

Written Testimony of Rick Hill
Chairman of the National Indian Gaming Association
Before the Senate Committee on Indian Affairs
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Chairman Ben Nighthorse Campbell, Vice Chairman Daniel Inouye, Members of the Senate Committee on Indian Affairs, thank you for inviting me to testify on behalf of the National Indian Gaming Association (NIGA) on this very important issue.

As you may know, NIGA is a non-profit organization established in 1985 by Indian Nations engaged in governmental gaming activities. NIGA membership is composed of 168 sovereign Indian nations and 99 non-voting Associate (corporate) members representing Tribes, organizations, and businesses engaged in tribal gaming enterprises throughout the United States. NIGA was formed by Tribes to protect their sovereign governmental rights and to support their economic interests before Congress and around the country.

Let me begin by stating that Indian Nations and NIGA are very pleased that the Senate Committee on Indian Affairs has elected to examine the issue of Internet gaming and S. 692, the Internet Gambling Prohibition Act. Legislation that addresses the use of the Internet in gaming operations could have collateral consequences for the Native American community. As such, we applaud your taking the initiative to review the issues surrounding Internet gambling.

Internet gaming is a very serious issue for NIGA members. In addition to removing potential opportunities in the future for Indian Nations, S. 692 could also foreclose beneficial activities which are presently authorized under the Indian Gaming Regulatory Act (IGRA).

In addition, this legislation fails to factor in technological advances which, in the future, could result in Indian Nations being denied economic development opportunities enjoyed by every other governmental entity in the United States. Even the National Gambling Impact Study

Commission has acknowledged the positive economic effects of Indian gaming in general, and the use of technology by Tribes in particular. In short, the Internet is merely an extension of these tools for economic development.

We have listed several general concerns Tribal governments have with regard to a broad-based prohibition of Internet gaming, as well as the specific problems we believe S. 692 creates. We also propose a solution for the problems created in the current iteration of S. 692.

Specific Concerns

1) S. 692 is Overly Broad and Puts Indian Nations at a Competitive Disadvantage

Although S. 692 is entitled "The Internet Gambling Prohibition Act," it does not establish an absolute prohibition. Instead, it contains numerous carve-outs for favored industries and constituencies. For example, state lotteries, horse racing, and forms of computer-aided gaming similar to those that take place on Indian reservations would be allowed to continue.

Moreover, S. 692 would legalize some forms of computer-assisted betting that are technically illegal under current law. For example, the broad exemption given to pari-mutuel wagering activity would essentially make legal on the Internet, types of wagering that are not legal in the physical world. S. 692 as it is currently drafted, implies that the Interstate Horse Racing Act allows for the legal transmission and receipt of interstate pari-mutuel bets or wagers. As the Justice Department noted in Congressional correspondence last year, the Interstate Horse Racing Act does not allow for such gaming activity; if a pari-mutuel wagering business currently transmits or receives interstate bets or wagers (as opposed to intrastate bets or wagers on the

outcome of a race occurring in another state), it is violating federal gambling laws.

In addition, while the Interstate Horse Racing Act permits limited interstate wagering on pari-mutuel horse racing, it is silent on other forms of pari-mutuel wagering, such as dog racing and jai alai. The Internet Gambling *Prohibition* Act would legalize such wagers. Thus, if enacted, S. 692 would actually expand legal wagering over the Internet.

You should also know that under S. 692, some in-home wagering would be allowed, despite the "dire consequences" of such activities that have been predicted by Senator Jon Kyl and other sponsors of the bill.

In short, it appears to us that the intention of S. 692 is to pick winners and losers in the marketplace, favoring industries with large lobbying budgets and powerful political constituencies over Indian Nations and other less influential gaming industry participants.

It is NIGA's position that, in the context of legislation dealing with Internet gaming activity, tribal governments should be offered at least as much protection under the law as state governments and certainly, private, for-profit gaming interests.

2) S. 692 Upsets the Balance Between federal, State and Tribal Authority over Gaming

A broad-based prohibition on the use of technology in Indian gaming imposed at the federal level represents a dramatic change from traditional methods of dealing with gaming. For the most part, the model of cooperation between Tribes and state governments under IGRA has worked, providing tremendous economic opportunities to Indian Nations and entertainment opportunities for consumers. At the very least, when current law is not sufficient to address the use of technology in Indian gaming, we believe issues should be worked out between individual Indian Nations and the states in which they are located.

We have already seen this take place in one jurisdiction. The compact between the Coeur d'Alene Nation and the State of Idaho explicitly permits the use of interactive technology to enhance gaming opportunities. We question why the federal government should substitute its judgement for that of state and Tribal officials in this context.

3) Current Law Adequately Addresses the Use of Technology in Indian Gaming

We believe that Congress has already spoken on the issue of using technology to assist tribal gaming operations. The Indian Gaming Regulatory Act and the accompanying legislative history to IGRA are crystal clear about the conditions under which new technologies may be used for Tribal gaming operations.

The Committee intends... that Tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that Tribes should restrict class II games to existing games, sizes, levels of participation, or current technology. The Committee intends that Tribes be given every opportunity to take advantage of modern methods of conducting class II games, and the language regarding technology is designed to provide maximum flexibility.

IGRA struck a delicate balance between states and Tribal gaming operations. That legislation was carefully crafted to ensure that Indian Nations would have the opportunity to engage in gaming activities to further economic development and allow Tribes to achieve a measure of self-sufficiency. S. 692 would upset the balance of IGRA by putting Indian Nations at a competitive disadvantage to other gaming interests, and, therefore, deal an economic blow to Tribes.

Currently successful multi-tribal games such as Mega-Bingo would be put at risk by

passage of S. 692 in its current form. The Internet Gambling Prohibition Act precludes the use of computer-assisted technology to link interstate gaming operations such as Mega-Bingo.

Moreover, intrastate, multi-jurisdictional class II games would only be permitted if tribal-state compacts were in place. In essence, S. 692 imposes a new compact requirement on technologically-assisted class II gaming. We believe specific reference should be made in S. 692 to these and other games as permissible under IGRA without restriction.

The National Gambling Impact Study Commission's draft report addresses this issue:

Tribes currently operate Class II "megabingos" that... are not Internet gaming, as the linkages are reservation to reservation and do not involve individual home terminal access. Over 60 tribal governments currently use these forms of technology in the play of interstate linked class II bingo games which are satellite broadcast across the country. These forms of technology are used to broaden the participation levels of these games and attract more people to visit Indian communities.

In its final report, the Commission will put forth the following recommendation:

The Commission recommends that Congress should adopt no law altering the right of Tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of Class II bingo games as defined under the Indian Gaming Regulatory Act.

NIGA supports the Commission's recommendation, and urges Congress to include specific relief for Indian Nations in S. 692.

4) Proxy Play

Section 2(F)(2) of the Internet Gambling Prohibition Act attempts to prohibit the use of

proxies in any type of technologically-assisted class II gaming in which a computer server is utilized. This provision directly undermines the National Indian Gaming Commission, which has ruled that proxy play is legal and appropriate.

NIGA believes that proxy play should be allowed to the full extent permitted by the Indian Gaming Regulatory Act. Accordingly, we urge the Committee to delete Section 2(F)(2) and ensure the viability of proxy play.

5) State Law Enforcement on Tribal Lands

The Internet Gambling Prohibition Act would set a dangerous precedent by allowing state authorities jurisdiction over activity that takes place on Tribal Lands. S.692, as currently drafted, provides broad authority for state attorneys-general to enforce the terms of a federal prohibition on most forms of Internet wagering. To the credit of the drafters, there is an exception to this broad authority for enforcement on Indian reservations. Section 2(5)(B)(iii) of S. 692 states that the prohibition (and therefore, state enforcement authority) does not apply to:

information exchanged exclusively between or among I or more wagering facilities that are located within a single state and are licensed and regulated by that State, and any support service, wherever located, if the information is used only for the pooling or processing of bets or wagers made by or with the facility or facilities under applicable State law.

Unfortunately, to qualify for the exception, gaming must be "licensed and regulated" by the state. As you know, class II gaming, regardless of whether it is technologically enhanced, does not require a Tribal-state compact, pursuant to the terms of IGRA. Thus, the exception would seem not to apply to class II gaming activity that takes advantage of telecommunications

technology.

This oversight highlights the need for this Committee to review and amend any and all gaming legislation that potentially impacts Tribes. Given the complexities of IGRA and the unique relationship Tribes have with federal, state, and local governments, the expertise of the Committee on Indian Affairs is desperately needed.

6) The Internet Provides Extraordinary Economic Opportunities for Rural Tribes

Internet gaming can be a great boon to rural Indian Nations. The Internet represents an opportunity for rural Tribes to reach a global market and generate revenues that had previously been out of the realm of possibility. Many Tribes are not physically located near large enough population centers to sustain land-based gaming operations. The Internet merely provides these Nations with the same opportunities Tribes located close to major cities already enjoy. For these rural Tribes, Internet gaming could be the gateway to economic self-sufficiency and wealth creation.

Equally important, using Internet technology to enhance gaming can also be a gateway to other forms of electronic commerce for Tribes — commerce not centered around gaming. Web sites can generate advertising revenues, technology-related employment, and innovative marketing opportunities. Gaming activity provides the jobs and training resources that can ultimately be applied to other e-commerce activity. In the same way that gaming Tribes are using the capital generated by wagering operations to diversify into other businesses, the Internet provides an avenue for reinvestment of intellectual capital. For tribes to be shut out of this avenue of economic development would be a mistake.

General Concerns With the Approach Taken by S. 692

We recognize that there is a fundamental policy debate surrounding the pervasiveness of gaming in America in general. Like others, we have concerns about the extension of gambling into the home.

Nevertheless, the framework for imposing a semi-prohibition such as the one contained in S. 692 raises serious questions with respect to enforceability and intrusiveness. The following are some of NIGA's concerns about the bill's approach in general.

1) Prohibition of Internet Gaming is Unenforceable

Today, there are a few hundred thousand Internet sites. In ten years, there will be a few hundred *million* sites. There is no functional way for federal and state law enforcement personnel to examine every site on the Internet, now or in the future. In addition, the Internet is an international medium. Regardless of any action undertaken by the U.S. government, the United States will not be able to stop the proliferation of gaming sites in foreign countries.

Australia and sovereign nations in Europe and in the Caribbean already have fully developed licensing or regulatory regimes that do not and will not exclude customers located in the U.S. By prohibiting tribes from competing with such interests, the Tribal share of the gaming market will erode, and gains made to date could be erased.

In addition, Internet sites are extremely liquid — changing the name and address of a location (and thus, removing it from the authority of a specific Court injunction) takes a matter of seconds. The enforcement scheme in S. 692 relies on already overworked federal and state law enforcement personnel. Moreover, as Senator Dianne Feinstein recently explained, S. 692

“deputizes Internet Service Providers” as federal law enforcement agents.

We are concerned that because application of S. 692 would be difficult (if not impossible) overseas, the vast majority of enforcement authority (both at the ISP level and on the ground) would target Indian Nations, since they are easy to reach. The disproportionate enforcement would likely resemble legislation specifically and solely aimed at Indian Nations.

2) Regulation of Tribal Internet Gaming

From a regulatory perspective, the challenges posed by Internet and other remote gaming activities are nonexistent in the context of tribally-sponsored operations. The fundamental problem with private-sector Internet gaming is that it is difficult to pin down. Addresses change, ownership shifts, and Internet sites move — not merely from city to city, but often from country to country. The only way to ensure comprehensive regulation is to require a fixed site — one that can be inspected at will to ensure compliance with all applicable rules and regulations.

In contrast, tribal gaming conducted with the use of Internet technologies does not move. Tribal lands remain the unchanging tie for regulators. Moreover, all tribal gaming is subject to at *least* two levels of regulation: by each tribal gaming commission and by the National Indian Gaming Commission.

From a technical perspective, regulating the actual transaction in the context of Internet wagering can be accomplished in the same manner as regulation of so-called "land-based" casinos. Each transaction leaves an electronic audit trail that can be preserved indefinitely. Software experts can test the integrity of each computer operation, while computer engineers can review the workings of each piece of computer hardware. Moreover, auditors can review all books and

records to ensure that jurisdictional rules are respected, minors are screened out, and appropriate information is reported to taxing authorities. Finally, tribes can mandate other requirements such as links to Gamblers Anonymous, the National Council on Problem Gambling, or other similar sites.

Such a regulatory regime could generate enough revenue to pay for itself without costing taxpayers a dime, while providing a means for Tribal economic development in cyberspace.

Potential Solutions

Because of the issues outlined above, NIGA cannot support S. 692 as currently drafted.

There is not sufficient acknowledgment of the current legality of Indian gaming, no workable exemption for existing Indian gaming, and no mechanism to allow Indian Nations to use new technologies such as the Internet for growth and development (as is specifically provided for in IGRA).

NIGA believes the entire effort to prohibit economic development through gaming on the Internet is misguided at best, and could be disastrous at worst. Moreover, such a prohibition is contrary to the first purpose of IGRA:

To provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments.

This purpose should not be overlooked or limited with the development of new technologies.

We believe many problems can be remedied by adding language similar to the following in section (f)(1) of the bill, which would exempt from the prohibition:

(C) any otherwise lawful wager for Class II gaming as defined in Section 4 of the Act of October 17, 1988 102 Stat. 2467, conducted by an Indian Tribe on the Tribe's reservation.

While this language would not correct seemingly fatal flaws with respect to enforcement and intrusiveness, it would ensure that the status quo with respect to tribal gaming is maintained.

Indian Nations, like individual states, should be permitted the opportunity to use new technologies for the development of their gaming operations. Tribes, as sovereign governmental entities, should also be afforded an exemption within S. 692 that permits Class II play under tribal oversight and regulation, and for Class III gaming subject to compact. We respectfully request the Committee consider such an amendment in its deliberations over S. 692.

Thank you for inviting NIGA to testify. We are prepared to respond to any questions.