

1           COMMISSIONER LOESCHER:   Madam Chair?           You speak  
2 a lot about the Native American gaming in your paper. And in our  
3 subcommittee, working really hard with our honorable chairman  
4 from Mississippi, we are mandated by the Chair to address this  
5 issue of the impasse between states and tribal governments in the  
6 good faith negotiation thing.

7           And I have advocated in the committee that the states  
8 and the tribes are talking, as we speak, have been for several  
9 months working towards a resolution of that and that that process  
10 should be encouraged. And I believe that the states and the  
11 tribes can resolve these issues between and among them.

12           Then comes the second part of the question, that this  
13 Commission took a position on forestalling Secretary Babbitt's  
14 promulgation of those regulations regarding good faith  
15 negotiations. And those matters are still pending by the  
16 Secretary.

17           Our group in our committee has been talking about I  
18 advocate for the good faith discussions in the continuing of this  
19 process between states and tribes. But then they ask me the hard  
20 rhetorical question: Bob, what happens if the impasse continues?  
21 How do you resolve it?

22           So we're sort of pondering this question. We've come  
23 to the end, saying that: Well, maybe it ought to come back to  
24 the Secretary's hands again between the states and the tribes.  
25 But this time it would have the Secretary making his final  
26 decision based upon a certain number of issues, criteria, and  
27 parameters that the Secretary should make a finding one way or

1 the other, either in favor of the states or the tribes, but have  
2 a certain set of parameters that would have to be met before he  
3 could make a final decision.

4 That seems to be one pathway maybe, but how do you feel  
5 or how do the governors feel thinking about this set of  
6 circumstances?

7 MR. SCHEPPACH: Well, it's a tough one because what  
8 would happen here is that governors would give up authority. And  
9 I'd have to say any Secretary of Interior is suspect to the  
10 conflict of interest. So they really don't believe they're going  
11 to get a fair deal there.

12 The other issue in negotiation is that you always want  
13 to get something when you give something. Most of the  
14 discussions are giving up gubernatorial authority.

15 And although I think we're willing to entertain some  
16 movement there, we would like to get some things in exchange,  
17 more concurrence on trust lands, enforcement, allowing a state to  
18 go into court to enforce illegal gaming that's happening in  
19 tribes, particularly in California and Florida.

20 So our feeling is that we need to put some of the other  
21 things on the table if we're going to give up our Eleventh  
22 Amendment rights.

23 COMMISSIONER LOESCHER: Madam Chair, just one more  
24 thing. When you say you'll leave the illegal gaming, you mean  
25 uncompact gaming?

26 MR. SCHEPPACH: Yes.

1           COMMISSIONER LOESCHER: Okay. The other thing is the  
2 business of -- two points. One is the impasse between the tribes  
3 and the states has its roots in the U.S. Constitution. And the  
4 legal scholars tell me that the tribal existence occurred before  
5 the states' rights occurred in this section of the Constitution.

6           And so that's why tribes in this question of the  
7 difference between what the states' rights are and what the  
8 tribal rights are are rooted in the Constitution.

9           The best way is to find some kind of way to find an  
10 answer between the two that resolves it in a reasonable way. Is  
11 that your understanding as well?

12          MR. SCHEPPACH: Well, we have always looked at it that  
13 both are sovereign nations and they are equal.

14          COMMISSIONER LOESCHER: Okay.

15          MR. SCHEPPACH: I think a lot of the problems revolve  
16 around the scope of gaming. And if the scope of gaming were  
17 clearly defined, -- and we think the Rumsey decision does that --  
18 then the compacting process would be a lot smoother.

19          I think personally a lot of times there are problems  
20 because the tribes want to negotiate outside what's legally  
21 available for other citizens in the state. And that's where the  
22 problem comes down.

23          COMMISSIONER LOESCHER: Madam Chair, just one more, and  
24 I'll be satisfied.

25          The business, you know, some people suggest that  
26 there's a problem, that the states don't have a right to tax  
27 Indian gaming enterprises. And there is a concept that one

1 government shouldn't tax another government. But there are  
2 arrangements that are made between and among the tribes and the  
3 states and which are outside of the notion of tax, one government  
4 to another.

5 And I like to use the term "exclusivity payments" that  
6 the tribes are not allowing themselves to be taxes, but outside  
7 of the compact terms, there are agreements made as a basis for  
8 other consideration where payments are made from the tribes to  
9 the states.

10 Example, in Connecticut, that's done. I think there  
11 are other examples as well. And that seems to be a fair  
12 arrangement when those agreements are reached voluntarily with a  
13 mutual agreement between the states and tribes.

14 Do you have a view on that?

15 MR. SCHEPPACH: I think you're right. Our sense is  
16 that all of these issues ought to become part of the compacting  
17 process. We are having increasing problems with respect to  
18 environmental issues, zoning issues, transportation issues, as  
19 well as tax issues. I mean, the tax issues around tobacco and  
20 gasoline are bubbling up as well.

21 So there are a lot of tough issues, I would say,  
22 between tribal governments and states now, but our feeling is  
23 that it ought to be done on a case-by-case basis. They ought to  
24 sit down and try to negotiate it.

25 We may differ a little bit on the number of compacts  
26 that are in place somewhere between 171 and 189, I guess. But  
27 let's say there's been a lot of successful compacts during the

1 particular process. And I think because we are having some  
2 problems doesn't mean that the process has not worked.

3 Now, I haven't looked over what has happened over the  
4 last year, but I'm told that compacts are still being done. So I  
5 think there has been a fair amount of success.

6 COMMISSIONER LOESCHER: Thank you, Madam Chair.

7 CHAIRPERSON JAMES: Thank you.

8 COMMISSIONER LEONE: I just want to make sure I  
9 understand that the position of the governors is that there is no  
10 need for additional federal legislation in the Indian gaming  
11 area.

12 MR. SCHEPPACH: Well, if we could clarify issues such  
13 as scope of gaming so that it became very ironclad clear that the  
14 Rumsey decision that the state never had to negotiate outside  
15 what other citizens have available in this state, we would like  
16 that.

17 Right now there is an inconsistency. There is a bad  
18 faith against the state, but there's no bad faith against the  
19 tribe. So there's things that we would like to have fixed, but  
20 basically the law we believe has been working.

21 COMMISSIONER LEONE: This is a little off the tribal  
22 gaming, but are there other areas where you think governors have  
23 a position where they think there should be federal legislation?  
24 I know the attorneys general do in a couple of areas. Do the  
25 governors --

26 MR. SCHEPPACH: Well, the only area that --

1           COMMISSIONER LEONE:    -- take any apart from tribal  
2 gaming and gambling?

3           MR. SCHEPPACH:    Yes.    Well, the whole issue of  
4 bringing other commercial properties onto reservations and being  
5 exempt from taxes.

6           COMMISSIONER LEONE:    No.    I mean, away from tribal  
7 issues, like internet gambling or telephone gambling or things --

8           MR. SCHEPPACH:    Well, yes.    I mean, we would support --

9           COMMISSIONER LEONE:    Has the association taken a  
10 position on --

11          MR. SCHEPPACH:    On internet gaming, yes.    We're opposed  
12 to internet gaming.

13          COMMISSIONER LEONE:    Any of the other forms of  
14 electronic gambling that are out there; for example, the cable  
15 television telephone pari-mutuel betting activity?

16          MR. SCHEPPACH:    We really haven't taken any positions  
17 on that.

18          COMMISSIONER LEONE:    You haven't taken a position on a  
19 lot of things.

20          COMMISSIONER BIBLE:    If I understood your position  
21 correctly, you're willing to negotiate on the dispute resolution  
22 process as long as you have the scope issue tightened up and  
23 defined in such a manner that the tribes would not be able to  
24 offer gaming opportunities that are not available to other  
25 citizens of the state.

26          MR. SCHEPPACH:    I think that's right.    Scope of gaming  
27 is --

1 COMMISSIONER BIBLE: Those two are linked.

2 MR. SCHEPPACH: Right. That's exactly right.

3 COMMISSIONER BIBLE: And so I assume when the  
4 subcommittee talks about this issue, they'll talk about both the  
5 scope issue and the dispute resolution issue.

6 CHAIRPERSON JAMES: Will you?

7 COMMISSIONER MOORE: We are talking about that. The  
8 states say that compacts are working. And, you know, we have  
9 records that say that most of them are.

10 The states that have casino and no doubt just opened  
11 class three gaming, I would assume that those states have not  
12 much trouble with the compact with the American Indians.

13 MR. SCHEPPACH: I think that's right. I think that's  
14 right.

15 COMMISSIONER MOORE: Yes. Then we come to those states  
16 that want to bring in a little money, and they have a lottery.  
17 And maybe that's the only thing that they have in the lottery. I  
18 think what you're seeing is a lottery is Class 3.

19 So if you have a Class 3 lottery in Louisiana, -- we're  
20 picking on Louisiana -- what if the Indians wanted to come in,  
21 you were the governor of Louisiana, and wanted to put a casino in  
22 Louisiana? Now, this is what you're talking about, the scope.

23 In other words, because you have one form of gaming  
24 that's Class 3, does that allow them to have any form or do you  
25 want them just to have lottery?

26 MR. SCHEPPACH: The lotteries.

27 COMMISSIONER MOORE: You want them to have --

1 MR. SCHEPPACH: That specific game. Okay? And this is  
2 a serious problem. And I think what's happened, how we got to  
3 where we are is that the courts interpret it very, very broadly,  
4 like you said. And that's what's led to the increase in gaming.

5 COMMISSIONER MOORE: Maybe in the course that they say  
6 that they can have anything they want. And if the state doesn't  
7 want it, maybe they would be a little bit more careful about  
8 having a lottery.

9 MR. SCHEPPACH: Well, I don't disagree that the  
10 beginning of the lotteries has not contributed to expanding this,  
11 but if you trace a lot of the lotteries, they actually went back  
12 and did referendums with the whole population in the state before  
13 they did the law.

14 That isn't true everywhere, but they were concerned  
15 enough about it to actually go back to citizens and say  
16 specifically, "Do you want it?" Okay?

17 COMMISSIONER MOORE: One more question. It seems like  
18 when you have an impasse there is no such thing as one side  
19 acting in good faith. I believe that any deal is pulled off if  
20 people go away happy. Then they'll come back and deal with each  
21 other again. You know, each one of them thinks they got the best  
22 end of it. So that's what needs to be with a compact. So it's  
23 got to be each side in good faith.

24 Now, we also know that every land deal that you want to  
25 do or any deal that you want to do doesn't always come to  
26 fruition. So we're at an impasse.

1           Now, this subcommittee is going to come up with a  
2 recommendation of some kind of how to solve that impasse.  
3 Whether the full Commission goes along with it is another story,  
4 but I'll bet they will. And so we need some suggestions and some  
5 know-how on where to go.

6           I agree with you wholeheartedly. I think going to the  
7 Secretary of Interior is about like going to my wife, and she  
8 doesn't know anything about Indian gaming.

9           MR. SCHEPPACH: It's hard for me, but I'll pass on  
10 commenting on that.

11           COMMISSIONER MOORE: You must have discussed this. I  
12 mean, here you are representing the executive director of the  
13 governors. You are representing all the governors of America.  
14 You have discussed this.

15           If we can't get it from you people, who are dealing  
16 with compacts, we're not going to be able to get it from Native  
17 Americans. They like it the way it is. I can tell you that.  
18 I've heard enough testimony. They like it all the way from up  
19 yonder in Connecticut to Albuquerque, New Mexico.

20           MR. SCHEPPACH: Well, again, without getting into  
21 details, I mean, I think there is a package which includes being  
22 very specific with respect to the scope of gaming.

23           I think most of the problems is that if the tribes  
24 don't get their scope of gaming, they're headed to the court and  
25 claiming bad faith. Okay?

26           So if you're very clear on that and then, second of  
27 all, the good faith/bad faith goes in both directions, you've got

1 to be willing to shut down I'll correct myself and say  
2 uncompact gaming, which is a significant problem.

3 States have to have the right to go into federal court  
4 with respect to uncompact gaming. And you've got to deal with  
5 some of the trust provisions.

6 In other words, there's a broad deal here if you're  
7 going to talk about some kind of an expedited process that you've  
8 got to be willing to exchange something and minimize the  
9 interests of going to the court.

10 I mean, one of the things that IGRA tried to do and I  
11 think did a reasonable job is that you've got to create that  
12 tension so it's better for the states and the tribes to sit at  
13 the table and negotiate until they get an agreement, as opposed  
14 to going to the Secretary of Interior or to the courts. They've  
15 got to stay at the table until they work it out.

16 COMMISSIONER MOORE: I use illegal gaming. I don't use  
17 compact too much because if it says that they must have a compact  
18 before that they can have Class 3 gaming, then we've got to come  
19 up with a recommendation somehow to make sure that there's no  
20 slot machines. We'll use that because I understand the slot  
21 machines a little bit.

22 There will be no slot machine in any state on any  
23 reservation until a compact has been reached. And then there  
24 would be no illegal gaming out there.

25 MR. SCHEPPACH: What I'm saying is that I wonder  
26 sometimes: If a tribe can set up uncompact gaming, why do they  
27 sit at the table if nobody shuts it down? The state can't go

1 into the court, and the federal government refuses to. What  
2 incentive is there to stay at the table?

3 COMMISSIONER MOORE: I'm just saying that that's got to  
4 be a recommendation, I think, I know from the subcommittee, I  
5 believe. But we need help.

6 MR. SCHEPPACH: I'm trying to give you a little bit.

7 CHAIRPERSON JAMES: Commissioner Lanni?

8 COMMISSIONER LANNI: Just for Commissioner Loescher, you  
9 talk about the exclusivity fees, which do exist in Connecticut.  
10 I'm aware of that. In fact, they also exist in other states, in  
11 which they find federally recognized Native American gaming  
12 facilities within states.

13 Michigan is one of the perfect examples with some 17 in  
14 that regard. The day the first commercial casino opens in  
15 Michigan, which is probably the end of this summer or the  
16 beginning of fall, those fees will stop coming to the State of  
17 Michigan. However, not all states have given exclusivity  
18 agreements to those fees.

19 For example, Michigan in four new compacts that have  
20 been approved by the legislature in Michigan and the governor in  
21 conjunction with the Native American tribes calls for payments at  
22 a different level but to continue for the newly compacted  
23 entities, rather than the prior ones.

24 So they're not always on an exclusivity basis. There  
25 are times when they obtain fees, taxes, whatever one wants to  
26 call them, revenue enhancements to the government regardless,  
27 even if exclusivity is not the issue.

1           And I, for one, did raise the issue that, as I said  
2 before, I support Native American gaming. I think it should be  
3 limited to whatever form of gaming exists within the state in  
4 which they find their particular facility.

5           However, I think they should help in some fashion to  
6 deal with the services that they are causing to be delivered  
7 without paying for them in certain instances and some form of fee  
8 arrangements, taxes, what have you, with the local and state  
9 governments.

10           I might add one other thing. This is more of a  
11 statement to Mr. Scheppach. I think that I couldn't agree with  
12 you more that there should be good faith requirements on both the  
13 Native American side and the governors' side. However, I must  
14 tell you, even though I am a Republican and a supporter of Pete  
15 Wilson, I think he was not very much dealing in good faith when  
16 he was dealing with the Native Americans in California and  
17 probably brought about more than he ever expected to be brought  
18 about as a result of that.

19           So I think, even if you have requirements, not  
20 necessarily do the governors always follow those requirements of  
21 good faith. But I think there should be a requirement. I agree  
22 with you on both sides.

23           COMMISSIONER LOESCHER: Madam Chair?

24           CHAIRPERSON JAMES: Certainly.

25           COMMISSIONER LOESCHER: Maybe one more. I can hardly  
26 let this gentleman go without inquiring. The internet gaming  
27 business, I have a perception that internet itself is a problem

1 to states, commerce conducted over the internet. And the problem  
2 is that states haven't figured out how to tax it and get  
3 reporting of that.

4 Some day somebody is going to figure this out. And I'm  
5 sure it's going to happen sooner than later because of the volume  
6 of commerce that's beginning to occur.

7 Once they figure that out, then I think the states will  
8 be embracing internet commerce. Taking it one step further to  
9 internet gaming, if you can regulate taxes and whatever you want  
10 to do on the internet for commerce, then internet gaming is just  
11 one step away as a commodity or service, whatever.

12 I have been interested in the notion that once the  
13 states are able to solve these kinds of problems, I believe that  
14 intrastate commerce will be fully endorsed and possible commerce  
15 between and among states will probably be endorsed. And then  
16 gradually federalism will take over and we'll have unitary tax or  
17 some kind of thing on the internet.

18 What are your views with regard to where the states  
19 stand now just on being able to regulate and tax the internet?  
20 And is that of concern to the governors?

21 MR. SCHEPPACH: It's a fairly complex subject, but let  
22 me say first off that state sales taxes are use taxes. And,  
23 therefore, I think you're a resident in Alaska. And I think that  
24 if you ordered something over the internet from the State of  
25 California and the tax collector from Alaska happened to be at  
26 your doorstep when that package came, you would be obligated to  
27 shell out the taxes on that item.

1           The issue is because it's interstate commerce, the  
2 Supreme Court said that you cannot force a seller outside the  
3 state to, in fact, collect the tax. It's not that you're not  
4 liable for it. It's that we can't force an out-of-state seller.

5           This has been a problem for mail order sales. States  
6 lose about \$4 billion on \$100 billion worth of sales. The  
7 internet rate now, we probably don't lose much at all because  
8 it's in its infancy, in all honesty. But projections are it will  
9 go to \$300 billion within the next 5 years and our loss in  
10 revenues at that time will be 20 billion.

11           We have at the state level some problems because we  
12 have different classification systems and different audit  
13 procedures. And we have the problem at times where local sales  
14 tax is in addition to state sales taxes.

15           We are in the process now of agreeing to a common set  
16 of definitions, a common audit procedure, and working with states  
17 to put one rate that would be a blend of the local rate as well  
18 as the national one.

19           Once we fix our problems, we will ask the Congress to  
20 enact legislation that people have to pay the tax. There are no  
21 technological problems on this. A lot of people say: If you're  
22 in one state and you collect tax in another state, how do you  
23 know?

24           Well, it's very clear. All states, the only thing that  
25 matters is where you receive the goods and since any order has to  
26 be shipped to a certain place and there's already software  
27 available.

1           So we're not anti-internet. In fact, we're trying to  
2 clean up what we think is a legitimate business problem to the  
3 classification. And at that time, we'll ask Congress to give us  
4 the right.

5           It is an issue of equity. How can you in a state ask  
6 the local retailer to collect the tax and not have it collected  
7 from somebody else? You cannot support a tax that is inequitable  
8 in that sense.

9           And if the states are not allowed to tax it, the  
10 federal government is eventually going to tax it under the  
11 interstate commerce clause. You saw Congressman Tozin the other  
12 day.

13           I'll stop. This is a whole new subject, but I'd be  
14 happy to talk about it later.

15           CHAIRPERSON JAMES: Thank you. And we do appreciate  
16 your comments. We are in probably one of the most critical  
17 phases of our work as a Commission and want to thank you for your  
18 patience today as you waited to offer your suggestions before us.  
19 But if we could as we continue through this process pick up the  
20 phone and call you if we wish to ask you for additional input, we  
21 would consider that very helpful. I'm sure the various  
22 subcommittee members and chairmen would as well. With that, I'd  
23 like to thank you very much for being here today.

24           MR. SCHEPPACH: Thank you.

25           CHAIRPERSON JAMES: Thank you.

26           MR. FINNEGAN: Thank you very much.

27