TESTIMONY OF
GLENN M. FELDMAN

BEFORE THE COMMITTEE
ON INDIAN AFFAIRS,
UNITED STATES SENATE

OVERSIGHT HEARING ON THE
U.S. DEPARTMENT OF JUSTICE OPINION
ON INTERNET GAMING:

WHAT'S AT STAKE FOR TRIBES

FEBRUARY 9, 2012

Glenn M. Feldman
Mariscal, Weeks, McIntyre
& Friedlander, P.A.
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012
602-285-5138
glenn.feldman@mwmf.com

Mr. Chairman and members of the Committee:

I appreciate the opportunity to testify here today on this important issue. By way of background, I am a lawyer in private practice in Phoenix, Arizona. For more than 30 years, my practice has been devoted exclusively to federal Indian law, representing tribes and tribal entities around the country. Among other things, I have served as outside General Counsel to the Cabazon Band of Mission Indians since 1979, and it was my great good fortune to argue – and win – California v. Cabazon Band (the so-called "Cabazon case") before the U.S. Supreme Court in 1987. Since that time, I have been actively involved in negotiating tribal-state gaming compacts for tribes in a number of states as well as litigating a variety of other Indian gaming issues. A more complete biography is attached to this testimony.

Let me begin by saying that I am not here as any sort of self-appointed spokesman for Indian Country. Given the complexity of the internet gaming issue and the wide divergence of opinion among tribes on the subject (including among my own tribal clients), I'm not sure that anyone can – or should – try to perform that role.

Nor am I here as an advocate for or against federal legislation in the area of internet gaming. Rather, what I hope to do is provide the Committee with some thoughts on how it, and Congress as a whole, might want to proceed as it considers this difficult issue.

Let me say at the outset that I believe that lawful internet gaming in the United States is inevitable. I don't see how anyone can look at the technological advances of recent years and not understand that the internet is going to become an important component of the gaming industry in the future. The only real questions are how and when. And so, the advice that I give all my tribal clients is the same: just saying "no" is not an effective strategy for dealing with inevitable change. In my view, tribes need to be at the table; need to be active participants in the development of the legislation and the systems; and need to be flexible and smart

in their thinking in order to be sure that they share in the benefits and avoid the problems that internet gaming will bring.

Part of my message today, however, is that there is no need to rush to enact federal internet gaming legislation. I do not share the views of those who suggest that the recent Justice Department opinion is immediately going to open the floodgates of unlicensed and unregulated internet gaming in the United States. While such gaming may not be prohibited by the federal Wire Act under the Justice Department's recent opinion, interstate internet gaming is still subject to the proscriptions of UIGEA and may well run afoul of the Unlawful Gambling Business Act, RICO and other civil and criminal forfeiture statutes. As a result, I think Congress would be making a serious mistake if it rushed into enacting federal legislation without the careful, deliberative process the subject deserves.

In this connection, I think there are some useful parallels to be drawn between where Congress finds itself today with respect to internet gaming and where Congress was in the late 1980's, when it was considering Indian gaming legislation after the Cabazon decision.

Both situations presented a complex and controversial mix of federal, tribal, state and commercial interests and both tribal gaming then, and internet gaming now, are likely to have important economic, political and societal consequences. But despite these facts, Congress did not rush to enact Indian gaming legislation in the 80's. Twenty months elapsed between the time of the Cabazon decision, in February, 1987 and the enactment of the Indian Gaming Regulatory Act in October, 1988. But what must be kept in mind is that Congress had been actively considering Indian gaming legislation as early as 1984, a full three years before Cabazon. So by the time IGRA was signed into law by President Reagan in 1988, Congress had devoted more than four full years to that legislative process.

Now, I'm not suggesting that Congress necessarily needs to devote that much time to the internet gaming issue and I'm not proposing that Congress "study the issue to death." Nor do I want to minimize the difficulty or complexity of the

negotiations that resulted in the final version of the Indian Gaming Regulatory Act. As Professor Skibine recalls, all of us left blood, sweat and tears on the floors of those meeting rooms. But in the end, that long, deliberative process worked and produced a legislative framework that, despite its flaws, has proven to be a pretty good compromise that is now pumping more than $25 billion annually into Indian Country.

The situation involving internet gaming today presents a very similar challenge. It involves many moving parts and potentially competing interests. But precisely for those reasons, the issue deserves thoughtful attention and not a rush to judgment. Authorizing the use of this technology in gaming to maximize its benefits and minimize its potential problems requires no less.

While I'm talking about parallels, let me mention one more. In IGRA, and particularly in the definition of "class II gaming," Congress in 1988 declared that tribes were entitled to incorporate future technologic advancements (or what the statute calls "electronic, computer or other technologic aids") into their gaming activities. As this Committee's Report on S.555 plainly stated,

> [t]he Committee specifically rejects any inference that tribes should restrict class II games to ... current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to proved maximum flexibility.

Senate Committee Report, page 9.

I think the parallel here is obvious. If Congress is going to continue to keep that promise it made to tribes about allowing them to incorporate technologic advances into their gaming activities, then that same commitment needs to apply to internet gaming now.

This leads me to the final premise of my testimony. Indian tribal governments need to be full and active participants in all processes by which

federal internet gaming legislation is developed, and tribes are entitled to have the full right to develop, use and benefit from internet gaming to the extent they wish to do so. Legislation that limits or restricts the ability of tribal governments to reap the benefits of internet gaming is simply unacceptable.

Admittedly, not all tribes will choose to make this leap across the digital divide. And for those that do, there will be any number of potential models as to how that involvement might be structured. The IGRA format – involving tribal ownership, operation and regulation of the gaming operation – has proven its worth over the last 25 years and could be one option for some tribes.

But that is certainly not the only model. In California, for example, a group of 29 gaming and non-gaming tribes has joined forces with an equal number of commercial cardrooms to form the California Online Poker Association. That group is promoting state legislation under which California would create, license, regulate and derive state revenues from an intrastate internet poker system. Again, this may not be the right answer for every tribe, but for those that choose that path, they ought to have that right.

Internet gaming today, like Indian gaming 25 years ago, is complicated and controversial. But it's coming, and so tribal governments need to be smart and flexible in their thinking on the issue, and Congress needs to recognize that tribes must have a seat – in fact, given the wide diversity of opinions on the subject in Indian Country, they are probably entitled to several seats – at the tables where these decisions are going to be made.

That concludes my testimony and I would be happy to respond to any questions the Committee members may have.

U:\ATTORNEYS\GMF\Senate Testimony.doc

MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.

2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012
(602) 285-5138

Biographical Sketch

Glenn M. Feldman

Glenn Feldman is a shareholder in the law firm of Mariscal, Weeks, McIntyre & Friedlander of Phoenix, Arizona. Glenn is a 1973 graduate of Georgetown University Law Center. He is admitted to practice law in Arizona, the District of Columbia and before the U.S. Supreme Court, as well as several U.S. Circuit Courts of Appeals and tribal courts.

Glenn's practice is devoted exclusively to Federal Indian Law, with heavy emphasis on Indian gaming and reservation economic development activities. He is counsel to a number of Indian tribes, tribal casinos and tribal business ventures in Arizona, California and other western states.

In 1986, Glenn successfully argued the tribal gaming case, California v. Cabazon Band of Mission Indians, before the United States Supreme Court. Since that time, he has also been involved in a variety of other important Indian law cases, including Cabazon Band v. Wilson, 37 F.3d 430 (9th Cir. 1994), United States v. Santa Ynez, 983 F. Supp. 1317 (C.D. Cal. 1997) and Cabazon v. Smith, 388 F.3d 691 (9th Cir. 2004). Glenn has extensive experience in drafting tribal codes and ordinances and has been involved in the negotiation of tribal-state gaming compacts in California, Arizona, Wisconsin, Kansas and Oklahoma. Since 2002, he has been involved in casino financing transactions totaling more than $1.3 billion, as well as providing legal counsel to a variety of other tribal businesses, including three tribal telephone companies.

Glenn is Past Chair of the Indian Law Section of the Arizona State Bar, and has been selected for inclusion in the Best Lawyers in America in both the "Native American Law" and "Gaming Law" categories and in Chambers USA, a listing of "America's Leading Lawyers for Business" in the "Native American Law" category.