate, that the agency had implemented a hiring freeze and restricted travel. That hiring freeze, while significantly reducing our operational capability, has been an effective device for conserving funds. As a result, we are now able to fully fund necessary travel for our remaining staff. In addition, the fiscal year 2003 omnibus appropriations bill has authorized us to collect up to \$12

million in fees for fiscal year 2004. As matters now stand, as long as we approach the hiring process cautiously, over the next year and a half, all of this adds up to a somewhat improved picture from the one that was painted for you last year.

In assessing our financial resources in light of the salary savings we have realized and the higher cap on assessments for fiscal year 2004, it is our current plan to begin filling some of our existing vacancies. We will, though, delay adding new staff positions until we can ensure that we will have access to more than \$8 million beyond fiscal year 2004. Parenthetically, I should say that, although we are authorized to collect up to \$12 million in fiscal year 2004, I do not anticipate that we will in fact operate at a level much above \$10 million next year.

While we are certainly better off financially this year than we have been in the recent past, by any objective measure the Commission's impact on the industry remains limited.

We have 19 field investigator positions, three of which are vacant, and seven auditor positions, of which three are vacant. In terms of federal regulatory presence in Indian gaming operations, this field staff accomplished the following during the past fiscal year (2002):

Routine site visits (includes combined-purpose visits):	329
Visits to conduct training:	75
Visits for the purpose of addressing a specific problem area:	
Tulsa office:	148
All other offices:	82

These site visits are not evenly distributed throughout the agency. Some gaming operations are within the local commuting area of the regional offices and can be visited without significant resource expenditure, others may require a day or more of costly travel each way. Operations experiencing problems received more attention than other operations. Thus, our Tulsa office is able to reach many gaming operations in two hours or less and can get to most gaming operations in its region in under four hours. In addition Oklahoma is the state where we have experienced the highest volume of contentious compliance issues. Currently there are over 300 Indian gaming operations subject to our oversight. The real story of these numbers is that, while a few gaming locations were visited multiple times, there were 150 gaming operations that were not visited at all during this period, and 87 that were visited only once.

Auditors are the big guns in the fight to protect the integrity of the cash flow in gaming. We take advantage of the capabilities of our auditors in three principal ways. First, our auditors review the annual independent audits, or financial statements, and CPA compliance reports that each gaming operation is required to submit to the Commission. Second, where we have an indication that irregularities such as theft or loss may be occurring at a tribal casino, our auditors often in concert with our field investigators, will conduct a fraud or investigative audit. Finally, to the extent permitted by our resources, we conduct internal control compliance audits. The annual independent audits are primarily designed to validate the financial statements of the gaming operations. Investigative or fraud audits involve detailed examination of all financial transactions relevant to the irregularity at issue.

Internal control audits are a detailed, labor intense analysis of the controls on the flow of cash and recordation of gaming related transactions in the gaming operations. We review our findings from these audits with the tribes and assist them in developing a plan for corrective

action. These audits are really the only mechanism we have for determining with any certainty the extent to which specific operations are at risk of theft or loss or may be engaging in practices that jeopardize the integrity of the games conducted. For that reason the audits are tremendously valuable to us as regulators and to the tribes. While, ideally, each gaming operation would undergo such an audit every five years or so, during fiscal year 2002 we were able to conduct five. With our current number of auditors, it will take us well over thirty years to get around to auditing the internal controls of each tribal gaming operation.

Time on the ground in Indian country is important, but it is not the whole story. In FY 2002 we processed more than 30,000 sets of fingerprints to the FBI for the tribes and we reviewed almost 24,000 employee background investigations. Over the last two years, our handling of these background investigations has been significantly improved by the participation of our field offices. Our regional offices are also busy hosting training sessions for tribal gaming employees and regulators, and NIGC representatives have continued to participate in training functions sponsored by outside organizations. Other routine activities of the agency continued throughout the year, as NIGC staff conducted a systematic review of the tribes' annual independent gaming audits, reviewed tribal gaming ordinances, processed management contracts, responded to requests under the Freedom of Information Act and were otherwise engaged in carrying out our specific responsibilities under IGRA and our general duties as a federal agency.

In 1999, the Commission had embarked upon a program of quarterly consultations with tribes. Over a two-day period tribal leaders in different locations throughout the country were given a block of time to sit down with the Commission and discuss issues those leaders thought important. We also arranged the schedule for these consultations so that tribes in the region could take advantage of training provided by NIGC staff and outside experts, including representatives of the Department of the Interior and the Internal Revenue Service. In the fall of 2001, these comprehensive consultation and training meetings were among the first casualties of the tight budget. I participated in the first of these consultations when I was Vice Chair, and because of their immense value to us and to the gaming tribes we have taken advantage of the temporary improvement in our financial situation to restart the process. In fact since the three of us have come on board we have been engaged almost continuously in meetings and discussions with tribal leaders and gaming regulators, in and out of Washington. Last month, Commissioner Choney and I met with tribal leaders in Oklahoma to explain our priorities for legislation, rulemaking and enforcement, and to listen to what they had to say. Later this month, the entire Commission will participate in consultative meetings with Midwestern tribes, and we are planning similar sessions in the Pacific Northwest in July. We are also committed to the development of written policy guidelines for the agency that will ensure a meaningful and practical government-to-government consultative process.

Since 1997 the NIGC has been supported entirely by assessments on tribal gaming revenue. These assessments are currently capped at \$8 million. Owing to the steady growth of the industry's revenues the rate at which fees have been assessed has been declining steadily and cannot fairly be considered burdensome. For example, the preliminary fee rate for 2003 is .059%, or 59 cents per \$1000, on Tier II revenues, the rate for 2002 was .065% or 65 cents per \$1000 on Tier II revenues (the first \$1.5 million dollars, the Tier I revenues, are assessed at 0%).

The fixed fee cap, though, has proven inadequate because of the impact of inflation on our costs. Even if the \$12 million fee cap becomes a fact after FY 2004, it will work for a few years, then a successor Chair will find him or herself in the same situation as my predecessors

and I. It is the Administration's intention, therefore, to submit a legislative proposal to tie our fee collections to the size of the industry, and we hope that the proposal will receive favorable consideration from this Committee. From our perspective, rather than continue to impose a cap, it would make more sense to let the Commission's fee collection authority float so that we can grow or contract with the industry. For example, authorizing us to collect fees at a maximum rate of one-tenth of a percent (.001) would yield up to \$12 million this year. At that rate, which amounts to one dollar per \$1000 of gaming revenue, a tribe with a \$10 million a year operation would pay a fee to the Commission of less than \$10,000.

I have attached a projection of the Commission's use of increased revenue. This is obviously forward looking and is subject to change dictated by experience, but it gives you an idea of what the NIGC would look like with a \$10 million budget. An initial step will be to open small offices in Southern California and the Great Plains, with a view to increasing our presence in areas where there are a number of gaming tribes. I should note that it is our intention to use some of the additional resources, as they become available, to fill in the Washington support staff. Without retreating from our commitment to maintain a visible presence in Indian country, I have concerns that we are too thinly staffed in positions that are essential to meeting our basic responsibilities as a federal agency and in positions that are necessary to support the field operations.

The bottom line on the resource issue is, of course, that we will work with the fee structure that Congress authorizes for us. While we are aware of the debate in the media and elsewhere about our role, the Congress' determination as to the funding of the NIGC is the definitive statement as to the level of federal regulation that the Congress expects us to provide.

I would like now, to move away from funding issues and address the statutory structure under which we operate.

When Congress passed the Indian Gaming Regulatory Act, it articulated concerns about organized crime and other corrupting influences, ensuring tribes were the primary beneficiaries of their gaming operations and gaming being conducted fairly and honestly. Congress created the National Indian Gaming Commission as an independent regulatory authority to deal with those concerns and to establish federal standards for gaming on Indian lands. In 1988, when the Indian Gaming Regulatory Act was passed, Indian gaming was Indian bingo. It was being played in about 100 operations and generating about \$100 million in revenue. Today, Indian gaming occurs at over 300 sites and it is predominately casino gaming, producing revenues exceeding those of Las Vegas and Atlantic City combined. The basic legal structure for federal oversight of this new industry, however, has not changed since the bingo days.

The NIGC is seeing and hearing widespread questioning of our legal authority to regulate the class III gaming that accounts for most of the revenue in the industry. This dispute arises because of the way IGRA is written. No court has yet addressed this issue, and I am confident that our lawyers are prepared to meet the legal challenges as they arise; however, the very existence of these questions is hindering our operations.

The Indian Gaming Regulatory Act gave the Commission responsibility for ensuring that management contractors would deal fairly with Indian tribes and for keeping unsuitable individuals from participating in these contracts. Since 1988, though, developers, consultants, equipment lessors and others who determine the odds and payout percentages, and who may have access to uncounted cash, have been operating under legal arrangements that are not

management contracts. These people have been able to get into Indian gaming and siphon off significant gaming revenues, out of the reach of the NIGC. IGRA gives us neither the tools for preventing this, by overseeing these agreements or licensing the participants, nor a mechanism for penalizing the individuals who may be victimizing a tribe or the gaming public.

The December 2002 TIME magazine article on Indian gaming incorrectly reported that the NIGC had “yet to discover a single major case of corruption.” This is not correct. We have investigated a number of incidents involving theft, misappropriation, conflicts of interest and other violations of the criminal laws, by casino employees, tribal governmental officials and contractors. The problem for the NIGC is that when we identify problems of this nature our options are to turn the matter over to law enforcement agencies, which may or may not be interested, and/or notify the tribal government, which may or may not choose to act. The NIGC has no authority to deal directly with these problems, because we cannot fine an individual wrongdoer or require disgorgement of money unjustly obtained at tribal expense.

The U.S. Supreme Court’s 1996 Seminole<sup>1</sup> decision, recognizing state immunity to suit by tribes seeking compacts, has also been a source of regulatory problems. IGRA contemplated a situation in which tribes would be entitled to engage in class III gaming in states where such gaming was otherwise permitted, and provided a mechanism for reaching an authoritative determination as to the permissible scope of Indian gaming under state law. The Seminole decision has allowed states to avoid IGRA’s requirement for good faith compact negotiations, and, as a result, uncompact class III gaming is occurring in a number of states. While I will acknowledge that IGRA gives the Commission the legal authority to put a stop to such activity, these are difficult cases. They are resource intensive, requiring hundreds of attorney hours and often thousands of scarce dollars in litigation expenses and they tend to have an impact on only one tribe at a time in what may be a competitive market. There is also a fairness issue that weighs against bringing these cases in states where class III gaming, of some kind, would clearly be compactable. In addition, perhaps because of this fairness issue, the courts appear reluctant to support action against class III games in such situations. A collateral consequence of illegal class III gaming is that it tends to attract unsuitable individuals who could not get licensed or do business in jurisdictions like Nevada or New Jersey. For that reason there is more at stake when it comes to gray area gaming than the jurisprudential debate about the legal status of a particular machine or game. The Secretary of the Interior has put a process in place for prescribing class III gaming procedures where a state has refused to engage in good faith compact negotiations, but the validity of that process is being challenged. The Commission’s advice, here, is that this is not a healthy situation for Indian gaming, and the Congress should consider restoring IGRA’s original balance between tribes and states.

As mentioned above, this Commission is serious about its commitment to consult with the tribes about Indian gaming. Pursuant to the advice of the Conference Committee in connection with the omnibus appropriations bill, we will be talking to the tribes about our fee cap and we will be talking about our definition regulations, but we will also be discussing some of our concerns about the substantive provisions of the Indian Gaming Regulatory Act. It is our plan not only to consult with the tribes, but also to work with the Administration and to work with this Committee to modernize IGRA, so that we can get the tools to do the important mission we have been given.

My testimony today has been focused on those legal and financial resources we think

---

<sup>1</sup> Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

might enhance the federal regulatory presence. One resource I have not mentioned, but should, is the human resource. Throughout the public debate about the proper role of the Commission, and in the face of often daunting legal and budgetary challenges, the men and women of the National Indian Gaming Commission have remained committed to carrying out the agency's mission. They are professionals who understand the positive effects that gaming dollars have had in Indian country and the importance of achieving the goals expressed by the Congressional declaration of policy in the Indian Gaming Regulatory Act. These dedicated people have continued to work hard and to take their responsibilities seriously. They have never let themselves get distracted by the obstacles; instead, they have kept an eye on costs and continued to find innovative ways to stay engaged and to make a difference in Indian gaming on a restricted budget. The tribes and the American people have gotten a very high level of high quality effort for the money they have put into the NIGC.

Thank you for your time and attention. We would be happy to answer any questions that the Committee may have.

---

---

Attachments:

- A. Bar graph: Growth of the Indian Gaming Industry
- B. Pie chart: National Indian Gaming Commission FY 2003 Budget Allocation
- C. NIGC Organizational Chart
- D. Regional Statistics
- E. Projected Use of Increase in Available Revenue