Testimony for Philip N. Hogen, Chairman
National Indian Gaming Commission

Senate Indian Affairs Committee
February 8, 2006

Good morning Chairman McCain, Vice-Chairman Dorgan and members of the Committee. I am Philip Hogen, Chairman of the National Indian Gaming Commission. Currently the NIGC consists of two members, Associate Commissioner Cloyce Choney and myself. Mr. Choney is in Oklahoma recuperating from surgery and cannot be here today but extends his best wishes to the Committee.

I understand the Committee seeks to gather information, generally about lobbying fees and political contributions paid by tribal governments and specifically about whether tribal revenues generated by Indian gaming are or can be used for such purposes; what laws, regulations and procedures are in place that would bear on such use of tribal gaming revenues; and the administration of such statutes, regulations or policies.

## HISTORICAL SUMMARY

To put all of that information in proper context, I want to briefly discuss the history, nature and extent of the Indian gaming industry. In the 1980s, and perhaps even earlier, a number of tribes in pursuit of economic development opportunities for depressed tribal reservation communities and economies turned to high-stakes bingo games as a means of

generating tribal revenues. Due to good tribal management, promotion, and favorable market opportunities, many of these high-stakes bingo operations thrived and prospered. Some states were perplexed by this gaming activity in their midst, and questions were raised regarding the legality of such tribal activity when that activity did not comport with those states' laws, regulations or limitations governing the play of bingo.

Although in 1953, Public Law 280 was passed conferring state criminal and civil jurisdiction over Indians in Indian country in a number of states, the extent and nature of that jurisdiction evolved in the courts. The doctrine that resulted was that the civil jurisdiction conveyed by Public Law 280 was not as broad as some states had imagined, and it was held only to provide tribes and Indians with access to states' civil court systems on tribal lands. It did not extend the full regulatory power of states to Indians in Indian country, nor did it permit state taxation of Indians in Indian country.

When high-stakes tribal bingo games were challenged as being in violation of state law, including criminal statutes which limited the scope of the play of bingo (hours of operation, prize and pot limits, etc.), tribes defended on the grounds that those states did not criminally prohibit bingo. Rather, states regulated that activity, and hence tribes were free to similarly permit the activity and impose their own regulation, even if it differed from the states'. State challenges to high-stakes tribal bingo reached the federal courts, and those courts ruled that the tribes' gaming activity was permissible. Consistent with the evolution of the scope of state civil jurisdiction under Public Law 280, courts drew a criminal-prohibitory / civil-regulatory distinction, holding that when states did not criminally prohibit an activity but rather permitted and regulated it, such activity was similarly permitted in Indian country, subject to tribal regulation that might differ from state regulation.

When the United States Supreme Court denied petitions for writs of certiorari in two of those cases,[1] more and more tribes throughout the country began engaging in high-stakes bingo activity for economic development on their reservations, and it proved quite

[1] Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983); Butterworth v. Seminole Tribe of Florida, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

successful, particularly where there were large markets. A culmination of state challenges to such tribal activity occurred when the United States Supreme Court decided California v. Cabazon Band of Mission Indians in 1987.[2] Thereafter, in 1988, Congress enacted the Indian Gaming Regulatory Act, which provides the current structure for tribal gaming activities, created the NIGC, and tasked it with an oversight role with respect to tribal gaming.

Thus, as this committee studies Indian gaming and its ramifications, it should never lose sight of the fact that Indian gaming is not a federal program. The tribes invented it and were making it work prior to IGRA's enactment in 1988.

In my view and experience, Indian gaming has been the most effective economic development tool ever brought to Indian country nationwide. Its success, of course, depends not only on wise management, but also on market opportunities, and thus it does not work as an economic development tool equally for all tribes. Those tribes that are in remote and rural areas likely will never enjoy large revenues, whereas tribes situated near populated areas may find it extremely profitable and successful.

Revenue generation, of course, is not the only objective or benefit for tribes. In many instances, even small, rural tribal gaming operations have brought employment opportunities to tribal members where none existed before. I am a member of the Oglala Sioux Tribe from the Pine Ridge Reservation in South Dakota. Unfortunately, our reservation is located in the poorest county in the United States, and our rural location out in the Badlands will likely never permit the tribe to solve the great economic challenges it faces through gaming alone. Nevertheless, when my tribe opened the Prairie Winds Casino on the west edge of our reservation, it created approximately 200 jobs, 99% of which are filled by Indians, and most of them are our own tribal members. For many, these were the first long-term jobs they ever held or had the opportunity to hold.

## INDIAN GAMING REVENUE

[2] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

Indian gaming has grown dramatically since the enactment of IGRA in 1988, and the attached chart, Exhibit 1, shows the increase in those revenues from 1995 through 2004. Today Indian gaming generates over $20 billion in gross gaming revenues – that is, the amount wagered at Indian casinos, less the amount returned to patrons as jackpots and prizes.

This gaming is conducted on Indian lands throughout the country by approximately 225 tribes, which together operate over 400 tribal gaming operations. The diversity among these operations is dramatic. They vary from the largest casino in the world, Foxwoods, operated by the Mashantucket Pequot Tribe on its land in Connecticut, to Bear Soldier Bingo on the Standing Rock Reservation in South Dakota, where bingo is played for small crowds 4:30 pm to 10:30 pm five days a week.

With this diversity in mind, it is instructive to examine how gaming revenue is distributed among the 367 tribal gaming operations reporting financial information to NIGC. Three further charts, Exhibits 2-4, are attached to my testimony. These reflect that most of the $19.4 billion generated in 2004, the last year for which we have final figures, is generated by a relatively small number of facilities. As shown, 55 of the 367 operations in 2004 – 15% of them – grossed $13.5 billion, just over two-thirds of the total revenues. By contrast, 116 of the 367 operations, representing those that are the smallest – 31.6% of operations overall – generated less than 1% of total revenue.

As this demonstrates, a relatively small number of tribes have very large tribal gaming revenues, while a large number have relatively small tribal gaming revenues.[3]

## PERMISSIBLE EXPENDITURES GENERALLY AND NIGC MONITORING OF INDIAN GAMING REVENUE

[3] The committee should bear in mind that I have discussed gross – rather than net – gaming revenues. Thus, the numbers here do not reflect expenses and do not reflect cash on hand available for tribal government use or other permissible uses for gaming revenue.

The Indian Gaming Regulatory Act restricts the purposes for which tribes can spend their gaming revenues. These categories are very general and very broad. Found at 25 U.S.C. §2710(b)(1)(B), these categories are: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies. To provide guidance on the uses of gaming revenue, the NIGC issued Bulletin 01-05, which discusses and illustrates permissible and prohibited uses. I have attached this bulletin to my testimony as Exhibit 6.

The Indian Gaming Regulatory Act also authorizes the use of tribal gaming revenues to make equal, per capita payments to tribal members, but only if a tribe first adopts a revenue allocation plan that is then reviewed and approved by the Secretary of the Interior.

Not every tribe makes per capita payments, for to make them or not is a sovereign tribal decision. Tribes that do make per capita payments allocate in their revenue allocation plans a percentage of gaming revenues to most or all of the other permitted categories as well as a percentage to per capita payments. (The Interior Department regulations require a revenue allocation plan to "reserve an adequate portion of net gaming revenues ... for one or more" of the permitted categories in § 2710(b)(1)(B). 25 C.F.R. § 290.12(b)(2)). However tribes decide to distribute gaming revenue, if they use it for purposes inconsistent with the aforementioned restrictions, or if their distributions are inconsistent with an approved revenue allocation plan, they would violate IGRA.

The NIGC is authorized to take enforcement actions against tribes that violate IGRA, regulations promulgated by the NIGC, and the tribes' own tribal gaming ordinances, which must meet requirements in IGRA and be approved by the NIGC Chairman before they are effective. In this way, the NIGC has an oversight responsibility with respect to tribes' expenditures of tribal gaming revenues. We take this responsibility seriously and will be looking at ways to enhance our enforcement of IGRA requirements.

The standard underlying the NIGC's approach to expenditures is that where gaming revenues are spent in a manner that does not benefit the tribal government or tribal membership as a whole, then the NIGC will investigate. In taking this approach, we have encountered instances where tribal gaming revenues were not expended for authorized purposes, and we initiated investigations and enforcement actions. Included in these situations were instances where gaming revenues were expended: 1) for the benefit of certain tribal officials or tribal factions rather than the benefit of the tribe as a whole; 2) to influence the outcome of tribal elections; 3) to secure contracts in which certain individuals had an undisclosed financial interest; 4) without the required approvals designated by tribal law; 5) as payments to an individual or entity that was managing the tribe's gaming operation under a contract that had not been approved by the NIGC; 6) by a tribal entity that was not recognized by the Bureau of Indian Affairs as the lawful tribal government; and 7) to provide unauthorized or unlawful incentives for certain patrons of a gaming operation.

We have also found or are investigating allegations where tribes were not spending revenue consistently with their revenue allocation plans; where tribal council members were making so-called discretionary payments to preferred tribal members to the exclusion of others in violation of the per capita payment requirements in its revenue allocation plan; where per capita payments were not properly held for minors or incompetent individuals; and where per capita payments, or the lack thereof, are inextricably tied up with tribal membership disputes. I should also note that in a number of circumstances, our investigation discovered evidence of possible criminal activity. As required by IGRA, we referred the relevant information to the appropriate law enforcement agency for further investigation.

Lastly, we took this investigative approach with regard to what has become the widely publicized investigation that has brought so much attention to the question of lobbying fees. In its investigation, the NIGC identified concerns about the propriety of certain expenditures of tribal gaming revenue – not because gaming revenue was spent on

lobbying, but because the circumstances surrounding the expenditure suggested potential criminality, and so we referred the matter to the Interior Department Office of Inspector General for further investigation.

All of that said, however, exactly how the NIGC should best oversee or monitor the expenditure of gaming revenue is not clearly specified in IGRA, in the NIGC's regulations, or in regulations of the Bureau of Indian Affairs. Attached to this testimony is a fifth chart, Exhibit 5, which generally depicts the line of authority with respect to the operation of tribal gaming operations and the flow of revenues generated thereby. Most tribes directly manage their gaming operations by themselves, employing both tribal members and non-members to operate the gaming business at the tribe's direction. In other instances, tribes enter into management agreements with outside third parties (and the NIGC Chairman must review and approve those agreements).

Further, in most instances under their gaming ordinances, tribes will attempt to separate governmental operations from gaming business operations and tribal gaming regulation. Ordinarily, a tribal council will serve as the governing body for the tribe; the council will create a board of trustees or enterprise board which will oversee the tribe's businesses, including gaming activities, and an independent tribal gaming commission will provide regulatory oversight. When the gaming business generates its revenues, typically they will be passed back to the tribe's enterprise board, which in turn will disperse them to the tribal government, through its treasurer's office or otherwise. Thereafter, those funds may well be placed in the tribal general fund, where they are commingled with tribal revenues from other sources such as grazing, forestry, oil and mineral revenues. From that general fund, the tribe will operate its programs for the benefit of its tribal members. These include health and public safety programs, housing programs, educational programs and the like. The NIGC does not attempt to follow each dollar of tribal gaming revenue after it is dispersed from the tribal gaming operation, and nowhere is it required to.

In a report issued by the Office of Inspector General for the Department of the Interior on September 1, 2005, the Inspector General observed that there is not presently in place a

mechanism that would closely monitor the expenditure of such revenues. If Congress desires greater scrutiny of the expenditures of these dollars, directions therefore would not seem to be found in IGRA as it is now written. We should be careful, however, to ensure that any outside direction of the tribes' expenditure of their own earned revenues is consistent with IGRA's stated: tribal economic development, tribal self-sufficiency and strong tribal government. 25 USC 2701 (4).

## POLITICAL SPENDING

I understand that a concern of this committee and the focus of this hearing is the expenditure of tribal funds for political purposes, lobbying expenditures, and the making of campaign contributions in state and federal elections. To date, the NIGC has not initiated enforcement action against a tribal government for making such campaign contributions, because such expenditures were deemed to fall into one or more of three permissible expenditure classifications: providing for the general welfare of the tribe and its members, promoting tribal economic development, and funding tribal governmental operations. In addition, lobbyists may arguably be engaged and paid for by the gaming operation, just like any non-Indian business, and not by the tribal government. In other words, lobbyists may also be paid not out of net gaming revenues but as an expense for the gaming operation.

Tribal businesses generally, and tribal gaming businesses specifically, are dependent on the statutory and regulatory basis within which they operate, and tribes often need professional assistance in monitoring legislative and administrative developments which may influence and even eliminate those activities.

Can expenditures of this nature be abused? Undoubtedly they can. Are there recent examples where this has occurred? Yes. Can or should Congress enact enforceable legislation that would more severely limit the purposes for which tribes may make expenditures of tribal gaming revenues or change how those expenditures are reported or overseen? That is a question for the Committee to consider..

Where tribes have expended seemingly exorbitant amounts for lobbying services or contributed million of dollars to causes that seem to have little relationship to their immediate economic development interests, there may be cause for concern about the due diligence exercised by those tribes. While economic prosperity and the wherewithal to make political contributions are relatively recent developments for most tribes, some general inquiries into the nature and magnitude of political contributions by others would put into perspective what might be reasonable expenditures of tribal assets to promote the political viewpoints of tribal governments. When tribal governments make contributions that are grossly disproportionate to what others spend, great caution ought to be in order.

I believe that the great attention that has come to this area, including this committee's scrutiny, as further evidenced by today's hearing, will send a clarion call to all of us, including tribes, that greater diligence and transparency is in order.

Indian gaming is a very competitive industry, and it is becoming more so. Tribes are necessarily protective of their market share, and this will sometimes manifest itself in political and legal efforts. When it occurs, it ought to occur fairly and openly.

Due diligence in this connection is required at several levels. Tribal leaders – tribal governments – should look before they leap. They should make every effort to be certain that precious tribal dollars are spent in the tribes' interest and that tribal dollars are truly being utilized as represented. Further, they must exert diligence in fully informing their tribal membership with respect to the extent and nature of their significant expenditures. Certainly there are "trade secrets" and political strategies in the Indian gaming industry, as well as elsewhere, that from time to time need to be closely guarded. However, tribal members are the shareholders in the tribal gaming operations, and they have a right to be informed of, and to influence, where their money is going. Similarly, tribal members themselves have a sacred duty to hold their leadership to account and to demand information to which they have a right. Thus, the whole Indian community has an obligation to help ensure that abuses do not occur.

The NIGC will continue to attempt to fulfill its oversight responsibilities, including oversight of the expenditure of tribal gaming revenues for those limited purposes identified in IGRA. If greater scrutiny is expected of the NIGC in this area, additional tools would likely be required. As I have said, however, I believe that the current system can work, but it will only work if the tribal gaming community itself calls on the community of tribal nations to use greater due diligence as it participates in the political process. It will work if tribes operate with a transparency that permits tribal members to be fully informed about tribal activities and that allows individuals and institutions such as Congress and this committee to have confidence that the economic development opportunity which IGRA fosters is not abused.