

TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

November 17, 2011

Chairman, Vice Chairman, Committee members and other distinguished participants:

Thank you for inviting me to speak to the Committee today.

My name is Penny Coleman. I am the owner of Coleman Indian Law and serve as counsel to Anderson Indian Law, both of which represent Tribal Nations. In 2010 I retired from the federal government. During my career, I worked on Indian gaming issues for over 20 years and served as chief counsel for many of my 16 years at the National Indian Gaming Commission (NIGC).

I am here today to discuss some of the challenges and impacts of internet gaming on Indian Nations if legislation was passed now.

I cannot emphasize enough that, without legislation that considers and mitigates the impacts of internet gaming on tribal government gaming, many of the Indian Nations will simply be run over. Most of the draft legislation limits tribal participation by making eligibility to operate or regulate internet gaming unnecessarily restrictive. Most Indian Nations would not qualify. Further, such legislation assumes that Indian Nations cannot both own and regulate internet gaming while still recognizing that States own and regulate lotteries.

There are many Nations poised to operate and regulate internet gaming. There is a large consortium of Nations and card rooms in California that is already operating a free play poker site as a precursor to its planned internet gaming. A few other nations are operating similar on-line, free play sites. Many Nations, however, have not had the time or money to turn to internet gaming while it remains only a possibility rather than a certainty. For many, internet gaming is not yet on their radar.

The National Indian Gaming Association laid out several basic principles its tribal constituents require to assure that internet gaming is good for the Nations rather than a detriment. One important principle is the concept that internet gaming should result in positive economic benefits for the Indian Nations.

For the Nations, historically mired in poverty, it is of utmost importance that internet gaming does not take away the positive economic benefits that gaming now brings to them. Internet gaming offers Tribal Nations the opportunity to develop a new industry that can complement their brick and mortar facilities. Las Vegas and New Jersey recognize this potential and are already developing online sites that would tie into their existing player's club databases. If Tribal Nations are not included in authorizing legislation, we can expect that fewer dollars will be spent at the Tribal Nations facilities. Indian Country also needs legislation that will place all

Tribes in a position to benefit from internet gaming, even those, or especially those, in isolated parts of the country.

The draft bills limit Tribes opportunity to engage immediately in internet gaming while assuring that a few States can do so. This lack of parity assures that many Tribes will completely miss the internet gaming opportunities. By the time regulations are developed and tribal applications processed, potential patrons will already have identified their favorite gaming sites. Within a short time, we can expect that there will be a handful of gaming sites that will bring in the largest number of gamers and all the rest will be an afterthought.

Designating the Department of Commerce as the regulatory oversight agency for Indian internet gaming will not resolve those problems. And it will definitely not assure that Tribes can quickly become competitors in internet gaming.

The National Indian Gaming Commission is the best example of the challenges the Department of Commerce would face in the first years of its existence. From 1988 to the issuance of the NIGC regulations in early 1993, there were four years where the federal government simply did not provide any gaming oversight. It took two years before the first chairman was appointed and two years to appoint staff and issue regulations. NIGC then had to organize, train, and add staff and regional offices while developing its own expertise in Indian gaming.

While developing its own infrastructure and expertise, the NIGC developed working relationships with over 200 tribal governments and over 200 tribal gaming commissions. NIGC staff had to understand and appreciate the cultural backgrounds and economic challenges facing each Nation and develop regulatory and training programs that would serve the Nations' needs. The NIGC's early efforts at conducting background checks and assisting the Nations on criminal history checks were time consuming and impractical. Employees would have already moved on before these checks were done. It had to work with the Tribes, the FBI and finally OPM to develop an investigatory program that really worked.

Fortunately, IGRA provides some relief from the usual federal bureaucratic impediments that slow federal agencies. The NIGC is exempt from some of the appointment, classification and pay restrictions imposed on other agencies. This allows the NIGC to hire more quickly and determine pay based on its needs. Consequently, the NIGC can compete to a limited extent with the Nations and companies which are also hiring gaming talent. The NIGC, because of its status as an independent agency, is also able to publish regulations more quickly.

The Department of Commerce will have none of these advantages. They will not know Indian Nations or gaming. They will not bring regulatory or enforcement experience or even much internet experience to the system. Consequently, they will delay tribal opportunity in internet gaming for years. I attached an article to my testimony that describes this issue in more detail.

Further, the draft bills do not take into consideration the need to assure that tribal brick and mortar facilities are not negatively impacted, to assure that Tribes are placed at least on equal footing with the States, and that profits from internet gaming are not diverted away from tribal government services. Taxing the Nations establishes a bad precedent for Tribes and is really unnecessary. The Tribal Nations have been completely willing to pay for the cost of federal oversight as well as pay for the cost of the day to day regulation of their gaming. There are other mechanisms, such as that established under the Indian Gaming Regulatory Act (IGRA), which allow Tribes to pay for regulating costs without being subjected to taxation.

Tribes, like States, should be able to opt in or out of internet gaming and not be limited by the decisions of the State that surrounds them. To compete, Tribes need to be able to offer internet gaming wherever it is legally operated in the United States. This also allows all Tribal Nations to compete in the same manner as the States as well as other Tribes.

To have nationwide competition, federal legislation is necessary. Although states could individually authorize internet gaming, jurisdictional, regulatory and enforcement questions would quickly arise between the States and Tribal Nations when offering gaming outside the individual State's borders. Such legislation could also resolve whether the Wire Act applies to internet gaming.

If the IGRA taught us anything, making tribal government internet gaming operations subject to state law and regulation, especially without the Nations' ready agreement, will cause ongoing conflict and litigation. Under IGRA, some states adopted a policy of overreaching and the view that Indian gaming should financially benefit them. They failed to recognize that they were working with another sovereign government and treated the Nations as commercial establishments rather than governments with program and infrastructure needs. This approach resulted in continued litigation, gaming not sanctioned by IGRA and some Nations unable to game because States were able to use the 11<sup>th</sup> Amendment as a shield against litigation. They failed to recognize Indian gaming as legitimate governmental gaming in the same manner as state lotteries are governmental gaming. I do not mean to suggest that this was the experience of all Tribal Nations. Certainly many describe very positive relationships with state governments. However, the conflicts have been often and severe enough that I urge Congress to look very closely at any legislation before subordinating tribal government interests to state interests.

IGRA also assumed that the States were in the best position to regulate gaming. This quickly proved to be a false assumption. Many states did not have regulatory infrastructures, knowledge and experience in gaming and were unwilling or unable to develop the day to day capabilities for regulating. They often did not understand the cultural and governmental

differences between States and Tribal Nations or the economic challenges facing the Nations. We cannot expect these issues to disappear under new internet legislation.

The draft bills raise other questions. For example, they do not prohibit cyber cafes. Cyber cafes could pop up all over serving as strong competitors to the established brick and mortar facilities. Cyber cafes could also allow a slot type gaming experience and allow pay offs on the premises. The result would be small casinos that technically meet the requirements of the internet gaming laws while directly competing with brick and mortar casinos.

Finally, the Nations will need to make a number of decisions before they launch internet gaming. Will it operate or regulate internet gaming? Or, if permitted, will it do both? What is the best way to assure that the Tribal Nations will profit from internet gaming? Who will it work with -other Tribes, established consortia, established gaming companies, or newcomers, such as Amazon or Facebook, that have tremendous lists of potential clients? Who should finance the endeavor and how should it be regulated? What are the best practices for regulation? What kinds of cross jurisdictional agreements are needed and can be reached to assure that the gaming, minors, and patrons are protected? Can a Tribe afford not to go on line? What kind of tie in should there be with the Nation's brick and mortar facility. These decisions are complex and numerous. Many of the Tribal Nations are only just starting to answer these questions.

While there is much more that could be said on this important issue, this concludes my remarks. I thank the Committee Members for the opportunity to provide my views. If you have any questions, I stand ready to answer them.



## Can the NIGC Oversee Internet Gaming?

by Penny Coleman

As the availability of Internet poker in the United States becomes more inevitable than just possible, many are looking to the National Indian Gaming Commission (NIGC) to oversee the tribal nations' participation in Internet gaming. So, is this a task that the NIGC can handle? Most definitely. It is the only federal agency that can. The NIGC has two areas of expertise that lend itself to regulation of tribal gaming. First, it knows Indian Nations. Second, it knows gaming. In addition, the NIGC is in a position to establish a regulatory structure much more quickly and efficiently than any other federal agency.

In the twenty years that the NIGC has operated, it fostered a working relationship with over 200 gaming tribes. To do so, it developed a constantly updated listing of government and regulatory leaders, a data base of gaming sites and the Indian lands they occupy, a working relationship with tribal leaders and employees, and a regulatory and training program designed to assist each Nation with its regulatory issues. To make that program effective, NIGC leadership and staff had to understand the cultural backgrounds and economic challenges of the Nations it oversees. Many brought that understanding with them to their positions; others had to learn through experience.

NIGC's experience in gaming regulation has no counterpart in the federal government. The NIGC is specifically tasked with regulatory oversight of poker. It has 20 years of experience in all facets of gaming regulation. Such experience includes regulating linked games across tribal jurisdictions. On the other hand, while the Department of Defense has some experience in regulating gaming, that experience is limited and not centralized. Further, while the Department of Commerce is included in draft legislation as a potential regulator, that department has no regulatory enforcement experience, no gaming experience, limited experience with tribes, and experience with the Internet as a policy advisor rather than a regulator.

At this point, the NIGC can assume responsibility for Internet regulation faster and with fewer glitches than any other federal agency. From the passage of the Indian Gaming Regulatory Act in 1988 to the issuance of the NIGC's regulations, there were four years where the federal government failed to provide any kind of gaming oversight. The first two years were spent waiting for the appointment of the first chairman. The remaining two years required time to appoint staff and issue regulations. After those first four years, the NIGC organized

internally, trained and added additional staff and regional offices, and expanded its own areas of expertise. It was many years before NIGC oversight was truly considered effective. Any federal agency taking on this task must take on the same development. Such a task takes time; a commodity that a new federal agency will not have.

The NIGC's freedom from a few of the usual bureaucratic impediments will help it progress quickly. The NIGC is exempt from some of the burdensome appointment and constraining compensation requirements. These exemptions allow the agency to hire within weeks rather than the months federal agencies normally take. And, by being exempt from restrictive pay requirements, it can be more competitive with the many companies that will be seeking employees with Internet gaming expertise. The NIGC, by virtue of its size and independence from certain rulemaking requirements, can also promulgate regulations much more quickly than other agencies.

Further, the NIGC already has a system in place to conduct background checks of major gaming companies and employees and to assist tribes to do so. The NIGC serves as the conduit between the FBI and the Nations seeking criminal history information. To do so, it moved from a manual finger printing system that took months to provide results to a nationwide electronic system that provides criminal history information to the Nations within minutes. It also established a section within the NIGC that carries out extensive background investigations with the assistance of the Office of Personnel Management.

Finally, the NIGC's requirement that two of the three commissioners are tribal members and its recent adoption of an Indian preference employment policy help assure that the NIGC is staffed with many who will not have to learn about Indian Nations to do their jobs. Employing people from the communities that are served is critical to the credibility of the agency and its ability to foster relationships built on trust. What's more, it confirms the federal government's commitment to the policy of promoting tribal economic development, self-sufficiency, and strong tribal governments.

Taken together, NIGC's experience, expertise and infrastructure make it the only agency for the job. ♣

*Penny Coleman, Principal of Coleman Indian Law and Counsel to Anderson Indian Law, provides legal services to tribes. She can be reached by calling (240) 330-3697 or email [colemanindianlaw@gmail.com](mailto:colemanindianlaw@gmail.com).*