

Testimony of  
Elizabeth Lohah Homer  
Before the  
Senate Committee on Indian Affairs  
Oversight Hearing on the Regulation of Tribal Gaming:  
From Brick and Mortar to the Internet  
July 26, 2012

Chairman Akaka, Vice-Chairman Barrasso, and Members of the Committee:

Thank you for inviting me to testify this afternoon with regard to regulatory issues that arise in the context of tribal internet gaming. My name is Elizabeth Lohah Homer. I am a member of the Osage Nation and a practicing attorney. I founded Homer Law shortly after leaving federal service, where I served as a special attorney with the Criminal Division at the U.S. Department of Justice, Director of the Office of American Indian Trust with the U.S. Department of the Interior, and finally, a three-year term appointment to the National Indian Gaming Commission (“NIGC”), where I served as the Vice-chair from July 1999 to July 2002.

During my tenure with the NIGC, the Commission undertook several important regulatory initiatives, including the revision of regulatory definitions for gaming activities; revision of the minimum internal control standards; and the development of an interpretive rule concerning environment, public health, and safety standards for tribal gaming operations. We also oversaw the expansion of the NIGC to include a field office structure and an increase in the agency’s staffing level.

For nearly a decade now, I have primarily served tribal clients in the gaming law arena, with a particular focus on regulatory matters. My clients include tribal councils, tribal regulatory agencies, tribal gaming enterprises, and tribal organizations such as the National Indian Gaming Association. Although I draw heavily on this experience in my testimony today, the views I express this afternoon are mine alone and should not be attributed in any way to anyone other than me.

In much of Indian Country, though not all, the advent of gaming has meant the difference between a future of seemingly hopeless poverty, depression, and despair and one of growth, advancement, and promise. Tribal gaming revenues have provided tribal governments the means to make investments that could hardly be imagined when I graduated from college and began my first job with the Osage Nation in 1979. These revenues translate directly into increased tribal governmental capacity and new and expanded tribal governmental programs and services that range from law enforcement to fire and emergency services to health care, education, roads, clean water, sanitation facilities, and the list goes on and on and on. This Committee deserves a lot of credit for what has and continues to happen throughout Indian Country, but it is the responsible manner in which the tribal leadership has undertaken gaming and the wise investments that have been made with the revenue that has made tribal gaming successful and beneficial.

Today, we stand at a crossroads similar in many ways to the one confronted in the mid-1980s just prior to the enactment of the Indian Gaming Regulatory Act (“IGRA”) in 1988, where important decisions must be made and time is of the essence. The technological revolution, the advent of the internet and broad public access to the information highway – these things are changing the world. It is an exciting time, but it is a challenging one as well. As the Committee deliberates the ramifications of internet gaming and considers legislation related to it, I urge you to take into consideration foremost that although the technology behind internet gaming is relatively new, the legal and policy issues underlying this important discussion are familiar ones. The fact is that there is a mature, effective gaming regulatory structure already in place and functioning. It is a structure that is consistent with core principles of federal Indian policy and one that recognizes the political status of tribal governments within the Constitutional framework of our Nation.

In IGRA, Congress established a unique system of shared regulatory responsibilities among the federal government, the states, and tribal governments, but designated tribal governments as the primary regulators of tribal gaming on Indian lands. To carry out the federal government’s

responsibilities in this structure, Congress created the NIGC, an independent federal regulatory agency within the Department of the Interior.

The NIGC's core mission is to provide federal civil regulatory oversight in order to shield Indian tribes from organized crime and other corrupting influences; ensure that Indian tribes are the primary beneficiaries of gaming revenue; and assure that gaming is conducted fairly and honestly by both operators and players. To that end, the NIGC has been vested with specific oversight powers and responsibilities under IGRA, including the authority to promulgate regulations and take enforcement actions.

Under current law, the respective roles of the NIGC and tribal governments are thus clearly defined and, as noted, consistent with well-established principles of federal Indian policy. It is a system that works and should be reflected in any new legislation pertaining to internet gaming by tribal governments. Any legislation that would operate to bifurcate federal regulatory oversight responsibilities between the NIGC and another federal agency should be avoided as it would create uncertainties; increase the potential for inter-agency conflict; and subject tribal governments to oversight by federal agency personnel inexperienced in Indian Affairs, Indian law and policy, the federal-Indian relationship, and the regulation of gaming. Having two regulatory agencies regulating essentially the same functions would be redundant and problematic.

The NIGC, on the other hand, has nearly two decades of gaming regulatory experience, and its members and the staff understand the unique constitutional status of Indian tribes as sovereigns as well as the responsibilities associated with the special government-to-government relationship between tribal governments and the United States. Since the appointment of its first Chairman in 1993, the NIGC has grown considerably in size, scope, and sophistication. In October 1993, the NIGC had a staff of 27 and was responsible for overseeing 200 gaming operations operated by an estimated 175 tribal governments. The NIGC's staff now consists of over 120 employees who oversee an industry comprised of approximately 240 tribal governments operating over 420 tribal gaming operations in 28 states. The NIGC currently has field investigators operating out of seven regional offices and three satellite offices who work in conjunction with tribal gaming

regulatory agencies in rendering technical assistance to tribal gaming operators. As a result, no other federal agency has achieved a comparable level of understanding in the tribal gaming context or possesses such experience.

There is no question that the NIGC is the ideal federal agency candidate to be assigned administrative jurisdiction over and implementation of any new legislation related to tribal internet gaming. Besides its experience and longstanding relationships with tribal governments, particularly tribal gaming regulatory agencies, it is the only federal agency that possesses the regulatory infrastructure and tools to quickly and efficiently assume a gaming regulatory oversight role in relation to tribal internet gaming.

The fact is that it takes years if not decades to establish a well-functioning regulatory agency. A new agency must assemble a capable staff, promulgate rules and regulations, meet all legal requirements applicable to all federal agencies, and commence operation. The NIGC's experiences during the first years of its formation are instructive in this regard. From the time the NIGC was first established by IGRA in 1988, it took nearly three years to appoint the first Chairman and assemble a skeleton staff, and another two years after that for the first set of regulations to become effective. Thus, it took nearly five years for the NIGC to actually begin carrying out its regulatory responsibilities. A similar delay in staffing an entire agency and "gearing up" the agency to begin regulating could prove disastrous for tribal governments and place them at a competitive disadvantage relative to non-tribal operators who are forging ahead under new state laws.

Although the regulation of internet gaming will inevitably raise new regulatory and enforcement concerns, the NIGC possesses the necessary procedures and tools for monitoring and enforcing compliance with applicable gaming laws and regulations. The NIGC has already developed the institutional infrastructure for carrying out investigations, initiating enforcement actions, conducting hearings, and adjudicating appeals. It would be a relatively simple matter for the NIGC to add the technical expertise required to oversee the implementation of a tribal internet gaming statute. Hence, the NIGC would not be hindered by a long start-up time or the kinds of delays involved in the formation of new agencies.

In addition, a key difference between the NIGC and other federal agencies is the NIGC's status as an independent regulatory agency. Independent regulatory agencies are generally charged with "independence" from other parts of the Executive Branch and are designed to enhance balance, provide greater stability, and mitigate the potential for sudden changes or reversals in agency policy likely to produce unnecessary or exceptionally severe economic harm to the regulated industry.

In establishing the NIGC as an independent regulatory agency, Congress intended to cloak the NIGC with the necessary independence and flexibility to work closely and freely with tribal governments in assuring the proper regulation of tribal gaming. Congress understood that insulation from external political influences would be critical to the successful implementation of the NIGC's regulatory oversight program. Any legislation that assigns regulatory oversight of tribal internet gaming to a federal agency other than the NIGC would deprive tribal governments of the intended benefits of regulatory continuity and stability, and subject tribal governments to oversight by a federal agency that may be particularly vulnerable to abrupt changes in leadership, policy, resources, and organization.

In closing, I would note that what is most important is ensuring that the successes and investments that tribal governments have made in the gaming arena are not compromised. Nor should the Congress enact legislation that would place tribal governments at a competitive disadvantage by delaying tribal entry into the internet gaming market. Sound regulatory institutions are well-established at both the federal and tribal levels of government and capable of performing regulatory functions in relation to internet gaming. It would be neither cost-effective nor practical to re-invent new agencies when there are experienced and capable institutions currently in place to carry out important regulatory functions.

Thank you again for the opportunity to participate in this hearing. I am happy to answer any questions that you may have for me.