

TESTIMONY OF JAMIE HUMMINGBIRD, CHAIRMAN
NATIONAL TRIBAL GAMING COMMISSIONERS / REGULATORS ASSOCIATION
SENATE COMMITTEE ON INDIAN AFFAIRS
REGULATION OF TRIBAL GAMING: FROM BRICK AND MORTAR TO THE INTERNET
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Chairman Akaka, Vice-Chairman Barrasso, members of the Committee, my name is Jamie Hummingbird. I am the Director of the Cherokee Nation Gaming Commission. I also serve as Chairman of the National Tribal Gaming Commissioners & Regulators Association. It is in this capacity in which I address you today.

Please accept my most sincere appreciation on behalf of the National Tribal Gaming Commissioners & Regulators Association for allowing testimony before the Committee regarding the state of gaming regulation in Indian Country today and how it may change in the future.

The National Tribal Gaming Commissioners & Regulators is an organization devoted to the education and advancement of gaming regulation within tribal gaming facilities. Comprised of tribal gaming regulators across the country, the organization serves as a center for the training of regulatory professionals and the free exchange of regulatory best practices. As the gaming industry has evolved, incorporating the latest in technology for game play as well as the associated systems that complete the gaming experience, so too have tribal gaming regulators grown in their capacity to successfully regulate tribal gaming.

A Brief History of Indian Gaming Regulation

In the late 1970's and early 1980's, Indian tribes across the country began operating bingo facilities as a means of providing funds for tribal assistance programs. The success of these facilities quickly drew the attention and ire of local and state government officials who sought to enforce state laws on Indian land.

Tribes, believing their decision to operate gaming facilities was an exercise in tribal sovereignty, resisted state incursions of tribal gaming facilities. The debate regarding the legality of tribes offering gaming on tribal lands culminated in the 1987 Supreme Court decision in *California v. Cabazon Band of Mission Indians* wherein the Court held that tribes could operate and regulate gaming on tribal lands.

As a result of this landmark decision, the Congress passed the Indian Gaming Regulatory Act (IGRA) in an attempt to balance state and tribal gaming interests. In its drafting of IGRA, the

Select Committee on Indian Affairs set out to “preserve the right of tribes to self-government” by recognizing tribes’ sovereign rights to determine the course of their own affairs, including the means by which they would regulate their respective gaming operations.

IGRA required tribes to adopt gaming ordinances to provide the regulatory structure that would govern tribal gaming facilities. In order to achieve this task, tribes and tribal gaming regulatory authorities (TGRA) assessed their particular gaming environment and formulated regulations that provided for the licensing of gaming facilities, employees and vendors, approval of games, surveillance, security, and auditing of gaming operation financials. In addition, tribes and TGRAs were called upon to ensure the protection of the environmental, public health and safety of the gaming facility employees and patrons.

The IGRA incorporated many of the principles of regulation that tribes followed at the time, which continue to shape the face of gaming regulation in Indian Country today. Every TGRA, at its heart, contains the core values of protecting tribal assets, ensuring the integrity of the gaming environment, and requiring accountability of the gaming operations.

Over the years, the success of tribal gaming prompted more tribes to engage in gaming. Realizing the need for consistency and in an effort to assist those tribes that were new to the industry, a task force of tribal regulators within the National Indian Gaming Association and the National Congress of American Indians developed a model set of internal controls that provided base operating standards by which any gaming operation could be effectively regulated. The choice to adopt these standards and the language that would be contained in a tribal set of internal controls was left to each tribe to determine. However, In 1999, these standards were adapted by the National Indian Gaming Commission (NIGC) to become the Minimum Internal Control Standards (MICS) that all tribes were required to abide by.

In addition to the MICS, TGRAs utilize several other methods to ensure compliance of tribal gaming facilities, few of which match the importance of the employment of qualified personnel. Tribes invest heavily in the training of regulatory staff and highly value those with experience in law enforcement, accounting, and information technology.

By remaining at the forefront of innovation in gaming and gaming regulation, tribal gaming operations have become as sophisticated as any non-Indian gaming jurisdiction, if not more so. It is in this tradition of innovation and regulation that tribes will enter the digital realm of Internet gaming.

History of Internet Gaming

Although the subject of iGaming, also called online gaming or Internet gaming, has seen increased debate in numerous circles over the last few years, the industry has its origins in the mid-1990's when the government of Antigua and Barbuda passed laws allowing online casinos to offer the first gambling games on the internet. Shortly thereafter, the Kahnawake Gaming Commission in Canada was established, controlling and regulating online gaming activity from the Mohawk Territory of Kahnawake.

Today, there are approximately eighty-five (85) countries that have legalized some form of iGaming, whether in the form of Internet cafes, as part of a brick-and-mortar facility, or through a mobile device (e.g. smartphone / tablet), representing an estimated \$30 billion industry. Jurisdictions such as Malta, the Isle of Man, the U.K., Italy, Germany, Alderney, and British Columbia have chosen to establish iGaming laws and favor strict regulatory controls to govern iGaming activities.

Seeing the “new” communication medium called the Internet was going to be used not only for commerce but also for gambling, some states enacted anti-gaming laws prohibiting iGaming in the late 1990's and early 2000's. One state – Nevada – staying true to its gaming roots, enacted legislation legalizing internet gaming in 2001 and empowered the Nevada Gaming Control Board to enact regulations to pave the way for iGaming commerce to begin.

In 2003, Antigua lodged a complaint with the World Trade Organization (WTO) stating that, although American policy did not prohibit iGaming, the American government refused to allow foreign casinos to accept wagers from U.S. players. In a first-of-its-kind ruling, the WTO stated that the United States laws prohibiting iGaming violated international trade laws. The Bush Administration condemned the ruling over a concern that American social policy would be dictated by foreign powers.

Despite this activity, nothing happened on the U.S. iGaming scene until 2006 when the Unlawful Internet Gaming Enforcement Act (UIGEA) was passed, being attached to a must-pass port security act literally at the midnight hour. Although the name suggests the act of iGaming was made illegal by this piece of federal legislation, in actuality the practice of allowing financial transactions at iGaming sites by financial institutions was the center of the legislation; the legislation also did not pertain to intra-state transactions.

On April 15, 2011, the U.S. Department of Justice (DOJ) seized the Internet domain names of five of the largest online gaming operators, a day that has become know as “Black Friday”. A month later, on May 23rd, a Maryland grand jury ordered the seizure of approximately a dozen more internet domain names of other companies offering iGaming, a day that has been labeled

“Blue Monday.” These actions marked the first significant action taken against iGaming since the passage of the UIGEA.

In spite of the activity earlier in the year, iGaming interests continued to pursue avenues to legalize iGaming. A major obstacle in the way of the legalization of iGaming was the applicability of the 1961 Wire Act. It was long thought that the Wire Act prohibited the transmission of wagers across state lines. However, the DOJ changed this mindset with the issuance of a legal opinion on 23 December 2011 wherein the agency reversed its long-held position stating the Wire Act only applied to sports wagering and did not cover iGaming, particularly on-line poker, casino games and lotteries.

Throughout this time, iGaming has drawn proponents and opponents from state and tribal governments as well as various federal departments and members of Congress. Some states, besides Nevada, have taken firm steps towards authorizing iGaming (some with the active participation of tribal governments) and there is an increasingly louder call from all areas of the gaming industry for a federal solution to be enacted.

Federal & State Legislation

In the years since 2006 and the UIGEA, the American iGaming landscape at the federal level has undergone a paradigm shift from iGaming being considered criminal-prohibitory to being civil-regulatory in nature. Members of Congress who initially opposed iGaming now support allowing iGaming under certain conditions.

At the same time, commercial casinos in New Jersey and Nevada, as well as advocacy groups such as the American Gaming Association, have switched to supporting iGaming – again, under certain conditions.

Various bills have been introduced in the House of Representatives and in the Senate that would essentially undo the effects of the UIGEA. Some bills contained provisions that provided a basis for tribes to build on while others contained language that either put tribes at a disadvantage to commercial casinos or were outright contrary to tribes and tribal sovereignty. In 2010, Representatives Barney Frank, John Campbell, and Senator Robert Menendez each offered bills to regulate iGaming, which finally provided tribes with a place at the table.

Any legislation considered at the federal level must provide parity to tribes by providing tribes and states equal treatment under any law that is enacted.

The majority of states are forecasting budget shortfalls in the coming years and are looking for ways to add to state coffers. This has led to a trend amongst states to consider authorizing iGaming as a means to that end.

The following are examples of some of the steps taken by the various states:

- △ Nevada – The State legislature authorized iGaming in 2001; enacted iGaming regulations in 2011; began accepting applications for online operator gaming licenses in February 2012 and have begun issuing licenses to iGaming operators.
- △ New Jersey – The State legislature authorized iGaming in 2010, but the bill was vetoed by Governor Christie; a new bill has unanimously passed the state senate Budget & Appropriations Committee with a vote expected in the Fall of 2012.
- △ Iowa – A study was conducted and a report issued on the possible regulation of iGaming in Iowa, with the recommendation for approval; the Iowa Senate passed a bill on 13 March 2012 authorizing iGaming; the Iowa House voted against the bill three days later on 16 March 2012.
- △ California – The current form of California’s iGaming bill (SB 1463), which would authorize internet poker, was referred to committee at the end of March and is currently pending.
- △ Delaware – In June, the Governor has signed House Bill 333 into law allowing for all forms of gaming – poker, blackjack, slot machines, and lottery tickets – to be offered online to Delaware citizens.

Tribes across the country have debated whether the introduction of iGaming into tribal jurisdictions will be a detriment to current brick-and-mortar facilities or if it is a new segment of the market that, if left untouched, could be a competitive disadvantage and/or result in lost revenue to the tribe.

At the heart of the controversy – besides the overall issues surrounding tribal sovereignty – is the concern regarding the potential impact any legislation may have on tribal exclusivity as contained in tribal-state compacts. Despite this concern – or perhaps because of it – many tribes are carefully assessing their options in the instance iGaming is authorized, whether at the state or federal level.

State operated lotteries are another side of the iGaming issue. Several state lotteries have looked to the Internet to boost sales and have begun offering scratch-off tickets and other lottery tickets

online. Seven (7) other states and the District of Columbia are also pursuing Internet lottery games.

Regulation of iGaming

As stated earlier, TGRAs jealously protect the integrity of any and all games offered by the tribal gaming facilities. This would be no less true should iGaming become a viable option for tribes.

In order to ensure the integrity of iGaming, TGRAs will be called upon to introduce new regulations over aspects of iGaming beyond those relating to game play.

Under any legislation that is enacted, whether at the state or federal level, TGRAs will be tasked with ensuring that only those persons within their authorized jurisdiction are able to conduct gaming transactions in tribal iGaming sites. Depending on the legal parameters defined in the legislation, this may be accomplished in one or two ways: residency verification and/or geo-location. Should the legislation prescribe a limited coverage area, say a reservation, state borders, or countries in which iGaming is not permitted, TGRAs will require a prospective player to attest to his/her residence and then, through the process of geo-location, the process of verifying a person's physical location, determine whether or not that person is able to legally access the tribe's iGaming site. Geo-location will also play an instrumental role in verifying the location of authorized players utilizing mobile devices such as smartphone or tablet computers.

The societal issues of underage gambling and problem gambling are issues that TGRAs will be required to address. These concerns are best addressed by the regulations TGRAs will require to establish iGaming accounts and the process by which gaming activity will be monitored to identify any potential patterns indicative of problem gambling. TGRAs may require additional information and/or documentation from prospective players to verify not only their identity but their ability to legally engage in iGaming.

Many other tools that will be needed by TGRAs to effectively regulate iGaming currently exist. TGRAs have methods to thoroughly investigate gaming and gaming related vendors. However, these methods may require slight modifications depending on the path taken by the tribal gaming operations, particularly if partnerships with overseas vendors are pursued.

The technical standards and game testing requirements employed by TGRAs will also lend themselves to being used in the digital arena. Far from having to reinvent the wheel, TGRAs can learn from jurisdictions where iGaming is in operation to develop a set of requirements that will fit their unique environment. Game protection is paramount to TGRAs and the ability of games to be certified as legal and secure is essential.

These standards will also provide the first line of defense in protecting information obtained from prospective players. The confidentiality of personal and financial information provided by prospective players as they establish iGaming accounts cannot be compromised.

The rules and regulations and internal controls used to govern the activity of the brick-and-mortar facilities can be adapted to fit iGaming operations. The regulations that ensure the financial accountability of the gaming operation and demonstrate the ability of the iGaming operation to meet all financial obligations.

Each of these aspects will require an investment on behalf of any tribe electing to offer iGaming. Investments in technology, infrastructure, and operating capital must be made. Yet that is not the extent to which tribes will need to invest; investment in human capital will also be necessary. The need for qualified and experienced staff is of vital importance to the success of an iGaming venture.

Conclusion

The success of any business venture lies in preparation. In the case of iGaming, preparation includes formulating the proper regulatory model to complement the legislative side of the equation. Tribes have been responding to a changing gaming market since the enactment of IGRA. Our tribal governments and regulators often set the standard for new gaming technologies and regulations. We are prepared to do so again should iGaming expansion occur.

The success of Indian gaming operations is due, in part, to the presence of strong regulatory bodies. Through years of practical application, tribes have garnered the necessary expertise and experience to overcome the challenges that will be presented with the passage of iGaming legislation. The success we have collectively achieved since the passage of IGRA clearly shows that tribes are more than capable of being strong participants and regulators in the gaming industry.

On behalf of the National Tribal Gaming Commissioners and Regulators, I thank you for the opportunity to present this testimony, and am open to any questions you may have.