



# ***THE SENECA NATION OF INDIANS***

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

before the

### **COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE**

#### **OVERSIGHT HEARING ON THE U.S. JUSTICE DEPARTMENT'S OPINION ON THE WIRE ACT AND INTERNET GAMING: WHAT'S AT STAKE FOR TRIBES?**

February 9, 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 the testimony I am submitting for the record on behalf of the Seneca Nation of Indians.

My purpose in testifying is this -- I believe it is in the interest of each member of this Committee, as well as the other senators representing Indian Country, like our Senator Schumer and Senator Gillibrand, to join with the Seneca Nation and with other Indian tribes in protecting the existing jobs at tribal brick-and-mortar gaming facilities and in preserving the right of Indian nations to meaningfully and substantially participate, from the outset, in any new internet gaming authorized under federal or state law.

Cultivating job creation within Indian country and ensuring meaningful, substantial, early and fair participation by Indian nations in internet gaming, be it poker, lottery, or other games, is in the mutual self-interest of Indian nations, of our neighbors and of the states whose lands adjoins ours. It is also sound federal Indian policy.

The Seneca Nation, like dozens of other Indian tribes, is one of the largest employers and economic enterprises in our region. The ancillary impact of tribal gaming operations on regional economies surrounding Indian tribes is in the millions if not billions of dollars each year. Tens of thousands of American workers -- our neighbors -- depend on the health and vitality of tribal gaming operations for their jobs, either directly with Indian nations as their employers or as vendors or nearby enterprises who rely on our gaming casino activity for their upstream or downstream business activity.

We ask that you join with Indian tribes to protect against any move by powerful gaming interests who will try to force Nevada-only or New Jersey-only control over internet gaming. This is not idle speculation. Last year, some senators released draft legislation which would have shut out Indian tribes from any competitive involvement in internet gaming, as if we are inferior and irrelevant gaming operations who are incapable of meeting or exceeding Nevada or New Jersey regulatory standards. The approach embodied in the draft bill was certainly short-sighted, as it would have threatened existing jobs.

The governors of New York, and Arizona, California, Florida, Connecticut, Michigan, Minnesota, Oklahoma, Oregon, Washington, Wisconsin, all know full well how robust and capable and sophisticated Indian gaming is today. This Committee certainly knows it. And I am confident this Committee will not tolerate anyone in the United States Senate giving serious consideration to a power grab by Nevada and New Jersey gaming interests that would result in job losses in Indian country and would shove aside our large and successful tribal gaming operations from the internet gaming table. Far too much is at stake, in terms of the interests of tribal nations, our employees, our business partners and our neighbors. And while history does sometimes repeat itself, we know one of the missions of this Committee and of you, Mr. Chairman, is to avoid repeating the errors of previously misguided federal Indian policy. More on that later. But first, I wish to describe my Nation, where we've been and where we are going.

#### BACKGROUND ON THE SENECA NATION OF INDIANS

Our Nation was 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. In that Treaty, the United States promised that it would recognize the Seneca Nation as a sovereign nation and that the title of our lands would remain forever secure and 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 recent years as we continue to strive towards 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 Seneca Nation government and individual Seneca citizens have benefited from the

opportunity to expanding into economic trade with non-Indians during the last 40 years, focusing primarily on the tobacco and gaming 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. This internet gaming and lottery issue is merely the latest in a long line of battlefronts. Like most threats, it also offers great opportunities.

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

The Seneca Nation has a rich history of actively regulating and enforcing 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 sales and distribution on our Territories. As a result of the enactment and enforcement of our 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 enforce the law on our Territories.

We also have comprehensive ordinances governing class II and class III gaming activities at our bingo halls and casinos on our Territories. Under these tribal laws, the Nation's gaming regulatory body, the Seneca Gaming Authority, oversees and ensures the integrity of our highly successful gaming enterprises. And the Seneca Gaming Authority works closely with its federal counterpart, the National Indian Gaming Commission, in the regulation of our class II gaming and with both the National Indian Gaming Commission and the New York State Racing and Wagering Board in the regulation of our class III casino gaming activity.

I raise these examples 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 many cruel ironies.

American economic development has chronically and habitually by-passed Indian Country or has extracted value and then abandoned Indian Country like a mere colony.

Native American history is one of nearly complete loss of what we once had. We have lost most of our lands and nearly everything of value and significance associated with them. We have lost most of our natural resources, such as the beaver belt and the buffalo herds. We have lost most of our stockpiles of gold, uranium, oil, gas, salt, and gravel. We have had the use of most of our remaining lands taken for railroads, highways, non-Indian homes and reservoirs for hydroelectric dams. In the late 19<sup>th</sup> Century, the United States forced upon the Seneca Nation long-term leases for nominal payment to accommodate the establishment of the City of Salamanca on the Allegany Territory and to legitimize the leases obtained by railroad corporations through unsavory means. And just 45 years ago, the United States again broke the Canandaigua Treaty and took 10,000 acres of our Allegany Territory for the Kinzua Dam and Allegheny 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.

Even when Indian nations were paid for our property, it was often at confiscatory prices under coercive agreements pushed down our throats for only pennies on the dollar of the actual value taken by outsiders.

Whenever I read the founders of American capitalism, and the great treatises defending the fundamental sanctity of property rights in American law, I cannot help but recall how Indian property is the glaring exception to the rule of property law. Any unvarnished view of American history will reveal that, when it comes to the property of indigenous people, federal and state law has subverted 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 Americans. This, whether anyone likes it or not, is the common strain of American history towards the aboriginal occupants of this land. And, just a few years ago, the federal courts legitimized theft of Indian property by adopting the theory that if the stealing happened long enough ago, it's okay. We ask that you not tolerate any further repetition of this history.

#### 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, and threatening the jobs that Indian gaming has created directly for our employees and indirectly for vendors and our neighbors whose businesses our employees and customers frequent. 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. Once again, Indian nations possess something our neighbors covet.

In New York, as in some other states, the governor has decided to try to grab gaming exclusivity away from the Indian tribes, tearing up the agreement his predecessors struck with us. Governor Cuomo can expect a fight this time. And we have lots of allies this time who are not simply going to let Albany pull the rug out from under us and them.

The Seneca Nation is one of the largest employers within the borders of western New York State. If the governor kills our gaming enterprises by breaking the exclusivity agreement we negotiated with the State of New York, thousands of people will be put out of work and the economy of our entire region will be disrupted.

With the request it made to the U.S. Department of Justice last year, it appears that the New York Lottery is seeking to offer an electronic lottery gambling to customers over the internet within New York. If -- instead of working with the Seneca Nation and other existing tribal casinos within the borders of New York -- the New York Lottery seeks to directly compete with our brick-and-mortar casinos by putting the equivalent of slot machines in every living room in New York -- we will make every effort to see that its effort is a commercial failure.

There is much that we can do together -- New York State and the Indian nations with whom New York shares borders --- that will be in our mutual self-interest and help us together, as neighbors, withstand the competitive influences of New Jersey and other surrounding states. But if New York will not join with us, we are all the weaker. The tobacco trade is a fresh example of how not to respond; of how short-sighted New York interests combined with (Big Tobacco) interests outside New York to short-change the interests of New York taxpayers.

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

Until last year, the 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 and they created many, many jobs for Indians and non-Indians alike.

Like with gaming, our Indian internet trade in tobacco slipped through the cracks of history and for a time it blossomed, and the entire Western New York region was the beneficiary of the successes of our Seneca entrepreneurs. 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.

Two years ago, the U.S. Senate and the U.S. House of Representatives 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. The PACT 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 tobacco trade to a grinding halt and threw hundreds of families out of work.

#### IS INTERNET GAMING THE NEW AMERICAN FRONTIER?

Some Senators, as well as many other observers of the American economic future, appear to believe that internet gaming is the new American economic "frontier". 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 two years ago?

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 empty lip-service being paid in these hallways to a pseudo concern for Indian country 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 with internet gaming proposals, or internet gaming proposals that preclude Indian nations from participating on fair terms.

## INTERNET GAMING - A 21<sup>ST</sup> 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. Make no mistake about it. Internet gaming in the sole hands of these Big Gaming moguls absolutely threatens the jobs that Indian country has created at its brick-and-mortar gaming facilities through years of innovation and investment in Indian country. And it further threatens to undermine the regional economies that Indian gaming has created.

Moreover, 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 like internet gaming. And our job creation and economic diversification in our regions should be both respected and cultivated, not attacked.

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. It is exposing the mutual interests that best define what Indian tribes and state governments can do together. Our common interests are to protect local jobs and local commerce that creates more local jobs. Internet gaming, if not tied to local facilities and local operations that trade in ancillary local entertainment and local commerce, does not create local jobs and local economic activity within a state. Internet gaming, if it is not controlled locally and connected to local commerce, will bleed our region dry. Internet gaming, and the new technologies that make it possible, actually is the occasion for combining the local interests of states like New York and nations like Seneca and the interests we hold in common as neighbors. The interests of the Seneca Nation and our neighbors in New York are aligned and congruent when it comes to internet gaming and lottery operations. We are sending this message here today because we are convinced that our New York senators will sooner or later recognize, like Speaker Tip O'Neill is said to have said years ago, that all politics is local.

### CONCLUSION

The Seneca Nation asks that this Committee to avoid taking action that does anything other than cultivating the job creation and economic diversification that Indian gaming has created in our respective regions. We have serious concerns that internet gaming will undermine our efforts to-date to lift ourselves up from centuries of economic depression and will threaten many of the existing jobs that our Indian gaming enterprises have created.

Should this Committee believe that internet gaming is nevertheless the right answer for Indian country and the American people, 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 engage in internet gaming activity on terms that reflect the economic interests of ourselves and that of our neighbors in New York.

We believe it is in the interest of Senators to join with the Seneca Nation and with other Indian tribes in protecting the right of Indian nations to meaningfully and substantially participate, from the outset, in any new internet gaming authorized under federal or state law.

Specifically, and urgently, we ask that you join with Indian tribes to protect against any move by powerful gaming interests who are trying to force Nevada-only or New Jersey-only control over internet gaming.

Thank you for this opportunity to provide testimony and we ask that it be made part of the record of this hearing.

Nya-weh.