Testimony of Chairman Philip N. Hogen
National Indian Gaming Commission
Senate Indian Affairs Oversight Hearing
March 8, 2006

Good morning Chairman McCain, Vice-Chairman Dorgan and members of the Committee.

I am Philip Hogen, an Oglala Sioux from South Dakota, and I have had the privilege of Chairing the National Indian Gaming Commission (NIGC) since December of 2002. 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 it 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 two issues addressed by S. 2078: the NIGC's authority over Class III gaming and gaming-related contracts.

S. 2078 – SECTION 5 - POWERS OF THE COMMISSION – CLARIFICATION OF NIGC'S CLASS III AUTHORITY

Under the Indian Gaming Regulatory Act (IGRA), gross gaming revenues have grown from approximately $200 million in 1988 to over $20 billion in 2005. Indian gaming is being conducted at over 400 locations by more than 225 gaming tribes, and this gaming is as diverse as the tribes themselves and their rich cultures.

A point that must be emphasized is that Indian gaming has not been an economic development solution for a majority of tribes, particularly those that are the most rural and remote. The economic success tribal gaming enjoys is directly proportionate to location and market opportunities, complemented by the tribes' skillful management.

With IGRA, Congress recognized that the primary regulators of tribal gaming would be the tribes themselves. Regulation of traditional and ceremonial gaming, Class I gaming, was left exclusively to the tribes to regulate. This is non-commercial gaming and plays no significant part in the revenues tribal gaming generates.

At the time of IGRA's passage, the primary Indian gaming activity was bingo generally and high stakes bingo in particular. Congress grouped into Class II gaming bingo and other games such as poker where players play against one another. Congress tasked tribes with regulating Class II gaming, requiring the adoption of tribal gaming ordinances that have to meet requirements in IGRA and be approved by the Chairman of the NIGC. Congress tasked the NIGC, which IGRA created, with an oversight role of this area. Given the primary position bingo occupied in the area of tribal gaming at the time of IGRA's passage, it would not be surprising if those in Congress that supported IGRA envisioned such Class II gaming to remain the dominant activity that would be conducted under IGRA.

IGRA grouped into Class III all remaining gambling games – those most often associated with casinos, such as slot machines and house banked card and table games. Tribes may conduct Class III gaming only in states where such activity is permissible under state law, and where the tribes enter into compacts with states relating to this activity, which compacts require approval of the Secretary of the Interior. Compacts might include specific regulatory structures and give regulatory responsibility to the tribe, to the state, or to both in some combination of responsibilities.

Since the passage of IGRA, 232 tribes have executed 249 Class III compacts with 22 states, and the allocation of regulatory responsibility, if addressed at all, is as diverse as the states that have negotiated them. Typically, the regulatory role a particular state undertook in its compact was taken from and modeled on that state's experience with the regulation of its own legalized gaming at the time the compact was negotiated. Thus, a state like Nevada, which had the most experience with the regulation of legalized gaming

and the most elaborate state regulatory structure, negotiated compacts where the state was extensively involved in compacted Class III tribal gaming. States like Michigan, which at the time it compacted had little commercial gaming and a nominal state gaming regulatory structure, opted for a minimal role in the regulation of Class III tribal gaming.

Technically created on October 17, 1988, when President Reagan signed IGRA into law, the NIGC didn't get off to a running start. It was not until 1990 that the first members of the first Commission were appointed, and after the first Commission was in place, it did not publish its first substantive regulations until 1993. In the meantime, Indian gaming was growing rapidly, and the trend that was developing was the growing dominance of Class III gaming as the primary source of tribal gaming revenues. I have attached as Exhibits 1 and 2 a timeline and growth chart depicting the growth of tribal gaming operations and revenues, the growth of the National Indian Gaming Commission's staff, and some of the benchmark developments that have occurred during this history.

IGRA declares as a purpose the establishment of the NIGC as an independent federal regulatory authority for gaming on Indian lands in order to address Congressional concerns about gaming and to advance IGRA's overriding purposes. These are to ensure that tribal gaming would be employed to 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 beneficiary of their gaming operations; and to ensure that the gaming would be conducted fairly and honestly by both the tribal gaming operations and its customers. With respect to NIGC's regulatory oversight responsibilities, IGRA authorized the Commission to penalize violations of the Act, the Commission's own regulations, and the Commission-approved tribal gaming ordinances by the way of imposition of civil fines and orders for closure of tribal gaming facilities.

The diversity of tribal gaming operations is great. Both rural weekly bingo games and the largest casinos in the world are operated by Indian tribes under IGRA. As the industry grew, NIGC needed the appropriate tools to implement its oversight responsibilities.

What the Commission 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. At that time, 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.

Subsequently, the NIGC assembled a tribal advisory committee to assist us in drafting minimum internal control standards applicable to Class II and Class III gaming. These were first proposed on August 11, 1998, and eventually became effective on February 4, 1999. With the adoption of the NIGC's MICS, all tribes were required to meet or exceed the standards therein, and the vast majority of the tribes acted to do so. NIGC's approach during that time was to assist and educate tribes in this regard, not to find fault and penalize. When shortcomings were encountered by NIGC at tribal operations, NIGC's assistance was offered and grace periods were established to permit compliance.

From the NIGC's perspective, the MICS were an unqualified success. NIGC had the rule book and measuring stick it needed to perform effective regulatory oversight, and tribal gaming regulators had guidance to assist them in achieving first-rate regulatory processes. The NIGC MICS were embraced by state regulators, several of whom adopted or incorporated NIGC MICS, or compliance therewith, in their compacts.

For six years, NIGC oversight of Class II and Class III gaming with the use of minimum internal control standards went quite smoothly. 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.

NIGC employed three methods of monitoring tribal compliance with its MICS. First, the MICS require that the annual independent audit of a tribal gaming operation include a review of tribal compliance with the MICS, and the results of that review, together with the balance of the audit itself, must be provided to the NIGC. 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. Almost always, the non-compliance is then successfully resolved by the tribe. 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 taken an enforcement action resulting in a fine for tribal non-compliance with NIGC MICS.

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 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 Honorable John Bates, U.S.D.J., 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 to the U.S. Court of Appeals for the District of Columbia Circuit. The entire Indian gaming community is watching this case with interest, and it is watching S. 2078. Your bill would clarify NIGC's authority over Class III gaming generally, and in particular, it would make clear NIGC's authority to issue MICS and to require Class III operations to comply with them.

While tribes are required to report their annual gaming revenues to the NIGC, they do not necessarily break down the split between Class II and Class III revenues. Consequently, there is no exact determination of what portion of the $20 billion plus of Indian gaming revenue comes from Class II gaming and what portion comes from Class III. Nevertheless, NIGC has estimated that over 80% of total revenue is generated by Class III gaming.

It is NIGC's belief that in IGRA, Congress intended that the federal entity established to provide oversight of Indian gaming would have an oversight role with respect to the dominant form of gaming in the industry, whether bingo in 1988 or Class III gaming now. To that end, NIGC is pursuing its appeal from the ruling in the Colorado River Indian Tribes case and strongly supports the language in Section 5 of the bill which clarifies its authority.

If the NIGC role with respect to its minimum internal control standards and Class III gaming is not clarified by the courts or legislation such as S. 2078, most tribes will continue to operate first-rate, well-regulated facilities, and their tribal gaming regulatory entities will perform effectively. Others will likely not. 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, 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 Commissioner 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.

SECTION 8 – GAMING-RELATED CONTRACTS

Before IGRA was enacted, 25 U.S.C. § 81 provided that those who entered into contracts with Indian tribes relating to tribal lands needed to secure federal review and approval before the contracts were valid. This requirement stemmed from historical instances of unscrupulous dealings third parties had with tribes, and inserted the federal government, as the trustee of Indian nations, into such contractual arrangements so that there would be a review to ensure that tribes were not unduly disadvantaged in those arrangements.

Recognizing that contracting for the construction and operation of gaming facilities was a complex and specialized area, IGRA took the responsibility for reviewing and approving such contracts away from the Bureau of Indian Affairs and gave it to the NIGC. Congress contemplated that tribes might find it useful to contract with experienced gaming developers and operators for the construction and operation of tribal gaming operations. Specifically, at 25 U.S.C. § 2711, Congress authorized tribes to enter into management contracts for the operation and management of their gaming activities and provided that such agreements would require the review and approval of the NIGC Chairman. Approval could only be obtained if the contract met a strict set of criteria set out in IGRA and if the contractor's principals could, after a background investigation, be deemed suitable, again in accordance with statutory criteria. I have attached as Exhibit 3 a chart reflecting some of NIGC's experience with the review and approval of management contracts.

NIGC has learned that not all contracts that involve the management of tribal gaming operations are denominated "management contracts," nor are they submitted to NIGC for review and approval. Some of these agreements are called "consulting agreements," "development contracts," or "leases." NIGC has discovered that not only did some of these agreements provide for outsiders' management, but they provided compensation well in excess of what IGRA permits for management contracts.

Further, by employing agreements purportedly not subject to NIGC review and approval, the contractors escaped the thorough background investigation and suitability determination required for management contracts. In a number of instances, tribes have been victimized by paying more under such arrangements than was conscionable, and they found themselves in business with individuals and entities that would not have secured gaming licenses had the NIGC management contract review process been employed.

Another shortcoming of the existing arrangement under IGRA for the review of management contracts is that a thorough background investigation and suitability determination is not required for contracts dealing solely with Class III gaming. As mentioned above, as the most lucrative area of tribal gaming, more than 80% of annual tribal gaming revenues comes from Class III gaming.

Finally, NIGC's enforcement ability is limited to penalizing the tribes themselves or contractors that are managing. Other nefarious individuals and entities can be out of NIGC's reach. To be effective, the scope of those subject to NIGC enforcement needs to be broader.

Also, when IGRA is reviewed, it is appropriate to focus on a means to bring greater scrutiny to the area of gaming-related contracts. As would be expected, any industry generating $20 billion in gross gaming revenues will involve a plethora of contractual arrangements. Most gaming tribes have become quite sophisticated about contracting. They do first-rate jobs of evaluating and entering into contracts for the goods and services

required to operate complex gaming operations, and they often employ thorough vendor-licensing programs.

Of the multitude of contracts tribal gaming operations enter into for their day-to-day operations, only a small minority are directly related to the conduct of the gaming activity. Most of the contracts relate to the provision of goods and services that support the gaming operation (food, beverage, non-gaming supplies, etc.). Thus, the NIGC has a concern that if it is tasked, as S. 2078 is presently drafted, to review and approve all "gaming-related contracts," broadly defined, it could become a bureaucratic bottleneck that would threaten to stifle the day-to-day operations of tribal gaming facilities. I have attached as Exhibit 4 a table listing the kinds of contracts now subject to NIGC review and approval and those "gaming-related contracts" that are reviewable under S. 2078, broadly defined.

Based upon legislative and regulatory models in tribal and other jurisdictions, one could more narrowly define the "gaming-related contracts" subject to NIGC review and approval and to define those other contracts tribal gaming operations may enter into for the goods and services they need to operate their facilities as "ancillary contracts" whose review would be discretionary. This would permit NIGC to identify and review selected contracts as needed and for cause. History has shown that corruption, including organized crime–related interests, has accessed gaming operations in a number of ways, employing service agreements relating to trash removal, food and beverage, construction, and the like. Thus, if background investigations and suitability determinations for such "ancillary contracts" were discretionary, problematic situations might be addressed while smooth and efficient operation of the vast majority of tribal gaming operations' contracts for goods and services would go unimpeded.

OTHER SECTIONS IN S. 2078

In addition to NIGC authority and gaming-related contracts, S. 2078 makes a number of other amendments to IGRA, some "housekeeping" and some more substantive. NIGC

supports the proposed amendments that are consistent with the legislative proposal that it sent to Congress in March 2005:

- Section 5 [25 U.S.C. § 2704] would resolve an ambiguity in IGRA. Section 2704(c) makes clear that in the absence or disability of the Chairman, or if the office is vacant, the Vice-Chairman may act in the Chairman's place and exercise the Chairman's full authority.
- Section 6 [25 U.S.C. § 2705] is closely related. Section 2705(c) explicitly authorizes the Chairman to delegate any part of his or her authority to another member of the Commission.
- Section 8 would amend IGRA to conform its various pay provisions to changes in the United States Code that came later than IGRA's adoption.
- Section 11 [25 U.S.C. § 2710] deals generally with Tribal gaming ordinances. Proposed amendments in that section would require tribal gaming commissioners to be subject to license requirements, background investigations, and suitability determinations.

As observed earlier, gaming has been an economic miracle in Indian country for many tribes who for generations languished in poverty. Whether their gaming successes have been fostered or inhibited by the Indian Gaming Regulatory Act has been hotly debated, but my experience suggests that the structure IGRA established significantly contributed to the integrity now associated with the operation and regulation of tribal gaming and is vital to its continuation and growth. Having so prospered under the existing structure, it is understandable that tribes are reluctant to make changes in this framework. But experience and the passage of time have shown that some changes are desirable, if not necessary. Thus, I believe that the limited, thoughtful amendments to IGRA proposed in S. 2078, as modified as I have suggested, will further strengthen the Indian gaming industry and the integrity it depends upon. I urge the Committee to give its favorable consideration to these changes.

I thank the Committee for the opportunity to present the views of the National Indian Gaming Commission and stand ready to respond to any questions the Committee may have for me.