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ASSOCIATE COMMISSIONER PHILIP N. HOGEN  
NATIONAL INDIAN GAMING COMMISSION  
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS  
OVERSIGHT HEARING OF THE NATIONAL INDIAN GAMING COMMISSION

**BODY:**

I am Phil Hogen from South Dakota. I have been a member of the National Indian Gaming Commission (NIGC) since my appointment by Interior Secretary Babbitt on December 1, 1995. I concur with the statement Chairman Monteau has presented on behalf of the Commission. I think it truly

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reflects the substantial and effective efforts our Commission has made in the regulation of Indian gaming, and suggests appropriate steps which would make the Commission more effective.

Additionally, however, I would like to take this opportunity to share with the Committee some of my observations and thoughts, formulated during the brief time I have been privileged to serve on the Commission, and to describe what I believe is the mission of the Commission, and what I perceive as the appropriate role of a member of this Commission.

In overseeing the way the National Indian Gaming Commission is performing the tasks assigned it by the Indian Gaming Regulatory Act I believe it is first necessary to have an understanding of the Indian gaming industry which the Commission is to help regulate. I would like to first comment on the nature and state of that industry.

It is very easy to misunderstand the impact of the dynamic development of the Indian gaming industry and its magnitude and significance to tribal economic development. Limited tribal participation in gaming In attempting to evaluate Indian gaming and its regulation, certain factors must constantly be kept in mind. The thread which runs through all these factors is the vast diversity among the many tribes and their reservations. Some of the most important factors to consider are:

First, not all Indian tribes are involved in gaming. Some, for philosophical and cultural reasons have chosen not to engage in gaming. Some have an interest and desire to engage in, and profit from this economic development, but for sound economic reasons--often because of their geographic location with respect to a viable market for gaming--cannot. Some may have an interest and desire to engage in gaming, and have proximity to a viable market, but find that the market is already being adequately filled by competitors--Indian and non-Indian alike--and they lack the wherewithal to enter such a competitive market. Some have attempted to engage in gaming, but have found it unprofitable, and have discontinued those efforts. Some tribes, of course find themselves in States which

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prohibit gaming, and they cannot therefore engage in gaming under the Indian Gaming Regulatory Act (IGRA).

Diverse opportunities

Secondly, among those tribes successfully engaged in gaming, there is no direct or proportional relationship between the size of the tribal membership (on-reservation and/or off-reservation) or the size of the reservation, the economic needs of the tribe, and the revenues generated by its gaming operation. While I haven't statistically made an analysis of the subject, I would expect that there may even be an inverse correlation between the size of the reservation and its on-reservation tribal population and the revenues a tribal gaming operation generates. Most of the larger reservations, with large on-reservation tribal populations are found in our most rural, sparsely populated settings, without access to the larger gaming markets. Unfortunately, it is in these situations where we most often find the greatest poverty and greatest need for economic development among the tribal populations.

My own tribe, the Oglala Sioux of South Dakota, has a reservation of nearly 2 million acres and is the home of nearly 20,000 tribal members. Unfortunately, most of the Pine Ridge reservation lies within the county which is perennially categorized by all economic standards as the nation's poorest. The tribe's gaming profits are modest in comparison to its size and needs.

Diverse economic achievement The economic development gaming brings to the gaming tribes, is often nearly as diverse as the demographics of Indian country. That is, in some instances the principal benefit of the gaming activity is large profits which are used to meet tribal needs and diversify the economic development of the tribe; in others, profits may be small, but the employment for tribal members which is created--often the first jobs of some those employed--is the principal benefit.

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### Diverse governmental structures

Nearly as diverse as the size, land bases, and profitability of gaming tribes are the governmental structures of those tribes. Some tribes, of course, vest governing decisions in a tribal council or tribal business committee; others govern by general council, permitting all voting tribal members a direct say on such matters as the identification and compensation of tribe's gaming manager.

### Diverse tribal gaming regulators

The National Indian Gaming Commission's principal partners in the performance of its role in the regulation of gaming in Indian country are the tribally-established regulatory bodies, typically designated tribal gaming commissions. The bodies are called for in IGRA, and NIGC's regulations, and are established in the tribal gaming ordinances or resolutions which NIGC must review and approve before Class II or III gaming may commence. These tribal commissions, too, are quite diverse in the breadth of their responsibility and activity with respect to the tribe's gaming.

In some instances membership on the tribe's council or governing body is the same or similar to the tribal gaming commission. In these instances it becomes hard to distinguish between the proprietary function of the tribe as owner and operator of a gaming facility, and regulatory functions of the commission to insure that there is fair play and proper accounting for gaming revenues, among other things, in the tribal gaming operation. In other instances, the regulatory role of a strong, independent commission is clearly distinguishable.

No doubt, tribal customs and traditions, the size of tribal memberships, and other local matters all influence the nature of these regulatory partners of NIGC. As is true of nearly every thing else in the diverse world of Indian affairs, one size does not fit all.

### Diverse gaming

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The variety in the extent and nature of the gaming conducted in Indian country is also vast. Class II gaming varies from small "conventional" bingo halls, with callers using public address systems and a handful of players marking paper cards, to megaoperations, employing satellites and electronics, and interconnected with sister operations hundreds of miles apart, offering play to thousands of patrons at a time, while doing brisk businesses in pull-tabs and other "instant" games. Class III gaming, of course, is to be conducted pursuant to IGRA-mandated tribal-state compacts, and usually conform to some degree to scope of gaming permitted in the state where the tribe is located.

None of the gaming laws in the 28 states wherein tribes are conducting Class III gaming are identical, and a broad variety of Class III gaming, ranging from pari-mutuel racing, to roulette wheels and craps tables, results. Tribal-state Class III gaming compacts within the same state likewise also vary, adding to the diversity. Several individual tribal gaming facilities generate hundreds of millions of dollars per year, entertain millions of patrons, license and employ thousands of staff members. Others operate in make-shift facilities, with only a small staff and a few games or gaming devices, and sometimes at a loss.

#### Scope of oversight

All of these factors tend to give the NIGC a lot of things to keep track of at the same time. Unlike state gaming regulatory bodies, or individual tribal gaming commissions, which ordinarily have a sole, static regulatory code and body of gaming to oversee and enforce, the NIGC must monitor a multiplicitous, dynamic array of gaming activity, literally spread across the nation.

To fulfill the regulatory role the Congress mandated for the NIGC, the Commissioners and staff must first attempt to familiarize themselves with all of the foregoing aspects of this relatively new, burgeoning industry, and then master its intricacies and details. This is not easily done, and requires

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significant resources to attempt. The exponential growth of the industry since the time of the Commission's creation has required constant vigilance by the Commission, just to attempt to stay abreast of the trends and developments in the industry. As the industry has grown, it has become increasingly competitive, and as a consequence, some of the competitors tend to "push the envelope" in the gaming activities they introduce and the technology they employ.

#### Mission of the National Indian Gaming Commission

The mission of NIGC is to insure the integrity of tribal gaming on Indian lands. That is accomplished

- by the promulgation of regulations to guide the operation of tribal government gaming;
- by direct regulation of certain aspects of those gaming activities, and coordinated regulation, with Tribal and other regulatory agencies of other aspects of that gaming;
- by the review, and approval where appropriate, of Tribal gaming ordinances and agreements;
- by reviewing backgrounds of individuals and entities to insure the decency of those seeking to engage or invest in such gaming;
- by maintaining oversight and review of the actual conduct of such gaming and the financial performance of such gaming;
- by seeking to detect any violations of the IGRA, the regulations of NIGC, and instances relating to tribal government gaming which threaten the safety of the tribes, their assets, those engaged in the industry, and the public upon which the industry depends;
- and by imposing appropriate sanctions on those committing such violations.

In performing this mission, NIGC fulfills the mandates of IGRA and fosters economic development in Indian country.

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As it fulfills these responsibilities, NIGC is particularly concerned with any indications of corrupting influences such as organized criminal elements known to be attracted to cash-intensive industries such as gaming.

In attempting to accomplish this mission, the NIGC must always be mindful of the trust relationship the United States bears to the Indian nations it serves. In addition, the NIGC recognizes that the prompt and efficient administration of IGRA is required to foster the economic development so urgently needed by Indian tribes. In all phases of its regulatory performance, the NIGC and its staff attempt to observe the due process rights of those who come before it, and extend the courtesy that all individuals are entitled to expect from their government. Where consistent with its regulatory role, NIGC also tries to be responsive to tribes seeking guidance as they enter the dynamic gaming industry, and monitor trends in tribal government gaming and report its findings to Congress and the Administration when congressional or administrative action is called for.

#### Role of individual Commissioners

To appreciate the nature of the Commissioners' roles, the regulatory scheme established by IGRA needs to be stated and understood. A dual level of oversight and regulation is provided. IGRA prohibits Tribes from engaging in Class II or III gaming until they have adopted an ordinance or resolution providing for the Tribe's own regulation and licensing of its gaming which must be approved by the NIGC Chairman prior to implementation. Among the specific tribal regulatory mechanisms or safeguards required are the following: - licenses are required for each gaming facility [25 U.S.C. S2710(b) (1)(S)];

- the tribe must have the proprietary interest in and responsibility for the gaming (with exceptions);
- limitations on the purposes for which the gaming revenues may be used;
- independent audits of the gaming activity and certain contracts;

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- specifications that facilities are built and maintained to meet certain environmental and safety standards, and - background investigations are conducted for gaming officials and employees [25 U.S.C. S2710(b)(2) & (d) (1) (A) (ii)].

Such ordinances and resolutions must further require that the audits be provided to NIGC, as well as the results of the background investigations, and NIGC may object to the issuance of gaming licenses to applicants for tribal gaming licenses [25 U.S.C. S2710 (c)].

As the Act has mandated NIGC to "monitor class II gaming", conduct inspections and examinations of facilities, etc., the regulation of Indian gaming is a coordinated effort between the Tribes' own regulatory authorities, created under IGRA and approved by NIGC, and NIGC itself. These two levels of gaming regulation must compliment one another, and cooperate in their regulatory efforts.

The range of the responsibilities of the Commissioners is wide, extending from specific and in some cases ministerial chores to broad general mandates regarding the regulation of Indian gaming.

An examination of those responsibilities makes it immediately apparent that the Commissioners are required to have command of a considerable amount of information, and in some cases, expertise with respect to the Commission's operation, as well as the activity and industry they are to regulate.

Most of the Commission's initial regulatory authority and responsibility is vested with the Chairman; a significant share of the full Commission's responsibility is performed only when decisions of the Chairman are appealed to the full Commission. This discussion attempts to focus on the role of the Associate Commissioners, and how the Commissioners can be best informed and situated to perform that role.

IGRA and the Commission's experience to date demonstrate that while the Commission must meet with some regularity, under current caseload conditions, a schedule of regular bi-weekly or monthly Commission meetings can ordinarily adequately address those matters now required to formally

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come before the assembled Commission and requiring action by the Commission. Current technology, including voice mail, cellular telephones, "500" telephone numbers, laptop computers, modems for remote access to computer data bases, e-mail, speaker phones, pagers, fax machines, the information superhighway, and the like provide immediate and thorough access to the Washington office from even the remotest location, if necessary.

To give substance to the requirement that the Commission monitor Indian gaming, the Act vests the Commission with the authority and responsibility to close Indian gaming facilities if and when necessary in the face of violations of IGRA, NIGC regulations or tribal regulatory measures providing for the integrity of Indian gaming and the safety of the tribe, its members, and the patrons of the gaming facilities. To accurately measure the extent and nature of the monitoring IGRA requires of the NIGC, the Commission must have a prominent presence in the Indian gaming community.

The Commission's oversight role cannot simply be an arrangement whereby it springs into action if and when a Tribe or its gaming commission notifies the Washington agency that there are problems or violations which require regulatory solutions. The vigilance required of NIGC demands a more proactive role. As time and resources permit, NIGC, in many instances in the persons of the Commissioners themselves, needs to be on-site at the gaming facilities. Given the vast diversity among the Tribes and their gaming operations, the degree of NIGC presence and participation in on-site regulation will also vary, but hopefully it will insure that in any instances where Tribal oversight is meager, NIGC can provide the regulation needed to insure the integrity of such tribal gaming until tribal supervision is brought up to the needed level.

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In defining the role of the Commissioners, some of the specific duties need examination. Approval of the Commission's budget requires, of course, full knowledge of the structure of the Commission and the costs entailed in its operation, including the staffing levels, the salary and fringe benefit costs of the personnel, the rates at which they are expected to grow; the other expenses of office operation, including rentals for the Commission's offices and equipment, the supplies required for operation, the costs of utilities and communications services, as well as the estimated amounts of travel expenses to do the Commission's business. As importantly, the Commissioners must have an intimate knowledge and understanding of the Commission's anticipated revenues, which are derived in part from appropriated funds, and in part from fees assessed by the Commission on the Class II gaming it regulates. Such fiscal information, of course, must be continually measured and evaluated in the context of whether the objectives of IGRA are being substantively fulfilled. Thus, the Commissioners must not only have good command of the organization of which they are a part, but also of the growing and dynamic Indian gaming industry for which they have significant responsibility. A certain amount of knowledge can, of course, be gleaned from existing records of the Commission. To an extent, such knowledge can only come with experience observing the Commission's operation and by working with and conferring with the Commission's staff which performs its duties. While this method may familiarize Commissioners with the internal aspects of this regulatory body, such knowledge will only be meaningful if combined with knowledge of the industry. That knowledge can only be gained by first hand interface with the Tribes and their agents actually engaged in the gaming activity, including tribal gaming managers, or where they have been employed, management firms, as well as the Tribal Gaming Commissions which have direct roles and responsibility for day-to-day gaming regulation of Class II gaming, and if provided for in tribal-state gaming compacts, Class III gaming.

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Likewise, tribal gaming needs to be viewed and measured within the complex context within which it operates--the growing gaming industry, which has been earlier described. Consequently, Commissioners need to familiarize themselves with the industry and its trends and directions. Relationships need to be built with those engaged in the regulation of gaming on State levels, as well as with individuals and organizations which have direct and tangential relationships with the industry, such as manufacturers and suppliers, as well as the law enforcement family concerned with Indian gaming specifically and gaming generally, including Federal, State, local and tribal regulators, enforcement agencies and prosecutors.

Throughout the networking Commissioners must do to gather the knowledge, information and perspective outlined above, the Commissioners, of course, will be vanguard representatives of Indian gaming to those with whom they so interface. Tribal officials will rightfully look to the Commissioners to be key spokesman for Federal concerns and trends regarding gaming and its regulation. Given the vast diversity existing within Tribal gaming, State and industry representatives will look to the Commissioners to speak authoritatively about the nature, scope, and direction in Indian gaming at its various levels.

While some experience and knowledge will no doubt be acquired by the Commissioners as they perform their regulatory duties in deciding those cases which come before them in the hearings and appeals process, and as the Courts speak to the Commission action when judicial review is sought from the Commission's actions, the Commissioners can likely best appreciate and apply such experience and knowledge if they spend considerable portions of their time with those engaged in Indian gaming where it is conducted--in the gaming halls and casinos in Indian country, in the offices of tribal gaming commissions, and with the tribal leaders and councils that have the ultimate responsibility for those gaming enterprises. The dual level of gaming regulation described above will

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certainly be enhanced if Tribal gaming commissions and the NIGC Commissioners know and trust each other.

#### Role and organization of Commission staff

The role and structure of the Commission's staff needs to be considered as well, in defining the Commissioners' roles. As explained in Chairman Monteau's statement, the Commission has recently undergone a reorganization or restructuring of its staff. The organization has now been divided into four sections or divisions: 1) enforcement & background; 2) contract and audit review; 3) legal; and 4) administration, all of whom are directly responsible to the Chairman. The Commission's small staff includes 6 members formerly designated as field representatives, who will now serve in the enforcement section, designated as field investigators. The Chairman has delegated certain aspects of his delegable authority to members of the staff, who will now make some initial determinations, subject to the review of the Chairman, and if appealed, to the whole Commission.

In the past, the field representatives attempted to fulfill the roles of enforcement agents, background investigators, and general good-will ambassadors from the Commission to the gaming community. These roles were often incompatible, and the "good-will ambassador" roles they played will now likely be fulfilled by the Associate Commissioners.

In performing its rule making and adjudication functions, the Commission must comply with the Administrative Procedures Act (APA) [28 U.S.C. 551 et seq.], and must observe statutory and court imposed standards and restrictions regarding separation of functions and ex parte contacts, which can be difficult in such a small agency, particularly when housed in central quarters.

A careful balance must be struck by the Commissioners with regard to the allocation of their time. Obviously, to perform the specific statutory duties assigned them, and to participate in the hearings and appeals relating to those cases they are scheduled to hear or act on, a portion of their time must

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Federal offices. It will also be in the headquarters offices where they will do much of their work with the Commission staff, familiarizing themselves with staff responsibilities and their ability to fulfill those responsibilities, as well as imparting to the staff and the Chairman and each other the policy they seek to implement in the course of their regulation. The administrative decisions and duties of the Commissioners will likewise be performed most often in the Washington office.

A certain amount of time will necessarily be devoted to attending meetings and conferences relating to Indian gaming specifically, and gaming generally, and the travel necessary to attend those events. National and local developments regarding the industry as well as legislation and judicial decisions which impact it are often first expressed at such meetings and conferences, and the Commissioners need to be fully aware of those developments. Likewise, the Commissioners will often appropriately be asked to make presentations regarding the Commission and Indian gaming at such gatherings, and the Commission and Indian gaming need and deserve to be well represented in that regard. The balance of the Commissioners' time can likely best be spent in Indian Country, getting a hands-on, first hand look at the industry for which they are responsible. Obviously, those subject to its regulation will take more seriously the regulation imposed, if the regulators--the Commissioners--have a pervasive presence in the facilities where the gaming occurs.

Those regulated will also rightfully have a greater confidence that the regulators know of where they speak when the Commissioners know the facilities they are ruling on not simply by way of a report or file, but have spent time there, gotten acquainted with the facility's staff and the tribal gaming commissioners and council representatives responsible for the operation.

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IGRA set forth specific characteristics for members of the Commission. The administrations which appoint the membership similarly seek specific talents and characteristics in those appointed to the Commission. The Commission ought to attempt to maximize and preserve the value of the perspectives which the Commissioners bring to the Commission. This can most nearly be achieved by the Commissioners maximizing their access to the information they need to best perform their duties and maintaining the objectivity their regulatory roles require. Further, this will preserve for the Commission an "outside- the-beltway" perspective which will bring needed insight to the Commission, while permitting the Commissioners a full and immediate role in the Commission's day-to-day activities.

#### Conclusion

I believe that the future of economic development for Indian tribes through gaming is bright, although not without challenges. Many of those challenges will be best met with a strong, fair National Indian Gaming Commission. I look forward to contributing to that effort.

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#### Biography of Philip N. Hogen

Philip N. Hogen, a member of the Oglala Sioux Tribe, was appointed on December 1, 1995, as Commissioner of the National Indian Gaming Commission (NIGC).

The NIGC was established by Congress to regulate and monitor certain gaming activities on Indian lands.

A native of South Dakota, Commissioner Hogen was raised on and near the Pine Ridge Indian Reservation. He received a B.S. from Augustana College in Sioux Falls, S.D., and a J.D. from The University of South Dakota School of Law. Commissioner Hogen has previously distinguished himself in Federal Service. He was appointed by President Reagan as United States Attorney for the State of

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South Dakota from 1981 through 1991. In that capacity, he served as Chairman of the Indian Affairs Sub-Committee of the Attorney General's Advisory Committee of U.S. Attorneys. He was appointed in 1992 by Secretary of the Interior Manuel Lujan to organize and serve as the first director of the Office of American Indian Trust. He also served as Administrative Assistant to Congressman Jim Abdnor of South Dakota.

Commissioner Hogen has been active in Indian Country: In 1988, he received the Attorney General's award for dedication and leadership in the prosecution of crimes within Indian Country; in 1991 he received the Inspector General's Integrity Award, OIG Department of Health & Human Services; also in 1991, he received the Assistant Attorney General-Civil Rights Division Department of Justice award for protection of Indian Rights, 11/91.

From 1975 to 1981, Commissioner Hogen served as States Attorney for Jackson County, South Dakota. He has also had a private practice in Rapid City, South Dakota.

The Commissioner is a member of the South Dakota Bar Association and the American Bar Association. He is a Former President of the South Dakota Attorneys Association and a Former Member of the National District Attorneys Association's Board of Directors. He is also a Former Judge of the Rosebud Sioux Tribal Court of Appeals.

Hogen and his wife Marty make their home in the Black Hills of South Dakota, when Commission business does not require him to be in Washington, or visiting Indian country. Marty teaches foreign languages in the Rapid City School system. Their daughter Vanya Hogen- Kind practices Indian law with a firm in Minneapolis, and their son Herbert attends the University of Wisconsin.

END

**LOAD-DATE:** October 3, 1996

