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CHAIRMAN HAROLD MONTEAU
OF THE NATIONAL INDIAN GAMING COMMISSION
ACCOMPANIED BY
ASSOCIATE COMMISSIONER PHILIP HOGEN
AND ASSOCIATE COMMISSIONER THOMAS FOLEY
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

BODY:

Mr. Chairman, members of the Committee, my name is Harold Monteau, I am Chairman of the National Indian Gaming Commission. With me today on the panel are Associate Commissioners Tom Foley and Philip Hogen. This a particularly historic hearing today. It is the first Senate Committee

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oversight hearing of the National Indian Gaming Commission (NIGC) since its establishment by Congress under the Indian Gaming Regulatory Act of 1988.

BACKGROUND

To assist you in understanding the NIGC, let me briefly describe the history of the passage of the Indian Gaming Regulatory Act of 1988, and the creation of the Commission under that Act. Before and after the United States Supreme Court decision of 1987, in *California v. Cabazon Band of Mission Indians* (which found that Indian tribes located in States that otherwise allow gaming have a right to conduct gaming on Indian lands unhindered by State regulation) several versions of Indian gaming legislation were considered by Congress to address the issues surrounding Indian gaming. In an attempt to balance the competing interests of the Indian tribes and the States, Congress, through the Indian Gaming Regulatory Act, set up the jurisdictional framework which presently governs Indian gaming.

The IGRA classifies Indian gaming into three categories and designates the governmental entity or entities with regulatory authority for each category. Class I gaming is gaming conducted on Indian lands at traditional ceremonies and celebrations. Regulatory jurisdiction for class I is retained solely in the Indian tribe. Class II gaming includes bingo, bingo related games, pull-tabs, lotto, punchboards, tip jars, instant bingo and other games similar to bingo and certain non-banking card games. Primary jurisdiction for regulatory control of these class II gaming activities is retained by the Indian tribes. The National Indian Gaming Commission, however, also has certain enforcement, approval, and oversight responsibilities for class II gaming as further discussed in this testimony.

Class III gaming is all forms of gaming that are not class I or II. The regulation of Class III gaming is primarily governed by the Tribal-State compacting process set out in the IGRA.

ENFORCEMENT

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Congress delegated certain enforcement authority to the Commission to take actions against violations of the Indian Gaming Regulatory Act, the Commission's regulations and violations of the tribal ordinances which are approved by the Commission. Violations are addressed through the Commission's authority to issue closure orders and impose and collect civil fines.

In contrast to the early years of the Commission, during which regulatory development and management contract approval were necessarily emphasized, during my tenure at the Commission, we have turned our focus to enforcement activities. This is the result of the tremendous growth of Indian gaming in recent years and the natural evolution of the NIGC from its regulation promulgation phase to one of monitoring, compliance and enforcement.

When the IGRA was enacted, it was not contemplated that Indian gaming would be so successful and that it would grow so quickly. However, the uncertainties of the law pre-IGRA were somewhat resolved by passage of the Act, resulting in tribes who had been uncertain about entering into the gaming arena deciding to begin gaming operations. Today, there are 184 Indian tribes with 257 gaming facilities located on their lands. This has caused an increase in regulatory expectations of the Commission by both the public and private sectors without a concomitant increase in the NIGC's budget, authority or staff.

Consequently, I have reorganized the Commission with a greater emphasis of NIGC resources on enforcement responsibilities. Until recently, the Commission had field representatives who spent the majority of their time performing background investigations or serving as liaisons. Now I have developed a strong Enforcement Division consisting of the Director of Enforcement and field investigators. The largest percentage of the NIGC staff is now under the authority of the Director of Enforcement. Consequently, during the last nine months the Commission has opened nineteen (19) new enforcement matters. This number far exceeds the total number of enforcement matters opened

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in the previous three years of the Commission's operation. The enforcement matters address a wide range of issues including gaming facilities operating without a tribal license, gaming operations failing to perform background investigations on key employees and primary management officials, facilities engaging in illegal pull-tab sales, operating gaming on lands which do not meet the Act's definition of Indian lands, operating class III games without a Tribal-State compact, management by contractors without approved management contracts, individually-owned gaming operations failing to make the required payments to the tribe which licensed them, and gaming facilities maintained in a manner which could threaten the health and safety of the public.

As an example of the enforcement actions we have taken, we can look to the State of California and the many enforcement actions we have pursued there. In December 1994, The NIGC disapproved a management contract between the Morongo Band and Great Western Casino on the grounds that the contractor was leasing class III gaming devices to the casino and obtaining excessive gaming revenues through this arrangement. That action was stayed by federal court order because of a pending parallel criminal proceeding. That criminal action is still pending. In another case, the NIGC brought an action against American Casino Enterprises for operating a gaming operation without an approved management contract. As a result of that action, the company paid a fine of \$500,000. Recently, the Commission issued a notice of violation to the Mooretown Rancheria for operating without a gaming ordinance. This action resulted in a \$30,000 fine. The Commission also issued three other notices of violation for operating without a gaming ordinance, failing to conduct background investigations, and operating in a manner which could threaten the health and safety of the public. In one of the closure actions in California, violence had erupted between rival factions over control of the tribal government and over a small gaming facility on the Elem Rancheria in northern California. I believed that the closure of the facility would prevent further injury and harm to the

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Rancheria membership and provide some measure of stability on the Rancheria, while the issues surrounding the control of tribal government were resolved. I also called upon the Bureau of Indian Affairs Law Enforcement program to lend assistance to local law enforcement authorities in diffusing the situation. They responded overnight and further violence was abated.

Our enforcement actions in California have been complicated by two related cases which affect gaming in that state. One of these cases is Rumsey Rancheria v. Wilson, a case currently on appeal to the 9th Circuit Court of Appeals, and Western-Telecon v. California State Lottery, a case recently decided by the California Supreme Court. Both of these cases involve the question of the scope of gaming authorized in the State of California. The Rumsey Court has stayed its order until it has reviewed the briefs filed with the Court following the Western-Telecon decision.

While these cases have been pending in California, the United States Attorneys have elected not to prosecute tribal gaming operations for violations of the Gambling Devices Act (Johnson Act).

In five situations the Commission found it necessary to exercise its most severe penalty, closure of a gaming facility. In other situations in Minnesota, Texas, Oklahoma, Washington, New York, North Dakota, California, Idaho, and Wisconsin, the NIGC has issued closure warnings in order to bring operators into compliance.

In another closure action, the Santee Sioux Tribe of Nebraska was offering class III gaming without an approved Tribal-State compact. The Santee had been in litigation with the State of Nebraska.

However, this litigation was dismissed after the Supreme Court decision in Seminole.

The Santee action demonstrates the difficulty in bringing what appeared to be a straight-forward enforcement action and having a closure order enforced. The Santee enforcement action commenced following Commission discussions with the United States Attorney for the District of Ne-

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braska. Thereafter, in April 1996, I issued a Notice of Violation and Order of Temporary Closure to the Santee Sioux Tribe for operating a class III gaming operation without a Tribal-State compact.

Upon the issuance of the closure order, the gaming operation was required to cease operating. The Tribe requested an expedited hearing as provided by NIGC regulations. At that hearing, the Tribe presented evidence of the failure of the Governor of the State of Nebraska to negotiate a compact in good faith and the poor economic conditions of the reservation. During this hearing process the Chairman issued a temporary stay of the closure order.

On May 1, I issued a Revised Temporary Closure Order and on May 2, I determined that the equitable arguments put forth by the Tribe failed to provide an adequate legal basis for rescission of the closure order. I ordered the gaming operation closed, and the Santee Sioux Tribe closed the facility on May 6, 1996.

The Tribe then filed an appeal to the full Commission. During the pendency of the appeal, the Tribe filed an injunction action against the NIGC and other federal agencies and officials in the United States District Court for the District of Nebraska and reopened its casino in violation of the temporary closure order. After consultation with the United States Attorney for the District of Nebraska, the United States filed its own action against the Santee Sioux Tribe seeking to enjoin the Tribe from operating its class III casino in violation of the closure order. On July 10th, the Federal court dismissed both the Tribal action and the Federal closure action. The Tribe's action was dismissed for failure to exhaust the administrative remedies provided by the IGRA and NIGC regulations, and the federal action was dismissed on the grounds that the United States was not entitled to civil injunctive relief to enforce the closure order. The United States has filed a motion for reconsideration of the Court's dismissal of the federal enforcement action. This motion is currently pending before the court. The Tribe continues to operate the facility during the pendency of the federal action. This

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particular case illustrates the difficulties which can be encountered in a closure action. Bringing such an action severely impacts the limited resources of the Commission. The Santee closure action required the work of a field investigator, the Director of Enforcement, and three attorneys to handle the administrative action and to assist the United States Attorney in the judicial proceedings. Therefore, the Commission has had to be mindful of its limited resources and staff when it considers its enforcement priorities. Protracted litigation is assured in almost all such situations.

In addition to direct enforcement actions, the Commission also seeks voluntary compliance in a variety of ways. It issues bulletins and letters notifying tribes and other gaming entities of their responsibilities under IGRA, such as the requirement to provide the Commission with audits, the requirement that banking card games can be played only under a tribal-state compact, and the requirement to allow the play of pull-tabs only in the same location as bingo. We provide advisory opinions on whether games fall within the class II or class III category and issue letters to parties if contracts submitted to the NIGC include prohibited gaming activities. All of these approaches encourage voluntary compliance as well as assist tribal gaming commissions in their compliance efforts.

The NIGC also relies upon both formal and informal networking to carry out its responsibilities. We work with tribal gaming commissions and tribal law enforcement as well as state gaming commissions and state law enforcement where the states are involved pursuant to a tribal-state compact.

The NIGC also utilizes and cooperates with many agencies within the federal government including the individual U.S. Attorneys around the country, the FBI, the U.S. Marshals, the Department of the Treasury, the IRS, the Justice Department (headquarters), the Solicitor General, the Department of the Interior and the Bureau of Indian Affairs. We have also participated in conferences with state Governors and Attorneys General to discuss their issues.

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TRIBAL BACKGROUND INVESTIGATIONS AND MANAGEMENT CONTRACTS

Under the IGRA the Commission is responsible for approving tribal gaming ordinances and processing tribal background investigations of gaming employees. In fulfilling these obligations, the Commission has approved 227 gaming ordinances for 221 tribes. As part of the background investigations, tribes must complete a criminal history check of each key employee and primary management official by requiring the fingerprinting of each employee required to undergo a background investigation. One hundred thirty-four (134) Indian tribes have entered into Memoranda of Understanding with the NIGC for the purpose of processing fingerprint cards. In addition, 84 Indian tribes are currently submitting fingerprint cards for processing. As a result, the NIGC processes monthly approximately 1200-1300 fingerprint cards. The Commission currently has over 36,000 records on individuals in its database.

In an effort to cope with the significant volume of tribal background investigations, the Commission has recently engaged in a pilot project to streamline the filing of applications and reports. This project will be tested for the next six months and will involve 20 Indian tribes who are in full compliance with the background investigation requirements. Under this pilot project, each participating tribe will be allowed to maintain on-site employee applications for tribal licensing rather than submitting those applications to the NIGC. Those participating tribes will still be required to submit to the NIGC a copy of the "investigative report" and "suitability determination", along with a list of all employees whose background investigations have been completed and for whom a suitability determination for licensing has been made. The fingerprint cards will continue to be processed through the NIGC or the states.

There exists a general misconception that Congress vested the NIGC with the responsibility for conducting background investigations on all persons and entities involved in management contracts

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and in Indian gaming generally. However, under the present statutory scheme Congress has vested this responsibility to a large extent in the tribes and the states. While the NIGC reviews and comments on tribal investigations and conducts investigations of class II contractors, it was anticipated in the IGRA that states would conduct the background investigations for Class III gaming.

Moreover, under Section 2710d(9) of the Act, the Commission cannot charge a fee to the contractors for the purpose of conducting a background investigation when the contract is for class III only. These limitations are consistent with the overall scheme of the Act, that is class III gaming, including background investigations, is generally controlled by a Tribal State compact. The limitations do, however, create the potential of inconsistent results when compared with Class II management contract approval authority.

The Commission also has the responsibility of approving management contracts for both class II and III gaming on Indian lands. Prior to the establishment of the NIGC and it becoming operational in 1993, the Bureau of Indian Affairs was vested with responsibility of approving management contracts. Beginning in February 1992, the Commission assumed the responsibility for management contract approval. Since then the Commission has approved 22 contracts and disapproved 16 contracts. The Commission currently has 22 management contract submittals before it for review. In addition, since 1992 the Commission has received 14 amendments to management contracts. The Commission has approved 7 amendments, disapproved 2 amendments, and 2 have been withdrawn. The Commission is frequently asked to review other contracts affecting the operation of class II and III gaming. These contracts include financing agreements, lease agreements, employment agreements, consulting agreements, slot-route agreements and employee lease agreements.

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All contracts are reviewed to see if they constitute a "management contract", thereby requiring Commission approval. In addition, those agreements which are not "management contracts" are forwarded to the Bureau of Indian Affairs for review as to the applicability of 25 U.S.C. S 81. The Commission is presently reviewing its policy with regard to the so-called "slot-route" or "machine-releasing agreements" because of the potential for abuse of these types of agreements. It may be relatively easy to "manage" the gaming operations under the guise of these types of agreements. The anticipated budget for the Commission for Fiscal Year 1997 is 4.22 million dollars. Of this amount, only 1 million dollars is from appropriated dollars. The rest of the funds comes from fees paid by the tribes and contractors. Under the provisions of the IGRA, the Commission is authorized to receive annual appropriations from Congress of 1.5 million dollars. In addition to the appropriations, the Commission is authorized to impose annual assessments of no less than 0.5% of gross revenues of the first 1.5 million dollars of gross revenues on class II gaming operations. Class III, which generates far greater revenues than class II gaming, is not assessed because such assessments are not authorized in the IGRA. The Commission spends the largest part of its resources addressing class III related or class II and III combined activities despite the fact that only class II operations are assessed.

When the Commission was first established, it promulgated regulations to implement the class II fee assessment provisions of the IGRA and began collecting fees in 1991. These revenues were deposited with the United States Treasury for future use by the Commission. The Commission sought and obtained an amendment to the IGRA (codified at 25 U.S.C. S 2717a) authorizing the Commission to carry over unused fee assessments. For the first two years, the NIGC built up a surplus of fees. However, since fiscal year 1993, the Commission has been using the surplus fees to supplement its

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budget. Without these surplus fees, the Commission would have been limited to operating on a budget of 2.5 million dollars annually.

The problem for the Commission is that the before mentioned carry-over fee assessment funds could be exhausted during fiscal year 1998.

There are approximately 257 Indian gaming operations in the United States. Although the role of the Commission is not that of day-to-day regulation of these gaming facilities, the IGRA does vest oversight authority in the Commission over these operations. Even when the role of the tribes and the states is taken into account for class III regulation, the Commission's staff is not large enough to adequately meet its current statutory obligations.

By way of comparison, the State of Arizona exercises regulatory function over 17 gaming operations with a budget of 4 million dollars. The State of Nevada regulates 400 operations with a budget of 20 million dollars. Clearly, the Commission needs some relief from the present cap imposed on it by the Act.

NEW INITIATIVES

In addition to the overall reorganization of the Commission and the background investigation pilot project, the Commission has started a variety of new initiatives. Most importantly, we are now emphasizing our enforcement activities. This is probably the most important step we can take as a regulatory agency. We are increasing and improving our records and physical security and improving our information storage and retrieval capabilities. As Chairman, I am delegating certain authority to others and seeking to streamline our processes to eliminate bureaucratic obstacles and to place more responsibility in the staff and the other Commissioners. Commissioner Hogen will also present testimony on the role of the Associate Commissioners. Finally, the Commission is proceeding to contract with outside agencies and the private sector to provide services which our small staff

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cannot provide. For example, the Office of Personnel Management will now be conducting large segments of our background investigations, and a private contractor will provide the necessary technical expertise for environmental and health and safety compliance. We are also exploring the use of contractors to compile background information that is a matter of public record.

LEGISLATIVE AMENDMENTS

The Commission is on record with this Committee in support of legislation proposed by the Committee (S.487) which would establish Federal minimum regulatory standards. The Commission again reaffirms its support for this concept. These standards proposed in the legislation will provide uniformity while still recognizing and supporting the concept that primary regulation for class II gaming remains with the tribes and, in the case where a Tribal-State compact is in place, with the tribe and the state. Although the IGRA limits the scope of Commission involvement in class III gaming activities, the Commission has quite necessarily found itself dedicating more and more of its time and resources to activities involving this class of gaming. For example, the Commission has conducted enforcement actions against contractors that were managing class III facilities without an approved "management contract." These kinds of enforcement actions are time consuming and expensive to carry out. In addition to the specific example just referenced, the majority of the Commission enforcement actions discussed in this testimony concern class III operations. As a consequence, the Commission supports the provision in S.487 that would authorize the NIGC to collect fees from class III gaming revenues and increase the cap to twenty-five million dollars.

Under the IGRA, the NIGC is only authorized to conduct a background investigation on a person or entity with a financial interest in a management contract. The NIGC has informed the Committee in previous hearings of our support for expanding the Commission's authority to scrutinize the background of any person or entity with a financial interest in a gaming related agreement with an Indian

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tribe. S.487 would vest the Commission with that authority. However, the NIGC offers to work with the Committee in arriving at language that would insure that Federal minimum standards for background checks are adhered to and would give the NIGC authority to step in when violations occur. This could be done without duplication of tribal and tribal-state background investigations, unless the NIGC found it necessary to conduct an independent federal background check.

The NIGC should be given the authority to conduct background investigations and suitability determinations in the "precertification" process of bonafide management contractors. However, there is a concern that to also require NIGC approval or pre-certification for every gaming related contractor or vendor would in most instances duplicate the corresponding efforts of the tribes and the states. Moreover, it would tie up the resources of the NIGC which would be better used for monitoring, compliance and enforcement of Federal minimum standards.

There should, however, be a filing requirement for tribal and tribal-state background checks with the NIGC. Also, the NIGC should have the authority to deny the individuals participation in Indian gaming based on information submitted or on the NIGC's own information. The NIGC, where good cause exists, should conduct its own background investigation and make its own suitability determination.

The Commission supports the new requirements for Commissioners but encourages the Committee to re-examine the deletion of the requirement that two of the Commissioners should be tribal members. It is important to remember that the distinction for requiring tribal membership for two of the three Commissioners is based on the political distinction of Indian tribal governments pursuant to treaties with the United States, the Constitution of the United States and Federal statutes. It is not a race-based distinction.

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The Commission also supports the amendment that requires Presidential appointment and Senate confirmation of all Commissioners. The Commission likewise supports the increased authority vested in the Associate Commissioners viz-a-viz the Chairman.

This concludes my prepared remarks. I would be happy to answer any questions from the Committee.

END

LOAD-DATE: October 3, 1996