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TESTIMONY-BY: PHILIP N. HOGEN, CHAIRMAN

AFFILIATION: NATIONAL INDIAN GAMING COMMISSION

BODY:

Statement of Philip N. Hogen Chairman, National Indian Gaming Commission

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Committee on House Resources

March 15, 2006

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

I am Philip Hogen, an Ogalala Sioux from South Dakota, and I have had the privilege of Chairing the National Indian Gaming Commission (NIGC) since December of 2002. Currently the NIGC consists of two members, Associate Commissioner Cloyce Choney and me.

I understand the Committee seeks to gather comments on H.R. 4893, introduced by Chairman Pombo last week. Further, I understand that the Committee desires an explanation of the role and function of the NIGC as it relates to determining the status of Indian Lands for purposes of regulatory oversight and the application of current statutory definitions in the determination of Indian land status.

The narrow mission of the NIGC is to provide regulatory oversight of gaming conducted by Indian tribes on their lands. To accomplish this mission, occasionally, we need to take a broader view of Indian tribes as part of regulating their gaming activities. In the context of this hearing, this occurs when we need to determine if gaming activity tribes conduct is in fact occurring on those lands which Congress categorized as eligible for such gaming under the Indian Gaming Regulatory Act (IGRA). Mere ownership of land by Indian tribes does not qualify those lands as permissible sites

for gaming under the Indian Gaming Regulatory Act. Rather, in IGRA, Congress limited such gaming to "Indian lands" as it then defined that term in that Act.

Thus, the nature and quality of a tribe's ownership of lands where it intends to conduct gaming must be understood and analyzed by the NIGC to conclude that where the tribe's bingo hall or casino is located so qualifies.

America's Indian tribes are very diverse. Their histories and cultures vary from Northwestern fishermen, Navajo shepherds, hunters of the Plains, Pueblo farmers, woodsmen of the Eastern forests as well as many others. One common characteristic that all tribes share, however, is that they once owned and lived on lands that were subsequently owned and occupied by what became the dominant society. Land-based treaty tribes, such as my own tribe, the Ogala Sioux in South Dakota, retain some of the lands they originally owned, while ceding away the vast majority of the lands they once owned and occupied. Other tribes were totally divested of the lands they owned and lived on when they encountered what is now the dominant society, having been relocated elsewhere by the federal government, or otherwise forced from those lands. Notwithstanding their removal or eviction, many of those tribes kept their communities intact, and later acquired new homelands and in some instances, although such acquisitions have not yet occurred, aspire to so acquire new homelands.

Thus, there is not a single model that applies to the lands of all Indian tribes with respect to lands they own, occupy or conduct their businesses upon. It therefore is somewhat problematic to develop a fair and even handed system or set of rules that classifies those lands where tribes can govern and conduct activities such as gaming. On a daily basis the NIGC attempts to apply the existing rules, and that application is not without its challenges. The NIGC thus agrees it is appropriate to evaluate this process, and consideration of H.R.4893 is an opportunity to do that.

It might first be useful to look at the history of the process which has been followed to date in determining those properties that have been found to be "Indian lands" for purposes of conducting tribal gaming under IGRA, as well as some instances where lands have been determined not to so qualify.

When Congress enacted IGRA in October of 1988, it specified that "Indian lands" would include lands within the limits of then existing Indian reservations and lands held in trust for tribes and individual Indians over which the tribes exercised governmental powers. The Act then further specified that lands acquired after the enactment of IGRA (October 17, 1988), could only be used for Indian gaming if they were within or contiguous to a reservation that was then in existence, or, if the tribe had no reservation on that date, then, if such lands were in Oklahoma, that they were acquired within the boundaries of the tribe's former reservation or contiguous to other pre-IGRA trust lands held by Oklahoma tribes in Oklahoma. Elsewhere, such lands had to be within the tribes last recognized reservation (in the state where in they were then located) or, a two-part determination occurred, wherein the Secretary of the Interior concluded that acquisition of such lands for gaming purposes would be in the best interest of the tribe and not detrimental to the surrounding community, and the governor of the state wherein the lands' where located would have to concur in that determination.

Further exceptions, where post-IGRA acquisitions could be utilized for gaming included instances where lands were taken into trust as part of the settlement of a land claim, the creation of an initial reservation of a tribe under the federal acknowledgement process or the restoration of lands for tribes that were restored to federal recognition.

As we previously testified before the Senate Committee on Indian Affairs, for a tribe to be restored to federal recognition under the IGRA, it must have been previously recognized; it must have lost its recognized status; and it must be returned to a recognized status.

Whether lands are restored lands requires a case-by-case analysis. Under the federal court decision on lands of the Grand Traverse Tribe and other court decisions, the factors to consider include (1) the factual circumstances of the land acquisition; (2) the location of the acquisition (including such questions as whether it is close to the tribe's population base and important to the tribe throughout its history); and (3) the temporal relationship of the acquisition to the tribal restoration (in other words, was this land acquired a year after the tribe was restored to recognition or 30 years later and after the tribe acquired 20 other parcels).

As a result of this process, there are many Indian lands questions pending. At least fifteen of these pending opinions present the question of whether the lands qualify as restored lands under IGRA. Two of the tribes already have open facilities and another is scheduled to open its facility by June of this year. All three of these tribes already have their land held in trust. Another tribe also has its land held in trust but does not have a gaming operation. That tribe has submitted a site specific ordinance to the Commission for approval. By statute, we must approve or disapprove ordinances within 90 days.

The Department and the NIGC have issued an additional ten opinions where we have concluded that the tribes' lands qualify as restored lands. Of those ten, seven tribes have open gaming facilities. The other three tribes have pending trust acquisitions.

In addition, the Department has approved trust acquisitions for three tribes that would qualify as initial reservations. None of these three tribes has an open gaming facility on these parcels.

The Secretary has issued three positive two-part determinations since the passage of IGRA where the Governor of the State has concurred in that determination and the land was acquired into trust. There are a number of other proposed trust acquisitions that would qualify for gaming only if the Secretary makes a positive two-part determination and the Governor concurred in that determination.

Finally, one tribe falls within the settlement of a land claim exception. That Tribe is operating a facility and is moving forward to establish a second facility under the same exception.

While these tribes are not the entire universe of those that are potentially impacted by H.R. 4893, we have attached an exhibit to reflect the existing and potential facilities described above.

It is unclear to what extent this bill is intended to impact the existing and proposed facilities. While there is a savings provision that indicates that the legislation is intended to apply prospectively only, that provision arguably only saves those agreements that are already in place. It is not clear how the savings provision would affect tribes with lands that are already acquired into trust but have no gaming facility or existing gaming facilities that are playing only Class II games and do not have a tribal-state compact. It is also unclear what the intent of the proposal is when agreements, such as compacts, expire on their own terms.

We also note that the major impact of the proposed legislation will be on restored, newly acknowledged or landless tribes. These tribes usually have the least resources available to fund an advisory referendum and a Secretarial two-part determination. It is our experience that such tribes are susceptible to partner with those who take advantage of tribes under these circumstances because traditional financial support is not available for a difficult process with such an uncertain outcome.

Finally, having recognized the difficulties that the post 1988 exceptions pose to the NIGC, the tribes, and the surrounding communities, we have undertaken several initiatives to bring clarity to

the process. First, we are establishing an Indian lands data base. That data base will identify all of the existing and proposed facilities, include documentation necessary for an Indian lands analysis, and identify whether the lands were acquired after October of 1988 and fall within one of the post 1988 exceptions. Second, we are drafting licensing regulations that, as proposed, would require tribes to notify the NIGC before it opens a new gaming facility and would require tribes to document that the gaming facility is located on Indian lands. Third, the Indian lands determinations are presently issued pursuant to a memorandum of understanding between the NIGC's Office of the General Counsel and the Department of the Interior's Office of the Solicitor. We are working with the Department to develop a strategy for improving coordination between the two offices. Finally, we are assisting the Department of the Interior on its draft regulations which will establish a process for issuing Secretarial two-part determinations and more clearly define the restoration and initial reservation exceptions.

I would like to thank the Committee for holding this hearing and will be happy to answer any questions that you may have.

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