National Indian Gaming Commission

Philip N. Hogen, Chairman

Testimony

House Resource Committee

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Good morning Chairman Pombo, Ranking Member Rahall and members of the Committee.

My name is Philip Hogen, and I am a member of the Oglala Sioux Tribe from South Dakota. I have had the privilege of Chairing the National Indian Gaming Commission (NIGC) since December of 2002. Currently the NIGC consists of two members, myself and Associate Commissioner Cloyce Choney, who is here with me today.

I commend the Committee for observing that the diversity and dramatic growth of Indian gaming since the passage of the Indian Gaming Regulatory Act in 1988 makes it timely to revisit that legislation, to address concerns that were not anticipated when IGRA was enacted, and to attempt to further perfect something that fostered an economic miracle in Indian country. I want to direct my comments today primarily toward the NIGC's authority over Class III gaming.

In 1987, when the Supreme Court decided the *Cabazon* case and clarified that tribes had the right to regulate gambling on their reservations, provided that the states wherein they were located did not criminally prohibit that activity, large-scale casino gaming operations existed only in Nevada and New Jersey. The Indian Gaming Regulatory Act was passed in 1988 and established the framework for the regulation of Tribal gaming. That same year, Florida became the first state in the southern United States, and the 25 th overall, to create a state lottery. In 1989, South Dakota legalized gambling in the historic gold mining town of Deadwood and Iowa and Illinois legalized riverboat gambling. The following year, Colorado legalized gambling in some of its old mining towns, and in 1991, Missouri legalized riverboat gambling. By that time, 32 states operated lotteries, while tribes ran 58 gaming operations. Thus, not just in Indian country but throughout the United States there was at that time a manifest social and political acceptance of gambling as a source of governmental revenue. What is also evident is that very few states had experience in the regulation of casino gaming.

When IGRA was enacted, those tribes then engaged in gaming were primarily offering bingo. While there may have been an expectation in Congress that there would be a dramatic change in the games tribes would offer, I think it is reasonable to assume many expected Tribal gaming would continue to be primarily Class II, or uncompacted, gaming. After 1988, when tribes began negotiating compacts for casinos with slot machines and banked games, most of the states they negotiated with had little or no experience in regulating full-time casino operations. Michigan, for example, first compacted with Tribes in 1993 but didn't create its own Gaming Control Board or authorize commercial gaming until the end of 1996. Minnesota began compacting with Tribes in 1990 and to this day has no non-Indian casinos within its borders.

A review of compacts approved since 1989 shows that the more recent compacts often address the mechanics of the oversight and regulation of the gaming quite specifically, but that earlier compacts, many of which were entered into in perpetuity, do not. Further, the dispute resolution provisions in the compacts often employ cumbersome and time-consuming procedures like mediation or arbitration that do not necessarily foster effective regulation. For example, in the 22 states with Class III gaming, 12 provide for some form of mediation or arbitration with varying degrees of specificity and enforceability. Attached as Exhibit 1 is a chart summarizing the internal control and dispute resolution provisions of the compacts in these 22 states.

When the NIGC came on the scene, actually getting up and running in the early 1990s, it believed – and still believes – that its mission was to provide effective oversight of Tribal gaming. IGRA states that it established the NIGC as an independent Federal regulatory authority over Indian gaming in order to address Congressional concerns and to advance IGRA's overriding purposes. These are to ensure that Tribal gaming would promote Tribal economic development, self-sufficiency and strong Tribal governments; to shield gaming from organized crime and other corrupting influences; to ensure that the tribes were the primary beneficiaries of their gaming operations; and to ensure that gaming would be conducted fairly and honestly by both the Tribal gaming operations and its customers. IGRA therefore authorizes the Chairman to penalize, by fine or closure, violations of the Act, the NIGC's own regulations, and approved Tribal gaming ordinances.

Of course, the dramatic growth of Indian gaming was in the direction of Class III, or casino-style gaming, to the point where today it represents more than 80% of gross gaming revenue. While in 1988, the Indian gaming industry's gross gaming revenue was $200 million, we estimate that it was $22.5 billion in 2005. Class III gaming, therefore, accounts for at least

$18 billion of this revenue. Attached as Exhibit 2 are charts showing the growth and diversity of Indian gaming.

There is a vast diversity among Class III Tribal gaming operations, not only in size and revenues, but in the effort and resources devoted to regulation and oversight. Historically, casino gaming has been a target for illicit influences. Nevada's experience provides a classic case study of the evolution of strong, effective regulation. It was not until Nevada established a strong regulatory structure -- independent from the ownership and operation of the casinos themselves -- and developed techniques such as full-time surveillance of the gaming operations that most criminal elements were eliminated from the gaming industry there. All jurisdictions that have subsequently legalized gaming have looked to Nevada's experience to help guide their own regulation and oversight.

In the major non-Indian gaming jurisdictions in the United States, casino gaming is owned and operated by the private sector, and the regulation is provided by the state – the public sector. Indian gaming is different, for the most part, in that the gaming operations are owned and regulated by the public sector – the tribe. A similar situation exists with respect to most state lotteries. They are owned, operated and regulated by the state itself, but of course with a very few exceptions, state governments are much larger political units, and the separation of regulation from operation -- the independence of the regulation -- is more apparent.

With Tribal gaming, the diversity of operations is great. Both rural weekly bingo games and the largest casinos in the world are operated by Indian tribes under IGRA, and as the industry grew, it appeared that large numbers of Tribal operations, particularly smaller ones, were not operated or regulated comparably with the operation and regulation of commercial casinos in gaming states. NIGC needed tools appropriate to its oversight responsibilities. What it lacked was a rule book for the conduct of professional gaming operations and a yardstick by which the operation and regulation of Tribal gaming could be measured.

By the late 1990's, some in Congress expressed concerns that uniform minimum internal control standards, which were common in other established gaming jurisdictions, were lacking in Tribal gaming. The industry itself was sensitive and responsive to those concerns and a joint National Indian Gaming Association – National Congress of American Indians task force recommended a model set of internal control standards. Ultimately, NIGC adopted its Minimum Internal Control Standards (MICS) and applied them to all Tribal Class II and Class III Tribal gaming operations.

The MICS provide, in considerable detail, minimum standards that Tribes must follow when conducting Class II and III gaming. To choose a few of many possible examples, the MICS prescribe a method for removing money from games and counting it so as best to prevent theft; they prescribe a method for the storage and use of playing cards so as best to prevent fraud and cheating; and they prescribe minimum resolutions and floor area coverage for casino surveillance cameras. Attached as Exhibit 3 is a copy of the MICS table of contents, which provides a more details overview of their comprehensive scope.

At the time of adoption, of course, many Tribal gaming operations and Tribal regulatory units were already far ahead of the minimums set forth in the MICS. Other tribes, however, had no such standards, and for the first time they had the necessary rule book by which to operate, and NIGC had a yardstick with which to measure their performance.

I served as an Associate Commissioner on the NIGC from 1995 through mid-1999, and I participated in the decision to adopt and implement the MICS. I have now served as the Chairman since December of 2002. It is my confirmed view that the Minimum Internal Control Standards -- given the tribes' strong effort to meet and exceed them and the inspections and audits that NIGC conducts to ensure compliance -- have been the single most effective tool that our Federal oversight body has had to utilize to ensure professionalism and integrity in Tribal gaming .

The NIGC employs three methods of monitoring Tribal compliance with the MICS. First, the MICS require that when tribes have their annual independent audit conducted, their auditors make a thorough review of tribes' MICS compliance, and the auditors' reports are sent not only to the Tribal government but to the NIGC. In other words, the tribes themselves must monitor how effectively they comply with the MICS and their own internal control standards. Prior to NIGC's adoption of its MICS, reports of this nature were seldom generated, and in my opinion, this serious scrutiny of Tribal gaming operations was sorely lacking.

Next, on a regular basis, NIGC investigators and auditors make site visits to Tribal gaming facilities and spot check Tribal compliance. Finally, NIGC auditors conduct a comprehensive MICS audit of a number of Tribal facilities each year. Typically those audits will identify instances wherein tribes are not in compliance with specific minimum internal control standards. In fact, we find, on average, anywhere between 35 and 90 MICS violations per audit. These include both minor items of non-compliance, such as recordkeeping failures, and major items of non-compliance – such things as the failure to investigate cash variances and the failure to perform proper cash cage accounting. Attached as Exhibit 4 is a table summarizing the number and kinds of MICS violations found from January 2001 through February 2006.

All of that said, the non-compliance is then almost always successfully resolved by the tribe. The result is that the NIGC is pleased that the tribe has a stronger regulatory structure, and the tribe is pleased that it has plugged a gap that might have permitted a drain on Tribal assets and revenues. Although there have been instances where the non-compliance with the MICS was not resolved, in those instances the tribes were persuaded to voluntarily close their facilities until the shortcomings were rectified. NIGC has never yet issued a closure order or fine for Tribal non-compliance with the MICS.

For six years, NIGC oversight of Class II and Class III gaming with the use of minimum internal control standards went quite smoothly. The MICS were, for the most part, well accepted by Tribal operators and regulators and by state regulators who played roles in the regulation of Tribal gaming where Tribal-state compacts so provided. NIGC has not attempted to be, and in my opinion has not been, too intrusive in the manner in which the MICS were applied and enforced.

When necessary, NIGC revised its MICS, and it employed the assistance of Tribal advisory committees in doing so. Each time, though, there were expressions of concern by tribes that NIGC was reaching beyond its jurisdiction under IGRA. As it did when the MICS were adopted initially, NIGC considered those arguments, but rejected them, based on the various mandates from Congress.

When NIGC initiated a MICS audit at the Blue Water Resort and Casino of the Colorado River Indian Tribes on its reservation in Parker, Arizona, in January 2001, the issue of NIGC's jurisdiction over Class III gaming again arose. The NIGC concluded it was being denied access to perform its audit, took enforcement action, and imposed a penalty. While an arrangement was eventually negotiated that permitted the audit to be completed, the Tribe reserved its right to challenge NIGC's Class III MICS authority in court and eventually filed such an action in U.S. District Court for the District of Columbia. On August 24, 2005, the court rendered an opinion concurring with the tribe's position and finding that NIGC had exceeded its authority in issuing MICS for Class III gaming. The court wrote:

A careful review of the text, the structure, the legislative history and the purpose of the IGRA ... leads the Court to the inescapable conclusion that Congress plainly did not intend to give the NIGC the authority to issue MICS for Class III gaming.

Colo. River Indian Tribes v. NIGC, 383 F. Supp. 2d 123, 132 (D.D.C. 2005).

While the opinion is broad, the order entered in the action is narrow. It applies only to NIGC and its relationship with the Colorado River Indian Tribes. The court entered no injunction and did not strike down the MICS. The case is now on appeal. The entire Indian gaming community is watching this case with interest, and it is watching the Congress. Some of the provisions contained in S. 2078, now out of the Committee on Indian Affairs and before the full Senate, seek to clarify NIGC's authority over Class III gaming generally, and in particular, the bill would make clear NIGC's authority to issue MICS and to require Class III operations to comply with them.

If the NIGC's role with respect to its minimum internal control standards and Class III gaming is not clarified by the courts or legislation, most tribes will continue to operate first-rate, well-regulated facilities, and their Tribal gaming regulatory entities will perform effectively. Others will likely not. NIGC has been advised by a number of tribes that if IGRA is not amended to clarify NIGC's role in the Class III area, or if the *Colorado River Indian Tribes* decision is not reversed, they will discontinue the practice of having these reviews conducted by their auditors. There will be temptations, generated by demands for per capita payments or other Tribal needs, to pare down Tribal regulatory efforts and bring more dollars to the bottom line. There will be no federal standard that will stand in tribes' way should this occur. For the most part, the NIGC will become an advisory commission rather than a regulatory commission for the vast majority of Tribal gaming. The very integrity of the now-smoothly-operating regulatory system, shared by Tribal, state and federal regulators, will be disrupted. If there is one imperative change that needs to be made in the Indian Gaming Regulatory Act, in the view of this NIGC Chairman and consistent with the legislative proposal that the NIGC sent to this Congress in March 2005, it is the clarification that NIGC has the authority to regulate Class III gaming.

In conclusion, let me again say that while it may not have been anticipated initially, the lion's share of Tribal gaming activity is casino gaming conducted pursuant to Tribal-state compacts. Without the NIGC's oversight role, much of that gaming would lack effective oversight from an entity independent from the gaming operation itself. NIGC does not seek to expand its limited oversight role over Class III gaming but rather to continue the effective role that it has been playing since 1999.