TESTIMONY OF
PHILIP N. HOGEN
CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS

MARCH 24, 2004

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, thank you for this opportunity to comment on S. 1529, the "Indian Gaming Regulatory Act Amendments of 2003."

I am Philip Hogen, a member of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation in South Dakota. Seated with me are Commissioners Nelson Westrin, a former Executive Director of the Michigan Gaming Control Board, and Cloyce "Chuck" Choney, a member of the Comanche Nation of Oklahoma and former Special Agent for the Federal Bureau of Investigation.

We took our oath of office in December of 2002, and after a year of activity, we can point to a number of accomplishments. I am providing a copy of the Commission's Annual Report, which describes our accomplishments for 2003 and includes information on our goals for the next two years. We are very proud of our work this past year and encourage you and your staff to review this document.

Before I begin, on behalf of the Administration, I would like to say that we look forward to introduction of the Administration's Proposal, the "Indian Gaming Regulatory Act Amendments of 2004" in the Senate. In addition to the questions raised by the Department of the Interior in its testimony, the Administration has concerns with S. 1529. Throughout my testimony, I will highlight similarities between S. 1529 and the Administration's Proposal which we strongly support. I will also mention areas where these two pieces of legislation differ.

NIGC Responsibilities and Budget

The mission of the National Indian Gaming Commission (NIGC or Commission) is to provide regulatory oversight of gaming activities on Indian lands adequate to shield Indian tribes from organized crime and other corrupting influences, to ensure that Indian gaming tribes are the primary beneficiaries of gaming revenue, and to assure that Indian gaming is conducted fairly and honestly by both operators and players. To achieve these goals, the Commission is authorized to conduct investigations, take enforcement actions, including the issuance of notices of violation, assessment of civil fines and/or issuance of closure orders, conduct background investigations, conduct audits, and review and approve tribal gaming ordinances and management contracts. The NIGC is staffed by 74 employees, of which 36 are located in our regional offices.

Of the responsibilities mentioned above, the NIGC believes keeping organized crime and other corrupting influences out of Indian gaming are especially important. This is achieved primarily through the due diligence exercised by the gaming tribes themselves, as the day-to-day regulators of Indian gaming under the Indian Gaming Regulatory Act (IGRA). Another effective means to achieve this goal is through a Federal law enforcement initiative started by the NIGC this past year. Initially, we contacted the Federal Bureau of Investigation to take part in this effort and have subsequently included the Office of the Inspector General Department of Interior, the Bureau of Indian Affairs Law Enforcement, the Internal Revenue Service, and the Department of Justice to become a part of this work group. The purpose of the group is to enhance cooperation between each agency, obtain commitments to undertake an investigative role, pool resources, coordinate roles and functions, and develop effective strategies to investigate and prosecute Indian gaming-related crime. The NIGC has advised gaming tribes through consultation meetings of the existence of this law enforcement initiative. Our message is that anyone committing a felonious act in a Native American casino will be prosecuted.

The Commission operates on a lean budget in spite of the breadth of its mission. The Indian gaming industry has grown significantly since the passage of the IGRA. In 1988, the year IGRA became law, Indian gaming was a $100 million dollar year industry conducted by approximately 100 tribes. Today, Indian gaming is a multi-billion dollar industry. For fiscal years ending in 2002, Indian gaming operations grossed $14.5 billion dollars and were conducted by more than 200 tribes, at over 300 sites in 28 states.

Regulating and providing oversight of this rapidly growing industry has been a challenge. The Commission is funded exclusively through fees paid by Indian gaming tribes on Class II and Class III assessable gross revenues in excess of $1.5 million. The NIGC is allowed to collect a congressionally determined maximum amount in fees. In 2003 through two appropriation bills, Congress authorized the NIGC to collect up to $12 million for Fiscal Years 2004 and 2005, which represents a $4 million increase over our previous cap of $8 million.

The NIGC recently announced a preliminary fee rate of .069 percent of assessable gross revenues over $1.5 million for 2004. To put this in perspective, for each thousand dollars of assessable gross revenue, the NIGC will receive 69 cents. I would like to emphasize that although we are authorized to collect up to $12 million this year, the NIGC will likely collect and expend less than $10.7 million through our current preliminary fee rate. The Commission believes planning and managing growth is critical, and to move from an $8 million fee cap to a $12 million fee cap in one year would have presented integration problems. Further, we recognize that dollars the NIGC collects from gross gaming revenue are funds that could be spent on improving tribal services, and in this respect, we work very hard to be resourceful in performing our responsibilities.

S. 1529 proposes a schedule of fees that will increase our fixed fee cap through FY 2008. Increasing our budget from $8 million to $12 million is appreciated and the additional funds have allowed the agency to improve its regulatory and oversight functions. We

were able to fill numerous staff vacancies in both the field and in our national office, to better serve Indian gaming operations through increased visitation by staff and to provide training to tribal regulators and gaming commissions. In addition, information system upgrades and modifications were designated as a priority in 2003. A request for proposals was issued late in the year to assess the agency's current state of managing information and to develop a model for capturing and sharing information and providing relevant information to gaming tribes. An unrelated information system improvement was the ongoing development of the electronic system called Live Scan for processing fingerprints through the Federal Bureau of Investigation (FBI). Live Scan, which is now available to all tribes, will make criminal history reports available to tribes within 24 hours after submitting the fingerprints, compared to the previous system, which could take weeks. Tribes use fingerprints in conducting background investigations for applicants seeking tribal gaming licenses.

Although the increase in our budget has improved our operations and services, we are concerned that a fee schedule that is not reflective of the growth of the Indian gaming industry will inhibit our ability to fulfill our mission in the future.

We support allowing the Commission's fee collection authority to float, allowing us to grow, or contract, with the size of the Indian gaming industry. The Administration's Proposal would set the maximum amount the NIGC can collect in fees at .080 percent of gaming revenues. Again, this means that for each gaming operation grossing more than $1.5 million, the NIGC would receive a maximum of 80 cents of $1,000 in gross gaming revenue. While we don't anticipate an actual decrease in gaming activity, a floating fee cap would also require the Commission to adjust to declines in Indian gaming industry revenues.

I do want to stress that although the NIGC prefers a floating fee cap, we believe setting a schedule of fees through FY 2008 is a step in the right direction. Our main concern is that we have both financial viability and sufficient funding to allow us to regulate the current environment and develop long-term plans and goals to better regulate and protect the integrity of an industry that is extremely important to tribes. The current practice of establishing our fee cap through annual appropriations is not conducive to a stable operation, especially given the size of the budget. If funding should decrease, it becomes very difficult for an agency, such as NIGC, with limited personnel and resources to adjust in the course of a year and continue to fulfill its very important mission. In fact, a big concern is that the many improvements made in 2003 would be negated by any decrease in the budget.

We also want to mention our concern regarding the proposed Fee Reduction Program outlined in S. 1529. This program would require the NIGC to reduce fees based on factors such as the level and quality of state and tribal regulation. In determining our goals and plans for the year, we do consider these factors even though many of them are subjective and subject to change based on tribal and state leadership and philosophies. It is also important to note that tribes do in fact, have an opportunity to reduce their fees by making application for a Certificate of Self Regulation. Admittedly, we have more

interaction with tribes that have poor or substandard regulatory oversight. However, this is the nature of industry regulation.

We are concerned not only with the integrity of gaming but the perception of the integrity of gaming and all tribes benefit when the reputation of the industry is advanced. Even though a tribe is well regulated, it has an interest in ensuring that all other tribes are also well regulated, and further, that there is substance and integrity in the Federal regulatory agency responsible for their oversight. While all tribes will not require the same extent of NIGC intervention or assistance all of the time, all tribes are well served when a credible NIGC infrastructure and capability is in place and available. As all gaming tribes are served by this, all tribes should be called upon to make proportionate contributions to the creation and maintenance of that infrastructure and capability. Given the unique structure of Indian gaming under IGRA, this is a cost of conducting Indian gaming business.

NIGC Authority

When the IGRA became law in 1988, Indian gaming really meant Indian bingo. The IGRA created our statutory framework based on a relatively small industry comprising of about 100 tribes. Today, Indian gaming is much more than bingo; it includes casino gaming producing revenues that exceed the gaming revenues of Las Vegas and Atlantic City combined. Yet the basic legal authority of the NIGC has not changed since 1988.

The Commission supports language in S. 1529 and the Administration's Proposal that would modernize our statutory structure, and allow our agency to become more effective in fulfilling its regulatory role. For example, both pieces of legislation include language that would: require the NIGC to develop a strategic or regulatory plan; define how vacancies within the Commission are filled; clarify the Chairman's delegation authority; and make adjustments to pay rates. More importantly, we strongly support language included in both bills that eliminates questions challenging our legal authority to monitor and regulate Class III gaming.

The Indian Gaming Regulatory Act gave the Commission responsibility for ensuring that management contractors deal fairly with Indian tribes, and to keep unsuitable individuals from participating in these contracts. However, in some situations, developers, consultants and equipment lessors may exert significant control over the gaming operations under arrangements that are not considered management contracts, and thereby avoid federal scrutiny. Our mission, in part, is to ensure that tribes are the primary beneficiaries of gaming revenues. However, if any of these parties violate the IGRA, the Commission's recourse is against the tribe, which in such cases, may be the victim. It is for this reason that we advocate an expansion of remedies, included in the Administration's Proposal, which would allow the NIGC to take action against individuals, not just the tribes, who take advantage of or exploit tribes and Indian gaming operations.

The Indian gaming industry has been challenged by the difficulty in differentiating between Class II and Class III gaming devices requiring a significant investment of time on the part of the NIGC. In the past, the NIGC has issued opinions and bulletins to assist in determining the class of individual games. Recognizing that issuing opinions on individual games is not the most efficient way to address the issue, we have developed a Tribal Class II Game Classification Standards Advisory Committee. This committee will help us formulate more definitive technical standards and regulations for distinguishing whether electronic games are Class II or Class III games under the IGRA.

Minimum Internal Control Standards

The NIGC supports the concepts included in Section 20 of S. 1529, which require our agency to establish Minimum Internal Control Standards (MICS) for Class II and Class III gaming.

MICS are procedures used to protect the integrity of gaming operations and offer uniformity and consistency in the application of internal controls on an industry-wide basis. The NIGC first developed MICS in the late 1990s through a Tribal Advisory Committee process and in close consultation with tribes. We recently established a Standing Tribal MICS Advisory Committee, comprised of tribally nominated tribal reprsentatives, to recommend and provide input regarding the formulation of proposed amendments necessary to update our current MICS and address changes in gaming technology. Nine individuals have been selected to serve on the committee through December 2005.

The NIGC supports language included in the Administration's Proposal that would allow the Commission to retain the current system of utilizing Advisory Committees. This process is efficient and effective. S. 1529, on the other hand, would require the Commission to utilize a time-consuming negotiated rulemaking process. In doing so, we would also be required to completely discard our current MICS and create a new set of MICS. Our preference is to amend the current MICS, and we therefore prefer the language contained in the Administration's Proposal.

Our authority to promulgate and require MICS for Class III gaming has recently been challenged. In July 2003, the NIGC issued a Final Decision and Order concluding that the Colorado River Indian Tribes violated NIGC regulations by denying access to Commission representatives to conduct an audit on the Tribe's Class III gaming activities. The Tribes filed suit on January 7, 2004, alleging that the NIGC exceeded its statutory authority under the IGRA.

The NIGC considers MICS to be one of the primary regulatory tools available to protect Indian gaming and strongly believe the Commission must continue to have authority over MICS in both Class II and Class III gaming. Although we are confident in defending our position through litigation, if necessary, we appreciate the fact that both S. 1529 and the Administration's Proposal include language that provide clarity to this issue.

Use of Civil Fines

NIGC is concerned about Section 19 and Section 21 of S. 1529. Section 19 would require the NIGC to invest a portion of all fees and civil fines to supplement our budget. Under current law, fines we assess to gaming operations in violation of IGRA are paid to the general treasury of the United States government, not to the NIGC. Regulatory agencies should not be the financial beneficiaries of their own regulatory programs.

Enforcement actions are one of the least desirable, but necessary, parts of the Commission's oversight responsibilities. In 2003, our field investigators conducted 446 site visits to tribal gaming operations; our Enforcement Division issued 25 Potential Notices of Violation (PNOVs), and provided evidence leading to the issuance of four Notices of Violation. For clarification, PNOVs give tribes the opportunity to correct questionable practices and get back on the right track before formal enforcement action is taken. Unfortunately, we are sometimes forced to take more severe enforcement action. In 2003, the NIGC collected more than $4 million from fine assessments. If the NIGC were in any way benefiting from the assessment and collection of these fines, the legitimacy of our enforcement decisions and our motives may be called into question.

For similar reasons, the NIGC is concerned with Section 21 of S. 1529, which would require our agency to create a special Indian gaming regulation account to provide grants and technical assistance to Indian tribes using funds secured through civil fines. We strongly agree that increased training in Indian Country is an important part of the Commission's role in regulating gaming. Well-trained gaming officials are better able to protect the integrity of gaming and greatly assist in our efforts. In 2003, our agency conducted more than twenty training sessions for tribal leaders and tribal gaming regulators on subjects such as MICS, environmental safety and health, tribal gaming authority responsibilities, and Indian land and jurisdictional issues. While we are supportive of increasing training and providing additional services, we do not believe that civil fines should be used to fund these kinds of activities.

Consultation

I also wanted to comment on Section 22 in S. 1529, which requires federal agencies, including the NIGC, to consult with federally recognized tribes to the maximum extent possible. Although there is not a consultation section included in the Administration's Proposal, the Commission believes that consultations are an important and effective method of communicating with federally recognized tribes and their authorized government leaders.

Commissioners Westrin, Choney and I are dedicated to engaging in regular, timely, and meaningful government-to-government dialogue on matters impacting Indian gaming. In 2003, we conducted five formal regional consultations across the country, as well as many other consultations with tribes, regulators and others impacted by our work. These

initial consultations provided valuable insight, and we plan to issue a formal consultation policy by April 5, 2004. We will share this policy with you and your staff upon completion.

Conclusion

Keeping tribal gaming operations squeaky clean by scrutinizing the individuals permitted to participate in them, carefully monitoring the fairness of the play of the gaming conducted -- by the operations and the customers who patronize them -- and ensuring that the proceeds of the gaming activities flow to the tribal entities which created and operate them, continues to be challenging. It remains that tribes bear and accept the primary responsibility for this work. NIGC oversight, by being thorough and efficient, lends credibility to the tribes' efforts in this regard. This credibility enhances the public's confidence in tribal gaming operations, and fortifies the trust tribal members have that their assets and economic development opportunities are protected.

All areas of tribal gaming addressed by the IGRA are of importance to the NIGC as it implements its mission. The focus the Commission's efforts will shift as challenges, such as distinguishing between the classes of gaming, are resolved by regulatory, judicial and legislative progress. New challenges, such as tribes' utilization of tribal gaming revenues in accordance with the mandates of IGRA, will arise. Given the tools and resources, including an organic Act -- the Indian Gaming Regulatory Act -- which keeps pace with the dynamic progress of the gaming industry, NIGC will continue to help tribes achieve self-determination and self-sufficiency as that Act originally intended.

Again, I appreciate the opportunity to testify on S. 1529 and am happy to respond to any questions the Committee may have.

Attachment:
Administration's Proposal, the "Indian Gaming Regulatory Act Amendments of 2004"
National Indian Gaming Commission Annual Report 2003