

Testimony for Senate Indian Affairs Committee

Oversight Hearing

April 17, 2008

National Indian Gaming Commission

Philip N. Hogen, Chairman

Good morning Chairman Dorgan and members of the Committee. The National Indian Gaming Commission (NIGC) is delighted that the Committee has once again chosen to look at the NIGC and the role it plays under the Indian Gaming Regulatory Act (IGRA). As I have testified before, Indian gaming is the greatest engine for economic development that Indian country has developed.

Indian gaming is not a federal program, and its genesis did not occur with the enactment of IGRA. Rather, tribes have been gaming since before the inception of the Act and in many respects, the structure established by IGRA has fostered the growth and development of that industry. IGRA created the NIGC and it is the nation's only federal gaming regulatory entity. To put the regulation of tribal gaming in proper context, we need to appreciate that the vast majority of the regulation of tribal gaming is done by the tribes themselves, with their tribal gaming commissions and regulatory authorities. In many instances, where tribes conduct Class III or casino gaming, state regulators also participate in the process. NIGC has a discrete role to play in this process and is only one partner in a team of regulators.

As I have often told this Committee, the growth of revenues generated by tribal gaming is large, and getting larger. For individual casinos, however, growth may slow and, in some cases, may even diminish. There has been and continues to be growth in the industry, which now generates nearly \$26 billion of gross gaming revenues annually, and which represents the second largest component of gaming revenues generated by the gaming industry in the United States.

NIGC's role in the structure established by IGRA is to ensure ongoing integrity in the tribal gaming industry by assisting tribes to determine the suitability of those whom they approve or license to staff and operate their gaming operations and to ensure that the play at the casinos and bingo halls is fair, both to the customer players and to the facilities themselves. In addition, NIGC ensures that the revenues generated by the tribal gaming operations go to the tribal governments and are not wrongfully siphoned away or disproportionately paid to those who supply and assist tribes as they conduct those operations.

As the Committee knows, zero taxpayer's dollars are provided to NIGC to fund its role, but rather the tribes pay their way through fees the Commission assesses on the tribes' gross gaming revenues. The large and growing scope of Indian gaming of late has meant that NIGC, too, has grown and is growing to keep pace. The composition and staffing of NIGC is currently as follows:

Overview of the Commission

The NIGC is headed by three Commissioners. The Chairman is appointed by the President with the advice and consent of the Senate and the other two Commissioners are appointed by the Secretary of the Interior. One Commissioner position is currently vacant.

Our current structure is comprised of our Washington D.C. Headquarters Offices, six regional offices (one of which is housed in our D.C. offices) and five satellite offices. The typical regional office is composed of a regional director, several field investigators, one or two auditors and administrative staff.

Collectively our field personnel consist of six regional directors, field and background investigators, auditors, and administrative staff (with one vacancy). It should be noted that the auditors in the regional or satellite offices actually report to the Director of Audits in our D.C. offices.

Our D.C. Headquarters houses the Directors of Enforcement, Training, Auditing, and Contracts. The Directors and our managers for Information Technology (IT), Freedom of Information Act requests, Finance and other administrative roles all report to a Chief of Staff. In addition there is the Office of General Counsel. The attached chart further breaks down the composition of our staffing. Of our 104 employees, 22 are Native American, 16 of whom are enrolled tribal members.

A brief description of the function and achievement of the several divisions of the Commission follows:

Enforcement Division

NIGC's Enforcement Division, through its field investigators, reviews the conduct of gaming at 416 tribal gaming operations run by 230 tribes.

As a result of NIGC field investigators' work and with the help of NIGC's Office of General Counsel, in 2007 NIGC issued seven Notices of Violation and entered into an additional 4 Settlement Agreements in lieu of notices of violation. Although informal compliance is the primary method for assuring compliance, approximately 160 Notices of Violation have been issued over the years.

Training

Along with Congress's grant of flexibility in the amount of fees collected to fund our activities came a mandate to provide technical assistance to tribal gaming operations. NIGC has always seen training as an important part of its mission but has taken special care to offer training since enactment of Pub. L. No. 109-221 on May 12, 2006. For example, in calendar year 2007, NIGC's Division of Enforcement provided over 700 hours of formal training to tribal regulators. This figure excludes all the hours of informal training that took place during the 715 site visits that were conducted during 2007 or that took place at national and regional gaming conferences. Training topics include: tribal background investigations and licensing; environment, public health and safety programs; tribal gaming commission duties; and slot machine technology.

NIGC recently hired a Director of Training, who will oversee the agency's training efforts, integrating the work of our field investigators and field auditors in providing the training, both formal and informal, that is needed by tribal gaming facilities and regulators.

Audit Division

Since the U.S. Court of Appeals for the D.C. Circuit affirmed the holding in the *Colorado River Indian Tribes (CRIT)* decision, the Audit Division has foregone the conduct of Minimum Internal Control Standards (MICS) audits at most gaming operations conducting Class III gaming; however, at the time of the decision follow-up was being performed from several previous audits. At the request of some tribes, that work continued and reports of findings were provided to the tribal gaming regulatory authorities for their disposition. Furthermore, in addition to performing four compliance audits at Class II gaming operations, the Division has received two requests from Class III properties to conduct audits; one has been completed and the other is in progress.

The Division has also conducted audits confirming that the uses of gaming revenue by three tribal governments were compliant with NIGC regulations. Complementing the audit work has been an increased demand for training assistance from gaming operations and tribal regulatory personnel. Since the beginning of the current fiscal year, audit staff have participated in or conducted training on 17 occasions.

The Audit Division has also worked to install a computerized accounting system to improve various aspects of the agency's financial management. The new system has allowed the automation of billings and receipts for the tribes that process fingerprints of tribal gaming operation key employees through the NIGC. The new system also allows us to better monitor the timely payment of NIGC quarterly fees and to more accurately track payment of fines and penalties that are deposited with the U.S. Treasury. The system will also help improve NIGC's monthly financial management through preparation of monthly financial statements, comparing actual expenditures to budgeting revenues and expenses to facilitate financial planning for the future.

Contracts Division

The Contracts Division is responsible for reviewing all management contracts and amendments in order to make a recommendation to the Chairman, who must approve management contracts before they become effective.

Tribal Background Investigations and Licensing

The NIGC assisted in processing over 72,000 fingerprint cards for tribal gaming operations. All the fingerprint information is sent electronically to the Federal Bureau of Investigation, pursuant to a MOU with the Bureau with most of the results returned to the tribes within 24 hours. This is a marked improvement since the early days of NIGC when results were sent through the mail and not received for two to four months.

Administration Division

The NIGC Administration Division has responsibility for, among other things, responding to Freedom of Information Act (FOIA) requests. Our FOIA Office began FY 2007 with 10 pending requests, and received 101 new requests. By December 31, 2007, the Office had processed and closed out 108 of those requests; the remaining three were closed out within the 20-day time limit.

In addition to updating the Employee Manual with many new policies and procedures, the Division is also working to create an updated agency-wide data base.

Office of General Counsel

The Office of General Counsel (OGC), a staff of 17, provides legal advice and counsel to the Commission.

Currently, OGC attorneys, along with the Department of Justice, are handling 13 cases in Federal courts and monitoring 11 additional cases that impact the Commission. In 2006, 69 ordinances and amendments were submitted for review, and in 2007, an additional 49 were submitted. In every instance, those reviews were completed within the 90-day statutory deadline.

Twenty-eight contracts in 2006 and 22 contracts in 2007 were submitted to OGC for a review of management and sole proprietary interest. The OGC issues advisory opinions on these contracts as a service to tribes and contractors so that they may avoid possible violations of the IGRA.

The OGC also assumed responsibility for tracking whether tribal gaming facilities are located on Indian lands. It established an Indian lands data base to capture all of the information required to determine if the lands are eligible for gaming. That data base is undergoing a complete revamping to make it more user friendly. The OGC is also developing a system of maps to reflect where the gaming operations are located.

The OGC, along with NIGC's program personnel, staffs the Commission's work on regulations. It also provides legal advice on the distinction between class II and class III games. As a consequence, over a period of five years, the Office helped draft and revise the Commission's several drafts of the regulations for classification, facsimile definition, technical standards, and class II minimum internal control standards. To do so, they staffed the meetings of two advisory committees, the meetings of a separate working group formed by the advisory committees, consultation hearings, and hundreds of individual consultations, and reviewed hundreds of written comments submitted by tribes, states and others.

The OGC also drafted Facility License Standards which were published as final in the Federal Register in February of this year. The regulation requires tribes to notify the Commission 120 days before a tribe plans to license a new facility. The rule was finalized after nearly two years of consultation with tribal leaders and 217 written comments on prior drafts and proposed standards. Since the Facility License Standards were published, the NIGC has received seven tribal notifications of intent to open a new gaming facility in 120 days. We have requested information from another five tribes regarding their intent to open a facility within the 120-day timeframe.

The Commission's Evolving Mission

Over time, of course, the methods by which the Commission fulfills its mission have evolved, and continue to evolve. Some of the areas of focus in this regard are as follows:

Consultation

In keeping with the obligation to consult, NIGC adopted its consultation policy in early 2004, a copy of which is attached and which we published in the Federal Register. This policy was itself a product of the Commission's consultation with tribes as it was formulated. In the course of formulating this policy, NIGC also gathered and examined the consultation policies of other federal agencies, and discussed the utility of those policies with those agencies.

In the course of consulting on regulations, we typically first draft the proposed regulations, based on the agency's experience of what is needed for healthy regulation, and then we present these proposed regulations to the tribes. The proposals are often published on our website and, for example, in the case of the classification regulations, are presented to tribal advisory committees, so that tribal gaming regulators with the most experience in the field can advise NIGC of how the regulations would affect them.

We continue to seek consultation in the most effective ways. While there are 562 recognized tribes in the United States, only about 230 are engaged in Indian gaming, and so it is that group to whom the NIGC has most often turned for consultation. In the two years 2006 to 2007, NIGC has conducted 154 government-to-government consultations.

In addition, I met with 41 tribes here in my office in D.C. at their request to discuss a myriad of issues. NIGC also attended 15 tribal advisory committee meetings, 15 national and regional conferences, and eight tribal leadership meetings to which we were invited. In addition, on September 16, 2006, we held a public hearing on the class II regulations. That hearing, at which 27 speakers made public comments, was attended by 129 participants.

It is not possible, of course, for the Commission to visit every tribe on its reservation each time an issue or policy might affect tribes. Gaming tribes have formed regional gaming associations, such as the Great Plains Indian Gaming Association (GPIGA), the Oklahoma Indian Gaming Association (OIGA), the Washington Indian Gaming Association (WIGA), the California Nations Indian Gaming Association (CNIGA), the Midwest Alliance of Sovereign Tribes (MAST), and the New Mexico Indian Gaming Association (NMIGA), among others, as well as national and regional organizations such as National Indian Gaming Association (NIGA), National Congress of American Indians (NCAI) and United South and Eastern Tribes (USET). Those organizations meet annually or more often, and NIGC has taken those opportunities to invite tribal leadership to attend consultation meetings on a NIGC-to-individual-tribe basis. Consulting at gaming association meetings maximizes the use of the Commission's time and minimizes the travel expenses that tribes, who ordinarily attend those meetings anyway, must expend for consultation.

Many tribes accept these invitations, many do not. Some tribes send their tribal chair, president or governor, and members of their tribal council to these consultation sessions, while others only send representatives of their tribal gaming commissions, or in some instances staff members of the tribal gaming commission or of the tribal gaming operations. The consultation session is always most effective when tribal leadership, by way of tribal chair or council, is present. The letters of invitation identify issues that NIGC is currently focusing on, and about which the agency would like tribal input. The letters always include an invitation to discuss any other topics that might be of particular interest to an individual tribe. Some consultations, therefore, have been limited to a single issue, such as NIGC's proposals to better distinguish gaming equipment permissible for uncompact Class II gaming from that permitted for compacted Class III gaming. Others might focus on issues specific to the individual concerns of the tribes.

We do not only make ourselves available for numerous consultations but we also listen seriously to what we hear at those consultations. The regulations NIGC adopts are published with thorough preambles, which attempt to summarize all of the issues raised in the government-to-government consultation sessions the Commission has held with tribes, as well as those raised by all other commenters providing written comment, during the comment period on the regulation. We write such detailed preambles so that commenters will know that we considered their comments and understand why those comments were or were not accepted.

We also take to heart what we hear at consultations while we formulate our regulations. For example, the proposed regulations on Minimum Internal Control Standards for Class

II gaming were written completely in response to observations made by the Tribal Advisory Committee on the Class II regulations. Likewise, we have drastically revised our Class II classification regulations and technical standards based on tribal feedback. While it may not be patently clear to the Committee why reducing the number of daubs or ball releases in an electronic bingo game is important, I can assure you, it is a topic of hot debate among gaming tribes and the states. The fact that we have reduced the number of daubs from two (after the game starts) to one, makes a tremendous difference in the speed with which the game may be played.

This is not to say that our responses to tribal feedback are met with applause in Indian Country. We believe that consultation should not necessarily mean agreement and that the parties consulting should not measure the good faith or effectiveness of the consultation by whether agreement is reached. We must also balance the desire for collaboration with the regulated community (Indian gaming tribes) with our statutory mission to provide robust and healthy regulation.

Typically, there is little or no clamor for consultation if the action being considered is favorably received throughout the Indian gaming industry. NIGC's recent reduction in the fees it imposes on gross gaming revenues to fund NIGC operations provides such an example. On the other hand, if the issue the agency is considering is viewed as problematic, often there are concerns expressed that consultation has been inadequate.

A further challenge the NIGC has observed is that consultation is most often criticized by tribes when the eventual policy that the agency settles on is at odds with the position expressed by tribes during consultations. That is, the NIGC's failure, from the tribal point of view, was not in the consultation per se but rather that the Commission did not agree with tribal points of view. It is often the case that the only consultation deemed adequate is that in which the Commission always fully comports with tribal points of view. NIGC often finds itself sympathetic to tribal points of view, but it is also bound by statutory constraints. For example, the IGRA's characterization of certain games as Class III requires the sanction of tribal-state compacts.

Government Performance and Results Act (GPRA)

In mid- 2006 IGRA was amended by Pub. L. No. 109-221 (Act of May 12, 2006) to require the NIGC to formally comply with the Government Performance and Results Act (GPRA).

The formal GPRA process was new to NIGC, and we lacked knowledge and experience in our agency in preparing strategic and performance plans in accordance with GPRA procedures and requirements. Our staff, after reading GPRA and reviewing one or two existing plans from other agencies, drafted a plan for FY 2008. In light of feedback, including from tribal representatives who read the discussion draft on our website, the plan was essentially discarded and we started anew.

The new draft was completed around the first of April 2008. We are now seeking review, guidance and assistance relative to our new plan.

We hope to have a draft strategic plan suitable for submission to Tribes and Congress for comments by the end of June 2008.

CRIT Decision

In performing its oversight role, in the 1990s NIGC addressed concerns about the lack of internal controls in a number of tribal gaming facilities by adopting a comprehensive set of Minimum Internal Control Standards (MICS), which the NIGC applied to Class II and Class III gaming. While many tribes at that time already had excellent internal control systems, a number did not, and as a result of the application of those standards, the entire Indian gaming industry moved to a more professional level, some tribes adopting the NIGC MICS, some tribal-state compacts adopting those MICS, and many tribes combining the NIGC standards with their own, more rigorous standards. The annual audits IGRA requires tribes conduct and furnish to NIGC for review, thereafter included independent auditors' analysis of tribal compliance with those standards. NIGC expanded its team of auditors and conducted tribal audits in connection with compliance with those standards. Those standards were applied to Class II and Class III gaming. At the time of their adoption, many tribes, while complying with the new regulations, voiced a concern that NIGC lacked the authority to so regulate Class III gaming – Class III gaming constituting more than 90% of the \$26 billion of gross gaming revenues per year. Those concerns crystallized in a judicial challenge brought by the Colorado River Indian Tribes (CRIT) to the NIGC's MICS's application to Class III gaming. The United States District Court and the United States Court of Appeals in the District of Columbia agreed with the tribes reasoning and in 2006 decreed that NIGC could no longer mandate tribal compliance in that area. Thus, the role and approach of NIGC in that area has since changed. A number of tribes have recently amended their tribal gaming ordinances to adopt and include the NIGC MICS, and to recognize NIGC's enforcement authority over Class III. In those instances NIGC has reverted to the role that it earlier played. Elsewhere, NIGC confines its review of MICS compliance to Class II gaming except when a number of tribes have invited the NIGC to their facilities to do Class III MICS audits on a voluntary basis.

Classification Standards

Perhaps the highest profile initiative of the NIGC in recent years has been its effort to adopt a regulatory scheme to draw a brighter line to distinguish gaming equipment tribes may use for uncompact Class II gaming (bingo, etc), from that which tribes employ for compacted Class III gaming (casino gaming). The IGRA recognized that the long standing Johnson Act prohibited "gambling devices" in Indian country, but made a specific exemption for the use of such equipment when it is utilized pursuant to the tribal-state compact. The Act also recited that tribes could use computers and electronic and technologic aids when they conducted their bingo and games similar to bingo, but further provided that slot machines of any kind and electronic facsimiles of games of chance fell

into the compacted Class III category. After taking enforcement actions, closing tribal gaming facilities and imposing significant fines, in instances where the NIGC observed slot machines or electronic facsimiles of games of chance being employed in the absence of compacts, the Commission attempted to better address the issue by providing a number of advisory opinions with respect to equipment it deemed playable without a compact. That process proved complex and difficult, and with the rapid advances in technology, we discovered that no sooner were such advisory opinions written, than they became obsolete. Thus, a long effort, assisted by tribal advisory committees, was commenced to write regulations to clarify what equipment could be used without a compact, and how such equipment could be identified and certified. This effort included a long discussion and negotiations with the Department of Justice, which has responsibility for enforcement of the Johnson Act, and drafting and proposing rules which, after strong criticism by tribes and others during many consultation sessions, were withdrawn.

As a result of a long arduous effort by the NIGC's tribal advisory committees, working with a working group of representatives who build, design and regulate such equipment at the tribal level, a new package of proposals was published in the Federal Register in October, 2007. Much consultation with respect to those proposals was held thereafter, and the comment period was extended several times, most recently concluding on March 9, 2008. In connection with this effort the Commission commissioned an economic impact study which will be considered together with the comments on the proposals under consideration. This long-standing effort deserves to be fairly and finally concluded, and the Commission is cautiously optimistic that with the information received from tribes, states and the public, it can publish final rules with respect to at least some aspects of this concern in the near future.

Unless or until clarity is brought to this area, challenges will remain for gaming tribes, as well as those of us who attempt to regulate them. Tribal gaming is by no means the only sector where concerns of this nature exist. In many states, there is a significant expansion of what is purported to be charitable gaming using automated bingo equipment. These states find themselves struggling with questions about whether such equipment complies with their charitable gaming laws or runs afoul of their gambling laws, and, generally, with the scope of permissible charitable gaming within their borders. In some instances, this has raised issues about violating the "exclusivity" that tribes understood they had bargained for in their Class III compacts in exchange for revenue sharing with the states. Tribes cannot expect to have an unfettered breadth of Class II gaming equipment in their sector, yet require states to view the issue very narrowly. Clarity in this area will serve many purposes.

Change in the Face of Growth

The NIGC, in the context of the federal family, is a relatively young and small agency. It was not long ago when NIGC's staff consisted of only a handful of people, operating from a single office. As the industry grew from at most a \$200 million industry when IGRA was enacted to a \$26 billion industry, the agency's budget grew from \$1.2 million in 1991, to \$13 million in 2006, to \$20.5 million in 2008. The days are not long past when there were only five "field investigators" operating out of their homes and the trunks of their cars, spread throughout Indian country.

As this growth has occurred, it has become necessary to adopt more and more formal policies and procedures. The agency has always attempted to look at federal statutes, such as most of Title 5 U.S.C. governing government organization and employees, and through more specific procedures of the Department of the Interior under our interagency arrangement with the Department to provide administrative support. With the agency's growth, it has become necessary to develop and adopt more agency-specific policies, and this is a work in progress. Recently the agency has adopted policies relating to reasonable accommodations under Equal Employment Opportunity Commission guidance, and undoubtedly as the agency continues to grow, further policies of this nature will be deemed appropriate. Common sense and good judgment has always been the approach the agency has attempted to take when dealing with its management. As the NIGC has now grown to have a staff of more than 100, formal policies and procedures become a greater necessity. While an informal approach kept the agency nimble in its early days, experience is showing that as it has grown, more bureaucracy, to ensure due processes and transparency, is appropriate and the agency continues to examine its practices to develop measures that are necessary. In this connection, the agency is using its own audit staff to conduct audits of a number of its programs, and greater consistency and clarity is resulting there from.

That is an overview of how we are evolving in carrying out our mission. I will be happy to answer any questions the Committee have. Thank you.

Staffing at the NIGC Headquarters

- 1 – Chief of Staff
- 2 – Commission assistants
- 1 – Director of Audits
- 1 – Director of Enforcement
- 1 – Director of Training
- 1 – Director, Region VI
- 1 – Director, Congressional and Media Relations
- 1 – Director of Contracts
- 1- Financial Analyst
- 1 – NEPA Compliance Officer
- 2 - Tribal Background Investigation Staff
- 1 – Support Staff
- 1 – Director of Administration (vacant)
- 11 – Administration Personnel (1 vacant)
- 1 – IT Manager
- 4 – IT Staff (1 vacant)

- 1 – Acting General Counsel
- 13 – Attorneys (2 on detail)
- 5 – Legal staff

D.C. Total 50

Field Total 54

Agency Total 104

April, 2008