



THE SENECA NATION OF INDIANS

P.O. Box 231
Salamanca, New York 14779
Phone (716) 945-1790
Fax (716) 945-1565

1490 Rt. 438
Irving, New York 14081
Phone (716) 532-4900
Fax (716) 532-6272

TESTIMONY OF ROBERT ODAWI PORTER PRESIDENT OF THE SENECA NATION OF INDIANS

before the

COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE

OVERSIGHT HEARING ON INTERNET INFRASTRUCTURE IN NATIVE COMMUNITIES: EQUAL ACCESS TO E-COMMERCE, JOBS AND THE GLOBAL MARKETPLACE

October 6, 2011

INTRODUCTION

Nya-weh Ske-no. Mr. Chairman and members of the Committee, I am thankful that you are well and I am pleased to appear today to discuss briefly the written testimony I am submitting for the record on behalf of the Seneca Nation of Indians.

The Seneca Nation of Indians (“Nation”) is one of America’s earliest allies, historically aligned with the other members of the historic Haudenosaunee (Six Nations Iroquois) Confederacy and living in peace with the American people since the signing of the Canandaigua Treaty nearly 217 years ago on November 11, 1794, 7 Stat. 44. Our Nation has entered into numerous treaties and agreements with the United States since that time and we have always sought to live up to our side of this relationship, despite repeated instances in which the United States has not done so.

The most important promise made to us by the United States under the Canandaigua Treaty is that the Seneca Nation would be recognized as a sovereign nation and that the title of our lands would remain secure. Specifically, the United States made a commitment to us that it made no

other Indian nation – that we would retain the “free use and enjoyment” of our lands. This promise has served as the basis for a level of freedom possessed by the Seneca people that we believe is unmatched by other indigenous peoples in the United States.

Because of this treaty-protected freedom, our Nation has been able to achieve success in recovering from nearly 200 years of economic deprivation inflicted upon us by the United States due to devastating losses of our lands and resources. Both our Nation government and individual Senecas have benefited from the opportunity to expanding into economic trade with non-Indians during the last 40 years, focusing primarily on the gaming and tobacco businesses. We have fought hard for our recent economic success – just as we have fought hard to protect our lands – but the fact remains that we are under constant assault from hostile forces such as the State of New York and private sector predators who seek to deprive us of economic prosperity and return us to the poverty of a prior era.

SENECA NATION'S TERRITORIES ARE IMMUNE FROM STATE TAXATION AND FEDERAL REGULATION

The Seneca Nation, our people and our lands, have been immune from state taxation and federal regulation since the day the United States of America was formed. Solemn agreement after agreement has reiterated this state tax immunity and our Nation's inherent, sovereign right to regulate all conduct within our Territories free of interference by the United States. As I have mentioned, the most notable of these agreements is the Treaty of Canandaigua of 1794.

This federal treaty obligation --

- To protect the immunity of the Seneca Nation and its Territories from the reach of taxation by the State of New York; and
- To protect our inherent, sovereign right to free trade; and
- To preserve our recognized right to regulate economic conduct within our Territories to the exclusion of the State of New York and the United States;

-- should be the focus of any inquiry of this Committee into how e-commerce and e-trade from within Indian Country should be handled. And make no mistake about it, the Seneca Nation is fully capable of this. We have years of experience governing our own economy and trade with others. What follows is but one example of this.

THE SENECA NATION OF INDIANS ENFORCES ITS OWN COMPREHENSIVE LAWS
WITHIN ITS OWN TERRITORY

The Seneca Nation regulates and enforces all economic activity within our Territories. For example, our Council enacted a comprehensive Import-Export Law in 2006 to regulate sales of tobacco and other products from its Territories. The Nation's Import-Export Commission regulates all aspects of tobacco and other product sales. Among its other functions, the Commission --

- Requires that only Nation-licensed stamping agents may import tobacco products into Nation Territories;
- Prevents the sale of tobacco products without the affixation of a Nation import stamp and payment of the required import fee;
- Defines unstamped cigarettes as contraband;
- Requires accurate accounting of all stamps issued to Nation authorized stamping agents;
- Prohibits cigarette sales in excess of 9,800 cigarettes (lower than the Federal threshold);
- Imposes severe penalties, including loss of business license, for trafficking in contraband cigarettes; and
- Prevents the sale of tobacco products to minors under age 18.

As a result of the enactment and enforcement of its own tribal law, the Nation has gained regulatory control of tobacco and other sales activities on its Territories. The Nation's aggressive implementation of its Import-Export law has greatly enhanced its capacity to cooperate with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) and the federal Alcohol, Tobacco Tax, and Trade Bureau (ATTTB) in enforcing the law on the Nation's Territories. Please be assured that as a government with law enforcement responsibilities for our Territories, the Seneca Nation of Indians is committed to cooperation with federal authorities in the implementation of federal and tribal law. The Nation is a leading player on the national stage with respect to eliminating illegal tobacco trafficking activity, and has likely done more to curtail contraband trafficking than any State agency, including that of New York State.

I raise this example to remind everyone that Indian tribes, like the Seneca Nation, are governments. We govern the people and activity within our own Territories. This is reflected in the U.S. Constitution that governs how the United States government is supposed to deal with us -- nation to nation. How America has actually dealt with Indian nations, however, is twisted into unconstitutional shapes.

SENECA NATION HISTORY IS REplete WITH IRONY

If you look at American history from the perspective of a Seneca Nation citizen – or of any American Indian for that matter – it is filled with irony.

American economic development has chronically and habitually by-passed Indian Country or has extracted value and then abandoned Indian Country like a mere colony. Our history is one of nearly complete loss of what we once had. We have lost our lands and nearly everything associated with them. We have lost our natural resources, such as the beaver belt and the buffalo herds. We have lost our stores of gold, uranium, oil, gas, salt, and gravel. We have had the use of our remaining lands taken for railroads, highways, and reservoirs for hydroelectric dams. Just 45 years ago, the United States again broke the Canandaigua Treaty and took 10,000 acres of our Allegany Territory for the Kinzua Reservoir so that a license could be granted to a private mega-corporation to make millions of dollars from the sacrifice of our lands and the burning of our homes. When not actually confiscated, we have had coercive agreements pushed down our throats for only pennies on the dollar of the actual value taken by outsiders.

In his *Wealth of Nations*, Adam Smith, the moral philosopher whose economic theory underpins modern-day American capitalism, said:

"Civil government, so far as it is instituted for the security of property, is in reality instituted for the defense . . . of those who have some property against those who have none at all."

When it comes to Indian property holders, there is no question that the U.S. government has abandoned Adam Smith's rule, completely subverting the natural order of property ownership. All too often the United States has appropriated, or has allowed states and others to steal, like common thieves, valuable property held by Native peoples. This, whether anyone likes it or not, is the common strain of American history towards the aboriginal occupants of this land. For Americans who care about justice, this history should be a source of shame and embarrassment.

DISCOVERY HAS LED TO CONFISCATION

The storyline of American Indian history has been the same, time after time. When non-Indians "discover" that the Indians possess something of value to the non-Indians ... then the non-Indians grab it for themselves. No money can adequately compensate Indian Country for these takings, and precious little money has ever been offered.

Recently, Indian gaming slipped through the cracks of this history and for the last 30 years a thousand flowers bloomed for Indian Nations with territories near large population centers in states where the law frowned upon gambling. Because gambling was disfavored by state law but craved by state citizens, neighboring Indian gaming markets thrived. The recognition by the U.S. Supreme Court of tribal sovereignty in the pivotal Cabazon case, although constrained soon

thereafter by the Indian Gaming Regulatory Act, resulted in a temporary but tangible advantage for some tribal economies.

But now big casino industry and cash-starved states are embracing casino gaming in nearly every state market. This is eroding tribal exclusivity and thus, tribal gaming market share. Once again, Indians have been discovered to possess something the non-Indian economic interests want for themselves. As inevitable as the sun's rising in the East, discovery of tribal government gaming is leading to its confiscation. This erosion makes it an absolute imperative that those of us who lead our Native Nations must develop diversified tribal economies that can survive as our corner on the casino gaming market shrinks and shrinks.

CAN INDIAN DIVERSIFICATION OUTPACE THE TIDAL WAVES OF NON-INDIAN CONFISCATION?

Until last year, Seneca Nation had a robust and diversified trading economy based in large part on the sale of tobacco and fuel products to non-Indians. Unlike many other places in Indian Country, Seneca Nation Territories had a decades-old, private sector economy comprised of competitively-driven Seneca entrepreneurs. Our Seneca entrepreneurs traded products for years in bricks and mortar, over the counter transactions and, when the World Wide Web offered additional avenues for trade and commerce, they expanded their market reach into the internet tobacco trade.

Like with gaming, our Indian internet trade in tobacco slipped through the cracks of history and for a time a thousand flowers bloomed. Because tobacco use was disfavored by state law but craved by state citizens, the Indian internet tobacco trade thrived. But when jealous Big Tobacco industry interests combined with the avaricious appetites of state taxing authorities, their envy colluded to persuade the U.S. Congress that they alone, not Indian Nations, and their terms, not ours, should govern trade in tobacco products.

Last year, the U.S. Senate and the U.S. House chose to over-ride strenuous objections from the Seneca Nation and enact the Prevent All Cigarette Trafficking Act of 2010, the so-called PACT Act. That Act single-handedly destroyed our internet tobacco trade. It levied prohibitively costly fines and penalties on anyone connected with the common carriers and the U.S. Postal Service from moving our trade in tobacco products. It brought Seneca Nation's booming e-commerce trade to a grinding halt and threw hundreds of families out of work.

THE AMERICAN FRONTIER OR INDIAN COUNTRY?

This Committee, with this hearing, as well as many other observers of the American economic future, appears to believe that e-commerce is the new American economic "frontier". That internet commerce and trade is the future. If it is, what warning signals can we learn for Indian Country and our allies on this Committee and in Congress and the Administration? What lessons

can we draw from the history of how the United States, and the various states, and American economic interests, have shaped the American frontier, from timber and gold and water to gaming 25 years ago and to the Indian tobacco trade last year?

One lesson is unavoidable. Isn't it time the property rights of Indian Nations are respected and protected? If not now, when? Isn't it time non-Indians respect the inherent and treaty-recognized rights of Indian Nations to control what happens on and from our own land? That's exactly what the Treaty of Canandaigua promised the Seneca Nation and the Seneca people.

I and many tribal leaders have no patience for the pitiful lip-service being paid in these hallways to a false concern for Indian jobs and the diversification of Native economies.

If that concern is real, then honor Indian treaties. Respect tribal sovereignty. Let Indian nations trade as sovereigns. Stop undermining Indian casino gaming. Stop obliterating the Indian tobacco trade. And for goodness sake, don't put Indian nations at the back of the internet gaming bus before it leaves the station.

INTERNET GAMING - A 21ST CENTURY GOLD RUSH

In recent years the Big Gaming interests, not unlike Big Tobacco, have allied themselves with state regulatory interests in Nevada and New Jersey and pushed for federal internet gaming legislation that would bestow upon them a monopolistic control of internet gambling operations. That brazen power grab is premised on the fiction that the big Nevada and New Jersey interests are alone sophisticated enough to operate internet gaming in the first wave.

Like land homesteaders and gold stake claimers before them, these Nevada and New Jersey moguls see Indian gaming as a competitive threat and are determined to shove Indian gaming away from the table or, at best, deal Indian gaming a short hand.

The truth is this: the Seneca Nation and dozens of other tribal gaming operations are as or more sophisticated in terms of management, security, oversight and regulation than the biggest and best operators in Atlantic City and Las Vegas. In addition, until this Congress and this Administration recently shut it down with enactment of the PACT Act, the Seneca Nation regulated one of the most robust internet commerce operations in America -- the tobacco trade. It is an affront to our dignity for the Congress to give any credence to the insulting notion that the Seneca Nation is somehow "not ready" or inexperienced or otherwise ill-equipped to conduct internet gaming from Nation Territory, according to Nation laws and regulations, anywhere the internet markets take our game and our trade.

Our treaty rights to conduct commerce -- from our land, on our own terms, and without restraint by any outside power -- must be respected and honored. That must apply to both over-the-counter trade and internet commerce.

This Congress and this Administration bowed to Big Tobacco and Big State interests last year with the PACT Act and devastated the Seneca economy. I urge this Committee, to find its true identity -- as a strong ally of tribal sovereignty and as a stalwart defender of Indian treaties -- and fight to the death to ensure that no internet gaming legislation is enacted unless it guarantees to Indian Nations the right to set all terms and reap all benefits of all e-commerce that originates on Indian Country.

Internet gaming developments are the most recent, modern-day threat to tribal sovereignty. I must ask this Committee -- will Congress roll over once again and, PACT-like, squash tribal sovereignty and tribal ingenuity by acquiescing to the powerful internet gaming interests in Nevada and New Jersey and the cash-envious state and federal treasuries?

I don't think you will. Your hearing today heartens me, and I think, many others. I encourage you to take the record you have heard today and work to ensure that tribal sovereignty applies to all e-commerce emanating from Indian Country to all customers without regard to where the customers are located.

The technology of 21st century trade and e-commerce challenges old notions of territory and borders and boundaries. The locus of where a "sale" is made, and controlled, must be returned to the place where the trader is located. In the case of tribal sovereignty, that would return sovereign control of all e-commerce originating on Indian land to the Indian Nation.

CONCLUSION

The Seneca Nation asks that this Committee ensure that the U.S. Congress, in conformity with its responsibility under the U.S. Constitution, honor our treaties and protect our inherent, sovereign right to regulate all commerce and conduct on what remains of our Indian Country. Thank you for this opportunity to provide testimony and we ask that it be made part of the record of this hearing.

Nya-weh.